

**PROVINCE OF PRINCE EDWARD ISLAND  
IN THE SUPREME COURT - APPEAL DIVISION**

Citation: R. v. Watson et al. 2007 PESCAD 18

Date: 20070824

Docket: S1-AD-1116

Registry: Charlottetown

**BETWEEN:**

**PAUL FRANKLIN WATSON AND COLIN BIROC, ANDRE CASANAVE,  
MEAGAN SOUTHERN, LAURA DAKIN, GEORGES FRITZ, RYAN GOYETTE,  
PETER HAMMARSTEDT, MATTHEW SCHWARTZ, LISA SHALOM,  
JERRY VLASK AND ALEXANDER CORNELISSEN**

**APPELLANTS**

**AND:**

**HER MAJESTY THE QUEEN**

**RESPONDENT**

Before: The Honourable Chief Justice G.E. Mitchell  
The Honourable Mr. Justice J.A. McQuaid  
The Honourable Mr. Justice K.R. MacDonald

Appearances:

John K. Mitchell, Q.C., counsel for the Appellants

Paul B. Adams, counsel for the Respondent

Place and Date of Hearing

Charlottetown, Prince Edward Island  
June 13, 2007

Place and Date of Judgment

Charlottetown, Prince Edward Island  
August 24, 2007

**Written Reasons by:**

The Honourable Mr. Justice J.A. McQuaid

**Concurred in by:**

The Honourable Chief Justice G.E. Mitchell  
The Honourable Mr. Justice K.R. MacDonald

***CRIMINAL LAW - Regulatory offences - Summary conviction proceedings - Appeal to a court of appeal***

The appellants were granted leave to appeal because the issues on appeal raised questions of law alone which were of legal importance and which had a reasonable possibility of success.

***CONSTITUTIONAL LAW - Canadian Charter of Rights and Freedoms - Reasonable limits - Fundamental freedoms - Freedom of expression***

The Summary Conviction Appeal Court did not err in finding the impugned **Regulations** were saved by s. 1 of the **Charter**. The appeal was dismissed.

Authorities Cited:

**CASES CONSIDERED:** *R. v. Moore* 2000 BCCA 588; [2000] B.C.J. No. 2164 (B.C.C.A.); *R. v. Rhynes* 2004 PESCAD 15; (2004) 239 Nfld. & P.E.I.R. 89; *R. v. Shrubbsall* 2000 CarswellNS; [2000] N.S.J. No. 26 (N.S.C.A.); *Irwin Toy Ltd. v. Quebec (A.G.)*, [1996] 1 S.C.R. 480 (SCC); *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141 (SCC); *R. v. Oakes*, [1986] 1 S.C.R. 103 (SCC)

**STATUTES CONSIDERED:** *Fisheries Act*, R.S.C. 1985, c. F-14, S.78(a); *Canadian Charter of Rights and Freedoms*, s.52 of the *Constitution Act, 1982*, s.1, s-s.2(b)

**REGULATIONS CONSIDERED:** *Marine Mammal Regulations* [SOR/93-56], ss. 32, 33

Reasons for judgment:

**McQUAID J.A.:**

[1] The pursuit of seal pelts by Atlantic Canadian fishers has been frequently marked by various controversies. The most notable controversy appears to surround the desire of those opposed to the fishery to express their views while being in close proximity to where the fishery is taking place - on ice floes in the Gulf of St. Lawrence. As a result, the right of fishers to fish and the right of individuals to express their opposition to the fishery in various expressive forms have frequently intersected on those same ice floes. These discrete, yet important rights now intersect in the courts of Prince Edward Island.

[2] The appellants were charged for alleged violations of ss. 32 and 33 of the

**Marine Mammal Regulations** [SOR/93-56] (the "**Regulations**") and thereby allegedly committing an offence contrary to s.78(a) of the **Fisheries Act**, R.S.C. 1985, c. F-14. Following a trial Orr P.C.J. entered convictions against all appellants, except Mr. Paul Watson. As the result of an appeal by the appellants from their convictions, as well as a cross-appeal by the Crown from the acquittal of Mr. Watson, Cheverie J. as a Summary Conviction Appeal Court judge, confirmed the convictions, set aside the acquittal of Mr. Watson and entered a conviction against him. Pursuant to s. 839 of the **Criminal Code** the appellants seek leave to appeal to this Division of the Court from the order of the Summary Conviction Appeal Court judge. If leave is granted, they appeal from the order.

[3] The appellants initially made a motion before the trial judge for a declaration that ss. 32 and 33 of the **Regulations** were of no force and effect because they infringed their right to freedom of expression as enshrined in s.2(b) of the **Charter of Rights and Freedoms**. The trial judge found that the impugned provisions of the **Regulations** did not infringe the appellants' right to freedom of expression by way of the use of video photography with sound. In addition, the trial judge found that while the above provisions of the **Regulations** did infringe the right of the appellant to express themselves by way of verbal communication with the fishers, the sections were saved from invalidity by s.1 of the **Charter** as a reasonable limit on the exercise of this right and a limitation that could be demonstrably justified in a free and democratic society.

[4] In the Summary Conviction Appeal Court the appeal from the convictions proceeded on two issues: (1) whether the trial judge erred in concluding that ss. 32 and 33 of the **Regulations** were a reasonable and justifiable limit on the right to freedom of expression; and (2) whether the trial judge erred in finding the **Regulations** did not infringe the right of appellants to express themselves by way of video photography.

[5] The issue in the cross-appeal from the acquittal of Mr. Watson was whether the trial judge erred in finding that Mr. Watson was exempt from obtaining a seal observation license as required by the **Regulations** because the ship which he used to sail to the location of the fishery, the *Farley Mowat*, was his residence.

[6] Although the Summary Conviction Appeal Court judge set aside Mr. Watson's acquittal and entered a conviction against him similar to that entered against the other appellants, in this Division of the Court the appellants' application for leave to appeal and their appeal is primarily focussed on the two issues referred to in paragraph 4. The issue as to whether the *Farley Mowat* was the residence of the appellant Watson, thereby exempting him from the application of the **Regulations**, does not arise in the application for leave to appeal or in the grounds of appeal.

## DISPOSITION

[7] I would grant leave to appeal. I would allow the appeal from that part of the order of the Summary Conviction Appeal Court judge where he held the right of the appellants to express themselves by way of video photography was not an infringement of their right to freedom of expression as protected by s. 2(b) of the **Charter**. I would find, however, that the impugned sections of the **Regulations** in relation to this form of expression are saved by s. 1 of the **Charter** as a reasonable and justifiable limit on the right to freedom of expression. Finally, I would deny the appellants' appeal from that part of the order of the Summary Conviction Appeal Court judge where he held the impugned provisions of the **Regulations**, although restricting the appellants' right to freedom of expression, are a reasonable and justifiable limit on that right as provided for in s. 1 of the **Charter**.

## ANALYSIS

### (i) Application for Leave to Appeal

[8] Pursuant to s. 839 of the **Criminal Code** an appeal may be taken from the Summary Conviction Appeal Court to the Appeal Division of this Court with leave and on a question of law alone. The appellant must establish that the issues on appeal raise questions of law alone, that the issues are of legal importance and that the appeal has a reasonable possibility of success. See: **R. v. Moore** 2000 BCCA 588; [2000] B.C.J. No. 2164 (B.C.C.A.) at para. 2, and **R. v. Rhynes** 2004 PESCAD 15; (2004) 239 Nfld. & P.E.I.R. 89 at para. 23.

[9] The error of law must be one committed by the Summary Conviction Appeal Court and not the trial judge. See: **R. v. Shrubbsall** 2000 CarswellNS; [2000] N.S.J. No. 26 (N.S.C.A.) at para. 7, and **R. v. Rhynes, supra** at para. 21.

[10] The first issue is whether the **Regulations** restrict the right of the appellants to express themselves by way of video photography. This constitutes a question of law alone and one which is of legal importance because it could have potential impact beyond this appeal. See: **R. v. Rhynes, supra** at para. 28.

[11] The second issue is whether the provisions of ss. 32 and 33 of the **Regulations** constitute a reasonable limit in a free and democratic society on the appellants' right to freedom of expression. This issue, which engages whether s. 1 of the **Charter** applies, raises a question of law alone. It is a question of law that is of legal importance because it too could have potential impact beyond this appeal.

[12] These issues are neither frivolous nor vexatious. They are arguable and thus the appeal must be considered to have a reasonable possibility of success.

[13] I grant leave to appeal.

**(ii) The Appeal**

[14] Sections 32 and 33 of the **Regulations** are enacted pursuant to the **Fisheries Act, supra** and they provide as follows:

- 32.(1) A seal fishery observation licence may be issued only if the Minister determines that the issuance of the licence will not cause disruption to a seal fishery.
- (2) For the purposes of subsection (1), the Minister, in determining whether the issuance of a seal fishery observation licence will cause disruption to a seal fishery in a specific geographical area, shall consider
- (a) the period and geographical area for which the licence is being sought;
  - (b) the number of seal fishery observation licences previously issued for that period in that area;
  - (c) the number of seal hunters operating in that area; and
  - (d) whether the applicant has a stated aim of disrupting the seal fishery or has been convicted, in the five years preceding the application for the licence, of tagging, marking or moving a live seal or of approaching within one-half nautical mile of a person who is on the ice fishing for seals.
- 33.(1) Subject to subsection (2), no person shall, except under the authority of a seal fishery observation licence issued by the Minister, approach within one-half nautical mile of a person who is on the ice fishing for seals.
- (2) Subsection (1) does not apply
- (a) to a person who is authorized to fish for seals under these Regulations;
  - (b) in respect of commercial flights that are operating on scheduled flight plans;

- (c) in respect of commercial vessels that are in transit;
- (d) to a person who is employed by, assisting, or present at the request of the Department; or
- (e) to a person who resides within one-half nautical mile of a person who is on the ice fishing for seals.

[15] In accordance with these provisions of the **Regulations** no person is permitted to be within one-half nautical mile of a person who is on the ice fishing for seals unless that person is in the possession of a seal observation license. Such a license will only be issued if the Minister comes to the conclusion the issuance of a license to an applicant will not disrupt the seal fishery in a particular area. There are also exceptions to the requirement to have a license; however, none of these are applicable to the issues in this appeal.

[16] Section 2(b) of the **Charter of Rights and Freedoms** provides as follows:

2. Everyone has the following fundamental freedoms:

.....

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...

[17] The trial judge held the appellants did not establish their right to express themselves by way of the use of video photography was infringed by the provisions of ss. 32 and 33 of the **Regulations**. This order was upheld by the Summary Conviction Appeal Court and, as I noted above, this part of his order is an issue in this appeal.

[18] On the other hand, the trial judge held that ss. 32 and 33 of the **Regulations** did infringe upon the right of the appellants to express themselves by way of verbal communication with the fishers. The Summary Conviction Appeal Court judge agreed.

[19] He also agreed with the trial judge's conclusion that while the **Regulations** constituted an infringement of the appellants' right to express themselves by way of verbal communication with fishers, the infringement was a reasonable limit on their right to freedom of expression. That part of his order is also an issue in this appeal.

[20] With respect, it is my opinion the Summary Conviction Appeal Court judge erred in holding that the appellants' right to express themselves by way of video photography was not infringed by virtue of the provisions of ss. 32 and 33 of the **Regulations**. He failed to identify an error of law made by the trial judge.

[21] The trial judge correctly placed the burden on the appellants to prove their right to expression by way of video photography was infringed; however, she erred in determining the degree of the burden which the appellants had to discharge to prove this right had been violated. She was of the view the appellants were required to prove there was no technology capable of obtaining video images, together with sound, from beyond the one-half nautical mile limit imposed by the **Regulations**.

[22] Section 2(b) of the **Charter** guarantees to each citizen the right to express themselves in any manner, provided the expression does not take the form of violence. There are also certain limitations on expression in public places. See: **Irwin Toy Ltd. v. Quebec (A.G.)**, [1996] 1 S.C.R. 480 (SCC); **Montreal (City) v. 2952-1366 Quebec Inc.**, [2005] 3 S.C.R. 141 (SCC). To establish a violation of their right to expression, a citizen must prove that the manner in which he or she chooses to convey the expression is restricted by the impugned governmental action.

[23] In this case, the appellant Lisa Shalom established that because of the limitation on access imposed by the **Regulations** her camera equipment did not permit her to obtain pictures, capture sound and generally convey the meaning she wished to convey about the seal hunt. In her evidence Ms. Shalom was clear in stating, "My main mission with my documentary is to bring to light the realities of the slaughter and so to do that I need to be actually within the vicinity of the slaughter." See Transcript of evidence at p. 98 ll. 22-25. It was her intention to capture video images with sound so as to convey to the public the reality of the seal fishery. To do this, it was her evidence that she had to be in the midst of the hunt and not more than one-half nautical away. See: Transcript of evidence at pp. 98 and 99.

[24] Ms. Shalom had a camera which she wished to use to achieve this objective, and it was not capable of doing so beyond the restricted limit of the **Regulations**. If the Crown had evidence to prove this was not so, it should have been brought forth so it could be weighed by the trial judge with all the evidence. There was no evidence on this issue contrary to that of Ms. Shalom.

[25] Ms. Shalom carried the legal burden of establishing that the limit imposed by the **Regulations** violated her right to convey meaning by the use of the video and sound equipment at her disposal. Her evidence was uncontradicted as to the capabilities of the equipment she wished to use to convey meaning, as was her evidence that it was necessary for her to be close to the place of the hunt to convey

her message in the most realistic fashion.

[26] The trial judge placed the burden on the appellant, Lisa Shalom, to prove there was not some other form of more technologically advanced camera and sound equipment which would permit this form of expression beyond the one-half nautical mile limit. This was too high a burden. The uncontradicted evidence of Ms. Shalom was sufficient to establish a violation of her right to freedom of expression. She did not have to establish there was equipment available somewhere in the public domain which would allow her to engage in the particular form of expression outside the limit imposed by the **Regulations**. Accordingly, I would allow this ground of appeal.

[27] The issue remains, however, whether the infringement of the appellants' right to express themselves by way of direct contact with fishers, or by means of capturing video images and sounds of the fishery, was a reasonable limit on their right to freedom of expression as guaranteed by s.2(b) of the **Charter**.

[28] Section 1 of the **Charter** provides as follows:

1. The **Canadian Charter of Rights and Freedoms** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[29] For the reasons given by the Summary Conviction Appeal Court judge, I am of the view that the infringement of the appellants' s. 2 (b) rights to freedom of expression is saved by s. 1 of the **Charter**. See: **R. v. Watson** 2006 PESCTD 50; (2006) 149 C.R.R. (2d) 268 at paras. 14 to 31.

[30] The objective of the impugned provisions of the **Regulations** was to address the need that the seal fishery be allowed to take place without the interference of the public and particularly those who wished to express their opposition. The need to continue the fishery and protect the right of fishers to earn a livelihood by engaging in a lawful occupation is sufficiently important to warrant the measures authorized by the **Regulations**.

[31] The **Regulations**, as a means of achieving this objective, are reasonable and demonstrably justified when considered in the context of the proportionality test set forth in **R. v. Oakes**, [1986] 1 S.C.R. 103 (SCC) and restated recently in **Montreal (City) v. 2952-1366 Quebec Inc. supra**. Firstly, there is a rational connection between the measures in the **Regulations** directed at regulating access of the public to the location of the seal fishery and the objective of permitting fishers to pursue their livelihood in this fishery. Secondly, the licensing regime established by the **Regulations** and implemented in the manner outlined in the evidence, minimizes any

impairment to the right of the citizen to convey the meaning he or she may wish to convey about the seal fishery while it is in progress and at the place where it is in progress. Thirdly, any harmful effects of limiting, by way of the **Regulations**, the right of the citizen to express their opinions about the seal fishery in this manner are proportional to the beneficial effects of allowing the fishery to proceed in an orderly fashion.

[32] The impugned provisions of the **Regulations** are a reasonable limit in a free and democratic society on the appellants' right to freedom of expression. The appeal is, therefore, dismissed.

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The Honourable Mr. Justice J.A. McQuaid

I AGREE: \_\_\_\_\_  
The Honourable Chief Justice G.E. Mitchell

I AGREE: \_\_\_\_\_  
The Honourable Mr. Justice K.R. MacDonald