IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quinn v. Dubnyk,*
2011 BCSC 792

Date: 20110617
Docket: S096327
Registry: Vancouver

Between:

:popois of the :shishalh.-tl'extl'ax-min,
authorized representative for David Brian Jeffries Quinn

Plaintiff

And

Constable Tracey Dubnyk Badge #52916 and
C. McPherson Badge #57416, Employers District of Sechelt,
Office of the Ministry of Public Safety/Solicitor General, ICBC

Defendants

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

The Plaintiff:	Appearing In Person
Counsel for the Defendants, Constable Tracey Dubnyk, C. McPherson and Office of the Ministry of Public Safety/Solicitor General:	L. Bell
Counsel for the Defendant, District of Sechelt:	A. Atherton
Counsel for the Defendant, ICBC:	D. Griffin
Place and Date of Hearing:	Vancouver, B.C. May 17, 2011
Place and Date of Judgment:	Vancouver, B.C. June 17, 2011

INTRODUCTION

[1] On May 19, 2009, the defendant constables, who are employed by the Royal Canadian Mounted Police ("RCMP"), were on general duty and operating a marked police vehicle on Highway 101 north of Sechelt when they saw the plaintiff driving a motor vehicle that was displaying Canadian flags instead of licence plates. When the constables stopped the plaintiff's vehicle he was on Sinku Drive, which is within a reserve belonging to the Sechelt (Shishalh) Indian Band. The plaintiff did not have vehicle insurance or valid licence plates and the constables issued him a ticket for violating s. 13(1)(b) and s. 24(3)(b) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*Motor Vehicle Act*].

[2] The plaintiff advised the officers that he would not sign the violation ticket and would not obtain insurance because he was operating a "state" vehicle immune from these provincial requirements. To prevent further infractions of the *Motor Vehicle Act*, the constables arranged to have the plaintiff's vehicle impounded pending proof that the plaintiff had secured insurance coverage for it.

[3] The plaintiff disputed the violation ticket and a trial was set down in provincial court for July 15, 2010. The plaintiff failed to attend on the day set for trial and was deemed convicted of the *Motor Vehicle Act* violations specified in his violation ticket. The plaintiff did not appeal this conviction.

[4] On August 28, 2009, the plaintiff commenced this action claiming damages against the defendants for exercising an unlawful authority to issue the violation ticket and impound his vehicle. In essence, the plaintiff claims the constables had no authority to enforce provincial legislation on lands claimed by the Shishalh band. Accordingly, the plaintiff submits, the constables acted unlawfully by issuing a violation ticket under the *Motor Vehicle Act* and by impounding his vehicle.

[5] The defendants apply to dismiss the plaintiff's claim pursuant to Rules 9-7 and 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. In addition to the defendants' position that the plaintiff's amended statement of claim discloses no

cause of action against them or a triable issue, the defendant constables and the Solicitor General maintain the plaintiff's pleadings are scandalous, frivolous, vexatious, embarrassing, and otherwise an abuse of process.

[6] The plaintiff opposes the defendants' application generally; however, at the hearing of this matter, the plaintiff consented to an order that his claim against the Insurance Corporation of British Columbia ("ICBC") be dismissed. I reserved my decision on ICBC's claim for costs.

[7] It is my intention to address the claim against each of the defendants separately and then address the sufficiency of the plaintiff's amended statement of claim.

DISTRICT OF SECHELT

[8] The plaintiff's claim against the District of Sechelt may be interpreted as based on two premises. First, Sechelt is vicariously responsible for the wrongdoing of the RCMP constables who issued the plaintiff a violation ticket and impounded his vehicle. Second, Sechelt is responsible for enacting and enforcing the *Motor Vehicle Act* against aboriginal people and on land claimed by the Shishalh nation.

[9] Turning to the first argument, pursuant to s. 3 of the *Police Act*, R.S.B.C. 1996, c. 367 [*Police Act*], a municipality with a population in excess of 5000 persons, which includes Sechelt, must provide policing and law enforcement services by one of three means. A municipality may establish its own municipal police force, enter into an agreement with the provincial government to provide police services through use of the provincial police force, or enter into an agreement with another municipality to share their municipal police force. Sechelt chose to provide these services through a provincial police force and contracted with the BC government for this purpose. The BC government does not have its own police force. To supply a provincial police force to municipalities, the BC government entered into an agreement with the Federal government for the use of the RCMP to act as a provincial police force carrying out the duties of a municipal police force. This

agreement is sanctioned by s. 14 of the *Police Act* and s. 20 of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 [*RCMP Act*].

[10] Pursuant to s. 14 of the *Police Act,* where the BC government has entered into a policing agreement with the Federal government, the RCMP officers so employed are deemed to be a provincial police force and each officer is deemed to be a provincial constable. Sechelt remains vicariously responsible for the torts and other improper acts of constables employed as municipal police officers pursuant to s. 20 of the *Police Act*; however, it is not vicariously liable for acts of the RCMP acting as a provincial police force. Neither the *Police Act* nor the policing agreement between Sechelt and the BC government renders Sechelt vicariously liable for the torts of RCMP officers acting as provincial constables. It is thus only the provincial government that continues to be vicariously liable for the torts of provincial constables.

[11] In *Rosario v. Canada (Royal Canadian Mounted Police)*, [1998] B.C.J. No. 3068 (S.C.), Ralph J. addressed an application by the City of Richmond to dismiss an action against it for damages arising out of wrongdoing by RCMP officers acting as provincial constables pursuant to the *Police Act* and a policing agreement with the BC government that was identical to the agreement between Sechelt and the BC government in the case at hand. After a thorough review of the legislation and the relevant provisions of the policing agreement, Ralph J. held that the City of Richmond was not vicariously liable for the acts of the RCMP officers. At para. 27 of the judgment, Ralph J. concluded as follows:

> It is my conclusion that the R.C.M.P. constables serving in a municipal police unit remain provincial constables. They do not become municipal constables by either the provisions of the Police Act or the Municipal Police Unit Agreement made between the province and the municipality. A municipality is not vicariously liable for constables who are not municipal constables.

[12] Accordingly, there is no triable issue with respect to the liability of Sechelt based on the plaintiff's first argument.

[13] The plaintiff's second argument must also fail because it is based on the faulty premise that Sechelt is responsible for the enactment of the *Motor Vehicle Act* and its application to either aboriginal persons or to land claimed by aboriginal nations. The *Motor Vehicle Act* is provincial legislation. Sechelt, as a municipal government, has nothing to do with the enactment or enforcement of this legislation apart from its contractual arrangement with the BC government concerning the provision of police services. Only the provincial government can be responsible for the impact of provincial legislation on the plaintiff or on lands claimed by the Shishalh nation.

[14] As a consequence, the plaintiff's action against the District of Sechelt must be dismissed pursuant to Rule 9-7. Sechelt is not vicariously liable for the acts of the defendant constables. Sechelt is not liable for any wrongful acts arising out of the enactment or enforcement of the *Motor Vehicle Act.*

CONSTABLES DUBNYK AND MCPHERSON

[15] The defendant constables are sued in their personal capacities for performing their duties. Whether or not the enforcement of the *Motor Vehicle Act* against the plaintiff as an aboriginal person or on lands claimed by the Shishalh nation is wrongful, it is apparent that the constables were carrying out their duties as police officers when they issued a violation ticket to the plaintiff and impounded his vehicle. Section 21 of the *Police Act* creates a limited immunity for police officers performing duties as provincial constables pursuant to a policing agreement with a municipality.

[16] In particular, s. 21(2) of the *Police Act* provides that no action for damages lies against a provincial constable for acts done in the performance of her duties or in the exercise of her powers or for any alleged default or neglect in the performance of her duty or the exercise of her powers. While s. 21(3) defines an exception to this immunity for police officers who are guilty of dishonesty, gross negligence, and malicious or wilful misconduct, the plaintiff does not allege that the actions of the defendant constables amount to behaviour in any one of these categories.

[17] Section 18(a) of the *RCMP Act* provides that it is a duty of every member of the RCMP to uphold all laws in force in the province in which they are assigned to work. The *Motor Vehicle Act* is a provincial law that the defendant constables were bound to enforce in the proper performance of their duties. A dispute about the application of this provincial law to aboriginal people or on lands claimed by aboriginal people does not give rise to a claim for damages against a police officer in his or her personal capacity. The plaintiff's claim, if one exists at all, is against the Minister of Public Safety and Solicitor General of British Columbia who is jointly and severally liable for wrongful acts committed by provincial constables.

[18] Accordingly, the plaintiff's action against the defendant constables is dismissed. This action cannot be brought against the defendant constables in their personal capacities because it is barred by s. 21(2) of the *Police Act.*

MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL

[19] Sinku Drive, where the plaintiff was stopped by the defendant constables, is a highway within the meaning of s. 1 of the *Motor Vehicle Act*, which incorporates by reference the definition of "highway" contained in s. 1 of the *Transportation Act*, S.B.C. 2004, c. 44. Included within that definition of "highway" is "a public street, road, trail, lane, bridge, trestle... any other public way...". There is no dispute that s. 13(1)(b) of the *Motor Vehicle Act* makes it an offence to operate a motor vehicle on a highway without displaying current licence plates and that s. 24(3)(b) of the Act prohibits a person from driving a motor vehicle on a highway that is not insured as evidenced by an owner's certificate. The plaintiff lacked both licence plates and valid insurance for his vehicle when he was ticketed by the defendant officers.

[20] The plaintiff failed to attend at the hearing of his dispute notice concerning the offences charged in the violation ticket issued by the defendant constables. As a result, the plaintiff was deemed convicted of the offences. The plaintiff did not appeal his conviction. In these circumstances the court must accept that the violation ticket was properly issued in accordance with the *Motor Vehicle Act*.

[21] In view of the plaintiff's deemed conviction for these *Motor Vehicle Act* offences, the Minister can only be vicariously liable for acts of the defendant constables in the performance of their duties if the plaintiff, as an aboriginal person, is not subject to the *Motor Vehicle Act* or the *Motor Vehicle Act* is not enforceable on the Shishalh reserve where the plaintiff was ticketed and his vehicle impounded.

[22] There is no authority for the proposition that aboriginal persons are immune to provincial laws of general application. Indeed, the law is to the opposite effect. In *R. v. Alphonse*, [1993] 4 C.N.L.R. 19 (B.C.C.A.), the Court of Appeal held that laws of general application that do not affect "Indians in their Indianness", "Indians qua Indians" or "Indians in relation to the core values of their society" or "the status and capacities of Indians" apply to Indians by their own force as valid provincial laws: per MacFarlane J.A. at para. 39. Laws of general application that do affect Indians in the ways described above require s. 88 of the *Indian Act*, R.S.C., 1985, c. I-5 [*Indian Act*], which incorporates such laws by reference, to make them applicable to Indians.

[23] I do not think there can be any doubt that the *Motor Vehicle Act* is a law of general application in that it applies throughout the province to all residents. Further, the *Motor Vehicle Act* governs the operation of motor vehicles in the province and does not have any impact on the plaintiff as an aboriginal person in his capacity as an aboriginal person. As a consequence, the plaintiff's claim does not raise issues about the constitutional validity of s. 88 of the *Indian Act* and, in particular, whether it violates s. 35 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act*].

[24] Neither s. 35 of the *Constitution Act* nor the *Royal Proclamation of 1763* grant to aboriginal persons who reside within a province, immunity from the laws in force within that province and which apply to all persons resident in that province. Accordingly, any argument based on personal immunity from the application of the *Motor Vehicle Act* must fail.

[25] The plaintiff also argues that the *Motor Vehicle Act* is unenforceable on the lands claimed by the Shishalh nation. It is only necessary to address the application of the *Motor Vehicle Act* to the Shishalh or Sechelt band reserve where the plaintiff was stopped and issued a violation ticket by the officers. For the purpose of this summary dismissal application, it is unnecessary to determine the consequences of operating an unlicensed motor vehicle on other lands claimed by the Shishalh nation. If the violation tickets were lawfully issued to the plaintiff on the Sechelt reserve, it is irrelevant that these tickets may not have been validly issued for driving without insurance or licence plates at some other location.

[26] The reserve where the plaintiff was pulled over is land held in fee simple by the Sechelt Indian Band and these lands are governed by the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27 [*Sechelt Indian Band Self-Government Act*]. The members of the Sechelt band approved of this legislation in substance in a referendum held on March 15, 1986. The Act transfers to the Sechelt Indian Band all reserve lands in fee simple and reposes in the band the right of self-government over the lands subject to certain exceptions. The exceptions relevant to this case are found in ss. 37 and 38 of the Act:

> 37. All federal laws of general application in force in Canada are applicable to and in respect of the Band, its members and Sechelt lands, except to the extent that those laws are inconsistent with this Act.
>
> 38. Laws of general application of British Columbia apply to or in respect of the members of the Band except to the extent that those laws are inconsistent with the terms of any treaty, this or any other Act of Parliament, the constitution of the Band or a law of the Band.

[27] The Solicitor General argues that s. 37 of the Act incorporates by reference the *Indian Reserve Traffic Regulations*, C.R.C., c. 959 passed pursuant to the *Indian Act.* Section 3 of the Regulation provides that it applies to all roads within Indian reserves. Section 6 of the Regulation requires a driver of a vehicle on reserve lands to comply with all provincial motor vehicle laws in force from time to time. In my view, it is not clear that the *Indian Reserve Traffic Regulations* is a law of general application within the meaning of the Regulation. Indeed, it is a law that specifically

applies to “Indians” in their capacity as “Indians”. In addition, the Sechelt Band Council is granted authority under the *Sechelt Indian Band Self-Government Act* to pass laws in regard to a wide range of matters, including “public order and safety on Sechelt lands”, which is found in s. 14(1)(l) of the Act. The regulation of traffic on the reserve appears to be encompassed within the category of “public order and safety”. Thus it would be inconsistent to interpret s. 37 as incorporating by reference provincial legislation through the application of a federal law that is not a law of general application and over a subject which the band council theoretically has jurisdiction to enact laws.

[28] On the other hand, s. 38 of the Act directly extends the application of provincial legislation to members of the band while on a Sechelt reserve if it is a law of general application and not inconsistent with treaties, federal legislation, the band constitution or a law passed by the band. As set out above, the *Motor Vehicle Act* is a law of general application. The plaintiff purports to be a member of the Sechelt band although he prefers the aboriginal name of “Shishalh”. The application of the *Motor Vehicle Act* to members of the Sechelt band while on the reserve lands is not inconsistent with any act of Parliament, including the *Sechelt Indian Band Self-Government Act.* Further, the plaintiff has not produced any evidence that the application of the *Motor Vehicle Act* to members of the Sechelt band while on the reserve is inconsistent with any law passed by the band or the band’s constitution. Thus I must conclude that s. 38 of the Act extends the provisions of the *Motor Vehicle Act* to persons travelling on roads within the Sechelt reserve lands.

[29] Accordingly, I find that the defendant officers had a right to enforce the *Motor Vehicle Act* against the plaintiff while on the Sechelt reserve lands. Consequently, the Solicitor General is not vicariously liable for the actions of the defendant constables in the circumstances of this case.

ABUSE OF PROCESS

[30] The Solicitor General argues that the plaintiff’s statement of claim is deficient in many respects. However, I find it is only necessary to address the Solicitor

General's argument that the plaintiff's action is an abuse of process because it is essentially a collateral attack against his deemed conviction of the offences charged under the *Motor Vehicle Act*.

[31] The court's process must not be used for an improper purpose and a statement of claim that attempts to use the court's process for ulterior or improper motives may be struck under Rule 9-5(1)(d). A civil action that seeks to challenge a conviction for an offence under the *Motor Vehicle Act* is an abuse of process: *Sydel v. HMTQ*, 2010 BCSC 638 [*Sydel*]. Having failed to appeal the deemed conviction for operating a motor vehicle without insurance and without valid licence plates, the plaintiff cannot bring a civil action that essentially challenges the validity of that conviction. As Kelleher J. says at paras. 42 and 43 of *Sydel*:

> It is an abuse of the Court's process to bring a civil action which attempts to collaterally challenge a criminal conviction. As a result of the distinction between criminal proceedings and civil litigation, a party cannot seek a remedy statutorily provided for by way of an appeal through civil proceedings. Such an evasion of the criminal process is known as a collateral attack and is prohibited: *Hainsworth v. Ontario (Attorney General)*, [2002] O.J. No. 1390 at paras. 39-40 (S.C.J.); *Semeniuk v. British Columbia (Financial Institutions Commission)*, 2008 BCSC 1634 at para. 26.
>
> Public policy requires a defendant, who seeks to challenge her conviction, to do so directly by seeking to appeal that conviction. As Lord Steyn noted in *Arthur J.S. Hall and Co. v. Simons*, [2002] 1 A.C. 615 at 679 (H.L.):
>
> > It is... prima facie an abuse to initiate a collateral civil challenge to a criminal conviction. Ordinarily therefore a collateral civil challenge to a criminal conviction will be struck out as an abuse of process.

[32] The plaintiff failed to attend the trial of his offences under the *Motor Vehicle Act* and, as a result, he was deemed convicted. The plaintiff has not appealed that conviction. Instead, he seeks a declaration from this Court that he could not have been charged with these offences and an order for damages against the defendants for the consequently unlawful seizure of his vehicle. This action, in my view, amounts to a collateral attack on the plaintiff's deemed conviction under the *Motor Vehicle Act*. His only recourse was to appeal the conviction. The plaintiff cannot avoid the appeals process by commencing a civil action that seeks to override the

conviction. I thus find this action must be struck as being an abuse of process of the court.

COSTS

[33] The normal rule is that the successful parties are entitled to their costs. There is no reason to depart from this principle in the circumstances of this case. Accordingly, I find the defendants are entitled to their costs at Scale A.

"Bruce J."