

Date: Date 2002-05-17

IN THE PROVINCIAL COURT OF NOVA SCOTIA
[Cite as: **R. v. Russell, 2002 NSPC 018**]

Her Majesty the Queen

versus

Eric Barnett Russell

DECISION RE: CHARTER APPLICATION

Heard: at Baddeck, Nova Scotia, before the Honourable Judge A. Peter Ross

Decision: May 17, 2002

**Written Release
of Decision:** May 17, 2002

Counsel: Mr. Darcy MacPherson, for the Crown
Mr. Ralph Ripley, for the Defendant

- [1] Eric Barnett Russell is charged with two offences from the 10th day of October, 2001; hunting moose without a valid license contrary to s. 4(5) of the Moose Hunting Regulations, and hunting moose out of season contrary to s. 5(2) of the Regulations made pursuant to the Wildlife Act of Nova Scotia. A Charter application was made before trial for an order excluding evidence seized from the defendant's residence. The item seized was a moose carcass. The defendant alleges a breach of his rights under s. 7 and 8 of the Charter in the following terms:

The applicant alleges that a search warrant issued October 13th, 2001 by Harold Rafuse, Justice of the Peace, authorizing Terry Beck to search the residence of Eric Russell at 166 North River Road, North River, Lunenburg County, Nova Scotia, was granted based on an Information sworn by Terry Beck that contained information gathered by Terry Beck during a warrantless entry of the premises of Eric Russell ... on October 11th, 2001 and that those facts should not have been considered by the Justice of the Peace and that when those facts are excised, the Information sworn would not support the granting of a search warrant.

The defendant asks that any evidence seized and sought to be tendered at the trial as a result of the search be excluded under s. 24(2) of the Charter.

- [2] The grounds stipulated by Conservation Officer Beck in his Information to Obtain the Search Warrant, under s. 2B of the Summary Proceedings Act of Nova Scotia are rather brief and thus reproduced here for ease of reference.

- Thursday, October 11th, 2001, approx. 01:00, Conservation Officer Troy Bonar, Department of Natural Resources, Bridgewater, Lunenburg Co., N.S. receives a complaint from Shubie Telecoms of shots fired and possible night hunting at Eric Russell's residence.

- 01:15, approx., Officer Bonar calls the complainant which says that there is a lot of activity at Eric Russell's and that the complainant heard what sounded like a gun shot. The complainant described where Eric Russell lives in North River, Lunenburg County, N.S.

- 08:45, Officer Troy Bonar, the writer, and Troy Johnson arrive at the residence of Eric Barnett Russell. The Officers notice a man in the outbuilding of the residence where the original complain was reported to happen. The officers exit the vehicles and there is a man cleaning up a two point Bull Moose. Officers identify themselves as Natural Resources. Officers tell that they were there due a shot fired complain from earlier in the morning.

- The officers make small chat with the man, who is identified as Eric Russell, the owner of the house and the one who shot the moose. Officer ask if there were any shots fired in the area early in the morning and Eric said no, he and a friend had

just returned from Cape Breton at 1:00am the same day with the Moose that we saw on the floor of the outbuilding.

Officer Bonar and Johson (sic) talk to Mr. Eric Russell while the writer checks the moose over. The writer asks Mr. Russell for his appropriate documentation for the Moose and Mr. Russell gives the writer a Metis Status Card and two other cards from the Metis Council of Nova Scotia. One of the Metis Council cards states that he was entitled to one Moose.

- Officers leave the area to further investigate the shots fired.

- 1500hrs, the same day (October 11, 2001) Mr. Russell call (sic) DNR Bridgewater for a meat storage permit for a friend to keep some Moose meat (as per policy). Mr. Russell tells the DNR Bridgewater Officer clerk that he had his Metis Status card. The clerk tells Mr. Russell that he would have to speak to Kerry Miller, DNR Enforcement Coordinator regarding the issue because policy does not recognize Metis to have any Treaty Rights in the Province of Nova Scotia that the Province only accepts Mi'kmaq Harvesters.

- Kerry Miller tells Mr. Russell to go and get the Moose cleaned up and cut up and that someone would be in contact with him.

- Friday, October 12, 2001 1300hrs Coordinator Miller speaks to the writer to back (sic) and speak to Mr. Russell regarding the situation because he is in violation of the Wildlife Act.

- 1500hrs Officer Johnson and the writer go to Mr. Russell's residence to take a statement of what happened on October 10, 2001 at Cape Breton. He said in a Chartered Statement that he shot the Moose at Cape Breton, Hunter Mountain, Nova Scotia, with a 308 calibre rifle and he used his Metis Status Card as his license.

- Mr. Russell lives at civic number 166 North River Road, Lunenburg Co., Nova Scotia. This information was found in the Land Information Registry System and was also give (sic) on the statement by Mr. Russell.

- Attached as appendix "B" Statement of Mr. Russell and Appendix "C" Department policy as per Aboriginal Rights.

- Therefore I believe that since Mr. Russell did not have a license as issued by the Department and that the Department does not recognize the Metis Status Card as an Aboriginal Right to hunt he did commit the offence of hunt without a valid Moose hunting license contrary to section 4(5) and hunt Moose out of season

contrary to Section 5(2) of the Moose Hunting Regulations RRNS made pursuant to the Wildlife Act Chapter 504 RSNS.

Therefore I believe that the moose carcass or any parts thereof are in the residence or outbuilding of Mr. Eric Barnett Russell who lives at 166 North River Road, Lunenburg County, Nova Scotia.

- [3] Appended to the Information To Obtain was a copy of the Department's policy regarding Mi'kmaq Aboriginal Peoples Harvesting and a copy of the statement taken from Mr. Russell at 3:15 p.m. on October 12th, 2001 at his residence. The central incriminating feature of the statement was already known by DNR Enforcement from his call to them the previous day, though it goes on to disclose the time and place that he shot the moose and mentions an individual who was with the Defendant at the time.
- [4] The statement was done a form commonly used by Conservation Officers. The block containing the "Statutory Warning" was not filled in. A notation does confirm that the defendant was given his Charter right to counsel and that he declined an opportunity to call a lawyer. The Justice of the Peace would be hard pressed to determine the voluntariness of the statement as determined by the confession rule and cases which have considered it, including, recently, R. v. Oickle (2001) 36 C.R. (5d) 129. However, given that the written statement is essentially what was volunteered by the defendant to the Bridgewater Office of DNR on the previous day when he called them about the storage permit, the Justice of the Peace could reasonably conclude that the statement was voluntary, taken in accordance with the Charter, and thus properly considered as part of the grounds for the issuance of the warrant. The giving of a statutory warning is not determinative, one way or the other, of the issue of voluntariness. Having read the statement and listened to the testimony of the officers pertaining to it, I conclude that it properly formed part of the grounds to be considered by the Justice of the Peace when he entertained the application for the warrant on October 13th, 2001.
- [5] More contentious, perhaps, are the observations made by the Conservation Officers at 8:45 on October the 11th, 2001 at the Russell residence. It was at that time that they noticed the moose in the defendant's garage. Defence characterizes the events described in paragraphs 3 to 5 as a warrantless and unreasonable search. With that portion of the Information excised, Defence submits that insufficient grounds remain to support the issuance of the warrant. I will address this submission presently but wish to make the following preliminary comment.
- [6] It has been suggested that the Court should not speculate about what would have happened had the Conservation Officers not attended at the Russell residence on October 11th when they investigated the complaint about the gunshot. However, it does not strike me as speculation to conclude that the events described in the final 8 paragraphs of the grounds would have occurred even if the Conservation Officers had not paid a visit with the Defendant the previous day. There is nothing in the Information To Obtain, nor in testimony to show that Mr. Russell was motivated to call DNR by the preceding events. Rather, it would appear that Mr. Russell was doing what the law required of him, namely to obtain a permit for someone other than himself to store the moose meat which he had obtained through hunting. It is reasonable to presume that Mr. Russell would comply

with the law. He believed he was acting lawfully, as a Metis, in taking the moose. Although it may not be explicitly stated in the grounds, I know from Constable Beck's testimony that the Conservation Officers, as of the time they left Mr. Russell's residence on October 11th, 2001, had no reason to believe that he had violated the law. The clerk at the DNR office, hearing that Mr. Russell had a Metis Status Card, was immediately alert to the potential violation of the Department's policy and regulations. This led to the Enforcement Coordinator, Mr. Miller, directing Officer Beck to speak to Mr. Russell about this matter. Up to this point Officer Beck's only concern was the shots which were supposedly fired near the Russell residence. The second visit on October 12th, 2001 led to the statement and undoubtedly would have given Officer Beck knowledge of the location of the carcass. It thus appears that even in the event that the officers had not visited Mr. Russell on October 11th and seen the moose carcass at that time, the subsequent events, and thus what is described in the concluding paragraphs of the Information, would have been before the Justice of the Peace on October 13th, 2001. These grounds alone would justify the issuance of the search warrant which led to the seizure of the carcass.

- [7] Defence argues that even if the paragraph beginning "1500hrs same day" survives his challenge and is not excised, the Information To Obtain would be deficient as not containing evidence for the Justice of the Peace to know *where* the evidence was to be found. However, the original complaint to the DNR office included a description of where Mr. Russell lived in North River, Lunenburg County. This together with what Mr. Russell told the clerk on the telephone, coupled with the address information on the statement form would give the Justice of the Peace ample information on this point.
- [8] Turning to the main thrust of the application, I have regard primarily to the grounds as set out in the Information but also the elaboration of the events contained in Officer Beck's testimony to the Court. This is not a case where the Information contains fraudulent or misleading material as in R. v. Morris (1998)134 C.C.C. (3d) 539.
- [9] Officer Beck and Officer Johnson attended the defendant's residence at 8:45. While they later spoke to one H. Carver about the alleged gun shot near the defendant's residence, it is clear that their first step was to go directly to Mr. Russell's residence. Officer Beck seemed to suggest that the moose was apparent from the road, but it is highly unlikely the Conservation Officers would have taken notice of the moose had they not gone up Mr. Russell's driveway. At the same time the defendant was not trying to hide the carcass. The garage door was open and the moose readily visible to anyone who happened approach him that morning.
- [10] When the Conservation Officers drove up Mr. Russell's driveway that morning, they were concerned about possible night hunting. Discharging a firearm too close to a residence is also an offence. The officers were thus investigating matters within the scope of their duties, but there is nothing from which to conclude that they were focussed on Mr. Russell himself as a suspect. Any night hunting or firing of shots could easily have been done by someone other than Mr. Russell. The initial complaint which DNR received described certain activity near Mr. Russell's residence. Mr. Russell might as easily have been a "victim" or witness to an offence as the perpetrator.

- [11] The officers attended at a time of day when visitors or deliveries to a residence would not be unexpected or unusual. There is nothing to indicate that the defendant wished to exclude anyone from his property at that time. The driveway was un gated. Mr. Russell himself was present. He expressed no disapproval of the officers' presence. There was no sense of confrontation in the conversation that the defendant had with the officers. Officer Beck said that when he left, he "thought everything was okay".
- [12] R. v. Grant (1993) 84 C.C.C. (3d) 173 is one case cited by the defendant in support of his application. However, the warrantless perimeter searches of the residences conducted in that case were done surreptitiously without the knowledge of the occupant there. The defendant was followed and observed without his knowledge. By contrast, Officer Beck was seeking the attention of the property owner when he attended at the Russell residence. There is no reason to think that Officer Beck was looking for residual evidence of a gun shot. The enforcement authorities had no specific information about where the shots were fired and would not have expected to find any trace of such. They could not expect to obtain any information regarding a possible offence of night hunting or discharging a firearm near residential premises *without* the involvement of Mr. Russell or whoever else might happen to be there at the time. Therefore it appears that they attended at the defendant's property not to search his premises but to engage him.
- [13] In taking these measures the Conservation Officers might reasonably expect that a property owner would wish to be protected, or at least to know about, night hunting near his or her residence. Many members of the public which police authorities may wish to speak to about possible crimes or offences will be in their homes or on their properties. In this case the Conservation Officers went to that location without the slightest inkling that they would see a moose carcass there. In the absence of any signs or gates it was reasonable for them to enter the premises to speak to the occupant. As indicated, any number of persons, of different vocations, might have done the same thing for one reason or another.
- [14] The defendant has also submitted the case R. v. Chetwynd (1996) 161 N.S.R. (2d) 391 (N.S.S.C.). While that decision is binding upon me it is distinguishable on its facts. In that case the Conservation Officers made what could be called a "stake out" of the defendant's premises. They went to the subject residence at 10:30 at night, in the dark, unbeknownst to the defendant or any occupant. Although they had seen someone enter the house minutes before, and thus knew that there was "somebody home", they entered upon the curtilage of the property and hid behind a barn. Shortly after they observed the defendant dragging a deer carcass from the house. The officers then approached the defendant and seized the offending carcass. In distinction to the present case, the officers made no attempt to announce their presence on the premises upon entry, and acted surreptitiously prior to making the observations and seizure. As well, the officers in Chetwynd were present at the residence shortly after the complaint was lodged, thus may have expected to find evidence of or even to intercept an offence. In the present case, the officers attended 7 1/2 hours after the initial complaint and expected only to speak to someone in the Russell residence about the events of the previous evening. They should not require a search warrant to do so.

- [15] There is nothing clandestine about the actions of the Conservation Officers in this case. They did not possess any ulterior motives. They had no reason to even suspect, as of the initial visit, that Mr. Russell had committed any offence. Mr. Russell was present at the time, with his garage door open. He was directly and openly approached by the Conservation Officers. Even if this action can be classified as "search", of which I am less than certain, it is not an unreasonable search. The officers were properly engaged in the execution of their duties and did not violate any expectation of privacy held by Mr. Russell at that time and place. The action (and the search, if it be such) of the officers was reasonable. What they did and saw was properly included in the Information To Obtain and considered by the Justice of the Peace in issuing the warrant. When the search and seizure of the moose carcass was conducted on October 13th, the officers thus possessed a valid search warrant and this search and seizure, too, was reasonable. Neither are there any surrounding or proximate violations of the Charter as would call into play the exclusion of the evidence obtained.
- [16] Defence suggested that the officers could have gone to speak to others before entering Mr. Russell's premises. This may simply beg the question of how they could do so without entering upon the property of those other individuals, whomever they may be. In doing so, if they made observation of something in plain sight, and later information was received connecting it to a possible offence, it is difficult to see how they would be disentitled from putting their observation before a justice in order to obtain a warrant.
- [17] While defence has argued that certain of the sources in the Information To Obtain could not be considered reliable, it appears to me that the DNR Enforcement Coordinator would be a reliable source, as would Mr. Russell himself. These being the two principle sources relied upon by Officer Beck, who averred that he considered them to be reliable, the search warrant application does not suffer from any deficiency in this regard.
- [18] While the Notice of Charter remedy filed by the defendant makes reference to s. 7 of the Charter, the argument appeared to focus primarily on s. 8. I will thus comment only briefly that having considered the evidence on the application and the relevant law as contained in R. v. White (1999) 24 C.R. (5d) 201 and R. v. Fitzpatrick (1995) 43 C.R. (4d) 343, it does not appear that Mr. Russell was conscripted against himself in such a way as to violate his s. 7 right against self-crimination. It would appear his statement, as appended to the Information To Obtain was itself voluntary. Indeed it was a repeat of what he volunteered and initiated the previous day in his telephone conversation with the clerk at the DNR office. Furthermore, his s. 10 rights were observed prior to the taking of the statement. R. v. Hebert [1990] 2 S.C.R. 157 speaks to the importance of this in the context of s. 7. Also, Mr. Russell's call to the DNR office regarding the moose meat storage permit seems somewhat akin to the obligations attendant upon the fishermen in Fitzpatrick, and it was only at that point that anything which could be described as an adversarial context began to emerge.
- [19] I thus conclude that (1) the Information to Obtain contained sufficient grounds to justify the issuance of the search warrant and (2) there was no breach of either s. 7 or s. 8 as would entitle the defendant to a remedy under s. 24(2) of the Charter.
- [20] At the continuation of the trial, Crown may tender into evidence the moose carcass. (or a reasonable facsimile thereof).

Dated at Sydney, this 16th day of May, A.D., 2002

A. Peter Ross, JPC