ENVIRONMENTAL LAW CENTRE

FISHERIES

POLLUTION REPORTS

VOLUME 6

(Part 2 of 2)

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ENVIRONMENTAL LAW CENTRE

The Environmental Law Centre (Alberta) Society is a non-profit charitable organization operating in Alberta since 1982. The society believes in making the law work to protect the environment and in support of this objective provides services in environmental law education and assistance, environmental law reform and environmental law research. The Society operates the Environmental Law Centre which is staffed by four full-time lawyers.

Funding is provided to the Society in part by the Alberta Law Foundation and through the generous support of the public. The Centre also accepts private and government research contracts for work relevant to and consistent with the Society's objectives.

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PREFACE

This is the 6th volume of the *Fisheries Pollution Reports* published by Environment Canada. Volume 6 includes Canadian court cases for 1992, 1993 and 1994 which consider one or more of sections 34-42, inclusive, of the *Fisheries Act*.

Volume 6 of the *Fisheries Pollution Report* was prepared by the Environmental Law Centre under contract to Environment Canada. The advice and support of Glenn Hamilton and David Noseworthy in the Regional Office of Environment Canada in Edmonton, and Paul Gavrel in the National Office of Environment Canada in Ottawa was appreciated. Both Rob Patzer and Ian Zaharko provided invaluable assistance.

The completion of Volume 6 of the *Fisheries Pollution Report* required the involvement of a number of Environmental Law Centre staff: Dolores Noga, librarian, Tammy Allsup, office manager, Debbie Lindskoog, secretary-receptionist and Shannon Keehn, summer research assistant. Without their professionalism and imagination, this project would not have been completed.

It was truly an honour to work on a project initiated so many years ago by my law school classmate, Michael J. Hardin.

Donna Tingley

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NORTHWEST TERRITORIAL COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #3]

Between Her Majesty the Queen in Right of Canada as represented by Environment Canada, and Her Majesty the Queen in Right of Canada as represented by the Commissioner of the Northwest Territories

Bourassa J.

Yellowknife, August 27, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 36(3), 40(2) – defendant charged with 3 counts under s. 36 – sewage lagoon failure released sewage into Koojesse Inlet – defendant's failure to operate lagoon constituted "permitting" – raw sewage is deleterious to fish – defendant convicted on third count**

Defences – due diligence – defendant did not follow departmental guidelines

Defences – act of third parties – defendant knew of third party's plans and did nothing – defendant cannot use third party failure as shield

Defences – Act of God – spring runoff and flooding was foreseeable

Defences – officially induced error – water license was issued to municipality not the defendant – license required compliance with federal and territorial law

Summary: The defendant was charged with 3 counts under s. 36 of the *Fisheries Act* arising from the washout of the defendant's sewage lagoon in Iqualuit, resulting in the discharge of 56,000 cubic meters of waste into Koojesse Inlet. The court found that the Crown proved each element of the offence.

The defendant admitted its ownership of the sewage lagoon in Iqualuit although there was confusion as to who was responsible for the lagoon. The learned judge found that the defendant "permitted" the deposit of sewage. The defendant had actual knowledge of prior problems with the lagoon, even though it had no employees responsible for the construction, operation and maintenance of the lagoon. The defendant was aware of a construction project adjacent to the lagoon that would affect the watershed and did nothing. A drainage ditch constructed after a previous dyke failure was not maintained. Once the dyke failed, municipal officials effected some repairs. Nevertheless, there was continued seepage of about 7,200 gallons of sewage per day.

The learned judge found that raw sewage constitutes a deleterious substance based on evidence of bioassay results in this case and similar findings in a previous case. Evidence was sufficient to prove both that the sewage entered Koojesse Inlet and that the Inlet was water frequented by fish.

The learned judge rejected the 4 defences raised by the defendant. One, the defendant did not prove that it took reasonable care to prevent the commission of the offence. Based on the defendant's own guidelines for the planning, design, operation and maintenance of wastewater lagoon systems in the Northwest Territories, there was no evidence that the guidelines for the operation and maintenance of the lagoon were followed. Two, the failure of the lagoon was not caused by the acts of third parties whose construction activities contributed to the event. The defendant knew of the project details at least one year in advance and did nothing. Three, the event was not, the court found, the result of an Act of God. Although temperatures were unusually high on the day the event occurred, the problem of spring runoff and flooding was foreseeable. Four, the water license held by the municipality under the *Northern Inland Waters Act* did not provide the defendant with the defense of officially induced error. The license was issued to the municipality, not the defendant, and in any event, its terms specified that it was subject to compliance with other federal and territorial legislation.

Held: The defendant was convicted.

REASONS/MOTIF:

J. Cliffe and B. Webber, Counsel for the Crown
J., Donihee, R. Secord, D. Jenkins and P. Kennedy, Counsel for the Defence

[para1] BOURASSA J.:-- The Defendant is charged with three offences contrary to Section 36 of the *Fisheries Act*. These charges follow the washout of the Defendant's sewage lagoon in Iqaluit, Northwest Territories, and the alleged resultant discharge of sewage into the waters of Koojesse Inlet. The charges read:

> Count 1: Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in a place, to wit: the intertidal area of Koojesse Inlet immediately southwest of the west dyke of the Iqaluit sewage lagoon, under conditions where the said deleterious substance may enter water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36 (3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 40 (2) of the *Fisheries Act*.
>
> Count 2: Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in a place, to wit: the intertidal area of Koojesse Inlet immediately southwest of the west dyke of the Iqaluit sewage lagoon, under conditions where the said deleterious substance entered water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36 (3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 40 (2) of the *Fisheries Act*.
>
> Count 3: Between the 1st day of June, A.D. 1991 and the 10th day of June, inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the

> Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36 (3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 40 (2) (a) of the *Fisheries Act*.

[para2] In determining the factual issues herein, I have, of course, relied upon the evidence, in particular Exhibit 26 as it relates to the construction, maintenance and operation of sewage lagoons. The viva voce evidence given by all witnesses, with one exception, was notable for its candour and honesty; the evidence of the Defendant's employee in charge of the Department of Public Works in Iqaluit was coloured. I admitted some hearsay evidence to avoid a totally mechanistic approach to the events. I attributed such weight as I felt appropriate to that evidence. I thank counsel for their effort and vigorous advocacy.

[para3] In broad terms I have to answer two questions: 1) Has the Crown proven its case beyond a reasonable doubt and if so, 2) Has the Defendant established any defence?

[para4] I answer the first question in the affirmative. These are my reasons.

[para5] Section 36 *Fisheries Act* prosecutions involve proof of a particular *actus reus*. Section 36 can be broken down into a number of constituent elements which the Crown must prove. I address those elements with respect to Count 3.

THE DEFENDANT:

[para6] At the beginning of the prosecution, both the Defendant and the Municipality of Iqaliut were named on the Information. At the opening of the trial the Defendant, through its counsel, acknowledged its "responsibility" for the sewage lagoon. In response to this the Crown withdrew the charges against the Municipality. This responsibility was reaffirmed during the trial by counsel for the Defendant. I understand the admission of responsibility in the context and the circumstances in which it was stated, i.e., an acknowledgement that the Defendant was the owner/operator of the lagoon and therefore responsible in law for any default found by this court. This point has to be made because at a later time during the trial the Defendant attempted to distance itself from that acknowledgement.

[para7] I find, on the evidence, that the Defendant was the owner and operator of the sewage lagoon. It was desirous of transferring its responsibility for the lagoon to the Municipality of Iqaluit and to that end had entered into an agreement with the Municipality. A number of witnesses spoke of this transfer agreement. It is clear that the Municipality was a reluctant party and, at the time in question, had not yet accepted such responsibility. The Municipality wanted a lengthy phase-in in order to hire, train and prepare staff and allocate resources for the obligations that would arise with the responsibility. That agreement, presumably setting out the rights, liabilities, and responsibilities of the two parties with respect to the operation and maintenance of the lagoon, in the sole control of the Defendant, was not tendered in evidence.

[para8] The evidence discloses that there was confusion and uncertainty on the part of the Municipal employees and the Defendant's employees located in that community, as to who was

responsible for exactly what with respect to the lagoon. On the evidence, no one was in charge. The Municipal employees working in the field were left in a state of ignorance. I find that there was no person actually responsible. The Defendant's supervision and control existed on paper only.

[para9] Later in the trial, the Defendant argued that the Municipality, in the maintenance and repair of the lagoon following the washout, was an independent contractor which absolved the Defendant of its responsibility for any delict arising therefrom. The facts do not support this argument and I reject it.

THE CHARGE:

> 1. Between the 1st day of June, 1991 and the 10th day of June, 1991 inclusive, at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit on Baffin Island, in the Northwest Territories...

[para10] There is no issue with respect to these elements.

THE CHARGE (continued)

> 2. ...did unlawfully deposit or permit the deposit..

[para11] In discussing the principles to be applied in determining the *actus reus* of permitting, discharging or causing pollution, Mr. Justice Dickson stated in *R.* v. *City of Sault Ste Marie*:

> The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so. The "discharging" aspect of the offences centres on the direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen.

[para12] This sewage lagoon is located in a depression bounded by elevated ground on three sides. It is located a few hundred meters from the town site, a short distance from the tidal waters of Koojesse Inlet. The sewage is contained by the existing hills and two dykes; the main one known as the west dyke. The lagoon is in a natural drainage basin for a large surrounding area. It holds approximately 56,000 cubic meters of municipal waste when full.

[para13] This lagoon has been problematic in the past. The evidence in chief is that the west dyke failed on at least two prior occasions. On one occasion, a high tide washed out the west dyke; on another, in 1987, spring runoff flooded the lagoon and the same west dyke failed. It was at that time that a small diversion ditch was dug to attempt to direct some of the runoff away from the lagoon, which was the natural place for it to go. In cross-examination of Crown witnesses, it was further revealed that this same west dyke had failed a total of five times in the past ten years.

[para14] Based on the evidence before me, I fix the Defendant with constructive and actual notice of the construction, operational and maintenance needs involved in the operation of sewage lagoons. The facts indicate that the Defendant had actual notice of these needs, in particular, of the problems of spring runoff and snowmelt.

[para15] I find that the Defendant had no personnel actually and effectively in charge responsible for the supervision, operation, and maintenance of the lagoon. One Municipal employee conducted a drive-by five days per week and if everything looked OK that was precisely what he reported ... "OK". Another Municipal employee, concerned about the state of the lagoon that very spring, increased this surveillance, on his own initiative, by conducting a drive-by on weekends. The reports were simply filed. For this purpose only he was somehow deemed an employee of the Defendant. Some Municipal employees were concerned about the lagoon site, but had no authority, direction or responsibility. Municipal employees, aware of the potential problems with the sewage lagoon and out of simple concern, had requested manuals, guidelines and instructions from the Defendant on a number of occasions. They received none. Those employees had concerns about spring runoff; they had concerns about the high level of waste in the lagoon before the washout, but the Defendant was not there to listen.

[para16] The diversion ditch that was dug in 1987 was not maintained. At the time of the washout it was shallow and unable to handle the runoff where it made a right angle turn.

[para17] Earlier in the year, a major construction project was commenced on the lands adjacent to the sewage lagoon and on the lagoon's water shed. This work was the construction of the Forward Operating Location undertaken by the Department of National Defence. By any scale, it was a major undertaking and the work was visible to anyone who looked. It involved construction of barracks, hangars, roads and taxi-ways. These works were carried out at a location close to and uphill of the sewage lagoon. The project included replacing a number of nearby drainage culverts, increasing their capacity and altering the topography. The project works affected the watershed such that it would possibly allow for an increased flow of water downhill to the lagoon. In my view, this major construction project would have alerted any reasonable observer to the possibility of an effect on the drainage patterns in the area and the nearby lagoon.

[para18] This work had been outlined, discussed and described in a planning meeting between the contractor, Municipal officials and the Defendant's representatives months in advance of construction. The Defendant's agents and employees knew the work was being undertaken and, in fact, was done. The project was known to all, yet this did not generate any watchfulness, vigilance, concern, or action by the Defendant. No inspections were undertaken. No risk assessments were made. On the evidence, the only concern voiced by the Defendant as a result of this knowledge was one of access to its nearby furniture warehouse.

[para19] The drainage ditch that would bear the increased flow of spring runoff remained in the state it was.

[para20] On June 1, 1991, it was unusually warm in Iqaluit. What experience taught, engineering studies described, and any person could foresee, happened: runoff - snowmelt - overran the drainage ditch at the right angle turn. The lagoon was already overfull -- ice and

sewage levels had reached the top of the west dyke -- the lagoon overflowed at the dyke. The dyke failed and the entire contents of the lagoon washed out - - 56,000 cubic meters or more of waste.

[para21] Following the washout, the lagoon was hastily repaired by Municipal officials who had to act in default. The Defendant was simply not present in any meaningful way at the site. It did not direct, supervise or participate in the repairs. It was not repaired in a manner that was even close to the Defendant's own guidelines for the construction of such lagoon dykes. As a result, there was significant seepage of raw sewage estimated by one observer at 5 gallons per minute or 7,200 gallons per day.

[para22] In these circumstances, I find that the Defendant permitted the deposit as set out in the Information.

THE CHARGE (continued)

> 3. ...of a deleterious substance, to wit: sewage ...

[para23] Is raw, untreated sewage a substance deleterious to fish? Specifically, was this effluent deleterious to fish?

[para24] Raw sewage is referred to in a number of exhibits in negative terms insofar as human, animal, and fish are concerned. From Exhibit 26, it is clear that sewage is a public health concern that demands the creation of some kind of proper functioning treatment, including the prevention of spills and seepage.

[para25] The Defendant's own agents, including the Deputy Minister, described the waste in Exhibit 33, a letter to the Government of Canada, Environmental Protection Service. With respect to the Iqaluit lagoon, it states:

> ...Nor were we willing to undertake this considerable expense (regular sampling of the effluent) knowing that the treated waste water discharged from a cold temperature lagoon as toxic... (my emphasis)

[para26] The problematic aspect of untreated sewage in proximity to people and animals in the N.W.T. was discussed in *Health of our Oceans,* a March, 1991 publication of the Marine Environmental Quality Group, Conservation and Protection of Environment Canada as follows:

> Municipal Effluent:
>
> Municipal use of the marine environment is restricted to discharges of untreated or primary-treated sewage into coastal waters. Seven communities collect liquid sewage and transfer it to holding ponds or lagoons. Two communities, Resolute and Rankin Inlet, discharge liquid sewage directly into the ocean through outfall pipes (Cameron et al., 1982a, b; Dusseault and Elkin, 1983a, b). Therefore, sewage effluents enter marine waters directly, or by percolation through lagoon substrates and leaching into surface drainage systems. Communities on open coasts may discharge raw sewage directly onto the shoreline. At

> present, there is no completed chemical analysis of treated or untreated sewage from coastal Arctic communities although preliminary assessments are under way (Stanley and Associates and Dobrocky Seatech, 1987). A public health concern may exist at communities which harvest shellfish from contaminated waters or butcher marine mammals on contaminated shorelines. At present, however, the possible relationship between sewage disposal practices, consumption of contaminated meats, and the incidence of enteric diseases in Arctic peoples is unknown.
>
> A community dump (West 40) in Iqaluit, although primarily used for domestic waste, has been known to be a disposal site for industrial chemicals. During the spring snow melt, runoff from this site enters Frobisher Bay. There have been several aviation fuel spills in a watershed that runs through another dump site in Iqaluit (North 40) and drains into Frobisher Bay. Inorganic and mixed organic compounds may have contaminated the Apex dump site. Runoff from this site drains into Tarr Inlet.

[para27] Further on at page 72, dealing specifically with fish and shell fish, the report states:

> Important fish and shellfish species in the Arctic include broad whitefish, arctic cisco, least cisco, arctic char, lake fish, arctic cod, pacific herring, polar cod, capelin, clams, and scallops. Anadromous fish species, particularly arctic char and whitefish, are a very valuable resource. Environmental threats to both marine and anadromous species, described in Table 4.5, include destruction of bottom habitat (by dredging or drilling waste discharges) and bioaccumulation of contaminants in fish tissue. Fish that live close to or in contact with marine sediments and feed on benthic infauna and epifauna are particularly vulnerable to these threats.
>
> Chronic water quality problems may exist near coastal communities discharging raw or primary-treated sewage into estuaries and fjords. Residents of most eastern Arctic communities harvest shellfish in near shore waters. The potential for shellfish contamination with pathogenic organisms exists in these coastal communities, although the correlation between the incidence of human disease and sewage disposal practices is not known (Sackmann et al., in preparation). During high tide near the community of Iqaluit, Baffin Island, the potential for flooding of the sewage lagoon with runoff into Frobisher Bay is quite high (S. Heinze-Milne, pers. comm.). Bacteriological studies near the Pangnirtung, Baffin Island, dump site showed that clams in the area had high faecal coliform counts Coleman et al., unpubl. data).

[para28] The Defendant argues that municipal waste is comprised of a naturally occurring, biodegradable material and perforce, cannot be deleterious -- or I take it -- if it is, it must form an exception to the definition of "deleterious" because of its very characteristics as a naturally occurring product. The analogy was drawn to the thousands, if not tens of thousands, of caribou that roam the Arctic leaving deposits with no adverse effects on man animal or fish. This argument is untenable. Caribou do not live in towns and use lagoons.

[para29] There have been decisions by other courts that have held raw, untreated sewage to be "deleterious" as contemplated by the *Fisheries Act* s. 36 (3) most notably *R.* v. *The Corporation of*

the District of North Vancouver, a decision of the B.C. Court of Appeal reported (1982) 11 C.E.L.R. 158. At all levels, trial and appeal, the finding that raw municipal sewage was deleterious to fish was sustained.

[para30] The lagoon held raw untreated sewage. Moreover, this sewage was under ice cover and had been for the whole winter -- approximately 7 to 8 months. In these circumstances, the degradation of the sewage is minimal according to the authors of Exhibit 26. The seepage that was examined by witnesses, shortly after the failure and subsequent repair, was noted to be greyish-green. According to Exhibit 26 a grey colour is consistent with an anaerobic lagoon performing very badly. Again, according to the authors of Exhibit 26, this is a common problem with cold temperature storage lagoons. I have evidence before me that prior to the washout of the dyke, the lagoon level was up to the top of the west dyke.

[para31] I have no evidence that would suggest that the lagoon had been cleaned out, drained, or otherwise tampered with by officials at any time in the year preceding which would reduce, or affect, its toxicity.

[para32] The evidence indicates that samples of the effluent seeping from the repaired dyke were taken on June 9 and 10, 1991. These samples were taken to be utilized in a bioassay procedure. That is to say, fish were introduced to various concentrations of the sampled effluent and observations are made with respect to their vitality.

[para33] The Defendant argues that the effluent sampling procedures were defective in a number of respects and, therefore, suspect. This argument is based only upon the fact that certain protocols were not followed to the letter.

[para34] For example, the protocol states that samples should be collected in a sterile container, and maintained in a cool or refrigerated environment and utilized quickly. The sampled effluent was stored in new 5 gallon plastic "jerry cans". These cans were not sterilized, the samples were not refrigerated; we do not know if they froze. A number a days passed before they arrived in Edmonton for use in the bioassay procedure.

[para35] However, I have no evidence that would suggest that the alleged failures in any way affect the ultimate results. Additionally, "protocol" does not represent a rigid formula. As I understand the word, in this context, it is a "preliminary draft or memorandum" from its root in Greek for the first sheet of a papyrus roll with the date of manufacture, and the word for glue or glue together.

[para36] Exhibit 19, The Field Procedures for Water Quality Sampling, commences with the preamble:

> This document is intended as a reference manual to promote uniformity in water quality field procedures within the Western Region and to assist with the initial training and orientation of new staff members. It outlines the present state of field methods practised. However, due to variations in hydrological or environmental conditions and changes to program design, adaptations may be required. (my emphasis)

[para37] Finally, I have the evidence of Mr. Sackmann who stated that the delay and the possibility of elevated temperatures would have worked to the benefit of the Defendant in reducing the coliform count of the samples.

[para38] Similarly, defense argues that the bioassays were not conducted exactly according to protocol, (in this case Exhibit 21, Biological Test Method: Reference Method to Determine Acute Lethality of Effluents to Rainbow Trout) and therefore, are suspect. Alleged failures include: a) that there is no evidence the test fish were not fed within 24 hour pre-test period; b) that the biologist involved ran an unplanned, unsanctioned additional test; and c) that not enough concentrations were prepared for testing.

[para39] I can find nothing on the evidence that compromises the bioassay results. The alleged failures, if they are such, do not impact on the actual results obtained by the biologist, an expert in her field. Any departures from norm were inconsequential and of no import. She applied her expertise and made definite and certain scientific findings: all of the fish placed in a 100% solution of the effluent died within 3 hours. At a calculated dilution of 31.4%, 50% of the fish would die. This finding came as no surprise to Mr. Nickel, an expert biologist with extensive experience in the field. He testified about the effect of raw sewage on fish generally. In response to questions about bioassay testing of fish in sewage, he confirmed the efficacy of such testing and stated that he was not surprised with the results of the testing in this case. In his opinion it simply confirmed what everyone knew, "sewage kills fish".

[para40] Therefore, in light of the above, and in light of the fact that I have no evidence -- in direct or cross -- that would even suggest that the minor departures from the protocols would in any way compromise the sampling results, I am satisfied beyond a reasonable doubt that the samples were properly taken and the results gained from them accurately reflect what they purported to measure.

[para41] I am satisfied, beyond a reasonable doubt that the contents on the Iqaluit sewage lagoon - raw, untreated sewage - immediately prior to the washout on June 1 and continuing to June 10 were deleterious to fish.

THE CHARGE (continued)

4. ... in water ... to wit: Koojesse Inlet ...

[para42] Where did more than 56,000 cubic meters of waste go when the west dyke failed? The Defendant argues that there is no direct proof that the sewage actually entered the waters of Koojesse Inlet. No one saw where it went. I agree. However, I have no difficulty in concluding what occurred. The view shown in Exhibit 32, a photo montage of the area, places me at the site. The sewage flowed down a patently obvious drainage course, from the lagoon into the waters of Koojesse Inlet a mere 1 or 2 hundred meters distant. The same course is described as a "discharge stream" in Exhibit 34, a draft of the Operations and Maintenance Manual for the lagoon prepared by the Defendant. This drainage course is in the area that is flooded at high tide; indeed some high tides lap at the base of the west dyke. That the sewage ran out over the shore ice, flowed into crevices in that ice and was not in evidence when the ice melted does not persuade me that the

sewage somehow did not flow into those waters. I find that the sewage entered the waters as alleged. Those waters are waters as defined in the *Fisheries Act*.

THE CHARGE (contiued)

5. ... frequented by fish ...

[para43] In my view, the evidence is clear and unambiguous. The waters of Koojesse Inlet are frequented by fish as defined in the *Fisheries Act*. In this part of the ocean, people actively net fish, dig and harvest clams and all within short distances of the lagoon. The Defendant's arguments to the contrary are not based on any evidence.

[para44] I am satisfied that all elements have been proven. Certainly there have been some questions raised, but no doubts.

[para45] Having answered yes to the first question, I now turn to the second: has the Defendant established any defence? My answer to this question in every aspect is no. My reasons are as follows:

DUE DILIGENCE:

[para46] To address this defence, I begin from the consideration stated by Dickson J. in *Sault Ste. Marie*:

> Has the Defendant exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking reasonable steps to ensure that the effective operation of the system.

[para47] I conclude there is nothing to demonstrate or reflect anything that might be construed as due diligence. The Defendant was at best only perfunctorily and nominally involved -- on paper -- in the operation and maintenance of the lagoon. Yet, it was fully aware, through reports it commissioned, of what was required to operate such a facility.

[para48] In this regard, I refer to Exhibit 26, Guidelines for the Planning Design Operation and Maintenance of Wastewater Lagoon Systems in the N.W.T. produced for the Defendant dated November, 1988. I recognize that this exhibit titles itself as "guidelines" and not as a mandatory code. However, it is a useful discussion which is relevant to the issues before me. It shows that the Defendant was alive to the subject matter in 1988. As guidelines, the report marks the path that the Defendant may follow, complete with advice, direction and warnings.

[para49] Sewage lagoons are used to hold the raw sewage emanating from human settlements for a period of time wherein it undergoes some degradation, following which the high quality effluent is released into the watershed in concentrations that are, by and large, harmless. This is an ongoing process.

[para50] Sewage lagoons represent a practical, efficient and relatively inexpensive way of dealing with municipal waste water. They are used across North America and extensively in Northern Alberta and the N.W.T. They have been in use for many years, and the technology for their construction and operation is basic. They are not without problems however.

> Many problems exist in the application of published guidelines for wastewater lagoons when applied to conditions in the N.W.T. and in other parts of northern Canada. The severe climate in the N.W.T. causes winter freeze-up of receiving water courses potentially restricting the discharge of effluents. Cold water temperatures produce thick ice covers on lagoons for many months and reduce treatment performance during that time. Therefore lagoons may need to be designed for long-term storage of winter flows to achieve adequate performance. Design criteria based on a continuous discharge mode of operation cannot generally be used without serious environmental impact. Most lagoons in the N.W.T. need to be operated in a draw-fill mode with discharge occurring only once or twice a year, and in some locations, with continuous discharge during summer months only. The abundance of lakes near communities may, under certain circumstances, make their use as part of an engineered lake-lagoon system possible. Furthermore, construction, operation and maintenance of lagoons in the N.W.T. must take into account the special difficulties caused by the occurrence of deep frost penetration, existence of permafrost and the shortage of trained personnel in the N.W.T. For these reasons there is a need for guidelines for wastewater lagoons for the Northwest Territories, which this document addresses. (Guidelines for the Planning p. 2)

[para51] With respect to design the report has states:

> The lagoon should, if possible, be located to permit gravity drainage from the collection system. However, the lagoon must be located out of the flood plain so that its operation is not impaired by high water or flooding. The lagoon should not intercept surface runoff, ground water, or snowmelt. The use of lift stations should be minimized to reduce capital and operating costs as well as maintenance requirements. It may be necessary to install a lift or pump station near a lagoon to ensure that the mains do not surcharge. (my emphasis)

and further:

> The dykes should be constructed of impervious soil and compacted to 95 per cent of Standard Proctor density.
>
> This will reduce permeability and improve the side slope stability. This does not relieve the designer of the permeability requirements of Section 5.2.3.2. (my emphasis)

[para52] With respect to design features to prevent dyke erosion, the report states:

> Wind action and surface runoff are the two main sources of slope erosion. Several approaches are available for erosion protection of inner and outer slopes. The least expensive and most widely used method is grass cover from the toe of the outer slope to the toe of the inner slope. If grass cover is not practical, some form of revetment is necessary.

> Revetment materials can include rip-rap, soil cement, gabions, geocomposites, interlocking concrete blocks, sand bags, or scrap materials such as broken concrete or discarded tires. (my emphasis)

[para53] With respect to operation the report states:

> Wastewater lagoons are an attractive wastewater treatment technology for small communities since lagoons require relatively little attention to achieve good performance. However, some attention is necessary to ensure optimum performance and to prevent catastrophic failure of the lagoon system. (my emphasis)

[para54] With respect to planning and operation:

> The ground thermal regime, soil type, permeability, and slope stability are topics of importance in the design of a lagoon. A competent geotechnical specialist should be involved during the pre-design soil investigations and through detailed design and construction of a lagoon in cold regions. Catastrophic failures of the lagoon earthworks or serious pollution of ground water may occur if the geotechnical engineering is overlooked. The Cold Climate Utilities Manual provides an excellent review of geotechnical considerations in cold climates. (my emphasis)

[para55] Notwithstanding the simplicity of lagoon works, they cannot simply be ignored. They must be maintained and operated. Exhibit 26 sets out the operational and maintenance standards. These include checking that the lagoon works normally, adjusting the water levels and ensuring that the controls work, the keeping of records, repairs and the like.

[para56] Records are required:

> Record keeping is necessary to have information on what has happened. The use of accurate records is very important for the operator, the manager, the Department of Public Works, the Water Board and its supporting agencies and to engineers that may need to work on the system.
>
> The records must be detailed enough to allow evaluation of performance and to track the development of problems. The records also give a good check on completed tasks and those left to do ... (my emphasis)

[para57] Finally with respect to maintenance requirements the report states:

> Liners are installed to prevent water from seeping through the berm to avoid ground water pollution, and to ensure that the berm does not collapse because of washout or through pressure from ice lens formation within the berm. (my emphasis)
>
> The objective of berm and liner inspection is to make sure that leakage does not occur. The two major concerns are excessive growth of vegetation due to lack of cutting, which may

> hide developing problems, and erosion. Erosion of dikes is caused by wave action and surface runoff. The problems can be aggravated by animal burrows. (my emphasis)

[para58] Regular monitoring and maintenance are required to control berm erosion.

> Surface runoff will have been normally prevented from entering the lagoon through diversion ditches at the bottom of the outer berm slope. The ditches must be properly maintained to prevent blockage of drainage. (my emphasis)

[para59] These excerpts describe the fundamentals, and basic design, construction, operation, and maintenance techniques for sewage lagoons. I use this document not as an ideal, nor as a minimum in the sense of standards but only as its title suggests -- a guide. Even at that level it represents actual notice to and knowledge of the Defendant with respect to the issues, concerns, and needs generated by the establishment and operation of lagoon waste water treatment systems. Action on some of the guidelines might well have constituted due diligence. Unfortunately, for all intents and purposes, this document is not even remotely reflected in the operation of the Iqaluit sewage lagoon. The Iqaluit lagoon was out of sight and out of mind, under paper management only.

ACTS OF THIRD PARTIES:

[para60] The Defendant has argued vigorously that it was the intervening acts of third parties that contributed to, if not caused, the event so that the Defendant bears no responsibility. The Defendant refers to the Forward Operating Location construction site and new culverts. I agree that acts of third parties contributed to the event in question. However, in my view that fact does not absolve or shield the Defendant. The Defendant knew one year in advance of the project details, including modifications/replacements of culverts. The evidence reveals that there was a meeting in March, 1991 between the contractor involved, Municipal officials, and the Defendant's officials to discuss the works, including the replacement of the culverts. This aspect of the work is clearly shown on blueprints presented at the meeting. Yet, there was a want of even modest vigilance on the part of the Defendant as to what was occurring at the site from day to day or week to week. The Defendant's only concern was for its furniture warehouse. As I stated above, the Defendant knew and ignored what was occurring with respect to the construction project as it impacted on the drainage immediately uphill of the sewage lagoon. This ignorance is totally consistent with the confusion and non involvement of the Defendant in the maintenance, supervision and operation of the lagoon. The Defendant cannot shelter behind the acts or omissions of the contractor involved -- even if it did not follow municipal by laws -- for the simple reason that it knew, well in advance, that the work was going to affect the drainage and did nothing. Any person, exercising a modicum of vigilance over its undertaking would have seen the project under way and asked questions. This, in my view, is simply the principle stated by Dickson, J. in action.

ACT OF GOD:

[para61] An Act of God is an event that has been "caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as could not by any amount of ability

have been foreseen, or, if foreseen that it would happen, could not by any amount of care and skill be prevented." *McQuillan* v. *Ryan* 64 D.L.R. 482 applying *Nugent* v. *Smith* (1875) 1 C.P.D. 19.

[para62] Ford J. in *Low* v. *C.P.R.* [1949] 2 W.W.R. 433 stated:

> The defence of *vis major* or act of god is also relied on by the defendant. The decisions make it clear that it is a question of fact whether an occurrence of nature is so phenomenal or of such a magnitude as not to be reasonably foreseen and guarded against, the capacity to foresee being based on previous experience and knowledge of nature's law.
>
> Foreseeable adverse weather conditions require reasonable precautions. Whatever contributing influence can be attributed to nature, this influence could have been avoided by reasonable foresight and preventative steps. *Stuart J.R.* v. *Placer Developments* 13 CELR p. 52 (Yukon Territorial Court).

[para63] Historical data reveals that the temperature on June 1, 1991 was one of the warmest days on record. More precisely, the temperature reached a high not seen for 37 years. Evidence indicates temperatures at the period in question were as follows:

Date	Degrees Celcius		
		May 24	- 1.9
		May 25	.8
May 15	- 7.1	May 26	- .7
May 16	- 6.9	May 27	- .8
May 17	- 4.5	May 28	- .7
May 18	- 2.5	May 29	1.9
May 19	- 1.9	May 30	3.5
May 20	- 3.9	May 31	7.9
May 21	- 1.2	June 1	11.7
May 22	- 2.0	June 2	9.6
May 23	- 1.4		

[para64] The Defendant argues that this unseasonably high temperature must have caused significant runoff which resulted in flooding of the lagoon and the washout. I accept that the temperature was unusually high, however, that is not evidence of a flood problem. A report purporting to show precisely that was introduced into evidence and subsequently demolished in cross-examination. The report was flawed, based on fictitious data.

[para65] Common sense may tell us that a warm or hot day will cause snow to melt, but it cannot tell us what percentage nor how much will ultimately runoff and at what rate. Nor do I have any evidence that I accept in that regard. Iqaluit is by and large built on the side of a ridge of rising ground. If the temperature was such as to cause flooding, would there not be some evidence of such flooding elsewhere? I have no evidence of flooding problems anywhere else in the town.

[para66] Notwithstanding many past catastrophic failures of the west dyke due to spring runoff, the Defendant had not built or provided for any emergency overflow control or decant structure.

[para67] In my view the Defendant had the power and authority to prevent or control the alleged flooding. It could have simply maintained the drainage ditch; it could have liaised with the contractors doing nearby work altering the culverts; it could have been modestly vigilant. In history, in reports, in evidence, and in view of the general problem of spring runoff, the potential for flooding was evident; the problem was foreseeable. The Defendant's own documents must be taken to have made it alive to the issue.

[para68] Finally, there is no evidence other than the high temperature on that day that suggests a phenomenal natural occurrence that would fall under the legal understanding of an Act of God. The evidence is conclusive: care and skill would have prevented this washout, even with the elevated temperatures.

WATER LICENSE:

[para69] There is one issue that I must address if only to dismiss it.

[para70] Pursuant to the *Northern Inland Waters Act* and Regulations, the Northwest Territories Water Board has issued a Water License that relates to this sewage lagoon. The License, Exhibit 13, permits the use of certain water resources for municipal sewage purposes. It also sets standards for effluent quality after such use. In other words, for the quality of the discharge from the Iqaluit sewage lagoon.

[para71] It is argued that, for all practical purposes, the Defendant was the Licensee, and that I ought to recognize the Defendant as such in considering certain arguments: The Defendant has argued that, what one enactment -- the *Northern Inland Water Act*, and the actions of the Water Board set up thereunder -- permits, another enactment -- the *Fisheries Act* --cannot prohibit. Furthermore, there is a conflict between the two enactments in that they both purport to regulate the same matter -- the effluent quality discharged from the sewage lagoon. The Defendant argues that in (presumably) complying with the Water Board requirements, it is protected from prosecution under the *Fisheries Act*. If the effluent quality is such as to contravene the *Fisheries Act*, then this is an officially induced error.

[para72] The arguments ignore the fact that the effluent released between June 1 and June 10, 1991 exceed the quality standards set out in the License. It ignores the fact that the License, by its terms, is subject to "compliance with the requirements of other Federal or Territorial legislation". It ignores the fact that the Water License is issued to the Municipality of Iqaluit. It is the legal entity that is licensed to use water for its municipal purposes, and it is the entity that is subject to the terms, rights, and obligations of that License.

[para73] The Defendant, in policy and law, maintains the independence and separate identity of Municipalities. It cannot ignore that legal reality at its pleasure when convenient. This is what I am asked to do. I cannot. In my view, the instant case does not provide the factual basis which would allow me to rule on those arguments. The Defendant is not a party to the License.

[para74] The Water License and its terms are irrelevant in this case.

[para75] I convict the Defendant on Count 3.

ALBERTA COURT OF QUEEN'S BENCH

[Indexed as: Kostuch v. Alberta (Attorney General)]

IN THE MATTER OF Regina ex rel Kostuch v. The Queen in right of Alberta et al being information number 21075833P1 ("the information") sworn by Martha Kostuch in the Provincial Court of Alberta in the Judicial District of Calgary ("the Court") on the 28th day of July, 1992, alleging inter alia that The Queen in right of Alberta, UMA Engineering Ltd., W.A. Stephenson Construction (Western) Limited, and SCI Engineering & Construction Inc. ("the Accused") did contravene section 35(1) and 40(1)(b) of the Fisheries Act, R.S.C. 1985, c. F-14, and upon which summonses have been issued to the Accused by the Court to appear in Courtroom number GR-1 in the Court of Queen's Bench Courthouse in the City of Calgary on Monday, March 22, 1993 to answer the information.

Between: Martha Kostuch, Applicant, and The Attorney General of Alberta, Respondent

Power, J.

Calgary, August 30, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 35, 35(1), 35(2), 37, 40(1)(b) – charge by private informant under *Fisheries Act* – provincial Attorney General intervened and directed stay of proceedings – application to set aside and prohibit Attorney General intervention and direction of a stay dismissed**

Criminal procedure – information laid by private informant – provincial Attorney General intervention and direction of stay – informant with reasonable and probable grounds can swear information – provincial Attorney General has exclusive jurisdiction unless information laid by federal government and federal Attorney General appears to prosecute – court will not interfere with decision to stay proceeding unless flagrant impropriety by the Attorney General

***Charter of Rights and Freedoms* – Attorney General intervention in a privately sworn information does not violate s. 7 unless there has been flagrant impropriety – likewise, there is no violation of s. 2(a), (b) unless there has been flagrant impropriety**

Summary: The applicant, a private citizen, laid an information before the Provincial Court of Alberta charging the accused with an offence under s. 35(1) of the *Fisheries Act* in respect of the construction of the Oldman River Dam. Following an *ex parte* process hearing, the learned trial judge issued process to compel all of the accused, except Hyundai, to attend at provincial court on a specified date. After various adjournments, at the date set for election and the hearing of the preliminary inquiry, two agents for the Respondent appeared before the court and intervened in the prosecution and directed the Clerk of the Court to enter a stay of proceedings under s. 579(1) of the *Criminal Code*.

This is an application under s. 24(1) of the *Charter of Rights and Freedoms* to set aside the intervention of the Respondent as prosecutor and the direction by the Respondent to the Clerk of the Court to enter a stay of proceedings on the basis that it infringed the Appellant's rights, specifically, s. 2(a) - freedom of conscience, s. 2(b) - freedom of opinion and expression and s. 7 - not to be deprived of security of the person except in accordance with the principles of fundamental justice. The Appellant also sought an order under s. 774 of the *Criminal Code* prohibiting the Respondent from intervening in the prosecution and prohibiting the Respondent from directing a stay of proceedings on the ground of reasonable apprehension of bias of the Respondent.

The learned justice reviewed extensively the events preceding the Applicant's Information, including the swearing of a similar private information, followed by intervention by the provincial Crown who also directed a stay of proceedings. Subsequently, the current Applicant was invited to submit her complaint to the appropriate authorities who would undertake a proper investigation. The investigation raised the question of whether there was any authorization of the alteration under s. 35(2) of the *Fisheries Act*. The court reviewed the various events related to the federal intention to delegate authority under s. 35(2) of the *Fisheries Act* to the province of Alberta, stating that it could be concluded that the federal Ministers of Fisheries and Oceans did authorize the dam under s. 35(2) of the *Fisheries Act*.

The court reviewed the role of the federal and provincial Attorneys General in prosecuting a charge under a federal act not dependent on the federal criminal law power for its constitutionality. Anyone with reasonable and probable grounds can lay an information. If neither Attorney General appears to conduct the prosecution, the informant may conduct the prosecution. The provincial Attorney General can always take conduct of prosecutions for a violation of federal legislation unless the information is laid on behalf of the federal government and counsel for the Attorney General of Canada appears. Prosecutorial discretion to enter a stay of proceedings is reviewable only where there is a flagrant impropriety on the part of the Attorney General. There was no evidence in this case that there was any flagrant impropriety, that the Attorney General failed to uphold a law or was acting with improper motives for an improper purpose.

With respect to *Charter* arguments, the court adopted the same test – there was no violation of an informant's rights under s. 7 unless there was flagrant impropriety by the Crown. As well, the Applicant's rights under s. 2(a) and (b) of the *Charter* did not extend to the circumstances in the case. Once again, without flagrant impropriety, there was not a *Charter* violation.

Held: Application dismissed.

REASONS/MOTIF:

R. Ian Cartwright, Counsel for the Applicant
T.A.H. Beattie, Counsel for the Respondent
Ingrid C. Hutton, Counsel for the Department of Justice

[para1] POWER J.:-- The Applicant Martha Kostuch applies for the following:

1. An order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act*, 1982:

(a) setting aside the intervention of the Respondent as the prosecutor of the Information, pursuant to s. 2 of the *Criminal Code*, R.S.C. 1985, c. C-46;

(b) setting aside the direction of the Respondent to the Clerk of the Court to make an entry on the record that the proceedings on the Information are stayed pursuant to s. 579(1) of the *Criminal Code*;

on the grounds that such intervention and direction has infringed the rights of the Applicant as guaranteed by the *Charter*, specifically, sections 2(a) (freedom of conscience), 2(b) (freedom of opinion and expression) and 7 (not to be deprived of security of the person except in accordance with the principles of fundamental justice).

2. An application for an order pursuant to s. 774 of the *Criminal Code*:

(a) prohibiting the Respondent from intervening in the prosecution of the Information;

(b) prohibiting the Respondent from directing the Clerk of the Court to make an entry on the record that the proceedings on the Information are stayed;

on the ground of reasonable apprehension of bias of the Respondent.

FACTS

[para2] The Applicant relies on the facts as found in five judgments pertaining to the construction of the dam on the Oldman River, located in the southern part of the Province of Alberta.

1. *Regina ex rel. Kostuch* v. *Kowalski et al*. (1990), 57 C.C.C. (3d) 168, decided June 1, 1990, by His Honour Provincial Court Judge Harvie.

2. *W.A. Stephenson Construction (Western) Ltd*. and *SCI Engineering and Constructors Inc*. v. *Kostuch*; *R. In Right of Alberta* v. *Kostuch* (1991), 78 Alta.L.R. (2d) 131, decided January 3, 1991, by His Honour Provincial Court Judge Fradsham.

3. *Re W.A. Stephenson Construction (Western) Ltd. et al and Fradsham* (1991), 66 C.C.C. (3d) 201, decided July 4, 1991, and September 27, 1991, by Associate Chief Justice Miller of the Alberta Court of Queen's Bench.

4. *Re Friends of the Oldman River Society and the Queen in right of Alberta et al; Attorney General of Quebec et al, Interveners* (1992), 88 D.L.R. (4th) 1, decided January 23, 1992, by the Supreme Court of Canada. The complete historical background of the Oldman River Dam Project is found at pages 8 to 12.

5. Re *W.A. Stephenson Construction (Western) Ltd. et al* v. *Fradsham* (1992), 71 C.C.C. (3d) 266 (Alta.C.A.), decided January 10, 1992.

[para3] On July 28, 1992, the Applicant laid an Information (No. 21075833P1) before Her Honour Judge Bensler of the Provincial Court of Alberta pursuant to s. 504 of the *Criminal Code*. On the same date, Judge Bensler held an in-camera *ex parte* hearing (process hearing) pursuant to s. 507 of the *Criminal Code*. Judge Bensler heard evidence from the Applicant and submissions of her counsel, Ian Cartwright, and process was issued (summons) to compel all accused, with the exception of Hyundai Engineering & Construction Co. Ltd., to attend in Provincial Court on September 14, 1992, at 9:00 a.m.

[para4] The matter was adjourned from time to time until November 26, 1992, at which time the matter was further adjourned to March 22, 1993, at 9:30 a.m. for election and the hearing of the preliminary inquiry. On this date, Terrance J. Matchett and George Dangerfield, Q.C., acting as agents and counsel for the Respondent did two things:

1. Intervened in the prosecution pursuant to the definition "prosecutor" in s. 2 of the *Criminal Code*;

2. Directed the Clerk of the Court to enter a stay of proceedings pursuant to s. 579(1) of the *Criminal Code* which reads as follows:

> 579. (1) The Attorney-General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

[para5] Ian Cartwright, Counsel for the Applicant, had been advised that these steps would be taken by the Respondent and arranged for this application to be heard in the Court of Queen's Bench of Alberta on June 28, 29 and 30, 1993.

[para6] It is important to review certain portions of the history of the Oldman River Dam in order to understand some of the issues that have come before the Court. In August 1988 the Applicant swore a Private Information under the *Federal Fisheries Act* alleging there had been a disruption or destruction of fish habitat at the Oldman River Dam site near Pincher Creek, Alberta. A Justice of the Peace issued process against Ken Kowalski, Minister of the Environment, the Department of the Environment, Ralph McManus of the Department and the construction company contracted to do the work on the dam. The summonses were returnable August 30, 1988, in Pincher Creek Provincial Court.

[para7] It was anticipated that the Federal Department of Justice would intervene in the matter, however, it was determined that they had no jurisdiction since the proceedings were not commenced at the instance of the Federal Government. The Provincial Attorney General's Department intervened and entered a stay of proceedings since there had been no investigation

conducted by an appropriate investigative agency and there was no evidence to support the charges. The Applicant was advised through her lawyer of the actions taken by the Attorney General and was invited to take any complaint based on reasonable grounds to the appropriate investigative agency, namely, the Provincial Department of Forestry, Lands and Wildlife, Fish and Wildlife Division, which had an office in Pincher Creek.

[para8] The R.C.M.P. were requested to conduct an investigation in relation to the allegations and report the findings to Bruce McFarlane, Q.C., General Counsel and Director for the Federal Department of Justice. Mr. McFarlane had agreed to review the results of the investigation and to prosecute any offence pursuant to the *Fisheries Act* that was supported by evidence, as the Department of Forestry, Lands and Wildlife was considered to have a conflict in the matter and so did the Attorney General of Alberta.

[para9] Inspector Stephen Allan Duncan of the R.C.M.P. was assigned to conduct the investigation with respect to the allegations made by the Applicant. A number of reports were prepared by Inspector Duncan.

[para10] The first report, dated November 4, 1988, stated that the object of the investigation was to determine if there existed a *prima facie* case on which to proceed against the parties named in the Private Information dated August 2, 1988, and to consider only the offence under the *Fisheries Act* and determine if sufficient evidence existed to proceed.

[para11] On October 27, 1988, the Applicant was interviewed by the R.C.M.P. who prepared a full statement on the basis of her complaint and why she believed an offence had been committed under the *Fisheries Act*. Violation under s. 35(1) of the *Fisheries Act*, c. F-14 states:

> (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

[para12] The Applicant contends that it is clear from the diversion of the river in July of 1988 that the fish habitat has been altered. It is also clear from several studies undertaken that the Oldman River did provide fish habitat.

[para13] One of the issues that arises comes under s. 35(2) of the *Fisheries Act* which states:

> (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this *Act*.

[para14] The Applicant's position is that she has proof to establish that the alterations were not authorized by the Minister nor are there regulations made by the Governor in Council under the *Fisheries Act*. The position of the Applicant is that the Federal Government cannot delegate to the Province of Alberta its authority under the *Fisheries Act*.

[para15] On January 9, 1987, Her Majesty the Queen in Right of Canada, represented by the Minister of Fisheries and Oceans, and Her Majesty the Queen in Right of Alberta, represented by

the Minister of Forestry, Lands and Wildlife, entered into the Canada-Alberta Fisheries Agreement, portions of which are set out as follows:

> WHEREAS Canada recognizes that Alberta has constitutional jurisdiction over privately held lands and over Crown lands in the province and has a proprietary interest in fish found in waters of the Province of Alberta; and
>
> WHEREAS Alberta recognizes that Canada has constitutional jurisdiction over inland fisheries, as provided in the *Constitution Act* 1982; ...

[para16] Article I sets out that the purpose of this agreement is "to renew and strengthen co-operation between Canada and Alberta; to achieve the goals as stated in the Fish and Wildlife policy for Alberta; and to ensure that, within the national framework, co-operative action is taken in pursuing the objectives of the Fish and Wildlife policy for Alberta". Article II, paragraph 2, states that

> "subject to constitutional and statutory constraints, administrative responsibilities under the *Fisheries Act*, identified in a subsidiary agreement hereunder, shall be delegated by Canada to Alberta or to such agency or official of Alberta as the subsidiary agreement shall provide". Article III, paragraph 1 reads:
>
> > This agreement, to be known as the "Canada - Alberta Fisheries Agreement, 1987", upon signature by an authorized representative of each Party, shall continue thereafter until terminated on one year's written notice from either Party to the other.

[para17] A Canada - Alberta News release dated January 9, 1987, announcing the Canada/Alberta Fisheries Agreement, states in part:

> The Canada/Alberta Fisheries Agreement reaffirms assignment of fisheries administrative responsibilities from Canada to Alberta and establishes a framework to address issues related to fish habitat management, aquaculture and fish health, sport fisheries development, commercial fisheries development, fish inspection and small craft harbours.

[para18] No evidence was tendered to the Court to indicate that the Canada - Alberta Fisheries Agreement of 1987 has been terminated by either the Federal government or the Alberta government.

[para19] Inspector Duncan, in the course of his investigation, contacted Ken Ambrock, Director of Habitat, Alberta Fish and Wildlife, Jim Nicholls, Director of Operations, Alberta Fish and Wildlife, Duane Radford, Alberta Fish and Wildlife, Lethbridge, Alberta, and Lorne Fitch, Regional Habitat Head, Fish and Wildlife, Lethbridge, Alberta, and established that there had been a task force set up to mitigate the damages caused by the Oldman River Dam Project. A series of projects had been planned upstream from the dam to enhance the fish population.

[para20] On December 12, 1988, Inspector Duncan prepared an investigation summary with respect to the Oldman River Dam Project and submitted it to the Department of Justice in Ottawa.

A third report is dated September 18, 1989. The investigation continued with Inspector Duncan interviewing the Director of Habitat, Ken Ambrock, and Jim Nicholls, and he was advised that the goal of the Department of the Environment was a "no net loss" of recreational fishing opportunity on the three rivers, i.e. Crowsnest, Oldman and Castle.

[para21] The investigation disclosed that the Province of Alberta does not contact the Federal Department of Fisheries each time permission to violate s. 35 of the *Fisheries Act* is required. The Provinces of Alberta and Saskatchewan are the only two provinces that do not seek this exemption under the *Fisheries Act*.

[para22] The next investigation report stated that on April 11, 1990, the decision of Justice A.J. Stone of the Federal Court stated that "the Minister of Fisheries and Oceans was obviously aware of the dam and reservoir project and of its possible adverse impact upon the fisheries in the Oldman River".

[para23] A letter dated June 25, 1987, from Tom Siddon, Minister of Fisheries and Oceans, to R. Kambeitz, the lawyer for the Bow River Chapter of Trout Unlimited, in reply to questions on who is responsible for management of fisheries in Alberta, was summarized in the investigation report of April 18, 1990, as follows:

a) Since 1930 and the passage of the *Natural Resources Transfer Act*, Alberta has managed its own natural resources.

b) Regulations under the *Fisheries Act* are drafted by the Province and promulgated by the Federal Government.

c) The federal-provincial "umbrella" agreement on fisheries matters is being prepared as well as a subsidiary agreement to more clearly define the roles in fish habitat management.

d) Officials of the Dept. of Fisheries and Oceans have consulted with Provincial Officials on the implications of the dam construction on fish resources.

e) In matters of fish habitat and the protection of fish it is the Minister of Forestry, Lands and Wildlife, Mr. Don Sparrow, whose Department would be responsible and the matter was referred to him.

[para24] In a letter written by Tom Siddon, Minister of Fisheries and Oceans, dated August 25, 1987, he advised that he did not propose to intervene in the matter. The Minister, in writing to Miss Bailey, President of the Southern Alberta Environmental Group, with a copy to the Alberta Minister of Forestry, Lands and Wildlife, indicates: "my regional staff in Winnipeg ... have also consulted with provincial government biologists who are responsible in Alberta for the day to day administration of fisheries management issues". The letter continued: "[we] ... are now awaiting the formulation of mitigation and compensation proposals to remedy the potential problems posed to the fisheries resources". His letter continued with:

> In view of the long-standing administrative arrangements that are in place for the management of fisheries in Alberta, and the fact that the potential problems associated with a dam are being addressed, I do not proposed [sic] to intervene in this matter.

[para25] From the statement contained in the letter of the Minister, one could conclude that the Minister authorized the project under s. 35(2) of the *Fisheries Act*.

[para26] In addition, there was correspondence from the Office of the Minister of the Environment on January 15, 1988, from Holly Martel to the President of Friends of the Oldman River which was reported as follows:

> "dam project falls primarily within provincial jurisdiction. The Federal Government is not directly involved with the proposal, and, therefore, it would be inappropriate for Environment Canada or Fisheries and Oceans Canada to intervene directly by attempting to link it to the Federal water policy."

[para27] The investigation concluded that it appears the Province acted in good faith, following completely the instructions of their Federal counterparts, which culminated on September 18, 1987, when the Minister of Transport issued approval to the Alberta government pursuant to the *Navigable Water Protection Act* to construct the dam. On February 5, 1988, interim licence #15410 was then issued by the Alberta Minister of Environment.

[para28] The next report is also dated April 18, 1990. Investigation continued with an interview with Mr. Walter Solodzuk, Alberta Deputy Minister of Environment from 1975 to December 1986. In January 1987, he signed a contract with the Province of Alberta to become the Assistant Project Manager of the Oldman River Dam, and he continued in this position until May 1988. Mr. Solodzuk advised that he has been concerned about the Provincial responsibility for administering the *Fisheries Act* since the sections in question came into being through Bill C-38 in 1977. Through Bill C-38, the *Fisheries Amendment Act*, ss. 31 and 33 (which are now sections 35 and 37) came into effect. Solodzuk appeared before the House of Commons Standing Committee on Fisheries and Forestry on June 16, 1977, opposing the amendments on the grounds that they repudiated any acknowledgement of Alberta's own Environment Control and Water Resources Management Program. He was told that the new legislation would provide stronger measures to protect fish habitat and to control water pollution, and that the Province of Alberta would administer these fish habitat provisions.

[para29] In May 1978, three Provincial Ministers wrote submissions to the Minister of Fisheries and Environment outlining the overlapping jurisdiction and stating how burdensome to the private sector were governmental regulations. It was submitted that the Province was responsible for ss. 31 and 33 of the *Fisheries Act*. These submissions completely reviewed these sections and suggested and asked that the Province have delegated authority.

[para30] On August 3, 1978, the Minister of Fisheries and Environment Canada, Roméo LeBlanc, wrote to the Honourable D.J. Russell, Minister of the Environment for the Province of Alberta, and stated as follows:

> With respect to Section 31 and to those parts of Section 33.1 that relate to the alteration, disruption or destruction of fish habitat, I consider these to be important parts of the overall fisheries management responsibility of those agencies in Canada that administer the fisheries. In Alberta this is the responsibility of the Provincial Government. Accordingly, I would see the Minister of Recreation, Parks and Wildlife in Alberta using all the habitat protection sections that are needed to manage the fisheries resource. This is consistent with the long-standing arrangements that we have had for the administration of fisheries in Alberta.
>
> Please find attached, a public information leaflet which we have recently prepared on the new fish habitat protection laws. (Section 31 and related parts of 33). You will note that explicit reference is made to the fact that it is the Provincial Government in Alberta which administers the *Fisheries Act* and that in Alberta it is the provincial fisheries management agency that is the contact to fish habitat protection requirements.

[para31] The pamphlet prepared by the Department of Fisheries and Environment entitled, "Planning Work Near the Water" states in part:

> In Alberta, Saskatchewan, Manitoba, Ontario and Quebec, where the federal Fisheries Act is administered by the provincial government, contact the appropriate provincial fisheries management agency.

[para32] On October 3, 1978, Len Marchand, Minister of Environment for Canada, wrote to the Honourable D.J. Russell, Minister of the Environment for the Province of Alberta, stating as follows:

> ... We agree that, wherever possible, a province should implement the pollution provisions of the *Fisheries Act*.
>
> In response to some of the specific issues raised in your submission, I confirm that Alberta has been delegated the authority to administer section 33 of the *Fisheries Act* and pertinent regulations made under section 33 [now s. 35]. In addition I will ask my colleague, the Honourable Roméo LeBlanc, to appoint Alberta officials as inspectors and analysts.

[para33] In an additional pamphlet issued by the Federal Fisheries Department entitled, "What the *Fisheries Act* says about fish habitat", the list of provincial fisheries contacts indicates, "In Alberta ... where the federal *Fisheries Act* is administered by the provincial government, contact the appropriate provincial fisheries management agency".

PROCEDURAL DEFECT OF THE APPLICANT

[para34] The Respondent raises in argument that the parties named in Information 21075833P1 have not been served with the Notice of Motion with respect to this application, referring specifically to UMA Engineering Ltd., W.A. Stephenson Construction (Western) Limited and SCI Engineering & Constructors Inc., pursuant to the *Alberta Rules of Court*, Part 60, Rule 827 reads as follows:

827. (1) The notice of motion shall be served upon every person who appears to be interested or likely to be affected by the proceedings.

(2) The Court may require the notice of motion to be served upon any person not previously served.

(3) Where it is sought to quash a conviction, order, warrant or inquisition, the notice of motion shall also be served at least seven days before the return thereof....

(4) Any person not served with a notice of motion may show that he is affected by the proceedings and thereupon may be permitted to take part in the proceedings as though served.

[para35] In the opinion of the Court, the rights of W.A. Stephenson Construction (Western) Limited, SCI Engineering & Constructors Inc., and UMA Engineering Ltd. may have been affected in the event that the Applicant were successful and they should have been served with a notice of motion and supporting material.

ROLE OF THE ATTORNEY GENERAL OF ALBERTA

[para36] In the case of *Regina* v. *Sacobie* and *Paul* 51 C.C.C. (2d) 430, the New Brunswick Court of Appeal set out in the headnote that in the prosecution of a violation of a federal statute (such as the *Narcotic Control Act* and the *Fisheries Act*) which does not depend for its constitutional validity on the criminal law power under s. 91(27) of the *British North America Act*, 1867, counsel for the Attorney General of Canada has exclusive jurisdiction to conduct the proceedings only if the information is laid, or the indictment is presented, by the Government of Canada and such counsel appears to conduct the proceedings.

[para37] Anyone may lay an information for such an offence (with some exceptions in certain statutes such as the *Combines Investigations Act*) if he has reasonable and probable grounds pursuant to s. 455 and s. 720 of the *Criminal Code* and if neither the provincial nor federal Attorney-General appears by counsel or agent to conduct the prosecution, the informant, his counsel or agent as the *Criminal Code* provides, may conduct the prosecution. Pursuant to the definition of "Attorney-General" in s. 2 of the *Criminal Code* the provincial Attorney-General and his counsel or agent may always take conduct of prosecutions for a violation of federal legislation except if the information is laid on behalf of the federal government and counsel for the Attorney-General of Canada appears.

[para38] If the Information is laid on behalf of the federal government but counsel for the Attorney-General of Canada does not appear, then counsel for the provincial Attorney-General has exclusive jurisdiction to conduct the prosecution.

[para39] When a prosecution has been commenced privately, the Attorney-General retains the right to intervene in the proceedings. Such intervention can have two purposes. It is open to the Attorney-General to intervene in a private prosecution in order to conduct the prosecution, for

example, to continue the proceedings that a private prosecutor intends to abandon on the grounds that the proceedings are in the public interest.

[para40] The exercise by the Attorney-General of his prosecutorial discretion to stay proceedings is not subject to review by a court except where there is a flagrant impropriety on the part of the Attorney General.

[para41] In *Re Balderstone et al. and the Queen* (1983) 8 C.C.C. (3d) 532 (Man.C.A.) (leave to appeal to the Supreme Court of Canada was refused), Monnin, C.J.M. expressed the principle as follows (at p. 539):

> The judicial and executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney General - barring flagrant impropriety - he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.

[para42] In *R.* v. *Moore* (1986), 26 C.C.C. (3d) 474, Huband, J.A. stated at p. 476:

> If the courts have the power to inquire into the exercise of that discretionary authority by the Attorney-General, then I do not see on what basis every exercise of his discretionary powers would not also be reviewable. There would have to be hearings and representations presented and heard before deciding what criminal charges should be laid against whom. The criminal law system would be in a shambles.

[para43] Since the *Charter of Rights* has been proclaimed, the provisions of s. 507 of the *Code* have been held to be constitutionally valid.

[para44] Based on the above authorities, absent a constitutional issue to be reviewed, the action is not justifiable with the possible exception where it can be said that there was "flagrant impropriety" on the part of the Attorney General in directing the stay. There can be no suggestion in this case that the Attorney General failed to uphold a law or that he was acting out of improper motives for an improper purpose.

[para45] Gerald Gunther, author of Individual Rights in Constitutional Law, 3rd ed. (1981), Foundation Press, cited by Tarnopolsky and Beaudoin: *Canadian Charter of Rights and Freedoms,* page 574, wrote in the July 6, 1987 edition of Time magazine, which was devoted to the 200th anniversary of the Constitution of the U.S.A.:

> It is important to remember that the *Charter* has its limits. Not all the social issues are constitutional ones. The Constitution is not an infinitely malleable instrument, not something to be treated as a tool to reach desired ends, not a justification for everything.

[para46] In Re Hamilton and the Queen 30 C.C.C. (3d) 65, the headnote reads as follows:

> While the *Criminal Code* provides that anyone may lay an information charging a person with a criminal offence the informant does not have a legal right or liberty to continue such a prosecution in the face of intervention by the Crown. The Crown has a discretionary right to intervene in criminal matters and having done so to stay the private prosecution. Once the Attorney-General or counsel on his behalf intervenes then that counsel assumes control of prosecution and that counsel's rights are paramount to the private person's or his counsel's rights. The right of everyone to liberty and the right not to be deprived thereof except in accordance with the principles of fundamental justice as guaranteed by s. 7 does not entitle the private informant to continue a prosecution when he is met by the Attorney-General's direction to enter a stay of proceedings pursuant to s. 508 of the *Criminal Code*, at least in the absence of clear evidence to support some flagrant impropriety on the part of the Crown officers.

[para47] In the case of *R*. v. *Osiowy* (1989), 50 C.C.C. (3d) 189, Vancise, J.A. of the Saskatchewan Court of Appeal, stated at p. 191:

> ... It is settled that an individual has the right to initiate a private prosecution. It is also settled that the Attorney General has the right to intervene and take control of a private prosecution. Included in the right to intervene and take control is the power to direct a stay pursuant to s. 508. It follows, then, that a private informant has the right to initiate proceedings; but that right does not give him the liberty to continue the proceedings should the Attorney-General decide to intervene and invoke s. 508(1) and direct the entry of a stay of proceedings. Once the Attorney-General or counsel on his behalf intervenes and assumes control of the prosecution, that counsel's rights are paramount to the private person's or his counsel's rights. The discretion of the Attorney-General to enter a stay is not reviewable in the absence of some flagrant impropriety on the part of the Crown officers.

[para48] In Re W.A. Stephenson Construction (Western) Ltd. and Fradsham;, 66 C.C.C. (3d) 201, Miller A.C.J. stated at p. 206:

> Generally, the degree of impropriety to be met before the court will intervene to reverse an action by the Attorney-General is very extensive. It must border on corruption by the Crown, violation of the law, bias against the particular offence, or prejudice against the accused or the victim.

[para49] No such impropriety has been established by any of the evidence called on behalf of the Applicant.

[para50] The Applicant has made no allegations of flagrant impropriety by the Respondent. The Respondent's actions in sending the matter to the Federal Attorney-General and the Manitoba Attorney-General was entirely appropriate, given the circumstances of the matter.

[para51] Once the Attorney-General intervenes in a prosecution, he assumes control of the prosecution and has the right to stay those proceedings despite the wishes of the Informant. In the absence of flagrant impropriety on the part of the Crown officers, such action does not constitute a violation of the Informant's rights under s. 7 of the *Charter of Rights and Freedoms.*

[para52] Section 7 of the *Charter* reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[para53] In *R.* v. *Mills*, [1986] 1 S.C.R. 863 at 919-20, Lamer, J. stated:

> ... security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation..." These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

[para54] In his textbook Legal Rights in the *Canadian Charter of Rights and Freedoms*, 2nd ed., the Honourable David C. McDonald stated at p. 137:

> - The guarantee of "liberty" in s. 7 was held not to have been violated when the Crown intervened in a private prosecution and directed that a stay of proceedings be entered. McKenzie J. held that, even accepting the "expanded definition of liberty" adopted by Nemetz C.J.B.C. in *R.* v. *Robson* [(1985), 45 C.R. (3d) 68], the private prosecutor's "liberty... does not free him to continue a prosecution when he is met by the Attorney General's direction to enter a stay of proceedings".

[para55] In *R.* v. *Lyons*, [1987] 2 S.C.R. 309 at 361, La Forest, J. expressed the following views as to the principles of fundamental justice as that phrase is used in s. 7:

> It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness .... It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

[para56] The analysis of s. 7 involves two steps as summarized in *R.* v. *Beare*, [1988] 2 S.C.R. 387, reversing [1987] 4 W.W.R. 309, by La Forest J., for the Court, who stated at p. 401:

> To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice. Like other provisions of the *Charter*, s. 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation but it is important not to overshoot the actual purpose of the rights in question ....

[para57] The former s. 508 of the *Criminal Code* which gives the Attorney-General the power to stay proceedings does not violate s. 7 of the *Charter*, notwithstanding that the section itself does not contain any guidelines for the exercise of the Attorney General's discretion. The section is an adequate expression of the power which has always rested in the Attorney General and which is essential to the proper enforcement of criminal law.

[para58] Safeguards of the individual against the improper use of the power to stay which existed before the *Charter* was proclaimed continue to exist. Those safeguards have been enhanced by the rights guaranteed under the *Charter* together with the power of the court to give a remedy if necessary.

[para59] Under the *Canadian Charter of Rights and Freedoms* s. 2 refers to the fundamental freedoms which include:

> 2 Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;

[para60] In my opinion, the Applicant's rights under s. 2(a) and (b) do not extend to the circumstances of this case. Absent flagrant impropriety by the Respondent, the actions in intervening in this prosecution and entering a stay do not violate the Applicant's rights under s. 2(a) and (b) of the *Charter*.

[para61] The Applicant has failed in her challenge with respect to the steps taken by the Attorney-General of Alberta in entering a stay of proceedings.

[para62] In the opinion of the Court, it would be an abuse of process to allow this litigation to proceed further. The Respondent has provided full and complete information to the Applicant with respect to the investigation conducted by the R.C.M.P. into this matter. If the issues were permitted to be relitigated, it would raise the spectre of improper motive of the Applicant to harass the Respondent unreasonably.

[para63] For these reasons, I would dismiss the application. If costs are being asked for, they may be spoken to by the parties.

SASKATCHEWAN PROVINCIAL COURT

[Indexed as: *R.* v. *Lerat*]

Between Regina, and Peter Lerat

Rathgeber Prov. Ct. J.

Broadview, September 29, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 24, 26(a), 42(2)(e) – treaty Indian charged under ss 42(2)(e), 24 and 26(a) – charges did not infringe treaty rights under Treaty 4 – accused convicted**

Treaty rights – no evidence of fishing as an avocation at the time of treaty signing – evidence of fishing after treaty is not evidence of a treaty right – sale of fish not a part of Indian culture at the time of treaty signing – treaty right to sell fish is subject to reasonable government regulation

Summary: The accused, a treaty Indian, was charged with 3 offences under the *Fisheries Act*: selling fish contrary to s. 42(2)(e); setting a net in a manner that obstructs navigation contrary to s. 24; and fishing with a net without an authorizing license contrary to s. 26(a).

The accused admitted to selling a small amount of fish and claimed that his treaty right under Treaty 4 included the right to sell fish or that he had a treaty right to sell fish commercially. The court found that as a matter of law, there is no treaty right to sell fish without a license. The learned judge distinguished *R.* v. *Horseman* as a case dealing with hunting; hunting and trapping as part of the fur trade was historically different from fishing. Further, there was no evidence that the sale of fish for food was an integral part of Indian culture at the time of treaty signing and therefore cannot be a right under the treaty. Evidence that the Hudson Bay Company hired an Indian to fish is not the same as evidence of commercial fishing. Evidence of fishing after treaty is not necessarily evidence of a treaty right. The treaty right to fish for food has not evolved to include the sale of fish or commercial fishing. Even if the sale of fish for human consumption is a treaty right, it is subject to reasonable government regulation. Commercial licenses would not have been issued for the lakes in question due to mercury contamination.

With respect to the charge of setting a net so as to obstruct navigation, there was no interference with a treaty right as the regulation has reasonable conservation objectives and as well as ensuring free navigation. Similarly, on the charge of using a net without a license, the treaty right is subject to conservation measures. The regulation is reasonable and justified to conserve the fish stock.

Held: The accused was found guilty.

REASONS/MOTIF:

David Gerecke, Counsel for the Accused

P. Mitch McAdam, Counsel for the Crown

[para1] RATHGEBER PROV. CT. J.:-- The accused is an Indian living on the Cowessess reserve which was created by Treaty No 4 in 1874. He is charged with three offences under the *Fisheries Act* namely; selling fish contrary to Sec. 42(2)(e), setting a net in a manner that obstructs navigation contrary to Sec. 24, and fishing with a net without an authorizing license contrary to Sec. 26(a).

[para2] On the charge of selling fish, the accused admitted to the sale of a small quantity of fish to a friend. The proceeds were used to purchase gasoline for his truck. In answer to the charge the accused contends firstly that the treaty right to fish for food includes the sale of fish or alternatively that he has a treaty right to fish commercially.

[para3] Treaty No 4 states "... Her Majesty agrees that Her Indians shall have the right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country.

[para4] As a question of law, the case of *R.* v. *Sundown*, [1988] S.J. No. 49 (Q.B Feb. 11/88) held that it is not a treaty right to sell fish without a license. I believe I am bound by that decision although the Crown concedes the *Natural Resources Transfer Agreement* is not applicable here. The ratio of that case was based on the wording of the treaty and I do not agree that such case has been superseded by *R.* v. *Horseman*, [1990] 1 S.C.R. 901, or *R.* v. *Littlewolf*, [1992] A.J. No. 726. Those cases dealt with hunting rights. As a question of fact, hunting and trapping for the fur trade as an avocation was historically different from fishing. The extent of the right to fish contained in the treaty hinges on evidence of fishing as an avocation at the time of the treaties. The fur trade was the major business of the Hudson Bay company from its charter in the 17th century. The difference between hunting, trapping and fishing was probably due to the perishable nature of the product and the lack of demand for fish by the Europeans.

[para5] There is evidence that the Hudson Bay Company hired an Indian to fish during the winter but it does not follow that it is therefore a treaty right to sell fish. In doing so the company was not buying fish. Hiring out your services as a fisherman is different in kind from fishing commercially and does not give rise to the treaty right to sell fish. Other evidence of the sale of fish prior to 1874 is sparse. Evidence was led as to the fishing practice after 1874 and insofar as it confirms the prior practice, it is certainly relevant to determination of the extent of the treaty right. However such evidence as there is of the sale of fish is not necessarily evidence of a treaty right. I think it is an error to assume that everything Indians did was pursuant to a treaty right. Their treaty rights were in addition to the rights enjoyed by all including the sale of fish. But there is evidence that Indian food fishing during closed season was allowed on a limited basis, and Indians fished commercially with licenses along with non Indians according to the early fisheries reports. Fishing was only one of the many non treaty commercial endeavours the Indians engaged in to earn their living.

[para6] Nor is it entirely clear that such commercial or net fishing was conducted legally. A reading of the sessional papers cannot leave one with any other impression than that the laws and their general enforcement were in a very early stage. There are many entries which report, the

seizure of nets and it would appear that at least the fisheries dept considered their regulations to be among those the Indians had undertaken to abide by in the treaty. Some of the Indian agents encouraged fishing, but whether with or without licenses or as a treaty right, or a general right, is not clear. By at least 1893 conservation laws had become a necessity.

[para7] A consideration of all the evidence does not lead to the conclusion that sale of fish was an integral part of the culture of the Indians at the time of the treaty. While fishing for food was common, sale among Indians or to Europeans was not and I conclude that the right to fish for food is what is meant by "avocation" in the context of the treaty.

[para8] Furthermore I cannot conclude that the sale of fish to obtain money to buy food or fishing supplies is part of or a logical extension of the treaty right. While the Treaty right to fish, may be exercised by modern means, I do not find it to be the law that the right itself evolves so as to include sale either commercially or as part of the food fishing right. I conclude there is no right to sell fish caught for food and there is no treaty right to sell fish commercially separate from food fishing.

[para9] If the sale of fish for human consumption is a treaty right, such right is also subject to reasonable or justifiable government regulation. The public has come to expect certain standards of safety and inspection in the sale of food and mercury contamination has made the fish largely unsafe for human consumption. The evidence establishes that a commercial license, meaning the right to sell fish, would not have been granted for the lakes in question due to the mercury content. Such, regulation is justifiable. Public safety concerns require some regulatory limits on the right to sell food.

[para10] I find the accused guilty of the charge under section 42(2)(e) of selling fish without the required license.

[para11] On the charge of setting a net so as to obstruct navigation, the accused contents firstly that his net did not obstruct navigation on the river, and alternatively, if he did so, Sec. 24 is an unjustified interference with his treaty right to fish.

[para12] I am satisfied from the evidence that the net was set is such a way that it covered the entire river from bank to bank. Navigation was obstructed.

[para13] The accused states that Sec. 24 is an interference with the treaty right to fish. The evidence establishes that prohibiting netting the entire width of the river has a conservation objective as well as ensuring free navigation. On both points the regulation is reasonable in intent and application and not an unjustified interference with the right to fish. I find the accused guilty on the second count, as charged.

[para14] On the charge of fishing with a net without an authorizing license, the accused contends Sec. 26(a) requiring a license is an unjustified infringement of his treaty right to fish. The evidence establishes that the license is a conservation measure. Indian food fishing is a priority subject only to conservation requirements, but without some regulatory method there would be no way of controlling even the amount of Indian food fishing in order to conserve the stock. The regulation

recognizes that fishing with a net has the potential to damage the stock in a way that angling does not. I am satisfied that the regulation is reasonable in both its intent and application and is justifiable. The accused is required to obtain such a license and accordingly I find him guilty as charged.

[para15] I am indebted to counsel for their well prepared submissions.

NOVA SCOTIA COURT OF APPEAL

[Indexed as: R. v. Canada (Minister of National Defence)]

Between Her Majesty the Queen in Right of Canada (Department of Fisheries & Oceans), Appellant, and Her Majesty the Queen in Right of Canada (Department of National Defence), Respondent

Freeman, Hart and Roscoe JJ.A.

Halifax, September 30, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 3(2), 35(1), 78(a) – charge against federal Crown represented by Minister of National Defence – issue whether Act applies to the Crown – whole of *Fisheries Act* is binding on the Crown**

***National Defence Act*, R.S.C. 1985, c. I-21, s. 269 – 6 month limitation in s. 269 does not bar prosecution against the Crown under other acts**

Summary: The accused, the Crown in Right of Canada, as represented by the Minister of National Defence, was charged under s. 35(1) of the *Fisheries Act* with carrying on a work, specifically a bridge construction field exercise at the Cape Breton rifle range, that resulted in the harmful alteration of fish habitat. At trial, the learned judge found that Her Majesty was not immune from prosecution, but that the prosecution was barred by the 6 month limitation period in the *National Defence Act*.

The Court of Appeal agreed with the trial court on the question of whether the *Fisheries Act* is binding on the Crown. S. 3(2) expressly binds Her Majesty in Right of Canada or a Province. However, the court disagreed with the trial court's finding on the applicability of the 6 month limitation in s. 269 of the *National Defense Act* to the Crown. The *National Defense Act* does not apply to proceedings brought against the Crown, but only applies to persons performing duties under the *National Defence Act*. It could not have been the intention of Parliament to protect the Crown as a "person" under s. 269.

Held: Appeal allowed; matter remitted to the Provincial Court for trial.

REASONS/MOTIF:

Wayne J. MacMillan and Michael A. Paré, Counsel for the Appellant
Mark E. MacDonald and Robert G. Grant, Counsel for the Respondent

[para1] FREEMAN J.A.:-- The issue in this appeal is whether Her Majesty the Queen in the Right of Canada as Represented by the Minister of National Defence is a proper defendant in a prosecution under the *Fisheries Act*, R.S., c. F- 14, brought in the name of Her Majesty the Queen, also in right of Canada, represented by the Minister of Justice.

[para2] The information alleges that Her Majesty between April 1, 1991 and April 11, 1991, carried on work at Wash Brook, Cape Breton County, that resulted in the harmful alteration of fish habitat contrary to s. 35(1) of the *Fisheries Act*, thereby committing an offence under s. 78(a) of the *Fisheries Act*. The work was actually done by members of the 45th Field Engineering Squadron of the Canadian Armed Forces as part of a bridge construction field exercise undertaken at the Cape Breton rifle range.

[para3] The trial judge found that Her Majesty was not immune from prosecution but he decided on a preliminary motion that the prosecution was barred by the six-month limitation period in s. 269 of the *National Defence Act* R.S.C. 1985 c. N- 5, .

[para4] S. 17 (formerly s. 16) of the *Interpretation Act* R.S.C., c. I-21 provides:

> " 17. No enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment."

[para5] S. 34 (2) (formerly s. 27) of the *Interpretation Act* provides:

> " All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that *Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides."

[para6] S. 2. of the *Criminal Code* provides that "in this act. . . 'every one', 'person', 'owner' and similar expressions include Her Majesty . . . "

[para7] In *R.* v. *Eldorado Nuclear Limited* (1984) 4 D.L.R. (4th) 193 (S.C.C.) Chief Justice Dickson, as he then was, held that "in the absence of a provision expressly incorporating the *Criminal Code* definition of 'every one' into the *Combines Investigation Act*, the definition applies only in the *Code* itself."

[para8] With respect to ss. 17 and 34, then respectively ss. 16 and 27, he wrote:

> "Section 16 makes the Crown immune unless expressly bound, and it cannot be that s. 27 of the same *Act* binds the Crown unless expressly exempted. In my view s. 27 (2) of the *Interpretation Act* does not import the *Criminal Code* definition of "every one" into the *Combines Investigation Act*, and it does not make the latter *Act* binding on the Crown."

[para9] In *CNCP Telecommunications* v. *Alberta Government Telephones* (1989), 98 N.R. 161 at p. 220 he explained further:

> "Section 16 requires a clear Parliamentary expression of an intention to bind the Crown. This does not necessarily require that a federal enactment requires a section stating "This *Act* shall bind Her Majesty" (although such a provision, as a matter of legislative drafting, would put the issue beyond doubt).

[para10] S. 3(2) of the *Fisheries Act* provides:

> "This *Act* is binding on Her Majesty In Right of Canada or a Province. "

[para11] In my opinion therefore the whole of the *Fisheries Act* is binding on the Crown; Her Majesty is not immune from prosecution under the *Fisheries Act* for offences committed in her name.

[para12] The obvious intention of Parliament in enacting s. 2 of the *Criminal Code* was to make the concept of the criminal liability of the state, as personified by Her Majesty, a feature of Canadian criminal law. The respondent referred to jurisprudence from other Commonwealth jurisdictions relating to crown immunity. In my opinion the question is settled in Canada by statutes supported by jurisprudence: the state is not above the penal law nor immune from prosecution under it when the binding intention of a statute is clear.

[para13] Similar conclusions were reached respecting the liability of the Crown in right of a province in *R.* v. *Forest Protection Limited* (1979), 25 N.B.R. (2d) 513 and *R.* v. *British Columbia* [1992] 4 W.W.R 490 (B.C.S.C.).

[para14] In the British Columbia case Shaw J. distinguished *Canadian Broadcasting Corp.* v. *Ontario (Attorney General),* [1959] S.C.R. 188, 122 C.C.C. 305, 16 D.L.R. 609 in which the C.B.C. as a Crown agency was found not to be a "person" subject to prosecution under the *Lord's Day Act*. Shaw J. found that case "involved quite different legislation . . . . The Court was not addressing anything comparable to the scheme of the *Fisheries Act* and the quite specific wording of s. 3(2) of that *Act*.

[para15] There is a similarity between the facts in present case and those in *Department of the Environment, Canada* v. *Department of Public Works, Canada,* (1992) 10 C.E.L.R. (N.S.) 135 (C.Q.), which set a precedent as the first case in which one minister of the federal Crown had prosecuted another. Public Works had misread its authorization from Environment and unlawfully dumped sand from a dredging operation in the Magadalen Islands over lobster grounds during a season when lobsters were breeding. Decoste J. of the Court of Quebec considered arguments of Crown immunity but found that s. 4 of the *Canadian Environment Protection Act,* S.C. 1988, c. 22 [R.S.C. 1985, c. 16 (4th Supp.)] provided a complete answer. It is identical to s. 3(2) of the *Fisheries Act.*

[para16] In the present case the proceedings were brought approximately a year after the alleged offence. The respondent argued that Her Majesty in right of the Minister of National Defence was protected by a six-month limitation period on prosecutions. S. 269(1) of the *National Defence Act* was pleaded on her behalf:

> " No action, prosecution or other proceeding lies against any person for an act done in pursuance or execution or intended execution of this *Act* or any regulations or military or departmental duty or authority, or in any respect of any alleged neglect or default in the execution of this *Act*, regulations or any such duty or authority unless it is commenced

> within six months after the act, neglect or willful default complained of or, in the case of continuance of injury or damage, within six months after the ceasing thereof."

[para17] Counsel agreed that s. 269(1) created a limitation period for the benefit of persons performing duties under the *National Defence Act* that applied even when proceedings were brought under other federal acts. I will assume that to be the case. The issue is whether s. 269 applies to proceedings brought against Her Majesty under another federal act. I agree with the appellant that the s. 269 limitation does not apply to such proceedings against the Crown.

[para18] Parliament's obvious primary intention in enacting s. 269 was to create a prescriptive defence for National Defence personnel with respect to the large number of military offences created by the *Act*. Her Majesty is not bound by the *National Defence Act* as she is by s. 3(2) of the *Fisheries Act* and s. 4 of the *Environmental Protection Act*. As she cannot be prosecuted for offences under the *National Defence Act*, it could not have been the intention of Parliament to protect her as a "person" under s. 269. The language does not support a conclusion that it was intended to apply to Her Majesty with respect to prosecutions under other acts. In my opinion the Crown is not a "person" entitled to the protection of s. 269 and the trial judge erred in finding that the six-month limitation period applied to Her Majesty.

[para19] A similar result was reached in *Pelletier* v. *R.* [1970] Ex. C.R. 2 and *Way* v. *Canada and John Doe* (1993) 63 F.T.R. 24.

[para20] The respondents argued that the prosecution of Her Majesty in Right of Canada by Her Majesty in Right of Canada creates an absurdity. While there may be conceptual difficulties, these must yield to the principle that Her Majesty in Right of Canada or a Province is not above the law. When a statute that Parliament has made binding upon Her Majesty is violated in her name and on her behalf, the declarative effect of a finding of guilt is more important than the penalty imposed. This is particularly true when the statutory violation consists of an act destructive to the environment. Decoste J. dealt with a similar argument in the Environment Canada case.

> "Moreover, even if it is subject to the *Act*, what justification is there for a charge, knowing full well that the Treasury Board would receive from one hand (Environment Canada) what is paid with the other (Public Works Canada)? . . .we invited prosecuting counsel to explain the justification for these proceedings.
>
> First, he submitted, the general deterrent aspect is very important. By this, he meant sending a clear message to our private sector of the seriousness of the objective adopted by Parliament: the protection of the environment, of human life and of the health of Canadians. They want to practise what they preach.
>
> Second, they also want by doing this to make government employees and contractors take more responsibility. They must also be sensitized to this concept of the environment, and act in such a way that none of the many decisions which they must make involve the slightest risk to environmental protection.
>
> In my opinion, these two reasons alone fully justify the initiation of criminal proceedings."

[para21] Decoste J. imposed a fine of $1.00 and ordered a $100,000 (reduced to $40,000 on appeal) cleanup of the damaged lobster grounds.

[para22] I would allow the appeal and remit the matter to the Provincial Court for trial.

BRITISH COLUMBIA PROVINCIAL COURT

[Indexed as: R. v. Agrifoods International Co-operative Ltd.]

Between Regina, and Agrifoods International Co-operative Ltd. and Fraser Valley Milk Producers Cooperative Association, carrying on business as 'Dairyland Foods'

Tweedale Prov. Ct. J.

Burnaby, October 8, 1993

***Fisheries Act*, R.C.S. 1985, c. F-14, ss 36(3), 40(2), 79.2(f) – charge of depositing a deleterious substance – spilled chemical flushed into storm sewer – failure to report spill – guilty plea**

Sentencing – fine of $5,000 – order under s. 79.2(f) to pay $10,000 to Crown to improve fish habitat – each sentence is fact specific – pollution offences must be treated as crimes

Summary: The accused company was charged under s. 36(3) of the *Fisheries Act* with depositing a deleterious substance under conditions where the substance may enter water frequented by fish. The company pleaded guilty to the charge. Although the Crown elected to proceed by indictment, the Crown asked that the sentencing hearing proceed as if it had chosen to proceed summarily.

The accused company spilled one or two containers of a cleaner, Miraclean, in its yard. Company employees washed the area of the spill with water and either flushed it into the storm sewer drain or took insufficient care to keep the chemical away from the drain. The diluted chemical traveled through the storm sewer into a tributary of Still Creek, which are waters frequented by fish. The spill resulted in a fish kill in the tributary. The company did not report the spill to the Department of Fisheries until questioned by a Fisheries Officer. Company employees were not trained to deal with spilled chemicals and did not follow the manufacturer's instructions for cleaning up a spill of Miraclean. Following the incident, the company instituted various improvements including its method of storing Miraclean, significant expenditures on rebuilding drains and new monitoring equipment and company training.

In arriving at appropriate sentencing principles, the learned judge agreed with two points in *R.* v. *United Keno Hill Mines Ltd.*: that each sentence is fact specific and pollution offences must be approached as crimes. In this case, aggravating factors were the company's failure to train its employees and its failure to report the spill; mitigating factors were the company's cooperation after the spill and its remedial steps.

Held: Fine of $5,000 plus order under s. 79(2)(f) to pay $10,000 to the Crown for enhancement of fish habitat in Still Creek and its tributaries.

REASONS/MOTIF:

John D. Cliffe and Daniel M. Scanlan, Counsel for the Attorney General of Canada
William K. McNaughton and C. Januszczak, Counsel for the Defence

TWEEDALE PROV. CT. J.:--

The Offence

[para1] The accused, referred to here as the company, pled guilty to depositing a deleterious substance at its Burnaby plant under conditions where the substance may enter water frequented by fish - sections 36(3) and 40(2) *Fisheries Act*. R.S. c. F-14, as amended.

[para2] The offence is indictable or punishable on summary conviction. The Crown proceeded by indictment only because the charge was sworn past the limitation period for summary conviction proceedings. The Crown asked that I sentence as if it had chosen to proceed summarily.

Penalty

[para3] The summary conviction penalty for a first offence (the case here) is a fine not exceeding $ 300,000.

Facts

[para4] In the early morning of July 25, 1991, one or two containers (the evidence is unclear) of Miraclean 12 spilled in the yard of the company's Lougheed Highway plant in Burnaby. Miraclean 12 is a cleaner with a 12% concentration of sodium hypocholrite.

[para5] This occurred when the one or two Miraclean containers, each containing 23 litres, ruptured. It is not clear to me from counsel's submissions exactly how the rupture occurred. For the purposes of sentencing, the storage and cause of the rupture are not of great importance. It is the action taken after the discovery of the spill by the company's employees that gives rise to the charge.

[para6] The employees washed the area of the spill with about 2200 litres of water. They then either flushed the diluted Miraclean into a nearby storm sewer drain or took insufficient care in keeping the diluted chemical away from the drain. (For the purpose of sentencing either action is blameworthy as it shows that the company failed to property train its employees to deal with a chemical spill of this kind.)

[para7] The diluted Miraclean then travelled into a storm sewer and ended up in an unnamed tributary which runs into Still Creek. Both the tributary and Still Creek are waters frequented by fish.

[para8] The Crown called evidence to prove that this spill not only had the potential to kill fish, but that fish were killed as a result. Defence counsel challenged this evidence and argued the Crown had not proven beyond a reasonable doubt this aggravating factor.

[para9] Twenty or more dead carp, catfish, stickleback and trout were seen by a Burnaby Health Inspector at about 845 a.m. on July 25 in still Creek, near the unnamed tributary and storm sewer outfall referred to above.

[para10] The Crown called as an expert Lee Nikl, a Department of Fisheries biologist. Mr. Nikl examined two of the dead carp that morning. His expert opinion was that the fish had died within 24 hours. There being only conjectural possibilities of other sources for the fish kill, I consider the evidence sufficient to establish the Miraclean spill caused the death of the fish.

[para11] Fortunately, the fish kill was not large and there was no continuing or long-term damage to the water or the surrounding area.

[para12] On the afternoon of July 25, Mr. Nikl, the fish biologist, went to the company's plant and interviewed Lorne Vallee, the plant manager. Mr. Vallee was not aware of the chemical spill. He agreed to make inquiries. The next day Mr. Vallee contacted Mr. Nikl. Mr. Vallee had learned that the spill had occurred at 1:30 a.m. on July 25. He understood two Miraclean containers had ruptured when a pallet fell over and they were crushed.

[para13] On August 2, Scott Gilbert, a fishery officer, went to the company's plant. Mr. Vallee gave him a written statement about the spill and the clean-up action.

[para14] It is clear from the statement that 1) the employees were trained to dilute the spilled chemical, but were not trained to keep the diluted chemical out of drains, sewers and surface waters 2) Mr. Vallee was not aware of the Miraclean manufacturer's recommendation to use a dry chemical to absorb the spill and then safely dispose of the residue 3) the company's reporting procedures did not result in Mr. Vallee being told of the spill, nor a report being made to the Department of Fisheries.

[para15] Sometime in August 1991, the company installed signs where chemicals were kept which read: CHEMICAL SPILLS - NOT TO BE FLUSHED TO ANY STORM SEWER - NOTIFY A SUPERVISOR IMMEDIATELY.

[para16] At the time of the spill, the pallets holding the Miraclean were double-stacked and the containers were single- wrapped in plastic. After the spill, the pallets were double- wrapped and single stacked.

[para17] By February 1992, the company had in place the recommended neutralizing agent to deal with a Miraclean spill. The company circulated a memo dated January 28, to appropriate employees outlining the use of the agent and proper steps for disposal.

[para18] The company marked the storm drains with fish symbols alerting employees to not flush chemicals into the drains.

[para19] The company spent $24,000 rebuilding drains and $47,000 on equipment to monitor acid/alkali levels of chemicals used in the plant.

[para20] There have been no further chemical spills which have resulted in damage to the environment.

The Crown Position

[para21] Crown Counsel, Mr. Cliffe, argues the company should be liable to pay $30,000 to $35,000. He suggests this be divided between a fine of $5,000 and a fish enhancement order under s. 79.2(f), a 1991 amendment to the *Fisheries Act*.

[para22] Mr. Cliffe says there was a lack of due diligence. The company failed to properly train and equip its employees to deal with this kind of spill. The failure to report the spill and the lack of Mr. Vallee or other senior supervisory staff having knowledge of the spill, he argues, are aggravating sentencing factors. He also points to a slow company response in taking curative steps. The chemical spill sign was not in place when Fishery Officer Gilbert visited the plant August 2. No neutralizing agent was in place until late January or February 1992.

[para23] Crown Counsel points out that Dairyland is a large, well-established, profitable company and has the ability to pay the suggested fine and fish enhancement amount.

[para24] He says the late guilty plea, entered on the first day of this scheduled 7 day trial is not a mitigating factor. The Crown had fully prepared its case which required a great deal of time and money.

The Defence Position

[para25] Mr. McNaughton, counsel for Dairyland, suggests that the company's liability should be $10,000, most of it an amount paid under a s. 79.2(f) fish enhancement order.

[para26] He argues that the small amount of chemical spilled and a lack of long-term effects should lead to a small fine and a modest s. 79.2(f) order to assist in the improvement of the fish habitat in Still Creek and tributaries.

[para27] Dairyland has been in business for 75 years. It has a good corporate reputation. This is the first and only time Dairyland has been guilty of this offence. The chemical, while harmful, was followed by appropriate safety precautions. The chemical spill warning signs went up within several weeks of the spill. The neutralizing agent took about 6 months to be put in place, but no harm resulted in this delay. Defence Counsel points to the full cooperation by the company through the plant manager, Mr. Vallee. After investigating, Mr. Vallee contacted the fisheries biologist with full particulars of the spill and provided a complete statement to the fishery officer on August 2.

[para28] Although the company failed to properly train its employees regarding the handling of this chemical spill, Mr. McNaughton stressed there was no profit motive connected with the spill.

[para29] He also filed corporate financial statements which show that while Dairyland has large gross sales, its net profit is relatively modest.

The Law

[para30] The blame worthiness involved in this offence, acknowledged by the company through its guilty plea is this: the company did not "...exercise all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system" *R*. v. *City of Sault Ste. Marie* (1978) 40 C.C.C. (2d.) 353 at 377 (SCC).

[para31] One of the leading sentencing cases dealing with environmental damage is Chief Judge Stuart's decision in *R*. v. *United Keno Hill Mines Ltd*. (1980) 10 C.E.L.R. 43 (Yukon TC). I agree with Stuart C.J. that each sentence is fact specific and that 1...pollution offences must be approached as crimes, not as morally blameless technical breaches of a regulatory standard," (page 47).

[para32] I find his sentencing criteria helpful and have used them in arriving at a fit sentence.

Discussion of Criteria

1) Nature of the Environment

[para33] The tributary and Still Creek are surrounded by both highly built-up urban development and a desirable wooded area adjoining Burnaby Lake Regional Park. It is not, at present, a high use area for public recreation. It is a minor fish habitat.

2) Extent of Injury

[para34] The damage inflicted was of brief duration and minor. There is no suggestion the chemical presented a continuing threat to the water and fish. After the initial fish kill, the chemical was further diluted in Still Creek and dispersed.

3) Criminality of Conduct

[para35] As stated earlier, this is a case of a lack of proper training of employees. The company did not take sufficient care to comply with the information provided by the Miraclean manufacturer - to neutralize the spill and keep it out of drains, sewers and surface water. There was no surreptitious violation. The company took an early step to prevent a recurrence. (It took further steps, but not as quickly as it might have.)

4) Extent of Attempts to Comply

[para36] The plant manager dealt appropriately with the Department of Fisheries, once the spill was brought to the manager's attention by the Department of Fisheries. The company has taken steps so employees now will know how to effectively respond to a chemical spill. The $71,000 spent on plant improvements will assist in dealing with any further spill. This shows, in a meaningful way, the company is serious about preventing recurrence of the offence.

5) Remorse

[para37] The personal appearance of corporate executives in court and...plans to avoid repetitions of such offence is another indication of genuine corporate contrition." (*R.* v. *United Keno Hill Mines* at p.49.) Three senior executives of the company were present in court throughout the one day sentencing hearing. The corporate decision to spend money shows a sincere desire to make this offence a onetime event.

6) Size of the Corporation

[para38] As the ability to pay a fine is a factor when sentencing an individual, so to is the profitability of the company. Dairyland, while large, does not have the same ability to pay a fine that a more profitable large company has.

7) Profits Realized by the Offence

[para39] It would have cost the company very little money to adequately train their employees and have a chemical neutralizing agent available prior to the spill. There was no profit made as a result of this failure.

8) Criminal Record

[para40] The company has no record for this offence or any other similar offence.

Decision

[para41] The lack of care shown by the company in failing to properly train and equip its employees was wrong. The failure to report the spill to the Department of Fisheries - such failure apparently based on a reporting breakdown in the company because of a lack of training -is also cause for censure.
[para42] However, the cooperation of the company with the Department of Fisheries' investigation afterward and the company's remedial steps - training, equipment, plant improvement - all reflect favorably on the company.

[para43] Based on my application of the sentencing criteria to the facts, I find a reasonable fine to be $5,000.

[para44] As a result of the spill, there was an immediate (but not long-term) harmful impact on fish and the waters frequented by them. Although I have reflected this in the amount of the fine, the effect of the chemical spill should also be a factor in a s. 79.2(f) order. The company, through its counsel has recognized this, in part, by suggesting most of any payment should be directed to fish habitat improvement.

[para45] I therefore direct that, in addition to the fine, the accused pay $10,000 to Her Majesty the Queen "...for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat", specifically the unnamed tributary to Still Creek which is the subject of this charge, Still Creek and other related waters.

NORTHWEST TERRITORIAL COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #4]

Between Her Majesty The Queen in Right of Canada as represented by Environment Canada, and Her Majesty the Queen in Right of Canada as represented by the Commissioner of the Northwest Territories

Bourassa J.

Yellowknife, November 2, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 36(3), 40(2), 79.2 – charge of depositing or permitting the deposit of a deleterious substance – sewage lagoon washed out – conviction at trial**

Sentencing – fine of $49,000 – order under s. 79.2 to pay Environment Canada $40,000 for marine life aquarium and programs to improve municipal sewage and waste treatment – changes to penalties in the Act create a new scale for sentencing – offence committed by a government should not be taken lightly – penalty should include a fine to compensate for costs of trial – order under s. 79.2 should relate to the offence committed

Summary: The accused government was charged and convicted at trial of contravening s. 36(3) of the *Fisheries Act* after the west dyke of the Iqualuit sewage lagoon washed out and 56,000 cubic meters of raw sewage washed into the Koojesse Inlet, which are waters frequented by fish.

This is a hearing on sentencing. The court reviewed changes to the *Fisheries Act* which increased fines for contraventions of the Act and authorized the courts to impose a variety of orders under s. 79.2 of the *Fisheries Act*. The result was a new scale to which sentencing principles must be applied.

The learned judge addressed the issue of whether the accused's status as a government should entitle it to special consideration. The court found that the opposite is the case; any breach of the law by a government is in effect a breach of trust and should not be taken lightly. In response to an order under s. 79.2 proposed by the Crown and agreed to in part by the defence, the court noted that there should be a fine to defray some of the costs of prosecution and that any such order should relate to the delict before the court. Mitigating factors included the defendant's lack of a previous record and the fact that the commission of the offence did not result from any active conduct. The defendant's costs in repairing and rebuilding the lagoon could not be taken into consideration. The major aggravating factor in this case was the defendant's complete failure to exercise due care and attention.

Held: Fine of $49,000 plus a payment order of $40,000 to be paid in trust to the Government of Canada for the Department of Environment, $20,000 to be used for a marine life aquarium in Iqualuit and $20,000 for research, studies and programs on improving municipal sewage and waste treatment in the Northwest Territories.

REASONS/MOTIF:

J. Cliffe and B. Webber, Counsel for the Crown
J. Donihee, R. Secord, D. Jenkins and P. Kennedy, Counsel for the Defense

REASONS FOR SENTENCING

[para1] The Defendant is to be sentenced for a contravention of Section 36(3) of the *Fisheries Act* over a period of ten days. After trial, the Defendant was convicted for an offence set out as follows:

> Count 3: Between the 1st day of June, A.D. 1991 and the 10th day of June, inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36(3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 40(2) of the *Fisheries Act*.

[para2] On June 1, 1991, the west dyke of the Iqaluit sewage lagoon washed out, releasing approximately 56,000 cubic meters, or 12.3 million gallons, of raw, untreated sewage and municipal waste directly into the waters of Koojesse Inlet, which are waters frequented by fish. This event occurred as a result of the Defendant's lack of due diligence.

[para3] I have set out the full facts in my Reasons for Judgment and will not repeat them here.

[para4] In any sentencing a balance has to struck in weighing the various factors that have been identified in jurisprudence. This balancing must be undertaken with a goal in mind. Until recently, in these kind of cases the goal has been deterrence. This goal has recently been re-articulated by the Canadian Sentencing Commission. Their approach has been adopted by the Ontario Court of Appeal in *R.* v *M. (G.)* (1992), 11 O.R. (3d) 225, where Abella J. cites the Commission's definition with approval:

> The fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions, thereby contributing to the maintenance of a just, peaceful and safe society.

[para5] The principles to be taken into account are well known and I will not continue with yet another repetition of them. In particular, I acknowledge the considerations discussed in, inter alia, *R.* v. *City of Sault Ste Marie*; *Re Friends of the Oldman River*; *R.* v. *Gulf of Georgia Towing*; *R.* v. *United Keno Hill*; *R.* v. *Kenaston Drilling Ltd.*; *R.* v. *Echo Bay Mines Ltd.* (Ayotte TCJ); *R.* v. *Canada Marine Drilling Ltd.*; *R.* v. *Panarctic Oils Ltd.*; *R.* v. *Robinson's Trucking Ltd.*; *R.* v. *British Columbia*; *Canada* v. *Canada*.

SENTENCE RANGE

[para6] As a result of the amendments to the *Fisheries Act* of January 17, 1991, the sentencing parameters available have been broadened significantly. Firstly, the maximum fine for a single offence has been raised from $50,000 to $300,000.

> 40. (1) Every person who contravenes subsection 35 (1) is guilty of
>
> (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars, and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
>
> (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

[para7] Secondly, the Act now provides for a variety of Orders that may be against a Defendant.

> 79.2 Where a person is convicted of an offence under this Act, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:
>
> (a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation or repetition of the offence;
>
> (b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;
>
> (c) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;
>
> (d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the commission of the offence;
>
> (e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;
>
> (f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;

> (g) directing the person to post a bond or pay into court an amount of money the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement mentioned in this action;
>
> (h) directing the person to submit to the Minister, on application by the Minister within three years after the date of the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances; and
>
> (i) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this *Act*.

[para8] These changes in the law represent a major increase in the scope and severity of the sanctions that may be brought to bear against a defendant. Furthermore, these changes make many of the sentencing ranges indicated by other, earlier decisions of little assistance. This dramatic increase has been brought about by Parliament, no doubt to reflect the public's concern. These amendments reflect those concerns for the environment generally, and for fish and fish habitat specifically. In my view, it indicates a direction with respect to sentences: that significant sanctions be applied to achieve the purpose of the legislation.

[para9] In applying the law it is my view that the courts must be careful not to defeat the express intention of Parliament by a process of judicial nullification. Sentences must reflect many things: one of them must be the scale at which they are set by Parliament.

[para10] It is trite to note that the legislation provides for no minimum penalty. In a proper case, a minimal sanction could be imposed. It is also trite to state that the highest fine is reserved for the worst offender and the worst factual situation. These principles remain unchanged; however, in my view, the scale has been changed and those principles have to be applied on the new scale.

[para11] Recognizing that every offence and every offender is different, a mid-range offender and offence should expect financial sanctions in the $150,000 range. If this scale of sanctions is too severe, then the legislators, not the courts, should reduce the maximum and the scale.

[para12] Chief Justice Lamer stated in *Re Friends of Oldman River*:

> The protection of the environment has become one of the major challenges of our time.

[para13] The courts are constituted to apply the law. Under the rule of law, the courts are the protectors of the public welfare of the environment. The courts must meet the challenge. If the courts do not act, there is no one left to act.

THE NATURE OF THE DEFENDANT:

[para14] It is argued that, inasmuch as the Defendant is a Government, any fine or financial penalty is unnecessary and/or inappropriate, if not pointless. It is argued that a fine would amount to the transfer of the same tax payers' money from one government's consolidated revenue fund to

another's. It is suggested that, as governments operate "not for profit", financial penalties should be minimal.

[para15] In this vein, Perry Co. Ct. J. stated in *R.* v. *Quesnel* (City) [1987] BCJ:

> I am rather inclined to the view that one should be circumspect when you are dealing with a municipal corporation because the fact is it is the taxpayers who have to pay in cases of that kind.

[para16] In my respectful view, a more compelling argument may be made for the opposite perspective, that government Defendants should receive no special consideration. Indeed, that very fact may be taken in aggravation in the proper case.

[para17] Shaw J., in *R.* v. *British Columbia* 66 B.C.L.R. (2d) 84 makes it clear:

> Governments are much involved in many activities that can harm fisheries.

[para18] Governments can commit offences as readily as humans or corporations. They are not immune to breaking the law. For that reason only, the concepts of deterrence and encouraging respect for the law are just as relevant as they are to other kinds of defendants.

[para19] There is an additional element: our constitution is premised upon the goals of "Peace, Order and Good Government". We regularly charge our governments, at all levels, with duties and regulatory roles that we do not trust or want the private sector to undertake: health care, police, in some cases automobile insurance, pensions, unemployment insurance. The list is lengthy. It may very well be that we entrust governments with such duties because of the absence of the potentially corrupting profit motive or special interest consideration. We want to believe that governments will act in the broad public interest and not in a narrow selfish manner. We look to governments to protect us from incompetence or conduct compromising the public welfare.

[para20] If this hypothesis is correct, governmental conduct resulting in an offense against the law is not something that should be taken lightly. It is the antithesis of good government and arguably constitutes a breach of trust.

[para21] Distinguishing governments from other defendants is not without precedent. Dickson J. in *R.* v. *Sault Ste Marie* distinguished the powers and responsibility of government from large and small corporate contractors with these words:

> It must be recognized, however, that a municipality is in a somewhat different position by virtue of the legislative power which it possesses and which others lack. This is important in the assessment of whether the defendant was in a position to control the activity which it undertook and which caused pollution. (p. 377)

[para22] I am strengthened in this approach by the decision of the Court of Quebec in *Canada* v. *Canada* 10 CELR (NS). This case involved the destruction of lobster beds by government agents. In it, Decost J. states:

> In my humble opinion, the court must be much more severe when such a disaster is caused by agents of an arm of the Crown, since it is precisely the Crown on which the public relies to protect both the resource species and the environment.
>
> ...we believe that the fine should be set at $100,000; this fine is demanded by the need for general deterrence, and to make Public Works Canada employees take greater responsibility, in my humble opinion. (my emphasis)

ORDERS PURSUANT TO SECTION 79

[para23] Crown counsel has suggested that the court make a number of Orders pursuant to Section 79:

a) Publication pursuant to Section 79.2 (c) of the *Fisheries Act*;

b) Payment pursuant to Section 79.2 (f) of the *Fisheries Act* for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories by:

1. Providing some or all of this money for the purposes of facilitating any studies and programs related to the improvement of municipal sewage and waste treatment in the Northwest Territories; and/or

2. Providing some or all of this money for the purposes of designing, constructing and operating a marine life aquarium at the Science Institute in Iqaluit. This aquarium would display local fauna for the purpose of educating the community about the complexity of the marine ecosystem, the diversity of marine life and the biological and social impact of man upon this ecosystem. Partners in this project would include the Department of Fisheries and Oceans, Department of Indian Affairs and Northern Development, and the Arctic College Environmental Technology Program; and/or

3. Providing some or all of this money to fund a community cleanup project for the banks of the Sylvia Grinnell River (lower 5 km. of the river towards its mouth) to remove barrels, construction waste, oil residue, scrap metal and other unsightly waste and potential contaminants.

c) By way of preventative/remedial Order, rebuild the sewage lagoon.

[para24] Except for the publication Order (which is resisted), the Defendant agrees that the suggested Orders would be an acceptable disposition from its point of view, provided, of course, that the total financial cost of implementing the Orders not be too substantial. The Defendant also points out that the sewage lagoon has already been rebuilt and an Order in that regard is not needed.

[para25] Counsel have referred me to a number of similar decisions arising from unreported cases in British Columbia. They are similar in that at the sentencing stage the Crown and Defence

both apparently negotiated and agreed upon joint representations for making specific Orders by way of disposition and sanction. Some courts, in turn, have endorsed those Orders.

[para26] I am not inclined to approach the sentencing of this Defendant in a similar manner for these reasons:

[para27] When the Sentencing Commission speaks of the sentence, it is of course speaking of a process that culminates with a sentence. The sentence is the final expression of the law. There is as much social utility in prosecution and conviction as there is in sentencing offenders. The whole process of enforcing the laws that reflect community values contributes to the acceptance of and respect for those values and the law. Want of enforcement diminishes respect for law which may give rise to cynicism and other negative attitudes about the rule of law. In other words, want of enforcement may bring the administration of justice into disrepute.

[para28] Prosecution may be a very expensive proposition, especially when the Defendant has extensive resources available to it. In this case the Defendant pleaded not guilty, as it was entitled to. Successful prosecution required witnesses from across Canada and many days of evidence. I have no doubt that a significant expense was incurred. The Defendant could have pleaded guilty and used that in mitigation. It chose not to.

[para29] One can easily foresee situations where prosecutorial officials may decide, or be compelled, not to prosecute obvious offenders simply because of the expense involved. That expense may be a function of the power and resources of the offender, undermining the concept of equal application of the law.

[para30] This is why in imposing sentence in this case generally, and in particular, in weighing the options before me of: a) endorsing jointly submitted orders; b) imposing a fine; or c) a combination of both, I am of the view that there should be a financial penalty by way of fine. The fine may then be used to defray some of the costs of prosecution.

[para31] In my view, Orders made pursuant to Section 72 (i) should be related to the delict before the court. Care must be taken not to impose requirements upon a Defendant that have little if anything to do with the events that bring it to court in the first place.

[para32] The power that Parliament has given Courts must be exercised judicially and carefully and not as a blank cheque for an environmental wish list. It is with this in mind that I choose not to order the Defendant to clean up a nearby river as laudable as the project may be.

[para33] A publication Order pursuant to Section 79 would normally be appropriate. It appears that publicity with respect to a conviction is an anathema to the people that carry on business sheltered behind a corporate shell. Public announcement of their corporate offences, or their role, is to be avoided. This may well stand as proof in itself of the deterrent value of such publication. In this case the media has taken an interest and there has been ample publicity to date. I feel that any Order by me will be redundant, however, that may not always be the case. Most trials escape the attention of the media, and in those cases a publication Order will surely be appropriate.

[para34] The Defendant argues that the $300,000 plus the cost of repairing and rebuilding the lagoon may properly be taken into consideration in determining sentence. I disagree. It was the Defendant's duty to provide the facility involved. To get credit for repairing what it did not build or maintain properly in the first place would be to encourage incompetence, if not defeat the very purpose of the legislation.

[para 35] As Ayotte, TCJ stated in *R.* v. *Echo Bay Mines Ltd.* 3 F.P.R. 47:

> Similarly, while the response to the spill and the subsequent plans and efforts to upgrade and change the fuel handling system show a serious concern to prevent any future occurrences such as this, they are after the fact as it were. The legislation is not intended to encourage compliance after the environmental mishap but rather to demand compliance before those mishaps occur so as to prevent them. (my emphasis)

FACTUAL ASPECTS

[para36] In mitigation, I acknowledge that the Defendant has not been convicted of any prior offences.

[para37] This event did not come to pass as the result of the conscious or active conduct of the Defendant such as in *R.* v. *Panarctic Oils Ltd.* Here, the Defendant simply - as far as I can determine - abandoned its responsibility. The lagoon with all its problems was forgotten. While the result of offences of omission or commission may well be the same, in my view under the general heading of Criminality of Conduct, the latter case is usually more aggravating.

[para38] However, there is a major aggravating feature with respect to the facts of this case. As stated, the Defendant's failure to exercise due care and attention was virtually absolute. There was little in the evidence that might be considered as the exercise of due care and attention. Notwithstanding its public duty in this regard, the existence of the sewage lagoon and dyke were wholly absent from the Defendant's consciousness. This is aggravated significantly when one considers that: a) the lagoon had a long and recent history of problems; the dyke had failed five times in ten years; and b) that the Defendant had the policy, the necessary engineering and scientific studies, the management and operational guidelines all in hand that, if applied, would have prevented the offence.

SENTENCE

[para39] For these reasons I have determined to sentence the Defendant using a combination of fine and an Order contemplated by Section 79, taking the total effect into account.

[para40] For the events of June 1, 1991:

Fine .....$ 40,000

For each day of seepage due to faulty repair - $1,000 x 9: Fine 9,000

By way of Payment Order 40,000

[para41] This represents, in total, a penalty of $89,000 for the Defendant's default.

[para42] The Payment Order is as follows:

> Pursuant to Section 79.2 (f) of the *Fisheries Act*, I order the Defendant to pay the sum of $40,000 in trust to the Government of Canada for payment to the Department of Environment, (Environment Canada) District Accounting Office, Box 2970, Yellowknife, Northwest Territories X1A 2L2, for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories by:
>
> 1) allocating $20,000 of this sum for the purposes of designing, constructing and operating a marine life aquarium at the Science Institute, Iqaluit, N.W.T. This aquarium is to serve as a focal point for research and study of marine life and to promote related educational objectives. This project of the Department of Environment may be in partnership with the Department of Fisheries and Oceans, the Department of Indian Affairs and Northern Development, and the Arctic College Environmental Technology Program.
>
> 2) providing the balance of the funds remaining, $20,000, together with accrued interest, to facilitate, in whole or in part, any studies, research or programs directly related to the improvement of municipal sewage and waste treatment in the Northwest Territories.

ONTARIO COURT OF JUSTICE – GENERAL DIVISION

[Indexed as: R. v. Oliver, Mangione, McCalla and Associates]

Between Her Majesty The Queen, Appellant, and Oliver, Mangione, McCalla and Associates, Agrodrain Systems Limited, Robert J. Wielgut, R.J. Nicol Homes Limited, Respondents

Charron J.

Ottawa, November 18, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(1) – charge under s. 35(1) of unlawfully carrying out work – over 2 years after first appearance charges stayed for not being tried in a reasonable time – no evidence of prejudice – stay removed – returned to provincial division for trial on expedited basis**

***Charter of Rights and Freedoms*, s. 11(b) – corporate accused entitled to right to be tried in a reasonable time – corporate accused cannot rely on presumption of prejudice from a lengthy delay – must introduce evidence that its fair trial interest has been irremediably prejudiced**

Summary: The appellants were charged under s. 35(1) of the *Fisheries Act* with unlawfully carrying on work that resulted in the harmful alteration of the fish habitat and under s. 13(a), s-s 1(d) of the *Public Lands Act* with causing shore lands to be dredged without a work permit. The charges were laid on August 9, 1989 and September 12, 1989 and the respondents first appeared in court on September 26, 1989 at which time they entered not guilty pleas. The trial was set for January 17-18, 1990 and evidence was heard on that date, but various adjournments, appeals and other events caused delay. On December 12, 1991, the learned Justice of the Peace granted a motion to stay the charges pursuant to s. 11(b) of the *Charter of Rights and Freedoms* on the ground that it would be contrary to the basic concept of justice for the court to permit the cases to continue.

On appeal, the court confirmed that the principles in *R.* v. *Askov* with respect to the right to be tried within a reasonable time apply to a corporate accused, namely length and explanation of the delay and waiver and prejudice of the accused. However, following the principles set out in the subsequent case of *CIP* v. *The Queen*, a corporate accused cannot rely on the presumption of prejudice based solely on very long delays. There must be evidence of irremediable prejudice. No evidence was entered showing such prejudice. Although the *CIP* case was decided after the decision appealed from, the respondents did not seek to introduce evidence on the appeal to show prejudice.

Held: Appeal dismissed.

REASONS/MOTIF:

Stephen March, Counsel for the Appellant

Keith MacLaren, Counsel for the Respondents, Agrodrain Systems Limited, Robert J. Wielgut
Roydon Kealey, Counsel for the Respondents, Oliver, Mangione, McCalla and Associates Ltd.

[para1] CHARRON J.:-- The Attorney General of Canada appeals from an Order staying an information against the respondents alleging that offences were committed contrary to the *Fisheries Act* R.S.C. 1985, c. F-14. A stay of proceedings was entered by a Justice of the Peace on December 12, 1991 on the ground that the respondents had not been tried within a reasonable time as guaranteed by s. 11(b) of the *Charter of Rights and Freedoms*.

[para2] The respondents were charged on August 9th, 1989 and September 12th, 1989 with offences under s. 35(1) of the *Fisheries Act* whereby it was alleged that they unlawfully carried on work that resulted in the harmful alteration of the fish habitat. The incidents that gave rise to these charges occurred between April 25th, 1985 and June 2nd, 1989 and between August 11th, 1989 and September 9th, 1989. The respondents were also charged with offences under the *Public Lands Act* s. 13(a) s-s. 1(d) in which it was alleged that they caused shore lands to be dredged without the authority of a work permit. The incidents that gave rise to these charges occurred between July 14th, 1989 and July 24th, 1989. The history of the proceedings is of relevance to this appeal and can be summarized as follows:

Sept. 26/89 The respondents first appeared in Court on these charges. The Crown indicated its intention to proceed summarily and the respondents agreed to be tried together on all charges under both the *Fisheries Act* and the *Public Lands Act*. The respondents entered not guilty pleas and the matter was set for trial for two days for January 17th and January 18th, 1990. On this first appearance, the respondents indicated that more than two days would be required for trial and notwithstanding this assessment, only two days were set at that time.

Jan. 17-18/90 Evidence was heard on both days at the end of which all parties agreed that the trial would take at least another three days. As a result, the matter was adjourned for continuation on March 7, 1990.

Mar. 7/90 The Crown closed its case against the respondents, at which time a motion for a directed verdict was brought by the respondents. The motion was argued on March 7th and 8th, 1990 following which the Justice of the Peace reserved her decision and scheduled the matter for continuation on May 25th, 1990.

May 25/90 The Justice of the Peace granted the respondents' motion with respect to the charges under the *Public Lands Act* and dismissed all charges under that statute. She also dismissed the charges under the *Fisheries Act* with respect to some of the respondents. She denied the motion with respect to the *Fisheries Act* charges against the respondents concerned on this appeal and a new date was set for the continuation of the trial for August 23rd, 1990. Following this date, the Attorney General for Ontario commenced an appeal in relation to the decision dismissing the *Public Lands Act* charges.

Aug. 23/90 As a result of the pending appeal, the respondents requested that the matter be adjourned to allow the appeal to be heard before they were called upon to call evidence in their defence. The Crown consented to that request. The request was denied by the Justice of the Peace

whereupon all respondents, save and except R.J. Nicol Construction and R.J. Nicol Homes Ltd. indicated that they wished to bring an application for prohibition. As a result, the trial was adjourned to November 15th, 1990 in order to allow the prohibition application to be brought.

Nov. 6/90 Mr. Justice Chilcott of this Court granted an Order prohibiting the Justice of the Peace from continuing the trial under the *Fisheries Act* until such time as the appeal of the *Public Lands Act* charges was heard or abandoned.

Jan. 8/91 The appeal with respect to the dismissal of the *Public Lands Act* charges was heard and the decision was reserved.

Apr. 10/91 A decision to dismiss the Crown's appeal was released on that date.

May-Aug./91 On May 9th, 1991 the Attorney General for Canada wrote to counsel for the respondents advising that the Justice of the Peace was not authorized to hear federal offences under the particular section of the *Fisheries Act* and raised the possibility of laying a new information. There followed in the ensuing months correspondence between the parties with respect to this issue and a date was finally set to appear before the Justice of the Peace on August 30th, 1991.

Aug. 30/91 A date was set by the Justice of the Peace for the continuation of the trial on December 12th and 13th, 1991.

Dec. 12/91 It was confirmed at that time that the Justice of the Peace now had the jurisdiction to hear the particular matter and without prejudice to their right to bring a motion for a stay under s. 11(b) of the Charter, the respondents agreed that the charges be re-read and that the evidence already heard by the Justice of the Peace would apply. Following this, they brought a motion seeking a stay on the ground that they had not been tried within a reasonable time. The Justice of the Peace granted the motion and the Crown hereby appeals this decision.

The Justice of the Peace gave the following reasons for her ruling:

> In reply to the motion by defence counsel of *R.* v. *Askov*, I agree with counsel in that Ottawa and Winnipeg are comparable cities relating to the length of time for setting trial dates. As we all know, the approximate length of time in this area is six months for most cases.
>
> *R.* v. *Askov* indicates certain factors to be taken into consideration in the time delay, i.e., the length of delay, the reason for delay, including the Crown's conduct, systemic and institutional delay, and the complexity of the cases in question. Waivers, the onus rests very clearly on the Crown to demonstrate that any waiver is made unequivocally and with full knowledge of the consequences. And, finally, if the rights of the accused have been violated pursuant to the Charter.
>
> I look at the case before the court today sworn to in August and September, '89, returnable September 26th, '89; date set for January 17th and 18th, 1990.

> Obviously, not enough time for the ensuing trial, and it goes on. It's related and chronologically introduced by Mr. MacLaren.
>
> We've all played our parts in this twenty-seven to twenty-eighth month delay. The Crown in not setting sufficient time for trial, the length of time taken for the appeal, defence counsel in the Motion of Prohibition, which, of course, they're perfectly entitled to, and the fault also lies with the court, my unavailability for vacations, the lack of court space, the lack of time, so we all contributed in this lengthy delay. It's a little bit more than systemic or institutional delay.
>
> Then, I approach the final concept, 'Has the accused's rights been violated?' September 26, Mr. Vice indicated, "Your Worship, my clients need a date as soon as possible, they cannot have this hanging over their heads."
>
> Bearing these remarks in mind, and looking at the dates of August-September, '89, and today's date, December 12th, 1991, and taking all the aforementioned facts into consideration, I feel it would be contrary to the basic concept of justice for this court to permit these cases to continue. It would be a direct violation of their Charter rights.
>
> I also feel, however, that the matter of my jurisdiction, lost or gained, has no bearing at all in the matter, nothing was saved, nothing was lost, and, accordingly, these proceedings are Stayed. Thank you.

[para3] The determination of this appeal rests upon a consideration of the principles set out in the subsequent case of *CIP* v. *The Queen* (1992), 71 C.C.C. (3d) 129 S.C.C. on the question of prejudice and the corporate accused. In *CIP Inc*., the Supreme Court of Canada confirmed that a corporate accused has the right to be tried within a reasonable time pursuant to s. 11(b) of the *Canadian Charter of Rights and Freedom*s. The factors as set out in *R*. v. *Askov* (1987), 37 C.C.C. (3d) 289 must be considered: the length of the delay, the explanation of the delay, waiver and prejudice of the accused. In *Askov*, the Court found that prejudice may be inferred or it may be proven. In cases of very long delays "an often virtually irrebuttable presumption of prejudice to the accused " would result from the passage of time. It was argued in *CIP Inc*. however that a corporate accused could not rely on the presumption of prejudice resulting from a long delay since the inference of prejudice was linked to the liberty and security interests of an accused, not the fair trial interest. The Supreme Court of Canada reviewed the concerns expressed in *Askov* which led to an inference of prejudice and, with the exception of legal costs, found those of no relevance to corporations. The Court concluded as follows at p. 144:

> In order properly to assess the reasonableness of delay, a court has to balance the various interests at stake. The interests of the accused must be weighed against the interest of the community in ensuring that those who have allegedly transgressed the law are brought to justice. The balancing process must be fair. There is no room for artificiality. It seems to me that allowing a corporation to rely upon a presumption of prejudice would offend that principle. It is therefore my opinion that with respect to this fourth factor, a corporate accused must be able to establish that its fair trial interest has been irremediably prejudiced.

> I use the phrase "irremediably prejudiced" because there are some forms of prejudice that a court can remove, notably by making specific orders regarding the conduct of the trial.

[para4] On December 12, 1991, the respondents relied on the presumption of prejudice resulting from the lengthy delay of some 27 months since the laying of the charge. The stress resulting from the pending trial and the ensuing costs were noted in particular. With respect to the respondent Oliver, Mangione, McCalla and Associates in particular, a firm of professional consulting engineers, it was noted that the notoriety of the trial had an "incalculable" impact on their reputation. It was noted as well that the Crown had had the opportunity to present its evidence at a defence would be forced to present its evidence some two years after the event if the trial were to proceed on that date.

[para5] The respondents have essentially made the same submissions on this appeal with respect to prejudice and have not sought to introduce any new evidence. In addition, they point to the fact that the tape of the proceedings of September 26, 1989, when the respondents first appeared in court to set a date for trial, is no longer available. This tape was available at the time of the application on December 12, 1991 and the Justice of the Peace listened to it. She noted in her decision that the defendants had requested an early date for trial since they did not want the charge hanging over their heads.

[para6] I am unable to find in the record any evidence that the respondents' "fair trial interest has been irremediably prejudiced" as required by *CIP Inc.* nor is there any indication that the missing tape of September 26, 1989 referred to any such matter. Indeed, it couldn't have since there had not yet been any effect of the passage of time on the fairness of the trial at that point. The only point raised before the Justice of the Peace which touched on the fairness issue was that the defence would be forced to present its evidence some two years later than the Crown at a time when memories would no longer be fresh. Of course, this would not be the case at a second trial where all of the evidence could be called during the same period of time and consequently, it cannot be said the fair trial interest is "irremediably" prejudiced.

[para7] Of course, the Justice of the Peace did not have the benefit of *CIP Inc.* at the time she made her ruling and in other respects it cannot be said that she erred in principle. I have the benefit of this subsequent case and I am bound by it. The respondents argue that the application of these principles at this point in time would amount to a retroactive application of the law. Not so, since they could have sought to introduce evidence on the appeal to show the existence of the kind of prejudice which must be proven. They have not sought such leave and indeed have made no reference at all in their submissions to any matter which would suggest the existence of such evidence.

[para8] In the absence of some evidence of prejudice establishing that the respondents' fair trial interest had been irremediably prejudiced, I must conclude that the stay was entered in error. The appeal is allowed, the stay is removed. The matter is remitted to the provincial division for a trial to proceed on an expedited basis.

BRITISH COLUMBIA COURT OF APPEAL

[Indexed as: R. v. Rivtow Straits Ltd. (c.o.b. Pacific Rim Aggregates)]

Between Regina, Appellant, and Rivtow Straits Limited, carrying on business as Pacific Rim Aggregates, Respondent

Hutcheon, Southin and Prowse JJ.A.

Vancouver, December 13, 1993

***Fisheries Act*, R.S.A. 1985, c. F-14 – s. 36(3) deposit of a deleterious substance in a water body frequented by fish – Crown appeal of acquittal – appeal dismissed – definition of "permitting" – particularized wording of Information must conform with relevant section of the Act.**

Summary: This is an application by the Crown to appeal an acquittal of the Respondent from conviction of a charge of depositing a deleterious substance in water frequented by fish under the *Fisheries Act*, R.S.C. 1985, c. F-14.

The Respondent was charged with two counts under s. 36(3) of the *Fisheries Act*: (1) with depositing a deleterious substance to wit: oil in water frequented by fish … , and (2) permitting the deposit of a deleterious substance to wit: oil in water frequented by fish. The trial judge found as a matter of fact that there was insufficient evidence that the oil in the creek was from the Respondent's activities and the Respondent was acquitted on the first count. The trial judge convicted the Respondent on the second count on the basis that even if the Respondent was not the polluter, it failed to prevent an occurance which it should have foreseen and that it provided the opportunity for the pollution to take place even if it did not control the pollutant.

On appeal by the Respondent the summary conviction appeal justice reversed the conviction on the second count. The learned justice found that the element of control is essential in the definition of "permit" and that the Respondent did not have any authority or control the pollution by the neighboring company.

On further appeal to this court, the majority found for the Respondent based on the wording of the second count. Since the wording of the Information is particularized in accordance with s. 34(1)(a) of the *Fisheries Act*, and because it is was accepted that the place where the oil was deposited is other than Shannon Creek, the Respondent cannot be convicted of the offence in count 2 as the Respondent cannot be said to have any control over property occupied by another party where the deposit occured.

A dissenting judgement on appeal found that the definition of "deposit" in the *Fisheries Act* includes both "leaking" and "seeping" which can occur by inaction. Accordingly, the facts would support a conviction on the second count.

Held: The Crown's appeal was dismissed.

REASONS/MOTIF:

C. Stolte, Counsel for the Appellant
R.J. Kaardal and J. Lysyk, Counsel for the Respondent

[para1] SOUTHIN J.A.:-- This is an application by the Crown for leave to appeal and, if leave be given, an appeal by the Crown from the acquittal on 14th January, 1992, by Huddart J., sitting as a summary conviction appeal court, of the respondent on the second count of a two count information:

> RIVTOW STRAITS LIMITED, carrying on business as PACIFIC RIM AGGREGATES On or about the 21st day of November, 1989, at or near Shannon Creek, Sechelt, in the Province of British Columbia,
>
> * * *
>
> Count 2: Did permit the deposit of a deleterious substance to wit: oil in a place under conditions where the deleterious substance to wit: oil may enter water frequented by fish, to wit: Shannon Creek,
>
> Contrary to Section 36(3) of the *Fisheries Act*

[para2] By reasons for judgment delivered the 12th April, 1991, Giroday P.C.J. had convicted the respondent on that count, but acquitted on the first count:

> Count 1: Did deposit a deleterious substance to wit: oil in water frequented by fish to wit: Shannon Creek,
>
> Contrary to Section 36(3) of the *Fisheries Act*

[para3] We were offered no explanation for the Crown's failure to bring this appeal on for hearing with more expedition.

[para4] The relevant statutory provisions are these:

> *Fisheries Act*, R.S.C. 1985, c. F-14:
>
> 34.(1) For the purposes of sections 35 to 43, "deleterious substance" means
>
> (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
>
> (b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state

> that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,...
>
> "deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;
>
> "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;
>
> "water frequented by fish" means Canadian fisheries waters.
>
> * * *
>
> 36. (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

[para5] Because one branch of Mr. Kaardal's submission is founded on what he says was the course of the trial, I must give a brief account of that trial.

[para6] The Crown did not open and the appellant did not ask for particulars.

[para7] The first and principal Crown witness, J.A. Morrison, a Fisheries Officer, described going to a parcel of land near Shannon Creek, which parcel was partly under the management and control of B.A. Blacktop Ltd. and partly under the management and control of the appellant and upon which was a drainage system which debouched into Shannon Creek.

[para8] Mr. Morrison produced a series of photographs and identified the various buildings and parts of the drainage system shown thereon and explained under whose management and control each part was. He then produced a diagram of the drainage system:

[para9] The arrows show the flow through the system as established by a dye test.

[para10] He identified the oil barrel shed and the oil soaked ground and the fuel tank on stilts as being within the control of Rivtow and the asphalt plant as being within the control of B.A.

[para11] He described taking samples of water from various parts of the system.

[para12] As to sample 4, he testified:

> Q. The area from which sample 4 is taken, could you describe that area?

A. Sample 4 was a pool adjacent to the shop. It was -- appeared to be a great deal of contamination on the surface of the pool at that point and by a great deal, I would mean that there was between half an inch and an inch of what appeared to be petroleum products sitting on the top of the pool in that immediate vicinity. Also this is what I would refer to as the main collecting pool as on the basis of my dye test work, all the material from the contaminated area -- the site ended up draining into this pool before it exited another culvert towards the drainage ditch that leads off site.

* * *

Q. In the area of -- from which sample 4 was taken, did you understand that area and he shop adjacent to it, to be under the management and control of Rivtow Straits Ltd.?

A It was my understanding that it was under the management and control of Pacific Rim Aggregates. At that time, I did not know the corporate relationship between Pacific Rim Aggregates and Rivtow Straits.

Q. The -- on the basis of the dye testing you did, did you observe dye that had arrived at or was placed in the pool from which sample 4 was taken, to make it's way to Shannon Creek?

A. Yes, I did.

[para13] He described also the taking of sample 7 at the mouth of a culvert entering pond "H" - "J".

[para14] The next witness, Jezdimir Rankovic, an analytical chemist, whose report as to all the samples and what he found in them was filed, said as to sample 4:

Q. In -- with respect to sample number 4, you make reference to -- you say "plus other markings, nearly full, containing a liquid with two phases; one upper phase black heavy textured liquid and one lower phase clear liquid." What do you mean by the

A. That's correct.

Q. -- reference to phases?

A. Two phases meaning that the -- there are two liquids present in the sample 4 was a lighter liquid which was in a form of emulsion on the top of the clear liquid which is the lower liquid. And there was the upper phase was the emulsion of oil and possible water, of course, and the lower clear liquid was water. Water with some suspended possible.

[para15] His report on this sample said:

> The upper phase of sample #891168-4 provided "FID-GC" patterns characteristic of a "DIESEL" type fuel with a hydrocarbon range from about nC11 to nC23 and a "LUBRICATING" type oil with a hydrocarbon range from about nC24 to nC38.

[para16] His evidence as to sample 7 was that it contained no detectable petroleum hydrocarbons.

[para17] The Crown called four other witnesses, Messrs. Tancock and Squire, both Fisheries Officers, Mr. E.G. Lucas, Rivtow's superintendent, and Mr. J.C. Nanson, the manager of the Sechelt division of B.A. Blacktop. It is unnecessary to make any further reference to the evidence of Mr. Squire who was not present on the site on the day charged in the information.

[para18] The other witnesses gave evidence concerning pool "C" and the Rivtow fuel storage tank shown at the top of the diagram:

Mr. Tancock (Fisheries Officer):

Q. Okay. Did you observe in -- in or about the shop in either of those pools any fish?

A Yes, in the pool that's by the one labelled C I also observed small fish, in the neighbourhood of about two inches. I didn't get a look at it. The oil was so thick on the surface of the water there that I saw it and then it scooted off in underneath the sheet of the oil and I could not see it after that, but I observed a fish in that pool as well.

Mr. Lucas (Rivtow's Superintendent):

Q. The ditch system from 'L' to 'M' and from 'M' -- well, let's just use 'L' to 'M' that was under the management of Pacific Rim?

A. Yes.

Q. Okay, and the -- and the pool on the -- to the right of the shop, that was under the management of Pacific Rim?

A. Yes.

* * *

Q. The -- the culvert or the pipe between 'C' and 'D' who managed that?

A. It was under Pacific Rim's jurisdiction, yes.

Q. Okay, the -- and the system after the pipe from -- from 'D' towards Shannon Creek, was that under the management of Pacific Rim?

A. Yes.

Q. As at November of 1989?

A. Yeah.

* * *

Q. Now in the course of your -- the time that you were superintendent on that site, most particularly, in or about the area of November, 1989, did you ever observe oil on the surface of any water in -- that forms part of the drainage system?

A. Yes.

Q. And where would you have observed that at?

A. In the ditch by B.A. and in the pond beside our shop.

Q. Okay. The pond beside your shop being that the pond, if I could have figure three again, Exhibit two, I believe, where you --

A. It's the large pond on the right-hand side.

Q. Okay. The large pond that's here.

A. This pond here had oil on the surface of it.

Q. Okay, designated as 'C'.

Mr. Nanson (B.A. Blacktop's Sechelt Manager):

Q. The area shown in photograph eleven, that is beside the shop, maintenance shop, of -- of Rivtow.

A. Yes.

Q. And that area was under the management of Rivtow? A I believe so, yes.

The Court Sorry, what number was that?

Mr. Fairweather: Number eleven.

The Court: Thank you.

Mr. Fairweather:

Q The area shown in photographs fourteen and fifteen, do you know where that is located?

A. That's the -- if you're taking a face view on the maintenance shed of Rivtow's, it's to the righthand side.

Q. That area was under the management of Rivtow?

A Yes.

Q. Now we're referring to photograph twenty-four, the tank that's shown on the stilts there, whose tank is that?

A. It was Rivtow's diesel fuel storage.

Q. And the person who - - you see where the person is standing in the area of that tank, have you ever observed oil in what appears to be water under or adjacent to that tank?

A. Yes.

Q. Did you observe oil in -- in that -- in that area on or about November 21st of 1989?

A. Yes.

[para19] Having recounted the evidence at some length, the learned judge concluded her reasons thus:

> Mr. Morrison felt that material from the contaminated area, starting at least with pool "K" drained into pond "C" and thence through the system into Shannon Creek. His opinion was that there had been a chronic discharge of contaminations at the Rivtow site rather than a one-event spill, and that given the nature of the creek, there would be no opportunity for the fish to avoid the contamination.
>
> Defence counsel points out that there was no sample taken directly from pool "H" - "J", the pool directly below and nearest "G", and that the first contamination found after "G" in the system was in "K", the pool directly below "H" - "J". Nor was there a sample taken of the apparently oil soaked ground outside Rivtow's shed. There is no direct evidence that oil from pool "G" got into the ditching system. The dye made its way from "G" to the system despite the lack of pipe or ditch connection, obviously by seepage through the berm. It is not, however, established that oil would similarly have passed through the berm and indeed Mr. Lucas' evidence is to the contrary.
>
> On a consideration of the evidence herein, some of which I have summarized, I conclude as follows:

(a) the substance found in Shannon Creek by Fisheries Officer Squire on November 21, 1989 was oil, probably lubricating oil mixed with a diesel type fuel;

(b) that oil was a "deleterious substance" as defined in section 34 (1a) of the *Fisheries Act*;

(c) Shannon Creek is "water frequented by fish" as defined in Section 34 of the *Act*, being "Canadian Fisheries Waters", which phrase is further defined in Section 2 of the *Act* as including "all internal waters of Canada";

(d) the oil came from Rivtow's site via the drainage system controlled in part by Rivtow and in part by BA;

(e) there is insufficient evidence to determine whether it was oil from Rivtow's activities which was found in Shannon Creek, as opposed to oil from BA's activities;

(f) it is not established that Rivtow did "deposit" the deleterious substance, oil, within the meaning of "deposit" in Section 34 of the *Act*, which implies a direct activity resulting in pollution.

With respect to count 2: "permit" or "permit the deposit of" is not defined in the *Act*. The verb "permit" is defined in Black's Law Dictionary 5th Edition 1979 at page 1026 as "to suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent..." In the Concise Oxford Dictionary 6th Edition 1976 page 822 "permit" is defined inter alia as "give opportunity". The "permitting" aspect of the offence centres on a defendant's passive lack of interference, or its failure to prevent an occurrence which it ought to have foreseen. (*R.* v *VESPRA (TOWNSHIP*) 9 WCB (2nd) p. 166 (Ont.))

(g) assuming in favour of Rivtow that BA oil was the pollutant herein, Rivtow failed to prevent an occurrence which it ought to have foreseen. Its plant superintendent knew of BA's spillages, at least in 1988, and no effective steps were taken to prevent or at the very least contain the spillages. Rivtow constructed the site or a considerable portion thereof; BA was simply a sub-tenant from Rivtow;

(h) further, the portion of drainage system controlled by Rivtow downstream from BA's area made possible the pollutant's entry into Shannon Creek. The danger should have been obvious to Rivtow's employees. Rivtow clearly provided the opportunity for the pollution to take place even if it did not in fact control the actual pollutant.

(i) with respect to count 2, the Crown has established the actus reus and the defendant has not established reasonable care or due diligence on its part.

[para20] In speaking of the actus reus, the learned judge was only doing what her hierarchical betters do all the time. But for my part, I am in agreement with Lord Diplock who, in *R.* v. *Milier*,

[1983] 1 All E.R. 978 at 979, referring to a question put to the House of Lords concerning "the actus reins of the offence of arson", said:

> The question speaks of 'actus reus'. This expression is derived from Coke's brocard (3 Co Inst ch I, fo 10), 'Actus non facit reum, nisi mens sit rea', by converting incorrectly into an adjective the word reus which was there used correctly in the accusative case as a noun. As long ago as 1889 in *R* v. *Tolson* 23 OBD 168 at 185-187, [1886-90] All ER Rep 26 at 36-37 Stephen J when dealing with a statutory offence, as are your Lordships in the instant case, condemned the phrase as likely to mislead, though his criticism in that case was primarily directed to the use of the expression 'mens rea'. In the instant case, as the argument before this House has in my view demonstrated, it is the use of the expression 'actus reus' that is liable to mislead, since it suggests that some positive act on the part of the accused is needed to make him guilty of a crime and that a failure or omission to act is insufficient to give rise to criminal liability unless some express provision in the statute that creates the offence so provides.
>
> My Lords, it would I think be conducive to clarity of analysis of the ingredients of a crime that is created by statute, as are the great majority of criminal offences today, if we were to avoid bad Latin and instead to think and speak (as did Stephen J in those parts of his judgment in *R* v *Tolson* to which I referred at greater length in *Sweet* v *Parsley* [1969] 1 All ER 347 at 361, [1970] AC 132 at 162-163) about the conduct of the accused and his state of mind at the time of that conduct, instead of speaking of actus reus and mens rea.

[para21] In agreeing with Lord Diplock, I would not wish to be taken as denigrating the study of Latin, the disappearance of which from our educational institutions I deplore.

[para22] I point out that there is nothing at all in the record to indicate that the Crown's case on the first count was founded on the proposition that the "deposit" by B.A. was in law "deposit" by Rivtow or that the Crown's case on the second count was limited to an assertion that the respondent ought to have prevented B.A. from putting any oil into the system.

[para23] In subparagraph (g) of her reasons, the learned trial judge said "no effective steps were taken to prevent or at the very least contain the spillages" and in sub-clause (h), she said, "further, the portion of drainage system controlled by Rivtow downstream from BA's area made possible the pollutant's entry into Shannon Creek".

[para24] The respondent appealed, giving these grounds:

1. Her Honour Judge Giroday erred by finding that the Crown proved that Rivtow committed the actus reus of the offence.

2. Her Honour Judge Giroday erred in law by ruling:

> "(g) assuming in favour of Rivtow that BA oil was the pollutant herein, Rivtow failed to prevent an occurrence which it ought to have foreseen. Its plant superintendent knew of BA's spillages, at least in 1988, and no

> effective steps were taken to prevent or at the very least contain the spillages. Rivtow constructed the site or a considerable portion thereof; BA was simply a sub-tenant from Rivtow;
>
> (h) further, the portion of drainage system controlled by Rivtow downstream from BA's area made possible the pollutant's entry into Shannon Creek. The danger should have been obvious to Rivtow's employees. Rivtow clearly provided the opportunity for the pollution to take place even if it did not in fact control the actual pollutant.
>
> (i) with respect to count 2, the Crown has established the actus reus and the defendant has not established reasonable care or due diligence on its part."

3. Her Honour Judge Giroday erred in law in finding that the defendant did permit the deposit of a deleterious substance: to wit, oil, after having found that all of the oil may have come from B.A. Blacktop and that the defendant did not control the oil and did not deposit the oil.

4. Her Honour Judge Giroday erred in finding that:

> "The portion of drainage system controlled by Rivtow downstream from BA's area made possible the pollutant's entry into Shannon Creek and that the danger should have been obvious to Rivtow's employees and that Rivtow clearly provided opportunity for the pollution to take place even if it did not in fact control the actual pollutant."

[para25] As she was bound to do, Huddart J. accepted the learned Provincial Court judge's findings of fact.

[para26] Huddart J. began her reasons by saying that the appeal "concerns the meaning of the word 'permit'..."

[para27] She noted that the respondent did not seek to avail itself of the defence of due diligence, nor did it dispute - as indeed it could not - any of the learned trial judge's findings of fact.

[para28] As I understand her reasons, she held, relying on *R*. v. *City of Sault Ste*. Marie, [1978] 2 S.C.R. 1299, that one cannot be said to permit that which one has no legal capacity or authority to prevent. To be guilty one must be, in her words, "in a position to exercise control over the activity and prevent the pollution from occurring, but fail to do so".

[para29] Huddart J. said this:

> If the element of control i[s] essential, as I believe Sault Ste. Marie says that it is, then the Crown argues that there was evidence before the trial judge from which she could conclude that Rivtow did have that authority or control. In his written argument counsel for the

> Crown says that "...Rivtow failed to prevent a pollution occurrence which it ought to have foreseen. It is clear that Rivtow could and should have controlled the deposit of oil from B.A.'s asphalt plant and/or the deposit of oil from the main collecting pond ('C'). Rivtow was responsible."
>
> This argument fails because the trial judge did not find that Rivtow "could" have controlled the deposit of oil into the drainage system by B.A. and she acquitted Rivtow of the charge of having deposited oil into fishing waters. What she found is that Rivtow did nothing about B A.'s polluting activities and thereby provided the opportunity for them to continue. The fact that Rivtow could have controlled the deposit from the last collecting Pond is rendered irrelevant by this acquittal.
>
> I cannot find in the trial judge's findings of fact as to the nature of Rivtow's operations support for an inference that it has any authority or control over B.A. The evidence at trial suggested at most the degree of influence one might expect between neighbours sharing a drainage system. Put simply, providing the opportunity for pollution to continue by not doing anything about a neighbour's activities, is not enough to constitute the actus reus of section 36(3) in view of the principles set down by the Supreme Court of Canada in Sault Ste. Marie.
>
> An example by way of analogy might assist. Consider two neighbours who share a common ditch. One of them, while changing the oil in her car, causes some oil to flow down her driveway into the ditch. The water and the oil then flow across the innocent neighbour's property through the common ditch into water frequented by fish. To allow a conviction in such circumstances would be to find the accused guilty of the acts of another and to use the language of Devlin J. (supra at p. 8), it would be "pouncing on the most convenient victim". If the legislature wishes to place a positive duty on a neighbour in such circumstances it can do so in clear language.
>
> I do not think the fact that the innocent neighbour is the landlord of the polluter is relevant unless the terms of the agreement between the neighbours gives the first some authority. In the case at bar there was no evidence about any agreement between Rivtow and B.A. The trial judge must have inferred a tenancy arrangement from the evidence of any employee of Rivtow. Indeed, there was no evidence that Rivtow had the ability to control the conduct of B.A., nor was there evidence to support such a finding. B.A. was not carrying on business for the benefit of Rivtow nor was it undertaking work on behalf of Rivtow such that control, power, or even influence could be inferred.
>
> In conclusion, the decision by the trial judge is inconsistent with the principles set down by the Supreme Court of Canada in Sault Ste. Marie. [Emphasis mine.]

[para30] I confess I do not understand the second emphasized passage.

[para31] As I have noted earlier, the main collecting pond "C" was on Rivtow's portion of the parcel.

[para32] The grounds of appeal to this Court are these:

1. THAT the learned appeal Judge erred in law by misapplying the principles set down by the Supreme Court of Canada in *Regina* v. *City of Sault Ste. Marie* as it related to its consideration of the "element of control" in strict liability offences.

2. THAT the learned appeal Judge erred in law by misapplying the principles set down by the Supreme Court of Canada in *Regina* v. *City of Sault Ste. Marie* as it related to its consideration of the word "permit".

3. THAT the learned appeal Judge erred in failing to uphold the learned trial Judge's finding that the Respondent did permit the deposit of a deleterious substance in water frequented by fish.

4 AND UPON such other grounds as Counsel may advise.

[para33] First, I would not have thought it necessary to rely on *R.* v. *Sault Ste. Marie*, supra, on the issues arising in this case. *R.* v. *Sault Ste. Marie* is about the necessary state of mind in so-called strict liability offences. It is not directed to the proper interpretation of the sections of the *Fisheries Act* in issue. I do accept, however, that one cannot be said in ordinary speech to permit that which one cannot prevent. But *R.* v. *Sault Ste. Marie* does not stand for the proposition that Parliament cannot require one to clean up that which one could not have prevented.

[para34] As I understood counsel for the respondent in this Court, he told us that the issue on the second count before the learned trial judge and before Huddart J. was the respondent's liability for a failure on its part to Prevent B.A. from depositing oil in that portion of the drainage system on the land occupied by B.A.

[para35] In my opinion, if counsel was of that opinion at the trial, he did not understand the thrust of the Crown's case.

[para36] In its evidence, the Crown first sought to prove, and as Giroday P.C.J. points out, failed to prove, that Rivtow had deposited oil in the system in those parts of it above the asphalt plant and, secondly, sought to prove by the extensive evidence concerning collecting pond "C", much of which I have quoted, that Rivtow permitted the deposit from that point to the creek. If that was not the Crown's case on count 2, the evidence of the management and control of pond "C" to which I have adverted was irrelevant. But if that evidence was irrelevant, why was it not objected to?

[para37] The Crown's case before the learned trial judge on the second count was not limited to whether the appellant permitted B.A. to put oil into B.A.'s part of the system. Quite obviously, the learned trial judge did not think so as is shown by subparagraph (h) of her reasons.

[para38] As I understand Mr. Kaardal, he now founds his submission as to what the Crown's case was at trial on the wording of count 2. He says that by saying "to wit: oil" the Crown was invoking s. 34(1)(a) and that its argument now, founded upon the presence of oil in pond "C", is, in fact,

invoking s. 34(1)(b). I take it he means that the second count ought to have read "a deleterious substance, to wit: water containing oil".

[para39] He says further that only in the dying moments of argument before Giroday P.C.J. did the Crown raise the case as it has now been argued.

[para40] With all respect, the learned trial judge found as a fact that "oil" was found in Shannon Creek on the 21st November, 1989. That finding of fact cannot be attacked in this Court, founded as it was on the evidence. The expert says he found "oil" in the samples and Mr. Tancock said that "oil was so thick" in pond "C" that he could not see a fish which "scooted off in underneath the sheet of the oil".

[para41] In my opinion, this argument, founded on the wording of the count, is a quiddity. I am sure that had it been put to the learned trial judge, she would have had no hesitation in amending the count to conform to the evidence.

[para42] Mr. Kaardal also argues, as I understand him, that the very wording of the second count militates against any liability on the part of Rivtow for permitting the oil to go from pond "C" to the creek. Relying upon certain American authorities, he says that "deposit" cannot encompass, although these were not his exact words, failing to clean up someone else's deposit of a deleterious substance onto one's land which then went into waters frequented by fish.

[para43] As to this point, I do not find it necessary to address those authorities because the *Fisheries Act* contains its own definition of the word "deposit". Suppose, instead of what happened here, B.A. had put, without permission, on to the respondent's land, a number of leaking drums filled with oil and, knowing of the presence of those drums, the respondent had done nothing. In my opinion, upon the plain words of the definition of "deposit", the respondent would be liable for such inaction. Both "leaking" and "seeping" can occur by inaction.

[para44] Here, the oil, albeit floating on the water, was discharged from the collecting pond into the system and thence into the creek. The respondent permitted that discharge.

[para45] In cases in which the accused is alleged to have permitted a deposit and the evidence discloses inaction, the real issue is whether the accused had exercised due diligence.

[para46] I return to the grounds of appeal.

[para47] As to the first and second grounds, I need only say that, in my opinion, far more was made of *R.* v. *Sault Ste. Marie*, supra, than was warranted on the findings of fact of the learned trial judge. There was no question, and it was not disputed in this Court, that the respondent knew of the presence of oil in pond "C" and knew that the contents of pond "C" made their way to the creek. It had no defence of due diligence.

[para48] As the learned appeal court judge considered the failure to control the contents of pond "C" was "irrelevant", it is the third ground which must be considered.

[para49] Although that ground does not contain the words "in law", nonetheless, in my opinion, it does raise a question of law upon which the learned judge erred. That question, quite simply, was whether the learned trial judge's findings of fact in law supported the conviction on count 2. They did.

[para50] I would, therefore, give leave to appeal, allow the appeal and restore the conviction.

SOUTHIN J.A.

[para51] PROWSE J.A.:-- I have had the privilege of reading, in draft, the reasons for judgment of Madam Justice Southin. With respect, I conclude that an argument raised by the respondent which deals with the wording of Count 2 of the Information is determinative of the appeal in favour of the respondent. While the point is narrow, I am persuaded that it is meritorious.

[para52] Counsel for the respondent submits that Count 2 of the Information is particularized in such a way that it is clear it is based on the definition of "deleterious substance" found in s. 34(1)(a) of the *Fisheries Act*, R.S.C. 1985, c. F-14 (the "*Act*"). He submits that, having particularized the Information by utilizing the definition of deleterious substance in s. 34(1)(a), the Crown is bound to prove the Count as particularized in order to obtain or sustain a conviction under Count 2. [See *R*.v. *Johnson* (1977), 35 C.C.C. (2d) 439 (B.C.C.A.)] Counsel submits that this is particularly so since the trial proceeded on the basis that s. 34(1)(a) was applicable and the arguments of counsel were framed accordingly.

[para53] The relevant provisions of the *Act* are as follows:

> 34. (1) For the purposes of ss. 35 to 43, "deleterious substance" means
>
> > (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
> >
> > (b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,
>
> 34. (1) "deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;
>
> 36. (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

[para54] Count 2 of the Information states that the respondent:

> Count 2: Did permit the deposit of a deleterious substance to wit: oil in a place under conditions where the deleterious substance to wit: oil may enter water frequented by fish, to wit: Shannon Creek,
>
> Contrary to Section 36(3) of the *Fisheries Act* [Emphasis added]

[para55] I agree with counsel for the respondent that Count 2 of the Information particularizes the deleterious substance in accordance with s. 34(1)(a) of the *Act*. Although the place where the deleterious substance is deposited is not particularised in Count 2, the wording of that Count makes it clear that the place is somewhere other than in Shannon Creek.

[para56] The learned trial judge was not able to determine whether the oil found in Shannon Creek came from Rivtow's activities or from the activities of B.A. Blacktop Ltd. ("B.A."). She assumed, therefore, in favour of Rivtow, that B.A. oil was the pollutant. If B.A. oil was the pollutant, it follows that the deposit of oil by B.A. was on B.A. occupied property. That is the place referred to in Count 2. There is no dispute that Rivtow did not have the authority either to permit or prohibit the deposit of oil on B.A. occupied property. In the absence of a finding that Rivtow had any control over the deposit of oil by B.A. on B.A. occupied property, I conclude that Rivtow should not have been convicted of the offence charged in Count 2 of the Indictment.

[para57] In the result, I would dismiss the Crown's appeal.

PROWSE J.A.

HUTCHEON J.A.:-- I agree.

ALBERTA COURT OF QUEEN'S BENCH

[Indexed as: *R.* v. *Bremner*]

Between: Her Majesty The Queen, Respondent, and Richard L. Bremner and Bremner Engineering and Construction Ltd., Applicants

O'Leary J.

Calgary, December 14, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, s. 36(3) – individual and corporate accused charged under s. 36(3) – upgrading sewer system in Canmore – unexpected volume of water accumulated and was discharged into Spring Creek – water contained high degree of silt – both accused convicted in 1990 – application to extend appeal period denied**

Criminal procedure – application to extend appeal period – power is discretionary – court can take into account 4 factors – applicant's bona fide intention to appeal during appeal period – whether the applicant had a reasonable excuse – whether it is arguable that the judgement of the trial judge was wrong – discretion should be exercised in favour of applicant where failure to do so would result in a miscarriage of justice

Summary: The Applicants were charged with violating s. 36(3) of the *Fisheries Act*. Both the individual and corporate accused were convicted; reasons were issued on June 27, 1990 and sentence was imposed on September 27, 1990. There were no steps taken to appeal until August 27, 1993. In the interim, the Association of Professional Engineers, Geologists and Geophysicists of Alberta (APEGGA) held disciplinary hearings and suspended the rights of the individual Applicant to practice his profession for one year, based largely on the fact of the conviction. This is an application to extend the period for appealing conviction and sentence beyond the 30 day period established in the *Criminal Code* and the *Alberta Rules of Court*.

The power to extend the appeal period is discretionary. However, the court considered factors identified in previous cases for determining whether or not to exercise that discretion in favour of the Applicants. (1) The court determined that the Applicants had no *bona fide* intention to appeal during the appeal period. (2) The Applicants' explanation for the delay was that the disciplinary hearing produced expert opinions that might have resulted in acquittal had they been before the trial judge. The learned justice found the explanation not to be reasonable as the information and expertise was available at trial. (3) The court found that the Applicants did not have a reasonable prospect of success on appeal. The learned justice reviewed the Reasons for Judgement and found that there was evidence before the trial judge of sufficient weight of the presence of fish and fish habitat in Spring Creek and that the trial judge's conclusion that silt was a deleterious substance was not unreasonable. (4) The court found that its failure to extend the time for appeal would not result in a miscarriage of justice, as there was no question of an error of law at trial.

REASONS/MOTIF:

R.W. Eden, Q.C. and G.E. Peterson, Counsel for the Applicants
A.H. Channer, Counsel for the Respondents

[para1] O'LEARY J.:-- The Applicants seek to extend the time within which to appeal their conviction and sentence on a charge of violating Section 36(3) of the *Fisheries Act*, R.S.C. 1985, c. F-14 ("the Act").

[para2] The individual Applicant is a professional Engineer who wholly owns and controls the corporate Applicant. They were jointly charged that they:

> "Between the 1st day of October, A.D. 1989 and the 30th day of November, A.D. 1989, at or near Canmore, in the Province of Alberta did unlawfully deposit or permit the deposit of a deleterious substance in any type of water frequented by fish ...."

[para3] The relevant part of Section 36(3) is as follows:

> "(3) ... no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish ...."

The term "deleterious substance" is defined in Section 34(1) as meaning:

> "any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man or fish that frequent that water."

The same Section defines "fish habitat" as:

> "Spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life process."

[para4] The trial occupied six days. The trial judge reserved judgment and on June 27, 1990 issued written reasons in which he convicted both Defendants: (1991), 119 A.R. 81. Sentence was imposed on September 27, 1990.

[para5] The Applicants took no steps to appeal until August 27, 1993. In the interim, a discipline committee of the Association of Professional Engineers, Geologists & Geophysicists of Alberta ("APEGGA") investigated the circumstances and, based largely on the fact of the conviction, suspended the right of the individual Applicant to practice his profession for a period of one year. He has appealed that decision and the appeal has been stayed pending the outcome of this application.

[para6] During the course of preparing for the appeal the Applicants concluded that they may have had a good defence to the charge and they then initiated this application.

[para7] In 1989 the corporate Applicant was awarded a contract to upgrade the sewer system in the Town of Canmore. During the course of the work an unexpected volume of water accumulated in excavations and was discharged into Spring Creek. The water contained a high degree of silt, the "deleterious substance" alleged by the Crown. The charge was not laid until August, 1990 despite the fact that Federal and Provincial environmental officials were aware of the discharge when it occurred.

[para8] Notice of Appeal from conviction of a Summary Conviction offence must be filed within 30 days after the conviction was made or sentence was imposed, whichever is later (Section 815(1) of the *Criminal Code* and Rule 850.3(1) of the *Alberta Rules of Court*). Section 815(2) of the *Code* authorizes this Court to extend the time within which a Notice of Appeal may be filed.
[para9] The power to extend the time for appeal is discretionary. There are no fixed criteria and each case must be decided on its own merits. A number of factors have, however, been identified as requiring examination when considering whether or not to exercise the discretion. In *R.* v *Cole* (1977), 33 C.C.C. (2nd) 242, the Court, after reviewing the authorities, held that consideration must be given to three factors:

> 1. Whether the Applicant has shown a bona fide intention to appeal while the right to appeal existed;
>
> 2. Whether it is at least arguable that the judgment of the trial Court was wrong; and
>
> 3. Whether the Applicant acted with reasonable diligence or has a reasonable excuse for the delay.

[para10] The Court added a fourth element to those recognized to that point: the discretion should be exercised in favour of an applicant where refusal to do so would result in a miscarriage of justice.

[para11] Although the Court must consider each of the above matters, the relevance and relative importance of each are issues for the Court's determination in the circumstances of the particular case. Twaddle, J.A. said in *R.* v. *Mohammed* (1989), 52 C.C.C. 470, at p. 476:

> "For the purpose of doing justice, a judge hearing an application for a time extension will consider, so far as each is relevant to the case before him, each of the matters which ... it is incumbent on the applicant to show. But the relevance and the relative importance of each are issues for the judge's determination on the facts properly before him ...."

BONA FIDE INTENTION TO APPEAL

[para12] The Applicants had no intention to appeal while the right to appeal existed. Almost three years elapsed between the date the right to appeal expired, October 27, 1990, and the initiation of this application on August 27, 1993. The intention to appeal arose only when a possible defence or defences came to light in the course of preparing an appeal from the APEGGA disciplinary proceedings.

EXPLANATION FOR DELAY

[para13] I have referred above to the Applicants' explanation for the delay in bringing this application. The disciplinary suspension was imposed by APEGGA in May, 1993. This application was filed August 27, 1993. The Applicants have moved promptly since receiving advice from their solicitors that they may have had other defences to the charge.

[para14] The decision to appeal was not made as a result of the penalty imposed in the disciplinary proceedings but was, rather, triggered by the receipt of expert opinions which, had they been before the trial judge, may have resulted in an acquittal.

[para15] The explanation for the delay is not reasonable. The new evidence is based on information and expertise which was available at the time of trial.

ARGUABLE THAT TRIAL VERDICT WRONG?

[para16] Another way of expressing this factor is to ask whether the Applicants have a reasonable prospect of success on appeal.

[para17] Section 686 (1) (a) of the *Code* sets out the grounds upon which an appeal Court may allow an appeal from conviction:

> (a) The appeal may be allowed if:
>
> (i) the verdict is unreasonable or cannot be supported by the evidence,
>
> (ii) there is a wrong decision on a question of law,
>
> (iii) on any ground there was a miscarriage of justice.

[para18] The Applicants submit that there was no evidence or insufficient evidence that, at the relevant time, there were fish in Spring Creek or that it was a fish habitat. Therefore the trial judge's conclusion that the discharge was a "deleterious substance" is not supported by the evidence and is unreasonable.

[para19] In his Reasons for Judgment the trial judge said at page 109 (para. 120):

> "Spring Creek is much frequented by fish. Indeed it is an important spawning area for brook trout. It is designated Class 2 for fish habitat meaning it is good fish habitat. Siltation (the collection of silt on the creek bed): (1) reduces the areas available for fish to spawn, (2) potentially it reduces the survival rate of the eggs that are deposited, (3) reduces the interstitial habitat between the rocks and stones that would be utilized by the juvenile fish (which results in a reduction in the value of the area for raising fish), and (4) negatively impacts on some of the Benthonic Macro Invertebrates which are of importance to the trout. It adversely impacts on both the fish and their habitat."

He continued on the same page at para. 122:

> "It is clear to me that the water placed into Spring creek by the accused contained within it a deleterious substance (silt). It was deleterious to the Creek as a fish habitat and to the fish which frequented the Creek."

[para20] The Crown did not have to establish that the silt deposited into Spring Creeks in fact degraded or altered the quality of the water. It merely had to prove the deposit and that the silt deposited was a "deleterious substance", that is, that it was potentially harmful to fish or fish habitat, one or both of which were present in Spring Creek at the critical time. The magnitude of the harm or potential harm is immaterial. In *R.* v. *MacMillan Bloedel (Alberni) Limited* (1979), 47 C.C.C. (2d) 118, the British Columbia Court of Appeal said at p. 121:

> "Section 33(2) [now Section 36(3)] prohibits the deposit of a deleterious substance, not the deposit of a substance that caused the water to become deleterious."

[para21] The deposit of silt is not the deposit of a deleterious substance merely because it could harm fish or fish habitat. To be deleterious, the deposit must have the potential to actually harm fish or fish habitat. That means that one or both of fish or fish habitat must be exposed to a risk of harm as a result of the deposit. The Crown concedes that in order to prove that the silt deposited was a deleterious substance it must show that the deposit could have harmed fish or fish habitat, and to do so must show that there were fish or fish habitat in Spring Creek which were exposed to harm as a result of the Applicants' discharge into it of silt-laden water.

[para22] It is conceded that the water discharged contained a percentage of silt which would render it harmful to fish or fish habitat had either or both been present in Spring Creek between October 1 and November 30, 1989.

[para23] The question is whether there was sufficient evidence before the trial judge of the presence at the relevant time of fish and/or fish habitat in Spring Creek which could have been harmed by the deposit. If there was some evidence upon which the trial judge could reasonably have concluded that fish or fish habitat, or both, were present, the Applicants would have no reasonable prospect of success on an appeal. On the other hand, if there was no evidence or insufficient evidence on this vital point, the Applicants would have a reasonable chance of succeeding on an appeal. In the latter case the Crown would have failed to prove an essential element of the offence, namely that the silt deposited was a deleterious substance. The verdict would be unreasonable and not supported by the evidence.

[para24] I have carefully reviewed the Reasons for Judgment of the trial judge and those portions of the evidence to which I have been referred by counsel. I am of the view that there was evidence before the trial judge of the presence of fish and fish habitat in Spring Creek of sufficient weight and credibility to support the verdict. The trial judge's conclusion that the silt was, in the circumstances, a deleterious substance was not unreasonable. In my opinion the Applicants would not have a reasonable prospect of success on appeal.

[para25] It is not suggested that the trial judge erred in respect of a question of law. In my view the refusal to exercise my discretion in favour of extending time will not result in a miscarriage of justice.

[para26] The application is dismissed.

BRITISH COLUMBIA SUPREME COURT

[Indexed as: R. v. Fletcher Challenge Canada Ltd.]

Between Regina, Respondent, and Fletcher Challenge Canada Limited, Appellant

Errico J.

Prince Rupert, January 24, 1994

***Fisheries Act*, R.S.A. 1985, c. F-14, s. 35(1) – whether trial judge correctly discounted credibility of defence witnesses thereby leaving no basis for due diligence defence – was sufficient evidence to support trial judge's findings**

Criminal procedure – credibility – test for appeal court – proper test is could a jury or judge properly instructed and acting reasonably have convicted – appeal court should show great deference to trial findings of credibility

Summary: The appellant was charged under s. 35(1) of the *Fisheries Act* with carrying on a work or undertaking resulting in harmful alteration, disruption or destruction of fish habitat. The appellant was convicted at trial and appealed on the basis that findings of credibility by the learned trial judge, which left no basis for the defence of due diligence, were unsupported by the evidence or were unreasonable.

The charge arose from the appellant's logging activities near a tributary to Indian Cabin Creek, B.C., which is classified as a class I salmonoid creek. A contractor for the appellant felled unmerchantable timber in a leave strip across, along and into the creek. In support of a claim of due diligence, the appellant argued that there had been extreme blow-down in the stretch of the tributary in question and that felling the leave strip was essential to clean up the creek. The appellant also argued that Fisheries did not require a leave strip and that ultimately, the edge of the stream was to be fully logged. A Fisheries Officer had inspected the tributary just prior to the appellant's actions and did not observe extreme blow-down in that part of the creek.

The learned trial judge rejected the appellant's submissions regarding whether a leave strip was required and whether there was extensive blow-down in the area. On appeal, the appellant challenged the latter finding. The court reviewed the relevant evidence before the learned trial judge and applied the test of whether a jury or judge properly instructed and acting reasonably could have convicted. While showing great deference to findings of credibility at trial, the court found that there was evidence upon which the trial judged could make the findings he did and there was no material misapprehension of the evidence.

Held: Appeal dismissed.

REASONS/MOTIF:

C.H. Harvey, Q.C., Counsel for the Appellant

M.J. Shaw, Counsel for the Respondent

[para1] ERRICO J.:-- The appellant, Fletcher Challenge Canada Limited ("Fletcher Challenge"), appeals its conviction under section 35(1) of the *Fisheries Act* of Canada, R.S.C. 1970, c. F-14 which provides:

> "s.35(1) no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."

[para2] This appeal deals with the trial Judge's adverse findings as to the credibility of the witnesses who testified for Fletcher Challenge. These adverse findings left no basis for a consideration of the defence of due diligence that was raised. The position of Fletcher Challenge on this appeal is that those findings of credibility were unsupported by the evidence or were unreasonable.

[para3] The trial Judge in his written reasons gives the following overview of the surrounding circumstances:

> "Indian Cabin Creek flows into Long Inlet which is located approximately 45 minutes travel by boat in Skidegate Inlet West of Queen Charlotte City. It is a class I salmonoid creek ranked the 4th highest producer of salmonoid out of the 39 salmonoid creeks feeding into Skidegate Inlet. The tributary, the subject creek in this case, is also classified class I.
>
> The tributary has three sections. The first section is a small lake in the upper levels contained by a beaver dam. The second section, the subject of this case, is a 275 meter stretch of creek from the beaver dam to a bridge built by Fletcher. The third lower section is the creek from the bridge to where it feeds into Indian Cabin Creek.
>
> Cut block L-30 was awarded to Fletcher to log, amongst other areas, the area around the lake and down to Indian Cabin Creek. Logging commenced in the upper and middle sections with a leave strip remaining either side of the creek in the middle section.
>
> On or about October 6, 1990, an employee, Armand Boutin, of Copper Bay, on instructions from Morris Campbell, President of Copper Bay [Copper Bay Contracting Ltd. was a contractor for Fletcher Challenge and a co-accused], felled unmerchantable trees, hemlock and spruce timber, snags, leaners, in the middle section leave strip, across, along, and into the creek. Both accused argue that cutblock L-30 and particularly the middle and lower sections, above and below the bridge, experienced an extreme blow-down of trees in the leave strip into the tributary in September and October 1990, and therefore, felling the leave strip, including bucking wind throw and snags, was necessary to clean up the creek. It is a hard fact that the wind-throws, an act of God, were not reported by Fletcher to Forestry or Fisheries personnel as is required in the British Columbia Coastal Fisheries Forestry Guidelines Manual, Second Edition, 1988. By chance, on October 9th, 1990, Fisheries Officer Deborah Hughes in the presence of Fisheries Officer Robert Pettigrew inspected the tributary for the specific purpose of checking blow-down in the lower section of the creek that Fisheries Officer Pettigrew had observed on October 3, 1990. Fisheries Officer Hughes

> notified Fisheries and Forestry causing everything to come to a head while plans were made for the clearing out of fallen timber and debris and cleaning of the creek. The faller, Armand Boutin, did not testify in court for it was reported that he cannot be found. Both Crown and the accused have been unable to locate him or knowledge of his whereabouts."

[para4] The evidence disclosed that a "leave strip" is an area next to a stream in which timber which can be felled and yarded away from the stream leaving standing merchantable timber and timber that cannot be felled except over or into the stream and other forest growth and snags.

[para5] The position taken by Fletcher Challenge at trial, through the evidence of its employees, was that there was no leave strip required by the Department of Fisheries for this portion of the stream and that while a leave strip had, in fact, been left during the initial felling of trees in this area it was done so with the intention that the merchantable timber would be removed at a later date when it could be yarded with minimal damage to the stream immediately upon being felled.

[para6] It was the position of Fletcher Challenge that some time prior to October 1st, 1990 winds had blown down the majority of the remaining timber and that a decision was made on October 1st, 1990 to fell the remaining timber before it also was wind thrown, to remove all of the merchantable timber and to clean up the stream. This would, in effect, advance the original logging plans because of the wind thrown trees. This was the basis for the defence of due diligence.

[para7] The principles to be applied by an appellant Court in dealing with the findings of the trial Court as regards credibility may be summarized in the following passages from authorities cited to me by counsel for the appellant.

[para8] In *Yebes* v. *The Queen*, (1987), 36 C.C.C. (3d) 417 (S.C.C.), McIntyre J., for the Court, summarized the function of an appellant Court in the following passage at page 430.

> "In my view, the majority of the Court of Appeal did not fail to apply the correct principles relating to the treatment of circumstantial evidence. The function of the Court of Appeal, under s. 613(1)(a)(i) of the Criminal Code, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a property instructed jury, acting judicially, could reasonable have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence."

[para9] In *Regina* v. *R.W.* (1992), 74 C.C.C. (3d) 134 the Supreme Court of Canada considered the application of these principles to a finding of credibility. McLachlin J., for the Court at page 141 said:

> "It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on

> findings of credibility. In my opinion, it does. The test remains the same; could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the Court of Appeal should show great deference to findings of credibility made at trial. This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: *White* v. *The King* (1947), 89 C.C.C. 148 at p. 151, [1947] S.C.R. 268, 3 C.R. 232; R. v. M.(S.H.) (1989), 50 C.C.C. (3d) 503 at pp. 548-9, [1989] 2 S.C.R. 446, 71 C.R. (3d) 257. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable."

[para10] In *Whitehouse* v. *Reimer et al*., [1980] 116 D.L.R. (3d) 594 (Alta. C.A.), at p. 595 Laycroft J.A., for the court, in considering an appeal based on a finding of credibility said:

> "Where a principal issue on a trial is credibility of witnesses to the extent that the evidence of one party is accepted to the virtual exclusion of the evidence of the other, it is essential that the findings be based on a correct version of the actual evidence. "

[para11] Defence witnesses testified that no leave strip was required by Fisheries to be left and that ultimately the edge of the stream was to be fully logged. This evidence was rejected by the trial judge. Those witnesses were, in part, the witnesses upon which Fletcher Challenge relied to establish the factual background for the defence of due diligence. The basis of the rejection was the acceptance of the evidence of a senior fisheries officer which was consistent with the *Coastal Fisheries Regulations* which dictated a leave strip on Class I streams, unless there was a written exemption in the cutting permit. The cutting permits which were filed in evidence did not contain such exemptions.

[para12] Fletcher Challenge does not challenge this adverse finding in this appeal but rather the trial judge's finding that the evidence of the appellant's witnesses that there had been an extensive blow-down of timber in the relevant area was a fabrication. The trial judge was assessing credibility on this latter point in the context of his other findings of credibility. In assessing the evidence of the principal witness for Fletcher Challenge on this point, the trial judge found it difficult to believe his evidence over that of the witness who had inspected the creek at about that time for the Fisheries Department. Referring to the Fletcher Challenge employee, the trial judge referred to his 25 years in the logging industry and said that he:

> "... clearly understands the importance of Class I streams, the spawning times of salmon, the 'operating window' of June 1 to August 15 in the Queen Charlotte Islands and the need to be in constant contact with Fisheries and Forests, yet he goes ahead with a plan to 'fall and yard' in conflict with all his knowledge and Coastal Fisheries Forestry Guidelines. It isn't reasonable or credible. I find that his explanation that 60% of the leave strip was wind-thrown is a complete fabrication to justify the falling on October 6, 1990. Mr. Pettigrew's evidence on his observations of wind-throw on October 3, 1990, is accepted by the court."

[para13] It is clear from that passage that the trial judge is not simply rejecting the evidence of the Fletcher Challenge witness by accepting the evidence of the Crown witness.

[para14] With regards to the more narrow issue of whether or not the trial judge was in error in what the evidence of Mr. Pettigrew actually was, counsel for Fletcher Challenge refers to the following passage as the trial judge's finding:

> "On October 3 (Pettigrew) had 'no concern about blow-down above the bridge' ... windthrow in the middle section ... as Mr. Pettigrew said, ...did not exist."

[para15] The Trial judge's findings in full on this subject are as follows:

> "The statement is totally in conflict with the testimony of Robert Charles Pettigrew, a charter boat operator, who, as a part time fisheries officer, had documented his inspections of Indian Cabin Creek and the tributary on September 8, 16, 23, 30, October 3, 9, 15, 19, 24, 31. For the past eleven years, Mr. Pettigrew has been looking after Indian Cabin Creek. He testified that up to 1990 there were no references to blow-downs in the Indian Cabin Creek. The forest was old growth - a mix of spruce and hemlock - which provided a stable cover for the creek. On September 8, 1990 he walked through the leave strip from the bridge to the lake. The leave strip was approximately 10 meters on both sides of the creek. Logging had taken place above the bridge and about 100 meters down below the bridge. On September 8th he did not see blow-down. On October 3rd he observed that 'there was more blow-down below the bridge which was a major problem for the large number of fish in the lower part of the creek.' On October 3 he had 'no concern about blow-down above the bridge.'"

[para16] Counsel for the appellant then refers to the evidence of Mr. Pettigrew found in his examination in chief as follows:

> "Q. And October 3rd, What can you say about blow-down above the bridge?
>
> A. Similar. I have no -- no recollection of any major blow-down up there. I do not believe I inspected that section of the stream above that bridge and the reason that I would not inspect that stream -- I did not inspect that portion of that stream all of the time because by then you're through -- I would be through the most productive area of the stream ..."

[para17] This passage does not cover all of Mr. Pettigrew's testimony with regard to his inspection on October 3rd. Immediately prior to the above passage the following passage appears in the transcript:

> "Q. Now, during September 1990 and in regards to this leave strip between the lake and the bridge; we've heard testimony that sixty percent of that leave strip was blown down by wind. Can you comment on that?
>
> A. I'm just thinking back to my September 30th walk and at that time I believe that I walked to the bridge, not above and I believe that I observed a blow down -- a few blow-

> down (sic) below the bridge but did not inspect that area above the bridge. When I looked upstream I did not, in my memory, observe any massive blow-down, either on September 30th or October 3rd. October 3rd there was more blow- down noted approximately a hundred metres below the bridge and that was of a major concern to me because it was lying in the creek. There were a lot of fish in the creek at that point, struggling past this blow-down that was in the creek and at that time I believe that I asked Debra Hughes to accompany me on the next walk to inspect that particular blow-down. This is relating to the area below the stream.
>
> Q. Below the bridge?
>
> A. Sorry, below the -- below the bridge and my memory -- I just do not have any recollection of any major blow-down at that time, up until October 3rd, in the upper portion above the bridge."

[para18] While the portion of the trial judge's findings quoted above makes reference to "no concern about blow-down above the bridge" and that exact passage does not appear in the testimony of Mr. Pettigrew, a reading of the trial judge's reasons in full, I think, makes it clear that what he accepts is that there was no severe or major blow-down above the bridge, the area in question, about which Mr. Pettigrew had any concern. As I read the trial judge's reasons in full they are that he rejects the defence evidence that there was a major blow-down above the bridge by October 1st, 1990, the time when the defence evidence was that there was a discussion and decision to fell the remaining trees to prevent further blow-down and further damage.

[para19] Accordingly, I am of the view that the trial judge's findings, accepting the observations of Mr. Pettigrew over those of the woods foreman of Fletcher Challenge are not unreasonable or not supported by the evidence. I think that a reading of his entire reasons does not suggest that this finding of credibility was based on certain isolated portions of the evidence, but rather on all of the evidence of the defence witness as against all of the Crown evidence.

[para20] The defence witnesses testified that they held a meeting on October 1st, 1990 in which they discussed logging this leave strip and they then decided, because of the major wind throw that had already occurred, to complete the logging of this strip. The trial judge found in his reasons as follows:

> "...He may have discussed logging the leave strip in the middle section but he did not at that time formulate a plan with Mr. Kay to clean up wind throw in the middle section, because as Mr. Pettigrew said, it did not exist."

[para21] Counsel for Fletcher Challenge submits that there was no cross-examination of that defence witness on that point, nor was there any evidence led to suggest that the meeting did not occur. I do not think that the trial judge suggested that the meeting did not occur. He made his finding that there could have been no discussion about cleaning up the existing wind throw or that the existing wind throw was the reason to log the area because of his finding that the severe wind throw had not occurred.

[para22] In his reasons the trial judge did not discuss evidence which dealt with the issue of whether or not a wind thrown tree which had been subsequently bucked could be distinguished from a tree which had been intentionally fallen. There was evidence that a wind thrown tree could, in certain circumstances, be bucked causing the root-wad to fall back into place leaving a stump, but that a felled tree and wind thrown tree, in those circumstances, could be distinguished by the absence of an undercut in the wind thrown tree. This evidence was given in part for the defence by an engineer who prepared a detailed report and drawing from an inspection sometime after there had been a cleanup or partial cleanup of the area. In that testimony there was some evidence of the distinction between a bucked wind thrown tree as opposed to a felled tree. The evidence and report of this witness was rejected by the trial judge, but the trial judge did not, in rejecting his evidence, reject the concept of determining whether a tree had been intentionally felled or wind-thrown and bucked. All of the Crown witnesses who said trees had been felled were cross-examined on this point and they all had knowledge of the distinction between a felled tree and a wind thrown bucked tree. Counsel for Fletcher Challenge submits the trial judge, in failing to direct his attention to an assessment of how many trees had been felled and how many trees had been wind thrown as adduced by the evidence of this survey and mapping, failed to appreciate evidence that would have gone to the other issues of credibility. Although the trial judge did not go into a detailed analysis of the question, the Crown witnesses denied that a large number of the tress were wind thrown and bucked and I do not think that the trial judge failed to appreciate significant evidence in failing to make that determination. He had rejected the survey on a number of grounds including the witnesses acknowledgement that he did not know how many trees or logs had been removed at the time of his survey.

[para23] Finally while the trial judge did not make any adverse findings of demeanour or appearance with regards to the defence witnesses, he did make positive findings in that regard with respect to the Crown witnesses.

[para24] Accordingly, I am of the view that there was evidence before the trial judge upon which he could make the assessment of credibility that he did, and I am further of the view that he did not misapprehend the evidence by making wrong findings of what the evidence actually was in making his findings of credibility.

[para25] It is not for this court to reassess credibility on a consideration of the transcript of evidence, but rather to determine whether or not there was evidence upon which the trial judge could reasonably make the finding he did. I am of the view that there was such evidence that supported the trial judge's findings; that he did not misapprehend the evidence before him in any material aspect and accordingly the appeal must be dismissed.

BRITISH COLUMBIA COURT OF APPEAL

[Indexed as: *R.* v. *West Fraser Mills Ltd.* #2]

Lambert, Legg and Finch JJ.A.

Vancouver, February 11, 1994

***Fisheries Act*, 1985, c. F-14, ss 35(1), 78, 82(1), 82(2) – interpretation of limitation period in s. 82 – whether certificate of ministerial awareness under s. 82(2) triggers operation of 2 year limitation for summary offences – whether in absence of certificate, limitation for summary conviction offences is 6 months under the *Criminal Code* – limitation in s. 82 provides a complete code – the limitation under s. 82 for summary conviction offences is 2 years – any extension of that limitation period requires a certificate of ministerial awareness under s. 82(2)**

Summary: The appellant was charged under s. 35(1) of the *Fisheries Act*. The alleged offences occurred between January 1, 1991 and March 31, 1991. The information was sworn on November 19, 1991, which is more than 6 months after the latest date the offences allegedly occurred. The Crown proceeded summarily. The learned provincial court judge found that the proceedings had not commenced within the time for summary proceedings under s. 82(1) of the *Fisheries Act*, held the appellant's not guilty plea a nullity and called on the appellant to elect a mode of trial. The learned provincial court judge held a preliminary inquiry and committed the appellant for trial.

The appellant applied for certiorari on the basis that (1) there was no evidence as to who damaged the fish habitat, and (2) the offence was statute barred because the information was sworn more that 6 months after the alleged offence. The learned chambers judge dismissed the application on both grounds.

The appeal to this court raised several issues. However, the court focused on two issues. The first concerns the interpretation of s. 82(2) of the *Fisheries Act*. The appellant argued that the proof of the Ministerial awareness is a "triggering event" for the application of the section giving rise to a limitation period of 2 years from the ministerial awareness of the offence. If there was no proof of ministerial awareness, by reason of s. 34(2) of the *Interpretation Act*, s. 782(2) of the *Criminal Code* applies and the limitation period is 6 months for a summary conviction offence. This interpretation was accepted by both the learned provincial court judge and the learned chambers judge.

The court agreed with the respondent that s. 82(1) of the *Fisheries Act* establishes a 2 year limitation period for summary conviction offences which can be extended for up to 2 years after the minister became aware of the subject-matter of the proceedings. The court reviewed the history of the provision noting that amendments to the act in 1991, including amendments to s. 82, strengthened the Crown's enforcement powers. The court found that it was not logical that Parliament would revert back to a 6 month limitation period under the *Criminal Code* given the long history of a 2 year limitation period for *Fisheries Act* summary conviction prosecutions.

The second issue the court addressed was the appropriate order to issue in light of its finding on the first point. The Crown argued that the appropriate remedy was to refer the matter back to the provincial court for a summary conviction trial. The court found that on a plain reading of s. 485(1) of the *Criminal Code*, the provincial court is not functus, and that the court has the jurisdiction to make the order requested by the Crown. However, the court also found that it has the discretion to make such an order but declined to do so in this case. To order the appellant to submit to a trial would be unfair given the length of time since the alleged offence and the expense to which the appellant has been put in defending itself. The unfairness did not arise from anything the Crown did or did not do. The order of the chambers judge was set aside and a direction issued that all charges be stayed.

Held: The order of the chambers judge was set aside and the charges under the original Information stayed.

REASONS/MOTIF:

Alan P. Czepil, Counsel for the Respondent
Gary W. Hales and Elizabeth L. Bayliff, Counsel for the Appellant

FINCH J.A. (for the Court, allowing the appeal):--

I

[para1] The appellant appeals from the dismissal of its application for certiorari to quash its committal for trial following a preliminary hearing on a charge of logging contrary to the provisions of s-s.35(1) of the *Fisheries Act*, S.C., c.F-14, as amended.

[para2] Originally the Crown elected to proceed summarily.

The appellant entered a plea of not guilty. When the trial commenced before the learned Provincial Court Judge, he raised the issue of whether the proceedings had been commenced within the time limited for summary proceedings under s-s.82(1) of the *Fisheries Act*. He concluded that they had not. He held that the appellant's not guilty plea was a nullity, and should be set aside. He called upon the appellant to elect its mode of trial. The appellant elected to be tried by a judge sitting alone.

[para3] The learned Provincial Court Judge then commenced a preliminary inquiry into the charges on the bases that the Information was valid and that the appellant was charged with indictable offences. At the conclusion of the preliminary inquiry the Provincial Court Judge committed the appellant for trial.

[para4] That committal gave rise to the appellant's application for certiorari. The appellant advanced two grounds of error:

1. that there was no evidence as to who damaged the fish habitat; and

2. that the offence was statute-barred in that the information was sworn more than six months after the alleged offence.

[para5] The learned chambers judge, before whom the application for certiorari came, held that there was evidence that the appellant or its agents may have caused the damage alleged to the fishery. He said that the first ground failed.

[para6] The second ground raised the issue as to how s- s.82(1) of the *Fisheries Act*, which provides a time limit for proceedings by way of summary conviction, should be interpreted. Subsection 82(1) says:

> 82 (1) Proceedings by way of summary conviction in respect of an offence under this *Act* may be instituted at any time within but not later than two years after the time when the Minister became aware of the subject-matter of the proceedings.

II

[para7] In his ruling on the interpretation of s-s.82(1), the learned Provincial Court Judge said:

> [t]he information alleges that the offences occurred between the 1st day of January, 1991, and the 31st day of March, 1991. The information was sworn on November 19, 1991, more than six months after the latest date upon which the offences could have been committed in accordance with the information sworn.

[para8] Then the judge referred to s-s.34(2) of the *Interpretation Act*, R.S.C. 1985, c.I-21, as amended, which provides:

> 34 (2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that *Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

[para9] The Provincial Court Judge continued:

> [t]he *Criminal Code* provides that all proceedings commenced in a summary matter must be commenced within six months of the date of the alleged offence. In other words, the information must be sworn within six months.
>
> So, on the face of it, there has been non- compliance with the provisions of the *Criminal Code*.

[para10] The judge quoted s-ss.82(1) and (2). Then he said:

> I asked counsel for the Crown whether she would be able to give me an undertaking that before the completion of the case for the Crown she would file a document pursuant to 82(2), and drew attention to the fact that such a document could, under the provisions of s.

> 24 of the *Interpretation Act*, be signed by the Deputy Minister. She advises me that she is unable to give me such an undertaking.
>
> In the circumstances, I suggested that the appropriate disposition for me to make, having regard to the fact that the offence with which the accused is charged, may be prosecuted either by indictment, or summarily, by virtue of the provisions of s. 78 of the *Fisheries Act*, would be for me to set aside the pleas of not guilty that have been entered in this matter, and to treat the information as being brought by indictment, and then to call upon the accused to elect their mode of trial.

[para11] Later on he said:

> .... [t]he information, not having been sworn within the six months limitation period, and there being no certificate from the Minister of Fisheries or his deputy, the effect in law is that the information which has been sworn, charges the accused with indictable offences, and their pleas of not guilty must be treated as nullities, and set aside.

[para12] The appellant applied in the Supreme Court for certiorari to quash its committal for trial. In his ruling on the application for certiorari the learned chambers judge said this:

> [t]he Crown submitted that the [Provincial Court] ruling was incorrect and that in effect Section 82 of the *Fisheries Act* was a code in itself. I am of the opinion that Section 34(2) of the *Interpretation Act* which reads in part: "... except to the extent that the enactment otherwise provides..." does incorporate the six months limitation period provided by the *Code*. Section 82 is an exception to the rule that there is a six month limitation period. The issue is, has the *Fisheries Act* otherwise provided.
>
> Section 82 governs circumstances in which the Minister becomes aware of the subject matter of the charge within a certain time. Such instances do not cover all circumstances, and in fact did not cover the issue here. This being so, the *Fisheries Act* does not constitute a complete code, and with deference to the learned Provincial Court Judge I conclude he was correct.

[para13] Accordingly he dismissed the application for certiorari.

III

[para14] On this appeal, the appellant raises the following issues:

1. The learned Chambers Judge erred in finding that the Crown's election to proceed summarily and the Appellant's pleas of not guilty were void and in failing to find that the learned Provincial Court Judge had jurisdiction to accept and act upon the election and to accept a plea.

2. The learned Chambers Judge erred in finding that the information remained a valid information charging an indictable offence.

3. The learned Chambers Judge erred in finding that the learned Provincial Court Judge had jurisdiction to strike out the election by the Crown to proceed summarily and the not guilty plea of the Appellant, and to proceed with the information by way of indictment after the proceedings had been conducted summarily from January 27th, 1992 until June 29th, 1992.

[para15] In its factum the respondent Crown raised an additional issue as follows:

4. The learned Chambers Judge erred in concluding that section 82 of the *Fisheries Act* only governs circumstances in which the Crown proves that the Minister is aware of the subject matter of the charge.

[para16] When the appeal came on for hearing, we asked counsel to address first the issue as to the correct interpretation of s-s.82(1), the limitation issue. Then we asked counsel to address what order ought properly to be made if we were to conclude that the respondent should succeed on the limitation issue. We reserved judgment on both of those issues, and advised counsel that, depending upon their resolution, we would if necessary hear them in full on the other issues which the appellant raises. In view of the disposition that I would make of the first two issues, I do not consider that any further hearing is necessary.

IV

Subsection 82(1) of the *Fisheries Act*

[para17] The respondent Crown says that both the learned Provincial Court Judge and the learned chambers judge erred in their interpretation of s-s.82(1) of the *Fisheries Act*. The respondent says the clear legislative intent was to provide a minimum two-year limitation period for proceeding by way of summary conviction, and that that minimum period might be extended for a period of time up to two years after the date on which "... the Minister became aware of the subject-matter of the proceedings."

[para18] Counsel said the provisions of s-s. 82(2), permitting proof by certificate of the date upon which the Minister became aware of the subject matter of the proceedings, would be applicable only in those cases where the Crown sought to extend the limitation period beyond the two- year minimum.

[para19] For the appellant, counsel contends that before any time limitation period under s-s.82(1) began to run, there must first be a "triggering event". That triggering event, says the appellant, is the Minister's becoming aware of the subject matter of the proceedings. In the absence of proof as to the Minister's awareness, s. 82 provides for no limitation period. In those circumstances, relying upon s-s.34(2) of the *Interpretation Act*, the appellant says that s-s.786(2) of the *Criminal Code* applies, and the limitation period for this summary conviction offence is six months. That was the view held by both the learned Provincial Court Judge and the learned chambers judge, and the appellant supports it.

[para20] With respect to contrary opinion, it is my view that this latter interpretation of s-s.82(1) is unreasonable and cannot be sustained. It would result in a six-month limitation period, followed by an indefinite period in which summary conviction proceedings would be barred, followed by a two-year limitation period commencing with awareness in the Minister of the subject matter of the proceedings.

[para21] A limitation period provides an end date, and not a start date. The Minister could not become aware of the subject matter of the proceedings before it occurred. He or she could become aware of the subject matter only on or after the date of its occurrence. Assuming the Minister's awareness at the time of the event, the minimum limitation would be two years. In the absence of evidence to the contrary, such an assumption is reasonable and in accord with common sense. If the Crown sought to proceed summarily outside that minimum two-year limitation period, it would have to show that the minimum period had been extended. Subsection 82(2) permits the Crown to do so upon proof that the Minister did not become aware until some date after which the two-year period would commence to run.

[para22] That interpretation of s-s. 82(1) is supported by looking at the predecessor section, before the amendments of 1 February 1991. The predecessor section provided:

> Any proceedings by way of summary conviction in respect of an offence under this *Act* may be instituted at any time within but not later than two years after the time when the subject-matter of the proceedings arose. R.S., c. F-14, s. 64; R.S., c. 17 (1st Supp.), s. 8.

[para23] This provision covered all circumstances and therefore amounted to a complete code. It was not necessary to refer to the six-month month limitation period set out in the *Criminal Code* in relation to fisheries offences because the *Fisheries Act* "otherwise provided."

[para24] Section 82 was amended by S.C. 1991, c. 1, s. 26. This legislation contained a number of provisions designed to strengthen and extend the enforcement capabilities of the *Fisheries Act*. The maximum penalties for offences under the *Act* were increased.

[para25] It is not logical that Parliament intended to revert back to a six-month limitation period under subsection 786(2) of the *Criminal Code*, considering the long history of the two-year limitation period for summary conviction proceedings under the *Fisheries Act*. Nor would such a reversion accord with the tenor of the other changes made to the *Act* in 1991. The thrust of those amendments was to strengthen and extend rather than weaken and restrict the Crown's powers of enforcement.

[para26] In *R.* v. *Aqua Clean Ships Ltd*. (29 July 1993), Vancouver 27584C (B.C. Prov. Ct.), His Honour Provincial Court Judge Bastin considered the limitation provisions in s-s. 117(1) of the *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c. 16, as amended. That limitation section is phrased in terms identical to those found in s-s. 82(1) of the *Fisheries Act*. The learned Provincial Court Judge in that case held that s-s. 117(1) provided for a limitation period of at least two years "... and longer under certain circumstances."

[para27] In my respectful view that is the correct interpretation of this language.

[para28] It was an error to conclude that s-s. 82(1) of the *Fisheries Act* required proof of the Minister's awareness before the two-year limitation period commenced. The subsection creates a minimum two-year limitation period for proceeding by way of summary conviction. That minimum period may be extended upon proof, as contemplated by s-s. 82(2), of the Minister's awareness for a period of up to two years beyond the date of that awareness.

[para29] In my respectful view the learned Provincial Court Judge erred when he concluded that the matter could not be proceeded with by way of summary conviction.

[para30] It is therefore necessary to determine what order ought properly to be made in the circumstances.

V

The Order to be made

[para31] Crown counsel says the appropriate remedy is to refer the case back to the Provincial Court for a summary conviction trial, on the original Information.

[para32] Counsel for the appellant says that there should be no referral to the Provincial Court for a summary conviction trial on the original Information. In support of this position, the appellant makes three arguments. They are:

1. the Provincial Court is functus, and the original information should be treated as though it had never been sworn or laid;

2. the provisions of the *Criminal Code* do not authorize the Court of Appeal to make the order for which the Crown contends; and

3. even if the Court of Appeal has a power under the *Code* to refer the matter back to the Provincial Court, it is a discretionary power which should be exercised against the Crown in the circumstances of this case.

[para33] On the first issue, counsel for the appellant says the Provincial Court Judge exceeded his jurisdiction by proceeding to hold a preliminary inquiry, and so lost jurisdiction over the offence alleged in the Information. The original Information is therefore void and must be treated as though it had never been laid. Counsel says that if the Crown wishes to proceed summarily, it must swear a new Information.

[para34] On the second issue, whether this Court has a power under the *Criminal Code* which would permit it to refer the case back to Provincial Court, in the event that the Information is still valid, counsel for the appellant says that there is no such statutory power. He points out that this is an appeal from the Supreme Court chambers judge's refusal of relief by way of certiorari. The chambers judge refused to quash the indictment or the committal for trial. Counsel says that if the judge erred on the limitation issue, the only appropriate remedy for this Court is to prohibit the Provincial Court from proceeding by way of indictment. Counsel says that to return the matter to

the Provincial Court for summary conviction trial now would in effect afford the Crown relief by way of mandamus. The Crown has not sought, and could not now seek, mandamus because the six-month time limit for doing so has passed. On the certiorari hearing before the chambers judge the appellant pointed out that there was no application by the Crown for mandamus, and the Crown did not pursue that line of argument.

[para35] On the third issue, counsel for the appellant says that even if this Court has a power under the *Criminal Code* to refer the case back to the Provincial Court for trial on summary conviction, the Court should refuse to exercise its discretion to do so. In exercising its discretion, if there is one, to return the matter to Provincial Court, counsel for the appellant says this Court should consider the following factors:

1. the offence alleged is relatively minor;

2. the accused came prepared for trial on the date set;

3. instead of a trial there was a five-day preliminary inquiry, with its attendant expense;

4. the Crown has not been diligent in pursuing matters by way of summary conviction; and

5. the Crown did not seek mandamus.

Now, over one year after the original trial date and over one year after the time limit for mandamus went by, the Crown, in effect, seeks that relief which is statute barred. The accused says that in all these circumstances the Court should exercise its discretion against referring the matter back to the Provincial Court.

[para36] In my view, the answer to the appellant's first point is found in s-s. 485(1) of the *Criminal Code*. That section reads:

> 485. (1) Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this *Act* respecting adjournments or remands.

[para37] Here, the Provincial Court Judge had jurisdiction under the *Fisheries Act* to try the case summarily. Because he held a mistaken view of the time limit for doing so, he felt that he could not proceed summarily. He thus failed to act in the exercise of that jurisdiction within the time limited for doing so. On a plain reading of s-s. 485(1), the Provincial Court did not lose jurisdiction in the circumstances.

[para38] Counsel for the appellant says that s-s.485(1) was not intended to apply to a case such as this. He says the subsection was enacted so as to prevent loss of jurisdiction which would otherwise result from administrative or clerical errors. He says the section was enacted as a cure

and in response to cases such as *Doyle* v. *R.*, [1977] 1 S.C.R. 597, (1976), 29 C.C.C. (2d) 177, 35 C.R.N.S. 1, 68 D.L.R. (3d) 270, and *R.* v. *Krannenburg*, [1980] 1 S.C.R. 1053, 51 C.C.C. (2d) 205, 17 C.R. (3d) 357, 108 D.L.R. (3d) 333, [1980] 2 W.W.R. 651. He says the subsection was not intended to apply where the failure to act resulted from a judicial or legal error of a serious nature, such as occurred here. No authority is cited to support the interpretation of s-s. 485(1) for which the appellant contends.

[para39] I would not give effect to this argument because in my view, on a plain reading, s-s. 485(1) applies.

[para40] The second point argued is that this Court does not have jurisdiction to make the order sought by the Crown remitting this case to the Provincial Court for trial on summary conviction. The order from which the appellant brings this appeal is one in which the Supreme Court Judge, in chambers, dismissed the appellant's application for certiorari. The appellant's argument is that this Court's jurisdiction is therefore limited to two alternatives. It may allow the appeal, grant an order in the nature of certiorari, and quash the order of the Provincial Court Judge committing the appellant to stand trial. Or, the Court may dismiss the appeal, refuse certiorari, and permit the appellant's trial by way of indictment to proceed. The appellant claims that these are the only two dispositions open to this Court, and that it may not, in particular, make the order sought by the Crown returning the case to Provincial Court for trial by way of summary conviction proceedings.

[para41] The relevant provisions of the *Criminal Code* on this issue are s-ss. 784(1) and (2):

> 784 (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of mandamus, certiorari or prohibition.
>
> (2) Except as provided in this section, Part XXI applies, with such modifications as the circumstances require, to appeals under this section.

[para42] Subsection 784(2) brings into play, inter alia, s-s. 683(3) of the Code, which reads:

> 683 (3) A court of appeal may exercise, in relation to proceedings in the court, any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court, but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.

[para43] The powers which might be exercised by this Court in a civil case include the powers contained in s. 9 in the *Court of Appeal Act* and therefore (on an application for certiorari) the powers contained in the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, as amended. Section 5 of that *Act* provides:

> Power to remit
>
> 5. (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal

> whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application for judicial review relates.

[para44] I therefore conclude that by virtue of s-s. 683(3) this Court could remit the case to the Provincial Court with a direction that it reconsider its jurisdiction to proceed by way of summary conviction proceedings in accordance with the opinion of this Court as expressed above. Having concluded that summary conviction proceedings were not barred by any time limitation, and that the Provincial Court retained jurisdiction by the application of s-s. 485(1), the Provincial Court could then proceed to try the appellant on the original Information by way of summary conviction.

[para45] I would therefore not give effect to the second point argued by the appellant.

[para46] The final question is whether this Court should exercise a discretion to refer the case back to the Provincial Court for trial on summary conviction proceedings. The Crown agrees that the power to do so is discretionary. However, the Crown does not concede any lack of diligence on its part. It says it has always taken the position that the case should be proceeded with by way of summary conviction. It was only when the learned Provincial Court Judge held that it could not do so that the Crown agreed to proceed by way of indictment. Once the Judge made his ruling, it was not open to the Crown to adopt a contrary position and to attempt to proceed summarily.

[para47] In the unusual circumstances of this case, it would in my view be unfair now to require the appellant to submit to a trial on summary conviction proceedings in the Provincial Court. I do not think the unfairness arises from anything which the Crown has, or has not, done. It arises rather because of the lapse of time from the date of the alleged offence in early 1991, almost three years ago, and the expense to which the appellant has already been put in defending itself upon the preliminary inquiry, and in pursuing prerogative writ relief in the Supreme Court of British Columbia and in this Court. The delay and expense resulted from the misinterpretation of s-s. 82(1) of the *Fisheries Act* by the learned Provincial Court Judge.

[para48] I would set aside the order of the Chambers judge and direct that all further proceedings on the original Information be stayed.

ONTARIO COURT OF JUSTICE – GENERAL DIVISION

[Indexed as: R. v. Boise Cascade Canada Ltd.]

Between Boise Cascade Canada Ltd., Appellant, and Her Majesty The Queen, Respondent

Platana J.

Fort Frances, June 3, 1994

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 35, 36(3), 36(4), 78.6 – charge under s. 36(3) of depositing a deleterious substance – accused had permit under *Public Lands Act* – whether abuse of process – stay granted**

Defences – due diligence – defence not available when accused operating under provincial permit – could not carry on activity without breaching *Fisheries Act*

Criminal procedure – abuse of process – test whether fair and just – not fair and just to be charged by same authority who granted permit under different legislation

Summary: The Appellant was charged under s. 36(3) of the *Fisheries Act* with depositing or permitting the deposit of a deleterious substance into waters frequented by fish… The Appellant was a logging company operating in the Manitou Forest Management area and had constructed, through an independent contractor, a culvert crossing in an unnamed stream. The Appellant had been issued a work permit by the Ontario Ministry of Natural Resources under the *Public Lands Act* to construct water crossings, including a culvert stream crossing on the Whalen Road. The same provincial department charged the Appellant under the *Fisheries Act* following the deposit of sediment into the stream during construction.

Following the trial, the Appellant brought a motion requesting that the Justice of the Peace issue a stay of proceedings based on an abuse of process. The motion was denied and the Appellant found guilty. This is an appeal from conviction. The Appellant was also charged under the *Public Lands Act* with violating various terms of its permit and entered a plea of guilty.

The Appellant argued that the learned Justice of the Peace erred in finding that the defence of due diligence was available under s. 78.6 of the *Fisheries Act* because that defense is only available where a consequence occurs which itself is not necessarily permitted by legislation. The court agreed that no matter how diligently the company did its work it could not avoid deposit of sediment into the stream during construction of the culvert and thus, could not avoid violating the *Fisheries Act*. While s. 36(4) anticipates regulations permitting the deposit of deleterious substances, none had been passed. The court found that due to the gap in the regulatory process and in the way the two pieces of legislation are administered by the Province, that it would not be fair and just to allow the same administering authority to both permit an act and subsequently charge the Appellant with an offence for doing that which was permitted.

Held: Appeal allowed and the proceedings stayed.

REASONS/MOTIF:

Clare Brunetta, Counsel for the Respondent
Paul Cassidy, Counsel for the Appellant

[para1] PLATANA J.:-- The Appellant, Boise Cascade Canada Ltd, Appeals from a conviction on July 23, 1993, on a charge of depositing a deleterious substance into waters frequented by fish contrary to Section 36(3) of the *Fisheries Act*, R.S.C. 1985, Chapter F-14 as amended.

[para2] 36(3) Subject to Sub. Section (4)

> "No person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

[para3] Following a trial, which proceeded on the basis of an agreed statement of facts and certain exhibits which were filed, the Appellant brought a Motion requesting that the Justice of The Peace Stay Proceedings based on an abuse of process.

[para4] The Motion was denied and the Appellant was found guilty.

[para5] The Appellant is a company duly incorporated to carry on business in the Province of Ontario and has carried out extensive logging and associated activities in the Manitou Forest Management area either directly or indirectly through its servants or agents.

[para6] The Ontario Ministry of Natural Resources has charge of the management, sale and disposition of the public lands and forests of Ontario. Work permits are issued by the Ministry to individuals or corporations to carry out activities as described in the permit on public lands. This Ministry also administers the Federal *Fisheries Act*.

[para7] On or about March 22, 1991, a work permit No. FF-1991-91-18.00 was issued to the Appellant by the Ontario Ministry of Natural Resources pursuant to Section 14 of the *Public Lands Act*, R.S.O. 1990, C.P. 43, to construct water crossings, including a culvert stream crossing on the Whalen Road. A further work permit was issued extending the time for such work to be completed. The unnamed stream is acknowledged to fall within the definition of 'water frequented by fish' under Section 36(3) of the *Fisheries Act*.

[para8] Following the issuance of the permit, the Appellant contracted with an independent contractor to construct the culvert stream crossing. Construction commenced in the summer of 1991 and was substantially completed in late November of that year. By that time, a large amount of fill had been placed over the culvert.

[para9] The stream over which the culvert was constructed flows into Bat Lake. This lake contains numerous fish species as documented in a 1976 lake survey, angler checks by conservation officers and seine net checks at the stream mouth.
[para10] It is obvious that the deposit of fill or sediment of some type and amount during culvert stream crossing construction is a necessary consequence of such construction. A deposit of sediment into waters frequented by fish during construction could not be avoided.

[para11] The construction of the culvert stream crossing resulted in the release of deleterious substances, namely sediment, into the stream between June 1st of 1991 and August 20th of 1992.

[para12] The construction of this culvert stream crossing was carried out under the authority of the previously noted permit issued under the *Public Lands Act*. The Appellant was also charged with violating certain conditions of the permit issued and in fact has entered a plea of guilty to a charge under Section 14 (A)(1)(b) of the *Public Lands Act*. At trial, defense counsel's argument was that the work permit issued allowed the dumping of fill into the water to hold the culvert in place.

[para13] Section 78.6 of the *Fisheries Act* provides:

> 78.6 Due diligence defence. - No person shall be convicted of an offence under this Act if the person establishes that the person
>
> (a) exercised all due diligence to prevent the commission of the offence; or
>
> (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

[para14] Counsel then further argued that the defense of due diligence or reasonable care as provided in this Section 78.6 was for all practical purposes not available to the Appellant in this case. His argument is that due diligence only applies in circumstances where a consequence occurs, which consequence in and of itself is not necessarily permitted by legislation.

[para15] In reviewing that submission at trial, the learned Justice of the Peace noted specifically that since Section 78.6 provided a due diligence defense this charge was therefore one of strict liability. He went on to indicate that the defense of due diligence had not been made out and accordingly entered a conviction.

[para16] In addition to the argument as to the applicability of the due diligence defense, the accused also argued that it ought to have been entitled to an acquittal on the basis of the defense of officially induced error. The basis of that defense lies in the fact that the Ministry of Natural Resources issued a permit for work to be done with respect to constructing a culvert, and then that same government agency subsequently laid the charge under the *Fisheries Act* charging the Appellant with the very nature of the work for which they themselves had issued a permit. At trial, the Justice of the Peace simply noted that the evidence in this case did not justify such a finding.

[para17] On this Appeal both counsel have indicated to me that the Appeal turns on an interpretation of the decision in *R.* v. *MacMillan Bloedel (Alberni) Ltd.* (1979), 47 C.C.C. (2nd) (110) (B.C.C.A.). The specific reference referred to by both counsel occurs at page 121 of that decision where the Court states:

> "The purpose of this legislation is to prevent waters being rendered deleterious to fish and that, if given the plain meaning of the words, an absurdity will result. It is said that if a teaspoon of oil was put in the Pacific Ocean, and oil was a deleterious substance, that would constitute an offence. In its submission that absurdity can be avoided by reading the Act to require that the water be made deleterious. There are some attractions to that reasoning, but I think that the result would be as at least as unsatisfactory."

At page 122,

> "Had it been the intention of Parliament to prohibit the deposit of a substance in waters so as to render that water deleterious to fish, that would have been easy to express. A different prohibition was decided on. It is more strict. It seeks to exclude each part of the process of degradation. The thrust of the section is to prohibit certain things, called deleterious substances, being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply."

[para18] Counsel for the Appellant submits that on the basis of MacMillan Bloedel, as soon as any deleterious material is put into waters, the offence is made out. He submits that the due diligence defense is aimed at the situation where someone is constructing something near to a body of water and where, after a deposit has occurred, it is shown that it could have been avoided if all reasonable care had been taken. He then goes on to suggest that in this situation, the very activity involves putting sediment into the water and that therefore the Section 78.6 due diligence defense cannot apply.

[para19] Section 36(4) contains provisions for regulations to be made allowing the deposit of deleterious substances in certain circumstances.

> 36(4) - "The Governor and Counsel may make regulations for the purpose of:
>
> (b) prescribing:
>
> a) a deleterious substance or classes thereof authorized to be deposited not withstanding Sub. Section (3)."

No such regulations have been put into effect under this Sub-Section. The effect of this, counsel submits, is that at this time there cannot be permitted any culvert stream crossings under the provisions of the *Fisheries Act*. It is impossible to even apply for a permit to come within Section 36(4).

[para20] It is on this basis that counsel suggests the learned Justice of the Peace erred in law in determining that the due diligence defense was available to the Appellant at the trial of this matter. Counsel suggests that there is a gap in the regulatory process and what has happened in this case is

that the Ministry of Natural Resources has issued a permit under the provisions of the *Public Lands Act* of the Province of Ontario to carry out an activity the very nature of which contravenes Section 36 of the *Fisheries Act*. Counsel submits that even in the event that a permittee complies completely with the conditions of any permit issued under the *Public Lands Act*, there is still an automatic breach of section 36 of the *Fisheries Act* to which the defendant is not entitled to raise any defense.

[para21] The Respondent acknowledges that a strict reading of Section 36(3) would appear to create an absolute liability offense and since the legislature has not deemed it appropriate to pass any regulations to take it out of the realm of absolute liability it becomes absurd. He suggests that if the defendant had acted in a commercially reasonable manner then the defense would be available to him. He submits that in the absence of regulation I must look at what happened in the facts of this case and apply these to the existing common law.

[para22] The Respondent acknowledges that the Appellant in this case could not have constructed this culvert stream crossing without violating the *Fisheries Act*. He argues that due diligence does not mean not depositing anything into the water, but that it means minimizing the impact by following the guidelines that are put in place, by doing it in a reasonable manner, as a reasonable man ought to to minimize the effect of the impact. The Respondent further indicates in his submissions that if I accept the Appellant's interpretation of MacMillan Bloedel, that any speck of oil in the ocean constitutes the offense and that one cannot absent themselves from that, then I should indeed give weight to the Appellant's request for a Stay.

[para23] The Respondent's interpretation of the *Fisheries Act* is that when a deleterious substance is deposited into water, the elements of the offense have been satisfied but that there is still then a defense available under Section 78.6. He suggests to me that this case boils down to one simple element. If the defense can establish that it took whatever steps are reasonable under the circumstances of this particular construction to minimize the impact, to minimize the amount of substance into the water, then the due diligence is available and the accused ought not to have been convicted.

[para24] The Respondent refers me to *R.* v. *Rayonier Canada Ltd*., an unreported decision of the British Columbia Provincial Court for the proposition that participation by Federal Officials in the formulation of pollution standards for inclusion in a Provincial License granted to the accused does not preclude the Federal Crown from laying charges under the Federal Legislation even if compliance with the Provincial instrument would still have resulted in violation of the Federal Enactment. The trial judge in *Rayonier* determined that there had been no abuse of process and the trial was ordered to proceed. Counsel did not provide me with the facts of that case.

[para25] The Respondent also refers me to the decision in *Regina* v. *Pioneer Timber Company Ltd.*, Fisheries Pollution Reports, 279,

> "An offense prescribed under Section 33(2) of the *Fisheries Act* is a public welfare offense where proof of mens rea is not necessary, leaving it open to the accused to avoid liability by proving that it took all reasonable care."

[para26] The Section of the Act in that case read as follows:

> "33(2) subject to Sub. Section (4), no person shall deposit or permit the deposit of a deleterious substance of any type frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

[para27] The facts of that case as noted in the head-note are that the accused, while rebuilding an old logging road, deposited some blasted clay and gravel material on the lower side of the road directly above the head-wall of a tributary stream. The following day, during a spring thaw, a flood of water ran down the road surface and poured over the edge of the road, through the deposited material and into the tributary stream. Two conservation officers found that what had been a clear stream the day before was now dirty. The sediment causing the water to become dirty came from the clay and gravel deposit.

[para28] Further in, *Regina* v. *Connor Farms* Ltd., Fisheries Pollution Reports, 23, the accused corporation had authorization under Provincial Water Rights Legislation to construct and operate a dam. It was determined that the Company took no reasonable steps to ensure a flow of water through the dam and into a creek which contained salmon fry. Fry were destroyed as a result of the loss of water. The Corporation was charged under the *Fisheries Act.*

[para29] The British Columbia County Court held that authorization to construct and operate a damn under Provincial Water Rights Legislation did not relieve the accused of liability under the Federal *Fisheries Act.*

[para30] In *R.* v. *Jack Cewe Ltd*., 4 Fisheries Pollution Reports, 271, the accused was acquitted after raising the defense of due diligence to a charge under Section 33(2) of the *Fisheries Act*. The accused owned a gravel pit operation and was charged with depositing material from the outfall of a culvert to a river. However, the Court did not accept the inference that the matter coming out of the culvert was coming solely from the sediment stock pile located on the accused company's property. The Court also held that the Company took all reasonable steps to contain and solve their environmental problem in allowing the defense.

[para31] In my view, these cases can be distinguished from the situation where an accused intentionally deposits a deleterious substance into water. With respect to this offence, that means that an accused can rely on this defence only if it can be demonstrated that all reasonable care was taken to avoid the deposit of the deleterious substance, in this case, the fill. No matter how diligently the Appellant's construction activities were undertaken, the construction of the culvert stream crossing necessarily required the deposit of the fill. The Appellant could not have obtained a permit to do so under Section 36(4) since no regulations have been passed thereunder.

[para32] That does lead to the situation that the only way the Appellant could avoid the commission of the offence in these facts was to refrain from building the crossing.

[para33] We are then faced with the situation that such crossings are required for development, not only by this Appellant but by others who require to build roads to cross streams to carry out

their business undertakings. Indeed, many operations in this Province require such streams to be crossed and the only practical way to do so is by way of such type of crossing.

[para34] There indeed appears to be a gap in the regulatory process and in the way these two pieces of legislation are administered by the Province. On the one hand, there is no way that a culvert stream crossing can be constructed without attracting liability under the *Fisheries Act*. On the other hand, the same Provincial body to whom authority for enforcement under such Act has been delegated, issues permits to construct such crossings.

[para35] It is important for my determination of this Appeal to note the manner in which all charges against this Appellant were dealt with. Charges were laid both under the *Fisheries Act*, and the *Public Lands Act*. The charges under the *Public Lands Act* resulted in pleas of guilty. It may well be on the basis of cases cited by the Respondent, that had charges been laid only under the *Fisheries Act*, the Appellant may not have been in a position to plead that permission by a Provincial authority allows the breach of a Federal statute. However, the situation, in my view, is very different where the same enforcement authority lays charges under both Federal and Provincial Acts.

[para36] Counsel for the Respondent has argued that if the Appellant had complied with the terms of the permit issued under the *Public Lands Act* and had taken reasonable care, no charges would have been laid under the *Fisheries Act*. That argument is unacceptable. Any person is entitled to proceed with their actions without having the concern of knowing that to do so violates a statute and that the prosecution of same is totally dependent upon a discretionary decision by the enforcement authority.

[para37] I recognize that the impact of this decision will, in essence, if I accept the argument of the Appellant, mean that no culvert stream crossings can be constructed without violating the *Fisheries Act*, whether or not a permit is issued under the *Public Lands Act*. That is a problem for the legislation to contend with by passing the appropriate regulations of the *Fisheries Act*. Counsel have advised that subsequent to the charge being laid in this matter, regulations have been passed under Section 35 of the Act which deals with the harmful alteration, disruption or destruction of fish habitat but that no similar regulation has been passed under Section 36. Since there was no regulation in effect in the time frame of this charge, it is not necessary for me to determine the affect of the regulation now passed on Section 36.

[para38] The Appellant requests that this appeal be allowed on the basis of abuse of process. Counsel refers me to *Regina* v. *Northwood Pulp Timber Ltd*., an unreported decision of His Honour Judge R.B. Macfarlane, in the Provincial Court of British Columbia:

> "By the very nature of the pulping process, toxicants are released into the environment."

From page 14,

> “The state of the law with respect of abuse of process is to be found in the Ontario Court of Appeal case *RE: Abitibi Pulp and Paper and the Queen*, 47 C.C.C. (2nd) at 407. Mr. Justice Jessep at page 495, having found that in the prosecution of a provincial statute: 'a

> provincial judge had jurisdiction to Stay Proceedings before him for abuse of process...' concluded at page 496,
>
> 'The cases use such adjectives as vacuous, unfair, oppressive and now 'most exceptional circumstances' in describing conduct deemed to be an abuse of process...'
>
> In my opinion, the conduct of the crown in this case, in breach of an undertaking by one of its senior officers, attracts each of the adjectives I have mentioned.".

From page 15,

> "Thus, the law has settled that the accused must establish on a balance of probabilities that prosecuting the company for breach of the total suspended solids parameters and their permit is so offensive in the circumstances as to be an abuse of process."

Counsel has also referred to me the decision in *R.* c. *Gravel Chevrolet Oldsmobile Inc.* 8 C.R. (4th), 316,

> "Considering the exceptional circumstances of the case, the proceedings should be Stayed without discussing the validity of the officially induced error. The State, which has full knowledge of an advertising contest that a person is about to manage, cannot approve it by requiring the payment of a fee, despite its illegality, and then charge the person before a criminal court. The State cannot use the judicial process to obtain the conviction of a person induced into error by the system"

[para39] Further, in *R*. v. *D*(E) 73 O.R. (2nd), 758 at 767,

> "A finding of abuse of process requires a delicate balancing of rights and interests, not in the abstract, but in the context of society's changing perception of what is fair and just."

[para40] Government regulatory process can often be complicated to understand and may at times lead to confusion. Whether or not the Appellant complied with the terms of any permit issued is irrelevant. In the strict wording of Section 36(3) of the *Fisheries Act*, no permit should have been issued under the *Public Lands Act*. The argument that if the permit had been complied with, charges under the *Fisheries Act* would not have been laid is also irrelevant.

[para41] In circumstances such as this, it is in my view not fair and just that the Appellant should be required to face a charge of having committed an offence by doing the very act which it was permitted to do by the same administering authority.

[para42] This Appeal is therefore allowed and the proceedings are stayed.

NORTHWEST TERRITORIES SUPREME COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #5]

Between Her Majesty the Queen on the information of Neil Bruce Scott, Enforcement and Compliance Officer, Respondent and Cross-Appellant, and The Commissioner of the Northwest Territories, Appellant and Cross-Respondent

de Weerdt J.

Yellowknife, July 22, 1994

***Fisheries Act*, R.S.C. , c. F-14, ss 2, 34(1), 36(3), 36(4), 36(5), 40(2)(a), 40(5)(a), 78.6, 79.2(f) – whether s. 36(3) is constitutionally vague – is a valid exercise of federal authority under s. 91(12) of the *Constitution Act, 1867* – conviction under the act is not inevitable once a decision is made to prosecute – section does not lack fair notice to citizens or create a "standardless sweep" – act of "permitting" a deposit under s. 36(3) – lack of action to prevent the deposit …, which ought to have been foreseen and could have been prevented through due diligence, is an offence**

***Northern Inland Waters Act*, R.S.C. 1985, c. N-25, ss 2(1), 7, 8(1), 11, 29 – definition of "waters" – use of "waters" under this act does not authorize use of "internal waters" on the seacoast in "Canadian fisheries waters" under the *Fisheries Act* – scope of licenses – scope is restricted to the legislative scope of the statute**

***Canadian Charter of Rights and Freedoms, 1982*, ss 1, 7, 24(1) – whether provision unconstitutionally vague – s. 36(3) of the *Fisheries Act* meets established tests – test is whether the provision provides an adequate basis for legal debate -- threshold for meeting this test is high**

Defences – necessity – no emergency where accused's fault consists of actions whose clear consequences actually occurred

Summary: This is an appeal from a conviction under s. 36(3) of unlawfully depositing or permitting the deposit of a deleterious substance (sewage) in water frequented by fish (Koojesse Inlet) at or near Iqualuit, Northwest Territories on and between June 1 and June 10, 1991.

The appeal was limited to four issues. The first argument by the Appellant asserted that s. 36(3) of the *Fisheries Act* is unconstitutionally vague contrary to ss 1 and 7 of the *Charter of Rights and Freedoms*. The learned justice determined that there are two theoretical foundations for the doctine of vagueness: fair notice to the citizen and limitation of enforcement discretion. Fair notice constitutes both formal notice and substantive notice, which is an understanding that certain conduct is the subject of legal restrictions. A provision is constitutionally vague where it gives insufficient guidance for legal debate due to lack of precision. The threshold to be crossed before a provision is found to be constitutionally vague is high. S. 36(3) was not shown to lack fair notice to citizens or to create a "standardless sweep". Neither was s. 36(3) shown to have insufficient

limitations on its enforcement such that it did not lack sufficient precision that a conviction would automatically follow a prosecution.

The second challenge by the appellant was based on the argument that the accused was acting in compliance with a license granted under the *Northern Inland Waters Act*, whose provisions must prevail in the event of a conflict with the *Fisheries Act*, and in any event, he was exempted under s. 36(4) of the *Fisheries Act* as a licensee under another federal statute. The learned justice decided this point in favour of the respondents on two bases: one, the definition of "waters" in the *Northern Inland Waters Act* refers only to inland waters and could not authorize the Town of Iqualuit to use "internal waters" on the sea coast included in "Canadian fisheries waters" as defined in the *Fisheries Act*; and two, that nothing in the license absolves the licensee from complying with the *Fisheries Act*.

The third issue concerned whether the trial judge erred in law as to the test he applied in determining that the accused committed the actus reus of the offence charged. Focusing on three points, proof that the appellant "permitted the deposit", the substance was "deleterious" and it was in "water frequented by fish", the learned justice concluded that there was no merit in submissions that the actus reus of the offence was not established.

The last issue concerned whether the verdict reached by the trial judge was unreasonable and not supported by the evidence. The court accepted the appellant's submission that the evidence could not support a conviction for June 1, 1991 and amended the conviction to June 2, 1991. In respect to this issue, the learned justice disposed of five arguments as follows: (1) the trial judge did not err in failing to mention the defence of necessity given the evidence before him; (2) there was no substantial wrong or miscarriage of justice resulting from the trial judge's reference to a government report; (3) the trial judge exercised his discretion judicially when considering the appellant's application to reopen its case; (4) in a prosecution, the Crown is not estopped from challenging the validity of evidence produced by the Crown in right of Canada; and (5) it is too late, on appeal, to raise certain complaints of Crown non-disclosure of evidence.

Held: Appeal of the conviction was dismissed.

REASONS/MOTIF:

John Donihee and Priscilla Kennedy, Counsel for the Appellants
John D. Cliffe and Brett O. Webber, Counsel for the Respondents

de WEERDT J.:--

I. Introduction

[para1] The Commissioner of the Northwest Territories appeals against the conviction, entered against the Crown in right of Canada as represented by him, of unlawfully depositing or permitting the deposit of a deleterious substance (sewage) in water frequented by fish (Koojesse Inlet) at the Iqaluit sewage lagoon at or near the Town of Iqaluit in the Northwest Territories on and between

June 1st and 10th 1991, in violation of s.36(3) and contrary to s.40(2)(a) of the *Fisheries Act*, R.S.C. 1985, c. F-14.

[para2] Should that appeal fail, the Commissioner also appeals against the sentence imposed by the trial judge in the Territorial Court in respect of that conviction. The sentence consists of fines totalling $49,000 plus a penalty by way of payment order, pursuant to s.79.2(f) of the *Fisheries Act*, in the amount of $40,000. Neither of these amounts has been paid to date, an order of this Court suspending their payment until the appeals have been determined having been made on April 8th, 1994.

[para3] These appeals are opposed by the Crown represented by counsel on behalf of the Attorney General of Canada. And the Crown cross-appeals against the sentence mentioned.

[para4] To avoid confusion, I shall refer to the first mentioned appellant as "the Commissioner" and to the last mentioned appellant as "the Crown".

[para5] It may be mentioned that the Commissioner is the chief executive officer of the Northwest Territories pursuant to s.3 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27, having the responsibility of administering the government of these Territories under instructions from time to time given by the Governor General in Council or the Minister of Indian Affairs and Northern Development of Canada, as provided by s.4 of the *Act*. The powers of the Commissioner include those vested before September 1st 1905 in the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as declared by s.5 of the *Act.*

[para6] The conviction and sentence under appeal were entered in summary conviction proceedings governed by Part XXVII of the Criminal Code, under s.34(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21. The appeals are therefore likewise governed by that Part.

[para7] For convenience of reference, each of the decisions of the trial judge now challenged on appeal is reported as *Canada (Environment Canada)* v. *Northwest Territories (Commissioner)*, [1994] 1 W.W.R. 430, 441 and 459; 12 C.E.L.R. (N.S.) 25, 37 and 55 (N.W.T. Terr.Ct.).

[para8] Submissions by counsel on the sentence appeals have been deferred pending the determination of the conviction appeal. What follows is therefore restricted to the conviction appeal.

II. Issues

[para9] Four issues call for determination:

1. Is s.36(3) of the *Fisheries Act* unconstitutionally vague?

2. Was the conviction precluded by the issuance of a licence pursuant to the *Northern Inland Waters Act*, R.S.C. 1985, c. N-25?

3. Did the trial judge err in law as to the test he applied to determine if the Commissioner committed the actus reus of the offence charged?

4. Was the verdict reached by the trial judge unreasonable and unsupported by the evidence?

III. Vagueness

1. Subsection 36(3) of the *Fisheries Act*

[para10] This provision reads:

> (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deleterious substance may enter any such water.

[para11] Subsection 36(3) must of course be understood within its context. The immediate context, to which it refers, is subsection 36(4); and that subsection makes specific reference to subsection (5). These additional subsections read as follows:

> (4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
>
> > (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this *Act*; or (b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5).
>
> (5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing
>
> > (a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);
> >
> > (b) the waters or places or classes thereof where any deleterious substance or classes thereof referred to in paragraph (a) are authorized to be deposited;
> >
> > (c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;
> >
> > (d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;

(e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and

(f) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.

2. The wider context: definitions

[para12] Section 34 of the *Fisheries Act* states:

34. (1) For the purposes of sections 35 to 43, "deleterious substance" means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c);

"deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

"fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;

"water frequented by fish" means Canadian fisheries waters.

(2) The Governor in Council may make regulations prescribing

(a) substances and classes of substances, (b) quantities or concentrations of substances and classes of substances in water, and (c) treatments, processes and changes of water

for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsection (1).

[para13] The language of s.36(3), read in the context of s.34, is to be understood in accordance with the following specific definitions in s.2 of the *Act*:

2. In this *Act*,

"Canadian fisheries waters" means all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada:

"fish" includes shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

[para14] The expression "no person" in s.36(3) includes reference to the Commissioner. More precisely, as provided by s.3(2) of the *Act*:

(2) This *Act* is binding on Her Majesty in right of Canada or a province.

[para15] The term "province" includes the Northwest Territories, pursuant to s.35(1) of the *Interpretation Act*. It is therefore immaterial whether the Commissioner is classed as a representative of Canada or of the Northwest Territories, for purposes of s.36(3) of the *Fisheries Act*.

3. The test for unconstitutional vagueness

[para16] The Commissioner relies upon the unanimous decision of the Supreme Court of Canada in *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289, 15 C.R. (4th) 1, 93 D.L.R. (4th) 36, 10 C.R.R. (2d) 34, 43 C.P.R. (3d) 1, 114 N.S.R. (2d) 91, 31 A.P.R. 91, 139 N.R. 241 in support of his submission that subsection 36(3) of the *Fisheries Act*, as fisheries legislation, fails to delineate an area of risk and creates a "standardless sweep" of law enforcement, as interpreted by the courts to date, so that it is so vague and overbroad that a conviction almost surely follows from the decision to prosecute, all contrary to s.7 and s.1 of the *Canadian Charter of Rights and Freedoms*, which provide (in reverse order):

1. The *Canadian Charters of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[para17] In the Nova Scotia Pharmaceutical Society case it was held that "the threshold for finding a law vague is relatively high". Furthermore:

> The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness ... These two rationales have been broadly linked with the corpus of principles of government known as the "rule of law", which lies at the core of our political and constitutional tradition.

a. Fair notice to the citizen

> Fair notice to the citizen, as a guide to conduct and a contributing element to a full answer and defence, comprises two aspects.
>
> First of all, there is the more formal aspect of notice, that is acquaintance with the actual text of a statute. In the criminal context, this concern has more or less been set aside by the common law maxim, "Ignorance of the law is no excuse", embodied in s.19 of the Criminal Code, see *R.* v. *MacDougall*, [1982] 2 S.C.R. 605, 1 C.C.C. (3d) 65, 142 D.L.R. (3d) 216. ... In any event, given that, as this court has already recognized, case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not of central concern in a vagueness analysis.
>
> ... There is also a substantive aspect to fair notice, which could be described as a notice, an understanding that some conduct comes under the law ...
>
> Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values held by society. It is no coincidence that these enactments are often found vague ...
>
> Hence, aside from a formal aspect which is in our current system often presumed, fair notice to the citizen comprises a substantive aspect, that is an understanding that certain conduct is the subject of legal restrictions.

b. Limitation of enforcement discretion

> ... A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.
>
> * * *

d. The scope of precision

This leads me to synthesize these remarks about vagueness. The substantive notice and limitation of enforcement discretion rationales point in the same direction: an unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague.

... Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

By setting out the boundaries of permissible and non- permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed, no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk ...

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use terminology of previous decisions of this court, and therefore fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

e. Vagueness and the rule of law

... The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law

> in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

4. Applying the test

[para18] Recent decisions of our highest court which apply the test enunciated in the Nova Scotia Pharmaceutical Society case may be noted. In *R.* v. *Morales* (1992), 77 C.C.C. (3d) 91, 17 C.R. (4th) 74 (S.C.C.), the difficulties inherent in the doctrine of unconstitutional vagueness are illustrated by the dissenting reasons of Gonthier J. (L'Heureux Dubé J. concurring), especially since Gonthier J. had, only months before, written for the unanimous court in the Nova Scotia Pharmaceutical Society case. The court was also divided in *R.* v. *Finta* (1994), 20 C.R.R. (2d) 1 (S.C.C.), though there again the dissenting minority joined with the majority in applying Nova Scotia Pharmaceutical Society.

[para19] Both in the Nova Scotia Pharmaceutical Society decision and in *R.* v. *Finta* the court declined to strike down the impugned legislation as unconstitutionally vague. That ground of challenge succeeded, however, in *R.* v. *Morales*.

[para20] In the case of Nova Scotia Pharmaceutical Society the court upheld as valid, in the face of a challenge of unconstitutional vagueness, the somewhat generally expressed provisions of what is now s.45(1)(c), (2) and (2.2) of the *Competition Act*, R.S.C. 1985, c. C-34. The provisions there impugned were considered to be a pillar of the *Act*, which was held to be "central to Canadian public policy in the economic sector". It is noteworthy that the court made the point that s.45(1)(c), then s.32(1)(c),

> ... must not be taken in a vacuum. Its interpretation is conditioned, first of all, by the purposes of the *Act*. Furthermore, its content is enriched by the rest of the section in which it is found and by the mode of inquiry adopted by courts as they have ruled under it. These are matters of law ...

[para21] In *R.* v. *Morales*, Lamer C.J. for the majority held that the expression "public interest" had not received a consistent and workable meaning from the courts, as that expression appeared in s.515(10)(b) of the Criminal Code. To that extent, then, this provision was held to be unconstitutionally vague and, consequently, inoperative. And the rationale relied upon for the decision was the need for a limitation of law enforcement discretion. Once again it is noteworthy that the court sought an interpretation of the impugned legislation on the basis of decisions reached in the lower courts rather than by formulating one of its own.

[para22] Finally, in *R.* v. *Finta*, the court upheld the extraordinary jurisdiction conferred upon Canadian courts by s.7(3.71) of the Criminal Code to adjudicate prosecutions of war crimes and crimes against humanity committed outside Canada either before or after the enactment of that law. The expressions "war crime" and "crime against humanity", as defined by s.7(3.76) of the Code, were held not to be unconstitionally vague. Given the extraordinary reach of this legislation and the widely general scope of these definitions, this case therefore provides a recent illustration of the considerable height of the threshold to be crossed before a law may be declared inoperative on grounds of unconstitutional vagueness.

5. Application of the test in the instant appeal

[para23] Subsection 36(3) of the *Fisheries Act* was unanimously held to be a valid exercise of federal legislative authority pursuant to s.91(12) of the *Constitution Act*, 1867 in Northwest Falling Contractors Ltd., [1980] 2 S.C.R. 292, [1981] 1 W.W.R. 681, 53 C.C.C. (2d) 353, 113 D.L.R. (3d) 1, 32 N.R.541. Although decided before the advent of the *Canadian Charter of Rights and Freedoms*, that case is worthy of note for its examination of the definitions, in the *Fisheries Act* of that day, of the expressions "deleterious substance", "deposit", "fish" and "water frequented by fish", all of which were defined then as they now appear in s.36(3) of the *Act*.

[para24] In particular, the court declared in that case (referring to what is now s.36(3) of the *Act*):

> The definition of "deleterious substance" ensures that the scope of s.33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.

[para25] This disposes of any suggestion, in my respectful view, that s.36(3) is overbroad in the context of s.91(12) of the *Constitution Act*, 1867; and it goes a long way to dispose of the claim that s.36(3) is overbroad in reference to s.7 (or, if so, s.1) of the *Constitution Act*, 1982. There is no basis for equating s.36(3) with the legislation struck down either in *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, [1988] 3 W.W.R. 385, 49 D.L.R. (4th) 1, 25 B.C.L.R. 145, 40 C.C.C. (3d) 289, 84 N.R.1 or in *Fowler* v. *The Queen*, [1980] 2 S.C.R. 213, [1980] 5 W.W.R. 511, 113 D.L.R. (3d) 513, 53 C.C.C. (2d) 97, 32 N.R. 230.

[para26] Counsel for the Commissioner argues that s.36(3) is demonstrably overbroad in view of the decision of the British Columbia Court of Appeal in *R.* v. *Western Stevedoring Company Ltd.* (1984), 3 F.P.R. 487, leave to appeal to S.C.C. denied May 7th 1984, see (1984), 4 F.P.R. 486 (S.C.C.), to restore a conviction for a violation of s.36(3), where the defendant had adduced evidence to show that the deleterious substance dumped by the defendant's employees had in fact not reached the water but had been contained in large drainage tanks, the outlet from which had yet to be reached by the liquid in the tanks. With great respect, I am unable to agree. The fact that the liquid level in the tanks could rise with the addition of more liquid (in the form of rain or other water, for example) was indicative of an existing risk that the deleterious substance "may enter" the water frequented by fish below the outlet. The risk was foreseeable and real, not merely speculative. In any event, there was also evidence that the deleterious substance had, in fact, entered the water (which was frequented by fish); and it was the trial judge's finding to that effect, based on that evidence, which determined the decision on appeal as it did at the trial level.

[para27] It is also the Commissioner's submission that the decision of the British Columbia Court of Appeal in *R.* v. *MacMillan Bloedel (Alberni) Limited* (1979), 4 W.W.R. 654, 47 C.C.C. (2d) 118, leave to appeal to S.C.C. denied June 19th 1979 (*ibid*), shows that s.36(3) is overbroad, since the court there held (it is submitted) that the meaning of "deleterious" in s.36(3) is "not related to a deleterious effect on fish". With great respect, I am unable to agree with this submission. Seaton J.A., delivering the judgment of the court, made the relationship of the expression "deleterious substance" to water frequented by fish perfectly clear, as follows:

> What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To rephrase the definition section in terms of this case: oil is a deleterious substance if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that that water is deleterious to fish or to the use by man of fish that frequent that water.

[para28] As for the argument that s.36(3) creates a "standardless sweep" in legislation providing for a possible penalty of imprisonment, I note that the court in *R.* v. *Jack Cewe Ltd.* (1987), 4 F.P.R. 271 (B.C.Prov.Ct.) vividly demonstrated, by its acquittal, that a conviction is not inevitable once a decision has been made to prosecute an alleged violation of s.36(3) of the *Fisheries Act.* And, as counsel for the Crown has reminded the Court, s.78.6 of the *Act* provides:

> 78.6. No person shall be convicted of an offence under this *Act* if the person establishes that the person
>
> > (a) exercised all due diligence to prevent the commission of the offence; or (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

[para29] No mention of *R.* v. *MacMillan Bloedel (Alberni) Limited* is made in the later decision of the Supreme Court of Canada in the Northwest Falling Contractors Ltd. case. That later decision does not, in my respectful view, either expressly or impliedly overrule the earlier decision. And the still later decision in *R.* v. *Jack Cewe Ltd.* is noteworthy for having been made, without hesitation or question, on the basis of *R.* v. *MacMillan Bloedel (Alberni) Limited*, some five years after the coming into force of s.7 of the *Constitution Act*, 1982.

6. Conclusion

[para30] The Commissioner's challenge to s.36(3) of the *Fisheries Act* on grounds of unconstitutional vagueness amounting to a breach of s.7 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act*, 1982, must fail. The impugned legislation has not been shown to lack fair notice to the citizen, be it in formal or substantive terms; and it has not been shown to create a "standardless sweep" having insufficient limitations on its enforcement. Subsection 36(3) is not unintelligible; certainly, it is no less intelligible than the legislation upheld by our highest court in the Nova Scotia Pharmaceutical Society case and in *R.* v. *Finta*.

[para31] In coming to this conclusion, I have endeavoured to approach the challenge posed to the legislation without considering the circumstances of the offence charged, as revealed in the evidence. In doing so, I have followed the approach adopted in *Canadian Bar Assn.* v. *British Columbia (Attorney General)*; *Law Society of British Columbia* v. *British Columbia* (1993), 101 D.L.R. (4th) 410 (B.C.S.C.) per Lysyk, J. at page 438. However, I note that a contrary approach was adopted by the Ontario Court of Appeal in *R.* v. *Canadian Pacific Ltd.* (1993), 22 C.R. (4th) 238, 13 O.R. (3d) 389 sub nom. *Ontario* v. *Canadian Pacific Ltd.*, leave to appeal to S.C.C. granted on February 10th 1994. If this contrary approach should prove to be the more appropriate one, it is perhaps as well to say that it strongly reinforces the conclusion which I have already

reached using the more abstract and diffuse approach urged upon me by counsel for the Commissioner.

[para32] It is perhaps as well to add that I have reached the foregoing conclusion quite independently of the trial judge's reasons for his judgment dismissing the Commissioner's motion to quash or dismiss the information before the Territorial Court in this case on the ground that the information fails to disclose an offence known to law on the ground that s.36(3) of the *Fisheries Act* is unconstitutionally vague, in breach of s.7 of the *Constitution Act*, 1982, pursuant to s.24(1) of the latter enactment. Those reasons speak of an application to have s.36(3) "struck"; though that, it seems to me, was beyond the jurisdiction of the Territorial Court. That aside, I agree generally with the reasons of the trial judge; but I have endeavoured not to repeat them here since they are already reported as earlier mentioned.

IV. The Licence

1. The Commissioner's submission

[para33] It is submitted on behalf of the Commissioner that a contravention of s.36(3) of the *Fisheries Act* cannot be found, in law, when the act or omission giving rise to the contravention is in compliance with a licence validly granted pursuant to the *Northern Inland Waters Act*, R.S.C. 1985, c. N- 25.

[para34] The trial judge held that the licence on which the Commissioner relies is irrelevant to the issues before the Court since the licence was not issued to the Commissioner (or to Her Majesty The Queen, as represented by the Commissioner) but was instead issued to the Town of Iqaluit.

[para35] This is not disputed by the Commissioner. It is the Commissioner's submission that he is nevertheless entitled to rely on the licence, since he was at all material times acting on behalf of the Town of Iqaluit in relation to the Iqaluit sewage lagoon and its operations.

[para36] Furthermore, it is said on behalf of the Commissioner that the *Fisheries Act* must be understood and applied harmoniously with the *Northern Inland Waters Act* so as to give due recognition and effect to a licence issued pursuant to the latter Act. If these statutes are in conflict, it is argued that the latter Act must prevail, not only because it was enacted later in time than the first mentioned *Act* but also because its licensing provisions are specific whereas s.36(3) of the *Fisheries Act* is general in scope. In any event, s.36(4) of that *Act* exempts the Commissioner as a licensee (or acting on behalf of a licensee) under another federal statute such as the *Northern Inland Waters Act*.

2. The Crown's position

[para37] Crown counsel opposes the Commissioner's submission. It is the Crown's position that the trial judge was correct in ruling the licence to be irrelevant.

3. The terms of the licence

[para38] On January 9th 1991 licence numbered N5L4-0087 was issued to the Town of Iqaluit by the Northwest Territories Water Board pursuant to the *Northern Inland Waters Act* and the *Northern Inland Waters Regulations*, C.R.C. 1978, c. 1234, enacted under that *Act*. The licence, except for the conditions thereto attached (to which I shall refer below) reads as follows:

> NORTHWEST TERRITORIES WATER BOARD
>
> Pursuant to the *Northern Inland Waters Act* and Regulations the Northwest Territories Water Board, hereinafter referred to as the Board, hereby grants to
>
> TOWN OF IQALUIT (Licensee)
>
> of IQALUIT, NORTHWEST TERRITORIES (Mailing address)
>
> hereinafter called the Licensee, the right to alter, divert or otherwise use water subject to the restrictions and conditions contained in the *Northern Inland Waters Act* and Regulations made thereunder and subject to and in accordance with the conditions specified in this licence:
>
> | | |
> |---|---|
> | Licence Number | N5L4-0087 (RENEWAL) |
> | Water Management Area | NORTHWEST TERRITORIES 05 |
> | Location | IQALUIT, NORTHWEST TERRITORIES |
> | Purpose | TO USE WATER FOR MUNICIPAL PURPOSES AND DISPOSE OF MUNICIPAL WASTES |
> | Quantity of Water Not to be Exceeded | 800,000 CUBIC METRES PER YEAR |
> | Rate of Use of Water Not to be Exceeded | 800,000 CUBIC METRES PER YEAR |
> | Effective Date of Licence | JANUARY 1, 1991 |
> | Expiry Date of Licence | DECEMBER 31, 1995 |
>
> This Licence issued and recorded at Yellowknife includes and is subject to the annexed conditions.
>
> Northwest Territories Water Board
>
> (Signed)
> "PAMELA R. LeMOUEL"
> Witness
>
> (Signed)
> "DAVE NICKERSON"
> Chairman
> Approved by

(Signed)
"TOM SIDDON"
Minister of Indian Affairs and Northern Development

[para39] The conditions attached to the licence include the following:

GENERAL CONDITIONS

PART A

1. Scope

This Licence allows for water use and waste disposal for municipal purposes at the Town of Iqaluit, Northwest Territories.

2. Definitions

In this Licence: N5L4-0087

"*Act*" means the *Northern Inland Waters Act*;

"Regulations" means Regulations proclaimed pursuant to Section 29 of the *Northern Inland Waters Act;*

"Board" means the Northwest Territories Water Board established under Section 8(1) of the *Northern Inland Waters Act;*

"Licensee" means the holder of this Licence:

"waste" means waste as defined by Section 2(1) of the *Northern Inland Waters Act:*

"Sewage" means all toilet wastes, greywater and commercial wastewater.

4 This Licence is issued subject to the conditions contained herein with respect to the taking of water and the depositing of waste of any type in any waters or in any place under any conditions where such waste or any other waste that results from the deposit of such waste may enter any waters. Whenever new Regulations are made or existing Regulations are amended by the Governor in Council under the *Northern Inland Waters Act*, or other statute imposing more stringent conditions relating to the quantity or type of waste that may be so deposited or under which any such waste may be so deposited this Licence shall be deemed, upon promulgation of such Regulations, to be automatically amended to conform with such Regulations.

11. Compliance with the terms and conditions of this Licence does not absolve the Licensee from responsibility for compliance with the requirements of other Federal and Territorial legislation.

CONDITIONS APPLYING TO WASTE DISPOSAL

PART C

1. The Licensee shall discharge all piped and pumpout sewage waste using the facilities as identified in Drawing No. 86-5175-TR1 entitled "Municipality of Iqaluit Sewage and Water System - Overall Plan" dated March 1987, or as otherwise approved by the Board in accordance with Part D of this Licence.

2. All waste discharged from the facilities as identified in Part C, Item 1, shall meet the following effluent quality standards during open water periods:

PARAMETER MAXIMUM AVERAGE CONCENTRATION

BOD[subscript 5] 180 mg/L Suspended Solids 120 mg/L Fecal Coliform 2.0 x 10[superscript 5] CFU/dL

The pH shall be above 6 and there shall be no visible sheen of oil and grease.

[para40] The term "waste", to which Part A, Item 2 of the General Conditions of the Licence refers, is defined by s.2(1) of the *Northern Inland Waters Act* as follows:

2.(1) In this *Act*

"waste" means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water to an extent that is detrimental to its use by man or by any animal, fish or plant that is useful to man, and

(b) any water that contains a substance in such a quantity of concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water to the extent described in paragraph (a),

and without limiting the generality of the foregoing, includes anything that, for the purposes of the *Canada Water Act* is deemed to be waste.

4. The scope of the licence

[para41] Licences such as that now under consideration derive their legal effect only from the statute under which they are issued; and their scope is restricted to the legislative scope of the statute. This licence was issued pursuant to s.11 of the *Northern Inland Waters Act*. As appears from s.11, such a licence authorizes the licensee "to use waters, in association with the operation of a particular undertaking described in the licence", and no other waters. The term "waters" is defined by s.2(1) of the *Act*, as follows:

> 2.(1) In this *Act*
>
> "waters" means waters in any river, stream, lake or other body of inland water on the surface or underground in the Yukon Territory and the Northwest Territories.

[para42] As appears on the face of the licence, the licensee's right to use water thereunder is subject to the restrictions and conditions contained in the *Northern Inland Waters Act*. Section 7 of the *Act* provides:

> 7. (1) Except in accordance with the conditions of a licence or as authorized by the regulations, no person shall deposit or permit the deposit of waste of any type in any waters or in any place under any conditions where the waste or any other waste that results from the deposit of the waste may enter any waters.
>
> (2) Subsection (1) does not apply to the deposit of waste in waters that form part of a water quality management area designated pursuant to the *Canada Water Act* if the waste so deposited is of a type and quantity and is deposited under conditions authorized by regulations made by the Governor in Council under paragraph 18(2)(a) of that *Act* with respect to that water quality management area.

[para43] Bearing in mind the restrictive definition of "waters" in s.2 of the *Act*, and the use of that term in s.7 (and elsewhere) in the *Act*, it is readily apparent that this term refers only to inland waters as opposed to waters of the sea, whether "internal waters" or "territorial sea" waters as defined by s.3 of the *Territorial Sea and Fishing Zones Act*, R.S.C. 1985, c. T-8. And, as already noticed, the expression "water frequented by fish" is defined by s.34(1) of the *Fisheries Act* to mean "Canadian fisheries waters", which is in turn defined by s.2 of that *Act* to mean waters in the "territorial sea", "internal waters" and "waters in the fishing zones" of Canada. No mention is there made of "inland waters".

[para44] The licence issued to the Town of Iqaluit in this instance therefore could not in law, and so did not, authorize the Town (or anyone on its behalf) to use waters other than as defined by the Northern Inland Waters Act; and, more particularly, it did not authorize the use of "internal waters" on the sea coast included in "Canadian fisheries waters" by the definition in s.2 of the *Fisheries Act*.

[para45] Quite apart from that, it is furthermore all too clearly apparent from Part A, Items 4 and 11 of the General Conditions of the licence that nothing stated or intended in it absolves the licensee, or anyone acting on its behalf, from responsibility for due compliance with the requirements of the *Fisheries Act*. Even if the effluent quality standards described in the

Conditions Applying to Waste Disposal, Part C, Item 2 of the licence are to be understood as applying only "during open water periods", nothing in the licence authorized the Commissioner (or anyone acting for or under him) to deposit any deleterious substance, or permit such deposit, in violation of s.36(3) of the *Fisheries Act*.

5. Conclusion

[para46] It is therefore not necessary to consider the basis upon which the trial judge ruled that the licence was irrelevant. The licence provides no defence in law to the charge that there was a violation of s.36(3) of the *Fisheries Act*.

[para47] Nor is it necessary to consider whether, and to what effect, the Commissioner was acting on behalf of the Town of Iqaluit so as to be able to claim that he was covered by the licence. And since the licence is inapplicable to the matter at hand, there is no need to consider whether the Commissioner (or anyone acting under him) was misled into an officially induced error by reason of the licence.

[para48] Finally, it is not necessary to consider the statutory interpretation arguments advanced by counsel for the Commissioner with reference to any conflict between the *Northern Inland Waters Act* and the *Fisheries Act*. I see no conflict between these statutes, each of which applies within its own domain. The conditions of the licence make it clear, in any event, that the *Fisheries Act* is paramount so far as the licence is concerned, if indeed these statutes should overlap or give rise to any conflict. That being so, there is no basis upon which the Commissioner can invoke s.36(4) of the latter *Act* to justify the offence charged, even if the licence could have the status of "regulations" under s.36(4), which is not the case, on the evidence.

V. The " actus reus"

1. Strict Liability

[para49] In her submissions on behalf of the Commissioner with respect to the unconstitutional vagueness argument, counsel took the position that the offence of which the Commissioner has been convicted is one for which a term of imprisonment may be imposed. I have proceeded on that basis in considering the argument although I notice that s.40(2) of the *Fisheries Act* does not provide for the imposition of a term of imprisonment, even on default of payment of a fine, for a first offence. The conviction under appeal is for a first offence only. Subsection 40(2) of the *Act* states;

> 40. (2) Every person who contravenes subsection 36(1) or (3) is guilty of
>
> > (a) an offence punishable on summary conviction and liable, for a first offence, to a fine notexceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

> (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

[para50] Counsel's position is, for all that, nevertheless correct in my view since the provisions of s.36(3) of the *Fisheries Act* must be read in the same way and subject to the same requirements of constitutionality and general law whether the offence is, or is not, a first offence. I have therefore proceeded on that basis not only in reference to the constitutional question but also in what follows.

[para51] It is common ground between the parties, in any event, that the offence in this case must be regarded as one of strict liability pursuant to the criteria recognized in *R.* v. *Sault Ste Marie*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, 3 C.R. (3d) 30, 85 D.L.R. (3d) 161, 7 C.E.L.R. 53, 21 N.R. 295. That is the basis on which s.36(3) and s.40(2)(a) of the *Fisheries Act* are discussed here.

[para52] As in the prosecution of any offence of strict liability, it was not necessary for the Crown to go further than establishing in evidence, beyond a reasonable doubt, each of the essential elements of the offence known as the actus reus, in order to obtain a conviction; there was no obligation on the Crown to also show that the Commissioner acted with mens rea or "guilty knowledge".

2. Alleged Errors

[para53] On behalf of the Commissioner it is submitted that the trial judge erred in finding that the Crown had established in evidence, beyond a reasonable doubt, that the Commissioner (1) "permitted the deposit" of a substance that was (2) "deleterious" in (3) "water frequented by fish, to wit: Koojesse Inlet".

(a) "permitted the deposit"

[para54] The term "deposit", as it is defined by s.34(1) of the *Fisheries Act*, is to be understood within the context of s.40(5)(a) for the purposes of s.36(3) of the *Act*. Paragraph 40(5)(a) states:

> 40. (5) For the purposes of any proceedings under subsection (2) or (3), (a) a "deposit" as defined in subsection 34(1) takes place whether or not any act or omission resulting in the deposit is intentional.

[para55] In *R.* v. *Sault Ste Marie*, Dickson J. (as he then was) made the following statement:

> It may be helpful ... to consider in a general way the principles to be applied in determining whether a person or municipality has committed the actus reus of discharging, causing, or permitting pollution within the terms of s.32(1), in particular in connection with pollution from garbage disposal. The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so.

> ... The "permitting" aspect of the offence centres on the defendant's lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen.

[para56] The offence in that case was created by s.32(1) of the *Ontario Water Resources Act*, R.S.O. 1970, c.332, an enactment in many important respects analogous to s.36(3) of the *Fisheries Act*. The principles governing the interpretation and application of the Ontario provision are equally applicable to the interpretation and application of s.36(3) of the latter *Act*. These principles are fully consistent with para. 40(5)(a) of that *Act*. Lack of action to prevent the deposit of a deleterious substance into water frequented by fish, a deposit which ought to have been foreseen and which could have been prevented by the exercise of due diligence, therefore violates s.36(3).

[para57] The trial judge cited the relevant principles which had been laid down in *R.* v. *Sault Ste Marie*, in his reasons for judgment on the issue of guilt delivered on August 27th 1993. And while he did not quote the entire passage from that case which I have set out above, he did quote the essential portion of it. It is plain that he had the relevant principles in mind. And although he did not quote the following passage from that case, it is equally plain that he applied it in a complete and thoroughgoing manner:

> The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges", "causes", or "permits" the pollution will be a question of degree, depending on whether it is actively involved at the point where the pollution occurs, or whether it merely passively fails to prevent the pollution.

[para58] This was the nature of the test applied by the trial judge to the evidence before him. It was the proper test to be applied. The question now posed to this Court is whether that test was however properly applied.

[para59] First of all, did the Commissioner have control over the Iqaluit sewage lagoon? At trial, both ownership and control over the lagoon by the Commissioner was admitted as a fact by counsel on his behalf. It is immaterial whether the Commissioner's ownership and control was as principal or as agent, or partly one and partly the other. On the basis of the admission, the trial judge could and did find that the Commissioner in fact controlled the lagoon at the time of the offence charged, and had done so for some years before.

[para60] Secondly, did the Commissioner control or should the Commissioner have controlled the lagoon's seaward dyke so as to prevent any overflow or, as events proved, a bursting of the dyke with the lagoon's contents being discharged beyond the dyke? This question, in turn, leads to the further question: whether the overflow and bursting of the dyke, with its consequences, were outside the control of the Commissioner. If there was only a reasonable doubt on that point, the Commissioner was entitled to an acquittal on the ground that the Crown had failed to prove each element of the actus reus of the offence charged.

[para61] That was the basis on which a majority of the British Columbia Court of Appeal upheld the acquittal in *R.* v. *Rivtow Straits Ltd.* (1994), 12 C.E.L.R. (N.S.) 153, affirming (1992), 8 C.E.L.R. (N.S.) 16 (B.C.S.C.).

[para62] The trial judge, on the evidence, did not find any reasonable doubt on the point. He rejected the Commissioner's submissions that the overflow and rupture of the dyke were caused either by modifications made by another federal department or agency to the slopes and drainage above the lagoon or by an Act of God in the form of exceptionally warm weather leading to an unusually sudden and heavy flood of water down those slopes, none of which (it was submitted on behalf of the Commissioner), was foreseeable or within the Commissioner's control.

[para63] Having reviewed the evidence, I hold that it was reasonably capable of supporting the trial judge's conclusion that the Commissioner in fact did passively permit what ultimately occurred when the dyke of the lagoon gave way, since the Commissioner was responsible for its control and was aware of the risk from an earlier instance of dyke failure in 1987.

(b) "deleterious"

[para64] It is submitted on behalf of the Commissioner that the trial judge failed to apply "the test" for what is "deleterious" as formulated in the Northwest Falling Contractors Ltd. case. Furthermore, counsel for the Commissioner reminds the Court: "Not one dead fish was ever reported as a result of the failure of the sewage lagoon".

[para65] Reliance is also placed on *R.* v. *Cominco Ltd. - Cominco Ltee.* (1993), 11 C.E.L.R. (N.S.) 61 (B.C.Prov.Ct.), by counsel for the Commissioner, for the proposition that there was no evidence before the trial judge as to the element of deleteriousness of the deposit since no test samples were taken at the time of the spill or soon thereafter.

[para66] I am unpersuaded by these submissions that the trial judge erred in finding, as he did, that the contents of the sewage lagoon had been shown, on the evidence before him, to be beyond a reasonable doubt "deleterious" within the meaning of s.36(3) and s.34(1) of the *Fisheries Act*. Once again, a review of the evidence reveals that it was reasonably capable of supporting the trial judge's factual finding on this point.

(c) "water frequented by fish, to wit: Koojesse Inlet"

[para67] The evidence that a significant spillage of the contents of the sewage lagoon flowed downslope across the ice still present (early in June 1991, at Iqaluit on Baffin Island) after the dyke burst, is of course only circumstantial. Those contents, according to the evidence, consisted of 56,000 cubic meters of untreated sewage. This can be restated, for ease of comprehension, as 12 million gallons of untreated sewage.

[para68] There is not a shred of evidence to cast the slightest shadow of doubt on the conclusion reached by the trial judge that some, if not all, of the lagoon's contents reached and entered the waters of the sea lapping the shore of Koojesse Inlet at a distance of about one or two hundred meters below the lagoon. That was the only reasonable conclusion to be reached on the evidence.

[para69] The Court House at Iqaluit is located within a similar short distance from the waters (and, of course, seasonal ice) of Koojesse Inlet. The very name "Iqaluit" is well known in that part of the Northwest Territories to connote fishing. These are tidal waters, as the evidence mentions, forming an arm of the sea. It is a notorious fact that seagoing vessels, on which the population of Iqaluit relies for many supplies and provisions brought there regularly by "sealift", are to be seen anchored in Koojesse Inlet when the ice permits (usually within a relatively short time after the period when the lagoon spilled its contents in 1991).

[para70] No attempt was made, quite understandably, on behalf of the Commissioner, to advance any proof pursuant to s.40(5)(b) of the *Fisheries Act*, which states:

> 40. (5) For the purposes of any proceedings under subsection (2) or (3),
>
> (b) no water is "water frequented by fish" as defined in subsection 34(1), where proof is made that at all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish.

[para71] This element of the actus reus of the offence charged was also established, on the evidence before the Court and to the satisfaction of the trial judge, beyond a reasonable doubt.

3. Conclusion

[para72] In reviewing the evidence I have borne in mind the principles enunciated by the Supreme Court of Canada in *R.* v. *Yebes*, [1987] 2 S.C.R. 168, [1987] 6 W.W.R. 97, 36 C.C.C. (3d) 417, 59 C.R. (3d) 108, 43 D.L.R. (4th) 424, 17 B.C.L.R. (2d) 1, 78 N.R. 351, and reaffirmed in *R.* v. *Burns* (1994), 165 N.R. 374 (S.C.C.).

[para73] Having reviewed the evidence as a whole, with particular attention to the submissions made on behalf of the Commissioner, I find no merit in the submission that the actus reus of the offence charged was not established, as to each element, beyond a reasonable doubt; and there is furthermore no merit in the submissions made on behalf of the Commissioner to the effect that the trial judge's factual findings in respect of the actus reus, or any of them, were unreasonable except as follows.

VI. Events of June 1st 1991

[para74] I accept the submission made on behalf of the Commissioner that the evidence before the trial judge cannot support the factual finding that the unlawful deposit of sewage took place on June 1st rather than June 2nd 1994. The conviction under appeal must therefore be amended accordingly.

VII. Defence of Necessity

[para75] The Commissioner having permitted the sewage lagoon to overflow and burst its dyke so that the dyke required immediate repair; and having taken no measures whatever to prevent that from occurring or to be in a position to make adequate repairs in an emergency; the defence of

necessity is not available in answer to the charge, particularly for the period of June 3rd to 10th 1991 (both dates inclusive). The trial judge did not err by omitting even to mention that defence, given the evidence before him.

[para76] The relevant law is discussed in *Perka* v. *The Queen*, [1984] 2 S.C.R. 232, 14 C.C.C. (2d) 385, 42 C.R. (3d) 113, [1984] 6 W.W.R. 289, 13 D.L.R. (4th) 1, 55 N.R. 1, in which it was held (per Dickson J. for the majority) that:

> If the accused's "fault" consists of actions whose clear consequences were in the situation that actually ensued, then he was not "really" confronted with an emergency which compelled him to commit the unlawful act he now seeks to have excused. In such situations the defence is not available.

[para77] The most that can be said for the actions taken during the period June 3rd to 10th 1991 (both inclusive) is that they may be considered in mitigation of sentence, in so far as those actions were taken by or on behalf of the Commissioner.

VIII. Extra-curial Evidence

[para78] No substantial wrong or miscarriage of justice arose from the references made by the trial judge to the publication Health of Our Oceans, published in March 1991 by the Marine Environment Quality Group, Conservation and Protection Branch, Department of Environment of Canada. There was ample evidence, quite apart from anything in that publication, to sustain the factual findings made by the trial judge as to the deleterious nature of the contents of the lagoon deposited in the waters of Koojesse Inlet.

[para79] In my respectful view, the verdict of the trial judge could have been no different had he made no reference to this publication.

IX. The Application to Re-open

1. The trial judge's exercise of discretion

[para80] It is well established that a trial judge may, in the exercise of a proper judicial discretion, either allow or disallow a party to re-open that party's case before judgment: *Scott* v. *The Queen* (1990), 61 C.C.C. (3d) 300, 2 C.R. (4th) 153, 43 O.A.C. 277, 116 N.R. 361 (S.C.C.); *R.* v. *Hayward* (1994), 86 C.C.C. (3d) 193 (Ont. C.A.). And an appellate court will not interfere unless it is shown that the trial judge failed to exercise that discretion judicially: *R.* v. *Lessard (1976)*, 30 C.C.C. (2d) 70, 33 C.R.N.S. 16 (Ont. C.A.).

[para81] The trial judge heard the application to re-open the Commissioner's case at some length, from both the Commissioner's and the Crown's side. He then delivered his decision to reject the application, together with his extensive oral reasons for that decision, all of which is in the trial record. It is unnecessary to repeat those reasons here. It is enough that they show his thorough grasp and painstaking consideration of the submissions made on behalf of the Commissioner and

that he found them nevertheless to be wanting. He exercised his discretion judicially. That ends the matter.

2. The estoppel argument

[para82] No authority has been offered on behalf of the Commissioner in support of the submission that the Crown in right of Canada was estopped from challenging or disputing the validity of data published officially by an agency or department of the Crown in right of Canada. It is always open, in my respectful view, to the Crown in its prosecutorial aspect to challenge or dispute any such data if it is in the interests of justice to do so in the course of a prosecution. Nor, I should think, would the Crown as a defendant be estopped from doing so, in the interests of justice, in the course of a prosecution.

3. Crown disclosure

[para83] It is argued that the Crown failed to disclose in advance the evidence which it led in rebuttal of the Commissioner's defence evidence. This alleged failure was argued on behalf of the Commissioner as an alternative basis for his application to re-open his case. However, that basis or ground for the application was abandoned by counsel for the Commissioner, since it would have required the filing of affidavit material and could have led to complications for the Commissioner's counsel in representing his client. More-over, no objection was taken, at the time, to the evidence led by the Crown in rebuttal, on the ground of non-disclosure; even though cross examination of the Commissioner's witness for the defence should by then have alerted the Commissioner's counsel that the Crown was aware of frailties in that witness's testimony, which frailties were made apparent by undisclosed information. It is too late now to raise the non-disclosure, on this appeal, in these circumstances.

X. Disposition

[para84] The appeal against conviction is dismissed subject to the conviction being amended to exclude reference to June 1st 1991.

[para85] The appeals against sentence shall now be heard. Costs may be spoken to at that time also.

ALBERTA COURT OF QUEEN'S BENCH

[Indexed as: *R.* v. *Jackson*]

Between Her Majesty the Queen, Crown/Respondent, and Richard Jackson, Accused/Appellant

Wilson J.

Edmonton, September 15, 1994

***Fisheries Act*, R.S.C. 1985, c. F-14, s. 35 – interpretation of "harmful" – modifies "alteration"**

Defences – de minimus – application of defence should not be calculated as a comparison of the work to the entire body of water

Summary: This is an appeal by the accused of a charge under the *Fisheries Act*. The learned justice responded to three arguments by the appellant. The first argument concerned whether there was evidence of dependence by fish on the water for life processes. The court found that evidence in the agreed statement of facts to the effect that the channel dredged by the accused was the site of northern pike spawning habitat was also evidence of the "life processes" aspect of the definition of fish habitat in the Act.

The second issue was whether there was sufficient evidence before the trial judge to find that there was damage to fish habitat. The court found that the trial judge found damage as a matter of fact and there was no reason to interfere with the finding. The learned justice stated in obiter that the word "harmful" arguably modifies "alteration" only; not the words "disruption" and "destruction" in s. 35 of the *Fisheries Act*.

The third issue raised the question of whether the accused could rely on the defence of *de minimis non curat lex* because of the insignificant nature of the channel dredging in comparison to the vast area of the lake and shoreline. The court rejected the defence, stating that the dredging operation was significant. The *de minimus* defence should not be calculated by a comparison of the work to the total body of water.

Held: Appeal dismissed.

REASONS/MOTIF:

Wesley W. Smart, Counsel for the Crown
Tom Plupek, Counsel for the Accused

[para1] WILSON J.:-- I have concluded that this appeal should be dismissed.

[para2] Mr. Plupek argued before me that there was no evidence that the work had damaged "fish habitat" as that expression is defined in the *Fisheries Act*, R.S.C., 1985, c F- 14. He argues

that there was no evidence that the "fish depend directly or indirectly (on the area) in order to carry out their life processes". That is the wording in the definition clause.

[para3] I do not agree. There is such evidence. It is found in the agreed statement of fact, paragraph 19, which reads as follows:

> "Based on the witness report prepared by Dave Walty, Exhibit 11, it is agreed that the channel was dredged through fish habitat, for purposes of Section 35 of the *Fisheries Act*. The channel dredged by Richard Jackson was the site of northern pike spawning habitat."

[para4] This is an admission that all the necessary parts of the definition of "fish habitat" were proven. By this admission the "life processes" aspect of the definition was admitted.

[para5] I do not necessarily agree with the learned trial Judge that the word "harmful" modifies the words "disruption" and "destruction" in Section 35 of the *Fisheries Act*. Arguably, it only modifies "alteration", and that view of the meaning of the section seems to be born out by the discussion in *R.* v *Fillion* ([1993) AQ No 1810, Quebec C.A.), where the French version of the section is considered and compared to the English. This however is not critical to the decision under appeal. The learned trial Judge found that "harmful" meant, inter alia, "damage", and that there was evidence that supported a finding that the habitat had been damaged by the alteration. It is not necessary to a conviction that there be a finding that any fish has been harmed or altered. The Trial Judge found this as a fact on sufficient evidence. The Appellant agreed that this was a finding of fact. There is no basis to interfere with it. This Court should not interfere with that finding unless there was no evidence upon which the impugned finding could be made, or unless there is palpable or over-riding error. There is no such error demonstrated.

[para6] In my opinion the defence of *de minimis non curat lex* is not available to assist the Appellant. Granted, the Trial Judge found that the work was insignificant when compared to the vast area of the lake and shoreline itself. That, I think, is not the test. The photo exhibits indicate that this was a major channel dredging, a substantial piece of work. In my view, a *de minimis* defence would only be available if the work was in the nature of a shovel full or two of digging, or something in the nature of clam or mussel digging on the foreshore on a casual basis. It would not cover an operation such as that described here. It should not be calculated by a comparison of an area of work compared to area of total lake or body of water. I reject that defence in the circumstances that exist here.

ALBERTA PROVINCIAL COURT CRIMINAL DIVISION

[Indexed as: *R.* v. *Suncor*]

Between Her Majesty the Queen v. Suncor Inc.

Mustard, Prov. Ct. J.

Edmonton, October 26, 1994

***Fisheries Act*, R.S.A. 1985, c. F-14, ss 35(1), 79.2 – guilty plea to charge under s. 35(1) – sentencing hearing – spill from pipeline – not worst case scenario**

Sentencing – total penalty $100,000 – fine of $25,000 – order under s. 79.2 of the *Fisheries Act* of $75,000 – general and specific deterrence are most important factors in environmental sentencing – each sentence must be decided on its own facts

Summary: The accused company, Suncor, pleaded guilty to charges under s. 35(1) of the *Fisheries Act* of unlawfully carrying on a work or undertaking, being an oil pipeline, that resulted in the harmful alteration or disruption of fish habitat in the House River. This is a hearing on sentencing.

The pipeline spill resulted from 2 factors: (1) lack of knowledge on the part of the operator and the absence of a work standard for checking for closed valves, and (2) a pipe failure as part of a fatigue crack. Approximately 7600 bbls. of diesel-naphtha was spilled, of which 2100 bbls. reached the river. Half of that was recovered. Mortality of fish and the benthic community was substantial, but the benthic communities and possibly the fish populations would have returned to pre-spill levels in 30-90 days.

The learned judge determined that sentencing in each case must be decided on its own facts, using general principles from previous cases as a guide. This was not a worst case situation respecting the environmental destruction, resulting mainly from the rapid and effective response from the accused corporation. Imposition of a sentence required balancing the substantial spill and resulting damage against the factors reflecting good corporate citizenship, including the company's extensive efforts to comply with the law, its remorse as demonstrated by its guilty plea, the presence of a corporate executive at the hearing, its follow up inspection activities and its good record respecting pipeline operations. The court concluded that the offence falls in the top of the lower third of the continuum and should attract a proportionate sentence.

Held: A total penalty of $100,000 was imposed, including a fine of $25,000 and $75,000 to be subject of an Order under s. 79.2 of the *Fisheries Act*, to be agreed on by the parties and approved by the court.

REASONS/MOTIF:

Dennis R. Thomas, Q.C., Counsel for the Defendant

Wesley W. Smart, Counsel for Her Majesty the Queen

SENTENCING

[para1] MUSTARD PROV. CT. J.:-- On October 11, 1994, the accused Corporation pled guilty to an offence under s. 35(1) of the *Fisheries Act* that it did;

> "between the 19th day of June, AD., 1992 and the 27th day of June, AD., 1992, near the City of Fort McMurray, in the Province of Alberta ... unlawfully carry on a work or undertaking, to wit: the oil pipeline between Tea Island and Edmonton, that resulted in the harmful alteration or disruption of fish habitat, to wit: the House river... "

[para2] After submissions and argument the matter was adjourned to this date for sentencing.

[para3] The Agreed Statement of Facts, Exhibit 1 in the sentencing, is incorporated by reference and will only be repeated here as necessary.

[para4] Pollution is a crime and punishable as such. Sentencing involves a review of what the Courts have delineated as the relevant areas for consideration and then the balancing of the aggravating and the mitigating factors related to them. General and specific deterrence are probably the most significant elements in environmental sentencing.

THE FACTORS:

a. Nature of the Environment

[para5] The House River is a typical northern boreal river. The point on the river where the spill occurred was relatively inaccessible, in the lower reaches of the river, well below the more sensitive spawning areas. While the aquatic environment as it respects fish is relatively fragile, on the facts before us, it recovered quickly with minimal long term effect.

b. The Extent of the Damage

[para6] In the order of pipeline spills recorded in Alberta, the quantity of the diesel-naphtha spill was substantial, - 7600 bbls. of which 2100 reached the river, and about half of that was recovered. The mortality of the fish and the benthic community was substantial but on the evidence

> "the benthic communities (eg. bacteria, algae, macrobenthos) and perhaps fish populations would have returned to pro-spill levels within 30 to 90 days."

[para7] It was not a case of "destruction" of the habitat as originally alleged and subsequently amended and acknowledged by the Crown, rather it's "alteration and disruption."

c. The Criminality of the Offence

[para8] Exhibit S3 indicates there were two primary causes for the spill,

> (a) a lack of knowledge by the operator and the absence of a work standard requiring the log to disclose and be checked for closed valves, with the result that the pumps were operated against a closed valve; and
>
> (b) pipe failure as a result of a fatigue crack at the edge of a weld attaching a hot-tap to the line in 1974 as part of a leak isolation and repair procedure carried out at that time.

[para9] It was the unique combination of these factors that caused the spill. The Corporation has since modified its faulty work standard, and prior to the spill had a more comprehensive training and operations manual in the course of development. None of this was wilful or conscious, but the guilty plea acknowledges that the defence of due diligence is not available.

[para10] A sophisticated computer operated monitoring system, including pressure alarms, was in position and operating, and exceeded ERCB requirements. As a result of human error they didn't prevent the break. The maintenance, inspection and repair programs of the Corporation relative to the Pipeline met and in some ways exceeded ERCB requirements. These involved an annual cost of $13 million prior to the spill and were subsequently accelerated to $1.9 million annually. In my opinion the submissions of the Crown on the degree of culpability of Suncor go well beyond what is justified by the evidence before the Court.

d. The Extent of Suncor's Attempts to Comply with the Law

[para11] The evidence shows no failure on their part to comply with applicable regulatory requirements relative to the maintenance and operation of the pipeline. Once the spill was identified the response of Suncor was immediate, substantial, effective and very expensive. Within six hours, mostly in darkness, in a relatively inaccessible area, they had a dike in place to prevent further product from entering the river. The clean-up conducted by the Corporation was efficient and successful, involving an expenditure of more than $2.2 million, in addition to the cost of the accelerate maintenance and inspection program. Suncor promptly reported the spill to both regulatory bodies and co-operated with them throughout.

e. Remorse

[para12] The accelerated inspection program resulted in line cut-outs well in excess of ERCB requirements. Suncor has upgraded the software for the computer facilities already referred to. A senior executive was present at the sentencing hearing as evidence of corporate remorse.

[para13] The most significant remorse factor is the guilty plea. Based on the known costs to both Crown and defence in other environmental prosecutions the saving to the taxpayer of a timely plea is enormous and constitutes an important mitigating factor. No illegal gain or profit accrued to Suncor as a result of it's failure to repair the anomaly at the site of the break, of which it had notice in October 1991. That in my opinion, is not, as the Crown alleges, a case of the Corporation "taking a calculated risk" in not the making that repair at that time. Hindsight has 20-20 vision.

f. Size, Wealth etc. of Suncor

[para14] Suncor is a very large fully integrated oil and gas company. It differs from many of its competitors in that in addition to its conventional crude oil sources it has it's huge Oil Sands operations as well as the pipeline to carry that production to Edmonton for final refining.

[para15] The Oil Sands Group, of which the Pipeline is a part, forms a large element of the total corporate operations and has been consistently profitable over the past five years, with the exception of a large loss in 1992 - not, I might add, due to the pipeline spill. The Oil Sands operations and the related pipeline have been in operation since the mid-sixties and in 1993 employed 1715 people. The break and spill in question is the first involving the pipeline since 1974, and that was caused by a landslide.

g. Criminal Record

[para16] Suncor has no record of any convictions in relation to the operations of the pipeline. However, in relation to the operations of the Oil Sands Plant there are the following convictions:

a. Conviction after trial in 1985 on two counts of offences under the *Fisheries Act* related to an explosion and fire at the Plant in 1982 resulting in the release of substances into the Athabasca River. It received two $15,000. fines; and

b. In 1990 Suncor pled guilty to four counts of failing over a period of four days to comply with the conditions of a license under the *Clean Air Act* on the occasion of a plant start-up following a shut-down for routine maintenance. Two $15,000. and two $20,000. fines were assessed.

[para17] There is no evidence before the Court as to the seriousness or the extent of those offences. The convictions relate to the Plant and not the Pipeline, nonetheless they must be considered somewhat related. While they are aggravating factors, their effect should be tempered by the reality that in any operation as massive and complicated as those at the Suncor Plant near Ft. McMurray, there are bound to be accidents. That there haven't been more incidents over that span of time speaks well for the care with which the corporation carries on its operations.

h. Penalty

[para18] From the evidence it would appear that Suncor has sophisticated equipment and computer programs to monitor the pipeline operations and warn of problems. Unfortunately the systems for leak detection were less effective during start- up, which was the situation here, something that has since been modified and improved by Suncor. What occurred here were two factors acting together that reflect something less than due diligence. The result was unfortunate and substantial, but thanks in large part to the rapid and effective response of the Corporation, the damage was transient, not long term.

[para19] For that and the other reasons already stated, and on the evidence I am unable to categorize this as a "worst case" of environmental destruction (or even a worst case "alteration or disruption," to quote the wording of the Information). Once the aggravating and mitigating factors are considered, this case falls far below a "worst case" situation for which a maximum or a very high fine is appropriate.

[para20] The cases cited by both parties cover the spectrum from the most aggravated to minimal in terms of culpability, corporate attitude, response, clean-up, duration, volume and toxicity, damage and potential for damage, and sensitivity of the environment affected, not to mention the wide variety of fines imposed and the applicable maximums against which they may be compared. For this reason the usefulness of the cases as precedents to be followed in setting the penalty in this case is very limited. In this respect the words of Ayotte, Terr. Ct. J. in *R.* v. *Echo Bay Mines Ltd* 1980 3 F.P.R. 47. are particularly apt:

> "I should also say that I have been mindful of the sentences imposed in the other cases cited to me. Both counsel urged one or the other of them upon me as seemed in their view appropriate. With the greatest respect to those who feel otherwise, I feel that any attempt to quantify a sentence or extract some tariff of sentencing from decided cases to be a futile exercise and therefore have relied on the cases cited more to provide general guidelines than for help in fixing the precise amount of the fine imposed. Each sentence must be decided on its own facts and I have tried to apply that principle here."

and apply equally here. For that reason I do not intend to attempt to distinguish or compare them to the present case. All cases cited by counsel are listed in the attached schedule "A" and have been read and considered. In my opinion the closest in point of fact and applicable factors is *R.* v. *Shell Canada Products Ltd*. 1992 unreported Burnaby, B.C. B.C. Prov. Court. Shell is an even larger fully integrated oil company, the same type of product escaped, the environment was similar to what it was in this offence, each was a good corporate citizen, each responded quickly and effectively, each was unable to show due diligence and both had short related records. On balance, I feel the present case more serious, based on the damage and the quantity spilled.

[para21] In my opinion to arrive at the appropriate penalty one must balance the factors already stated, weight their relative importance and try to arrive at a penalty that fits the crime. In doing so one must neither make light of the substantial environmental spill and resulting damage nor impose a penalty for those aspects of the total situation already stated that reflect good corporate citizenship. The penalty must at the same time deter both Suncor and others from any want of care giving rise to like incidents.

[para22] Taking all the factors and their related aggravating and mitigating circumstances into consideration, it is my opinion that this offence falls in the top of the lower third of the continuum from "de minimus" to "worst case" and should therefore attract a penalty proportionate to that assessment. I therefore find $100,000.00 to be appropriate in the circumstances. This Court therefore imposes a fine of $25,000.00 and the balance of $75,000.00 shall be the subject of an Order under s. 79.2 of the *Fisheries Act* to be agreed upon between the parties and approved by this Court.

MUSTARD PROV. CT. J.

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SCHEDULE "A"

[para23] AUTHORITIES

1. *Fisheries Act* R.S.C. 1985 c. F-14, s. 41(1)

2. Le Chene No 1 (1987), 4 F.P.R. 67, 70 (NWT.T.C.)

3. *Canada Tungsten Mining Corporation* v. *R.*. (unreported) March 5, 1976 (NWT.S.C.)

4. *R.* v. *Placer Development Ltd*. (1985), 4 F.P.R. 366, 386 (Yukon T.C.)

5. *R.* v. *Cotton Felts* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.)

6. *R.* v. *Cyprus-Anvil Mining Corp*. (1976), 2. F.P.R. 32 (Y.S.C.)

7. *R.* v. *Echo Bay Mines Ltd*. (1980), 3 F.P.R. 47 (Terr. Ct).

8. *R.* v. *FMC of Canada Ltd*. (1985) 4 F.P.R. 216 (B.C. Prov. Ct.)

9. *R.* v. *Kenaston Drilling (Arctic) Ltd*. (1973), 12 C.C.C. (2d) 383 (N.W.T.S.C.)

10. *R.* v. *Esso Resources*, [1983] N.W.T.R. 59 (N.W.T. Terr.Ct.)

11. *R.* v. *Panarctic Oils Ltd*. (1983), 43 A.R. 199 (N.W.T. Terr. Ct.)

12. *R.* v. *Neptune Resources Corp*. (Terr Ct., N.W.T.) (1991)

13. *R.* v. *Bremner* (1991), 83 Alta. Law Reports (2d) 125 (Alta. Prov. Ct.)

SCHEDULE "A" LIST OF AUTHORITIES

1. Statement of Agreed Facts dated October 7, 1994

2. *Fisheries Act*, R.S.C. 1985, c. F-14, as amended

3. *R.* v. *United Keno Hill Mines Ltd.* (1980) 10 C.E.L.R. 43 (Y.T. Ten. Ct.)

4. *R.* v. *Bata Industries Ltd.* (1992) 7 C.E.L.R. (N.S.) 245 (Ont. Ct. (Prov. Div.)), at; varied (1993) 11 C.E.L.R. (N.S.) 208 (Ont. Ct. (Gen. Div.))

5. *R.* v. *Echo Bay Mines Ltd.* [1993] N.W.T.J. No. 44 (Ten. Ct.)

6. *Canada (Environment Cab)* v. *Canada (Northwest Territories (Commissioner)*) (1993) 12 C.E.L.R. (N.S.) 55 (N.W.T. Terr. Ct.)

7. *R.* v. *Jackson Bros. Logging Co. Ltd*. [1984] 4 W.W.R. 563 (B.C. Co. Ct.)

8. *Fisheries Act*, R.S.C. 1985, c. E-14, s. 40(1)

9. *R.* v. *J.A.C. Enterprises Limited*, unreported Order of Nemirsky P.C.J., St. Albert, November 1, 1993 (Alta. Prov. Ct.)

10. *R.* v. *Tioxide Canada Inc*. [1993] A.Q. no 852 (C. Que.)

11. *R.* v. *Shell Canada Products Ltd.*, unreported, Burnaby Reg. No. 43550, May 30, 1992 (B.C. Prov. Ct.)

12. *R.* v. *Amoco Canada Petroleum Co*. (1993) 13 C.E.L.R. (N.S.) 317 (Alta. Prov. Ct.)

13. *R.* v. *Cariboo Pulp & Paper Limited*, unreported, Quesnel (Information Nos. 14204 & 14256), December 12, 1990 (B.C. Prov. Ct.)

14. *R.* v. *Canadian Pacific Forest Products Ltd*. [1992] B.C.J. No. 1339 (S.C.)

15. *Canada (Ministère de l'Environnement)* c. *Canada (Ministère des Travaux Publics)* (1992) 10 C.E.L.R. (N.S.) 135 (C. Que.)

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SCHEDULE "B"

IN THE PROVINCIAL COURT OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN

- and -

SUNCOR INC.

STATEMENT OF AGREED FACTS

1. The matter before the Court arises from a release into the House River on June 20-21, 1992, of a petroleum product mixture (50% diesel, 50% naphtha) from the pipeline operated by Suncor Inc. ("Suncor") between Fort McMurray ("the plant") and Edmonton (the "Pipeline").

THE PIPELINE

2. The Pipeline was constructed circa 1965-66 to move petroleum product from the plant operated by Great Canadian Oil Sands Ltd. (now Suncor) at Fort McMurray to tank storage in Edmonton.

3. The Pipeline is approximately 430 km long. It is 16 inches in diameter and its walls are 0.203 inches thick over the majority of its length.

4. The Pipeline is approved by the Energy Resources Conservation Board ("ERCB") pursuant to the *Pipeline Act* (Alberta) and is required to be operated and maintained in accordance with ERCB requirements.

5. There are a series of pumps, booster pumps and valves along the length of the Pipeline. At major river crossings, such as the Athabasca, House and North Saskatchewan Rivers, a valve is located on each side of the watercourse. Attached hereto as Schedule "A" is a plan showing the Pipeline and the valve locations.

6. The Pipeline is subjected to regular inspections and maintenance in accordance with ERCB requirements. Regular maintenance, at an approximate annual cost of $1.3 million (pre-1992) and $1.9 million (post-1992), includes:

(a) internal inspection "linologs" to detect pipeline metal wall loss (every 5 years);

(b) right-of-way inspection (every two weeks by fixed-wing aircraft; more frequently if there is construction activity in a given location);

(c) inspection of major river crossings at Athabasca and North Saskatchewan (every 2 years, using divers);

(d) all transmitters are calibrated once per year;

(e) remote-controlled valves were tested as Pipeline operations permitted; now they are tested every 3 months; manual valves are tested on an annual basis.

7. The Pipeline is operated from Sherwood Park, Alberta, from the Sherwood Park Control Centre ("SPCC") by a number of operators, each of whom works a shift in such a way that the SPCC is manned 24 hours per day, 365 days per year.

8. The Pipeline is operated by way of a computerized system known as the Supervisory Control and Data Acquisition (SCADA) system, which was installed in 1981 at a cost of approximately $1.4 million. The SCADA system is upgraded as technological improvements are realized to keep

the system up to date. The last upgrade prior to June 1992 were hardware improvements to the system.

9. SCADA transmits data from various points along the Pipeline to the SPCC and allows the SPCC operator to "communicate" with remote points on the Pipeline. Specifically, remote terminal units at valves along the Pipeline transmit pressure and flow rate data to the SPCC where they are monitored by the operator. These remote terminal units can be thrown into "fast scan" mode in order to transmit more data more often to the SPCC operator.

10. The Pipeline operates subject to maximum operating pressure ("MOP") limits established by the ERCB. MOP limits are set at levels less than the actual physical strength (i.e. the "minimum yield strength") of the Pipeline at any given point. There are different MOP limits for different portions of the Pipeline, with MOPs decreasing further south along the Pipeline. At the time of the Spill, the portion of the Pipeline in which the failure occurred was licensed by the ERCB to operate at a MOP of 6,550 kPa. The Pipeline normally operates at 4,100 kPa, but normal operating pressure can range from 1,400 kPa to 5,500 kPa.

11. Valves are equipped with over- and under-range pressure alarms which alert the SPCC operator to pressure anomalies occurring in the Pipeline. Pumps and booster pumps are set to shut down automatically upon certain pressure thresholds being reached. Over the course of a shift, the SPCC operator is expected to monitor pressure and flow rate data for anomalies.

12. The physical status of the Pipeline is monitored by way of a colour-coded, on-screen schematic diagram of the Pipeline. The schematic displays the entire Pipeline, or can be limited to particular segments for greater detail. The schematic illustrates valve status by depicting a closed valve in red, while open valves are depicted in green. The Pipeline path immediately following a valve is depicted in the same colour as that depicting the valve.

13. At some valve locations, such as at Wandering River (which is about at the halfway point on the Pipeline), there is a configuration of valves. At Wandering River, there are 6 valves in configuration as shown schematically on Schedule "C". Various combinations of open and closed valves at this point may mean that the product has a clear path through the configuration or it may not. In some circumstances, the last valve in the configuration may be open (green) yet there may not be a clear path from the first valve in the configuration to the last. It is the responsibility of the operator to ensure that a clear path is available.

14. SCADA also includes software for leak detection and prevention. The software in place, both today and in 1992, exceeded ERCB requirements for Liquid Petroleum Pipeline Leak Detection Prevention and Detection in Alberta. At the time of the Spill, the software was unable to detect leaks as efficiently during start-up (or "transient") conditions as it could detect leaks during normal (or "steady state") conditions. This difficulty was experienced by the industry as a whole. Since the Spill, Suncor has been able to modify its software to improve leak detection during transient conditions.

THE OPERATORS

15. In June, 1992, the SPCC operators, with the exception of the operator on duty on June 20-21, 1992 (Mark Burns), had between 6 and 12 years' experience operating the Pipeline.

16. Mark Burns had been employed as an SPCC operator since February, 1992, and had received on-the-job training for 3 1/2 months under Suncor's most senior operator, Larry Downing.

17. There was no industry standard for training of SPCC operators prior to June 1992. There is, as yet, no formal, industry-wide certification process for pipeline operators, though one is presently being developed.

18. Prior to June, 1992, Suncor had identified the need to upgrade and formalize its training program, including the preparation of a more comprehensive and "user-friendly" training and operations manual. The development of the program and the materials was approximately 50% complete at the time of the Spill. It was Suncor's intention to retrain all of its operators under the new program and with the new materials, once they were in place.

19. In addition to monitoring the on-screen schematic and the data gathered by SCADA, the SPCC Operators were and are expected to maintain a detailed logbook of the events on their shifts.

20. An operator is expected to highlight certain types of entries in the logbook to draw them to the attention of operators on subsequent shifts. Valve status was not an entry that required highlighting according to this system.

21. An operator coming on shift is expected to read all entries made in the logbook since the last time that operator was on shift.

22. The SPCC operators receive training in oil spill/emergency response. At the time of the Spill, Suncor had in place an "Oil Spill" Manual, which included a recommended shutdown procedure and an emergency response plan.

EVENTS LEADING UP TO THE SPILL ON JUNE 20-21, 1992

23. Owing to a plant upset at Fort McMurray in April, 1992, Suncor was unable to fully upgrade its crude oil. Batches of crude were delivered to Syncrude, where the crude was upgraded and then delivered to Edmonton by way of Syncrude's pipeline.

24. Delivering crude oil to Syncrude required the use of a "cross-tie" connection from Suncor's Pipeline to the Syncrude plant. It also required a special procedure to shutdown Suncor's Pipeline to prevent product from flowing south to Edmonton (the "Syncrude Procedure").

25. The Syncrude Procedure was recorded in what is known as the Daily Orders Book, which, among other things, contains any unusual Pipeline procedures. All of the SPCC operators read and initialled the Syncrude Procedure.

26. On June 18, 1992, one of the SPCC operators, Randy Gibbon, followed the Syncrude Procedure to initiate a delivery of crude oil to Syncrude. Because the Syncrude Procedure

essentially required the entire Pipeline south of the Athabasca River to be shut down, Gibbon took the opportunity to test all of the valves along the Pipeline to ensure their proper functioning. Testing of this nature requires each valve to be fully closed and re-opened-i.e. put through a full "stroke".

27. While Suncor puts its valves through a full stroke, ERCB guidelines require only a partial stroke.

28. When testing was completed, Gibbon left 4 valves closed: Athabasca River, Wandering River, North Saskatchewan River (north valve), and the Interprovincial Pipeline Delivery valve (Edmonton). Only the first and last valves were required to be closed for the Syncrude Procedure, but as an added precaution against upset during the shutdown period, Gibbon left the Wandering River and North Saskatchewan River (north) valves closed. Gibbon made an entry in the Logbook as to which valves he had re-opened but no entry as to the four valves left closed.

29. The delivery to Syncrude initiated during Gibbon's shift on June 18, 1992, was completed shortly after Mark Burns came on shift on the evening of June 20, 1992. Burns had last been on shift on June 19. As required, he had read the logbook entries made by Randy Gibbon on June 18 and was aware that at least some of the Pipeline valves had been tested by Gibbon.

30. When the delivery to Syncrude was complete and a delivery of different product was ready for shipment to Edmonton, Burns followed the Syncrude Procedure to "swing" back to Edmonton delivery. Following that procedure, he opened the Athabasca River and Interprovincial Pipeline Delivery valves and started the Scotford Density Pump.

31. Burns did not see that two valves at Wandering River and the North Saskatchewan River were still closed.

32. The following is the sequence of events immediately prior to the Spill. (All times are in MST. "Tar Island" refer to the main pumping station at the plant near Fort McMurray.)

21:07 Pumps #3 and #4 at Tar Island put on line manually pumping a mixture of 50% diesel, 50% naphtha.

21:35 Marianna Booster brought on line for start-up assistance

21:37 High pressure alarms sound at Marianna Booster and House River (both up and downstream)

21:39 Wandering River over-range pressure alarm sounds meaning that MOP limit has been exceeded.

21:41 Marianna Booster automatically shuts off due to high discharge pressure.

21:43 Tar Island pumps #3 and #4 are taken off-line due to high pressure.

21:45 Burns notices that the Wandering River and Saskatchewan River valves are closed and opens them.

21:55 Tar Island pumps #3 and #4 come back on line

22:02 Tar Island flow rate is back up to 313 m3/hour, but very little flow is registering at Edmonton Meter (93 m3/hour)

22:20 Burns notes entry in Logbook: "Do we have a leak?"

22:45 Burns telephones Tar Island and asks them to increase rate of flow.

22:56 Burns ensures that Athabasca River valve is fully open because Tar Island rate is increasing but little flow is registering in Edmonton.

22:58 Burns is seeing anomalous readings from House River and puts the remote terminal unit there into fast scan to verify the data he is receiving.

23:00 Barry Ford of Rio-Alto Exploration is in the vicinity of the House River at the Waskikegan Campground. He smells a very strong diesel odour.

23:07 The Tar Island operators are seeing normal conditions and so put pumps #1 and #2 on line.

23:20 Barry Ford calls Mark Burns at the SPCC reporting that he could smell diesel and saw a mist in the air near the House River.

23:22 Burns closes the valve on the north bank of the House River and calls his supervisor, Trevor Dane, to advise him of a possible leak.

23:23 House River North valve re-opened to check for pressure loss across the valve.

23:29 House River North valve closed again.

23:30 Wandering River valve closed. Trevor Dane initiates Suncor's Emergency Response Plan by contacting his immediate superior, Joel Croteau.

23:31 All four Tar Island pumps go off line and the Athabasca River valve is closed.

24:00 Barry Ford contacted by Suncor, asked for more information on spill; valley is full of mist and river covered in light oil June 21, 1992:

> 00:20 Emergency equipment sent to location while Suncor personnel enroute to site from Fort McMurray.
>
> 00:51 Joel Croteau reports spill to Energy Resources Conservation Board.

01:07 Joel Croteau reports spill to Alberta Environment.

01:11 Oil Sands Group Oil Spill Response Team is activated.

01:30 Doug Hankinson of Suncor confirms to SPCC there is product on the river, from spill 600 metres uphill on south side of House River. Emergency equipment sent to location:

02:00 Stopple Tee and plug are installed in the Pipeline to stop the leak.

03:00 Dike/Dam structure is built on south bank of House River to prevent flow of product into River.

33. The Suncor Emergency Response Plan in effect in June, 1992, defined an "emergency" as "any unforeseen happening or situation requiring prompt action, such as fires, explosions, and widespread threat to loss of life, health, property destruction and/or environmental damage".

34. The Suncor Oilsands Pipeline ("OSPL") Training Manual in effect in June, 1992, stated that the primary purpose of the SPCC operator was to ensure that a leak in a pipeline is detected as soon as possible.

35. The OSPL manual indicated that a "large leak" should be easy to detect. The primary indications the operator would get are listed as follows:

* large unexpected pressure drops at specific stations, followed by pressure drops at a slower rate at the rest of the stations;

* flowrate decrease at delivery point;

* an indication on the computer display of

* volume in being greater than volume out;

* a large negative linepack value;

* a large negative overshort.

THE SPILL

36. The Pipeline had ruptured at a point just south of the check valve located on the south bank of the House River. There had been a previous rupture of the Pipeline on the north side of the River caused by a landslide on the north slope of the valley. The repairs to the Pipeline in 1974 included the installation of a "stopple" located on the south bank of the river in order to isolate the break which had occurred on the north side of the valley. A stopple is a device which is placed on a pipeline to insert a plug into the line and block the flow. During the 1974 repair, a "hot tap" fitting was also welded onto the line as part of the leak isolation and repair procedure. In addition,

replacement pipe was installed at the surface on the north side of the River to minimize the likelihood of a break in the event of another landslide.

37. In 1978, as a further preventative measure, Suncor excavated this portion of the Pipeline in order to install a check-valve----designed to prevent the backward flow of product in the Pipeline and out of any rupture that might occur north of the check-valve. A diagram showing the various fittings at the location of the 1992 rupture is attached as Schedule "B."

38. In October 1991 Suncor had arranged for the inspection of this portion of the Pipeline as part of its overall Pipeline Maintenance Integrity Program. Suncor had contracted Canspec Group Inc. (Materials Engineering and Testing) to carry out the physical inspection of the Pipeline in October 1991. The particular focus of the inspection was the examination of the girth (i.e. circumferential) welds attaching repair sleeves to the Pipeline. This work was undertaken in response to newly promulgated CSA standards for such welds because of an industry wide concern about the failure of such welds. After the excavation of a repair sleeve in the vicinity of the House River, a decision was made to inspect a nearby stopple fitting. The Pipeline was excavated to expose the stopple for inspection, an excavation that also revealed the nearby hot tap.

39. Because the hot tap was welded too close to the Pipeline, magnetic particle testing equipment could not be placed under the flange to test the weld; therefore, it was not possible to carry out anything but a visual examination. It was noted that the pipeline was "pushed in" at the location of the hot tap. The Canspec inspector noted the condition to be abnormal and brought this condition to the attention of the Suncor representative who was present. A photograph was taken of the hot tap fitting by the Suncor representative, but nothing further was done to inspect or repair the hot tap prior to the Spill in June 1992.

40. Following the Spill, the section of failed Pipeline was inspected by Canspec which formed the opinion that the poor quality of the weld likely would have been grounds for rejecting the weld when the hot tap was installed in 1974. It was the further opinion of Canspec that the combination of the poor weld and the dent in the Pipeline at the location of the hot tap had likely propagated a fatigue crack which finally ruptured owing to the high pressures that had built up on June 20, 1992, when product was being pumped against the closed Wandering River valve. Canspec also speculated that there may have been a small leak from the fatigue crack prior to the time of the Spill.

41. Based on SCADA information from the time of the failure, the pressure was subsequently calculated to be 6,930 kPa at the failure point, in excess of the MOP of 6,550 kPa for which the Pipeline was licensed by the ERCB. The highest recorded pressure at or near the time of failure (7,704 kPa), which occurred at Wandering River, was less than 85% of the minimum yield strength of the pipe.

42. The highest recorded pressure at the House River at or near the time of failure was 6,376 kPa. At the Marianna Booster, 12 miles upstream, the recorded pressure was 6,433 kPa, while at the Wandering River block valve, 43 miles downstream, the recorded pressure was 7,704 kPa. The distance from the Marianna Booster to the Wandering River block valve was approximately 55

miles of pipeline, the whole of which was operating at high pressure, near or above MOP prior to the Spill.

43. Following the rupture on June 20, 1992, and after leaving the Pipeline, the product travelled approximately 600 m down the south bank of the House River before entering it. The total volume of product spilled is estimated to be 1,200 m3 or 7,600 barrels ("BBL") of which 2,100 BBL is estimated to have entered the House River. By the end of August, 1992, there had been recovery of approximately 2,700 BBL of product, of which 1,180 BBL were recovered from the River. Owing to the nature of the product mixture (50% diesel, 50% naphtha) it is estimated that approximately 2,000 BBL of product "flashed" (evaporated) into the air. More product saturated the river bank and was partially recovered over the course of the ensuing year by an elaborate flushing and collection program implemented by Suncor. In addition, a water collection and treatment system was installed to treat all run off water from the 1993 spring thaw. Only one barrel of product was recovered during this 1993 work suggesting that the site had been effectively cleaned up.

44. The Spill affected the terrestrial environment on the south bank of the House River down which the product flowed after leaving the Pipeline. The Spill also affected the aquatic environment as a result of the product entering the House River.

45. From its source upstream of the location of the Spill to the point where it enters the Athabasca River in the northeast part of Alberta, the House River is, and at all material times was, fish habitat as defined in the *Fisheries Act*.

46. The House River is, and at all material times was, a water frequented by fish. A fisheries biologist employed by Alberta Fish and Wildlife surveyed the House River and conducted fish sampling on the River on June 25 and June 26, 1992. He observed fish populations in the House River below the Spill site (downstream) at levels at least 80% below fish populations observed above the Spill site (upstream). Significant mortality was observed for all species of fish. The biologist concluded that it was likely that all sport species present at the time of the Spill (walleye, pike, Arctic grayling and Mountain whitefish) suffered total mortality. Dead fish, which may have become stranded while attempting to avoid the Spill material, were observed well away from the water's edge.

47. There were acute impacts to the benthic communities on the river bottom and to the fish populations extending 90 km downstream from the point of the Spill, though major effects were confined to the first 60 km downstream. Fish declined both in absolute numbers and in number of species, while benthic species were also reduced. The effects would not have extended into the Athabasca River owing to dilution of the product after entering it. Environmental consultants retained by Suncor to examine the effects of the Spill predicted that, because of the nature of the materials entering the River, the benthic communities (e.g. bacteria, algae, macrobenthos) and perhaps fish populations would have returned to pre-Spill levels within 30 to 90 days following the Spill. In fact, some fish were found "re-colonizing" the area of the Spill within 7 days of the Spill.

48. The river bank affected by the Spill was also expected to recover relatively quickly and was aided by a soil remediation program undertaken by Suncor. Owing to the natural bacterial

degradation of hydrocarbons in the soil, Suncor has reported that long term effects of the Spill are not expected.

EVENTS FOLLOWING THE SPILL

49. As part of the containment and cleanup effort, Suncor utilized five helicopters and five Oil Spill Containment units. A total of 5 control points were established, 3 of which were not accessible by road. A minimum response would have established 2 control points and incurred approximately half the cost. To date, Suncor has spent in excess of $2.2 million in immediate and long term monitoring and remediation of the effects of the Spill.

50. In particular, to prevent "leaching" into the House River of product that may have soaked into the soil, Suncor constructed a collection and treatment system at the base of the slope. Collection efforts were aided by flushing the hillside during spring and summer conditions. Ten groundwater monitoring wells were installed at the base of the hill and a water monitoring program implemented. These efforts continued through the spring and summer of 1993 until Suncor was satisfied that the Spill had been cleaned up.

51. Suncor has completed a full assessment of the environmental impacts of the Spill, followed by rigorous monitoring and extensive remediation, particularly of the river bank affected by the Spill. The monitoring and remediation program included the following components:

(a) comprehensive river sediment and water survey program;

(b) comprehensive vegetation and soils survey program;

(c) biofeasibility study and subsequent nutrient program (to aid in degradation of hydrocarbons in soil)

(d) site restoration.

52. In October 1992, Suncor accelerated the inspection program that had revealed the hot tap near the House River. The accelerated program involved the excavation and inspection of all Pipeline appurtenances----repair sleeves, hot taps, stopples and other "by-pass" type fittings. Corrosion anomalies were also excavated and inspected. In all, 172 appurtenances and/or anomalies were inspected. As a result of this inspection, Suncor implemented a major pipeline excavation, purge id "cut-out" program completed in May 1993. Approximately 80 anomalies at 48 cut-out sites were removed during the program. Only 9 of the 40 cut-out sites were, in fact, required to comply with ERCB requirements. A major pipe replacement at Goathead Creek was also completed as part of this program.

53. This inspection program was one component of an overall integrity program for which Suncor hired a number of consultants to carry out a review of Suncor's Pipeline operation. The review is divided into 3 components:

Mechanical Integrity:

* Hydraulic Review * Pump Stations * Quality of Metering * Lock-out Systems * Pipeline Defect and Repair Assessment * Procedures

Systems Integrity:

* Interface of equipment to SPCC * Quality and calibration of end devices * Software * Line-balance calculation methods * System control during start-up and shutdown

Operations Assessment:

* Operator Training * Technical Participation/Support * Follow-up Activities * Field Supervision * Inspection Procedures * Maintenance Programs * Defect Assessments * Operating Philosophy * Operating Procedures

This work has been carried out and the Integrity Program continues.

54. A number of software upgrades were discussed and some implemented. In particular, an "inter-lock" system was added to SCADA, which prevents a mainline pump or booster from starting if a mainline valve has been left closed. In addition, SCADA was upgraded to improve leak detection capability.

55. The cost of these initiatives breaks down as follows:

Integrity Program	$ 938,709	(Excavation, inspection, repair)
Goathead Creek	304,898	(Pipe replacement, hill stabilization)
Purge	419,113	(Removal of product from Pipeline)
Cut-Out	1,154,562	(Defects removed from Pipeline)
Leak Detection	92,906	(SCADA improvements)
TOTAL	$2,910,188	

56. Suncor's operations manual was amended to include a specific requirement to ensure that all downstream valves are open before pumping begins.

57. Revised and integrated operations and training manuals have been completed and put into use and all operators have been given further training using the new materials.

AGREED TO this 7th day of October, 1994.

DEPARTMENT OF JUSTICE (CANADA)

Per: - Wesley W. Smart Counsel for Her Majesty the Queen

MILNER FENERTY

Per: Dennis R. Thomas, Q.C. Counsel for Suncor Inc.

NORTHWEST TERRITORIES SUPREME COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #6]

Between Her Majesty the Queen on the information of Neil Bruce Scott, Enforcement and Compliance Officer, respondent and cross-appellant, and The Commissioner of the Northwest Territories, appellant and cross-respondent

de Weerdt J.

Yellowknife, November 14, 1994

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 2, 34(1), 34(2), 36(3), 40(2)(a), 79.2, 79.2(f) – wording of payment order under s. 79.2(f) – project to protect "marine life" is too broad – order cannot purport to bind third parties**

Defences – due diligence – lack of due diligence by the offender is not an aggravating fact for sentencing

Sentencing -- $100,000 fine imposed – public deserves protection from government officials who flout the law – primary principles for sentencing are denunciation and deterrence – Parliament's increase of fines under the Act demonstrates gravity of the offence – aggravating factors include previous incidents and the offender's public responsibility towards the environment

Summary: This is an appeal by the accused, Commissioner of the Northwest Territories, of a sentence imposed by the Territorial Court for a conviction under s. 36(3) of the *Fisheries Act* and a cross-appeal of the sentence by the Crown.

The incident resulting in the charges and conviction occurred in Iqualuit when the west dyke of the Iqualuit sewage lagoon washed out, releasing approximately 56,000 cubic meters of raw untreated sewage and municipal waste directly into the waters of Koojesse Inlet, being waters frequented by fish. The west dyke had failed at least 5 times in the 10 years prior to the offence. A diversion ditch constructed to divert spring run-off from the lagoon was not maintained. Various construction works in the lagoon's watershed allowed an increased flow of water into the lagoon and a warmer than usual spring resulted in snowmelt overruning the drainage ditch and filling the lagoon. Efforts to repair the situation were unsuccessful and the seepage continued for an additional 8 days.

The appellant was convicted at trial and was sentenced to pay a fine of $49,000 plus a payment order of $40,000 under s. 79.2(f) of the *Fisheries Act*. The payment order was to be paid to the federal Department of the Environment to promote the conservation and protection of fish habitat in the Northwest Territories, specifically to be used to design, construct and operate a marine life aquarium at the Science Institute at Iqualuit ($20,000) and to facilitate studies, research or other

programs related to the improvement of sewage and waste treatment in the Northwest Territories ($20,000 plus interest).
With respect to the payment order, the learned justice agreed with the appellant that the order went beyond the terms of s. 79.2 of the *Fisheries Act*, by mentioning, for example "marine life" which is broader than "fish" or "fish habitat" and that the order purported to bind third parties not a party to the action. The justice increased the payment order to $100,000 and reworded the terms to fall within the requirements of s. 79.2.

With respect to the fine, the appellant argued that it was excessive, given the circumstances of the case or alternatively, that a token fine with the balance directed to the payment order would have been sufficient. The Crown argued that the fine should be increased to reflect the seriousness of the violation and the circumstances.

The learned justice increased the fine from $49,000 to $100,000 finding that the fine should better reflect the seriousness of the violation as recognized by the public through Parliament. The status of the appellant calls upon the court to protect the public from the illegal actions or inactions of government officials. Given the potential harm and sheer volume of the discharge, the incident constitued a major violation. Aggravating factors included the history of previous lagoon failures, the absence of remorse, the identity and public status of the offender and the appellant's special responsibilities towards the environment.

An award of costs of $10,000 was made in favour of the Crown in respect to an application by the appellant to adjourn the hearing of his conviction appeal sine die, which was characterized by the learned justice as political interference with the conduct of the appeal.

Held: The appeal was dismissed and the cross-appeal allowed. The payment order was increased to $100,000, the fine was increased to $100,000 and costs of $10,000 were ordered against the appellant.

REASONS/MOTIF:

John Donihee, Counsel for the Appellant
John K. Cliffe and Brett O. Webber, Counsel for the Respondent

[para1] de WEERDT J.:-- The Commissioner of the Northwest Territories appeals against the sentence imposed on him by a judge of the Territorial Court upon his conviction of a contravention of s. 36(3) of the *Fisheries Act*, R.S.C. 1985 c. F-14 (as amended) pursuant to s. 40(2)(a) of that *Act*. The Commissioner's appeal against the conviction was dismissed on July 22nd 1994.

[para2] In addition, the Crown (represented by the Attorney General of Canada) cross-appeals against the sentence and asks for costs of the appeal against conviction.

[para3] The sentence comprises a fine together with a payment order pursuant to s. 79.2(f) of the *Fisheries Act*. The fine, totalling $49,000, is calculated by adding $40,000 for an initial major contravention on June 1st 1991 together with $1,000 for each of the nine days immediately following, when that contravention was found to have continued (as charged). The payment order

is in a further amount of $40,000. The grand total to be paid is therefore $89,000 as ordered by the sentencing judge.

[para4] These appeals come before this Court at the first appellate level under Part XXVII of the *Criminal Code*.

[para5] Although the conviction appeal was dismissed, the conviction was amended by deleting June 1st 1991 and substituting June 2nd 1991 as the first day of the period during which the offence was committed. The period was thereby reduced to nine days from the ten mentioned in the conviction at first instance. It is not in dispute, however, that the material facts remain otherwise unchanged for the purposes of this appeal.

[para6] Pursuant to s. 822 of the *Criminal Code*, s. 687 applies. It reads as follows:

> 687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.
>
> (2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

[para7] The sentence under appeal is not "fixed by law" in the sense that it cannot be varied. The first step to be taken, therefore, is to determine the fitness of that sentence.

[para8] Clearly, the amendment made to the conviction requires a reconsideration of the sentence, if only because the period during which the offence continued has been shortened by one day. In that sense, at least, the sentence no longer fits the facts set forth in the conviction.

[para9] Both parties submit that the amount of the fine is inappropriate. For the Commissioner it is argued that the amount is excessive, in all the circumstances; and, in the alternative, that a token fine would suffice with the bulk of the penalty being instead in the form of a payment order pursuant to s. 79.2(f) of the *Fisheries Act*. Crown counsel contends that the total penalty, be it in the form of a fine or a payment order, should be of a magnitude which better reflects the seriousness of the violation as recognized by Parliament in that *Act*; and which likewise better reflects the circumstances of the case. It is also urged on behalf of the Crown that the fine should be increased, rather than reduced, to better compensate the Crown for the expenses which it incurred in the prosecution of the trial.

[para10] In addition, the Commissioner submits that the present payment order should be set aside or varied at least in part, having regard to the implications of the order for other parties, not party to the case, who are thereby affected.

[para11] These submissions require at least a brief examination of the facts established in evidence at trial, both in reference to the offence and in reference to the offender (nominally the Commissioner, but in reality the officials who had responsibility for the events comprising the offence in question).

[para12] In addition, it is to be noticed that s. 40(2) of the *Fisheries Act* was amended in 1991 (with effect on Assent, which was given on January 17th of that year). The amended subsection reads:

> 40. (2) Every person who contravenes subsection 36(1) or (3) is guilty of
>
> > (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
> >
> > (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

[para13] Prior to the amendment, the maximum fine upon summary conviction for a violation of s. 36(3) of the *Act* was $5,000 for a first offence and $10,000 for a second offence. The 1991 amendment therefore represents a substantial increase in public recognition of the potential gravity of such an offence.

[para14] Furthermore, the *Fisheries Act* was then also augmented, as to the penalties which a court may impose in such cases, by the addition of s. 79.2, which states:

> 79.2 Where a person is convicted of an offence under this *Act*, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:
>
> > (a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation or repetition of the offence;
> >
> > (b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;
> >
> > (c) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;
> >
> > (d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or

> caused to be taken on behalf of the Minister as a result of the commission of the offence;
>
> (e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;
>
> (f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;
>
> (g) directing the person to post a bond or pay into court an amount of money the court onsiders appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement mentioned in this section;
>
> (h) directing the person to submit to the Minister, on application by the Minister within three years after the date of the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances; and
>
> (i) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this *Act*.

[para15] For present purposes, counsel agree that I need only consider paragraph 79.2(f). I have nevertheless quoted the entire section here so that the context of that paragraph may be more conveniently understood.

The Facts

1. The offence

[para16] The facts of the offence are more fully set out in the reasons given by the sentencing judge both on conviction (reported at (1994) 1 W.W.R. 441, 12 C.E.L.R. (N.S.) 37) and on sentence (reported at (1994) 1 W.W.R. 458, 12 C.E.L.R. (N.S.) 55). I shall summarize here.

[para17] On or about June 2nd 1991, the west dyke of the Iqaluit sewage lagoon washed out, releasing approximately 56,000 cubic metres (or 12.3 million gallons) of raw untreated sewage and municipal waste directly into the waters of Koojesse Inlet, an arm of the sea within Frobisher Bay on the south shores of Baffin Island, these being waters frequented by fish. The material flowing from the lagoon into the sea was a "deleterious substance" as defined by s.34 of the *Fisheries Act*, which reads in part:

> 34. (1) For the purposes of sections 35 to 43, "deleterious substance" means
>
> (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is

rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c);

* * *

(2) The Governor in Council may make regulations prescribing

(a) substances and classes of substances,

(b) quantities or concentrations of substances and classes of substances in water, and

(c) treatments, processes and changes of water

for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsect ion (1).

[para18] It is to be noted that the terms "fish" and "fish habitat" are defined by the *Fisheries Act*, as follows:

2. In this *Act*,

"fish" includes shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

34. (1) For the purposes of sections 35 to 43,

> "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

[para19] In convicting the Commissioner, the Territorial Judge found that this event occurred as a result of the Commissioner's lack of due diligence.

[para20] The sewage lagoon was located in a depression bounded by elevated ground on three sides. It was located a few hundred metres from the town site of Iqaluit, a very short distance from the tidal waters of Koojesse Inlet. The contents of the lagoon were contained by the existing hills and two dykes, of which the main one was known as the west dyke. The lagoon is a natural drainage basin for the surrounding area. It held approximately 56,000 cubic metres (or 12.3 million gallons) of sewage and municipal waste when full.

[para21] The west dyke had failed completely on two specific previous occasions. In one instance it was washed out by a high tide. On another, in 1987, Spring run-off from the surrounding hills flooded the lagoon causing the dyke to give way. A diversion ditch was then dug in an attempt to divert such run-off away from the lagoon. The evidence shows that the west dyke had failed no less than five times in the ten years immediately before the occurrence of the offence now under consideration. These facts were known to departmental officials under the Commissioner.

[para22] The diversion ditch dug following the 1987 dyke failure was not maintained. At the time of the offence in question that ditch had become so shallow that it was unable to contain the run-off at a point where the ditch made a right angle turn. As a result, the run-off entered the lagoon, already overfull, causing it to overflow and burst the dyke.

[para23] A major construction project had been undertaken on the lagoon's watershed earlier in 1991. This involved the construction of roads, aircraft taxi-ways, hangars and barracks, all quite close to and uphill from the lagoon. Among other things, the project included the replacement of nearby drainage culverts, increasing their capacity and altering the topography. These works made it possible for an increased flow of water to pour into the lagoon, given the state of the diversion ditch. Though all this was known to officials under the Commissioner, nothing was done to better protect the lagoon.

[para24] June 1st 1991 was warmer than usual for that time of year at Iqaluit. Snowmelt began to run off the high ground above the lagoon. It overran the drainage ditch at the right angle turn and flowed into the already overfull lagoon. The results earlier mentioned then followed on or about June 2nd 1991.

[para25] Repairs were immediately made in haste by municipal officials acting ad hoc in default of any contingency plan or resources for the purpose on the part of the Commissioner. These repairs were nevertheless insufficient to prevent the continued seepage of raw sewage from the lagoon into the waters of Koojesse Inlet, at an estimated rate of five gallons a minute or 7,200 gallons a day. This seepage continued for the eight days immediately following, that is to say from and including June 3rd to and including June 10th 1991.

[para26] Quite apart from public health concerns which lie beyond the scope of the *Fisheries Act*, the evidence before the Territorial Judge led him to find that the outflow from the lagoon was in fact toxic to "fish" as defined by the *Act*. It is immaterial that "not one dead fish was ever reported as a result of the failure of the sewage lagoon". Iqaluit is named for the presence of fish in the waters here in question; it is and has long been a centre of aboriginal fishing activity.

[para27] The circumstances in which the offence took place do not reveal that this occurrence was the result of any unforeseeable, unpreventable, or completely unexpected event amounting to an "Act of God", or that the Commissioner (or his officials) should be absolved of all responsibility because of the contributing actions of a third party. And the licence relied upon by the Commissioner which had been issued to the Town of Iqaluit pursuant to the *Northern Inland Waters Act*, R.S.C. 1985, c. N-25 is of no avail to the Commissioner given the limited scope of that *Act*, and consequently of the licence. Nor is the licence to be considered in extenuation of the Commissioner's lack of due diligence, in the circumstances, given that the Commissioner and his officials cannot be looked upon as lacking competent legal advice. There is nothing to show that the Commissioner (or anyone under him) was misled into any officially induced error by reason of the licence, in the sense that any official or tribunal acting under either the *Northern Inland Waters Act* or the *Fisheries Act* was responsible for any such inducement.

2. The offender

[para28] The Commissioner is the chief executive officer of the Northwest Territories pursuant to s. 3 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27, having the responsibility of administering the government of these Territories under instructions given from time to time by the Governor General in Council or the Minister of Indian Affairs and Northern Development of Canada, as provided by s. 4 of the *Act*. And while the powers of the Commissioner include those vested before September 1st 1905 in the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as declared by s. 6 of the *Act*, the office of Commissioner was, at the relevant times, held by an official of the Government of Canada with deputy ministerial rank. Nevertheless, by 1991, the functions exercised by the Commissioner in person had become largely ceremonial and their executive character had become restricted to the point that he could by then be regarded as holding a constitutional position analogous to that of a provincial Lieutenant Governor, his administrative and executive powers being exercised almost exclusively through the Executive Council of the Northwest Territories (and its ministerial members, acting through their subordinates in the public service of the Northwest Territories).

[para29] For purposes of the sentence under appeal, it is therefore the Executive Council and its members, more particularly those having responsibility for matters which encompass the offence in question, and not the Commissioner as an individual, whose actions or lack of action are to be considered. These officials are today (as they were in 1991) in the appropriate position to formulate public policy and take administrative and executive action on behalf of the Commissioner, so as to ensure that subordinate officials in the public service of the Northwest Territories conduct the business of the Territorial government in such a manner that the offence will not be repeated and so that other such offences are prevented from occurring. The Commissioner, for present purposes, is therefore only a convenient nominal or symbolic representative of those who have the relevant political authority and the means to exercise it.

[para30] I have, since the inception of the appeal, described the defendant appellant as the Commissioner more for purposes of clarity and conciseness of expression than anything else. It is, besides, extremely confusing to see the Crown mentioned as both prosecutor and defendant in a case subject to criminal procedure. By describing the defendant appellant in less than regal terms, I have endeavoured to focus attention on both the subordinate constitutional status of that party and the present-day political realities of government action in the Northwest Territories at the Territorial level.

[para31] To illustrate this further reference may be had to the statement made in the Legislative Assembly of the Northwest Territories on February 15th 1989 (No. 8-89(1), by the Honourable Dennis Patterson, M.L.A., then Government Leader) on the subject of environmental contaminants. In that statement the Government Leader, speaking on behalf of the Executive Council (and, by implication, the Legislative Assembly as a whole) declared that the problems posed by such contaminants "will not be resolved without strong, deliberate and co-ordinated action by all levels of government, industry, the scientific community and the support of the public". He went on to add:

> Mr. Speaker, environmental contaminants are a complex issue. The dangers of contaminants and how they get into wildlife resources is not fully understood, nor is it easy to translate information on the problem into the aboriginal languages of the Northwest Territories.

[para32] That the Commissioner, meaning the Government of the Northwest Territories as a whole, was thus well aware of the importance of environmental issues in 1991, is therefore self-evident. It is not without all relevance, perhaps, that the Government Leader who made these statements was also the Member of the Legislative Assembly for Iqaluit.

The Payment Order

[para33] Under the order made by the sentencing judge pursuant to s. 79.2(f) of the *Fisheries Act*, the Commissioner is required to pay $40,000 to the Department of Environment of Canada "for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories".

[para34] The order then goes on to specify that this sum is to be used for purposes which I have paraphrased as follows:

1. $20,000 for designing, constructing and operating a marine life aquarium at the Science Institute at Iqaluit with the intention that the aquarium shall serve as a focal point for research and study of marine life and promote related educational objectives (the project to be one of the federal Department of Environment whether or not in partnership with the federal Department of Fisheries and Oceans, the federal Department of Indian Affairs and Northern Development, or the Arctic College Environmental Technology Program).

2. 20,000 (with any accrued interest) for the facilitation of studies, research or other programs related to the improvement of sewage and waste treatment in the Northwest Territories.

[para35] On behalf of the Commissioner, it is submitted that this order goes beyond the scope of s. 79.2(f), which only empowered the sentencing judge to direct the payment of an appropriate amount to "Her Majesty ... for the purpose of promoting the proper management and control of fisheries and fish habitat or the conservation and protection of fish or fish habitat".

[para36] It is immediately apparent that the order, except for its reference to the Department of Environment of Canada in lieu of "Her Majesty", is couched in both the general terms of s. 79.2(f) and additional terms which purport to give specific content to the general terms. It is the additional terms which give rise to objection on the part of the Commissioner.

[para37] The objection goes further than the specific purposes mentioned. It is contended, in my view correctly, that parties not before the Court are mentioned in the order in a manner which purports to bind them. For instance, the aquarium is contemplated as to be constructed and operated at the Science Institute, an entity not represented before the sentencing judge and whose consent to involvement is not shown as having been given. There is nothing in the *Fisheries Act* which in any way empowered the sentencing judge to so involve the Science Institute in the project. Likewise, although the Department of Environment of Canada was evidently involved in the initiation of the prosecution in this case, that Department was not itself represented before the sentencing judge. Nothing in the *Act* empowered him to make an order with binding effect on that Department.

[para38] Although these submissions may seem mere legal formalism, it is readily apparent that they do have actual substance. The sums mentioned in the order are ex facie mere token amounts, given the purposes to which they are to be directed. There is nothing in evidence to show that there is any realistic expectation that the money would ever be spent for those purposes.

[para39] Not that the design, construction and operation of a marine life aquarium at Iqaluit, whether at the Science Institute or elsewhere, does not appear to be very laudable, should the necessary funding and many other requirements be forthcoming. Leaving aside the argument that the order is ultra vires since "marine life" encompasses more than "fish" and "fish habitat", even as those terms are inclusively defined by the *Fisheries Act*, it is enough to say that the order nonetheless raises too many other questions, in the absence of evidence which would provide satisfactory answers, to be allowed to stand in respect of its additional specific terms.

The Fine

[para40] As already noted, the amendment made to the conviction requires that the fines imposed for the June 1st and 2nd 1991 violations be reconsidered, in any event.

[para41] The total fine of $49,000 is approximately equal in amount to the out-of-pocket expenses incurred by the Crown in the conduct of the trial. This does not include any counsel fees or costs of preparation by counsel. It might be thought, therefore, that a fine of this amount would serve as at least partial compensation to the Crown in respect of its necessary prosecution expenses.

The objection that any fine would be merely an intergovernmental transfer of the taxpayer's dollars could thus be met on the basis that those dollars should be allocated from the offender's bank account rather than from the federal Consolidated Revenue Fund.

[para42] Had the Commissioner acknowledged his responsibility for the offence by entering a guilty plea, thus eliminating the need for a trial, those out-of-pocket expenses need not have been incurred. And other burdens of conducting the trial could thus have been minimised. In that event, no doubt, the remorse which would have been evidenced could have been taken into account when it came to imposition of the sentence. No such responsibility was acknowledged and consequently no remorse was shown. The absence of due diligence which led to the offence was instead followed by a brazen denial of all responsibility for it.

[para43] It was of course fully within the legal right of the Commissioner to enter a plea of not guilty and to then insist on strict proof by the Crown of the offence charged. Likewise, it was open to the Commissioner to challenge the constitutional validity of s. 36(3) of the *Fisheries Act* and to argue all the legal defences that counsel saw fit to raise, as occurred. The case was thus vigorously fought, as the record amply shows, on every conceivable issue which legal ingenuity could devise. Having taken that course, it hardly seems fitting that the Commissioner should now, nevertheless, be able to escape the full rigour of the law.

[para44] In the circumstances, the fine of $49,000 does not fit either the offence or the offender, who comes before the courts not as an unlettered pauper but as the representative head of a government which is possessed of powers and resources well beyond those of any individual, and most private corporations or municipal institutions, in the Northwest Territories.

Sentencing Principles

[para45] Since the sentence is not a fit one, in all the circumstances, it must be varied accordingly, within the limits prescribed by the *Fisheries Act*. To that end, consideration must be given afresh to the applicable sentencing principles as argued on this appeal.

1. Protection of the public

[para46] The anomalous position of the Commissioner as an offender in a purely nominal sense who merely represents the government (and the particular officials) responsible for the offence suggests that whatever sanction the Court is to impose must be one which will be clearly seen by the public as more than a mild reprimand and certainly not as condonation. The public deserves to have its laws respected by its governments, and their officials, who owe us all no less than that. If it takes a prosecution and a sentence to bring this about, then so be it. In this sense, the Court is duty bound to act to protect the public, so far as necessary and within the Court's powers, from the actions (or inaction) of governments or officials who flout the law. They must not be allowed to do so with impunity.

2. Denunciation and deterrence

[para47] The sentencing judge recognized and applied these principles. Both parties are in agreement that these are the primary principles to be applied in sentencing in this case. They disagree only as to the manner of their application.

[para48] For the Commissioner, it is contended that the conviction is sufficient in itself by way of denunciation and deterrence. After all, the penalty for a second offence could be much more severe than that for a first offence, as in this case. The conviction has the effect of hereafter exposing the offender to a much higher scale of punishment.

[para49] It is the Crown's position that a much more significant sentence, in terms which will come widely to public attention as judicial condemnation of the offence, is required in all the circumstances of this case if the decision of the Court is to be respected.

3. Gravity and magnitude of the offence

[para50] As already noted, the public through Parliament recognized the potential gravity of violations of s. 36(3) of the *Fisheries Act* when it substantially increased the scale of penalties for such violations in 1991, indeed only six months before the offence took place. The ridiculously small scale of those penalties before then was an open invitation to offenders to look upon them as no more than "the price of doing business as usual".

[para51] The actual effect of the offence on the environment at Koojesse Inlet is not known, although it is said that some studies show that it had minimal impact. It is argued on behalf of the Commissioner that the contents of the lagoon which reached the sea were largely quite rapidly biodegradable. Those contents were not confined to organic material normally found in human sewage, however, since the evidence shows that the lagoon also contained "municipal waste", which in today's world would include the chemicals in detergents and other items of common use.

[para52] In terms of potential harm, as recognized in 1989 by the statement in the Legislative Assembly, and in terms of sheer volume, this was a major violation of s. 36(3) of the *Fisheries Act.* And when due account is also taken of the identity and public status of the offender, that aspect of the matter is placed beyond all question.

4. Aggravating and mitigating factors

[para53] The lack of due diligence shown by the offender is the gravamen of the offence and is, therefore, not in itself an aggravating factor. What does aggravate the seriousness of the offence is the history of previous incidents of failure of the lagoon, well-known to the offender before the offence occurred; it is against this notorious background that the seriousness of the offence is to be measured, in terms of aggravation.

[para54] It is furthermore an aggravating feature that the offender stood in a position of special public responsibility towards the environment, as acknowledged in the statement to the Legislative Assembly in 1989, even if the *Fisheries Act* lay outside the sphere of that responsibility. We all know, today, that the environment is a seamless web of which no part is disconnected from the rest.

[para55] There are no mitigating factors revealed in the evidence before the Court, apart from the absence of evidence that the contents of the lagoon were more than just potentially harmful in the longterm. The plea that a third party contributed to the offence remains unsubstantiated. On the evidence, whatever was done by that third party, it remained the Commissioner's responsibility to

exercise due diligence to prevent the offence from occurring; and that was not done. Nor was the unusually warm weather a mitigating consideration. Due diligence required that it be reckoned with; and it was not. As for the licence, it cannot be regarded as a mitigating circumstance for the reasons already mentioned. Finally, the Commissioner's arguments at trial and on this appeal, that the provisions of s. 36(3) of the *Fisheries Act* are unconstitutional, lack all merit in support of a plea of mistake as to the law made in good faith. The Commissioner is not to be equated with a simple municipal garbage collector.

5. Proportionality

[para56] Taking all these factors and circumstances into account, I am driven to conclude that both the fine and the payment order must be varied, notwithstanding the evident pains taken by the very experienced sentencing judge in crafting the penalties which he imposed.

[para57] In reaching that conclusion, I have not ignored the fact that some $300,000 was expended by the Commissioner to restore the lagoon to operating condition (and, presumably, the condition to which it should have been brought before the offence occurred, so as to prevent its occurrence). I assume that this includes clean-up costs. The lagoon was at all times the property of the Commissioner, who remained in control of it and continued to operate it after the restoration. That amount is therefore not to be regarded as a part or in mitigation of any penalty to be judicially imposed. It does, however, reflect to some degree on the lack of due proportionality between the offence and the offender, on the one hand, and the sentence under appeal on the other hand.

The Sentence

[para58] Before the sentencing judge, Crown counsel took the position that a publication order should be made pursuant to s. 79.2(f) of the *Fisheries Act*. This was opposed on behalf of the Commissioner. In the result, no such order was made; and the Crown has chosen not to pursue the point in this appeal. I therefore do not include any such order in the sentence of the Court.

[para59] The payment order is varied as follows:

1. it shall be in the amount of $100,000 in lieu of the $40,000 in the sentence under appeal;

2. the $100,000 shall be paid no later than forthwith upon expiry of the period within which this sentence may be appealed;

3. it shall be paid to Her Majesty the Queen in right of Canada;
4. it shall be used by Her Majesty to promote the conservation and protection of fish or fish habitat in the waters of or adjacent to the Northwest Territories;

5. such use may include the design, construction or operation of an aquarium, at Iqaluit, whether or not in conjunction with other concerned government agencies or individuals, as the Department of Environment of Canada may approve; and

6. such use may include the funding or conduct of programs approved by the Department of Environment of Canada related to sewage and waste treatment and disposal, so as to meet the requirements of the *Fisheries Act* in relation to the Northwest Territories.

[para60] The fine is varied to a total of $100,000 which includes $1,000 a day for the period of seepage from and including June 3rd 1991 to and including June 10th 1991. The Commissioner shall have until the expiry of the period of any appeal from this sentence within which to pay the fine in the usual manner.

[para61] The total penalty imposed under the *Fisheries Act* is therefore increased from $89,000 to $200,000.

Costs

[para62] Section 826 of the *Criminal Code* makes the following provision for an award of costs:

> 826. Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.

[para63] The fact that the Commissioner was a representative of the Crown, assuming that to be the case for purposes of argument, does not prevent an award of costs being made against him: *R.* v. *Ouellette*, [1980] 1 S.C.R. 568, 52 C.C.C. (2d) 346, 15 C.R. (3d) 372. And see *R.* v. *Pawlowski* (1993), 20 C.R. (4th) 233 (Ont. C.A.).

[para64] This is clearly not a case for an award of costs against the Crown as prosecutor. The question remains as to whether any costs are to be awarded against the Commissioner.

1. The application to adjourn the appeal hearing

[para65] On April 8th 1994 I directed that costs should be addressed by counsel at the conclusion of these appeal proceedings. That has now been done. On that occasion, I had dismissed the Commissioner's application to adjourn the hearing of his conviction appeal sine die.

[para66] That application was supported by an affidavit of the then Acting Deputy Minister of Justice of the Northwest Territories, in which he alleged that differing standards for the treatment of municipal sewage effluent were being applied by the federal Department of Environment, on one hand, and the federal Department of Indian Affairs and Northern Development, on the other, in the exercise of their respective authorities under the *Fisheries Act* and the *Northern Inland Waters Act*. As a consequence, it was said that, depending on the appropriate standard, the Government of the Northwest Territories may be required to incur considerable capital expenditures to upgrade municipal sewage treatment systems on pain of further prosecution under the *Fisheries Act*.

[para67] The affidavit went on to say that, as a result of these public policy concerns, the Minister of Justice of the Northwest Territories had entered into correspondence with the Deputy

Prime Minister and Minister of Environment of Canada to attempt to resolve these concerns by meetings of their officials, it being the position of the Territorial Minister that, if satisfactory progress could be made (at the policy level) between the two governments, then the Commissioner would abandon his appeal. No mention was made, in the affidavit, of the Crown's cross-appeal against sentence. Nor was any mention made of the fact that the Commissioner had not paid any part of the penalty imposed upon him by the judge of the Territorial Court, no attempt having been made on behalf of the Commissioner to obtain a judicial stay of execution in that respect.

[para68] Crown counsel submits that the grounds for that adjournment were inappropriate in the circumstances; it appeared, indeed, that what was being attempted was nothing short of political interference with the Court's conduct of the appeal. I find this to be no more than a reasonable characterization of the situation. An award of costs of the day, in an amount to compensate the Crown for the need to attend and appose the application, is in my view entirely justifiable. Moreover, to mark the Court's disapproval of the application, the amount of those costs should be fixed in an amount which may serve to impress on those responsible for it that they should avoid any repetition of the type of conduct there shown.

[para69] I therefore fix the amount of the costs to be paid by the Commissioner to the Crown, in respect of the application to adjourn, in the amount of $10,000.

2. The conviction appeal

[para70] With the sole exception of the factual issue of whether the offence commenced on June 1st 1991 or on June 2nd 1991, as to which the Commissioner's appeal against the conviction was technically successful, the remaining issues raised by him in that appeal were resolved in favour of the respondent Crown.

[para71] The Commissioner says that this was not a "test case" and that no oblique motive existed in his conduct of the appeal. The Crown submission is that the contrary is the case. I agree with counsel for the Commissioner that the Court should not be quick to find an oblique motive merely because the Commissioner's cause was vigorously pursued, even if in the end it was all for naught. The "test case" line of authority is inapplicable, it seems to me, where the prosecuting Crown has been successful.

[para72] Nor do I find merit in the Crown's contention that the Commissioner's constitutional challenge to s. 36(3) of the *Fisheries Act* placed the administration and enforcement of that provision in jeopardy across Canada. The Territorial Court has no jurisdiction beyond the Northwest Territories any more than this Court. Had either court ruled against the Crown on that challenge, there was still another level of appeal before it could become a national issue with legal consequences of a binding character. There were arguable contentions put before both the Territorial Court and this Court on the matter. That those contentions failed on both occasions is not, in itself, a ground for the award of costs against the unsuccessful contender.

[para73] Nevertheless, the record shows that the Commissioner did not hesitate to "pull out all the stops" in the course of both the trial and the appeal, forcing the Crown to go the limit, for its

part. It was of course the Commissioner's legal right to do so. And the Deputy Minister's affidavit sheds some light on the reasons for that course being taken. A financial consequence far greater than the penalty which could properly be imposed in this case was clearly dictating the Commissioner's response to the prosecution, quite apart from the political consequences which might flow from a conviction.

[para74] In conclusion, I decline to make an award of costs against the Commissioner in respect of either the trial or the appeals to this Court, other than that above mentioned. These costs shall be paid contemporaneously with the fine.

[para75] Counsel on both sides are to be complimented upon the completeness and thoroughness of their submissions, for which I express my appreciation.

BRITISH COLUMBIA SUPREME COURT

[Indexed as: Standard Trust Co. (In liquidation) v. Lindsay Holdings Ltd.]

Between Standard Trust Company, in liquidation, Petitioner, and Lindsay Holdings Ltd., John Richard Ostaf, ACC Auto Care Centre, Inc., Coast Hudson Ltd. and Royal Bank of Canada, Respondents

Thackray J.

Vancouver, November 22, 1994

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 38(4), 38(6), 42(1), 42(2) – application for court order appointing receiver and manager – proposed order contained limitations on environmental liability – order would conflict with some provisions of the *Fisheries Act* – order not granted**

Receivership – environmental laws apply to court appointed receiver

Summary: The petitioner applied for the appointment without security of a receiver and manager of certain lands and businesses in Richmond, B.C. The property of concern was an automotive-oriented shopping mall, which contained some petroleum pollution. Richmond is bounded on two sides by the Fraser River which is a spawning ground and migration route for salmon. The issue was whether the order appointing the proposed receiver should protect the receiver from legislation that creates liability for the costs of environmental protection and environmental damage.

The learned justice rejected the petitioner's argument that legislation must specifically state that receivers' liability is unlimited. On the contrary, it is more logical for legislation to exclude receivers' liability if that is the intention. Further, the court rejected the petitioner's argument that authority for the exemption requested could be found in the courts own rules, the *Law and Equity Act* or its inherent jurisdiction. None of these sources of judicial power allow a court to ignore the facts that receivers do have environmental obligations under law and courts do not have jurisdiction to rewrite the statutes that create such obligations. The definitions of "person" in environmental legislation such as the *Fisheries Act* give effect to the intention to achieve broad application of environmental protection legislation. To implement the proposed order would contradict some provisions of the *Fisheries Act* concerning the direction to take remedial measures (s. 38(6)) and the provision establishing joint and several liability for certain public costs (s. 42(1)).

In addition, the court rejected the petitioner's argument that as an officer of the court, it should be shielded from liability under environmental laws in the same manner as the court itself. A receiver and manager is a commercial entity and as such is different from the court.

Held: The portions of the proposed order set out in the judgement dealing with environmental liability were denied.

REASONS/MOTIF:

F.L. Lamer, Counsel for the Petitioner
G. Burnyeat, Counsel for Lindsay Holdings Ltd. and John Richard
G. Donegan, Q.C., Counsel for the Attorney General of Canada
D. Doyle, Attorney General of British Columbia

[para1] THACKRAY J.:-- The petitioner applied for the appointment, without security, of Price Waterhouse Limited as receiver and manager of certain lands, buildings, leases, rents and business. The property is an automotive-oriented shopping mall in Richmond, British Columbia. The contentious issue is the desire of the proposed receiver to have protection from legislation that creates liability for the costs of environmental protection and for environmental damage.

[para2] Richmond is bounded north and south by the Fraser River which is a spawning ground and migration route of numerous specie of salmon. Seepage of petroleum products or spillage that enters the storm drainage system could find its way into the river.

[para3] Opposition to the liability provisions was thought by the Attorneys General to be hypothetical. However, such might not be the case. Counsel for the petitioner indicated that there is some pollution, although the extent was not disclosed.

[para4] The controversial sections of the proposed order read as follows:

> AND THIS COURT FURTHER ORDERS that the Receiver and Manager (which term shall herein include its officers, directors, employees, agents, consultants, principals and solicitors, as well as any party substituted for Price Waterhouse Limited and in the limited case of the liability contemplated by subparagraph (b) below, extends to any individual including any agents, employees, former employees and officers of the Respondent Lindsay Holdings Ltd. that the Receiver and Manager may hereafter employ or retain from time to time) shall not be personally liable either directly or vicariously under any Environmental Regulations in respect of any environmental condition which arose, or any environmental damage which occurred either:
>
> (a) before the Receiver and Manager's appointment hereunder;
>
> (b) after the Receiver and Manager's appointment and prior to its discharge hereunder; or
>
> (c) after the discharge of the Receiver and Manager,
>
> unless it can be demonstrated by the regulatory authority responsible for the administration of the applicable Environmental Regulations ("Environmental Regulator") that the condition arose or the damage occurred after the appointment of the Receiver and Manager and prior to its discharge and as a result of the Receiver and Manager's failure to comply with any written order or instruction issued by the Environmental Regulator and that the

Receiver and Manager has been provided sufficient funding or assurance of funding specifically designated for compliance with such order or instruction.

AND THIS COURT FURTHER ORDERS that the Receiver and Manager shall undertake 0such environmental preservation and environmental maintenance and monitoring of the Property as the Environmental Regulator reasonably advises the Receiver and Manager should be undertaken by way of written order or instruction by the Environmental Regulator and for which the Receiver and Manager has or receives funding or is provided with assurances of funding which are acceptable to the Receiver and Manager and which funds are specifically designated for compliance with such order or instruction.

AND THIS COURT FURTHER ORDERS that nothing in this order shall compel the Petitioner or make the Petitioner liable to provide the funding required for compliance with any written order made by the Environmental Regulator.
AND THIS COURT FURTHER ORDERS that the term of this order sets out the only requirement of:

(a) the Receiver and Manager, and

(b) any individuals including agents, employees, former employees and officers of Lindsay Holdings Ltd. that the Receiver and Manager shall employ or retain from time to time ("Employees") for such period as such person or persons is employed by the Receiver and Manager

with respect to compliance with and liabilities arising under the Environmental Regulations such that, except as expressly provided to the contrary herein, nothing herein contained shall vest in the Receiver and Manager or Employees the ownership, control, possession or management nor require the Receiver and Manager or Employees to take possession, control or manage the Property or a part thereof which may be a pollutant or contaminant or cause or contribute to a discharge, release or deposit or a substance contrary to any Environmental Regulations which may have application in any jurisdiction in which any of the Property is situate.

AND THIS COURT FURTHER ORDERS that excepting liability for acts of willful misconduct or gross negligence on the part of the officers, directors and direct employees of Price Waterhouse Limited in its personal capacity and not in its capacity as Receiver and Manager, any liability of the Receiver and Manager whatsoever, including without limitation arising under Environmental Regulations resulting out of or from its appointment in the exercise of its powers hereunder shall be limited in the aggregate to the amount received by the Receiver and Manager from the disposition of the Property or any part thereof after deductions for payment of both the fees, disbursements and expenditures of every nature and kind incurred by the Receiver and Manager and its counsel and any monies borrowed by the Receiver and Manager pursuant to this Order.

[para5] The Attorneys General oppose these limitations. They submit that the court does not have jurisdiction to limit a receiver manager's liability as proposed. The petitioner framed the issue as follows:

> The issue in this case is whether a court can, under Rule 47 and Section 36 of the *Law and Equity Act*, R.S.B.C. l979, c. 224, limit the civil and penal liability of a court appointed receiver under the *Fisheries Act*, R.S.C. l985, c. F-l4, the *Canadian Environmental Protection Act*, R.S.C. 1985, c. C-16, the *Transportation of Dangerous Goods Act*, R.S.C. 1985, c. T-19, the *Navigable Waters Protection Act*, R.S.C. 1985, c. C-19, the *Canada Water Act*, R.S.C. 1970, c. N-22, the *Waste Management Act*, S.B.C. 1982, c. 41 the *Environment Management Act*, S.B.C. 1981, c. 14, the *Municipal Act*, R.S.B.C. 1979, c. 290, the *Transportation of Dangerous Goods Act*, S.B.C. 1985, c. 17, as amended, or the regulations thereunder or any other existing legislation, federal, provincial or otherwise relating in whole or in part to the protection or the enhancement of the environment, transportation of goods, occupational safety, product liability, public health and public safety (collectively, "Environmental Laws"), which may have application to the property which is the subject matter of the order being requested from the court.
>
> [...]
>
> ... the issues raised by the Attorney General of British Columbia and the Attorney General of Canada in relation to the request for court ordered limitation on environmental liability are as follows:
>
> > (a) Is a court appointed receiver, in its capacity as an officer of the court acting in compliance with the terms and conditions of its appointment, a "person" to which environmental laws apply?
> >
> > (b) Even if the environmental laws are capable of encompassing court appointed receivers in the absence of court ordered limitation on liability, does the wording of any environmental law restrict, either specifically or by necessary implication, the power of a court to appoint a receiver "on terms and conditions the court thinks just"?

SUBMISSIONS OF THE PETITIONER

[para6] The petitioner submitted that a court appointed receiver is an officer of the court and not a person to which environmental laws apply. Accordingly, the court can "clarify" a receiver's duties and powers. The petitioner noted that the word "person" as defined in the *Interpretation Act*, R.S.C. 1985 c. I-23, and in the *Interpretation Act*, R.S.B.C. 1979, c. 206, does not mention an officer of the court.

[para7] Counsel for the petitioner contended that who or what is encompassed by "person" is dependent on the purpose and meaning of any specific legislative enactment. He said that the starting point in any analysis of the issue is to determine the legal status of a court appointed receiver. He cited *Parsons* v. *The Sovereign Bank of Canada*, [1913] A.C. 160 (P.C.) at page 167:

> A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs, with the result that some of its contracts, such as those in which it stands to an employee in the relation of master to servant, being of a personal nature, may, in certain cases, be determined by the mere change in possession, and the company may be liable for a breach.

[para8] The petitioner further submitted that as an officer of the court the receiver holds the property which is the subject matter of the receivership on behalf of the court and not on behalf of any secured creditor. He concluded that a receiver's, "obligations should be limited to the resources available to it". He continued:

> ... the use of the word "person" in an Environmental Law (or indeed any other statute) cannot be interpreted to cover a court appointed receiver if it purports to impose unlimited liability on such a "person". This is essentially the reasoning used by Chief Justice Hickman in *Bank of Montreal* v. *Lundrigans Ltd*. (1992), 12 C.B.R. (3d) 170 (Nfld. S.C.(T.D.)) to rule that such an unlimited liability cannot be imposed on a court appointed receiver. Chief Justice Hickman found that none of the environmental legislation referred to him (including federal legislation) "provides that a receiver and manager shall be personally liable for any environmental contaminant found upon the property that comes into its or his hands", at pages 179-80:
>
> > [. . .]
>
> In my view, the appointment of a receiver and manager by the court, and his subsequent assumption of control of all or some of a debtor's assets, does not, under existing legislation, render him liable to pay money or perform work ordered by environmental authorities in excess of the value of or moneys received from the sale of the individual asset which caused the environmental damage. Legislation intended to impose unlimited liability on a receiver and manager would have to say so in clear and unmistakable language, which is not the case with existing environmental legislation.
>
> The Petitioner submits that this rule of construction is valid with respect to any legislation which could potentially cover court appointed receivers. This rule of construction applies even more forcefully to the Environmental Laws in view of the basis upon which liability is imposed, i.e. mere possession and control.
>
> It would be irrational to impose such unlimited liability on a "person" who does not have the same rights, powers and obligations as either a natural person, a corporation or even a "corporation sole" (i.e. a government). In fact, a court appointed receiver is merely the corporate conduit of a court ordered mandate because, in its capacity as a court officer, it is the person through which the court has elected to act. None of the Environmental Laws can be interpreted as imposing liability on the courts and, as a result, no liability can be imposed

> under these statutes to the court's duly appointed officers. It is for this reason that a court appointed receiver cannot be considered to be a "person" within the meaning of the Environmental Laws. It is the Petitioner's respectful submission that, as a result, none of the Environmental Laws specifically imposed environmental obligations on court appointed receivers.

[para9] Counsel for the petitioner canvassed whether environmental legislation is intended to restrict the powers of the court under Supreme Court Rule 47 and section 36 of the *Law and Equity Act*. He said that Chief Justice Hickman in *Lundrigans* (also reported at (1992) 92 D.L.R. (4th) 554 (N.S.S.C.)) held that the court has the inherent jurisdiction to make an order such as the one proposed.

[para10] Finally, counsel for the petitioner said that the appointment of a receiver cannot be achieved if Price Waterhouse may incur unlimited liability. He concluded as follows:

> For these reasons, the petitioner submits that the order sought with respect to environmental liability is merely declarative in nature and that, even if it isn't, the court has jurisdiction to provide the requested limitation on liability in order to ensure that it is capable of finding a receiver who will be able and willing to perform its court ordered mandate.

JUDGMENT

[para11] I do not accept the proposition that legislation must specifically state that there is unlimited liability upon receivers. It follows that I do not agree with Hickman C.J. in *Lundrigans* when he said that, "Legislation intended to impose unlimited liability on a receiver and manager would have to say so in clear and unmistakable language...". Similarly, I reject the submission of the petitioner that the word "person" in statutes "cannot be interpreted to cover a court appointed receiver if it purports to impose unlimited liability on such a 'person'".

[para12] The *British Columbia Interpretation Act* defines "person" as including, "a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law." The federal *Interpretation Act* defines person as including a corporation. It must therefore be concluded that legislators, in using the word "person" in various statutes to describe those upon whom liability for environmental damage attaches, intended to provide an expansive definition, one that should not be limited by the courts.

[para13] Federal and provincial legislation create liability for environmental damage. No federal legislation authorizes the court to limit liability in the manner sought by the petitioner. For example, the *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42(4) which provides that, "The liability of any person described in paragraph (1)(a) is absolute and does not depend on proof of fault or negligence ...". Paragraph (1)(a) defines "any person" as anyone who at any material time owned the deleterious substance or had charge, management or control thereof.

[para14] Rather than suggest that the legislation must specifically include entities not intended to be made liable, the more logical approach would be to expect legislation to exclude those not liable. This is precisely the approach taken by Parliament with respect to trustees in bankruptcy.

Under a recent amendment to the *Bankruptcy and Insolvency Act*, R.S.C. 1992, c. 26, s. 14.06, the potential environmental liability of a trustee has been expressly limited. No similar limitation is given to receivers in any legislation and accordingly I conclude that the legislators intended them to fall within the ambit of environmental legislation.

[para15] To make the order requested the court would have to find jurisdiction within its own Rules, the *Law and Equity Act* or its inherent jurisdiction. Rule 47 provides that the court may appoint a receiver "either unconditionally or on terms ...". *The Law and Equity Act* empowers the court to appoint a receiver and the order may be made "on terms and conditions that the court thinks just." Neither of these, in my opinion, empowers the court to impose conditions that conflict with statutory duties, rights or liabilities.

[para16] Counsel for the petitioner submitted that the inherent jurisdiction of the court will suffice. He contended that Chief Justice Hickman in *Lundrigans* was correct in relying upon the inherent jurisdiction of the court in limiting the liability of a receiver under environmental laws. However, I must point out that Hickman C.J. stated that while the court had the inherent jurisdiction to act, he also acknowledged that any order must be made "in accordance with existing laws ... ".

[para17] The petitioner referred to I.H. Jacobs, The Inherent Jurisdiction of the Court (1970), 23 Current Legal Problems 23 at pp. 27-28:

> The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner.

The petitioner contended that, "the inherent jurisdiction of the court is the jurisdiction to grant such orders as may be necessary in order to prevent ... the law from being stultified and in order to ensure that superior courts have the procedural powers necessary to accomplish their mandate to uphold the law." However, regardless of the jurisdictional foundation, a court may only interpret legislation, not amend it. If the legislation clearly attaches liability upon a receiver then, for the court to acknowledge such, is not a "stultification" of the law.

[para18] I am of the opinion that the various statutes defining the liable entity as a "person" are clear and unambiguous. I agree with counsel for the petitioner who said:

> The environmental laws impose liability on the basis of the notion of "possession and control", as opposed to the notion of any wrongdoing on the part of a "person". Under the environmental laws, there is no middle ground in liability: if an entity is a "person" in "possession or control" under the environmental laws, it is fully and immediately liable to comply with the obligation set out in the environmental laws ...".

[para19] In *R.* v. *British Columbia* (1992), 66 B.C.L.R. (2d) 84 (B.C.S.C.) the court specifically noted, "that the word 'person' is fundamental to the framework of the [*Fisheries*] *Act*." Shaw J. said

that the scheme of the *Fisheries Act* is meant to give far-reaching protection to fisheries. He quoted Nemetz C.J.B.C. in *R.* v. *Richmond*, [1984] 4 W.W.R. 191, 4 D.L.R. (4th) 189 (B.C.C.A.) at 192:

> In the first place, I look to the entire scheme of the *Act*. I think it is only common sense that Parliament in providing for the protection of waters from pollution intended that that should apply to all persons in Canada and could not, unless there was some specific language, exclude a municipal corporation.

[para20] The petitioner said that the courts have indicated that environmental laws should be "observed to the extent possible under the circumstances." Consequently, under its inherent jurisdiction, the courts have been imposing some environmental obligations on receivers "which they would not otherwise have." Therefore, according to the petitioner, "courts may grant complete immunity to a court officer such as a receiver or a trustee in bankruptcy."

[para21] There are two assumptions in this argument. The first is that receivers have no obligations under environmental legislation. The second is that if the court has the power to impose environmental responsibilities upon receivers then it has the power to render immunity from all environmental obligations. I am of the opinion that receivers do have environmental obligations and that the court does not have the jurisdiction to either tamper with or emasculate legislation creating such obligations.

[para22] The petitioner submitted that, "None of the environmental laws can be interpreted as imposing liability on the courts and, as a result, no liability can be imposed under these statutes to the court's duly appointed officers." Implicit in this submission is the assumption that an officer of the court enjoys the same immunity from liability as the court itself. I do not agree with that proposition. Taken to the extreme, such reasoning inexorably leads to the conclusion that, regardless of negligence, a court appointed officer may avoid liability simply because of the source of the appointment.

[para23] In my opinion the purpose of designating individuals as officers of the court is not to shield them from liability but to impose upon them obligations for which they will be accountable. As early as the Middle Ages the court held a disciplinary jurisdiction over lawyers because they were officers of the court: see W.S. Holdsworth, *A History of English Law, 3d,* vol.III (London: Methuen, 1923) at 392.

[para24] There are many categories of people who are "officers of the court", of which a receiver manager is one: see *Kerr on Receivers and Administrators* (London: Sweet & Maxwell, 1989) at 131. However, a receiver is obviously different from the court itself. A receiver is a commercial entity which takes on business responsibilities for financial gain. As such its potential liability is different from that of the court. As F. Bennett notes in *Receiverships* (Toronto: Carswell, 1985) at 118:

> Notwithstanding that the receiver and manager is an officer of the court, [its] fiduciary duty to all extends to a standard of care in the running of the business comparable to the "reasonable care, supervision and control as an ordinary [person] would give to the business

> were it his own" ... Where [it] fails to provide such a standard of care, [it] may be liable for [its] negligence.

[para25] Although Bennett's comments are in relation to a common law duty they are equally applicable, if not more so, to liability for a breach of a statutory duty.

[para26] *Re Lamford Products Ltd.* (1991), 63 B.C.L.R. (2d)1388 (B.C.S.C.) is relied upon by the petitioner. A pollution abatement order was issued on October 18, 1990. Lamford Forest Products Ltd. had made a voluntary assignment into bankruptcy on October 11, 1990. In all likelihood this was not known by the Regional Waste Manager when the abatement order was made. In any event, the order was made against Lamford, not against the official receiver.

[para27] Taking those circumstances into account, Mr. Justice Harvey made the following observation regarding the potential liability of a trustee in bankruptcy (at 392):

> ... I do not think that s. 71(2) imposes personal liability on the trustee in bankruptcy for the remediation of the Sooke site. In the same way that a trustee does not become personally responsible for any other debts of the bankrupt, the trustee cannot be held personally liable for the costs of cleanup beyond the funds realizable from the estate."

Contrary to the petitioner's submissions, these comments do not, in my opinion, assist in the resolution of the case at bar. They relate to the scope of s. 71(2) of the *Bankruptcy Act*, and not to the potential liability of trustees under other legislation. This was acknowledged by Harvey J. in the next paragraph where he stated (at 392):

> However, with regard to the disposal of the P.C.B.s stored on the site, the trustee could fall within the scope of other legislation, such as s. 36 of the *Canadian Environmental Protection Act*, S.C. 1988, c. 22; ss. 4 and 5 of the *Transportation of Dangerous Goods Act*, R.S.C. 1985, c. T-19; s. 9 of the *Canada Water Act*, R.S.C. 1985, c. C-11; s. 35 of the *Fisheries Act*, R.S.C. 1985, c. F-14; and s. 3.1 of the *Waste Management Act*. Since there has not yet been any question of the violation of these statutes, I will refrain from commenting on a trustee's potential liability under them.

[para28] Nevertheless, I am not overlooking the comments in Lamford at page 396:

> The balancing of values in this case falls in favour of protecting the health and safety of society over the rights of creditors, as it did in the *Bulora* and the *Panamericana* case, but there is also a need in modern society for trustees to take on the duty of winding up insolvent estates. The evidence before me indicates that no trustee can be found who will take on the bankruptcy of Lamford without a guarantee that he or she will be entitled to trustee's fees to be deducted from the amount paid out under the order, and will have no personal liability for the costs of cleanup of the contaminated site ...

I understand these concerns. They were echoed by counsel for the petitioner herein. However, they cannot override the intention of the legislation. If receivers are to be protected to the extent of trustees in bankruptcy, or to a greater or lesser extent, that obligation falls upon the legislators.

[para29] The proposed indemnity sections of the order not only provide indemnity to the receiver, but "rewrite" environmental legislation. So as not to expand these reasons immeasurably, I will detail only one example. Section 38(4) of the *Fisheries Act* provides that where there is a deposit of deleterious substance in water frequented by fish, or an imminent danger thereof, any person who owns or has charge, management or control of the substance shall report such an occurrence.

[para30] Section 38(6) states that where an inspector is satisfied that there is such an occurrence, the person who has management or control of the substance may be directed to take remedial measures. Section 42(1) makes the person described in 38(4) jointly and severally liable for any costs incurred by the authorities in either preventing, remedying or mitigating the problem.

[para31] In contrast, the proposed order provides that a receiver shall not be liable either directly or vicariously under any environmental regulation either prior to or after its discharge, or during its tenure, "unless it can be demonstrated" by the authorities that the condition arose during the tenure "and as a result of the receiver and manager's failure to comply with any written order or instruction issued by the Environmental Regulator and that the receiver and manager has been provided sufficient funding or assurance of funding specifically designated for compliance ith such order or instruction."

[para32] Such indirect legislative alterations are outside of the jurisdiction of this court. Furthermore, the proposed indemnity sections are in direct contradiction to the unambiguous language of the legislation. In *Baxter Student Housing Ltd*. v. *College Housing Co-operative Ltd.* (1975), 57 D.L.R. (3d) 1, [1976] 1 W.W.R. 1, [1976] 2 S.C.R. 475, Dickson J. in delivering the judgment of the Court said at page 480:

> In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will.

[para33] This binding principle provides a solid foundation for rejecting the proposed order. In *Lamford*, Harvey J. specifically noted that the order which he was making was, "not in conflict with the federal statute [*the Bankruptcy Act*]."

[para34] The petitioner relies heavily upon *Lundrigans*. However, the primary concern in that case was environmental damage caused prior to the receiver and manager being appointed. At page 175 Chief Justice Hickman said:

> ... the appointment by the court of a receiver and manager does not impose upon such receiver and manager liability for environmental misbehaviour or damages caused by or attributable to an asset or assets owned by a debtor prior to the appointment of such receiver and manager.

Furthermore, the Chief Justice concluded at page 178 as follows:

> ... should the receiver and manager appointed to take over the assets of Lundrigans breach any environmental laws during the discharge of its functions and responsibilities, that such receiver and manager will be answerable for same and subject to any direction given by the appropriate regulatory regime.

[para35] The proposed order in this case goes beyond what was envisioned in *Lundrigans*. It even goes beyond the provisions of the *Bankruptcy and Insolvency Act* wherein the protection to the trustee is given only for the period outside the trustee's tenure.

[para36] The petitioner asserts that it, "is merely attempting to limit the liability of Price Waterhouse so as to ensure that it is willing to act in a manner that will maximize the value of the collateral." This being so, the risk of being required to provide compensation for environmental problems should fall on the persons who stand to gain - namely, the creditors or indeed the receiver - and not the general public. I reject a course that will protect creditors and their agents at the risk of the public losing the protection of environmental legislation.

[para37] Protection of the receiver as sought represents a potential encouragement to creditors to have a receiver appointed to improve the creditors' position. It was suggested by the Attorney General for Canada that there may be answers to the liability potential without court involvement. It may be that receivers should require suitable indemnity from creditors applying for the appointment of a receiver.

[para38] Those portions of the proposed order set forth earlier in these reasons are denied.