IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Atlantic Towing Ltd., 2010 NSPC 58

Date: September 27, 2010
Docket: 2133304, 2133305, 2133306, 2133307, 2133308, 2133309, 2133310, 2133311, 2133312, 2133315, 2133314
Registry: Halifax

Her Majesty the Queen

v.

Atlantic Towing Limited, a body corporate and Authorized Representative of the Canadian vessel, **Shovelmaster**, Official No: 369850

DECISION ON DEFENCE APPLICATION FOR PARTICULARS

Judge:	The Honourable Judge Anne S. Derrick
Heard:	August 31, 2010
Decision:	September 27, 2010
Charge:	sections 118 & 121 (1) of the *Canada Shipping Act, 2001, c. 26*
Counsel:	Paul Adams - Crown Attorney
	William Ryan, Q.C., and Alex Keavney - Defence Counsel

By the Court:

[1] Atlantic Towing Limited ("ATL") is seeking an order for particulars pursuant to section 587 (1) (f) of the *Criminal Code* with respect to the charge it is facing under section 118 of the *Canada Shipping Act*. The charge states that:

> Atlantic Towing did, on or between November 18, 2008 and November 20, 2008, in waters under Canadian jurisdiction adjacent to the south-western coast of the Province of Nova Scotia, take action that might jeopardize the safety of a vessel or of persons on board a vessel, namely, the "*Shovelmaster"*, in contravention of section 118 of the *Canada Shipping Act* 2001, thereby committing an offence contrary to section 121(1) of the Canada Shipping Act, 2001 (2001, c. 26), as amended.

[2] An order for particulars is available pursuant to Section 587 (1) (f) of the *Criminal Code.* That section provides that:

> A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars…further describing the means by which an offence is alleged to have been committed.

[3] In a nutshell, ATL submits that it does not know what the "action" is that it took during the dates of November 18 – 20, 2008 that might have jeopardized the safety of a vessel or of persons on board the Shovelmaster. ATL says it does not know from the wording of the Information, the disclosure it has been provided, or the description contained in the Crown's brief "what precisely it is supposed to have done", to borrow a phrase from *R. v. Armour Pharmaceutical Co.*, one of the cases relied on by ATL. In its written brief ATL indicates that it "took hundreds of 'actions' with respect to the Shovelmaster between November 18 and 20, 2008"

and states: “While Atlantic Towing denies any of these actions jeopardized the safety of the Shovelmaster or persons on board, it is entitled to particulars identifying which of its actions is the subject of the s. 118 count.”

[4] ATL has put the issue squarely as one of fair trial rights, arguing that it needs to understand the charge against it and be able to construct a defence to the charge and make informed decisions about the conduct of that defence, including what experts to call and what documentation to tender. In the submission of ATL, an order for particulars is essential if these critical objectives are to be achieved. Without such an order, ATL submits that it will be unable to effectively defend itself and will be “required to attempt to justify…all of [the] actions it took relating to the Shovelmaster during [November 18 – 20, 2008].”

[5] ATL identifies other hazards associated with the trial proceeding in the absence of particulars: (1) it will have to guess what the impugned “action” is, at the risk of being wrong and ending up with a conviction on a charge “it might otherwise have properly defended against”, and (2) a lack of particulars will compromise the effective administration of the trial, notably the judge’s ability to properly assess objections to irrelevant evidence equipped with “nothing more than the vague charge that Atlantic Towing took some “action” that might have jeopardized the safety of her vessel or her crew.”

[6] The Crown has a simple response to the ATL application: you know the case you have to meet. The Crown submits that the factual and evidentiary basis for the section 118 charge is found in the disclosure, which the Crown indicates is not voluminous, the wording of the charge in the Information, and most recently, in the description of the events of November 18 – 20, 2008 set out in the Crown’s written brief filed for this application.

[7] I do not of course have any of the disclosure before me on this application. I do have the Crown's brief and from that have extracted the Crown's outline of the facts that will be adduced at trial. At paragraph 5 of its Brief, the Crown advises that this proposed evidence has been fully disclosed to ATL. It then summarizes the evidence, a summary I have reproduced below:

> At the time of the alleged offence, Atlantic Towing Limited was the owner and "authorized representative" (as defined in s. 14 of the *Canada Shipping Act, 2001*) of both the tug "Atlantic Larch" and the dredge "*Shovelmaster*". The "*Shovelmaster*" is a non-propelled flat-bottomed barge with a crane mounted on deck which was used for harbor dredging.
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> On the evening of November 18, 2008, the tug "*Atlantic Larch*" left the port of Saint John, New Brunswick, on a voyage destined for Halifax, Nova Scotia. The "Atlantic Larch" was towing the dredge, "*Shovelmaster*". There were three crew members onboard the "*Shovelmaster*". As acknowledged by the Defendant (p. 8 Defendant's Brief), Atlantic Towing Ltd was responsible for preparing for and engaging in the voyage.
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> On November 18 and 19, 2008, the Environment Canada marine forecast had gale warnings in effect for the areas off the south-western coast of Nova Scotia through which the voyage would be proceeding. On November 19, 2008, the vessels encountered heavy weather/gale force winds approximately 20 nautical miles off the south-western coast of Nova Scotia. A garage door (similar in design to a residential garage door) that formed part of the superstructure on the deck of the "*Shovelmaster*" was insufficient to withstand the heavy seas. It was hit by a wave and collapsed. This left the barge's superstructure open to the sea causing the "*Shovelmaster*" to take on water. The three crew members onboard were ill-equipped and unable to repel the accumulating seawater and the vessel flooded. The situation deteriorated with the vessel listing heavily.
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> The crew of the "*Atlantic Larch*" were unable to safely rescue the three crew members onboard the "*Shovelmaster*" and the Coast Guard was contacted for assistance. A Canadian Forces Search and Rescue helicopter

subsequently arrived on the scene over 20 nautical miles off the coast of Nova Scotia. After assessing the situation, attempts were made by Search and Rescue technicians to rescue the three crew members from the deck of the "*Shovelmaster*". However, the crew could not be safely airlifted directly from the "*Shovelmaster*" due to the rolling and pitching of the barge in the heavy weather conditions and various obstacles on the deck of the vessel, which included 80' pylons, steel cables, and a crane.

By this time, the situation onboard the "*Shovelmaster*" was deteriorating rapidly as the vessel took on more and more water and became increasingly unstable. The Search and Rescue technicians' assessment was that the vessel was in imminent danger of sinking and that prompt action was necessary to rescue its crew.

The Search and Rescue technicians onboard the helicopter decided that the best option was to attempt a "water hoist". The three crew members onboard the "*Shovelmaster*" were instructed to put on their survival suits and abandon the vessel, which they did. The Search and Rescue technicians were then able to winch the three crewmen to safety onboard the rescue helicopter. This operation was carried out in perilous conditions endangering both the "*Shovelmaster*" crew and the Search and Rescue personnel. The "*Shovelmaster*" capsized shortly after 4 p.m. on November 19th – approximately 26 minutes after its crew were rescued from the sea.

At the time of the above-noted voyage, the "*Shovelmaster*" did not have a valid *Ship Inspection Certificate* as required under s. 10 of the *Vessel Certificates Regulations*, SOR/2007-31 – the only *Ship Inspection Certification* issued to the "*Shovelmaster*" having expired over seven years earlier on June 21, 2001. The purpose of the required *Ship Inspection Certificate* is to ensure compliance with Canadian ship safety requirements. The expired *Ship Inspection Certificate* issued to the "*Shovelmaster*" restricted the vessel to voyages "not more than 15 miles offshore" and required that the vessel be "unmanned when under tow". The voyage resulting in the capsizing (and eventual sinking) of the "*Shovelmaster*" was contrary to the restrictions contained in the expired *Certificate*.

[8] The Crown states plainly in its Brief that its summary of the evidence "…is not a formal statement of 'particulars' nor an exhaustive summary of the evidence relevant to the s. 118 charge." ATL objects to this, asking why the Crown is not prepared to state its factual summary as particulars in the formal sense. This does not represent the full extent of ATL's complaint however: in oral argument ATL submitted that the Crown's factual summary is insufficient to satisfy its entitlement to know the case it has to meet.

[9] Ordering the Crown to provide particulars is different from ordering disclosure to vindicate an accused's section 7 *Charter* rights to make a full answer and defence. Particulars form part of the indictment and like the other elements of the indictment, must be proved beyond a reasonable doubt. (*R. v. Dalton, [1999] N.J. No. 388 (Nfld. S.C., paragraph 11*.) An order for particulars necessarily constrains the conduct of the prosecution's case.

[10] ATL has directed me to several cases where particulars were ordered to ensure a fair trial. *R. v. Imperial Tobacco,[1940] A.J. No. 2 (Alta. S.C.); R. v. Canadian General Electric Co., [1974] O.J. No. 13 (Ont. H.C.J.)*; and *R. v. Cominco Ltd., [1978] A.J. No. 930 (Alta. S.C.T.D.)* are all pre-*Charter* cases decided before the Crown's disclosure obligations were entrenched by the 1991 decision of the Supreme Court of Canada in *R. v. Stinchcombe, [1991] S.C.J. No. 83*. *Canadian General Electric* and *Cominco* involved complex prosecutions under the *Combines Investigation Act* and the defendants there do not appear to have had the benefit of the disclosure that would now be mandated by the *Charter*. The problem in *Imperial Tobacco*, a prosecution under the *Criminal Code* for conspiracy to restrain trade or commerce in relation to certain commodities, was the fact that the alleged conspiracies, involving 35 corporations and spanning approximately 10 years, were not specified by the counts in the indictment. The

court ruled that the accused were entitled to have the Crown "segregate and identify with clarity and certainty the particular conspiracy which is aimed at in each count of the charge." (*Imperial Tobacco, paragraph 17*)

[11] The theme underlying the *Imperial Tobacco* decision is articulated in the more recent decision of *R. v. Armour Pharmaceutical Company, [2006] O.J. No. 137 (Ont. S.C.J.)*: "Each count on an indictment must identify a single transaction with sufficient detail to give the accused the ability to identify the specific transaction." (*R. v. Armour Pharmaceutical Company, paragraph 11*) Particulars were ordered in *Armour* in light of allegations against the accused that were "framed generically as criminal negligence…[covering] a range of possible acts, omissions and failed legal duties." The trial was expected to be complex, scheduled to take more than a year with 116 names on the tentative witness list. The disclosure was over 400,000 pages and was not readily searchable. The court ordered particulars to "supplement [the] indictment, which, although sufficient, is not adequate for the accused to properly prepare his defence and be assured of a fair trial." (*R. v. Armour Pharmaceutical Company, paragraph 21*)

[12] However, even complex cases do not necessarily require an order for particulars to ensure trial fairness for an accused. In a case with "massive disclosure" involving terrorism and conspiracy charges, no particulars were ordered where the Crown provided the accused "with considerable assistance in explaining the theory of its case against each accused in written form." This satisfied the court that the accused knew the case they each had to meet. *(R. v. Ahmad, [2009] O.J. No. 6149 (Ont. S. C.J. , paragraph 26)*

[13] The courts have consistently ruled that the Crown should not be required to set out the "theory" of its case in the Indictment. *(R. v. Dalton; R. v. Groot,[1998]*

O.J. No. 3674 (Ont. C.A.), paragraph 14; R. v. McCune,[1998] B.C.J. No. 2925 (B.C.C.A.), paragraph 37; R. v. Gormley,[1999] P.E.I.J. No. 80 (P.E.I.S.C., App. Div.), paragraphs 73 – 75; R. v. Govedarov, Popovic and Askov,[1974] O.J. No. 1837 (Ont. C.A.) The Crown must prove beyond a reasonable doubt the essential elements of the offence as set out in the charge but it is not required to prove its "theory". *(R. v. Dalton, paragraph 15)* An accused must be able to defend against the charge, a requirement that is balanced in the analysis required to determine if particulars are "necessary for a fair trial" with consideration for the fact that the Crown is not to be fettered in its conduct of the case. *(R. v. Groot, paragraph 17)*

[14] Trial fairness is guaranteed to an accused by the common law and the *Charter*. However a fair trial is not solely constituted by what concerns the accused. A fair trial is "one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused." *(R. v. Harrer, [1995] S.C.J. No. 81)* A trial must be fair from both the perspective of the accused and of society more broadly. *(R. v. Bjelland, [2009] S.C.J. No. 38)*

[15] A fair trial is in part ensured through the Crown satisfying its obligations to make full disclosure. ATL does not suggest the Crown has failed to do so in this case. As noted by the Ontario Court of Appeal in *R. v. Horan, [2008] O.J. No. 3167* at paragraph 26, disclosure is intended to "…ensure that the accused receives a fair trial, that the accused has an adequate opportunity to respond to the prosecution case and that in the result the verdict is a reliable one." Trials being dynamic and adversarial processes, events may "unfold [such that] prosecution and defence may find that they have to respond quickly to changes in strategy and changes from the expected testimony of witnesses." (*R. v. Horan, paragraph 26*) By saying this I am indicating that not everything can be anticipated. In addition to the disclosure, ATL has, in advance of trial, been given what in my opinion is

“considerable assistance” in the form of the factual and evidentiary summary provided by the Crown for this application. ATL does not suggest that the Crown summary of the facts it intends to prove is inconsistent with the evidentiary disclosure provided.

[16] ATL’s position that the Crown’s factual and evidentiary summary provides insufficient details concerning the “action” it took during the relevant dates suggests to me that ATL wants to confine the prosecution of this case to an unreasonable extent. I do not see how ATL can complain that it does not know the case it has to meet. It is not a case shrouded in mystery. ATL has not persuaded me that an order for particulars is necessary to ensure a fair trial or that there is a justification for binding the Crown to prove everything contained in its summary. The application for particulars is denied.