

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Boudreau, 2009 NSPC 45

Date: September 18, 2009

Docket: 1814651, 1814652, 1814653

Registry: Sydney

Her Majesty the Queen

v.

Gordon Andrew Boudreau

DECISION ON MOTION FOR DIRECTED VERDICT

Judge: The Honourable Judge Anne S. Derrick

Heard: September 17, 2009

Decision: September 18, 2009

Charges: Section 78 *Fisheries Act*, R.S.C. 1985, c. F-14 x 3

Counsel: David Iannetti, Crown Attorney
Ralph W. Ripley, Defence Counsel

By the Court:**Introduction**

[1] On September 10, 2007, Fisheries Officer David L. Sinclair swore out a three count Information against the Defendant, Gordon Boudreau. The three counts allege offences under the *Fisheries Act*, R.S.C. 1985, c. F-14 between June 29 and July 1, 2007:

1. Within Canadian Fishery Waters adjacent to the coast of Nova Scotia, while carrying on fishing or any related activity under the authority of an communal licence, contravene or fail to comply with the conditions of that licence, to wit: did fish in a closed area, contrary to section 7 of the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332, and did thereby commit an offence under s. 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14;
2. Within Canadian Fishery Waters adjacent to the coast of Nova Scotia, fish for a species of fish, to wit: snow crab, without authorization contrary to s. 14(1)(b) of the *Atlantic Fishery Regulations*, 1985, SOR/86-21, and did thereby commit an offence under s. 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14; and
3. Within Canadian Fishery Waters adjacent to the coast of Nova Scotia, possess fish, to wit: snow crab, caught in contravention of s. 14(1)(b) of the *Atlantic Fishery Regulations*, 1985, SOR/86-21, contrary to s. 33 of the *Fisheries Act*, R.S.C. 1985, c. F-14, and did thereby commit an offence under s. 78 of the said *Fisheries Act*.

[2] Mr. Boudreau's trial commenced on March 9, 2009. I decided two pre-trial Defence applications and heard a *Charter voir dire*, with the result that I admitted into evidence a statement made by Mr. Boudreau on July 1, 2007 to Fisheries Officers. On September 17 at a continuation of the trial, the Crown concluded its case. The

Defence then made an application for a directed verdict, which is the subject of this decision.

[3] Certain facts, which I do not believe to be controversial, are helpful to understanding the issues which are the subject of the motion for a directed verdict.

Relevant Facts

[4] On July 1, 2007, the *Chief Gerald Gloade* docked at Louisbourg with a load of snow crab. Mr. Boudreau was on board as the captain. He held a fisher's registration card, Document No. 10730044, a copy of which is found in Exhibit 1. This "card" confirmed that Mr. Boudreau was registered for 2007 as a full time fisher.

[5] Mr. Boudreau had in his possession an Aboriginal Commercial Communal Fishing License. This document is part of Exhibit 1. The License was issued to the Millbrook First Nation. It states at page 1 of 9:

This licence is issued under authority of the Fisheries Act and section 4(1) of the Aboriginal Communal Fishing Licenses Regulations. This licence confers on the above-named First Nation, subject to the Fisheries Act and regulations made thereunder, the authority to fish under the conditions set out below.

[6] The licence authorized fishing for snow crab using the *Chief Gerald Gloade*. The snow crab licence provided that: "No person shall fish in any portion of those waters of crab fishing Area 24 known as the Eastern Holes defined below during the periods of June 1 to June 30 (inclusive) each year." (page 8 of 9, Exhibit 1)

[7] Mr. Boudreau told Fisheries Officer Sinclair, who boarded the *Gloade* when she docked, that he had picked the licence up in Millbrook First Nation. He advised Officer Sinclair that he had been the captain of the *Chief Gerald Gloade* for the previous seven summers. He said he had started this fishing trip on the *Gloade* on June 30. A Department of Fisheries surveillance aircraft had taken photographs of the *Gloade* fishing in the Eastern Hole on the afternoon of June 30.

[8] Adrian Gloade was called as a Crown witness on March 9, 2009. He is the manager of Millbrook Fisheries which is associated with the Millbrook First Nation. He testified that Mr. Boudreau was a designated fisher under the snow crab licence, Exhibit 1. A letter from Mr. Gloade confirming that Mr. Boudreau was designated by the Millbrook First Nation to operate the *Chief Gerald Gloade* “for the upcoming 2007 snow crab season starting in June” was tendered as Exhibit 2. A fax cover sheet indicates the letter was faxed by Mr. Gloade to Fisheries Officer David Sinclair on August 20, 2007, “as requested.”

[9] Mr. Gloade admitted on cross-examination however that his letter would have been authored around the time it was sent to Officer Sinclair and that on June 30, 2007, there had been no letter done up designating Mr. Boudreau to fish the *Chief Gerald Gloade* in 2007. On redirect Mr. Gloade confirmed that Mr. Boudreau had not been designated for the 2007 season until the letter was prepared sometime in August. Mr. Boudreau had been designated in past years but not in June 2007.

Concession By the Crown in Relation to Count 1

[10] At the conclusion of the Crown's case on September 17, Mr. Iannetti conceded that on account of Mr. Gloade's testimony there was no evidence to support the first count in the Information and I directed an acquittal of that charge. Mr. Iannetti acknowledged the Crown could not show that Mr. Boudreau had been acting under the authority of a communal licence, a key element of the charge, as he had not been designated by Millbrook to fish.

Counts 2 and 3

[11] The issue of the two remaining charges has been hotly contested and I will now review the positions of Crown and Defence.

Position of Mr. Boudreau

[12] Mr. Ripley notes that Mr. Boudreau has been charged with fishing for snow crab without authorization contrary to section 14(1)(b) of the *Atlantic Fishery Regulations (AFR)*, thereby committing an offence under the *Fisheries Act*. To comply with section 14, Mr. Boudreau had to have had a fisher's registration card, which as I have already indicated, he did, and be authorized, pursuant to subsection (2), to fish for snow crab. Mr. Ripley has submitted that Mr. Boudreau was authorized to fish for snow crab under the *AFR* as provided for in section 14(2)(d) which states that a person is authorized to fish if that person is "on board a vessel the owner of

which is the holder of a licence that authorizes the use of that vessel in fishing for that species and an operator is not named in the licence.”

[13] Mr. Boudreau was on board a vessel, the *Chief Gerald Gloade*, owned by Millbrook First Nation that held the Aboriginal Commercial Communal Fishing Licence 2007 I described earlier. As I indicated, that licence authorized the use of the *Gloade* in fishing for snow crab. As for the requirement in section 14(2)(d) that an operator not be named in the licence, after a recess to facilitate his careful review of the licence, Fisheries Officer Sinclair confirmed that no operator was named in the Millbrook licence.

[14] Therefore it does appear to have been established that between June 29 and July 1, 2007 Mr. Boudreau came within the provisions of section 14(2)(d): he was on board a vessel the owner of which was the holder of a licence that authorized the use of the vessel in fishing for snow crab and an operator was not named in the licence.

[15] Mr. Ripley submits that Mr. Boudreau was therefore authorized to fish under section 14(1)(b) of the *AFR*: he held a fisher’s registration card and he satisfied the requirements of section 14(2).

[16] It is Mr. Ripley’s position that there is no evidence to support the second count in the Information that between June 29 and July 1, 2007, Mr. Boudreau was fishing snow crab without authorization, contrary to section 14(1)(b). Furthermore, Mr. Ripley submits, an acquittal on the second count necessarily requires an acquittal on the third count. The third count is predicated on the second count as it alleges

possession of snow crab in contravention of section 14(1)(b) of the *Atlantic Fishery Regulations*. Mr. Ripley says Mr. Boudreau was not fishing without authorization as contemplated by this provision of these *Regulations* and therefore any snow crab in his possession on the *Gloade* was not caught in contravention of section 14(1)(b).

Position of the Crown

[17] In response to the motion, Mr. Iannetti has relied on another set of regulations under the *Fisheries Act* - the *Aboriginal Communal Fishing Licences Regulations*. (*ACFLR*) These regulations provide the Fisheries Minister with the discretion to issue a communal licence to an aboriginal organization to carry on fishing and related activities. (section 4(1)) The Minister may designate, in the licence, the persons who may fish under the licence, and the vessels that may be used to fish under the authority of the licence. (section 4(2)(a) and (b)) If the Minister does not designate the persons who may fish under the authority of the licence, the aboriginal organization may designate, in writing, those persons. (section 4(3)) None of these possible designations are mandatory.

[18] Mr. Iannetti points out that the *ACFLR* contain prohibitions. No person carrying on fishing or any related activity under the authority of a licence shall contravene or fail to comply with any condition of the licence. (section 7) No person other than a designated person may fish under the authority of a licence. (section 8)

[19] It is Mr. Iannetti's position that Mr. Boudreau had no authorization to be fishing the *Chief Gerald Gloade*. He was not designated under the Millbrook Aboriginal

Commercial Communal Fishing Licence. Without a designation he had no authority to be fishing which, Mr. Iannetti says, brings him within the allegations of count 2 of the Information that he was fishing snow crab without authorization.

Analysis

[20] The question to be determined on a motion for a directed verdict is whether there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. If there is no evidence on an essential element of the offence then there is no basis for requiring the Defendant to be put to his defence on the charges.

[21] I am satisfied that the evidence establishes that Mr. Boudreau was authorized to fish snow crab under section 14(1)(b) of the *Atlantic Fishery Regulations*, which is what he is charged with having contravened. It does appear that section 8 of the *Aboriginal Communal Fishing Licences Regulations* prohibited him from fishing under the Millbrook snow crab licence because he had not been designated, for the 2007 season, to do so. But Mr. Boudreau has been charged with violating section 14(1)(b) of a different set of Regulations from the *ACFLR*. What is the significance of this to the issue of the motion for a directed verdict?

[22] The Information charging Mr. Boudreau is required to put him on formal notice of his potential jeopardy. (*R. v. R(G)*, [2005] 2 S.C.R. 371 at paragraph 11) The proper focus is on what the Crown has alleged, not on what the Defendant may already know. “An accused will often know a good deal more about the circumstances of an offence than the police or Crown will ever know, but it is not

enough for the Crown to say to an accused "you know perfectly well what you're guilty of". (*R. v. R(G)*, at paragraph 2) Therefore, even if Mr. Boudreau may have known he was not designated by Millbrook - and I do not know what his state of knowledge about that may have been - is not relevant to the issue of whether there should be a directed verdict. A defendant is entitled to know what charges he or she is required to answer. The Information is a "written accusation that fulfills this function." (*R. v. R(G)*, at paragraph 13)

[23] The principle of fair notice is fundamental to the right to a fair trial. A defendant is only called upon to meet the charge put forward by the prosecution. Effectively I am being asked to decide if Mr. Boudreau should be required to meet the charges in the Information: if I do not grant the motion, he will have to elect whether or not to call evidence in his defence.

[24] Mr. Boudreau has been before this Court since September 2007, when the Information was laid, charged with breaching section 14(1)(b) of the *Atlantic Fishery Regulations*. In March 2009 the Crown learned through Adrian Gloade's testimony in court that at the time of the alleged offences Millbrook had not designated Mr. Boudreau to fish under its snow crab licence. That brought into focus the issue of Mr. Boudreau's possible contravention of section 8 of the *Aboriginal Communal Fishing Licences Regulations*. However, it did not change the fact that Mr. Boudreau was in compliance with the requirements of section 14(1)(b), the regulatory provisions he is charged with violating.

[25] Mr. Iannetti has argued that Mr. Boudreau should not get the benefit of an acquittal on count 1 because he was not designated by Millbrook (and therefore not acting under the authority of the communal licence) and yet also be able to secure acquittals on counts 2 and 3 because he came within section 14(2)(d) and was therefore authorized to fish under the same licence. But I read section 14(2)(d) as being very specific in what it requires for authorization to fish. It may be there is some inconsistency between these two sets of regulations that this case brings into focus. I have concluded that the evidence indicates Mr. Boudreau was not authorized to fish under the *ACFLR* but was authorized under section 14(1)(b) of the *AFR*. Having said that, the charges that remain - counts 2 and 3 - refer only to his not being authorized under section 14(1)(b). While this may seem somewhat technical I consider that it would be unfair, and contrary to Mr. Boudreau's fair trial rights to require him to defend against charges where there is no evidence to sustain a guilty verdict on the charges he is facing. The Crown's argument that Mr. Boudreau was not authorized to fish at all in the absence of a designation is a complete answer to the Defence motion has not persuaded me. The Crown sought to prosecute Mr. Boudreau for fishing without authorization but there is no evidence that he contravened the provisions he was believed to have breached. Counts 2 and 3 represent the charges Mr. Boudreau has understood he had to meet. They are very specific as to the nature of the authorization in issue.

[26] Mr. Boudreau may have broken the law by fishing when he was not designated by Millbrook First Nation to do so, but that is not the law he is charged with breaking. There is no evidence that he broke the law that underpins the charges in the

Information. Accordingly, I am granting the motion for directed verdicts of acquittal on counts 2 and 3 of the Information sworn September 10, 2007.