Date: April 11, 2002

IN THE PROVINCIAL COURT OF NOVA SCOTIA
[Cite as: R. v. Fraser, 2002NSPC006]

Her Majesty the Queen

versus

Paul Garret Fraser

s. 129(a) Criminal Code of Canada

D E C I S I O N

Before: His Honour Judge A. Peter Ross, J.P.C.

Heard: January 31, 2002, at Sydney, Nova Scotia

Date of Decision: April 11, 2002

Decision Released: April 11, 2002

Counsel: Mr. John MacDonald, for the Prosecution
Mr. Paul G. Fraser, on his own behalf

[1] The defendant, Paul Fraser, had sought access to an off shore fishery from the Federal Department of Fisheries and Oceans. Having been refused a license he was determined to protest against what he perceived as favouritism towards large companies. To this end, he entered the offices of DFO at the Canadian Coast Guard College site at Westmount, in the Cape Breton Regional Municipality and told the supervisor in charge of the office that he intended to stay there "as long as it took".

[2] Gus Van Helvoort was in charge of the DFO office. The normal closing time for the office is 4:30, after which the premises are not open to the public nor any other users of the Coast Guard College facility. He spoke to Mr. Fraser for a few minutes, explaining to him that when the office closed he would have to leave. Mr. Van Helvoort returned to the reception area at 4:30 and found Mr. Fraser still seated there. Mr. Fraser said he would only leave if he were "physically removed". Mr. Van Helvoort called the police who arrived just prior to 5:00 p.m.

[3] The police spoke with the defendant, but he was not open to persuasion. Police then had the supervisor repeat the direction to Mr. Fraser to leave the premises. The police repeated the command themselves. Mr. Fraser said "no" to each. Police told Mr. Fraser he would be charged with obstruction of a police officer if he did not leave immediately. When he refused, he was placed under arrest for obstruction for "refusing to leave".

[4] Upon arrest Mr. Fraser went peacefully with the police. He accompanied them to the police car. He went to the lock up overnight. He would not sign an undertaking containing proposed terms of release. He declined to call a lawyer. The following day he was released on court ordered conditions. Mr. Fraser caused no interference with the operation of the DFO office while he waited there, although it would appear he interfered with the normal and lawful operation of the property at 4:30 by preventing staff from leaving and securing the premises at the close of regular business hours.

[5] It is assumed for the purpose of these reasons that the supervisor of a federal government office is an occupier within the meaning of the Protection of Property Act, R.S.N.S. 1989 c. 363. If this is not so, it is likely that an analysis predicated upon the powers and duties of police who find a person committing a criminal offence under s. 430(1)(c) would yield the same result.

[6] This is not one of those cases dealing with the difference between one who "resists" and one who "wilfully obstructs" a peace officer in the execution of his duty. Neither does it deal with any difference between "active" as

opposed to "passive" resistance. From the point of arrest on, Mr. Fraser was fully cooperative with the police and presented no difficulty whatsoever. It is his conduct in refusing to leave, when directed to do so by the police, that constitutes the gist of the alleged offence.

[7] At first blush it might seem obvious that there was no obstruction. The police were not required to exert any force nor even to expend any physical effort in removing Mr. Fraser from the premises. Mr. Fraser did not actively conceal evidence, or refuse to identify himself. However there is a line of case law which states that a person is not guilty of obstructing a peace officer merely by doing nothing, *unless there is a legal duty to act arising at common law or by statute*. On this theory of wilful obstruction, the defendant's omission must relate to something which he is legally obliged to do. On this interpretation of s. 129 of the Criminal Code, Mr. Fraser might, at second blush, seem obviously guilty. However, while the facts of this case are simple, the issue does not appear to be so. The specific question which arises here is as follows: When a police officer, at the behest of an occupier of property, delivers a direction to a certain person, pursuant to the Protection of Property Act, to leave the premises, does such person, by refusing to leave, commit the offence of obstruction of a police officer in the course of his duty, contrary to s. 129 of the Criminal Code of Canada?

[8] As mentioned above, it is assumed for the purpose of this decision that either the Department of Fisheries and Oceans or Mr. Van Helvoort is an "occupier" within the meaning of the Protection of Property Act. Section 2(b) defines occupier to include a person in possession of premises or a person who has responsibility for and control over the condition of premises or the activities there carried on. Section 4 of the Act states that every person who, without legal justification remains on premises after being directed to leave by the occupier of the premises or a person authorized by the occupier is guilty of an offence. Section 6 of the Act gives a police officer power to arrest a person for an offence under the Act and to detain that person in custody, after arrest, if the police officer believes that detention is necessary to prevent the continuation of the offence.

[9] Under s. 15 and s. 10(6) of the Police Act R.S.N.S. 1989 c.48 each officer of a municipal police force is charged with the enforcement of the penal provisions of all laws of the province in force within the municipality, and is vested with the power and authority of a provincial constable, "to enforce and to act under every enactment of the province".

[10] As noted above, as of 4:31 p.m. Mr. Fraser was trespassing. Section 41 of the Criminal Code states that a person in peaceable possession of real property, and everyone lawfully assisting him or acting under his authority, is justified in using force to ... remove a trespasser therefrom if he uses no more force than is necessary. A trespasser who resists such an attempt to remove him is deemed to commit an assault without justification. Presumably, therefore, Mr. Van Helvoort might have resorted to this course of action, but he took the prudent course and called the police for assistance.

[11] Any offence which is investigated by the police prevails upon the time, energy and resources of individual police officers. While it might be said, in a general sense, that everyone has a duty to obey the law, a person who commits an offence is not thereby rendered guilty of obstructing the police. He may be engaging the police, worrying the police, taxing or even exhausting the police, but not "obstructing" the police within the meaning of s. 129 of the Criminal Code.

[12] Upon arrival, the police were confronted with an apparent violation of s. 4 of the Protection of Property Act (remaining on premises after request to leave). In a sense, Mr. Van Helvoort "authorized" the police to direct Mr. Fraser to leave, although theoretically he could authorize anyone, including a civilian, to give such a direction. Does Mr. Fraser's refusal to leave constitute an obstruction of a police officer in the execution of his duty when, clearly, it would not be so where the command is given by the property owner or a civilian authorized by the property owner? Is the police officer, in this situation, "in the execution of his duty"? Numerous cases have considered the meaning of this phrase.

[13] It has been said that the offence of obstruction in s. 129(a) contains three specific elements - 1) that there is an obstruction, 2) that the obstruction affected the police officer in the execution of a duty he was actually performing at the time and 3) that the person obstructing did so wilfully. There is little doubt here that Mr. Fraser acted wilfully and intentionally, fully cognizant of the directions given to him and aware of what steps the police would have to take upon his refusal. As regards the first element, while there is case law that mere inconvenience does not constitute obstruction, it seems to me that the steps which the police were forced to take here, in light of Mr. Fraser's refusal to leave, amount to more than mere inconvenience. Having to arrest and detain a person, and to keep them in

custody for a significant period of time, entails a large measure of responsibility for the police and diverts them from other duties which they could be performing. More problematic is the second element - whether the police were in the execution of a duty given to them as police officers.

[14] It is a well-established proposition that in the absence of a legal duty to act under statute or at common law, there is no duty on the part of a citizen, even a suspect, to assist police officers in discovering evidence upon which to found a conviction. Thus, in R. v. Semeniuk 111 C.C.C. (3d) 370 the defendant was not guilty of obstruction simply by refusing to unlock the glove compartment of his vehicle upon the command of a police officer where the glove compartment contained liquor in violation of the Liquor Control Act. Similarly in R. v. Lavin 76 C.C.C. (3d) 279 the defendant was not guilty of obstruction merely by refusing to hand over an illegal radar detector where there had been no attempt at concealment of the evidence.

[15] In certain cases persons have been convicted of obstruction of a police officer when they refused an order to disperse. In such cases the defendant was part of a crowd disturbing the peace and order of the community by blocking traffic, disturbing a residential neighbourhood, or otherwise breaching the peace and order of the community.[1] In such cases the police were presumably acting under s. 31(1) of the Criminal Code, or were invoking their duties under common law which have been defined in Rice v. Connolly [1966] 2 All E.R. 649 (Q.B.) as being those "necessary to ensure that the public peace would be kept and to prevent crime and to detect crime and bring offenders to justice and generally to protect from criminal injury". See also R. v. Dedman (1985) 20 C.C.C. (3d) 97 (SCC).

[16] In the present case Mr. Fraser's conduct would not constitute a breach of the public peace.) Nor did he prevent the police from detecting a crime that he or anyone else might have committed.[2] Nor did he pose a threat of injury to persons or property. Nor did he make it difficult to execute legal process by,

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[1]See, for instance, R. v. Watkins 7 C.C.C. (2d) 513, R. v. Jarvie (1981) 18 Alta. L.R. (2d) 36 and R. v. Lykkemark (1982) 18 Alta. L.R. (2d)48.

[2]See, for example R. v. Anderson (1996) 111 C.C.C. (3d) 540 (B.C.C.A.) where it is implicit in the judgement that had the Defendant heard the police officer's command to move a vehicle which was impeding the officer's own vehicle at a time when he was actively pursuing an investigation, the defendant would have been guilty of obstruction under s. 129

for example, refusing to identify himself.[3] Mr. Fraser's identity was well known.

[17] The case R. v. Noel 101 C.C.C. (3d) 183 (B.C.C.A.) makes clear that something more than merely being "on duty" is required before a peace officer will be "in the execution of his duty". Whether a peace officer is "in the execution of his duty" will depend in each case on the nature of his activities at the time he is obstructed. To cite the example used in that case, a police officer who is eating lunch in the midst of her shift could not be said to be engaged in the execution of her duty. The Court looked rather at the "performance of definable duties, however general in nature those duties may be".

[18] In R. v. Sharma [1993] 1 S.C.R. 650 the Supreme Court of Canada had occasion to deal with the case of a street vendor who disobeyed a police officer's order to remove his wares from the sidewalk. The police officer was seeking to enforce a municipal by-law which purported to license street vending. For reasons which are of no direct concern to the present case, the municipal by-law which the peace officer sought to enforce was found *ultra vires* the municipality. However, the Court went on to say (as did Justice Arbour in the Ontario Court of Appeal) that *even if* the by-law were valid the flower vendor should be found not guilty of the charge of obstruction of a peace officer under s. 129 of the Criminal Code. However, this view appears to rest on the fact that the by-law contained no arrest power. The Protection of Property Act, s. 8 (supra) does contain an arrest power. Thus, even though the defendant Sharma did not "obstruct" police by refusing to desist from selling his flowers on the street, the Crown might argue that this decision actually supports its position - i.e. that the presence of the arrest power in the Protection of Property Act distinguishes the present case from Sharma. The Sharma decision thus requires careful consideration. In this analysis, I am supposing, as did the Supreme Court of Canada in its *dicta*, that the Metro Toronto by-law in Sharma *was* valid and effective legislation, as is the Protection of Property Act of Nova Scotia.

[19] Mr. Sharma was selling flowers on Yonge Street in Toronto, Ontario when he was approached by a member of the Metro Toronto Police who informed

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[3]Identification of one's self to the police in certain circumstances was dealt with by the Supreme Court of Canada in R. v. Moore [1979] 1 S.C.R. 195. Moore was distinguished and explained in R. v. Guthrie [1982] A.J. No. 29 (Q.L.), a case which also applied Rice v. Connolly.

him that exposing goods for sale on the street without a license violated a municipal by-law. Mr. Sharma was issued a summary offence ticket and told to pack up his display and move on. Mr. Sharma was given a brief grace period to check with his employer or his lawyer, but was told that if he were still there when the officer returned, he would face criminal charges of obstructing the police. Mr. Sharma took advice and decided not to move. Upon the officer's return, he was still selling at the same location. Accordingly he was charged with obstructing the police contrary to s. 129 of the Criminal Code. Mr. Sharma was originally convicted of both the by-law offence and the criminal charge. As indicated above the by-law was ultimately found to be *ultra vires*.

[20] This alone was enough to dispose of the obstruction charge. This was not a case, like R. v. Biron [1976] 2 S.C.R. 56 where the accused was ultimately acquitted of the underlying offence yet convicted of obstructing the police when they arrested for the underlying offence. In Biron the underlying offence was valid, per se, and so long as the police arrest for an apparent perpetration of a valid offence, they are acting in the execution of their duty even if the defendant is later acquitted of it. Thus, a defendant has no right to resist or obstruct. In Sharma however, the underlying offence, breach of the by-law, did not exist because the by-law was itself invalid.

[21] Nevertheless the Supreme Court of Canada advances with its reasoning to find, as Justice Arbour stated in the Ontario Court of Appeal, that

> "However, even if the prohibition was valid, the charge of obstruction would still have to fail as, in my respectful view, the conduct of the appellant in the circumstances did not amount to a wilful obstruction of the peace officer engaged in the execution of his duty within the meaning of s. 129 of the Criminal Code." (See [1991] O.J. No. 14 (Q.L.) at p. 17)

[22] Central to this reasoning was the fact that there were no provisions, either in the by-law or in the Provincial Offences Act empowering the police to arrest when faced with a person in apparent violation of the by-law. While the Court recognized that police officers have general common law and statutory duties to preserve the peace, prevent crime, apprehend criminals and enforce municipal by-law, the municipality had exercised a legislative choice not to authorize arrest for this kind of offence. At p. 18 Justice Arbour states

> "Here the legislature has not seen fit to provide a mechanism by which the conduct prohibited in s. 11 of the by-law can be immediately brought to a halt. A police officer may invite a person to desist. He or she may issue a new summons

> if the offence is being repeated. However, the continuation of such conduct, absent circumstances amounting to a breach of the peace or interfering with the authority of the police officer to issue a summons, cannot amount to obstruction, in my opinion, even after the alleged offender has been warned to stop his activities."

A distinction was drawn with the case Johansson and Daniluk v. The King (1947) 4 D.L.R. 337 (S.C.C.), for in that case the by-law of the City of Vancouver contained a section imposing a specific duty to comply with a police officer's order concerning the movement and regulation of traffic and pedestrians.

[23] An instance of a case applying the reasoning in Sharma would be R. v. Webber [1995] Y.J. No. 29 (Q.L.) where the police were found not to be acting in the execution of their duty when the accused interfered with the arrest of her son, because the Noise Prevention Act contained no power of arrest except to establish identity, and because the police were trespassers on the property at the relevant time, there was no statutory common law power which entitled them to remain or to effect an arrest.

[24] Because the Protection of Property Act of Nova Scotia *does* contain an arrest power this reasoning might be construed as support for the Crown's position that Mr. Fraser, in refusing to leave the Department of Fisheries' office when directed to do so not only by the officer manager but by the police, committed an obstruction within the meaning of s. 129. In my view, however, the Sharma does not offer support for such a position.

[25] It seems to me the important question which I must answer in the present case is the following - does it follow from the decision in Sharma that where an arrest power exists, as it does under the Protection of Property Act in the present case, Mr. Fraser's refusal to leave premises upon being ordered by the police to do so amounts to obstruction under s. 129 of the Criminal Code? In my view it does not necessarily follow from the ruling in Sharma that where there is an arrest power, mere refusal to leave at the direction of the police, prior to an arrest being effected, constitutes criminal obstruction of a police officer in the execution of his duty.

[26] In Sharma the concern appeared to be that the police were improperly developing an excuse to arrest the defendant. Justice Iaccobucci states at paragraph 33 that

> "The police cannot circumvent the lack of an arrest power for a violation of the by-law by ordering someone to desist from the violation and then charging them with obstruction."

[27] The purpose of a police force is to encourage, and if necessary enforce, compliance with the law. Thus, in a sense, conduct such as refusing to leave is less an impediment to effective law enforcement where there is an arrest power then when there is not, because in the former case the police have a tool at their disposal to put an end to the violation. This is not to say that the police should be permitted to in effect "create" such a power where none is authorized by statute or common law. As noted, this seems to be the particular concern of the Court in Sharma.

[28] In R. v. Waugh [1994] O.J. No. 2455 (Q.L.) the accused, who was observed parking in a restricted area at an airport, for which he did not have a permit, was found guilty of obstruction of a police officer by his continuous refusal to identify himself. Unlike Sharma, which was specifically distinguished, the governing legislation gave the police various powers, including a power of arrest. Firstly, the Federal Airport Traffic Regulations required the driver of a motor vehicle on an airport to comply with an directions given to him by a constable. Furthermore, every person on an airport was specifically obliged to produce to a constable upon demand any license or permit. Further, the Ontario Highway Traffic Act required that every person unable to surrender a license must, when requested by the police officer, give a reasonable identification. Finally, the Highway Traffic Act included a power of arrest.

[29] In R. v. Hayes [2001] O.J. No. 1133 (Q.L.) police conducted a road check of motor cyclists. Hayes was requested to turn over his helmet for inspection. Upon refusing to do so, he was told he would be charged with obstruction if he did not comply. Upon further refusal, he was charged under s. 129. Mr. Hayes then gave the officer the helmet, which had the required safety sticker on the inside. Mr. Hayes was issue an appearance notice and released within 30 minutes. The Ontario Superior Court stated that as a matter of law "wilfully obstructs" can be satisfied by an act or omission. In examining whether the officer was acting in the course of his duty, reference was made to s. 216(1) of the Ontario Highway Traffic Act which permitted a police officer to require a driver of a motor vehicle to stop. Reference was also made to the Ontario Court of Appeal decision in R. v. Brown (1998) 131 C.C.C. (3d) 1. That decision in turn referenced the various decisions of the Supreme Court of Canada in concluding that the legislation authorized the police to conduct spot check of vehicles for highway regulation and safety purposes, to examine the documents associated with the driver and vehicle, to assess the mechanical fitness of the vehicle, and further to examine

equipment for compliance with safety standards. Our own Court of Appeal has reached a similar conclusion in R. v. MacLennan (1995) 97 C.C.C. (3d) 69 (N.S.C.A.).

[30] A further example of a potential obstruction was given in Hayes as follows

> "Suppose that a driver refused to undo his seatbelt and get out of the car. In those circumstances the officer could not ascertain if the seatbelt were operational and probably could not check the brakes. In my view the decisions of the appellate courts have ruled that the driver has a duty not to interfere with the officer's inspection and therefore the refusal of the driver to undo the seatbelt or get out of the car would be an obstruction of the officer's execution of his duty and would constitute an offence. The driver does not have a duty to manipulate the seatbelt or manipulate the brake pedal to assist the officer to examine it, but he cannot refuse to get out of the vehicle and so interfere with the officer's duty to manipulate that equipment."

[31] In considering the decisions in Daniluk and Johansson, Waugh, Hayes, and others, a common feature appears to emerge . In each case the police officer giving the order or making the request to the individual accused was authorized, in most cases quite specifically, to take such a step. In some cases the power was specifically given in a by-law, in others by the arrest provisions of the Criminal Code, and in some a common law component of the duty was identified. In each case the actions of the police officer when the obstruction occurred were actions undertaken in his capacity as a police officer. Obstruction of a police officer "in the execution of his duty" must be obstruction of the police officer qua police officer and not merely obstruction of a person who happens to be a police officer or a police officer who is not exercising any power given to him in that particular capacity. However troublesome or inconveniencing the latter conduct might be, it does not constitute an offence under s. 129.

[32] For this reason I believe the present case is distinguishable from the foregoing decisions. The Protection of Property Act gives an occupier of premises the power to direct a person to leave. No reason need be given. If a person remains on premises after being requested to leave by the occupier, he commits an offence. While the occupier may authorize another "person" to give such a direction, that direction is given no enhanced significance because it comes from a police officer as opposed to some other civilian. The duty owed by the individual who is asked to leave is one owed to the occupier, and while the police act reasonably and appropriately in attempting to re-enforce the occupier's direction, it does not appear to me that when

they do so they are giving such a direction in any specific capacity which they have as police officers.

[33] The Provincial Legislature presumably might have included (but did not) a specific provision in the Protection of Property Act making it an offence not to comply with a direction given by a police officer, or conversely imposing a positive obligation on a person to comply with such a direction.

[34] It is the occupier who defines and determines who is and is not a trespasser. Permission can be given and revoked at will, at any time. The police themselves cannot make this determination. In contrast, when the police are enforcing the provisions of the by-law or acting at common law to preserve the public peace. or pursuing an investigation, no intervening act of a private citizen is required to define what they may or may not do. In the present case concerning Mr. Fraser, the police acted appropriately and reasonably in repeating the occupier's direction and attempting to persuade Mr. Fraser to leave the DFO office. When he refused to do so they were perfectly justified under s. 6 of the Protection of Property Act to arrest him and to detain him where it appeared necessary to prevent the continuation of the offence. However, Mr. Fraser did not obstruct the police officers qua police officers in the execution of their duty, merely by refusing to leave at their direction, when such was in essence the direction of the occupier being reiterated by the police. That being said, his arrest was justified under s. 6 of the Protection of Property Act, (although this was not the reason given for it). His conduct after arrest posed no difficulties whatsoever.

[35] As a matter of practice and policy it is better to require that a police officer invoke the particular powers assigned to him or her *as a police officer* by the Protection of Property Act by arresting and/or detaining an individual before putting an individual in legal jeopardy of a criminal charge of obstruction by his mere refusal to leave premises.

[36] For these reasons, Mr. Fraser is found not guilty of the offence with which he was charged.

[37] I leave open the question whether the outcome in this case would be different had Mr. Fraser been the subject of a court order prohibiting entry upon the DFO premises at the Coast Guard College pursuant to s. 10 of the Protection of Property Act. In such a case, the police would be giving effect to a judgement and order from a Court, not simply attempting to give effect to the wishes of an occupier.

Dated at Sydney, Nova Scotia, this 11th day of April, A.D., 2002.

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A. Peter Ross, J.P.C.