IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: [R. v. Allen], 2004NSPC69

Date: 20041214
Docket: 1440480, 1441443,1432233,
1440471, 1438107, 132106
Registry: New Glasgow

BETWEEN:

Her Majesty the Queen

v.

**Clifford Robert Allen, Jr., Joseph E. Boudreau,
John Alex Grant, Darren Lee Langille,
Jason Andrew MacDonald and Edwin D. Shaw**

Judge: **The Honourable Judge Robert Stroud**

Heard: **November 23, 2004**

Written decision: **December 14, 2004**

Charge: **Section 13 of the Fisheries Organization Support Act**

Counsel: **James E. Clarke, Senior Crown Attorney**
Gary A. Richard, Defense Attorney

Facts:

[1] The Defendants have each been charged with one charge under s. 13 of the ***Fisheries Organizations Support Act*** (hereinafter referred to as the "***Act***"), for failing to pay dues as required by that section. Counsel submitted an agreed Statement of facts prior to the commencement of the trial which eliminated the requirement to prove the actus reus of the offences.

[2] The purpose of the ***Act*** is set out in s. 2:

> **"to strengthen fisheries organizations in the province and provide a procedure to enable accredited fisheries organizations to collect mandatory annual dues from licence holders."**

[3] Under s. 5, the Minister of Fisheries is required to conduct a vote among the licence holders in each region to determine whether they want an organization to represent them in the region in matters relating to the management and regulation of the inshore fishery. The time and manner for each vote is prescribed by regulation.

[4] Section 6 specifies that an affirmative vote requires that at least 60% of the licence holders in each region cast a vote and a majority of the valid votes cast must be in favour of representation by an organization.

[5] To become accredited, an organization must meet the criteria

established by s. 8 of the Regulations. One of those requirements is that the association have a membership of at least 100 eligible licence holders or 15% of the eligible licence holders in the region.

[6] Section 11(1) provides that, upon being accredited, an organization retains its accreditation for four years.

[7] S.9 provides that every licence holder in a region shall pay annual dues to an accredited organization in that region.

[8] Counsel for the Defendants called evidence from two experienced fishers in the affected areas primarily to voice their disagreement with the ***Act***. Sterling Heighton testified that prior to the enactment of the ***Act*** in 1996, fishers had the freedom to belong to an association in their area or form their own. He indicated that since 1996, there is only one accredited association in his area and it is not possible to get 100 fishers to apply for another accredited association. On cross-examination, he admitted that there were five other accredited associations in his region (Region 1) that he could belong to if he chose to do so. He further stated that his reason for not belonging to the association in his immediate area was that the president of that association is difficult to deal with. Upon questioning by the Court, he acknowledged that the association had a voting procedure whereby the president could be

replaced by the membership. He also complained that the accredited associations were getting more involved with the management of the fishery when it was the practice in the past for individual fishers to deal directly with the Fisheries and Oceans Canada (hereinafter referred to as "FOC"). On cross-examination he admitted that his failure to belong to an association has not affected his federal licence.

[9] The thrust of the second defence witness, Angus MacDonald, was that he previously belonged to one of the accredited organizations in his region but left when it failed to act on a problem that he brought to its attention. He stated that the ***Act*** has confused the issue of who has the authority to deal with FOC and expressed the opinion that it limits that authority to accredited associations. In spite of that, he stated that he has dealt directly with FOC in the past and will continue to do so in the future.

[10] The Crown also called two witnesses in rebuttal. Katheryn Wallace, a researcher for the Gulf N. S. Bonafide Fishermen's Association, testified that her duties are to research various multi-species issues. She stated that the association's activities include:

(1) interviewing fishers in the region concerning their ecological knowledge in order to gather data about the fishing grounds;

(2) meeting with first nations representatives concerning aboriginal fishing issues;

(3) assisting new fishers entering the fishing industry;

(4) providing water safety training programs for fishers;

(5) assisting fishers obtain certification with FOC;

(6) attending semi-annual meetings of DFO; and

(7) generally to act as a voice for all fishers in dealing with both FOC and the provincial Department of Fisheries. (Ms. Wallace emphasized that the province does not dictate to her association.)

[11] Ms. Wallace stated that her association has members throughout Region 1, with the exception of the northern part of Cape Breton and they include aboriginal fishers. She also stated that all multi-species associations in the region work together and have assisted fishers with mid-shore issues in the past by buying quota.

[12] According to Ms. Wallace her association has regular general meetings and an annual meeting to elect officers, etc.

[13] The Crown's second witness was Clarence Reardon, marine advisor

for the Department of Agriculture and Fisheries. He stated that he administers the ***Act*** on a day-to-day basis. That includes evaluating applications for accreditation and making recommendations to the Minister of Fisheries. According to Mr. Reardon, the Minister has never refused to grant an accreditation when he has recommended it and that the province does not exert any influence on associations after they have been accredited. He also stated that he still deals with non-accredited associations throughout the province regardless of the legislation and that he will consider special sectoral applications where less than the minimum number of members is practical.

[14] On cross examination Mr. Reardon indicated that:

(1) he has been involved in the administration of the Act since 1999;

(2) there are now 12 accredited associations in the province;

(3) at the end of 1995 there were approximately 75 - 80 fishers' associations in the province vs. approximately 50 - 60 now; and

(4) that in his opinion it was not the intention of the Act to reduce the number of associations but the effect has been

to create stronger organizations.

Issues:

[15] **(1) Is the *Fisheries Organizations Support Act* ultra vires the Government of the Province of Nova Scotia because it deals with matters which are within a class of subjects that are within the exclusive constitutional jurisdiction of the Federal Government under s. 91(12) of the Constitution Act, 1867?**

(2) If the *Fisheries Organizations Support Act* is intra vires the legislative powers of the Province of Nova Scotia, does s. 9 violate the Defendants' rights under s. 2(d) of the Charter of Rights and Freedoms?

(1) Is the *Act* ultra vires the legislative powers of the Province of Nova Scotia?

[16] The main argument by defence counsel is that the ***Act*** in pith and substance is an attempt by the Province of Nova Scotia to become involved in the maintenance and preservation of the fishery as a whole. In his summation he stated that the fact that the ***Act*** deals with the structure and establishment of fisheries organizations and the licencing of fisheries which are a class of subjects that are within the exclusive jurisdiction of the Federal Government (Seacoast and Inland Fisheries), results in the ***Act*** being ultra vires the Government of the Province of Nova Scotia.

[17] The Crown, on the other hand, argued that the ***Act*** should be deemed to be intra vires the Province of Nova Scotia unless it infringes upon the

jurisdiction in some meaningful way and should not be deemed ultra vires simply because it has an incidental impact on the federal jurisdiction. It was also argued that the stated purpose set out in s. 2 of the ***Act*** should be given its plain meaning, namely to strengthen fisheries organizations in the Province.

[18] Both counsel referred to **Ward v. Canada,** [2002] 1 S.C.R. 569 to advance their respective arguments regarding the pith & substance of the Act.

[19] In **Ward,** supra McLachlin, C.J. stated at paragraphs 16, 17, and 18:

> **"16. The pith and substance analysis asks two Questions: first, what is the essential character of the law? Second, does that character relate to an enumerated head of power granted to the legislature in question by the Constitution Act, 1867?**
>
> **17. The first task in the pith and substance analysis is to determine he pith and substance or essential character of the law. What is the true meaning or dominant feature of the impugned legislation? This is resolved by looking at the purpose and the legal effect of the regulation or law: . . . . . The purpose refers to what the legislature wanted to accomplish. ..... The legal effect refers to how will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law: . . . . . The effects can also reveal whether I law is "colourable", i.e. does the law in form appear to address something within the legislature's jurisdiction, but in substance deals with a matter outside that jurisdiction? . . . . .**
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> **18. The pith and substance analysis is not technical or formalistic: ... It is essentially a matter of interpretation. The court looks at the words used in the impugned legislation as well as the background and circumstances surrounding its enactment: . . . . . In conducting this analysis, the court should not be concerned with the efficacy of the law or whether it achieves the legislature's goals: . . . "**

[20] In support of his conclusion following his pith and substance analysis counsel for the Defendants makes the following points:

> 1. Fisheries organizations have historically been concerned primarily with fish stock management in the broadest sense, namely: inputting on quotas, negotiating licensing conditions, species management practices, and industry research, which are manifestly federal areas of jurisdiction.

[21] With respect, I do not see where the fact that accredited organizations negotiate with FOC on behalf of fishers supports an argument that the ***Act*** encroaches upon federal jurisdiction.

> 2. The Act is not legislation of general application that happens to have an incidental effect upon the fishery in Nova Scotia because it deals specifically with fisheries organizations and evinces an intent on the part of the Province to become a participant in fisheries management in the Province.

[22] In my view this argument is nothing more than conjecture and is not supported by the evidence.

> 3. The ***Act*** is intended to reduce the number of fisheries organizations in the province and the effect of accreditation will be to cause FOC to restrict its negotiations regarding the fishery to such organizations.

[23] Again, this is a matter of conjecture which is not supported by the evidence. In any event, it is difficult to see how it supports a pith and substance argument for the Defendants.

> 4. Fishers will tend not to be attracted to any organizations that can effectively only deal on their behalf with one level of government.

[24] Once again, I reject this argument because it is contrary to the evidence of a Crown witnesses who clearly stated that the Gulf N. S. Bonafide Fishermen's Association represents fisheries in dealing with both the provincial and federal branches of government.

> 5. The constitutional issue raised by the Act's approach to funding is that
> (a) by permitting the province to attach conditions to federally issued fishing licenses, the real possibility arises that such power could be used to manage the fishery, and
> (b) it also holds the real possibility of effecting entry regulation upon the fisheries in the Province through licence fees.

[25] I also reject these arguments as they are pure speculation and are not supported by the evidence.

> 6. The Province's constitutional jurisdiction in relation to the fishery is grounded in "property and civil rights" and is only triggered when the fish are landed: ie., when they become a marketable commodity. The fisheries organizations established under the Act are not primarily interested in fish as a commodity, but with the health of the resource.

[26] Based upon my assessment of the evidence the goal of accredited organizations is to represent the best interests of fishers in relation to a broad range of subjects including, inter alia: assisting new fishers enter the industry,

training fishers in water safety, assisting fishers in becoming certified by FOC, representing fishers at FOC meetings, etc. Although some of the meetings with FOC will undoubtedly relate to the health of the resource, the organizations' role is one of negotiator, not legislator or enforcer.

[27] McLachlin C.J. stated at paragraph 40, 42 & 43 of **Ward,** supra**:**

> **40. " . . . . . In British Columbia Packers Ltd. v. Canada Labour Relations Board, [1976] 1 F.C. 375 . . . . . , Jackett, C.J. remarked that the fisheries power does not extend to the "making of laws in relation to things reasonable incidental to carrying on a fishing business . . . . . when such things do not in themselves fall the concept of "fisheries".**
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> **42. "Although broad, the fisheries power is not unlimited. The same cases that establish its broad parameters also hold that the fisheries power must be construed to respect the provinces' power over property and civil rights under s.92(13) of the Constitution Act, 1867. This too is a broad, multi-faceted power difficult to summarize concisely. For our purposes, it suffices to say that the regulation of trade and industry within the province generally (with certain exceptions) falls within the province's jurisdiction over property and civil rights: . . . . . "**
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> **43. "Thus we have before us two broad powers, one federal, one provincial. In such cases, bright jurisdictional lines are elusive. Whether a matter best conforms to a subject within federal jurisdiction on the one hand, or provincial jurisdiction on the other, can only be determined by examining the activity at stake. Measures that in pith and substance go to the maintenance and preservation of fisheries fall under federal power. By contrast, measures that in pith and substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights."**

[28] In paragraph 30 of **Ward,** supra, McLachlin C.J. set out two principles that guide the examination of the scope of the federal fisheries power in

relation to property and civil rights, namely:

> **"1. The Constitution must be interpreted flexibly over time to meet new social, political and historic realities: . . . . . " ; and**
>
> **"2. The principle of federalism must be respected: . . . . . Power is shared by two orders of government, each autonomous in developing policies and laws within their own jurisdiction subject to the courts which "control the limits of the respective sovereignties." . . . . Classes of subjects should be construed in relation to one another: . . . . In cases where federal and provincial classes of subjects contemplate overlapping concepts, meaning may be given to both through the process of "mutual modification": . . . . Classes of subjects should not be construed so broadly as to expand jurisdiction indefinitely: . . ."**

[29] In my view the Act in pith and substance relates to property and civil rights within the Province of Nova Scotia and is therefore intra vires the legislative powers of the province under s.92(13) of the Consitution Act, 1867.

(2) Does s. 9 of the Act violate the Defendants' rights under s. 2(d) of the Charter of Rights and Freedoms?

[30] Counsel for the Defendants argued that the provisions of the Act that imposes membership in an accredited association upon them and a compulsion to pay dues to that association violates their freedom to associate under s, 2(d) of the **Canadian Charter of Rights and Freedoms.**

[31] The Supreme Court of Canada has, as a result of **R. v. Advance Cutting & Coring Ltd.,** [2001] 3 S.C.R. 209 and **Lavigne v. Ontario Public**

Service Employees Union, [1991] 2 S.C.R. 211 has acknowledged that right to associate also implies a limited right not to associate. However, before legislation will be considered to violate that right it must be demonstrated that it imposes a danger to a specific liberty interest.

[32] In **R. v. Advance Cutting & Coring Ltd.**, Supra, Iacobucci J. stated at **paragraphs 284 & 285:**

> **284. "Unlike my colleagues Bastarache and LeBel JJ. I have serious reservations about basing the analysis of the negative right within s. 2(d) on an inquiry principally into whether the state has obliged the adoption of a certain ideology. . . . "**
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> **285. "In preference to the "ideological conformity" test, I would adopt an analysis that construes the negative freedom within s.2(d) more broadly. That is, I would endorse the analytical framework set out by LaForest J. In Lavigne. According to LaForest J., where the state obliges an association of individuals whose affiliation is already "compelled by the facts of life" (such as the workplace) and the association serves the common good or "further"[s] the collective social welfare", s. 2(d) will not be violated unless the forced association imposes a danger to a specific liberty interest."**

[33] In my opinion the above analytical framework endorsed by Iacobucci J. and LaForest J. is appropriate to the facts of this case because obligation to pay dues involves an association of fishers whose affiliation is already "compelled by the facts of life (the fishing industry). Since, in my view of the evidence, the accredited associations provided for by the Act serve the common good and further the collective social welfare, s. 9 of the Act does not violate

s. 2(d) of the **Charter.** Implicit in this conclusion is a finding that the Defendants have failed to conclusively demonstrate that the compelled association seriously undermines any liberty interest of the Defendants.

[34] Even if I had come to the opposite conclusion the legislation is, in my opinion, justified under s.1 of the **Charter.**

[35] Section 9 only imposes an obligation to pay dues to an accredited association. This requirement does not force membership on fishers. They remain free to disassociate themselves from the activities of accredited associations (but, based upon the evidence before me, it is difficult to imagine why they would do so).

[36] In coming to this conclusion I have adopted the reasoning of La Forest J. in **Lavigne,** supra. In my view the compulsion to pay dues to an accredited association is rationally connected to the purposes of the Act. In addition, the minimum impairment test has also been met and an opting out formula could seriously undermine accredited associations' financial base and thereby limit their effectiveness and ability to accomplish the goals of the Act.

[37] As a result of my conclusions in relation to the constitutional issues and the admissions filed with the Court, I find each of the Defendants guilty of an offence under s. 9 of the Act.

[38] I will now hear from counsel with respect to sentencing.

DATED at New Glasgow, in the County of Pictou, this 16th day of December, 2004.

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ROBERT A. STROUD
A Judge of the Provincial
Court of Nova Scotia.