SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Babin, 2013 NSSC 434

Date: 20131217
Docket: Yar. No. 378079
Registry: Yarmouth

Between:

John Paul Babin

Appellant

v.

Her Majesty the Queen

Respondent

Decision

Judge:	The Honourable Justice James L. Chipman
Heard:	December 17, 2013, in Yarmouth, Nova Scotia
Written Decision:	January 20, 2014
Counsel:	Andrew S. Nickerson, Q.C. for the Appellant Gerald A. Grant, for the Respondent

By the Court (Orally):

INTRODUCTION AND BACKGROUND

[1] The Appellant, John Paul Babin, was charged on May 15, 2001 as follows:

> While carrying out any activity under the authority of a licence, contravene or fail to comply with any condition of the licences in that he did fish gillnets that he was not authorized to fish, contrary to s-s 22(7) of the Fishery (General) Regulations, SOR/93-186, thereby committing an offence under s. 78 of the Fisheries Act, R.S.C. 1985, c.F-14.

[2] At trial, the Appellant admitted the facts alleged to constitute the offence, but defended the charge against him on the basis that he was exercising an existing metis aboriginal right "to fish for food" that was infringed without justification.

[3] The trial took place before the Provincial Court sitting in Yarmouth on various dates between October 9, 2001 and counting the date for sentencing, January 3, 2012.

[4] In a decision rendered December 20, 2011, the Honourable Judge Robert M.J. Prince dismissed the Appellant's metis aboriginal right claim. A Fine Order was issued January 3, 2012.

[5] The Notice of Summary Conviction Appeal was filed February 2, 2012. The five grounds of appeal alleged that the learned trial judge erred in law in his interpretation of the:

1. "effective European control" of western Nova Scotia in a manner that does not give effect to the term "effective" as required by the principles established in *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43.

2. date of "effective European control" of western Nova Scotia by adopting a definition that is not correct in law and does not establish political and legal control as required by the principles established in *R. v. Powley*, supra.

3. date of "effective European control" of western Nova Scotia by adopting a definition that is not correct in law and wrongly equates European presence with European control.

4. date of "effective European control" of western Nova Scotia by adopting a definition that is not correct in law and fails to consider the establishment of treaties as an indication of European control.

5. date of "effective European control" of western Nova Scotia by adopting a definition that is not correct in law and fails to consider the perspective of the native population.

[6] On August 23, 2012 the parties filed an agreement to limit content of transcript pursuant to *Civil Procedure Rule* 91.16 to the proceedings conducted on November 14, 15, 16, 17 and 30, 2006; September 15, 16, 17 and 18, 2008; October 22, 2009; January 11, 2011; and January 3, 2012.

THE MAIN ISSUE ON APPEAL

[7] The principles in the matters to be proven in the establishment of a section 15 right under the Charter of Rights and Freedoms to be recognized as an aboriginal community were established in *R. v. Powley*, supra. That case set out 10 issues to be canvassed by the court as follows:

(1) Characterization of the Right - paragraph 19;

(2) Identification of the Historic Rights-Bearing Community - paragraph 21;

(3) Identification of the Contemporary Rights-Bearing Community - paragraph 21;

(4) Verification of the Claimant's Membership in the Relevant Contemporary Community - paragraph 29;

(5) Identification of the Relevant Time Frame - paragraph 36;

(6) Determination of Whether the Practice is Integral to the Claimants' Distinctive Culture - paragraph 41;

(7) Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted - paragraph 45;

(8) Determination of Whether or Not the Right Was Extinguished - paragraph 46;

(9) If There Is a Right, Determination of Whether There Is an Infringement - paragraph 47; and

(10) Determination of Whether the Infringement Is Justified - paragraph 48.

[8] The issue which is of prime importance to this appeal is the fifth issue "(5) Identification of the Relevant Time Frame". As to that issue the Supreme Court of Canada said in *R. v. Powley*; supra:

> 18 With this in mind, we proceed to the issue of the correct test to determine the entitlements of the Métis under s.35 of the *Constitution Act, 1982*. The appropriate test must then be applied to the findings of fact of the trial judge. We accept *Van der Peet* as the template for this discussion. However, we modify the precontact focus of the *Van der Peet* test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights. [my emphasis]
>
> . . .
>
> 36 As indicated above, the pre-contact aspect of the Van der Peet test requires adjustment in order to take account of the post-contact ethnogesis of the Métis and the purpose of s.35 in protecting the historically important customs and traditions of these distinctive peoples. While the fact of prior occupation grounds aboriginal rights claims for the Inuit and the Indians, the recognition of Métis rights in s.35 is not reducible to the Métis' Indian ancestry. The unique

> status of the Métis as an Aboriginal people with post-contact origins requires an adaptation of the pre-contact approach to meet the distinctive historical circumstances surrounding the evolution of Métis communities.
>
> 37 The pre-contact test in Van der Peet is based on the constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their distinctive existence or relationship to the land. By analogy, the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis. [my emphasis]

STANDARD OF REVIEW

[9] The scope of review of a Summary Conviction Appeal Court was set out by Cromwell, J.A., as he then was, in giving the Court's judgment in *R. v. Nickerson*, [1999] NSJ 210 as follows:

> 6. The scope of review of the trial court's findings of fact by the Summary Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(I) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.C.A.) Per Jones, J.A. at p.176. Absent an error of law or a miscarriage of justice, the test to be applied by the summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.) At 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of

> determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcirpt.

[10] This description has been repeatedly endorsed by the Nova Scotia Court of Appeal; for example: *R.v. RHL*, 2008 NSCA 100; *R. v. Francis*, 2011 NSCA 113; *R. v. MacGregor*, 2012 NSCA 18 and *R. v. Prest*, 2012 NSCA 45. This standard of review was repeated without reference to *R. v. Nickerson* in *R. v. Pottier*, 2013 NSCA 68.

[11] Given my review of the authorities it is fair to say that the responsibility of the Summary Conviction Appeal Court is to review the evidence at trial, re-examine and re-weigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusion.

[12] In so doing, I am mindful of the principles laid out by the Supreme Court of Canada in such cases as *R. v. Sheppard,* [2002] SCC 26 and *R. v. REM,* [2008] SCC 51.

THE EVIDENCE AT TRIAL

[13] The trial was lengthy and involved both lay and expert witnesses. In addition, there were voluminous exhibits, including lengthy and detailed experts' reports. Judge Prince's decision spans just over fifty pages and provides a comprehensive overview of the evidence and competing Defence and Crown positions. The judge makes it clear in his decision that the court must be guided by the principles set out in *R. v. Powley*, supra. He also overtly turns his mind to the principles related to the assessment and treatment of expert testimony referring to lengthy excerpts from McWilliams' Cdn Criminal Evidence, 4th Edition, Volume 1, Chapter 12, pages 117-127. He then concludes his decision as follows:

> In my view this case resolves itself on the basic issue of whether there is proof on the balance of probabilities that an historic Métis community existed prior to effective control by Europeans.
>
> The proof before me on these issues is founded on the testimony of Dr. Chute and Dr. Wicken on behalf of the Defendant as well. The rebuttal evidence on the Crown's part is provided by Dr. Patterson and Dr. von Gernet. I have qualified each to give expert opinion evidence in their respective fields. Their evidence was of assistance to the Court in considering the whole of the evidence.

I must address the issues raised on behalf of the Defendant regarding the testimony of Dr. von Gernet. Counsel at trial raised concerns regarding the impartiality of this witness both on the voir dire and in final submissions. As a result of these comments I took particular care to examine the 7 volumes of supporting documents that are exhibits 37-44. As a result I have satisfied myself that his scholarship and statements are accurate as was his methodology. I can appreciate the comments of Defence counsel but I have concluded that if the tone of his writings and viva voce evidence caused some concern I am satisfied nevertheless that whe he says is accurate and supported fully by his sources. His testimony deserves significant weight and was most helpful to the Court in assessing issues raised at trial.

The evidence of Dr. Chute was at sometimes confusing in relation to terms used to describe person of mixed blood and person who were members of a dstinct historic Métis community. It is my view that the problem was related to the parameters within which the report was created. She certainly possesses vast knowledge. It does not appear that her testimony and report were designed to address the precise issues before the Court. Perhaps as a result, some of her statements regarding the description of individuals are not adequately supported by sources. It is difficult for me to understand and rely on her evidence. Again, I wish to emphasize that I am not critical of her as a witness but rather unclear as to the issues she was trying to address and the parameters within which she was testifying.

There were a number of references to sources that caused some concern and it would appear that they were in some cases not resolved by the provision of corrective information. I have also considered Dr. von Gernet's testimony with respect to the actual statements of some of the sources which were not in accord with the viva voce testimony of the witness. This has an impact on the weight I can accord to her testimony.

With respect to the testimony of Dr. Wicken I found him to be a knowledgeable and capable witness. There were instances where it was unclear how he interpreted some of the sources. But his testimony overall supports his opinion. This opinion it would appear is not one that is shared by a number of historians referred to in the evidence before me. He was, however, firm in his defence of his position that effective control was not achieved until 1775 and that there was a distinct Métis community in place before effective European control was

> established. I must consider the lact of primary source support for this opinion in assessing his testimony.
>
> Dr. Patterson testified with respect to a number of issues and I have concluded that his evidence from all perspectives is deserving of significant weight. Hie testimony and approach was most helpful to the Court in resolving the issues put forth at trial. His opinion seems to have the support of other historians who have been cited in documentary and viva voce evidence. I consider his opinions to be reliable. Therefore, with respect to his opinion on the date for effective contril I accept his evidence as establishing that effective control by the Europeans would have been established first by France and then by Britain from 1670 onwards. I also accept his opinion that there is insufficient evidence of sources to suuport the existence distinct historical Métis community extant before 1670.
>
> The testimony and report of Dr. von Gernet supports the conclusions arrived at by Dr. Patterson on the issue of the existence of the distinct historical Métis community.
>
> I have carefully weighed the evidence of the witnesses and the materials submitted in support and I have concluded that there is not proof on the balance of probabilities that there has been established the existence of an identifiable, historic, right-bearing Métis community in the area of Eel Lake with a degree of continuity and stability sufficient to support a site-specific aboriginal right claim.

ANALYSIS AND DISPOSITION

[14] Returning to the main argument advanced on appeal, having regard to the decision of the Court below I conclude that the trial judge correctly interpreted *R. v. Powley*, supra. In doing so, he relied on and explicitly preferred the expert evidence of Dr. Patterson to conclude the date of effective European control for

the area in question to be 1670. Further, he explicitly preferred the expert evidence of Drs. Patterson and von Gernet in concluding there was no proof on a balance of probabilities that there was established at any time the existence of an identifiable, historic rights-bearing métis community in the area of Eel Lake with a degree of continuity and stability to support a site specific aboriginal right claim.

[15] I find the reasons as set out in his decision make it abundantly clear what the decision is as well as the basis in fact and law for the decision. In my view Judge Prince's decision makes it clear he carefully examined and weighed the evidence in the context of the proper authorities.

CONCLUSION

[16] In conclusion I find the appeal to be without merit. The trial judge heard the evidence and made reasonable findings of fact. He assessed the experts' competing evidence, and made the calls.

[17] In my view he did so correctly in the context of the authorities. There was ample evidence to support the trial deicision and I would not disturb it. The decision is fulsome and provides the reader with a clear understanding of why it was made. In the result, I dismiss the appeal.

Chipman, J