**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**HER MAJESTY THE QUEEN**
**Respondent**

**-and-**

**ALEXANDER PETER MCDONALD**
**Applicant**

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**DECISION ON APPLICATION**

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**[Cite as: R. v. McDonald, 2001 NSPC 7]**

**HEARD BEFORE:** **The Hon. Jean-Louis Batiot, C.J.P.C.**

**PLACE HEARD:** **Digby, Nova Scotia**

**DATE HEARD:** **April 9th, 2001**

**CHARGES:** **Contrary to Section 62FA, 62 FA,249(1)(b) CC and 145(5)(a) CC**

**COUNSEL:** **Lori-Ann Veinotte, for the Crown**

**Alexander Peter McDonald, self-represented**

BATIOT, C.J.P.C.

1. Mr. McDonald applies to this Court to have state-funded counsel appointed to represent him in two different trials of two charges contrary to s. 62 of the *Fisheries Act r.s.c. 1985, c. F-14* (obstructing a Fisheries officer), on two different dates and places, one charge contrary to s. 249(1)(b) of the *Criminal Code of Canada* (dangerous operation of a Motor Vessel), and one charge contrary to s. 145 C.C.C. (Breach of an undertaking). The latter and one of the S. 62 are to be tried in Digby on June 19th, 2001; the former is set for trial May 16, 2001 in Yarmouth.

2. The Yarmouth charge was joined to this application, and only to that extent, to avoid duplication of procedure and to deal with it in an expeditious manner, as the Digby matters were already scheduled for pre-trial. The accused began this application on January 22nd, 2001, continued it on March 9th in Halifax and then on April 9th in Digby. Ms. Veinotte of the federal Crown filed a very helpful brief on March 2, 2001.

3. On March 9th, 2001 in Halifax the Applicant was unable to proceed with the presentation of the evidence; he was not prepared, having received the brief in question on March 5th. A discussion ensued relating to specific provisions imposed by the jurisprudence and more particularly *R. v. Rain* (1998), 130 CCC(3d) 167 (Alta C.A.) and *R v. Keating (*1997), *159 NSR (2D) 357 (NSCA).* These cases deal at great length with the nature of such an application, the type of evidence that ought to be provided to meet the burden of proof imposed upon the Applicant and the role of the presiding Judge.

**EVIDENCE**

4. On April 9th Mr. MacDonald presented evidence that he applied to Legal Aid on different occasions in Yarmouth, in Truro ( his place of residence) and in Digby but was turned down since, in the criminal cases, the Crown was not asking for incarceration should there be a conviction and, with respect to the allegations contrary to s. 62 of the *Fisheries Act*, Legal Aid does not handle that sort of cases. Mr. MacDonald further said that he did not appeal their decision and was unaware of that remedy. He will attempt to do so.

5. Mr. McDonald says that he has been a status Mi'kmaq since birth (Registration # 0250066001) and that he is a direct descendent of a signatory of one of the relevant treaties (in the Mi'kmaq fashion, his *grandfather*). He says that he has attained grade 9 at East Hants Rural High; he followed a brick laying course and has attended courses with respect to marine emergency duties and a one week course at the Coast Guard College in Cape Breton, some five years ago, where, among other things he was taught how to deal with the media.

6. He works from time to time as a labourer and carpenter, a fisherman, a trapper, and has logged as well. His evidence shows that he does not work for very long and his earnings are not recorded. He does not pay GST nor any taxes to the Federal Government; he has no evidence with respect to income except his representations nor does he have any assets except the truck he now drives (*which breaks down all the time*) and the assets that

have been seized by *Department of Fisheries* on July 26th,2000. He puts no value on these assets and there is no evidence as to what they may be worth. At any rate- but for the truck he uses, and needs daily and to attend Court- they are still in the possession of *Department of Fisheries* and were the subject of a failed application to this Court for their return.

7. There are other as well as similar allegations against Mr. McDonald and others, beginning on the 26th of July 2000, in St. Mary's Bay, for which they are all represented by counsel retained for them by "the Union".

8. It would be fair to say that Mr. McDonald appears to have a hand-to- mouth existence, lives with his relatives moist of whom, he says, are on welfare. He does not receive welfare himself as he does not reside on the Reserve; may accept from time to time some funds from the Reserve but it is not clear what they may be available. At any rate he is at odds with the Chief and the Reserve leadership, in part, so Mr. McDonald believes, because he has made complaints against their financial practices and has caused an investigation to be initiated into such management.

9. Indeed Mr. McDonald believes that he is represented on the allegations dated July 26th, 2000, and subsequent dates, involving several charges, only because he is one of many accused, and that his participation in this defense arrangement was at one time questioned, given these conflicts.

10. Mr. McDonald alleges, emotionally, that the Crown owes him a fiduciary duty to be fair. He refers to the Treaty of 1752. He believes that the Crown must deal with him honorably and fairly. It is not, he says, when it is pursuing him through the criminal Courts; has two fully qualified members of the Bar oppose this Application, which he must, alone, without legal training, argue. Essentially, to force him to defend himself from these substantive charges, fraught as they are with consequences, adverse to his people as well as to himself, is beyond comprehension.

11. He believes the cases involve complex issues of his and his people's right - and not merely a privilege - to access fish, without being hindered by officials of the *Department of Fisheries.* He says that the law entitles his people, and him, to have such access. To be denied it will cause untold and dire consequences to the 22,000 Mi'kmaqs, the 12,000 Malecites and to many Passemaquodies. He further believes that he would be un able to present a case and prove the basis of his beliefs and his positions and that he would not be able to marshall the necessary and relevant evidence and his argument in a cogent and effective manner.

12. He acknowledges he has not tried, indeed he did not know about counsel working pro bono but has advised that the lawyers that he has met, aside from Legal Aid, quoted to him retainers of ten to twenty thousand dollars. This was simply impossible.

13. He did not know the results of the application with respect to the return of the fishing equipment (it was denied). He mentioned knowing about the possibility of a bond to have

such equipment released under the *Fisheries Act* but he had no money to pay for such a bond. Because he did not have the use of those assets, he could not work meaningfully in the last 6 months but again, as I said before, there is no indication as to what sort of income he would have earned. If he had been able to fish and earn an income during the winter he would have qualified, likely, for Employment Insurance, depending on how the Band managed the money received. He has further indicated that he could do very little trapping because of all the snow on the ground where he has his own trap lines. He admitted having gone to the United States, last August, for a period of a week and half, to a spiritual retreat; members travel there in a caravan, pooling their resources, at little cost, at a time he was receiving an income from fishing.

14. It is apparent that Mr. McDonald can present himself well and can handle himself in court. There is evidence that he does talk to the media and has been quoted in newspaper articles but he indicated he prefers not to do so. He has some experience in expressing himself publicly.

15. Mr. McDonald says that possibly the same evidence or similar evidence will be presented by the Defence for both the May 12th (Yarmouth) and July 16th (Digby) 2000 matters than will be presented on the trial dealing with the July 26th, 2000 allegations in which all the accused, the applicant included, are represented by the same lawyer, Mr. Douglas Brown ( who represented them on the Application for return of the fishing equipment). He is, however, not certain of this evidence as he may not be at liberty to speak with Mr. Brown freely, and they do have differences of opinion.

16. He further says that he was unable to obtain legal representation from the Band counsel for these two matters given his opposition to the leadership.

17. It is fair to say that Mr. McDonald appears to have committed himself to work in the burgeoning native fisheries and is involving himself, fully, in the present difficulties with the *Federal Department of Fisheries.* Certainly his evidence and arguments on this application show his frustrations with the system when he believes it is to be at odds with his conception of the honour of the Crown and his right to engage in a fishery. He does not mention caselaw by name, which appears to him to be *irrelevant*, can be emotional, but is certainly aware of the struggle that has been waged for the last few years by different aboriginal groups in this cause to which, to all appearances, he has devoted himself. It is very important issue to him, a very emotional one, and one he sees as crucial for his people.

**ARGUMENTS**

18. Ms. Veinotte argues that
1. there is no general right to a state funded counsel;*(R. v. Rowbotham (1988), 41 CCC (3d) 1 (Ont. CA));*
2. in order to have one, the applicant must present cogent evidence *(R. v. Keating (1977), 159 NSR (2d)357(NSCA));*
3. it is granted only in exceptional cases *(R. v. Rain (1998), 130 C.C.C. (3d) 167(Alta. C.A.);*
4. indeed, in '*complex and serious'* cases only *(R. v. Rockwood (1989), 49 C.C.C. (3d) 129 (NSCA));* and
5. only once the Applicant has discharge his onus on the balance of probabilities (*R. v. Collins, [1987] 1 S.C.R. 265 and R. v. Rain, supra);*
6. however, fisheries matters, regulatory in nature, are not so serious and complex *(R. v. Wilcox, (28 February 2001) (NSCA) {Unreported}* to warrant such remedy*;*
7. furthermore, as there is no prior offence, incarceration would not be a reasonable outcome in these matters and only fines would be requested under s. 718 on the *Criminal Code* in case of conviction.

19. Ms. Veinotte also argues that the cases, for the Crown, are straightforward ; that the May 12th, 2000 charges involve one to four witnesses and the July 16th charges, one to seven, and these are matters where people represent themselves routinely in the Provincial Court,. This should include the Applicant.

20. At any rate the Court is here to assist the accused in presenting his case (*Keating* and *Rain*) and the accused has not made sufficient efforts to obtain or retain counsel or secure the means to do so, one in private practice either on a pro bono basis, or at a reduced rate. Indeed this Court ought to be cautious and should not appoint counsel and transform a s. 10 *Charter* rights into a substantive right to legal representation, contrary to the *Charter*, as considered in *R. v. Prosper, [1994] 3 S.C.R. 236.*

21. Crown counsel recognizes the fiduciary duty the Crown owes aboriginal people. The concept of *honour of the Crown (R. v. Marshall, [1999] 3 S.C.R. 456, at para. 49)* is a principle used by the Governments and the Courts when interpreting treaties, and does not extend to procedural matters such as prosecutions or providing legal counsel. It speaks of the fiduciary obligation the Federal Government owes the aboriginal people not to use *sharp practice (Marshall, supra at para 51).* Such duty is not the creation of a treaty or legislation but that of jurisprudence. It does not extend, as the Applicant says, to cover his legal fees when he faces charges brought under a Statute of general application.

**POTENTIAL BREACH**

22. The Applicant/accused faces three trials, as already mentioned: one, dealing with a single count contrary to s. 62 of the *Fisheries Act* (obstructing a Fishery Officer) near Yarmouth on May 12th, 2000; a similar obstruction charge on July 16th, 2000 at St. Mary's Bay together with a companion charge of dangerous operation of a motor vessel (s.249 of CCC); and, thirdly, a breach of undertaking pursuant to s. 145(5) of the *Criminal Code.*

23 The representations made so far in this case, in pre-trial as well as during this application, would indicate that the probable and main issue in the first two trails is, to put it broadly, the clash between the Federal Government's right to regulate those involved in aboriginal fisheries in a limited commercial enterprise, as recognized in *Marshall*, supra, and the exercise, as to time, place and person at the very least, of that right. There is no indication as to whether it is a *fish for food* activity, or what was being fish. The issue is difficult: the parties and society at large, have attempted to deal with it since the decision of the Supreme Court of Canada on September 19,1999. The trials are scheduled for several days each in light of the expected defence evidence.

24. This issue is of crucial importance to the Federal Government and more particularly to the Mi'kmaq people, to which Mr. MacDonald belongs. It is one that can only be decided on the proper and through arguments and admissible evidence. It is an unresolved point in this evolution of aboriginal fishing and, it appears, is one that requires a full airing by both the Crown and Defence, in light of the existing jurisprudence, more particularly the two *Marshall* decisions of the Supreme Court of Canada, dated September 19th and November 17th, 1999, declaring that the Mi'kmaq have a limited commercial right to fish for eels, by treaty, and where the Federal Government failed to justify its regulations limiting the exercise of this right, as it denied the existence of such right in the first place.

25. The Nova Scotia Court of Appeal recognized, in *R. v. Denny (1990),* 55 C.C.C.(3d) 322, the aboriginal right to fish for food. The defence, in the case at bar, will likely have to decide, in light of the evidence which may be available, whether it wishes to argue its case on the basis of an aboriginal or treaty right, which evidence it ill introduce, through whom and how it must present it. Depending on the quality of the evidence, it will have to be familiar with the growing jurisprudence dealing with aboriginal or treaty rights, construction of treaties, historical evidence, if any, their application to the locus or the alleged offences, or the offender. It will have to make strategic decisions, well before the trial, and completely outside what help a trial judge may be able to offer. It will have to prepare its arguments carefully and present them cogently. Indeed, before trial, the defence may agree with the Crown, after having advised the Crown of its possible evidence as to whether there can be an agreed statement of facts. At any rate, through these discussions the Crown may be able to present justification evidence at the time of trial without seeking an adjournment.

26. A charge contrary to s. 62 of the *Fisheries Act*, by itself, is usually not a complex case to meet, nor is an allegation under s. 249 of the *Criminal Code*: you are dealing with the evidence to establish, if the Crown can, the factual situation relevant to the information. When, however, the defence is alleging that the accused had the right to do what he was doing, and, as I understand, the Fisheries officers had no business to interfere, it becomes a complex case. The defence needs evidence outside the facts of the alleged offence. It must prove what it alleges. The burden of proof it must discharge is well beyond the ordinary case. It is not a matter of raising a reasonable doubt as to the actus reus, or proving the mistake of facts or the due diligence defences available to a strict liability offence (in the case of s. 62 F.A.), or the actus reus and the mens rea in s. 249 C.C.C.. It must take out a case, on a balance of probabilities, that the accused has the right he

alleges he has, and the extent of such a right.

27. Under s.11(d) of the *Charter*, any person charged with an offence has the right

> ...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal...

28. An essential principle of fairness, and one of *the principle of fundamental justice*( s.7 of the *Charter*) is the right to make full answer and defence *(R. Rose, [1998]* 3 S.C.R. 262).

**DEFENCE**

29. In light of the above and the issues that have been raised by the defence, the accused has discharged the onus placed on him, and has satisfied me that a trial judge could not provide him with sufficient help for him to conduct his own defence. Absent this help, given the very special circumstances of this case, I am satisfied he will not be able to make full answer and defence, and therefore could not get a fair trial.

30. Accordingly, under s. 24 (1) of the *Charter*, I order a stay of proceedings until state-funded counsel is provided to the accused.

31. As for the 145(5) of the *Criminal Code* this is a straightforward allegation of a breach of undertaking, unrelated to the defence proposed for the other offences. The trial is set for the 19th of June 2001 in Digby. It will proceed.

Dated at Digby, Nova Scotia, this 17th day of April, 2001.