R. v. *Beaver*, 2006 NWTSC 01

Date: 2006 01 05
Docket: S-1-CR-2004000142

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

MICHAEL BEAVER

Appellant

Summary conviction appeal of conviction under s. 57(1)(a) of the *Wildlife Act*, R.S.N.W.T. 1988, c. W-4 as amended.

Heard at Yellowknife, NT on October 13, 2005.

Reasons filed: January 05, 2006

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant:	Bradley W. Enge
Counsel for the Respondent:	John MacFarlane

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REASONS FOR JUDGMENT

[1] The Appellant represented himself at his trial in Justice of the Peace Court on a charge of wasting big game meat, contrary to s. 57(1)(a) of the *Wildlife Act*, R.S.N.W.T. 1988, c. W-4 as amended.

[2] He now appeals his conviction and raises a number of issues about the trial. In light of the conclusion I have reached on one of those issues there must be a new trial and so I will not deal with all of the grounds of appeal.

[3] The ground on which I allow the appeal is the failure of the presiding Justice of the Peace to make an inquiry as to whether there was an unreasonable search and seizure, contrary to s. 8 of the *Canadian Charter of Rights and Freedoms.*

[4] The accused was not represented by counsel at trial. On being asked by the Justice of the Peace whether he understood the charge, he indicated that he did and that he was prepared for trial.

[5] The record is not clear as to whether the Crown was represented by counsel at the trial or a wildlife officer or police officer. In any event, having ascertained that the Crown was calling one witness, the Justice of the Peace asked, “Do you expect any Charter issues to arise?”, to which the Crown representative answered, “I don’t”. It is not

possible to tell from the record whether the question was addressed to the Crown only or both the Crown and the Appellant; in any event, the record reveals no response from the Appellant.

[6] The Crown witness was a renewable resource officer. He testified that on the date in question he and another officer:

> attended at Mr. Beaver's residence to ask him some questions regarding a Bison hunting investigation that we were conducting and when we went to the house we noticed the smell of meat, what I would describe as the smell of spoiled meat in the air. So we walked around to the back of the house where the smell was coming from and looked inside the shack where the smell was coming from. There was no door, there was just a blue tarp. And when we looked inside we saw three bags that we were pretty sure was meat on the floor inside the shack.

[7] The officers subsequently located and spoke to the Appellant and then returned to the shack with him and seized the bags of meat.

[8] The *Wildlife Act* sets out the authority of renewable resource officers to enter onto property and search in s. 68, subsections (1) and (2) of which provide:

> 68. (1) Where an officer reasonably believes that a person is committing or has committed an offence under this Act or the regulations, the officer may
>
> > (a) with a search warrant, enter and search any premises, conveyance, camp, box, bale, pack, container or parcel in which the officer reasonably believes that he or she may find any wildlife or other article evidencing the commission of the offence;
> >
> > (b) where a justice empowered to issue a search warrant is not readily available, without a search warrant, enter and search any premises, conveyance, camp, box, bale, pack, container or parcel in which the officer reasonably believes that he or she may find any wildlife or other article evidencing the commission of the offence; ...

[9] There is no indication in the evidence before the Justice of the Peace that either of the preconditions in s. 68 were fulfilled prior to the renewable resource officers entering onto Mr. Beaver's premises to look inside the shack. Nor is the evidence very clear about exactly what they did when they went to the back of his house. However, the evidence on the record does give rise to the concern that they conducted an unauthorized search, one that might be found to be contrary to the guarantee in s. 8 of the *Charter* that, "Everyone has the right to be secure against unreasonable search or seizure".

[10] The Appellant did not raise any *Charter* issues at trial. His cross-examination of the Crown witness and his own testimony focused on the state of the bison meat located in the shed and what he had done with it and planned to use it for. He did not complain specifically about the officers having looked in his shack. He did testify that when he was being questioned by the officers after they had been to his home, the sub-chief of his band told him he did not have to say anything to them because "all they like to do is harass the native people with their laws", and so he did not say anything more to the officers at that point. That could be taken as an oblique reference to being concerned about the officers infringing his rights.

[11] The Crown relied on the general principle that an issue not raised at trial cannot be raised for the first time on appeal. I was referred to the dissenting judgment of L'Heureux-Dubé J. in *R. v. Brown*, (1993) 83 C.C.C. (3d) 129 (S.C.C.), in which she set out the prerequisites for raising a new issue, including a *Charter* challenge, on appeal (the majority judgment took no issue with this):

> 1. there must be a sufficient evidentiary record to resolve the issue;
>
> 2. it must not be an instance in which the appellant for tactical reasons failed to raise the issue at trial;
>
> 3. the Court must be satisfied that no miscarriage of justice will result from refusal to consider such new issue on appeal.

[12] In this case, the evidentiary record is not sufficient to resolve the issue. The appropriate remedy would be a new trial, where both the Crown and the Appellant would have the opportunity to bring forth evidence about the officers' actions and make argument as to the *Charter* implications. There is no reason to think that the failure to raise the issue at trial was a matter of tactics as the Appellant was unrepresented. Finally,

on the trial record, it is not possible to say that no miscarriage of justice will result from refusal to allow the *Charter* issue to be considered at a new trial. It is not possible to say what the result would have been had the issue of the legality of the search been thoroughly canvassed at trial.

[13] Some of the cases, such as *R. v. Sveinson*, [1990] M.J. No. 671 (Q.B.), point out that under section 24 of the *Charter*, the person whose rights and freedoms are said to have been denied must apply for a remedy. However, as was also the case in *Sveinson*, here we are dealing with an unrepresented accused and the court would likely allow some latitude for his failure to assert in a formal fashion the infringement of his rights.

[14] In *Sveinson*, the accused had made no complaint at all about infringement of his *Charter* rights, but the trial judge had, without hearing submissions on the point, decided that they were infringed and dismissed the case. In allowing the Crown's appeal, Krindle J. referred to the fact that the accused had made no complaint about his rights, but said that had the accused directly or indirectly been the mover behind this entire area of consideration, she would have ordered a new trial. As he had not, she substituted a conviction for the acquittal granted at trial. In the case before me, while the Appellant made no direct complaint about his rights at trial, I also take into account, as described at the beginning of these Reasons, that it is not clear whether the Justice of the Peace sought a response from the Appellant about whether any *Charter* issues were expected.

[15] The Justice of the Peace did the right thing by trying to ascertain whether any *Charter* issues were anticipated, although it should also have been made clear for the record what the Appellant's response was to the question posed about that. The difficulty, of course, is that a layperson may not always recognize a *Charter* issue and may be unable to assist the Justice of the Peace in that regard. However, even though the Appellant did not raise or pursue the issue, the legality or otherwise of the search is an issue that clearly arises from the evidence given by the Crown witness at trial. In my view, this case falls within the principle stated by Oland J.A. in *R. v. Travers* (2001), 154 C.C.C. (3d) 426 (N.S.C.A.): "... where there is strong evidence of a *prima facie* case of breach of a *Charter* right relevant to the proceeding, a judge has a responsibility to raise the issue, invite submissions and, if appropriate, to conduct an exclusionary hearing in order to protect the integrity of the judicial process". Failure to make that inquiry amounts to an error of law.

[16] I have reviewed other cases cited where appellants were not permitted to raise *Charter* issues for the first time on appeal, for example, *R. v. Ubhi*, [1996] B.C.J. No. 934 (C.A.); *R. v. C.J.*, [1997] M.J. No. 31 (C.A.); *R. v. R.R.* (1994), 91 C.C.C. (3d) 193

(Ont. C.A.). In those cases, the challenge raised for the first time on appeal was to legislation or to the constitution of the court. In my view the situation is different where, as here, the possible *Charter* violation arises from the trial evidence itself.

[17] For the foregoing reasons, I allow the appeal, quash the conviction and order a new trial.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
05 day of January 2006

Counsel for the Appellant: Bradley W. Enge
Counsel for the Respondent: John MacFarlane

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