



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Chaulk*, 2021 NLCA 49

Date: September 29, 2021

Docket Number: 201901H0084

BETWEEN:

ERIC CHAULK

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Hoegg, O'Brien and Butler JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Corner Brook

Appeal Heard: April 7, 2021

Judgment Rendered: September 29, 2021

Reasons for Judgment by: O'Brien J.A.

Concurred in by: Hoegg and Butler JJ.A.

Counsel for the Appellant: Brian D. Wentzell

Counsel for the Respondent: Arnold W. Hussey Q.C.

Authorities Cited:

CASES CITED: *R. v. Haynes*, 2013 NLCA 18; *R. v. Anderson*, 2012 NLCA 69, 330 Nfld. & P.E.I.R. 257; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (S.C.C.); *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124; *R. v. Rich*, 2016 NLTD(G) 188; *R. v. McDougall*, 2014 MBCA 95; *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612; *R. v. Szabo*, [1991] 1 S.C.R. 736 (S.C.C.); *R. v. Cook* (1986), 13 O.A.C. 238, 26 C.C.C. (3d) 188 (Ont. C.A.).

STATUTES CONSIDERED: *Criminal Code*, RSC 1985, c. C-46, sections 2, 266, 812, 813, 829, 830, 839; *Court of Appeal Act*, SNL 2017, c. C-37.002, sections 2, 6, 35; *Miscellaneous Statute Law Amendment Act, 2014*, SC 2015, c. 3; *Judicature Act*, RSNL 1990, c. J-4, sections 2, 52; *Constitution Act, 1867*, sections 91(27), 92(13), 92(14), 92(16).

O'Brien J.A.:

OVERVIEW

[1] The Appellant, Eric Chaulk, pleaded guilty to three counts of assault (s. 266 of the *Criminal Code*). The matter proceeded summarily in the Provincial Court of Newfoundland and Labrador and Mr. Chaulk was convicted. He received a nine month conditional sentence of imprisonment, a twelve month period of probation, and a ten year weapons prohibition. Mr. Chaulk wishes to appeal two parts of the sentence, namely the probation order and weapons prohibition.

[2] A notice of appeal was filed in this Court pursuant to s. 830 of the *Code*, which provides for appeals from a summary conviction court. On appeal, the issue was considered as to whether this Court has jurisdiction to hear the appeal under s. 830.

[3] For the reasons that follow, and having considered the applicable *Code* provisions and the relevant provincial legislation, I would conclude that this Court does not have jurisdiction to hear this summary conviction appeal under s. 830 of the *Code*. Rather it is the Supreme Court of Newfoundland and Labrador that has jurisdiction under s. 830. Accordingly, the appeal should be transferred to the Supreme Court.

ISSUE

[4] The issue to be determined is whether this Court has jurisdiction to hear this appeal under s. 830.

ANALYSIS

[5] Section 6 of the *Court of Appeal Act*, SNL 2017, c. C-37.002, describes the appellate jurisdiction of this Court, including jurisdiction that is provided by a provincial or federal statute:

- 6(1) Subject to section 7 and the rules made under section 38, an appeal lies to the court
 - (a) from an order of the Supreme Court or an order of a judge of the Supreme Court; and
 - (b) in a proceeding where jurisdiction is given to it under an Act of the Legislature or the Parliament of Canada.
- (2) Where another Act of the Legislature or the Parliament of Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that Act prevails.
- (3) The court shall have and exercise appellate jurisdiction, with the original jurisdiction that may be necessary or incidental to the determining of any proceeding before the court, with appellate jurisdiction in civil and criminal proceedings, and jurisdiction and power to hear and determine appeals respecting an order or decision of a judge of the Supreme Court.

[6] When a right of appeal exists, the language of the respective federal or provincial statute that provides appellate jurisdiction must be considered to determine how the appeal is to proceed, including the court to which the appeal is to be brought.

Relevant *Criminal Code* provisions

[7] In this context, s. 830(1) of the *Code* provides for an appeal from a summary conviction court:

830 (1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that:

- (a) it is erroneous in point of law;

(b) it is in excess of jurisdiction; or

(c) it constitutes a refusal or failure to exercise jurisdiction.

[8] Section 829 of the *Code* identifies the court that has jurisdiction to hear such an appeal. It states that a summary conviction appeal under s. 830 is to be made to an “appeal court”. The term “appeal court” is defined in s. 829, and means the “superior court of criminal jurisdiction for the province”.

[9] The term “superior court of criminal jurisdiction” is also defined, in s. 2 of the *Code*. Notably, the definition of superior court of criminal jurisdiction, as it relates to Newfoundland and Labrador, was amended in 2015 (*Miscellaneous Statute Law Amendment Act, 2014*, SC 2015, c. 3, assented to February 26, 2015). As discussed below, this amendment is significant to determining the issue of jurisdiction.

[10] Before the 2015 amendment, s. 2 of the *Code* stated that the superior court of criminal jurisdiction in this province “means ... the Supreme Court or the Court of Appeal”. On this basis, the Court of Appeal determined that it had jurisdiction under s. 830 to hear appeals, including sentence appeals, from a summary conviction court (see for example *R. v. Haynes*, 2013 NLCA 18; *R. v. Anderson*, 2012 NLCA 69, 330 Nfld. & P.E.I.R. 257).

[11] As a result of the 2015 amendment to s. 2, the defined term “superior court of criminal jurisdiction” in Newfoundland and Labrador was changed, and now “means ... the Supreme Court” only, and not the Court of Appeal. The reference to “or the Court of Appeal” was removed at that time.

[12] Therefore, at present, s. 2 of the *Code* provides that the “Supreme Court” is the appeal court for summary conviction appeals under s. 830. However, the *Code* provides no definition of “Supreme Court” in s. 2 as it relates to this province. The definition of Supreme Court in this context is found elsewhere, in provincial legislation, specifically in the *Judicature Act*, RSNL 1990, c. J-4, and the *Court of Appeal Act*.

The Judicature Act and the Court of Appeal Act

[13] Both the *Judicature Act* and the *Court of Appeal Act* identify the Supreme Court and the Court of Appeal as two distinct courts, each with its own respective jurisdiction.

[14] For example, this distinction between the courts is maintained in the *Judicature Act*, which defines the courts as follows:

2(f) "Court of Appeal" means the Court of Appeal of Newfoundland and Labrador continued under section 3 of the *Court of Appeal Act*;

2(u) "Supreme Court" means the Supreme Court of Newfoundland and Labrador.

[15] Similarly, the language of the *Court of Appeal Act* also reflects this distinction between the courts:

2(d) "court" means, unless the context indicates otherwise, the Court of Appeal of Newfoundland and Labrador referred to in section 3 or a judge or the judges of that court;

2(o) "Supreme Court" means the Supreme Court of Newfoundland and Labrador as continued in the *Judicature Act*.

[16] The central question for this appeal then is, in light of the legislative distinction between these two courts, whether the term "Supreme Court", as it is used in s. 2 of the *Code*, ought to be interpreted to mean not only the Supreme Court of Newfoundland and Labrador, but also the Court of Appeal of Newfoundland and Labrador.

Statutory interpretation

[17] The analytical approach to be taken in considering a question of statutory interpretation was confirmed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[18] The approach to statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd. (Re)* has been consistently applied throughout Canada, including by this

Court (see *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, for an early example of this Court’s adoption of this approach). Both *Rizzo & Rizzo Shoes Ltd. (Re)* and *Archean Resources Ltd.* set out a contextual approach to interpretation that entails going beyond the ordinary or plain meaning of the words and language being considered, situating the words and language within a specific context, and interpreting them in a manner that is informed by this context.

Does the term “Supreme Court” include the Court of Appeal?

[19] To determine whether the term “Supreme Court” ought to be interpreted to include the Court of Appeal, it is necessary to consider whether the statutory reference to the “Supreme Court” in s. 2 of the *Code* provides jurisdiction to the Court of Appeal, either explicitly or implicitly, to hear a summary conviction appeal under s. 830. This requires consideration of the *Code* provisions as well as the provisions and definitions in the *Judicature Act* and the *Court of Appeal Act*, as referenced above.

[20] There are two arguments in this respect.

[21] The first argument is that the Court of Appeal has explicit jurisdiction to hear s. 830 appeals. As noted above, before 2015 the Court of Appeal had explicit jurisdiction to hear summary conviction appeals because s. 2 of the *Code* stated that the appeal court meant the “Supreme Court or the Court of Appeal”. However, as s. 2 was amended in 2015 and the reference to the Court of Appeal was taken out, it can no longer be maintained that the *Code* provides the Court of Appeal explicit jurisdiction to hear s. 830 appeals.

[22] The second argument is that that term “Supreme Court” in s. 2 of the *Code* implicitly includes the Court of Appeal, and should be interpreted to include the Court of Appeal. This argument is based on the way the courts were historically structured until 2017, at which time the *Judicature Act* was amended and the *Court of Appeal Act* was enacted.

[23] From 1986 to 2017, the *Judicature Act* stated that the Supreme Court was composed of two divisions; an appeal division, to be called the Court of Appeal, and a Trial Division (see s. 3(2) of the previous version of the *Judicature Act*). As well, until it was amended in 2017, s. 2(u) of the *Judicature Act* stated that Supreme Court “means the Supreme Court of Newfoundland and Labrador ... and where the subject or context requires, the Court of Appeal or the Trial Division”.

[24] Therefore, even after s. 2 was amended in 2015 (when the reference to the Court of Appeal was removed) it might still have been argued that a reference to the “Supreme Court” in s. 2 of the *Code* could have meant either the Supreme Court, Trial Division or the Court of Appeal. That is, there was an argument, based on the statutory language, that the term “Supreme Court” included both courts, that it continued to refer to the Court of Appeal, and that it should be interpreted to include both. This interpretation was given to “Supreme Court” in *R. v. Rich*, 2016 NLTD(G) 188.

Amendments to the *Judicature Act* and a new *Court of Appeal Act*

[25] However, in 2017 legislative amendments to the *Judicature Act* repealed the former definition of the Supreme Court, and replaced this with new definitions of Supreme Court and Court of Appeal, as set out above, recognizing the courts as separate. Therefore, as noted above, the current definition of Supreme Court in s. 2(u) of the *Judicature Act* states that “Supreme Court means the Supreme Court of Newfoundland and Labrador”. Similarly, the new *Court of Appeal Act*, enacted in 2017 and in force in 2018, mirrored the *Judicature Act* definitions and the statutory distinction between the two courts.

[26] As a result, in both the *Court of Appeal Act* and the *Judicature Act*, the Supreme Court no longer includes the Court of Appeal. Therefore, any argument that the term “Supreme Court” in s. 2 of the *Code* should be interpreted to include the Court of Appeal is no longer supported by the amendments to the *Judicature Act* in 2017, the enactment of the *Court of Appeal Act* in 2017 (in force in 2018), or the current definitions of Supreme Court and Court of Appeal in both Acts.

The *Miscellaneous Statute Law Amendment Act, 2014*

[27] In terms of statutory interpretation, it is noteworthy that the amendment to the definition of “superior court of criminal jurisdiction” for this province, in s. 2 of the *Code*, was made through a federal omnibus amendment statute, the *Miscellaneous Statute Law Amendment Act, 2014*. The long title of the *Act* states that it is an “Act to correct certain anomalies, inconsistencies and errors and to deal with other matters of a non-controversial and uncomplicated nature in the Statutes of Canada and to repeal certain provisions that have expired, lapsed or otherwise ceased to have effect”. The introductory preamble note to the *Act* includes the heading “Background and Process”, in which it is stated that any proposed amendments in the *Act* must meet certain criteria, including that they “not be controversial” and “not prejudicially affect the rights of persons”.

[28] Therefore, guided by the interpretive analysis set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, as the stated intention of the amending legislation is that it is not to be controversial and not affect rights, it might be argued that this should result in an interpretation of the term “Supreme Court” under s. 2 that includes the Court of Appeal. Otherwise, excluding the Court of Appeal may be considered controversial or affecting rights.

[29] However, when considering the role of the provincial legislation in defining “Supreme Court”, I would conclude that this interpretation should not prevail. That is, the amendment to s. 2 in the *Miscellaneous Statute Law Amendment Act, 2014*, in 2015 did not oust the Court of Appeal’s jurisdiction (see, for example, *R. v. Rich*). Rather the exclusion of the Court of Appeal as an appeal court under s. 829 effectively occurred when the definition of Supreme Court, found in provincial legislation, was amended in 2017. In that respect, the amendment to s.2, in and of itself, was not controversial and did not affect rights. Further, and as discussed below, the right to appeal a decision of a summary conviction court remains after the amendment, but the appeal is to be brought to the Supreme Court at first instance, not to the Court of Appeal.

The intent and clarity of the provincial legislation

[30] Further, with respect to the *Rizzo & Rizzo Shoes Ltd. (Re)* statutory interpretation analysis, it is not just the language of s. 2 of the *Criminal Code*, but also the language of the provincial legislation that must be considered and interpreted in this context. Both the *Judicature Act* and the *Court of Appeal Act* are clear that the Supreme Court is not the Court of Appeal, and *vice versa*. Indeed, the long title to the *Court of Appeal Act (An Act Respecting an Independent Court of Appeal in the Province)* signals a legislative intent that the Court of Appeal is to operate independently and separately from the Supreme Court. They are effectively different courts, and a statutory right to appeal to the “Supreme Court” can no longer be said to vest jurisdiction in the Court of Appeal.

[31] As stated by the Supreme Court of Canada in *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612, at para. 12: “If the statute is unambiguous, the court must give effect to the clearly expressed legislative intent”. In the present context, interpreting the term “Supreme Court” to include the Court of Appeal would be contrary to clear statutory language.

Federal and provincial concurrency

[32] For each respective province or territory identified in s. 2, the *Code* lists the court(s) having jurisdiction (e.g. the Supreme Court, Superior Court of Justice, Court of Queen's Bench, Court of Appeal etc.) without defining any of these courts. In all cases, one must refer to the respective provincial or territorial legislation to determine how each court is defined. While it is within the legislative authority of Parliament to specifically define each court, it has not done so. Instead, this is left to the provinces and territories, in their legislation.

[33] This does not create a constitutional, division of powers problem. Parliament can legislate within its constitutional authority under s. 91(27) (the criminal law power) of the *Constitution Act, 1867*, when enacting s. 2. A province can legislate regarding courts (and can define courts) within its jurisdiction, for example under s. 92(13) (property and civil rights in the Province), s. 92(16) (matters of a merely local or private nature in the Province), and perhaps also s. 92(14) (the administration of justice in the Province). No constitutional law concerns were raised on appeal, and there is nothing to suggest that a province, in enacting or amending the definitions of courts within its jurisdiction, would in any way be encroaching on the federal, criminal law power. There is no suggestion, for example, that the enactment of definitions or related provisions in the *Judicature Act* or the *Court of Appeal Act* would be outside the constitutional authority of the provincial legislature such as to be, in pith and substance, criminal law. Provincial law in this context operates concurrently with the federal law. There is no conflict and federal paramountcy is not engaged.

[34] The fact that s. 2 of the *Code* operates such that the courts referred to therein are defined exclusively by provincial and territorial legislation, is a significant contextual consideration in the statutory interpretation analysis. That is, as Parliament has left to the provinces the task of defining the courts mentioned in s. 2, and as the provinces have legislative competence to amend the definitions of their courts at any time, it should not be expected that the definition of "Supreme Court", in the Newfoundland and Labrador context, is meant to remain static. Rather, recognizing the provincial legislative competence to amend the definition of its courts from time to time, it would be more reasonable to assign to the term "Supreme Court", in s. 2, an interpretation that reflects and accords with the language of the provincial legislation at the time the term is interpreted.

[35] Moreover, s. 2 is not uniform. For some provinces and territories, it expressly references the Court of Appeal, but for others (including Newfoundland and Labrador) the Court of Appeal is not referenced. When s. 2 explicitly refers to a respective Court of Appeal, jurisdiction is clearly provided (see for example *R. v. McDougall*, 2014 MBCA 95). This is not the case for Newfoundland and Labrador. However, should it wish to do so, Parliament could address the subsequent provincial amendment to the definition of “Supreme Court”, for example by explicitly including a reference to the Newfoundland and Labrador Court of Appeal in s. 2, thereby effectively reverting to the language used in that section before the 2015 amendment.

Other relevant authorities

[36] Finally, an interpretation of “Supreme Court” as not including the Court of Appeal is consistent with previous determinations of the Supreme Court of Canada in *R. v. Szabo*, [1991] 1 S.C.R. 736 (S.C.C.), and the Ontario Court of Appeal in *R. v. Cook* (1986), 13 O.A.C. 238, 26 C.C.C. (3d) 188 (Ont. C.A.).

[37] In *Szabo*, the Supreme Court considered whether there was a right to appeal the decision of a summary conviction court directly to the Court of Appeal, or whether the appeal was to the Quebec Superior Court. Like the present situation for Newfoundland and Labrador, “superior court of criminal jurisdiction” with respect to the Province of Quebec was (and still is) stated in s.2 of the *Code* to mean the Superior Court only; the Court of Appeal is not mentioned. The Supreme Court held, in those circumstances, that the right of appeal was to the Superior Court, not the Court of Appeal (at 740):

...The appeal under [the present s. 830], the section upon which Mr. Szabo sought to rely in the case at bar, is an appeal to the superior court of criminal jurisdiction for the province; it is *not* an appeal to the Quebec Court of Appeal. ...

[38] In *Cook*, the Ontario Court of Appeal noted that, at the relevant time, the definition of “superior court of criminal jurisdiction” in s. 2 of the *Code*, as it related to Ontario, did not include a reference to the Court of Appeal. The Court held that this meant that the Court of Appeal had no jurisdiction to undertake the requested review of a judicial interim release order.

Conclusion: Court of Appeal has no jurisdiction to hear the appeal under s. 830

[39] In the result, I would conclude that the term “Supreme Court” in s. 2 of the *Code*, as it relates to Newfoundland and Labrador, does not implicitly include the Court of Appeal.

[40] As such, the Court of Appeal is not an “appeal court” for the purposes of s. 829, and does not have jurisdiction to hear the appeal under s. 830. The Supreme Court has jurisdiction in this regard.

A possible subsequent appeal to the *Court of Appeal* under s. 839 of the *Code*

[41] The fact that this appeal under s. 830 should have been commenced in the Supreme Court does not mean that the Court of Appeal is precluded from ever dealing with the matter. Rather, s. 839 of the *Code* provides for a further appeal to the Court of Appeal of a decision of the Supreme Court (operating as the “appeal court” under s. 829), in prescribed circumstances. That is, s. 839 provides that an appeal of a decision of the Supreme Court can be made to the Court of Appeal, with leave, “on any ground that involves a question of law alone.” There is, then, a right to seek leave of this Court to appeal a Supreme Court decision in this context.

[42] In addition to s. 830, the *Code* provides a separate route under s. 813 by which a decision of a summary conviction court can be appealed. An appeal under s. 813 is also taken to the Supreme Court, not the Court of Appeal. The provisions of s. 839, described above, also apply to a decision of the Supreme Court in a s. 813 appeal. That is, there is a right to seek leave of the Court of Appeal with respect to an appeal of a decision of the Supreme Court (operating as the “appeal court” under s. 812). Therefore the Court of Appeal may become involved but, as with s. 830 appeals, not as the first-instance appeal court.

Transfer of proceedings

[43] In the present circumstances, a notice of appeal was filed in the Court of Appeal when the appeal should have been brought to the Supreme Court. However, this does not mean that Mr. Chaulk is necessarily denied the opportunity to appeal.

[44] Section 35 of the *Court of Appeal Act* allows for a transfer of the appeal in these circumstances to the appropriate court, which in this case is the Supreme Court:

35(1) If a proceeding has been started in the court where it ought not to have been started, a judge may direct that proceeding be transferred to the court in which the proceedings ought to have been started.

(2) All proceedings taken by a party that have been transferred under subsection (1), and all orders made before the transfer, are considered to be as valid as if they had been taken and made in the court in which the proceedings ought to have been started.

[45] The *Judicature Act* has a similar provision, allowing for a transfer of a proceeding that was commenced in the Court of Appeal to the Supreme Court:

52(1) If a proceeding has been started

(a) in the Court of Appeal where it ought not to have been started; or

(b) in the Supreme Court where it ought not to have been started,

a judge of the respective court may direct that proceeding be transferred to the appropriate court.

[46] At the hearing of this matter counsel for the Crown indicated that, in the event the appeal ought not to have been commenced in this Court, the Crown would not oppose having the matter heard in the Supreme Court.

[47] In the result, I would direct that the proceeding be transferred to the Supreme Court.

F.P. O'Brien J.A.

I concur: _____
L.R. Hoegg J.A.

I concur: _____
G.D. Butler J.A.