IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Scott Milligan, 2004 NSPC 9

Date: 20040107
Docket: 1260474
Registry: Kentville

Between:

Her Majesty the Queen

v.

Scott Milligan

Judge: The Honourable Judge Alan T. Tufts

(Oral)
Decision: January 7, 2004

Counsel: Lloyd Lombard for the Crown
Robert Stewart, Q.C. for the Defendant

By the Court (orally):

[1] The Defendant is charged under s. 50(2) of the **Environment Act**, S.N.S. 1994-95, c.2. Particularly, it is alleged that the Defendant was conducting a topsoil removal operation without proper approval.

[2] The Crown has completed its case in chief. The defence has made a motion for a directed verdict. The Crown has requested an amendment to the Information. Defence has raised an issue under s. 8 of the **Charter** alleging an unreasonable search and requesting that certain evidence should be excluded. I will deal with all of the motions but will deal with the directed verdict motion first.

[3] Defence submits that the Crown failure to prove the **Activities Designation Regulations,** O.I.C. 95-286, N.S. Reg. 47/95 is fatal to its case and that the Court cannot take judicial notice of same. The defence relies on s. 6 of the **Nova Scotia Evidence Act,** R.S.N.S. 1989, c. 154 as amended. The Crown relies on s. 11 of the **Nova Scotia Evidence Act** and s. 9 of the **Regulations Act,** R.S.N.S. 1989 c. 393, as amended..

[4] The **Regulations Act** governs the filing and publication of regulations. Regulations are required to be filed and have no effect if not filed; s. 3(7). Publication of a regulation in the Royal Gazette is *prima facie* proof of its making, approval and filing, s. 9(1)(a) and judicial notice shall be taken of a regulation that is published; s. 9(2).

[5] The issue here is whether the subject regulation has been published and whether the Crown is required to provide proof of publication. The Supreme Court of Canada in **R. v. Steam Tanker "Eugenia Chandris" 22 C.C.C. (2d) 241** deals with this issue and while this case deals with a federal regulation the same issue and principles apply. In that case s. 23 of the federal **Statutory Instruments Act** provided that a statutory instrument that has been published in the Canada Gazette shall be judicially noticed. DeGrandpre, J., writing for the majority held, at p. 249:

> Thus, by the words of the statute, the rule of judicial notice is limited to those instruments which in fact have been published in the Gazette. But the fact of publication needs no proof. [emphasis added]

[6] In my opinion this settles the issue. The Crown is not required to prove publication. This regulation has been published. The Court is accordingly required to take judicial notice of it and does so.

[7] The defence argues that there is no evidence that the alleged conduct "commenced" during the time alleged in the Information. The Crown maintains that the testimony of Reid Joudrey contains such evidence, but in any event asks that the Information be amended to replace the words "commence" with the words "commence or continue" in the Information.

[8] I agree ultimately with the Crown's position on this issue. Mr. Joudrey's evidence is clear that he arrived on the Milligan site between September 5-7, 2001 and began hauling soil away between September 10-September 12, 2001. The operation continued until November of the same year. The Crown has asked that the Information be amended to conform with the evidence.

[9] I will grant the Crown's motion to this extent. The Information will be amended to replace the word "commence" with the word "continue" rather than "commence or continue" as requested and I believe the evidence supports this conclusion. The Information is amended accordingly.

[10] I will now deal with the search issue. Mr. Fuller, the Environmental Officer, approached the defendant on two occasions in September of 2001. On the second occasion Mr. Fuller was told to leave and the defendant used rude and uncomplimentary expletive language when doing so. As a result Mr. Fuller, albeit in a somewhat tardy manner, applied for an order to "enter and inspect" under s. 121 of the **Environment Act**. The Crown now concedes that the application was flawed and that the order is invalid and does not rely on it. Mr. Fuller wanted to enter the property to determine the extent of the operation and to allow a surveyor to calculate the affected area. The Crown argues that Mr. Fuller was permitted to enter pursuant to s. 119 of the **Act** and that an order under s. 121 was not necessary and that his entry was authorized in any event, or alternatively even if the entry was not authorized, the search conducted was not unreasonable and not in breach of the defendant's s. 8 **Charter** rights and even if such breach existed the violation

was not serious, the evidence was not conscripted and the evidence obtained should not be excluded.

[11] The defence argues the contrary; that s. 119 does not permit what is arguably an "investigative" entry, see **R. v. Jarvis**, 169 C.C.C. (3d) 1 (S.C.C.); that the entry is a search of the defendant's premises; that the search was unreasonable and the evidence obtained should be excluded.

[12] In my opinion Mr. Fuller had the legislative authority to enter the defendant's property pursuant to s. 119 of the **Environment Act** and that an application under s. 121 was not necessary. This is not to say that an order under s. 121 could not be granted in the circumstances however, in my opinion, such was not necessary as in my view s. 119 provides the required authority. This was not a dwelling house as contemplated under s. 120 which requires either consent or an order before entry.

[13] It is clear Mr. Fuller wanted to enter and inspect the land to determine the extent of the defendant's activity. This is a purpose of s. 119. It does not require the owner's consent and entry can, in my opinion, be made without such consent.

[14] In my opinion Mr. Fuller's actions were at this stage administrative and not investigative. He was, in my opinion, inspecting in accordance with his duties as an Inspector and 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**, *supra*.

[15] Notwithstanding Mr. Fuller may have had reasonable and probable grounds to lay charges, this factor is not determinative, in my opinion. The predominant purpose of his entry was not a determination of penal liability.

[16] I have reviewed the facts of this matter against the factors referred to in **R. v. Jarvis**, *supra*, see paras. 85-93 of that case, and have concluded that Mr. Fuller's actions were administrative.

[17] Furthermore I am satisfied even if the impugned entry is a violation of the defendant's s. 8 rights it was authorized by law, ie. s. 119 and that that law is reasonable and demonstrably justified and thereby saved by s. 1 of the

Charter. The test in **R. v. Oakes** [1986] 1 S.C.R. 103 (S.C.C.) has been satisfied, in my opinion.

[18] However, if I am incorrect and s. 119 does not provide the required authority I am still of the view that the search was not a violation of the defendant's s. 8 rights.

[19] For reasons I stated above the entry was for administrative purposes. Moreover the defendant had little or no expectation of privacy either subjectively or objectively. While the defendant exercised some control of the property - he asked Mr. Fuller to leave - the property was the subject of considerable movement by third parties and was in clear view of a major arterial provincial highway. The defendant was not present when the entry was made and in my opinion the conclusions in **R. v. Lauda** [1998] O.J. No. 71 (Ont. C.A.) Affirmed [1998] S.C.J. No. 71 (S.C.C.) referred to by the defence do not apply to these circumstances.

[20] However, again, if I am incorrect and the defendant's s. 8 rights were violated ie. the entry was not administrative and was unreasonable I must now consider whether the evidence obtained as a result should be excluded. This is the real issue in this part of the application and one argued extensively by both counsel.

[21] This requires a consideration of s. 24(2) of the **Charter**. The Supreme Court of Canada in **R. v. Buhay** [2003] S.C.J. No. 30 (S.C.C.) has recently done a complete review of the jurisprudence in this area and is included in paras. 41-73 of that decision. This analysis necessarily requires consideration of 1) the effect of trial fairness, 2) seriousness of the police conduct, and 3) the effects of exclusion on the administration of justice.

[22] Because the evidence, ie. the survey and measurements and other observations are not conscriptive and did exist independent of the inspector's conduct the issue of trial fairness is not engaged. In my opinion the seriousness of the breach does not favour exclusion. In my opinion Mr. Fuller acted in good faith. The order sought even if necessary was invalid for technical reasons. He sought legal advice. The expectation of privacy while perhaps sufficient to engage the application of s. 8 is not high. The breach was not deliberate, wilful or flagrant. The search was not obtrusive.

Mr. Fuller did have reasonable and probable grounds to get a warrant. All of these factors mitigate against exclusion.

[23] Finally, to exclude the evidence in these circumstances in my opinion would bring the administration of justice into disrepute, having reviewed the circumstances described above.

[24] I find accordingly that even if Mr. Fuller had no authority to enter and if the entry violated the defendant's s. 8 rights the evidence should not be excluded for the reasons stated.

[25] In summary, therefore, the defendant's motion for a directed verdict is dismissed. The Crown's motion to amend the Information is granted and the defendant's motion to exclude the evidence for a breach of s. 8 **Charter** rights is also dismissed.

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ALAN T. TUFTS, J.P.C.