

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Boudreau, 2009 NSPC 26

Date: June 8, 2009

Docket: 1814651, 1814652, 1814653

Registry: Sydney

Her Majesty the Queen

v.

Gordon Andrew Boudreau

DECISION ON SECTION 10(b) CHARTER APPLICATION

Judge: The Honourable Judge Anne S. Derrick

Heard: March 10, 2009

Decision: June 8, 2009

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

Counsel: David Iannetti - Crown Attorney
Ralph W. Ripley - Defence Counsel

By the Court:**Introduction**

[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] The charges were laid against Mr. Boudreau on September 10, 2007. He entered not guilty pleas to the charges on December 19, 2007 and his trial started on March 9, 2009 in Sydney. On March 10, Defence Counsel made a *Charter* motion to exclude

a statement given by Mr. Boudreau to a Fisheries Officer on July 1, 2007.

[3] Mr. Boudreau's motion to exclude his statement from evidence is based on a claim that he was denied his constitutionally guaranteed right to counsel. Defence counsel also challenged the voluntariness of the statement but conceded this issue once the Crown's evidence was led. I found Mr. Boudreau's statement to be voluntary having satisfied myself from the testimony of the Crown's witnesses that voluntariness had been established beyond a reasonable doubt.

[4] This decision addresses the issue of Mr. Boudreau's *Charter* section 10(b) rights and whether they were violated when a statement was taken from him by Fisheries Officers in the early morning hours of July 1, 2007. The burden of establishing a *Charter* violation rests on Mr. Boudreau.

Facts

[5] Just before midnight on June 30, 2007, Mr. Boudreau was on board the vessel *Chief Gerald Gloade* as it steamed into port at Louisbourg. Two Fisheries Officers, David Sinclair and Edmund Morris were waiting there for him, having arrived a little before 11:30 p.m.

[6] Before arriving in Louisbourg, Officer Sinclair had formed the view that the *Chief Gerald Gloade* had been fishing snow crab illegally by hauling traps in the Eastern Hole in Area 24, an area closed for snow crab fishing. Officer Sinclair's opinion in this regard was based on information he received from another Fisheries

Officer, Raymond Rockwell, who had been patrolling Area 24 in a surveillance aircraft. It was on the basis of this information that Officer Sinclair made plans to go to Louisbourg with Officer Morris and meet the *Gloade* when she docked. Officer Sinclair understood the *Gloade* was due to dock at midnight.

[7] The *Chief Gerald Gloade* arrived at 00:23 hours. Once she had been tied up at the dock, Officers Sinclair and Morris went on board. Officer Sinclair located Mr. Boudreau in the wheelhouse and informed him that he was being investigated for illegally fishing snow crab. Officer Sinclair testified to having an independent recollection of advising Mr. Boudreau of this although he did not record it in his notebook. He did not arrest him as he did not foresee a repetition of the offence nor was he concerned that Mr. Boudreau would fail to show up for court. Reading in English from a standardized card, Officer Sinclair told Mr. Boudreau about his right to retain and instruct counsel without delay. He advised Mr. Boudreau of his right to legal aid and the availability of duty counsel. He told him the applicable 1-800 number for duty counsel.

[8] Mr. Boudreau indicated that he did not wish to contact a lawyer, “at this time.”

[9] Officer Sinclair then gave Mr. Boudreau a police caution which Mr. Boudreau indicated he understood.

[10] Officer Morris was present when Officer Sinclair gave Mr. Boudreau his *Charter* rights and caution but played no role in dealing with him. He recalls Officer Sinclair reviewing the license conditions with Mr. Boudreau. Officer Morris was not

sure if it was just before or just after the reading of the *Charter* rights and caution that Officer Sinclair told Mr. Boudreau he was investigating him for fishing in the Eastern Hole.

[11] There were telephones available had Mr. Boudreau wished to call a lawyer. Officer Sinclair had a cell phone as did Officer Morris although they did not tell Mr. Boudreau this. Officer Sinclair observed that the *Gloade* was equipped with a hard-wired cell phone in the wheelhouse.

[12] According to Officer Morris' notes, he and Officer Sinclair boarded the *Gloade* at 12:27 hours and a statement was taken from Mr. Boudreau sometime after 12:35 hours.

[13] Mr. Boudreau recalls the Fisheries Officers, whom he knew from talking to them previously and from inspections, "flashing badges and reading rights" within "seconds" of coming on board. He recalls that the officers indicated he was under investigation and was being charged for illegally fishing snow crab.

[14] Mr. Boudreau is fluently bilingual. He recalls being asked if he needed a lawyer and answering "No." He agreed in his evidence that he told Officer Sinclair that he did not want to call a lawyer, "at this time." He acknowledges that he was not in shock but says he "couldn't believe [I] was being charged for something." He was "really nervous, fishing someone else's license." Mr. Boudreau testified that he had no phone book and was 600 miles from home in the middle of the night. "I didn't know what to do" was his evidence. At no time, including during questioning by Officer Sinclair,

did Mr. Boudreau ask to call a lawyer.

Positions of Defence and Crown on the Denial of Right to Counsel

[15] The Defence advanced a series of arguments in submitting that Mr. Boudreau's Charter right to counsel was denied:

- Mr. Boudreau did not give a valid waiver of his right to counsel;
- Mr. Boudreau's waiver was equivocal and therefore invalid;
- Mr. Boudreau made his waiver in the context of having to process what was happening in his second language, English, rather than being able to deal with the right to counsel in his first language, French;
- Officer Sinclair was not specific enough when informing Mr. Boudreau why he was being investigated;
- Mr. Boudreau was not advised that he was being investigated before being given his *Charter* rights and caution;
- There is no assurance that duty counsel would have had expertise in Fisheries matters.

[16] The Crown has submitted that Mr. Boudreau knew he was in jeopardy when he was informed by Officer Sinclair that he was being investigated for illegal crab fishing, which Mr. Boudreau acknowledged is what he was told. Mr. Boudreau had ample time to assess his options and made a valid waiver of his right to call a lawyer. In the Crown's submission, it is speculative to assume that a call to duty counsel

would have been a waste of time, if Mr. Boudreau had made the call.

[17] One issue that was not addressed by counsel was whether Mr. Boudreau was detained. Detention or arrest is what triggers the right to counsel. Officer Sinclair was clear that Mr. Boudreau was not arrested, but evidently the Fisheries' officers considered Mr. Boudreau to be detained because Officer Sinclair advised him of his right to contact a lawyer. There was some evidence elicited by Defence about the confined nature of the wheelhouse area and its small area. It did sound from the evidence that Mr. Boudreau and the Fisheries officers were crowded together in a relatively tight space. The Crown did not contest the issue so I take it as conceded that Mr. Boudreau was detained in the wheelhouse, which entitled him to contact counsel for advice.

Analysis

[18] The Defence arguments on the right to counsel issue can be broken down into three essential issues: what Mr. Boudreau was informed was his jeopardy, and when; whether the right to counsel, had he exercised it, would have been effective, and the waiver. I will deal with each of these separately, keeping in mind that the Defence bears the burden of establishing that Mr. Boudreau's *Charter* right to counsel was breached.

What Mr. Boudreau Was Informed About His Jeopardy and When

[19] I am satisfied on the evidence that Mr. Boudreau was informed by Officer

Sinclair, before he was given his *Charter* rights and caution, that he was being investigated for illegal crab fishing. Officer Sinclair testified that this is what he told Mr. Boudreau and I accept his evidence. Mr. Boudreau agreed that this was said to him. Officer Morris could not remember if Mr. Boudreau was advised about their investigating him for illegal crab fishing before or after the rights and caution but I am satisfied with the recall of Officer Sinclair, who was doing the talking.

[20] I am furthermore satisfied that this was ample information for Mr. Boudreau to know that he was in jeopardy. This was not an inspection; the Fisheries officers were investigating illegal fishing and Mr. Boudreau was made aware that he was entitled to speak to a lawyer before he answered questions from the officers and that the answers to those questions could be used as evidence against him.

[21] Mr. Boudreau's testimony indicates that he knew what was happening. He acknowledges understanding that the Fisheries officers were investigating him for illegal crab fishing. He knew he was being charged for illegal fishing and it made him "really nervous". I am satisfied he did not decline to call a lawyer because he was in some doubt about why the Fisheries officers wanted to speak to him.

Duty Counsel and the Issue of Expertise

[22] It is my view that there is no merit to the Defence argument that Mr. Boudreau's right to counsel would have been a hollow right if exercised, because there was no guarantee that duty counsel would have had expertise in Fisheries law. When Mr. Boudreau was given his right to counsel, he was also informed that what

he said to the Fisheries officers could be used in evidence against him. The most pressing matter he required advice concerning was the impending questioning and his right to remain silent if he chose to. (*R. v. Hebert*, [1990] S.C.J. No. 64 at paragraph 52; *R. v. Brydges*, [1990] S.C.J. No. 8 at paragraph 16) Any duty counsel could have advised him about his right against self-incrimination. No special Fisheries law expertise was required.

The Issue of Waiver

[23] There is no dispute that when Mr. Boudreau was asked if he wanted to contact a lawyer, after he was told he had the right to, he said he did not, “not at this time.” The Defence submits that this was equivocal and the Fisheries officers should have pressed for a clearer response.

[24] In the submission of the Defence, Mr. Boudreau’s response to being informed of his right to counsel that he did not wish to call a lawyer “at this time” was not an informed waiver of his *Charter* right. In the characterization of the Defence, Officer Sinclair rattled off the right to counsel from a card, and as soon as Mr. Boudreau responded, launched into questioning him. The Defence argues that this did not afford Mr. Boudreau sufficient time to process what was happening and make an informed decision about speaking to a lawyer. Mr. Boudreau was not offered the use of a telephone. The Defence submits that greater care must be taken in going over a person’s rights so that any waiver of them is validly given.

[25] I do not agree that anything more needed to be or should have been done by

Officer Sinclair once Mr. Boudreau said he did not wish to speak to a lawyer. Mr. Boudreau was not unequivocal: he plainly stated that of the two choices he had, to speak to a lawyer or not to speak to a lawyer, at that time he did not wish to speak to a lawyer. His answer was not equivocal. He did not say he was unsure about whether he wanted to speak to a lawyer or not. He did not say he did not want to speak to a lawyer only to change his mind and say he did. He did not try to contact a lawyer and give up. He told Officer Sinclair, knowing that Officer Sinclair was investigating him for illegal crab fishing and wanted to ask him some questions, that at that time, he did not want to exercise his rights and speak to a lawyer.

[26] I do not accept that the Fisheries officers should have done more to facilitate telephone use for Mr. Boudreau. Mr. Boudreau did not indicate he needed a telephone or wanted to call a lawyer but did not know how to. He said he did not want to call a lawyer at that time. He went on to answer questions put to him by Officer Sinclair and did not, at any time, indicate that he had changed his mind about exercising his right to counsel. This is not a situation like one noted in *R. v. Prosper*, [1994] S.C.J. No. 72 where the Supreme Court of Canada said the courts must be vigilant about the issue of waiver of the *Charter*-protected right to counsel where:

...a detainee has asserted his or her right to counsel and has been reasonably diligent in exercising it, yet has been unable to reach a lawyer because duty counsel is unavailable at the time of detention... (*Prosper*, at paragraph 43)

[27] There is, in my view, no merit to the Defence submission that Mr. Boudreau

was hampered in his decision-making by the fact that his rights were provided to him in English when French is his first language. Mr. Boudreau has acknowledged that he is fluently bilingual. I find that he was fully able to comprehend his right to counsel and exercise his waiver of that right, in English. There is no evidence that he found the process of dealing in English with the Fisheries officers to be problematic, confusing or overwhelming.

[28] In arriving at my conclusion that Mr. Boudreau effectively and unequivocally waived his right to counsel with the words, “No, not at this time”, I have reviewed and considered the case provided by Defence of *R. v. Liddell*, [2008] B.C.J. No. 947 from the British Columbia Provincial Court. In that case, the Honourable Judge Doherty held that these words, uttered by a driver to a police officer making a breathalyzer demand, did not constitute an effective waiver of the right to counsel. Doherty, J.P.C. held that the words were ambiguous and found that the police “must satisfy themselves that they have received an unequivocal waiver.” He took the view that more must be done to ensure the detainee does not want to call a lawyer unless there has been an “unequivocal ‘no’ in response to a *Charter* warning.” (*Liddell*, paragraph 7)

[29] With due respect, I simply do not agree with the Honourable Judge Doherty. In my opinion, the words uttered by Mr. Boudreau “No, not at this time” constituted a clear waiver of the right he had been told he was entitled to exercise at that time. He declined to do so. He was unambiguous in this and did not at any time indicate he was having second thoughts or changing his mind. He did not ask to call a lawyer at any point, which was consistent with his original indication that he did not wish to do so.

[30] I am satisfied that Mr. Boudreau was adequately informed of his right to counsel and gave an express waiver. He knew he was the subject of an illegal fishing investigation. He chose not to speak to counsel and answered the questions of Officer Sinclair. I find there was no violation by the Fisheries officers of his *Charter*-protected right to counsel.