IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Boudreau, 2008 NSPC 78

Date: December 12, 2008
Docket: 1814651, 1814652,1814653
Registry: Sydney

Her Majesty the Queen

v.

Gordon Andreau Boudreau

DECISION ON CHARTER STANDING

Judge: The Honourable Judge Anne S. Derrick

Heard: By Written Submissions

Decision: December 12, 2008

Charges: section 78 *Fisheries Act,* R.S.C. 1985, c. F-14 x 3

Counsel: Gerald A. Grant - Crown Attorney
Ralph W. Ripley - Defence Counsel

By the Court:

[1] Gordon Boudreau is charged with three offences under the *Fisheries Act,* R.S.C. 1985, c. F-14 which the Crown alleges were committed between June 29 and July 1, 2007*:*

1. Within Canadian Fishery Waters adjacent to the coast of Nova Scotia, while carrying on fishing or any related activity under the authority of an communal licence, contravene or fail to comply with the conditions of that licence, to wit: did fish in a closed area, contrary to section 7 of the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332, and did thereby commit an offence under s. 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14;

2. Within Canadian Fishery Waters adjacent to the coast of Nova Scotia, fish for a species of fish, to wit: snow crab, without authorization contrary to s. 14(1)(b) of the *Atlantic Fishery Regulations*, 1985, SOR/86-21, and did thereby commit an offence under s. 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14; and

3. Within Canadian Fishery Waters adjacent to the coast of Nova Scotia, possess fish, to wit: snow crab, caught in contravention of s. 14(1)(b) of the *Atlantic Fishery Regulations*, 1985, SOR/86-21, contrary to s. 33 of the Fisheries Act, R.S.C. 1985, c. F-14, and did thereby commit an offence under s. 78 of the said *Fisheries Act*.

[2] Mr. Boudreau entered not guilty pleas to the charges on December 19, 2007 and is scheduled to stand trial on March 9 and 10, 2009 in Sydney.

[3] I have been asked to determine the preliminary issue of whether Mr. Boudreau has standing to seek a stay of proceedings for a purported infringement of his

language rights under section 20(1) of the *Charter*. It was agreed that this issue would be addressed through written briefs and by reference to some basic uncontroverted facts without the calling of evidence. I want to thank counsel for their helpful and thorough submissions which I have now reviewed.

[4] In a Notice of Application dated September 21, 2008, Mr. Boudreau indicated that he was seeking a stay of proceedings pursuant to section 24(1) of the *Charter* on the grounds that his rights under section 20(1) of the *Charter* had been infringed. Mr. Boudreau's Notice states that the breach he is alleging is of his "right to receive communication and receive service from and communication with the government of Canada pursuant to s. 20(1) of the *Canadian Charter of Rights and Freedoms* as it relates to receipt of Fishing Licenses and Conditions of Fishing Licenses which were provided to [him] by the Department of Fisheries & Oceans of the government of Canada in English only." Mr. Boudreau submits that he has the right to make his case for a stay of proceedings by leading evidence and making written and oral submissions on the merits. It is the Crown's submission that he does not have standing to advance a language-rights violation claim.

[5] The brief filed on Mr. Boudreau's behalf on the issue of standing indicates that Mr. Boudreau's first language is French. There is no dispute that the license conditions in the license pursuant to which Mr. Boudreau was fishing were in English only.

[6] It is also not disputed that the fishing license in question was issued to the

Millbrook First Nation. Millbrook designated Mr. Boudreau to fish the license for the Band.

[7] The Crown has argued that Mr. Boudreau's *Charter* application should be summarily dismissed without the hearing of evidence on the merits because, in the Crown's submission, Mr. Boudreau's language rights are not implicated by the issuance, to the Millbrook First Nation, of the fishing license in English only.

[8] As the Crown has stated in its brief the issue on this preliminary matter of standing is whether, in the circumstances of these proceedings, the language obligations imposed on the Department of Fisheries and Oceans by section 20(1) of the *Charter* and by the Federal *Official Languages Act* extend to Mr. Boudreau so as to provide him with standing to apply for a stay of proceedings of the charges against him.

[9] Section 20(1) of the *Charter* provides that: "Any member of the public in Canada has the right to communicate with, and receive available services from, any head or central office of an institution of Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (a) there is a significant demand for communications with and services from that office in such language; or (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French." Similar provisions are found in the *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31.

[10] Mr. Boudreau is seeking a remedy under section 24(1) of the *Charter* because the license pursuant to which he was fishing was issued only in English when his first language is French. For Mr. Boudreau to secure a remedy under section 24(1) of the *Charter*, he has to demonstrate that his constitutionally-protected language rights have been infringed. As stated by the Crown in its brief: "A remedy under s. 24(1) is available where there is some government action (beyond the enactment of an unconstitutional statutory or regulatory provision) that infringes a person's own *Charter* rights." In support of its argument that it is the individual's rights that must be implicated, the Crown cites *R. v. Rahey, [1987] 1 S.C.R. 588 at paragraph 62; Borowski v. Canada, [1989] 1 S.C.R. 342 at paragraph 54; Schacter v. Canada, [1992] 2 S.C.R. 679 at paragraphs 84 - 89;* and *Hogg in Constitutional Law of Canada, 5th ed., 2007, at pages 40 - 43.*

[11] The reservation of section 24(1) remedies to the individual whose rights have been denied is illustrated in the context of section 8 infringements arising from unreasonable searches. Only a person who can show a reasonable expectation of privacy can advance a claim for a section 24(1) remedy such as an order to exclude seized evidence. A failure by an accused to demonstrate a reasonable expectation of privacy in someone else's apartment or car, for example, will be fatal to a claim for standing to seek a section 24(1) remedy. *(See: R. v. Edwards, [1996] 1 S.C.R. 128, at paragraph 46; R. v. Belnavis, [1997] 3 S.C.R. 341, at paragraphs 19, 21 and 22; R. v. Pugliese, [1992] O.J. No. 450 (Ont. C.A.) at paragraphs 15, 21)*

[12] Mr. Boudreau grounds his claim for *Charter* relief in the fact that he has been compelled to court by the charges against him. He refers to *R. v. Big M Drug Mart*

Limited, [1985] 1 S.C.R. 295 in support of his standing claim, noting that Big M Drug Mart was permitted to defend itself by attacking the constitutionality of the legislation pursuant to which it had been charged. Big M Drug Mart advanced its challenge on the basis of freedom of religion, a *Charter* right Big M itself could not claim to have. The *Big M Drug Mart* case dealt with standing in the context of section 52(1) of the *Constitution Act.* At paragraphs 37 and 38, Dickson J. held as follows: "Section 24(1) sets out a remedy for individuals...whose rights under the *Charter* have been infringed...Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to section 24 is unnecessary and the particular effect on the challenging party is irrelevant."

[13] Mr. Boudreau's challenge is not against a potentially unconstitutional law. The fact that he is facing charges and comes before the Court involuntarily does not confer standing on him to seek a section 24(1) remedy. Merely being compelled by charges to face prosecution does not entitle an accused to claim a section 24(1) remedy. If that were the case then Mr. Edwards (*R. v. Edwards, supra*) and Ms. Lawrence (*R. v. Belnavis, supra*) would have been automatically entitled to seek section 24(1) relief as a consequence of being charged, without having to show a reasonable expectation of privacy in relation to the search.

[14] An automatic right of standing to obtain relief pursuant to section 52 of the *Constitution Act* is granted where the defence being advanced is that the statutory provision under which the accused is charged is itself unconstitutional. *Big M Drug Mart* is an example of this, where the corporate defendant sought a declaration that the Lord's Day Act was inoperative on the basis that it violated a *Charter*-protected right.

Another example emerges from *R. v. Morgentaler, [1988] S.C.J. No. 1* where Dr. Morgentaler sought a declaration that the abortion prohibitions in the *Criminal Code* were constitutionally invalid as an infringement on women's *Charter*-protected rights to life, liberty and security of the person. A defendant is entitled to seek a section 52 declaration that the legislation under which s/he is charged is unconstitutional without having to show an infringement of his or her own *Charter*-protected rights. However, automatic standing to claim a section 24 *Charter* remedy has been emphatically rejected by the Supreme Court of Canada with the Court noting that the automatic standing rule has been "discredited". *(Edwards, supra, at paragraphs 53 - 56*)

[15] Section 52(1) of the *Constitution Act 1982* is not engaged by this case. Section 52(1) is engaged "when a law is itself held to be unconstitutional, as opposed to simply an action taken under it." (*Schacter, supra, at paragraph 84*) Section 24(1) is resorted to "where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed." (*Schacter, supra, at paragraph 87*)

[16] Millbrook First Nation could have invoked section 20(1) of the *Charter* to require the Department of Fisheries and Oceans to produce the fishing license in French. It did not. It obtained a fishing license in English and was apparently content with that. It designated Mr. Boudreau to fish that license. This is not a case like *R. v. Saulnier (1989), 90 N.S.R. (2d) 77* which dealt with the language rights of a fisherman charged with violating a variation order made in relation to a license issued to him directly. There is no connection here between the issuance of the license, and any constitutional

or legislated requirements for a fishing license to be in one of the two official languages, and Mr. Boudreau. There is no evidence that Mr. Boudreau had any dealings with the Department of Fisheries and Oceans concerning the license or the language in which it was issued. There is no evidence that the Department even knew Mr. Boudreau was designated to fish the license that had been issued to Millbrook. Mr. Boudreau's language rights entitlements are not animated by the issuance of the English-only fishing license to the Millbrook First Nation. Mr. Boudreau is not entitled to an automatic grant of standing to claim a remedy under section 24(1) of the *Charter* and I find, in the circumstances of this case, he does not have standing to advance a language rights claim in respect of this prosecution.

Anne S. Derrick

Judge of the Provincial Court of Nova Scotia