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No Costs Awarded for Failure to Prosecute Aboriginal Fishing Rights Case

By Jennifer Koshan

Cases Considered:

R. v. Nest, 2008 ABQB 323

Donald Marshall, David Milgard, and Guy Paul Morin are the troika of wrongful conviction cases in Canada, bringing to mind overzealous prosecution of innocent persons and the compensation required to right those wrongs. But what about the opposite scenario, where the *failure* to prosecute is alleged to constitute a rights infringement deserving of compensation? This was the argument made by the claimants in a recent Alberta case.

Dwayne Nest and Frank Charland were charged with fishing without a license on Primrose Lake in 1998, contrary to regulations under the *Fisheries Act*, R.S.C. 1985, c. F-14. Nest and Charland are members of the Cold Lake First Nation, and sought to defend their charges on the basis that Treaty 6 accords them the right to fish for food and ceremonial purposes, guaranteed under s. 35 of the *Constitution Act, 1982*. A trial was finally scheduled for the fall of 2003, some five years after the charges were laid. A month before trial, the Crown advised that it would be calling 16 witnesses. Ten days later, the Crown announced that it would not be proceeding with the charges, and formally withdrew them a short time later without giving any explanation for its decision.

Nest and Charland sought costs from the Crown, arguing that their right to security of the person under s. 7 of the *Charter* had been violated. More specifically, the claimants alleged that the withdrawal of charges deprived them of the right to have their treaty rights to fish (and those of their Nation) settled, and amounted to an abuse of process contrary to the principles of fundamental justice. Judge Peter Ayotte of the Alberta Provincial Court accepted their argument, finding that "[t]reaty rights are fundamental to the security of those persons who take their benefit. It surely was one of the primary purposes of the treaty process to secure for its native signatories and their descendants' rights which the Crown recognized were important to them" (*R. v. Nest*, 2004 ABPC 159 at para. 11). The Crown's withdrawal of charges amounted to a violation of the claimants' right to security of the person "which their treaty rights were meant to provide" (at para. 13). Further, the Crown's position that it had no obligation to provide an explanation for the withdrawal was found to "offend the community's sense of decency and fair play", meeting the test for an abuse of process from *R. v. O'Connor*, [1995] 4 S.C.R. 411 (at para. 17). To remedy the s. 7 violation, Judge Ayotte awarded costs on a "thrown away" basis,

with the quantum to be agreed upon by the parties. When the parties were unable to agree, Judge Ayotte quantified costs at $25,000 (see 2007 ABPC 178). The Crown appealed the decision to award costs, and Nest and Charland cross-appealed the quantum, having argued for full solicitor-client costs before the Provincial Court.

Writing for the Alberta Court of Queen's Bench, Justice Paul Belzil applied the correctness standard of review, allowed the Crown's appeal and dismissed the cross-appeal. He noted that there was no authority for the respondents' argument that the Crown had a duty to continue with the prosecution in order to clarify the legal rights of the Aboriginal fishers (at para. 34). Further, Justice Belzil held that there had been no abuse of process. Subsequent to the Crown withdrawing the charges, it provided Nest and Charland with a "Statement of the Government of Canada" disclosing the reason for the withdrawal: a defect in the regulations governing the Aboriginal fishery in Alberta. The Statement went on that the Crown "felt it could not disclose its defect without creating a significant risk to the Alberta fishery" (at para. 21). Once the defect was remedied, the defect was disclosed (in 2005). Finding that the Crown was "ethically and legally obligated" to act as it had, Justice Belzil held that there was no violation of s. 7 - in fact, to find a Charter breach "would have a chilling effect on prosecutorial discretion and would impair the independence of the Attorney General" (at paras. 40-41).

It must be noted that the Statement was first disclosed at the hearing into costs before Judge Ayotte in 2007. In spite of the Crown's disclosure, Ayotte, J. found that costs should be awarded on the basis of negligence in drafting the legislation and failing to identify the defect sooner. Justice Belzil disagreed. He stated that even if he was wrong, and there was a s. 7 violation, this would not be an appropriate case in which to award costs against the Crown. Such costs can only be awarded where the Crown's conduct amounts to "a marked and unacceptable departure from the reasonable standards expected of the prosecution" (at para. 44, citing *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 at para. 87). Even if there was negligence in drafting and correcting the legislation, as found by Judge Ayotte, Justice Belzil held that this would not amount to the level of "serious misconduct" required for a costs award against the Crown. In the end, the refusal to provide reasons for the withdrawal of charges was seen by the Court as "an intentional act made in good faith in the public interest, with the goal of protecting a valuable natural resource pending correction of the legislative defect" (at para. 52). The costs award was overturned, and the cross-appeal was dismissed.

One can certainly sympathize with the plight of the respondents, having spent $200,000 in solicitor-client costs to prepare for a trial that did not proceed in a matter that still hangs over their heads. As noted by Judge Ayotte:

> the reasons given by the Crown for the withdrawal of the charges has had no effect on the treaty rights issue. The Defendants remain frustrated in their attempt to get a judicial determination of those rights. The only change is that they now know that the charges were not withdrawn as a concession to the validity of those claims, since the defect which has now been repaired was unrelated to the treaty

> issue. Accordingly, they can expect another round of prosecutions if they fish in circumstances comparable to the 1998 incident (2007 ABPC 178 at para. 7).

This was confirmed in an affidavit filed by Mr. Nest, stating that the withdrawal of charges had the following impact:

> "I became uncertain of whether I was entitled to fish in the traditional ways of the Nation, and have not conducted any significant fishing for food for my family since that time.": Affidavit of Dwayne Nest, para. 19 (cited in 2004 ABPC 159 at para. 13).

Justice Belzil may be correct that there are no cases directly supporting the contention that a failure to prosecute violates the right to security of the person under s. 7 of the Charter. However, it is well established that security of the person includes protection against state action that has a "serious and profound effect on a person's psychological integrity" (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 60). This interpretation of s. 7 merited further attention from the Court, as it is not unreasonable to claim that the withdrawal of charges in a treaty rights context where the right to fish for food is at stake might well result in such effects.

The case also underlines the difficulties with delineating Aboriginal and treaty rights through the adversarial system. As noted by the Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (at para. 186), "s. 35(1) provides a solid constitutional base upon which … negotiations can take place… Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith." Are prosecutions of Aboriginal persons engaged in fishing for food the best way to resolve questions relating to the limits on such rights for conservation purposes, and are such prosecutions consistent with the Crown's duties? This is a particular problem in the case of treaty rights, where Aboriginals persons should be entitled to rely upon their agreements with the Crown. Surely the time has come for the government to re-think its approach of leaving it to Aboriginal peoples to undertake the huge burden associated with litigation to defend their rights.