IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: Her Majesty the Queen v. Richard Bagnell, 2004 NSPC 29

Date: 20040511
Docket: 1260019
Registry: Sydney

Between:

Her Majesty the Queen

v.

Richard Bagnell

Judge:	A.Peter Ross
Heard:	August 8th, 2003, in Baddeck, Nova Scotia September 24th, 2003, in Sydney, Nova Scotia
Written decision:	May 11th, 2004
Charge:	s 35(1), Fisheries Act of Canada
Counsel:	Matthew Ryan, for the Crown Darlene MacRury, for the Defendant

INTRODUCTION:

[1] This is a decision on a **Charter** application during the trial of an offence under the **Fisheries Act** of Canada. It requires the Court to consider various competing rights and values including an individual's right to privacy in real property and the importance of fish habitat as an aspect of our natural environment.

[2] The Defendant, Richard Bagnell, owns real property on the shores of Baddeck Bay, Victoria County, Nova Scotia. Intending to build a retirement home there, he retained an engineering firm in May of 2001 to assist him in obtaining the usual permits for on-site sewage disposal, culvert work, etc. In particular, he made application for approval to infill a portion of a pond (wetland) on the property. Although that application was made to the Nova Scotia Department of Environment and Labour (DOEL), they referred it to the Federal Department of Fisheries and Oceans (DFO). Eventually DFO indicated that it was unable to support approval of the application on the basis that the wetland provided habitat for fish. These concerns were echoed by DOEL when subsequently it formally rejected the infill application.

[3] Mr. Bagnell appears to have recognized the need for approval at the inception of his project. He testified that he sought the advice of the engineering firm because of the water on his land. He "did not know what to do with the water there". Eighteen months later, by an Information dated November 18, 2002, he was charged with carrying on a work or undertaking that resulted in the harmful alteration or destruction of fish habitat contrary to section 35(1) of the Fisheries Act. It is alleged that he performed work on the property, including the filling and alteration of the pond, between May 21st and November 18th, 2002.

[4] DFO became involved in the matter in early June of 2002. Various officials visited the site. They made observations and did sampling from the pond. The Crown intends to use the evidence gleaned in the current prosecution. Each of these visits entailed entry on the Bagnell property without his express permission, and in most cases without his knowledge. All were done without prior warrant. Further observations were made subsequent to the laying of the charge, although certain of these may have been made from off the property. The Defence contends that Mr. Bagnell had a reasonable expectation of privacy in regard to his land, that from early June 2002 onwards DFO were in an investigation mode, and that accordingly the evidence should be excluded from the trial as having been obtained

in the course of an unreasonable search and resulting violation of Mr. Bagnell's section 8 Charter Rights. The Crown contends that the visits were mere inspections, that they violated no reasonable expectation of privacy, and that if searches, they were reasonable , though warrantless, and that any evidence obtained should be ruled admissible.

FACTUAL BACKGROUND:

[5] Although I will also refer to certain matters of fact in the discussion which follows, I will set out here a chronology of events, taken from the evidence, which are pertinent to the decision on this *voir dire*.

May 2001 - Defendant retains Carey Engineering re various approvals, and constructs driveway into the property.

July 3, 2001 - Application is made for on-site sewage disposal system.

September 4, 2001 - The Nova Scotia Department of Natural Resources (DNR) advises Carey that the proposed infilling does not involve that department, because its jurisdiction extends from high water mark seaward.

September - October 2001 - The property is inspected by DNR officials pursuant to a “wetlands directive” of that department. This becomes the subject of subsequent discussions in 2002. Further, Mr. Carey and officials of DOEL visit the site in regard to the application for an on-site sewage disposal system. Mr. Bagnell places a chain across his driveway and displays a nameplate.

December 3, 2001 - DOEL forwards to Carey approval for construction of the on-site sewage disposal system. Among its terms is a stipulation that the holder is not relieved from obtaining any permissions for work which may be required by federal legislation.

April - May 2002 - The Defendant clears portions of the property and does further work on the driveway and begins to picnic and camp there on occasional weekends. This use continues through the relevant time period.

April 26, 2002 - Carey Engineering makes application on behalf of Mr. Bagnell to DOEL for approval to infill the pond (wetland). The letter refers to previous inspections by DNR. The application form is signed by Mr. Bagnell. A survey plan of the property is attached, highlighting the area to be infilled. The property is roughly rectangular, one point seven acres in area, lying between Provincial Highway No. 205 and the waters of Baddeck Bay.

May 10, 2002 - Gordon Matheson of DOEL writes to Ed Carey to acknowledge receipt of the infill application. This letter was expressly copied to both Richard Bagnell, the defendant, and Joan Reid of DFO. Additional information is requested, including certain matters relevant to the wetlands directive. A copy of this is delivered by Mr. Matheson to both the defendant and Mr. Carey before the end of May, and was to be discussed at a meeting to be held on May 30th.

May 22, 2002 - Gordon Matheson of DOEL and Joan Reid of DFO visit the Bagnell property and develop concerns about activities taking place there and the applications which have been made.

May 28, 2002 - Gordon Matheson leaves a copy of the wetland directive in Mr. Bagnell's mailbox at his house on Howe Street in Sydney.

May 29, 2002 - Mr. Matheson leaves a copy of the wetland directive at Mr. Carey's office.

May 28/30, 2002 - Meeting scheduled for May 30th between DOEL, DFO and Mr. Carey to discuss the deficiencies in the infill application is postponed indefinitely. Apparently Mr. Carey had not received a report of the inspection done in October, 2001.

May 31, 2002 - A call is received at the offices of DOEL from someone expressing concern about activity on the Bagnell property. Gordon Matheson visits site and observes contractors there putting down fill.

May - June 2002 - On an unspecified date Mr. Bagnell meets in Sydney with certain government officials concerning the applications made on his behalf. Though questioned about his ownership of the property, the identity of his contractors and the cost of work he was undertaking, he declines to answer questions as he was unsure of the purpose and direction of the meeting.

June 3, 2002 - A meeting is held in Sydney between officials of DFO and DNR concerning Mr. Bagnell's infill and sewage system applications. Also on this date a letter is sent by Joan Reid, Habitat Co-ordinator at DFO, to both Mr. Bagnell at his home address and to Mr. Carey advising that DFO is "unable to support approval" of the application to infill the pond. The letter gives the environmental basis for this concern, refers to section 35(1) of the Fisheries Act, under which the defendant was eventually charged and goes on to state "further you are strongly advised not to carry out any landscaping, infilling, rocking or other physical work below the ordinary high water mark in either the tidal pond or the original outlet channel. If you have any questions concerning the above, please contact me at 902-564-7708".

June 4, 2002 - Fishery officer, Gary MacDonald, enters the Bagnell property and sets a minnow trap to determine the presence of fish. Photographs are taken. These things are done for "evidentiary purposes".

June 5, 2002 - Gary MacDonald speaks with Ed Carey. MacDonald says the Bagnell matter is "under investigation" and it appears that the possibility of charges was mentioned.

July 23, 2002 - Gordon Matheson attends at the Bagnell property where he observes a dam-like structure in the pond, a ditch and sods. He notes that the waterway is "nearly blocked off completely". He does not report this to DFO.

August 15, 2002 - DOEL writes to Ed Carey to advise that the Bagnell application will not be dealt with unless more information is supplied. This apparently takes Mr. Carey somewhat by surprise as his firm subsequently writes on August 21, 2002, to ask for an extension to September 30th, 2002, in order to discuss the matter with Mr. Bagnell.

August 16, 2002 - Gordon Matheson sends a registered letter to Mr. Bagnell to advise that his application is incomplete as first mentioned in the May 10th letter, that there was no reply to that letter within three months and that accordingly his application could now be rejected. Mr. Bagnell is asked to advise of his intentions

failing which his application would be closed. As noted above, DOEL received a request for an extension to September 30, 2002, from Carey.

September 23, 2002 - Fishery officer MacDonald attends Bagnell property after a complaint is made to his office. He observes a backhoe working on the property and notes that a large part of the property has been infilled. Additional photographs are taken.

September 27, 2002 - Gordon Matheson visits the subject property after a complaint to DFO. He observes a contractor on site and the backhoe operating around the pond. This is one of seven visits made by Mr. Matheson between May and November of 2002 to check activity on the property.

October 3, 2002 - Following a complaint lodged by Mr. Matheson, Fishery Officer MacDonald visits the property with Fishery Officer, Nicole Caron. Photographs, measurements and notes are taken. Fishery Officer MacDonald forms a definite opinion that an offence had taken place. Officer Caron wishes to contact people in the habitat section of DFO for advice on what to do.

October 9, 2002 - Fishery officers MacDonald and Caron attend at the property again. They set minnow traps and return later on to collect fish samples. Officer Caron advises she is still waiting to hear what the habitat people might say. She is unsure of the level or seriousness of the matter.

October 16, 2002 - Fishery officers MacDonald and Caron together with a habitat co-ordinator and a technician visit the site. They are satisfied that destruction of fish habitat has occurred but have not decided with certainty to lay charges, at least until consulting with their superiors in the Department.

November 12, 2002 - Fishery officers MacDonald and Caron on routine patrol note mud on the highway and as a result enter the Bagnell property where they note the tracks of a machine and further infilling.

November 14, 2002 - Carey Engineering writes to DOEL to advise that they have had no involvement with the Bagnell property since their letter of August 21, 2002.

November 18, 2002 - The information alleging the present offence is sworn by Officer Caron.

November 21, 2002 - Letter from DOEL to Carey Engineering to advise that the application for alteration to a wetland under the Nova Scotia Environment Act has been rejected. The reason for rejection is stated to be the unwillingness of DFO to grant approval for the infilling of the wetland.

April 2003 - Officials from DFO pay a visit to the Bagnell property and compare the condition of the site to the previous year.

May 19, 2003 - Officer Caron makes certain observations of the Bagnell property, at least some of which are from neighbouring premises owned by one MacLeod.

She notes a backhoe and a dump truck. She speaks to the operator of the truck and also to Mr. Bagnell who happens to arrive. When asked whether there were any permits Mr. Bagnell advises that the matter would be "sorted out at trial in June". Officer Caron takes photographs over the protests of Mr. Bagnell.

June 3, 2003 - One Hargrave visits the site with Officer Caron, walking into the property and observing the infill area.

June 11, 2003 - Mr. Terry Power of DNR visits the site at the request of DFO, intending to develop an expert opinion.

THE LEGAL ISSUES:

[6] The Defendant is primarily concerned with the entry by fishery officers upon his property. His counsel totalled seven occasions on which they visited the site to make observations and take measurements. There were, at various times, visits by other government officials from DOEL and DNR. Likely it is the fishery officers who are the principal source for the evidence which the Prosecution intends to use. The Defence contends that it is these agents in particular who were intent upon charging Mr. Bagnell. It appears the fishery officers relied upon their inspection power in s. 49(1) of the Fisheries Act, which gives them the power "for the

purpose of ensuring compliance with this Act and the regulations" to "enter and inspect any place, including any premises...in which the officer believes on reasonable grounds there is any work or undertaking or any fish or other thing in respect of which this Act or the regulations may apply." The section sets out power to conduct tests and analyses, and also to require any person to produce for examination various records or documents. It is the latter which came into focus in cases such as **R. v. Fitzpatrick**[1] and **R. v. Wilcox**[2]. Although documents are, by their very nature, more likely to be self-criminatory than the type of evidence in issue here, the same question raises its head: did the use of the s. 49(1) power, in the circumstances, infringe the defendant's rights under the **Charter**?

[7] In **R. v. Hufsky**[3], a demand for a driver's registration and license, required by provincial legislation, was declared to be a mere inspection, not a search. In **R. v. Potash**[4], the Supreme Court indicated that the power to examine a work environment and inspect documents is properly characterized as a search. However

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[1] R. v. Fitzpatrick (1995) 43 C.R. (4th) 343 (SCC)

[2] R. v. Wilcox (2001) 152 C.C.C. (3d) 157 (NSCA)

[3] R. v. Hufsky (1988) 63 C.R. (3d) 14 (SCC)

[4] R. v. Potash [1994] 2 S.C.R. 406

it is characterized, as inspection or search, the entry here was warrantless. A warrantless *search* is presumptively unreasonable. The Crown may rebut this presumption by showing that the search was authorized by law, that the law itself was reasonable, and that the manner of search was also reasonable. The right to challenge the reasonableness of a search depends upon the accused establishing that his personal right to privacy was violated. Under this analysis Courts first determine whether there was a reasonable expectation of privacy. Then one looks to see whether the search was conducted reasonably.

[8] As Abella, J.A. stated in **R. v. Tessling**[5]:

> Two inquiries are engaged by a Section 8 challenge, as articulated in **R. v. Edwards**:
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> "The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy". Bastarache, J. summarized the nature of the s. 8 inquiry in **R. v. Law**: "It has long been held that the principle purpose of Section 8 of the **Charter** is to protect an accused's privacy interests against unreasonable intrusion by the state. Accordingly, police conduct interfering with a reasonable expectation of privacy is said to constitute a "search" within the meaning of the provision".
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> In **R. v. Evans**, Sopinka, J. defined a search for the purposes of Section 8...His rationale was the following: "As this court stated in **Hunter v. Southam Inc.** the

[5] R. v. Tessling (2003) 171 C.C.C. (3d) 361 (Ont. CA)

> objective of Section 8 of the **Charter** is "to protect individuals from unjustified state intrusions upon their privacy". Clearly it is only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that Section 8 of the **Charter** comes into play. As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a "search" within the meaning of Section 8.

[9] There appear to be at least two axes or gradients upon which analysis occurs in cases such as this. In one, sometimes begun with s. 7 of the **Charter** in mind, the Court considers the degree of antagonism between the individual and the state. The Court might ask was it an audit/inspection or a true investigation? Did the state agent possess mere suspicion or reasonable and probable grounds in the existence of an offence? Was the official performing a random check, or did the official have the Defendant "in its sights" and, having decided to charge, was gathering evidence to strengthen the intended prosecution?

[10] Another analysis considers the expectation of privacy which, again, exists on a sliding scale. This analysis also has regard to whether the right exists in a regulatory context. Generally this involves a consideration of whether the Defendant was engaged in a regulated activity. However, it also considers a

number of other factors which were set out in **R. v. Edwards**[6], including the nature of the property, the extent of possession or control exercised by the Defendant, the ability to regulate access, etc. I will attempt to determine where the present case lies along each of these two "axes".

THE RELATIONSHIP BETWEEN INDIVIDUAL AND STATE

[11] Many cases have wrestled with the question of inspection/search or audit/investigation in the regulatory context. Defence argues that the entries by the fishery officers occurred after they had formed reasonable grounds to believe that Mr. Bagnell was carrying on work in contravention of the **Act**, and that consequently a search warrant was required, as contemplated by s. 49.1 of the **Fisheries Act**. The inclusion of such a section in the legislation appears to support the Defence proposition that where reasonable grounds exist, an entry power may *only* be exercised pursuant to warrant. In **Wilcox** our Court of Appeal found it unnecessary to decide whether resort to the inspection power was precluded once the authorities had reasonable and probable grounds to obtain a search warrant (the trial Judge having earlier concluded that the officers had

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[6] R. v. Edwards (1996) 104 C.C.C. (3d) 136

nothing beyond suspicion at the time of the inspection). In the present case, it appears on the evidence that the fishery officers had increasingly strong grounds to believe that the work underway on the Bagnell property constituted a contravention of the Act. However, it is not possible to precisely measure the intensity of human belief, and difficult to draw a clear line between suspicion and reasonable grounds. Nor do I think that it is necessary to do so in the course of deciding whether searches prior to the laying of charges were "unreasonable" within the meaning of s. 8.

[12] The fishery officers, even in July of 2003, had at the very least strong suspicions that an offence was being committed. By November of the same year at least one of the fishery officers appeared quite sure that an offence was being committed. Nevertheless, the decision to charge was one they would not make with consulting with their superiors, particularly those in the Habitat section. They stated they were unsure of the "degree of seriousness" of the offence. The Act does provide for the making of remedial orders, rather than a prosecution. Hence I would not conclude that the fishery officers had decided to charge Mr. Bagnell until just before the Information was actually sworn on November 18, 2002.

[13] On June 3, 2002, there was a meeting held with Fishery Officer MacDonald, and Habitat Coordinator Joan Reid of DFO, together with Gordon Matheson of DOEL, Wendy Arsenault of DNR and possibly others. The meeting concerned Mr. Bagnell's applications for sewage disposal and in-filling. This meeting resulted in Officer MacDonald being dispatched to visit the property on June the 4th. He stated the purpose of this visit was both to establish what fish habitat could be found on the property, and to investigate a possible violation concerning it. It appears the June 3, 2002 letter also followed upon this meeting. A reasonable interpretation of these events is that DFO needed to know more about the property and wanted to stop Mr. Bagnell from carrying out any more work until they had done a complete evaluation of the situation on the property. While the Defence would construe the June 3, 2002 letter as fixing DFO's determination thereafter to investigate Mr. Bagnell in order to gather evidence for a possible prosecution, the situation appears to me to be potentially more fluid, and the purposes of DFO less focused than this. As Mr. Matheson testified, changes are often made to such applications after an initial review and contact with the applicant, and often after a referral to DFO. Even four months later, Fishery Officer Caron testified, in regard to her visits of October 3rd and 9th, 2002, that she still was not sure of the level of

seriousness of the matter, unsure what opinion the habitat section might have, and not certain that charges ought to be laid.

[14] While there is no specific evidence in this case that DFO was considering use of the remedial powers under Section 38(6) of the **Fisheries Act**, this statutory context may nevertheless be worthy of some consideration here. As the Supreme Court of Canada said in **Jarvis**[7], "even where reasonable grounds to suspect an offence exists, it will not always be true that the predominant purpose of an inquiry is the determination of penal liability". It went on to say the courts must guard against creating shackles on regulatory officials or "forcing the regulatory hand" by removing the possibility of seeking lesser administrative penalties, even where reasonable grounds exist to believe that there is culpable conduct. Furthermore there is, in a regulatory as well as a criminal context, a charging discretion, which may involve any number of factors.

[15] Mr. Bagnell, in seeking to build a house, install a sewage system, and infill a wetland was engaged in activities subject to state regulation. In this sense he is like the fisherman in **Fitzpatrick**. At the inception of the process, when he made

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[7] R. v. Jarvis (2000) 149 C.C.C. (3d) 498 (SCC)

the various applications, there is no sense in which he could be said to stand in an adversarial relationship to the State, even though they may have had different interests in regard to the property. As matters developed over the summer and fall of 2002, the relationship acquired a more adversarial character, but not until November of 2002 did the permission-seeking process come to an end with the formal rejection letter by DOEL.

[16] Other cases considered by the Supreme Court of Canada, for instance **Fitzpatrick** and **Jarvis**, instruct that where the impugned state action occurs in a regulatory context, where there is often an audit or inspection power, expectations of privacy may be diminished to degree. Consequently, while police cannot stop and detain people at random on the street to check for the possible possession of illicit drugs, there is, on the other hand, an expectation and acceptance of the fact that fishery officers and income tax auditors will conduct so-called “random” inspections on person whose activities fall within the scope of their regulatory authority.

[17] In some cases the intention of the state agents is an important factor in determining whether an unreasonable search has occurred. Hence, in **Jarvis**

whether "the predominant purpose of a particular inquiry is the determination of penal liability" became the central issue in determining whether Canada Customs and Revenue Agency officials could properly have recourse to the inspection and requirement powers given to them under the **Income Tax Act**. However, the court went on to point out that the mere existence of reasonable grounds to suspect an offence will not in and of itself determine the predominant purpose of an inquiry, though this will be an important factor. Likewise, in **R. v. Evans**[8], the Supreme Court looked at the intention of the police in approaching the individual's property in determining whether they exceeded an implied "licence to knock".

[18] Even if, later in the summer and fall of 2002, one considers that DFO was in an investigation mode (rather than an inspection mode), the context and purpose of the searches, being related to features of the natural environment, may well serve to make them reasonable. No real property interests are absolute. Hunters and surveyors may traverse land and fishermen may traverse streams. The State retains a legitimate underlying interest in fish and wildlife which may be seen as subject to

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[8] R. v. Evans (1996) 45 C.R. (4th) 210

a public trust rather than being the private property of the title holder. When the fishery officers went on Mr. Bagnell's property to look at the pond, they were simply determining the natural pre-existing features of this property.

[19] Where the entry of a state agent is for the purpose of conducting a simple examination of a natural feature of the property, or some potential environmental insult to it, this is a particular context within which courts should not readily declare a warrantless search to be unreasonable. In **Wilcox**[9]**,** Cromwell, J.A. notes that in questioning whether the **Charter** has been infringed, one cannot always establish clear lines which divide regulatory inspections from criminal investigations. When he says citing the Supreme Court of Canada in **Wholesale Travel**[10] that "what is important are not labels but the values at stake in the particular context", I think he calls upon courts to consider such things as the importance of tidal ponds to ecosystems such as the Bras d'Or Lakes, and the legitimate state interest in saving these from destruction.

THE EXPECTATION OF PRIVACY

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[9] Supra, at par. 106

[10] R. v. Wholesale Travel (1991) 8 C.R. (4th) 145

[20] One notes that the entry and actions of the fishery officers have two aspects. First, there are the simple visual observations, supplemented by photographs and notes, of the infilling and location of work being done upon the property. Second, there is observation, including fish sampling techniques, related to the pre-existing nature of the pond/wetland itself, directed to such matters as whether it supported fish life.

[21] The first, it would seem, both on the evidence and from the "view" taken by the Court at the outset of the proceeding, could easily have been achieved from vantage points off the property. A neighbouring property provided a point from which the infilling work could be seen. Likewise the beach, over which the public has access, provided a vantage point, as did the waters of the Bras d'Or Lake itself. Despite the fact that there were trees which would screen the pond from the public highway (moreso when in leaf), a certain amount of the activity could have been viewed or even heard, from this public roadway.

[22] In so far as their observations concerned Mr. Bagnell's in-filling, such work is not equivalent to a document created by the Defendant as was the case in

Fitzpatrick or in the many **Income Tax Act** cases which have grappled with this issue. Documents are inherently more private. They may contain personal information, are generated by the accused, and are thus potentially self-criminating. Hiring people to in-fill this wetland may have potentially adverse consequences for Mr. Bagnell, but in looking at the expectation of privacy which ought to attend to the property and to his personal stake in it, one notes that the persons operating the equipment knew what was being done to the wetland, and knowledge of this activity is not confidential as between Mr. Bagnell and such employees.

[23] On the other hand, the sampling from the stream obviously required entry upon Mr. Bagnell's property. It could be done no other way. However, as I will further discuss, it appears to me that on this second aspect Mr. Bagnell has a lesser claim to privacy. We are here concerned with natural features which have particular ecological importance, which are deserving of protection, and which ought to survive the passing of title from one person to another. Even private ownership of real property has its limits.

[24] One might analyse the evidence in this case from the point of view of a "waiver" of the privacy interest, given Mr. Bagnell's application for various permits. In cases where the Crown wishes to assert a waiver of charter right, it has an onus to show that the person waiving the right had full knowledge, was properly informed, and gave a true consent. I do not view this case as being one of "waiver" or "consent to search" in the true or usual sense. Mr. Bagnell did not give any express approval at any time to a fishery officer or to anyone else to enter his property at a particular time. In my view the application/approval process is more appropriately considered against the question of whether Mr. Bagnell had a reasonable expectation of privacy. In other words, it enters into the analysis at an earlier stage than in the usual consent cases.

[25] Mr. Bagnell, being the person who made application for the various permits, must have known, or ought to have known, that approval of his request would entail inspection, observation and entry upon his property at Baddeck Bay. A person in such a situation thus has a diminished expectation of privacy vis a vis any agency which is, as a matter of regulatory necessity, involved in the evaluation of his application. It may be that Mr. Bagnell himself did not realize which agencies would be involved in doing inspections. In particular, he may not have

known that DFO would be brought into the process by the DOEL. His unfamiliarity with these procedures is the very reason he retained Carey Engineering. While Mr. Carey at one point testified that it was not until the letter of June 3, 2002 from Joan Reid that he knew of DFO's actual involvement, he understood that other departments and agencies, including DFO, might potentially be involved in an application such as this. Moreover, the May 10, 2002 letter from DOEL to Mr. Carey was copied, on its face, to both Mr. Bagnell and to DFO, something which would have alerted both to the potential involvement of that agency.

[26] Defence argument has made much of the June 3, 2002 letter, pointing to the clear statement that DFO was "unable to support approval of the application" and noting that there was a warning to Mr. Bagnell not to carry out any in-filling in the tidal pond. It argues that this was, in essence, a rejection, and that later visits could not be considered inspections under s.49(1). While the warning might in one sense be construed as a conclusion that Mr. Bagnell had or was about to violate the **Fisheries Act**, and as a rejection of his application, it must be noted that the letter also advised him that if he wished to submit a revised plan, it would be re-evaluated by the Department. Furthermore, while DFO had warned Mr. Bagnell

not to in-fill the pond, subsequent visits were triggered by either complaints received or observations of machinery entering the property. This may have raised concerns that further activity of some sort was occurring, but it is not clear that without taking a closer look, DFO would know for certain whether any additional work involved the pond (rather than some other part of the property) or even if it did, whether it was in-filling as originally proposed by Mr. Bagnell or some other scheme or redesign.

SOME CASES WITH POSSIBLE APPLICATION

[27] In **R. v. German**[11] it was determined that once fishery officers had reasonable and probable grounds that would have permitted them to obtain a warrant, they could not resort to the inspection powers under Section 49 of the Fisheries Act but should in such circumstances obtain a warrant under Section

[11] R. v. German (1991) 104 N.S.R. (2d) 298 (Co. Ct.)

49.1. However, as noted above, **R. v. Jarvis**, a subsequent decision of the Supreme Court of Canada, holds that the existence of reasonable and probable grounds does not *ipso facto* make an inquiry an investigation rather than an inspection.

[28] The **German** decision was considered in **R. v. Wilcox**. There, as noted above, our Court of Appeal dealt with the issue of whether and how to draw a "line" between the proper use of a regulatory power and an improper use. Cromwell, J.A. states as follows at paragraph 106 and 107:

> "In my respectful view, the search for a particular point in time or fact that is, of itself, the watershed between regulation and criminal prosecution is not the correct way to approach the issue. The question in each case is not whether a particular action or the exercise of a particular power should be labelled "regulatory" or "criminal". The question is whether the Charter has been infringed. One must define the content of the Charter right in the particular setting. This cannot be done, in my view, by establishing "lines" or "points" which divide regulatory inspections from criminal investigations. I respectfully adopt the remarks of Lane J. in **Pheasant**, supra at [paragraph] 66 that what is required is "... a case-by-case approach which rejects simplistic distinctions based on characterizations of powers as criminal, quasi-criminal, administrative or regulatory". Or, as LaForest J. put it in **R. v. Wholesale Travel**, supra, what is important are not labels but the values at stake in the particular context (at p. 209);
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> That said, the Supreme Court has frequently considered the distinction between "regulatory" and "criminal" legislation to be an important element of the contextual analysis: see, for example, **R. v. Wholesale Travel**, supra, per Cory J. at 226; **B.C. Securities Commission v Branch**, [1995] 2 S.C.R. 3 at pp. 26 - 28

> and p. 35; **R v. Baron**, supra; **R. v. Fitzpatrick**, supra, per LaForest J. at [paragraph] 29 and 30. This distinction is not always easy to make and will not necessarily be the controlling factor. However, in general somewhat less exacting Charter protections will be applied in regulatory, as opposed to truly criminal, proceedings."

[29] The judgement in **Wilcox** goes on to say this to say about the **Fisheries Act** at paragraph 109:

> Applying these considerations, the Fisheries Act is clearly regulatory in nature. The alleged offences in issue here are, to paraphrase LaForest J. in **Thomson**, far removed from the typical concerns of the criminal law: 509. The enforcement and penal provisions are ancillary to the Act's regulatory purpose. The conduct in issue does not give rise to the sort of moral disapprobation or stigma associated with true criminal offences. As for penalties, no term of imprisonment is available under the Act for first offences. As the Supreme Court of Canada said in **Fitzpatrick**, the Act addresses important regulatory objectives relating to conservation and management of the fishery for the benefit of everyone depending on it for their livelihood; the Act's purpose is to help ensure the survival of the fishery and the fair distribution of its profits: at [paragraph] 29 and 35.

[30] There is, however, an important and notable distinction between the actions of Mr. Wilcox and those of Mr. Bagnell. The documents were seized from Mr. Wilcox because he was a commercial fisherman. Hence the emphasis of the Court of Appeal on the **Fisheries Act's** purpose to ensure survival of the fishery and fair distribution of its profits. Another purpose of the **Fisheries Act** is to protect and preserve fish habitat. It is this concern for the marine environment which provides context for the actions of the fisheries officers in the present case, and constitutes

an important “value at stake” against which the property right and attendant privacy interests of Mr. Bagnell must be evaluated. We are concerned in this case not so much with a regulated industry as with protected habitats, which have inherent value beyond the pursuit of profit and the enjoyment of property.

[31] Other cases have considered searches of unoccupied lands. In **R. v. Lauda**[12] police, acting on a tip, climbed over a high steel gate and walked a considerable distance into a corn field to find a crop of marihuana plants. The Ontario Court of Appeal held that persons in lawful possession of unoccupied lands have a right to exclude members of the public from their property, and that a certain expectation of privacy is reasonable, even if the property is not visible to the public. However, our Court of Appeal in **R. v. Patriquen**[13], took a different view of the so-called “open fields doctrine”. There, police located marihuana plants in a clearing a short distance from a secondary woods road. The property was not fenced. Drawing an analogy with the computer records in **R. v. Plant**[14] the court stated that “woodlands in rural areas are in some respects subject to inspection by members of the public at

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[12] R. v. Lauda [1999] O.J. No. 2180 (QL)

[13] R. v. Patriquen (1995) 136 N.S.R. (2d) 218 (NSCA)

[14] R. v. Plant (1993) 24 C.R. (4th) 47 (SCC)

large". The Bagnell property is in a rural-residential area, much closer to adjacent homes and public highways. While this difference might be viewed as heightening the reasonable expectation of privacy, I note that Pugsley, J.A. in dissent found significance in the fact that the Patriquen property was "in a location that could not be seen from any vantage point accessible to the public". In the present case, the Bagnell property could be viewed from the adjacent waters of the Bras d'Or Lake, a waterway which is a well known and highly popular recreational area and populated by boaters in the warmer months of the year.

[32] The Defendant cites and relies upon a decision of the British Columbia Provincial Court in **R. v. Douglas**[15]. The Defendant in that case was the Chief of an Indian band conducting a gravel removal operation within the Reserve. He and others were charged with carrying on a work that resulted in alteration or destruction of fish habitat. Fisheries officers entered the Reserve lands, making observations and gathering other evidence which the Crown sought to tender at trial and the Defendant sought to have excluded as having been obtained in violation of Section 8 of the **Charter**. The Court determined that all the searches were done without warrant, unreasonable and in violation of Section 8. A notable

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[15] R. v. Douglas [2000] B.C.J. No. 2701 (QL)

exception was made for observations taken from outside the Reserve. The Court stated that no Section 8 issue arose in connection with such observations.

[33] In his discussion of the law, Lenaghan, P.C.J. identifies “a clear and fundamental difference between Section 49 and Section 49.1". He states, at paragraph 125, that where a fishery officer has reasonable grounds to believe that work is being carried on in contravention of the **Act**, he or she must obtain a warrant before entering and searching a place where the work is located. While this interpretation certainly accords with a reading of the **Fisheries Act**, the subsequent decision of the Supreme Court in **Jarvis** and comments of our own Court of Appeal in **Wilcox** suggest that the existence of reasonable grounds does not, in and of itself, mean that the purpose of an inquiry is the determination of penal liability. I am instructed by these subsequent decisions to look at the particular inspection/search in total context.

[34] I note as well that the Defendants in the **Douglas** case lived on the Reserve where the search occurred. The Reserve was their home, and they exercised a considerable degree of control over activities on the Reserve generally and also on the excavation site. While the Band had sought approval from the Department of

Fisheries for the gravel removal operation, it was not sought in the same sense as Mr. Bagnell's application for an on-site sewage permit or an in-filling permit. Rather, there were negotiations between the parties and disagreement, it would seem, on whether approval of DFO was actually required. Consequently, the expectation of privacy was not diminished as it is in Mr. Bagnell's case.

[35] A further decision which may lend support to the Defendant's position is **R. v. Alexander**[16]. There the British Columbia Court of Appeal dealt with a case where officials of the Ministry of Forests, believing there was an illegal cutting site on Crown land, and having seen a van enter the site, called upon the RCMP for assistance. The RCMP officer stopped the van, opened the rear doors, and found cedar logs inside. Despite the presence of an inspection power in the relevant legislation, the Court found that the actions of the police officer constituted an unreasonable search, because, at the relevant time, the purpose was to determine penal liability. However, the Court went on to say that the evidence should not be excluded under Section 24(2) of the **Charter**. Of interest, the Court, at paragraph 25, referred to the existence of reasonable and probable grounds (a central factor in determining that there was a Section 8 violation in the first place) as a factor

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[16] R. v. Alexander [2003] B.C.J. No. 1509 (QL)

weighing in favour of admissibility of the evidence. Be that as it may, the accused in that case was investigated for and charged with a **Criminal Code** offence and had not himself engaged government agencies in a regulatory process, as did Mr. Bagnell. These are distinguishing features.

[36] In **R. v. Milligan**[17], the Defendant was charged with conducting a topsoil removal operation without required approval under the **Environment Act** of Nova Scotia. His application to exclude measurements and observations conducted on the property by an environmental officer failed. Tufts, P.C.J., found that Section 119 of the Act supplied the required authority to enter the property in that the actions of the official were:

> ....at this stage administrative and not investigative. ...while he may have been responding to a complaint or even "investigating the situation" at this stage this was not an adversarial relationship as is explained in **R. v. Jarvis**. Notwithstanding Mr. Fuller may have had reasonable and probable grounds to lay charges, this factor is not determinative. The predominant purpose of his entry was not a determination of penal liability.

The Court went on to find that even if the section did not provide the required authority, the search was not a violation of the Defendant's Section 8 rights, as he

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[17] R. v. Milligan [2004] N.S.J. No. 34

had little or no expectation of privacy, either subjectively or objectively. The Court went further to state that even in the event Section 8 rights were violated, the evidence should not be excluded under Section 24(2) of the **Charter**.

[37] Although there are, of course, some factual differences (for instance the property in **Milligan** was in clear view of a major provincial highway whereas the Bagnell property is, at least for part of the year, largely screened from view from the adjacent highway) many of the same considerations in **Milligan** are also found in the present case, and point to similar conclusions.

SUMMARY AND CONCLUSIONS

[38] The actions of the fishery officers in the instant case involve entry, observation, note taking, photographs, and fish sampling methods. There are two aspects to this - the construction work itself, and the inherent characteristics of the wetland, such as whether it supported fish life, etcetera. It is the first of these in which the Defendant has the stronger claim to privacy, involving activities which he conducted on private property, but which at the same time were readily visible from vantage points off the property. In contrast, the second aspect, the properties

of the wetland, required entry, testing, and closer observation. However, this aspect is the one in which the Defendant has a lesser claim to privacy. Even if this entry and the testing may be characterized as a search, when one considers that the purpose is the simple examination of a natural feature of the property this is a particular context, involving the integrity of the natural environment, within which courts ought not readily declare a warrantless search unreasonable.

[39] I conclude that the fishery officers were acting under the s.49.1 inspection power on all occasions up to November 18, 2003. Even if this is not a proper characterization, I conclude that the actions of the fishery officers in entering, observing and sampling did not constitute an unreasonable search, given the diminished expectation of privacy and the values at stake.

[40] Even absent an application for regulatory approval of some sort, where fishery officers or other agencies take an interest in activity occurring on private property which might reasonably involve damage or destruction of habitat, or some other environmental insult, an inspection/search conducted bona fides, performed reasonably, with the minimum amount of intrusion, may not be unreasonable, even in the absence of a warrant and consent. However, where the Defendant here has

made an application for regulatory approval concerning the very activity in question any resulting search is even more obviously reasonable. Accordingly I find no violation of the Defendant's s.8 **Charter Right**.

[41] If I am incorrect to conclude that any search in this case was reasonable, I would conclude further that under a Section 24(2) Charter analysis, the evidence here should not be excluded. The evidence obtained here was not conscriptive and thus the issue of trial fairness is not engaged as it is with evidence created by the accused. The fishery officers appeared to be acting in good faith throughout, believing that they possessed statutory authority to enter the property as they did. The expectation of privacy here was much less than for a dwelling, or the curtilage attached to a dwelling. The breach was not deliberate or flagrant. On most occasions the Defendant was not present, and the search was not obtrusive. Finally, the evidence was gathered after DFO had explicitly warned Mr. Bagnell, in its letter of June 3, 2002 that he should desist from any further activity in the vicinity of the tidal pond. It is my sense that the exclusion of evidence in these circumstances, evidence of activities conducted in apparent contravention of a prior warning, would bring the administration of justice into disrepute.

[42] I do think however, that a line was crossed when, subsequent to laying charges, the Fishery Officer entered the property without warrant and without permission. By then the Defendant's application was formally rejected. There is no sense in which the approval-seeking process was still open. DFO thereafter was in a pointedly antagonistic relationship with Mr. Bagnell. It appears it was simply gathering more evidence to bolster the pending prosecution. Under principle set out in **Jarvis**, I rule inadmissible evidence obtained by entry after November 18, 2002.

[43] With regard to observations which may have been made from vantage points *off* the subject property (from the neighboring property, or the beach), I do not think that these engage s.8. There was no recourse to technological enhancement, such as infrared imaging. They are observations that might have been made, lawfully, with or without purpose, by various members of the public. Evidence resulting from any such observations, whenever made, is ruled admissible.

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JUDGE A. P. ROSS