R. v. Gray (D.J.) (2004), 284 N.B.R.(2d) 31 (CA);
284 R.N.-B.(2e) 31; 742 A.P.R. 31

MLB headnote and full text

[French language version follows English language version]

[La version française vient à la suite de la version anglaise]

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Darrell Joseph Gray (applicant) v. Her Majesty the Queen (respondent)
(68/03/CA)

Indexed As: R. v. Gray (D.J.)

New Brunswick Court of Appeal
Robertson, J.A.
December 15, 2004.

Summary:
The accused, a member of the Mi'kmaq community living on the Pabineau (First Nation) Reserve, was charged with unauthorized cutting of timber on Crown lands contrary to s. 67(1)(a) of the Crown Lands and Forest Act. The accused claimed a treaty and an aboriginal right to harvest trees for personal use. The trial judge rejected the treaty defence, but acquitted the accused, holding that he had an aboriginal right. A summary conviction appeal judge affirmed that the accused did not have the alleged treaty right. The appeal judge also held that the accused did not have the alleged aboriginal right and convicted him. The accused appealed with respect to the aboriginal right issue.

The New Brunswick Court of Appeal, in a decision reported at 273 N.B.R.(2d) 157; 717 A.P.R. 157, allowed the appeal, holding that the accused had an aboriginal right to harvest trees for personal use on Crown lands traditionally occupied by members of the Mi'kmaq community now living on the Pabineau (First Nation) Reserve. The court restored the verdict of not guilty. The Crown applied for leave to appeal to the Supreme Court of Canada. Robertson, J.A., of the New Brunswick Court of Appeal, signed a consent order, granting a stay with respect to the Court of Appeal's decision. The accused applied to set aside the consent order.

The New Brunswick Court of Appeal, per Robertson, J.A., dismissed the application.

Barristers and Solicitors - Topic 1366

Authority - Setting aside acts and agreements of counsel - Grounds - Lack of authority - The Court of Appeal acquitted an accused of unauthorized cutting of timber on Crown lands - The court held that the accused and members of his community had an aboriginal right to harvest trees for personal use on Crown

lands traditionally occupied by members of the community - The Crown applied for leave to appeal - Robertson, J.A., signed a consent order, granting a stay with respect to the court's decision - The accused applied to set aside the consent order, arguing that his former counsel lacked authority to agree to such an order - The New Brunswick Court of Appeal, per Robertson, J.A., dismissed the application - There was no evidence to support the understanding that the accused's former solicitor was not acting within his apparent authority - Nor was there any evidence to support an argument that the Crown was aware of any limitation that the accused might have placed on his former solicitor's authority to enter into the consent order - See paragraphs 9 to 14.

Practice - Topic 5539

Judgments and orders - Consent orders - Setting aside - General - [See **Barristers and Solicitors - Topic 1366**].

Practice - Topic 9090.4

Appeals - Supreme Court of Canada - Leave to appeal - Stay of judgment pending application for - The Court of Appeal acquitted an accused of unauthorized cutting of timber on Crown lands - The court held that the accused and members of his community had an aboriginal right to harvest trees for personal use on Crown lands traditionally occupied by members of the community - The Crown applied for leave to appeal - Robertson, J.A., signed a consent order, granting a stay with respect to the court's decision - The accused argued that Robertson, J.A., lacked jurisdiction to grant the stay under s. 65.1 of the Supreme Court Act (Can.), because the stay granted did not fit within the stay contemplated by s. 65.1, which only referred to a stay of proceedings - The New Brunswick Court of Appeal, per Robertson, J.A., rejected the argument - "Proceedings" in s. 65.1 was to be given a broad interpretation - See paragraphs 4 to 8.

Cases Noticed:

R. v. Bernard (J.) (2003), 262 N.B.R.(2d) 1; 688 A.P.R. 1 (C.A.), refd to. [para. 5].

R. v. Marshall (D.J.), Jr., [1999] 3 S.C.R. 533; **247 N.R. 306**; **179 N.S.R.(2d) 1**; 553 A.P.R. 1, refd to. [para. 6].

H.M. and M.M. v. Director of Child Welfare (P.E.I.) (1989), 81 Nfld. & P.E.I.R. 93; 255 A.P.R. 93 (P.E.I.C.A.), not folld. [para. 7].

RJR-MacDonald Inc. et Imperial Tobacco Ltd. v. Canada (Procureur général), [1994] 1 S.C.R. 311; **164 N.R. 1**; 60 Q.A.C. 241, refd to. [para. 7].

R. v. Werhun (1990), 68 Man.R.(2d) 223 (C.A.), not folld. [para. 8].

Scherer v. Paletta, [1966] 2 O.R. 524 (C.A.), refd to. [para. 9].

Cosper v. Cosper (1995), 141 N.S.R.(2d) 344; 403 A.P.R. 344 (C.A.), refd to. [para. 10].

Begg v. East Hants (Municipal District) and Nova Scotia (Director of Assessment) (1986), 75 N.S.R.(2d) 431; 186 A.P.R. 431 (C.A.), refd to. [para. 10].

Correia et al. v. Danyluk et al. (2001), 286 A.R. 117; 253 W.A.C. 117 (C.A.), refd to. [para. 10].

Hrycoy Estate v. Hrycoy Estate et al., [2004] A.J. No. 1202 (C.A.), refd to. [para. 10].

Stewart v. Complex 329 Ltd. et al. (1990), 107 N.B.R.(2d) 407; 267 A.P.R. 407 (T.D.), refd to. [para. 11].
Wilkinson v. Yat Ming Industrial Factory Ltd., [2003] O.T.C. Uned. 325 (Sup. Ct.), refd to. [para. 12].
Morency and Pelletier v. Charest et al. (1991), 123 N.B.R.(2d) 392; 310 A.P.R. 392 (C.A.), refd to. [para. 13].
Chitel v. Rothbart, [1987] O.J. No. 2321 (S.C.), refd to. [para. 13].
Racz v. Mission (District) (1988), 22 B.C.L.R.(2d) 70 (C.A.), refd to. [para. 13].
Wagg v. Minister of National Revenue (Customs and Excise), [2004] 1 F.C.R. 206; **308 N.R. 67 (F.C.A.)**, refd to. [para. 13].
Beanland v. Beanland (1997), 151 Nfld. & P.E.I.R. 51; 471 A.P.R. 51 (Nfld. C.A.), refd to. [para. 13].
Paper Machinery Ltd. et al. v. Ross (J.O.) Engineering Corp. et al., [1934] S.C.R. 186, refd to. [para. 13].

Statutes Noticed:

Supreme Court Act, R.S.C. 1985, c. S-26, **sect. 65.1** [para. 4].

Counsel:

Thomas J. Burke and Ronald E. Gaffney, for the applicant;
C. Gabriel Bourgeois, Q.C., for the respondent.

This application was heard on December 10, 2004, by Robertson, J.A., of the New Brunswick Court of Appeal, who delivered the following decision on December 15, 2004.

[End headnote]

[1] Robertson, J.A. : The applicant moves to set aside a consent order that I signed on October 25, 2004, granting a stay with respect to a decision of the Court, for which the respondent is seeking leave of the Supreme Court: **R. v. Gray** , [2004] N.B.J. No. 291 (C.A.). The applicant advances two arguments in support of his position. First, the applicant submits that I lacked the jurisdiction to issue the order and, second, that it issued without his consent. I hasten to add that the motion to set aside the consent order was served on the applicant's former solicitor who chose not to participate in the present proceedings.

[2] The essential facts are as follows. On July 22, 2004, this Court released its decision in **R. v. Gray** upholding the applicant's acquittal with respect to a charge of harvesting trees on Crown lands, contrary to s. 67(1)(a) of the **Crown Lands and Forests Act** , S.N.B. 1980, c. C-38.1. The acquittal was based on a finding that the applicant possessed an aboriginal right to harvest trees, for personal use, on Crown lands traditionally occupied by status members of the Mi'kmaq community now living on the Pabineau First Nation Reserve. On September 28, 2004 the respondent Crown sought leave to appeal that decision to the Supreme Court: [2004] S.C.C.A. No. 416. As well, the Crown applied, to this Court, under s. 65.1 of the **Supreme Court Act** , R.S.C. 1985, c. S-26, for an order that would stay the "effect" of our decision pending the Supreme Court's disposition of the leave application or, if leave were granted, until disposition of the appeal. I hasten to add that on appeal, in **Gray** , the Crown did not

seek a stay, either in its written submission or during oral argument.

[3] On October 25, 2004, I was presented with a consent motion together with three supporting affidavits. On the basis of those affidavits, the existing jurisprudence and having regard to the applicant's apparent consent to the order being sought, I granted the impugned order. On November 1, 2004, the applicant received a letter from his former solicitor indicating that the latter had consented to the stay. The applicant's affidavit alleges that not only did his former solicitor lack the authority to agree to such an order, but in fact, he had been instructed to oppose any stay that the Crown might seek.

[4] The applicant maintains that I lacked the jurisdiction to grant a stay under s. 65.1 of the **Supreme Court Act** , because that section refers only to a stay of proceedings and, in the present case, there are no proceedings pending in the courts below. Section 65.1 reads as follows:

> "65.1(1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.
>
> "(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.
>
> "(3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section."

[5] It is worth restating that the stay granted on October 25, 2004, is the same type of stay that was granted by this Court in **R. v. Bernard (J.)** (2003), 262 N.B.R.(2d) 1; 688 A.P.R. 1 (C.A.). In **Bernard** , however, the stay was for a period of one year. Following expiration of that period, and pending the hearing of the appeal from our decision, the Supreme Court extended the stay in **Bernard** until final disposition of the appeal, which is to be heard in January of 2005: see **R. v. Bernard (J.)** (July 9, 2004) 30005 (S.C.C.), LeBel, J.

[6] Unlike the conventional stay, which stays the judgment of the court, the stay in the aboriginal rights cases is intended to restrict the precedential significance of any case in which this Court has declared that an aboriginal right exists (treaty or otherwise): see **R. v. Marshall (D.J.), Jr.** , [1999] 3 S.C.R. 533; 247 N.R. 306; 179 N.S.R.(2d) 1; 553 A.P.R. 1, at para. 47 and **R. v. Bernard** at paras. 549-552. In practical terms, this means, for example, that if a status member of the Pabineau First Nation were charged with harvesting trees on Crown lands, and he or she were to raise the defence of aboriginal right, as established in **R. v. Gray** , the trial court would not be at liberty to give effect to it. Thus, the stay is not a stay of the judgment per se. Indeed, the applicant was found to be not guilty and the acquittal stands. Rather, what is being stayed is the effect of the judgment to the extent that it would provide the applicant and other members of the Pabineau First Nation with a defence to the charge of

harvesting trees in contravention of the **Crown Lands and Forests Act** .

[7] The applicant takes the position that the type of stay granted by this Court does not fit within the stay contemplated by s. 65.1 of the **Supreme Court Act** , which refers only to a stay of proceedings. In support of that position, he cites two cases. The first is **H.M. and M.M. v. Director of Child Welfare (P.E.I.)** (1989), 81 Nfld. & P.E.I.R. 93; 255 A.P.R. 93 (P.E.I.C.A.). In that case the Crown sought a stay pending an appeal with respect to a declaration that a provision of the **Family and Child Services Act** , R.S.P.E.I. 1974, c. F-2.01 was unconstitutional. The Court of Appeal denied the stay on the basis that the right to a stay, provided for under the **Rules of Court** , applied only to a "stay of proceedings" and not the staying of a "decision". In my view, that case has been overtaken by the Supreme Court's decision in **RJR-MacDonald Inc. et Imperial Tobacco Ltd. v. Canada (Procureur gé néral)** , [1994] 1 S.C.R. 311; 164 N.R. 1; 60 Q.A.C. 241, decided after **H.M** . More to the point, in **RJR-MacDonald** the Supreme Court rejected the narrow interpretation of s. 65.1 being advanced before me. At page 329 [S.C.R.] the Supreme Court held:

> "We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court." (My emphasis.)

[8] Note that the Supreme Court's broad interpretation of the word " proceedings" is consistent with the French version of s. 65.1(1) of the **Supreme Court Act** . Finally, the above quote effectively negates the application of the second case that the applicant cited in support of his argument, which was decided before **RJR-MacDonald** : see **R. v. Werhun** (1990), 68 Man.R.(2d) 223 (C.A.). In brief, the argument that I lacked the jurisdiction to grant the impugned consent order is without foundation.

[9] This leads me to the applicant's contention that the consent order must be set aside because of the failure of his former solicitor to obtain the applicant's consent. With great respect, both parties to this application are operating under a fundamental misunderstanding of the law. The mere fact that a client did not consent to an agreement or consent order is not a sufficient basis on which to set it aside. In that regard, one must turn to the principles of agency law. The general principle is that if the solicitor acts within the scope of his "apparent" authority and the opposing party has no notice of any limitations imposed by the client, then the client will be bound by any agreement or accord entered into, notwithstanding the limitations that had been placed on the solicitor. The lead decision on this point is **Scherer v. Paletta** , [1966] 2 O.R. 524 (C.A.), where at pages 526-27 it was held:

> "The authority of a solicitor arises from his retainer and as far as his client is concerned it is confined to transacting the business to which the retainer extends and is subject to the restrictions set out in the retainer. The same

> situation, however, does not exist with respect to others with whom the solicitor may deal. The authority of a solicitor to compromise may be implied from a retainer to conduct litigation unless a limitation of authority is communicated to the opposite party. A client, having retained a solicitor in a particular matter, holds that solicitor out as his agent to conduct the matter in which the solicitor is retained. In general, the solicitor is the client's authorized agent in all matters that may reasonably be expected to arise for decision in the particular proceedings for which he has been retained. Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority. As between principal and agent, the authority may be limited by agreement or special instructions but as regards third parties the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties. ...
>
> " A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. ..." (My emphasis.)

[10] The **Paletta** decision has been consistently applied by other appellate courts: see **Cosper v. Cosper** (1995), 141 N.S.R.(2d) 344; 403 A.P.R. 344 (C.A.), **Begg v. East Hants (Municipal District) and Nova Scotia (Director of Assessment)** (1986), 75 N.S.R.(2d) 431; 186 A.P.R. 431 (C.A.), **Correia et al. v. Danyluk et al.** , [2001] A.J. No. 799; 286 A.R. 117; 253 W.A.C. 117 (C.A.), **Hrycoy Estate v. Hrycoy Estate et al.** , [2004] A.J. No. 1202 (C.A.).

[11] I hasten to add that reliance on **Stewart v. Complex 329 Ltd. et al.** (1990), 107 N.B.R.(2d) 407; 267 A.P.R. 407 (T.D.), at para. 13, for the proposition that a consent order may be set aside "where it is clearly shown a party did not in fact consent" is in error. The idea that a party could set aside any agreement or consent order solely on the basis that he or she was not consulted has no support in the law.

[12] In the present case, there is no evidence to support the understanding that the applicant's former solicitor was not acting within his apparent authority. Nor is there any evidence to support an argument that the Crown was aware of any limitation, that the applicant might have placed, on the authority of his former solicitor to enter into the impugned consent order. In brief, there is no evidence to even suggest that Crown counsel had good reason to believe that the applicant's former solicitor lacked the authority to enter into the consent order: see **Wilkinson v. Yat Ming Industrial Factory Ltd.** , [2003] O.T.C. Uned. 325; [2003] O.J. No. 1385 (Sup. Ct.).

[13] Accepting that the impugned consent order was entered into with the apparent authority of the applicant's former solicitor, the law is clear that a consent order can only be set aside on grounds that would vitiate a contract: e.g. common mistake, fraud, collusion, misrepresentation, duress and illegality. See **Morency and Pelletier v.**

Charest et al. (1991), 123 N.B.R.(2d) 392; 310 A.P.R. 392 (C.A.) and **Chitel v. Rothbart** , [1987] O.J. No. 2321 (S.C.), **Racz v. Mission (District)** (1988), 22 B.C.L.R.(2d) 70 (C.A.) and **Wagg v. Minister of National Revenue (Customs and Excise)** , [2004] 1 F.C.R. 206; 308 N.R. 67 (F.C.A.). There is also the possibility of a "slip" in drawing up the order or an error in expressing the manifest intention of the parties: see **Beanland v. Beanland** (1997), 151 Nfld. & P.E.I.R. 51; 471 A.P.R. 51 (Nfld. C.A.), at para. 41 and **Paper Machinery Ltd. et al. v. Ross (J.O.) Engineering Corp. et al.** , [1934] S.C.R. 186.

[14] The applicant did not allege that the consent order was obtained in circumstances which would warrant the setting aside of a contract. It follows that there is no legal basis for setting aside the consent order that issued on October 25, 2004. In these circumstances, it is unnecessary to revisit the issue whether a stay is warranted. That said, I wish to draw attention to one aspect of **Gray** that was discussed during the motion hearing. It involves the matter of prejudice and the prospective nature of the stay order.

[15] As noted above, the effect of a stay order is to suspend the right of a trial judge to give effect to a defence based on an aboriginal right in cases where an aboriginal is charged with unlawful harvesting under the **Crown Lands and Forests Act** . The object of the stay is to preserve the status quo pending negotiations between aboriginal groups and the provincial government or to preserve the status quo pending an appeal to the Supreme Court. In either case, the stay order must be looked on as a prospective ruling. It does not apply to those who harvested wood on Crown lands prior to the stay issuing. For example, in the present case, the stay does not apply to those members of the Pabineau First Nation who harvested wood prior to the stay issuing on October 25, 2004. Those who did harvest wood prior to that date and who have been charged under the **Crown Lands and Forests Act** possess the right to raise the defence of aboriginal right, as well as any other available defence. Correlatively, the trial judge is under an obligation to entertain all of the defences. I hasten to add that it is one matter to say that the right to raise a defence exists and quite another to determine whether the legal requirements surrounding its establishment have been satisfied on the facts of a particular case.

[16] For these reasons, the motion to set aside the consent order, dated October 25, 2004, is denied. Both parties agreed that there should be no order as to costs.

Application dismissed.

Editor: David Weir/pdk