SUPREME COURT OF YUKON

Citation: *R v Smith*
2022 YKSC 37

Date: 20220822
S.C. No. 20-AP016
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND

SMITH, MOREY

APPELLANT

Before Chief Justice S.M. Duncan

Counsel for the Respondent — Kimberly Sova

Appearing on his own behalf — Morey Smith

REASONS FOR DECISION

Introduction

[1] The appellant, Morey Smith, appeals his conviction of making a false statement to a forest officer, contrary to s. 39(a) of the *Forest Resources Act*, SY 2008, c. 15 (the "*Act*"). Mr. Smith was found guilty after a two-day trial in the Territorial Court of Yukon. He was fined $100 plus a $15 surcharge.

[2] Mr. Smith through his company, Luckey-Rose Wood Development, had a harvesting licence and cutting permit issued under the *Act* allowing him to harvest wood in a defined area. On August 13, 2019, he reported no harvest of wood on the harvest summary required by the permit conditions to be submitted to a forest officer. A notice of non-compliance was sent to Mr. Smith by Mr. Bryan Levia, a senior Natural

Resources Officer also designated as a forest officer, on October 8, 2019. It stated the minimum annual harvest volume of 5m³ of wood needed to be completed by December 16, 2019. Mr. Smith submitted a revised harvest summary dated October 22, 2019, reporting a harvest of 2.265m³ in October 2018 and a harvest of 2.735m³ in December 2018.

[3] After inspecting the licensed area and finding no evidence of recent harvest, Mr. Levia requested by letter dated November 1, 2019, that Mr. Smith show him the location of his reported harvest by November 15, 2019. Mr. Smith did not respond substantively to this letter.

[4] On December 17, 2019, Mr. Levia conducted a second inspection of the licensed area and found no evidence of recent harvest of 5m³ of wood. He issued a summary convictions ticket to Mr. Smith under s. 39(a) of the *Act*.

The Trial and Judgment at Trial

[5] The trial judge heard evidence and submissions at the trial over two days during a regular Territorial Court circuit sitting in Haines Junction, Yukon. The first day, November 19, 2020, started at 3:51 p.m. and ended at 6:43 p.m. The continuation began on March 18, 2021, at 3:51 p.m. and ended at 7:15 p.m., including the delivery of the judgment and sentence with reasons.

[6] The Crown called as witnesses at trial the forest officers, Mr. Bryan Levia and Mr. Owen MacKinnon who were involved in this matter. Mr. Smith testified on his own behalf. There were no other witnesses.

[7] Section 39(a) of the *Act* states:

> 39 Obstruction of officer
>
> A person must not
>
> (a) knowingly make a false or misleading statement to a forest officer who is acting under this Act; …

[8] The trial judge described Mr. Smith's defence in his reasons for decision. Mr. Smith said he made a clerical error because it was the first time he had completed the harvest summary report where he had an obligation to cut a minimum volume of wood. In previous years, there was no minimum harvest requirement, and he filled in zeros on the harvest summary report. Mr. Smith had unsuccessfully twice requested amendments to his permit so that he would not be required to harvest a minimum amount of wood. He testified he was saving the wood for a project of job training for Jackson Lake Healing Camp participants, endorsed by several First Nation governments and other political representatives. Mr. Smith testified that in October and December 2018 he harvested non-merchantable wood that had been lying on the ground for years and could still be of some use, but was not good enough quality to be sold. He said he kept some of that harvested wood for personal use and gave some to a local restaurant.

[9] The trial judge noted the offence was a strict liability offence. After considering all of the evidence, the trial judge outlined his concerns with Mr. Smith's evidence. He found that while Mr. Smith may have harvested some wood during the period in question, he did not harvest the requisite amount of wood as required by his permit. As a result the trial judge found that Mr. Smith made, at least, a misleading statement to a forest officer under the *Act* and as a result was guilty.

[10] Mr. Smith was encouraged by the Court to file written materials before the hearing of this appeal but he did not. He made oral submissions on his own behalf throughout the trial and appeal.

[11] The Crown filed an extensive written outline of argument and in addition made oral submissions at the appeal.

Issues on Appeal

[12] Mr. Smith's grounds of appeal set out in his notice of appeal were worded in a general way and they changed during several case management conferences. After discussion, the following grounds of appeal were clarified and set out in a case management conference order on September 24, 2021. They are the issues to be decided in this appeal:

a. notice of trial – did the trial judge err in finding that Mr. Smith's failure to receive a notice of trial did not invalidate the trial;

b. sworn ticket – did the trial judge err in finding that the ticket was not improperly sworn i) because of an error in the date of the offence on the ticket, ii) because it was not provided to Mr. Smith with the appearance notice, and iii) because the jurat was set out in the facsimile section of the form, when the signature was done in person;

c. failure to adjourn to hear witnesses – did the trial judge err in denying Mr. Smith an adjournment on day two of the trial because his witness was not available;

d. amendment of ticket at trial – did the trial judge err in allowing the date of the offence on the ticket to be amended at trial;

e. failure to enforce the policy referred to in s. 40 of the *Act* – did the trial judge err in finding the proper steps were followed by the officers in this case; and

f. remedy for *Charter* breach – did the trial judge err in reducing the fine as a result of the *Charter* breach instead of staying the proceedings.

Standard of Review

[13] The standard of review is set out in the statute and confirmed by the jurisprudence.

[14] Section 2.01 of the *Summary Convictions Act,* RSY 2002, c. 210*,* states every provision of the *Criminal Code,* R.S.C. 1985, c. C-46 (the "*Code*") applicable to a summary conviction proceeding is deemed to be incorporated into the *Summary Convictions Act*, unless it is inconsistent with the *Summary Convictions Act* or another Yukon statute. The *Summary Convictions Act* is silent on standard of review on appeal. There is no other Yukon statute addressing standard of review for summary conviction appeals. Therefore, s. 686 of the *Code* applies to summary conviction appeals.

[15] Section 686(1) provides that a court may allow a defendant's appeal where the verdict is unreasonable and cannot be supported by the evidence, or was based on a wrong decision on a question of law, or on any ground if there was a miscarriage of justice. The defendant's appeal should be dismissed where, although not properly convicted on a particular count, they were properly convicted on another count or where there was a legal error made but no substantial wrong or miscarriage of justice occurred. The relevant portion of s. 686(1) is as follows:

> 686 (1) On the hearing of an appeal against a conviction ...
> the court of appeal

> (a) may allow the appeal where it is of the opinion that
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> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[16] In *R v Pottie*, 2013 NSCA 68, the court explained the standard of review for a summary conviction appeal from a trial decision on factual grounds:

> [16] **The standard of review for the SCAC** [summary conviction appeal court] **judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to**

> **review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.** [emphasis added]

[17] On a question of law, the standard is correctness, and the appellate court should intervene if the decision is not correct in law unless, in the case of defence appeals, no substantial wrong or miscarriage of justice has occurred. See *R v Shepherd*, 2007 SKCA 29, and *R v Henry*, 2006 SKQB 469.

[18] Many of the issues raised by Mr. Smith are mixed fact and law. They attract the same standard of review as questions of fact alone. Some issues are questions of law. These characterizations will be identified below.

Issue a) – Notice of Trial

[19] This is a question of mixed fact and law.

[20] Mr. Smith says he should have received a notice of trial after the not guilty plea was entered. He bases his argument on s. 23(1) of the *Summary Convictions Act* which states before trial a sworn ticket and a notice of trial must be provided to the defendant.

[21] At the second day of trial, March 18, 2021, Mr. Smith confirmed that after the ticket was served on him, he chose the third option on the back, which was to appear at one of the court registries to arrange for a court date to present relevant information to the Court. He did this on February 20, 2020. He received an Appearance Notice dated February 28, 2020, by email from the Court Registry on February 28, 2020. He appeared in court on March 19, 2020, the day noted on the Appearance Notice, and made subsequent appearances. He entered a plea of not guilty on September 17, 2020, and that day the trial date of November 19, 2020 was set in court on the record.

[22] At trial, the judge heard Mr. Smith's allegation and explanation of his failure to receive a Notice of Trial several times. The judge said:

> … You -- as you discussed, you have three options, and you chose the option to come to Court. And once it's in court, why would we give you a Notice of Trial when you have entered -- when the judge enters the not guilty plea on your behalf … So, why would you receive a Notice of Trial after that? You are here.
>
> …
>
> You knew when the trial was scheduled for and you showed up, and here we are again. (Transcript, Proceedings at Trial, March 18, 2021, pp. 5-6, lines 43 to 5)

[23] After further submissions by Mr. Smith, the trial judge said again:

> … You received the appearance notice. You made your appearance. There was ultimately a not guilty plea entered. We have commenced the trial. We're into your case if you wish to call any evidence, and that's where we stand. (Transcript, Proceedings at Trial, March 18, 2021, pp. 12-13, lines 45 to 1)

[24] The Crown argues on appeal the trial judge made no error in his decision. The Crown referenced ss. 8(1) and 9 of the *Summary Convictions Regulation*, OIC 2016/105 (the "*Regulation*"):

> 8(1) **If, when a defendant appears at a court registry in accordance with Option 3 as set out in Part B of a ticket, they do not enter a plea to a charge set out in that ticket, a justice must issue an appearance notice** in respect of each charge for which the defendant did not enter a plea at that time. [emphasis added]

[25] Section 9 of the *Regulation* states if a person who was issued an Appearance Notice does not appear, the court may either proceed to trial or issue a warrant. A Notice of Trial is not necessary after an Appearance Notice has been issued.

[26] I agree the trial judge made no error. Mr. Smith attended court as required by the Appearance Notice, a plea of not guilty was entered, a trial date was set in court at the time the plea was entered, and Mr. Smith appeared for trial. The process followed was consistent with the *Summary Conviction Act* and *Regulation*. The evidence supports the trial judge's conclusions.

Issue b) – Sworn Ticket and Issue d) – Amendment of Ticket at Trial

[27] These issues overlap so they are addressed together. Some of the arguments are pure legal questions, while some are questions of mixed fact and law.

[28] Mr. Smith says the trial judge erred in rejecting his arguments that the ticket was improperly sworn, thereby invalidating the prosecution. Mr. Smith raises three concerns under this issue.

[29] First, Mr. Smith says the incorrect date of the offence on the ticket invalidates it because it was not the truth at the time of swearing. The trial judge then erred in amending the offence date at trial, in part because Mr. Levia who swore the ticket was retired by that time so the amendment was invalid. This part of the argument is a question of mixed fact and law. This argument overlaps with Issue d) – amendment of the ticket at trial, which is a question of law.

[30] The date of the offence of making a false or misleading statement set out on the ticket was December 17, 2019. Mr. Levia testified he used that date because it was the day after the compliance date on the Notice of Non-Compliance. He said he recognized the date should have been October 22, 2019, the date Mr. Smith signed the harvest summary report setting out his harvesting of wood in October and December 2018.

[31] The trial judge granted the Crown's amendment application because it conformed with Mr. Levia's evidence at trial, which he accepted as a reasonable explanation. The trial judge applied the test set out in the applicable section of the *Code*:

> 601(1) …
>
> Amendment where variance
>
> (2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and
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> (a) a count in the indictment as preferred; or
>
> (b) a count in the indictment
>
> (i) as amended, or
>
> (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587.
>
> …
>
> Matters to be considered by the court
>
> (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider
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> (a) the matters disclosed by the evidence taken on the preliminary inquiry;
>
> (b) the evidence taken on the trial, if any;
>
> (c) the circumstances of the case;
>
> (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and

> (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

[32] The *Code* also provides at s. 601(6) that the question whether an amendment of an indictment should be granted or refused is a question of law.

[33] On November 19, 2020, the trial judge said "the law is that if it conforms with the evidence that has been led at trial and it's not prejudicial to you --" (Transcript, Proceedings at Trial, November 19, 2020, p. 76, lines 16-18) and later:

> … I accept the evidence of Mr. Levia -- Levia to that extent and that extent is that he put the date at -- at or around the time of the second inspection. He said that he made a mistake and he should have put the date of the annual -- the revised annual harvest summary, which is October the 22nd, 2019, and so I don't see any prejudice to you. It conforms with the evidence and I am going to allow the amendment. (Transcript, Proceedings at Trial, November 19, 2020, p. 76, lines 35-41)

[34] When Mr. Smith raised the issue again on the second day of trial, March 18, 2021, the trial judge summarized his reasons for granting the amendment on November 19, 2020 again:

> … I accepted the amendment because of this: The -- in terms of date, date is not an essential element of an offence, and the Supreme Court of Canada has said so, except in certain circumstances. And in short, this was one of those circumstances where I felt that it fell within the -- the norm, … which would allow the Crown to make an application to amend, ask the Court to amend the date based on the evidence that was heard in court. And at the end of the day it appeared to me, my recollection is, that Mr. Levia had made a mistake when he had put in the date that he had put in. He corrected that mistake by saying that it actually should have been October the 22nd of 2019; I don't know why I put in December the 17th of 2019." (Transcript, Proceedings at Trial, March 18, 2021, p. 2, lines 18-29)

[35] The Crown argues the trial judge made no error with this ruling. Although Mr. Smith does not appear to have raised at trial the issue of Mr. Levia's retirement, the Crown dismisses this argument by reference to s. 601(7) of the *Code* which does not require an indictment/charging document to be resworn after amendment:

> 601(7) An order to amend an indictment or a count therein shall be endorsed on the indictment as part of the record and **the proceeding shall continue as if the indictment or count had been originally preferred as amended.** [emphasis added]

[36] Thus the fact that Mr. Levia was retired by the time the trial occurred is not relevant as there is no need by law to have the ticket resworn. The trial judge made no error in allowing the amendment even though Mr. Levia was retired.

[37] Further, the trial judge made no error of law in granting the amendment in this case. He understood and applied the law correctly.

[38] The proper time to make an application to amend under s. 601 of the *Code* is after the evidence has been heard (*R v McConnell* (2005), 75 OR (3d) 388 (Ont CA) at para. 20 ("*McConnell*")).

[39] The court in *McConnell* addressed the notion of prejudice in deciding whether an amendment should be allowed by stating the court must "consider whether the accused will have a full opportunity to meet all issues raised by the charge and whether the defence would have been conducted differently" (para. 11). In this case the amendment is of the date of the offence.

[40] In R v McMillan, 2016 YKCA 10 at para. 23, the court wrote:

> …The "golden rule" for determining whether a count is factually sufficient is that the accused must be "reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and fair trial: … At a

> minimum, this means that a count must describe the offence in such a way as to "lift it from the general to the particular"
> …

[41] Here there is no reason to question the trial judge's conclusion there was no prejudice to Mr. Smith created by the amendment. That Mr. Smith knew which harvest summary report was the subject of the offence was evident from his cross-examination questions to the forest officers who testified about the October 22, 2019 report and the steps they took after it was provided. There was no basis for a belief that Mr. Smith's defence would have been different if the mistake had not been made.

[42] The second concern raised by Mr. Smith about the sworn ticket was that it was required by the *Summary Convictions Act* to be provided to him along with a Notice of Trial or Appearance Notice. In this case the Appearance Notice was issued around the same time as the ticket was sworn and he did not receive the sworn ticket at the same time as the Appearance Notice.

[43] At trial, the Crown set out the sequence of events surrounding the sworn ticket. She confirmed:

- the ticket was served on Mr. Smith on January 31, 2020, within the two year limitation period set out in s. 86(2) of the *Act;*
- Mr. Levia delivered the ticket to the court registry on February 20, 2020, within 30 days of service on Mr. Smith, as required by the *Regulation*;
- Mr. Levia swore the ticket on or about February 28, 2020, following the normal practice; and
- The ticket is required to be sworn before the trial proceeds.

[44] The trial judge confirmed his view that the ticket was validly before the Court.

[45] The Crown on appeal confirmed the Crown's position at trial that there was no obligation at law for Mr. Levia to swear the ticket before the Appearance Notice was issued, or before the issuance of a Notice of Trial. The only requirement was that the ticket be sworn before the trial commenced on November 19, 2020, and this was done.

[46] Section 23(2) of the *Summary Convictions Act* provides that a trial may not proceed until an enforcement officer swears the complaint. Section 9(3) of the *Regulation* requires the enforcement officer to swear the complaint before a trial or warrant proceeding after an appearance, referred to in Option 3 of the ticket.

[47] The trial judge made no error on this basis in finding the sworn ticket was validly before the court. There was no obligation to provide the sworn ticket with the Appearance Notice and all the required timelines were met in this case.

[48] The third concern raised by Mr. Smith related to the sworn ticket was that the jurat to confirm the ticket was signed in the section "if sworn by facsimile", while in fact, the ticket was sworn in person. He argues the trial judge erred by not finding the ticket was invalid as a result.

[49] Mr. Smith did not pursue this concern in oral submissions at the appeal, but did not indicate he had abandoned it, so it will be addressed here.

[50] The Crown on appeal relies on *R v Dean* (1985), 36 Alta LR (2d) 8 (QB) at para. 29, in which the Court noted the signature on the jurat is evidence the oath was administered but is not the oath. A defect in the jurat did not alter the fact the oath was administered and effective. Further, s. 62 of the *Evidence Act*, RSY 2002, c 78, provides that an irregularity in the form of any affidavit, affirmation or statutory declaration does not prevent the court from accepting it into evidence, if that court thinks it is proper to

receive it. Here, the trial judge was correct to accept the sworn ticket despite the irregularity.

[51] The trial judge made no error in accepting the sworn ticket as valid despite the signature of the jurat on the wrong section. This is a minor irregularity that does not affect the fact the oath was properly administered and effective.

Issue c) – Failure to Adjourn to Hear Witnesses

[52] This is a question of mixed fact and law. Mr. Smith says the trial judge's refusal to adjourn the second day of trial because of the unavailability of one of Mr. Smith's witnesses was a miscarriage of justice.

[53] Mr. Smith made an application to adjourn at the outset of the second day of trial on Thursday, March 18, 2021, because his witness was not available that day. Mr. Smith said he phoned the witness on Monday or Tuesday of that week, and advised him court would be held on Wednesday (although the trial continuation was scheduled for Thursday). In answer to the judge's question, Mr. Smith advised he had not subpoenaed the witness. He had not advised the Crown of anything related to the witness. The reason for the witness' unavailability was explained initially by Mr. Smith that he was called out on an emergency. On further explanation, Mr. Smith said the witness was the owner of a helicopter business and he was flying tourists over the mountains, as part of his normal business.

[54] At trial the Crown opposed the adjournment request. March 18 was the first time they had heard of any defence witnesses. The matter had first come to court a year earlier, had been adjourned several times to accommodate Mr. Smith's requests, and

had been adjourned after the first day of trial in order to be completed on March 18, 2021.

[55] The trial judge denied Mr. Smith's application to adjourn on the basis that Mr. Smith had not subpoenaed his witness. When Mr. Smith raised the issue again shortly after the ruling, the trial judge noted he had had approximately 12 weeks to arrange for his witness to be there, to which Mr. Smith replied "I've had a year." The trial judge reiterated he had not been presented with a valid reason why the witness was not there and why he was not subpoenaed.

[56] The Crown on appeal argues that the granting of an adjournment due to the unavailability of witnesses is within the Court's discretion. The three conditions necessary to entitle a party to an adjournment are set out in *Darville v The Queen*, [1956] SCJ No 82 ("*Darville*") at 117 as follows:

> (a) that the absent witnesses are material witnesses in the case;
>
> (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses;
>
> (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial.

[57] The Crown noted in this case the trial judge focussed on the second condition – that is, Mr. Smith's failure to subpoena the witness and provide a valid reason for his inability to attend court.

[58] While Mr. Smith says this witness was important to his case as he could testify that Mr. Smith brought wood to one of his businesses, an RV park with a fire pit, in the fall of 2018, this is not sufficient on its own to constitute an error of the trial judge. It

shows that this witness was a material witness for the defence, thereby meeting the first condition in *Darville*, but making it important for Mr. Smith to take all necessary steps to procure his attendance at trial.

[59] The trial judge did not err in exercising his discretion to refuse the adjournment in this case. Generally, courts consider all three factors set out in *Darville* as a whole. The applicant for an adjournment must provide evidence on all three factors and that evidence, when considered as a whole, must convince the judge on a balance of probabilities an adjournment should be granted (*R v Kocsis*, [2003] OJ No 4502 (Ont SC); *R v Pusey*, 2015 ONSC 7150). In this case there was sufficient evidence to support the trial judge's finding that Mr. Smith neglected to procure the witness' attendance by failing to subpoena him or provide a valid reason for his non-attendance.

[60] Given all of the circumstances as indicated above, the trial judge's decision to refuse the adjournment application was reasonable.

Issue e) – Failure to enforce the policy referred to in s. 40 of the *Forest Resources Act*

[61] This is a question of mixed fact and law.

[62] Section 40 of the *Act* states:

> The Director must establish and make public a policy respecting the enforcement of this Act, including procedures and guidelines governing the exercise of discretionary powers under this Act.

[63] A Compliance and Enforcement Operational Policy and Procedures was published by the Yukon government in February 2011 and is still in force.

[64] Mr. Smith says that certain aspects of the policy were not followed. In particular at the appeal he argued that the officers failed to consider his compliance history, failed

to do an investigation, and failed to interview him before laying the charge. He also raises other procedural concerns about various aspects of the policy not being followed.

[65] The only issues raised at trial were the absence of an investigation and a failure to interview him. Mr. Smith says the failure to follow the policy should have resulted in a stay of proceedings.

[66] The Crown did not respond to these allegations at trial as they were not referred to in submissions and were raised by Mr. Smith through cross-examination of the forest officers only.

[67] The trial judge did not refer to these arguments in his decision or in any rulings at trial. He may have considered them implicitly in his assessment of the evidence of the forest officers. For the purposes of appeal the assessment must be whether the trial judge erred in failing to consider these arguments made through cross-examination by Mr. Smith at trial, or, if he did consider them, whether he made any error in not staying the proceedings as a result of a breach.

[68] The Crown on appeal argues the steps taken by the forest officer were discretionary and should not be reviewed. This is supported by the Federal Court of Appeal decision in *Ochapowace First Nation (Indian Band No. 71) v Canada (Attorney General)*, 2009 FCA 124 at para. 29, in which the Court wrote because of the importance of investigator discretion, courts should not review police or prosecutorial discretion except in the clearest cases of abuse. The Crown also relies on *R c J.M.*, 2020 QCCQ 13686, in which the Court held an investigator had no obligation to meet an offender before charges were laid or show the offender had no valid defence to the

charges (para. 30). They only had to have reasonable grounds to file a complaint, developed with diligence and care (para. 30).

[69] In any event, the Crown notes that Mr. Levia did write to Mr. Smith, asking him to show Mr. Levia where he harvested the wood, before he issued the ticket, and Mr. Smith did not respond substantively.

[70] The trial judge did not err in failing to consider this argument explicitly at trial. It was not clearly raised by Mr. Smith and not referred to by the Crown or Mr. Smith in submissions at trial. The trial judge may have considered it implicitly in accepting the evidence of Mr. Levia of the steps taken in this case and concluding the Crown had proved its case against Mr. Smith. But even if this argument had been made clearly at trial, it provides no basis for a stay of proceeding. The evidence supports the appropriate steps taken by the forest officers before issuing the ticket – that is, reviewing the initial harvest summary report and making a determination about its failure to meet the licence terms, issuing a notice of non-compliance within a reasonable period of time to complete the harvest, inspecting the licensed area after receiving the revised harvest summary report to find evidence of harvest, writing to Mr. Smith requesting he show him where the harvest occurred and receiving no response, inspecting a second time after the deadline for compliance had passed, and finally issuing a ticket for making a false report. There is no requirement to follow all of the steps set out in the policy in a particular sequence in every case. The policy provides a guideline for the officers in the exercise of their discretion on the facts of each case. What is important is that due process and fairness are followed and in this case, the trial judge was not presented with any clear evidence or arguments that this did not occur.

Issue f) – Remedy for *Charter* breach

[71] This is a question of law.

[72] The Crown raised this issue and conceded that Mr. Smith's s. 9 *Charter* right (the right to be free from arbitrary detention) was breached when Mr. Levia and the RCMP officers who accompanied him served the ticket on Mr. Smith. The trial judge found there was a breach because both Mr. Levia and one of the RCMP officers mistakenly believed they had the right to detain Mr. Smith, resulting in them asking Mr. Smith for his identification and engaging him in an unpleasant conversation for a period of 20-30 minutes. He further found after applying the analysis set out in *R v Grant*, 2009 SCC 32 ("*Grant*") at paras. 124-126, to determine whether evidence should be excluded or not as result of the breach under s. 24(2) of the *Charter* (seriousness of the *Charter*-infringing conduct, impact on the *Charter* protected interests of the accused, and society's interest in an adjudication of the matter on its merits – see para. 32 of trial judgment) that the appropriate remedy was not an exclusion of evidence and stay of proceedings, but instead a reduction in the fine. The trial judge found it was not the most serious breach because there was no arrest, Mr. Smith was not touched in any way, and ultimately, the officers departed after leaving the ticket on his car windshield. The trial judge reduced the fine from $200 and a $30 surcharge to $100 and a $15 surcharge.

[73] Mr. Smith argues the remedy for the breach should have been a stay of proceedings.

[74] The Crown on appeal argues that the trial judge's decision was appropriate. The trial judge identified the relevant tests for remedies for a *Charter* breach. Stays of

proceedings are appropriate only “in the clearest of cases” (*R v O’Connor*, [1995] 4 SCR 411 at 486). This case was noted by the trial judge not to be a serious breach for the reasons set out above. He noted the detainment was a result of a mistaken belief by the officers of their authority in that situation. He properly applied the factors set out in *Grant* for excluding evidence as a remedy, and concluded a reduction in sentence was the appropriate remedy in the circumstances. A reduction in a sentence has been found by the Supreme Court of Canada to be an appropriate remedy for a *Charter* breach (*R v Nasogaluak*, 2010 SCC 6 at para. 55), so long as the incidents giving rise to the breach are relevant to the usual sentencing regime. In this case arbitrary detention during the service of a ticket by the state is relevant for sentencing.

[75] There is no reason to overturn the trial judge’s conclusion on this issue. The choice of remedy for a *Charter* breach is discretionary, guided by the legal tests and principles in the statute and jurisprudence. There is no basis for this Court to intervene.

Other Matters

[76] Mr. Smith at the appeal presented affidavits from three individuals. These were apparently proposed witnesses for his defence. Only one of the three had been referred to at trial, in the context of the adjournment request.

[77] These affidavits are new evidence and no application was made by Mr. Smith to adduce fresh evidence, despite the Crown setting out the test in her outline of argument filed months in advance of the hearing of this appeal. As a result, I will not be considering these affidavits for the purposes of this decision.

Conclusion

[78] Mr. Smith's appeal is dismissed. There will be no order as to costs.

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DUNCAN C.J.