
CANADA / JUDGMENT

R. v. Mission Western Developments Ltd.

2011 BCSC 1378

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1378 R. v. Mission Western Developments Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Mission Western Developments Ltd.,

2011 BCSC 1378

Date: 20111014

Docket: 58083-1

Registry: Chilliwack

Between:

Regina

Appellant

And

Mission Western Developments Ltd. and

Blake Larsen

Respondents

Before: The Honourable Mr. Justice Grist

On appeal from: Provincial Court of British Columbia, August 27, 2010

(R. v. Mission Western Developments Ltd., Abbotsford Registry Docket 70318-1)

Reasons for Judgment

Counsel for the Appellant, the Public Prosecution Service of Canada:

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Counsel for the Respondents:

P.D. Le Dressay

Place and Date of Hearing:

Chilliwack, B.C.

March 10-11, 2011

Place and Date of Judgment:

Chilliwack, B.C.

October 14, 2011

- [1] The Crown appeals the acquittal of the defendants on two charges of harmful alteration of fish habitat contrary to s. 35(1) of the federal Fisheries Act, R.S.C. 1985, c. F-14.
- [2] At the commencement of the trial on these charges, the defence challenged evidence the Crown intended to introduce through a Fisheries Officer and a biologist, both employed by the federal Department of Fisheries and Oceans [DFO], of their attendance at a property owned by the corporate defendant, on February 18, 2008, along with photographs, observations and notes they had taken at the site. The evidence was challenged as resulting from an illegal search in violation of the Canadian Charter of Rights and Freedoms [Charter] s. 8. The Crown's response was that the actions of the Fisheries employees were within the powers of inspection set out in s. 49(1) of the Fisheries Act. In the Crown's submission, actions reasonably falling within these powers to inspect do not breach the s. 8 right to be secure against unreasonable search.
- [3] Following a voir dire heard on February 22 and 23, 2010, the trial judge, on February 24, 2010, handed down reasons finding a breach of s. 8 and subsequently excluded the evidence under s. 24(2). The trial continued and ultimately the accused were acquitted of the two Fisheries Act charges.
- [4] The Crown appeals the acquittal alleging errors in law in the finding that there was a s. 8 breach, and the subsequent exclusion of evidence under s. 24(2). For the reasons given below, I agree with the Crown's position in respect of the s. 8 breach. I have not gone further to consider the grounds advanced relating to the decision to exclude under s. 24(2).

Background

- [5] In September 2007, the corporate defendant purchased the property on which the Crown alleges the Fisheries offences occurred. It is located in Mission, British Columbia, in an area which has been developed for commercial use, consisting primarily of strip malls and a large shopping centre. The property covers an area of about five acres. It is a corner property, bordered on the west and south by major thoroughfares. There are no buildings on the property, but approximately two-thirds of the area nearest the intersection has been filled and levelled for a commercial development. The remaining portion of the property to the east and north of the filled area accommodates Windebank Creek, a fish bearing watercourse. The creek is at a considerably lower elevation than the adjacent filled area, with the higher elevation sustained by a stepped concrete retaining wall approximately 30 feet high. Trees and brush cover much of the lower level. The photographs the Crown attempted to introduce into evidence depicted that much of the vegetation had been recently cleared and some of the trees had been cut and stacked.
- [6] The corporate defendant purchased the property from a previous owner that had begun work intended to lead to a commercial development of the site. They had modified the contour of the property after receiving permits from the City of Mission which had stipulated the involvement of the federal Department of Fisheries and Oceans in respect of the impact on Windebank Creek. One of the project requirements was that a restrictive covenant be registered on title. The restrictive covenant outlined the area contiguous to the creek and restrained any buildings from being constructed there, from cutting down trees and removal of ground cover. The previous owner had also entered into an agreement with the DFO which required remedial measures by way of planting favourable species of plants, and maintaining the area free of invasive varieties in order to enhance the habitat and ensure it remained viable. The commitments in this regard had been allowed to lapse and the corporate defendant was in the course of dealing with the DFO in order to carry on with the development.
- [7] The narrative giving rise to the charges begins with observations made by Ms. McDonald, a DFO biologist, who passed the site each day on her way to work. On February 18, 2008, she noted that the vegetation in the area of the creek appeared to be less dense. She brought this up with DFO Fisheries Officer McGuire-Funk. The two decided to inspect the site and attended there later that day.
- [8] Most of the perimeter of the area adjacent to the creek is contained by a chain mail fence. The fence, however, does not completely contain the area and there is a ramp-like structure that allows access from the west. This was to allow access by City officials to the lower site. There is also a point of entrance from the east side of the property where a gate had been constructed at the end of a short side-road. The evidence given by Mr. Larsen, a director of the corporate defendant also charged in the Information, was that the fence was maintained to restrict access to people who would come onto the site to live there for periods of time and to consume drugs. His evidence was that "No Trespassing" signs also were posted along

the perimeter, but that these were often removed and he could not say if they were in place on February 18, 2008.

- [9] When the DFO employees arrived, at about 11:00 a.m. that day, the gate giving access from the side-road was open and they walked down to the creek. They noted the cut and stacked trees and the removal of bush. A Bobcat was working on the site. They spoke with the operator of the Bobcat, who informed them that the owner of the property had hired him to clean up the area.
- [10] The DFO employees asked the Bobcat operator to discontinue work, and they proceeded to take photographs and make observations in relation to any apparent impact upon the creek. After about one hour, they left the property.
- [11] The evidence for the Crown on voir dire consisted of the evidence of the two DFO employees. The defence called Mr. Larsen and his fellow director, Mr. Weiss.
- [12] Ms. McDonald, the DFO biologist, gave evidence of changes to the site on her way to work. She was asked if she was able to determine if there had been a harmful impact to the fish habitat from what she first observed. Her answer is transcribed in the evidence of February 22, 2010, p. 11 at lines 13-16:

Not 100 percent. It's something you have to actually visit the site and have a look to be able to make a determination of whether or not there were impacts to -- fish.

- [13] She then gave evidence of speaking to Fisheries Officer McGuire-Funk and their attendance at the site, coming onto the property through the open gate and being met by the man who was operating the Bobcat. She described her subsequent actions as follows, on p. 16 at lines 35-37:

I walked the stream corridor and made observations and took photos of the works that had been completed.

- [14] On cross-examination, it was put to her that they were there to gather evidence of harmful work being done and to make a charge. The subsequent answer and following exchange is on p. 28 at lines 3-33:

A We were going to inspect the site to determine what works had occurred and whether or not those works were having harmful effect on fish habitat. So we were -- we were attending the site to -- to inspect, to look and see what had happened.

Q To -- can you -- go ahead.

A That was it.

Q To inspect, so that if there was a harmful work going on you would lay a charge.

A Not necessarily, no.

Q You would put -- give the information to Crown counsel to see if they would lay a charge.

A That's not -- it's not necessarily always the way the process works. We were -- we were going to observe what happened and then there's -- many -- I mean, this is sort of a frequent occurrence for us. There's many different approaches and follow-ups and next steps that -- typically occur with this type of issue. so it wasn't -- certainly wasn't our intent to attend the site and then proceed with -- charges. It was just -- at that point, it was just going to make some observations.

Q Well, you weren't seeking a resolution of the matter, were you?

A At that point, before we went to the site, we didn't know what type of resolution we needed to seek, until we --

Q Well --

A -- saw the works.

[15] On p. 32 at lines 11-47; and p. 33 at lines 1-21, similar questions were put to her:

Q ... And you went around the property making observations and taking photographs.

A Yes.

Q Correct? And you've written an expert report on this matter. You -- you're prepared to give expert evidence in this matter, correct?

A Yes.

Q And all the expert evidence you can give is based upon all those observations you made on February 18th, 2008, correct?

A Yes.

Q Okay. And you realize that the expert report or the expert opinion evidence you were going to give in this matter was for prosecution, of course.

A Yes.

Q And the evidence that you gathered on February 18th, 2008, you were gathering evidence and the main purpose, I suggest to you, was for a prosecution.

A At the time, we didn't know what was going to happen. There's -- there's usually -- when we come across sites like this, we will make our observations at the time and then we will decide -- you know, the people in our department who are responsible for making those decisions makes them at a different time. But my role as a biologist is to have a look at the site and make opinions and -- and statements about impacts to -- to fish and fish habitat.

Q And to gather the evidence so that, if the decision is made, you will have the sufficient evidence that a prosecution can take place. That was one of your purposes.

A We tend to take photos at most sites we visit. At the time, I -- I wasn't -- it certainly wasn't something that was going through my mind that I need to gather all this evidence for prosecution purposes or whatever the next step would've been. At the time, it was just sort of gathering observations and taking photos as we typically do.

Q Well, Ms. McDonald, on February 18th, 2008, you knew there was a number of possible outcomes of what you were doing, right?

A Corrrrect.

Q And one possible outcome was prosecution.

A Yes.

Q And you wanted to make sure that -- you did your job to make sure that the -- the people who would make the decision on the prosecution would have the necessary evidence to carry forward that prosecution.

A I want to make sure that I had enough evidence for myself, so that I could formulate an opinion on -- on the impacts at the site.

Q And do your part in a prosecution.

A Just do my job, not necessarily in a prosecution.

[16] The evidence of these events given in chief by Fisheries Officer McGuire-Funk is on p. 36 at lines 31-47:

Q Returning to the February 18th, at the time that you went to this site, in your mind, did you believe that a habitat violation had been committed?

A I was aware our habitat biologists were concerned, but I did not conclude that a violation had taken place. I had not seen the site and was not aware of the amount or extent of work that had been done on the site.

Q And what was your purpose in going to the site at that point, Officer?

A It was to take a look at the site, help take any photographs, measurements and to see what work had been done.

Q At that point, had you given any thought to whether charges would be laid?

A No, Your Honour, I hadn't.

[17] And on p. 51 at lines 38-47; and p. 52 at lines 1-38, in cross-examination:

Q ... [A]fter you had stopped all the work that was going on on the property, you searched this private property for one full hour and took photographs to use in evidence and made observations to be used in evidence against my clients.

A I did take photos that were used later to determine whether or not a violation took place, yes.

Q Do you think, Officer Funk, that's a proper use of your powers of inspection?

A Yes, I do, Your Honour. Until you get on the site and walk the entire site, I was unaware of the extent of the work. And until I got back to the office and looked at the file, I was unaware what plans were in place for the area. At that time, inspections, when it comes to habitat, do include looking at the entire area to determine the extent of what went on before that information can be brought to a biologist who can then look at that information and determine whether or not the works that were done were a harmful alteration.

Q Well, let's just stop there, Officer Funk. When you spoke to the worker, you could see -- you'd -- you'd gone onto the property, inspected, you spoke to the worker, stopped the work, correct?

A That's correct, Your Honour.

Q You'd agreed with me you could see that some work had gone on, then?

A Yes, Your Honour.

Q And you could see a Bobcat on the property, correct?

A That's correct, Your Honour.

Q You could've easily gone back to your office and applied for a warrant, correct?

A No, Your Honour, I don't believe I personally would have not had enough information to apply for a warrant as the area I saw was a small area. The Bobcat was off to the side. Again, I had no idea to the extent and whether or not the works actually conducted were a harmful alteration. I believed at the time that under my powers of inspection I am allowed to go onto the property to collect that information that helps determine whether or not harmful alteration has taken place.

[18] Fisheries Officer McGuire-Funk spoke to the Bobcat operator. The evidence of this conversation was recorded on p. 47 at lines 35-47; and p. 48 at lines 1-11:

Q ... [A]nd you tell me if this is correct, my note is that you said you "explained to the worker that there was no permit in place and some paperwork had not been done," is that -- do I have that right?

A I have -- it was something to that effect, Your Honour, yes. I've got, Your Honour, some brief notes that I did take at the time, where I jotted the bits and pieces of our conversation in my notebook.

Q Did you explain to him that a permit was not in place and that paperwork had not been done?

A It would've been that type of information that I explained to him, Your Honour.

Q And, as a result of you telling that worker that information, the worker stopped working.

A Yes, Your Honour, he did.

Q What permit was missing?

A Your Honour, there would've been notice to the office that works on the property were beginning. There's a notification clause in the application that the habitat section has and they're to be notified prior to any works that were permitted commencing.

[19] Neither DFO employee saw a "No Trespassing" sign posted on the property and both indicated that they entered through the open gate.

[20] The evidence of Mr. Larsen and Mr. Weiss, called by the defence on the voir dire, provided details of their application for planning approval for their development, which involved a City of Mission stipulation that they comply with the DFO requirements in respect of enhancing and maintaining the creek area. Their evidence was that the fence around the property was maintained to guard against liability claims being made against the company, and to discourage shanties being constructed and drug use in the area of the creek. Neither was on site on February 18, 2008 and accordingly, they could not give evidence of the events of that day.

The Decision on Voir Dire

[21] In dealing with the power to inspect under s.49 of the Fisheries Act, the trial judge said at paras. 45 and 46 of his reasons:

45 Finally, the Fisheries Act contains a power, at s. 49 for an officer to enter and inspect places for the purposes of ensuring compliance with the Act. However, where the predominate purpose of the entry is to gather evidence for the purposes of a penal proceeding, then this section will not avail the officer and a warrant must be obtained. Relying on R. v. Campbell, [2005] B.C.J. No.3160.

46 It is submitted that the defendants has a reasonable expectation of privacy in the Windebank Creek area that was part of their property for the following reasons:

- (a) They owned it;
- (b) They had fenced it;
- (c) They exercised their right to exclude others;
- (d) They expected their privacy rights to be respected;
- (e) Any reasonable person looking at the property, seeing the fences, seeing the "No Trespassing" signs, seeing the area that it was in within an urban area would reasonably conclude that the owner of the property expected privacy upon that property -- and particularly privacy in the sense of excluding others from entry at will.

[22] He continues at paras. 48-51:

48 This property is private and is not unoccupied property open to the public. This is urban property. This property was heavily overgrown with bush. This property could not be observed from the street. This property could only be observed upon entry and that is why the officers entered on February 18, 2008. It was gated, fenced and posted with "No Trespassing" signs.

49 If the officers were entering on February 18, 2008, to determine if illegal works were being undertaken as an inspection pursuant to s. 49, then they would have conducted an inspection. However, the predominant purpose of the entry was not to inspect. Rather, statements were taken, observations were made and photographs were taken. This was a penal investigation. They could have inspected, then went away and obtained a warrant.

50 There were no exigent circumstances. As for the issue of reasonable search, it is argued by the defence that this was a warrantless search and therefore it is presumed to be unreasonable.

51 The onus is on the Crown to establish that the search was authorized by law, that the law authorizing the search was reasonable and the manner in which the search was carried out was reasonable. It is submitted that the Crown cannot demonstrate any law which authorizes this search. This was not an inspection but a penal investigation. Absent the inspection power, there is no law to authorize this search and therefore the search violated the s. 8 rights of the accused.

[23] In dealing with Mr. Larsen's separate right to protection under s. 8 of the Charter, the trial judge said at para. 47:

47 Mr. Larsen has as much of a privacy interest as Mission in the property it is submitted by defence. Section 8 protects people not places. Mr. Larsen is being charged in his role as a director of Mission Western Developments Ltd. Mr. Larsen as an officer and director of that company had a right to access the lands and to exclude others. He had the same rights and expectations as the company in respect of the land in terms of s. 8 of the Charter.

Scope of the Appeal

[24] It is uncontested that the Crown appeal can only be founded on an error in law or a finding of fact that is unreasonable or cannot be supported by the evidence. *British Columbia. v. Posselt*, [1999] B.C.J. No.1141 (S.C.).

Analysis

[25] The question on appeal is whether the DFO employees' entry onto the development site and their actions in observing the state of Windebank Creek, recording their observations by notes and photographs, and inquiring into the activities of the Bobcat operator, constitute an infringement of the defendants' right under s. 8 of the Charter to be secure from an unreasonable search.

[26] Two aspects of analysis are focal to this question. First, whether the defendants had a reasonable expectation of privacy in respect of the property; and second, whether in the context of the powers of inspection conferred on the Fisheries Officer by s. 49(1) of the Fisheries Act, the DFO actions can be construed as an unreasonable search (*R. v. Edwards*, [1996] 1 S.C.R. 128 (S.C.)). In *Edwards*, these two questions of reasonableness are described as distinct. However, in the circumstances of a regulatory inspection, the authority to inspect can operate to diminish the expectation of privacy, but may also be relevant in

circumstances where the regulatory authority is alleged to have been used as a guise for some other unauthorized purpose, and amount to an unreasonable search for an unauthorized purpose. In this sense, the statutory power to inspect needs to be considered in both contexts.

- [27] At para. 48, the trial judge characterized the property as, "private and ... not unoccupied property open to the public." He comments that it was, "gated, fenced and posted with 'No Trespassing' signs", but it is also clear from the evidence that the fencing was primarily to guard against liability claims, construction of shanties, and to protect it from being an area for drug use. It was otherwise a development property which did not house any of the activities of the corporate defendant, nor was it used for any personal purpose by Mr. Larsen. Further, the evidence was that the gate was open on February 18, 2008, allowing the DFO employees to enter the site and the "No Trespassing" signs were not evident.
- [28] As indicated in *R. v. Lauda* (1999), 136 C.C.C. (3d) 358 (Ont. C.A.), there is no 'open fields doctrine' in Canadian law necessarily negating a reasonable expectation of privacy in respect of unoccupied land. Rather, as also indicated in *Lauda*, recognition of such a reasonable expectation should proceed on a case by case analysis of the factors at hand that might be recognized generally as giving rise to an expectation of privacy, both reasonable and worthy of protection.
- [29] In this case, the fact that the company maintained a fence around most of the property and tried to restrict unauthorized use of the property by the fencing and "No Trespassing" signs were relevant considerations in assessing whether a reasonable expectation of privacy existed. But consideration should have also extended to the fact that the fencing and signs were at least primarily to protect from liability and exclude unauthorized use; and that on the day the DFO employees attended, the gate was open and no signs were evident.
- [30] Further, this is a case involving property intended for commercial development, a highly regulated use which cannot be expected to sustain a reasonable expectation of privacy over the statutory powers of inspection given to regulatory authorities. The defendants knew the development depended on approvals that required meeting DFO standards, and that use of the lower portion of the property was constrained by commitments to maintain and improve the fish habitat and to notify the DFO of work being done on the site.
- [31] In *R. v. King*, 2009 PECA 9 [King], the effect of the regulatory power and statutory right of inspection provided by s. 49(1) of the Fisheries Act was considered an element in the analysis of the expectation of privacy. At para. 40, the Court said:

40 There is a much reduced expectation of personal privacy when inspection powers are exercised upon an individual participating in a highly regulated endeavour like the fishery. In a regulated environment, the individual's privacy interests must give way, more quickly than in criminal or quasi-criminal environment, to the need for broader powers of search and seizure.

- [32] In King, the inspection was of a shed operated by the defendant containing illegally caught lobster, but the same statutory power of inspection is at issue here, and I see no lesser objective in the need to protect fish habitat in a fish bearing creek.
- [33] The significance of a statutory power of inspection was commented upon in another context in *R. v. Nolet*, [2010] 1 S.C.R. 851 (S.C.C.) [Nolet], a case involving a stop of a commercial truck for an inspection authorized by the Saskatchewan Highways and Transportation Act, 1997, S.S. 1997, c. H-3.01. At para. 31 of Nolet, Binnie J. recognized that the sleeping area of the cab of the transport truck, "suffices as a temporary mobile home", but that "[n]evertheless, the level of expectation [of privacy] is necessarily low because the cab of a tractor-trailer rig is not only a place of rest but a place of work, and the whole of the cab is therefore vulnerable to frequent random checks in relation to highway transport matters."
- [34] In this case, in my view, the trial judge erred in law in failing to consider these relevant factors in assessing whether the defendant had a reasonable expectation of privacy in the circumstances accompanying the DFO employees' attendance on February 18, 2008. On consideration of all of the relevant circumstances relating to the property itself and the ongoing relationship with DFO, the defendants had, at best, a very diminished reasonable expectation of privacy in the property relating to the DFO inspection.
- [35] The second consideration of reasonableness relates to whether the activities of the DFO employees should, nonetheless, be considered as an unreasonable search.
- [36] In Nolet, the court discussed a number of decisions in which, as in this case, the court used a predominant purpose test to determine the context relevant to the purported unreasonable search in circumstances where the actions of the police or other authority might have been initiated or have been contemporaneous with a valid regulatory purpose. At para. 41, Binnie J. said:

41 [T]he question is not "determining which purpose is predominate or subordinate" ... [a]s long as there is a continuing regulatory purpose on which to ground the exercise of the regulatory power, the issue is whether the officer's search ... infringed the reasonable expectations of privacy of the appellants.

[Internal citations omitted.]

- [37] In the fisheries context, Cromwell J.A. for the Nova Scotia Court of Appeal in *R. v. Wilcox*, 2001 NSCA 45, discussed a number of cases which attempted to draw a line distinguishing the use of authority to inspect under a regulatory provision from effecting a search for a criminal law purpose. At para. 106, he concluded:

106 In my respectful view, the search for a particular point in time or fact that is, of itself, the watershed between regulation and criminal prosecution is not the correct way to approach the issue. The question in each case is not whether a particular action or the exercise of a particular power should be labelled "regulatory" or "criminal". The question is whether the Charter has been infringed. One must define the content of the Charter right in the particular setting. This cannot

be done, in my view, by establishing "lines" or "points" which divide regulatory inspections from criminal investigations. I respectfully adopt the remarks of Lane J. in *Pheasant*, supra at [paragraph] 66 that what is required is "... a case-by-case approach which rejects simplistic distinctions based on characterizations of powers as criminal, quasi-criminal, administrative or regulatory". Or, as LaForest J. put it in *R. v. Wholesale Travel*, supra, what is important are not labels but the values at stake in the particular context (at p. 209); see also *Baron v. Canada*, [1993] 1 S.C.R. 416 at 444.

[38] In this case, the only evidence relating to the purpose for the DFO employees' attendance on February 18, 2008, was that of the employees themselves. They described what prompted their attendance, that what they did was typical of an inspection of fish habitat, and denied that their purpose was to gather evidence to support a preconceived prosecution. There were no adverse findings of credibility to suggest the contrary but, putting this aside, their attendance was, at the least, prompted and accompanied by a valid regulatory purpose.

[39] The core of the trial judge's decision is found in para. 45:

45 ... [W]here the predominant purpose of the entry is to gather evidence for the purposes of a penal proceeding, then this section [s. 49(1)] will not avail the officer and a warrant must be obtained.

[40] And at para. 49:

49 If the officers were entering on February 18, 2008, to determine if illegal works were being undertaken as an inspection under s. 49, then they would have conducted an inspection. However, the predominant purpose of the entry was not to inspect. Rather, statements were taken, observations were made and photographs were taken. This was a penal investigation. They could have inspected, then went away and obtained a warrant.

[41] There appears to be nothing in the evidence to support that what was done was different from other inspections and both DFO employees denied any preconceived intent to prosecute. I see nothing to suggest that the making of observations and the taking of notes and photographs were anything but consistent with the usual course of a habitat inspection. The Fisheries Officers' conversation with the Bobcat operator to identify what he was doing on the site, inform him of the notice requirement, and to ask him to discontinue work, was hardly an interrogation and, in my view, consonant with a DFO inspection.

[42] But turning to the test applied by the trial judge, his decision was based on a finding of predominant purpose, which on the above authorities was the wrong test to apply in the circumstances of a legitimate Fisheries concern. In that context, the actions of the DFO employees cannot be seen as unreasonable or a guise for some other unauthorized purpose.

Conclusion

- [43] In my view, the decision on voir dire was founded on errors in law. The defendants had a minimal expectation of privacy from inspection under the statutory authority conferred under s. 49(1) of the Fisheries Act and the actions of the DFO employees did not, in the context of a legitimate concern for fish habitat, constitute an unreasonable search.
- [44] The evidence suppressed by the trial judge's finding on voir dire was relevant to the Crown's case. It appears to be material evidence in that it consisted of the DFO employees' detailed observations on the date most relevant to what the Crown says was a harmful alteration of habitat, and it has the prospect of being significant to the outcome of the case. Accordingly, the appropriate order is to uphold the appeal and remit the matter to the Provincial Court for retrial.

"W.G. Grist J."

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