

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

Cite as: Nova Scotia (Environment and Labour) v. Nova Scotia (Transportation and Public Works), 2006 NSPC 3

**Date:** 2006/02/15

**Docket:** 1528569

to

1528575

**Registry:** Sydney

Her Majesty the Queen (Department of Environment and Labour)

v.

Her Majesty the Queen (Department of Transportation and Public Works)

Application by Defendant  
(Department of Transportation and Public Works)  
for Standing to Invoke a Charter Right and Seek a Remedy

**Judge:** The Honourable Judge Anne S. Derrick

**Heard:** February 10, 2006 in Sydney, Nova Scotia

**Written decision:** February 15, 2006

**Counsel:** Mr. Ralph Ripley, for Her Majesty the Queen  
Department of Transportation and Public Works

Mr. Peter Craig, for Her Majesty the Queen  
Department of Environment and Labour

**FACTS**

[1]. On February 12, 2004, John Maclean, an employee with the Nova Scotia Department of Transportation and Public Works ("the DTPW") was injured while working as a member of the Steel Bridge Crew.

[2]. The Provincial Department of Environment and Labour ("the DEL") conducted an investigation that resulted in charges against the DTPW under the *Occupational Health and Safety Act* ("OHSA".)

[3]. The DTPW and the DEL have agreed that certain items, which the DEL is intending to introduce into evidence at the DTPW's trial, were seized without warrant by the DEL from the DTPW premises. It is the seizure of these items that gives rise to the application by the DTPW for standing to invoke a *Charter* right and seek a *Charter* remedy.

[4]. The DTPW has indicated its wish to invoke section 8 of the *Charter* in relation to the warrantless search and to assert that the violation of these rights entitles it to a remedy under section 24(2) of the *Charter*. As stated in the DTPW's written brief:

The Applicant will be alleging that its rights as guaranteed by section 8 of the Charter of Rights and Freedoms were infringed and seeking a remedy pursuant to s. 24 of the Charter.

[5]. The DTPW has also indicated that if granted standing it will be challenging the constitutionality of provisions of the *OHS Act*. Although no formal notice has been given by the DTPW, counsel for the DTPW advised at the hearing on the standing motion that a notice has been drafted and will be forwarded to the Provincial Department of Justice if a grant of standing is made.

[6]. A hearing on the standing application by the DTPW was conducted in the Provincial Court at Sydney, Nova Scotia on February 10, 2006. Briefs with supporting authorities were filed in advance. I am appreciative of the time and effort dedicated by both counsel to their written and oral submissions on this challenging issue.

## ISSUE

[7]. The DTPW's application raises the issue of whether a government department is entitled to standing to invoke the *Charter* and seek relief under it. The DTPW's position is that as an accused, the Department should be afforded the protections offered by the *Charter* to any accused. The position of the DEL, which is prosecuting the DTPW, is that the DTPW as a governmental entity is not entitled to any *Charter* protection. The *Charter*, argues the DEL, is intended to operate as a shield against government and cannot be invoked by government.

## LEGAL ANALYSIS

[8]. The DTPW relies principally on the Supreme Court of Canada decision in *R. v. Big M Drug Mart Limited*, [1985] 1 S.C.R. 295. Big M Drug Mart sought to argue that the Sunday observance legislation under which it was charged was inconsistent with section 2(a) of the *Charter* and by reason of section 52 of the *Constitution Act, 1982*, of no force and effect. In addressing the standing of a corporation to assert a *Charter* right, Dickson, C.J. held at paragraph 39 that:

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid.

[9]. Dickson, C.J. noted that section 52 of the *Constitution Act, 1982* establishes the fundamental principle of constitutional supremacy, stating at paragraph 38:

The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law.

[10]. The DTPW asserts that the language in *Big M Drug Mart* of "any accused" is what grounds its entitlement to standing. It is the DTPW's argument that its status as a Government Department is not what is relevant: what matters is that it is an accused, obligated, by virtue of being charged, to answer in court to charges under the *OHS Act*. The DTPW says it is compelled before the courts and should therefore have recourse to the *Charter* as any other accused would, including corporations, for the purpose of invoking section 8 *Charter* rights. The DTPW says that the Supreme Court of

Canada has expanded the scope of *Charter* access for corporations even since the *Big M Drug Mart* decision, citing the case of *Canadian Egg Marketing Agency v. Pineview Poultry Products Limited*, [1988] 3 S.C.R. 157 in which a corporation, as a defendant, was permitted to invoke the *Charter* in a civil proceeding instigated by the state pursuant to a regulatory scheme. Permitting a government department facing charges under occupational health and safety legislation to have access to the *Charter* is, says the DTPW, a legitimate further extension of standing, justified by the department being an accused in a proceeding with penal consequences.

[11]. There is no issue of the DTPW's liability for prosecution under the *OHS Act*. Section 4(1) of the *OHS Act* provides that Her Majesty the Queen in right of the Province is bound by the *Act*. Section 74(1) (a) of the *Act* provides that:

Any person who contravenes the *Act* or the regulations...is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred and fifty thousand dollars, or to a term of imprisonment not exceeding two years, or to both a fine and imprisonment.

[12]. Section 75(1) empowers the court to make an order with conditions, in addition to any other punishment that may be imposed pursuant to the *Act*. Under section 77, an "officer, director, manager or agent" of a corporation who directs, authorizes, assents to, acquiesces or participates in the commission of an offence pursuant to the *Act* is guilty of that offence.

[13]. Presumably, as the *Act* is binding on Departments of the Provincial Government as employers, and hence the prosecution in this case of the DTPW, managers or agents of governmental departments could fall within the ambit of section 77 of the *Act*. A Government Department found guilty of contravening the *Act* can be fined under section 74 (1) (a) of the *Act* and made subject to an order under section 75(1).

[14]. The DEL takes the position that the jeopardy faced by the DTPW under the *Act* does not animate a right to standing to invoke the *Charter*. The DEL says that the pivotal question is whether the DTPW is a person, either real or artificial, like a corporation, as only persons can claim

entitlements under the *Charter*. The rights under the *Charter*, says the DEL, are individualized, intended to apply to persons as evidenced by the language of the *Charter* which refers to: "everyone", "anyone" and "any person." The DEL asserts that by any modern approach to statutory construction, this language is meant to apply to individuals. Such individuals can, in certain circumstances, include corporations who are considered to be "artificial" persons. As the DEL points out:

A corporation may only claim a Charter right where it can establish an interest within the scope of a guarantee, and where such an interest accords with the right's purpose.

[15]. Under this analysis, section 8 rights have been extended to corporations, to be used as a shield, where the corporations have been "drawn in" to litigation or compelled to defend against a prosecution. It is well settled that corporations are entitled to invoke section 8 rights: *Hunter v. Southam*, [1984] 2 S.C.R. 145. See also for example: *R. v. Inco Ltd.*, [2001] O.J. No. 2098 (Ont. C.A.)

[16]. However, the DEL says, corporate and governmental entities are dissimilar. The DEL points to the fact that corporations file taxes and have other obligations. They are, in certain respects, corporate "citizens" and not to be equated with a governmental department. Government, argues the DEL, is empowered to make legislation, invoke section 33 of the *Charter* (the "notwithstanding" clause) and enforce legislation. These activities do characterize governments; however in the case of making legislation and invoking s. 33 of the *Charter*, it is legislative bodies that have these powers, not governmental departments. That being said, it is correct that there are very distinct differences between corporations and government departments. Nevertheless, the question remains: are government departments and corporations on a different footing when it comes to defending against charges before the courts?

[17]. The DEL argues that *Charter* rights have not been extended to corporations by the courts simply because corporations have been charged: the DEL says that corporations have had rights extended because they have established an interest within the scope of a guarantee, an interest that accords with the purpose of the right.

[18]. It is well settled that the *Charter* is a dynamic and evolving constitutional instrument. As noted by the Supreme Court of Canada in *Hunter v. Southam, supra*:

The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess.

Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. *It guarantees a broad and general right to be secure from unreasonable search and seizure.* [Emphasis added]

[19]. While this language speaks about guaranteeing the rights of individuals in relation to the exercise of governmental powers, it is necessary to assess the appropriateness of adopting, in the context of a state prosecution, a narrowed construction of the scope of section 8 rights that would place some accused in a different position from others. An individual accused or a corporate accused, charged under the Nova Scotia *Occupational Health and Safety Act* would have standing to invoke the protections of section 8. Should a Government Department accused be denied access to the protections of section 8 simply because it is "government"?

[20]. A Government Department has been found to be a "person" for the purposes of liability under the *Occupational Health and Safety Act: R. v. Nova Scotia Department of Supply and Services, [1997] N.S.J. No. 496 (N.S. Prov. Ct.)*

[21]. Stroud, P.C.J. held in *Department of Supply and Services* at paragraphs 7 and 8 as follows:

The defendant [Department of Supply and Services] also argues that, even if the Act applies to it, the penalty provisions of s. 49 do not, because the Crown is not a "person". In support of that argument it refers to the definition of that word in the Interpretation Act and the interpretation section of the current Occupational Health and Safety Act and other more recent legislation which specifically state that they apply to Her Majesty In Right of the Province. These arguments are not persuasive. The definition of "person" in the Interpretation Act is not all-inclusive. It simply indicates that certain entities that would not normally be considered "persons" will be so considered in legislation which does not indicate otherwise. In addition, s. 6(2) of that Act states that nothing in it excludes a judicial rule of construction which is not inconsistent with the Act. Furthermore, as far as the reference to more recent legislation is concerned, it could just as readily be argued that it simply clarified what was intended in the Act.

...

There is no mystery in the purpose of the Act. It is clearly designed to provide safe conditions for employees working on construction sites and sanctions for any person or entity that does not comply with its provisions. To exclude any government agency from its provisions would, in my view, result in an absurdity. (Although it may seem somewhat absurd to require one government agency to pay penalties to another, to exclude the Crown from the definition of "person" in s. 49(1), would exclude the Defendant from other sections which provide standards, etc. for the protection of the health and safety of workers).

[22]. I am not suggesting that constitutional interpretation is the same as statutory interpretation. Indeed, the Supreme Court of Canada has held that:

The task of expounding a constitution is crucially different from that of construing a statute" due to the necessity that the provisions of a Charter of Rights must be "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. (*Hunter v. Southam, supra at p. 7 (QL version)*)

[23]. There are two points to be mined from my referencing the *Department of Supply and Services* case and commenting on the "living tree" concept of constitutional interpretation. One point is the observation that the DTPW is a "person" for penalty purposes under the *OHSA* but according to the DEL is unable to deploy section 8 rights in its defence to the charges because it is not a 'person', and the other point is that *Charter* protections must be construed broadly as new

circumstances require.

[24]. There can be no doubt whatsoever that the *Charter* was intended to protect the rights of individuals against the power of the state: it is wholly unnecessary for me to recite the authorities establishing this truism. The *Charter* was not intended to provide rights and protections to government. However, standing to invoke a *Charter* right has been extended where an entity has been able to establish, within the scope of a *Charter* guarantee, an interest that accords with the purpose of the right. And, applying a broad and liberal interpretation of the *Charter*, "everyone" in section 8 has been held to include:

...all human beings and *all entities* that are capable of enjoying the benefit of security against unreasonable search. (*Hunter v. Southam*, [1982] A.J. No. 573 at paragraph 35 (*Alta. Q.B.*)) (*Emphasis added*)

[25]. It seems to me that a Government Department in the circumstances of the defendant in this case should be entitled to standing to invoke section 8 rights as an entity that is "capable of enjoying the benefit of security against unreasonable search." That is not to say that the DTPW will be able to make out a violation of a section 8 right; at this stage I am merely deciding if the DTPW should be granted standing to assert the right for adjudication on its merits. I see the risk of an injustice being perpetrated against the defendant in these proceedings by its inclusion (notwithstanding the use of the language in the *OHS Act* of "person") in the provisions of the *Act* for the purposes of penalty and its exclusion from being able to advance a *Charter* argument at trial on the basis that it cannot be brought within the meaning of "everyone" in section 8.

[26]. In my opinion it is material to the issue in this case that an accused's right to a fair trial is a fundamental right in Canadian law. Addressing the right of a corporation to invoke s. 11(b) rights under the *Charter*, Stevenson, J. held in *R. v. C.I.P. Inc.*, [1992] 1 S.C.R. 843 at paragraph 33:

The right to a fair trial is fundamental to our adversarial system. Parliament has seen fit to accord that right constitutional protection. I can find no principled reason for not extending that protection to *all accused*. (*Emphasis added*)

[27]. There is also a general public interest in protecting the right to a fair trial. As Iacobucci, J.



observed in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at paragraph 50:

Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

[28]. It would be fair to add that the courts have an interest in having all relevant and *admissible* evidence adduced in order to ensure that justice is done.

[29]. The Supreme Court of Canada found in *R. v. C.I.P. Inc, supra*, that a corporate defendant could avail itself of the protections afforded by s. 11(b) of the *Charter*. The notion that the “*status of an accused can determine whether the accused is to be accorded ‘fair’ or ‘just’ treatment*” was rejected. (paragraph 37) The Court, referencing *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, held that the purposive and contextual approach to *Charter* rights mandates a focus on “the language of the right in combination with the nature of the specific interests embodied therein...” (paragraph 22) The ability to invoke a *Charter* right will depend on whether the entity claiming the right can establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision. Situating the analysis in this case in the context of the right of the DTPW to a fair trial, I find that the DTPW has an interest that falls within the scope of the section 8 guarantee (the right to be secure against unreasonable search or seizure) and one which accords with the purpose of section 8 and should be entitled to standing to invoke that right in its defence to the charges brought against it by the DEL under the Nova Scotia *Occupational Health and Safety Act*.

[30]. In reaching this conclusion, I have determined that the decision of Warner, J. in *Nova Scotia (Human Rights Commission) v. Annapolis (County)*, [2005] N.S.J. No. 469 is distinguishable from the case before me. In that case, the Municipality of Annapolis County sought to invoke rights under the *Charter* for the purpose of resisting an attempt by the Nova Scotia Human Rights Commission to obtain disclosure about the proceedings of an *in camera* session at which a member

of a municipal advisory committee was terminated by resolution. Warner J. held that the Municipality being government and not "a private person or a private corporation" could not avail itself of the

*Charter*. Warner J. observed that the principle, emerging from *Big M Drug Mart* and *Canadian Egg Marketing Agency* (cases cited in the arguments before me), of corporations being afforded protection from unconstitutional laws, "will develop incrementally beyond the circumstances [of those cases]", but he saw no "logical or justifiable basis" for expanding the principle to the circumstances of the *Annapolis County Municipality* case.

[31]. The *Annapolis County Municipality* case did not involve the Municipality being before the courts as an accused facing penal consequences. Warner, J. also noted the Human Rights Commission's "investigatory, non-adjudicative" role in the proceedings and found that even if he were wrong to deny the Municipality standing to invoke the *Charter*, section 8 had not been breached and section 11 (c) of the *Charter* (one of the *Charter* provisions the Municipality sought standing to assert) had no application to the circumstances of the case.

[32]. I view the *Annapolis County Municipality* case as bearing no resemblance to the case before me where I find the defendant DTPW is "an entity capable of enjoying the benefit of security from unreasonable search" and entitled, as in the case of any accused facing a prosecution by the state, to a fair trial consisting of an adjudication based on relevant and admissible evidence. Having said that, I find the scope of *Charter* access for a governmental department to be limited to very specific circumstances involving a prosecution such as the one before me, where the Department has been compelled before the courts to answer charges brought by the state. The overarching purpose of the *Charter* is as a shield against state interference and to vindicate a positive obligation on the state to arbitrate competing societal demands. This role must not be eroded or diluted. As evidenced by the absence of any cases directly on point, the instances where a government department can avail itself of a *Charter* right will be extremely rare.

[33]. I therefore grant the DTPW standing to invoke section 8 of the *Charter* and pursue a remedy under section 24(2) should its rights be found to have been violated in this prosecution.

Order accordingly,

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Anne S. Derrick  
Judge of the Provincial Court