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FISHERIES POLLUTION REPORTS

VOLUME 2 AND RECOPIED VOLUME 1

CASE LAW:

PROSECUTIONS UNDER THE POLLUTION CONTROL PROVISIONS OF THE FISHERIES ACT

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Canada

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PROSECUTIONS UNDER THE POLLUTION CONTROL

PROVISIONS OF THE FISHERIES ACT

I would like to thank the many people who in one way or in another assisted in the preparation of Volume 2. I would particularly like to thank Mr. Michael J. Hardin for his diligent effort in preparing the majority of the headnotes, and closely reviewing various drafts of the new volume 2. Mr. Hardin was formerly with EPS Northwest Region in Yellowknife, NWT and graduated from law school at the University of Calgary in May, 1980.

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FISHERIES POLLUTION REPORTS

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Prepared by
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Environment Canada

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DROIT JURISPRUDENTIEL:

POURSUITE JUDICIAIRES ENGAGÉES EN VERTU

DES DISPOSITIONS ANTI-POLLUTION PRÉVUES DANS LA LOI SUR LES PÊCHES

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Robert E. Tourangeau
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CASE LAW: VOLUME 2

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REGINA v. COLUMBIA CELLULOSE CO. LTD.

British Columbia Provincial Court, Ward, J., Prince Rupert, September 3, 1970

Environmental law — Water pollution — Sentence — Fish kills resulting from oxygen depletion caused by pulp mill effluent — Charges brought after legislation amended to provide for greater penalty — Maximum fine not levied — Three thousand dollar fine imposed —Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused plead guilty to a charge of contravening s. 33(2) of the Fisheries Act when a break in its effluent disposal pipeline caused the release of large quantities of waste which resulted in large fish kills because of the depletion of oxygen.

Held, the accused was fined three thousand dollars. Although the offence was a most serious breach, the maximum fine was not imposed. Even though the Crown alleged that the accused has been polluting the water in question for some time, it had failed to bring the charges until after the legislation had been amended to provide for greater penalties than before.

Environmental law — Water pollution — Sentence — Order to refrain — Negotiations on-going between accused and government officials to remedy pollution problem — Effects of shut-down of plant on local economy considered — No order made — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(7).

Digby Kier, for the Crown.
Charles Locke, for the Accused.

Mr. Kier — This is for the record, I believe. My name is Digby Kier. My friend, Mr. Locke, appears on behalf of the Columbia Cellulose Ltd.

INFORMATION READ.

Mr. Locke — Your Honour, my name is Locke. I am representing the Company and I wish to enter a plea of guilty.

Mr. Kier — Your Honour, the Crown is alleging one offence and one offence only, between these dates. The charge is between these dates, but the offence is broken up in that period and the Crown is alleging only one offence.

Now, just to give you some background of this matter, if I could outline that. This summer, as we all know, the mills out there were shut down at Port Edward for a labour dispute, and when they started up again, the Department of Fisheries made tests of the effluent going into Wainwright Basin and into other bodies of water there, such as Porpoise Harbour and they had various control stations set up where they could sample the water in and around the Mill, and they discovered that a large portion of the, in fact if not all the effluent from these two pulp mills at Port Edward were going into Wainwright Basin. The Company had a pipeline, does have a pipeline from the

Mill underneath Porpoise Harbour to Ridley Island and to Chatham Sound. That pipeline, through no fault of the Company, has been breaking down because that pipeline is polyethylene and cannot stand the various temperatures and pressures for what it was designed for. Some of the effluent going through that pipeline during this period went from that pipeline to Porpoise Harbour.

Judge — There was a leak.

Mr. Kier — Yes. And I am sure my friend could tell Your Honour what proportion, what the costs have been to repair that pipeline, to stop the effluent going through the pipeline and push it out towards Wainwright Basin. The main study the Fisheries was concerned with, was the fish kills in Wainwright Basin. The Mill started up on the 24th of July, Your Honour. This is the approximate start up date, when it got to full operation, and by the 28th of July, there was the first indication of fish kills involving herring, flounders, salmon molt and sculpions and other species in Wainwright Basin. On the 29 of July, fish kill was found to be in Porpoise Harbour where the existing pipeline was because of a break in the pipeline. On the 30th of July, there was extensive fish kill in Porpoise Harbour and Wainwright Basin. There were large leaks in the pipeline, etc. and again on the 31st of July. Now, samples were taken of the oxygen content in the water. The reason for the fish kills is lack of oxygen in the water. This has come about because of the effluent which gets into the sea water. This effluent requires a certain amount of oxygen per day to break down and decompose it. By itself it takes out a large amount of oxygen and thereby leaving none for the fish. At the two stations in Wainwright Basin, the fisheries people started taking the oxygen content of the water and at normal conditions, the oxygen content will vary with the temperature of the water, etc., and normally varies between seven and a half and eight and a half parts per million dissolved oxygen in water. Studies in Wainwright Basin from July 23rd to August 3rd were taken and on Wainwright Basin there is two sample stations, one in the middle, No. 17 - I have graphs for this - and one at Zindardi Rapids, closer to where it enters the Rapids going to Porpoise Harbour, No. 19. Both graphs pretty well show a 45 angle of decline. I have shown my friend a copy. There is a 45 angle of decline. The oxygen over these days from July 23rd on, when the Mill started operation, by the 29th of July, both stations showed there was .5 parts per million, oxygen in the water, and it is upon reliable estimate by the biological experts, that the minimum oxygen required by the fish, just to exist, is 5 parts per million. In any sustained activity by fish, as spawning, to survive this is down to half parts per million and this is consistent with when they found the first indication of fish kills. If I could file this graph which reveals from the 29th of July on roughly, the .5 parts per million going to one and a half on the 3rd of August. Now, the quantity of the effluent actually being put in there from these two mills in a given day requires 742,000 pounds of biological oxygen every day, b.o.d., that's the total

amount required to neutralize the effluent. 742,000 pounds of biological demand that's b.o.d.

Judge — This is the weight of oxygen, this is the figure.

Mr. Kier — That is correct. It is a tremendous amount, and that is why the water in Wainwright Basin was almost taken right down to nil, and I have, I want to file these photographs of the Mills. I have shown them to my friend. There are a number that show the effluent when it comes from the Mill. We are mainly concerned with the main Wainwright Basin and the pictures show the effluent in these ponds. There is a dead skate, which is a fairly large fish, in one of the ponds; herring in another. I believe there is sixteen all together. It is a large quantity of oxygen that is required just to neutralize, to satisfy this effluent demand in the water when it goes in there. I want to point out another thing, through the labour dispute, this pipeline across Porpoise Harbour and through to Ridley Island, if the strike had not taken place, this pipeline, it is planned to rebuild it with a different pipeline that would be operational. Even so, if that was operational, that wouldn't take the full amount of effluent from the Mill into Chatham Sound where it can be disposed of easily, still some would be going into Wainwright Basin, and even if that pipeline were fully operational, certainly there have been negotiations before this time with respect to what the Company can do to clean up this pollution, and there has been constant negotiation for sometime and there still is. I might say the Company now appears to be fully co-operative in its efforts to really look at this effluent problem and contain it, but there was this strike, and the situation too has been existent for sometime. This Wainwright Basin has been known to the Fisheries. There were fish kills in 1968 as well. This effluent, it is a liquor effluent that comes out of this mill and of course, some solids are in Wainwright Basin, in the settling ponds, you can see where the solids have gradually accumulated and it will be quite a matter to clean it up, and my information is that this pipeline will remove, and my estimate, I stand to be corrected, they will be able to remove approximately 75 to 80% of the effluent when that pipeline is put in.

Judge — This is into Chatham Sound.

Mr. Kier — Yes. They had one pipeline that has been breaking down that removes 370,000 pounds of b.o.d. per day and the new pipeline, when it is put in, will be built to remove 620,000 pounds per day and, according to our figures would leave 122,000 pounds of b.o.d. going into Wainwright Basin per day. The Company is anxious to clean that matter up as well, Your Honour. I don't think I can usefully add any more. Those are the facts I have, Your Honour, and I want to point out the amount of hours that have gone into this investigation. The Department has calculated it has taken the equivalent of one man working a year. They started primarily this year in January and continued with the work, one man per year, I calculated that to be 1900 man hours' work involved in this work on the effluent, so that is

the amount of work the Department of Fisheries has put on this thing, and they have had, of course, I don't think I have to speak on that now. They certainly intend to have the full co-operation of this Company now, which they did not have in the past. Those are the facts. I want my friend to reply on the facts, and I would like to speak later as to sentence, if I would be permitted to do so.

Provincial Judge One point, you mentioned constant negotiations. Who with?

Mr. Kier With experts from the Columbia, I am sorry, Department of Fisheries, experts from the Department of Fisheries down there, and with, I believe, Dr. Becker from the Company. They have had outside consultants. There is a lawsuit pending between The Columbia Cellulose and the Department as to who is at fault and apparently the Company had outside consultants to say this pipeline would be satisfactory. There is a third party involved as I understand it.

Mr. Locke Your Honour, I would like to call one of the senior Vice-Presidents of the Company. Your Honour, Mr. Guimond is the senior Vice-President of operations of the Columbia Cellulose and affiliate companies. I think the history of this matter goes back for some years and it is not always easy to obtain all pertinent dates, and there are dates and times that I would like to give the Court and to that end, I have had prepared, under Mr. Guimond's supervision, a typed statement and if he might be permitted to read from it, and I would give the Court a copy.

Provincial Judge Did You say Columbia?

Mr. Locke He is the senior Vice-President of operations of the Columbia Cellulose and affiliate companies. He is called on behalf of Canadian Cellulose Co. Ltd. The words you will find in here, you should substitute the words Canadian Cellulose. There have been certain intercorporate changes of the Company which are insignificant to the Court. I will call Mr. Guimond. I have a copy of the statement for my friend.

Mr. F.X. Guimond Sworn

I am the Senior Vice-President, Operations of Columbia Cellulose and have been so since September of 1969. I have been in the pulp and paper industry for approximately 38 years. I am a chemical engineer and I have held positions through the years in management capacities with Quebec North Shore Paper Company, Canadian International Paper Company, Brown Company, Prince Albert Pulp Company Limited, including positions in technical, operations and managements. I have been in management for almost 20 years but I have kept myself closely abreast with most of the technical developments in the pulp and paper field. I have operated sulphate and sulphite mills and am familiar with the technical processes of both.

2 The Columbia Cellulose sulphite mill produces high alpha dissolving pulp and was constructed in 1951. The sulphate or kraft mill came on stream in 1967.

3 I am personally physically familiar with both mills, with the technical method of operation, with the effluent disposal system, and also have examined and am familiar with the bodies of water such as Wainwright Basin and Porpoise Harbour into which some of the waste from the mill discharges. Many of the facts I will relate are hearsay as coming from the records of the Company, but they can be verified from them and I have, through talking to individuals and references to the records, assured myself that these facts are correct. As some of these events go back several years, a number of the witnesses who might otherwise be available, are no longer with the company and there is actually no one that can give a complete story except probably someone in my position.

4 The complex of the two mills produces waste of three broad types: Sulphite waste (red liquor), Bleach plant waste (from the sulphite mill) and Kraft effluent. Much of the kraft mill waste is recovered in the recovery boilers.

5 In 1961 or 1962 the Fisheries Department drew to the attention of the Company the relatively high level of discharge of sulphite wastes into Porpoise Harbour and Wainwright Basin. Discussions continued and in 1965 when the kraft mill construction was underway the Company and the Fisheries Department discussed various systems for effluent disposal in view of the fact that the kraft mill waste would impose an added burden. Eventually a system was arrived at which received the approval of the Fisheries Department on the assumption that it would solve a number of the problems particularly objectionable to them. The scheme involved the installation of two new red liquor washers plus a 12 inch effluent discharge pipe to run from the plant under Porpoise Harbour, over Ridley Island and discharge into Chatham Sound at a point selected by the Department of Fisheries.

Provincial Judge What is ment by liquor washers?

Mr. Guimond Perhaps I should explain some of the processes of the plant.

Provincial Judge Just briefly.

Mr. Guimond Chips are cooked by the digester in a big container. When the mass reaches a certain degree of cooking, it is discharged into a large tank. The mass is then pumped over or vacuum filtered into drums 8 feet in diameter, some 16 feet long. That is to separate the fibrous material or red liquor in this case, and the idea is to separate the fibrous cellulose material from this liquor and this is the liquor that we are continuously referring to in our problem.

6 Engineering advice by consultants, after extensive study, was to build with polyethylene pipe. This was ordered from Dupont Canada Limited.

7 Installation of both washers and the pipe was started in 1966. The washers were completed in 1967 without incident and have continued to function satisfactorily. The history of the pipeline is, however, as follows:

a) Completion was delayed until February, 1968 because of a disastrous dock fire. This pipeline, incidently, follows along the dock and goes underneath Porpoise Harbour and this is the serious fire in 1968 which delayed the construction of the pipeline.

b) The Porpoise Harbour section suffered several breaks and a project was started in September, 1968, to replace this section of pipe with 16-inch polyethylene pipe. Completion was scheduled for December, 1968, but was delayed until February 1969 by a severe winter.

c) The Ridley Island section continually developed leaks and breaks which required a full time crew for detection and patching. A project to replace this section with fiberglass pipe was started in September 1969, and was scheduled for completion by April, 1970. Strikes have delayed completion until September, 1970. We expect to have this section completed this month.

d) Failures continued to occur in the already replaced Porpoise Harbour section and after extensive engineering studies, a contract has been let to replace it with 20 inch fiberglass pipe with a completion date of November, 1970.

8 During all the above, the Company has been advised in every respect by consulting engineers of the highest ability. The system has been upgraded by installing larger pipe and improvements in the pumping system.

9 Columbia Cellulose or Canadian Cellulose, has been legally advised that the Dupont Canada company is responsible to replace the broken pipe but after extensive negotiation came to nothing, action was commenced against the Dupont Company in the Supreme Court of British Columbia on the 13th day of August, 1970.

10 The total cost of the pipeline system is now in excess of 2.5 million dollars.

11 Since the time the first technical and engineering studies were instituted in 1965, the company has contemplated and actually planned for two other facets involving the reduction of wastes. There are:

a) In-plant fibre recovery in both mills. Technical and engineering work has started in early 1970, including studies by several equipment suppliers. Various parts of this program are being started in 1970 and 1971, with completion dates expected in 1971 and 1972. The estimated total cost of this will be in excess of one million dollars.

b) Out-plant removal of suspended solids has been under technical and engineering study since 1969 and various facets are to be started in 1971, with completion date expected in 1974. Consultants were engaged in early 1970 and the estimated cost is 2.7 million dollars.

12 The Department of Fisheries and the Pollution Control Branch have tentatively agreed that the program outlined above - that is, rehabilitation of the pipeline

system, in-plant fibre recovery and out-plant fibre recovery - should solve the pollution problem in Wainwright Basin. Columbia Cellulose has agreed that if this program does not reach the desired objectives, further treatment will be installed. Our effluent treatment program requires approval by the B.C. Pollution Control Branch and the Department of Fisheries before we can finalize our plans.

13 In addition to the above, the Company has been studying the possibility of sulphite red liquor burning. Several changes being made to the mill are essential for liquor recovery. These include the conversion to ammonium base completed early this year, installation of heat exchangers on the digesters and the installation of a large blow tank. These projects will total over 2 million dollars. The burning of ammonium base sulphite liquor is still in the very early stages of development. Our engineering department is evaluating many types of equipment that would work and also be compatible with long range objectives. Cost estimates for the systems run as high as 15 million dollars.

14 The Company would respectively point out the following:

a) Columbia Cellulose's losses in the last few years have amounted to more than 20 million dollars. The earnings of 1.4 million in the last year have come primarily from the Castlegar operation.

b) All the above pollution control programs involve the expenditure of over 8 million dollars. Major money had already been committed to this program prior to August, 1970, notwithstanding the obvious adverse effects on the Company's revenue of a 64-day strike. At the present minute, the Company's interior mill is shut down because of labour troubles common to the whole industry.

c) At the time these mills were built, they were welcomed into the community as the major employers of labour in the area and were built according to the technical standards of the time. It is further pointed out that the direct salaries paid to employees and total dollar volume expended by the Company in the Prince Rupert and Terrace area, amounts at an intelligent estimate to about 28 million dollars a year.

d) It is our understanding that even before the pulp mill was built, the direct or indirect contribution from fish in Wainwright Basin has been an exceedingly small percentage of the Prince Rupert area fishing industry. It is certainly far below the dollar input of the mill and even far below the 1.5 million dollars in municipal taxes paid each year by the mill.

15 When these mills were built, they were built according to the accepted technical standards of the day and the Pollution Control Authorities. Recently pollution control activity has been obviously stepped-up, but older mills must have time to earn the money to make the installations which will satisfy today's new standards.

In their Brief to the recent Pollution Enquiry, the Department of Fisheries made the following statement:

"Also new standards must be introduced in a predictable way. They must be capable of attainment, given the present state of the art, and they must be enforceable without creating undue financial hardship in the forest products industry in B.C."

17 The Company has had a pollution control program for many years, with the effort intensified in the last two years. As outlined above, we have spent over 2.5 million dollars to date and will spend an additional 5 million dollars in the next 3-4 years on water effluent control at Watson Island. This program has involved intensive contact with the Department of Fisheries including many meetings, a great deal of correspondence, phone contacts and co-operative testing programs at the mill. Our last formal meeting was held in Vancouver on June 4th to completely review the status of our effluent program. We informed them of the recent mill startup date so they could carry out tests.

We had thought that the Department of Fisheries was completely informed of the Company's plans, but perhaps in view of the present prosecution, this was not so. This is, no doubt, our fault and is regrettable.

September 3, 1970.

Mr. Kier — I have no questions, Your Honour.

Mr. Locke — Your Honour, I would like to say something about sentence. Perhaps my friend is going first.

Mr. Kier — Your Honour, Mr. Guimond did mention the value of this pulp mill to the community and there is no question that it is a valuable aspect here. I am advised that the main fish involved here in Wainwright Basin are herring and they don't fish for herring in Wainwright Basin but they go through there and the herring industry was a $600,000.00 industry in this area, and there is not much of a herring industry left any more in the last year or two. Of course, you can't lay all the blame on Columbia Cellulose. There are other factors involved, but certainly the position of the Crown is, and this is, of course, why we are here today, is that the pollution will have to be rectified. I might say I am instructed, in speaking to sentence, of asking for the maximum fine, which under the act is a summary conviction and Parliament has seen fit to set a maximum fine not exceeding $5,000.00, and the Crown is alleging one offence here. In my submission, I would say, Your Honour, that the large amount of effluent going into this body of water, Wainwright Basin which is almost land locked, there are rapids on both ends, and there is water right next, adjacent to the mill and it seems to be an accessible place for the mill to dump their effluent resulting in fish kills and this, to my mind, is a fairly severe breach of the Fisheries Act. This is, of course, a new section and came into effect July 15th of this year, but is not too different from the old section, Section 33, the deleterious substance section, and this has been modified this year. The law has always been the same. The company did make some effort and took some steps to control this pollution, but the facts speak for them

selves, when you have this total quantity of 742,000 lbs of b.o.d. per day from these mills and the existing pipeline capable of only taking away about half of that, that it is a fairly serious matter and that is why the Crown is asking for the maximum penalty. I am sure Your Honour is aware of the various aspects of sentences laid down by the various Courts, and the Court of Appeal. In this situation, it appears to me the main aspect here is two-fold, to protect the fishing industry and also to deter others from polluting and keep them on the right track to prevent pollution. Well, there may be extenuating circumstances in this pipeline, the breakdown, which is no fault of the Company's, and even a strike. Apart from this strike, there is still half of this 742,000 pounds per day of b.o.d. going into Wainwright Basin, and that is where the seriousness comes in, and I mentioned the 1900 man hours put in by the Department of this matter and Parliament has seen fit to make this a summary conviction and set a fine of, not exceeding, $5,000.00, for each offence. In addition, You Honour, sub-section 7 of Section 33, which is a new section of the act, the Court may, in addition to any other penalty, impose, or order that a person refrain from committing any further such offence, or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the Court, will or is likely to result in the committing of any further such offence. Now, the Crown here is not asking for you to make any such order because in the Crown's view, if you ordered this operation to cease, then you would, in fact, be shutting off the mill and adversely affecting the employment of a thousand men in this area. You have the power to refrain from doing such a thing. There has been some discussion with the Company and Department of Fisheries if there should be an order with a time schedule.

Provincial Judge

You are suggesting I have the power to make an order with a time in the future.

Mr. Kier I think you may have.

Provincial Judge

Have I the power to do that?

Mr. Kier From committing any further such offence or to cease operation? Strictly speaking, in my submission, I am not too sure, but I think you can say refrain from such and such a date in the future.

Provincial Judge

You are not asking for that.

Mr. Kier No. I note in Mr. Guimond's statement, paragraph 11 and paragraph 12, paragraph 11 mentions times and schedules, and paragraph 12

mentions tentative arrangements with the Department of Fisheries, tentative only. The Department of Fisheries will in my submission, have considerable authority as to what they feel is satisfactory, and paragraph 12 also states that further treatments will be installed. Now, that is a perfectly, in my submission, proper statement by the Company, and certainly one that is accepted by the Department of Fisheries, indicating to them that reasonable steps will be taken by Columbia Cellulose, and if reasonable steps are not taken, according to what the Department of Fisheries indicate, these will have to be modified as time permits, and circumstances, time stoppages and weather. At the present time, these are going forward and with considerable dispatch at this time, but in the past, not with that considerable dispatch. There was a meeting on July 4th and this labour dispute affected it somewhat. I have seen the outline Mr. Guimond has presented, and I don't quarrel with that. There has not been the fullest co-operation in the past and now it appears to be so and is intended to be so in the future. I don't want to keep harping on this large effluent, but it seems to me that there couldn't have been all that co-operation in the past, otherwise the Company would have seen fit to do something about this b.o.d., rather than wait for the serious fish kill in Wainwright Basin and Porpoise Harbour. Paragraph 16, the Department of Fisheries has said, appears to be a reasonable statement and the Department of Fisheries has the economic good of the country, and that is what is intended here. I am instructed, in speaking to this matter, to ask for the maximum fine, which I have done.

Provincial Judge

The position of the Crown is that they are satisfied with the plans put forward by the Company and that they are genuine.

Mr. Kier — At this point one date here I might say, 1974, that's the only thing I would say at this point is not quite in agreement.

Provincial Judge

Where is that?

Mr. Kier — Paragraph 11 (b), the third line down, completion data 1974. That's the only thing that would have to be worked out. I can't technically say whether these are all satisfactory or not. The outline is tentative and there will be reasonable co-operation. That is satisfactory to the Crown. In spite of that, the Crown is asking, because it is a serious offence, quite a serious offence, and the Crown is asking for the maximum penalty.

Mr. Locke — Just a brief few words. I think my friend is being very fair. I don't agree with everything he says, but after all, the plea of guilty was entered. If the Court will forgive me, evidence was called out of Columbia Cellulose's responsibility to its employees and stock holders

because with the passing of this act by the Minister of Fisheries, one cannot be unaware of the seriousness of this offence, particularly subsection 7, of the consequence that must ensue. I would say something though, my friend asked for a fine of $5,000.00 to be imposed and he stated the Crown's position quite clearly. I would like to say something about penalty. $5,000.000 or something like that, the Court will realize it is looking over the tip of an iceberg. The rest of the iceberg is underneath, unable to be seen, and it is five, six million dollars, so a fine at the top end.....Until the last few years, it was not a crime for industries to pollute, society formerly permitted this to be permitted, now it is not going to permit it, which is commendable. When you are in the position of representing older pulp mills, not built with everything, one is playing a game with a whole new world which was not in existence when it was built and now you are asked to spend large amounts of money, capital which is not always available to even large industrial companies as one thinks. This company has never paid dividends yet. Last year it paid three cents a share for, I can't remember how long. The pipeline has been plagued with difficulties. The pipe has broken, arguments have taken place about the various responsibilities of the Company. This may not be of interest to the Fisheries, but it is our problem. Liasion with the Department has, in the past, been pretty good. We met on June 4th and perhaps there has been a hiatus since then, I don't know. The statement we made in paragraph 12, stands. I am glad it was my friend who said the Company is genuine in its statement. I can only say this is so. I ask the Court to take these facts into consideration. We want to co-operate with the Department of Fisheries. We need their co-operation. We have provincial authorities to contend with and know the standards laid down. It is difficult to be too dogmatic in planning, from where I am sitting, as to what the future will hold. I hope the Court will bear these facts in mind and take these facts into consideration. There is so much at stake for a company of this size, considering the magnitude and considering all the people involved and that is why I thought it best to give the Court the fullest report and there is every intention of the company to co-operate with the Department of Fisheries in the future.

Provincial Judge

Thank you Mr. Locke.

Judge Decision (Oral)

I have carefully considered the evidence of Mr. Guimond and the able submissions of the Crown and of the Defence and I am of the opinion that this was a most serious breach of Section 33(2) of the *Fisheries Act*. However, I note that although the offence existed before the recent amendment, the Crown did not bring charges against the defendant, although it alleges that the defendant has been polluting Wainwright Basin for some time. It is evident that the Crown's preferring this charge at this time reflects the current social attitude to pollution and I consider that I should not take

into consideration conditions that have hitherto been tolerated as an evil - from economic necessity.

I therefore fine the defendant $3000.00.

I make no order under subsection 7 of Section 33 of the *Fisheries Act* taking into consideration the effect of such an order on the operation of the defendant's plant and the consequent effect on local employment, also taking into consideration the negotiations at present being undertaken between the Department of Fisheries and the defendant corporation concerning the elimination of the pollution problem.

REGINA v. KIRBY

British Columbia Provincial Court, Johnson, J., Powell River, B.C. May 8, 1972

Environmental law — Water pollution — Gasoline spill — Permitting the deposit of deleterious substance in water frequented by fish — Offence one of absolute liability — Negligence of the accused causing the spill — Accused found guilty — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused, as district agent for an oil company, was responsible for the management and operation of a tank farm. He was charged with permitting the deposit of a deleterious substance in water frequented by fish after 8400 gallons of gasoline overflowed from a tank which was being filled from a barge.

Held, the accused was found guilty. The offence was one of absolute liability and therefore the Crown was not obliged to prove *mens rea.* The guilt of the accused was founded upon two negligent acts which caused the event in question. These consisted of a mathematical miscalculation of the volume of the tank which overflowed and the failure to monitor the filling operation. The accused's acts had to be assessed under the conditions and circumstances that existed at the time and he could not be exonerated because his employer might have done something to prevent his negligence from causing the offense. If an accused has involved himself through a negligent act then he may be found guilty of the offence.

R. v. Churchill Copper Corporation Ltd., [1971] 4 W.W.R. 481; *The Queen v. Pierce Fisheries Ltd.* (1970), 12 D.L.R. (3d) 591; *R. v. Peconi* (1970), 12 Crim. L.Q. 125; refd to.

D.R. Kier, for the Crown
M.R. Giroday, for the Defendant

Johnson, J.:--The accused, whom I shall refer to as 'Kirby' was charged that on the 14th day of December, A.D. 1971, at Lang Bay in the County of Vancouver in the Province of British Columbia, did unlawfully permit the deposit of a deleterious substance, to wit: gasoline in water frequented by fish.

The charge is under the *Fisheries Act* of Canada, Chapter 119, s. 33(2) as re-enacted by 1969-1970 Chapter 63, s. 3(1):

> *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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*

This re-enacted section of the *Fisheries Act* was assented to June 26, 1970, the previous s. 33(2) read in part 'No person shall cause or knowingly permit to pass into, or put or knowingly permit to be put ..... or any other deleterious substance ..... in any water frequented by fish .....'.

The facts of the case are that at Lang Bay, a very small community a few miles from the District of Powell River, Gulf Oil of Canada have a small tank farm located near the shore of Malaspina Inlet, part of the British Columbia coastal waters. The tank farm consists of about six oil and gasoline tanks which are filled periodically by means of oil tank barge towed by a tug and located at an adjacent wharf. Hoses from the oil barge are attached to hoses at the wharf which are selectively connected to tanks in the shore tank farm. The barge delivers different oils and gasolines and the products at varying quantities are transferred by pumps on the barge to various tanks which may or may not be inter-connected by valves as the quantity of product are desired.

The total tank farm capacity in all tanks is 180,000 gallons. Surrounding the tank farm is a cement wall, inside the cement wall surrounding the tanks the surface is earth or gravel. Beside the tank farm is a road with a ditch which lead downhill to the sea. The distance from the tank farm to the sea is about 1,300 feet.

Kirby is the Powell River District Gulf Oil Agent. Gulf Oil of Canada constructed and own the tank farm and the products in the tanks. There is no other Gulf Oil representative, employee or agent locally resident and directly connected with the tank farm, except Kirby.

The system of oil and gasoline delivery is that by communication with the Gulf Oil office in Vancouver, Kirby makes arrangements for delivery of products to the tank farm in the quantities as required at the time. The practice is to fill all the tanks on each delivery by the oil barge.

Kirby operates the local oil agency and this tank trucks extract the oil and gas products from the tanks to his trucks for delivery to the various customers or outlets in the Powell River District. Kirby is required to account to Gulf Oil for the products he removes from the tanks. Kirby from time to time dips or measures the tanks to know the amount of product on hand, the amount of which he has taken delivery and to know when a new barge delivery is required.

The method of dipping the tanks is to lower a weighted cord into the tank, then to estimate the level of the product in the tank, remove the measuring cord and apply a substance at the approximate point of the level then lower the cord again, the oil product cuts this substance at a point to give a more accurate measurement of the level of the product in the tank. From this measurement and using a scale chart, the quantity of product required to fill the tank can be estimated quite accurately.

The incident in question occurred during the early morning hours of December 14, 1971. A few days before Kirby says he contacted Gulf Oil for a delivery by the barge. Because of bad weather the tug and barge were delayed, they arrived at Lang Bay about 1:00 am, December 14, 1971. The bad weather had caused heavy snow conditions and the cold weather caused an extra demand on Kirby to delivery fuel by truck to his customers. Kirby says that one of his trucks broke down and there was an extra long work day for him on December 13, 1971 and he did not arrive home for supper until about 10:00 pm.

Kirby says he retired to bed about midnight and was awakened by a phone call from the oil barge at 1:00 am to attend for the delivery to the tank farm. Kirby went

to the tanks for the purpose of measuring, that is gauging, the tanks. The weather conditions were snow to his knees and quite cold. Kirby measured the tanks as described and consulted a chart and made a mathematical calculation as to the amount of product required to fill the tanks. Kirby then went to the barge and talked to Leclair, the barge attendant, and told him that he, Kirby, required 39,000 gallons of diesel and 40,000 gallons of gas regular. Leclair then hooked the barge hoses to the risers and at 2:00 am began to pump for three and one-half hours. While the pumping was in progress Kirby left the barge and went to the tug for a coffee and remained there during the period of pumping.

There is a conflict of evidence as to who has the responsibility in respect to measuring the tanks. Kirby says that the products belong to Gulf Oil and that it is the responsibility of the barge man to measure or gauge the tanks, that at some places there is no agent present to gauge the tanks. He, Kirby, gauged the tanks only for his own information to protect his own interest. Leclair says that sometimes he does gauge the tank, most times with the agent, sometimes the agent alone gauges the tanks. In any event, in this case Kirby was the only one who gauged the tanks and he knew Leclair relied on his figures that the tanks would hold 40,000 gallons of gasoline. Kirby had made a substantial error in gauging the gasoline tank and the result was that the tank overflowed about 8,400 gallons of gasoline. Kirby blames his mathematical error on fatigue and the physical hardships caused by the bad weather. From his explanation and after hearing all of Kirby's evidence, I accept as true Kirby's explanation for the calculation mistake.

There was evidence that a person could not remain on top of the tanks during the filling process because of escaping noxious fumes. There was a small shed or warehouse on the tank farm property, there was no evidence as to why a person could not remain there during the filling. Kirby's evidence was that sometimes while the tanks are being filled he does not remain in the area. Kirby says that he believed that the surrounding cement wall around the tank farm was for the purpose that if any tank should leak or overflow, then the escaping oil or gasoline would be retained within the cement wall. This wall was built through the specifications of Gulf Oil of Canada and engineers of Gulf Oil. I did not have any evidence from Gulf Oil or any engineer that a gravel or earth floor of the tank farm was designed to be capable of retaining 8,400 gallons of gasoline. I would expect that gasoline, as well as water, would seep through the soil and run down hill to the sea.

As the barge pumped the gasoline the tank overflowed, gasoline ran in a small stream, cut a patch under the cement wall, ran to the ditch, cut a path in the snow and ran as a small river of gasoline down the hill past some residences near the beach, then across the top of the sea water. There was a gasoline slick on Lang Bay that morning described by a Fisheries Officer as one-eighth thick, 200 feet out into the Bay.

At about 5:00 am one of the residents was awakened by the smell of gasoline; investigated and raised an alarm, Leclair then shut off the pumps. Neither Leclair or Kirby realized that there was a gasoline overflow at the tank until the resident attracted their attention. The Fire Department was called and a very dangerous situation was controlled without further incident.

There was evidence by one local resident that he had caught fish and seen fish in this water at Lang Bay and I find that on the whole of the evidence that the crown has

proven that the water which the gasoline entered was water frequented by fish. The water was part of the coastal waters of British Columbia, the expression "water frequented by fish" is not restricted to exactly the area covered by the gasoline but the whole of the water of which Lang Bay was a part.

I heard evidence from two technicians of the Department of Fisheries who have conducted bio-assays as to fish and particularly gasoline. As to the whole of the evidence and hearing their opinion I find that the crown has proven that gasoline is a deleterious substance as set out in the charge.

There was no evidence that at the time of the offence that there were in fact any fish in the water covered by the gasoline, and there was no evidence that any fish were or might be expected to be degraded at that time at that place by the gasoline deposited on that water. I find that it is not necessary that the Crown prove that there is or might be any degrading of fish, the Crown need only prove that at some time the water is frequented by fish and that gasoline is a deleterious substance and that the accused did permit the deposit thereof.

The case to be decided is, did the accused permit the deposit of the gasoline and in considering the accused's intent must the Crown prove mens rea or is the law an absolute obligation on the accused not to permit the deposit.

In *Regina v. Churchill Copper Corporation Ltd.*,[1971]4 W.W.R. 481, His Honour Judge Arkell D.C.J., dealt with the same charge as this under the *Fisheries Act*, s. 33(2) as re-enacted and considered the defence of *mens rea* as applied to a charge under this section. Arkell, D.C.J. stated,

> *Also in Sweet v. Parsley, Lord Diplock states at p. 362:*
>
> *"Where penal provisions are of general application to the conduct or ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sanctions, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see Lim Chin Aik v. The Queen, [1963] A.C. 160 at 174, [1963]1 All E.R. 223 at 228)."*
>
> *Parliament, in the 1969-70 amendments to the Fisheries Act, obviously adopted the "fair and sensible course" suggested by Lord Pearce in Sweet v. Parsley when they enacted s. 38(8).*

Also, as stated by Lord Diplock in Sweet v. Parsley, the inference is not to be lightly drawn that this is an offence of absolute liability, "unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation". Here the defendant company could "promote the observance of the obligation" imposed by the Fisheries Act by the adoption of direct supervision, inspection and improvement of their operation.

In s. 33(2) of the Fisheries Act there are no such words as "knowingly", "willfully", "with intent" or "without lawful excuse", and I am satisfied that this is an act which, in the public interest, is prohibited under a penalty, and does not add a new crime to the general criminal law, as stated by Ritchie J. at p. 279 in the Pierce Fisheries case, with reference to the decision in Sherras v. De Rutzen, (1895) 1 Q.B. 918.

I am therefore of the opinion that s. 33(2) of the Fisheries Act is an offence of strict liability, of which mens rea is not an essential ingredient.

Even if I have erred in law and mens rea is an essential ingredient of the offence, I am satisfied that it has been established on the knowledge of the superintendent, a responsible employee of the defendant company.

There is a distinction between the charge under the *Fisheries Act*, s. 33(2) and the charge as considered in *Regina v. Pierce Fisheries Ltd.* The *Regina v. Pierce* judgment was not considering specifically the words "did unlawfully permit a deposit" and the *Pierce* case was in respect to an offence under the Regulations of the *Act* and not the *Act* itself, which had some bearing on the judgment, Ritchie J. says at page 201.

I do not think that a new crime was added to our criminal law by making regulations which prohibit persons from having undersized lobsters in their possession, nor do I think that the stigma of having been convicted of a criminal offence would attach to a person found to have been in breach of these regulations.

In *Regina v. Peconi*, Vol. 13-1, 1970, Criminal Law Quarterly, Stewart, J. dealt with a charge under the *Air Pollution Control Act* 1967 (Ont.), at page 125 he says:

O. Reg. 449/67 s. 6(2) provides:-

(2) No person shall cause or permit to be caused the emission of any odour to such extent or degree as,

(a) causes discomfort to persons;

(b) causes loss of enjoyment of normal use of property; or

(c) interferes with normal conduct of business.

It was urged upon me that the Crown had not proved mens rea and that this was an integral part of the defence. I gather from Mr. Bagwell that he meant by this that the Crown would have to prove that the accused was aware of the noxious fumes being emitted. In my view it is unnecessary to prove mens rea and that the prohibition set forth in s. 6 is absolute.

It was held in R. v. Sam Consentino Ltd., [1966] 1 C.C.C. 79, [1969] 2 O.R. 623, that mens rea was not an element of the offence of providing an unsafe machine contrary to the provisions of the Construction Safety Act, 1961-62 (Ont.), c. 18. The supplier of the machine was completely unaware of its unsafe condition as it was both supplied and operated by a third party from whom Consentino rented it. R. v. Industrial Tankers Ltd., [1968] 4 C.C.C. 81, [1968] 2. O.R. 142, was a case involving a charge of discharging oil into a creek that might impair the quality of the water, contrary to the provisions of the Ontario Water Resources Commission Act, R.S.O. 1960, c. 281, s. 27(1) (rep. & sub. 1961-62, c. 99, s. 5). The learned county court judge reviewed many cases and came to the conclusion that the Crown need not prove mens rea. R. v. Teperman and Sons Ltd., [1968] 4 C.C.C. 67, [1968] 2 O.R. 174, was a case involving the Construction Safety Act, 1961-62, which was held to be a statute enacted for the protection and safety of a large class of the public and that mens rea was not a necessary ingredient of the offences contravening the relevant provisions of the Act. It was held that such prohibitions did not fall within the proper domain of the criminal law. In Warner v. Metropolitan Police Commissioner (1958), 52 Cr. App. R. 373 at pp. 378-9, Lord Reid quotes with approval the judgement of Wright, J., in Sherras v. De Rutzen, [1895] 1 Q.B. 918, where he said:-

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

Then he mentioned two cases and continued:-

"Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush J. in Davies v. Harvey (1874) L.R. 9 Q.B. 433, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty ..... Another class comprehends some, and perhaps all, public nuisances ..... Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right."

In each of these cases the accused was a Corporation or owner of the plant or operation which was connected with the offence and in each case mens rea was not an essential element to prove a conviction. S. 33(8) of the *Fisheries Act* must be considered;

In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was

committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

Counsel for the accused has argued that the wrong person was charged, that the accused should be acquitted and that Gulf Oil of Canada, the owner of the tank farm, the barge and the gasoline, should have been charged. In view of the cases in respect to absolute liability under s. 33(2) *Fisheries Act*, and the wording s. 33(8) *Fisheries Act*, the Crown might well have considered such a prosecution, but that is not the case I have to deal with.

In respect to an accused who is not the owner of the plant and is not the owner of the deleterious substance, then before he can be found guilty there must be such involvement by the accused, be it as employee or agent, s. 33(8) *Fisheries Act*, or otherwise, as to come within the meaning of the *Act* that he did unlawfully permit the deposit. The absolute liability concept as set out in *Regina* v. *Pierce* cannot apply to every employee or agent, but only to those who did permit the deposit.

Mens rea is not an essential element in respect to a charge against an individual employee or agent, but there must be such involvement to come within the wording of s. 33(8) of the *Fisheries Act*, that the accused may establish his defence, "that he exercised all due diligence to prevent" the commission of the offence. The word permit in the charge need not be permission which is granted with knowledge, but may be permission granted by negligent act and the negligent act may be a malfeasance or a non-feasance. Where the accused is an individual he may be guilty of the charge if he does permit the deposit by doing an act whether intentionally or negligently or not doing an act which would have prevented the deposit if there was a duty imposed on the individual by the standard of the acts of reasonable man under situation. In this case the accused was involved in two negligent acts. The first was that the accused made a mathematical calculation which he conveyed to the barge man knowing that the barge man was relying on these calculations which resulted in the overflow of the tanks. The second negligent act on behalf of the accused was that of a non-feasance in that the accused was the agent for Gulf Oil, he was the only land based representative of the company, the tank farm was under his charge, and there was no other person of authority to observe the tanks during the filling operation. It was reasonable to expect that at some time through an error on the part of the gauging of the tanks or even an error on behalf of the barge man that there might be an excessive amount of gasoline or oil pumped into the tanks, particularly in view of the fact that it was the intent to fill all the tanks on each barge delivery. Therefore, it was the accused's responsibility and duty to keep these tanks under observation and that if there was any overflow to have it stopped as soon as possible in order to prevent danger or damage to the health and welfare of the community and its environment. The adverse weather conditions is not an acceptable defence, the duty is to the public safety and welfare under any conditions.

Considering the *Fisheries Act* and *Air Pollution Act*, (Ont.) this is environmental control legislation which is enacted for the purpose of the protection and control of the environment against acts of any person or persons. In respect to the owners and operators of plants and installations, then there is a very heavy onus on these persons to establish their plants and construct their equipment in such a way as there shall not be any unlawful damage to the environment. The law imposes an absolute liability on these persons and no excuse is acceptable as a defence. In *Regina* v. *Pierce*, the

offence occurred without the knowledge or permission and against the specific instructions of the company, and there was no evidence of any negligent act on behalf of any employees or agents of the company, and still the company was found guilty of the offence. In this case, Counsel for the defence argues that the damaged environment was caused by the Gulf Oil of Canada not properly installing the cement wall around the tank farm and if it had been done properly, then the gasoline would have been retained and, of course, not deposited on the water frequented by fish. Gulf Oil may well have installed some valves or controls on the tanks to prevent the overflow of the tank. They could have constructed a cement floor inside the walls of the tank farm which might have prevented the gasoline flowing to the sea. Because Gulf Oil did not do these acts and might be guilty of an offence under the *Act* does not exonerate the accused if, in fact, he has done any negligent act which has resulted in the deposit of the deleterious substance in the water frequented by fish. The accused's acts are assessed under the conditions and circumstances as existed at the time and he should not be exonerated because his employer might have done something to prevent his negligence from causing the offence. If the accused is involved by a negligent act then he may be found guilty of the offence. I find that the accused's actions on the night in question were such negligent acts as to permit the deposit of a deleterious substance in waters frequented by fish within the meaning of s. 33(2) of the *Fisheries Act*, and I find the accused guilty.

Johnson, J.:--(Sentence) In considering the sentence in this matter the *Fisheries Act* provides a maximum sentence under this charge of $5,000. In *Regina v. Churchill Copper Corporation Limited*, His Honour, Judge Arkell said: "To serve as a protection to society, and also as a deterrent, a fine of $5,000. has been imposed, in addition to an order being made pursuant to s. 33(7) that Churchill Copper Corporation Limited refrain from depositing or permitting the deposit of any deleterious substance in the Racing River." The only other case I found, which had to deal with sentencing under pollution control legislation is *Regina v. Industrial Tankers Limited*, Canadian Criminal Cases 1968, Volume 4, page 81, and His Honour, Judge Spragg of the County Court of Ontario dealt with the case under the *Ontario Water Resources Commission Act*. In that case a workman was cleaning a tanker truck and allowed an oil spill of approximately ten gallons into Morrison Creek. It appears that part of the ten gallons entered the creek and polluted the creek. The sentence in that case was the sum of three hundred dollars fine. I haven't found any cases which again deal with this problem, of the fine imposed on an individual rather than as to the corporation or owner of the plant which, for example, in *Churchill Copper's* case was presumably, a corporation of a great deal of wealth, the amount of money of $5,000. is a relatively small fine in comparison to their substantial wealth. I must relate this matter back to an individual. I have no evidence as to what Mr. Kirby's wealth is, other than his description of his occupation and his position, which I heard during the trial. I also have to take into consideration that this is a major spill, in that we are dealing with a quantity of 8,400 gallons of gasoline. We have no accurate information of what amount actually entered the water. But the evidence is that it is substantial. I do not have any evidence that it actually did any damage. From evidence I have heard that the potential of damage was also substantial. I must also take into consideration the matters pertaining to how this occurred in respect to Mr. Kirby and that it was Mr. Kirby's fault in making a mis-calculation in gauging the tank at a time when he was under extreme fatigue and under very adverse weather conditions. There were conditions which were not normal and the human body can, at times, stand only so much and there could be errors because of these conditions. I find that one of the

major faults that Mr. Kirby had made is that he was the only representative of Gulf Oil who was attached to this tank farm, was the only land-based personnel, the tank farm was his responsibility whether he owned it or not. It was his responsibility to see that the spill did not occur and that either he, or someone else, kept such observation on the tank farm that such spill would be prevented. This is whether he felt that he should, or should not have. I think that the standard and duty of care is such that he should have recognized that the tank farm should be kept under observation during a period of time when the tanks were being filled, because there might have been an error on his part, or an error on the part of the bargeman, or someone else, or that there may have been a mechanical failure. But again, it was at a time when the weather conditions were so adverse that it was difficult for anyone to keep a three to four hour watch on those tanks under those conditions. So, taking all these matters into consideration, I find that this is not an appropriate case for giving a maximum sentence, as set out in *Regina v. Churchill Copper*. So then what amount out of the total of $5,000. should be applied as a fine in this case. I find that a fine of $1,000. would be appropriate in this case and I so fine you $1,000. In default three months in gaol.

KIRBY v. THE QUEEN

British Columbia Supreme Court, Swencisky, J., November 22, 1972, Powell River, B.C.

Environmental law — Water pollution — Gasoline spill — Permitting deposit of deleterious substance in water frequented by fish — Appeal from conviction — Appeal dismissed — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2).

Swencisky, J.:--Gulf Oil is not before the Court as an accused person, so I express no opinion as to whether or not it would be liable to prosecution under the *Fisheries Act*. The charge with which the Court is dealing is a charge against the accused, Kirby. His appeal is solely regarding conviction and not against sentence. I hold that *mens rea* is not an element that the Crown is called upon to prove beyond a reasonable doubt, and I hold that the prohibition contained in the *Fisheries Act*, in the Section concerned, is absolute. I find that the error made by Kirby was the actual cause of the spillage. I find the accused guilty as charged. The appeal is dismissed without costs.

REGINA v. CONNOR FARMS LTD.

British Columbia County Court, Stewart, C.C.J., June 20, 1972

Environmental law — Fisheries — Destruction of fry caused by failure to maintain adequate flow of water in creek — Accused convicted — Fisheries Act, R.S.C. 1970, c. F-14, s. 30.

Constitutional law — Applicability of federal fishery protection legislation to fry rearing areas — Authorization to use water under provincial legislation not a defence — British North America Act, 1867, s. 91(12); Fisheries Act, R.S.C. 1970, c. F-14, s. 30; Water Act, R.S.B.C. 1960, c. 405.

The accused corporation drew water from an impoundment created by a dam across a small stream which flowed through its property. Although warned to maintain a continuous flow in the creek, the company nontheless occasionally caused the flow to be cut off entirely, and salmon fry perished as a result. An information charging the company under s. 30 of the *Fisheries Act* was dismissed in Provincial Court, and the Attorney-General of Canada appealed.

Held, the appeal should be allowed and the accused convicted. The evidence established that the actions of the company caused the death of the fry. S. 30 was a valid exercise of the exclusive federal power over sea coast and inland fisheries which would be severely limited if fry rearing areas such as the stream in question were not protected. Authorization to construct and operate the dam under provincial water rights legislation did not relieve the accused of liability under the federal statute.

R. v. McTaggart (1972), 6 C.C.C. (2d) 258; *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5; refd to.

J.A. McLennan, for the Crown, appellant
H.M. Suiker, for the accused, respondent

Stewart, C.C.J.:--This is an appeal by the Attorney General of Canada from an order of the Provincial Court dismissing an Information that the respondent destroyed fry of fish contrary to Section 30 of the *Fisheries Act*, R.S.C. 1970, c. F-14:

> *30. The eggs or fry of fish on the spawning grounds, shall not at any time be destroyed.*

This is the general background. The respondent operates a substantial agricultural undertaking in connection with which it uses quantities of water some of which, at least, it obtains from a stream running through its property. The water is stored by means of a dam and pumped as required. This operation is authorized by Provincial authorities under the *Water Act*, R.S.B.C. 1960, Chapter 405.

The alleged violation of Section 30 took place according to the Information, between the 16th and 28th of August, 1970 but an amendment was granted at this hearing with no objection from the respondent, changing these dates to the 10th and 29th of August, 1970.

The only reasonable explanation of the evidence establishes satisfactorily these additional facts. Salmon spawn above and below the dam in question. Fry existed in the area at material times. The flow of the creek below the dam was dangerously low at times during the summer of 1970. The respondent was warned and became fully aware, if it had not known before, that a continuous flow of water was required for the preservation of fry. After the warnings there were occasions when the flow of water was entirely cut off leaving isolated pools on the creekbed some of which became incapable of supporting fry as the oxygen was used. The fry perished at material times as a direct result of the failure of the respondent to permit a flow of water through the dam. I can draw no other conclusion but that the respondent took no reasonable step to permit a flow of water in keeping with the creek's capacity, and that it had no reasonable belief that water flowed continuously. Few dead fry were found below the dam and it clearly was not conclusively established that fry would not die even if the stream had not been obtructed by the dam. Yet I have no reasonable doubt that fry were destroyed as alleged.

That disposes of the defence that there must be a reasonable doubt on this essential ingredient of the violation. It also disposes of the defence that there was no evidence of *mens rea* for, in my opinion, the foregoing facts establish that element having regard to the nature of the violation involved, which is not a truly criminal offence. If I am wrong the respondent is still faced with the decision in *Regina v. McTaggart* (1972) 6 C.C.C. (2d) 258 where the principle laid down in *Regina v. Pierce Fisheries Ltd.* (1971) S.C.R. 5 was applied to Section 30 of the *Fisheries Act*. I do not consider it necessary to consider these authorities further.

This brings me to the third defence raised by the respondent. If I understand that defence correctly it substantially depends on the proposition that the scope of Section 30 does not extend to the area of the dam. It is argued that this area cannot be called a fishery and comes within no definition of that word and particularly the definition in the *Fisheries Act*, although that admittedly is not all inclusive. Counsel for the respondent questioned whether the scope of the section was ever intended to extend to non-tidal, non-navigable streams such as the stream in this case. Further, it was said, the *British North America Act* applies only to public fisheries which cannot be said to include this stream.

The appellant contends that any reasonable meaning of the word "fishery" would include the area here in question and that in any case the authorities are clear that Parliament has the exclusive jurisdiction to legislate for the protection and preservation of the fishing industry generally, and any interference with private proprietary rights is immaterial.

Something was made of the fact that the respondent's diversion of water from the stream was specifically authorized under the *Water Act of British Columbia*. I do not think that this relieves the respondent of any obligation he may have under Section 30 of the *Fisheries Act*.

So it seems to me that the point to be decided is whether Section 30 encompasses the area of this dam. I see some merit in the respondent's submission that the area in question is not a fishery. But that does not help the respondent's case because in my opinion matters dealt with in Section 30 are matters within that class of subject designated in Section 91 of the *British North America Act* as "Sea Coast and

Inland Fisheries". The prohibition of the destruction of fry contained in Section 30 is as vital as any legislative measure toward the preservation of fisheries generally. If Parliament did not have the right to legislate for the preservation of fish at their source the stream in question being one such source, the power granted to it over fisheries generally by the *British North America Act* would be seriously diminished and no argument on behalf of the appellant has pursuaded me that this was ever intended or that it is indeed the case.

It follows that I must allow the appeal and find the respondent guilty of the violation charged.

There remains only the matter of penalty which subject to submissions by counsel, I think should be nominal in nature. However, I am prepared to deal with this after hearing any submissions which counsel choose to make.

REGINA v. NORGAARD READY MIX LIMITED

British Columbia Provincial Court, Van Male, J., Merritt, B.C., July 12, 1973

Environmental law — Water pollution — Sentence — Deposit of deleterious substance in water frequented by fish — Remedial measures taken by accused and cooperation with authorities mitigating sentence — Fine of one thousand dollars — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

Peter Jensen, for the Crown
Glen Henderson, for the Accused

Van Male, J. (Orally):--Thank you. I do not think there is any need for me to reserve or take any time with this plea of guilty. I might comment that society of late is very aware of the destruction of our environment and our resources. In England where you have a great many more people crowded into a smaller area they have seen fit to pass very, very severe legislation and if this case were being heard in England and it was a case of, of a gaol sentence, they have legislation which makes the president of the company liable for gaol which is something we do not have. We deal with it here at this juncture and at this time by way of fines.

Since the time Columbus arrived in America until the present time we and our ancestors have felt that there was an inexhaustive supply of water, timber and energy and minerals and we now know that is not true and it may even be too late to reverse the destruction of the environment, and because of this feeling that is why the *Fisheries Act* and various other *Acts* have been brought into being and they will become more and more demanding and legislation will be imposing larger penalties for the destruction of any of our resources. We have had a great number of environmental groups that have sprung up. There is PROP and SPEC, indeed the Federal Government Environment of Canada, all clamouring for and demanding that our resources be protected. We have here Norgaard Ready Mix dumping water into the Nicola River which the Crown alleges is a spawning bed for fish and the penalty section of the *Act*, I believe, goes to some $5,000.00 a day.

Under different circumstances this Court would not hesitate to impose a fine of $5,000.00, but on Mr. Norgaard's part he says that he has, and the Crown admits, that he has cleaned up the operation and that he is endeavouring to obtain more land for a larger settling pond. I think while I may not be legally entitled to, I can take some judicial notice of the size of Norgaard Ready Mix as it relates to Kamloops Pulp and Paper and the Co-op and K.P. Wood Products and I do not propose to fine Mr. Norgaard or Norgaard Ready Mix on the same scale that I would fine a larger and bigger company.

I can take notice of the fact that the Crown has withdrawn a number of charges and I take it that is because they feel they are getting the required co-operation from Mr. Norgaard and taking that into consideration I am going to fine him, Norgaard Ready Mix Ltd., $1,000.00 for the offence which occurred on the 29th day of November, 1972.

REGINA v. ELF OIL EXPLORATION AND PRODUCTION CANADA LTD.

Northwest Territories Magistrate's Court, Parker, Ch. Mag., Yellowknife, April 30, 1974

Environmental law -- Water Pollution -- Oil Spill -- Deposit of deleterious substance in place where may enter water frequented by fish -- Failure to provide adequate containment facilities for oil -- Absence of continuous surveillance -- Due diligence not shown -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused was charged with permitting the deposit of oil in a place where it did enter water frequented by fish after diesel oil flowed from a ruptured fuel bladder and entered a nearby watercourse.

Held, the accused was convicted. No fuel should have been brought to the site until adequate precautions were taken to ensure its security. At the least, continuous surveillance of the fuel bladder was required under the circumstances. The conduct of the accused did not demonstrate due diligence under the conditions prevailing.

Orval J.T. Troy, Q.C., for the Crown.
David H. Searle, Q.C., for the Accused.

Parker, Mag.:--Well, this is a charge laid on behalf of Her Majesty the Queen by Hugh Robert Trudeau, a Fisheries Officer of the Northwest Territories, hereafter called the Informant, who says he has reasonable and probable grounds to believe and does believe that Elf Oil Exploration and Production Canada Ltd., on or about the 5th day of September, 1973, at or near Kugaluk River, approximate location 69 degrees 12 minutes north latitude by 130 degrees 57 minutes west longitude in the Northwest Territories, did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33(2) of the Fisheries Act. And I suppose I should read that Section, sub-section (2), "subject to sub-section (4), no person shall deposit or permit the deposit of a deleterious substance in water 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." And there was a statement of facts, agreed facts, filed, and I must say it was very helpful to me since it narrowed the issue down considerably. In fact, I think I am possibly not over-simplifying to say that it was admitted that the essentials of the charge were conceded subject to sub-section (8) of Section 33, which provides relief, I would suppose I should say, which I shall read as follows: "In prosecutions for an offence under this Section or Section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the Accused, whether or not the employee or employer has been prosecuted for the offence, unless the Accused establishes that it was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission." As I say, the evidence which was presented today was really limited to that last provision respecting the exemption, I suppose, of an Accused where "the Accused establishes it was committed without his knowledge and consent and that he exercised all due diligence to prevent its commission."

There were numerous photographs submitted by both the Crown and the Defence which were of great assistance to the Court, and we had very detailed technical evidence from witnesses, and particularly on the technical side from the Defence witnesses, and I must say I felt they gave their evidence in a very straightforward manner, and even I, as a layman, I think I could understand what they were getting at. The problem was, of course, that this diesel fuel which was in this bladder did, in fact, escape from this bladder, I think it was bladder No. 2, and made its way down to the surface of the adjacent water. This is the essential. You could see that this diesel fuel did percolate down in that manner; and also it is pretty clear how this happened. It was due to a break in the bladder which contained the diesel. There was considerable evidence on the particular location of this break. Apparently it was adjacent to a difficult one to repair, and indeed it appears that the weight of the valve itself contributed to the failure of this particular bladder at that point. I noticed that when Counsel were demonstrating this valve and showing it to the Court, that it did seem to be a very heavy item. I can quite see that it would put a strain on the material adjacent to it. Another thing, of course, the ground conditions at this site were extremely difficult. As was given in the evidence, it was a boggy, quagmire type of situation, and this made it very difficult to provide the proper dyke or berm, as it was called, around the area where the bladders, and this particular bladder, was installed. There was, in fact, no adequate dyke or berm around the bladder such as was required. Another situation which contributed somewhat was this leaky liner. The bonding cement which had been used, didn't act. We are not told why it wouldn't act. I know that some of these bonding cements have to be used in a warm temperature. Whether this was the case, I don't know. At any rate, it didn't hold, so you had a combination of various rather unfortunate circumstances. I suppose first really was the lack of a proper berm or dyke, and then there is the problem of the liner not being in one piece and not bonding properly, and then you have the bladder, though it had been repaired twice, finally failing again, and the combination of these circumstances led to this fuel escaping. The other point, which wasn't stressed but which occur to me, was that while there was a visit made to the site, I think on the 31st of August, there was not any type of continuous supervision or observation of this site. It seems to me there was a rather unsatisfactory situation there, and a possibility of trouble, more than a possibility. As I say, with this particular liner, the bladder had leaked twice; you had the condition of the poor liner; you had the condition of the lack of a berm; these three things, and nobody on the site. If there had been somebody on the site, with a walkie-talkie or something of that sort, possibly they could have done something or possibly move the valve as was done in September and at least controlled the spill to a certain extent. So, in my view, in these conditions, and it is easy to criticise, of course, after the event, the oil should not have been brought onto the property in the first place until such time as conditions were right to contain it. And, secondly, in my view, in this situation, you actually take a chance, really, in going against the regulations and the practice of taking the oil onto the property; and I feel you have to maintain continuous supervision if you are going to try to get away with it.

So, in the result, I can't find that the Company exercised due diligence to prevent the pollution. As was brought out, after the event, every effort was made and so on, but this is something else. In the result, I find this charge proved.

The penalties specified in this are a maximum of $5,000 (five thousand dollars). Actually, with the large expenditures and the potential serious results of infractions of this type, I believe the maximum penalty is really quite low. But, nevertheless, that is

the maximum, and I would only impose the maximum if it were a more flagrant case than this. Certainly these people although in my view they made a poor decision in getting in there, have co-operated, and I was impressed by the way they gave their evidence, and I felt that the witnesses for the company were very fair. So, I will impose a fine of $2,000 (two thousand dollars).

REGINA v. CYPRUS ANVIL MINING CORPORATION LIMITED

Yukon Territory Magistrate's Court, O'Connor Mag., Whitehorse, November 5, 1975

Environmental law — Water pollution — Sentence — Failure of tailings pond — Permitting deposit of deleterious substance in place where may enter water frequented by fish — Maximum fine of five thousand dollars — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

Failure of the dyke surrounding the tailings pond at the accused's mining and milling operation resulted in the deposit of approximately one million gallons of effluent into a nearby creek. The accused plead guilty to a charge under s. 33(2) of the *Fisheries Act*, but argued that approval of the dyke by government inspectors should mitigate the sentence.

Held, the maximum fine of five thousand dollars was imposed. The primary responsibility for the construction, maintenance and integrity of the structure in question lay with the accused, and neither the legislation nor the conduct of the government inspectors could diminish that responsibility. Having regard to the seriousness of the offence, the need to deter this accused and others engaged in the same activities, and the wealth and size of the company, the objectives of sentencing could only be met by imposition of the maximum fine.

P.J. McIntyre, for the Crown.
E.H. Nielsen, for the Accused.

O'Connor, Mag. (Orally):—This is the judgment with respect to the matter of sentencing of the Cyprus Anvil Mining Corporation. The facts surrounding the spill from the tailings pond have been fully set out by counsel and I am not going to repeat those facts in the judgment. However, a number of points have been raised by counsel during the course of their submissions which deserve comment.

Mr. Nielsen has made much of the fact that the government, pursuant to various pieces of legislation, had approved the plans for the erection of the five foot lift to increase the capacity of the upper tailings pond, and also of the fact that the government inspectors, under the legislation, were entitled to inspect the work that was carried out, as they saw fit. He points out that prior to the washout occurring on March 19th, no complaint was made by the government inspectors concerning this work. That, of course, is true. However, in my view, the primary responsibility for the proper design, construction, inspection and maintenance of the retaining wall rested with the defendant company. Nothing in the legislation, nor the fact that the government inspectors did not register any complaint concerning any weakness or fault in the retaining wall, diminishes the company's responsibility to ensure that it accomplished the purpose for which it was erected.

The Crown suggests that the washout occurred for one or more of four reasons, which, in the circumstances, seems to me to be a logical suggestion. In any event, whatever the cause of the original washout, it is obvious that the wall or dike as constructed by the defendant company, was not capable of performing the task for which it was erected. I must assume that the defendant company was aware that

should a break or washout occur in the dikes or the walls surrounding its tailings pond, the quantity of deleterious substance to escape into the nearby waterways would be substantial. The importance of properly constructing walls in the first instance, therefore, cannot be minimized.

I wish to comment as well on the suggestion that on March 20th, the representatives of the Fisheries Department, the Environmental Protection Services and of the Department of the Environment, who were on the scene, did not make any suggestions, or take any steps which resulted in a stoppage or a reduction of the quantity of effluent being discharged from the ponds. That again may be true but, in my view, the primary responsibility to repair the damaged wall rested with the company. It had been granted a licence to construct the tailings ponds, and none of the powers vested in government officials to approve, to inspect, to suggest or to order changes, reduces, or ought to reduce the company's responsibilities.

This is not a case of the company releasing a deleterious substance with greater than permitted toxic level on an isolated occasion. In other words, it is not a case of not properly controlling the amount of toxicity released into the waterways. This involves the release of an enormous quantity. I accept that in reacting to the crisis the company acted in the very best of faith and tried to bring the situation under control as quickly as possible. This is an offence of strict liability and as I have said, the company is required to bear the responsibility for the consequences that resulted from the original washout. The consequences that occurred, in my view, were foreseeable if a break or a washout did occur.

It is suggested that the amount of profit, or the size of the operation of the defendant company should not be considerations with respect to the quantum of fine. Certainly they are not relevant with respect to the defendant company's obligation to be careful. All citizens, corporate and otherwise, rich and poor, have an equal obligation in this respect. However, in determining what fine, if any, would best ensure that the defendant would not permit a repeat occurrence, it seems to me that the size of its operation and its wealth are relevant considerations. I agree that the maximum fine, $5,000.00, when compared to the size of the company's operation, seems hardly adequate to induce the company to do something that it is not otherwise motivated to do. But that is not a valid reason for not imposing a fine in that amount.

I must consider as well the deterrence of other companies who are licenced to construct and to maintain tailings ponds in the course of their business. As I have said, breaks in the walls surrounding tailings ponds can result in a very substantial escape of deleterious substances into waterways and in most instances very substantial damage. The fine here ought to point out the serious view that the court will take of any such occurrence. I am satisfied that in this case, for the reasons I have outlined above, that the objectives of sentencing can best be achieved by the imposition of the maximum fine. In so doing I do not feel that to impose the maximum fine with respect to a spillage of this size, and to impose that fine on this defendant, can be described as being either harsh or unfair. The defendant company will be fined in the amount of $5,000.00 in default distress.

CYPRUS ANVIL MINING CORPORATION LIMITED v. THE QUEEN

Yukon Territory Supreme Court, Maddison, J., Whitehorse, March 26, 1976

Environmental law — Water pollution — Appeal from sentence — Not "worst case category" — Maximum fine reduced — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5); Criminal Code, s. 755(3).

The accused appealed from the maximum fine of five thousand dollars imposed after conviction on one count of permitting the deposit of a deleterious substance in a place under conditions where it may enter water frequented by fish, contrary to s. 33(2) of the *Fisheries Act.*

Held, the appeal was reduced to four thousand five hundred dollars. While the guilty plea in this case was not a factor which could mitigate sentence, this incident nonetheless did not fall within the "worst case category". The offence occurred because of an error in judgment and was neither deliberate nor negligent, the company made repairs promptly, and the company cooperated with the authorities as a good corporate citizen.

Canada Tungsten Mining Corporation Ltd. v. The Queen, unreported, N.W.T.S.C., March 5, 1976; *R. v. de Haan,* [1967] 3 All E.R. 618; *R. v. Johnston,* [1970] 4 C.C.C. 54; *R. v. Spiller,* [1969] 4 C.C.C. 211; refd to.

P.J. McIntyre, for the Crown, Respondent.
E.H. Nielsen, Q.C., for the Accused, Appellant.

Maddison, J.A. (Oral):—The appellant pleaded guilty in Magistrate' Court to the charge that it:

> *did, between the 19th and the 21st day of March, A.D. 1975, unlawfully permit the deposit of a deleterious substance in a place and under conditions where such deleterious substance may enter waters frequented by fish contrary to Section 33 of the Fisheries Act.,*

and the Magistrate sentenced the appellant to pay the maximum fine provided by the *Fisheries Act* for that offence: the sum of $5,000.00.

On this sentence appeal brought by the appellant which lasted two days, I heard a statement of the facts with many exhibits tendered by the Crown; evidence tendered by the Crown and evidence tendered by the Defence.

On this appeal, by virtue of the provisions of Section 755 subsection (3) of the Criminal Code (which reads as follows):

> *Where an appeal is taken against sentence, the appeal court shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or receive, by order (a) dismiss the appeal, or (b) vary the sentence*

> *within the limits prescribed by law for the offence of which the defendant was convicted.*

I must consider the fitness of the sentence imposed.

Like the Magistrate, I do not need to come to any conclusion as to the cause of the failure of the dike. In this kind of situation where the matter is one of strict liability, the fact is that the dike proved to be inadequate for the purpose intended, and as a result, quantities of tailings water (somewhere between 70,000,000 gallons and 150,000,000 gallons) were deposited into Rose Creek. What part of that tailings water was toxic is open to question, but there is no question that the quantity of deleterious substance was very substantial.

The Magistrate in my opinion made no error in sentencing in referring to the wealth and size of the appellant in a case such as this. In the case of *Canada Tungsten Mining Corporation Ltd. v. Her Majesty the Queen* in the Supreme Court of the Northwest Territories (a case which is as yet unreported dated March 5th, 1976), Mr. Justice Morrow said this:

> *The magnitude and impersonal nature of present day industrial mining and similar operations makes it doubly important that the penalty not be so small as to invite breaches, as to make it worthwhile to gamble on not being detected. Regina v. Kenaston Drilling (Arctic) Ltd. (1973), 12 C.C.C. (2d) 383.*

This case comes (subject to what I have to add in a moment), because of the large quantity involved, into the category of what one may call "the worst case category". But Mr. Nielsen, counsel for the appellant, says that I must consider the mitigating circumstance of the guilty plea and the benefit to the community derived from saving the cost of taking the appellant company through a long trial to prove guilt. And in support of this contention he cites *Regina v. de Haan,* 1967 3 All E.R. 618, in the English Court of Appeal, which is relied upon by the Ontario Court of Appeal in *Regina v. Johnston,* [1970] 4 C.C.C., page 64.

I am not bound by *Johnston* or *de Haan,* and indeed I prefer to follow Mr. Justice Robertson in the Court of Appeal of British Columbia in a decision slightly earlier than the Jonhston decision (a decision given on March 17th, 1969 - the Johnston decision was March 31st, 1970) reported in [1969] 4 C.C.C., page 211: the case of *Regina v. Spiller.* Mr. Justice Robertson says this at page 214:

> *Counsel cited R. v. de Haan, [1967] 3 All E.R. 618 at p. 619, (C.A.). There Edmund Davies, L.J., said: 'It is undoubtedly right that a confession of guilt should tell in favour of an accused person, for that is clearly in the public interest.'*

Mr. Justice Robertson goes on to say:

> *With the greatest respect, I do not think that that is a principle of universal application, though it may well be appropriate to apply it in some cases, and I do not think that any significant weight should be given to a plea of guilty here: the respondent knew that she was inescapably caught.*

I agree with what Mr. Justice Robertson says. That is the case here. The appellant knew that it was inescapably caught by this *Fisheries Act*, "Pierce Fisheries" type of strict liability legislation. The guilty plea in these circumstances is not a mitigating factor.

Mr. Nielsen says, however, that I must consider as well the mitigating circumstances that the act was not deliberate or indeed even as a result of negligence, but as a result of an error in judgment; that there is no suggestion that the company's attitude was anything but cooperative; that the company responded promptly (Mr. Nielsen used the term "with alacrity") to make the necessary repairs as soon as the spillage was discovered; and that all of these three items, plus the protestations of good corporate citizenship from those two representatives of the company who gave evidence before me, along with their evidence of what they did, must lead me to take the case out of the "worst case category" and therefore reduce the maximum fine.

I am inclined to agree with that, and had it not been for the fact that the appellant re-commenced the mill and continued the mill running when there continued to be substantial leakage, I might have reduced the fine from the maximum to, say $2,500.00.

I am of the opinion that although the quantity comes into the "worst case category", there are other matters which one can envisage which can make the situation worse, such as: deliberateness, recklessness, a cavalier disregard for the Regulations and the instructions of the various environmental authorities. The maximum penalty must be reserved for those cases.

In considering the fitness of the sentence, I feel impelled to take this case out of that category by reducing the fine to $4,500.00, and I do so.

I wish to thank counsel for the excellence of their presentation.

REGINA v. DAN FOWLER

British Columbia Provincial Court, Johnson, Prov. J. April 23, 1976

Constitutional law -- Accused carrying on logging operation -- Charge under the Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3), that while engaged in logging accused put debris into water frequented by fish -- Section ultra vires Parliament.

Section 33(3) of the Fisheries Act, which provides: "No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water", is ultra vires the Parliament of Canada; the section is not certain and effectual and cannot be relied on where it clearly controls logging operations and leaves untouched other operations which also involve puting debris into water.

Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd. v. The Queen in Right of Man., [1975] 5 W.W.R. 382, [1976] 1 S.C.R. 477, 53 D.L.R. 321 referred to.

Regina v. Robertson (1882), 6 S.C.R. 52; Re B.C. Packers Ltd. and B.C. Council United Fishermen & Allied Workers' Union, [1974] 2 F.C. 913, 50 D.L.R. (3d) 602, affirmed [1976] 1 F.C. 375, 64 D.L.R. (3d) 522 (C.A.) applied.

Note up with 4 C.E.D. (West. 2nd) *Constitutional Law*, s. 41.

(Headnote from 1976 6 W.W.R. 28)

R. Gibbs, for Accused
B. Buan, for the Crown

Johnson, Prov. J.:—The accused is charged with two counts under s. 33 (3) of the *Fisheries Act* R.S.C. 1970, c. F-14, as follows:

> *That Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY put debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended;*
>
> *That Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY knowingly permit to be put, debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF THE SECTION 33 OF THE FISHERIES ACT, as amended,*

On completion of the trial it is conceded that all the ingredients of count 1 had been proven by the Crown and if the accused is guilty he would be guilty of count 1 and the Crown would withdraw count 2. The sole defence in this matter is that s. 33(3) of the *Fisheries Act* is *ultra vires* the Parliament of Canada.

The Attorney General for Canada and the Attorney General for British Columbia have been properly served under The *Constitutional Questions Determination Act*, R.S.B.C. 1960, c. 72. The Attorney General for Canada was represented by Crown counsel, no one appearing for the Attorney General of the Province of British Columbia. Service of the proper notice was acknowledged by the filing of the letter from the Attorney General's Department of British Columbia.

The facts of the case are that the accused, Dan Fowler, was carrying on a logging operation at a place known as Forbes Bay on the east shore of Humphrey Channel in the County of Vancouver, Province of British Columbia. Dan Fowler was subcontracting the removal of logs and timber from this land for the purpose of the logs being towed away. The evidence indicated that Dan Fowler was carrying on a normal and usual logging operation. As part of the logging operation the logs were removed from the forest by dragging the logs with a caterpillar tractor and in the course of dragging these logs they were dragged across a small stream, which is so small that it has no name. There was no exact measurement of the width of the stream but a photograph would indicate it is a few feet wide. From this logging operation there was debris deposited in the stream bed. From the photograph tendered as an exhibit and from the description given in evidence the debris consisted of limbs, branches or tops of trees.

This stream flowed into Forbes Bay which is salt water, part of the coastal water of British Columbia. The stream at some times contained fish; the fishery officer said that the stream was used for the spawning of two species of salmon, coho and pink, and for the rearing of the coho fry.

There was no evidence tendered by the Crown that the deposit of the debris affected or injured the fish or the fry in any way. On cross-examination the fishery officer said that this type of debris deposited in the stream could be a deleterious substance affecting the biological oxygen demand in the stream and that the fish eggs and the fry had a high oxygen demand. The fishery officer; on cross-examination, said that the debris could affect the number of fry by damaging the eggs in the gravel spawning ground. The fishery officer further said that every time something is done to the stream it may have a far-reaching effect or little effect.

The defence's argument that the part of the *Fisheries Act* under which the accused is charged is *ultra vires* in that this section does not provide for the protection and preservation of fisheries which is within jurisdiction of the Parliament of Canada under s. 91(12) of the *B. N. A. Act*, 1867, but that s. 33(3) of the *Fisheries Act* controls logging, lumbering and land clearing which is within the jurisdiction of the Legislature of the Province of British Columbia under s. 92(13) of the *B. N. A. Act*, and the right of the province to concern itself with the sale of public lands belonging to the province and of the timber and woods thereon under s. 92(5) of the *B. N. A. Act*.

To applicable section of the *Fisheries Act* is follows: (s. 33(3)):

> *(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.*

First the *Fisheries Act* in general, but specifically s. 33(3), will be examined in detail. This section applies only to those persons engaged in lumbering, logging and land clearing. It is significant from this point of view that if persons not so engaged, mining for example, should put debris into water frequented by fish this section would not apply. This section applies only to slash, stumps or other debris. In applying the *ejusdem generis* rule, the debris is material similar to slash and stumps such as leaves, limbs and parts of forest vegetation. In this particular case, the accused is charged only with putting the debris into water frequented by fish. Webster's New Collegiate Dictionary, 1975, has the following definition: "debris" - "the remains of something broken down or destroyed". Therefore, in interpreting this section the word "debris" would refer to that material broken down or destroyed during the logging operation which would include the limbs and branches from the logs or trees being removed from the forest and in particular those limbs or branches which were deposited in the stream. The debris would include any part of a tree besides the branches; it could include the leaves of the trees, cones and needles and the bark, no matter how small. Size or quantity would not be a criteria.

The words "slash, stumps or other debris" do not include the logs or trees themselves, "the slash" being that portion that is cut or moved from the tree, "the stumps" being that portion which is the root of the tree and "the debris" being those portions which are broken or otherwise removed from the tree. Section 33 (3) does not prevent the putting of the log acquired during the logging operations into the water frequented by fish. Therefore it was not an offence to take the log through the stream; the offence was in depositing or leaving the debris from the log in the stream.

In this particular case there was evidence that this was water frequented by fish. There was evidence that the accused made the statement to the fishery officer that he did not know that there were fish in the stream. This was not a defence advanced on behalf of the accused, but an explanation of why he had dragged these logs across the stream. From evidence given in this case and also from judicial notice of the geography of the British Columbia coast and from that which is advanced in argument by both counsel, I have taken into consideration that on the coast of British Columbia where there are substantial logging operations there are innumerable streams, riverlets, and creeks flowing from the land to the various inlets and waters adjacent to the British Columbia coast which is the salt water and portion of the ocean frequented by fish, and that the words of the section "into any water frequented by fish or that flows into such water" includes all these creeks, streams and riverlets of free-flowing water that accumulate and ultimately flow into the ocean no matter how small and whether or not at any particular point, the water is, at that point, frequented by fish.

In interpreting the *Fisheries Act* in general, this section and similar sections, there is substantial body of law following *Regina* v. *Pierce Fisheries Ltd.*, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, that these sections create an absolute prohibition and *mens rea* is not a defence. Therefore it is not essential for the Crown to prove that the accused intentionally put the debris in the stream and that if the debris was so deposited in the stream unintentionally, during the normal logging operation, the accused has contravened the provisions of s. 33(3) of the *Fisheries Act*.

I have referred to the size or quantity of the material and the water involved and I have referred to the absolute prohibition to emphasize the scope of the legislation.

In interpreting the effect of s. 33(3), if the size of the debris is not an essential ingredient and the *mens rea* or the knowledge of the logging operator is not an essential ingredient to the charge, and if the size or kind of water, other than being water frequented by fish, is not a matter of proof in the charge, the result then is that a logging operator who carries on a logging operation across a no-name stream and deposits therein a single piece of debris without his knowledge, is committing an offence against this section.

It is not a requirement of the section that the debris injure, damage or effect the preservation of fish. The only requirement of proof by the crown is that the water is water that is frequented by fish or that flows into such water. Considering that the definition of "fish" in s. 2 of the *Fisheries Act* is "any fish, including shell fish and Crustaceans and marine animals, and any part, product or by-products thereof", the scope of the legislation then covers almost all the water in Canada, on the sea coast and inland.

The defence argues that the scope of s. 33(3) is so wide, and since it does not require as proof of the essential ingredient that putting debris in the water does effect any fish, the real effect of the section is to control logging.

The Crown argument is that putting the debris in the stream may affect the fish, and Crown counsel submitted at trial:

> *My submission is that the legislators recognize what is, in fact, a reality, that logging, lumbering and land clearing and other operations are operations performed in a great number of instances, in the immediate vicinity of water, streams, rivers etc., and subs. (3) of the s. 33 may be no more than specific indication on the part of the federal Crown, that it is this particular area which concerns them. As long as it is related specifically to fishing and fish, within subs. (12) of s. 91 of the B. N. A. Act, then it's not ultra vires of the federal Crown to be specific in terms of what sort of operation they are dealing with. I think that it is a reality that lumbering and land clearing, in many instances, involves skidding logs across streams and falling logs into streams. That is a brief answer to your Honour's question as to why mining and other industries aren't involved and is the only submission that I can make there.*

The Crown's argument that s. 33(3) is *intra vires* Parliament is based on the words in the section "frequented by fish". These words do not mean that there are fish in that water, but that sometimes there are fish in that water. The section does not require that the putting of debris shall affect fish. This distinction "water frequented by fish", then, is not a description of a cause or action but is the description of a place. If the words "frequented by fish" were extracted from the section then the section would clearly be *ultra vires* Parliament, the addition of the words "frequented by fish" to the section, then, restricts the water affected by the section, and because there is a possibility that the putting of debris into this water might affect fish, does the section become *intra vires*?

In considering this section, I have used the words "logging" and "debris" because that is the charge in this case, but the analysis of the section applies in the same manner to the words "lumbering, land clearing and other operations" and to the words "any slash or stumps".

The scope of this legislation covers the handling of any wood material by loggers and land clearers in respect to almost any water in Canada. This section would affect every log, piece of lumber or tree that is so placed or dumped into any river, lake, stream or ocean in Canada from which there is detached therefrom any slash, stump or debris. I cannot conceive that the booming operations, the log drives and similar types of logging enterprises could be carried out without depositing some debris into the waters used for that purpose. If s. 33(3) does not require the additional proof that the deposit of the debris affects the preservation of fish then every such booming operation and log drive would be committing an offence against s. 33(3).

It would appear that there are no decided cases on the interpretation of s. 33(3) under the *Constitutional Question Determination Act.* In *Regina v. Pacific Logging Co. Ltd.*, [1974] 5 W.W.R. 523, 18 C.C.C. (2d) 222 Casham, Co. Ct.J. said at p. 530:

> *The appellant served notice under the Constitutional Questions Determination Act, R.S.B.C. 1960, c.72, upon the Attorney-General for British Columbia and the Attorney-General for Canada. No one appeared on behalf of the Attorney-General for Canada and Crown counsel stated that he had received no instructions from the Attorney-General for British Columbia on this aspect of the matter. Mr. Hutchison argued that s. 33 (3) does not regulate fishing but rather attempts to regulate logging and land clearing being matters of property and civil rights which can only be legislated upon by the Province.*
>
> *As I have found that the Crown has failed to prove the offence charged, as amended in this Court, I refrain from dealing with the constitutional question.*

Regina v. Robertson (1882), 6 S.C.R. 52, in the Judgment of Ritchie C.J. sets out law to be applied in interpreting the *B.N.A. Act* in respect to s. 91(12), sea coast and inland fisheries, in comparison to the provincial rights of jurisdiction. Ritchie C.J. at p. 110 says:

> *In construing the British North America Act, I think no hard and fast canon or rule of construction can be laid down and adopted by which all acts passed as well by the Parliament of Canada as by the local legislatures upon all and every question that may arise can be effectually tested as to their being or not being intra vires of the legislature passing them. The nearest approach to a rule of general application that has occurred to me for reconciling the apparently conflicting legislative powers under the British North America Act, is what I suggested in the cases of Valin v. Langlois (1879), 3 S.C.R. 1, leave to appeal refused, 5 App. Cas. 115, and Citizen's Insur. Co. of Can. v. Parsons; Queen Insur. Co. v. Parsons (1881), 4 S.C.R. 215, 1 Cart. 265, reserved 7 App. Cas. 96, with respect to property and civil rights, over which exclusive legislative authority is given to the local legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative power of the Dominion Parliament. But while the legislative rights of the local legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think such latter rights must be exercised so far as may be consistently with the rights of the local legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be*

necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.

It is the difficulty of applying s. 33(3) "effectually" for the preservation of fish and not the control of logging that is in question in this case. Ritchie, C.J., p. 114 says:

Let us now refer to the sections of the British North America Act bearing on the present case, and guided by considerations such as these, I think the act can be so read as to avoid all conflict and give to each legislative body the full legislative and proprietary rights intended to be conferred by the Imperial Parliament.

By section 91, sub-section 12, is confided to the legislative authority of the Dominion Parliament, 'Sea coast and Inland Fisheries;' to the exclusive power of the provincial legislatures by section 92, sub-section 13, 'Property and civil rights in the provinces;' and, by sub-section 16, 'Generally all matters of a merely local of private nature in the provinces;' and by section 108 certain public works and property specified in schedule 3 are declared to be the property of Canada; and by section 109, 'All lands, mines, minerals and royalties belonging to the several provinces shall belong to the several provinces in which they are situate, subject to any trusts existing in respect thereof and to any interest other than that of the province in the same;' and by section 92, sub-section 5, the exclusive power of legislation is conferred on the provincial legislatures in relation to 'the management and sale of the public lands belonging to the province and of the timber and wood thereon.'

And at pp. 120-21 he says:

...I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not in reference to 'property and civil rights' - that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof, whether belonging at the date of confederation either to the provinces or individuals, or to confer on the

Dominion Parliament the right to appropriate or dispose of them, and receive therefore large rentals which most unequivocally proceed from property in or to which the Dominion has no shadow of claim; but, on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth.

And further, pp. 123-24 he says:

To all general laws passed by the Dominion of Canada regulating 'sea coast and inland fisheries' all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

Ritchie, C.J., emphasizes the necessity that the Dominion Parliament legislation should be effective, which means that not only should the legislation intend to be effective but it must in fact be effective.

The *Robertson* case was followed and further analysed in *Re B.C. Packers Ltd. and B.C. Council United Fishermen and Allied Workers' Union*, [1974] 2 F.C. 913, 50 D.L.R. (3d) 602 at 615, affirmed [1976] 1 F.C. 375, 64 D.L.R. (3d) 522 (C.A.), by Addy, J. who said:

The subject-matter of the legislation in the present case is labour relations and the product affected is fish. This product is sold and traded within the Province, and the legislation would control the relationship existing between the parties for the sale of fish in the Province. Parliament cannot enact legislation affecting labour relations between fishermen and fish processors in a Province merely under the guise of its powers to regulate trade and commerce, nor does the mere fact that the legislation might possibly enure to the benefit of Canada as a whole displace the jurisdiction of provincial Legislatures in this field afforded them by the property and civil rights provisions under s. 92". (The italics are mine.)

And at pp. 617-18 he says:

> *The case, in my view, lays down a fairly strict limitation to the jurisdiction of the Parliament of Canada under this head. It limits the competence of Parliament in this field to the regulation, protection and preservation of fisheries and excludes from its jurisdiction the rights of individuals in the fisheries themselves. It would seem to follow a fortiorari sic that where the true nature of the subject-matter is the right of individuals to contract as to the proceeds of the catch, it must be excluded as being too remote to be necessarily incidental to or effectively required for the general policing or supervisory powers acorded the federal authority by s. 91(12) over fisheries. The principle in the Robertson case, supra, limiting federal power to the supervision and regulation of fisheries was subsequently followed by the Supreme Court of Canada in a reference entitled Re Jurisdiction over Provincial Fisheries (1895), 26 S.C.R. 444. Chief Justice Sir Henry Strong at p. 519 of this report stated:*
>
> > *...and the legislative authority of Parliament under section 91, subsection 12, is confined to the conservation of the fisheries by what may conveniently be designated as police regulations. As this has already been decided by the case of Regina v. Robertson, supra , which is binding upon me, I consider the decision in that case as settling the existing law. (The italics are Addy J.'s)*

If s. 33(3) is *intra vires* the Parliament, what protection or preservation of fisheries is afforded by the section?

The fisheries officer gave evidence that the debris might damage the gravel bed of the stream and destroy the spawning fry or eggs, but this is an offence under s. 30 of the *Fisheries Act*, which states: "30. The eggs or fry of fish on the spawning grounds, shall not at any time be destroyed." *(See Regina v. McTaggart* 1972 3 W.W.R. 30, 6 C.C.C. (2d) 258 (B.C.).)

The fisheries officer gave evidence that branches, leaves and similar vegetation debris cause an oxygen deficiency in the water. This would be the deposit of a deleterious substance and is prohibited under s. 33(2) re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3 of the *Fisheries Act.*

> *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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*

Therefore, the debris put into water frequented by fish as described in s. 33(3) is debris that is other than that which is a deleterious substance, or causes damage to spawning fry and eggs. What this other damage or injurious effect on the preservation of fisheries might be is not described in the section. Some persons may contemplate how debris put into water frequented by fish would be otherwise injurious to fish, and other persons could contemplate how debris so put into that water would not be injurious to fish or fisheries, but the section itself must be certain and effectual.

Section 33(3) does not prevent the putting of all slash, stumps and debris into water frequented by fish but only such slash, stumps and debris as should originate from "logging, lumbering and land clearing". How is the stump from a miner's blasting that falls into water frequented by fish not as injurious or should not warrant legal restriction the same as that of loggers and land clearers. There is not restriction under s. 33(3) to persons generally putting debris into these waters, it is only the loggers and land clearers who are restricted. The section does control logging operations as opposed to other types of occupations and operations.

Parliament does not have the right to control the putting of the debris in the water as a control of pollution of the water. In *Interprovincial Co-operatives Ltd. and Dryden Chemicals Ltd. v. The Queen in Right of Man.*, 5 W.W.R. 382, [1976] 1 S.C.R. 477, 53 D.L.R. (3rd) 321, Ritchie, J. at pp. 395-96 said:

> *It appears to me to follow from the above that legislation in respect of water quality and of pollution, including the permitting thereof in interprovincial rivers is clearly within the exclusive legislative authority of the Parliament of Canada under s. 91(12), whereas provincial legislation dealing exclusively with the effect of pollution, including the proof thereof and the measure of damage resulting therefrom, has controlling effect within the territorial limits of the Province by which it is enacted. It follows, in my view, that provincial legislation relating to the recovery of damages for pollution, and indeed creating and controlling an action therefor, against a polluter whose acts done within the Province have occasioned the pollution, is clearly within the provincial domain, whereas the overall authority seized with the regulation and control of pollution in interprovincial waters just as clearly rests with Parliament.*

The Crown's argument in this case is that logging operations are known to leave slash, stumps and debris in water frequented by fish and that this might be detrimental to the preservation of the fisheries.

Where the jurisdiction of the Parliament is in conflict with the right of the Provinces under s. 92 of the *BNA Act* the authority of Parliament is supreme, but in order for that legislation to be *intra vires* Parliament must be certain and effectual within the jurisdiction of Parliament. In this case s. 33(3) is not certain in that at best it might be effective for the preservation of fisheries in some cases and not in others, and the section is not actual as to which incidences are injurious to the preservation of fisheries. Because of the scope of s. 33(3) it does affect and interfere with logging and lumbering which, under s. 92(5), is within the right of the provinces.

I find that s. 33(3) of the *Fisheries Act* is not certain and effective to exercise the power of Parliament under s. 91(12) of the *BNA Act* and since it does interfere with the power of the provinces under s. 92(5) and (13), s. 33(3) is *ultra vires* Parliament.

The accused is therefore found not guilty and the charge against him is dismissed.

REGINA v. DAN FOWLER

British Columbia County Court, Ladner, J., April 29, 1977, Powell River, B.C.

Constitutional law -- Fisheries -- Federal legislation prohibiting putting of debris into water frequented by fish -- Intra vires -- The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3) -- The B.N.A. Act, 1867, s. 91.

Appeal from the judgment of Johnson Prov. J., [1976] 6 W.W.R. 28.

The accused was charged with unlawfully putting debris into water frequented by fish in contravention of s. 33(3) of the Fisheries Act, which stated that "no person engaged in logging, lumbering, land clearing or other operations, shall put ... any slash, stumps or other debris into any water frequented by fish". The accused claimed s. 33(3) conflicted with the legislative power of the province over property and civil rights.

Held, s. 33(3) was intra vires the federal Parliament, as it fell within the principles of legislative paramountcy enumerated in *A.G. Can. v. A.G.B.C. (Reference re Fisheries Act, 1914)*, [1929] 3 W.W.R. 449, [1930] A.C. 111, [1930] 1 D.L.R. 194. The words "or other operations" did not refer to the words "logging, lumbering and land clearing" only, and therefore limited any interference with property and civil rights.

A.G. Can. v. A.G.B.C. (Reference re Fisheries Act, 1914), supra applied.

(Headnote from [1977] 4 W.W.R. 449)

H. J. Wruck, For the Crown (Appellant)
R. Gibbs, For the Defendant (Respondent)

Ladner, J.:--The Respondent was charged that:

COUNT No. 1 that Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY put debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended;

COUNT No. 2 that Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY knowingly permit to be put, debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended."

The respondent appeared for his trial before Provincial Court Judge J.S.P. Johnson on the 23rd day of April, 1976, and pleaded not guilty to both counts.

The trial proceeded and the learned Provincial Court Judge found:

I find that s. 33(3) of the Fisheries Act is not certain and effective to exercise the power of Parliament under s. 91(12) of the B.N.A. Act and since it does interfere with the power of the province under s. 92(5) and (13), s. 33(3) is ultra vires Parliament.

The accused is therefore found not guilty and the charge against him is dismissed.

The Crown appealed to this Court by notice filed July 22, 1976.

Due notice of the desire to challenge the constitutional validity of subsection 33(3) of the *Fisheries Act* was given to the Attorney-General of Canada and to the Attorney-General of British Columbia.

Notice was acknowledged by the Attorney-General of British Columbia, and Mr. Wruck represented the Attorney-General of Canada as well as the Crown.

The charge is laid under the provisions of subsection (3) of Section 33 of the *Fisheries Act.* This provides:

(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

The respondent, through his counsel, admitted the facts as set forth in the Reasons for Judgment of the learned Provincial Court Judge. These reasons stated:

The facts of the case are that the accused, Dan Fowler, was carrying on a logging operation at a place known as Forbes Bay on the east shore of Humphrey Channel in the County of Vancouver, Province of British Columbia. Dan Fowler was subcontracting the removal of logs and timber from this land for the purpose of the logs being towed away. The evidence indicated that Dan Fowler was carrying on a normal and usual logging operation. As part of the logging operation the logs were removed from the forest by dragging the logs with a caterpillar tractor and in the course of dragging these logs they were dragged across a small stream, which is so small that it has no name. There was no exact measurement of the width of the stream but a photograph would indicate it is a few feet wide. From this logging operation there was debris deposited in the stream bed. From the photograph tendered as an exhibit and from the description given in evidence, the debris consisted of limbs, branches or tops of trees.

This stream flowed into Forbes Bay, which is salt water, part of the coastal water of British Columbia. The stream at some times contained fish; the fishery officer said that the stream was used for the spawning of two species of salmon, coho and pink, and for the rearing of the coho fry.

...

In this particular case there was evidence that this was water frequented by fish.

...

The fisheries officer gave evidence that the debris might damage the gravel bed of the stream and destroy the spawning fry or eggs, ...

The fisheries officer gave evidence that branches, leaves and similar vegetation debris cause an oxygen deficiency in the water.

I accept the finding of the learned Provincial Court Judge that:

In interpreting the Fisheries Act in general, this section and similar sections, there is a substantial body of law following Regina v. Pierce Fisheries Ltd., 12 C.R.N.S. 272, [1971] S.C.R. 5, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, that these sections create an absolute prohibition and mens rea is not a defence. Therefore it is not essential for the Crown to prove that the accused intentionally put the debris in the stream and that if the debris was so deposited in the stream unintentionally, during the normal logging operation, the accused has contravened the provisions of s. 33(3) of the Fisheries Act.

The relevant portions of the *British North America Act* are:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

...

12. Sea Coast and Inland Fisheries."

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

...

10. Local Works and Undertakings other than such as are of the following Classes:-

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with

any other or others of the Provinces, or extending beyond the Limits of the Province:

b. Lines of Steam Ships between the Province and any British or Foreign Country:

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

...

13. Property and Civil Rights in the Province.

This issue was raised in *Regina v. Pacific Logging, Co. Ltd.*,[1974]5 W.W.R. 523, 18 C.C.C. (2d) 222, but Cashman, C.C.J. said:

As I have found that the Crown has failed to prove the offence charged, as amended in this Court, I refrain from dealing with the constitutional question.

In *Regina v. Robertson* (1882), 6 S.C.R. 52 at page 110, Ritchie, C.J. says:

"The nearest approach to a rule of general application that has occurred to me for reconciling the apparently conflicting legislative powers under the British North America Act, is what I suggested in the cases of Valin v. Langlois (1879), 3 S.C.R. 1, leave to appeal refused, 5 App. Cas. 115, and Citizen's Insur. Co. of Can. v. Parsons; Queen Insur. Co. v. Parsons (1881), 4 S.C.R. 215, 1 Cart. 265, reversed 7 App. Cas. 96, with respect to property and civil rights, over which exclusive legislative authority is given to the local legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative power of the Dominion Parliament. But while the legislative rights of the local legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think such latter rights must be exercised so far as may be consistently with the rights of the local legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.

and commenting at page 120 Ritchie, C.J. says further:

...I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not in reference to 'property and civil rights' - that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and

increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof, whether belonging at the date of confederation either to the provinces or individuals, or to confer on the Dominion Parliament the right to appropriate or dispose of them, and receive therefore large rentals which most unequivocally proceed from property in or to which the Dominion has no shadow of claim; but, on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth.

and commencing at page 123 Ritchie, C.J. says further:

To all general laws passed by the Dominion of Canada regulating 'sea coast and inland fisheries' all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preverved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

I am accepting as guidance in this case the above quoted statements. The matter to be decided in *Regina v. Robertson* was as to the validity of a "lease of fishery" of a river from the Dominion Government as against the owners of conveyances of a portion of the river. The matter to be decided in the present case is whether subsection (3) of Section 33 of the *Fisheries Act* being a Dominion Statute conflicts or competes with the legislative power of the Legislature of the Province of British Columbia "over property and civil rights beyond what may be necessary for

legislating generally and effectively for the regulation, protection and preservation of the fisheries in the interests of the public at large."

In *Grand Trunk Railway Company of Canada v. Attorney-General of Canada,* [1907] A.C. 65 commencing at page 67 Lord Dunedin adopted the two propositions which he stated were established in *Attorney-General of Ontario v. Attorney-General of Canada,* [1894] A.C. 189 and *Tennant v. Union Bank of Canada,* 1894 A.C. 31, namely:

> *First, that there can be a domain, in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.*

Certainly in the present case the field would seem to be clear for the Dominion Parliament to enact the subsection in question under subsection 12 of Section 91 of the *British North America Act.*

The learned Provincial Court Judge in his judgment in this case stated:

> *If s. 33(3) is intra vires the Parliament, what protection or preservation of fisheries is afforded by the section?*
>
> *The fisheries officer gave evidence that the debris might damage the gravel bed of the stream and destroy the spawning fry or eggs, but this is an offence under s. 30 of the Fisheries Act, which states: '30. The eggs or fry of fish on the spawning grounds, shall not at any time be destroyed.' (See Regina v. McTaggart, [1972]3 W.W.R. 30, 6 C.C.C. (2d) 258 (B.C.).)*
>
> *The fisheries officer gave evidence that branches, leaves and similar vegetation debris cause an oxygen deficiency in the water. This would be the deposit of a deleterious substance and is prohibited under s. 33 (2) (re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3) of the Fisheries Act.*
>
> *(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*
>
> *Therefore, the debris put into water frequented by fish as described in s. 33(3) is debris that is other than that which is a deleterious substance, or causes damage to spawning fry and eggs. What this other damage or injurious effect on the preservation of fisheries might be is not described in the section. Some persons may contemplate how debris put into water frequented by fish would be otherwise injurious to fish, and other persons could contemplate how debris so put into that water would not be injurious to fish or fisheries, but the section itself must be certain and effectual.*

With respect I cannot agree with this reasoning. The overlapping of two subsections with respect to the actions being forbidden does not vitiate the part of the

one or the other subsection but rather subsection (3) provides more certainty with respect to the type of action forbidden.

Again at pages 38 and 39 the learned Provincial Court Judge continues:

> *Section 33(3) does not prevent the putting of all slash, stumps and debris into water frequented by fish but only such slash, stumps and debris as should originate from 'logging, lumbering and land clearing'. How is the stump from a miner's blasting that falls into water frequented by fish not as injurious or should not warrant legal restriction the same as that of loggers and land clearers. There is no restriction under s. 33(3) to persons generally putting debris into these waters: it is only the loggers and land clearers who are restricted. The section does control logging operations as opposed to other types of occupations and operations.*

In this paragraph a restrictive interpretation has been put on the words "or other operations" in apparently relating the words to "logging, lumbering and land clearing" only.

With respect I cannot agree. The slash and stumps would generally result from logging, lumbering and land clearing but the words "or other operations" and the words "into any water frequented by fish" may to some extent duplicate subsection (2) but also limit any interference with property and civil rights and create effective legislation with respect to the powers reserved to the Dominion Parliament under subsection 12 of Section 91 of the *British North America Act* and in particular the words "or other operations" would make the legislation in fact effective.

In *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111 at 118 Lord Tomlin said:

> *Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:-*
>
> *(1) The legislation of the Parliament of the Dominion, so long as it strictly related to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92: see Tennant v. Union Bank of Canada. ([1894] A.C. 31).*
>
> *(2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see Attorney-General for Ontario v. Attorney-General for the Dominion. (1896 A.C. 348).*
>
> *(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the*

provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see Attorney-General of Ontario v. Attorney-General for the Dominion [1894] A.C. 189; and Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348.

(4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see Grand Trunk Ry. of Canada v. Attorney-General of Canada, [1907] A.C. 65.

The subsection impugned by the respondent in this case would comply with these propositions.

I find that Section 33(3) of the *Fisheries Act* is *intra vires* the Parliament of Canada.

I appreciate the very helpful submissions of counsel for the appellant and the respondent.

I have only had submissions from counsel with respect to the validity of the legislation and will hear submissions with respect to the facts.

REGINA v. DAN FOWLER

British Columbia Court of Appeal, Farris, C.J.B.C., Craig, J.A., Lambert, J.A., October 16, 1978

Constitutional law — Fisheries — Federal legislation prohibiting putting of debris into water frequented by fish — Intra vires — The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3) — The B.N.A. Act, 1867, ss. 91(12), 92.

Appeal from the judgment of Ladner, Co. Ct. J., [1977] 4 W.W.R. 449, 36 C.C.C. (2d) 297, reversing [1976] 6 W.W.R. 28, who held that s. 33(3) of the Fisheries Act was intra vires the federal Parliament.

The accused was charged under s. 33(3), which provided that "No person engaged in logging, lumbering, land clearing or other operations, shall put ... any slash, stumps or other debris into any water frequented by fish.

Held, the appeal was dismissed. The legislation was clearly in relation to the matter of inland fisheries and the preservation of fish and was intra vires.

A.G. Can. v. A.G. B.C.; Re Fisheries Act, 1914, [1930] A.C. 111, [1929] 3 W.W.R. 449, [1930] 1 D.L.R. 194 (P.C.) applied.

Note up with 4 C.E.D. (West. 2nd) *Constitutional Law*, s. 41.

(Headnote from 1979 1 W.W.R. 285)

H.J. Wruck, for the Crown (Respondent)
R.C. Gibbs, for the Defendant (Appellant)
R.B. Hutchinson and D. Robbins, for the Attorney-General of British Columbia (Intervenor)

Farris, C.J.B.C.:—This is an appeal from a conviction 1977 4 W.W.R. 449, 36 C.C.C. (2d) 297, reversing [1976] 6 W.W.R. 28 (b.C.) on a charge:

> *...that Dan Fowler from April 27, 1975 to May 27, 1975, while engaged in logging did unlawfully put debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, contrary to the provisions of Section 33 of the Fisheries Act.*

The appellant is a logging subcontractor who apparently was carrying on operations. It is conceded that the acts that he performed constitute a contravention of s. 33(3) of the *Fisheries Act*, R.S.C. 1970, c. F-14, and the sole issue in this appeal is as to the constitutional validity of s. 33(3).

Under the *B. N. A. Act*, s. 91(12), the Parliament of Canada has jurisdiction over coast and inland fisheries. Also under the *B.N.A. Act*, by s. 92, the provinces have jurisdiction over the management and sale of lands, local works and undertakings, property and civil rights. The issue here is: is this legislation in respect to a matter that is within the jurisdiction of the Parliament of Canada?

It seems to me the principle that we are concerned with is that set out in *A.G. Can. v. A.G. B.C.; Re Fisheries Act, 1914,* [1930] A.C. 111, [1929] 3 W.W.R. 449 at 452, [1930] 1 D.L.R. 194 (P.C.) where Lord Tomlin said this:

> *Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:*
>
> *(1) The legislation of the Parliament of Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in sec. 91, is of paramount authority even though it trenches upon matters assigned to the provincal Legislatures by sec. 92: see Tennant v. Union Bank of Can., [1894] A.C. 31.*

Section 33(3) must be considered in this context.

Although there may also be earlier sections dealing with the preservation of fish, s. 33(1) prohibits the throwing overboard of:

> *...ballast, coal ashes, stones, or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on, or leave or deposit or cause to be thrown, left or deposited, upon the shore, beach or bank of any water or upon the beach between high and low water mark, remains or offal of fish, or of marine animals, or leave decayed or decaying fish in any net or other fishing apparatus; such remains or offal may be buried ashore, above the high water mark.*

Section 33(2) re-en R.S.C. 1970 (1st Supp.), c. 17, s. 3 sets out:

> *(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*

Section 33(3) sets out:

> *(3) No person engaged in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.*

In addition there is evidence here, accepted by all, given by the fisheries officer, that the depositing of debris in creeks can have deleterious effects. The first and most obvious -- and I am paraphrasing the evidence of the fisheries officer --- is:

> *...blockage of the creek -- access of the fish migration...*
>
> *The second and perhaps more important problem is the biological oxygen demand, as this material deteriorates over the years, it requires oxygen from the*

water to break it down in the rotting procedure. This oxygen is in high demand from the fish both as eggs in the gravel and also in the area as fry.

There may also be damage to spawning beds, fry and gravel beds.

Taken in this context, it seems to me that this is legislation clearly in relation to the matter of inland fisheries, and particularly to the preservation of fish.

The submission made by counsel for the appellant, supported in effect, though not in these words, by counsel for the Attorney-General, that the legislation, s. 33(3), is really legislation regulating logging, seems to me, I say with great deference, to be divorced from reality. In my view, it comes clearly within the proposition quoted from Lord Tomlin, and I would, accordingly dismiss the appeal because, in my view, s. 33(3) is valid legislation and within the competence of the Parliament of Canada.

Note: See page 286 for judgment of the Supreme Court of Canada.

REGINA v. BRITISH YUKON NAVIGATION COMPANY LIMITED

Yukon Territory Magistrate's Court, O'Connor, Mag., Whitehorse, May 21, 1976

Environmental law -- Water pollution -- Sentence -- Oil spill -- Deposit of deleterious substance in water frequented by fish -- Twelve hundred and fifty dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5)

The accused plead guilty to a charge under s. 33(2) of the Fisheries Act after several thousand gallons of fuel oil overflowed a tank being filled by its employee and entered a nearby creek.

Held, the appropriate fine under the circumstances was twelve hundred and fifty dollars. While the employee had failed to monitor the filling operation adequately, the company did not report the incident, and the dike surrounding the tank in question was inadequate to contain the oil, the offence was not in the most serious category. The previous good record of the accused and the remedial action it took as a result of this incident justified a fine substantially less than the maximum provided for by law.

P. O'Brien, for the Crown.
T. McBride, for the accused.

Mr. McBride: Appearing, Your Worship, as agent.

O'Connor, Mag.: Are you ready to plead to the charges?

Mr. McBride: Yes, Your Worship.

O'Connor, Mag.: Read the charge.

Mr. McBride: I'm instructed to enter a guilty plea on that, Your Worship. There are two other matters, Your Worship, one I understand relating to approximately the same time that is not being proceeded with.

Mr. O'Brien: That's correct. I wonder if we could have all the charges read. It's a little bit difficult because there is no particularization on the charges on the docket, and one will be withdrawn. However, until we get the charges read.

O'Connor, Mag.: All right. Read the other two then.

CHARGE READ PLEA GUILTY

O'Connor, Mag.: The third charge.

CHARGE READ

Mr. O'Brien: Perhaps we can check. Has there been a plea taken on the first count?

O'Connor, Mag.: There is a plea of guilty to the first count, plea of guilty to the second count, and there has been no plea to the third count.

Mr. O'Brien: I'd ask that the third matter be marked withdrawn.

O'Connor, Mag.: The third charge will be withdrawn at the request of the Crown.

Mr. O'Brien: With regard to the matter on April 11th, 1976, at approximately 2:40 p.m., there was a report of a tanker travelling up the Two-mile Hill apparently spilling fuel from a rear tank. This was witnessed by Constable Bill Hensley of the R.C.M.P. The truck was stopped, the driver identified as one Tony Bazilinski, and Corporal Knowles apparently arrived on the scene, went to the top of the tank, had the driver open the rear compartment, and the fuel was within apparently 3 1/2 inches of the open dome, approximately 5 inches above the full marker in the tank. The front compartment was then opened for comparison and the fuel level was 11 inches below the top dome and below the fuel level marker. Approximately 100 gallons was pumped off the rear compartment to bring the tank down to the full marker. There was a fuel track on Two-mile Hill starting at a point just beyond the turn on Industrial Road toward the hill. The trail continued upwards beyond the top of the hill. The greatest showing of fuel was about the center of the hill. The track was identified as having come from the fuel spill from the truck in question. This fuel is apparently very hard on the road surface, and it makes conditions on the hill very slippery because of the oil base. It is also a fire hazard, which is not severe though it does exist. Those are the facts on that particular charge.

O'Connor, Mag.: That is on the second count, is that correct?

Mr. O'Brien: Yes, that is the second count.

O'Connor, Mag.: Are those facts admitted, Mr. McBride?

Mr. McBride: Yes, they are, Your Worship.

O'Connor, Mag.: Then on the plea of guilty and the admitted facts there will be a conviction on the second count.

Mr. O'Brien: On the first charge, Your Worship, the spill was in Faro. I'm informed that in this particular instance the background is that these trucks owned by White Pass carry fuel to a pumping station or reservoirs. At this particular time a driver identified as Mr. Trigg; Norman Trigg, of Porter Creek, apparently was carrying out this action by delivering fuel to these fuel tanks, and on the date and time in question, he hooked his truck up to a tank which apparently was more full than he was aware, and when he unloaded his fuel he did not remain near the tank to observe the fuel level rising in the tank. There was no watch kept and the fuel was spilled over the top. The situation is that, according to Regulations, the fuel tanks are

supposed to be surrounded by an impermeable dike, so that in the event that a spill does occur the material that is spilled does not leak out and damage the environmental balance. This dike, however, apparently was not impermeable. The amount of oil spilled within the dike rose up to about a foot on the wall of the dike and the next morning was found to be - the dike was found to be empty, the oil having permeated through the wall of the dike into the ground. There is some dispute with my friend concerning the amount of oil that was spilled. The indication that we had is that there was somewhere in the neighbourhood of 6,000 gallons spilled.

O'Connor, Mag.: Into the dike?

Mr. O'Brien: Into the dike, yes. This spillage was not reported. It was found by an R.C.M.P. officer, I'm informed, who apparently noticed the oil slick or traces of oil on Van Gorda Creek. He traced these oil traces back to this particular dike, and an investigation was made, and at that time the source of the spillage was identified. Those are the facts which I have on my file, Your Worship.

O'Connor, Mag.: Mr. McBride?

Mr. McBride: Your Worship, those facts are substantially admitted. There are two areas that I would comment on. Firstly, I am instructed that the day after this incident happened the attendant at the bulk plant where the fuel was off-loaded dipped the tanks, and in reporting to the driver, Mr. Trigg, two days later indicated to him that the spill had been in the amount of 3,787 gallons. Now, that's my information, and we are admitting to that.

With respect to the actions of the driver himself during the off-loading, I am instructed that what had happened was the intake manifolds for two separate tanks were side by side, one for one type of petroleum product, and one for another, and the fuel from the petroleum product from one of these tanks was pumped into the tank, the furnace oil tank, which eventually overflowed for purposes of cleaning the tank that had emptied, and this wasn't brought to the driver's attention, and when he came and hooked up he wasn't aware of the extra oil that had been pumped into the tank that he was pumping into, and consequently the overflow resulted. I'm advised that there is no means of checking the level in the tank short of taking the top off and dipping or looking in with a flashlight or other means of illumination. There's no gauge that one can check. I'm advised that the normal procedure with respect to loading in tanks is to have - to know the level in the tank and then fill up to that level.

O'Connor, Mag.: There is a requirement that someone should attend though during --

Mr. McBride: My advice is again on the statement of Mr. Trigg, the driver, "My next load on September 21st was all stove oil, (7,000 gallons) and I pulled into the agency as usual and hooked up to the same manifold as

before ... It was dark and raining at the time. The floodlights mounted at the off-loading area illuminate the stem, the yard area and my truck as I unloaded. During the off-loading process (1 hour) I was moving back and forth around my rig monitoring the operation of my pump ..." That's the statement of the driver.

O'Connor, Mag.: It is hard to understand that if he was being very attentive that they could spill 3700 gallons.

Mr. McBride: I'm saying that not to excuse the driver's actions, but --

O'Connor, Mag.: Well, on the plea of guilty and the facts as admitted, there will be a conviction on that charge as well. Previous convictions?

Mr. O'Brien: No, there are no previous convictions that the Crown is alleging, Your Worship. However, with regard to sentence I'd ask Your Worship to take into consideration the seriousness of this type of offence with regard to environment in the area. Several studies have been made with regard to the effects of this type of deleterious material on the environment. With regard to this particular substance there is a continuous discharge, and this has been based on the experience at Canada Tungsten in 1973. This material, apparently there is no way of stopping it from - there's no way of cleaning it up or stopping it. There is a continuous discharge until the amounts are so little left in the area that they are no longer deposited into the creek beds.

There's also the situation of the disruption of the spawning population of the grayling and other fish that are down in Van Gorda Creek, and that I think should be taken into consideration when Your Worship considers sentence. The flesh of these fish which are caught by the people of Faro and other sportsmen and people passing through the area is tainted by this type of material being deposited in the water, and a situation similar to this was documented apparently in the Haines-Fairbanks pipeline near Dezdeash Lake in 1968, and if the experience gained from that documentation is any indication, it certainly does have a serious effect on the fish population in the area. There's also the question of the reduced recreational potential in the area as a result of oil slicks being continually deposited, or oil slicks continually appearing in the river. The outstanding features of the offence itself I think are the fact that a proper watch wasn't kept. The offence wasn't reported, and in fact the dike was not such as is required in order to stop this type of problem from occurring. The Regulations are such as to impose a duty on people handling this type of material, and this duty was breached certainly in this case in several ways, not the least of which is not having a proper dike to contain an oil spill, and certainly there was a breach of duty by not reporting this matter. I think Your Worship should perhaps take those factors into consideration.

O'Connor, Mag.: Thank you, Mr. O'Brien.

Mr. O'Brien: I believe also the sentence in this type of offence has recently been changed. It is now a maximum fine of $5,000.00.

O'Connor, Mag.: Yes, I am aware of that. Mr. McBride?

Mr. McBride: Well, Your Worship, this offence involves White Pass, one of the major companies within the Territory, and I would draw Your Worship's attention that this, as my friend has indicated, is the first offence under this Act that the Company has been charged with. In terms of the amount of oil spill which we admit is in the neighbourhood of 3800 gallons - in terms of the total fuel handled by that Company it is miniscule. I'm instructed that in 1975 something in excess of 43,000,000 gallons was handled by that Company in the Yukon Territory. In light of that immense volume of fuel I would submit that this is a minor spill. Immediately after the spill occurred the company - - immediately after the spill was brought to the Company's attention, and the Company can only regret that the matter was not reported by the Company itself, there was simply a lack of communication between the people who knew of the spill and the people whose duty it is in the Company to report the spill to the various environmental agencies, and the Company can do nothing but regret that, and as I say immediately after a series of memos were sent from the Executive Office in Vancouver to the various officers in Whitehorse and in the Yukon Territory specifying the action to be taken in the case of spills. I understand that these memos have been made available to the employees of the Company, and hopefully the non-reporting at least of this incident will not occur again.

I would submit that it is not - the non-reporting, it was certainly not intentional, it was simply a regrettable lack of communication within the Company itself. Steps as I say have been taken to hopefully avoid that problem in the future. I am instructed that the Company itself has had friendly relations with the environmental protection people, and that they have in the past and continue to make every effort to co-operate with the various agencies.

With respect to the incident itself, Your Worship, I would submit that it's one of employee error. The driver simply did not have the knowledge that he should have had admittedly, and erred in filling a tank that had more fuel in it than he was aware of. I would submit that that is a different circumstance than a spill that would occur as a result of a management decision to take a certain course of action which ran a risk of spill, and which the spill then occurred, or the deleterious substance managed to get into a waterway. I would submit that there is a difference between that sort of case and this case, and that should be taken into account by Your Worship.

Certainly there's no benefit to the Company by this sort of action. They have lost either 6,000 or 3800 gallons, and it's not the sort of decision that they would hope would recur, and I think that points out the difference between the two types of cases. The incident in my

submission is a freak accident that is unlikely to occur. The damage that has resulted, Your Worship, certainly with respect to the potential damage, the gallonage as I would submit not large in terms of spills that can occur. Your Worship has recently dealt with one case that the amount that was involved was somehwere between seventy and a hundred and fifty million gallons. I submit that in comparison this spill is indeed a minimal one. I have been provided with a copy of the report by the environmental protection people, and I would like to indicate several parts of the report. The report was prepared by a W. Robson. He indicates that the amount of oil entering the creek to be between 10 and 20 gallons per day. This report was made in October of 1975, Your Worship, some one month after the spill. "Once in the creek the oil can be seen in concentrations at only two locations; one near a culvert at a road crossing, and two, in a back-water where the creek meets the river. The slick is extremely thin, and once the oil is in the Pelly River proper, disappears altogether." I would submit that in terms of actual potential damage that again indicates that the problem is not of great magnitude. My friend has indicated the problem of the spawning of the grayling, and without wishing to give evidence, Your Worship, it's my understanding that grayling spawn in spring, and this incident occurred in the fall. Possibly if the amount is still being dispersed into the creek, and we have no information on that, it may well affect that, but my submission is that the incident occurred in the fall, and there doesn't appear to be any indication that it continues to be a problem, but I have no knowledge on that, so I don't wish to make a representation to that effect.

Again, my friend's comments with respect to the reduced recreational potential of the area, I simply don't know whether Van Gorda Creek is a recreational area that people fish in, or whether sewage from the town of Faro goes through it. I just don't know, and I'm not prepared to make any submission with respect to that.

O'Connor, Mag.: Can you comment on the dike, Mr. McBride, the suitability of it at that time, and whether or not any steps have been taken to rectify the situation?

Mr. McBride: I am advised, Your Worship, that the comment my friend made with respect to the mark up the side of the dike is a seepage problem rather than what I had inferred from the comment, and obviously Your Worship had, that this dike filled up and seeped out. As I understand it, what happened was that as the oil spilled out from the tank it would immediately seep into the ground, and the oil would also seep up the sides of the dike rather than --

O'Connor, Mag.: Fill up.

Mr. McBride: Be contained in the dike for a period of time, and then seep out of it. I'm also instructed that the dike itself is some distance from the creek in question, and in terms of percentage of fuel, of oil, that

would get to the creek it would be some small, or some portion of the actual amount spilled because it would be dispersed into other areas of the creek. With specific reference to your question, the environmental protection people have not requested any action in this regard, and none has been taken by the Company with respect to changing the dike to make it contain any spills.

O'Connor, Mag.: Is that your information, Mr. O'Brien?

Mr. O'Brien: I have no information on that, Your Worship, unfortunately.

O'Connor, Mag.: It seems odd that that is one of the complaints that they are making, is the inadequacy of the dike.

Mr. McBride: Well, if it is, they haven't conveyed it to the Company.

Mr. O'Brien: There may be a request in future whatever the results of this.

Mr. McBride: I have dealt with the facts, Your Worship. If I may have a comment or two with respect to the principle, and much of what I have said is perhaps not relevant to the actual guilt of the Company. However, I would submit that the prime principle which Your Worship should consider is one of deterrence, and much of what I have said is relevant with respect to sentence. I would submit that the fact that this is a simple error, that it's simple in error, my submission is an indication that the penalty to be considered should be somewhat less than if the incident had been an intentional one, and the point I'm making is that deterrence is - it's hard to see how deterrence is relevant where there is error involved. To err is human, and the ability to deter error is in terms of penalty imposed, I think is less successful than if the actions had been intentional. I would also like Your Worship to consider Mr. Justice Maddison's comments with respect to the worst case principle in the recent Regina v. Cyprus Anvil where he considered that case, and reduced the fine by an amount of $500.00, but indicated that he would have reduced it substantially more if certain things after the fact had not happened, the continuing to keep the dike open as I recall.

In any event, Your Worship, I'd just emphasize with respect to the aspect of sentence that in fact in my submission rather, this was a matter of an employee of the Company whose actions the Company is responsible for, and readily admits that responsibility, but in degree both in the amount of the spill and the management involvement in the incident is minimal.

O'Connor, Mag.: I will take 5 minutes and I will give my judgment.

AFTER ADJOURNMENT MAY 21st, 1976

O'Connor, Mag.: Dealing first of all with the charge under the Fisheries Act, the principle to be considered by the court in determining the appropriate sentence, first of all that of deterrence to this Company and other companies or persons, and also the need to indicate the degree of seriousness of the offence that has occurred. The facts disclose here that the driver of the truck made a mistake in not ascertaining the amount of the substance already in the tank when he commenced to off-load his truck. Mr. McBride has pointed out that this is an understandable human mistake, and I am sure that despite all precautions such mistakes will occur from time to time. The situation becomes somewhat more serious in light of a number of things that occurred thereafter. The driver failed to keep a sufficient watch on the filling process. Had he done so the spill no doubt to a large extent would have been avoided. It is true that this is an error, or a fault, committed by the employee of the defendant Company. However, the Company must assume responsibility for that. The matter was not reported as required. It is not clear from the facts which are before me whether or not reporting it would have made a difference in preventing environmental damage. This again was a failure by an employee or employees of the Company. However, again the Company must be held accountable for that. Finally, there is the matter of the dike which proved to be insufficient in order to contain the spill that occurred, and the primary responsiblity for protecting the environment from a spill of this sort lies with the Company, and apparently whatever provision had been made in this case was insufficient to prevent some fuel from reaching the Van Gorda Creek. The matters that I have referred to in my view take this case out of the least serious type of violations of the Fisheries Act to which the lowest range of fines would be appropriate.

On the other hand this is a single incident. The White Pass Company carries on a very large volume of business in the Territory. There is no suggestion of any previous problems of a similar nature, and indeed there has been no convictions registered against the Company. The Company has responded with an obvious concern for what happened here, and has taken steps within its internal organization to try to ensure that this type of driver error, and this type of spill, will not recur. The amount that went into the creek itself cannot precisely be determined, but I think it is fair to say that it is not a massive amount, as was in the case of the Faro tailings spillage last year, and in the case of other spills that the courts of the north have dealt with. These factors in my view take this case out of the more serious range of cases that are dealt with under the Fisheries Act.

Parliament has provided in the Fisheries Act for fines for conviction under this section up to the amount of $5,000.00, and the company in this case will be fined in the amount of $1250.00, in default distress.

With respect to the charge under the Gasoline Handling Ordinance, the considerations are different. There will be a fine in the amount of $200.00, in default distress.

REGINA v. NORTH ARM TRANSPORTATION CO. LTD.

British Columbia Provincial Court, Sarich, Prov. Ct. J., Campbell River, B.C., May 4, 1976

Environmental law — Water pollution — Permitting the deposit of deleterious substance in water frequented by fish — Oil Spill — Accused's employee overfilling on-shore tank from company's barge — Accused denied defence of all due diligence because of failure to enforce proper procedures — Accused convicted — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), 33(8).

Environmental law — Water pollution — Permitting the deposit of deleterious substance in water frequented by fish — Oil Spill — Accused's employee accepting tug boat as deck cargo — Tug boat leaked diesel oil into ocean on account of negligent conduct of employees — Accused denied defence of all due diligence — Accused convicted — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), 33(8).

The accused corporation was charged with two counts of permitting the deposit of diesel fuel in water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*.

Count 1 arose when fuel overflowed from an on-shore tank which was being filled from the company's barge by its employee.

Held, the accused was found guilty, as the defence provided by s. 33(8) was not available to it. Even though its officers had trained the employee properly in the correct procedures for handling fuel, their failure, through an absence of supervision, to ensure compliance with those procedures and to ensure an adequate standard of care denied the corporation the defence of "all due diligence".

Count 2 arose from an incident which occurred after the accused employees accepted as deck cargo on the same barge a small tug boat which later leaked diesel fuel into the ocean. The accident occurred because of the way in which the tug was loaded onto the barge.

Held, the accused was guilty. Responsibility for the tug shifted from its owner to the accused once its employees accepted the cargo. Their negligent conduct in transporting it in such a way as to allow the escape of fuel was sufficient to deny the accused the "due diligence" defence.

R. v. North Arm Transportation Co. Ltd.

The Queen v. Pierce Fisheries Ltd., [1970] 5 C.C.C. 193; *R. v. Churchill Copper Corporation Ltd.*, [1972]5 C.C.C. (2d) 319; *H.L. Bolten (Engineering) Co. Ltd. v. T.J. Graham and Sons Ltd.*, [1957] 1 Q.B. 159.

S. Stirling, for the Crown.
P.D. Lowry, for the Accused.

Sarich, J.:—The accused company is charged on an information containing two counts laid under Section 33(2) of the *Fisheries Act of Canada*, alleging that the accused company did:

Count 1 On or about the 1st day of March, 1975, at or near Kendrick Inlet, in the County of Nanaimo, in the Province of British Columbia, permit the deposit of a deleterious substance, a petroleum product, in water frequented by fish, to wit: Kendrick Inlet, and:

Count 2 On or about the 2nd day of March, 1975, at or near Gold River, County of Nanaimo, Province of British Columbia, permit the deposit of a deleterious substance, a petroleum product, in water containing fish, to wit: Matchlee Bay.

On this information, the accused company pleaded not guilty to both counts and the trial was held on the date set out above.

The facts established in evidence before me relating to Count No. 1 are as follows:

Late in the evening of February 28th, 1975 (about 10:00 P.M. to 11:00 P.M.) the tug the North Arm Prowler towing the fuel barge the North Arm Express arrived at Stoltz's logging camp in Kendrick Inlet on the West Coast of Vancouver Island. At the time, both the tug and the barge were owned and being operated by the Defendant company in its business of delivering petroleum products to logging camps and other small communities along the Coast of British Columbia. The barge was secured to the wharf at Stoltz's camp and the Defendant company's barge-man, one Jeffery P.J. Watt, set about the business of delivering diesel fuel into the tanks of a tank farm set on a hill about one-quarter of a mile from the wharf. At all material times Watt was the employee of the Defendant company, having been hired in July, 1974 and working for the company continuously until he left its employ in July of 1975.

After assuring that the barge was secure to the wharf, Watt took the hoses from off the barge and hooked these up to the appropriate "risers" or pipe connections on the wharf that led to Stoltz's tank farm. After this, he walked up to the tank farm which was situated on a sand and gravel hill, about 1/4 miles from the wharf, about 300 to 500 feet above tide water and about 300 feet distant from the beach.

At the tank farm Watt looked in all the tanks -- he believes six -- and determined that two of them which held diesel fuel were "bone dry", and that all the others were sufficiently full. In coming to this determination, he climbed a ladder to the top of each tank, opened a manhole on the top and shone a flashlight down into the tanks. The night was dark - I believe it to have been raining at the time and there was no artificial light in the area except Watt's flashlight.

Watt also checked another large tank near the camp itself and some considerable distance from the tank farm, and determined that it also required filling.

At this stage Watt shut all valves except those leading into the two tanks in the tank farm which he intended to fill, and he opened the valves leading into these two tanks. After this he walked back down the pipeline to the wharf, making a visual

inspection as he went. He then went onto the barge, checked all valves to ensure that he would be drawing the proper fuel and took and recorded the meter readings. Following this, he went back up the pipeline to the tank farm to double check the valves, then came back to the barge and started pumping.

After he started the pumps working on the barge, Watt went up the pipeline again to check all connections for leaks and climbed up each of the two tanks and looked in to satisfy himself that diesel fuel was entering each tank. Watt kept the pumps operating for from one to two hours, during the course of which time he made about fives checks of the pipeline and tanks.

During his last check, he got about half-way to the tanks from the barge and noticed that one of the tanks was overflowing. Oil was cascading down the sides of the tank from openings at the top of the tank. He ran back, shut the valves at the "risers" and then shut off the pumps on the barge.

Watt went immediately to the tank farm to check the effects of the spill. The tank farm sits on a sand and gravel hill, one side of which runs steeply down to a dirt road near the water's edge. Watt states that the sides of the tank were coated with diesel oil; there was a coating of oil and slime on the surface sand and gravel around the tanks, but that he saw no pools of oil or any oil "running in a river" down the hill. He also states he checked with his flashlight around the base of the hill, the road and the beach but saw nothing significant. Accordingly he went back and filled the third tank near the camp and then shut all the delivery system down, disconnected and stowed his hoses back on the barge and prepared his delivery invoice and bill for the camp operator. He did not report the spill from the tank overflow because he computed it roughly to be only 200 gallons at the maximum and he was satisfied it was all soaked up by the sand and gravel of the hill upon which the tank farm stood. He did not think the spill was of such significance that it should be reported.

It is interesting to note that Watt did not sound the tanks before he began pumping to determine the precise amount of fuel in them when he looked in with his flashlight. Watt also stated that when he first checked out the tanks, he thought them to be of 5,000-gallon capacity, but they were in fact only of 3,000-gallon capacity. On his barge at the time, Watt had a book listing these same tanks and showing their precise capacity as well as other pertinent information having to do with valve locations and filling procedures, but he did not refer to it. He was content he recalled from memory all the information he required. He made an interesting comment in his evidence, saying: "If I had known at the beginning they were 3,000-gallons tanks, I would not have overflowed them." Also, there were three other employees of the company on board the tug at the time, but no one was ever positioned on top of the tanks to keep watch, nor did the master of the tug supervise the discharge of fuel by Watt.

The next day, March 1st, 1975, Fisheries Officer Slater arrived in that area aboard a Fisheries Patrol Vessel about 0920 hours. He found a large oil slick extending from and covering about one-half the bay at the northern end of Kendrick Inlet, through Princesa Channel and extending about one-half way across Tahsis Inlet in an easterly direction. This officer could not see any oil around the wharf or foreshore installations at Stoltz's camp on this first visit, and he could not see any clear indication where the oil came from. He took samples of the oil and water and these

revealed from analysis that the oil on the water was a petroleum product of the intermediate range such as diesel fuel.

This officer and another Fisheries Officer came back to the area on March 3rd, 1975, to investigate the source of the oil spill. They found only two oil storage installations in the whole of Kendrick Inlet. One was the complex at Stoltz's camp, and the other was one large tank on a float at Plumper Harbour.

An inspection of the tank at Plumper Harbour showed no evidence of a spill, no oil between the logs of the float or the logs in the booming grounds and no evidence in the surrounding area.

At Stoltz's camp, however, the two men walked up the sand and gravel hill from the shore to the tank farm and found the ground surrounding the tank farm saturated with oil. While there was only an oily film on the undisturbed surface, a depression made in the surface with the heel of a boot collected a small pool of oil. The officers also saw a draw in the hill leading to the water's edge down which some oil was still running in spots and which showed evidence of having contained oil on some previous occasion. They followed this draw to the beach and saw it to be still weeping oil and that there was a connection between the oil from this draw and the large oil slick in Kendrick Inlet.

Although there was a possibility that the oil on the water of Kendrick Inlet came from some other source and as a result of some other spill, such a possibility was so remote that I have discarded it. I find as a fact that the oil slick on the waters of Kendrick Inlet described by Officer Slater came from the tanks in the tank farm at Stoltz's camp on the late night of February 28th 1975, or the early morning of March 1st, 1975. I find further that the oil spill into the said waters was the direct result of the overflow of the tanks during the filling operation being conducted at that place on that night by Watt on behalf of the accused company.

There is an admission by Counsel for the accused company that petroleum products of the intermediate range in water frequented by fish are deleterious to such fish. And I have the evidence of the Fisheries Officer, and I find as a fact that the water of Kendrick Inlet, Princesa Channel, Tahsis Inlet and Matchlee Bay are frequented by many varieties of fish. I find also that these waters are within the fishing zones of Canada.

Evidence given on behalf of the accused company established and I find that the accused company was careful in its training of Watt for his occupation as a bargeman. In accordance with the basic provisions of Part III of the *Oil Pollution Prevention Regulations* passed pursuant to the *Canada Shipping Act*, Watt was instructed in detail on the proper and safe methods of loading petroleum fuel onto the barge and discharging such fuel from it. He was also shown the details and idiosyncracies of each port of discharge by an experienced bargeman before he took on the operation of discharging petroleum fuel at such port himself. In addition, he had on board the barge detailed information about the tank capacities, and the pipe and valve connections of each such port of discharge.

In the course of such training, Watt was instructed by responsible officers of the accused company that before he undertook the filling of any tank with petroleum

products, he was to sound the tank with a metal tape weighted on the end, provided to him for such purpose, so as to establish with certainty the quantity of fuel in the tank before he commenced the filling operations. Watt was also directed to ensure that the deckhand from the tug remained at all times on top of the tank being filled, and that there be communications between them whether visual, vocal or by "walkie-talkie" radio so that Watt would be alerted when the filling of the tank was nearing the tank's capacity.

The manager of the accused company testified that Watt was instructed not to vary from any of the above safety procedures at any time. I accept this testimony as I do the testimony that the company maintains its vessels and ancillary equipment in good repair and that it has an excellent record for transporting petroleum products throughout the Coast of British Columbia without any previous spills. But there was no evidence before me from any source that as a bargeman in the delivery of petroleum products to isolated communities, the discharge procedures actually followed by Watt were supervised by any person or checked in any way.

The pertinent provisions of the *Fisheries Act* as amended are as follows:

> *33(2) Subject to Subsection (4), no person shall deposit or permit the deposit of deleterious substance of any type in water 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.*
>
> *(8) In a prosecution for an offence under this section or Section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission. (My emphasis).*

For the purpose of these proceedings, subsection (4) is not material.

I am satisfied that the offence set out in Section 33(2) of the *Fisheries Act* is one of strict liability. In reaching this conclusion I read with care the judgment of Ritchie J. in *The Queen v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193 (S.C.C.) and the judgment of Bull J.A. in *R. v. The Vessel "Aran"* (1973), 4 C.C.C. (2d) 179 (B.C.C.A.). While both of these cases dealt with different legislation, the wording of the legislative provisions is so similar as to make the decisions directly applicable. I am fortified in this conclusion by the decision of my brother judge, Arkell Prov. J. in *R. v. Churchill Copper Corporation Ltd.* (1972), 5 C.C.C. (2d) 319. But in both the *Pierce Fisheries* case and the *"Aran"* case, the legislation under consideration did not contain any provisions similar to the provisions of Section 33(8) of *Fisheries Act*, and it appears that this subsection was not argued or considered in the *Churchill Copper* case.

Bearing in mind the nature and purpose of the legislation and that section 33(2) creates an offence of strict liability, it is one thing when the act or acts complained of are committed by an individual in his own capacity and an entirely different thing

when the act or acts are committed by an employee or agent of an employer. It becomes more complicated still when the actual perpetrator is an employee or agent of a company, such as the accused.

If the offence created by Section 33(2) were not an offence of strict liability, that is, if the principle of *respondeat superior* did not apply, and if *mens rea* were a constitutent element required to be proven by the prosecution - conviction could be virtually impossible in cases of employer-employee relationship. But by the same token, if there is no amelioration of the rule of strict liability, then persons who are innocent of any wrong doing would be convicted. It must have been with this problem in mind that Parliament enacted the provisions of subsection (8) of Section 33. The proviso in that subsection permits an employer to escape conviction if he "...establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission". This proviso recognizes the separateness of entity as between an employer and his employee, and that if an employer can meet the terms set out therein, he should not be held criminally liable for the acts or omissions of his employee.

But where a company, such as is the accused, is the employer it is difficult in many cases to determine which officer or director of the company represents the mind or will of the company such that his guilt constitutes guilt of the company, and which is only an employee or agent having a distinct entity from that of the company. In this regard, a quotation often referred to is contained in the judgment of Denning L.J. in *H.L. Bolten (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.*, 1957 1 Q.B. 159 at p. 172:

> *A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors or managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.*

In my opinion one could readily determine the identity of the managers spoken of by Denning, L.J. by reference to the Articles of Association and Memorandum of the company and any valid delegation of the authority granted to any officer, director or manager by the Articles of Association and Memorandum of the company.

Nevertheless, I am satisfied that on the date of the spill of the diesel fuel and its entry into the waters of Kendrick Inlet, Watt was an employee of the accused company and not a director or manager of the company such that his acts became the acts of the company. Counsel for the Crown argued that since the offence was one of strict liability, all the Crown would have to prove were the acts constituting the offence and that Watt was an employee acting in the course and scope of his employment. I cannot accept this argument, for to do so would deny to the accused the possible defence set out in subsection (8) of Section 33.

But in order to succeed under the provisions of that subsection, the accused must establish not only that it did not know that the offence had been committed and did not consent to its commission, but also that it exercised all due diligence to prevent its commission. And both of the requirements resting on the accused to establish its defence are matters of fact to be determined from the evidence.

In regard to the first requirement, I am satisfied that the accused company did not know a spill had occurred until well after the occurrence. And not knowing of the spill, it could hardly have consented to it. But the matter of the exercise of all due diligence to prevent the spill is another matter.

The burden of "due diligence" placed on the accused company and any other transporter of petroleum products on and about the coastal waters of Canada must be commensurate with the seriousness of the injury which could be caused by the lack of such diligence. And it must surely now be evident to everyone who reads a newspaper that a spill of petroleum products on coastal waters, depending on the size of the spill, can cause immense injury and damage.

In this case, I find that the accused company had adequately trained the bargeman Watt and had set out a pattern of procedure to the standards required by the *Oil Pollution Prevention Regulations.* The accused company had also imposed requirements of Watt that, if met by him, would have maintained a high standard of care in the conduct of the business of the accused company. But due diligence as contemplated by Section 33(8) of the *Fisheries Act* requires more than the devising of proper and safe systems of carrying petroleum products in vessels on the coastal waters of Canada, and the loading of such products aboard and discharging such products from such vessels. That something more is the enforcement of adherence to a proper and safe system as far as it is practicable to do so.

Here, the accused company's operation consisted of a tug and a barge towed by that tug. The tug had a normal compliment of three, the master, deckhand and one other in addition to the bargeman who had some duties aboard the tug. But the bargeman's duties were mainly to operate the equipment of the fuel barge once it was secured to a wharf at the port of discharge. I do not understand why the master of the tug was not given the duty of supervising the discharge of fuel from the barge, or why he did not assume that duty or responsibility. It appears that the sole purpose for his being there was to effect delivery of diesel fuel to the tank farm at Stoltz's camp, so the added duty of supervision could surely have been included within the scope of his employment with the accused company. But if the master of the tug could not for some reason have performed this supervisory function, then someone else aboard that tug should have been affixed with this responsibility. There was no evidence before me of any supervision of Watt to ensure that he performed according to the standard of care required of him by the accused company. If the accused company makes less than a perfunctory effort, as in this case, to enforce the standards of performance of its bargemen, can it realistically expect a better performance than it received from Watt on this occasion?

Accordingly, I find that the accused company has not established that it exercised all due diligence to prevent the commission of the offence and I find the accused company guilty as charged on Count No. 1.

As to Count No. 2, the facts established in evidence are as follows:

> After the loading of the oil tanks from the barge at Stoltz's camp, the tug took the barge under tow and headed out of Tahsis Inlet into and easterly along Muchalat Inlet to its head at Matchlee Bay. Enroute, the tug and barge stopped at a logging camp and loaded a small steel tug or boom boat aboard the deck of the barge. After loading this boom boat aboard the deck of the barge, the tug apparently experienced some mechanical problems, so it towed the barge to Matchlee Bay, anchored it there and left it unattended until a tug could arrive and take it in tow. Meanwhile, the tug headed for Vancouver for repairs.

On the deck of the barge, the boom boat was lying on a small raft of logs secured together as a bed for the boat. It was lying with a considerable list to its port side. There was diesel fuel inside the bullworks on the port side and this diesel fuel was escaping through a scupper onto the deck of the barge along which it ran into the waters of Matchlee Bay. Apparently the list of the boom boat caused diesel fuel to run from the starboard fuel tank into the port fuel tank and caused this tank to overflow into the bullworks.

Evidence before me established that the logger who owned the boom boat had it resting on the log raft, had used his own machinery to push the raft and boom boat up the ramp of the accused company's barge, and that the accused company's employees did nothing more than receive the raft bearing the boom boat aboard the barge.

Counsel for the accused argued that the employees of the accused had nothing to do with the escaping of the diesel fuel from the boom boat into the water. He argued that the fault was that of the logger and not the accused.

I cannot accept this argument. Once that cargo was loaded aboard the barge its movement on the waters off the coast of British Columbia became the sole responsibility of the accused company. It was the responsibility of the master of the tug to see that the cargo was secured in such a way that it did not permit the discharge of diesel fuel into the waters along which it was to be transported. If the cargo could not be so secured, it should not have been taken aboard the barge. I find this episode of the accused company's business to have been conducted very carelessly indeed and certainly not with due diligence to prevent the spill of the diesel fuel into the waters of Matchlee Bay. Accordingly, on this count also, I find the company guilty as charged.

I request that both Counsel arrange for a date with the Court Clerk for the matter of sentencing.

NORTH ARM TRANSPORTATION CO. LTD. v. REGINA

British Columbia County Court, Stewart, Co. Ct.J., Nanaimo, B.C., July 14, 1977 and May 30, 1979 (New Trial)

Environmental law -- Water pollution -- Oil spill -- Permitting the deposit of a deleterious substance in water frequented by fish -- Crown alleging deposit in water when charge should have been for depositing in a place where deleterious substance may enter water -- Crown alleging permitting deposit on a day when accused could not have had knowledge of it -- Appeal allowed on both counts -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

The accused appealed from its conviction on two charges of permitting the deposit of a deleterious substance in water frequented by fish, contrary to s. 33(2) of the Fisheries Act.

The appeals on both counts were allowed when the appeal was first heard on July 14, 1977. The Crown then appealed the decision in August, 1977. Before the appeal could be heard Supreme Court of Canada delivered judgment in the case of R. v. Sault Ste Marie. In view of the direct bearing of this case a consent order was made October 5, 1978 by the British Columbia Court of Appeal allowing the Crowns appeal and directing a new trial. The same County Court judge heard the new trial and rendered judgment May 30, 1979.

Held, on retrial, the crown's appeal on the first count was allowed. The defendant could not establish that it exercised all due diligence to prevent the spillage of oil when filling the oil tanks as required by subsection 33(8). The employee was negligent and the "paper order" issued by the defendent was not sufficient to raise the defence of due diligence.

Held, on retrial, the crown's appeal on the second count was dismissed. The consequences of a small spillage of fuel from the small boat carried on deck of the barge were relatively minor. The defendant took reasonable care in the circumstances.

D.R. Kier, for the Crown, at new trial
S.D. Stirling, for the Crown, at first trial
P.D. Lowry, for the Accused, Appellant

Stewart, C.C.J.:(May 30 1979)—The incidents involved in this appeal occurred in March of 1975, and in each the same petroleum barge of the appellant was involved. An information was filed containing two counts of pollution contrary to the provisions of the *Fisheries Act*. The appellant was convicted on both counts by Sarich, Provincial Court Judge. An appeal was launched which, in due course, was heard by me and allowed on each count. My reasons for judgment (July 14, 1977), which follow, tell most of the story to that point.

(July 14, 1977)—The regrettable delay in the delivery of these reasons is in accord with the general pace of these proceedings from their inception. The two offences, convictions for which are now under appeal, were alleged to have occurred

on the 1st and 2nd days of March, 1975. The information covering the same was sworn on the 28th of November, 1975. The hearing took place on the 4th of May, 1976, and judgment was delivered in the Provincial Court on the 16th of June, 1976. The appeal was heard by me on the 24th of March, 1977.

Count 2 was incorrectly described in the Notice of Appeal and counsel for the appellant applied to amend. As reference will be made to both counts I set them out as they appear in the information:

> *Count 1:* *On or about the 1st day of March, 1975, at or near Kendrick Inlet, in the County of Nanaimo in the Province of British Columbia, permit the deposit of a deleterious substance, a petroleum product, in water frequented by fish, to wit: KENDRICK INLET.*
>
> *Count 2:* *On or about the 2nd day of March 1975, at or near Gold River, County of Nanaimo, Province of British Columbia, permit the* - deposit of a deleterious substance, a petroleum product, in water containing fish, to wit: MATCHLEE BAY.

In the Notice of Appeal in describing Count 2 the following words were added:

> *"in contravention of Section 5 of the 'Oil Pollution Prevention Regulations' and did thereby commit an offence contrary to Section 33(2) of the 'Fisheries Act of Canada', Revised Statutes of Canada, Chapter F-14 and Amendments thereto."*

Counsel for the Crown objected to the amendment and also submitted that the Notice of Appeal as to Count 2 was defective because of lack of certainty in describing the conviction and hence there was no jurisdiction in the Court. I reserved and proceeded with the hearing. I now refuse the application to amend but I have concluded that the words added to Count 2 in the Notice of Appeal are mere surplusage. In all the circumstances there can be no doubt as to the identification of the conviction appealed from and reasonable identification is the simple issue. Accordingly, this Court had jurisdiction to hear this appeal, the Notice of Appeal not being defective as alleged by the Crown.

All the evidence received at the trial in the Provincial Court was introduced through the transcript. Other evidence was also introduced in the form of some further testimony from one of the witnesses who gave evidence at the trial in the Provincial Court, some admissions of fact, and letters from two corporations engaged in the same sort of business as the appellant as to certain practices in the industry relevant to the issues in this appeal.

The appellant at relevant times operated a fleet of tugs and barges delivering petroleum products to coastal points in British Columbia and also moving machinery and equipent as required. As an indication of its volume of work it carried twenty-six million gallons of fuel from oil refineries to customers in the year 1975. Included in its fleet of barges was the fuel barge "North Arm Express".

This barge, under tow by one of the company's tugs, arrived at a camp in Kendrick Inlet, on the west coast of Vancouver Island, some time between ten and eleven o'clock in the evening on the 1st of March, 1975. The purpose of this visit was to deliver diesel fuel to tanks installed on shore for storage purposes. It was late, dark, and it seems that it was raining, although this is not too clear.

The barge man whose duty it was to carry out the unloading operation, with some assistance, hooked up his hoses to the pipes leading to the tanks. The tanks were located up an incline from the water, perhaps three to four hundred feet above the water. The incline seems to have been steep but still it was possible to walk straight up to the tanks and it is hard to determine from the evidence just how far the tanks actually were from the nearest water, but they must have been several hundred feet. The barge man proceeded up the hill on foot, equipped with a flashlight, to inspect the tanks of which there were approximately eight, six of which were for diesel oil. He looked in the tanks with his flashlight and ascertained to his satisfaction that one was half full and two were bone dry. He made no attempt to use a dipstick or to otherwise check to see whether the ones which appeared dry were in fact dry. He also from his visual inspection estimated that the two tanks which he had concluded were dry had a capacity of 5,000 gallons each. Having satisfied himself of the fuel requirements, he returned to his barge and commenced the pumping operation which was to take a matter of hours to complete. The barge man said he made checks every twenty minutes or half an hour to see that everything was alright. On the last of these inspection trips up the hill after an hour or two of pumping he observed from a considerable distance from the tanks that one was overflowing. There was some lighting available from a spotlight on the tug or the barge which enabled him to see the overflow before he actually arrived at the tank. He hastily closed down the operation. He checked the area physically to find out whether any of the fuel had run down to the water. As a result of this inspection and some calculations he made from his metre figures and from the size of the tanks which he now realized had only a capacity of 3,000 gallons, he satisfied himself that no oil had reached the water. He completed his delivery and that was the end of the matter, or so he must have thought.

However, the following morning a Fisheries' officer discovered an oil slick in the general area and there is no doubt whatever that the source of this slick was the overflow from the delivery of the previous night. The foregoing facts are relevant to Count 1.

The relevant sections of the *Fisheries Act* are as follows:

> *33(2) Subject 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*
>
> *(8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.*

In my opinion Section 33(2) creates four different offences:

1. The deposit of a deleterious substance in water frequented by fish.

2. The deposit of such substance in any place where such deleterious substance or any other deleterious substance resulting from such deposit may enter any such water.

3. Permitting the deposit of a deleterious substance in water as aforesaid.

4. Permitting the deposit of a deleterious substance in any place as aforesaid.

It is in my opinion incumbent upon the Crown to lay the proper charge in the circumstances. And here I think it has failed to do so. It seems to me that the proper charge here would have been the permitting of a deposit of a deleterious substance in a place from which such substance or any other deleterious substance resulting may enter water frequented by fish. The Crown has failed to prove the deposit of the deleterious substance in question in water. It is quite true that the escape of such deleterious substance into water frequented by fish has been clearly established, but this is not the charge. Counsel for the Crown took the position that in such a situation as this the Crown has a choice of either charging a deposit in water or a deposit in a place from which the substance might reach the water, but I reject that argument. The charge must fit the circumstances and here it does not and accordingly the appeal as to Count 1 should be allowed. There is no need then to specify and comment on the obvious and aggravated acts of negligence of the bargeman leading to the spill, nor on the effect of subsection (8) of Section 33.

The circumstances giving rise to Count 2 involve the same barge. Prior to the delivery in Kendrick Inlet the barge had picked up as a deck load a small steel tug. It had been moved on to the deck of the barge by its owner in a cradle of some sort. It lay on the deck in that manner during 3 separate deliveries of oil, including the one above described and a subsequent one at Matchlee Bay. After the last delivery the tug towing the barge had trouble and was forced to return to Matchlee Bay where the barge was secured and left unattended to be picked up by another tug later. There was an interval of 24 hours from the time of loading the small vessel until the barge on which it rested was secured at Matchlee Bay. It is impossible on the evidence to fix the precise time the barge was left at that point.

On the 3rd of March, 1975, the Fisheries officer to whom I have referred discovered the barge unattended at Matchlee Bay. This was at dusk but he noticed oil in the water about the barge and upon investigating found oil spilled on the deck of the small vessel, signs of oil on the cradle or platform on which the small vessel rested, and further signs of oil on the deck of the barge from where some had clearly escaped to the water.

At 2.30 the following morning the appellant's tug dispatched to pick up the barge arrived. As far as I can gather from the evidence, which is not very clear on the point, the Fisheries officer was there at the time. In any event the master of this tug, an employee of the appellant at the time, testified that the Fisheries officer was present. He also said that he noted the small vessel which he said was laying on its port side. It was leaking oil according to this witness, coming out of a vent which he assumed was

for a fuel tank. He took steps immediately to prevent further escape of oil into the water. This is the first time that the appellant can be said to have had any knowledge of the presence of oil in or about the small vessel and from the time of acquiring that knowledge no further deposit of oil into the water was permitted.

There is no acceptable evidence to show the type of fuel used by the small vessel, or the number, type, location or size of the tank or tanks, or the quantity of fuel that had been contained at the time of loading. All that has really been established to my satisfaction is that at some time in excess of 24 hours after the small vessel had been loaded aboard the barge the signs of an oil escape from the small vessel into the water were observed. This was at dusk on the 3rd of March and I note that the date of the offence alleged in the information is the 2nd of March 1975. I cannot determine the time when oil first leaked from the small vessel, and accordingly I cannot say that the appellant or anyone in its employ had knowledge of the situation until 2.30 a.m. on the 4th of March 1975. As I read the authorities, knowledge of a situation or an event is essential before one can be said to permit the situation to continue or the event to occur. There simply is insufficient information on a number of important matters to enable me to conclude that the only reasonable interpretation of the evidence involves guilt. Count 2 has not been proved. The appeal is allowed.

May 30, 1979, judgment continued--The Crown appealed my decision in August, 1977. Before the appeal could be heard the Supreme Court of Canada delivered judgment in the case of *Regina* v. *City of Sault Ste. Marie* 21 N.R. 295 and this decision left no doubt that the Crown's appeal was well-founded. It is therefore not surprising that when the matter came before our Court of Appeal, a consent order was made allowing the appeal and directing a new trial. By such order the counts in the information were amended to read as follows:

1. On or about the 1st day of March 1975, at or near Kendrick Inlet, in the County of Nanaimo, in the Province of British Columbia, deposit a deleterious substance, a petroleum product, in a place, under conditions where such deleterious substance may enter water frequented by fish, to wit: KENDRICK INLET.

2. On or about the 2nd day of March 1975, at or near Gold River, County of Nanaimo, Province of British Columbia, deposit a deleterious substance, a petroleum product, in water frequented by fish, to wit: MATCHLEE BAY.

Counsel agreed that I should conduct the new trial, the evidence to be that contained in the appeal book prepared for the Court of Appeal which included a transcript of the proceedings at the first trial de novo which in turn included a transcript of the proceedings of the Provincial Court hearing and the subsequently agreed statement of facts. It is now necessary to consider count 1 in the light of s.33(8) of the *Fisheries Act*. The Crown has succeeded in establishing that it was an employee of the appellant, namely, the bargetender, Mr. Watt, who committed the offence of pollution contrary to s.33(2) so as I see it the accused is guilty unless it establishes that the offence was committed without its knowledge or consent and that it exercised all due diligence to prevent its commission as provided in ss(8). I don't think it can be argued that knowledge of the employee was knowledge of the appellant so the issue is narrowed as to whether the appellant has established that due diligence was exercised to prevent the commission of this offence.

It becomes necessary therefore to elaborate somewhat on the facts to ascertain just what the appellant did to prevent such an incident occurring.

The appellant Company has much experience in the moving of liquid petroleum products by barge in the coastal waters of B.C. I am satisfied that it fully appreciates the importance of avoiding any spillage. A barge such as the one involved here requires a crew of one and while he is not engaged on the barge, accommodation is provided for him in the towing vessel. While the bargeman may assist in some non-technical duties on the tug, his real assignment is to load and unload the barge as required. These are operations which may take some hours. Subject to a qualification which I will mention in a moment, the tug crew has no duties whatsoever with respect to the barge apart from taking it to its various destinations and securing it. The qualification I referred to is that there seems to be some kind of an understanding, and on the evidence I can describe it in no other way, that the deckhand should be available to the bargeman in the moving and connecting of hoses and to attend at the tanks during the unloading pumping operation to watch for and report to the bargeman any difficulty arising there. There is no evidence that the Master of the tug is instructed that the deckhand or another member of his crew must be a look-out for the bargeman during unloading operations.

While the bargeman was negligent in a number of respects there is no doubt that this spillage would have been prevented had a man been present on the tank as required by the appellant's instructions to its bargemen. Mr. Watt thought he was clever enough to handle the unloading himself and was reluctant to call on the deckhand because it was a dark and rainy night, which I think in itself would be an added reason to have a look-out, even without instructions. This simple and unsophisticated requirement of having a relatively untrained person as a look-out was all that was required to prevent this incident. There can be no assurance against human failure or disobedience but the evidence does not satisfy me that the appellant issued more than a "paper order" that two men be engaged in this operation. I accept the proposition that the tug Master cannot have any responsibility for the unloading operations but such officer could most certainly be responsible to assign the deckhand or someone else to assist the bargeman. In cases where the barge is to be left and the tug dispatched on other duty, it would be simple, it seems to me, to arrange with the customer that a look-out must be provided before delivery could be effected. If that is impractical or impossible then obviously the unloading operation must wait until a look-out is produced from some source. I am prepared to accept as a fact that the appellant trained its bargemen sufficiently, that it chose a suitable candidate for the job from a point of view of possessing sufficient intelligence, but the appellant has failed to satisfy me that it took sufficient steps to make reasonably sure that two persons would be on the job during unloading operations. It did not exercise due diligence to prevent this offence occurring and its conviction on count 1 must be upheld.

Turning now to count 2, I emphasize once again that those involved in the carriage or delivery of liquid petroleum products are fixed with a heavy responsibility to prevent pollution. And the reason is, of course, the possible disastrous consequence of any significant spillage into water frequented by fish and other marine life. The consequences of a maximum spillage from the fuel tank of the small Dozer boat carried as a deck load on the appellant's barge could hardly be classified as

catastrophic or calamitous. I think this must be kept in mind when considering the appellant's obligations with respect to that small Dozer boat.

I have little to add to the comments I have already made to my decision after the first trial de novo and I see no reason to alter any of my comments. In my opinion s.33(8) does not apply to the circumstances of this count. I don't think the Crown has proved that the appellant committed the prohibited act. It was proved no more than that a very considerable time after the Dozer boat was installed on the deck of the barge, oil was seen to be escaping from the Dozer boat across the deck of the barge into the water. The only reasonable inference I can draw from the evidence is that the spillage occurred while the barge was unattended and it cannot be ascertained from the evidence whether the spillage was caused by some further listing of the small vessel in its cradle, or, perhaps, even by the tampering of a stranger. But assuming that proof of the escape of the fuel oil in the manner alleged is indeed sufficient to put the onus on the accused to prove that it took reasonable care to prevent such discharge, I am of the opinion there is little the appellant could have done in the circumstances. There is no evidence to show that the Dozer vessel was insecure in its cradle and there was no evidence to indicate that there was any risk of any escape of oil after the expiration of a substantial period of time after the loading.

On the evidence I don't see how the appellant could have prevented this discharge short of leaving a watchman with the unattended barge. In my opinion in the circumstances this would have been an impractical and too onerous an obligation to impose on the appellant. Accordingly I am of the opinion once again that the appeal from the conviction on this count should be allowed and the conviction quashed.

REGINA v. IRVING PULP AND PAPER LIMITED (No. 1)

New Brunswick Provincial Court, George, J., Saint John, N.B., October 1, 1976

Environmental law -- Water Pollution -- Pulp Mill Wastes -- Procedure for measuring toxicity to fish prescribed by regulations -- Newer toxicity test used by government authorities instead of prescribed procedure -- Accused acquitted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(11); Pulp and Paper Effluent Regulations, SOR/71-578.

The accused was charged with depositing a deleterious substance, pulp mill waste, into the Saint John River on April 6, 1976. *Regulations* which applied to the company prescribed in Schedule D a specific procedure for determining the toxicity of such waste to fish. However, government authorities conducted the toxicity test which was introduced in evidence according to a newer procedure rather than according to the methd set out in the *Regulations.*

Held, the accused was acquitted. Since the procedure followed was not the one prescribed by the Regulations, the Crown had failed to show that the substance deposited was deleterious within the meaning of s. 3(2) of the *Regulations* and s. 33(11) of the *Act.*

Hubert McKenna, for the Crown
Donald M. Gillis, Q.C., for the Accused

George, J.:--On the 16th day of June, 1976, Irving Pulp and Paper Company was charged before another Judge of the Provincial Court that on or about the 6th day of April, A.D., 1976, did deposit a deleterious substance namely water containing pulp mill waste in water, contrary to the provisions of section 33(2) of the *Fisheries Act* Chapter F-14, Revised Statutes of Canada.

The information was amended on August 24th before this Court and re-sworn to include the words, "water frequented by fish--".

It is not necessary for the purposes of this Judgement to recount the facts. The factual situation is not challenged by either Counsel for the Crown or Counsel for the accused corporation. The questions to be answered by this Court are questions of law. They are not technical but substantive which go to the heart of the matter. They are the following: Counsel for the Crown, Mr. Hubert McKenna, submits that Irving Pulp and Paper Limited fall within the strict arrest of Section 33(2) of the *Fisheries Act,* Chapter F-14, Revised Statutes of Canada, and that the definition of deleterious substance falls within and is under the control of Section 33(11) of the *Fisheries Act.* He further rests his case on the supposition that the regulations enacted pursuant to Sections 33 and 34 of the *Fisheries Act* respecting deleterious substances in the form of effluent from pulp and paper mills are irrelevant and not applicable to the charge before the Court. Mr. Donald M. Gillis, Q.C., puts his case for the *Irving Pulp and Paper Limited* upon two grounds: 1. That the Crown is restrained from proceeding against the accused corporation by virtue of Section 33(4) of the *Fisheries Act.* 2. That the regulations under the number P.C. 1971-2281 published in the Canada

Gazette on the 24th day of the 11th month, 1971, are mandatory and must be conformed with as an absolute to the present charge.

The germain sections of the *Fisheries Act* in the opinion of this Court are as follows: "3. (1) Subsection 33(2) of the said *Act* is repealed and the following substituted therefor:

> *"(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."*
>
> *"(4) Subsection (2) does not apply (a) to the deposit of waste of a type, in a quantity and under conditions authorized by regulations made by the Governor in Council under any other Act in any waters with respect to which those regulations are applicable, 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 such waters; or (b) to the deposit of a deleterious substance of a type, in a quantity and under conditions authorized by any regulations made by the Governor in Council under this Act for the purposes of this subsection in any water with respect to which those regulations are applicable, 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."*

The Court has extracted the following exerpts from the regulations which it considers to bear directly upon the matter in question.

> *"2. (1) In these Regulations, 'expanded mill' means any existing mill in which, after the coming into force of these Regulations, equipment has been installed that increases the production of the mill by ten per cent or more;"*
>
> *"3. (1) For the purposes of paragraphs (c) and (d) of the definition "deleterious substance" in subsection 33(11) of the Act, the following are hereby prescribed as deleterious substances:*
>
> *(a) total suspended solids;*
>
> *(b) oxygen-demanding decomposible organic matter produced as waste from a mill;*
>
> *(c) toxic wastes deposited by a mill.*
>
> *(2) For the purposes of paragraph (1)(c) "toxic waste" is any waste that is found to be toxic when tested in the manner described in Schedule D."*
>
> *"6. These Regulations shall apply to each mill of the class described in Column 1 of an item of Schedule F on and after the day set out in Column II of that item."*

SCHEDULE F

DATE OF APPLICATION

Column I Class of Mills	Column II Date
1. New Mills	November 24, 1971
2. Expanded Mills	November 24, 1971
3. Altered Mills	November 24, 1971
4. Existing Mills	-

Under cross-examination by Mr. Gillis the following testimony was elicited from William Roy Parker, a Crown witness:

"Mr. Gillis: Well, Mr. Parker, if this Irving Mill was actually an expanded mill by definition, wouldn't you then be obliged to follow Schedule D in the Regulations?

Mr. Parker: Yes, to my knowledge if it was an expanded mill then it would come under the Regulations, then we would do the tests as outlined in the Regulations.

Mr. Gillis: But you didn't do those tests, did you?

Mr. Parker: No."

Mr. George O'Brien taking the stand on behalf of Irving Pulp and Paper Limited testified as follows:

"Mr. Gillis: Now in the period from 1971, let's say to 1974, were you employed by the Irving Pulp and Paper Mill Limited?"

"Mr. O'Brien: Yes, I was.

Mr. Gillis: What was your position?

Mr. O'Brien: Co-ordinator of mill expansion and Mill Manager.

Mr. Gillis: Now was the expansion completed and equipment installed that would increase the production in November 1971?

Mr. O'Brien: It was.

Mr. Gillis: How much did this increase the production approximately?

Mr. O'Brien: In the vicinity of 50 per cent."

In arriving at its conclusion the Court has not chosen the least objectionable as contrasted with the most undesirable. The Court is fully aware of the magnitude and the implications involved in the decision it is about to pronounce. There is just no return to Paradise by the back door or by any type of legerdemain. It is the opinion of this Court that the Court cannot convict Irving Pulp and Paper Limited as charged since the Crown has failed to bring the accused corporation within the *Fisheries Act* and the aforementioned Regulations. Therefore a verdict of not guilty is entered.

REGINA v. IRVING PULP AND PAPER LTD. (No. 2)

New Brunswick Provincial Court, Harrigan, C.J., Saint John, N.B., April 15, 1977

Environmental Law -- Water Pollution -- Sentencing -- Pulp Mill Wastes -- Inadequate cooperation by corporate accused -- Thirty-five hundred dollar fine -- No order to refrain -- Fisheries Act, R.S.C. 1970, c. F-14; ss. 33(2), 33(7), 33(11); Pulp and Paper Effluent Regulations, SOR/71-578.

The accused plead guilty to one count of depositing a deleterious substance in water frequented by fish. The substance in question was waste produced during the normal operation of the company's pulp mill.

Held, the appropriate fine was thirty-five hundred dollars. Fisheries officers had attempted for eight years to persuade the company to reduce pollution at its plant, but received only limited cooperation from the accused's officers and employees. Nonetheless, no order to refrain from committing further offences was issued pursuant to subsection 33(7), as the Court found that the wording of this provision did not allow it to make an order.

H.P. McKenna, for the Crown.
D.M. Gillis, Q.C., for the Accused.

Harrigan, C.J.:--The Irving Pulp and Paper Limited. This is the information of Philip Hennebury, who says that he has reasonable and probable grounds to believe and does believe that the Irving Pulp and Paper Limited, a body corporate, carrying on business in Saint John, the County of Saint John, the Province of New Brunswick, on or about the sixth of January, 1977, did deposit a deleterious substance, namely water containing toxic pulp mill waste in the water of the Saint John River, Saint John, New Brunswick, contrary to the provisions of Section 33, subsection 2 of the *Fisheries Act,* being Chapter F-14 of the Revised Statutes of Canada 1970 and amendments thereto.

Mr. McKenna: Your Honour, the Crown wishes to withdraw that charge.

The Court: Any objection, Mr. Gillis?

Mr. Gillis: No, Your Honour.

The Court: On Crown's motion to withdraw, no objection from defence, the information is withdrawn, it is dismissed. There is a further information here of Philip Hennebury a fishery officer, who says that the Irving Pulp and Paper Limited, a body corporate, carrying on business at Saint John, in the County of Saint John, in the Province of New Brunswick, on or about the seventh day of Janaury, 1977, did deposit a deleterious substance, namely water containing toxic pulp mill waste in the water of the Saint John River, at Saint John, New

Brunswick, contrary to the provisions of Section 33, subsection 2 of the *Fisheries Act*, being Chapter F-14, of the Revised Statutes of Canada, 1970 and amendments thereto. Yes, Mr. Gillis?

Mr. Gillis: The plea to that charge is guilty, Your Honour, and I believe the Crown, and probably the defendant wishes to call a witness on the question of sentence.

The Court: Thank you, on the Company's plea of guilty the finding is guilty. Mr. McKenna?

Mr. McKenna: Yes, Your Honour, on the question of sentence the Crown would ask to call Richard Row?

The Court: Do you want him under oath?

Mr. McKenna: No, Your Honour, I don't think it would be necessary.

The Court: All right, let's have him come up here then. Do you want him under oath, Mr. Gillis.

Mr. Gillis: No.

Mr. McKenna: Would you relate your name and occupation?

Mr. Row: My name is Richard Row, and I am an engineer, I work with the Department of Fisheries and Environment Canada.

Mr. McKenna: And what is your occupation within the Department of Fisheries.

Mr. Row: I'm an environmental engineer and I am manager of the Technical Services Branch with the Environmental Protection Service.

Mr. McKenna: And where is your office located?

Mr. Row: It is located in Halifax.

Mr. McKenna: Now, sir, are you familiar with the charge before the Court?

Mr. Row: Yes, I am.

Mr. McKenna: The background concerning it?

Mr. Row: That's correct, yes.

Mr. McKenna: And would you relate to the Court the background of this matter?

Mr. Row: Can I refer to my notes?

Mr. McKenna: Yes.

Mr. Row: We in 1969 began negotiations with the Irving Pulp and Paper Mill to try and effect a waste treatment at the Pulp Mill in Saint John. The reason we began in 1969, was that the Company at that time announced a rather significant expansion in their production, their planned expansion was going from three hundred tons per day of kraft pulp up to eight hundred tons per day, which would bring the total production for the mill to in the vicinity of eleven hundred tons a day, when you include the roughly three hundred tons a day of sulphite pulp. We had been taking measurements at that time and had found that the effluent was extremely toxic to fish, and when I say toxic, we have a test whereby we place fish in the effluent and we use different dilutions of effluent, in other words we take a hundred percent effluent, we take another tank and we dilute it to fifty percent effluent with water, and we place fish in various dilutions, and we found that that effluent killed fish down to the range where only two parts out of a hundred was pulp mill effluent, at that time, in 1969, after one or two meetings the company came forth with plans to put in a biological treatment system. A biological treatment system consists of really a hole in the ground in which bacteria, either organic material in the pulp mill effluent, and in doing so, they take out the materials that are harmful to fish. We, after several meetings found that the plans that the company presented were acceptable, we felt quite confident that they would make the effluent acceptable for discharge to the river. However, in May of 1971, the company indicated that because of discussions they had had with the City of Saint John, they felt that it would be more economical to go into a treatment system with the City of Saint John, and the municipal effluents would be treated at the same time and in the same treatment system as the pulp mill effluents. We thought that this was a good idea because the City of Saint John, on the West Side did not have any waste treatment at that time and this provided an opportunity to get both of these pollution sources cleaned up. So we entered into discussions with the company at that time, to look at the plans for a suitable waste treatment system. These discussions carried on for a considerable period of time and included other representatives, or other departments of both the Federal and Provincial Government, people like representatives from the Department of Regional and Economic Expansion were involved as well for the funding of such a joint treatment system. Finally, in 1973, the company was asked because of the delays that we were experiencing to submit plans for a treatment system. In March, of 1973, the company indicated that they had grown skeptical of the joint treatment system with the City of Saint John, primarily because of economic constraints, and they were now looking at what they called an in-plant system. The first two systems as I mentioned were biological treatment systems, and the treatment would have been done outside of the actual pulping facilities at the Mill. The third system, the in-plant system would be accomplished by various changes in the process. We were skeptical at the time that the plans were presented for the in-plant system. We asked the company, we

told the company this and then we gave them what we call a compliance date --

Mr. McKenna: A compliance what?

Mr. Row: A compliance date. What that is is we said we don't think that you are going to meet our objectives with this in-plant approach, but this is the third go around we have had for waste treatment, so we want a treatment system installed by December 31st, 1975, we don't care what you do, but we want out requirements met by that date. We went back--well, let me go back a little bit, when we came to the end of December, 1975, the company indicated that it would be impossible to meet that deadline, because of various problems that they had experienced, particularly with the construction in Saint John, and the shortage of pipefitters was one of the problems mentioned. So an extension to this deadline was granted to, I believe the end of March, 1976. We sent a team of samplers down to the mill in April of 1976 and collected samples for five days, and this case is now before the Courts. The Company indicated that there were other things that were going to be done at the mill, we were still skeptical that these would achieve the requirements that we had in mind, and we sent another sampling team back this year, and picked up additional samples on two days, and these are the samples that we are talking about now. We found that the effluent was extremely toxic to fish and in fact there had been little change since we started measuring the effluent in 1969.

Mr. McKenna: That is eight years ago?

Mr. Row: That is correct, yes.

Mr. McKenna: Now would you interpret to the Court, or relate to the Court, the analysis of the samples that were taken for January 7th, this year.

Mr. Row: Yes, I would. On January 7th, we placed rainbow trout in effluent collected from the Irving Pulp Mill, and the trout died in less than half an hour, we also placed Atlantic salmon in the same effluent and again death occurred in less than half on hour. Now with the proper treatment system, both Atlantic Salmon and rainbow trout are capable of surviving for more than ninety-six hours, in a properly treated effluent. So that shows you the difference between what a good treatment system can do and what we found at the Irving Pulp Mill.

Mr. McKenna: Now the treatment system they have now was obviously not working on January 7th.

Mr. Row: That is correct, not working according to our requirements.

Mr. McKenna: Now, can you tell me how long in your, in the Department's opinion, it would take to have the treatment centre there come up to your requirements, how long would it take the defendant company?

Mr. Row: Well, we believe, after going over the experiences we've had with other kraft mills in New Brunswick, that we feel that a proper treatment system could be constructed and put into operation in approximately a year and a half. There are various steps that would have to take place before this year and a half, before this period, for instance we would think that it would be acceptable for the company to tell us in conceptual terms what they are going to do to properly treat their waste, we would think that it would take perhaps another three months to come up with detailed plans showing in very detailed fashion what this treatment system is all about, and we would expect that in another month or two that construction could take place to build this treatment system, and we would expect that in a year and a half that system would be finished and in operation and producing an effluent in which fish could live for more than ninety-six hours.

Mr. McKenna: Now they live less than a half an hour?

Mr. Row: That is correct.

Mr. McKenna: You said that in 1969, that the situation hasn't changed from the analysis from then?

Mr. Row: We have collected several samples from the Mill, at times the fish --I think the greatest survival we've measured, and I would have to go over my notes and check in detail, but the greatest figure that I remember is the survival time of roughly forty-eight hours, and this was done on a trial basis, where effluent was simulated. But in our trips down to the mill to collect effluent from the sewer pipe, the toxicity or death occurs to the fish in very short periods of time, less than half an hour is certainly not out of line, with what we found in the past.

Mr. McKenna: What about the compliance for the company of the other regulations and requirements, that they must be fulfilled, like monitoring and anything else, were you getting co-operation in that respect?

Mr. Row: We have not received data from the company as far as the monitoring goes, but I must admit that we haven't formally asked the company to submit this information on a routine basis, we are concerned however that the last time we checked that the necessary flow measuring information and the sampling equipment was not installed. This is the main reason that we did not ask for the information, we felt that it didn't exist.

Mr. McKenna: Now, well, to enforce the regulations, or whatever, if I understand correctly, there is an offence every day?

Mr. Row: That is correct. Each day constitutes a separate offence.

Mr. McKenna: It is your estimate that it would take a year and a half to correct this?

Mr. Row: That is correct, yes.

Mr. McKenna: Thank you very much.

CROSS-EXAMINATION BY MR. GILLIS:

Mr. Gillis: Mr. Raw, is it?

Mr. Row: Mr. Row.

Mr. Gillis: Row, I'm sorry, were these, you told us what the results were on the tests on the seventh?

Mr. Row: Right.

Mr. Gillis: How did they compare with the tests that were made on the sixth?

Mr. Row: The tests on the sixth, the L.T. 50, for rainbow trout on the sixth -- I should explain, the L.T. 50 is the time fifty percent of the fish survive up to this time. So it was forty-eight, between forty-eight and seventy hours on January sixth, in other words, fifty percent of the fish died between forty-eight and seventy hours.

Mr. Gillis: Well, I wanted to ask you this, the tests were much better on the sixth than on the seventh?

Mr. Row: That is correct, I perhaps should add though that our people, when they were down there on the sixth observed that the pulp mill was -- the effluent was cleaner, and it was quite different than they had ever noticed before, on the seventh, the effluent was consistent with past observations, and this was a visual observation.

Mr. Gillis: Do you know that the mill had problems on the seventh?

Mr. Row: I'm not aware myself that they had problems on the seventh.

Mr. Gillis: But that could account for the difference, would you agree?

Mr. Row: All I can relate is that the observations made on the seventh were not significantly different from past observations.

Mr. Gillis: Well, I'm suggesting that they had problems on the seventh, that they didn't have on the sixth, that is all I'm suggesting.

Mr. Row: Well, that could well be.

Mr. Gillis: Now, am I not correct under a regulation there are three different, what do I say, classifications under deleterious substances, there is the suspended solids, and the B.O.D. and the toxicity, is that correct?

Mr. Row: That is correct.

Mr. Gillis: This company have met their -- have met the regulations in respect to suspended solids, have they not?

Mr. Row: Well, this is something that we were unable to measure, because suspended solids are based on production, now when we go into the mill, we take a sample of the effluent, and we do an analysis in the lab, and they tell us what the concentration of suspended solids are on a part per million basis, in other words in a concentration. You have to multiply this by the flow, to arrive at what the suspended solids discharges are as they are interpreted in the regulations. We did not have the information on the flows because the flow metering information was not available.

Mr. Gillis: Well, do I understand your answer is you don't know if they have met these conditions on suspended solids or not?

Mr. Row: We don't know, that is correct.

Mr. Gillis: But you are not complaining about that?

Mr. Row: Well, we aren't complaining about it because we couldn't measure it.

Mr. Gillis: I see, well, what about the B.O.D.?

Mr. Row: We have exactly the same problem with the B.O.D. as we do with the suspended solids.

Mr. Gillis: Are you aware that the company in recent years has spent a great amount of money in trying to meet these regulations?

Mr. Row: We are aware that a great deal of money has been spent at the pulp mill for various reasons, and we are aware that there have been changes made in the mill which has cut down on the amount of - or the volume of waste discharge to the river. But I think it is rather debatable to say that all of the money has been spent on pollution control.

Mr. Gillis: Have you had an opportunity to review a report of Mr. W.J. Wilson of Atlantic Analytical Services, made in February of this year?

Mr. Row: I am not aware of the report myself.

Mr. Gillis: You're not?

Mr. Row: No, I'm not.

Mr. Gillis: Have you heard of it?

Mr. Row: No, I haven't.

Mr. Gillis: Well, I wanted to read you then perhaps a few portions to see if you agree, it's talking about the water quality at this mill.

Mr. Row: Is this of the effluent or in the river?

Mr. Gillis: Well, let me read, it says the requirement for the Irving Pulp Mill is that their acqueous discharges must not contain more than fifty thousand pounds of B.O.D. per day, and sixteen thousand pounds suspended solids per day, excluding sulphite mill B.O.D. Excluding the sulphite mill contribution the Irving Pulp Mill is presently sewering sixty-two thousand six hundred pounds of B.O.D., which is a dramatic improvement over former levels, and has been achieved by internal modifications, such as spill recovery, counter-current washing, at a cost estimated by environment officials to be in the vicinity of three to four million dollars, would you agree to that?

Mr. Row: Well, I can't agree or disagree, because as I said we had a great deal of difficulty because the flow measuring equipment wasn't in, but I would like to comment on the B.O.D., if I may.

Mr. Gillis: Well, just let me go on a minute. The current level of suspended solids is eighty-two thousand five hundred pounds per day, well above the permitted level and the Irving Pulp Mill is required to install control equipment before October 15th 1978, to meet the requirements by December 31, 1978. The Mill has already changed to dry-barking which has eliminated the problem of suspended solids and B.O.D. in bark or effluent. The Province estimates that approximately three point nine million was spent on this, could you agree or disagree with this statement.

Mr. Row: I couldn't agree with the cost figure, but I could certainly agree that the company has gone to dry-barking. It has been an improvement, yes. I note that the solids are still quite a bit above the Federal requirements.

Mr. Gillis: It says also, it concludes here, there is only one mill in the Province which is in compliance with the regulations on water quality, Ste. Anne Nackawic, is that correct?

Mr. Row: No, that is not correct.

Mr. Gillis: What others are?

Mr. Row: The Miramichi Timber Resources in Newcastle.

Mr. Gillis: I see, Consolidated Bathurst?

Mr. Row: No, Consolidated Bathurst certainly isn't.

Mr. Gillis: It says other mills have clarifiers and treatment plants under construction, or in operation, although not always in compliance with the regulations, is that true?

Mr. Row: I really don't know, when we go around to sample, we have found that the effluent at the Mills that have treatment systems are meeting our requirements.

Mr. Gillis: Are you familiar with a report of T.W. Beak, Consultants who made a study of this?

Mr. Row: I'm not sure which report you are referring to.

Mr. Gillis: Well, this was one, did you never see a report where they recommended that Irving Pulp and Paper install facilities to control foam and wood chips which were discharged to the river?

Mr. Row: I believe that that was one of the initial reports that was done by Beak for the company. And I believe in the same report they also recommended biological treatment, this was in 1969, if that is the correct report.

Mr. Gillis: It is not a fact that the effluent which is discharged in the river, receives very rapid dispersion?

Mr. Row: I believe that would probably be a correct statement, yes.

Mr. Gillis: So, this mill is unique in this respect, in respect to its location and that regard.

Mr. Row: Well, it is unique that it is the only mill on the Reversing Falls.

Mr. Gillis: Yes, and near the mouth of the River.

Mr. Row: Yes, like MacMillan Rothesay, yes.

Mr. Gillis: That is all.

The Court: Thank you. Is that everything, Mr. McKenna?

Mr. McKenna: That's everything, Your Honour.

The Court: Yes, Mr. Gillis?

Mr. Gillis: I'd like to call Mr. R.J. Kneeland. Would you state your name?

Mr. Kneeland: Roland Joseph Kneeland.

Mr. Gillis: And what is your occupation?

Mr. Knelland: Manager of the Irving Pulp and Paper Company Limited, Saint John.

Mr. Gillis: And what are your qualifications?

Mr. Kneeland: I am a graduate Chemical Engineer, with an associate degree in pulp and paper and some twenty-one years in the business of manufacturing paper and pulp.

Mr. Gillis: Now, are you familiar with these classifications of deleterious substances under the regulations of the Fisheries Act?

Mr. Kneeland: In a general way, I am, yes.

Mr. Gillis: And am I correct that there are three classifications?

Mr. Kneeland: That is correct.

Mr Gillis: Suspended solids, B.O.D. and toxic waste, is that correct?

Mr. Kneeland: That is correct.

Mr. Gillis: Now, how is the mill now, with respect to the first one, let's say the suspended solids?

Mr. Kneeland: We feel that except for upset conditions which did occur on the seventh of January, the mill is in compliance on B.O.D. and suspended solids.

Mr. Gillis: And would you tell us about these upset conditions on the seventh, why the seventh was not similar to the sixth of January?

Mr. Kneeland: We had a problem in the mill that required that the sulphite mill be down and part of the kraft mill was not operating, nor were the paper machines, the pulp machines. We produced on that day four hundred and forty seven tons of pulp, the day of the sixth, the day before we produced nine hundred and fourteen tons. It is the type of day when everything goes wrong and the mill was upset as concerns flows or control. That happens on occasion.

Mr. Gillis: And that would affect the results?

Mr. Kneeland: Yes, sir, that would.

Mr. Gillis: Now then, speaking of toxicity, I gather that is the complaint now, what is the program of the company been to come within compliance of the regulations, would you tell us?

Mr. Kneeland: I'm not familiar in detail with the occurrences prior to January, 1974, when I came to Saint John, but at time we concluded, as indicated earlier by Mr. Row, that in-plant containment was the way for us to go, for several reasons. I'd like to come back to that Mr. Gillis,

because it is rather unique. At about that point some very serious far-reaching work was being done in the industry, at the University of Toronto, which indicated that the future of a mill like ours should be looked at from the standpoint of a closed system, without being technical, I would say to you that that simply means you re-use the water as many times as you can before you discharge it. The man who did this work, along with his associates has since been awarded several science prizes in the industry, and that process today is in general operation at Great Lakes Paper, at the Lakehead, and is the first in the industry and the foremost, because of that work, it had been determined at Irving Pulp that we should follow a similar path, that required an expenditure of nearly three quarters of a million dollars, to more than double our capacity to manufacture chlorine dioxide, such that we could substitute for the chlorine, a less deleterious substance. We have worked jointly with the Province in this matter, and although there have been some doubts expressed the effect of this, we feel, has been very good. Except for the circumstances with the sulphite mill, and some of the things we cannot control, we still hope and anticipate that this approach will in fact put us in compliance in the area of toxicity.

Mr. Gillis: I think you said you wanted to come back to reasons later, what did you wish to say in that respect?

Mr. Kneeland: I would like to mention the approach we are taking to B.O.D. and suspended solids. The approach that I favoured for many years, and is now being held up as the practice of the future is a very simple one. Keep your waste in the mill, keep your material in the mill, don't let it out, and if you don't let it out, it doesn't contaminate. But it does one more very nice thing for the environment, it means that you are utilizing your trees to a better extent, and it means that that material which in a bio-degradable system is thrown away for land fill is now made into a useful product. It is however, a unique approach and requires a good deal of money and time and particularly education on the part of your operators. It is not easily accomplished, however, we feel proud of the fact that we have now accomplished that in terms of B.O.D. and suspended solids.

Mr. Gillis: And how much, would you say approximately has been spent in attempting to reach these objectives so far?

Mr. Kneeland: It is difficult to give you a figure that is accurate to the penny, Mr. Gillis, however, and this would include the work done to change from wet-barking to dry-barking. It is approximately eight and a half million dollars.

Mr. Gillis: So far?

Mr. Kneeland: To date.

Mr. Gillis: And has your program been completed as yet?

Mr. Kneeland: No sir, we have several minor aspects of the program on-going with the requirement of approximately another half a million dollars.

Mr. Gillis: And when that is completed, can you express an opinion with respect to compliance with the matter to toxicity?

Mr. Kneeland: I would reiterate again, we hope and we anticipate that this will put us in compliance.

Mr. Gillis: How is your program then, with respect to other mills, is it the same approach, or have you approached it differently?

Mr. Kneeland: No sir, the mill that I mentioned, the Great Lakes Paper Company, is really the only other mill in this part of Canada that has taken this approach. Most of the mills in the U.S. utilize the bio-degradable system and the system referred to earlier by Mr. Row, which is separation by settling, and we are, I think, in eastern Canada, unique in our approach.

Mr. Gillis: How does your mill compare with respect to compliance with other similar mills, in the Atlantic Provinces, or in the Province of New Brunswick?

Mr. Kneeland: You make those judgments on the basis of the people you discuss the matter with, however, our understanding is there is only one mill in New Brunswick in compliance on water quality standards, and that same mill has very serious air quality standards. We know of no other mill in New Brunswick, perhaps one in Nova Scotia which is in compliance on water quality.

Mr. Gillis: You are familiar with this report of Mr. Wilson, of Atlantic Analytical Services Limited, made a little more than a month ago. Do you have any comments with respect to that, Mr. Kneeland?

Mr. Kneeland: I would only say that the report was made at the request of Councillor T.J. Higgins, who is chairman of the Pollution Control Committee, for the City of Saint John, in order that the City fathers could determine what Irving Pulp's position was in relation to water and air quality standards and pollution. The general comments I would make are certainly public in their nature, and are in this report as well as in a prior newspaper article, however, I would quote here a statement by Doctor Jim Young who is an air quality expert with the Province, when he says that Irving Pulp and Paper Company is the foremost in air quality control and standards in the Province.

Mr. Gillis: That is air quality?

Mr. Kneeland: That's air quality.

Mr. Gillis: Just before you go on, how much has the Company spent to achieve those results, approximately?

Mr. Kneeland: Including the extra money spent on the boiler for control of air borne pollutants, mainly from the recovery boiler, somewhat more than three million dollars. I would quote again from Doctor Young, this is again on air quality, that the electrostatic precipitator at the Irving Pulp Mill is the best in the Province when operating effectively and removes ninety-nine point three percent of the particulate matter passing through it. And in conclusion a general statement from Doctor Young says that the Pulp Mill is the best controlled mill in the Province. In terms of water quality he says that the only other mill in the Province which is in compliance with the regulations on water quality is Ste. Anne Nackawic.

Mr. Gillis: What do you say Mr. Kneeland, as to the location of a mill, with respect to dispersion of the effluents?

Mr. Kneeland: It is a rather unique location, because we are in the centre of the City, and for that reason, we are concerned greatly about the air quality problems. But it is also unique in that the discharges to the river have may times been tested and it has been indicated by so-called experts, namely T.W. Beak, that there can be found to be no damage done in the river itself, when sampled above, at, or below the mill.

Mr. Gillis: Now, Mr. Kneeland, just for general information what is the number of employees at the mill.

Mr. Kneeland: Approximately at this moment, six hundred and thirty-eight, or six hundred and thirty-nine persons employed at the mill.

Mr. Gillis: That's all.

CROSS-EXAMINATION BY MR. MCKENNA:

Mr. McKenna: Who is Doctor Young, Mr. McKneeland?

Mr. Kneeland: He is a member of the air quality group for the Province of New Brunswick.

Mr. McKenna: Who employs him?

Mr. Kneeland: The Province of New Brunswick, the exact terminology of the Department escapes me, but it is the air quality group, I believe, for the Province.

Mr. McKenna: You realize the charge here has to do with toxic pulp mill waste?

Mr. Kneeland: Yes sir.

Mr. McKenna: It has nothing to do with B.O.D. or suspended solids?

Mr. Kneeland: Yes sir, but that has been discussed here in some length.

Mr. McKenna: Well, it is not being alleged, anything to do with suspended solids or B.O.D.?

Mr. Kneeland: That is correct.

Mr. McKenna: Would you agree with the first witness, Mr. Kneeland, that the toxicity of the effluents from that mill has not changed since 1969?

Mr. Kneeland: No, I would not agree with that. As I understand you have to understand.

Mr. McKenna: You were only there since '74?

Mr. Kneeland: That's right, January, '74, I do not know exactly what the conditions were in 1969, however knowing that wet-barking was a part of the procedure, and that many tons of bark per day, and chips, and other material which contribute to a toxic nature of effluent were then present, and are not now present with the new barking facility, one would have to deduce that it has to be less.

Mr. McKenna: Well, would you agree that the Department has been in touch with the Irving Pulp and Paper Company since 1969, regarding toxicity?

Mr. Kneeland: That is my understanding, and you know, if I may make a comment on that, we have very little contact with the Federal people, we do work with the Provincial people, and the only times that I personally, other than visits to Halifax, have seen the Federal people, is when they arrive unannounced at our gate with two or three trucks, wanting to be let in to take samples.

Mr. McKenna: Well, now would you agree that under the regulations that you are to monitor?

Mr. Kneeland: That is correct, and we do monitor.

Mr. McKenna: I understand that there was a call made and there aren't records kept?

Mr. Kneeland: That is not my understanding, if you have some information I don't have, there was a request for information which I will forward to the people, the request was made for our information for the sixth and seventh and that was given over, was it not?

Mr. McKenna: For the sixth and seventh, yes.

Mr. Kneeland: And I would also argue with the point of measurement, you know there are many ways to measure the height of a man or the flow through a weir, other than by automatic measurement, if the reference is made to automatic measurement I would agree with Mr. Row. If the reference is made to measurement I would not agree with Mr. Row. Because we do in fact measure flow. On that

particular day, the particular time in reference our calculations determined that there were fifteen million gallons going through that particular effluent point.

Mr. McKenna: Well, the problem, do you know the solution to the problem?

Mr. Kneeland: I believe the solution to the problem is the direction we are heading in, yes sir.

Mr. McKenna: How many years is that going to take?

Mr. Kneeland: That is a very difficult question to answer.

Mr. McKenna: Could it be done within a year and a half, as Mr. Row said?

Mr. Kneeland: I would have to say, Mr. McKenna, that if we do not arrive at a solution -- that we should arrive at a solution, a final determinate on the merits of ClO2 substitution and containment before the end of the year and a half, yes sir.

Mr. McKenna: And it would then fulfill the requirements under the regulations?

Mr. Kneeland: We certainly anticipate and hope that they will.

Mr. McKenna: In a year and a half?

Mr. Kneeland: I suppose that is possible. By the same token there are other deleterious materials going to the sewers there from the sulphite mill, which are not under control as you know.

Mr. McKenna: That is all I have, Your Honour.

Mr. Gillis: That's all.

The Court: Anything further Mr. Gillis, any witnesses?

Mr. Gillis: No, no witnesses, Your Honour.

The Court: Any argument?

Mr. McKenna: Your Honour, just referring to the amended section of the Code, Section 33, subsection -- excuse me -- 33 subsection 5, which provides for the penalty, which says a fine not exceeding five thousand dollars for each offence, we are dealing with one offence. Under subsection 7, Your Honour, it talks about, the Court may in addition to any punishment, impose, order to refrain from committing any further such offence, or to cease to carry on any activity specified in the order. It is accepted by the Crown that an order under 7 might be -- well it is not asked for that an order that stops -- because it is just physically impossible.

The Court: Suppose you did ask for it, the way that that particular subsection 7 is worded.

Mr. McKenna: Yes, Your Honour.

The Court: Let's look at it for a moment, where a person is convicted of an offence under this section, the Court may in addition to any punishment it may impose, order that person to refrain from committing any further such offence. You are presupposing that this Court can find a Company or a person guilty of a similar offence of which it's just found him guilty, and then hold that person or corporation in contempt. I don't make any sense out of it. It doesn't make sense. I'd very much like to be able to issue some sort of an order to restrain the pulp mill from pumping out the effluent that apparently is being pumped out there. And with all respect to Doctor Young, I believe he must reside elsewhere. But how can I function with the wording of that particular subsection 7. Whether you are asking for it or not, it is my discretion whether to use it.

Mr. McKenna: Oh, yes, Your Honour.

The Court: How could I function, if I wanted to, which I'd very much like to, quite frankly. I think you'd better refer the wording of that subsection back to your principal in Ottawa and tell them to take a hard look at it, as far as draftsmanship is concerned, I don't think it is a workable section.

Mr. McKenna: Right, Your Honour. So with regard to the fine Your Hounour, under subsection 5, it it totally within the discretion of the Court, Your Honour, it is submitted on behalf of the Crown that this has been a continuing nuisance to the -- now mind you it is a large mill but this idea of being able to pollute the waters for the sake of, even though it is nine hundred and sixty jobs, and we are only dealing --

The Court: Six hundred and thirty-eight jobs.

Mr. McKenna: Six hundred and thirty-eight, I'm sorry, it still doesn't justify the polluting of our water and presumably there is other pollutants going on, but we are not dealing with those. It is a growing thing, the purpose of the penalty there is in hopes that such activities could be restrained by fines. It is the hope of the Crown that the penalty imposed by the Court under that fine, would help to restrain any future violations of the section. Knowing evidence that it would take a year and a half, even in the opinion of the Crown to totally correct this matter. There are certain things that have to be done in order that it be completed in a year and a half. It is just the hope, that the Crown has been attempting apparently, the Department, since 1969 to get something to happen there, and it hasn't happened, and I would just ask the Court that in determining the money penalty that well it give all of those factors consideration.

The Court: Yes, Mr. Gillis?

Mr. Gillis: I guess all I can say, please Your Honour, it is in your discretion of course, I would ask you to take into account though the facts, or the evidence given by the witnesses, and especially Mr. Kneeland.

The Court: First of all Mr. McKenna, I believe that Parliament intended something by drafting subsection 7, it intended to do something, and the something that they intended to do was to try to force a company or a person to immediately cease, desist, from putting toxic substances into the waters and what have you. But here I have evidence out of the mouth of your own witness, that indicates to me that even with every best effort put forth by the mill, this situation can't be corrected for a year and a half. Now, that being the case then, I say to myself, can you then reasonably lay another charge within the next year and a half, and hope to get a conviction. On the one hand you are not seriously arguing that I should try to apply subsection 7, and on the other hand, by what your own witness has said you have practically barred yourself from successfully prosecuting a further charge for every day that mill might be polluting the waters, because all the company has to do is get up and say we are making every honest effort to correct it, as a result of being chastised on April 15th, 1977 by some sort of a fine. So where do we stand. I have to say quite frankly, gentlemen, I'm probably not completely sold on all the fancy studies that are made by the so-called experts, particularly in one, the person of Doctor Young, who tells me that there is no air pollution from that mill over there. In any event, you are trying to work within the framework of an *Act*, Mr. McKenna, that leaves you with a considerable struggle on your hands, and by the same token the spirit of the *Act*, I think, is excellent. Frankly I don't think I can let this moment pass without making an observation that serious attempts have been made by the Fisheries Officers since '69 to correct the situation over there, then I would have to say to myself that not very serious attempts have been made by the mill personnel to cooperate in correcting the situation. For this offence the company is fined the sum of thirty-five hundred dollars, in default of payment thereof distress will issue, levy on the goods and chattels of the said company. How many days will the company need to pay the fine, Mr. Gillis? I'll give the company a week and then you can work out the arrangements. Time one week.

REGINA v. CANADIAN PACIFIC LIMITED

British Columbia Provincial Court, McCarthy, J., Vancouver, B.C., February 11 and 28, 1977

Information — Duplicity — Depositing and permitting deposit of deleterious substance in water frequented by fish — Statute creating two separate offences — Crown charging both but in different counts — Information not void for duplicity — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2); Criminal Code, s. 724(1)(b).

Evidence — Witnesses — Compellability and privilege against self-incrimination --Employee of accused corporation compellable to testify as Crown witness — No privilege.

Environmental law — Water pollution — Depositing and permitting deposit of oil in water frequented by fish — Release of oil from locomotive into pollution control system resulting in escape of oil into nearby watercourse — Accused claiming defence of all due diligence — Evidence showing insufficient maintenance of antiquated pollution control system — Accused convicted — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused was charged with depositing and permitting the deposit of a deleterious substance in water frequented by fish after oil from the accused's railway maintenance yards escaped into a nearby harbour. The evidence showed that while a portion of the oil in question could be attributed to an unforeseeable failure in one of the accused's locomotive, the remainder had been released on account of inadequate maintenance of the pollution control system.

Held, the accused was convicted. Although the accused had made a considerable effort to clean up the spill, it was still liable on account of its prior negligent conduct, and therefore had not brought itself within the defence of all due diligence.

Environmental law — Water pollution — Sentence — Factors to be considered — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

Kienapple v. The Queen (1975), 15 C.C.C. (2d) 524; *R. v. Judge of the General Sessions of the Peace for the County of York, Ex parte Corning Glass Works of Canada Ltd.*, [1970], 3 C.C.C. 204; *Canada Tungsten Mining Corporation v. The Queen*, unreported, N.W.T.S.C., March 5, 1976; *Sweet v. Parsley*, [1970] A.C. 132; refd to.

H.J. Wruck, for the Crown
Ms. P. Maughan, for the Accused

McCarthy, J.:--(Ruling on Preliminary Objections, Feb. 11, 1977) I reserved until today on a number of issues. First, I wish to thank both counsel for their very able submissions, both oral and written. The latter especially has made my task considerably less difficult, more interesting but less difficult.

The first issue I reserved upon, without prejudice to the defence, was the motion by way of preliminary objection to quash the Information for duplicity. The section under which the Crown has proceeded, s.33(2) *Fisheries Act* R.S.C. c.119 reads as follows:

> *Subject to subsection (4) no person shall deposit or permit the deposit of any deleterious substance of any type in water 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.*

On consideration of this subsection I have come to the conclusion that it contemplates two separate offences: (1) depositing a deleterious substance into waters frequented by fish, and (2) depositing a deleterious substance at a place under conditions where such substance may enter water frequented by fish. The depositing itself of a deleterious substance is not a wrongful act; the wrongfulness of the act is depositing such a substance in water frequented by fish or, alternatively, depositing such a substance at a place under conditions where such a substance may enter water frequented by fish. A defendant can do one without doing the other. If the Crown had combined these two complaints in one count then it would clearly have been bad for duplicity. A count in an Information cannot charge an offence in the alternative, and the reason is that the defendant is entitled to know with precision with what it (here a company) is being charged and of what it is being convicted. Here the Crown has charged the defendant in the alternative but in different counts, which it is entitled to do. See s. 724(1)(b) of the Canadian Criminal Code. Now the facts in this case may reveal that both counts arise out of the same matter, and if so it would be open to the defendant, of course, to move for the dismissal of one count on the basis of the principle enunciated in the case of *R. v. Kienapple* (1974), 15 C.C.C. 524. The Crown is not precluded, however, for the reasons I have just given, from laying two counts and in the form in which they appear on the Information before me. The motion to quash is dismissed.

The second issue to be resolved is whether Mr. Peter Green, an employee of the defendant company is, in law, a compellable witness for the Crown. In my considered opinion he is. He is a witness who happens to be a servant of the corporate defendant and he can testify, like any other witness, as to all relevant facts within his knowledge. He does not speak "for" the company. His status *vis a vis* the defendant company does not, in my view, affect his compellability to testify even though his evidence might tend to incriminate his employer. The privilege against self-incrimination is, of course, available to Mr. Green as a witness upon his testifying, but it does not extend to the defendant whose employee is called by the Crown in this criminal trial. See: *R. v. Judge of the General Sessions of the Peace for the County of York, Ex Parte Corning Glass Works of Canada Ltd.*, [1970] 3 C.C.C. 204.

Finally, the third issue, I find the statement made by an unidentified person to Mr. Elliot inadmissible as it lacks that sufficient nexus to the defendant to be relevant, at least at this juncture.

McCarthy, J.:--(Reasons for Judgment, February 28, 1977) The defendant is charged with two complaints under section 33(2) of the *Fisheries Act* R.S.C. 1970, c. F-14 (as amended). They are:

> *Count 1: Canadian Pacific Limited at the City of Vancouver, in the Province of British Columbia, on or about the 30th day of October 1975, did unlawfully deposit a deleterious substance in a place under conditions where such deleterious substance may enter waters frequented by fish, contrary to the form of the statute in such case made and provided;*
>
> *Count 2: Canadian Pacific Limited at the City of Vancouver, in the Province of British Columbia, on or about the 30th day of October, 1975, did unlawfully deposit a deleterious substance in waters frequented by fish, contrary to the form of the statute in such case made and provided.*

The evidence led by the Crown reveals, and I find as fact, that the defendant owns and operates a railway maintenance yard situate and being on the north side of False Creek in the City of Vancouver. Waste material from the yard, and in particular from a Roundhouse located thereon is received by a series of drains which lead to an oil separator that in turn discharges into False Creek through a sewer outfall.

On or about October 30th, 1975 in excess of one hundred gallons of lubricating oil was discharged into False Creek through this system. False Creek, I find, is water frequented by fish and it is agreed that lubricating oil is a deleterious substance.

The admitted evidence on behalf of the defendant is that on the night of October 29th and 30th, 1975 a locomotive had completed a maintenance check and was idling outside the Roundhouse when a gasket blew causing sixty gallons of lubricating oil to leak into a drain leading to the separator and a consequent discharge into False Creek. The maintenance foreman, a Mr. Silver, who was on duty, had never seen in his long experience, or heard of, such an occurrence.

The defendant relies on sub-section (8) of Section 33 of the *Fisheries Act* and submits that on the facts it has satisfied the "unless" portion of this sub-section. This sub-section reads as follows:

> *(8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.*

Counsel for the defendant submits that the "separator was put into use to clean up every day predictable oil spills of a routine nature" and its installation was not intended to anticipate every conceivable eventuality such as occurred on the night and day in question. It is further submitted that the oil separator had been reliable in the past, was regularly maintained and not found to be wanting. The deposit of oil was caused by a latent defect in a company locomotive, it was caused without the consent or knowledge of the defendant and that the company exercised "all due diligence" to prevent the commission of the offence. For the most part I respectfully disagree.

The oil separator was built in 1914 and in the opinion of Mr. John Watkins, Chief Operations Protection Officer of Environment Canada, it was inadequate to cope with today's pollution problems. Proper maintenance of this separator in his view required the removal of the oil daily or at least weekly. This was not done. Indeed and on the contrary the evidence is that it was cleaned, the separator, at best on three to four weekly intervals, more often monthly or longer. The oil capacity in this separator was two hundred and fifty gallons. The discharge from the locomotive was only sixty gallons and the discharge into False Creek was over one hundred gallons. One can but conclude from this that there must have been a considerable amount of oil in the separator prior to October 30th, 1975 which ought to have been removed. In other words, if there had only been sixty gallons discharged into the separator and it had been properly maintained as claimed, then by its very structure and capacity it ought to have remained in the separator, ready for removal, and not have been, as it was, discharged into False Creek. Further, the separator had no overflow tank or automatic devices to prevent discharge of oil into the outfall in the event of other than small oil flows.

Mr. Green, Assistant Divisional Engineer of the defendant company, in conversation with Mr. Watkins some three days before the incident occurred, said that the separator was "inadequate to cope with todays flows of oil." Mr. Green agreed that a new oil separator to replace the existing one would help but it was not part of the company's polution abatement proposals that were to be submitted to Environment Canada. Mr. Green has testified in this trial and his evidence is, in part, less incriminating than what he said to Mr. Watkins. This is understandable. However, where there is any variance between what he said to Mr. Watkins and what he has said to me, I am inclined to accept as more accurate the former. There is evidence that there had been previous incidents of oil spillage into False Creek, one such incident prompted boat owners of the local marina under the leadership of one, Stanley Burke, to prepare a petition and present it to whom they considered the person responsible for action.

The action of the defendant subsequent to October 30th, 1975 including the more frequent cleaning of the old oil separator, the one in question, and more significantly the installation of a new separator alongside it can permit of the inference that the defendant tacitly acknowledged that the system employed before was inadequate for the existing needs.

Now there is no argument that the defendant intended or hence consented to the unprecedented escape of oil from the locomotive as previously described. The Crown's position is, as I understand it, that this spillage constituted but a percentage of the total discharge or deposit present in the oil separator, and that there has been no evidence adduced here sufficient to establish that the defendant exercised all due diligence to prevent the oil separator from getting into the condition which resulted in the oil spill into False Creek as proven.

I am unconvinced on the facts before me that the defendant has shown here that it did not know nor consent to the depositing of oil (excepting the sixty gallons from the locomotive) into False Creek. Even if I were convinced, to avoid liability the defendant must couple lack of consent or knowledge with, and I'm now quoting from the judgment of Mr. Justice Morrow of the Supreme Court of the Northwest Territories in the case of *Canada Tungston Mining Corp. Ltd. v. The Queen*,

unreported, March 5, 1976, the defendant must couple lack of consent or knowledge with:

> *A behavior or consciousness which in effect shows it was not blind to the consequences of the possibility as well as the consequent danger of a leakage such as is found in the present case.*

I cite *Sweet v. Parsley* 1970 A.C. 132, as Judge Morrow did, where Lord Diplock states at page 163:

> *Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject matter of a statute is the regulation of a particular activity involving potential danger to public health, safety, or morals, in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sentences, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfill the ordinary common law duty of care.*

The cleaning up operation by the employees of the defendant company, while praiseworthy in itself, does not affect liability. It occurred after the event. "Prevention" not "correction" is the word used in Sec. 33(8).

The responsibility for the proper installation, repair and maintenance, especially maintenance, of the oil separator is the defendants. The defendant has, in my considered opinion, fallen short of showing any sufficient effort which could be termed due "diligence to prevent". I am satisfied, on the whole of the evidence, that the Crown has proven its case beyond a reasonable doubt with respect to both counts. I am equally satisfied that this defendant has not brought itself under Sec. 33(8) to gain an acquittal, and I accordingly find the defendant guilty of both charges.

Now, what does counsel have to say with respect to the matter of sentence or convicting of both counts. I have in mind the principle of *Kienapple*.

Mr. Wruck: Yes, Your Honour, the Crown has no desire of convicting the defendant of both counts because of the principle in *Kienapple*. Really, the Crown is only interested in successfully prosecuting the accused for one count.

The Court: Well, you agree then that the two complaints originate from the same cause or matter and hence the application of that principle enunciated in that case applies here?

Mr. Wruck: Yes, I agree completely with Your Honour.

The Court: I take it you don't take any exception to that, ma'am?

Ms. Maughan: No, Your Honour.

McCarthy, J.,:--(Remarks at Sentence, February 18, 1977) In passing sentence in this case -- let me see the Information, please -- and by the way sentence is going to be passed on Count Two.

In passing sentence I am going to take into account the efforts of the defendant's employees immediately after the spill was detected, and also I am going to take into account the consequent construction of a new oil separator. I am not entirely satisfied as to that searator's full use and effect, nor am I unaware of the fact that it was constructed, or completed rather, some six months thereafter, but in any event it shows an indication of concern of the defendant in that respect.

Now, I must also bear in mind the deterrent effect of a conviction and the resultant consequences in the present type of offence. The defendant is one of the largest corporate entities in this country. Its very magnitude and size makes it important that the penalty not be so small as to invite further breaches. The defendant has several previous convictions under this Act or similar enactments and has shown some reluctance to implement, has been less than responsive, to proposals for better pollution abatement in False Creek.

The place of occurrence is not insignificant here. False Creek in 1975, the year of the commission of this offence, provided as it does now facilities for pleasure craft, and plans had been laid at that time for the construction of low and medium rental accommodation, that is, on the south side of False Creek. Such users and others, the public as a whole, are entitled to the many benefits and pleasures of the area, including the marine life that exists both therein and thereunder. The defendant must accept its corporate responsibility and do so seriously when maintaining an operation such as this in a location so central to the heart of Canada's third largest city.

By Section 33(5) prevision is made for a maximum fine of five thousand dollars.

To adequately meet the requirements of deterrence and protection it is my opinion that there should be a fine here, and I do so impose a fine, of four thousand dollars.

Now with respect to Count number one, Mr. Prosecutor, is it one that I should dismiss or invite the Crown to enter a stay? I don't think it should be left in limbo.

Mr. Wruck: No, Your Honour. The Crown would direct the Clerk of the Court to enter a stay of proceedings on Count One.

REGINA v. GREAT CANADIAN OIL SANDS LTD.

Alberta Provincial Judges' Court, Aime, J., Fort McMurray, February 23, 1977

Environmental law — Water pollution — Deposit of deleterious substance in water frequented by fish — Acute lethality tests performed in laboratory using species of fish not present in water in question — No other evidence of harmful effects — Deleterious nature of deposits not proven — Accused acquitted — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(11).

The accused operated an oil sands extraction plant near the Athabasca River. It was charged with permitting the deposit of a deleterious substance in water frequented by fish after government tests showed that two samples of seepage in the area of its operations were acutely lethal to fish under laboratory conditions. The first sample consisted of seepage which flowed out of the dyke surrounding the accused's tailings disposal area. This effluent flowed into a nearby swamp and could not be directly traced to the river. However, seepage also flowed from a pipe which projected from the riverbank in the same vicinity, and a sample of the surface water of the river collected immediately where this seepage emptied into it was also found to be acutely lethal under laboratory conditions.

Held, the charge should be dismissed. The Crown's evidence of acute lethality arose from tests on species of fish which were either only marginally present in the waters in question or totally absent, and otherwise disclosed no discernible harmful effects on the river. Accordingly, the deleterious nature of the material deposited was not proven and the accused was therefore entitled to be acquitted.

D.W. Kilgour, for the Crown
D.R. Thomas, for the Accused

Aime, J.: (Orally)--We are now dealing with the judgment of the charge under the *Fisheries Act* against the Great Canadian Oil Sands Company Limited of Fort McMurray. The charge in the Information dealing with the complaint is that Great Canadian Oil Sands Limited, a body corporate registered under the laws of the Province of Alberta, on or about the 12th day of July, 1976 near Fort McMurray in the Province of Alberta did permit the deposit of a deleterious substance in water frequented by fish, namely, the Athabasca River contrary to the provisions of Subsection 33(2) of the *Fisheries Act* as amended to date.

The statute, we are dealing with, Section 33 subsection 2, no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish, or any place under any conditions for such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water. The definition under the *Act*, Section 33 (11) 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 deleterious to fish or to the use by man of fish that frequent that water; and, subsection (b) has practically the same thing "that frequent that water."

The Crown therefore must prove first, the identity of a person or registered company, two, that on July the 12th, 1976 they did permit a deposit, three that there was a deleterious substance, and four, in water frequented by fish; and this being a summary conviction procedure it must be beyond a reasonable doubt. It is of strict liability which means - doesn't - intent is not an ingredient, excuse, or negligence a defence.

We now go to the evidence. The evidence is that Great Canadian Oil Sands is a corporation in the Province of Alberta, and we're dealing with the material time of July the 12th, on or about. The Crown led several expert witnesses, and dealing with Mr. William Lake he along with two others took samples from what was described as the dyke filter pipe, and also from the inner surface - interface samples.

The Crown led the evidence of the laboratory tests before the evidence of the taking of the samples, and it was a bit difficult to just relate the two. However, Mr. William Lake, Peter Mildner and William Cary together went to the area between the dyke and the settling pond of the Great Canadian Oil Sands' operation and the Athabasca River. They took water samples from the so-called dyke filter and a sample from the interface, so-called, and also from 10 feet upstream from the interface and 40 yards downstream.

Mr. Lake conducted bio-assay tests using the Stickleback, and from the interface it is my understanding from the evidence that three of the ten died. Mr. Beckett also conducted tests with the use of rainbow trout, and the dyke samples, five died within 72 hours, and at the interface five died of the five within the 96 hours. None - there was no mortality of the downstream nor of the upstream.

Mr. Dave Berry, research programmer, who had worked on the Athabasca River during the greater part of last summer between June and September, on a 80-mile stretch of the river from Fort McMurray to the Firebag River sampling fish and that he found at least 20 species. He found no rainbow trout. He found five Stickleback which was out of over 3000 fish that he had netted, and he observed that there was no predication of the ecological environment on the Athabasca River.

Mr. Galbraith and Mr. Spagnut did not give expert evidence but they did say that they fished on the river, and especially Mr. Spagnut who said that he fished within the area and has done so for a considerable length of time and did not find that there was any deterioration to the ecology of that particular area. Mr. Perehinec of the Great Canadian Oil Sands gave evidence that there was considerable rain water along the dyke, that fertilizer had been used, and I think I can say at this moment that it really doesn't matter whether the effluent we're concerned with comes from inside the dyke or outside the dyke as long as the company are responsible for its control.

I therefore find that GCOS or Great Canadian Oil Sands is a corporation within the Province of Alberta, that they did have control of the dyke at the interface area, the effluent from the dyke filter went into a ditch, and there's only an inference that there was a connection between that particular location and the interface area. So, it really cannot be considered evidence as going into the river as it is only near. The effluent from the interface area was under the control of the Great Canadian Oil Sands and that this effluent did flow into the Athabasca River and that it was deleterious to fish that were subjected to tests in the laboratories.

I also find that the Athabasca River is frequented by fish, and this leaves the matter of a deleterious substance, was it or was it not to the Athabasca River.

The Crown has made an analogy of a speeding car, with 31 miles an hour being one mile over the speed limit; that it is an offence regardless of the degree; however, I feel that he left out another element that is necessary, and that is not only was there speeding but it was dangerous to the public, if you want to use that analogy.

I think the purpose of the *Fisheries Act* is to protect the ecology environment of the river from pollution by industries or any persons that may be involved. We all agree I think that this should be controlled for the public interest.

I also would like to say that when we're dealing with a matter of pollution you have motor boats on the river, you have the bitumen in the Athabasca River, you have birds on the river, even fish themselves would pollute the water, so there's no such thing as pure water.

So, we are dealing with a matter of degree, and we're dealing with getting back to what is a deleterious substance. Any substance that if added to any water that 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 deleterious to fish or to the use by man of fish that frequents that water.

To be a deleterious substance it must affect the fish in the water that we're dealing with which is the Athabasca River and not elsewhere. I find that there is absolutely no evidence of any effect on the ecology or the fish in the Athabasca River at, near, or downstream from the Great Canadian Oil Sands' plant on or about the 12th day of July, 1976, neither before or after. Therefore, I dismiss the charge against the company.

REGINA v. GREAT CANADIAN OIL SANDS LIMITED

The District Court of Alberta, Edmonton, Alberta, McClung, J., January 10, 1978

Environmental law — Permitting the deposit of a deleterious substance in water frequented by fish — No evidence of adverse effects on river in question — Acute lethality tests performed using fish species not present in water affected —Deleterious nature of deposit not proven — Appeal dismissed — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(11).

The accused was charged with permitting the deposit of a deleterious substance in the Athabasca River after seepages collected in the vicinity of its operations were shown to be acutely lethal to fish under laboratory conditions. The charge was dismissed in Provincial Court on the grounds that the Crown had failed to prove that the material deposited was deleterious within the meaning of the statutory definition.

Held, the appeal should be dismissed. There was no evidence of any harmful effects on the river, nor was there any evidence of deleterious substances in the fluids in question. Moreover, the Crown's tests had utilized species of fish not present in the Athabasca River or only very rarely so, and these data were therefore insufficient to prove that the seepages in question were deleterious.

R. v. British Columbia Forest Products Ltd., unreported, B.C. Co. Ct., June 17, 1976; refd to.

D.W. Kilgour, for the Crown, Appellant
D.R.G. Thomas, and T.A. McCrum, for the Accused, Respondent

McClung, J.:--Great Canadian Oil Sands Ltd. was charged that (it) on or about the 12th day of July, 1976 near Fort McMurray in the Province of Alberta, did permit the deposit of a deleterious substance in water frequented by fish, namely, the Athabasca River, contrary to the provisions of subsection 33(2) of the *Fisheries Act* (Canada) as amended to date. The Crown appeals the company's acquittal following trial in the Provincial Court.

The company's operations include a tar sand mine and processing plant near Fort McMurray situated near the Athabasca River. The processing plant separates bitumen from tar sand by means of a sophisticated hot water process. The bitumen is then refined to synthetic crude oil and the by-products, sand, water and clay are diverted to a large tailings pond near the extraction plant. A large dyke encircles the tailings pond and some of the by-product sand is employed in elevating the height of the dyke to contain increasing water levels. Some water is withdrawn from the pond and recycled for use at the plant. The clay settles slowly within the pond and in the opinion of William Cary, the Environmental Conservation Co-ordinator of the company, who was called as a Crown witness, forms an impermeable barrier between the water found within and the sand dyke surrounding which prevents any seepage.

Suspicious that effluents were reaching the Athabasca River, environmental authorities took water samples at four locations between the tailings pond and the

nearby Athabasca River on July 12, 1976 and thereafter. These samples are described as follows:

(a) The dyke drainage sample - this sample was taken from two of some 72 drainage pipes which had been apparently installed to regulate water levels within the dyke itself to insure its stability. Notably, this discharge was never monitored to determine if it eventually entered the Athabasca River. Its progress after leaving the pipes was described as "meandering" and without definite channel.

(b) The interface sample - a pipe extending about three feet from the river bank discharged liquid into the river, the level of which was about 18 to 24 inches below the pipe itself. The sample was not taken solely from the fluid discharged by the pipe but from the river immediately below. The Environmental Officer understood that the pipe emitted liquid initially collected from the upper third of the dyke although it appeared to connect with what was described as a little collection pond which in turn connected with some ditches near the base of the dyke.

(c) The downstream samples - water was collected from the Athabasca River nearby but downstream from the interface sample point.

(d) The upstream samples - water was collected from the Athabasca River nearby but upstream from the interface sample point.

These four samples were then taken to Edmonton where in laboratory conditions two species of fish, Rainbow Trout and Brook Stickleback, were introduced into each of the samples for specified periods of time. Some of the fish expired in the dyke drainage and interface samples but no mortality was reported in the upstream or downstream samples.

In my view, a review of the evidence supports the learned Provincial Judge's disposition of this charge. The evidence indicates that:

(1) The river itself displayed no visible evidence of any adverse effects as a result of any aspect of Great Canadian's operation.

(2) There was no evidence of any disruption of the aquatic or biological systems present in the river.

(3) While there was some evidence that sodium hydroxide, napthenic acid and bitumen itself reached the tailings pond as by-products of the extraction process there was no evidence that they or any harmful substance was discharged from the tailings pond during or after the settling process into the river through the discharge pipes investigated by the environmental authorities. No analysis of the questioned fluids was proven in evidence. An *in extremis* attempt to prove that ammoniated fertilizer used by the company in the cultivation of grass and shrubbery during area reclamation had washed into the river during recent heavy rains was made by Crown Counsel during his cross-examination of defence witnesses. The learned Provincial Judge made no finding in this regard but it is clear from the

reasoning in *Regina v. Wynnychuk* (1962), 37 W.W.R. (N.S.) 381 that such a finding could not support a verdict adverse to the respondent.

(4) The dyke drainage sample fluid was not proved to have reached the Athabasca River or have been "deposited" within it.

(5) The interface sample fluids, apart from their questionable source, were not proved "deleterious" having regard to the fact that the Athabasca River itself was either inhospitable or instinctively objectionable to Brook Stickleback and Rainbow Trout because of their absence, or at least rarity, in its waters.

(6) No proper evidence was led indicating the chemical composition of the alleged effluents from which the learned Provincial Judge could find toxicity to fish by themselves or in conjunction with other substances.

(7) No proper evidence was led establishing that any toxic substance associated with the company's operation reached the river which was not present in any event when regard is had to the fact that the river or its tributaries flow through outcroppings of tar sand releasing into its course bitumen iridescents or natural oil slicks.

(8) There was no evidence indicating the pathology of the dead Rainbow Trout and Brook Stickleback.

(9) No tests whatever appear to have been carried out to demonstrate any undesirable effect arising from the alleged effluents upon aquatic life measurably innate to the Athabasca River. Consequently there was no evidence that any species that "frequented" the river was deleteriously affected. The use of the verb "frequent" in s. 33 of the *Fisheries Act* (Canada) is not without significance. The Shorter English Oxford Dictionary provides the following definitions:

'frequent - to visit often; to resort to habitually; to use habitually; ... to resort to and unto; to associate with; to be often in and about; to crowd, fill.'

Neither the Brook Stickleback or the Rainbow Trout used in the laboratory bioassays "frequented" the river and it was, therefore, open to the learned Provincial Judge to decline any finding, which he did, that the discharges had been proven a "deleterious substance" as defined by the *Act*.

The frailties of conducting bioassays in laboratory conditions without regard to on-site circumstances in these investigations are reviewed by His Honour Judge Cashman in *Regina v. British Columbia Forest Products Ltd.*, British Columbia County Court, Nanaimo Cr. 663, June 17, 1976 (unreported). On any view the bioassays prepared in this investigation are merely one isolated circumstantial evidentiary fact. The learned Provincial Judge apparently refused to regard them, even inferentially, as proof beyond reasonable doubt of the offence. I am not prepared to attach greater weight to them. On the contrary, I agree with his disposition. The appeal is therefore dismissed.

REGINA v. CANADIAN CELLULOSE COMPANY, LIMITED

British Columbia Provincial Court, Romilly, J., Terrace, B.C., March 14, 1977

Environmental law — Water pollution — Deposit of deleterious substance in place under conditions where may enter water frequented by fish — Defence of due diligence — Meaning of deleterious — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused corporation was charged after a transformer exploded at its pulp mill causing the release of 210 gallons of polychlorinated biphenyl (PCB) into drains leading to a nearby harbour. The explosion occurred on account of a prior leakage of PCB from the transformer brought about by extensive corrosion of its body.

Held, the accused was convicted. Due diligence had not been exercised in the care and maintenance of the transformer which could have prevented the explosion, nor was there any evidence to support the theory of sabotage. Moreover, the officers and employees of the corporation were negligent in failing to prevent the unlawful deposits after the explosion or to mitigate their harmful effects. In proving the substance deleterious, the Crown was not obliged to lead evidence of the results of tests for acute lethality. The Crown could discharge its burden by introducing expert testimony as to the deleterious nature of the substance in question.

The Queen v. Pierce Fisheries Ltd. (1970), 12 D.L.R. (3d) 591; *R. v. Churchill Cooper Corporation Ltd.*, [1971] 4 W.W.R. 481; *Monkman v. The Queen*, [1972] 3 W.W.R. 686; *R. v. Jordan River Mines Ltd.*, [1972] 3 W.W.R. 30; *Canada Tungsten Mining Corporation Ltd. v. The Queen* (1976), 5 C.E.L.N. 120; *Sweet v. Parsley*, [1970] A.C. 132; *Kienapple v. The Queen* (1975), 15 C.C.C. (2d) 524; refd to.

Werner Heinrich, for the Crown.
Robert Gardner and Irene Stewart, for the Accused.

Romilly, J.:--(Orally) These charges were laid under Section 33(2) of the *Fisheries Act*, 1970 R.S.C., C-14, amended in C-17 (1st Supplement) which states:

> *Subject to Subsection (1) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*

It is obvious Subsection (4) has no application in these proceedings.

The Crown takes the position that the Section creates absolute liability and that the absence of *mens rea* is no defence. The Crown further argues that the Defendant must bring itself under subsection (8) of Section 33 of the *Fisheries Act* to gain an acquittal, although Mr. Gardner suggests that Section 33(8) might not even apply to this particular case.

I am of the view, and even Defence counsel would concede, that *mens rea* does not apply to a prosecution under Section 33(2) of the *Fisheries Act*, although Defence

counsel points out that before we get to that point there has to be some proof that an agent or employee of the company had committed the offence or caused the spill. With the greatest respect, I am not satisfied that I have to satisfy myself that an agent or employee committed the spill. At any rate, from the evidence I have there is no doubt at all that the company was partially, if not totally, responsible for the spill.

I would say at this stage that *mens rea* does not apply under Section 33(2) of the *Fisheries Act*. I will simply adopt what was said by the majority judgment in the Supreme Court of Canada in *The Queen v. Pierce Fisheries Ltd.* (1970), 12 D.L.R. (3d) 591, the more recent decision in *Regina v. Churchill Copper Corporation Ltd.*, [1971] 4 W.W.R., 481, the decision in *Monkman v. The Queen*, [1972] 3 W.W.R., 686, *Regina v. Jordan River Mines Ltd.*, [1974] 4 W.W.R., 337, and *Regina v. McTaggart*, [1972], 3 W.W.R., 30.

Defence counsel made many submissions, but I am going to summarize them and I hope I can deal with all the points that he raised.

(1) Defence counsel submitted that the Defendant company has established a defence under Section 33(8) of the *Fisheries Act* if it was necessary to establish that defence.

(2) He indicated that the Crown had not proved the deposit of a deleterious substance, and

(3) He indicated that there was not sufficient evidence that PCB 1254 reached water frequented by fish.

I shall deal with these submissions in turn.

Has the Defendant company established a defence of due diligence under Section 33(8) of the federal *Fisheries Act*? Section 33(8) of the federal *Fisheries Act* states:

> *(8) In a prosecution for an offence under this section, or Section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent his permission.*

It would appear from this subsection that in order for the company to establish a defence under this subsection, the company has to establish (1) that the offence was committed without its knowledge and consent, and (2) that it exercised all due diligence to prevent its commission. After reviewing the evidence at length, after sitting through 11 days of trial, after assessing the various witnesses, assessing their demeanor and what have you, I am satisfied that the spillage of PCB 1254 in this case was accidental. Certainly I am satisfied that the Defendant company did not consent to the spillage of PCB 1254 in the sense of willingly agreeing or hoping for it to enter water frequented by fish. But as was stated in the Supreme Court of the Northwest Territories in the case of *Canada Tungsten Mining Corporation Ltd. v. Her Majesty the Queen*, a decision of Mr. Justice Morrow, reported in (1976) 5 C.E.L.N. 120 (N.W.T.S.C.):

But to avoid liability the appellant must couple a lack of consent with a behaviour of consciousness, which in effect shows it was not blind to the consequences of the possibility, as well as the consequent danger, of a leakage such as is found in the present case.

The general approach to the problem is beautifully expressed in *Sweet v. Parsley*, [1970] A.C. 132, where Lord Diplock states at page 163:

Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject matter of a statute is a regulation of a particular activity involving potential danger to the public health, safety or morals, in which citizens have a choice as to whether they participate or not, the Court may feel driven to infer an intention of Parliament to impose, by penal sentences, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfill the ordinary common law duty of care.

Having found that the accused company has established that the offence was committed without its knowledge or consent, I now have to deal with the question as to whether the accused company exercised all due diligence to prevent the commission of the offence. In this case I have to deal with the question as to whether the company exercised due diligence to prevent the commission of the offence before the explosion of the transformer and immediately after the explosion of the transformer.

Dealing first with the question of due diligence by the company before the explosion of the transformer in Woodroom No. 3, I have to deal with the condition of the transformer and the steps taken to make sure that it was in working order. It was clear from the evidence of Mr. Smart and Mr. Hebron and the photographs which were marked Exhibits 2-A and 2-L in these proceedings that the transformer which eventually exploded was not a very pretty transformer. It is evident from those photographs that the transformer showed signs of advanced rust. In fact, they appeared to be so rusty on the fins that Mr. Carscadden felt that if he was shown a photograph of a transformer in that shape he would make sure that it was checked on a daily or shift basis and efforts would be made, in his opinion, to have it replaced as soon as possible. In this case the Defendant company wasn't about to take this type of precaution. The Defendant company felt that the transformer was in good working condition and tested it on a weekly basis or at least every three days. This was even after the transformer developed a pin-hole leak sometime in October or November of 1976. When the transformer developed a pin-hole leak, instead of replacing the fins or trying to see if the transformer could be replaced the company, according to the evidence of Mr. Tindale, placed a plug into the fins of the transformer, something which the experts Dr. Levelton and Mr. Carscadden indicated should not be done. There was some question as to whether a plug could be a part of an epoxy process that the company was using to prevent leaking, but it is evident from a careful perusal of the evidence that the reference was to a plug and not to a part of the epoxy. You will recall from the evidence that there were references to a plug being seen next to the

transformer after the explosion. There is no reference to that being part of the epoxy. Two witnesses at least, Mr. Tindale and Mr. Townsend, refer to this plug being seen at the site of the transformer after the explosion. Dr. Levelton was asked as to whether the plug could be a part of the epoxy process, and Dr. Levelton indicated that it could be in certain circumstances. He indicated in response to a question from the bench that he saw no sign of any epoxy on the fins of the transformer which he examined, the transformer which was located in Woodroom No. 3. In fact, Mr. Townsend, one of the first persons to witness the exploded transformer in Woodroom No. 3, was brought all the way from Nova Scotia under subpoena by Defence counsel but he was asked to be excused by the court before he could shed some light as to whether it was a plug that was in fact inserted into the fins of the transformer. It is true that Dr. Levelton was called by the Defence and established that this rust on the tank of the transformer and the fins of the transformer was merely superficial rust and didn't really attack the metal to any great extent, but his evidence had to be academic when we realize that the only part of the fins of the transformer that eventually ruptured and from which there is no doubt that the vast amount, if not all of the PCB 1254 leaked, was an 18-inch portion which was taken from the transformer before Dr. Levelton had a chance to look at it. With Dr. Levelton not being able to examine that portion, that crucial 18 inches of the fins of the transformer, I have no alternative but to accept the evidence of Mr. Smart and Mr. Hebron and the pictures that they produced in court with respect to the state of the transformer and in particular the fin portion of the transformer that eventually exploded. You would recall that Mr. Smart indicated that portion was so rusty that a slight pressure with one finger caused fluid to seep out from the transformer. The Defence counsel raised the theory of sabotage by a person or persons unknown. To substantiate this theory he called Mr. David John Walker, who suggested that security at the plant couldn't really be maintained because of a CNR right-of-way which went through the premises of the Defendant company. Dr. Levelton was also asked to speculate with respect to the implosion that was referred to by Mr. Tindale and the fact that the portion of the fins that ruptured appeared to be bent inward. This sabotage theory, in my respectful opinion, was just that -- a theory. I am not satisfied that this theory was substantiated in any way, shape or form by any credible evidence that was brought before me in this trial. As a matter of fact, it was suggested by Mr. Carscadden that this inward turning of this particular rupture in the fins could have possibly been caused by a plug being inserted into one of the fins, the very thing that Mr. Tindale told us was inserted to patch a pin-hole leak. One would have expected that with the surges of power that Mr. Burchardt mentioned, and the surges which were also described so accurately by Mr. Wiole, and the activity that one would expect in a transformer that the company would have been more careful about having equipment that could possibly withstand those types of pressures rather than this type of rusty equipment which I find was situated on Woodroom No. 3 and eventually exploded.

Of course, one just can't overlook the opinion of Mr. Tindale, who had the occasion to look at this transformer almost immediately, who was responsible to a certain extent for servicing it, and after it exploded and after he had some time to think of it and after having quite a bit of experience dealing with transformers themselves, he said in his opinion the explosion of the transformer was due to the corrosion of the fins. He felt that because of the corrosion of the fins the transformer lost oil and as a result of the loss of oil there was, in his opinion, this explosion which caused the transformer to fail. This is an opinion given by one of the employees of the company, a person in charge of the neurojet program and one who had some

supervision over the electrical system, it would appear, of the company. This opinion is in part supported by Mr. Carscadden whose evidence I dealt with while reciting the evidence and making certain finding of fact. On the basis of the foregoing, I am not satisfied at all that the Defendant company in this case exercised the due diligence that one would expect the company to exercise to prevent the commission of the offence.

After the explosion the company was fortunate that their attention was drawn to this transformer. They were fortunate because as soon as this transformer failed, the lights in the woodroom area went out. The representatives of the company, however, in my opinion, refused to be concerned with the environmental aspects or the environmental hazards of this explosion. According to the evidence of Mr. Nickolichuk and Mr. Tindale, all went to the scene to see what the trouble was. They were all able to ascertain that the transformer had exploded. According to the evidence that I heard, and after reading the transcript carefully, it becomes evident that Mr. Nickilichuk, Mr. Townsend and Mr. Tindale were mainly concerned with making a business decision; that is, the business decision of replacing the transformer in Woodroom No. 3 as soon as possible. No one really noticed much about the surroundings of the transformer and in particular whether or not any of the PCB 1254, which was contained in the transformer, was leaking. Obviously someone other than these three witnesses may have noticed it because the letters from Mr. Kruett and Mr. Halliday which were marked in evidence indicated they noticed some PCB 1254 had leaked after the explosion of the 22nd of January. The officials, whoever they may be, felt however, it was all contained on the roof. It would appear from the evidence that because of this negligence, because of this inability to take the precaution of preventing the spill of this toxic substance which was contained in the transformer, the inevitable happened. A large amount of PCB 1254, approximately 210 gallons, spilled onto the roof, into the caves, down the sides of the caves, into the drains, into the interceptors -- interceptors which drained directly into Porpoise Harbour. The Defendant company says that the reason this wasn't noticed earlier than the 24th of January, 1977, was because the mill was not in full operation, whatever that means. At any rate, on the 24th of January, 1977, I am satisfied that when the company officials resumed full operations a considerable amount of PCB was found on the roof, was found in the eaves, was found at the site of Woodroom No. 3, was overflowing in the interceptors and in fact, there was PCB all over the place, as evidenced by the large amount of sawdust -- sawdust eight feet wide, one foot deep -- along one side of Woodroom No. 3. There were a large number of drums being used to seal the substance away, there was a large amount of wood that had to be sawed up on the roof itself and the roof had to be replaced and all sorts of steps had to be taken to prevent a further spillage of this toxic chemical. That this PCB 1254 got into the interceptors that flowed directly into the Southern Outfall is evident from the evidence of Mr. Smart and Mr. Hebron who described what they saw on the 24th of January. The evidence of Mr. Hebron is that even on the 27th of January, 1977, the interceptors were full of sediment. I have no doubt that the substance contained in the interceptors, even up to the 27th of January, was PCB 1254. This was the substance that was sampled by Mr. Hebron in the interceptors marked "H" and "J" in red on Exhibit 4, and remember that substance was the substance that was analyzed by Mr. Sargent and that was the substance the Crown claims flowed directly into the Southern Outfall into Porpoise Harbour. You will recall Mr. Sargent had a chance to test the sediment from these interceptors from the sediment samples. You will recall that one of the sediments was marked "EPS 14" and the other one "EPS 19". You will recall

that when Mr. Sargent attempted to test the samples the response was so strong that the instrument was unable to record a reading. Is it any wonder, especially when one considers that the substance that was spilled from that transformer contained 950,000 parts per million of PCB. All it seems to have taken down on its way into these interceptors was some tar from the roof. I'm satisfied from Monday, the 24th of January, 1977, the company took all steps necessary to prevent further spillage from the transformer and to prevent further amounts of PCB 1254 from entering the harbour through the interceptors. I am not satisfied from the evidence and from what I have said so far that the company exercised due diligence after the explosion to prevent the spillage of approximately 210 gallons of PCB 1254.

The next Defence raised is that the Crown has failed to prove the deposit of a deleterious substance, PCB 1254, or that the Crown has failed to prove that PCB 1254 is in fact a deleterious substance. Section 33(11) of the federal *Fisheries Act* defines deleterious:

> *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 deleterious to fish or to the use by man of fish that frequent that water.*

Defence counsel submits that the best way to prove whether PCB has any effect on fish, and in particular whether any PCB that may have been spilled into Porpoise Harbour had any effect on the fish in that harbour was to conduct a bio-assay of the fish. Defence counsel said that a bio-assay was not done by the Crown. The Defence counsel indicated that the Defendant company did their own test. They indicated that although there is no onus and should be no onus on the Defendant company, they did their own testing in an effort to help the court. They indicated that Dr. Vigers conducted a test with herring with PCB sediment at levels of 2.6 parts per million, 42 parts per million and one control sample over a period of 30 days. Defence took the position that results showed conclusively that PCB contaminated sediment with levels of up to 42 parts per million had no harmful effect on herring tested. Defence counsel also referred to evidence of Dr. Vigers that fathead minnows were known to survive in PCB water containing sediment with contamination levels of up to 500 parts per million over a period of 32 days. As I stated before, I find the test conducted by Dr. Vigers far from conclusive; in fact, I find it pretty inconclusive. The tests were conducted with herring that had PCB present in the fish to begin with, they were treated with contaminated food. The herring, it was admitted, were not bottom borders like the sole which was found in Porpoise Harbour itself. There was no effort that I am aware of trying to have this sediment used in the experiment similar to the sediment that existed at Porpoise Harbour -- that is, sediment with quite a bit of particulate matter to which it was alleged that PCB had a tendency to cling. The particulate matter you will recall was described by Ms. Garrett when she took a sample of the water and sediment and tried to get it to settle, -- water and sediment from Porpoise Harbour. There was no effort made, it seems to me in my respectful opinion to reproduce the type of activity that might exist and in fact does exist at Porpoise Harbour. There was no effort to refer to the food chain build-up that was referred to by Ms. Garrett. There was too much emphasis in my opinion on the mortality rate rather than the sub-lethal effects described so adequately by Ms. Garrett -- effects with respect to the hatchability of the fish, the thyroid activity, their inability to fend off predators. I accept Ms. Garrett's testimony that it is very

difficult to do laboratory experiments for the effects of PCB on fish. I accept her testimony that PCB is in fact deleterious in small amounts. In any event, Dr. Vigers who was called by Defence counsel admitted that PCB in tens of parts per million, PCB 1254, would be deleterious to fish. He further stated that levels of 2,025 parts per million and 3,000 parts per million would be deleterious to fish, although I must admit that he tempered that somewhat when under re-examination. These two levels were found just below the Southern Outfall in Porpoise Harbour by Messrs. Packman and Nelson. One could only imagine what effect levels of 8,554 parts per million would have on fish. There were samples taken by Mr. Ho and his technician of shellfish obtained 100 feet from the Southern Outfall and a quarter mile from the Southern Outfall. In my opinion they really established nothing except to establish that both these samples had no PCB present. It should be noted in this particular case that the grid system that was suggested by Defence counsel as a proper method of collecting sediment samples was not used. It may very well be that these shellfish were nowhere near the pool of PCB that was alleged to have been eventually deposited into Porpoise Harbour. There is also no indication as to when the shellfish came into the area. In any event, they established very little as to the effects of PCB 1254 on the fish generally found and in Porpoise Harbour in particular.

There was some reference as to whether tests should be done of fish in situ and whether any tests in any waters frequented by fish would be enough. This is quite an important point and perhaps I should refer to it. I realize that what His Honour Judge Cashman said and I realize what was said in the *Athabasca* case but I prefer the dicta of His Honour Judge Catliff in the case of *R. v. Imperial Oil Limited and British Columbia Hydro and Power Authority* unreported, B.C. Co. Ct., 20 November 1975. His Honour at page 10 of his decision had this to say:

> *The point as I understand it is that the words 'that water' in Section 33(11) have reference only to the water alleged to be degraded at the actual site of the spill. I do not consider the words 'that water' are to be so construed. In my view they refer to the words 'any water' earlier in the subsection. The words 'any water' would include the water at the site of a spill but are clearly not limited to it. The only qualifications to be attached to the words 'any water' is that such water must be proved to be frequented by fish. As I say, the water used by the Crown's expert in his experiments was water taken from Burrard Inlet which is water admittedly frequented by fish.*

I am satisfied in this case that no satisfactory tests were done. I am satisfied that in this particular case it was not possible to conduct the type of tests that could be conducted to show the full life cycle effects and to show the body burdens as was suggested Ms. Garrett. She suggested it was very, very difficult indeed, to conduct these tests. Because of the difficulty in doing these types of tests, I am satisfied that in this particular case I could rely on the opinions of the experts -- the readings, of the opinions of very many people who have done research in these fields and who have published papers, the papers that Ms. Garrett and Dr. Vigers have had access to.

The last Defence and perhaps the one that causes me the most concern is the Defence raised by Defence counsel that there is not sufficient evidence that PCB 1254 reached water frequented by fish. Defence counsel submitted that tests done by Messrs. Thompson and Sargent were meaningless in that they were not done in a very scientific manner. Defence counsel suggested that the destruction of the samples

before they had a chance to cross-examine on them certainly means that any results that were received, if accepted by the court, should be given very little weight indeed. Defence counsel indicated that the samples were not taken in a properly prepared bottle and in addition to that, Defence counsel claimed that there was sulfur present and that no effort was made to remove sulfur from the samples before they were tested, thus affecting the results. Defence counsel also dealt with the question of the Eckman Grab Sampler being used. An Eckman Grab Sampler which they submitted may have been used for other PCB related projects and may well have been contaminated. Defence counsel said that their independent tests (two tests) away from the alleged site of the spill, some distance away from the alleged spill, into the Southern Outfall in Porpoise Harbour showed that there was little or no PCB present in Porpoise Harbour. It showed that there was a reading of .10 parts per million of PCB which the Defence claimed was the normal type of PCB around any commercial plant. With the greatest respect to Defence counsel, however, I have already dealt with this matter on the No Evidence Motion. I have pointed out that it would have been better if the Crown had kept its samples, but the fact that they were destroyed really doesn't mean that the results of the sampling cannot be introduced into evidence. I have already ruled on the No Evidence Motion that the fact that the samples were not present or that all the samples were not present in court affects the weight to be attached to this evidence. I agree that little weight should be attached to the results. In any event, at least three of these samples were kept and introduced into evidence. At least three of these gas chromatograms were introduced by Mr. Thompson to show how or what his readings were and to show what sort of graphs he got as a result of the tests he conducted. As I pointed out before, Messrs. Thompson and Sargent indicated that there was no elemental sulfur present. In any event, if there were, it would have no effect on their readings. If I remember Dr. Hasman's evidence, he said when pressed about whether sulfur had to be removed he kept retreating to the answer, "I removed it in my sample. I decided to make it a practice in the lab that it be removed". In any event, Dr. Hasman pointed out that the presence of sulfur would affect the detectors and therefore make the gas chromatograph unable to pick up PCB, or it may affect the base line; but in any event he indicated that the presence of sulfur would show up in the gas chromatograph. Both Messrs. Thompson and Sargent pointed out that no sulfur showed up although under cross-examination Mr. Sargent indicated that there were no detectable signs of elemental sulfur present. In any event, this Defence argument about sulfur, while interesting, is really not that persuasive especially when I look at the facts in this particular case. I have to remember that in this particular case there is no doubt at all that there was an explosion. There is no doubt at all that approximately 210 gallons of PCB 1254 was spilled from the transformer. There is no doubt at all that approximately 210 gallons of PCB not only spilled out on the roof of Woodroom No. 3, but also went into the eaves of Woodroom No. 3, down the down spouts, into the interceptors, interceptors which flowed directly into the Southern Outfall in Porpoise Harbour. You would recall that the concentration of PCB 1254 from the transformer was 950,000 parts per million. There was no sulfur in that. You would recall that from the evidence there is no doubt that the PCB left the transformer and some of the PCB left this transformer and went right down into the interceptors. This was noticed on the 24th of January by Mr. Smart and other people. Even as late as the 27th of January large amounts of PCB were noticed in the sediment of the overflowing interceptors which flowed directly into Porpoise Harbour. Is there any wonder that readings similar to the readings found by Mr. Sargent were found in the sediment right below and immediately near to the pipe which flowed into the Southern Outfall into Porpoise Harbour. Is it any wonder

that the results of 8,554 parts per million and results of 2,025 parts per million and results of 3,725 parts per million were found in that setting? To hold that these results were erroneous is perhaps to defy the ordinary rules of common sense and logic. In my opinion, however, the readings were just icing on the cake from the Crown's point of view. There is almost an irresistable inference that the PCB 1254 which flowed from the roof into these interceptors did in fact go or flow directly into the sediment just below the Southern Outfall pipe. Mr. Gardner suggested that PCB is heavier than water and that's accepted. He said the dye test suggested that water or maybe dye would flow directly from the interceptors through the Southern Outfall pipe into Porpoise Harbour but it would likely not be the same with PCB. There was not however, only water in these interceptors on the 27th January, 1977. According to my recollection of the evidence, these interceptors were filled with sludge and sediment, and water. That the substance flowed directly from the interceptors to the harbour was evidenced from the personal observations of Mr. Hebron and the result of the water samples which were received by Mr. Hebron on the 30th of January, the 9th of March, 1977. In any event, I don't have to deal with the question of whether the sediment did in fact get into Porpoise Harbour, or whether that type of concentration got into Porpoise Harbour. I am satisfied from the evidence that when PCB 1254 reached the interceptors -- in an unadulterated form presumably after looking at EPS 14 and the results -- which flowed directly into the Southern Outfall into Porpoise Harbour it was certainly in a place under conditions where such deleterious substance may enter water frequented by fish. It is obvious that the deleterious material could have entered water frequented by fish because of the readings received from the water samples on the 30th of January, 1977, and the 9th of March, 1977.

I am satisfied after reviewing all the evidence, after sitting through almost 11 days of trial, after having a chance to assess the witnesses and assess the evidence, that the Crown has succeeded in establishing beyond a reasonable doubt that Count 6 has been made out. I find the accused guilty of Count 6. I have held before that the other charges in that group of four are in the alternative on the basis of *Regina v. Keinapple*. I'm not going to enter convictions with respect to the counts which are related to Count 5, 7 and 8.

I am not satisfied, however, that any deposit was made on the 21st of January, 1977. The evidence is quite clear that if there was a deposit, which I find there was in the interceptors, there was certainly a deposit from the 22nd of January onward. Count 6 would be amended to conform with the evidence and I find that there was permitted a deposit on the 22nd of January, 1977, to the 28th of January, 1977.

I have held before that the Information deals with four groups of four counts and I hold that with respect to Counts 9, 10, 11 and 12 which allege the deposit of a deleterious substance on the 30th of January, 1977, there is a doubt as to whether the sample or the reading received from that water sample was in fact deleterious or could in fact be deleterious to fish, although a reading of 1.45 parts per million would appear to be an extremely high reading if you listen to Ms. Garrett's testimony. I am not satisfied I have proof beyond a reasonable doubt that either of these counts have been made out, that is, Counts 9, 10, 11 and 12. As I said, there is a reasonable doubt and these counts will be dismissed.

With respect to Counts 13, 14, 15 and 16 which refer to another water sample on the 9th of March, 1977, the same applies and I am going to dismiss those Counts.

Again, with respect to the last set of Counts, Counts 17 to 20, which deal with the samples taken by Mr. McKenzie, I have already dealt with that in my review of the evidence. I have a doubt that these samples were properly taken and I have more than a doubt in any event, even if they were properly taken, that readings similar to .10 parts per million would in fact be deleterious to fish.

I find the accused guilty of Count 6. All the other counts are dismissed.

(SUBMISSIONS IN REGARD TO SENTENCE)

The accused has been convicted of Count 6. The amended Count 6 says that the company

> *At or near Prince Rupert, British Columbia, between the 22nd day of January, 1977 and the 28th day of January, 1977 did unlawfully permit the deposit of a deleterious substance, to wit: Polychlorinated Byphenil 1254, in a place under conditions where such deleterious substance may enter water frequented by fish, contrary to Section 33(2) of the Fisheries Act, R.S.C. 1970, C. F-14 and C. 17 (1st Supplement)"*

I am satisfied after taking into consideration the principles enunciated in *Canada Tungsten Mining Corporation Limited v. The Queen* with respect to sentence, after reading the other cases that deal with sentence of these types of offences, after hearing the submissions of Defence counsel and Crown counsel, after hearing the fact that the Defendent company has already spent $200,000.00 on clean-up of the spill, I am satisfied that a sentence should be imposed against the Defendant company of $3,500.00 per day — that is $3,500.00 for each day from the 22nd to the 28th of January, 1977, inclusive.

Note: The appeal is reported at page 256.

REGINA v. AMERICAN CAN OF CANADA LIMITED

Ontario Provincial Court, Thunder Bay, Duthie, J., April 4, 1977

Environmental law — Water pollution — Sentence — Pollution of waters by mercury — Circumstances not justifying maximum penalty — Four thousand dollar fine — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused plead guilty to sixteen counts of violating s. 33(2) of the Fisheries Act which resulted in the pollution by mercury of a harbour adjacent to its plant.

Held, the fine of four thousand dollars was levied against the accused on each count. While company was at times negligent and indifferent to the consequences of its actions, it had also taken some positive steps to control the pollution. The plea of guilty and the absence of previous convictions were factors which could mitigate sentence, even though the damage was quite extensive. Accordingly, the objectives of deterrence and the protection of society could be met by less than the maximum penalty.

Cyprus Anvil Mining Corporation Limited v. The Queen, unreported, Y.T.S.C., March 26, 1976; refd to.

L. McCaffery, for the Crown.
J. Brown, for the Accused

Duthie, J.:--Yes, this has caused difficulty in the past in sentencing on matters concerning the environment. This is illustrated by one of the cases that you quoted, Cyprus Anvil Mining Corporation. There seems to be a feeling among many members of the public, that fines in cases of this nature are too low, and that large multi national corporations can afford large amounts of money by way of fines, and that, therefore, maximum fines should be imposed, somehow to make up for the presumed deficiency in the maximum amount permitted by Legislation.

The cases quoted by the Crown today illustrate the manner in which various courts rationalized why maximum fines should be imposed in this type of situation. While impressive, I do not wish to forget other important principles of sentencing the purposes of which, first of all, are to protect all members of our society. In the case of a fine, as with all other penalties, one of the main objectives is of course deterrence. Now I would be naive to think that the accused corporation in this case is not in a good financial position. Maybe I should say, I would be surprised if it was not. I think therefore, that to be a deterrence, the fine has to be substantial enough to make an impression on this and other offending companies, or potential offenders.

On the other hand, there must be justification for imposing a penalty in the maximum amount allowed by law. The offence must, I feel, be one indicative of very substantial lawlessness or extremely wrongful circumstances. Therefore, there are other factors that have to be considered.

Mr. Brown speaks of there being no "flagrant violations" while Mrs. McCaffery quotes the company's wrong doing as "open and defiant." I think neither of those

descriptions is appropriate in this case. Perhaps "open", yes. But I wonder if there was "defiance" here, I really haven't recognized evidence in the summary which would illustrate "defiance". I think perhaps I have seen indications of neglect and even indifference at times. However I think I have also seen spurts of endeavour from the company from time to time, granted perhaps more so when pressure from the Ministry was applied, to attempt to employ the recommended devices necessary for filtering out the deleterious substances.

The company certainly did not sit back and do nothing. Certain procedural recommendations were implemented. Subsequently however, most were abandoned. Mr. Brown says one of the reasons for this was that the procedures themselves were at times found to be unsatisfactory or unworkable. We find for example, a holding tank being used for a purpose completely unrelated to prevention of the pollution for which it was originally intended. We find a centrifuge not working according to Mr. Brown, because the substance was, and I don't recall the exact word used, but it was to the effect that the substance was too heavy for the machine to handle. These are indications to me that the company made attempts to overcome the problems although I think they could have made stronger attempts or been more persistent. I believe the Order issued by Mr. Pitura in April, 1976, which advised the company that if the Ministry requirements were not met that it would be required to cease production, was a catalyst, if I may be allowed to borrow that term from the chemical discussions we've had today, which caused the company only then to appreciate how seriously its violations were being considered. In any event, that obviously was an effective procedure by the Ministry which caused the company to realize at that stage that the Ministry was no longer going to act in a spirit of co-operation with the company, if in fact the company had been under this impression earlier.

But I certainly don't get the impression from the evidence that there was anything like a constant battle going on between the Ministry officials and this company trying to get it to clean up its act. This impression I do get, as I said, is possibly that of neglect in pursuing vigorously the Ministry's suggestions and recommendations. But certainly, there was no flagrant disobedience of recommendations, nor violations in a way that would seem designed to dare the Ministry to take action. I can't see that from any of the evidence before the Court.

Now, examining the harmful effects of this substance in the case before the Court, I do not have sufficient evidence to accurately conclude just what are the permanent long term effects of mercury pollution, if I may use that phrase. However, I certainly am of the impression that they are not beneficial.

There was a brief submission concerning Minamata and problems that have occurred in other countries because of alleged related polluting activities but I don't think I can apply that to our situation here.

The size of the polluted Bay, or Peninsula Harbour as it's designated on the map, would seem to be about two miles by three miles. So say about six square miles in area. A fairly good sized harbour. The Crown's submissions are that the fish life in this harbour is no longer any good and the human community surrounding Peninsula Harbour can no longer safely use the fish or animal life from the waters for food because of the levels of the mercury found in the various areas in Peninsula Harbour where tests were taken.

I find that that would be a fairly acceptable submission, at least with present knowledge. I think it certainly would be advisable if people avoided eating the products of that harbour, if only to the extent that Mrs. McCaffery mentioned, that is, the Government suggested safe levels. I cannot find however, that there are any harmful effects to anybody at this time. Mrs. McCaffery suggests that it's impossible to put a price on damage done to the harbour. With that I agree. To try and figure out just what in dollar value would be the cost of such treatment of the harbour would be a monumental task.

This Court, fortunately at this time, does not have to try and calculate that. The company has, as Mr. Brown pointed out, entered pleas of guilty to the charges. I think that in itself is an indication of the present attitude of the company. It's prepared, it seems, to take its penalty because of its breaches of the *Act*, and comes before the Court without contesting the charges, ready to admit that it did wrong. Indications are that the matter will soon be finally cleared up because of the proposed closing of the offending plant before long, and the product being obtained instead from another source. Certainly these are matters to be considered.

Another important element to be considered is the fact that there have been no previous offences of this nature charged against this company or in any event no convictions entered.

Again, in regard to the amount of the fines, considering that there are increases of the maximum amount in the offing, the penalties in the future may be much more significant to companies convicted of pollution offences. At the present time however, the legislation with which we are dealing limits the maximum fine to $5,000.00. Any quarrel then with that maximum has to be taken up with the legislature, the governing body which defines these limits. I think to consider what they might be in the future as any basis for a penalty at the present time is wrong. I think as far as we are concerned I have to consider the legislation that is in effect now and not something that may, or may not, be passed at some other time.

I will then take into consideration all these matters, including the important fact that the company as I said, for the most part, did try to meet the requirements, although it lacked the endeavour necessary to achieve Ministry specifications.

Possibly a further matter that might be considered is the prominence now in realization of the importance of preventing pollution of the natural environment.

Thankfully, governing agencies and the public seem to be awakened to the fact that our resources are rapidly being depleted both by consumption and by pollution, and I think we are faced with having to consider that almost daily. We're becoming more cognizant of these facts, which even two or three years ago, were not in the minds of many people as important as they are now. This may have been the cause in the past of seeming indifference in the attitude of companies to responsibilities in regard to the environment. However, this, thankfully, is changing now. I believe work done by government environmental agencies and interested public groups is certainly benefitting everyone. There is more awareness, I believe, as to the value of our resources and how necessary it is to protect them. Had the present day attitude been in existence only a few years earlier, we would likely be in a much better

environmental position today. Now we are faced with serious problems which hopefully may still be corrected. It certainly seems to have been in this instance.

Although I suppose that we always have to have, as Mrs. McCaffery points out, a certain amount of tolerance for pollution, because without it, certain types of industries cannot exist, nevertheless, hopefully technology will be developed to the point that sometime in the near future that tolerance need only be minimal. That may be just wishful thinking.

Based on all the circumstances then, there will be a conviction registered against the company on all the counts with which it was charged, the total of sixteen. In regard to the fines, I do not feel, for the reasons I have expressed, that the maximum amounts are appropriate in this case. However, I do think they should be significant so that it will clearly signify that the Court cannot and will not tolerate pollution of the waters or any part of our environment.

Therefore, I deem the proper amount of each fine to be in the amount of $4,000.00 which I now levy against the accused on each of these counts.

REGINA v. McINTYRE MINES LTD., UNDERWOOD McLELLAN ASSOCIATES LTD., AND WAGRO CONSTRUCTION (1969) LTD.

Provincial Court of Alberta, Porter, J., January 12, 1978

Waters and watercourses -- Permitting debris to be put in creek -- Sand and silt not debris -- Defendants not engaged in coal mining or logging operations -- No unlawful diversion of waters -- The Fisheries Act, R.S.C. 1970, c. F-14, s. 33 am. 1970, c. 17 (1st Supp.), s. 3(2) -- The Water Resources Act, R.S.A. 1970, c. 388.

The defendant McIntyre had contracted with the other two defendants to build a coal haul road. During the course of construction, unduly heavy rainfall occurred and as a result of the operations a large quantity of mud flowed into a pond and thence into a creek where fish were found. The defendants were charged with knowingly allowing debris to be put into a creek where fish were to be found (*Fisheries Act*) and unlawfully diverting the flow of the water (*Alberta Water Resources Act*).

Held, the defendants were found not guilty of the charges. The defendants were not, in constructing the road, engaged in coal mining operations, even though one of the defendants was in fact carrying on mining operations in the area. Nor were they involved in "logging, lumbering or land clearing". Road construction could not be considered in the category of logging, lumbering or land clearing, nor did it come within the meaning of "other operations" in s. 33(3) of the *Fisheries Act*. The only evidence of foreign substance in the water was of mud or silt, which did not amount to "debris". The defendants, through carelessness, could be taken to have "knowingly" permitted the damage to be caused.

Second Judgment: While there was, technically, a division of the stream by the introduction of the mud, the tenor of the Water Resources Act was concerned with diversions or undertakings having a serious effect on the stream or watercourse, and an offence of that magnitude was not involved in this instance.

Johnston v. Can. Credit Men's Trust Assn., [1932] S.C.R. 219, 58 C.C.C. 1, [1932] 2 D.L.R. 462; *Thames & Mersey Marine Insur. Co. Ltd. v. Hamilton, Fraser & Co.* [1887], 12 App. Cas. 484 (H.L.) referred to.

R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591 followed.

(Headnote from (1978), 5 Alta. L.R. 201.)

D.W. Kilgour, for the Crown
B. Thompson, D. Thomas, for the Defence

Porter,J.:(Re: *Fisheries Act*)--McIntyre Mines Ltd., (McIntyre, Underwood McLellan Associates Ltd., (Underwood), and Wagro Construction (1969) Ltd., (Wagro), are jointly charged as follows:

that they *on or about the 25th day of July, A.D. 1977, near Grande Cache, in the Province of Alberta did, being persons engaged in coal mining operations, knowingly permit to be put debris into a water frequented by fish, namely the Sheep Creek, contrary to section 33(3) of the Fisheries Act as amended to date.*

The following are issues arising:

1. a) Was McIntyre engaged in any coal mining operations relevant to the charge before the Court.

   b) If not, was McIntyre engaged in a "road construction operation".

   c) If so, should the Information be amended under s. 732 of the Criminal Code, to conform to the evidence.

2. a) Was Underwood engaged in any coal mining operations relevant to the charge before the Court.

   b) If not, was Underwood engaged in a "road construction operation".

   c) If so, should the Information be amended under s. 732 of the Criminal Code to conform with the evidence.

3. a) Was Wagro engaged in any coal mining operations relevant to the charge before the Court.

   b) If not, was Wagro engaged in a "road construction operation".

   c) If so, should the Information be amended under s. 732 of the Criminal Code to conform with the evidence.

4. Can, by virtue of the fact that each of the accused companies was engaged in a "road construction operation", any or all of them be said to be engaged in "logging, lumbering, land clearing or other operations" as set out in s. 33(3) of the *Fisheries Act* having regard to the *ejusdem generis* rule.

5. Was the substance which entered Sheep Creek debris.

6. Is this an offence of strict liability and what import is to be given to the word "knowingly".

7. What is the relationship of each company to the others and are any of them agents or employees of any other.

8. Did any of the accused "knowingly permit to be put" anything into the waters of Sheep Creek.

9. If the answer to "8" is yes, can any of the companies avail themselves of subsection 33(8) of the *Fisheries Act*.

10. Are the waters of Sheep Creek at the point in question frequented by fish.

Turning now to the evidence, I might say at the outset that it was a pleasure to listen to the witnesses for both sides. It was one of those cases where the basic facts were not greatly in dispute and the Court heard a number of witnesses for both sides, all of whom appeared most professional in their chosen fields and gave honest and forthright evidence. The consequences flowing from that evidence and the legal implications thereof are somewhat more complex.

I make the following findings of fact:

It was alleged as a fact by the Crown and admitted by the Defence that on the 22nd of December 1977, each of the defendant companies was a body corporate registered to carry on business in the Province of Alberta.

It did not appear to be alleged that this was the case on the 25th July 1977, the relevant date, but this has not been raised as an issue by the defence and it would be a reasonable inference to draw from the evidence that this situation prevailed on the 25th July 1977 and I now draw that inference, particularly as the parties have indicated they want a decision on the merits.

Secondly, it was alleged as a fact by the Crown that McIntyre on the 25th July 1977 was a person engaged in coal mining operations and carried on such activities on that date at a point in Alberta near Grande Cache, Alberta.

In the summer of 1977, McIntyre contracted with Underwood to design, survey, provide inspection services and supervise the construction of a coal haul road, in the region of its coal mining activities. The work on site was physically undertaken by an Underwood employee named Brian Morel.

McIntyre entered into a second contract in the summer of 1977 with Wagro to construct the said road under the supervision of Underwood. The foreman for Wagro was the witness Piercey.

McIntyre was to have no direct involvement in the construction unless there was additional expense to be incurred when their Chief Engineer, a Mr. Wright, was to be consulted.

At the scene in question, there was a fairly steep slope leading at the bottom to a stream of water called Sheep Creek. At the top of the relevant part of this slope was a pond referred to as Reiff Terrace Mine Pad Pond. This is marked "A" on the Plan Exhibit 3 and I will refer to it as pond A. The purpose of pond A appeared to be to act as a reservoir for water pumped out of an adjacent mine. The water was fairly clean and was recycled to be used for washing and bathing by the miners. This was a large body of water.

A little below pond A down the slope was the upper part of the coal haul road referred to in the evidence as the upper road. The road descended in a Westerly direction for approximately a quarter of a mile, made a hairpin turn to the east and passed back along the slope below the upper road and pond A. This was called the

lower road. The upper road passed directly by pond A and the road appeared to originally form part of the bank to the pond.

Through the lower road directly underneath pond A was a culvert which appeared to service a natural water course flowing down the slope. Into this water course flowed water from the adjacent slopes and of particular relevance from a nearby disused, open pit mine taking with it any coal dust, sludge, mud or other sediment. This water passed through the culvert and followed another natural water course to a pond marked B on Plan Exhibit 3. This pond, somewhat smaller than pond A, was called a settling pond. Its purpose was to collect the water coming down the slope via the water course, allowing any sediment to settle out to the bottom and any excess clean water would pass over a dam at the far side and continue down the water course where it entered Sheep Creek at a point marked C on Plan Exhibit 3.

This arrangement I find was a perfectly satisfactory and acceptable way of dealing with the situation in the absence of any complications. Complications, however, developed. As a result of the inclement weather and particularly a heavy rainfall on and around 11th July, a segment of the upper road adjacent to pond A slipped, resulting in a considerable quantity of mud and gravel falling into the top of the water course at point S on plan Exhibit 3. This, over the next few days, moved to the lower road at point M and blocked the culvert.

This slide was inspected by Mr. Morel and he concluded that there was a compaction problem. He spoke with Mr. Wright and suggested that the water in pond A be lowered by means of first creating a coffer dam above the road, installing a culvert through the road, and thereafter lowering the coffer dam by six feet so the water could flow through the culvert. This would then enable the road itself to be lowered by six feet. Mr. Wright was consulted as this would involve additional expense. He agreed with the proposal and authorised it subject to the rider that the coffer dam was not to be lowered by more than six inches per hour which would provide for a maximum outflow of 1,000 gallons per minute. The design capacity of the settling pond B was to receive no more than 2,800 gallons per minute and there was thus an acceptable tolerance to allow the water to settle out before it went over the dam to Sheep Creek. Mr. Wright advised Mr. Morel of this. The lowering of the coffer dam was commenced on Saturday the 23rd July 1977 by Wagro employees. Mr. Piercey indicated that he was told by Mr. Morel not to lower the dam more than six inches per hour which instructions he followed. Mr. Morel indicates that the dam was lowered one foot on Saturday. Mr. Piercey said two feet. The remainder was lowered on Sunday. I am perfectly satisfied that Mr. Wright's instructions were followed in this respect on both Saturday and Sunday.

Brian Morel saw the water disappear down the water course at the point at which it crossed both the upper and lower roads. He authorized the cutting of a trench across the lower road as the culvert was blocked. He did not concern himself with where the water was going and knew not if there was any water already in pond B. The trench was cut by Piercey on Sunday, 24th July at which time he attempted to separate the mud from the water and retain the mud above the road. Until the trench was cut, most of the water and mud had travelled along the upper part of the lower road in an easterly direction to a point or points unknown. A small amount of water had crossed the road itself. Piercey did not inspect pond B thereafter. Wright was of the opinion and I am satisfied of this as a fact that if the road had not been cut, the mud would

not have reached pond B. At some stage McIntyre employees cleaned out the culvert but it was not clear to me from the evidence whether this was before or after 24th July and I make no finding in this respect.

On Monday, 25th July, Forestry Officer Sitar inspected pond B among other things and observed a large amount of mud forming on a third of the pond on the side where the water entered and voluminous quantities of muddy water going over and around the dam down the water course to Sheep Creek. He followed the water course down to the creek, observed fresh mud along the water course sides and muddy water entering Sheep Creek. I find the explanation for this to be that the water flowing out of pond A on Sunday 24th July had so saturated the mud slide between points S-M overnight that mud itself slid across the trench on the lower road down the water course into pond B thereby considerably reducing the capacity of pond B and causing the same to overflow muddy water which had not settled out.

Officer Sitar took samples of water from various points. At a point twenty yards upstream from point C the sample taken and later analysed contained 171 milligrams of suspended solids per litre. The sample taken at point C where the water from the water course was leading into Sheep Creek, contained 863,460 milligrams of suspended solids per litre. This clearly indicated an introduction of a foreign substance to Sheep Creek although the quantity by volume on account of diverse densities would be considerably less than 80% and in the region of 30% according to the evidence of the defence expert witness Neill. I accept his evidence on this point. A sample of water was taken by the witness Wright on the 25th July one mile downstream. This was analysed by an employee of McIntyre in a correct fashion and was found to contain 11 milligrams of suspended solids in one litre. This confirms the evidence of the witness Neill that the mud introduced into the water should quickly disperse in such a turbulent stream of water.

At point C there was a small delta formed by water emerging from the water course. A thin layer of mud covered the rocks on the shore line and some discolouration of water took place. There was speculation by Mr. Neill that some of this may be a quantity of solid mud and although he could not say for sure from the photographs, if it was solid, it would eventually be washed away and would have, if any, a pretty minimal effect on the flow of water in the stream. The delta was not unlike many to be found up and down a stream of this kind and they, according to Mr. Neill, tend to change their nature according to the height of water and rate of flow each year. Mr. Neill described various sediments ranging from fine to coarse as follows:

Clay
Silt
Sand 1-2 mls in diameter
Gravel 2-60 mls in diameter
Cobbles 60 - 200 mls in diameter
Boulders over 200 mls in diameter

Silt and clay would quickly be washed away upon introduction to a stream. He examined the sample taken at point C by Officer Sitar and was of the opinion that it was nearly all silt with a small fraction of very fine sand. He indicated it was consistent with the slurry or sludge that entered pond B. I accept his opinion.

Whilst not binding on this Court, he gave evidence of how the word "debris" is considered in the scientific world. He said the use was not always consistent. It was used by some geologists to mean any break down in the earth's crust. It was more commonly used for more coarse material, such as cobbles, rocks, gravel and extraneous material such as logs and rubbish. He would not personally in a scientific sense call silt and sand "debris".

Constable Olansky of the R.C.M.P. gave evidence that he had caught two fish, a little above point C on Sheep Creek in July 1977. Officer Sitar had once seen a flash in the water which he thought was a fish.

After the discovery of the running of the muddy water into Sheep Creek, I find that all reasonable steps were taken by and on behalf of each accused to bring the flow to a halt.

At no time is there any evidence of any leaves, bark, wood, trees, or organic material flowing from the site of operations into Sheep Creek.

I turn now to rule on the issues I have enumerated above:

1. a) Clearly, McIntyre was carrying on coal mining operations. That was admitted. Can it, however, with relevance to the charge, be said to be carrying on such operations when contracting for the construction of a road or did the involvement of its Chief Engineer Wright in authorizing the reduction of the coffer dam amount of "engaging in coal mining operations"? I think not. It cannot be said that because that was its principal business in the area that every thing done by any employee or agent of the company is an act of "engaging in coal mining operations". To so hold would lead to ridiculous results. I therefore hold that with relevance to the charge before the Court, McIntyre was not carrying on coal mining operations and any such operations carried on by them were irrelevant to the charge.

   b) McIntyre contracted for the construction of the coal haul road with an independent contractor. It reserved to itself the right to approve any alterations or additions to the original plan involving additional expense. By the involvement of Engineer Wright in authorizing the additional work, I find it was "engaged in road construction operations".

   c) The parties have argued the case on the merits and have indicated they want a decision on that basis. I do not think the accused McIntyre would be prejudiced or misled by amendment of the information by deleting from the charge the words "coal mining operations" and substituting therefore the words "road construction operations". I now accordingly make said amendments relative to McIntyre.

2. a) The Crown has argued that because McIntyre were involved in coal mining operations and required a road constructed for that purpose, the engineers who designed the road were engaged themselves in coal

mining operations. I find this a most tenuous argument and reject it out of hand. I find that Underwood was engaged in a "road construction operation" and not a "coal mining operation".

b) Quite obviously Underwood was engaged in a "road construction operation".

c) For the same reasons as those comprised in 1(b) I now amend the Information as it relates to Underwood and in the same manner.

3. a) For the same reasons as those expressed in 2(a), I find Wagro were not involved in coal mining operations.

b) Quite clearly, Wagro were engaged in a "road construction operation".

c) For the same reasons as those expressed in 1(c), I now amend the Information as it relates to Wagro and in the same manner.

4. The argument of each of the defendants of fairly simple and in this respect, it applies also to the issues raised in issue 5. Put simply, the argument is that "road construction" is not of the same *genus* or class as "logging, lumbering and land clearing", all of which involve the cutting and removal of trees. I was referred in a short written brief to a number of cases which I have considered, with the exception of case 9 involving the Town of Stony Plain, this case apparently being under appeal. I was also referred to Driedger on Literary Context and Maxwell on the Interpretation of Statutes.

It was said by Duff J. in *Johnston v. Canadian Credit Men's Trust*, Assn. [1932] S.C.R. 219 at 220, 58 C.C.C. 1, [1932] 2 D.L.R.462:

> *The rule is a working rule of construction which, properly applied, is of assistance in elucidating the intention of the legislature; although there is too much reason to think that sometimes the result of applying it has been to override that intention.*

The rule expressed by Lord Halsbury in *Thames & Mersey Marine Insurance Co. Ltd. v. Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484 (H.L.) is [p. 490] :

> *that general words may be restricted to the same genus as the specific words that precede them.*

In considering the words "other operations" in relation to "logging, lumbering and land clearing" it is appropriate to consider the substance in the section expressed to be the result of such operations, namely "slash, stumps or other debris" again denoting the concept of fallen trees.

I must consider whether Parliament intended that the general words "other operations" and "other debris" should be given a broader significance than

simply being confined to the specific genus of the preceding words and to this end consider the general scope and purview of the *Act*. Such considerations of s. 33(2) [re-en 1970, C. 17 (1st Supp.), s 3(1)] of the *Act* reinforces the defence submission as that section clearly excludes any application of the *eiusdem generis* rule by the words

> *whether the same is of a like character to the substance named in this section or not".*

[Ed. note: The fact that these words were removed from the section by the 1970 re-enactment was brought to Porter Prov. J.'s attention; however, he indicated that the change would not have affected the final disposition of the case.]

Such a phrase does not appear in subsections (1) or (3) of s. 33. Subsection 33(2) therefore widens the net to cover any substance whatsoever but then confines it to a substance that is "deleterious to fish". Subsection (1) which relates to the remains of fish and subsection (3) relating to trees and lumber do not place upon the Crown the onus of establishing harm to fish as does subsection (2). Thus the Crown has an easier burden in a prosecution under subsection (1) and subsection (3) and if the words "other operations" or "other debris" were to be interpreted to mean anything, subsection (2) would be entirely superfluous. I can come to no other conclusion but that Parliament intended dead and decaying fish and the products of removing trees from land to be kept out of water frequented by fish regardless of any harm it may do to fish; and any other substance, whatever it may be, would not be prohibited unless harmful to fish.

The interpretation of "other operations" as subsection (3) must therefore be confined to its *genus* that is to operations involving the cutting and removal of trees, shrub and bush from land. If Parliament intended to include building and engineering, it would surely have done so.

Whilst there was some suggestion that some trees had been cleared prior to the construction of the road, such clearing had no relevance to the events leading up to the charge before the Court and I do not take them into consideration. I find the "road construction" being undertaken by the accused companies does not amount to "other operations" within the meaning of that word in section 33(3) of the *Fisheries Act*.

5. For similar reasons, I find that the sediment of clay and sand found in the water running into Sheep Creek did not amount to "other debris" within the meaning of that word. Whilst I would not go so far as defence counsel would urge me and hold that only organic material could be contemplated by this term, the substance must have some connection with "stumps, slash, trees or logs", albeit the dirt and gravel attached to the roots for example. There is nothing to demonstrate any such connection in the evidence before me but rather the evidence is to the contrary.

Even if not confined in this manner by the *ejusdem generis* rule, I would find that the suspended solids in the water in question did not amount to debris. Whilst it is not binding upon me, I am inclined to adopt Mr. Neill's scientific view of debris as being somewhat different to a mud flow and

more of the nature of extraneous material of a coarse nature which would not dissipate quickly in water.

In the Shorter Oxford English Dictionary, "debris" is shown to come from the french word "debriser" meaning to break down or break up. It is said to be the remains of anything broken down and destroyed and in geology any accumulation arising from the waste of rocks; hence any similar rubbish formed by destructive operations.

For these reasons, I find the sediment of sand and clay in question was not debris.

6. Various authorities cited to me by counsel and contained in the Environment Canada binder are conflicting. I have re-read the case of *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, and take particular note of the words of Mr. Justice Ritchie at page 600 when he says:

> *In considering the language of the Regulation, s. 3(1)(b) it is signficant, though not conclusive, that it contains no such words as "knowingly", "wilfully", "with intent", or "without lawful excuse", whereas such words occur in a number of sections of the Fisheries Act itself which create offences for which mens rea is made an essental ingredient.*

This leads me to the conclusion that in using the words "knowingly permit to be put" Parliament intended when the accused was not the actual person "putting" an element of knowledge and *mens rea* to be present. Why else would Parliament include the word "knowingly". Thus it would seem the offence can be committed in one of three ways:

a) actually putting.
b) deliberately allowing or instructing to be put.
c) being recklessly careless as whether or not it was put.

This interpretation is borne out particularly in the case of a corporation by subsection (8) of the section relating to offences committed by an agent or employee of an accused:

> *In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.*

I hold, therefore, that the offence is not one of strict liability in respect of any of the accused, but the knowlegde and *mens rea* may be imputed to the company if the employee of the company charged with the responsibility on behalf of the company is in the exercise of that responsibility guilty as in

a), b) or c). For example, if X is employed by Y company to carry out certain work and is given an area of responsibility and discretion and he acts in a manner whereby he

a) deliberately does an act prohibited by law.

b) deliberately allows or instructs such act to be done
or

c) is recklessly careless whether or not such an act is done.

all within the scope of his employment, the *mens rea* is attached to the Company unless it can avail itself of the provisions of subsection (8): (see *R. v. Temperman and Sons Ltd.*, [*1968*] *2 O.R. 174*, [*1968*] *4 C.C.C. 67 (C.A.)*; 4., and the House of Lords in *Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153 at 171, [1971] 2 All E.R. 127, 5 N.Z.L.R. 357.

7. The contracts between McIntyre and Underwood and between McIntyre and Wagro were not placed before the Court and it is therefore hard to decide the exact relationships.

Wright was clearly an employee of McIntyre.

Morel was clearly an employee of Underwood and although it is apparent that the latter company was to supervise the construction of the road, Morel, who was a Crown witness, said he had no authority to give orders to Wagro but simply make suggestions and work things out by way of discussion.

Piercey was an employee of Wagro.

Wagro was an independent contractor and not an employee or agent of McIntyre or Underwood.

Underwood was clearly not an employee of McIntyre but was it an agent? It is apparent that to the extent that its contract was to design and survey, it would clearly be an independent contractor. According to Mr. Morel, he had no authority to instruct Wagro but he was the liaison between McIntyre and Wagro and to this extent, acted on behalf of McIntyre in passing on any instructions concerning additional work to be done. I find therefore that Underwood was acting as an agent of McIntyre in instructing Wagro to lower the coffer dam and release the water.

8. McIntyre, by virtue of subsection (8) is liable for the wrongful actions, if any, of Engineer Wright, and its agent Underwood. Underwood is responsible similarly for Morel and Wagro is responsible for Piercey. I am satisfied that the intent of Wright was to allow only clean settled water to pass into the Creek from Pond B and, to this extent, he gave proper instructions to Morel. It is not clear and I have a doubt in my mind as to whether or not Morel explained to Wright the full effect of the slide from the embankment of the road. Not being satisfied of this beyond a

reasonable doubt, I proceed on the basis that he was not told. I find therefore that Wright did not knowingly allow the sediment to pass into Sheep Creek, nor was he recklessly careless whether it so passed or not.

Morel was told by Wright of the existence of the settling pond B, knew of the mud slide from the road and that it was proceeding across the lower road particularly when the trench was cut. He made no effort to inspect pond B, advise Engineer Wright or to prevent the continuation of the mud down the hill. To this extent, Underwood are fixed with the knowledge and actions of their employee and McIntyre of their agent unless they can avail themselves of subsection (8).

There is no evidence that Wagro was informed, even of the existence of the settling pond by Morel and thus had no knowledge of that pond. Piercey had some knowledge of the mud and water proceeding down the slope but did not know where it went and made no enquiry. To this extent despite his efforts to separate mud from water, I found he was recklessly careless as to whether or not the mud went to the creek at the bottom of the slope and Wagro are responsible for his actions unless they avail themselves to subsection (8).

Thus the answers to the questions posed are:

Underwood "knowingly did permit"
Wagro "knowingly did permit"
McIntyre "knowingly did permit"

9. I am satisfied that the actions of Engineer Wright were most prudent in the given circumstances and that McIntyre has accordingly established that the offence was committed without its knowledge and that it exercised all due diligence to prevent its commission.

With regard to Underwood, in view of my findings regarding the conduct of Morel in ignoring where the mud was going, failing to advise Wright and not even bothering to aquaint himself with the effect of the mud on the settling pond, I cannot come to the conclusion that Underwood acted with due diligence.

For similar reasons regarding Wagro and Mr. Piercey's conduct in ignoring where the sludge was going, I cannot say that Wagro acted with due diligence.

10. Yes - I accept Constable Olansky's evidence in respect of this.

For the reasons given, I find each of the companies not guilty of the charge.

Porter Prov. J.:(Re; *Alberta Water Resources Act*)--The three defendant companies in this judgment called McIntyre, Underwood and Wagro respectively, were jointly charged at the outset as follows:

That they "on or about the 25th day of July, A.D. 1977, near Grande Cache, in the Province of Alberta did divert water, namely, the Sheep Creek, by permitting the deposit of material which did interfere with the flow of the water in the same watercourse, except under the authority of the Water Resources Act, its regulations or a licence, interim licence or permit issued under the said Act, contrary to s 6(1) of the aforesaid Act as amended to date."

The wording of this information appeared somewhat duplicitous in that it first charged diversion of water clearly under s 6(1) re-en. 1971, c. 113, s. 4; am. 1975 (2nd Sess.), c. 88, s. 6(a) of the Water Resources Act, R.S.A. 1970, c. 388, and then proceeded to make reference to "interference with the flow of water", words which did not come within the definition of "divert" and were similar to the wording in subs. 6(1)(e). The Crown, when asked to particularize their charge, indicated that it was intended to proceed under s. 6(1) on a charge of diversion and that the words "which did interfere with the flow of water" were surplusage and could be deleted. The defendants, through their respective counsel, agreed with this course of action and the words were accordingly struck out. The charge as amended then read as follows:

That they "on or about the 25th day of July, A.D. 1977, near Grande Cache in the Province of Alberta did divert water, namely, the Sheep Creek, by permitting the deposit of material, in the same watercourse, except under the authority of the Water Resources Act, its regulations or a licence, interim licence or permit issued under the said Act, contrary to s. 6(1) of the aforesaid Act as amended to date."

The evidence in this trial consisted of all the evidence in the trial under the Fisheries Act, R.S.C. 1970, c. F-14, being read into the record by agreement, and I make the same findings of fact. In addition, the witness Neill was called by the defence. He dealt with his understanding of the term "flow of water" which I found most helpful. He indicated that anything introduced across a stream of water would increase the velocity in the other parts of the cross-section of the stream. He was unable to say how far, if at all, the delta extended into the stream or how deep it was. At the worst, from what he could see in the photographs, he was of the opinion that any effect in the rate of velocity or the distribution of velocity of the water would be pretty insignificant. That side of the stream being very much shallower than the far side, he was of the view that even if 20 per cent in area of the shallow side was cut off the effect on the velocity would not be that great. He agreed that if the delta had any depth it would have some effect on the distribution of flow. He indicated again that these deltas constantly change naturally.

The word "divert" has three meanings under s. 2(1)6(ii) [re-en. 1971, c. 113, s. 2] of the Act: to do any act that has the effect of, (a) altering the flow of water; (b) changing the location of water; (c) changing the course of flow of water.

Item (a) obviously applies to the rate of flow of the water and I am quite satisfied that nothing here by way of the defendant companies changed a set quantity of water passing down Sheep Creek in a set time.

Regarding item (b), quite clearly the location of the watercourse was not changed.

Item (c) must refer to the physical path of the water along the same watercourse, i.e., the distribution of the velocity across the stream, and is perhaps best explained by an example. If a brick wall were built three-quarters of the way across the stream, then there would be a greater and faster flow rate through the remaining quarter and nothing through the three-quarters. Thus, the geography of the flow would change.

In order for the Crown to succeed under item (c) alone, they must establish beyond a reasonable doubt that the course of the water flow was "changed". To do this, the Crown would have to do one of two things: (i) show what was there before and after the event; or (ii) show quite clearly the introduction of something which quite obviously from the evidence was not there before and which had the effect of change.

The Crown clearly, as Mr. Thompson urged in argument, has not succeeded in showing what the situation was before. There was no such evidence, as nobody inspected it before.

It is obvious that some mud, consisting of silt and sand, was introduced which was not there before. The court cannot however come anywhere near to the conclusion, let alone be satisfied beyond a reasonable doubt, that such introduction of mud obviously had the effect of change. At best, there was speculation as to what this mud did when it entered Sheep Creek, Mr. Neill's evidence being based to a great extent on hypothetical questions. He repeated more than once that he could not tell whether the muddy colour in the photographs at point C was solid or just floating in the water. None of the other witnesses were of any greater help in this respect. At best the court might speculate that a small part of the mud or sludge was sitting on the bottom of the stream bed and frankly I am not prepared to speculate in that manner and find that I am not satisfied that any of the mud entered the water and reamined in a solid enough state to obviously effect change.

Even if I had come to a contrary conclusion, namely, that the whole of the brown area in the stream at point C was solid sludge, I would consider the provisions of the "de minimis non curat lex" rule. Mr. Kilgour conceded that, on the basis of Mr. Neill's evidence, the holding of a stick or piece of wood in the water would alter the course of the flow and that this would be covered by the rule. It is a question of where the line is to be drawn. In considering the delict aimed at by the Act, one cannot but come to the conclusion that it deals with the development, conservation and management of water in the province and the issue of permits and licences to those who seek by building, engineering or otherwise to interfere with such. Section 6(3) [en. 1975 (2nd Sess.), c. 88, s 6(b)] deals with the rectification of contravention of the whole section and refers to "fill or otherwise dam or block any excavation, ditch or canal in respect of which no permit ..."

The words "undertaking" and "works" are extensively defined and refer to matters of some considerable moment. The whole tenor of the Act concerns works and undertakings which would obviously have a serious effect on any stream or watercourse and I am not of the view that it was intended by the legislature to cover every minor eventuality which might technically be said to change marginally the flow of water. A different consideration would apply if a goodly part of a watercourse were affected by a large dump of material when a person standing on the bank looking

at the river might say: "well, that has certainly changed the characteristic of the flow at this point", but not, surely not, when we are considering a situation where the rate could hardly even be measured scientifically and at its worst appeared to be no less than what nature might do at any time under normal conditions.

In conclusion therefore, I find the Crown has not proved that anything was done by any of the defendants which had the effect of altering the flow of water, or changing the location of the water or changing the course of the water. Even if there was any such alteration or change, I find that it would have been of so little import that it was inconsequential and did not create a situation contemplated by the statute.

I find each defendant company not guilty.

RE FOREST PROTECTION LIMITED AND GUERIN

Supreme Court of New Brunswick-Queen's Bench Division, Stratton, J., Saint John, February 17, 1978

Abuse of Process - Whether the Court has a discretionary power to control its own proceedings.

Budworm Spray Program - New Brunswick's northern forests infested - Aerial spraying since 1953 to control pests.

Certiorari - When this extraordinary remedy lies to control certain actions and jurisdiction.

Constitutional Law - Whether the federal Pest Control Products Act and Fisheries Act are ultra vires the province's domain.

Crown Servant - Whether a corporation is a servant of the Crown or an independent contractor - Special Act and Letters Patent corporations.

Fisheries Act, R.S.C. 1970 c. F-14, s. 33(2), as amended - Deposition of deleterious substance in water frequented by fish.

Jurisdiction - Whether Provincial Court has jurisdiction to deal with charges layed under the federal Pest Control Products Act and Fisheries Act.

Pest Control Products Act, R.S.C. 1970, c. P-10 s. 3(1) - Manufacture, storage, display, distribution or use of any control product under unsafe conditions.

Regulation SOR-72-451, s. 44(1) - Authorized under the Pest Control Products Act - Use of a control product consistent with instructions on label.

Forest Protection Limited is a Crown corporation with its sole object and purpose being the protection of forests. The applicant corporation since 1952, except 1959, carried out an annual aerial spray program directed against the spruce budworm infestation of the forests in the northern part of New Brunswick. An agreement was entered into from 1953 to 1975 between Forest Protection Limited and the provincial government of New Brunswick which authorized the undertaking and management of spraying operations. The spray programs for 1975 and 1976 were approved separately. In 1976 a provincial Order-in-Council was issued and a Letter Agreement was executed giving approval to aerial spraying in 1976. This was done in response to the decision in *Bridges Brothers Limited v. Forest Protection Limited* (1976), 14 N.B.R. (2d) 91. The applicant, Forest Protection Limited, does not plead to the summons, but challenges the jurisdiction of the Provincial Court Judges to try the offences charged.

On applications by Forest Protection Limited for orders of *certiorari* to quash 30 summonses and for orders of *prohibition* to prohibit any further Provincial Court proceedings with respect to the summonses or informations. The applications were made on the grounds that as a provincial Crown corporation, Forest Protection Limited was immune from the Provincial Court jurisdiction, that s. 33(2) of the

Fisheries Act, s. 3(1) of the Pest Control Products Act, and the regulations made under the *Pest Control Products Act* are *ultra vires* the Parliament of Canada, that s. 33(2) of the *Fisheries Act* does not apply to areas other than the sea, and that the laying of a great number of informations with respect to the same matter is an abuse of the Courts process.

Held: The applications are dismissed with costs to the informant - respondent.

Certiorari and *prohibition* are available to the applicant as the challenge to jurisdiction was taken prior to plea. *Certiorari* lies to control the action of inferior jurisdictions whenever there has been a failure, absence, excess or an abuse of jurisdiction. *Prohibition* lies to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction.

Forest Protection Limited, a letters patent corporation, with much control vested in various departments of the provincial government, is nevertheless a commercial corporation which acts on its own behalf. As an independent contractor and not a Crown agent, Forest Protection Limited is not immune from prosecution.

It was conceded that the *Pest Control Products Act* was *intra vires* the Parliament of Canada. The *Fisheries Act* is also *intra vires* the Parliament of Canada as it is within the competence of Parliament to regulate, protect and preserve the fisheries, which also allows for the prohibition of the deposit of deleterious substances in waters frequented by fish. Section 33(2) of the *Fisheries Act* applies to waters including all waters in the fishing zones of Canada, which zones are not restricted to the sea.

The Court has no discretionary power to stay duly instituted proceedings because the prosecution is considered oppressive.

The Provincial Court has jurisdiction to deal with all the summonses and informations layed against Forest Protection Limited.

On appeal to the New Brunswick Court of Appeal.

(Headnote from (1978), 7CELR93.)

Levi E. Clain, Kenneth B. McCullough, for the applicant,
A.G. Warwick Gilbert, for the informant-respondent.

Stratton, J.:--These are three applications by Forest Protection Limited, ("F.P.L."), for orders of *certiorari* to remove into this Court and quash a total of thirty summonses issued to it by Judges of the Provincial Court of New Brunswick consequent upon informations laid before that Court by Lucretia J. Guerin, President, The Concerned Parents Group Inc., ("Mrs. Guerin") and for orders of *prohibition* to prohibit the Judges of the Provincial Court of New Brunswick from any further proceedings with respect to the summonses or information.

THE OFFENCES CHARGED

The summonses herein charge F.P.L. with offences

(a) Under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, which provides as follows:

> *33(2) Subject to subsection (4),* [not here relevant], *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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*

(b) Under section 3(1) of the *Pest Control Products Act*, R.S.C. 1970, c. P-10, which provides as follows:

> *3(1) No person shall manufacture, store, display, distribute or use any control product under unsafe conditions.*

(c) Under section 44(1) of *Regulation SOR-72-451* of the Pest Control Products Regulations dated November 10, 1972, issued and authorized under the *Pest Control Products Act*, which provides as follows:

> *44(1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.*

THE GROUNDS OF APPLICATION

The first application was made upon the following grounds:

> *(1) The applicant Forest Protection Limited is and has been at all times a servant of the Crown in right of the Province of New Brunswick and in particular during the months of May and June in the years 1975 and 1976, and as such it is not subject to proceedings under and by virtue of the Criminal Code, R.S.C. 1953-54, C. 51 and amendments thereto, and it is immune to prosecution under the Fisheries Act, R.S.C. 1970, C. F-14, and amendments thereto, and the Pest Control Products Act, R.S.C. 1970, C. P-10, and amendments thereto, and Judge Frederic Taylor of the Provincial Court therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.*
>
> *(2) Subsection (2) of Section 33 of the Fisheries Act, R.S.C. 1970, Chapter F-14, as amended, is ultra vires the Parliament of Canada insofar as it is legislation relating to the exercise of proprietary rights by persons within the Province of New Brunswick over the internal waters of the Province of New Brunswick, therefore, the said subsection does not create an offence and Judge Frederic Taylor of the Provincial Court therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.*

(3) Subsection (1) of Section 3 of the Pest Control Products Act, R.S.C. 1970, Chapter P-10, as amended, is ultra vires the Parliament of Canada insofar as it is legislation relating to the use of a control product in the management of public lands within the Province of New Brunswick and of the timber and wood thereon and on other property within the Province, therefore, the said subsection does not create an offence and Judge Frederic Taylor therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

(4) The Pest Control Products Act, R.S.C. 1970, Chapter P-10, as amended, is ultra vires the Parliament of Canada insofar as it authorizes the Governor in Council to make regulations relating to the regulating or prohibiting of the use of a control product in the management of public lands within the Province of New Brunswick and of the timber and wood thereon and on other property within the Province and therefore a violation of the Act or of a regulation relating to such use does not create an offence and Judge Frederic Taylor of the Provincial Court therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

(5) Subsection (2) of section 33 of the Fisheries Act, R.S.C. 1970, Chapter F-14 as amended, prohibits deposits of deleterious substances of any type in water frequented by fish or in any place under any circumstances where such deleterious substance of any other deleterious substance that results from the deposit of such deleterious substance may enter any such water. Subsection (11) of section 33 defines "water frequented by fish" as including all waters in the fishing zones of Canada. Subsection (1) of section 4 of the Territorial Seas and Fishing Zones Act, R.S.C. 1970, Chapter T-7, as amended, provides that:

> *the fishing zones of Canada comprise such areas of the sea adjacent to the coast of Canada as may be prescribed by the Governor in Council pursuant to sub-section 5.1(1).*

The waters referred to in the various summonses as being waters into which the deleterious substance has been deposited or into which the deleterious substance may enter are not areas of the sea and therefore the said summonses do not disclose an offence known to law and Judge Frederic Taylor therefore exceeded his jurisdiction in issuing the summonses referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

The second application repeated grounds 1 to 4 of the first application but added a new ground 5 as follows:

(5) The laying of nineteen more informations in addition to the previous ten already laid by the same informant against Forest Protection Limited under the same Acts in the circumstances, amounts to an abuse of the process of the Court in that the informant and the Concerned Parents Group Inc., which she represents, are endeavouring to use the Criminal Court to achieve a civil and/or political object and as such should not be tolerated.

The third application repeated grounds 1 and 3 of the first application and included as ground 3 the following:

> *The laying of this additional information in addition to the previous twenty-nine (29) already laid by the same informant against Forest Protection Limited under the same Acts in the circumstances amounts to an abuse of the process of the Court in that the informant and the Concerned Parents Group Inc., which she represents, are endeavouring to use the Criminal Court to achieve a civil and/or political object and as such should not be tolerated.*

THE FACTUAL BACKGROUND

The forests of New Brunswick have become infested with the spruce budworm, and insidious insect which defoliates and kills firs and spruce trees. In the spring of 1952, New Brunswick International Paper Company Ltd. and the Government of the Province of New Brunswick jointly carried out an experimental aerial spraying program over a limited area of forest to determine its effect upon the spruce budworm; it was successful. Subsequently, representatives of Government and the forest industry met and decided to incorporate a private company to undertake the organization and management of a program of aerial spraying of insecticide to protect the forests of New Brunswick.

F.P.L. was then organized; it was incorporated by Letters Patent dated September 6, 1952; it has as its sole object and purpose the protection of the forests. F.P.L. is a standard private trading corporation with a capital stock of $5,000.00 divided into 500 common shares of the par value of $10.00 each. Two hundred shares have been issued; in 1975, 180 of the issued shares were registered in the name of Her Majesty The Queen and in 1976, this increased to 182 shares. At the present time, of the remaining 18 issued shares, 17 are held by nine participating pulp and paper companies and one share is registered in the name of F.P.L.

Formerly, each of the nine pulp and paper companies had two representatives on the board of directors of F.P.L.; currently, there are 22 directors but only 9 of these now represent the pulp and paper companies; the balance are either Ministers of the provincial Crown or representatives of provincial government departments, principally the Department of Natural Resources. The president of F.P.L. is the Deputy Minister of Natural Resources; its chairman and secretary are employed and paid by the latter department. Other officers and employees of F.P.L. during the years 1975 and 1976 included employees of private industry paid by the individual companies from which they came, employees of the government of New Brunswick paid by the government as well as employees paid by F.P.L.

F.P.L. has, since 1952, (except for 1959), carried out an annual spray program in May and June of each year. The "Spray Program" for each year results from a number of contributing facts and factors; in the preceding fall, the area to be sprayed is first determined by defoliation and budworm egg mass surveys conducted by government agencies; as the result of these surveys, a proposed spray map is prepared depicting the areas of the province to be sprayed, regardless of ownership; the insecticide to be used is selected and the number of its applications and its dosage is determined. This spray program is then submitted to the federal Department of Agriculture which receives advice on the program from experts in related fields employed by the various

departments of the federal and provincial governments who form an interdisciplinary committee. The approval of the federal Department of Agriculture is received each year before the spray program is put into effect. The spray program is also presented to the board of directors of F.P.L.; the approval of the board is contingent upon the approval of the Deputy Minister of Natural Resources who receives his authorization from the Minister of Natural Resources.

The participating pulp and paper companies contribute one-third of the costs of the annual spray program and the province contributes two-thirds, although the province recovers one-half of its contribution from the federal government. F.P.L. makes no profit nor does it incur any loss. Its expenditures are merely met by the participating companies and the province in the proportions indicated.

Section 3 of the *Forest Service Act*, R.S.N.B. 1973, c. F-23, (formerly R.S.N.B. 1952, c. 93, s. 3) is here relevant; it provides as follows:

> *3(1) The Lieutenant-Governor in Council shall maintain a forest service for the purpose of*
>
> *(a) protecting the forests from fire, insects and diseases,*
>
> .....
>
> *3(2) Subject to the approval of the Lieutenant-Governor in Council, the Minister may enter into agreements with the government of Canada or with any person to undertake and carry out operations for protection the forests from fire, insects, and disease; and the Minister may delegate to such party such authority as may be deemed necessary for the effectual carrying out of the agreement.*

Section 3(2) was cited by the province as authority to pass Order-in-Council No. 53-376, dated May 7, 1953, which authorized the Minister of Lands and Mines, (now Natural Resources), to execute an agreement with F.P.L. by the terms of which the provincial government engaged F.P.L. to undertake and manage an aerial spraying operation directed against the spruce budworm infestation of the forests in the northern part of New Brunswick and undertook to pay two-thirds of the amount of the expenditures of the aerial spraying operation. From 1953 to 1975 this agreement was continued from year to year and the annual estimated cost of the government's share of the program was included in the estimates for the Department of Natural Resources and approved by the Legislature of the Province of New Brunswick.

The spray programs for the years 1975 and 1976 were submitted to the federal Department of Agriculture and approved. They were also approved by the board of directors of F.P.L. which engaged private contractors to provide the planes and pilots to carry out the aerial spraying operations; these latter contractors were engaged by an agreement providing for the approval of the government of New Brunswick. The main estimates for the Department of Natural Resources for the fiscal years commencing April 1, 1975 and April 1, 1976, together included sums exceeding $10,000,000.00 for forest insect control which were approved by the New Brunswick Legislature and actually paid by the Department to F.P.L. for the programs which were carried out.

Because of the decision of Mr. Justice Stevenson in *Bridges Brothers Ltd. v. Forest Protection Ltd.* (1976), 14 N.B.R. (2d) 91, the board of directors of F.P.L. sought and obtained from the provincial government an Order-in-Council and Letter Agreement. The Order-in-Council is numbered 76-335 and is dated May 12, 1976; it provides as follows:

> *1. Pursuant to section 3 of the Forest Service Act, the Lieutenant-Governor in Council gives his approval*
>
> *(a) for the aerial spraying for spruce budworm control in 1976;*
>
> *(b) for the proposed aerial spray program of approximately 9.6 million acres; and*
>
> *(c) for the Minister of Natural Resources to enter into an agreement with Forest Protection Limited to carry out the proposed spraying operations.*
>
> *2. The province agrees to indemnify Forest Protection Limited with respect to claims for damages for injury to the health of any person directly caused by the application of chemical insecticides used for killing spruce budworms in the spray program for 1976.*
>
> *3. The province's agreement to indemnify shall not apply*
>
> *(a) to lands owned or controlled by the sponsors of the spray program;*
>
> *(b) unless the chemical insecticide is mixed in the proper proportions and in accordance with any existing licences, regulations, instructions or requirements;*
>
> *(c) with respect to the spraying of private lands contrary to any instructions which may be given by the Minister of Natural Resources from time to time;*
>
> *(d) in the event the application of the chemical insecticide is not carried out in a proper manner in accordance with reasonable standards of competence and safety or not to knowingly cause harm to the health of any persons.*

The Letter Agreement is upon the letterhead of the Minister of Natural Resources and is as follows:

P.O. Box 6000.
Fredericton, N.B.
E3B 5H1

May 17, 1976.

Mr. H.J. Irving,
Managing Director,
Forest Protection Limited,
P.O. Box 1030,
Fredericton, N.B.
E3B 5C3

Dear Mr. Irving:

Pursuant to Order-in-Council of the Lieutenant-Governor under May 12, 1976 and numbered 76-335, I hereby authorize Forest Protection Limited to undertake and carry out the proposed 1976 aerial spray program for spruce budworm control of approximately 9.6 million acres of the forests in New Brunswick.

Further, I hereby delegate the Forest Protection Limited, by the power vested in me under the Forest Service Act, whatever authority is necessary for you to effectually carry out the above program.

Please endorse the original and carbon copy of this letter by your authorized representative signifying your consent to this agreement.

(Sgd.) Roland C. Boudreau
ROLAND C. BOUDREAU
MINISTER OF NATURAL RESOURCES

I, H.J. IRVING, President of Forest Protection Limited, hereby accept this agreement on behalf of the Company.

(Sgd.) H.J. Irving
H.J. IRVING
PRESIDENT

F.P.L. did not plead to the summonses issued herein against it and seeks, by these applications, to challenge the jurisdiction of the learned Provincial Court Judges to try it for the offences which are charged.

DO CERTIORARI AND/OR PROHIBITION LIE

It is generally recognized that *certiorari* will lie to control the action of inferior jurisdictions whenever there has been a failure, or absence or an excess or an abuse of jurisdiction.

Mr. Salhany writes that

> *certiorari is most frequently sought where the applicant complains that the inferior tribunal was improperly constituted or acted in excess or abuse of its jurisdiction. The applicant in such instances is not required to wait until the proceedings have been terminated but may apply as soon as the tribunal exceeds its jurisdiction. If the act alleged to be in excess of the tribunal's jurisdiction is not patent on the face of the record, affidavit evidence will be admissible to show this defect.*

See *Salhany, Canadian Criminal Procedure*, second edition, 1971, p. 295.

In *R. v. Robinson* (1970), 97 C.C.C. 160 Mr. Justice MacFarlane of the British Columbia Supreme Court concluded that *certiorari* does lie when there is clear absence of jurisdiction and the question is whether legislation under which a charge is laid is *ultra vires.*

Mr. Justice Martland, speaking for the majority of the Supreme Court of Canada in *Sanders v. The Queen* (1969), 8 C.R.N.S. 345 said this at pages 377-378 of the report:

> *A person who challenges the jurisdiction of a tribunal which proposes to try him can take objection to the jurisdiction and refuse to plead, in which event certiorari is available to him. But, if he does plead, and the case then proceeds to a trial of the merits, and if he has a right of appeal, his challenge to the jurisdiction can then only be made by way of appeal.*

Where *certiorari* is sought on the ground of absence or excess of jurisdiction, extraneous evidence of these matters will be admissible, and indeed necessary, if they are not apparent on the face of the record: *see Halsbury*, 3rd Edition, volume 11, page 75 and *Perepolkin v. Superintendent of Child Welfare* (1957), 118 C.C.C. 263 (C.A.).

The function of *prohibition* is to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction: *see Re Clifford and O'Sullivan*, [1921] 2 A.C. 570. *Prohibition* will issue only in cases of want or excess of jurisdiction: *see R. v. Phillips* (1906), 11 O.L.R. 478; *R. v. Spence* (1919), 45 O.L.R. 391 (C.A.). *Prohibition* is discretionary only where the defeat of jurisdiction is not apparent on the face of the proceedings and not where there is a clear absence of jurisdiction: *see R. v. Thompson (No. 2)* (1946), 86 C.C.C. 206.

Prohibition upon the ground of loss of jurisdiction, or upon the ground of unconstitutionality as a defence in law on the merits, - as to which *see LeTourneau, The Prerogative Writs in Canadian Criminal Law and Procedure*, Butterworths, 1976, pp. 157-159, - will lie to restain prosecutions under a statute which is inoperative; *see Re Dodd* (1956), 116 C.C.C. 334; *or ultra vires: see Vaillancourt v. City of Hull*, [1949] Que. K.B. 120; *R. v. Deacon*, [1970] 1 C.C.C. 305 and *Re Thodas* (1970), 10 C.R.N.S. 290 (C.A.). And, as in the case of proceedings by way of *certiorari*, so on an application for *prohibition* is affidavit evidence receivable to complete the record: *see R. v. Prokipchuk and R.* (1974), 18 C.C.C. (2d) 423.

The question of jurisdiction is fundamental both in proceedings by way of *certiorari* and by *prohibition*. As to whether *certiorari* or *prohibition* is the proper remedy, Lord Atkin, in *R. v. Electricity Commissioners*, [1924] 1 K.B. 171 (C.A.), said:

> *I can see no difference in principle between certiorari and prohibition except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in the final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction.*

In these present applications, it is the submission of F.P.L. that it is a servant of the Crown and is therefore not subject to proceedings under the *Criminal Code*, the *Fisheries Act* or the *Pest Control Products Act*, that the latter two acts are *ultra vires* the Parliament of Canada, and that in consequence thereof the learned Provincial Court Judges exceeded their jurisdiction in issuing the summonses herein and are without jurisdiction to conduct any further proceedings in relation thereto. This challenge to jurisdiction was taken by F.P.L. before plea. Accordingly, upon the authority of the decisions cited, I hold that either of the extraordinary remedies of *certiorari or prohibition* are available to the applicant and that affidavit evidence is admissible to bring to the notice of the Court the facts constituting the grounds of the applications.

CROWN SERVANT

The principal thrust of the argument, both in the extensive briefs filed by counsel and in their oral argument, was directed to the issue as to whether or not F.P.L. is a Crown Servant and thereby immune from prosecution.

It is the submission of counsel for the applicant that the facts disclosed in the several affidavits filed in a support of their applications establish that F.P.L. is controlled by the government of New Brunswick. In their brief they cite the following indicia as supporting this submission:

> *1. Of the 200 issued shares of Forest Protection Limited, 180 or more are held in the name of Her Majesty The Queen or in the name of one of her appointees, the remaining shares being distributed amongst appointees of the participating private companies who serve as directors;*
>
> *2. The Deputy Minister of Natural Resources has always been a Director of Forest Protection Limited and has always acted as spokesman for the government of New Brunswick on the board (the Minister of Natural Resources now sits as a director together with four other Ministers of the Crown);*
>
> *3. At the annual meetings of Forest Protection Limited since its incorporation, the Deputy Minister of Natural Resources as proxy for Her Majesty, The Queen, casts her votes;*
>
> *4. The sole object and purpose of Forest Protection Limited, and the very reason for its existence, is to protect the forests of New Brunswick;*

5. Forest Protection Limited was incorporated as a private company rather than delegate the task of forest protection to a department of government for reasons of economy and efficiency;

6. Forest Protection Limited does not seek or realize a profit but is merely reimbursed for the actual costs of its operations;

7. Each year the Legislature of the Province of New Brunswick appropriates funds for the express purpose of paying the province's two-thirds share of the actual cost of the spruce budworm spray program to be conducted by Forest Protection Limited for that year, and in the debate on these appropriations the spray program proposed for that year was made available to the members of the Legislature;

8. Since the incorporation of Forest Protection Limited, two-third of the actual cost of the spray program for each year has in fact been paid by the Department of Natural Resources or its predecessor;

9. Under Section 3(2) of the Forest Service Act, the Lieutenant-Governor in Council approved of the Minister of Natural Resources engaging Forest Protection Limited to conduct the spray program, and the Minister delegated to Forest Protection Limited such authority as was necessary to effectually carry out the program;

10. The Minister of Natural Resources expressly approved the spray program for each year and this approval was conveyed to the board of directors of Forest Protection Limited by his Deputy Minister;

11. That the approval of the spray program for each year by Forest Protection Limited was in fact contingent upon the approval of the government of New Brunswick as conveyed by the Deputy Minister of Natural Resources;

12. The spray program for each year is conducted by Forest Protection Limited in accordance with the approval of its board of directors and the Minister of Natural Resources, and subject at all times to the direct control of the government of New Brunswick;

13. The land to be included in the spray program is initially determined by surveys conducted by government agencies;

14. The land is included in the spray program regardless of ownership;

15. As part of their duties, employees of the government of New Brunswick serve as directors and officers and employees of Forest Protection Limited;

16. Private contractors are engaged by Forest Protection Limited to provide the planes and pilots to conduct the aerial spraying operations by an agreement subject to the approval of the government of New Brunswick.

It is the further submission of counsel for the applicant that the nature and degree of control which the government of New Brunswick exercises over F.P.L. is the

determinant factor in establishing it to be a Crown Servant. This, they contend, is the applicable principle to be abstracted from a long line of decisions culminating in *Mellenger v. New Brunswick Development Corporation*, [1971] 2 All E.R. 593, a decision of the English Court of Appeal, and in *Westeel-Rosco Limited v. Board of Governors of South Saskatchewan Hospital Center et al.*, [1977] 2 S.C.R. 238, a decision of the Supreme Court of Canada.

In the *Mellenger* case, the New Brunswick Development Corporation objected to the issue of a writ against it on the ground, *inter alia*, that the Corporation was an arm of the government of the province of New Brunswick and could not be sued in England. Lord Denning, in holding this ground valid, said at page 596:

> *The next point is whether the Corporation can avail itself of the doctrine of the sovereign immunity. If it is part and parcel of the government of New Brunswick - so much so as to be identified with it like a government department - it can clearly claim immunity. For this purpose we must turn to the statute which set it up. It was established by the New Brunswick Development Corporation Act of 11th April 1959. Clause I provides:*
>
> > *There is hereby constituted on behalf of Her Majesty in right of New Brunswick a body corporate under the name of The New Brunswick Development Corporation.*
>
> *Then follow clauses which show the close connection of the Corporation with the government. The Minister of Industry is an ex officio director. The other directors are appointed by the Lieutenant-Governor in Council. There is no issued capital.*
>
> *It has no stocks or shares. Its principal power is: ' ... to assist, promote, encourage and advance the industrial development, prosperity and economic welfare of the province.' It is true that there is a later clause which gives the Corporation power, subject to the approval of the Lieutenant-Governor in Council, 'to carry on any business of an industrial, commercial or agricultural nature'. But the evidence shows that the Corporation has never exercised this latter power. It has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in the way that a government department does, such as the Board of Trade in England. In the circumstances it seems to me that the Corporation is really part and parcel of the government on New Brunswick. The very words that it is constituted 'on behalf of Her Majesty in right of New Brunswick' bring it within the words which were used in Tamlin v. Hannaford, [1949] 2 All E.R. 327 at 329, [1950] 1 K.B. 18 at 25 per Denning L.J.:*
>
> > *When Parliament intends that a new corporation should act on behalf of the Crown, it, as a rule, says so expressly ...*
>
> *On this ground alone, I would hold that the Corporation is in the same position as a government department, and is entitled to plead sovereign immunity.*
>
> *Apart, however, from the statute, the functions of the Corporation, as carried out in practice, show that it is carrying out the policy of the government of New*

Brunswick itself. It is its alter ego. If and insofar as the Corporation played any part in this case, it was identified with the government. The evidence shows that the Prime Minister of the province played a leading part. The Corporation itself has never been legally involved in the transaction. It was not the owner of the land on which the factory is being built. The Airscrew Weyroc people bought it from some private owner. The Corporation has made no contract with anyone about these transactions. But the government of New Brunswick itself has done so. It agreed to guarantee a bond issue if required. There is no single point in which the Corporation itself has been involved. It was just the alter ego of the government, and can claim sovereign immunity. see: Rahimtoola v. HEH The Nizam of Hyderabad ([1957] 3 All E.R. 441 at 445, [1958] A.C. 379 at 393) per Viscount Simonds.

It is clear, I think, from a careful reading of the judgment of Lord Denning in the *Mellenger* case and that of Lord Salmon, which is to the same effect, that their Lordships, in arriving at the conclusion which they did, relied upon the fact that the Development Corporation was established by a Special Act of the New Brunswick Legislature which constituted the Corporation a body corporate "on behalf of Her Majesty in right of New Brunswick", and that the Corporation, although authorized to do so, never carried on any ordinary trade or commerce. Moreover, Lord Denning was careful to draw specific attention to his judgment in *Rahimtoola v. H.E.H. The Nizam of Hyderabad, et al.*, [1957] 3 All E.R. 441 at 460 wherein he held that "a separate legal entity which carries on commercial transactions for a state was an agent and not an organ of the government" and is not entitled to plead sovereign immunity.

In the *Westeel-Rosco* case, an unpaid sub-contractor claimed to be entitled, under the Saskatchewan *Mechanics' Lien Act*, to a charge upon a holdback fund retained by a Hospital Board in connection with the construction of a new hospital. The Hospital Board contended it was an agent of the Crown and therefore not bound by the provisions of the *Mechanics' Lien Act*. It was however the unanimous decision of the Supreme Court of Canada that the Board was not in fact a Crown agent and therefore the provisions of the Act applied to it. Mr. Justice Ritchie, who delivered the judgment of the Court, said, at pages 249-250:

Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it. This is made plain in a paragraph in the reasons for judgement of Mr. Justice Laidlaw, speaking on behalf of the Court of Appeal for Ontario in R. v. Ontario Labour Relations Board, Ex. p. Ontario Food Terminal Board, ((1963), 38 D.L.R. (2d) 530), at p. 534, where he said:

> *It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.*

Mr. Justice Ritchie, in the course of his judgment, reviewed the provisions of the Special Act which constituted the Hospital Board a body corporate and noted that its

seven member Board was appointed by the Lieutenant-Governor in Council and was endowed with wide powers for the construction and administration of the hospital including the power to manage, invest and expend all moneys, and manage all property belonging to the hospital. Additionally, the Board was given the power to make by-laws, rules or regulations relating to the operation, administration and management of the hospital and to borrow on security such sums of money as may be required to meet operating expenses. The act of incorporation further provided that the Legislature could appropriate funds for the maintenance of the hospital and expenses of the Board and that there was to be an annual audit by the provincial auditor and an annual report by the Board to the Minister of National Health on its finances and estimates of the next year's expenses. Although the hospital was to be built and operated out of public funds, Mr. Justice Ritchie stressed the fact that the Board had very wide discretionary powers of spending and of conducting its own affairs *within the limits of its statutory powers* (emphasis added) and concluded, at page 253:

> *In my opinion, as I have indicated, the powers with which the Board is endowed are far removed from those of a Crown agency which is subject at every turn to the control of the Crown in executing its powers ...*

It is to be noted that in *Westeel-Rosco*, as in *Mellenger*, the Courts were concerned with the nature and degree of control exercised by governments in respect of statutory corporations, that is to say, corporations incorporated and empowered by Special Acts of the governments concerned. Even in such circumstances, the judgments make clear, there can be serious question as to whether or not the very creature of government is, in fact, its agent. But that is not the situation we have here; F.P.L. is not a Special Act corporation; it is a letters patent company with share capital; it possesses the usual powers and has enacted the by-laws of a normal trading company; it owns assets in its own right and carries on trade and commerce; accordingly, in my opinion, different considerations apply to it. The law applicable here, in my view, is succinctly and accurately stated in *Halsbury* 4th Edition, Volume 9, page 722, in the following terms:

> *In the absence of any express statutory provision, the proper inference, at any rate in the case of a commercial corporation, is that it acts on its own behalf, even though it is controlled to some extent by a government department. The fact that a minister of the Crown appoints the members of such a corporation, is entitled to require them to give him information and is entitled to give them directions of a general nature does not make the corporation his agent. The inference that a corporation acts on behalf of the Crown is more readily drawn where its functions are not commercial but are connected with matters, such as the defence of the realm, which are essentially the province of government.*

The decision of the English Court of Appeal in *Tamlin v. Hannaford*, [1949] 2 All E.R. 327 is authority for the principle so stated. An application of the principle in Canada is contained in the decision of the Quebec Court of Appeal in *North and Wartime Housing Ltd. v. Madden, et al.*, [1944] 4 D.L.R. 161. Moreover, and importantly, this principle was cited and applied by Mr. Justice Stevenson in respect of F.P.L. in *Bridges Brothers Ltd. v. Forest Protection Ltd.* (1976), 14 N.B.R. (2d) 91 at page 137.

Upon the whole of the material before me, I am satisfied and find, as did Mr. Justice Stevenson, that F.P.L. is an independent contractor of the Crown and that it is not immune from prosecution.

CONSTITUTIONAL ISSUES

During the argument, counsel for F.P.L. conceded that grounds 3 and 4 of the first application were no longer in issue and that the *Pest Control Products Act was intra vires* the Parliament of Canada. It was however their submission that section 33(2) of the *Fisheries Act* was *ultra vires* as legislation relating to the exercise of proprietary rights by persons within the province of New Brunswick over the internal waters of New Brunswick.

The exclusive legislative authority of the Parliament of Canada extends to all matters coming within section 91(12) of the *British North America Act*, 1867, 30 & 31 Victoria, c. 3, - "sea coast and inland fisheries". While it has been held that this head of legislative authority does not confer upon the federal government any rights of property, it does confer upon it the exclusive right to impose restrictions or limiations by which public rights of fishing are controlled: see *Attorney-General for the Dominion v. Attorneys-General for the Provinces*, [1898] A.C. 700. This exclusive right of regulation, in my opinion, extends to include regulations which have as their object and purpose the protection and preservation of the fisheries such as are contemplated by section 32(2) of the *Fisheries Act*. In this connection, Chief Justice Ritchie observed, as long ago as 1882, in *The Queen v. Robertson*, 6 S.C.R. 52 at page 120 that:

> *legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not reference to 'property and civil rights' - that is to say not as to the ownership of the beds of the rivers or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a material and general concern and important to the public, such as forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth.*

There is present here admitted competence in the Parliament of Canada to regulate, protect and preserve the fisheries which, in my view, carries with it as a rational and functional connection, the right to prohibit the deposit of deleterious substances in waters frequented by fish and to provide a punishment for offenders, all as part of an integrated federal scheme to protect the fisheries. In my opinion, section 32(2) of the *Fisheries Act is intra vires* the Parliament of Canada; *see Papp v. Papp* (1970), 8 D.L.R. (3d) 389.

Counsel for F.P.L. also submit the rather ingenious argument that as section 33(2) of the *Fisheries Act* prohibits the deposit of deleterious substances in "water frequented by fish" which, by section 33(11) is defined to include all waters in "the fishing zones of Canada" which latter term is not defined in the *Fisheries Act* but by section 4(1) of the *Territorial Seas and Fishing Zones Act* is said to comprise "such

areas of the sea adjacent to the coast of Canada as may be prescribed by the Governor in Council pursuant to section 5.1(1)", then, so this argument goes, the summonses herein, which refer to waters which are not areas of the sea, do not disclose an offence known to law.

This argument, in my view, is fallacious. Section 33(11) of the *Fisheries Act* which defines "water frequented by fish" as *including* all waters in the fishing zones of Canada merely broadens and extends the normal, usual meaning of the words in question. Moreover, section 4(1) of the *Territorial Seas and Fishing Zones Act* merely permits a further extension of that meaning to include areas of the sea adjacent to the coast of Canada as may be prescribed by the Governor in Council, such as, by way of example, the extended 200 mile territorial sea of Canada. Therefore, in my opinion, there is no merit in this submission.

ABUSE OF PROCESS

It was a submission of the applicant that the laying of 30 separate informations and the issuing of 30 summonses against it was oppressive and an abuse of the process of the Court which the Court has an inherent discretionary power to prevent. This discretionary power is said to exist in England: *see Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401 (H.L.). But since the commencement of these present applications, the Supreme Court of Canada has decided otherwise: *see Rourke v. The Queen* (1977), 16 N.R. 181 wherein Mr. Justice Pigeon said at page 185:

> *I cannot admit of any general discretionary power in Courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.*

CONCLUSION

In the result, for the reasons given, the three applications by Forest Protection Limited herein are dismissed with costs to the informant-respondent.

Note: The appeal is reported at page 229.

REGINA v. IMPERIAL OIL ENTERPRISES LIMITED

Nova Scotia Magistrate's Court, Kimball, J., Halifax, March 6, 1978

Environmental Law — Water Pollution — Oil Spill — Oil deleterious only if present a certain concentration or greater — Crown failed to demonstrate concentration in water affected — Oil not proved to be deleterious — Accused entitled to acquittal — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), s. 33(11).

A malfunction in the accused's refinery resulted in the release of approximately one hundred gallons of oil into Halifax Harbour, and the company was charged with depositing or permitting the deposit of a deleterious substance in a place where it may enter water frequented by fish. Expert evidence led by the Crown indicated that the oil was lethal only if present in water at a concentration of 50 ppm or greater.

Held, the accused should be acquitted. There being no evidence of the concentration of oil in water, the Crown had failed to prove that the substance deposited was lethal and hence deleterious to fish within the statutory definition. Moreover, there was no evidence to show that any concentration of oil in combination with water was deleterious or toxic. Therefore, the accused was entitled to be acquitted.

Alphacell v. Woodward, [1972] 1 Q.B. 127, refd to.

Mr. Richard, for the Crown.
Mr. Gould, for the Accused.

Kimball, J.:—(Excerpts of the Judgment) ...The defendant company, Imperial Oil Enterprises Limited, is charged that it did on or about the 29th day of May, 1977, at or near Darmouth, in the County of Halifax, Province of Nova Scotia, unlawfully deposit or permit the deposit of a deleterious substance, to wit: oil, in a place under conditions where such oil may enter the waters of Halifax Harbour, being waters frequented by fish, contrary to Section 33(2) of the *Fisheries Act*, Revised Statutes of Canada 1970, Chapter F-14 as amended, and did thereby commit an offence under Section 33(5) of the said *Act*. The relevant provisions of the *Fisheries Act* as amended on June the 26th, 1970, repealed and substituted in 1969-1970, Chapter 63, Section 3, in my view are as follows:

> *33(2) 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 such deleterious substance (or any other deleterious substance) that results from the deposit of such deleterious substance may enter any such water.*
>
> ...
>
> *(11) For the purposes of this section and sections 33.1 and 33.2, "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 deleterious to fish or to the use by man of fish that frequent the water;"

...Having regard to the information, the Crown therefore must prove, in my view, that the defendant company:

1. Deposited or permitted the deposit of oil in a place under conditions where such oil may enter the waters of Halifax Harbour.

2. That the oil was a deleterious substance.

3. The the waters of Halifax Harbour are waters frequented by fish.

On the evidence, is there then proof that, No. 1, the Halifax Harbour is a water frequented by fish?... Mr. Duerden, the informant and the Crown witness, testified that at some time prior to the date of the alleged offence he had fished for mackerel and cod in his boat in the waters of Halifax Harbour. He also testified that during the time of an oil spill from the Irving Oil Refinery at some time prior to the date of the alleged offence he had occasion to walk along the Darmouth side of the said Harbour at a point north of the defendant's refinery and at that time had walked ankle deep in dead starfish, crabs, worms and mussels. He also testified that at some time prior to the date of the alleged offence he had fished at the Northwest Arm, within Bedford Basin and in the vicinity of McNab's Island and had caught cod at those places, McNab's Island being some two hundred yards' distance from the defendant's refinery. He also testified that he caught mackerel both at the Arm and outside the Arm, but conceded in cross-examination that he didn't fish from a point on McNab's Island closest to the defendant's refinery. Dr. Peter Wells, a Crown witness also, testified that he had seen cod on occasion within the waters of Halifax Harbour. I'm satisfied that from that evidence the waters of Halifax Harbour, including that portion of the water from which exhibits three, four and five - or more correctly, I should say from which exhibits four, five and six, I believe were taken, is and was at the material time a "water frequented by fish".

No. 2, has the Crown proven that the oil was deposited or permitted to be deposited in a place under conditions where such oil may enter the waters of Halifax Harbour? Black's Law Dictionery, revised 4th edition, p. 526, defines "deposit" as: "to place, to put, to let fall as sediment". I am satisfied that the substance visually observed within and without the oil boom and along the shore nearby and described in evidence as oil, and subsequently analyzed as an oil product was deposited in a place called the water sewer system under conditions where such oil might enter the waters of Halifax Harbour. The cause of the oil deposit in the water sewer system was a leak in cooler E-210 and the conditions under which the oil might, and in fact, did enter the waters of Halifax Harbour was the impossibility of its escape elsewhere except by means of the separator which could not and did not prevent its escape. The water sewer system, the separator and cooler E-210 were at all material times owned and entirely within the control of the defendant company. In my view the words of Lord Parker, C.J. in *Alphacell Ltd. v. Woodward*, 1972 1 Q.B. 127 at p. 138, are apt on this point.

> *It seems to me that the proper approach in any case of this sort is to deal with it as a matter of causation. One begins by visualizing the effluent pouring out into the river, and one asks oneself what or who caused that. When you then find a works, as in this case, conducted in such a way that the effluent is bound to go into and pollute the river unless some equipment is installed to prevent it, and the type of equipment, the maintenance of that equipment, the amount of that equipment, is entirely within the control of the owner of the works then, as it seems to me, it is impossible to say that their actions were not a cause, and as it seems to me, those actions remain a cause unless and until it is shown that some other activity completely outside their control, the action of a trespasser, and Act of God, has intervened and is itself so powerful a cause that what heretofore had been a cause, merely becomes a part of the history or the surrounding circumstances.*

No. 3, has the Crown proved that the oil was a deleterious substance?

...

The relevant evidence on this point is that of Dr. Peter Wells, whose qualifications with respect to the toxic effect of gas and oil in water frequented by fish were accepted by the Court. He indicated in his evidence that he was familiar with the term "deleterious" as used in the *Fisheries Act*, but stated that the type of oil and the degree of concentration were two important factors that had to be considered in determining whether it was deleterious. He testified that if forty to fifty gallons of oil were fairly confined within a relatively small area, such as the boom area, then such a quantity in several tens of thousands parts of water could cause toxic effects to fish entrapped in that body of water. He further testified that fifty parts of freshly emitted crude oil on one million parts of water would be acutely toxic and could cause fatality to a number of fish specimens within a three to four day period and to invertebrates within a short period of time. He could not, however, express the same opinion with respect to twenty-nine parts of oil in one million parts of water. He indicated he was not familiar with all species of fish within Halifax Harbour, but that he had seen small cod on occasion, which he, himself, caught off the Bedford Institute Pier on the Darmouth side of the Harbour, but he couldn't express any opinion whether fifty parts of oil to one million parts of water would be toxic to small cod such as he had caught.

...It is perhaps a rather unfortunate definition of deleterious substance in the *Fisheries Act* contains the word "deleterious". Deleterious is defined in the shorther Oxford English Dictionary, 3rd Edition, as "physically or morally harmful or injurious", "noxious"; and in Black's Law Dictionary, revised 4th edition, as "hurtful, morally or physically injurious; poisonous, unwholesome". There is no evidence before the Court that would make relevant the phrase "or to the use by man of fish that frequent the water", contained in the statutory definition "deleterious substance". The evidence differs with respect to the quantity of the oil found within the Halifax Harbour waters on the day in question.

...I am not of the view that in order to obtain a conviction on the charge laid the Crown must prove that the entire waters of Halifax Harbour were rendered deleterious to fish, but I do agree with Mr. Gould's submission that there is no evidence before the Court to show that oil and water *per se* is deleterious to fish. According to Dr. Wells, the toxic effect of oil in water depends upon its concentration and if the concentration

were fifty parts of oil to one million parts of water, it would be acutely toxic to fish and therefore deleterious to fish. From the evidence, I am uncertain as to the quantity of oil, either along the shoreline outside the boom or washed up against the rocks, so much so that I cannot say that the concentration of oil and water in that area was fifty parts or more of oil to one million parts of water. I am satisfied though, that at a material time there was at least fifty gallons of oil within the boom area and fifty gallons outside, extending away from the shoreline. Now, having made that finding as fact, gentlemen, then it remains to be determined whether, given that quantity of oil, a total of one hundred gallons, at least in my view, within the boom area and outside the boom area extending in an area that I would call "towards McNab's Island", was such on the evidence as could be proof that the concentration was, in fact, deleterious to fish.

...There must be proof of the concentration of that oil with the water there. Now, that is my difficulty here. How am I going to determine what the concentration is? All I know is that there was a quantity of water - or quantity of oil rather, lying on top of water, the area of which I am not quite sure, but it was a relatively small area, was in the boom and perhaps a little larger area outside, but I do not know that proportion that bore to the water, be it surrounding it, beneath if, where am I to draw a line?

...I don't think I can ignore the depth of the water because then it would appear to me that if the oil, insofar as it relates to its concentration, could be matched up against the water it was resting on then you would always have I suppose, a molecule of oil resting upon a molecule of water and there would be then a one on one situation and I think it would be rather asinine to suggest that that always made the concentration more than fifty-five per million, but if I don't consider it in that view, then what do I do, go straight down? Assuming that I did, then I would have to have something before me to indicate the depth of the water within the boom area or indeed outside. If I had that, then I could have a hypothetical wall, you might say, that would be comparable, I suppose, to a large container of water, but if that is the situation, I don't know the depth of the water there so that I can say that the oil resting on top, which is fifty gallons in one area, is there below, one million gallons of water? Because as I view the doctor's evidence, there must be to make a toxic, a quantity less than one million in proportion to the fifty parts of oil. Now, I will readily concede that the exhibits introduced in Court contained more by visual inspection, more than fifty parts of oil to one million parts of water. That I have no difficulty in at all, but if that is the simple test and a simple test only, then it would seem to me to follow that any time that there was a little dab, shall we say, of oil lying upon any body of water, however large, that if one scooped that up in a bottle, you would always have fifty parts of oil in one million parts of water and if so factor, that would be deleterious to fish and that would mean to say that any - a little spill, however small, would always, if that were that were the tests, be toxic and therefore deleterious. Now, I can't quite bring myself to that view without some evidence. If I had had somebody testify, which I had not, that even if you had an area of a one foot spread that was covered by oil, no matter whether it was ten feet from shore or out in the middle of the Atlantic Ocean or in the middle of the Halifax Harbour, that would make that water immediately beneath it deleterious, I would be happy with it, but here I only have a proportion, The good doctor was not prepared to say that oil in combination with water was deleterious or toxic.

...and the only evidence as I view Dr. Well's evidence is that there must be, in order to be toxic, therefore in order to be deleterious, a concentration of fifty parts of oil to one million parts of water.

...There is no evidence here of any fish that were killed or injured in any way which is not, I would agree, necessarily essential to the proof of the Crown's case, but that doesn't help me, so I am driven back to the consideration of Dr. Well's evidence to determine whether there was here proof beyond a reasonable doubt that the quantity in that oil on top of the water, it being one hundred gallons, was because of that quantity being there, deleterious to fish and that is what I can't be certain of on the evidence.

...I cannot conclude, and do not, that there is here proof beyond a reasonable doubt, that the oil deposited, however large the quantity, it totalling at least one hundred gallons, at one time was a deleterious substance within the meaning of the *Fisheries Act.* For that reason, and the reason alone, it would of course, follow that an acquittal on the charge was laid would have to be entered...

REGINA v. GULF OF GEORGIA TOWING CO. LTD.

British Columbia County Court, Millward, C.C.J., May 12, 1978

Environmental law — Water pollution — Oil Spill — Deposit of deleterious substance in a place where it may enter water frequented by fish — Improper manipulation of valves during fuel transfer — Failure by accused to exercise reasonable precautions — Appeal allowed and conviction entered — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2).

The Crown appealed the acquittal of the accused on a charge of depositing a deleterious substance in a place under a condition where it may enter water frequented by fish. The charge arose from a spill of oil which was the result of a valve being incorrectly left open during the transfer of fuel from a barge to an on-shore tank.

Held, the appeal should be followed and a verdict of guilty entered. The failure of the accused to exercise a close and continual scrutiny of the valves in question or otherwise to ensure that the correct valves would be open or closed amounted to a failure to ensure that all reasonable precautions were taken. Nor was it a defence to say that the fault lay with the accused's employee who failed to exercise reasonable care notwithstanding the imposition by company directors of rigid safety precautions and training programs.

Canada Tungsten Mining Corporation Ltd. v. The Queen, [1976] W.W.D. 104 (N.W.T.S.C., March 5, 1976); *R. v. The "M.V. Allunga",* [1977] 3 W.W.R. 673; *Regina v. The Corporation of the City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 253; refd to.

D.R. Kier, for the Crown (Appellant)
P.D. Lowry, for the Accused (Respondent)

Millward, C.C.J.:— The Respondent, Gulf of Georgia Towing Co. Ltd., was charged that it did on or about the 3rd day of November, A.D. 1976, at or near Tsowwin Narrows, County of Nanaimo, in the Province of British Columbia, deposit a deleterious substance, a petroleum product in a place under a condition where such deleterious substance may enter water frequented by fish to wit: Tahsis Inlet. The Respondent was acquitted and the Crown appeals from that acquittal.

The evidence was that the Respondent operated a tanker barge in connection with the supply of certain petroleum products to a storage facility at Sandpoint in Tahsis Inlet, just above Tsowwin Narrows. The storage facility consisted of four tanks with the tanks at the extreme ends being at lower elevations than those in between. On the day in question, one Mr. Egget, was located on the Respondent's tanker barge operating a pumping apparatus, while a crewman was located at the site of the storage tanks, assisting the pumping engineer and watching the storage tanks as they were being filled. The crewman, one Fulmer, testified that on instructions from the pumping engineer one of the two "inside" tanks was filled and the connecting valve turned off. Then, one of the lower "outside" tanks' connecting valve was opened while that tank was pumped full, the pump stopped and the valve turned off. Then, the other "inside" tank valve was opened and the tank filled whereupon the pump was shut off and the connecting valve to the third tank closed. After that the valve to the fourth, "outside"

tank was opened and the workers began to fill that tank with stove oil, whereupon Mr. Fulmer's attention was drawn by another workman to the fact that oil was "spurting out the air valve at the top" of the other outside tank, falling to the ground, and running into the Inlet.

It was agreed that the oil that entered the Inlet was a deleterious substance, and that the Inlet was a water frequented by fish.

Mr. Fulmer testified positively that following the filling of the first three tanks each of the valves associated with those tanks was turned off by him or in his presence by the other worker, but that after the overflow was noted the connecting valve to the outside tank in question was found by Mr. Fulmer to be in the fully open position. He testified that only some ten or fifteen minutes elapsed between his observing the turning off of the valve and the occurrence of the overflow. He said that during that interval there were various workmen walking in the area, preparing to go work, and that he, Fulmer, was in a position to observe the area of the valve and to notice anyone approaching the area throughout the interval, except for a period of four or five minutes when he absented himself briefly before resuming his part in the filling operation. The learned trial Judge found that the petroleum product found its way from the tank in question into the Inlet as a result of the connecting valve in question having been in the open position during the pumping operation intended to result in the filling of the last tank. The trial Judge found it to be a logical inference that the valve in question was opened by some unknown third party during the brief period of time that Mr. Fulmer absented himself from the storage site. The learned trial Judge also expressed the opinion that the Respondent Company "carried out a bad operation" with respect to the delivery of the petroleum products in question.

It is clear on the evidence, and the findings of fact made by the learned trial Judge, that either (a) Mr. Fulmer was in error when he said that the valve in question had been closed by him or his associate or (b) if he was correct in testifying that the valve in question had been closed, then the valve was subsequently reopened by Fulmer or his associate or a third party.

In *Canada Tungsten Mining Corporation Limited v. Her Majesty The Queen*, Morrow, J. in the Supreme Court of the Northwest Territories in a decision dated on the 5th of March, 1976, held that the Appellant did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, where the Appellant failed to exercise due diligence to prevent the occurrence of an oil leak from its plant. The leak was from a defective fuel pipe in the Appellant's plant. In *Regina v. The "M.V. Allunga"* [1977] 3 W.W.R. 673, Seaton, J.A. of the British Columbia Court of Appeal ruled that Section 5 of the *Oil Pollution Prevention Regulations*, namely,

> 5. *Subject to Section 6(a) no person shall discharge from any ship, and (b) no ship shall discharge oil or an oily mixture into any of the waters...*

imposed a heavy burden, but that the offence in question was one of absolute liability and that it was not open to the (Appellant) to say that it would not have happened but for the fault of some third person. He said at p. 676:

It has been said that a heavy burden is being placed on the ship but I do not find it offensive to demand that ships not spill oil — how oil spills are to be avoided is a problem for the ship.

In *Her Majesty The Queen v. The Corporation of the City of Sault Ste. Marie*, a decision of the Supreme Court of Canada pronounced on the 1st of May, 1978, Mr. Justice Dickson said at p. 28 of the decision that there are compelling grounds for the recognition of three categories of offences, rather than the traditional two:

1. *Offences in which mens rea consisting of some positive state of mind such as intent, knowledge, or recklessness must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence, and*

2. *Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case (R. v. Hickey (1976), 29 C.C.C. (2d) 23).*

3. *Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.*

On the basis of *The Canada Tungsten Mining Corporation Limited* case the best position that can be taken from the Respondent's point of view is that this case falls within the second category, that is to say, that of strict liability, and accordingly proof of the prohibited act *prima facie* imports the offence, but the accused may avoid liability by proving that he took reasonable care. To paraphrase Dickson, J. at p. 31, in the present case, the prohibited act would, in my opinion, be committed by those who undertake the delivery of oil and filling of the storage tanks in question, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so. Here the Respondent had complete control of the entire operation and had a clear duty to take all reasonable precautions to prevent any spill from occurring. In view of the obviously immediate and disastrous consequences of carrying on a pumping operation of the kind in question with respect to any one of the four tanks when a connecting valve leading to one of the three other tanks which had already been filled, "reasonable precautions" must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout. It is clear that no such continual scrutiny, nor any adequate alternative precautions were taken. The Respondent has not discharged the onus upon it. It is not a defence on the part of the Respondent to say that the fault lies with the employee who failed to exercise reasonable care notwithstanding the imposition by the company directors of rigid safety regulations and training programs. The appeal is allowed accordingly, and a verdict of guilty will be entered.

Note: The appeal is reported at page 252.

REGINA v. CHEW EXCAVATING LTD. AND THE CORPORATION OF THE DISTRICT OF SAANICH

British Columbia Provincial Court, Ostler, J., Victoria, B.C., May 16, 1978

Environmental Law — Water Pollution — Depositing or permitting the deposit of a deleterious substance in water frequented by fish or in a place under conditions where such deleterious substance may enter water — Silt a deleterious substance — Corporation responsible for acts of its agent and company for acts of its employee — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), Interpretation Act, R.S.C. 1970, c. I-23, s. 14(2)(b).

The co-accused were charged in an information containing four counts with offences against s. 33(2) of the Fisheries Act. While under contract with the Corporation, the limited company undertook the removal of domestic debris from a creek, and in so doing caused extensive siltation of the creek and a river into which it flowed.

Held, the Corporation was found guilty on the charge that it "did unlawfully permit the deposit of a deleterious substance in a place under conditions where such deleterious substance may enter water frequented by fish", and the company was found guilty on the charge that "did unlawfully deposit a deleterious substance in place under conditions where such deleterious substance may enter water frequented by fish." Whether the dictionary meaning of "deposit" was used, or the definition added to the Act after the date of the offence was applied, there had been a "deposit" here within the meaning of s. 33(2). The Crown discharged its burden to show that the silt was deleterious through expert testimony, and did not have to prove actual harmful consequences on fish resistent in the river at the material time. Other evidence proved that the water was "frequented by fish". The Corporation was responsible for the acts of its agents and the company for those of its employee.

Kienapple v. The Queen (1975), 15 C.C.C. (2d) 524, appl'd; *R. v. Stearns-Roger Engineering Company Ltd.*, [1973] 2 W.W.R. 669, [1974] 3 W.W.R. 285; *R. v. Jordan River Mines Ltd.*, [1974] 4 W.W.R. 337; *R. v. The Corporation of the City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353; ref'd to.

H.J. Wruck, for the Crown
M. Macaulay, for the Accused, Corporation of the District of Saanich.

Ostler, J.: (Orally)--The Corporation of the District of Saanich and Chew Excavating Ltd. are jointly charged in an information of:

Count 1: At or near the District of Saanich, in the Province of British Columbia on or about the 27th day of April, 1977 did unlawfully deposit a deleterious substance in water frequented by fish, contrary to Section 33 (2) of the Fisheries Act, R.S.C. 1970, C. F-14 and C. 17 (1st Supplement).

Count 2: At or near the District of Saanich, in the Province of British Columbia on or about the 27th day of April, 1977 did unlawfully permit the deposit of a deleterious substance in water frequented by fish, contrary to the same Section.

Count 3: At or near the District of Saanich, in the Province of British Columbia on or about the 27th day of April, 1977 did unlawfully deposit a deleterious substance in a place under conditions where such deleterious substance may enter water frequented by fish, contrary to the same section.

Count 4: At or near the District of Saanich, in the Province of British Columbia on or about the 27th day of April, 1977 did unlawfully permit the deposit of a deleterious substance in a place under conditions where such deleterious substance may enter water frequented by fish, contrary to the same section.

In this case the Crown asks that the Corporation be found guilty of counts 2 and 4, and that the limited company be found guilty of counts 1 and 3. But Mr. Wruck concedes that pursuant to the decision of the Supreme Court of Canada in *Kienapple* there should be a conviction with respect to each defendant on one count only.

Put as briefly as possible, the facts of this case are: that at the material time, one Dr. Langford, a consulting biologist, observed equipment working on Swan Creek above the confluence of that creek with the Colquitz River. The equipment was being operated by an employee of the defendant limited company. It is clear from the evidence that the company, Chew Excavating Ltd., had entered into a contract with the Corporation for the supplying of this equipment and its operator to do certain work under the direction of the Corporation. The company was, therefore, not an independent contractor, but in my view an agent on behalf of the Corporation for the purpose of the work being done under the direction of the employees of the Corporation; and specifically the work that was taking place at that time on Swan Creek.

It appears that the Municipality desired to clear out the creek which was full of debris, weeds, garbage, old tires, bicycles - and the witness even mentioned an old mattress. It apparently had been used as a dumping ground and the municipality, commendably in my view, was trying to clear it out and for that purpose had entered into a contract for the use of the equipment and operator from Chew Excavation.

Mr. Langford, who is an expert on the physiology of fish, with impressive credentials, made an investigation when he observed what was happening, and he traced the course of the creek and observed an excessive amount of sediment, as he said, coming out of Swan Creek into Colquitz Creek.

The cat was operating in the stream, and as a result of its activity he said the stream was heavily silted; upstream of the Colquitz River, that is to say, above its confluence with Swan Creek, the stream was clear. And downstream from the confluence the silt was mixing with the water of the Colquitz, and there was evidence of heavy siltation mixing with the clear water of the Colquitz Creek below its confluence with Swan Creek.

The first point for consideration is whether or not in the circumstances this silt was "deposited" in this water, and I have had the advantage of very careful argument from the learned defence counsel and the learned prosecutor.

As counsel have pointed out, that expression, "deposited" was considered by Munroe, J. of the Supreme Court of British Columbia in the case of *Regina v. Stearns-Roger Engineering Company Limited,* [1973] 2 W. W. R. 669, and at page 671, the learned judge of the Supreme Court dealt with the expression "deposit" and he concluded in the circumstances of that case, which are very similar to the circumstances in this case, that actually the bulldozer, the machine that was being used, did deposit the material or the substance in the water.

The judgment of Munroe, J., the determination that he made in that case, was reviewed by the Court of Appeal in [1974] 3 W. W. R. 285. But the Court of Appeal in that case declined to express a view as to the meaning of the word "deposit". The word "deposit" as it appear in the section was also considered in the case of *Regina v. Jordan River Mines Limited,* [1974] 4 W. W. R. 337, where that portion of the judgment of Munroe, J., was adopted and followed.

Mr. Macaulay gave a most impressive argument with respect to that point. He argues that what was done in this case could not properly be considered "depositing" and the learned defence counsel suggests that Section 14 Sub-section 2(b) of the Interpretation Act should be applied to cause the Court to consider the definition of "deposit" which has been added to the Fisheries Act since the activities which led to the laying of this charge. And in the Statutes of Canada, 1976/77 amendments to the *Fisheries Act,* "deposit" is defined and means "any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, flowing, dumping or placing".

Assuming, without deciding, that Mr. Macaulay is correct that I should have regard to the definition of "deposit" since enacted by Parliament with respect to this particular expression, it is my respectful view that in any event the evidence of what was done here brings that activity within the definition of "deposit" since enacted by Parliament but not in effect at the material time. And I think it brings it within the definition by referring to two words which the draftsman has employed, and it appears to me he tried not to overlook anything. But one refers to the words "releasing and placing".

With respect to the "releasing" it seems to me that the activity of this equipment caused the releasing of material which in normal circumstances could be presumed to remain on the river bottom. But, in addition, if one looks at the evidence of Dr. Langford, one sees that he says that the equipment was excavating the bank as well as the bed itself. So, in any event, what the equipment was doing was releasing the material in a real sense. It was also taking or dislodging material from the bank according to the uncontradicted evidence of Dr. Langford, and in my view was releasing it into the stream and was therefore depositing it whether one takes the definition since passed or whether one looks to the dictionary definitions referred to in the cases to which I have already referred.

So, I find that the Crown has shown beyond a reasonable doubt that the material was at this time "deposited" in the water.

The next question is whether or not this was a 'deleterious substance'. Although the statute defines 'deleterious substance' by section 33, sub-section 11, 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 deleterious to fish or to the use by man of fish that frequent water, or (b) any water that contains 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 deleterious to fish or to the use by man of fish that frequent that water," Parliament has refrained from defining 'deleterious' and simply repeats the word "deleterious" when defining a deleterious substance. So, what then is 'deleterious'.

A definition has been given by Munroe J., in the *Stearns-Roger* case.

The Oxford dictionary refers to 'deleterious' as "noxious", that is to say, "harmful, unwholesome, physically injurious".

In this case the Crown must prove that the substance in question was 'deleterious'. In that respect the Crown has called Mr. Langer who was an undoubted expert in fishery biology, and it is clear to my mind from his evidence that the silt that was released by the bulldozer on this occasion was 'deleterious' to fish.

The question here, in my respectful view, is not what happened, that is to say, whether any fish were killed - and clearly there were not, or, at least, they weren't seen to be but whether when it went into the water the silt was a deleterious substance.

It must be said that the activity was stopped on the intervention of an outside party. But, the material, as I understood the evidence, was a deleterious substance because it could do harm to fish in these circumstances. And on the evidence of Mr. Langer it is clear that it was harmful to fish in the Colquitz Creek.

I, with all respect to contrary opinion, have no difficulty in finding, on the evidence, that this substance, the silt, placed, released, into the water as it was in the circumstances of this case was deleterious and harmful to fish.

The word is not "inimical" or "fatal", it is "deleterious" simply, as defined, that it is harmful and unwholesome for fish and I find that it was.

The next question is whether this was water frequented by fish. Once again, one must go to dictionaries, and Blacks Law Dictionary refers to 'frequent' as "to visit often; to resort to often or habitually." And Oxford, "to go often or habitually to."

Having regard to the natural habits of fish and what has been said in this case, it is clear that this is water frequented by fish, perhaps not as much as desirable, and perhaps not as much as one hopes it will be in the future if the present plans materialize, but never-the-less, this water is frequented by fish.

There remains for consideration the responsibility with respect to each of the defendants. In so far as the District of Saanich is concerned, the employee of Chew Excavating was there under contract with this employer. He was there under the direction of the Corporation and its servants and it is clear from the evidence that complied with the directions of the servants of the Corporation; and applying what was said by the Supreme Court of Canada in the case of the *The Queen v. the Corporation*

of Sault Ste. Marie, with respect to the Corporation, I find that the Corporation did unlawfully permit the deposit of a deleterious substance as set out in Count 4, in the act of Mr. Morrissey, who, as the operator of the equipment, acting under the direction of the servants of the Corporation, carried out the work as directed, and in that instance the Municipality permitted the deposit which resulted. And the Municipality is found guilty of Count 4.

With respect to the defendant, Chew Excavating Ltd., irrespective of the fact that the employee was there under contract between Chew Excavating and Saanich, I am of the view nevertheless, in a charge of this kind, that there is a responsibility on Chew Excavating Ltd. to ensure that its employees do not carry out any activity which is unlawful. What was done in this case was contrary to the *Fisheries Act* and was therefore unlawful and the limited company is convicted of Count 3 because of the action of its servant.

Having regard to the *Kienapple* case, there will be no finding with respect to the balance of the counts.

REGINA v CANADIAN FOREST PRODUCTS LTD.

Provincial Court of British Columbia, Johnson, J., June 1, 1978

The accused was charged under s. 33(2) of the *Fisheries Act*, R.S.C. 1970 c. F-14 and c. 17 (1st Supplement) with spilling about 1000 gallons of Bunker C oil into Howe Sound near Vancouver when an oil pipe ruptured and the oil seeped into the waters through a nearby sewage system. The company took all possible steps to clean-up the oil slick in co-operation with Environment Canada, at a cost of $51,000.00 to the company.

Held: The accused was found guilty. Bunker C oil was a substance deleterious to fish and the waters adjacent to the sewerage outfall, from which the oil discharged from the pump mill, are frequented by fish. The *Fisheries Act* was one of absolute liability and s. 33(2) was an enactment of environmental protective legislation. The Crown was not required to prove that the substance was deposited in such a manner that the concentration at the time of the deposit was, or could be deleterious to fish, but only that it was known to be a substance which was deleterious to fish. Further, the defence of due diligence under s 33(8) was not available, as on the facts there was not an exercise of all due diligence to prevent the environmental damage, which includes due diligence being used in the construction, maintenance and inspection of the installation.

This decision has not been appealed.

Headnote from (1978), 7 C.E.L.R. 113

C. Osborn, for the Crown
L.M. Candido, for the Accused

Johnson, J:—The accused is charged with two counts under Section 33(2) of the *Fisheries Act* of Canada.

Section 33(2):

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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

The charges are:

Canadian Forest Products:

COUNT 1: at or near Port Mellon, in the County of Vancouver, Province of British Columbia, on or about the 14th day of September, A.D. 1977, did unlawfully permit the deposit of a deleterious substance, to wit: oil, in water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*, R.S.C. 1970 C.F-14 and C.17 (1st Supplement).

COUNT 2: at or near Port Mellon, in the County of Vancouver, Province of British Columbia, on or about the 14th day of September, A.D. 1977, did

unlawfully deposit a deleterious substance, to wit: oil, in water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*, R.S.C. 1970 C.F-14 and C.17 (1st Supplement).

The facts are that on 14 September 1977, during the pulp mill start-up of the Port Mellon Mill of Canadian Forest Products Ltd., an oil pipe ruptured and the oil leaked into the mill sewerage system and then into Thornborough Channel in Howe Sound, which is about five miles north of Gibsons, in the County of Vancouver, Province of British Columbia.

About 9:00 p.m. in the evening, oil was being pumped from the storage tanks to the boilers and there was a split in the oil pipe, caused by wear from vibration, which allowed the oil to leak for about one-half hour. The oil pipe was several feet off the ground outside, adjacent to a building and the escaping oil collected on the ground to a depth of approximately two inches. Some of the oil leaked into an open sewer about ten feet from the oil leak. It so happened at that time, that hot water was being drained away from another part of the mill through this sewerage system which was connected to the sewer opening adjacent to the oil leak. This sewer line lead to the alkaline outfall and the oil was subsequently discharged into the water of Thornborough Channel.

From all the evidence, the best calculation of the amount of oil that did leak from the pulp mill into the salt water was about one thousand gallons. The oil was a heating fuel known as Bunker C. There was no evidence of the exact chemical composition of this Bunker C, but from all the evidence, I concluded that it was used in the normal way as boiler heating fuel and was similar to other Bunker C oil.

When the mill crew discovered the leak, the oil line was shut down and the crew immediately took all steps to prevent further discharge of the oil into the sewer outlet. The oil leaked out into the salt water and was not discovered by the mill officials until approximately 8:00 a.m. the next morning, when a large oil slick was noticed stretching from the pulp mill about two and one-half miles down Howe Sound. As soon as the oil slick was discovered, the company officials, in cooperation with Environment Canada officials took all possible steps to clean up the oil spill, and this cost the company $51,000.00.

There is no doubt that the waters of Thornborough Channel and Howe Sound are waters frequented by fish. From the evidence I have heard, I find that the waters adjacent to the sewerage outfall, from which the oil discharged from the pulp mill, are abundant in fish and marine life.

I had thought that from these facts there would be no dispute that the Bunker C fuel oil was a substance deleterious to fish, and I do in fact find that the Bunker C oil which did leak from the Canadian Forest Products Ltd. pulp mill at Port Mellon into Thornborough Channel on Howe Sound, was such a deleterious substance.

In *Canada Tungsten Mining Corporation Limited v. Her Majesty The Queen* (1976), 5 C. E.L.N. 120 (NWTSC), the parties agreed that fuel oil was a deleterious substance, Morrow J. stated at page 4:

Finally it was agreed that Flat River is water frequented by fish and that diesel or fuel oil is a deleterious substance.

Bunker C or bunker oil has been found to be a deleterious substance in other previous cases: *Her Majesty The Queen v. Imperial Oil and B.C. Hydro and Power Authority* in the County Court of Vancouver, 25 November, 1975, His Honour Judge Catliff found that bunker fuel oil known as Fuel 46 was a deleterious substance; on 19 April, 1978, at the Provincial Court at Port Hardy, in *Regina v. Rayonier Canada*, His Honour Judge Watts found that Bunker C oil was a deleterious substance. There have been other cases in which other hydro-carbons have been found to be deleterious substances, particularly two previous judgements by this Court at Powell River, British Columbia: *Regina v. Norman Kirby*, 8 May, 1972; and *Regina v. Standard Oil Co. of British Columbia Ltd.*, 20 January 1975; wherein it was found that gasoline was a deleterious substance.

In *Suzuki and Ionian Leader (B.C. Admiralty District) (1950 Exchequer Court of Canada)*, Sidney Smith D.J.A. stated in *obiter dicta* on page 952:

The plaintiffs rely on Section 33 of the Fisheries Act, 1932 which forbids the dumping of deleterious substances into fishing waters. This does not specifically mention fuel oil but I have no doubt that oil would be covered by the section.

It would appear from this judgement that His Lordship was taking judicial notice that oil was a deleterious substance. Taking into consideration the familiarity of persons with gasoline and oil products in every day life and the national and international concern with oil pollution, it may be that a Court might be able to take the judicial notice that oils, gasoline and other hydro-carbons were deleterious substances, but I need not do that in this case as there is more than sufficient evidence for me to find that the oil deposited by the company was a deleterious substance from the evidence presented.

The trial in this matter lasted two days. The Crown presented two witnesses, who were accepted as expert witnesses, Mr. Guy Hebert, a Marine Biologist, and Dr. Ian Birtwell, and Environmental Scientist, and they both expressed the opinion that Bunker C oil deposited into salt water would be a deleterious substance in water frequented by fish.

The defence called as an expert witness, Dr. Cecil Walden, head of the British Columbia Research Council who gave substantial evidence in regard to conducting bio-assays of small fish in water collected from Thornborough Channel and controlled samples of a similar type Bunker C oil obtained from the company's Port Mellon pulp mill. Counsel for the defence advanced a strenuous argument as to why I should find that the Bunker C oil is not a deleterious substance in this case. I find that the defence argument is based on a misunderstanding of the meaning of the words contained in Section 33(2) of the *Fisheries Act*, and the essential ingredients which the Crown is required to prove in order to obtain a conviction under this section of the Act.

The *Fisheries Act* is one of strict liability, and Section 33(2) of the Fisheries Act is an enactment of environmental protective legislation, this is expressed by Judge Morrow in the *Canada Tungsten* case, at page 5:

Crown Counsel argues that this section creates absolute liability, that the absence of mens rea is no defence, and that the appellant here must bring itself under subsection (8) to gain the acquittal. One of the more recent decisions relied on for this proposition is R. v. Jordon River Mines Ltd., [1974] 4 W.W.R. 337. At page 339 Osler, D.J. quoting in part from R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5; 12 C.R.N.S. 272; [1970] 5 C.C.C. 193; 12 D.L.R. (3d) 591 holds:

> *In my view, the offences charged fall under that 'wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to the presumption that mens rea is an essential ingredient.*

I am in entire agreement with the enunciation of the law and with the Crown's submission here. See also the judgment of this Court in Monkman v. The Queen, 1972 3 W.W.R. 686.

The defence submitted in argument that the Crown must prove that the Bunker C oil which was deposited in this case was deleterious to fish, and that even though Bunker C may be deleterious at some concentrations, the Crown has not proven that the concentration of Bunker C oil in this case was harmful to fish. Although the Crown had samples of the oil deposited, no bio-assays on fish were done to calculate the toxic effect, if any, of this particular Bunker C oil on fish. The defence further submits:

> *It is fundamental that the concentration of the oil in the body of water is an essential ingredient in determining whether or not a substance is deleterious.*

The Crown's evidence that the Bunker C oil in this case is a deleterious substance is based on the expert opinion of the two witnesses, Mr. Hebert and Dr. Birtwell. Mr. Hebert said he did bio-assays on four different types of Bunker C and that the LC50 (the concentration of oil in which there would be lethal effect to one-half of the test fish in 96 hours) of the oils tested ranged from 780 to 5600 parts per million. He gave his expert opinion based principally on these tests and on his specialized knowledge that all Bunker C oils would have a toxic, that is lethal effect on fish as defined by the *Fisheries Act*.

Dr. Birtwell corroborated Mr. Hebert's opinion as to the toxic effect of any Bunker C on fish.

Dr. Walden gave evidence that at the request of the defence he arranged for the conduct of certain bio-assays at different levels of concentration of Bunker C oil. When asked if he had obtained an LC50, Dr. Walden said he did not, but could have. In his evidence, Dr. Walden expressed the opinion that in certain concentrations over a certain time Bunker C oil would not be toxic to fish. He did not express the opinion that the Bunker C oil from the Port Mellon pulp mill would not be deleterious at any concentration but only at the concentration at which he performed his tests. I find that Dr. Walden did not disagree with the Crown's expert opinion evidence that the Bunker C oil from the Port Mellon pulp mill would be toxic to fish at some specifically unknown concentration.

Dr. Birtwell described the life cycle of fish and the life chain of fish in the marine environment, and he said that oil, when it comes into contact with marsh grasses destroys the growth of these grasses, which are necessary in the life cycle of the juvenile fish, small shrimp and other marine animals, which, in the life chain support the higher stages of marine life. Dr. Birtwell also described how light is a necessary ingredient in the existence of certain marine life and that an oil slick on the surface of the water may cut off this light and therefore do harm to some of the marine animals requiring that light, such as small shellfish. Dr. Birtwell also described how the small juvenile herring come to the surface at night and that an oil slick in the water with some of the factions in the oil breaking down and dissipating into the water would do harm to the juvenile herring.

When the definition of "fish" is considered, it is evident that the legislation intends to protect not only that which may be fish of commercial value, but all those parts of marine life of the marine habitat.

The definition of "fish" Section 2 of the *Fisheries Act*, as amended is:

> *shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.*

The Crown is not required to prove that the substance deposited was deposited in such a manner that the concentration at the time of the deposit was, or could be deleterious to fish.

In *Regina v. Kirby*, page 6, this Court said:

> *I heard evidence from two technicians of the Department of Fisheries who have conducted bio-assays as to fish and particularly gasoline. As to the whole of the evidence and hearing their opinion I find that the Crown has proven that gasoline is a deleterious substance as set out in the charge.*
>
> *There was no evidence that at the time of the offence that there were in fact any fish in the water covered by the gasoline, and there was no evidence that any fish were or might be expected to be degraded at that time at that place by the gasoline deposited in that water. I find that it is not necessary that the Crown prove that there is or might be any degrading of fish, the Crown need only prove that at some time the water is frequented by fish and that gasoline is a deleterious substance and that the accused did permit the deposit thereof.*

The judgment was upheld on appeal, *Regina v. Kirby*, unreported, Swencisky, C.C.J. County of Vancouver, 22 November, 1972.

The definition of "deleterious substance" was amended by the *Fisheries Act Amendment* of 1 September, 1977 and there was added to the definition the words "likely to render deleterious" and the words "fish habitat". It is these words which made Section 33(2) of the *Fisheries Act* even more stringent.

The definition of "deleterious substance" is set out in Section 33(11) of the Fisheries Act:

"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 of man of fish that frequent that water.

An analysis of the definition of "deleterious substance" indicates that almost any substance may be deleterious to water frequented by fish. The substance is deleterious if, when added to water, it should "degrade" or "alter" the water and the word "alter " must have a different meaning from "degrade" to be used in this manner. The key words of the definition or that the substance need not of itself "degrade" or "alter" the water but only that it may "form part of a process of degradation or alteration of the quality of that water".

"Environmental Law" - West Coast Environmental Law Association, 1976, at page 87, states in reference to Section 33(2) of the *Fisheries Act:*

These provisions are very wide in scope -- the definition of deleterious substance is sufficiently broad and ambiguous that it could include almost any substance added to that water. The provisions therefore are extremely valuable in combatting water pollution.

This statement was made before the present amendments to the *Fisheries Act.*

I find that it is not necessary for the Crown to prove that the substance deposited was of such a concentration or attained such a concentration in the water, in this particular case, that it was deleterious to fish, but only that it is known to be a substance which is deleterious to fish.

All pollution legislation is concerned not only with the immediate damage of a pollutant but also by the cumulative effect of any substance, as expressed by the words "form part of degradation", Section 33(11).

Defence counsel argues that:

If the Crown's theory of absolute responsibility is correct then the owner of every motorboat that has a drop of oil leak out of the motor is guilty of an offence under the Fisheries Act.

This cited situation would be controlled under Section 6 of the Oil Pollution Regulations, *Canada Shipping Act,* but if the fisherman should throw a gallon of oil into the water from the dock, he would commit an offence under Section 33(2), the *Fisheries Act* does not distinguish between one gallon, one thousand gallons or ten thousand gallons, as to liability.

In considering the facts that in this case 1000 gallons of Bunker C oil was deposited into Thornborough Channel, a body of water abundant in fish near the place of the company's outfall, I have no doubt the company deposited a deleterious substance, to wit, oil in water frequented by fish.

The second defence of the accused is that the company exercised all due diligence to prevent the oil spill and that under the provisions of Section 33(8) of the *Fisheries Act* the circumstances of the case are such that the accused should be found not guilty.

Section 33(8) -

In a prosecution for an offence under this section or sections 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

Defence counsel submits:

The evidence indicated that the Defendant had procedures to try to prevent spills and to deal with an oil spill if one happened. What occurred was an accident and there was no evidence it should have been prevented.

I find that at all relative times, the persons at the pulp mill of the accused were the employees of the accused, and that pursuant to Section 33(8) of the *Fisheries Act* that the company was responsible for their actions, although I do find that the company and its employees at all relative times took all reasonable action to prevent a further development of the oil spill. That is not the point to be decided, the question is, did the company use all due diligence to prevent the commission of the offence prior to the accident occurring?

I find the facts to be that the company had maintained an oil pipe line feeding their heating boilers, the pipe line was hanging in the air on the bracket and was subject to wear from vibration and that ultimately there was a rupture in the oil line at this point. I find that such a rupture or damage to the pipe could have been anticipated by the company and the ultimate rupture of the pipe would indicate that there was not due diligence exercised in the maintenance of the pipe to prevent the leakage. Ten feet from the oil pipe line, a sewerage outlet lead directly to the sewerage outfall discharging the sewer wastes out to the water frequented by fish. I find that the company did not use all due diligence to prevent the commission of the offence in allowing the open outlet to be located in an area adjacent to oil pipe lines. Surely, an environmentally conscious engineer would have anticipated the dangers of an oil spill to the salt water, had this type of construction been examined in consideration of the prevention of environmental damage.

The facts of this case are not very much different from the facts of *Canada Tungsten Mining Corporation v. Her Majesty The Queen.* In that case there was a rupture of the oil lines supplying the fuel to the buildings at the company's establishment, the leak from the pipe was due to corrosion of the pipe, and Morrow J. found that the company was guilty of the commission of the offence under Section 33(2) and that the company's defence of due diligence was not accepted. Morrow J. states at page 9:

It is clear that the appellant from the first moment of discovery, and I do not have to review the facts here, acted responsibly and with alacrity. There was no attempt to hide the affair from the authorities. Rather every effort was made to consult with those responsible for the environment and to act upon their advice. In excess of $39,000.00 was spent by the appellant before the problem was under control.

In my view, however, those efforts, laudable as they may be, go more properly to alleviate penalty, rather than affect liability. They are all after the fact.

I cannot read the wording of Section 33(8) except to require "due care and diligence" to refer to preventing the leak not correcting the leak or reducing the damages. It is quite true, as was argued, that to prevent the leak in the present case, to set up inspections to look for weaknesses in the installations such as are found at the appellant's plant may be difficult. The fact of the matter is that no such tests appear to have ever been made since the plant was erected, and certainly no routine ever laid down for opening the packing around the offending pipes to see if erosion was taking place.

Regina v. Standard Oil interpreted the words "due diligence" this Court said:

The cases recognize, R. v. Industrial Tankers, that commercial enterprises have large and numerous installations which are potentially dangerous to deposit a deleterious substance in water frequented by fish and if this offence does occur then there may be a very substantial damage to the environment and the health and welfare of the community. The legislation places a very heavy onus on persons who should own or operate such installation not to commit the offence. The person must "exercise all due diligence to prevent" the environment damage and in a prosecution under this Act it is for the person charged to prove that "all due diligence" has been exercised, because the words of the section are "unless the accused establishes". The defences in common law the charge of strict or absolute liability are not applicable, the defence to the offence is found in the legislation. In the Fisheries Act, Section 33(8) is the defence to a charge under Section 33(2). In the Oil Pollution Prevention Regulations, Section 6, is the defence to a charge under Section 5, and Section 10-12 are the defences to a charge under Section 9.

The meaning of the words "due diligence" means not only the acts of the person charged, their employee or agent at the time of the offence, but also "due diligence" in the construction, maintenance and inspection of the installation. For the purpose of this case I do not need to go this far, but it may be that the person is required to prove not only that the installation was properly constructed and maintained, but that which was constructed was the best and most advanced construction possible to prevent the environmental damage. It may not be enough to say a cement retaining wall was built to prevent a gasoline spill without additionally proving that a cement wall was the best type of construction to prevent the spill.

I find that the Crown has proven all the essential ingredients of the charge on Count I, and I find the accused guilty to Count 1. Since Count 2 is a charge under the same section of the same facts, I find the company not guilty on Count 2.

REGINA v. MACMILLAN BLOEDEL (ALBERNI) LIMITED

British Columbia County Court, McClellan Co. Ct.J., Port Alberni, June 12, 1978

Fisheries — Depositing deleterious substance in water frequented by fish — Oil spill — Meaning of "water frequented by fish" and "deleterious substance" — Crown need not prove that fish frequenting water specifically affected by spill are harmed thereby — The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), (11) [both re-en, 1970 (1st Supp.), c. 17, s. 3 .]

The accused corporation spilled five barrels of bunker oil into water beneath its deep-sea dock located in a river estuary frequented by fish. As a result, it was charged under s. 33(2) of the *Fisheries Act*. The Crown's expert gave evidence concerning the oil's toxicity to fish. However, no specific tests had been made of the effect of the oil spill on the water under the dock. The trial judge acquitted on the ground that the Crown was required, and had failed, to prove that the water under the dock as a result of the spill was thereby rendered deleterious to fish. The Crown appealed.

Held, the appeal was allowed. The words "water frequented by fish" in s. 33(2) require only that the water in question be used regularly by fish, even if only annually for a short period. The word "water" includes water at the site of the spill, but is not limited to it. As the oil would have spread into areas where fish travelled, the Crown had proved that the water under the dock was water frequented by fish within the meaning of s. 33(2). Finally, the trial judge had placed too high a burden on the Crown in proving that the oil was a deleterious substance within the meaning of s. 33(11). That subsection imposed no burden on the Crown to show that the oil added to the specific water under the dock in some specific quantity was harmful to the species of fish that in fact frequented such water. The Crown discharged its burden on showing that the oil was harmful to any species of fish when added to any water.

D.R. Kier, for the Crown.
D.W. Shaw, for the respondent.

Headnote from 7 B.C.L.R. 210
Case also summarized at (1978), 7 C.E.L.R. 128

McClellan Co. Ct.J.:--The Crown (appellant) appeals the acquittal of the respondent by Ward Prov. J. in the Provincial Court of British Columbia, holden at Alberni. The judgment was made on 14th November 1977.

The accused corporation was charged with two counts as follows:

Count 1 — On or about the 15th day of February A.D. 1977, did unlawfully deposit a deleterious substance oil in water frequented by fish, to wit, Alberni Inlet, Province of British Columbia, contrary to Section 33(2) of the *Fisheries Act*.

Count 2 — On or about the 15th day of February A.D. 1977, did unlawfully permit the deposit of a deleterious substance oil in water frequented by fish, to wit, Alberni Inlet, Province of British Columbia, contrary to Section 33(2) of the Fisheries Act.

The accused corporation had pleaded not guilty to both charges and was found not guilty of both charges. The Crown appeals the acquittal on count 1 only.

Briefly, the facts reveal that on 15th February 1977 five barrels of Bunker C oil were spilled into the water beneath the accused corporation's deepsea dock at Alberni Inlet, British Columbia. The oil spill occurred because a suction valve on the line used in the unloading operation was not closed before draining the pipeline. The learned Provincial Judge, in his reasons for judgment, summed up the facts as follows:

> *Five barrels of oil, however, escaped down a drainpipe from the roof or ran down the pilings to enter the water beneath the dock, where it was mostly contained by a boom around the outer pilings of the dock, installed for that purpose.*

Prompt action by the corporation reduced the effect of the spill so that its effect was only minimal. There seems to be no issue that the spill occurred and that it occurred in water under the corporation's dock. Therefore there were two issues involved in the trial. Both of these arose from an interpretation of two expressions used in s. 33(2) [re-en. 1970 (1st Supp.), c. 17, s. 3] of the *Fisheries Act*, R.S.C. 1970, c. F-14. The Act reads as follows:

> *(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*

The learned trial judge devoted some time to considering the expression "water frequented by fish" and came to the conclusion with respect to the word "frequented" that Parliament had intended that to mean that "there has to be an element of habitual association of fish with that water". I would concur with that interpretation of the word "frequented". But I do not conclude that the meaning can be extended to mean that the water must be occupied by fish continually or even very frequently. If it is apparent that fish use the water in question regularly -- even if only annually for a short period -- then such water would, in my opinion, qualify as "water frequented by fish".

In dealing with the word "water", the learned trial judge placed many limitations upon it and apparently concluded that Parliament had intended by the use of the words "water frequented by fish" to mean areas frequented by fish. I can find no authority to support such a conclusion. I believe the court must take judicial notice that fish move around and, further, that waters move around.

The pier in question was located in an area adjacent to the mouth of the Somass River, and this is graphically depicted in Exs. 6A and 6B. It is notorious the damage which occurs to shorelines from oil tanker spills, and this damage can occur only by the movement of the water distributing the oil along the shorelines for considerable distances. There was evidence before the learned trial judge of the fish fry feeding along the shoreline of the Somass River and additional evidence as to the fish being in the area around the mouth of the Somass River. The area in question is situated almost immediately to one side of the mouth of the Somass River, and any fish

proceeding to that river or proceeding from it must pass within a very short distance of the dock in question. That any substance entering the water around the dock could and would spread over the area in which such fish travel cannot be gainsaid. The Crown had therefore proved beyond a reasonable doubt that the waters under the accused corporation's dock are waters frequented by fish within the meaning of s. 33(2).

I am supported in this view by the judgment of Catliff Co. Ct. J. in the unreported decision, *R. v. Imperial Oil Ltd.*, which was decided on 20th November 1975. In commenting on that definition, he said:

> *The point, as I understand it, is that the words 'that water' in s. 33(11) [en. 1970 (1st Supp.), c. 17, s. 3] have reference only to water alleged to be degraded at the actual site of the spill. I do not consider the words 'that water' earlier in the subsection. The words 'any water' would include the water at the site of a spill but are clearly not limited to it.*

The learned trial judge found that the water of the estuary of the Somass River in the Alberni Inlet in which the deepsea dock is located is water frequented by fish. With the ebb and flow of the tides in the area, and the effect of the water from the estuary, there is no doubt that the oil from the dock would affect waters passing by it in either direction and thus affect waters frequented by fish.

It remains to consider the meaning of the words "deleterious substance". Section 33(11) of the *Fisheries Act* reads, in part, as follows:

> *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 deleterious to fish or to the use by man of fish that frequent that water, or ...*

The word "deleterious" is defined in the Shorter Oxford English Dictionary as "physically or morally harmful or injurious". For the purposes of this case a deleterious substance would mean a substance that, if added to any water, would degrade or alter or form part of a process of degrading or alteration of the quality of that water so that it is rendered physically harmful or injurious to fish.

The Crown relies mainly on the evidence of Dr. Ian Kenneth Birtwell, a biologist with the Department of Fisheries, Fisheries and Marine Service, of the federal government. This witness, whose qualifications were admitted, gave evidence that in his opinion Bunker C oil was deleterious to fish, although he admitted that it could, in certain circumstances, be sub-lethal and affect the fish adversely without necessarily killing the fish. He agreed that there are many variables in deciding the toxicity of Bunker C oil, including the temperature of the oil, the temperature of the water in which it is placed, the activity of the water in which it is placed, and certain others.

Dr. Birtwell was cross-examined extensively as to the fact that no specific tests of the waters of Alberni Inlet had been completed to show the actual effect of the Bunker C oil on the water under the dock. It was pointed out that the authorities which he quoted, and which recorded tests as to the effect of Bunker C oil elsewhere,

all dealt with waters of a different kind and in a different area and under different conditions.

The definition provides that, to be deleterious, the substance need only be a 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 the water so that it is rendered deleterious to fish" (the italics are mine).

In my opinion the learned judge erred in imposing too heavy a burden on the Crown in requiring it to prove beyond a reasonable doubt that the water under the dock, having had the Bunker C oil added to it, was thereby rendered deleterious to fish. As I understand the effect of s. 33(2) of the *Fisheries Act*, it makes it an offence to deposit into water frequented by fish a substance which would, when added to water located in any part of the world and under any circumstances, render it deleterious to fish. I admit that this is a very wide interpretation, but the words "to any water" do not permit of any restriction in that regard. As I understand the definition, it simply means that once a substance has been found to be deleterious to fish when added to water anywhere, it then becomes an offence to deposit it into water in any other location.

It is paradoxical that a very strict interpretation of the words "to any water" lessens rather than increases the burden upon the Crown to prove the charge. It is not incumbent upon the Crown to prove that the specific substance added to the specific water of the dock area in Alberni Inlet in some specific quantity has harmful effects on fish. The effect of the Act is to provide that if such a substance has had a harmful effect on fish elsewhere when added to water, then it qualifies as a deleterious substance under the *Fisheries Act*. The cross-examination of Dr. Birtwell is enlightening, and I quote:

> *Q. All right, I'll put it another way. If you have one drop of Bunker C oil and you drop it in the middle of the ocean, are you going to come to court and say that that is deleterious to fish? A. In that Bunker C is deleterious to fish, I would say that it is deleterious to fish, whether it's a drop or two million gallons.*
>
> *Q. Is that the same for gasoline? A. Yes.*
>
> *Q. So anybody who uses a motorboat and drops a drop of gasoline while going down the Alberni Inlet, you suggest that's deleterious to fish and therefore there's been a breach of the law there? A. Yes, I do.*
>
> *Q. You go that far? A. You're asking my opinion whether or not it's deleterious, and to me if it's deleterious it's deleterious whether it's one tablespoon or two hundred gallons.*
>
> *Q. Well, surely the test is whether fish fry are deleteriously affected. Can you, in all honesty, say to this court that if a drop of oil is dropped in the middle of the ocean that fish are either going to die, or are going to be deleteriously affected? A. If it is a drop then it, presumably, once it's diluted, would not come up to 7,500 parts per million in a test. But it has been well documented that this particular oil is deleterious to fish. Now, the magnitude of the effect is obviously dependent upon various conditions and the amount of oil.*

Q. Has it ever been documented that one drop of oil in a reasonably sized container like the containers used by your two people, Hebert and Kussat, is deleterious to fish? A. Of any oil?

Q. Well, of Bunker C, I'll start with. A. Bunker C I don't think so, I don't think that a drop, whatever a drop is, I don't think that a drop of Bunker C in a large container has been tested. However, I do know that less than one cubic centimetre of oil in a litre of water has been shown to be toxic to pink salmon fry.

Of course, in the case of the example cited by Dr. Birtwell, such as the dropping of one drop of Bunker C oil in the ocean or the spilling of gasoline from an outboard engine, should a charge be laid, a court would likely apply the doctrine of *de minimus non curat lex*, but one can understand why even a small amount of a deleterious substance added to water in certain circumstances may render it injurious to fish. For example, if every power boat entering Nanaimo or Vancouver harbour added one-half pint of oil to the water in the harbour, it could very well cause serious contamination of the waters in the harbour and easily be deleterious to fish.

In summary, the onus on the Crown in the first count was to prove the following beyond a reasonable doubt:

(a) The formal essentials such as place and date.

(b) That Bunker C oil, in some quantity, was released into water by action of the respondent company. There was no issue on this essential.

(c) That the water into which it was released was frequented by fish. For the reasons given, I have found that the waters under the respondent company's dock were waters frequented by fish.

(d) That the substance, Bunker C oil, is deleterious to fish when added to any water. There was positive evidence of this fact from Dr. Birtwell, and that evidence was uncontradicted. I should also say, for clarity, that there appears to be no onus on the Crown to prove that the substance must be deleterious to the species of fish which frequent the waters in question. It is sufficient if the substance is known to be deleterious to other species of fish in other waters.

The intention of Parliament is made clear from a reading of the *Fisheries Act*. That Act was intended to put an onus on persons depositing any substances into waters frequented by fish to satisfy themselves that such substances were not deleterious to fish before they deposit them into such waters.

I would be manifestly ineffective to place an onus on the Crown to prove more than the essentials above listed, and the wording of the Act makes that very clear. It would be unreasonable to expect the Crown to sample each spill in any area whether remote or not, have it analyzed and the analysis produced as evidence. Most spills would be dissipated long before such a process could be put in action. There is no language in the Act that such a procedure is necessary. The use of the words "any water" instead of "water" was not an accident. In my view those words, and others in the Act, were purposely selected to place the onus on the person or corporation where

it belongs -- that is, on the person who deposits a substance in waters frequented by fish.

It is clear from the Crown's evidence that, in the opinion of the expert, Dr. Birtwell, Bunker C oil when added to water is deleterious to fish. The quantity which escaped into the water was approximately 170 gallons, which is certainly sufficient to warrant a charge being laid under the Act. The fact that the company promptly reduced the effect of the spill to a minimum is something which can be taken into account in mitigation but is not a factor in deciding the corporation's guilt or innocence of this charge.

For the reasons aforesaid, I would allow the Crown's appeal and enter a conviction against the corporation on count 1.

REGINA v. MACMILLAN BLOEDEL (ALBERNI) LIMITED

British Columbia Court of Appeal, Bull, Seaton, Carrothers, JJ.A., April 5, 1979

Environmental Law — Water Pollution — Oil Spill — Deposit of deleterious substance in water frequented by fish — Meaning of "water frequented by fish" — Meaning of "deleterious substance" — Fisheries Act, R.S.C. 1970, c. F-14, ss. 2, 33(2), 33(11).

The accused appealed its conviction in the County Court on a charge of depositing a deleterious substance in water frequented by fish. The grounds for the appeal were that the County Court Judge erred in his interpretation of the meaning of "water frequented by fish" and "deleterious substance".

Held, the appeal should be dismissed. It was not incumbent upon the Crown to prove that the few cubic feet of water into which the oil was spilled contained fish at the time of the event, given the fact that both fish and water move. Nor did the statutory definition of "deleterious substance" oblige the Crown to prove that the water into which the substance in question was introduced was rendered deleterious as a result; it was sufficient to show that the substance was itself deleterious when added to any water. The County Court Judge exercised his discretion properly in refusing to re-open the case.

R. v. of Georgia Towing Company Limited, unreported, B.C.C.A. February 7, 1979, *R. v. Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161; 40 C.C.C. (2d) 353; refd to.

D.R. Kier, for the Crown, Respondent
D.W. Shaw, for the Accused, Appellant

Seaton, JJ.A.:—The appellant was charged that it did unlawfully deposit a deleterious substance in water frequented by fish, contrary to s. 33 (2) of the *Fisheries Act.* It was acquitted in the Provincial Court but an appeal was taken to the County Court where the acquittal was set aside and a conviction entered. This appeal from conviction is restricted to a question of law alone.

The appellant says that the County Court judge erred in his interpretation of the phrase "water frequented by fish", in his interpretation of the phrase "deleterious substance", and in denying the appellant's application to reopen the case.

The charge arose out of a spill of about 170 gallons of bunker C oil during unloading at the appellant's deep sea dock at Alberni Inlet. A suction valve was not closed when it ought to have been and the oil spilled beneath the dock. The appellant was prepared for this sort of accident and the response was prompt. Very little oil spread beyond the dock and the cleanup was carried out relatively quickly. If an offence was committed when the oil was spilled, the containment of the oil and the prompt cleanup would be relevant to the sentence but not the conviction.

There have been some changes in the *Fisheries Act,* and what follows may be inapplicable to other cases. The provisions that concern us are these:

33. (2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

33. (11) For the purposes of this section and section 33.1,

"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 deleterious to fish or to the use by man of fish that frequent that water,

2. In this Act ...

"fish" includes shellfish, crustaceans and marine animals;

The first argument arises out of the words "water frequented by fish". The learned trial judge concluded that this oil was not deposited in water frequented by fish for these reasons:

The evidence established that the deep sea dock was in that part of the Alberni Inlet which forms the estuary of the Somass River, that is, the intertidal waters where the fresh water of the River and the salt water of the Inlet intermingle. The lower reaches of the Somass River are spawning grounds for four species of salmon, namely, sockeye, chum, coho, and spring, and the habitat of Steelhead trout. Adult salmon migrate up the river in the summer and fall, even as late as the end of the year in the case of coho salmon. Salmon fry could be found in the waters of Alberni Inlet from the 1st of February until the latter part of the summer depending upon water temperature and other conditions. They would feed in the shallow waters along the shoreline. On the 9th February, 1977, a fisheries office had carried out an inspection of the waters of the Inlet and had found freshly hatched chum salmon fry in the shallow waters of the Inlet including the water of Lupsi Kupsi Point some 200-250 yards from the deep sea dock. Sculpins had been observed off the deep sea dock during tests carried out in 1975-76. On the day of the spill, 15th February, 1977, and during the following four of five days when the clean-up operation was carried out, there was no evidence of fish being under or around the deep sea dock. As the Crown's evidence showed that salmon fry are normally found in the shallow waters of shorelines, no reasonable inference could therefore be drawn that salmon fry were present in the water beneath the deep sea dock on the 15th February, 1977, or during the subsequent clean-up. Mr. Kier submitted that it was irrelevant that no dead fish were observed as a result of the spill. However, it seems to me that if salmon fry had been present under the dock during this incident their dead carcases would have been very much observed. The absence of carcases means either there were no fish under the dock or if there were the oil was not deleterious.

On this evidence and applying the interpretation of "water frequented by fish" above, I find (a) that the water of the estuary of the Somass River in the Alberni Inlet in which the deep sea dock is located is water frequented by fish; (b) that the particular water beneath the deep sea dock was not frequented by fish; (c) that the oil spill was contained in the water beneath the deep sea dock and did not endanger the fish frequenting other parts of Alberni Inlet. The Crown has therefore failed to prove that the oil was deposited in "water frequented by fish" as alleged in both counts.

I think that approach too narrow. It restricts the enquiry to commercial fish present at the moment of the spill in the very drop of water into which the oil was spilled. I am not prepared to accept any of those restrictions. The definition of "fish" is given in the *Act* and it is broad. The section does not speak of "water in which there are fish" but of "water frequented by fish". To restrict the word "water" to the few cubic feet into which the oil was poured would be to disregard the fact that both water and fish move.

I think that the learned County Court judge did not err in law when he concluded that this deposit took place into water frequented by fish.

I turn now to that is meant by "deleterious substance". It is the appellant's submission that to prove this charge the Crown must show that after the spill the water was made deleterious. That was what the learned Provincial Court judge said:

The definition of "deleterious substance" is not very satisfactory because it begs the question when it states a "deleterious substance means (a) any substance that if added to water ... it is rendered deleterious to fish..." According to Dr. Birtwell one drop of bunker sea oil in the middle of the ocean can be potentially deleterious to fish. This may well be so but what the Crown has to establish in view of the words in the definition "so that it is rendered deleterious to fish" (emphasis added).

Deleterious means "physically or morally harmful or injurious" (Oxford International Dictionary, p. 474). In my view, then, the degradation of the water must be shown to be harmful or injurious to fish.

Dr. Birtwell's evidence showed that there were many factors to be taken into account in determining whether bunker sea oil rendered water deleterious to fish, but there was little, if any, evidence of these factors with respect to the water under the dock into which the oil was spilled. Two samples of this water (Exhibits 4 and 5) were collected by the fisheries officers but there was no evidence of any test upon them for toxicity. Dr. Birtwell's opinion on the toxicity of bunker sea oil in water was stated in broad terms based on tests carried out by others. As most of the conditions affecting that toxicity were not proven with respect to the water under the dock, I cannot find that that water was in fact rendered deleterious.

The learned County Court judge rejected that approach and I think he was right in so doing. Section 33 (2) prohibits the deposit of a deleterious substance, not the deposit of a substance that causes the water to become deleterious. The argument to the contrary is based on the definition of "deleterious substance". I must agree with

the Provincial Court judge that a definition section that uses the word being defined is awkward.

What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To re-phrase 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 water is rendered deleterious to fish or to the use by man of fish that frequent that water. Applying that test to the findings of fact here, bunker C oil is a deleterious substance. Once it is determined that bunker C oil is a deleterious substance and that it has been deposited, the offence is complete without ascertaining whether the water itself was thereby rendered deleterious. I do not think that the words "that water" in the definition section mean the water into which it is alleged the accused deposited the substance. Those words refer back to "any water", at the beginning of the definition; the hypothetical water which would degrade if the oil was added to it.

The appellant says that 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 at least as unsatisfactory. Nothing could be done to prevent damage to the water that fell short of rendering the water deleterious. To prove that the damage had gone that far would be difficult indeed.

Had it been the intention of Parliament to prohibit the deposit of a substance in water so as to render that water deleterious to fish, that would have been easy to express. A different prohibition was decided upon. 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.

The appellant applied to re-open before the County Court judge in order to argue the implications of *Regina v. Sault Ste. Marie* 85 D.L.R. (3d) 161; 40 C.C.C. (2d) 353; 3 C.R. (3d) 30 which had just been handed down. It is not apparent whether the application to re-open was made after or before the pronouncement of judgment.

For reasons that I expressed in *Regina v. Gulf of Georgia Towing Company Limited*, February 7th, 1979, I doubt that the *Sault Ste. Marie* decision would be useful to the appellant, but that is not before us. The County Court judge exercised his discretion in refusing to re-open. I do not think that he erred in law in so doing. That is the end of the appropriate enquiry in this court.

I would dismiss the appeal.

BYRON CREEK COLLIERIES LIMITED v. THE QUEEN

British Columbia County Court, Provenzano Co. Ct. J., Cranbrook, B.C. September 13, 1978

Environmental Law — Water Pollution — Permitting the deposit of a deleterious substance in a place from where it entered water frequented by fish — Accused constructing works to divert stream around overburden dump site — Unforeseeably large rainfall causing erosion and pollution despite accused's efforts — Defence of Act of God available — Accused entitled to acquittal — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

Environmental Law — Water Pollution — Permitting the deposit of deleterious substance in a place from where it entered water frequented by fish — Accused spending large sum on construction of works to prevent pollution and erosion — Accused intending to complete works but prevented from doing so by delay in governmental approval — Government inspector testifying that interim efforts of accused were adequate — Defence of all reasonable care available — Accused entitled to acquittal — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

The accused corporation appealed from a conviction on one count of unlawfully permitting the deposit of silt in a place from which it entered water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*. The accused had dumped overburden into a ravine, although a stream that intermittently flowed through the dump site had been partially diverted around it at considerable expense. Additional works were planned to control erosion and pollution, but a delay by the government in approving them meant they were not in place when the area was subject to an unusually heavy rainfall. This caused extensive erosion of material out of the dump site and into a nearby creek.

Held, the appeal was allowed. On the foreseeability of the unusual rainfall the trial judge erred in his finding of fact and thereby failed to give proper effect to the defence of Act of God. While the appeal could have been allowed on that ground alone, the County Court Judge also found that the accused had brought itself within the defence of all reasonable care. This was evidenced by the accused's expenditure of $400,000 on the pollution control measures, by the testimony of a provincial Inspector of Mines that the accused's interim efforts were adequate, and by the fact that the delay in implementing the full scheme for pollution control was the fault of the government, not the company. Short of suspending operations entirely, the accused did everything reasonable within its power to prevent the commission of the offence, and therefore could escape liability on this ground as well.

R. v. Jack Cewe Ltd. (1975), 23 C.C.C. (2d) 237; *R. v, The Corporation of the City of Sault Ste. Marie*, [1978] 3 C.R. (2d), (1978) 40 C.C.C. (2d) 253; appl'd.

S. Campbell, for the Crown, Respondent
L.A. Best, for the Accused, Appelant.

Provenzano, Co. Ct. J.:(Orally):—This appeal was heard by me on the 13th of June, 1978, and I adjourned it over to today to give me ample opportunity to review the transcript which were extensive in this particular appeal and to consider the

authorities that were cited to me on argument. I apologize that by reading my Reasons for Judgment it may take a little longer than if I'd had them typed and presented to the Court.

The appellant was convicted on the 14th of December, 1977, at Fernie, by His Honour Judge L.A.T. Nimsick of an offence under Section 33 (2) of the *Fisheries Act*, R.S.C. 1970, Chap. F-14. The offence charged was that the appellant between the 1st day of December, 1974, and the 16th day of August, 1976, near Corbin in the County of Kootenay, Province of British Columbia, unlawfully did permit the deposit of a deleterious substance in a place where such deleterious substance may enter water, to wit, Michel Creek, which is frequented by fish. The appellant appeals that conviction to this Court upon the several grounds set out in the Notice of Appeal.

The appellant is a federally incorporated company carrying on a strip coal mining operation in the southeast corner of this Province at Coal Mountain near Corbin. The appellant commenced these operations in late 1972, although the site had been the object of previous mining operations dating back to the turn of the century. The appellant held valid permits to operate the strip mine issued by the Reclamation Branch of the Department of Mines and Petroleum Resources of the Province of British Columbia. The permits authorized the appellant to develop pits and dump areas as designated in the plans submitted on its behalf by Golder Brawner Associates, a consulting geotechnical engineering firm.

In the course of carrying out its strip mining operations, the overburden covering the coal seams was removed and dumped into a ravine, through which at certain times of the year Open Cut Creek ran. This creek eventually flowed into Michel Creek. Where this dump interfered with the natural flow of Open Cut Creek, the appellant installed a plastic pipe to carry the creek water over and down the dump site. The appellant also constructed a settling pond and culvert system to catch the waters of Open Cut Creek to prevent these waters from interfering with the dump site.

The appellant had, from the commencement of its operations, proposed to the government departments plans for sedimentation and control structures to protect the local streams from runoff containing spoilage. These proposals were delayed and stalled mainly due to conflicts between the government departments and not due to any fault on the part of the appellant. The delays consumed the better part of one year and final approval to the plans was eventually granted in August 1976. In the meantime, while the appellant did take some steps to install controls and had expended some $400,000.00 in doing so. However, it was not able to complete the essential settling ponds as a lease of Crown lands was necessary for this purpose. This was not forthcoming until the final approval was received.

During the first two weeks of August 1976, heavy rainfalls occurred in the southeast corner of the Province in the area of the appellant's operations. Roads were washed out and the appellant ceased operations in order to save the roads. The excessive rainfall caused a scouring erosion of the mountain side, including part of the dump site, and a mud flow resulted ending up in Michel Creek. This occurred about the 10th of August, 1976.

On the 16th of August, 1976, John Williams, a Conservation Officer for the Fish & Wildlife Branch for the Province of British Columbia, attended at the confluence of

the Open Cut Creek and Michel Creek and took a number of samples of water and stream bed from these creeks. These samples were analyzed by David Brown, the laboratory scientist for the Province of British Columbia. Brown found on the basis of these samples that the residue and turbidity levels in Michel Creek were higher below the confluence of Open Cut Creek than above. Otto Langer, a Pollution Biologist who viewed Michel Creek and Open Cut Creek on the 23rd of February, 1977, concluded that Michel Creek was a normal, productive, salmonid stream. He observed siltation in Michel Creek and concluded that a large sediment release from Open Cut Creek had caused it. It was his opinion that this siltation would clog the stream bed thus affecting the support system of the fish and that the suspended solids would impair the fish's ability to breathe. (Langer concluded that this situation was deleterious to fish. This opinion was not shared by Gary Vigers, an environmentalist consultant). Vigers conducted a bioassay test on rainbow trout and cut-throat trout to ascertain if suspended solids were harmful to fish. In tests containing concentrations of suspended solids the same or greater than found in Michel Creek at the relevant times, he found no harmful effects on these fish.

In October, 1976, Williams laid an information against the appellant charging a violation of Section 33 (2) of the *Fisheries Act*.

The trial occupied several days. Namely, the 24th and 25th of February, 1977, and the 4th and 5th of May, 1977. This was followed by written submissions from counsel and judgment was given by the learned trial judge on the 14th of December, 1977.

While the appellant has listed several grounds of appeal, I believe that they can be grouped for these purposes into three categories without harming or diluting the force of the grounds of appeal.

The first category is the general ground that the conviction cannot be supported on the evidence.

The second is more particular in that it is that the trial judge did not properly weigh the evidence in support of the defence of an act of God.

And lastly, that the trial judge did not consider the evidence in support of the defence that the appellant, in the circumstances, (acted with due diligence or with all reasonable care).

For the purposes of this appeal, it is only necessary, in my respectful opinion, to deal with the last two categories. Evidence was adduced at the trial relating to the rainfall in the area neighbouring the site of the appellant's operations at Coal Mountain. The evidence, in my respectful opinion, clearly shows that the rainfall was unusally high for that time of the year and also was an unusual occurrence. Upon my reading of the transcript of the evidence, I cannot find any evidence which contradicts that evidence. There was not testimony adduced to indicate that the amount of rainfull that occurred could reasonably be expected to occur. For example, Mr. Nohels testified that he had not seen it rain like that in 50 years.

However, the learned trial judge rejected that evidence. He said at page 6 of his Reasons for Judgment:

The rainfall that caused the mud flows during August was foreseeable and the results were inevitable.

An appeal court must not lightly interfere with the findings of fact that are made by the trial judges. Often findings of fact that are made by trial judges are influenced by the credibility of witnesses which the trial judge must assess. That aspect is not, in my respectful opinion, present here. Therefore, where that is the case, then it may be proper for an appeal court to weigh the evidence and make a finding of fact in the same manner as the trial judge. With all respect to the learned trial judge in this case, I cannot say that I would, on the evidence come to the same conclusion as he did on this point. The evidence of the unusualness of the amount and occurrence of the rainfall is uncontradicted. The inference is to be drawn this situation also existed at the site of the appellant's operations.

At page 3 of his Reasons for Judgment, the trial judge said:

During the summer of 1976 an exceptional amount of rain fell in the area with result that a large amount of rock, coal, and other materials were carried down the draw in which Open Cut Creek runs into Michel Creek.

It appears to me that the trial judge had concluded that the rainfall was unexpected or unusual and on the evidence I would say that that is the inevitable conclusion that must be made.

That being the case then, I cannot agree with the trial judge in the absence of any evidence to the contrary that this unusual rainfall should have been foreseeable. There is, with all respect, no evidence to support that finding. In my respectful opinion, the rainfall that occurred in August 1976 at the site in question was not foreseeable and I would so find on the evidence.

Therefore, in my respectful opinion, the trial judge was wrong in not giving effect to the defence advanced that the harmful flooding of Michel Creek was caused by an act of God, namely, the heavy rainfall. There was uncontradicted evidence to support this from witnesses who testified that it was this rainfall that caused the flooding.

On this ground this appeal is similar to the case of *Regina v. Jack Cewe Ltd* (1975), 23 C.C.C. 2nd, 237. In the case my brother Judge Grimmett, C.C.J., gave effect to a defence of an act of God where he found the amount of rainfall to be an act of God and could not be reasonably expected. So in the circumstances of this appeal I would find that the rainfall was clearly unforeseeable and unexpected and that the appellant had a good defence to the charge. On that ground alone I would allow the appeal.

However, I am also satisfied that the appeal must be allowed on the third category that I mentioned above.

This case was decided in December of 1977. At that time the case of *The Queen v. The Corporation of the City of Sault Ste. Marie* was pending before the Supreme Court of Canada and has been reported now in [1978] 3 C.R. (3d) 30. Judgment in that case was handed down on the 7th of May, 1978. While the unreported Reasons for

Judgment in that case were available to this Court at the hearing of this appeal, they were not, of course, available to the trial court nor was the case submitted to that Court for consideration at that time.

The decision in the *Sault Ste. Marie* case is, to say the least, a landmark decision in the law relating to cases commonly called pollution cases.

Had that case been available to the trial court and to counsel before the trial at the trial, no doubt the evidence adduced would have been more extensively canvassed with respect to the law enunciated in that case. No doubt, also, the learned trial judge would have directed his mind to the law in that case when weighing the evidence adduced.

In the *Sault Ste. Marie* case, the City of Sault Ste. Marie was charged -- and I must say at this point that all my citations from the *Sault Ste. Marie* case are from the Unreported Decisions at page 2:

> *The City of Sault Ste. Marie was charged that it did discharge, or cause to be discharged, or permitted to be discharged, or deposited materials into Cannon Creek and Root River, or on the shore or bank thereof, or in such place along the side that might impair the quality of the water in Cannon Creek and Root River, between March 13, 1972, and September 11, 1972. The charge was laid under s. 32(1) of the Ontario Water Resources Act, R.S.O. 1970, c. 332, which provides, so far as relevant, that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence and, on summary conviction, is liable on first conviction to a fine of not more than $5,000 and on each subsequent conviction to a fine of not more than $10,000, or to imprisonment for a term of not more than one year, or to both fine and imprisonment.*

The facts of the case are not, I suggest, important here. However, the nature of the offence before the Court in that case is similar in intent to the offence on this appeal, notwithstanding that in the former it was a provincial statute involved, whereas here we were concerned with a federal statute.

Mr. Justice Dickson gave the judgment of the court and his opening remarks are interesting and I cite them here. Page 1:

> *In the present appeal the Court is concerned with offences variously referred to as "statutory", "public welfare," "regulatory," "absolute liability," or "strict responsibility," which are not criminal in any real sense, but are prohibited in the public interest. (Sherras v. De Rutzen, [1895] 1 Q.B. 918.) Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution.*

Those words, I believe, set the tenor for the learned dissertation that he propounds later in his judgment. With the greatest respect, if I may simplify, the learned justice goes on to say that on the one hand there are true criminal offences and on the other hand there are absolute liability offences, but somewhere between lie the public welfare offences.

In this regard he commences the development of his reasoning this way, at page 9:

> *The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.*
>
> *In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.*
>
> *Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.*

After reviewing many authorities and reported decisions, Mr. Justice Dickson concludes as follows at page 26:

> *We have the situation therefore in which many Courts of this country, at all levels, dealing with public welfare offences favour (i) not requiring the Crown to prove mens rea, (ii) rejecting the notion that liability inexorably follows upon mere proof of the actus reus, excluding any possible defence. The Courts are following the lead set in Australia many years ago and tentatively broached by several English courts in recent years.*
>
> *It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that the concept of absolute liability and the creation of a jural category of public welfare offences are both the product of the judiciary and not of the Legislature. The development to date of this defence, in the numerous decisions I have referred to, of courts in this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine.*

The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

I conclude for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

(1) Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

(2) Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.

(3) Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

In that case, Mr. Justice Dickson then went on to find that the change in that case was a pollution offence which he considered to be a public welfare offence with no presumptions of a full *mens rea*. On this the learned justice went on to say at page 30:

The conflict in the above authorities, however, shows that in themselves the words "cause" and "permit" fit much better into an offence of strict liability than either full mens rea or absolute liability. Since s. 32 (1) creates a public

welfare offence, without clear indication that liability is absolute, and without any words such as "knowingly" or "wilfully" expressly to import mens rea, application of the criteria which I have outlined above undoubtedly places the offence in the category of strict liability.

Proof of the prohibited act prima facie imports the offence, but the accused may avoid liability by proving that he took reasonable care.

I have no difficulty whatsoever in concluding that the offence before this Court on this appeal is for the same reasons given by Dickson, J. similarly an offence of strict liability.

Therefore it would be open to the appellant to exculpate itself from liability by showing on a balance of probabilities that it had used all reasonable care in the circumstances.

There was some evidence before the learned trial judge in this case of the care or due diligence taken by the appellant in the circumstances. And there is some indication that the learned trial judge may have weighed that evidence. And while it is to be presumed that a trial judge is alive to the law, unless the contrary can be shown, it cannot be said, in my respectful opinion, that the learned trial judge was properly charged on the law in this case as stated in the Sault Ste. Marie case.

In my respectful opinion, the learned trial judge considered responsibility on the basis of absolute liability -- which is the third category of offences set out by Mr. Justice Dickson and in that case it is concluded that the act of dumping having been done by the appellant and the polluting of Michel Creek having originated from the dump, the appellant was liable and no defence was open to it.

However, in my opinion, for the reasons given by Mr. Justice Dickson, as I have mentioned above, this offence falls into the second category of offences mentioned by him.

Ordinarily in such circumstances the proper course to follow would be for this Court to order a new trial. However, in view of my finding on the second ground of appeal above and because in my view there is some evidence already before the Court upon which this Court may make a finding of fact relative to this ground of appeal, I deem it proper and just not to order a new trial.

I would find on the evidence that the appellant had taken all reasonable care that in the circumstances could have been taken. The appellant has installed various overflow pipes over the dump, constructed ditches and some ponds. It had expended some $400,000.00 on this work to prevent the polluting of local streams. For over a year prior to the polluting event, it had sought approval from government departments of its plans for complete pollution control. The evidence indicates that approval of these plans was held up by the very department that commenced these proceedings. Henderson, the Inspector of Mines, testified that the efforts of the appellant were adequate. His department was also satisfied with the program laid down to be undertaken by the appellant. Another inspector of mines, Mr. Lewis, also testified that he was of the opinion that the appellant's proposals was the ideal solution to the problem of any pollution. Short of ceasing operations, he stated that he had doubts

that the appellant could have taken other measures to prevent the polluting that took place.

Mr. Aiello testified as to the steps taken by the appellant to install ditches and settling ponds. Particularly he related the delays and difficulties with government departments on their plans.

The appellant had all necessary approvals to carry on their business and had for sometime been carrying on their business. But it didn't have approval for the pollution control system proposed. This was not forthcoming until August 1976, after the big rains and the pollution occurred.

Up to that time there was no evidence of any polluting of Michel Creek.

As Mr. Lewis said, short of shutting down operations entirely, what else could the appellant have done?

In my respectful opinion, the appellant took all reasonable care in the circumstances and in these circumstances two things must be noted, namely, that the delays created by the government and that there were unusual rains both of which could not have been reasonably anticipated or foreseen by the appellant.

For these reasons I would allow the appeal on this ground also. The appeal is allowed and the conviction is quashed. There will be an order that the fine be returned to the appellant.

RAYONIER CANADA LIMITED v. THE QUEEN

British Columbia County Court, Millward Co. Ct. J., Nanaimo, B.C., October 13, 1978

Evidence — Admissions — Corporation alleged to have deposited deleterious substance in water frequented by fish — Crown introduced admissions made by accused's employees — Existence of agency relationship only asserted by third parties — Evidence inadmissible as hearsay — Failure to prove agency relationship — Admissions not admissible as against corporate accused.

Environmental Law — Water Pollution — Deposit of deleterious substance in water frequented by fish — Oil Spill — Crown identifying substance in water only as "hydrocarbon" — Crown's expert testifying that not all hydrocarbons are deleterious — Failure by Crown to prove deposit — Accused entitled to acquittal — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

The Corporation appealed from a conviction on a charge of depositing oil in water frequented by fish, contrary to s. 33(2) of the *Fisheries Act*. Fishery Officers sampled an oil slick in water adjacent to the accused's premises, but the analysis introduced showed only that "hydrocarbon" was present in the samples. They also recorded admissions inculpatory to the accused made by two of its employees. At the time of the alleged offence, soil in the accused's property in an excavation surrounding part of its fuel system was saturated with "Bunker C."

Held, the appeal should be allowed. The admissions made by the employees should not have been received in evidence, because the Crown's only proof of an agency relationship was inadmissible hearsay given by the Fishery Officers. In the absence of the admissions, the Crown had failed to discharge the onus to show that the oil was deposited by the company, and that the oil in the water was the same substance as that found on the accused's premises. Moreover, the Crown's expert witness testified that not all hydrocarbons are deleterious substances.

Confederation Life Association of Canada v. *O'Donnell* (1886), 13 S.C.R. 218; *Jarvis* v. *London Street Railway Co.* (1919), 48 D.L.R. 61; *R.* v. *Strand Electric Ltd.*, [1969] 1 O.R. 190; ref'd to.

E.C. Chiasson, for the Accused, Appellant.
E.M. Reid, for the Crown, Respondent.

Millward, J.:—The Appellant operates a pulp mill at Port Alice, British Columbia, and was convicted on the following count:

> *On or about the 21st day of July, A.D. 1977 at Port Alice, British Columbia, did unlawfully deposit a deleterious substance, to wit oil, in water frequented by fish, to wit the Neroutsos Inlet, Province of British Columbia.*

Fisheries Officers testified seeing "what appeared to be an oil slick" on the waters of Neroutsos Inlet, near the Appellant's plant, and caused samples of the substance to be taken. The Officers told of seeing certain excavation work involving

two pipelines some five hundred feet inland from the dock area, where a substance which appeared to be the same product as that in the water near the dock was seen to saturate the soil. They saw the two pipes in the excavation and observed that the soil surrounding the area was saturated with a black fluid. They assumed the fluid was a petroleum product and described it as a heavy black viscous liquid. On the waters of the inlet itself they saw what appeared to be globules of bunker oil. The samples taken by the Fisheries Officers were analyzed and found to contain "hydrocarbon".

Expert evidence was given to the effect that hydrocarbons can be harmful to fish; that the effects of "Bunker C" on fish vary from toxic to relatively innocuous; and that not all hydrocarbons are deleterious or harmful to fish.

The Crown relied on certain admissions made by two employees of the Appellant to the Fisheries Officers, who testified that the employees represented themselves to be the technical Superintendant of the mill complex and the Environmental Liaison man, respectively. The learned trial Judge referred to admissions made by the Appellant's employees to the Fisheries Officers in concluding that the substance in question was Bunker C oil and that it had escaped into the waters in question as a result of a leak from the Appellant's oil line.

The Appellant says that the evidence concerning the admissions made by the Appellant's employees is inadmissible. Cross on Evidence (3rd) at p. 441 says that statements made by an agent within the scope of his authority to third persons during the continuance of the agency, may be received as admissions against his principal in litigation to which the latter is a party, but that so far as the reception of admission is concerned the scope of authority is a strictly limited conception. The admission must have been made by the agent as part of a conversation or other communication which he was authorized to have with a third party. Further, the existence of the agency must be proved before the agent's admissions can be received against the principal. The alleged agent's own statement of this fact would be inadmissible hearsay. Here, the only proof of the agency of the two employees consists of representations made by the employees themselves to the Crown's representatives.

In *Confederation Life Association of Canada* v. *O'Donnell* (1886), 13 S.C.R. 218, Gwynne, J. held at p. 230:

> *The declarations or acknowledgements of an agent are never admitted as evidence against his principal unless they are part of the res gestae and they become admissible, not as admissions, but solely on the ground that they are part of a transaction then being conducted by the agent for his principal.*

Again, in *Jarvis* v. *London Street Railway Co.* (1919), 48 D.L.R. p. 61, at 64, Middleton, J. said:

> *Upon the argument and objection of the ruling of the trial Judge excluding evidence as to statements made by the conductor immediately after the accident was dealt with —. It was said that immediately after the plaintiff had fallen the conductor alighted and helped him to his feet and that then a conversation took place where the conductor said: "It was my fault. I should not have opened the door, but I thought the car had*

stopped." The conductor was clearly not a person whose statement would bind the Company; he was not the agent of the Company for the purpose of making any admissions. His statement if it be admissible in evidence at all should only be received upon the ground that it formed part of the res gestae.

In *R. v. Strand Electric Ltd.*, 1969 1 O.R. 190, Laskin, J.A. (as he then was) in a dissenting judgment recognized two principles for the admissibility of an agent's admissions against his employer. There must exist proof of the agency and the admission of the agent to a third party must have been made within the scope of his authority during the subsistence of the agency. A third party cannot testify that the agent himself asserted the existence of an agency relationship because that would be hearsay, and accordingly the agency must be established by means other than by out of Court statements of the alleged agent himself.

Accordingly, the evidence of statements made by the Appellant's employees to the Fisheries Officers was not properly admissible, and with respect, should not have been considered by the learned trial judge. The only other evidence as to the nature of the substance in question was given by the Fisheries Officers who said that it was a heavy black viscous liquid and they assumed it to be a petroleum product, and that the sample was analyzed to contain hydrocarbon. The Appellant says that the Respondent (Crown) has failed to establish that the material in question, that is the black viscous liquid containing hydrocarbon, was a deleterious substance. On that issue there was evidence to the effect that while hydrocarbons can be harmful to fish, the hydrocarbon contained in "Bunker C" if indeed the substance in question was Bunker C, can vary in its effect on fish from toxic to relatively innocuous. The Crown's witness testified that not all hydrocarbons are deleterious or harmful to fish. An expert witness called by the Crown was asked:

Q. Well, is it not fair to say that if you as an expert were simply told that a particular compound or material contained hydrocarbons, told nothing more about it, I take it you would agree with me that you couldn't say one way or another whether that particular substance was harmful to fish.

A. No, I could not. Not without being more specific as to which hydrocarbon.

The Appellant further argues that there was not sufficient evidence to indicate how the substance in question was deposited by the Appellant in the ocean. The learned trial Judge found that in all of the circumstances it was an irresistible inference that the substance in question came from the Appellant's plant. With respect, following the exclusion of the admissions of the Appellant's agents, and in the absence of evidence identifying the substance in question, as the same as that found on the Appellant's premises, while the inference may be a reasonable one, it is not irresistible and the Crown has not discharged the onus on it to show that the substance in question, deleterious or otherwise was deposited by the Appellant.

The Appeal is allowed and the conviction set aside.

REGINA v. CRESTBROOK FOREST INDUSTRIES LTD.

Supreme Court of British Columbia, Toy, J., Cranbrook, B.C., November 20, 1978

Information — Sufficiency — Deposit of logging debris in water frequented by fish — Charges alleging only that offences occurred within a four month period in creek and tributary thereof — Trial Judge quashing charges after accepting as fact defence counsel's statement that creek was twenty-five miles long and had one hundred different tributaries — On Appeal, information held to be sufficient and valid — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3); Criminal Code, ss. 510, 512 and 729.

The accused was charged with depositing or knowingly permitting the deposit of logging debris in water frequented by fish. After plea, but prior to the calling of evidence, defence counsel moved for a dismissal of the charges on the grounds of vagueness or uncertainty of the time and place of the alleged offences. The trial judge accepted as fact defence counsel's statement that the creek to which count one applied was twenty-five miles long, and the tributary to which count two related was potentially one of a hundred different tributaries. Accordingly, the charges were quashed on the grounds that they were defective in form and substance and failed to meet the requirements of s. 510 of the Criminal Code. The Crown appealed by way of stated case.

Held, the appeal should be allowed and the case remitted to the Provincial Court Judge for continuation of the trial. If details as to the place of the offences were lacking and were necessary in order to ensure a fair trial, then it is was open for the accused to ask Crown counsel for further details. As to the vagueness or uncertainty of time, the information could not be quashed on this ground as the Crown was alleging that a certain course of conduct over the four month period constituted the offence.

Brodie v. The King [1936], 65 C.C.C. 289; *Regina v. Toronto Magistrates, ex parte Bassett*, [1967] 1 C.C.C. 251; *R. v. Nadin* (1971), 14 C.R.N.S. 201, *R. v. Kininger and Voszler* (1972), 18 C.R.N.S. 120; refd to.

R.W. Cairns, counsel for the Attorney-General of British Columbia, Appellant.
M.E. Moran, Q.C., counsel for the Respondent.

Toy, J.:—This is an appeal by way of stated case from the quashing of two charges preferred under Section 33(3) of the *Fisheries Act* R.S.C. 1970 c.F-14 after plea but before the merits of the charges were heard by a learned Provincial Court Judge. The stated case is in these words:

STATED CASE

1. *CRESTBROOK FOREST INDUSTRIES LTD., the Respondent herein, was charged that it:*

   Count 1 - between the first day of July, A.D. 1976 and the seventh day of October, A.D. 1976, near Kimberley, in the Province of British Columbia, being engaged in logging operations, did put, or knowingly permit to be put, slash,

stumps or other debris into water frequented by fish, to wit: Meachen Creek, contrary to the form of Statute in such case made and provided, and

Count 2 - between the first day of July, A.D. 1976, and the seventh day of October A.D. 1976, near Kimberley, in the Province of British Columbia, being engaged in logging operations, did put, or knowingly permit to be put, slash, stumps or other debris into water frequented by fish, to wit: a tributary stream of Meachen Creek, contrary to the form of Statute in such case made and provided.

2. *This matter was set for trial on February 27th, A.D. 1978, and the accused appeared through Counsel, M.E. Moran, Q.C. and the Crown was represented by D. Niedermayer, Esq.*

3. *After plea, but prior to the calling of any evidence the defence made an application to quash both counts of the Information.*

4. *Defence counsel stated that Meachen Creek was approximately twenty-five miles long and had approximately one hundred tributaries and this statement was not commented on by Crown Counsel.*

5. *I quashed both counts of the Information on the grounds that they were defective in form and substance and did not meet with the requirements of Section 510 of the Criminal Code.*

6. *The Crown being dissatisfied with my determination in the quashing of both counts of the Information, duly applied to me in writing on the 7th day of April, A.D. 1978, to State and Sign a Case for the opinion of the Supreme Court of British Columbia, seting forth the grounds upon which same was questioned.*

THEREFORE in compliance with that Application, I have hereby in the above enumerated paragraphs set forth the facts of the said case and do herebelow state the grounds upon which the proceedings are questioned:

a) Did I err in law in finding that the two counts in the Information were defective in form and substance and did not meet the requirements as set out in Section 510 of the Criminal Code?

b) Did I err in law in accepting as a fact that Meachen Creek was approximately twenty-five miles long and had approximately one hundred tributaries, in the absence of any evidence to establish this fact?

The offences charged are ones that are to be tried pursuant to the summary conviction provisions of the Criminal Code of Canada i.e. Part XXIV. However, by virtue of Section 729(1), Sections 510 and 512 are made applicable to summary

conviction proceedings as well. I do not propose to reproduce herein the words of the various subsections but in connection with this appeal I have considered as being applicable to this appeal, Section 510(1), Sections 510(2) (b) and (c), Section 510(3), Sections 512(f) and (g), and Section 729(2).

Section 33(3) of the *Fisheries Act* reads as follows:

> *3. No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.*

The thrust of Crown Counsel's argument on this appeal is that:

> The wording of the two counts are:
>
> 1) in the words of the statute or section creating the offences and
>
> 2) that the actions of the charged company are set out giving the accused company notice of the two transactions it is charged with.
>
> The Crown further submitted to me it was difficult to know where the debris went into Meachen Creek and this was an ongoing operation and not just an isolated transaction.
>
> The argument of Counsel for Crestbrook was:
>
> 1) That the charges were insufficient or invalid and he extensively analysed *Brodie v. The King* (1936), 65 C.C.C. 289.
>
> 2) That Meachen Creek is 25 miles long and has 100 tributaries.
>
> 3) That one cannot tell when the offences were alleged to have occurred over a four month period.
>
> 4) That according to *Brodie v. The King* the Court cannot order an insufficient information to be particularized or amended to make it sufficient or valid.
>
> 5) That the information failed to specify the mode of committing these offences.

Dealing with Mr. Moran's 5th point first, I am satisfied that the provisions of Section 512(f) are determinative against him.

With respect to the forceful argument presented on the applicability of *Brodie v. The King*, I confess to great doubts that that case is of any help at all. I do not entertain any difficulty having read Sections 33(3) of the *Fisheries Act* and the two counts involved in concluding that the transactions charged are the act or acts of putting or permitting to be put debris into Meachen Creek and one of its tributaries.

I view the problem in the light of Section 510(3) - Has the charged company been given sufficient detail of the circumstances...with respect to the act or ommission...- and to identify the transaction referred to? In substance, Crestbrook complains that the vagueness and uncertainty of the time and the location where the alleged offences took place renders both counts insufficient or invalid.

The cases cited by Counsel and many more that I have researched on the sufficiency of counts or indictments are cases after a trial on the merits, or after a preliminary hearing where Counsel had some opportunity to discuss the factual issues which gave rise to the charges. Here the charges are ones that must be proceeded with under the summary conviction provisions of the Criminal Code and in the case at bar - according to the stated case the only facts discussed before the learned Provincial Court Judge were the disclosure by Mr. Moran that Meachen Creek was approximately 25 miles long and that it had approximately 100 tributaries. In my opinion, the common sense view adopted by the learned Provincial Court Judge was right and he was entitled to rely on Counsel's uncontradicted assertions concerning material facts.

Although I appreciate I must come to an overall conclusion as to whether these two counts are valid, I propose to examine the uncertainty or vagueness of time and place separately.

VAGUENESS OR UNCERTAINTY OF PLACE

Crestbrook's contention is that it does not know and cannot ascertain from the information where over a 25 mile distance it was alleged to have put slash, stumps or other debris in Meachen Creek, and into which one of some 100 tributaries it allegedly put slash, stumps or other debris. The vagueness or uncertainty of place has recently been considered by both the Ontario and British Columbia Court of Appeal. The first in point of time was *Regina v. Toronto Magistrates, Ex Parte Bassett*, [1967]1 C.C.C. 251, but that case may be distinguishable on several bases. The second is *Regina v. Nadin* (1971) 14 C.R.N.S. 201. The majority judgment is that of Branca, J.A. and Nemetz, J.A., as he then was, concurring though there is a forceful dissenting judgment of Robertson, J.A. In that case, the accused before plea on a "impaired" charge moved to strike out the charge on the same grounds as are being argued here. In that case, the driving was alleged to have occurred at Trail, British Columbia - without further particularization. The motion to quash was not acceded to by the learned Provincial Court Judge, but was given effect to on an appeal by way of stated case, but in the Court of Appeal the majority held that the charge was neither invalid nor void. Mr. Justice Branca said at p. 204:

> *The lack of details as to time and place should not, in my opinion, render the charge either insufficient or void. In my judgment, assuming that the time and place were not adequately particularized, as alleged, and that further detail was required in order to ensure a fair trial, then it was quite open to the accused to ask for added detail which no doubt would have been supplied by Crown Counsel, to the accused in the Court below.*

I am in respectful agreement with the foregoing reasons and propose to follow them with respect to the lack of particularity of place or location.

VAGUENESS OR UNCERTAINTY OF TIME

In coming to the conclusion that I do, I do not specifically rely on the judgment of the majority in the British Columbia Court of Appeal in *Nadin* as there the time specified was only one day i.e. the 12th of February, 1970. Here the period of time alleged is almost four months during which the commission of alleged offences occurred.

The reasons for specifying such a long period of time in my view admits for two possible explanations:

a) The Crown does not know and cannot tell with greater precision when the offences occurred or

b) That the Crown in alleging a series of occurrances extending over a period of time as constituting the two offences.

Crown Counsel in his reply in the hearing before me asserted that this was an ongoing operation and not just a one piece or one stump type of transaction.

The operative words of Section 510(1) and (3) are:

> *510(1) Each count in an indictment shall in general apply to a single transaction ....."*
>
> *(3) ...and to identify the transaction referred to.....*

There are many examples of multiple acts constituting one transaction such as a single rape charge where the female person is ravaged several times and sometimes by several persons. There are cases where thefts and frauds have been charged stretching over many months - where there has been a continuing scheme or plan. Authority for that position can be found in a judgment of the Alberta Supreme Court Appellate Division delivered by Chief Justice Smith in *Regina v. Kininger and Voszler* (1972), 18 C.R.N.S. 120 where many other authorities were reviewed.

Considering the section creating the offence and the two charges here, I can readily appreciate that 1, 2, 3 or more pieces of slash or stumps allowed to be put in water frequented to fish may not be sufficient to constitute an offence. However, evidence of a course of conduct continued over a period of time may very well be an offence.

Considering as I must the combined effect of vagueness or uncertainty of both time and place I am of the opinion that the two counts are sufficient and valid charges. Under the circumstances I answer the two questions posed as follows:

> *a) Did I err in law in finding that the two counts in the Information were defective in form and substance and did not meet the requirements as set out in Section 510 of the Criminal Code?* *YES*

b) *Did I err in law in accepting as a fact that Meachen Creek was approximately twenty-five miles long and had approximately one hundred tributaries, in the absence of any evidence to establish this fact?"* *NO*

There will accordingly be an order reversing the quashing of the information and the case will be remitted to the learned Provincial Court Judge with this opinion and a direction that he continue with the hearing of the trial according to law.

NORTHWEST FALLING CONTRACTORS LTD. v. THE QUEEN

British Columbia Supreme Court, Toy, J., Vancouver, B.C., December 7, 1978

Constitutional law — Attorney-General of Canada prosecuting pollution offences under federal fisheries legislation — Offences not truly criminal in nature but still validy prosecuted — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2); British North America Act, 1867, ss. 92(14), 91(21).

Constitutional law — Fisheries — Federal legislation prohibiting deposit of deleterious substance in water frequented by fish — Valid exercise of federal head of power — Intra vires — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2); British North America Act, 1867, s. 91(12).

Information — Accused jointly charged with another corporation — Accused applying for prohibition on grounds that the information failed to disclose the charge it had to meet — Accused able to bring motion to quash or application to sever in Provincial Court — Application denied.

The accused and another corporation were jointly charged in three counts with depositing and permitting the deposit of a deleterious substance in water frequented by fish and with permitting the deposit of a deleterious substance in a place where it may enter such water. The company applied for an order to prohibit the Provincial Court Judge from hearing the trial on three grounds: first, that the Provincial Court proceedings were a nullity as the initiation and prosecution of such offences fell within exclusive provincial jurisdiction; second; that s. 33(2) of the *Fisheries Act* was *ultra vires*; and, third, that the accused was unable to know the charge that it had to meet.

Held, the application should be dismissed on all three grounds. First, the Fisheries Act created offences which although not truly criminal in nature could nonetheless validly be prosecuted by the Attorney-General of Canada. Second, the subsection in question was valid legislation under s. 91(12) of the British North Amercia Act, 1867, having as its objective the regulation, preservation and protection of fisheries, fishing and fish. Third, the objections and complaints of the accused in claiming that it was entitled to know the charges it had to meet were properly within the jurisdiction of the Provincial Court Judge and could be dealt with accordingly by a motion to quash or application to sever before or at the time when plea was taken.

R. v. Hauser and Attorney-General of Alberta, [1977] 6 W.W.R. 501; *Miller v. The Queen* (1975), 30 C.R.N.S. 372; *The Queen v. Robertson* (1882), 6 S.C.R. 52; *Attorney-General of Canada v. Attorney-General for Ontario*, [1898] A.C. 700; *Re Fisheries Act, 1914*, [1930] 1 D.L.R. 194; *R. v. Somerville Cannery Co. Ltd.* (1927) 49 C.C.C. 65; *Mark Fishing Co. Ltd. v. United Fishermen and Allied Workers Union* (1972), 24 D.L.R. (3d) 585; *R. v. Dan Fowler*, [1979] 1 W.W.R. 285; refd to.

H.J. Wruck, for the Crown, Respondent
Graham Wright, for the Accused, Petitioner.

Toy, J. (In Chambers):--This is an application by Northwest Falling Contractors Ltd. for an order of prohibition directed to a Provincial Court Judge seeking to prohibit him from hearing a trial of an information containing some three counts alleging offences under Section 33 (2) of the *Fisheries Act*, Statutes of Canada 1970, c.F.-14. The information I have to concern myself with was sworn by a Mr. Raphael Scheck, a Fisheries Officer, on the 13th day of June, 1978.

The petitioner alleges that Section 33 (2) of the *Fisheries Act* is, *ultra vires*, the Parliament of Canada and that the Attorney-General of Canada on his servants or agents lack the authority to initiate proceedings or conduct the proceedings, and, accordingly, served on the Attorney-General of British Columbia a notice pursuant to the *Constitutional Questions Determination Act* R.S.B.C. (1960 c. 72). However, counsel for the Attorney-General of British Columbia has seen fit not to be represented or attend at the hearing.

Counsel for the petitioner made three forceful submissions to me:

(1) that the initiation and prosecution of offences under the Federal *Fisheries Act* fall within Section 92 (14) of the *British North America Act* - the administration of justice of the province and accordingly the proceedings before the learned Provincial Court Judge are a nullity.

(2) That Section 33, sub-section 2 of the *Fisheries Act* is, *ultra vires*, the Parliament of Canada.

(3) that the petitioning accused company is entitled to know the charge is has to meet.

(1) THAT THE INITIATION AND PROSECUTION OF OFFENCES UNDER THE FEDERAL *"FISHERIES ACT"* FALL WITHIN SECTION 92 (14) OF THE *"BRITISH NORTH AMERICA ACT"* - THE ADMINISTRATION OF JUSTICE IN THE PROVINCE, AND, ACCORDINGLY, THE PROCEEDINGS BEFORE THE LEARNED PROVINCIAL COURT JUDGE ARE A NULLITY

Petitioner's counsel argues that *Regina v. Hauser and Attorney-General of Alberta*, 1977 6 W.W.R. 501 is determinative of this issue in his favour. I do not so interpret that case, as only Mr. Justice Morrow's judgment, who wrote independant reasons for the majority, could be so interpreted. Chief Justice McGillivray, whose reasons were concurred in by Mr. Justice Lieberman, recognized that there was a distinction in his view between *Acts* of the Parliament of Canada that were criminal law and other statutes that provided penal provision not being matters of criminal law. At page 514, Chief Justice McGillivray said in part:

> *There are many Acts of the Parliament of Canada which as part of the enforcement of such Acts have sanctions for the violation of the Act. There are the "Customs Act", the "Excise Act", the "Income Tax Act", the "Migratory Birds Convention Act", and the "Bankruptcy Act", to mention a few; and, indeed most federal statutes have penal provisions in them. It does not follow that, because punishment for the failure to comply with such enactments is declared, the Parliament of Canada is dealing with*

criminal law any more than it can be said that a province is dealing with criminal law when, as a matter of highway traffic regulations, it imposes a prohibitation against driving after a conviction for impaired driving, when at the same time the government of Canada has, as a matter of criminal law, legislated so as to permit a suspension of the right to drive to be imposed as part of the penalty (Ross v. Registrar of Motor Vehicles, 1975 1 S.C.R. 5).

What we are dealing with here, however, is the "Narcotic Control Act". While the penalty imposed for duck-hunting without a licence issued under an enactment of the Parliament of Canada could hardly be regarded as a crime any more than in the provincial domain illegal parking could be so regarded, I am nevertheless of the view that there can be no doubt the "Narcotic Control Act" is clearly the subject of criminal law, and violations of that Act are indeed crimes.

In *Miller* v. *The Queen* (1975), 30 C.R.N.S. 372, Mr. Justice Lajoie, whose reasons were concurred in by Rinfret, J.A. and Brossard, J.A., concluded, *inter alia*, that the Attorney-General for Canada had the right to initiate and prosecute charges under the *Bankruptcy Act* of Canada, which was legislation passed pursuant to Section 91 (21) of the *British North America Act*. It is, accordingly, my view that prosecutions under the *Fisheries Act* R.S.C. 1970, c. F-14 and Amending Acts not being criminal in nature fall in the category of Acts of Parliament that the Attorney-General for Canada can initiate and instruct counsel to conduct such prosecutions.

(2) THAT SECTION 33, SUB-SECTION 2 OF THE *FISHERIES ACT* IS, *ULTRA VIRES*, THE PARLIAMENT OF CANADA.

The three counts in the information charging the petitioning company were laid pursuant to Section 33(2) of the *Fisheries Act* which can be found in the Revised Statutes of Canada (1st Supp.) 1970, c. 17 which reads in these words:

(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

The Parliament of Canada has passed various fisheries statutes and such legislation falls within Section 91 (12) of the *British North America Act*, the legislative head being described as "Seacoast and Inland Fisheries". Petitioner's counsel submitted that this was essentially environmental or pollution legislation and fell under the exclusive provincial authority pursuant to Section 92 (5), the management and sale of the public lands belonging to the provinces and of the timber and wood thereon, or Section 92 (13), property and civil rights in the provinces.

During the course of argument I was referred to the following authorities, which I have reviewed and considered, namely, *The Queen* v. *Robertson* (1882), 6 S.C.R. 52, *Attorney-General of Canada* v. *Attorney-General for the Province of*

Ontario, Quebec and Nova Scotia, [1898] A.C. 700; *Re "Fisheries Act", 1914,* [1930] 1 D.L.R. 194, *Rex v. Somerville Cannery Co. Ltd.* (1927), 49 C.C.C. 65, *Mark Fishing Co. Ltd. v. United Fisherman Allied Workers Union* (1972), 24 D.L.R. (3d) 585, and a recent as yet unreported judgment of the British Columbia Court of Appeal, *Regina v. Dan Fowler,* Court of Appeal No. 770605, reasons pronounced October 16, 1978. From those cases I conclude that legislation that has as its objective the regulation, preservation, or protection of fisheries, fishing and fish is validly enacted federal legislation.

An examination of Section 33 (2) quoted above satifies me that that section clearly has as its objective the protection and preservation of fish. It may very well be as the petitioner's counsel argued, prosecutions under Section 33 (2) may inhibit or interfere with the logging or mining industries in this Province, and that there may be validly enacted environmental or pollution legislation passed by the Provincial Legislature. I was not directed in arguments specifically to any such legislation, however, it seems to me that the words of Lord Tomlin, *Re Fisheries Act, 1914,* 1930 1 D.L.R. 194 at 196 are apt where he said:

> *Questions of conflict between the jurisdiction of the Parliament of the Dominion and Provincial jurisdiction have frequently come before their lord-ships' Board, and as the result of the decisions of the Board, the following propositions may be stated:*
>
> *(1) the legislation of the Parliament of Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislature by a s. 92: see Tennant v. Union Bank of Canada 1894 A.C. 31.*

It is, accordingly, my conclusion that Section 33 (2) is valid federal legislation.

(3) THAT THE PETITIONING ACCUSED COMPANY IS ENTITLED TO KNOW THE CHARGE IT HAS TO MEET

Petitioner's counsel submitted that the petitioner could not be charged as both a principal and an agent; that some of the counts involved a strict liability and others required *mens rea;* and that they were charges unknown to the law.

The three counts in the information sworn the 13th day of June, 1978 to which the petitioner, Northwest Falling Contractors Ltd. will be asked to plead are in the following words:

> *The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited, on or about the 4th day of April, 1978, A.D. in the County of Vancouver in the Province of British Columbia, did unlawfully deposit a deleterious substance into water frequented by fish, to wit: Cooper Reach, Head of Loughborough Inlet.*

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED

COUNT 2: The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited on or about the 4th day of April, 1978, A.D. in the County of Vancouver, in the Province of British Columbia, did unlawfully permit the deposit of a deleterious substance into water frequented by fish to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED

COUNT 3: The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited on or about the 4th day of April, 1978, A.D. in the County of Vancouver, in the Province of British Columbia, did unlawfully permit the deposit of a deleterious substance in a place under conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter water frequented by fish to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED

It seems to me that whatever objections or complaints that the petitioner has to any one or more of those three counts are matters that can properly be dealt with by motion to quash or an application to sever at or before the time when the petitioner is asked to plead to the charges. At this stage of the proceedings, in my view, such matters fall exclusively within the jurisdiction of the learned Provincial Court Judge, and they are not matters or arguments that I should accede to on an application for prohibition.

Under the circumstance I dismiss the petitioner's application on all three grounds advanced.

Notes:

1. An appeal to the British Columbia Court of Appeal was then taken and was dismissed unanimously by judgment dated May 22, 1979. No written reasons were given.

2. The judgment of the Supreme Court of Canada is at page 296.

REGINA v. CANADIAN PACIFIC TRANSPORT COMPANY LIMITED AND CANADIAN PACIFIC LIMITED

British Columbia Provincial Court, G.H. Johnson J., Vancouver, B.C., January 10, 1979

Environmental law — Water pollution — Sentence — Oil Spill — Depositing or permitting the deposit of deleterious substance in water frequented by fish — Twelve thousand dollar fine — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(3), 33(5).

The accused plead guilty to a charge of depositing or permitting the deposit of a deleterious substance in water frequented by fish after its employees caused the release of three hundred and fifty to four hundred gallons of oil into a harbour adjacent to its operations.

Held, the company was fined twelve thousand dollars. The accused could not have brought itself within the defence of all due diligence as the event in question could have been foreseen and prevented. Moreover, the company could have avoided the spill if it had applied the recommendations of Environment Canada in its pollution control program.

Canada Tungsten Mining Corporation Ltd. v. The Queen, unreported, N.W.T.S.C., March 5, 1976; refd to.

W.H. Heinrich, for the Crown.
P.L. Maughan, for the Accused.

Johnson, J:—Now in the case of *Regina v. Canadian Pacific Limited* the accused corporation was charged that at the City of Vancouver, Province of British Columbia, on or about the 17th day of May, A.D. 1978, did unlawfully deposit or permit the deposit of a deleterious substance, to wit oil, into the water frequented by fish contrary to Section 33(2) of the *Fisheries Act*, revised Statutes of Canada 1970, C.F-14 and C. 17 (1st Supplement). Now the corporation through its agent and house counsel plead guilty to this charge. The facts and circumstances surrounding the charge are as follows: On May 17th, 1978, at 1400 hours Environmental Protection Service received a call that there was an oil spill in False Creek. Officers arrived there at 1430 hours from the Protection Service and began action to try and stop it. The source was an effluent or discharge coming from the Canadian Pacific Limited properties line, traced and followed to two oil separators located on Canadian Pacific Railway Line properties on False Creek. Officers stopped the oil discharge by 1500 hours. Canadian Pacific staff were pumping oil from an old separator into a new separator and this was being done without emptying the oil from the new separator resulting in an overflow of oil from the new separator. Three hundred and fifty to four hundred gallons of an oily mixture which was a combination of lubrication oil and diesel fuel overflowed into the waters of False Creek. The oily mixture went from the separator to the storm sewer to a pipe on land and then over the abutment into False Creek. There were fifty to sixty boats moored at the False Creek Marina nearby. Approximately, ten people, six of them employees of Canadian Pacific, worked till 1400 hours May the 18th 1978, using approximately thirty-five hundred dollars worth of absorbent material to clean up the oil spill. The total cost of cleanup operations to

the Canadian Pacific Limited was nine thousand eight hundred and thirty-five dollars and one and a half days later the cleanup operation was approved by Environment Canada. The Crown served notice on the accused of its intention to seek a greater penalty under Section 33(5) of the *Fisheries Act*, by reason of the fact that the company had been previously convicted of the following similar offences: one, that Canadian Pacific Limited was convicted at Vancouver, B.C., on February the 28th, 1977 of the offence that on or about the 30th day of October, 1975, did unlawfully deposit a deleterious substance in the waters frequented by fish and received a fine of four thousand dollars; and two, that Canadian Pacific Limited was convicted at Mission, B.C. on November 30th, 1971, of the offence that on or about the 23rd day of November, 1971, did unlawfully permit the deposit of a deleterious substance in a place, to wit, at or near Inches Creek, County of Westminster, Province of British Columbia, under a condition where such deleterious substance may enter water frequented by fish and the company was fined one hundred dollars. For further consideration by the Court but not set out in the notice seeking a greater penalty were the follow admitted convictions against the corporation: June 20th 1972, in Port Coquitlam, unlawfully filling a ditch with oil, contrary to Municipal By-law, a fine of two hundred dollars; October the 19th, 1971, at Port Coquitlam, unlawfully filling a ditch, contrary to a Municipal By-law, a fine of a hundred dollars; October 10th, 1972, at Mission unlawfully did destroy fry on a spawning ground of Bell Creek on September 15th, '72, fine six hundred dollars. The penalty provisions for contravention of Section 33(2) of the *Fisheries Act* are contained in Section 33(5)(b) of this *Act* which reads as follows, 33(5):

> *Any person who contravenes any provision of (b) subsection (2) is guilty of an offence and liable on summary conviction to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence.*

Parliament has increased the maximum penalty for a first offence and for each subsequent offence to the present fifty thousand and one hundred thousand dollars respectively from a former penalty for a first offence and subsequent offence of five thousand dollars and ten thousand dollars respectively. This marked increase in the maximum fines clearly demonstrates the seriousness of the offence together with the importance of safeguarding the environment. The words of Morrow, J. are apt in the case of *R. v. Canada Tungsten Mining Corporation Ltd.* a judgment of the Supreme Court of the Northwest Territories handed down on the 5th day of March, 1976, at Yellowknife where he says on page eleven of his reasons for judgment: 'I have already observed that the behavior of the appellant (*Canada Tungsten*) when the oil leakage was found should be taken into consideration. It is important as well, however, to keep in mind the deterrent effect of convictions and resultant consequences in the present type of offence. The magnitude and impersonal nature of present day industrial mining and similar operations makes it doubly important that the penalty not be so small as to invite breaches as to make it worthwhile to gamble on not being detected, *R. v. Kenaston Drilling (Arctic) Limited* (1973), 12 C.C.C. 2nd, at 383.' Employees of Canadian Pacific Limited were in the act of emptying the oil separator when they realized that the oily mixture of lubrication oil and diesel fuel was escaping from the separator and entering the waters of False Creek. False Creek has some fish in it and it is used by the public primarily for boat mooring and it is bounded partly by some

industrial and some residential properties. As soon as the overflow of oil from the separator was discovered, the employees of Canadian Pacific Limited acted responsibly and with dispatch and succeeded in stopping the discharge after approximately one hour and the deposit of approximately three hundred and fifty to four hundred gallons of the oily mixture into False Creek. The cleanup began immediately in cooperation with Environment authorities and one and a half days later Environment Canada approved the cleanup. The total cost of cleanup was as indicated by Canadian Pacific Limited at nine thousand eight hundred and thirty-five dollars. The company also installed a floatable oil boom in to False Creek at a cost of two thousand dollar to contain any spill. The Crown in serving notice seeking a greater penalty by reason of the previous similar convictions of the company is critical of the pollution abatement proposals and steps taken by Canadian Pacific. The Crown cites exhibit two, the letter from the Regional Director of Environment Canada to the Superintendent of C.P. Rail dated February 2nd, 1976, outlining six steps that Environment Canada recommended that the company incorporate in its pollution abatement program. It is apparent that if the company had followed these suggestions the overflow of the oily mixture would not have occurred because the primary cause of the overflow from the oil separator was the excess storm water rain runoff that occurred just prior to the spill. Two days earlier, on May 15th, 1978, Vancouver had a near record rainfall of twenty-seven point two millimeters from dawn to dusk of that day. At that time a crew of men from Canadian Pacific came once a month and pumped out the oil separators and emptied them. Now the company empties the two oil separators every two weeks. The new oil separator that had just been installed by the company prior to the spill cost the company eighty thousand dollars. The water runoff from rainfall goes into the storm sewer and then into the separator and because of the near record rainfall the oil separator was severely taxed and the monthly emptying of the oil separators was not frequent enough to cover unusual taxing of the system through heavy rainfall. The company has two previous convictions as I indicated and the company has other convictions breaching Municipal By-laws pertaining to the protection of the environment. At first glance this prior record of the company could indicate a history of noncompliance with pollution control laws, however, I'm satisfied that that is not the case and that Canadian Pacific Limited is sensitive to the serious nature of pollution offence and are most concerned about being a good corporate citizen. This company is the largest company in Canada and one of the largest in the world and has twenty-five thousand employees that it must educate, supervise and control in relation to the importance of the protection of the environment. Some mistakes are bound to occur and likewise a lack of due diligence in preventing an oil spill does happen. While in the case at bar an unusual rainfall triggered the oilspill, nevertheless with due diligence it could have been foreseen and prevented. I hereby impose a fine against the company in the amount of twelve thousand dollars and in default of payment, distress.

REGINA v. UNITED KENO HILL MINES LIMITED

Yukon Magistrate's Court, Horembala, Dep. Mag., Whitehorse, Y.T., January 19, 1979

Environmental law — Water pollution — Sentence — Failure of tailings dam — Deposit of deleterious substance in place where may enter water frequented by fish — Fine of ten thousand dollars — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused entered a plea of guilty to a charge of depositing a deleterious substance in a place under conditions where it may enter water frequented by fish. The offence occurred when a dam which held back effluent from the accused's tailings treatment pond burst, releasing 11.8 million gallons of effluent into a nearby creek.

Held, the accused was fined ten thousand dollars. While the quantity of effluent released was very large, the incident had not been shown to have occurred because of negligent conduct by the company. In addition, this was the first offence of this kind for the accused, and it took remedial measures promptly after the incident occurred.

W.H. Corbett, for the Crown
D.H. Searle, Q.C., for the Accused.

Horembala, Dep. Mag.:—United Keno Hill Mines Limited has pleaded guilty to an offence that they did deposit a deleterious substance in a place under conditions where such a deleterious substance may enter the waters frequented by fish, to wit, the South McQuesten River, near Elsa, Yukon Territory, contrary to Section 33(2) of the *Fisheries Act.* The relevant facts, as I find them, are as follows:

Some time late in the afternoon of the day in question between 4:00 and 5:00 p.m., the dam holding back effluent from the treatment pond at the company's mine site burst, releasing into Flat Creek, which flows into the South McQuesten River, which itself empties eventually into the Yukon River, some 11.8 million gallons of effluent containing various amounts of zinc, cadmium, and copper and other minerals into this water system in a span of approximately one hour. Prompt action was taken by the company officials and that resulted in a temporary dam being in place by the evening hours at that day. The following day, in consultation with environmental and fisheries officials, the dam was repaired in a permanent nature. The ecological damage to the water system described is incalculable at this time. Although investigation of the said water system revealed that no dead fish were found, nevertheless, the evidence of Mr. Hoos, an environmental expert, was impressive with respect to the long-term effects on the growth and reproduction of fish; and that is the greatest concern from the stand-point of the environment and there can be no doubt whatsoever that the presence of these minerals in the water system is deleterious to the fish. It has been suggested by the Crown that the cause of the dam burst was as a result of the improper replacement of materials forming part of the dam structure in the spring of 1978. These materials were either ice-covered or snow-covered and were put in place after the removal of part of the structure of the dam in order to assist the removal of a D-8 Caterpillar that had been trapped in the ice. On the evidence before me, particularly that of Mr. Bennett from the company, who stated that the dam appeared to burst, not from the top of the structure, which contained the new materials, but from the bottom; and also the fact that the ice or

snow-covered materials may or may not have better compactability, I am not satisfied that it has been established that the replacement material was the cause of the break in the dam. It has also been suggested by the Crown that by using the machinery in question, that is, the caterpillar, to investigate seepage in April of 1978 the company was alerted at that time to a possible weakness in the dam structure. The evidence disclosed that the caterpillar was placed on the treatment pond for the purpose of digging trenches in the ice to help with the precipitation out of solids from the tailings pond in the spring months when the ice was still on the treatment pond. This was done every year, and that was the primary function for the machinery being on the ice. The caterpillar commenced an exploratory excavation in the general area of the apparent seepage and became subsequently trapped in the ice. The seepage that was revealed was not new, but apparently evidenced itself each and every spring, and its source was not necessarily from the dam structure but could possibly have been from the surrounding swampy area. On the basis of that evidence, it has not been established to the satisfaction of this Court that the Crown's submission in this regard is valid and one that the Court can act upon.

The final submission made by the Crown with respect to the penalty involved the lack of an emergency plan or back-up system, and it points to the fact, amongst other things, that the tailings pond was kept at full capacity and that also, a temporary plug was not installed in the tailings pond dam at the time of the incident. I am satisfied from the evidence in this case by Mr. Smith that maximum efficiency in the treatment system is achieved when the tailings pond is filled completely with effluent, and I am also satisfied that the installation of a temporary plug in the tailings pond would incur a risk to the tailings pond dam and would not be a prudent course of action with respect to this incident.

Turning now to the appropriateness of the fine. In September of 1977, the legislation was amended to increase the maximum fine ten-fold to a maximum of fifty thousand dollars to reflect the public concern with industrial pollution and its damage to the environment. The Crown has suggested a fine in the mid-range and says that it is justified in this case. I am assisted in determining the appropriateness of the fine by the case of *Canadian Pacific Limited*, decided on December the 7th, 1978, in Vancouver. Written Reasons for Judgment have been requested, but they have not yet been handed down. That was a case involving the spillage of four hundred gallons of crank-case and diesel oil into False Creek in the waterfront area of the City of Vancouver. In that case, the accused corporation had been previously convicted of a similar offence and had disregarded environmental agencies' warnings regarding the possibility of a second spill. Provincial Court Judge G.H. Johnson imposed a fine in that case of twelve thousand dollars. That case also disclosed that the company had spent approximately nine thousand dollars in cleanup costs. The distinguishing features of the case before me are as follows:

(1) Unlike the Canadian Pacific Case, a substantially greater volume, that being 11.8 million gallons of deleterious substance was released into the environment.

(2) On the other hand, from the accused' corporation's standpoint, the evidence in this case disclosed that the company acted prompty to the emergency .

(3) On the findings of this Court, there was not any negligence that could be attributed to the company in any way regarding this burst in the dam.

(4) This corporation has not been previously convicted for any pollution statute or ordinance, and the evidence here disclosed that the company officials acted prompty and have co-operated with the various environmental officers and agencies.

Having said that, the courts, particularly in the north, have generally imposed substantial fines, because of the precarious nature of the environment and in order to stress the deterrent element of environmental offences. The Court wishes to say this. The accused corporation now stands convicted of a pollution offence. It is also now aware of the possible structural weakness in the damming system employed at its mine-site; and in effect, is now put on notice that any future failure of the dam and possible conviction of a similar offence would be treated by the courts as extremely serious. But keeping in mind the findings of this Court in this case, the public interest would be served with the imposition of a fine in the amount of ten thousand dollars. In default, distress of the accused corporation. The fine will be payable on or before February 16, 1979.

REGINA v. TEXACO CANADA LIMITED

Nova Scotia Magistrate's Court, McCleave,J., Halifax, May 31, 1979

Environmental law — Water pollution — Oil Spill — Deposit of deleterious substance in a place under conditions where may enter water frequented by fish — Accused's inspection procedures not adequate to show it exercised all due diligence — Causal break in pipeline foreseeable — Oil a deleterious substance — Water frequented by fish — Accused convicted — Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

Constitutional law — Fisheries — Water pollution — S. 33(2) intra vires — Valid exercise of federal power — British North America Act, 1867, s. 91(12).

The accused was charged with the unlawful deposit of a deleterious substance in a place under conditions where it may enter water frequented by fish contrary to s. 33(2) of the *Fisheries Act* after twenty-nine thousand gallons of furnace fuel oil escaped from the accused's plant when part of an underground pipeline failed. The oil flowed through a sewer into Halifax Harbour.

Held, the accused was found guilty. The totality of the evidence established that the accused had not acted with all due diligence and therefore had not satisfied the reverse onus required for acquittal on a strict liability offence. In particular, the company's inspection procedures failed to address the possibility of an underground pipeline rupture, which was found to be a foreseeable event. The accused was responsible for the natural consequences of its negligence, once the oil escaped its control. Through the application of the statutory definitions and the receipt of evidence, the water in question was found to be frequented by fish. The oil in question was found to be a deleterious substance.

R. v. Canadian Forest Products Ltd. (1978), 7 C.E.L.R. 113; *R. v. MacMillan Bloedel (Alberni) Limited* (1978), 7 B.C.L.R. 210, 7 C.E.L.R. 128; *R. v. The Corporation of the City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 253; *R. v. Pierce Fisheries Ltd.* (1970), 12 D.L.R. (3d) 591; *R. v. Standard Oil Company of British Columbia Limited*, unreported, B.C. Prov. Ct., November 18, 1974; *Canada Tungsten Mining Corporation v. The Queen*, (1976) 5 C.E.L.N. 120; [1976] W.W.D. 104; *R. v. B.C. Forest Products Ltd.* (1976), 5 C.E.L.N. 7; *R. v. Imperial Oil Enterprises Limited*, unreported, N.S. Mag. Ct., March 6, 1978; refd to.

Subsection 33(2) of the *Fisheries Act* is a valid exercise of the exclusive federal power under s. 91(12) of the *British North America Act* and therefore is *intra vires*.

Northwest Falling Contractors Ltd. v. The Queen, unreported, B.C.S.C., November 6, 1978; folld.

B. Burgess, for the Crown.
J. Merrick and R.L. Barnes, for the Accused.

McCleave, J.:—In mid-December of 1977 there was a substantial loss of furnace fuel oil from a bulk storage tank owned and operated by Texaco Canada Inc. at 3617 Barrington Street, Halifax. A considerable quantity escaped into Halifax Harbour near Pier 9 and as a result the Texaco Company was charged that:

> *On or about the 13th day of December, 1977, did at or near the Texaco bulk plant near Pier 9, City of Halifax, County of Halifax, Province of Nova Scotia, unlawfully deposit a deleterious substance, to wit: Oil in a place under conditions where such oil may enter the waters of Halifax Harbour being waters frequented by fish, contrary to Section 33 (2) of the Fisheries Act, Revised Statutes of Canada, 1970, Chapter F-14, as amended, and did thereby commit an offence under Section 33 (5) of the said Fisheries Act.*

At the trial held in Court Room 1 at the Law Courts February 26th through 28th, 14 witnesses were heard - 13 called by the Crown - argument was made and decision reserved. The Court has anxiously considered the various legal issues raised, most particularly the elements of strict liability as they have been generated from the landmark decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie*, the defence of due diligence, and the effect of recent amendments to the *Fisheries Act* relating to what constitutes a "deleterious substance".

The legal issues were presented by Mr. Burgess for the Crown and Mr. Merrick (with whom was associated Mr. Barnes) for Texaco. It is convenient to itemize them and then deal with each one and the relevant evidence in turn.

FIRST - THE CONSTITUTIONALITY OF THE FISHERIES ACT

SECOND - WAS HALIFAX HARBOUR A HABITAT OF FISH?

THIRD - WAS THE FURNACE OIL AS DEPOSITED IN THE HARBOUR DELETERIOUS?

FOURTH - DID THE FURNACE OIL ESCAPE UNDER SUCH CIRCUMSTANCES AS TO MAKE TEXACO GUILTY OF THE CHARGE?

FIRST - THE CONSTITUTIONALITY OF THE *FISHERIES ACT*

Mr. Merrick advanced the argument that the *Fisheries Act* would be *ultra vires* if it sets arbitrary standards, which could in effect render it an act dealing with pollution. The Court has studied the various provisions of the *Fisheries Act* and respectfully agrees with Mr. Justice Toy's opinion in *Northwest Falling Contractors Ltd. v. R.* that

> *legislation that has as its objectives the regulation, preservation or protection of fisheries, fishing and fish is validly enacted Federal legislation. An examination of Section 33 (2) satisfies me that that section clearly has as its objectives the protection and preservation of fish.*

This decision, in the British Columbia Supreme Court, was handed down December 7, 1978.

I am therefore of opinion that the section in question is *intra vires* since it is within Section 91 (12) of the *British North America Act*, "Seacoast and Inland Fisheries".

SECOND - HALIFAX HARBOUR AS A HABITAT OF FISH.

Section 33 (2) as enacted by Chapter 63, Acts of 1969-70, deals with deposits "in water frequented by fish" and Section 33 (11) defines this phrase to include "all waters in the fishing zones of Canada". There was evidence at the trial, not seriously challenged that is the basis for my finding that Halifax Harbour is water frequented by fish. Alternatively, I would have to consider that the Harbour is within a fishing zone of Canada giving "zone" its natural meaning - the word does not appear to have been defined in the *Fisheries Act*, although I have found it mentioned in the *Fisheries Act*, Section 2, definition of "Canadian fisheries waters" and in chapter 63 in Section 34.4, "coastal waters of Canada".

The evidence I have referred to came from Wayne Leslie Pierce, a biologist with the federal Environmental Protection Service, Wayne Gordon Pelly, a chemist with the same service, Peter J. Wells, an aquatic biologist with the Federal Department of the Environment, Dr. John Henry Vandemeulen, marine zoologist and biologist, and Colin Duerden, Regional emergency co-ordinator for Environmental Protection Services.

(I might also note parenthetically that my brother provincial magistrate, Judge R.E. Kimball, in a similar case involving *Imperial Oil Enterprises Limited*, handed down a decision on March 6th, 1978, and found that the waters of Halifax Harbour fit the definition of "waters frequented by fish". The events in that case occurred May 29, 1977).

THIRD - WAS THE FURNACE OIL AS DEPOSITED IN THE HARBOUR DELETERIOUS?

The Court had the benefit of expert evidence from both sides on the question as to the effect of furnace oil on Halifax Harbour. It is obvious from the evidence that the oil had spread and eventually was dissipated. The Court does not however find that the situation was similar to one faced by Judge Kimball in the case referred to previously. There the Court had no evidence to satisfy it that there was enough oil in relation to the amount of harbour water to make the oil deleterious. As he noted,

> *"it's irrational to take the position that a mere drop of oil lying on top of a water, a large body of water, would make that deleterious."*

The Court notes that Section 33 (12) of the *Fisheries Act*, as enacted by chapter 63, Acts of 1967-70, provides that the Governor in Council may make regulations prescribing concentrations of substances which would in effect create a deleterious substance as defined in Section 33 (11). No such regulation has been drawn to my attention although there are more than nine pages of references to regulations under this *Act* in the Consolidated Index of Statutory Instruments published in Part II of the Canada Gazette, covering the period between January 1, 1955 and September 30, 1978.

(Most regulations concern Provinces or areas of Canada, a considerable number concern specific species such as Atlantic herring and Fraser River salmon, some deal

with seasons for fishing operations, and a few are related to environmental-pollution aspects: landfilling on the Fraser River, Chlor-alkali mercury liquid effluent, meat and poultry products plant liquid effluent, metal mining liquid effluent, petroleum refinery liquid effluent, potato processing plant liquid effluent, pulp and paper effluent and a number dealing with gravel and logging).

The Court considered the definition of "deleterious substance" as enacted in the 1969-70 amendment and further amended in 1976-77 by chapter 35.

> *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.*

In this area of law, one of the most experienced judges is His Honour J.S.P. Johnson of the British Columbia Provincial Court. I will be dealing with two of his decisions later, but refer to one now - *R. v. Canadian Forest Products Limited,* decided June 1, 1978 since it deals with the question of proof of "deleterious substance".

He noted at p. 4 of his 14 page decision:

> *Taking into consideration the familiarity of persons with gasoline and oil products in every day life and the national and international concern with oil pollution, it may be that a Court might be able to take the judicial notice that oils, gasoline and other hydro-carbons were deleterious substances, but I need not do that in this case as there is more than sufficient evidence for me to find that the oil deposited by the company was a deleterious from the evidence presented.*

And he noted at p. 8 that

> *The Crown is not required to prove that the substance deposited was deposited in such a manner that the concentration at the time of deposit was or could be deleterious to fish.*

Then quoting himself from another decision, he continued,

> *...the Crown need only prove that at some time the water is frequented by fish and that gasoline is a deleterious substance and that the accused did permit the deposit thereof.*

Then, summing up this observations on the effect of the amended definition, Judge Johnson wrote at p. 10:

> *I find that it is not necessary for the Crown to prove that the substance deposited was of such a concentration, or attained such a concentration in the water, in this particular case, that is was deleterious to fish, but only that it is known to be a substance which is deleterious to fish.*

British Columbia provided yet another case which was considered by the Court in determining the issue arising from the allegation of the deposit of a deleterious substance. *R. v. MacMillan Bloedel (Alberni) Limited* was decided in the Court of Appeal of that province on April 5th, 1979, and was brought to my attention by counsel after the original argument was completed.

There 170 gallons of bunker C oil spilled during unloading at the company's deep sea dock, because a suction valve was not closed properly. The company acted quickly to clean up.

The Court, Messrs. Justices Bull, Seaton and Carrothers, through Mr. Justice Seaton, dealt with the definition in this way:

> *What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To re-phrase 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 water is rendered deleterious to fish or to the use by man of fish that frequent that water. Applying that test to the findings of fact here, bunker C oil is a deleterious substance. Once it is determined that bunker C oil is a deleterious substance and that it has been deposited, the offence is complete without ascertaining whether the water itself was thereby rendered deleterious. I do not think that the words "that water" in the definition section mean the water into which it is alleged the accused deposited the substance. Those words refer back to "any water", at the beginning of the definition; the hypothetical water which would degrade if the oil was added to it.*

The witnesses in this area were Dr. Peter J. Wells, an aquatic biologist with the Department of the Environment, Dr. John Henry Vandemeulen, a marine zoologist and biologist, and, called by the defence as its only witness, Dr. Gilles La Roche, a biochemist with the Marine Sciences Centre at McGill University. Each was found qualified by the Court to offer opinions as to the effects of oil upon fish and the fish habitat.

When they formulated opinions, it was necessary that each found these on specific factors. For example, Dr. Wells considered the weather, water temperatures, organisms present, their distance from the shoreline, whether the oil is emulsified or floating or dispersed or stirred, whether the living matter affected would be killed or grow in a different way or discharge the component. Dr. Vandemeulen considered the sub-lethal effects, the metabolism, growth, feeding ability, ranges or concentration, including a threshold range, whether a compound was normally part of the current and the solubility of the oil. Dr. La Roche considered changing conditions of the environment, discernible effects, whether effects were stimulating or toxic, the time of contact and the concentration, evaporation and weathering, winds, his belief that concentration or uptake should not be related to toxicity, whether the environment were static or natural, the difficulties of determining concentration at low levels of water, and the mobility of fish.

The weight of evidence of these scientists does not hang on any question of credibility, although I did consider that Dr. La Roche was over-zealous in qualifying

his answers. Be that as it may, other judges could weigh their evidence as well as I could at trial by reading the transcript.

Before making my finding, I will deal at greater length with the question as to whether it was Texaco furnace oil found in the harbour. The evidence included 10 samples of oil (C.1 through C.9 and C.13) which were analysed by Wayne Gordon Pelly, a chemist with the Environmental Protection Service.

Similar samples were:

C.1 from Texaco's storage tank
C.3 from the sewer outlet into Halifax Harbour
C.7 from near Jetty four
C.8 from Pier 9
C.9 from the diked area at the Texaco plant

Dissimilar samples were:

C.2 from the tanker 24th of February at Pier 9
C.4, 5 and 6 from HMCS Preserver
C.13 from a storage tank of Petro Fina

The defence had opportunity to study the scans made by Pelly in carrying out his analyses. There is no doubt but that the greater quantity of oil found on Halifax Harbour December 14th came from Texaco.

It was useful, however, to consider the rate of flow of the oil before making this finding.

The witness James Edward Currie, a Texaco employee for 19 years, put the loss at 29,032 gallons after the company carried out its daily reconciliation process. The reconciliation was normally carried out at 7.30 or 8 in the morning. The previous reconciliation showed a shortage of 300 gallons.

Trucks would normally load at around 285 gallons per minute, according to Mr. Currie.

Wayne Leslie Pierce, the informant in this matter and a biologist with the Environmental Protection Service, described looking in the dike, and seeing a stream of oil running across the floor into a catch basin. As is obvious from the photographic exhibits, this was immediately south of the paved area for truck loading, and at a lower level. Pierce estimated the flow at 10 gallons a minute and said it was running out as fast as it was running in. He captured some (C.9).

Another Crown witness, Patrick McGonigal, marine surveyor with the Coast Guard, saw oil coming out the two foot sewer outlet, and captured some (C.3). He described the flow as 15 gallons a minute at least.

Pierce and McGonigal gave evidence as to the spread of oil on the harbour. On the 14th the lattter flew over the harbour in a helicopter and saw oil from the A. Murray MacKay bridge to Imperoyal and Point Pleasant Park.

Considering all the evidence - scientific and lay - I find that a deleterious substance, furnace fuel oil, came from the Texaco plant onto Halifax Harbour. My principal ground is the rate of flow observed pouring into the harbour at the sewer outlet.

FOURTH - THE QUESTION OF LIABILITY

The amendments in Chapter 63 of the Acts of 1969-70 provided, by what became Section 33 (8) of the *Fisheries Act*, that

> *it is sufficient proof of the offence to establish that is was committed by an employee or agent of the accused whether or not the employee or agent is identified or prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.*

I shall consider several cases later which deal with "due diligence".

On May 1st, 1978, Mr. Justice Dickson on behalf of an unanimous Supreme Court of Canada presented the landmark judgment in *R. v. The Corporation of the City of Sault Ste. Marie.* In this case all counsel have proceeded on the basis that the question of a breach of the Section 33 of the *Fisheries Act* fits the 2nd category set out in that decision.

It is therefore appropriate to consider those portions of the judgment applicable here (I shall refer to the page numbers in the 35 page copy available to me).

Category two is set out at p. 28 - "Offences in which there is no necessity for the prosecution to prove the existence of *mens rea* the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused ..... took all reasonable steps to avoid the particular event."

And, he notes further on the same page, "the principle that punishment should in general not be inflicted on those without fault applies".

The key words in the section which I am considering are "shall deposit or permit the deposit." At page 32 of *Sault Ste. Marie* Mr. Justice Dickson has helpful thoughts on direct acts of pollution. "The causing aspect centres on the defendant's active undertaking of something which it is in a position to control and 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 might have foreseen."

The judgment considers the defence of due diligence in its concluding paragraphs. One question to be answered, as I read the third last paragraph, is

> *...whether the accused exercised 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.*

In an earlier part of the judgment at p. 24, Mr. Justice Dickson refers to the element of control, and quotes various opinions as to its ingredients. The samples he notes are: supervision, inspection, improvement of business methods, exhortation of employees, pressure upon the thoughtless and inefficient, keeping organizations up to the mark, reasonable influence of control. (A consideration of the Supreme Court decision in *R. v. Pierce Fisheries Ltd.* [1971] S.C.R. 5 followed and it is a useful study as to how these elements could be considered in the operation of a fish plant).

For the purposes of this decision I think that is a sufficient consideration of *R. v. Sault Ste. Marie*, except to note that I make a finding that no wilful behaviour by any person is in question here.

What is the burden of proof then on Texaco? And the overall burden? As stated in *Sault Ste. Marie.*

> *While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.* (P. 28).

And I have noted earlier the *Act* itself provided that the Defendant can escape liability by establishing that he "exercised all due diligence."

In short, I must weigh the evidence and decide, on a balance of probabilities, whether Texaco established that it exercised all due diligence.

Now, a consideration of the facts. Texaco, as I will refer to Texaco Canada Inc., runs and operates a bulk storage plant at 3617 Barrington St., Halifax. On December, 14th, 1977, there was a break in its pipeline system, and furnace oil escaped in huge quantities as much as 29,000 gallons. Some of this escaped from a compound, flowed along a ditch between the Texaco plant and a railway track, and found its way to the harbour through a sewer outlet.

Texaco's chief engineer for the Atlantic region, Jack Arnold Rohrer, said that the source of the leak from the pipeline system was through a cast iron pipe fitting, cracked at its flange, which was located 38 inches below surface level. The fitting was part of the delivery system from the storage tanks to the loading area for delivery trucks.

In the summer of 1977, certain modifications were carried out at the plant. Two of the three storage tanks were relocated. The discharge in question came from the middle one, about 150 feet from the cracked flange. Donald Potter, the assistant superintendent for Texaco, had been present when the parking area was filled in. He said the pipe was laid into a bed of crushed stone, and the flange was within a few inches of the retaining wall. Another modification was the paving over of the loading area for the trucks which included the cracked flange.

About the year 1939, Texaco's predecessor - the McColl-Frontenac Company - had spent considerable funds to endyke the storage compound, and Texaco had since constructed facilities. Rohrer, whose background included construction engineering for Texaco for approximately 10 years, said that the dike was in reasonable condition, and could be expected to contain a massive spill. There were three small holes in the

dike wall to allow the release of rain water. To his recollection, there was no drain in the dyked area. The cast iron valves were considered to be safe, amongst the safest in the industry.

The weather had been exceptionally cold for December, and Rohrer said that frost was found when the cracked flange was excavated. The flange was 38 inches below the surface and 3 inches from the retaining wall. Rohrer said it was highly unusual to find frost to that depth so early on in the winter, and there should not have been any frost around the pipe.

The Court asked him if he could assess the cause of the crack and in order he gave differential stress, material fatigue and Act of God.

Could the break be foreseen? I have to think that this is really not a matter when an Act of God is a defence, since the Almighty can be expected to provide Halifax with cold weather at some time during the winter. In this case, the low temperatures came early. The one new factor that had interposed since the previous winter was the digging up and packing, then paving the loading area. Had this set up new strains upon the valve which cracked? I have to think that this is a factor I must consider.

The defence position is that there was nothing to indicate that such a leak should have been foreseen. The Crown argues that Texaco did not take all reasonable care, and points to these facts to support this condition: the enormous loss of oil before detection which indicated a lack of proper monitoring procedures, the leaving open of drains inside the dike, the lack of knowledge of three senior employees of the drains outside the dike into which the oil could flow, the dyke wall did not contain the oil indicating a lack of proper care in maintenance, and there was the change in the parking area which created new conditions.

The Court therefore turns to some of the cases involving oil escapes and section 33 (2) of the *Fisheries Act*.

(1) *R. v. Standard Oil Company of British Columbia Limited*, tried by Judge J.S.P. Johnson on November 18, 1974, with decision on January 20, 1975, in the provincial court of British Columbia. Gasoline had escaped from a bulk tank on to the clay floor of the bulk plant and then through a cement wall into the harbour. He considered the defence of "due diligence" provided by s. 33 (8) and said in part it meant

> *...due diligence in the construction, maintenance and inspection of the installation.*

He found that the gasoline had escaped through a hole in the cement wall and said

> *the onus was on Standard Oil to prove that they did exercise all due diligence to prevent that hole being in the wall and thus prevent the gasoline spill; they did not discharge that onus.*

Judge Johnson also has some opinions, clearly recognized by him as *obiter dicta* that

> *it may be that the person is required to prove not only that the installation was properly constructed and maintained, but that which was constructed was the best and most advanced construction possible to prevent the environmental damage. It may not be enough to say a cement retaining wall was built to prevent a gasoline spill without additionally proving that a cement wall was the best type of construction to prevent the spill.*

(2) *Canadian Tungsten Mining Corporation Limited v. R.* was decided by Mr. Justice Morrow of the Supreme Court of the Northwest Territories, on appeal *de novo* from Deputy Magistrate L.S. Ekhardt. Judgment was given in March, 1976. Oil was found on a river some distance below the oil storage tank of the accused, and it was first thought the oil had escaped from the tank. It was subsequently discovered that the oil had leaked from a fuel pipe which was part of the fuel distribution systems supplying heating oil from the storage tank to several buildings. As noted, "it had been completely closed and insulated until opened for the inspection. There had been no metering system or regular pressure tests in effect designed to detect any oil leakage from the tank or pipe." The defence raised was that the accused "exercised all due diligence to prevent its commission..." s. 33 (8) of the *Fisheries Act.*

Mr. Justice Morrow said

> *to avoid liability the appellant must couple lack of consent with a behaviour or consciousness which in effect shows it was not blind to the consequences of the possibility as well as the consequent danger of a leakage such as is found in the present case.*

And later he found "due care and diligence" would refer to preventing the leak and not the correcting the leak or reducing the damage.

> *It is quite true, as was argued, that to prevent the leak in the present case, to set up inspection to look for weaknesses in the installations such as are found at appellant's plant may be difficult. The fact of the matter is that no such tests appear to have ever been made since the plant was erected, and certainly no routine ever laid down for opening the packing around the offending pipes to see if erosion was taking place.*

The plant, he noted, was in an area where extremes of climate are common. There was a primary responsibility for proper installation, repair and maintenance as well as inspection upon the accused. The conviction was upheld, although the fine was varied.

(3) *R. v. British Columbia Forest Products Ltd.* was a trial *de novo* before Judge Cashman of the British Columbia County Court on June 17, 1976. The accused had used a substance known as Oilsperse 43 into waters to clear up an oil spill - the polluted waters were boomed. The substance was a new product and its drum contained no directions for its use. The Crown contended that Oilsperse 43 was

a deleterious substance, but the Judge concluded that it always remained on the surface of the water and said:

> *If that is so, there is no evidence as to the effect on fish or other marine life.*

The charge was dismissed. The learned county court judge did not consider the effect of s. 33 (8), or if he did it was not mentioned in his judgment.

(4) *R. v. Imperial Oil Enterprises Limited* was decided by Judge R.B. Kimball of the Provincial Magistrate's Court in Nova Scotia on March 6, 1978. Oil had escaped from the accused's refinery on the shore of Halifax Harbour. The accused was found not guilty on the point that is was not established beyond a reasonable doubt that the quantity which escaped in relation to the area it spread on was deleterious to fish. Much of Judge Kimball's judgment concerned this question of concentration. The final six pages of his 40 page judgment involve consideration of the defence of due diligence.

He thought that the oil had escaped in the quantity it did "because of the failure of the operator of the separator and the shift foreman to have detected the oil in the boom area... at a time when its detection would have prevented the accumulation of the oil in the quantities to which it did accumulate." Each had made a cursory visual inspection of the boom area "at a time when they each had a knowledge of an unusually large quantity of oil within the separator." Judge Kimball considered that they were acting with less than due diligence when they did not carry out further observation. He said that the defence of due diligence provided in s. 33 (8) could not be relied on by the company. He acquitted however on the sole point that there was lack of proof that the deposit of oil was deleterious.

(5) In *R. v. Canadian Forest Products Ltd.* Judge J.S.P. Johnson of the provincial court of British Columbia made a decision on June 1, 1978. The oil spill had resulted from the rupture of an oil pipe, the oil moving into the mill sewerage system and then into a channel. The split in the pipe was caused by wear from vibration. Due diligence was raised by the defence, the company claiming that an accident had caused the spill.

Judge Johnson considered the facts and found that the rupture could have been anticipated by the company, because the pipe line was hanging on a bracket and was subject to wear from vibration. Also there was a sewerage outlet ten feet from the oil spill line. He likened this case to the *Tungsten* case noted previously.

To understand the leakage, the bulk storage layout was: A load line from the harbour at Pier 9 to the bulk storage tanks; pipes from the tanks passing through valves, through open air in the dyked compound, through a wall alongside the paving area referred to, under that paving area and passing through a valve, and to the loading area for the delivery trucks near the parking area. (The photograph exhibit N-2 shows the latter part of the piping from the tanks as it enters the wall supporting the parking area. The delivery truck area is just to the left, but outside the picture).

One notes several changes of course in the flow of oil between the tanks and the pumps serving the delivery trucks.

The valves near the storage tanks were of a safe construction, and were there to stop any free flow of oil - they could operate only, as Mr. Rohrer said, when there was a truck being loaded at the other end. In other words, the loss of oil could only occur when these power chamber valves had been opened because trucks were being filled.

Each morning the company would make a reconciliation of its oil in storage. On the morning of the 14th, when the reconciliation was made by Donald Potter, the assistant superintendent, between 7.30 and 8, the reconciliation showed a loss of 300 gallons over the previous 24 hours - a figure not considered unusual because of the extreme cold and other factors. The next reconciliation, taken on the morning of the 15th, showed a loss of 29,032.

The total loss of 29,032 gallons had not taken place on the full day, however. It took place on the morning of the 14th, while trucks were being filled, until the moment when James Edward Currie, manager of the plant, noticed oil spurting from three holes in the wall at the east side of the property, and he had the pump supplying the trucks shut off and closed all the valves. This took place sometime before 3 p.m.

It might be noted that the tanks could be filled at rates of 285 gallons per minute, and the oil spurts - through holes from 1.1/4 to 1.3/4 inches - cleared some 12 to 15 feet of track before landing in a ditch between two sets of railway tracks. From then the oil ran southerly along the ditch, and into a rock (or French) drain, going underground.

In addition to the spurts of oil through the three holes, which were located in the wall immediately alongside the paved in area, (see the right portion of the wall in D.3) there was also a substantial flow of oil in the open area immediately south, shown at the middle of D.2, the bottom right of D.1 and in D.31. The informant, Wayne Leslie Pierce, a biologist with the Environmental Protection Service, told of visiting the Texaco plant early in the afternoon of the 14th - the time would be between 2 and 3 o'clock - and observing what he called a stream of oil, like a small stream or brook, flowing at a rate he estimated to be 10 gallons per minute, along the dyke floor into a catch basin. He took a sample in a bottle, C.9.

It is clear beyond any question that the spurts of oil through the wall flowed along the ditch and down the French drain. It is possible that the oil which disappeared into the catch basin inside the dike augmented this flow. In any event, the flow of oil from the old sewer outlet into the harbour continued for some time and Mel O'Leary of Cyril Dauphinee Limited, who managed the clean-up, estimated between 3,000 and 4,000 gallons of oil were taken out in 15 days.

It is clear that the escape occurred over a period of some seven or eight hours, and that the Texaco employees did not take action until Mr. Currie ordered the valves to be closed. It is also clear that the Texaco employees were not aware that the ditch outside their plant led to a drain into the harbour. It is also clear that the events of the leakage, so evident from the evidence assembled afterward, were clouded at the time by the fact there were other but small oil spills on the 13th from non-Texaco sources which were traced as to their source by government agencies.

Has Texaco discharged the burden of showing due diligence? These facts were considered by the Court:

(1) The dike obviously had holes from which oil could escape;

(2) The cold weather, though coming early, and the paving of the parking area created a situation which called for vigilance;

(3) The opinion of Mr. Rohrer that "anything man made is subject to failure. The most carefully constructed piece of equipment or facility is subject to disability at one time or another - dikes not excluded."

(4) The statement of Mr. Currie that in mid-morning of December 14th he checked the diked areas and saw nothing which would cause an oil spill in the harbour. This check was made after a telephone call from the agent for Petro Fina, that company having been considered as a possible source of the spill. Again between 2.30 and 3 he examined the drains in the dike and saw, as he said, nothing out of the ordinary in the dikes.

Countering each of these points would be this evidence:

(1) The dike in which the three holes were located was the old dike wall, and another wall had been built inside it;

(2) There was always cold weather at some time during the winter, and there had been no break in the system leading to large losses of oil before that day;

(3) The opinion of Mr. Rohrer that he "would expect the dike walls to retain a massive spill". and that he didn't "think I would expect a leak at the particular point." He answered "No" to the question as to whether there was any part of the inspection procedure that would have detected a break of this nature before it occurred.

(4) The evidence of Mr. Pierce, supported by that of Thomas Leung of the Nova Scotia Department of the Environment, was that there was a considerable quantity of oil in the diked area.

I must now consider whether Texaco did exercise due diligence. I am driven to the conclusion that the inspection procedure was not satisfactory. I make this a finding - in other words, there wasn't due diligence.

But one other question remains. Granted, as I have found, that there was fault in Texaco's inspection procedure, what effect is there in the fact that the open ditch led to an unknown sewer into Halifax Harbour?

I am of the opinion that the company is responsible, once it fails in the defence of due diligence, for a natural result of its fault. The natural result of an escape of oil may be unpredictable and unforeseen, but certain physical laws will be followed - the most important being that a liquid will seek lower levels.

The company has argued the unforeseeability of the result of the leakage. Indeed if the oil had remained in that ditch and had for example, prevented the movement of freight cars along the railway tracks or either side for several days, different law would have applied. That is to say, the action would probably be at common law and certainly s. 33 (8) would not be in issue.

The key words in that section are:

> *unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.*

What happened here, of course, was accidental - only a mad man would intend an oil spill or leakage. And, of course, Texaco people would not consent to the deposit of oil in the ground from whence it could enter the harbour. But as Mr. Justice Morrow said in the *Tungsten* case, previously noted,

> *To avoid liability the appellant must couple lack of consent with a behaviour or consciousness which in effect shows it was not blind to the consequences of the possibility as well as the consequent danger of a leakage such as is found in the present case.*

Accordingly I convict. In assessing the penalty, I consider that the company acted properly in trying to minimize the effects of the leakage, and I take into account the considerable amount of money spent on the safeguarding of the bulk storage plant, and on the clean-up. I must also consider the rather large amount of the leakage. It seems to me that a penalty in the lower range is appropriate, and I fix this at $2,000.00 payable by June 29, 1979.

Dated at Halifax, N.S., this 31st day of May A.D., 1979.

RE FOREST PROTECTION LIMITED AND GUERIN

Supreme Court of New Brunswick - Appeal Division, Hughes, C.J.N.B., Bugold and Ryan, J.J.A., Fredericton, May 25, 1979

Constitutional law — Fisheries Act — Pest Control Products Act — Certiorari — Prohibition — Crown Corporation.

Appeal from the judgment of Stratton, J. Supreme Court of N.B.- Queen's Bench Division, reported at p. 139 in this volume and (1978), 7 CELR 93.

The accused, Forest Protection Limited, a provincial crown corporation, applied for certiorari and prohibition to stop proceedings under subsection 33(2) of the *Fisheries Act* and subsection 3(1) of the Pest Control Products Act and, subsection 44(1) of the Pest Control Products Regulations. The informations were laid by Mrs. Guerin, the President of the Concerned Parents Group Inc.

Held, the application of the accused for orders of certiorari and prohibition with respect to the summons and informations laid under the Fisheries was refused. The Crown is liable to prosecution under section 71 of the *Fisheries Act*. No similar provision is contained in the Pest Control Products Act, and therefore, the Crown is not liable to prosecution under that Act. Prohibition was granted with respect to prosecutions under the Pest Control Products Act and the Regulations.

Hughes, C.J.N.B.: -- This is an appeal by Forest Protection Limited (herein referred to as "F.P.L.") from the judgment or order of Mr. Justice Stratton, dismissing with costs three applications by F.P.L. for orders of certiorari to remove into the Supreme Court and to quash thirty summonses issued by a number of Judges of the Provincial Court of New Brunswick to F.P.L. pursuant to informations laid by the respondent Lucretia J. Guerin, President of The Concerned Parents Group Inc. (herein referred to as "Mrs. Guerin"), and for orders of prohibition to prohibit any Judge of the Provincial Court of New Brunswick from taking any further proceedings with respect to the above referred to informations and summonses.

On March 14, 1977, Judge Taylor, a Judge of the Provincial court, pursuant to informations laid by Mrs. Guerin issued five summonses in which it was alleged that F.P.L. on or after May 20, 1975, and on May 26, 1976, and on three occasions on May 28, 1976, committed breaches of s. 33(2) of the Fisheries Act, R.S.C. 1970, Chap F-14 and amendments thereto, which reads:

> *33(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*

On the same date Judge Taylor issued two other summonses on informations laid by Mrs. Guerin in which it was alleged that F.P.L. did, on May 28th, 1976, May 21, 1976 and May 26, 1976, breach the provisions of s.3(1) of the Pest Control Products Act, R.S.C. 1970, Chap P-10 which reads:

> *3(1) No person shall manufacture, store, display, distribute or use any controlled product under unsafe conditions.*

Furthermore, on the same day, Judge Taylor issued three other summonses upon informations laid by the same informant, alleging that F.P.L., on two occasions on May 26, 1976 and on May 21, 1976 and May 28, 1976, breached s.44(1) of Regulation S.O.R.-72-451 of the Pest Control Products Regulations dated November 10, 1972 issued and authorized pursuant to the Pest Control Products Act. The subsection reads:

> *44.(1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.*

After the ten summonses hereinabove referred to had been served upon F.P.L., its counsel made application to Mr. Justice Stratton for an order of certiorari to remove and quash the ten summonses and for an order of prohibition to prohibit the Provincial Court or any Judge thereof from taking further proceedings with respect to the said summonses and/or informations. Upon this application, Mr. Justice Stratton made an order dated April 6, 1977, under O. 62 of the rules of the Supreme Court for the issue of a summons returnable before himself.

On May 16, 1977, Judge Gilbert, a Judge of the Provincial Court, upon an information laid by the respondent, issued a summons in which it was alleged that F.P.L. committed breaches of s.3(1) of the Pest Control Products Act on May 22, and on May 24, 1976.

On May 17, 1977, Judge Montgomery, also a Judge of the Provincial Court, issued two summonses upon informations laid by the respondent charging F.P.L. with offences under s.3(1) of the Pest Control Products Act on May 21 and May 26, 1976, and one offence against s.33(2) of the *Fisheries Act* alleged to have occurred on May 26, 1976.

On May 18, 1977, Judge Savage, a Judge of the Provincial Court, upon informations laid by Mrs. Guerin, issued eight summonses charging F.P.L. with offences against s.33(2) of the *Fisheries Act*, and s.3(1) of the Pest Control Products Act, alleging the offences to have occurred on May 20, 21, 24, 26 and 31, 1976.

On May 20, 1977, Judge Taylor, upon informations laid by Mrs. Guerin, issued a further eight summonses charging F.P.L. with offences against s.33(2) of the *Fisheries Act*, s.3(1) of the Pest Control Products Act and s.44(1) of the Regulations made thereunder, and alleging the offences occurred on June 1, 2 and 3, 1976, and May 12, 1977.

A similar application to Mr. Justice Stratton was made by counsel on behalf of F.P.L. for orders of certiorari and/or prohibition with respect to the last mentioned group of nineteen summonses, and an order thereon was made on May 26, 1977 returnable before the same Judge.

Finally, on May 24, 1977 Judge Gilbert issued one further summons upon the information of Mrs. Guerin charging F.P.L. with offences under s.3(1) of the Pest Control Products Act on May 25, and 30, 1976, and on June 9, 1977, Mr. Justice

Stratton issued a third summons for the hearing of an application for orders of certiorari and prohibition.

Mr. Justice Stratton conducted the hearing of all three summonses on June 28 and 30, 1977, and following the taking of evidence and the filing of briefs by counsel acting on behalf of F.P.L. and Mrs. Guerin, the learned Judge issued his judgment dated February 17, 1978, whereby he dismissed, with costs, the three applications.

On this appeal, counsel on behalf of F.P.L. alleges that the learned Judge erred in refusing to issue the orders of certiorari and/or prohibition asked for on one or both of the following grounds:

> *a) Forest Protection Limited is and has been at all times a servant of the Crown in Right of the Province of New Brunswick and in particular during the months of May and June in the years 1975 and 1976, and as such it is not subject to proceedings under and by virtue of the Criminal Code, R.S.C. 1953-54, C. 51, and amendments thereto, and it is immune to prosecution under the Fisheries Act, R.S.C. 1970, Chap F-14, and amendments thereto, and the Pest Control Products Act, R.S.C. 1970, Chap P-10, and amendments thereto, and the Judges of the Provincial Court referred to herein therefore exceeded their jurisdiction in issuing the within summonses and are without jurisdiction to conduct any further proceedings in relation thereto;*
>
> *b) The laying of thirty separate informations by the same informant against Forest Protection Limited under the same Acts in the circumstances amounts to an abuse of the process of the Court in that the informant and the Concerned Parents Group, Inc., which she represents, are endeavouring to use the criminal courts to achieve a civil and/or political object and as such, should not be tolerated.*

In his reasons for judgment, the learned Judge of first instance related the factual background of the instant case. Needless to say, the so-called spray program constitutes an extremely contentious issue due to conflicting concerns between those who believe the spray is necessary for the survival of the spruce and fir forests of the Province, and the economy based thereon, and those who are concerned over the effect of the spray upon the environment. As to the factual background, I can do no better in describing the situation than to quote certain portions of the reasons for judgment of the learned Judge of first instance in which he stated:

> *The forests of New Brunswick have become infested with the spruce budworm, an insidious insect which defoliates and kills fir and spruce trees. In the spring of 1952, New Brunswick International Paper Company Ltd. and the Government of the Province of New Brunswick jointly carried out an experimental aerial spraying program over a limited area of forest to determine its effect upon the spruce budworm, it was successful. Subsequently, representatives of Government and the forest industry met and decided to incorporate a private company to undertake the organization and management of a program of aerial spraying of insecticide to protect the forests of New Brunswick.*

F.P.L. was then organized; it was incorporated by Letters Patent dated September 6, 1952; it has as its sole object and purpose the protection of the forests. F.P.L. is a standard private trading corporation with a capital stock of $5,000.00 divided into 500 common shares of the per value of $100.00 each. Two hundred shares have been issued; in 1975, 180 of the issued shares were registered in the name of Her Majesty the Queen and in 1976, this increased to 182 shares. At the present time, of the remaining 18 issued shares, 17 are held by nine participating pulp and paper companies and one share is registered in the name of F.P.L.

Formerly, each of the nine pulp and paper companies had two representatives on the Board of Directors of F.P.L.; currently, there are 22 directors but only 9 of these now represent the pulp and paper companies; the balance are either Ministers of the Provincial Crown or representatives of Provincial Government Departments, principally the Department of Natural Resources. The president of F.P.L. is the Deputy Minister of Natural Resources; its chairman and secretary are employed and paid by the latter department. Other officers and employees of F.P.L. during the years 1975 and 1976 included employees of private industry paid by the individual companies from which they came, employees of the Government of New Brunswick paid by the Government as well as employees paid by F.P.L.

F.P.L. has, since 1952, (except for 1959), carried out an annual spray program in May and June of each year. The "Spray Program" for each year results from a number of contributing facts and factors; in the preceeding fall, the area to be sprayed is first determined by defoliation and budworm eggmass surveys conducted by Government agencies; as the result of these surveys, a proposed spray map is prepared depicting the areas of the Province to be sprayed, regardless of ownership; the insecticide to be used is selected and the number of its applications and its dosage is determined. This spray program is then submitted to the Federal Department of Agriculture which receives advice on the program from experts in related fields employed by the various departments of the Federal and Provincial Governments who form an Interdisciplinary Committee. The approval of the Federal Department of Agriculture is received each year before the spray program is put into effect. The spray program is also presented to the Board of Directors of F.P.L.; the approval of the Board is contingent upon the approval of the Deputy Minister of Natural Resources who receives his authorization from the Minister of Natural Resources.

The participating pulp and paper companies contribute one-third of the costs of the annual spray program and the Province contributes two-thirds, although the Province recovers one-half of its contribution from the Federal Government. F.P.L. makes no profit nor does it incur any loss. Its expenditures are merely met by the participating companies and the Province in the proportions indicated.

Section 3 of the Forest Service Act, R.S.N.B. 1973, c.F-23, (formerly R.S.N.B. 1952, c.93, s.3) is here relevant; it provides as follows:

3(1) The Lieutenant-Governor in Council shall maintain a forest service for the purpose of

(a) protecting the forests from fire, insects and diseases, ...

3(2) Subject to the approval of the Lieutenant-Governor in Council, the Minister may enter into agreements with the Government of Canada or with any person to undertake and carry out operations for protecting the forests from fire, insects, and disease; and the Minister may delegate to such party such authority as may be deemed necessary for the effectual carrying out of the agreement.

Section 3(2) was cited by the Province as authority to pass Order-in-Council No. 53-376, dated May 7, 1953, which authorized the Minister of Lands and Mines, (now Natural Resources), to execute an agreement with F.P.L. by the terms of which the Provincial Government engaged F.P.L. to undertake and manage an aerial spraying operation directed against the spruce budworm, infestation of the forests in the northern part of New Brunswick and undertook to pay two-thirds of the amount of the expenditures of the aerial spraying operation. From 1953 to 1975 this agreement was continued from year to year and the annual estimated cost of the Government's share of the program was included in the estimates for the Department of Natural Resources and approved by the Legislature of the Province of New Brunswick.

The spray programs for the years 1975 and 1976 were submitted to the Federal Department of Agriculture and approved. They were also approved by the Board of Directors of F.P.L. which engaged private contractors to provide the planes and pilots to carry out the aerial spraying operations; these latter contractors were engaged by an agreement providing for the approval of the Government of New Brunswick. The Main Estimates for the Department of Natural Resources for the fiscal years commencing April 1, 1975 and April 1, 1976, together included sums exceeding $10,000,000.00 for forest insect control which were approved by the New Brunswick Legislature and actually paid by the Department of F.P.L. for the programs which were carried out.

Because of the decision of Mr. Justice Stevenson in Bridges Brothers Ltd. v. Forest Protection Ltd. (1976) 14 N.B.R. (2d) 91, the Board of Directors of F.P.L. sought and obtained from the Provincial Government an Order-in-Council and Letter Agreement. The Order-in-Council is numbered No. 76-335 and is dated May 12, 1976; it provides as follows:

1. Pursuant to section 3 of the Forest Service Act, the Lieutenant-Governor in Council gives his approval

(a) for the aerial spraying for spruce budworm control in 1976;

(b) for the proposed aerial spray program of approximately 9.6 million acres; and

(c) for the Minister of Natural Resources to enter into an agreement with Forest Protection Limited to carry out the proposed spraying operations.

2. The Province agrees to indemnify Forest Protection Limited with respect to claims for damages for injury to the health of any person directly caused by the application of chemical insecticides used for killing spruce budworms in the spray program for 1976.

3. The Province's agreement to indemnify shall not apply

(a) to lands owned or controlled by the sponsors of the spray program;

(b) unless the chemical insecticide is mixed in the proper proportions and in accordance with any existing licenses, regulations, instructions or requirements;

(c) with respect to the spraying of private lands contrary to any instructions which may be given by the Minister of Natural Resources from time to time;

(d) in the event the application of the chemical insecticide is not carried out in a proper manner in accordance with reasonable standards of competence and safety or not to knowingly cause harm to the health of any persons.

The Letter Agreement is upon the letter-head of the Minister of Natural Resources and is as follows:

P.O. Box 6000
Fredericton, N.B.
E3B 5H1
May 17, 1976.

Mr. H.J. Irving
Managing Director
Forest Protection Limited
P.O. Box 1030
Fredericton, N.B.
H3B 3C3

Dear Mr. Irving:

Pursuant to Order-in-Council of the Lieutenant-Governor under May 12, 1976 and numbered 76-335, I hereby authorize Forest Protection Limited to undertake and carry out the proposed 1976 aerial spray program for spruce budworm control of approximately 9.6 million acres of the forests in New Brunswick.

Further, I hereby delegate to Forest Protection Limited, by the power vested in me under the Forest Service Act, whatever authority is necessary for you to effectually carry out the above program.

Please endorse the original and carbon copy of this letter by your authorized representative signifying your consent to this agreement.

(Sgd.) Roland C. Boudreau
ROLAND C. BOUDREAU
MINISTER OF NATURAL RESOURCES

I, H.J. IRVING, President of Forest Protection Limited, hereby accept this agreement on behalf of the Company.

(Sgd.) H.J. Irving
H.J. IRVING
PRESIDENT

F.P.L. did not plead to the summonses issued herein against it and seeks, by these applications, to challenge the jurisdiction of the learned Provincial Court Judges to try it for the offences which are charged.

In explanation of the reference in the reasons for judgment to the case of *Bridges Brothers Ltd. Forest Protection Ltd.* (supra), I should mention that this was an action brought by a company engaged in the blueberry business, which held about 8,000 acres of land in southern New Brunswick, claiming damages for loss of its blueberry crop in the years 1970, 1971 and 1972 caused by the spray program. One of the defences to the action pleaded by F.P.L. was that the spray operations were carried out with the agreement and approval of the Minister of Natural Resources with the object of protecting the forests from insects and disease pursuant to the *Forest Service Act* of the Province, and that the operations were conducted under statutory authority, and consequently the provisions of the Protection of Persons Acting Under Statute Act applied. F.P.L. also pleaded that it was an agent of the Crown or a Crown Corporation.

The learned trial Judge held F.P.L. had failed to adduce evidence to entitle it to the benefit of statutory immunity, there being no evidence to show that the Lieutenant-Governor in Council acted under authority of the Forest Service Act. Furthermore, he held that F.P.L., being a letters patent company, in the absence of a statute conferring immunity upon it, the proper inference was that it was acting on its own behalf even though controlled to some extent by a Government department; citing 9 Halsbury's Laws of England (3rd ed.) p. 10; North and Wartime Housing Ltd. v. Madden, [1944]4 D.L.R. 161; and Logan v. Board of School Trustees, District 14 (1973) 6 N.B.R. (2d) 599. The learned Judge concluded that F.P.L. was an independent contractor of the Crown and of the eight participating pulp and paper companies, and was an "agent" within the definition of that word in the Proceedings Against the Crown Act, R.S.B.N. 1973, Chap P-18, which includes "an independent contractor engaged by the Crown".

The offences charged

F.P.L. was charged with a number of offences against subsection (2) of section 33 of the *Fisheries Act* as amended. It was submitted, during the course of the hearing, that the following provisions of the Act are relevant to the issues to be decided:

> *33(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*
>
> *33(5) Any person who violates any provision of this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for each offence.*
>
> *64. Any proceedings by way of summary conviction in respect of an offence under this Act may be instituted at any time within two years after the time when the subject matter of the proceedings arose.*
>
> *71. This Act is binding on Her Majesty in Right of Canada or a Province and any agent thereof.*

F.P.L. was also charged with a number of offences against s.3(1) of the Pest Control Products Act, R.S.C. 1970 Chap P-10 and against s.44(1) of a Regulation made thereunder. Section 3(1) of the Act reads:

> *3(1) No person shall manufacture, store, display, distribute or use any control product under unsafe conditions.*
>
> Section 44.(1) of the Regulation reads:
>
> *44(1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.*
>
> Section 10 of the Act reads in part:
>
> *10(1) Every person who, or whose employee or agent, violates any provisions of this Act or the regulations is guilty of*
>
> *(a) an indictable offence and is liable to imprisonment for two years, or*
>
> *(b) an offence punishable on summary conviction.*

The Interpretation Act, R.S.C. 1970, Chap I-23 contains the following relevant provisions:

> *2(1) "enactment" means an Act or a regulation or any portion of an Act or regulation;*

> *16. No enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.*
>
> *27(2)... all the provision of the Criminal Code relating to summary conviction offences apply to all other offences created by an enactment except to the extent that the enactment otherwise provides.*

Counsel for F.P.L., in supporting his application for orders of certiorari and prohibition, contends that F.P.L. is immune from prosecution for the offences alleged in all thirty of the informations on the ground that at all times material to the alleged offences F.P.L. was a servant of the Crown in right of the Province of New Brunswick.

The learned trial Judge rejected this contention after reviewing a number of cases where Crown immunity was claimed. These included *Mellenger v. New Brunswick Development Corporation [1971] 2 All E.R. 593*, where the English Court of Appeal held the defendant immune from suit in England on the ground the defendant was an arm of the Government of New Brunswick and could avail itself of the doctrine of sovereign immunity. There the plaintiff's action was for a commission alleged to be due and owing to him by the Development Corporation. The defendant in that case was constituted by a special Act of the Legislature of New Brunswick which provided:

> *There is hereby constituted on behalf of Her Majesty in Right of New Brunswick a body corporate under the name of The New Brunswick Development Corporation.*

Lord Denning, at p. 596, stated the legislation constituted the corporation "on behalf of Her Majesty" which, in the circumstances, was sufficient to entitle the corporation to sovereign immunity, but he continued:

> *Apart, however, from the statute, the functions of the corporation, as carried out in practice, show that it is carrying out the policy of the Government of New Brunswick itself. It is its alter ego.*

Counsel for F.P.L. submitted that the latter statement indicated that even though F.P.L. is not a statutory corporation, it might still be a servant of the Crown because of its functions and purpose.

The second case relied upon by the learned trial Judge was that of *Westeel-Rosco Limited v. Board of Governors of South Saskatchewan Hospital Centre et al. [1977] 2. S.C.R. 238 (S.C.C.)*, where the defendant hospital board contended it was an agent of the Crown and as such was not subject to the Saskatchewan Mechanics' Lien Act. There is no resemblance between the facts in the Westeel-Rosco case and the instant case, but Mr. Justice Ritchie, in delivering the judgment of the Supreme Court, stated the applicable rule involved in the issue which we have to decide on this appeal. At pp. 249-50 he stated:

> *Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown depends upon the nature and degree of control which the Crown exercises over it. This is made plain in*

a paragraph in the reasons for judgment of Mr. Justice Laidlaw, speaking on behalf of the Court of Appeal for Ontario in R. v. Ontario Labour Relations Board, Ex. p. Ontario Food Terminal Board, (1953), 38 D.L.R. (2d), 530, at. 534, where he said:

> *It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.*

The learned Judge of first instance also relied on a passage in Halsbury's Laws of England, 4th ed. vol. 9 at p. 722 which reads:

> *In the absence of any express statutory provision, the proper inference, at any rate in the case of a commercial corporation, is that it acts on its own behalf, even though it is controlled to some extent by a government department. The fact that a minister of the Crown appoints the members of such a corporation, is entitled to require them to give him information and is entitled to give them directions of a general nature does not make the corporation his agent. The inference that a corporation acts on behalf of the crown is more readily drawn where its functions are not commercial but are connected with matters, such as the defence of the realm, which are essentially the province of government.*

Counsel for both parties to this appeal have submitted a number of other authorities on the issue of what is, and what is not, a servant of the Crown, but I find nothing in the material submitted nor as a result of my own research on the question which assists me in reaching a firm opinion on the question. I shall therefore seek to apply the test stated in the judgment in the Westeel-Rosco case, and consider in particular the nature and degree of control which the Crown, in right of the Province of New Brunswick, exercised over F.P.L. during the spray program seasons in 1976 and 1977 when the alleged offences were said to have been committed. I note, first of all, that s. 3(1) of the Forest Service Act provides:

> *3.(1) The Lieutenant-Governor in Council shall maintain a forest service for the purpose of*
>
> *(a) protecting the forests from fire, insects and diseases, ...*

I infer that this responsibility of the Lieutenant-Governor in Council could be discharged by the employment of persons having the status of employees within a department or branch of the Government. It could be performed through the employment of an independent contractor, or through a company owned and controlled by the Crown in right of the Province.

In *Montreal v. Montreal Locomotive Works Ltd. [1947] 1 D.L.R. 161 (P.C.)*, affirming [1945] S.C.R. 621, it was held that a commercial corporation which normally carried on its own business, may by contract, act as a servant or agent of Her Majesty

by contracting to act on business of Her Majesty under the control of Her Majesty through her Minister and on her behalf. In the contracts between the corporation and the Canadian Government represented by the Minister of Munitions and Supply of Canada for the production of tanks and gun carriages, the corporation's obligations were referred to as "for and on behalf of the Government and as its agent". It was held that on the proper construction of the contracts where the corporation took no risk of loss and assumed no liability except for bad faith or wanton neglect, and the fees it received from the Government were for management services, the corporation was an agent of the Crown rather than an independent contractor. Hence, the corporation was held not assessable for occupant or business taxes under the Montreal Charter. Lord Wright, after referring to the problem of whether the corporation was an agent of the Government or whether it was acting on its own behalf in making the tanks and gun carriages for delivery to the Government stated at p. 169:

> *The great difference of opinion on this question in the Courts below illustrates the difficulty which is inherent in deciding questions like this. In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases the more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.*

In the case at bar, F.P.L. does not carry on any business with a view to profit, nor is there any risk of loss. The company is used by the Government of New Brunswick as its instrument to perform the budworm spray program and to all intents and purposes, the company and the work which it performs, is totally controlled by officials designated or appointed by the Government or its officials. The spray program, which is carried out, is first approved by the Government which has power at any time to alter the program in any respect and to specify how, when and with what kind of insecticide the program is to be implemented. The degree of control which the Government has over the activities of F.P.L. is, in my opinion, as complete and detailed as the control which it could exercise over its own employees had the Government chosen to perform the spray operations with its own forces, and chartered air craft and pilots to carry out the spraying operations. Having given the question my best consideration, I have reached the conclusion that F.P.L. in the conduct of the spruce budworm program is a servant of the Government of New Brunswick and as such is entitled to such immunity from prosecution as the Crown in the Right of the Province possesses with respect to the offences specified in the Acts and Regulations under which the charges against F.P.L. have been laid. In reaching this conclusion, I have taken into consideration two decisions of this Court involving the quasi-criminal liability of employees of the Crown or of a Crown agency. In *The King v. Marsh: Ex parte Walker (1909) 39 N.B.R. 329*, where a station agent of the Intercolonial Railway at Fredericton was convicted under the Canada Temperance Act of an offence of warehousing and keeping for delivery a quantity of intoxicating liquor brought into the railway station by the Intercolonial Railway, while acting as a servant of the Railway, a public work owned and operated by the Crown in Right of Canada, it was held that the Crown, not being expressly mentioned in the Canada Temperance Act, was not bound thereby and therefore its station agent, acting in the course of his duty, could

not be convicted of the offence. In the second case, *The King v. LeBlanc (1930) 1 M.P.R. 21*, where a road supervisor, acting in obedience to his instructions, stored dynamite belonging to the Crown in the right of the Province of New Brunswick contrary to the Explosives Act, R.S.C. 1927, ch. 62, an Act not made binding on the provincial Crown, the conviction of the Crown's servant, acting in the course of his employment which was the construction of a public work to be used and operated for the benefit of the public, was set aside, the servant being held excluded from the provisions of the Explosives Act as was his employer, the Crown.

The question now to be considered is what immunity from prosecution does the Crown in Right of the Province of New Brunswick possess in respect of prosecutions (a) for offences against the *Fisheries Act*, and (b) for offences against the Pest Control Products Act and regulations made thereunder?

I have already set forth the text of s.33(2) and s.33(5) of the *Fisheries Act* which create the offences with which F.P.L. is charged. Section 71 of the Act reads:

> *71. This Act is binding on Her Majesty in Right of Canada or a Province and any agent thereof.*

In my opinion, no other objective can be attributed to s. 71 than that Parliament intended to make the prohibitions contained in the Act applicable to the Crown both in the Right of Canada and the Provinces and any agent thereof. This interpretation would, of course, include F.P.L. as an agent of the Crown.

The Pest Control Products Act and Regulations made thereunder are not made applicable to the Crown either in the Right of Canada or of a Province. Accordingly, I am of the opinion that the Crown in the Right of the Province of New Brunswick is not bound thereby, and that F.P.L., which I found to be a servant of the Crown, is also not bound by the Act when it acts in the course of its employment and within the scope of its authority as a servant of the Crown.

As a second ground for the application by counsel for F.P.L. for orders of certiorari and prohibition, counsel advanced the argument that the laying of thirty separate informations by the same informant, against F.P.L. under the same Acts, constituted an abuse of the process of the Courts in that the informant and the Concerned Parents Group Inc. are endeavouring to use the criminal Courts to advance a civil and/or political object, and that such should not be tolerated.

The learned Judge of first instance rejected this submission on the authority of *Rourke v. The Queen (1977) 16 N.R. 181; 35 C.C.C. (2d) 129*, wherein Mr. Justice Pigeon stated:

> *I cannot admit of any general discretionary power in Courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.*

Counsel submitted a number of decisions referring to the Rourke case including *Re Orysiuk and The Queen (1977) 37 C.C.C. (2d) 445 (Alta C.A.)*, and *R. v. Weightman and Cunningham (1977) 37 C.C.C. (2d) 303*, to support his contention that

the rule relied upon by the learned Judge of first instance did not apply to the facts of the instant case.

I find no admissible evidence in the material presented in the instant case to establish an ulterior or improper motive for the laying of the informations, all evidence relied upon being hearsay and contained in newspapers. It is therefore unnecessary, in these proceedings, to determine whether this is a proper case for the Court's intervention to prohibit a prosecution.

For the foregoing reasons I would allow the appeal in part, and order that the Judges of the Provincial Court of New Brunswick be prohibited and they are hereby prohibited from further proceeding in the matter of the informations laid by the respondent against Forest Protection Limited for alleged offences hereinabove referred to against the Pest Control Products Act and the Regulations made thereunder.

The application of Forest Protection Limited for orders of certiorari and prohibition with respect to informations laid under the *Fisheries Act* and the summonses issued thereon is refused.

As the appeal is allowed in part, I would make no order as to the costs.

REGINA v. BLACKHAM'S CONSTRUCTION LTD

British Columbia County Court, Chilliwack, Grimmett, J., December 27, 1979

Constitutional Law - Fisheries Act - R.S.C. 1970, chap. F-14, as amended by ss. 31(1) S.C. 1976-77, chap. 35 — harmful, alteration, disruption or destruction of fish habitat —British Columbia Gravel Removal Order, SOR/76-698, under Fisheries Act — property ownership.

The accused corporation was charged with removing gravel from the Fraser River without a permit from the fisheries authorities and carrying on an undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat. The provincial Court acquitted the accused.

Held, the appeal by the Crown was dismissed. The *Fisheries Act* cannot, in effect, prohibit the accused from carrying on its business of gravel removal from property over which it has exclusive rights of ownerships.

D. Renwick, for the Crown, appellant
J. Cram, for the accused, respondent

Grimmett, Co. Ct. J.:—- This is an appeal from an acquital by the Provincial Court of the Respondent on four counts that it did at or near Clark Road, in the Municipality of Chilliwack, Province of British Columbia:

1. *...on or about the 21st day of November, A.D. 1978 ... unlawfully did remove gravel from the normal high water wetted perimeter of the Fraser River that is a spawning ground frequented by fish without being the holder of a permit in writing issued by the Regional Director or a fishery officer.*

2. *...on or about the 21st day of November, A.D. 1978 ... did unlawfully carry on an undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat.*

3. *...on or about the 23rd day of November A.D. 1978 ... unlawfully did remove gravel from the normal high water wetted perimeter of the Fraser River that is a spawning ground frequented by fish without being the holder of a permit in writing issued by the Regional Director or a fishery officer.*

4. *...on or about the 23rd day of November, A.D. 1978 ... did unlawfully carry on an undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat.*

Counts 2 and 4 are laid under Section 31(1) of the Fisheries Act R.S.C. 1970 Chapter F-14 and Counts 1 and 3 are laid under the British Columbia Gravel Removal Order SOR/76-698 passed pursuant to the said *Fisheries Act* and the sections of the Act and the Gravel Removal Order as follows:

FISHERIES ACT

Section 31(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

Section 31(5) For the purposes of this section and sections 33, 31.1 and 33.2, '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.

BRITISH COLUMBIA GRAVEL REMOVAL ORDER

2. No person shall remove gravel from, or displace gravel within, the normal high water wetted perimeter of any portion of a stream, river or other body of water that is a spawning ground frequented by fish otherwise than under the authority of and in accordance with a permit in writing issued by the Regional Director or a fishery officer.

4. A permit issued under Section 2 or 3 shall not be constructed as permitting a person

(a) to alter the configuration of a river, stream or body of water without permission from the provincial authority having jurisdiction in the matter; or

(b) to remove gravel from or displace gravel within a place unless he is the owner of that place or acts on behalf of such owner.

The facts relating to the case are not in dispute, and the material facts are:

1. *The area involved is either owned by, or that portion not owned is leased, by the Respondent.*

2. *Both parts, either owned or under lease, were alienated from the Crown by Crown grants late in the last century, and are held in fee simple by the Respondent or its lessor as ultimate successor in title from the original Crown grantees.*

3. *All of the area involved was originally dry land but subsequent to the Crown grants, according to the surveyor witness, Tunbridge, in the 1930's or 1940's, the Fraser River changed and a channel of the river became established, still exists, and it is from part of this area of the river that the Respondent is in the business of gravel.*

4. *The area from which the Respondent is removing gravel is a "fishing habitat" as described in the Fisheries Act.*

Counsel for the Respondent candidly agrees that the Government of Canada has the legislative authority to enact legislation for the regulation and preservation of fisheries, but relies on the fact that the property is owned in fee simple or leased by it from an owner in fee simple and that it is entitled to carry on

the said gravel removal business in spite of Section 31 of the *Fisheries Act* and Section 2 of the British Columbia Gravel Removal Order.

In effect, the case turns on the question of whether the Federal Government with its power to enact legislation for the regulation and preservation of fisheries, can by such legislation, deprive an owner of land in fee simple without any reservations to the right to use that land in a manner that would, except for the federal *Fisheries act* legislation, be lawful.

Several cases were cited by counsel as follows:

1. *R. v. Fowler [1977] 4 W.W.R. 449*
2. *R. v. Fowler [1979] 1 W.W.R. 285*
3. *R. v. McTaggard 1972 3 W.W.R. 30*
4. *Attorney General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia [1898] A.C. 700*
5. *Attorney-General for Canada v. Attorney General for British Columbia [1920] 3 W.W.R. 449*
6. *The Queen v. Christian A. Robertson [1882] 6 S.C.R. 52*
7. *Venning v. Steadman [1883] 9 S.C.R. 206*
8. *Attorney General for British Columbia v. Attorney General for Canada, [1914] A.C. 153.*

I feel that it is only necessary to consider three of the cases cited, namely, *The Crown v. Robertson, Venning v. Steadman, and A.G. for Canada v. A.G.'s for Ontario, Quebec and Nova Scotia* and I shall quote from what I believe to be the applicable portions of the said cases:

The Queen v. Robertson

Headnotes, Page 53:

> *HELD - (affirming the judgment of the Exchequer Court) 1st, that the general power of regulating and protecting the Fisheries, under the British North America Act, 1867, sec 91, is in the Parliament of Canada, but that the license granted by the Minister of Marine and Fisheries of the locus in quo was void because said act only authorizes the granting of leases 'where the exclusive right of fishing does not already exist by law,' and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi River flows.*

Pages 63-64:

> *'The clause of the Act referred to in the first of the above questions is the 2nd section of the Dominion Act 31st Vic., ch. 60, and is as follows:— 'The Minister of Marine and Fisheries may, where the exclusive right of fishing does not already exist by law, issue or authorize to be issued Fishery Leases, and licenses for Fisheries and fishing wherever situate and carried on, but leases or licenses for any term exceeding nine years, shall be issued only under authority of an order of the Governor in Council'.*
>
> *'The Act in which this section is contained was passed by the Dominion Parliament' for the regulation of fishing and the Protection of Fisheries and it was passed under the authority of the British North America Act, the 91st section of which places, among other matters, under the exclusive authority of the Parliament of Canada, 'Sea Coast and Inland Fisheries'.*

Pages 123 and 124: (Ritchie, C.J.)

> *To all general laws passed by the Dominion of Canada regulating 'sea coast and inland fisheries' all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property of the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.*

Venning v. Steadman

Headnotes, Page 206 and 207:

> *Three several actions for trespass and assault were brought by A., B., and C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, against V. for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly-fishing for*

salmon in front of their respective lots. The defendant was a Fishery Officer, appointed under the Fisheries Act (31 Vic. ch. 60), and justified the seizure on the ground that the plaintiffs were fishing without licenses in violation of an Order-in-Council of June 11th, 1879, passed in pursuance of section 19 of the Act, which order was in the words:—'Fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the Department of Marine and Fisheries is hereby prohibited.' The defendant was armed and was in company with several others, a sufficient number to have enforced the seizure if resistance has been made. There was no actual injury. A recovered $3,000, afterwards reduced to $1,500, damages; B. $1,200; and C $1,000.

Held — That Sections 2 and 19 of the Fisheries Act, and the Order-in-Council of the 11th June, 1879, did not authorize the defendant in his capacity of Inspector of Fisheries, to interfere with A., B., and C.'s exclusive right as riparian proprietors of fishing at the locus in quo; but that the damages were in all the cases excessive, and therefore new trials should be granted.

Page 209:

Section 2 provides that:

> *The Minister of Marine and Fisheries may, when the exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases and licenses for fisheries and fishing wheresoever situate or carried on; but leases or licenses for any term exceeding nine years shall be issued only under the authority of an order of the Governor in Council.*

Page 209:

Under this statute, on the 11th June, 1879, the Governor in Council passed an Order in Council, which was as follows:

> *On the recommendation of the Honourable the Minister of Marine and Fisheries, and under the provisions of the 19th section of the Act passed in the session of the Parliament of Canada, held in the 31st year of Her Majesty's reign, ch. 60 and intituled: 'An Act for the Regulation of Fishing and Protection of Fisheries.'*

Page 210:

His Excellency, by and with the advice of the Queen's Privy Council of Canada, has been pleased to order, and it is hereby ordered, that the following fishery regulation be, and the same is hereby made and adopted:

> *'Fishing for Salmon in the Dominion of Canada, except under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited.'*

In construing the 19th section of this statute, I think the authority vested in the Governor of Canada to forbid fishing except under the authority of leases or licenses was intended to apply to cases such as are referred to in the second section, where the exclusive right of fishing does not already exist by law, or to cases where the Government may, as riparian proprietor, have the right as such to control the fishing, and ought not to be held to apply to cases where the exclusive right of fishing exists by law. Such an absolute prohibition of the enjoyment of their property by riparian proprietors, or what might be still worse by granting a license to one proprietor and witholding it from another, thereby destroying the value of the property of the one, and enhancing the value of the property of the other, would simply be an arbitrary interference with the rights of property pure and simple, and no statute should be so construed as to have such an effect, unless, assuming Parliament has the power to enact such a law, it should appear that, possessing such power, such an intention is indicated by clear and unequivocal language or irresistible inference, which it is quite impossible to say exists here, in the face of that well settled canon of construction, that statutes which encroach on the rights of the subjects, whether as regards persons or property, are to receive a strict construction, or as Cockburn, C.J. in Harrod v. Worship (1) says:—

> *'It is a canon of construction of acts of Parliament that the rights of individuals are not interfered with, unless there is an express enactment to that effect, and compensation given them!*

Page 211:

In this case, whether Parliament has the power absolutely to prohibit, or when or under what circumstances riparian proprietors may be prohibited from exercising their rights, it is not necessary to discuss or determine, because, I can find nothing in the statute to justify the conclusion that Parliament intended, for no apparent reason, thus to prohibit the enjoyment of riparian rights, and so directly to interfere with property and civil rights.

Page 226, 227:

...If this be so, what is the jurisdiction here of the defendant? He says:

> *'Under these statutes and regulations I went there to prevent the party who had the riparian right to fish from fishing on his own land, because he did not take a lease from the Government,'*

who had no power to give it to him, or a license where none was required. I have shown he did not require a license, because the law said, as plainly as words could make it, in my opinion, that a party who had an exclusive right did not require a license. Here, then, is one of the rights of property tacitly accorded by the terms of the regulation attempted to be attacked, and if the Government had the right to say, 'You cannot fish on your own land without taking a license,' they could demand a tax so heavy as to prevent the parties using their rights. It is possible that the extreme right

> *to legislate to that extend does exist, but it could only be exercised where there was an extreme public necessity for it. It is possibly true that extreme course, for the purpose of revenue, might be resorted to by the Government, but then very great necessity must be shown before, I think, Parliament would have the right to say to a riparian owner 'you shall not exercise your common law rights of property without paying a tax to the Government! It is quite possible that it might be done, and I do not say that in extreme cases it could not be done; but from what we know of the condition of the country, we have no right to conclude that any such necessity exists or existed.*

Attorney General for Canada v. Attorneys-General for Ontario, et al

Page 712, 713:

> *Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.*

The facts and the dicta in the *Venning and Steadman case* are rather compelling in leading me to the conclusion that there should be an acquittal in the case at bar. In that case in spite of an absolute prohibition against fishing for salmon except under lease or license from the Department of Marine and Fisheries it was held that the rights of the riparian proprietors of fishing at the locus in quo could not be interfered with. It of course must be presumed that the prohibition was enacted for "the regulation and protection of Fisheries". So too, and applying this principle, surely the *Fisheries Act* cannot, in the absence of express words, in effect prohibit the Appellant herein from carrying on its business of gravel removal from property over which it has exclusive rights of ownership.

REGINA v. CANADIAN INDUSTRIES LIMITED

New Brunswick Provincial Court, Ayles, J., Campbellton, New Brunswick, March 25, 1980

Environmental law — Water pollution — Pollution of waters by mercury — authority of federal Crown to prosecute in view of Canada - New Brunswick Accord — Fisheries Act, R.S.C. 1970.

The accused made a motion to dismiss the information containing 14 counts of depositing mercury in excess of the authorized amount. The accused argued that the federal Crown had delegated the responsibility to administer section 33 of the *Fisheries Act* to the Province of New Brunswick and that the federal Crown could not prosecute the accused.

Held, the Canada - New Brunswick Accord for the Protection and Enhancement of Environmental Quality did not prevent the federal Crown from prosecuting the accused. The Province of New Brunswick could have instituted action to lay the charges but they chose not to do so. Under the Accord the federal Crown retained residual right to enforce section 33 of the *Fisheries Act*.

R. Dube, for the federal Crown
R.J. Tingley, for the accused.

Ayles, J.: (orally) — Very well, gentlemen. On the 26th of February, I heard evidence and arguments relating to Defence Motion to dismiss the Information.

The basis of the objection, was that the information containing 14 charges against the Defendant, C.I.L., was improperly before the Court in that it was not laid by a person properly qualified to bring this information before the Court.

Cases cited by Counsel for the Defendant Company, such as *R. v. Houser*, 8 C.R. (3d) 89, *R. v. Miller*, 30 C.R.N.S. 372. and *R. v. Stevenson*, 26 N.B.R. (2d) 581, clarify who may or may not lay informations - the general principle being as stated in *R. v. Stevenson* by Mr. Justice Barry.

> *It is a general principle of law that, in the absence of statutory provision, restricting, or regulating, any person may lay an information before the Court by complying with the provisions of the Criminal Code of Canada.*

Therefore we start off with the assumption that because the *Fisheries Act*, R.S.C. 1970, Chapter F-14, contains no restriction or regulations - that any person may lay such an information before a Court having jurisdiction which in this case would be the Provincial Court of New Brunswick.

I must note that Houser and Miller, above, do not change that basic fact. They are concerned with who has the carriage of a particular action and the Houser case has definitely settled that in matters involving Federal Statutes, that the Attorney General of Canada has the right to institute and regulate proceedings for a breach of these Statutes. It is agreed, however, that where the Attorney General for Canada does not act or does not interfere, anyone may do so and may prosecute the same.

In this matter the information was instituted by the Attorney General of Canada and conducted to date by his agent, Raymond Dubé.

Up to this point there would be no doubt, whatever, that the information was properly laid. However, the Defence claims that on October 21st, 1975 an Accord was signed between the Government of Canada and the Province of New Brunswick, which was received as exhibit "D-1" attached, entitled; "Canada - New Brunswick Accord for the Protection and Enhancement of an Environmental Quality". Contending that under this Accord the Government of Canada has delegated to the Department of the Environment of New Brunswick the right to administer and to enforce the Regulations with which we are here concerned. Exhibit "D-2", a letter from Environment Canada to the Defendant Company was introduced as being further evidence that there was indeed a delegation of authority to the Province.

It is recognized in this Accord that Canada has jurisdiction and responsibility in a field of environmental quality including pollution prevention.

The crux of the question arises at Article 14 of the Accord and the interpretation of this Article or Paragraph is mainly the point at issue herein.

The Article reads as follows;

14. Canada agrees to take enforcement action:

(a) at federal facilities unless otherwise agreed to under Clause 13 above;

(b) at the request of the Province; or

(c) where the Province cannot, or for some reason fails to fulfill its obligations under this Accord, with respect to matters of federal jurisdiction administered by the Province.

We can agree that Clauses 14 (a) and (b) do not apply after the evidence heard by this Court on February the 26th. Therefore if Canada has delegated its authority, it would have to be done under Section 14 (c).

To paraphrase 14 (c)

> *Where the Province cannot, or for some reason fails with respect to matters of federal jurisdiction administered by the Province.*

It would appear from the Accord "D-1" - the letter "D-2" and the evidence of Mr. Silliphant from the New Brunswick Department of the Environment in Fredericton that the Chlor Alkali Mercury Regulations, which are of federal jurisdiction have been administered by the Provincial Environment Department, on behalf of Environment Canada.

In this case, the Provincial Department of the Environment knew and was made aware of the subject matter of the 14 charges against the C.I.L. and no charges were laid by the Province nor did they intend to institute any charges pursuant to this information which was given both to Environment Canada and to Environment New Brunswick. There was no question that New Brunswick, had it so desired, could have

instituted action to lay the charges presently before the Court by reason of the authority contained in Section 14 of the Accord. They chose not to do so on the advice, apparently, of their legal advisers.

That leaves me with this proposition; to paraphrase 14 (c) again; "Where the Province fails to fulfill its obligations under this Accord".

It seems to me that these words taken alone and also taken in context with the rest of the Article in the Accord are very plain. Looking at the factual situation, the Federal Government was apprised of the fact that the Province would not initiate any charges. Ergo, Environment Canada was left with the knowledge that the Province had failed to fulfill its obligations under this Accord; viz, the obligation to take enforcement action under Article 14 in conformity with the Chlor Alkali Mercury Regulations.

The Federal Government, in the exercise of its residual rights under Section 14 (c) after the Province failed to fulfill its obligations decided to take enforcement action, itself, which I am satisfied it had the full right to do so.

It is my opinion that Canada did not agree to give up any rights of enforcement or prosecution under this Accord. But, in fact, reserved the various items under 14 (a) and (b) and a catchall provision in Article 14 (c) where there may be some disagreement or refusal to act by the Province.

I am also of the opinion that a private individual could lay such an information before this Court and that this Accord would not preclude his so doing and that the Attorney General of New Brunswick would have no authority, whatsoever, to stay proceedings or conduct or control the cause. Unless, he was acting with the permission and under the control of the Attorney General for Canada.

In other words, the Attorney General for Canada is the only one who could interfere in such a case, to conduct the case if he so decided. Otherwise, it would continue to its conclusion.

It is my opinion that the 14 charges were properly laid. That the Attorney General of Canada acting by his agent Phil Henneberry, had authority to lay the said charges and that the Attorney General of Canada is the only party who may conduct, control or in any way deal with the fourteen (14) charges presently before this Court.

Those are my reasons for my decision, gentlemen.

The appeal by the accused to the Court of Appeal of New Brunswick, dismissed on September 9, 1980, is reported at page 304 of this volume.

REGINA v. GULF OF GEORGIA TOWING CO. LTD.

British Columbia Court of Appeal, Bull, Seaton, and Hinksen J.J.A., February 7, 1979

Environmental law — Pollution — Charge of depositing oil in water frequented by fish — Defence of "due diligence" on part of employer — "Due diligence" not shown — The Fisheries Act, R.S.C. 1979, c. F-14, s. 33(2) (re-en. R.S.C. 1970 c. 17 (1st Supp.), s. 3), (8) (en. R.S.C. 1970, c. 17 (1st Supp.), s, 3).

Fisheries — Pollution — Charge of depositing oil in water frequented by fish — Defence of "due diligence" on part of employer — "Due diligence" not shown — The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2) (re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3), (8) (en. R.S.C. 1970, c. 17 (1st Supp.), s. 3).

The accused was charged under s. 33(2) of the *Fisheries Act* that it had deposited oil in water frequented by fish. While the accused was engaged in filling fuel storage tanks a valve at the base of a tank which should have remained closed was open, and oil overflowed.

The accused raised a defence under s. 33(8), which stated that an accused would not be liable if it could show that "he exercised all due diligence to prevent" the commission of the offence. The County Court Judge rejected the defence, finding the accused had not exercised due diligence, and the accused applied for leave to appeal claiming that the judge had erred in law.

Held, leave to appeal was granted and the appeal dismissed. The County Court Judge was right in finding that the accused had not exercised due diligence as it had not created a proper system of ensuring its employees were suitably trained to avoid such spills, and failed to have a back-up system for inevitable human error.

R. v. Sault Ste. Marie (1978), 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295 considered.

Headnote from 1979 3 W.W.R. 84

P.D. Lowry, for appellant.
D.R. Kier, Q.C., for the Crown.

(Vancouver No. CA 780641) Excerpt from the transcript.

Bull J.A.: Mr. Kier, we will not need to call upon you. My brother Seaton will give the first judgment.

Seaton J.A.: This is an application for leave to appeal on a question of law alone from the decision of a County Court Judge.

The facts that led to this matter were that a fuel barge went to Tahsis Inlet and was unloading fuel. There were four tanks up on shore. Tank 1 was filled through the one pipe that led from where the barge was up to the four tanks. Prior to tank 1 being filled, tank 2 had been filled. Subsequently tanks 3 and 4 were filled, in that order.

When tank 4 was being filled, the oil overflowed from the top of tank 1. The valve at the base of tank 1 was found to be open. During this operation a Mr. Fulmer, who was a seaman on the tug, not skilled in this matter, was on top of the oil tanks at times; at times he was down at the bottom near the valves; and for one period he was away. The other person employed, a Mr. Egget, was the person in charge. He was the operator of the pump on the barge, though it is said that he did come ashore from time to time when they were turning off the valves.

The charge was that the appellant had deposited the oil in water frequented by fish. That charge was laid pursuant to s. 33(2) re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3 of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended.

The defence at trial before the learned Provincial Judge was that the employees did not deposit the oil. They said it was the act of an intervening party opening the valves. The trail judge accepted that defence and dismissed the charge. The Crown appealed.

On appeal that defence was rejected. There was a further defence raised, which had also been raised before the trial judge but was not considered by him, that being that the accused company was not guilty, notwithstanding that the employees might be, because the company had exercised due diligence. The source of that defence is s. 33(8) en. R.S.C. 1970, c. 17 (1st Supp.), s. 3 , which I read:

"(8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

The first defence that I referred to that was rejected by the learned County Court Judge is entirely a question of fact, and so it has not been urged on us. It is said that the learned County Court Judge, in allowing the appeal and convicting the appellant, failed to properly apply s. 33(8), that I have referred to.

The learned County Court Judge made findings of fact as to the cause of this oil spill:

"It is clear on the evidence and the findings of fact by the learned trial Judge that either (a) Mr. Fulmer was in error when he said that the valve in question had been closed by him or his associate, or (b) if he was correct in testifying that the valve in question had been closed, then the valve was subsequently reopened by Fulmer or his associate or a third party."

In my view, the learned County Court Judge concluded that due diligence within the meaning of s. 33(8) had not been shown.

He said this:

"Here the respondent had complete control of the entire operation and had a clear duty to take all reasonable precautions to prevent any spill from occurring. In

view of the obviously immediate and disastrous consequence of carrying on a pumping operation of the kind in question with respect to any one of the four tanks when a connecting valve leading to one of the three other tanks which had already been filled, 'reasonable precautions' must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout. It is clear that no such continual scrutiny or any adequate alternative precautions were taken. The respondent has not discharged the onus upon it. It is not a defence on the part of the respondent to say that the fault lies with the employee who failed to exercise reasonable care notwithstanding the imposition by the company directors of rigid safety regulations and training programs.

The beginning words of the final sentence I have read, "It is not a defence", have been relied on as a rejection of the defence under s. 33(8) being available, though, in my view, those words do not mean it is not a defence in law. They mean it is not a defence in this case.

The appellant says -- and it cannot be argued -- that it is very careful in its hiring and training practices, and that it ensures that people in the position of Mr. Egget have all the up-to-date safety requirements from the various department. Then, it says, that is enough to meet the onus on us under s. 33(8). I am unable to agree with that. For the purposes of these reasons I assume that Mr. Egget is not the company in respect of s. 33(8), rather that he is an employee or agent, as referred to in that subsection. Whether he is the company or only an employee need not be decided here.

To test the suggested error of law, I would suggest this: that due diligence under the circumstances here might include specific written instructions, maybe locking devices for other valves, possible alarm systems. But in the end I am of the view that the trial judge decided -- and rightly decided -- that this company did not make adequate provisions in its systems or otherwise to prevent a spill caused by a valve being open that should not have been open. I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake. For fuel barges, if one does nothing but hire careful people, train them carefully and tell them not to leave valves open, inevitably a valve will be left open. I am sure they have not hired infallible people. There will inevitably then be a spill. It seems to me that the consequences are so serious that something will have to be devised by the company if it is to be protected here to prevent spills when employees are not as careful as they are told to be.

Counsel for the appellant relied upon a recent decision, and important judgment, in *R. v. Sault Ste. Marie* (1978), 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295, a decision of the Supreme Court of Canada handed down on 1st May 1978. I must point out at the outset that we have a specific statutory provision. I refer to this case because counsel did and because I think that the common law is now substantially the same as this s. 33(8) provision. This is said at p. 324:

"The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee in the course of employment, the question will be whether the act took place without the

accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised 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."

If those words were to be applied here, I would think it clear that the appellant had failed. What it must do is create a proper system, and for that it is knowledgeable of what should be done, but I think it quite insufficient to say, "We hire and train carefully." In this case, in my view, due diligence has not been shown. I think that is what the trail judge meant when he said:

"...'reasonable precautions' must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout."

I see no error of law. I would grant leave and dismiss the appeal.

REGINA v. CANADIAN CELLULOSE COMPANY, LIMITED

British Columbia Count Court, Low, C.C.J., Prince Rupert, B.C., July 31, 1979

Environmental law — Water Pollution — Deposit of deleterious substance in place under conditions where may enter water frequented by fish — Defence of due diligence — Fisheries Act, R.S.C. 1970, c F-14, ss 33(2), 33(8).

The accused corporation appealed it conviction for permitting the deposit of PCB from January 22 to 28, 1977. The crown conceded the appeal with respect to January 28 as it was agreed that the accused exercised due diligence on and after that date.

Held, the appeal by the accused was dismissed with respect to the offence that occurred January 22 to 27, 1977. The County court reduced the sentence to $1000 per day from $3,500 per day originally imposed by the Provincial Court. In reducing the offence, the court considered that there were no previous convictions, the explosion of the transformer caused operational difficulties, and the clean up cost was $200,000.

Werner Hendrich, for the crown, respondent.
Robert Gauder and Irene Stewart, for the accused, appellant.

Low, C.C.J.,—This is a summary conviction appeal from the conviction of the appellant company that contrary to Section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F14 and c. 17 (1st Supplement) at or near Prince Rupert, British Columbia, on the 22nd day of January, 1977 to the 28th day of January, 1977 it did unlawfully permit deposit of a deleterious substance, to wit: Polychlorinated Biphenyl 1254, in a place under conditions where such deleterious substance may enter water frequented by fish. The chemical particularized is commonly referred to as PCB. It is also referred to as askeral.

Fifteen other counts were included in the information and tried at the same time. Three of them charged the other three offences created by Section 33(2) of the *Fisheries Act* for the same period of time as the count set out above. The other 12 counts charged the same offences on three specific dates subsequent to January 28, 1977. All additional counts were dismissed.

The appellant company owns and operates a pulp mill near Prince Rupert. On top of a building known as Woodroom III an electrical transformer was situated. At approximately 4:00 p.m., on January 22, 1977 the transformer exploded. The explosion discharged approximately 210 gallons of PCB from the transformer to the roof of the woodroom. The woodroom fronts onto Porpoise Harbour, an inlet of the Pacific Ocean. The transformer was located at the back of the woodroom. PCB is an oily substance which is heavier than water and not very soluble in water.

The Crown contended that PCB ran off the roof of the woodroom and into a storm drain system which empties into the harbour. The trial lasted 12 days spread over several months. Many employees of the company were called as Crown witnesses and each side called several experts. The oral judgment covers 104 pages of transcript and consists of an exhaustive review of the evidence and extensive findings of fact.

The Learned Trial Judge found that the charge of permitting the deposit of PCB from January 22 to 28, 1977 in a place under conditions where it may enter water frequented by fish was made out and he convicted accordingly. He applied the Kienapple principle with respect to the other 3 counts particularizing the same time span. He dismissed the other 12 counts because he was not satisfied that the company had deposited or permitted the deposit of the deleterious substance after January 28, 1977.

There was no dispute on appeal of the allegations that PCB is a substance deleterious to fish and that Porpoise Harbour contains water frequented by fish. The basis of the appeal is that the Learned Trial Judge erred in finding that it was the company that committed the offence, in finding that PCB did get to Porpoise Harbour by way of the drainage system, in finding that the Crown's scientific evidence was reliable, and in finding that the appellant did not exercise due diligence to prevent the deposit of the PCB in a place under conditions where it may enter water frequented by fish. In my opinion these are all issues of fact and the findings are not to be disturbed unless they cannot be supported by the evidence. The evidence was carefully and thoroughly sifted in the reasons for judgment and all the findings of fact were amply supported by the evidence. I would go further and say that the evidence was almost overwhelming to support the conclusion that PCB went into the interceptors of the drainage system from whence it made its way to Porpoise Harbour. That situation was permitted by the company to prevail for several days during which time its employees knew or should have known what the likely result would be. It is also my view that the evidence of the experts was properly dealt with and that the water samples from the harbour supported and strengthened the conclusion that PCB did get into the harbour in serious quantities.

The defence of due diligence arises from Section 33(8) of the *Fisheries Act* which reads as follows:

> *33 (8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.*

It would also arise from the Supreme Court of Canada decision in *Regina v. Sault Ste. Marie* (1978) 3 CR (3d) 30.

Some time was spent at trial on the cause of the explosion and the condition of the transformer prior to the explosion. The Learned Trial Judge reached the conclusion that the transformer needed replacement and that the appellant did not exercise due diligence in attending to it. He also concluded that after the explosion the company did not act reasonably and with the obviously necessary care to prevent the PCB from entering and remaining within the drainage system. I am not sure that it was necessary to make the first finding but both findings are certainly supported by the evidence. Once the explosion took place and the dangerous substance was released the company's duty to contain it was clear. It was not until January 24th that the cleanup of the oil on the ground started and the interceptors in the drainage system were not cleaned out until January 27th. The conclusion that PCB got into the

interceptors from the 22nd to the 27th and was permitted by the company to remain there is well founded by the evidence. It was not until the latter date that the company did anything to remedy the continuance of the problem insofar as the interceptors are concerned. The company's permissiveness therefore started on the 22nd when it should have acted more diligently and continued to the 27th when it did do what was needed to be done. It permitted the deposit on each of those 6 days. In my opinion the word, "deposit" in the section refers also to the result and not just the act of depositing. Even if the last drop of PCB went into one of the interceptors on, say, the 25th the offence continued as long as the company permitted the deposit to remain in the interceptors.

The Crown conceded on the appeal that the company acted with due diligence from the 27th onward and that the conviction should not have been recorded for the 28th. Accordingly, the appeal is allowed to that extent only.

Following conviction a sentence of $3,500.00 for each day from January 22 to 28, 1977 was imposed. In my opinion, the sentence was excessive. The company has no previous convictions. The spillage of the PCB was accidental and the gravamen of the offence is the failure of the company to react properly to it. The explosion of the transformer no doubt caused many operational difficulties in the pulp mill and I think that once its attention was directed fully to the effect of the spill the company acted responsibly. The cleanup has cost some $200,000.00 for land fill. Dredging was considered but is was determined to be hazardous, although cheaper. The company acted as a good corporate citizen in accepting the more expensive solution.

The sentence appealed is allowed and a sentence of $1,000.00 per day is substituted for January 22 to January 27, 1977 inclusive.

THE QUEEN v. SACOBIE AND PAUL

New Brunswick Court of Appeal, Hughes, C.J.N.B., Limerick and Ryan, J.J.A., December 10, 1979, Fredericton, N.B.

Authority of provincial Attorney-General to conduct prosecution under a federal statute other than the Criminal Code — Fisheries Act — New Brunswick Fishery Regulations — Interpretation of Criminal Code.

Appeal by Crown from judgment of Harper, Prov. J.

An information was laid by a fishery officer who was an employee of the federal government. A Crown Prosecutor, appeared as counsel and agent for the Attorney General of New Brunswick. The provincial judge dismissed the information on the basis that only the federal Attorney General may prosecute the *Fisheries Act*. The N.B. Attorney General appealed the dismissal of the information.

Held, the appeal was allowed and the case was remitted to the trial judge to hear the evidence and determine the case on the merits. While the federal Attorney General has exclusive jurisdiction to prosecute the case if he appears, the provincial Attorney General has exclusive jurisdiction if the federal A.G. does not appear to prosecute a case under the *Fisheries Act*.

Limerick, J.A.:—This is an appeal by the Attorney General of New Brunswick by way of a stated case by His Honour Judge J.D. Harper, a Judge of the Provincial Court of New Brunswick against an order of that Judge whereby he dismissed an information on a preliminary objection that the prosecutor had no jurisdiction to conduct the prosecution.

The facts stated in this case are that a fisheries officer, acting under the authority of the *Fisheries Act*, R.S.C. 1970 Chapter F-14, laid an information under oath charging the two respondents herein with committing together an offence against the New Brunswick Fishery Regulations contrary to s.61(1) of the *Fisheries Act*.

After the two defendants had entered pleas of not guilty, Judge Harper requested counsel to enter their appearances. A Crown Prosecutor, appointed under the *Crown Prosecutors Act* of New Brunswick, stated he appeared "as counsel and agent for the Attorney General of the Province of New Brunswick". No one appeared on behalf of the Attorney-General of Canada.

Counsel for the accused took a preliminary objection challenging the legislative authority of the Attorney General of New Brunswick through his counsel or agent to conduct the prosecution under the *Fisheries Act*.

Judge Harper held that only the Federal Attorney General of his counsel or agent may prosecute violations of the *Fisheries Act*, and without calling on the informant to conduct the prosecution, he dismissed the information. He purported to so act under the authority of *R. v. Hauser et al.*, (1979) 8 C.R. (3d) 89 (S.C.C.).

When the appeal came on for hearing, it became apparent that two other appeals on the docket viz. *The Queen v. Schriver* and *Stevenson v. The Queen* involved the

same questions, (1) the right of persons, other than the Federal government, to lay an information charging a violation of a federal statute other than one dealing with criminal law enacted under the authority of s.91(27) of the *British North America Act*, and (2) the right of the Provincial Attorney General to conduct the prosecution of such an offence. Counsel representing the Crown and counsel for the four defendants in all three cases agreed to argue the three cases together.

In *R. v. Donald Schriver*, the information which charged an indictable offence under the *Narcotic Control Act* was laid by a municipal police officer and at the conclusion of a preliminary inquiry the Judge of the Provincial Court discharged the accused holding there was insufficient evidence to warrant a committal for trial. The Attorney General of New Brunswick thereupon preferred an indictment before a Judge of the County Court against the accused charging the same offence under the *Narcotic Control Act*. The Judge quashed the indictment holding that, under his interpretation of the Hauser case (supra), the Attorney-General of Canada had exclusive jurisdiction to prefer indictments under the *Narcotic Control Act*.

In *Donald William Stevenson v. The Queen* Judge George of the Provincial Court concluded that an information charging an indictable offence under the Narcotic Control Act which was laid by a municipal peace officer was void and that the Attorney-General of New Brunswick had no authority to conduct the prosecution of such a charge. An order of mandamus was made, on the application of the Attorney General of New Brunswick, by Mr. Justice Barry directing Judge George to proceed with the hearing of the case on the merits. From this order the defendant has appealed.

Counsel for all parties agree that:

(1) Both the *Fisheries Act* and the *Narcotic Control Act* are within the exclusive legislative jurisdiction of Parliament.

(2) The subject matter of those Acts does not come within the ambit of criminal law under s.91(27) of the British North America Act.

(3) Section 27 of the Interpretation Act, R.S.C. 1970, c. I-23 applies so as to make all provisions of the Criminal Code relating to both summary convictions and indictable offences applicable to the prosecution of offences against any federal statute.

(4) Parliament may delegate to anyone the authority to lay informations and conduct the prosecution of any federal offence other than an offence against criminal law.

Mr. Neill, counsel for some of the defendants, contended that in spite of any delegation of authority intended by s.2 of the *Criminal Code* to the Attorney General of a province that the Hauser case (supra) should be interpreted to mean that an exclusive constitutional power was vested in the Attorney General of Canada to conduct the prosecution of all offences against federal statutes other than criminal offences, relying on certain statements found in the reasons of some of the Judges in the Hauser case (supra).

With all due respect, the Judges of the Provincial Courts, the County Court Judge and counsel for the accused, have failed to comprehend the reasons for judgment delivered in the Hauser case.

In that case the Supreme Court of Canada was concerned with an determined only the right of the Attorney General of Canada:

1. to prefer indictments under the Narcotic Control Act,

2. to have the conduct of proceedings instituted at the instance of the Government of Canada in respect of a violation or conspiracy to violate any Act of the Parliament of Canada or regulation made hereunder other than the Criminal Code.

The Court was not concerned with the question as to whether or not the Attorney-General of a province could prefer an indictment under the *Narcotic Control Act* or whether he could conduct the prosecution thereof, nor was the Court concerned as to whether a person other than an agent of the Attorney General of Canada could lay an information under that Act.

Lord Denning once stated that it is erroneous to read into the reasons expressed in a case, referable to a given set of facts, an application thereof to another case based on a different set of circumstances which were not in the contemplation of the Court when it gave those reasons.

The various Courts whose decisions are in question in the appeals before us and counsel rely on statements made by Spence, J., Pigeon, J. and Dickson, J. in the Hauser case. It is not necessary to consider the reasons of Spence, J. as his reasons were not concurred in by any other of the seven Judges who sat on that appeal. In interpreting the reasons of Pigeon, J., who wrote for the majority of the Court and of Dickson, J. whose reasons were concurred in by Pratte, J., we must keep in mind that the principal question for determination by them was whether the subject matter of the *Narcotic Control Act* fell under federal legislative jurisdiction as being criminal law under s.91(27) of the *British North America Act* or under the authority of the Peace, Order and Good Government provisions of that Act:

The statements of the Judges relied on are the following:

Pigeon, J. at p. 100:

As to the interpretation of the definiton of "Attorney General", I see no reason to disagree with the view taken by the Quebec Court of Appeal in Miller v. R., [1975] Que. C.A. 358, 30 C.R.N.S. 372, 27 C.C.C. (2d) 438, leave to appeal to Supreme Court of Canada refused 30 C.R.N.S. 372n (Can.). I find it clear that the effect of this enactment is to make the Attorney General of Canada the "Attorney General" in respect of all criminal proceedings instituted at the instance of the government of Canada and conducted by or on behalf of this government in respect of an offence or conspiracy pertaining to a statute other than the Criminal Code. This results in the exclusion of the attorney general of the province from any authority in respect of such proceedings so instituted.

And at p. 105:

Whatever may be said as to the necessity of limiting the extent of the federal power over criminal procedure so as to preserve provincial jurisdiction over the administration of justice in criminal matters, it appears to me that one must accept, at least, what is conceded by three provinces: unrestricted federal legislative authority over prosecutions for violations or conspiracies for violations of federal enactments which do not depend for their constitutional validity on head 27 of s.91 (criminal law). It appears to me that these provinces justly disclaim any constitutional power to subject the enforcement of federal statutes to their executive authority except in what may properly be considered as "criminal law".

Dickson, J. at p. 117:

Secondly, a clear distinction must be drawn between statutory construction and constitutional competence. As a matter of statutory interpretation, s. 2(2) of the Code may have the effect of excluding the provincial attorneys general only partially.

And at p. 144-145:

If s. 2(2) is properly characterized as merely increasing the number of persons authorized to prefer an indictment, one could not, I think, question the conclusion reached by Donnelly, J. In my view, however, as I have sought to show, s. 2(2) properly elucidated and characterized goes far beyond that and has the effect, generally speaking, of supplanting the provincial attorney general by the Attorney General of Canada, at the will of the latter, in the prosecution of any non-Code federal criminal offence.

In interpreting these statements it must be borne in mind that there were two constitutional questions before the Court, firstly, was the *Narcotic Control Act* supportable as being within Federal competency as being criminal law under heading 91(27) of the *British North America Act*, or was it supportable under Peace, Order and Good Government residual power; and secondly, if, as Dickson, J. found, it was criminal legislation, whether the Attorney General of Canada or the Attorney General of the Province had exclusive jurisdiction to enforce it.

The latter question only arose if the Narcotic Control Act was enacted by Parliament under its authority to enact criminal law. The *Hauser* case, by the majority decision of the Supreme Court of Canada, decided that issue; it is not criminal law. That decision is binding on this and all other Courts in Canada. Counsel all agree, for the purpose of this appeal, that the *Narcotic Control Act* is within the exclusive jurisdiction of Parliament and was not enacted under Parliament's legislative power over criminal law given by s. 91(27) of the *British North America Act*.

Dickson, J. therefore, when speaking of constitutional jurisdiction, predicated his comments on the premise that the *Narcotic Control Act* is criminal law and dissented therein from the majority judgment. He was very specific in stating, as quoted above, that we must be careful to distinguish between statutory interpretation and constitu-

tional competency. As there is no criminal enactment here involved, no constitutional question arises as to the power of the Attorney Generals.

The *British North America Act* constitutionally vests in Parliament the legislative power in respect of fisheries and narcotics and does not purport to vest any constitutional authority as such in the Attorney General of Canada, as it has been argued that it does in the Provincial Attorney General in criminal cases. The Federal Government can only exercise its constitutional powers over fisheries and narcotics by the enactment of legislation and by such legislation it may control the complete field in all aspects of both subject matters. It may therefore delegate authority including authority to enforce such legislation in either field to any person or officer it might deem advisable.

The constitutional argument relating to the powers of the Federal and the Provincial Attorney Generals arises out of the division of criminal jurisdiction between Parliament and the provincial legislatures by the *British North America Act.*

The *British North America Act* under s.91(2) vests in Parliament jurisdiction over The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters, and by s.92(14) vests in the Legislature of the provinces The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal jurisdiction, and including procedure in civil matters in those courts.

There is no such division of power between Federal and Provincial Governments in relation to the subjects matters which fall within the exclusive jurisdiction of Parliament and therefore no constitutional question arises as to the powers of the respective Attorney General.

Parliament has the exclusive right to legislate who may institute proceedings brought for the violation of Federal statutes other than criminal law; who may conduct such proceedings and which, if any, Attorney General may assume control of such proceedings. Parliament has enacted such legislation, viz. s.27(2) of the *Interpretation Act*, R.S.C. 1970, c.I-23 which is as follows:

> *s. 27(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 the Criminal Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.*

This subsection adopts the provisions of the *Criminal Code* relating to the prosecution of summary conviction and indictable offences. The only questions we are concerned with in this case are, therefore, not constitutional in nature, but of simply legislative interpretation.

Section 455 of the Code provides:

> *455. Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence, may lay an information . . .*

There is no restriction on that broad delegation of authority to be found in the Criminal Code. Therefore, subject to any restrictions to be found in particular Federal Acts such as appears in the *Lord's Day Act* and the *Combines Investigation Act* which require previous authority from either the Provincial Attorney General or the Federal Attorney General, anyone may lay an information for an indictable offence.

The same is true in relation to summary conviction offences. Section 720 of the Code defines "informant" as meaning "a person who lays an information".

There is likewise no restriction in the *Criminal Code* limiting who may lay an information charging the commission of a summary conviction offence and from time immemorial such informations have been laid by private individuals, by municipal, provincial or federal peace officers, and by agents of the Provincial or Federal Attorney General. In the absence of any statutory restriction, I can perceive no reason to qualify or deny the right to any person, be he a private citizen, a municipal police officer or an agent of a provincial Attorney General, to lay an information for an offence arising out of the violation of a Federal statute other than one relating to a criminal offence.

The right in a municipal police officer to lay an information has been conferred by valid Federal legislation and the Judges of the Provincial Courts in the *Schriver* and *Stevenson* cases (supra) erred in holding the informations to be void in those cases on the ground that they were not laid by agents of the Attorney General of Canada.

The authority of the Provincial Attorney General to conduct the proceedings in these three cases is also to be found in the provisions of the *Criminal Code* adopted by s.27 of the *Interpretation Act.* The Code provisions relate to the direct power of the "Attorney General" specifically in three major activities:

1. He may intervene to control or limit the prosecution of an offence by granting a "stay of proceedings" or may set aside such a stay.

2. He may prefer an indictment either following a preliminary inquiry or may initiate a new proceeding.

3. He may control the appeal from a verdict of acquittal or from sentence.

He is also inferentially involved and given the power to conduct prosecutions through counsel by the definition of "prosecutor" in s.2 of the Code. Prosecutor means "the Attorney General, or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them".

The Code defines Attorney General as follows:

s.2 "Attorney General" means the Attorney General or Solicitor General of a province in which proceedings to which this Act applies are taken and, with respect to

(a) the Northwest Territories and the Yukon Territory, and

> *(b) proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a violation or of conspiracy to violate any Act of the Parliament of Canada or a regulation made thereunder other than this Act,*
>
> *means the Attorney General of Canada and, except for the purposes of subsections 505(4) and 507(3), includes the lawful deputy of the said Attorney General, Solicitor General and Attorney General of Canada;*

Parliament, in its definition of Attorney General, specifically states that the Attorney General of Canada is only included in the meaning of "Attorney General" for the purpose of the prosecution of a violation of any Act of Parliament or regulation made thereunder, other than one under the Criminal Code, where the prosecution is instituted at the instance of the Government of Canada and the proceedings are conducted by or on behalf of the Federal Government.

In the *Sacobie and Paul* case, although the stated case would seem to imply, the proceedings were instituted by or on behalf of the Federal Government, they were not conducted by that Government. No counsel appeared on behalf of the Attorney General of Canada. Counsel did appear however on behalf of the Provincial Attorney General.

The correct interpretation of "Attorney General", as it appears in the Code, is that the Attorney General of the Province is intended by the use of those words, in relation to the prosecution of offences of a criminal nature as well as in the prosecutions of offences in violation of statutes of Canada and regulations there under, other than those relating to criminal law where the Government of Canada has not both instituted and appeared to conduct the proceedings.

I concur with the reasoning of Lajoie, J.A. in *R. v. Miller* (1975) 30 C.R.N.S. 372 at 378, wherein he stated, inter alia,:

> *(c) When proceedings are instituted in a province in respect of a violation of an Act or Parliament of Canada other than the Criminal Code, the bill of indictment can be preferred and the proceedings conducted, by the Attorney General of the Province or by the Attorney General of Canada.*

I would only add that if the proceedings are instituted by the Government of Canada, and the Attorney General of Canada or his agent appears to conduct that proceeding, the agent of the Attorney General of Canada would have exclusive authority. In all other cases, counsel for the Provincial Attorney General may appear and conduct the prosecution and if no counsel appears for the latter, the informant or his counsel may conduct the prosecution.

In the *Sacobie* and *Paul* case and in the Stevenson case there is no record of the Judge calling on the informant to proceed with his case. The Judge in each case dismissed the information because he held that counsel for the Provincial Attorney General, who was present to conduct the case for the prosecution, had no right to appear. Even if he had been correct in such view he should have called on the informant to proceed before he dismissed the information, particularly in the Sacobie

and Paul case where the informant acted on behalf of the Government of Canada and there was no suggestion that the information was a nullity.

In the *Stevenson* case the charge was laid by a municipal peace officer; the Federal Government not having instituted the proceedings had no right to conduct the prosecution of the offence.

Because Parliament has enacted legislation providing that anyone may lay an information for the violation of any Act of the Parliament of Canada including the Narcotic Control Act, the information in the *Stevenson* case was a valid information and the Judge of the Provincial Court erred in dismissing the information and in declining jurisdiction.

In the *Schriver* case the Provincial Attorney General instituted proceedings by preferring an indictment. Because the Federal Government had not instituted any proceedings, the Attorney General of the Province was empowered to prefer an indictment and the Judge of the County Court erred in quashing it.

The statements of Pigeon, J. and Dickson, J. earlier referred to and relied upon by the trial Judges and counsel were all qualified statements and the qualifications made by them were either completely ignored or misinterpreted.

Pigeon, J., at page 100 of the Hauser case, stated:

> *I find it clear that the effect of this enactment (s.2 of Code) is to make the Attorney General of Canada the "Attorney General" in respect of all criminal (sic) proceedings instituted at the instance of the government of Canada and conducted by or on behalf of this government in respect of an offence or conspiracy pertaining to a statute other than the Criminal Code. this results in the exclusion of the attorney general of the province from any authority in respect of such proceedings so instituted.*

The above underlined words quality the effect of the finding so that the exclusion of the Provincial Attorney General is effective only when the proceedings are "so instituted", that is when instituted and conducted by the Federal Government. In all other cases there is no such exclusion.

Pigeon, J., et al p. 105 in stating

> *It appears to me that these provinces justly disclaim any constitutional power to subject the enforcement of federal statutes to their executive authority except . . .*

did not imply a lack of constitutional power in the Federal Parliament to delegate authority to provincial executive power in such cases as the province might voluntarily accept that authority. He meant thereby that counsel for these three provincial governments disclaimed any executive power to override federal executive power over the prosecution of federal offences other than criminal offences. He did not imply thereby that the provincial executive power was lacking where the Federal government did not choose to exercise its executive power.

Dickson, J., in making the statement on pages 117 and 118 of the *Hauser* case, was speaking of the constitutional aspect of criminal law and not of federal offences other than under criminal law. His remarks were predicated on his dissenting judgment that the *Narcotic Control Act* was an enactment of criminal law under s.91(27) of the British North America Act and have no application to the legislative interpretation of federal statutes dealing with only non-criminal matters in the exclusive jurisdiction of Parliament.

Dickson, J. in stating at p. 144:

> *. . . s.2(2) properly elucidated and characterized goes far beyond that and has the effect, generally speaking, of supplanting the provincial attorney general by the Attorney General of Canada, at the will of the latter, in the prosecution of any non-Code federal criminal offence*

was careful to qualify his opinion to those cases where the Attorney General of Canada exercised his "will" to take charge of the proceedings. The statement does not support the contention that the Provincial Attorney General is supplanted in any such case where the Attorney General of Canada has not chosen to appear by counsel to conduct the proceedings and was intended to exclude such a case from the conclusion arrived at.

Counsel for the accused argued that the authority of the Attorney General, both Federal and Provincial, and their agents, was constitutional competence to institute and conduct the prosecution of non-criminal Federal Statutes".

The authority of the Attorney General of Canada to institute and conduct prosecutions of non-criminal offences is not a constitutional but a statutory power. To argue, predicated on the constitutional power of the enforcement authorities, is to argue on a false premise; their authority is purely statutory when acting under any act other than one relating to criminal law.

It is not necessary in this case to deal with the constitutional question as to the right of Parliament to supplant the Provincial Attorney General by the Attorney General of Canada in criminal cases, as these are not criminal cases, and as no federal statute has been enacted purporting to supplant the Provincial Attorney General in criminal proceedings.

The suggestion of counsel that a decision that the Attorney General of Canada cannot conduct the prosecution of an offence for the violation of a Federal statute other than the Code, where the information is laid by someone other than a person on behalf of the Federal Government, would lead to a foot race between the Provincial and Federal Attorney General, is facetious and has no application to the situation before us. It could only arise when there were two informations laid for the same offence one being on behalf of the Attorney General of Canada and would not be settled, as implied, by reference to which information was first laid or to the so-called foot race.

The various Provincial Court Judges, as well as some counsel, have difficulty interpreting the Hauser reasons for judgment. There are other cases standing for judgment before Provincial Courts pending the decision of this Court. It must be

borne in mind that these reasons are intended to apply to prosecutions of Federal offences not founded under the heading of criminal law under s. 91(27) of the *British North America Act*. The definition of Attorney General in s. 2 of the Criminal Code refers to Federal Acts other than the Code. There are other Federal Acts, the *Lord's Day Act* which deal with criminal offences not included in the Code. This leaves unanswered the question as to the constitutionality of the definition of Attorney General in relation to such other Acts.

I will endeavour to cover the various situations which may arise individually so that the ruling of this Court may be evident in each case coming within the possible situations contemplated.

In the prosecution of an offence for the violation of a Federal statute, which does not depend on the heading of criminal law under s.91(27) of the British North America Act to support it constitutionally.

1. If the information is laid or the indictment is presented by the Government of Canada and counsel appears on behalf of the Attorney General of Canada to conduct the prosecution thereof, he has exclusive legislative jurisdiction.

2. If an information is laid by or on behalf of the Federal Government and counsel for the Provincial Attorney General appears and counsel for the Attorney General of Canada does not appear, counsel for the Provincial Attorney General has the sole exclusive right to conduct the prosecution.

3. If neither Attorney General appears by counsel or agent to conduct the prosecution, the informant, his counsel or agent, as the Code provides, may conduct the prosecution.

4. Anyone may lay an information for an offence against a Federal Act who has reasonable and probable grounds for believing such an offence occurred and that the person charged committed it if such Act does not restrict such right.

5. If an information is laid by anyone other than on behalf of the Federal Government, the Provincial Attorney General may appear by counsel or agent, as the Code requires, and conduct the prosecution.

6. If an information is laid by anyone other than by a Federal agent, and the Provincial Attorney General does not appear by counsel, the informant, his counsel or agent, as the Code provides, may conduct the prosecution.

7. Either the Attorney General of Canada or the Provincial Attorney General may institute a proceeding by preferring an Indictment in cases where there has been no committal for trial on the charge preferred.

The appeal by way of stated case in the *Queen v. Sacobie and Paul* is allowed. The trial Judge erred in holding that "only the Federal Attorney General or his counsel or agents may prosecute violations of the *Fisheries Act* of Canada".

The case is remitted to Judge Harper to hear the evidence and determine the case on the merits.

REGINA v. WESTERN FOREST INDUSTRIES LIMITED

British Columbia Provincial Court, Giles Prov. CT. J., Duncan, B.C., December 1, 1978

Defences - Due diligence - All reasonable care taken in the factual circumstances - Whether de minimus non curat lex applicable when triffling amount of debris in view of the magnitude and difficulty of operations.

Fisheries Act. R.S.C. 1970, c.F-14, s.33(2) - Unlawful deposition of a deleterious substance in a place in the vicinity of water frequented by fish.

Government Directives - Reasonable efforts to comply with government staff directives in clean-up operations.

The accused cleaned-up a silt and debris laden reservoir, located above a creek frequented by fish, in accordance with instructions given by Department of Fisheries staff. In doing so, the reservoir was opened and 300,000 gallons of sediment laden water gushed down the creek over a four hour period. Later, the reservoir floor was cleaned of remaining debris. During the operation, five cubic yards of about the total of 1400 to 1600 cubic yards of debris was deposited over the side of the reservoir where it would be carried into the creek with the first rains. This deposition was necessary in the circumstances to avoid the operator of the clean-up machinery from possibly losing his life.

On two charges under section 33(2) of the *Fisheries Act, held,* both counts are dismissed.

The clean-up is in accordance with Fisheries staff directives. It is unfair to blame the accused for the initial 300,000 gallon discharge, when this discharge is a direct result of following Fisheries staff directives.

The deposit of five cubic yards of debris is triffling in view of the magnitude and difficulty of the operations.

The defence of due diligence applies. The accused observed all of the Fisheries staff directions. The choice of depositing a small amount of deleterious substance was made only during a moment of crisis in order to avoid the risking of the clean-up operator's life. This is the only logical, reasonable and possible decision that could have been made. As such, the diligence and reasonable care to be exercised, as contemplated in *R. v. Sault Ste. Marie. (1978) 3 C.R. (3d) 30, 7 C.E.L.R. 53 (S.C.C.)* must be deemed to stop short of risking life and limb. The accused took all reasonable care, acted with due diligence and did what any group of reasonable men would have done in similar circumstances.

This decision is not being appealed.

Headnote from (1978), 9 CELR 57

Giles, J.: The defendant company is charged that contrary to section 33(2) of the *Fisheries Act* it did, firstly, unlawfully deposit and, secondly, cause to be

deposited a deleterious substance in a place, namely Ashburnham Creek, in the vicinity of Cowichan Lake, V.I., in water frequented by fish.

Western Forest Industries Limited, the defendant company, owns in fee simple the lands through which Ashburnham Creek flows on its way to Cowichan Lake. The company operates a large mill at a townsite known as Honeymoon Bay. In order to supply water for the mill and the inhabitants in the townsite, the company built a dam across Ashburnham Creek thereby forming a fair-sized reservoir. This dam and reservoir has been in existence many years and regularly each year, except in 1976, the company has cleared out the reservoir to rid of accumulated silt and debris (leaves, bark, twigs, etc.) which if left would seriously cut down the capacity of the reservoir.

In previous years the company on its own initiative and for its own benefit carried out this cleaning process by removing a plug close to the base of the dam and some two feet in diameter. Apparently this plug was always covered by several feet of silt and debris at the time of the cleanout. It had been the practice over the years to pull the plug in a motion parallel to the creek bottom, let the reservoir drain and then go in with heavy equipment and clean out what silt, gravel and other debris still remained by lifting it mechanically from the bed of the reservoir on the up-stream side of the dam and "dumping" it over the top of the dam to fall on the down-stream side, to be carried away in due course by the flow of the stream and chiefly at the time of the first fall freshet.

It is apparently, this last described part of the process - the actual "dumping" of the residue back into the Creek on the downstream side of the dam - that the Fisheries Officers seem mostly concerned with, in fact, their position is that the residue heretofore "dumped" over the dam should be shovelled into trucks and carted away.

Conferences were held between Fisheries and Conservation Officers on the one hand and Company officials on the other. The then Conservation Officer of the Duncan District, one Ackerman, took a firm stand on his requirements, while the company manager and plant superintendent doggedly maintained that the company's past performance was adequate. The company apparently went over Ackerman's head, and some evidence crept into the record referring to a pressured change of policy followed by a reversal to official support of Ackerman's position. There were also suggestions of temper and bad language. All this, of course, is not relevant at all; however, it does underscore the obvious fact that relations between Fisheries and Company were strained almost to open hostility, which unfortunately may well have coloured testimony at the trial and impaired the judgments of the parties at the time of the incident.

Shortly after reserving judgment in this issue, I became aware of possible error in the information. In each count the words "unlawfully" and "knowingly" appear, whereas both are absent in the section of the *Fisheries Act* under which the defendant is charged. No exception had been taken at the trial. I advised counsel and invited submissions dealing with this point and I have indeed received submissions. I will deal with this aspect later, and continue now to deal with the case on its merits.

On the 26th day of July, 1977, a meeting was held at the damsite and the method to be employed by the company to clean out its reservoir was fully canvassed.

Fisheries officials were presumably acting under section 33(1) of the *Fisheries Act*. In any event, the following letter was delivered to the defendant company on July 27th, 1977:-

262 Station Street,
Duncan, B.C.
V9L 1N1

Province of British Columbia
Ministry of Recreation
and Conservation
Fish and Wildlife Branch

July 26, 1977

Mr. B. Fraser,
Western Forest Industries Ltd.,
Honeymoon Bay, B.C.
V0R 1Y0

Dear Mr. Fraser:

With reference to our field inspection of the proposed gravel removal behind your company's dam on Ashburnham Creek on this date, the following stipulations were agreed upon:

a) That the gravel is to be removed by truck from the site;
b) That the water level behind the dam will be lowered to a point where only a small flow from the creek will be existing behind and through the dam;
c) That a berm will be constructed to keep the above-mentioned flow away from the working area at all times; and
d) That gravel removal operations will commence on July 28th, 1977, and that the operations will take approximately five days.

These measures are necessary to prevent silt from entering Ashburnham Creek as a result of these operations.

You might also be interested to learn that this summer Federal Fisheries have recorded the largest number of fry in the creek in years. This, we feel, is a result of the lack of silt in the system during critical summer months. With improved gravel removal operations from your dam site, the utilization of Ashburnham Creek by salmon and trout fry should increase significantly during future years.

Yours truly,

"A. Ackerman"
A. Ackerman
Conservation Officer
Duncan District

cc. J.C. Lyons, Regional Director, Nanaimo
S. Mahannah, Habitat Protection Technician, Nanaimo
D. Morrison, Habitat Protection Biologist, Nanaimo
B. Caspell, Fisheries Officer Duncan
D.F. Hammond, Manager, W.F.I. Honeymoon Bay

This letter purports to set out the terms of an "Agreement", but in truth it was hardly that. Steps (a) to (d) inclusive are described as "stipulations", and if these were complied with "silt would be prevented from entering Ashburnham Creek".

In cross-examination Ackerman stated that he "had explained quite thoroughly" his requirements of the defendant company; that the so-called stipulations were "basically directives", that, when asked if he was aware that sediment covered the whole base of the dam to a point several feet above the plug, he admitted that he was, and that Mr. Fraser, the Company's superintendent had explained this to him, as well as the method of pulling the plug, with which method Ackerman was in agreement.

When asked if the Company's officials had carried out the terms of the letter of July 26, 1977, it is significant that Ackerman made in reply the bald statement: "Yes, they had no choice".

Mr. Lefebre, who was put in charge of the whole operation, supervised Baird Contracting an independent contractor hired by the Company to remove the sediment. Mr. Lefebre described how the "by-pass" was constructed and how some fourteen hundred cubic yards of sediment was trucked away. He also said that the fact the plug was below the sediment level "was visible to everybody".

Mr. Hammond, the Plant Manager, gave evidence to the effect the reservoir fills up with "gravel from the hills", that it had been two years since it was drained and contained approximately 300,000 gallons of water. He stated the plug was pulled in the usual manner on July 27th, 1977, and the work was completed three days later.

It seems that at this point the company had been acting entirely pursuant to the "directives" of the Conservation Officer, Ackerman, as contained in the letter of July 26th, 1977. The observations of an eye-witness, when the plug was pulled are significant. Mr. Fraser, who was present, stated that the moment the plug was pulled, the water gushing through the two foot hole caused a "vortex" to occur into which was dragged sediment, gravel and other debris. He described a jet of water two feet in diameter at the down-stream side of the dam, dirty brown in colour, coming from some several feet above the base of the dam and hitting the stream-bed some eight to ten feet away. This jet of sediment and debris laden water continued with diminishing intensity for some four hours after the pulling of the plug.

The Crown submitted a brochure of photographs (exhibits 26(1)-(24)), taken by the conservation Officers shortly after the dam was drained. These photographs do indeed show serious deposits of silt and debris; however, I am finding as a fact that the despoiling of the creek as indicated in the photographs was due almost exclusively to the pulling of the plug and the flooding that occurred for some four hours after, all of which was pursuant to the letter of July 26th, 1977, and the Fisheries Departments "directives" contained therein.

After the reservoir was drained the clearing away of sediment and gravel proceeded apparently satisfactorily and without incident or complaint. As mentioned before, Baird Contracting Ltd., carted away some fourteen hundred cubic yards of gravel.

At this point the second contingency arose, also apparently overlooked by the Conservation Officer - that of putting the plug back in place. This was a delicate operation and one fraught with danger. The water had gone from the upstream side of the dam and there remained a residue of what could best be described as "sludge", up to the level of the bottom of the plug hole. To get the plug back some of the

remaining debris had to be removed and the working area was so mushy heavy equipment could not safely be used.

Wise after the event, the Crown suggested several things; men in hipwaders with shovels, a dragline operating from the bank et cetera. It was at this point that the Company was faced with Shylock's problem - "one pound of flesh, but not one drop of blood". In their wisdom the company officials decided to use a light frontend loader.

At this point the duties of Baird contracting had been completed as can be seen from the following evidence:

48 Q And I take it to the best of your knowledge that your crew cleaned the area of the reservoir out as far as they could consistent with the equipment that you have, is that correct?

A. That's right.

49 Q And you used the best equipment that you could for this job?

A. Yes

50 Q Now, one final question. You have mentioned that you didn't go right up to the face, to the very edge of the dam on the upstream side, is that correct?

A. No.

51 Q And that's because with your equipment it would be dangerous for your equipment to go that close to the face, is that correct?

A. Yes

52 Q You went as close as you could, I take it?

A. Yes, that's right.

The Company took over at this point using their own frontend loader and operator. The operator had not been working such a piece of equipment for some years and much was made by the Crown of his lack of skill. I find this aspect exaggerated and possibly the only difference resulting from the use of a more experienced operator would have been that he would not have attempted the job at all. The operator, one Graves, described his task to be that of cleaning away the debris so that the plug could be replaced. He was working for just under an hour with a one and one-quarter yard bucket. Mr. Lefebre was in charge. The desirable course of action was for the loader to bring back each bucket of debris to the river bank; but with the consistency of the sludge, time was of the essence and furthermore the task was hazardous. Mr. Lefebre gave evidence that one wheel of the machine went into a hole, and it looked "as if the whole machine was going over". Mr. Lefebre said he was "real scared". At this moment, an emergency situation developed and the fact is that Graves dumped some five cubic yards over the dam to fall on a concrete skirt at the base of the dam on the downstream side, where it remained for some time. The Company was not at any time requested to remove it.

For reasons to be summarized later it is only this latter dumping of the five cubic yards by Graves for which the company could possibly be held responsible.

To explain this dumping at first Mr. Fraser used the seemingly exculpatory statement "inadvertent dumping"; not being entirely satisfied himself with this explanation he went on to say "it was a matter of necessity", which seems closer to the mark. Lefebre told Ackerman that it was "a management decision", which I am finding as a fact was the true state of affairs.

As to the actual amount of debris actually dumped over the dam, Graves states he was working only one hour before he had to stop. His machine had a one and one-quarter yard bucket and he stated that most of what was dumped over was water. The defence called a Mr. MacDonald, experienced in estimating bulk quantities such as hog-fuel and sawdust. He saw the pile of debris at the time and estimated it at five cubic yards. On cross-examination he stated it "could have been a bit more". Ackerman described the pile and stated he thought it amounted to eighty cubic yards, but withdrew the answer before being cross-examined on it. I accept the estimate of about five cubic yards given by MacDonald as being the amount dumped over the dam, and this appears to be substantiated by several photographs submitted as exhibits by the Crown.

Before proceeding further, it is well to dispose of the points established by the experts called by the Crown. I am finding as a fact the waters in question are frequented by fish and by fry, for that matter. I am also finding that the releasing of sand, silt and other debris into Ashburnham Creek, as happened here, is deleterious to fish.

The larger question here, in my view, is given all the surrounding circumstances of this case, and in particular, the very active participation of the Fisheries Officials in what can almost be described as a joint venture, at its best, and bureaucratic bungling and interference, as witnessed by the directives which the defendant Company had "no choice" but to follow, contained in the letter of July 26th, 1977, at its worst, - that is, given these aspects, is it right that the Company should in anyway be held responsible?

It should be noted that for the prior twenty years this dam had been opened and the reservoir been drained and 300,000 gallons of sediment laden water had presumably gushed down Ashburnham Creek. In the letter of July 27th, 1977, the Federal Fisheries are reported by Ackerman "to have recorded the largest number of fry in the Creek in years". Other witnesses spoke of the increasing fruitfulness of this Creek as a spawning ground and the increasing number of salmon and fry to be found in these waters year by year.

The defendant Company, Western Forest Industries, for over twenty years has used Ashburnham Creek to provide drinking water for its townsite at Honeymoon Bay, and water for its plant and processes located and carried on there. Three hundred inhabitants depend for their livelihood on this plant and indirectly on this Creek. The past use of this natural resource has not apparently detracted from its increasing usefulness as a spawning ground for fish.

After many years, man in general, and industry in particular, have finally become aware of the great need to protect our natural resources, including fish and wildlife. No one longer questions this. If, however, environmentalists are to continue their good work, or for that matter, hold their own, then they must maintain a basic minimum level of good public relations. To accomplish this end, they should rid their ranks of crackpots and zealots, and above all, eschew the power-hungry bureaucrat when in the throws of an ego trip.

Nature provides abundantly - the environment has survived forest fires, cave-ins, and earthquakes from time immemorial; rivers have been diverted from their courses; human and animal populations have been decimated by plague, flood, fire and famine. But life survives and returns; it seems little more is required beyond reasonable monitoring from time to time, when nature may on rare occasions seem to be getting the worst in the fight for survival.

When an irreconciliable conflict of interests develops between man and his environment, then the interest of man of necessity must be deemed to be paramount.

In the present case there are only two occasions when it could be said that a deleterious substance had been deposited: firstly, what appears to be the major deposit - the flooding of the creek when the plug was removed from the dam; secondly, the deposit by Graves, an agent of the defendant Company, of the five cubic yards of debris "dumped" over the dam.

In dealing with the first of these - there is no doubt that 300,000 gallons of silt laden water flowing down the creek for some four hours would have a deleterious effect on the creek as a spawning ground, at least for a period of time. But what happened was entirely at the direction of Ackerman, in accordance with his "stipulations", and following his "directives", all as outlined in his letter to the Company of July 26th, 1977. In this letter appear the rather astonishing words: "These measures are necessary to prevent silt from entering Ashburnham Creek as a result of these operations". He could only have been referring to the residue of silt, leaves and gravel left in the reservoir after it had been drained, and which were to be trucked away.

To be fair to both sides, it would seem that neither the Fisheries Branch nor the Company had within their contemplation the effect of removing the plug from the dam. As far as the Company was concerned it had been draining the dam and dumping the residue over the dam for twenty years. It was done in early fall and whatever deposits were left on the down-stream side merely awaited the "first fall freshet". That is, when the first rains came and the dam overflowed all debris was washed away. As one witness said, "it was there today and completely gone tomorrow". In short, to the Company officials the reservoir could not be cleaned out without first removing the plug from the dam. They had done this often before and gave this aspect of the problem little thought.

As far as the Fisheries officials are concerned, they either did not think at all about the effect of removing the plug or they thought the stipulations they had imposed upon the Company would be adequate. In either case it would be manifestly unfair and contrary to natural justice to hold the defendant Company to blame for this deposit, when it results entirely from the directives of Ackerman, who admitted the

Company had faithfully carried out the intent of his letter in all respects - "they had no choice".

I now come to the second deposit - the five cubic yards deposited by Graves. Perhaps the first thing to realize is that pursuant to the Fisheries Branch "directives" between 1400-1660 cubic yards of silt, gravel and other debris were in fact trucked away, which each for the previous twenty years had been dumped over the dam for the fish to contend with. I find that five cubic yards in fifteen hundred cubic yards (to take an average) amounts to one part in three hundred or .3%. If the letter of July 26th 1977, records a contract - and the words "the following stipulations were agreed upon" were used - then I would be inclined to find there had been "substantial completion"; if the letter is merely a list of instructions then I would be inclined to find there had been "substantial compliance"; and in view of the magnitude and the difficulty of the operations and the trifling amount of debris (.3%) which was dumped over the dam, I would be inclined to find (as I was urged by defence counsel) that the doctrine *de minimis non curat lex* applies.

However, I do not think it is necessary to make any of the above findings, as I feel the defence of "due diligence" is open to the defendant in this instance, and I refer to *R. v. Sault Ste Marie*, a recent decision of the Supreme Court of Canada, handed down May 1st 1978, and reported in 3. C.R. (3rd) 30.

It was agreed by Counsel at the trial that this was an offence of "strict liability", but the *Sault Ste Marie case* - I am not too sure of this - was not referred to. In any event, the report has since come into my hands. In brief, between the two traditional positions (the requirement of proof of *mens rea* by the Crown, on the one hand, and absolute liability upon proof of the act done, on the other) the Supreme Court of Canada has placed a third caterogy, one of strict liability on proof of the doing of the prohibited act, leaving it open to the accused to avoid liability by proving that he took all reasonable care.

These categories are set out on p. 53, of the Supreme Court of Canada judgment (Dickson, J.):

> *I conclude for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:*
>
> *1. Offences in which mens rea consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.*
>
> *2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event. These offences may*

properly be called offences of strict liability. Estey C.J.H.C. so referred to them in Hickey's case.

3. Offences of absolute liability where it is not open to the accused to excuplate himself by showing that he was free of fault.

It remains to examine the facts in the case at bar with particular reference to the circumstances surrounding the dumping of the five cubic yards in the process of replacing the plug in the dam. In the light of all existing circumstances can it be fairly said that the defendant company, its employees and agents, took all reasonable care and did what reasonable men would have done in the cricumstances?

The bulk of the silt and gravel had been trucked away, some fifteen hundred cubic yards of it, and all that remained was to replace the plug. The dumping of the five cubic yards was the price paid for the safe replacing of the plug without loss of life or limb. In an emergency situation on slushy footing, a light front-end loader had already dropped one wheel in a hole, and it looked "as if the whole machine was going over - I was real scared".

The Company had faithfully observed all Ackerman's directions at this moment, and there is no reason in the world to believe that that dumping of five cubic yards was an act of petty defiance; it was in fact, a necessity. The plug had to be replaced and the operator brought back to safety quickly. In a moment of crisis a choice had to be made between the depositing of some deleterious substance on the one hand, and the avoiding of it by risking a man's life on the other. In my opinion, the diligence and reasonable care to be exercised, as contemplated by Dickson, J. in the *Sault Ste Marie case*, must be deemed to stop short of risking life and limb.

In a moment of crisis Company officials made the only logical, reasonable and in my view, possible decision, and it was a management decision. The operator was directed to dump the five cubic yards and get back to safety as soon as possible. It was a reasonable, sound and authoritative decision, made by men who are accustomed to making such decisions, and they are to be commended for it.

I have no hesitation in finding as a fact that the defendant Company took all reasonable care, acted with due diligence and did what any group of reasonable men would have done in similar circumstances, and for these reasons the company has avoided liability and I so find.

It should be recorded that the defence called evidence on its own behalf and half of the Crown's witnesses were Company officials. I was impressed by the fairness of the evidence they gave and by the impartial way the Crown placed all the facts before the Court.

Briefly, before closing, I refer to an earlier reference I have made to the inclusion of the words "unlawfully" and "knowingly" in the Information. I invited written submissions on the possible effect of this, especially, with reference to the reasons in the *Sault Ste Marie case*. I prefer the position taken by Crown, that is, that the words in question are mere surplusage, do not invalidate the counts, and need not be proved. However, I consider the point now somewhat academic, as the case is dismissed on other grounds.

I wish to thank all counsel for their very able assistance.

The case is dismissed on both counts.

REGINA v. PIONEER TIMBER CO. LTD.

British Columbia Country Court, Campbell Co. Ct. J., Campbell River, B.C., March 7, 1979

Act of God - Defence - What constitutes an Act of God.

Defences - Act of God - Reasonable care - Public welfare offence of strict liability - Fisheries Act, R.S.C. 1970, c.F-14, s. 33(2).

Deleterious Substance - Sediment - Effect of high concentration on fish and fish habitat.

Evidence - Sufficiency - Deposition of sediment by accused.

Fisheries Act R.S.C. 1970, c.F-14, s. 33(2) - Permitting the deposit of a deleterious substance into a place where the substance may enter water frequented by fish - Defences - Public welfare offence.

Sediment - Deleterious substance - Effect of high concentration on food chain of fish, physiology of fish and on the actual habitat of fish.

The accused - respondent was charged with permitting the deposit of sediment, a deleterious substance near a tributary stream under conditions in which the sediment may enter water frequented by fish.

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.

On an appeal from a conviction under *s. 33(2) of the Fisheries Act, R.S.C., c. F-14,* as amended, *held,* the appeal is dismissed.

An offence prescribed under s. 33(2) of the *Fisheries Act* is a public welfare offence 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.

The defence of act of God is not available given the late spring season, the snow pack that existed when the work commenced and the fresh fall of snow, all of which made it reasonable to expect a run off of water.

The defence of taking all reasonable care or due diligence is also not available as the accused did not take reasonable steps to avoid the occurrence in that it did not ditch or divert the water from the area of the tributary stream in anticipation of a normal water run-off.

The clay and gravel material as shown in evidence is a deleterious substance. This sediment is deleterious to fish in respect of the effect of high concentrations of sediment on the food chain of fish, the effect on the physiology of fish and the effect on the actual habitat of fish.

Further, there is sufficient evidence to prove that the sediment was deposited by the accused even though there is no proof that the sediment actually sampled was deposited by the accused.

This decision is not being appealed.

J.S. Godrey, for the Attorney-General of British Columbia, respondent.
E.C. Chiasson, for the accused, appellant.

Headnote from (1979), 9 CELR 66.

Campbell, Co. Ct. J.: This is an appeal pursuant to the provisions of Section 748 of the *Criminal Code* from a conviction under Section 33(2) of the *Fisheries Act* R.S.C. 1970, c. F-14 and amending Acts, of a charge that the respondant "on or about the 22nd day of April 1977, near Port Hardy, County of Nanaimo, did permit the deposit of sediment, a deleterious substance, near Tributary No. 13 Creek, a place under conditions where such deleterious substance aforesaid may enter water frequented by fish, to wit: the Keogh River."

This charge arose as a result of certain activities of servants and agents of the appellant on the 21st and 22nd days of April 1977, in the Port Hardy area. The trial was held at Port Hardy before His Honour Judge Watts on February 15th, 1978, and on April 4th, 1978 the learned Provincial Court Judge found the appellant guilty and imposed a fine of $3,000.00. From that conviction this appeal is brought.

The evidence establishes the following: In April 1977 the appellant directed the opening of an old logging road. There had been a slide on this road in 1975 resulting in its closure and to re-open it it was necessary to rebuild the road at the point of that slide. This necessitated the blasting of the conglomerate on the cliff face on the upper side of the road. The effect of blasting the conglomerate was to break it into its constituents of gravel and clay. The bank on the lower side of the road at the point of such blasting was in effect the head wall of Tributary 13, which water course commences below the road and empties into the Keogh River some 1.6 miles downstream.

Blasting was carried out on April 21st, 1977, and a bulldozer was then used to rebuild the road using some of the blasted material for that purpose and piling the remainder of that material along the lower side of the road directly above the head wall of Tributary 13. That same day, April 21st, Slaney, a research biologist of the Fish and Wildlife Branch, travelled up the Keogh River to a point above the confluence of Tributary 13 and that river and found the water in the river was perfectly clear. At that time he heard blasting coming from the hill above the head wall of Tributary 13. On April 22nd, the next day, he again went up the Keogh River and at a point .6 miles downstream from the confluence of Tributary 13 and that river he saw that the river water was dirty. He proceeded further up the river and found that the source of the dirt was the confluence of Tributary 13 where the water was thick and dirty. He found

the water of the Keogh River above the confluence of Tributary 13 was clean. He took some water samples from various points of the river. Later that afternoon he returned to the scene with officials of the appellant and another conservation officer, Mr. Pratt. They went to the point where the road repairs were being carried out and there found the bulldozer at work and loose material from the blasting being piled along the lower side of the road directly above the head wall of Tributary 13 and slowly descending in a stream down the side of the bank towards Tributary 13.

Slaney and Pratt returned to the confluence of Tributary 13 and the Keogh and took further water samples. As a result of the observations of the fisheries officers and the analysis of those samples this charge was laid.

Wright, the contractor for the appellant, gave evidence regarding the weather conditions on the days in question. He experienced no difficulty in getting to the job site by truck on April 19th and 20th but did on April 21st because of a snowfall of three to four inches on the road surface. He testified there were three to four feet of snow in the area above the job site. On April 22nd he found a great deal of the snow had disappeared and a flood of dirty water approximately a foot deep and one and a half to two feet wide was running down the road surface picking up mud, silt and debris before it poured over the edge of the road, through the old slide area to the commencement of Tributary 13 and on into Tributary 13. Some of the flood waters ran through the material excavated by the appellant and some passed through the material which had been cast along the lower side of the road. A ditch was cut on the inside of the road by the bulldozer to assist the water to continue to run down the road.

Wright testified that he had worked in the area for 15 years and had never seen a thawing phenomenon such as he saw on April 22nd. He described it as a "Chinook" similar to those which he had experienced in southeastern British Columbia. The monthly meteorological summary for the month of April 1977 from the Port Hardy Airport was filed as an exhibit. This demonstrated a warming trend from April 21st to April 22nd but was not accepted by the trial Judge as confirming the extreme variation of temperature suggested by Wright's evidence.

Although the notice of appeal advances several grounds of appeal these resolve themselves into the three main points argued by the appellant at the hearing of the appeal. These are:

(1) *That the appellant exercised reasonable care and that such being the case it is entitled to be acquitted under the principles enunciated in R. V. Sault Ste Marie, (1978) 3 C.R. (3d) 30.*

(2) *That the Crown must prove the sediment in the Keogh River was deleterious and the evidence fails to establish such was the case.*

(3) *There was no proof that the sediment actually measured was deposited by the appellant assuming that the measured concentrations could be harmful to fish.*

Turning to the first point advanced by the appellant I should note that the judgment in this case was pronounced prior to that of the Supreme Court of Canada in the *Sault Ste Marie case (supra)* on May 1st 1978. This latter case deals with the

distinction between strict and absolute liability and the applicability of the defence of reasonable care in certain circumstances. The judgment of Dickson J. indicates that such a defence is available in appropriate circumstances and holds there are three categories of offences rather than the traditional two. After a throrough review of the authorities the learned Justice of the Supreme Court of Canada makes the following observations at page 53 of the report:

> *I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:*
>
> *1. Offences in which mens rea consisting of some positive state of mind such as intent knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.*
>
> *2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves considerations of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Estey D. J.H.C. so referred to them in Hickey's case.*
>
> *3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.*
>
> *Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly" or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.*

Section 33(2) of the *Fisheries Act* under which the charge in this case arises provides as follows:

> *33(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*

Subsection (4) does not apply here.

Applying the criteria enumerated by Dickson, J. in the *Sault Ste Marie case* to the legislation here I have no difficulty in concluding that the offence here is one of the second category, i.e. a public welfare offence where proof by the Crown of *mens rea* is not necessary; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care.

Thus the defence of reasonable care is open to the appellant here.

The appellant says that the deposit of sediment in the Keogh River was caused by an act of God or, alternatively, the sudden thaw and resultant run off were completely unexpected and improbable and in the circumstances the appellant exercised reasonable care.

The question as to what is an act of God was considered in *The Queen v. Canadian Pacific Railway Company*, (1965) 2 Ex. C.R. 222 at page 241 where Dumoulin, J. states:

> *What is considered an Act of God?*
>
> *Halsbury's Laws of England Third Edition, vol. 8, p. 183, no. 317 under the caption of "What constitutes an act of God" defines it as follows:*
>
> *An act of God, in the real sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or, more accurately, as an accident due to normal causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it. The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence (when in other words, it does not imply any law from which its recurrence can be inferred) does not prevent that phenomenon from being an act of God. It must, however, be something overwhelming and not merely an ordinary accidental cricumstance, and it must not arise from the act of man.*
>
> *Black's Law Dictionary, Fourth Edition, 1951, Vo. Act of God, emphasizes that the event attributed to the intervention of purely natural causes ...could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence, or by the aid of any appliances which the situation of the party might reasonably require him to use.*
>
> *An exculpatory plea of this nature is, necessarily, an extreme one, which must evince most if not all of the characteristic traits predicated of it. Otherwise, the expression, act of God, becomes a self-serving synonym for the negligent inaction of man.*

In *R. v. North Canadian Enterprises Ltd.* 20 C.C.C. (2d) 242, a decision of the Provincial Court of Ontario, the charge was that of polluting waters contrary to the *Ontario Water Resources Act* when a dam was breached after an excessively heavy rainfall. One of the defences required an extraordinary operation of nature to which no man contributed, which the accused could not have foreseen and could not have guarded against. Since there was no evidence that the amount of rainfall was so extraordinary as to be overwhelming and unforeseeable this defence failed.

The learned Provincial Court Judge in reviewing the authorities regarding the definition of "act of God" said the following at page 245 of the report:

> *How does one define 'act of God' in the legal sense? We are concerned with the legal as opposed to the ecclesiastical or biblical interpretation for in the latter cases, as was said by Lord Esher, M.R. in Pandorf & Co. v. Hamilton, Fraser & Co. (1886) 17 Q.B.D. 670 at p. 675.*
>
> *In the older simpler days I have myself never had any doubt but that it did not mean the act of God in the ecclesiastical or biblical sense, according to which almost everything is said to be the act of God...*

(emphasis added).

> *The learned law Lord went on to observe that in a mercantile sense it meant an extraordinary circumstance which could not be foreseen and which could not be guarded against.*
>
> *Middleton, J. in McQuillan v. Ryan (1921) 64D.L.R. 482 at p. 292-3, 50 O.L.R. 337 at p. 349, put it this way: 'act of God' ... must relate to an event which cannot be foreseen or which if it can be foreseen cannot be guarded against.*
>
> *The Court put it very succinctly in Nugent v. Smith (1876) 1 C.P.D. 423, where at pp. 435-6 the Court said:*
>
> > *The rain which fertilises the earth and the wind which enables the ship to navigate the ocean are as much within the term 'act of God' as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occuring in the former.*
>
> *Here the evidence does not disclose any extraordinary occurrence which in all the circumstances the accused could not have foreseen and could not have guarded against.*
>
> *In Pleet v. Canadian Northern Quebec R. Co. (1921), 64 D.L.R. 316, 50 O.L.R. 223, 26 C.R.C. 227 (C.A.) (affirmed (1923) 4 D.L.R. 1112, 26 C.R.C. 238), Ferguson, J.A. said at p. 323 D.L.R. p. 230 O.L.R. as follows: 'where the goods are lost, destroyed or damaged by an operation of nature to which no man contributed, the loss is an act of God. (Emphasis added). I would ask you to note*

particulary the words 'by an operation of nature to which no man has contributed'.

In the case now before me the learned Provincial Court Judge rejected the "act of God" defence saying, in effect, as I read his reasons, that there was no evidence to support such a contention. He in effect rejected Wright's evidence with respect to a sudden thaw or "Chinook" . However, even if he were wrong in so rejecting such evidence, and I am not prepared to say that he was, in my view the evidence does not establish that what occurred in this case was an "Act of God" in the sense defined in the *Canadian Pacific* and *North Canadian Enterprises cases.* Given the season of the year and the snow pack that existed when the work commenced, plus the fresh fall of snow, it was reasonable to expect a run off of water to some extent. The appellant did virtually nothing which it might reasonably be expected to do in the way of ditching or other means of diverting water from the area of Tributary 13 in anticipation of a normal water run off. Further, there was clearly "a contribution by man" or "human intervention" and the flow of water, sediment and debris in the direction it took could have been avoided or guarded against by those in charge of the appellant's operation. On the evidence as a whole I am unable to find that the appellant took reasonable steps to avoid the occurrence and thus establish the due diligence which would entitle it to an acquittal pursuant to the principles enunciated in the *Sault Ste Marie* case pertaining to strict liability offences.

Turning now to the appellant's second contention that the Crown has failed to prove that the sediment in the Keogh River was deleterious. In my opinion there was ample evidence before the learned Provincial Court Judge on which he could find that it had been proven beyond a reasonable doubt that the sediment in the Keogh River was deleterious. The evidence of both Pratt and Slaney leads to such a conclusion. Slaney's evidence makes it clear that sediment is deleterious to fish. I refer specifically to his evidence with respect to the effect of high concentrations of sediment on the food chain of fish, the effect on the physiology of fish, and the effect on the actual habitat of fish.

The result is that I find that there was ample evidence from which the Court could conclude that the sediment in the Keogh at the time in question was deleterious to fish.

With respect to the appellant's third ground of appeal that there was no proof that the sediment actually measured was deposited by the appellant, assuming that the measured concentration could be harmful to fish, I am similarly satisfied that there was sufficient evidence to support the finding of the learned Provincial Court Judge. This is clear from the evidene of Slaney who heard the blasting on Arpil 21st and who the next day saw the condition of the river both above and below the confluence of Tributary 13 and who also saw the water going from the road to the area of the headwaters of Tributary 13. In my opinion the evidence in this regard is overwhelming and the Provincial Court Judge could come to no other rational conclusion that the material put in place by the appellant reached the Keogh River and was in the river and of such concentration that it could be deleterious to fish. In addition, on the evidence he could fairly conclude that the concentration of sediment measured in the samples taken was caused by the activities of the appellant.

The result is that the grounds for appeal advanced by the appellant are rejected and the appeal is therefore dismissed.

FOWLER v. THE QUEEN

Supreme Court of Canada; Maitland, Ritchie, Pigeon, Dickson, Beetz, McIntyre, Chouinard, J.J.

Appeal hearing December 4 and 5, 1979, judgment pronounced June 17, 1980.

Fisheries Act, R.S.C. 1970, Chap. F-14, S.S. 33(3), Constitutional Validity, application to logging, lumbering, land clearing.

The sole issue in the appeal is whether subsection 33(3) of the Fisheries Act, R.S.C. 1970, Chap. F-14 is within the legislative competence of the Parliament of Canada. The Appellant and provincial intervenants attack constitutional validity. The criteria for establishing liability under subsection 33(3) are wide. Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. There was no evidence to indicate that the full range of activities caught by the subsection do cause harm to the fisheries.

Held Subsection 33(3) is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is ultra vires of the federal Parliament.

Counsel at hearing:

For the appellant; defendant

Duncan W. Shaw
Richard C. Gibbs

For the respondent; federal crown

T.B. Smith, Q.C.
H.J. Wruck

For the intervenants:

The Attorney General of British Columbia:

E.R.A. Edwards

The Attorney General of New Brunswick:

Alan Reid

Martland J.: The sole issue to be determined in this appeal is that which is raised in the constitutional question propounded in the order of the Chief Justice of this Court:

"Is Section 33(3) of *The Fisheries Act*, R.S.C. 1970, c. F-14, within the legislative competence of the Parliament of Canada?"

Section 33 of *The Fisheries Act* appears under the heading "Injury to Fishing Grounds and Pollution of Waters" and contains, *inter alia*, the following subsections:

> *33. (1) No one shall throw overboard ballast, coal ashes, stones, or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on, or leave or deposit or cause to be thrown, left or deposited, upon the shore, beach or bank of any water or upon the beach between high and low water mark, remains or offal of fish, or of marine animals, or leave decayed or decaying fish in any net or other fishing apparatus; such remains or offal may be buried, ashore above high water mark.*
>
> *(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.*
>
> *(3) No person engaged in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.*
>
> *(4) No person contravenes subsection (2) by depositing or permitting the deposit in any water or place*
>
> > *(a) of waste or pollutant of 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) of 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 (13).*
>
> *(5) Any person who contravenes any provision of*
>
> > *(a) subsection (1) or (3) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for a first offence, and not exceeding ten thousand dollars for each subsequent offence; or*
> >
> > *(b) subsection (2) is guilty of an offence and liable on summary conviction to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence.*
>
> *(6) Where an offence under subsection (5) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.*

...

(11) For the purposes of this section and sections 33.1 and 33.2,

"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 or 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 (12) (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 (12) (b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (12) (c);

"deposit" means by discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

"water frequented by fish" means Canadian fisheries waters.

(12) 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 (11).

The respondent contends that subsection (3) of s. 33 is valid legislation because of the legislative authority of Parliament in respect of "Sea Coast and Inland Fisheries" under s. 91.12 of *The British North America Act.* The appellant submits

that subsection (3) falls within provincial legislative powers, relying upon sections 92.5, 92.10, 92.13 and 92.16 of the Act:

92.5 The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

92.10 Local Works and Undertakings... .

92.13 Property and Civil Rights in the Province.

92.16 Generally all Matters of a merely local or private Nature in the Province.

This case is concerned with the prosecution of the appellant on two counts, as follows:

COUNT 1 that Dan Fowler, from April 27, 1975, to May 27, 1975, while engaged in logging, did UNLAWFULLY put debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended;

COUNT 2 That Dan Fowler, from April 27, 1975 to May 27, 1975, while engaged in logging, did UNLAWFULLY knowingly permit to be put, debris into water frequented by fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended.

The facts of the case are stated by the Provincial Court Judge by whom the case tried, as follows:

The facts of the case are that the accused, Dan Fowler, was carrying on a logging operation at a place known as Forbes Bay on the east shore of Humphrey Channel in the County of Vancouver, Province of British Columbia. Dan Fowler was subcontracting the removal of logs and timber from this land for the purpose of the logs being towed away. The evidence inferred that Dan Fowler was carrying on a normal and usual logging operation. As part of the logging operation the logs were removed from the forest by dragging the logs with a caterpillar tractor and in the course of dragging these logs they were dragged across a small stream, which is so small that it has no name. There was no exact measurement of the width of the stream but a photograph would indicate it is a few feet wide. From this logging operation there was debris deposited in the stream bed. From the photograph tendered as an exhibit and from the description given in evidence the debris consisted of limbs, branches or tops of trees.

This stream flowed into Forbes Bay which is salt water, part of the Coastal water of British Columbia. The stream at some times contained fish, the Fishery Officer said that the stream was used for the spawning of two species of salmon, Coho and Pink, and for the rearing of the Coho fry.

There was no evidence tendered by the Crown that the deposit of the debris affected or injured the fish or the fry in any way. On cross-examination the Fishery Officer said that this type of debris deposited in the stream could be a deleterious substance affecting the biological oxygen demand in the stream and that the fish eggs and the fry had a high oxygen demand. The Fishery Officer on cross-examination said that the debris could affect the number of fry by damaging the eggs in the gravel spawning ground. The Fishery Officer further said that every time something is done to the stream it may have a far reaching effect or little effect.

The appellant was acquitted at trial. The trial judge held as follows:

I find that Section 33(3) of the Fisheries Act is not certain and effective to exercise the power of Parliament under Section 91(12) of the B.N.A. Act and since it does interfere with the power of the provinces under Section 92(5) and 92(13), Section 33(3) is ultra vires Parliament.

The respondent appealed this decision and the County Court Judge allowed the appeal. The appeal to the Court of Appeal by the appellant was dismissed. The appellant, with leave, has appealed to this Court.

The Court of Appeal held that subsection 33(3) was within Parliament's power to enact because it was "legislation clearly in relation to the matter of inland fisheries and particularly to the preservation of fish". The Court relied upon the first proposition of Lord Tomlin in *Attorney-General for Canada* v. *Attorney-General for British Columbia and others*, [1930] A.C. 111 at p. 118. Lord Tomlin, in that case, stated four propositions, as follows:

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordship's Board and as the result of the decisions of the Board the following propositions may be stated:-

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92: see Tennant v. *Union Bank of Canada ([1894] A.C. 31).*

(2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see Attorney-General for Ontario v. *Attorney-General for the Dominion ([1896] A.C. 348).*

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the

Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see Attorney-General of Ontario v. Attorney-General for the Dominion ([1894] A.C. 189); and Attorney-General for Ontario v. Attorney-General for the Dominion ([1896] A.C. 348).

(4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see Grand Trunk Ry. of Canada v. Attorney-General of Canada ([1907] A.C. 65).

Counsel for the appellant contends that in order to uphold the legislation in issue the respondent must establish that it falls within the third proposition enunciated by Lord Tomlin in that case.

The earliest case in this court in which the scope of the federal power to legislate in relation to sea coast and inland fisheries is *The Queen v. Robertson* [1882], 6 S.C.R. 52 which was concerned with the validity of an instrument called a lease of fishery whereby the Minister of Marine and Fisheries purported to lease for a term of nine years a portion of the Miramachi River in New Brunswick for the purpose of fly fishing for salmon. The lessee's claim to the ownership of the fishing in that portion of the river was successfully resisted in the New Brunswick Courts by persons who owned a portion of the river. The lessee then filed a petition of right against the Crown in the Exchequer Court claiming compensation.

In the course of his judgment, Ritchie C.J., at p. 120, said this:

... I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not in reference to 'property and civil rights' — that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries, in other words, all such general laws as ensure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection,... .

At page 123, he said further:

To all general laws passed by the Dominion of Canada regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large.

The scope of federal power to legislate under s. 91.12 of *The British North America Act* was discussed by the Privy Council in the following two cases, from which I quote:

> *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia, [1898] A.C. 700 at 712:*
>
> *Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the time of the year during which fishing is to be allowed or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature.*
>
> *Attorney-General for Canada v. Attorney-General for Quebec, [1921] 1 A.C. 401 at p. 432:*
>
> *... There is everywhere a power of regulation in the Dominion Parliament, but this must be exercised so as not to deprive the Crown in right of the province or private persons of proprietary rights where they possess them.*

Reference to the first quoted passage in the judgment of Ritchie, C.J. in the *Robertson* case was made by Chief Justice Laskin in *Interprovincial Co-Operatives Limited et al* v. The Queen, [1976] 1 S.C.R. 477 at p. 495, a case which dealt with provincial legislation for the protection of provincial property rights in inland fisheries. The Chief Justice, who delivered the judgment of himself and Judson and Spence JJ., which dissented in the result, made the following statement which was not the subject of disagreement by the majority:

> *... It is, in my view, untenable to fasten on words in a judgment, such as the words "tending to their regulation, protection and preservation", which appear in the reasons in The Queen v. Robertson, and read them as if they have literal constitutional significance. Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization.*

The meaning of the word "fishery" was considered by Newcombe J. in this Court in *Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act, 1914*, [1928] S.C.R. 457 at p. 472:

> *In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:*
>
> > *A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.*
>
> *In Dr. Murray's New English Dictionary, the leading definition is:*
>
> > *The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.*

The above definitions were quoted and followed by Chief Justice Davey in *Mark Fishing v. United Fishermen & Allied Workers Union* (1972), 24 D.L.R. (3d) 585 at pages 591 and 592. Chief Justice Davey at page 592 added the words:

> *The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.*

The legislation in question here does not deal directly with fisheries, as such, within the meaning of those definitions. Rather, it seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects. *Prima facie* subsection 33(3) regulates property and civil rights within a province. Dealing, as it does, with such rights and not dealing specifically with "fisheries", in order to support the legislation it must be established that it provides for matters necessarily incidental to effective legislation on the subject matter of sea coast and inland fisheries.

In *Attorney-General for Canada v. Attorney-General for British Columbia and Others*, to which reference has already been made, the Attorney General for Canada sought to support provisions in the *Fisheries Act*, 1914, which required the obtaining of a federal licence in order to operate, for commercial purposes, a fish cannery or, in British Columbia, a salmon cannery or curing establishment. It was in this case that Lord Tomlin stated his four propositions regarding conflicts between federal and provincial jurisdiction.

The federal argument was that the legislation in issue was valid under s. 91.12 as being directly or incidentally in relation to sea coast and inland fisheries. It was argued that the operation of canning and curing establishments was inseparably connected with the conduct of fisheries.

The legislation was held to be *ultra vires* of Parliament. Lord Tomlin said at pages 121-22:

> *It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the*

taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordship's Board establishing the necessary connection between the two subject matters. In their Lordship's view, therefore, the appellant's second contention is not well founded.

The impugned sections confer powers upon the Minister in relation to matters which in their Lordship's judgment prima facie fall under the subject "property and civil rights in the province", included in s. 92 of the British North America Act, 1867. As already indicated, these matters are not in their Lordships' opinion directly or incidentally by any of the subjects enumerated in s. 91.

Counsel for the resopondent supports the legislation on the ground that it is preventive legislation intended to protect and preserve fish. He contends that its validity does not depend on showing that the operations to which it relates cause actual harm to a fishery.

The broad scope of the legislation in question is well illustrated in the following passages from the judgment of the Provincial Court Judge at trial:

From evidence given in this case and also from judicial notice of the geography of the British Columbia coast and from that which is advanced in argument by both counsel, I have taken into consideration that on the coast of British Columbia where there are substantial logging operations there are innumerable streams, riverlets, and creeks flowing from the land to the various inlets and waters adjacent to the British Columbia coast which is the salt water and portion of the ocean frequented by fish and that the words of the section "into any water frequented by fish or that flows into such water" includes all these creeks, streams and riverlets of free flowing water that accumulate and ultimately flow into the ocean no matter how small and whether or not at any particular part of the water is at that point frequented by fish.

The scope of this legislation covers the handling of any wood material by loggers and land clearers in respect to almost any water in Canada. This section would affect every log, piece of lumber or tree that is so placed or dumped into any river, lake, stream or ocean in Canada from which there is detached therefrom any slash, stump or debris. I cannot conceive that the booming operations, the log drives and similar type of logging enterprises could be carried out without depositing some debris into the waters used for that purpose. If section 33(3) does not require the additional proof that the deposit of the debris affects the preservation of fish then every such booming operation and log drive would be committing an offence against section 33(3).

The criteria for establishing liability under subsection 33(3) are indeed wide. Logging, lumbering, land clearing and other operations are covered. The substances which are proscribed are slash, stumps and other debris. The amount of the substance

which is deposited is not relevant. The legislation extends to cover not only water frequented by fish but also water that flows into such water, ice over any such water and any place from which slash, stumps and other debris are likely to be carried into such water.

Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is *ultra vires* of the federal Parliament.

I would allow the appeal, set aside the judgment of the Court of Appeal and the County Court and restore the judgment at trial. The appellant is entitled to his costs throughout.

NORTHWEST FALLING CONTRACTORS LTD. v. THE QUEEN

Supreme Court of Canada; Martland, Ritchie, Pigeon, Dickson, Beetz, McIntyre, and Chouinard, J.J.;

Appeal heard December 5, 1979, Judgment pronounced July 18, 1980

Constitutional law — Fisheries — Federal legislation prohibiting deposit of deleterious substance in water frequented by fish - valid exercise of federal fisheries authority.

Information - accused applying for prohibition on grounds that the information was multiplicatous — no ambiguity in count alleging one particular mode of offence — no greater jeopardy from several counts.

The accused was charged with depositing a deleterious substance as a result of an oil spill. The accused applied for an order to prohibit the Provincial Court Judge from hearing the trial. The two issues considered by the Supreme Court of Canada were (i) whether it was within the legislative competence of the Parliament of Canada to enact subsection 33(2) of the Fisheries Act, and (ii) whether the charges contained in the information were multiplicitous.

Held, the appeal should be dismissed.

Subsection 33(2) was *intra vires* of the Parliament of Canada and the information was satisfactory and did not prejudice the accused in the preparation of his defence by ambiguity.

Counsel at hearing:

For the appellant (accused):

Brian A. Crane, Q.C.

For the respondent (Crown):

T.B. Smith, Q.C.
H.J. Wruck

For the intervenants:

The Attorney-General of New Brunswick:

Alan Reid

The Attorney-General of Newfoundland:

James A. Nesbitt, Q.C.

Martland, J.: The main issue which is to be determined in this appeal is as to whether it was within the legislative competence of the Parliament of Canada to enact subsection 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended.

Subsection (2) is one of a number of provisions appearing in the section which comes under the heading "Injury to Fishing Grounds and Pollution of Waters". The following are the relevant subsections of s. 33:

> *33 (1) No one shall throw overbroad ballast, coal ashes, stones, or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on, or leave or deposit or cause to be thrown, left or deposited, upon the shore, beach or bank of any water or upon the beach between high and low water mark, remains or offal of fish, or of marine animals, or leave decayed or decaying fish in any net or other fishing apparatus; such remains or offal may be buried ashore, above high water mark.*
>
> *(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substances may enter any such water.*
>
> *(3) No person engaged in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.*
>
> *(4) No person contravenes subsection (2) by depositing or permitting the deposit in any water or place*
>
> > *(a) of 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) of 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 (13).*
> >
> > *(5) Any person who contravenes any provision of*
> >
> > *(a) subsection (1) or (3) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for a first offence, and not exceeding ten thousand dollars for each subsequent offence; or*
> >
> > *(b) subsection (2) is guilty of an offence and liable on summary conviction to a fine not excededing fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence.*

(6) where an offence under subsection (5) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

...

(11) For the purposes of this section and sections 33.1 and 33.2,

"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 (12) (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 (12) (b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (12) (c);

"deposit" means by discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

"water frequented by fish" means Canadian fisheries waters.

(12) 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 (11).

Section 2 of the Act contains the following definitions:

"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 and marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

The information setting out the charges against the appellant is as follows:

> *The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited, on or about the 4th day of April, 1978, A.D., in the County of Vancouver, in the Province of British Columbia, did unlawfully deposit a deleterious substance into water frequented by fish, to wit: Cooper Reach, Head of Loughborough Inlet.*
>
> CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED.

Count 2: The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited, on or about the 4th day of April, 1978, A.D., in the County of Vancouver, in the province of British Columbia, did unlawfully permit the deposit of a deleterious substance into water frequented by fish, to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED.

Count 3: The informant says that he has reasonable and probable grounds to believe and does believe that Northwest Falling Contractors Ltd., and Gulf Oil Canada Limited, on or about the 4th day of April 1978, A.D., in the County of Vancouver, in the province of British Columbia, did unlawfully permit the deposit of a deleterious substance in a place under such conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter water frequented by fish to wit: Cooper Reach, Head of Loughborough Inlet.

CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED.

Particulates were furnished by the respondent to the appellant in the following form:

At approximately 8:15 on the morning of April 4th, 1978, Captain R. Davis of the F.P.L. Bonilla Rock noticed an oil slick at the Head of Cooper Reach, slick was approximately one mile long. After investigation it was found that on the morning of April 3rd Dennis Stevson, Box 2086, Squamish, barge operator of the Gulf Oil barge, "Gulf Logger" delivered approximately 17,000 gallons of diesel fuel to tanks owned by Northwest Falling Contractors Ltd. There were four tanks resting on an old rotten log. Log broke causing pipe to break on bottom of one tank, spilling 3,000 gallons of diesel fuel into Cooper Reach, Head of Loughborough Inlet.

Before any plea had been entered, the appellant applied to the Supreme Court of British Columbia for an order of prohibition. The order was sought upon three grounds. Only two of those grounds were argued before this Court, i.e., that the information did not disclose an offence known to the law and, further, that the information was multiplicitous. The appellant also challenged the decision of the Court of Appeal that prohibition was not an available remedy to attack the charge as being defective. The first ground is based on the contention that subsection 33(2) was *ultra vires* of Parliament to enact.

The application for an order of prohibition was dismissed and this decision was confirmed on an appeal to the Court of Appeal of British Columbia. The appellant, with leave, then appealed to this Court.

The appellant attacks the validity of subsection 33(2) on the grounds that it is not legislation in relation to "Sea Coast and Inland Fisheries" (s. 91.12 of *The British North America Act*), but that it is legislation in relation to the pollution of water generally, or is legislation for the protection of all animal life in the water.

I will deal with the second point first. The argument is founded upon the definition of "fish" in s. 2 of the Act. It is said that this definition is too broad. However, federal legislative jurisdiction under s. 91.12 of *The British North America Act* is not a mere authority to legislate in relation to "fish" in the technical sense of the word. The judgments in this Court and in the Privy Council have construed "fisheries" as meaning something in the nature of a resource.

Chief Justice Ritchie, in the first judgment of this Court dealing with s. 91.12, *The Queen v. Robertson*, (1882) 6 S.C.R. 52, said, at p. 120:

> *... I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not in reference to 'property and civil rights' -- that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries, in other words, all such general laws as ensure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the*

local legislatures were, previously to and at the time of confederation in the habit of enacting for their regulation, preservation and protection,...

Viscount Haldane, in *Attorney-General for Canada* v. *Attorney-General for Quebec*, [1921] 1 A.C. 413, at p. 428, said:

... As this Board said in the British Columbia case in 1914, the object and effect of the provisions of s. 91 were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament and to leave to the Province no right of property or control in them. These rights, as was observed, are rights of the public in general, and in no way special to the inhabitants of the Province.

The meaning of the word "fishery" was considered by Newcombe J. in this Court in *Reference as to the Consitutional Validity of Certain Sections of the Fisheries Act, 1914*, [1928] S.C.R. 457, at p. 472:

In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:

A Fishery is properly defined as the right of catching fish In the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.

In Dr. Murray's New english Dictionary, the leading definition is:

The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.

The above definitions were quoted and followed by Chief Justice Davey in *Mark Fishing* v. *United Fishermen & Allied Workers Union* (1972), 24 D.L.R. (3d) 585, at pages 591 and 592. Chief Justice Davey at page 592 added the words:

The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.

Chief Justice Laskin, in *Interprovincial Co-Operatives Limited et al* v. *The Queen*, [1976] 1 S.C.R. 477, at p. 495, referred to the federal legislative power as being "concerned with the protection and preservation of fisheries as a public resource".

Shellfish, crustaceans and marine animals, which are included in the definition of "fish" by s. 2 of the Act, are all part of the system which constitutes the fisheries resource. The power to control and regulate that resource must include the authority to protect all those creatures which form a part of that system.

The appellant's main argument was that the legislation under attack is really an attempt by Parliament to legislate generally on the subject matter of pollution and thus to invade the area of provincial legislative power over property and civil rights. He points to the very broad definition of "water frequented by fish" in subsection 33(11) which refers to "Canadian fisheries waters" which, under s. 2, includes "all waters in the territorial sea of Canada and all internal waters of Canada". He also

refers to the broad scope of the definition of "deleterious substance". When these definitions are applied to subsection 33(2), it is said that the subsection is really concerned with the pollution of Canadian waters.

The charges laid in this case do not, however, effectively bring into question the validity of the extension of the reach of the subsection to waters that would not, in fact, be fisheries waters "or to substances other than those defined in paragraph (a) of subsection 33(11)". The charges relate to diesel fuel spilled into tidal waters. The task of the Court in determining the constitutional validity of subsection 33(2) is to ascertain the true nature and character of the legislation. It is necessary to decide whether the subsection is aimed at the protection and preservation of fisheries. In my opinion it is.

Basically, it is concerned with the deposit of deleterious substances in water frequented by fish, or in a place where the deleterious substance may enter such water. The definition of a deleterious substance is related to the subsection being deleterious to fish. In essence, the subsection seeks to protect fisheries by preventing substances deleterious to fish entering into waters frequented by fish. This is a proper concern of legislation under the heading of "Sea Coast and Inland Fisheries".

The situation in this case is different from that which was considered in *Dan Fowler v. Her Majesty the Queen*, a judgment of this Court recently delivered. That case involved the constitutional validity of subsection 33(3) of the *Fisheries Act* and it was held to be *ultra vires* of Parliament to enact. Unlike subsection (2), subsection (3) contains no reference to deleterious substances. It is not restricted by its own terms to activities that are harmful to fish or fish habitat. The basis of the judgment in the *Fowler* case is set out in the following passage:

> *Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries.*

In my opinion, subsection 33(2) was *intra vires* of the Parliament of Canada to enact. The definition of "deleterious substance" ensures that the scope of subsection 33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.

The appellant contended that an order of prohibition should have been granted because the charges contained in the information were multiplicitous.

In *The Queen v. Sault Ste. Marie*, (1978) 2 S.C.R. 1299, a somewhat similar violation was charged in omnibus fashion in a single count, i.e., discharging or depositing, or causing, or permitting the discharge of material. This generic charge was held not to be duplicitous. At p. 1308, it is said:

> *In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge?*

If there is no ambiguity in a count alleging several modes of commission of one offence, a *fortiori* there is no ambiguity in a count alleging one particular mode of commission of an offence. The fact that there are several counts, each alleging a different mode, does not make it any more difficult for the accused to know what case he has to meet or to prepare his defence. He is not placed in greater jeopardy if the counts relate to one delict, because, in view of the judgment of this Court in *Kienapple v. The Queen* [1975] 1 S.C.R. 729, he could not be convicted on more than one count.

In view of the fact that I consider the information to be satisfactory, there is no need to consider whether the Court of Appeal was correct in holding that prohibition was not an available means of attacking the information on the grounds of multiplicity.

I would dismiss the appeal.

REGINA v. CANADIAN INDUSTRIES LIMITED

New Brunswick Court of Appeal, Hughes, C.J.N.B., Ryan and Richard, J.J.A., Fredericton, New Brunswick, September 9, 1980

Environmental law - Water pollution - Pollution of waters by mercury — authority of federal Crown to prosecute in view of Canada - New Brunswick Accord -- Fisheries Act, R.S.C. 1970 — Application for Prohibition.

The accused made an application for prohibition to stop the trial on an information containing 14 counts of depositing mercury in excess of the authorized amount. The accused argued that the federal Crown had delegated the responsibility to administer section 33 of the *Fisheries Act* to the Province of New Brunswick and that the federal Crown could not prosecute the accused. The accused argued two other grounds for dismissing the information.

Held, the Canada - New Brunswick Accord for the Protection and Enhancement of Environmental Quality did not prevent the federal Crown from prosecuting the accused.

The Accord was entered into without legislative sanction or executive authority and therefore does not have the force of law. The constitutional validity of subsection 33(2) was upheld by the Supreme Court of Canada in the Northwest Falling Contractors Ltd case, and subsection 510(5) of the Criminal Code was applicable to render the information sufficient. The application of the accused for an order of prohibition was not supportable on any of the grounds and the application of the accused was dimissed.

R. Duke, for the Federal Crown
R.J. Tingley, for the accused

Hughes, C.J.N.B.:— This is an application by Canadian Industries Limited (herein referred to as "CIL") for an order to prohibit His Honour Judge Ayles or any other Judge of the Provincial Court from continuing with the trial of CIL on an information sworn to by Philip Heneberry, an officer of Environment Canada, before Judge Ayles on June 14, 1979, which contained 14 counts, each alleging that CIL, a body corporate carrying on business at Dalhousie, in the County of Restigouche, Province of New Brunswick, on fourteen different dates:

> *did unlawfully deposit a deleterious substance, namely water containing mercury exceeding 0.00250 Kg per reference tonne of chlorine in the water of the Restigouche River at Dalhousie, New Brunswick, contrary to the provisions of section 33(2) of the Fisheries Act, being Chapter F-14 of the Revised Statutes of Canada, 1970 and amendments thereto.*

The prosecution of CIL on these charges was adjourned for various reasons on a number of occasions after CIL appeared by counsel on June 25, 1979, in response to a summons issued by Judge Ayles. The following is a resume of the events leading up to the present application as established by the affidavit of counsel for CIL in support of his application for a summons returnable before this Court:

(1) On June 25, 1979, on motion of counsel for the Attorney General of Canada the information was amended by the addition of the words "being frequented by fish" after the words "Restigouche River" whereever they appeared in the information. Counsel for CIL in his affidavit deposed that prior to the amendment being allowed by the trial Judge there was no evidenciary basis for the amendment.

(2) On July 23, 1979, counsel acting on behalf of CIL entered a plea of "not guilty" to all counts in the information.

(3) On January 23, 1980, Judge Ayles refused leave to counsel for CIL to move pursuant to s. 732(1) of the Criminal code for an order quashing the information on the ground the trial Judge erred in allowing the amendment to the information granted on June 25, 1979 but granted leave to move for an order to quash the information based on the alleged legislative incompetence of Parliament to enact s. 33(2) of the Fisheries Act, c. F-14, R.S.C. 1970 and amendments thereto.

(4) At an adjourned hearing held February 26, 1980, Judge Ayles disallowed the motion to quash the information on the ground of the alleged legislative incompetence of Parliament to enact s. 33(2) of the Fisheries Act but granted leave to CIL to move to quash the information on the ground of an alleged delegation of authority to prosecute cases under s. 33(2) of the Fisheries Act conferred on the Province of New Brunswick by the Canada-New Brunswick Accord for the Protection and Enhancement of Environmental Quality which motion was disallowed by the trial Judge on March 25, 1980 who thereupon set June 3, 1980 for the trial of the information.

(5) On April 8, 1980, Mr. Justice Angers, upon the application of counsel for CIL, issued a summons returnable before the Court of Appeal seeking an order to prohibit Judge Ayles or any other judge of the Provincial Court from continuing with the trial of CIL on the information sworn June 14, 1979 on the following grounds:

> *1. Subsection (2) of Section 33 of the Fisheries Act, R.S.C. 1970, Chapter F-14, as amended is ultra vires the Parliament of Canada insofar as it is legislation relating to the exercise of proprietary rights by persons within the Province of New Brunswick over the quality of internal waters of the Province of New Brunswick, therefore, the said subsection does not create an offence and Judge L.C. Ayles of the Provincial Court therefore exceeded his jurisdiction in issuing the Summons referrred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.*
>
> *2. That the right to prosecute alleged violations of Section 33(2) of the Fisheries Act, Chapter F-14, R.S.C., 1970 as amended has been delegated to the Province of New Brunswick pursuant to a Canada-New Brunswick Accord for the Protection and Enhancement of Envrionmental Quality, and therefore, the said Phil Heneberry, an Officer of Environment Canada, did not have the authority to lay the*

information and Judge L.C. Ayles of the Provincial Court therefore exceeded his jurisdiction in issuing the Summons referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

3. That the allowance of the Crown amendment of the information by the addition of the words "being water frequented by fish" on the 6th day of November, A.D. 1979, was not supported by evidence as required by Section 732(2) of the Criminal Code and therefore the information without the amendment discloses no offence known at law and Judge L.C. Ayles of the Provincial Court therefore exceeded his jurisdiction in issuing the Summons referred to herein and is without jurisdiction to conduct any further proceedings in relation thereto.

At the hearing of the application before this Court the Attorney General of New Brunwick intervened in the proceeding and counsel acting on his behalf appeared, having filed a factum in support of CIL's contention that the enactment of s. 33(2) of the Fisheries Act is beyond the legislative competence of the Parliament of Canada and that the section does not create an offence known at law.

After hearing the submissions of counsel for CIL and of counsel for the prosecution on grounds 2 and 3 it was agreed that the Court should defer rendering its judgment on the application until the Supreme Court of Canada should deliver judgment which it had reserved in the case of Northwest Falling Contractors Ltd. v. the Queen which involved the question of the legislative competence of the Parliament of Canada to enact s. 33(2) of the Fisheries Act which was raised as ground 1 in the instant case. On July 18, 1980, the Supreme Court in a unanimous decision in that case upheld the constitutional validity of s. 33(2) of the Fisheries Act and it follows that CIL's application for an order of prohibition insofar as it is based on ground 1 must fail.

The second ground upon which this application is based is that even if s. 33(2) of the Fisheries Act be found to be within the legislative competence of Parliament the Government of Canada has delegated to the Department of Environment of the Province of New Brunswick the right to administer and enforce the Chlor-Alkali Mercury Liquid Effluent Regulations, being P.C. 1977-1978 made pursuant to s. 33 and s. 34 of the Fisheries Act. Counsel for CIL submitted that the delegation of enforcement powers by Canada to the Province of New Brunswick is to be found in the Canada-New Brunswick Accord for the Protection and Enhancement of Environmental Quality dated October 21, 1975.

The power to designate federal agents to lay informations and to conduct the prosecution of offences against the Fisheries Act and regulations made thereunder is clearly within federal competence: See R. v. Hauser et al. (1979) 8 C.R. (3d) 89. However, I find nothing in the Accord which refers to any provision of the Fisheries Act or any regulation made thereunder or which confers any power, exclusive or otherwise, upon provincial authorities to conduct the prosecution of violations of the Act. But even if the Accord could be interpreted as an attempt to confer exclusive power upon the Province of New Brunswick to enforce the Fisheries Act or regulations made thereunder it appears that the Accord was entered into without

legislative into without legislative sanction or executive authority and therefore does not have the force of law. I therefore find that there is no merit in ground 2.

Counsel for CIL submits in support of ground 3 that prior to the amendment of the information made by the insertion of the words "being waters frequented by fish" the information disclosed no offence known at law and for that reason the trial Judge exceeded his jurisdiction in issuing the summons pursuant to the information.

S. 510 of the Criminal Code specifies the requirements of a valid indictment. By s. 729(1) that section is made applicable to informations in respect of proceedings by summary conviction and consequently to the information in the instant case. In my opinion CIL was reasonably informed of the nature and substance of the fourteen offences alleged against it. The information specified the time and place of the alleged offences and the section and subsection of the Fisheries Act alleged to have been violated. I am also of the opinion that s. 510(5) of the Criminal Code was applicable to render the information sufficient. That subsection reads:

> *510(5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offences charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.*

In Regina v. Coté (1977) 33 C.C.C. (2d) 353 (S.C.C.), de Grandpré, J., after referring to the provisions of subsections (1) and (3) of s. 732 of the Criminal Code respecting the power of a summary conviction court to amend an information, said at p. 357:

> *Of course, s. 732 comes into play only if there is a defect in the information. Appellant submits that none exists, the words "without reasonable excuse" being brought to the attention of the accused by the specific reference to the section of the Criminal Code creating the offence. Appellant invokes s-s. (5) of s. 510, which also applies to informations:*
>
> .....
>
> *I agree with that submission; the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the Code, it is impossible for the accused to be misled. To hold otherwise would be to revert to the extreme technicality of the old procedure.*

In my opinion, the information in the instant case was sufficient to charge CIL in the fourteen counts with offences against s. 33(2) of the Fisheries Act without any amendment being made and I would therefore hold ground 3 is without legal merit.

In my opinion, the application of Canadian Industries Limited for an order of prohibition is not supportable on any of the grounds upon which the application was based and accordingly should be dismissed.

FISHERIES POLLUTION REPORTS

RECOPIED VOLUME 1

CASE LAW:

PROSECUTIONS UNDER THE POLLUTION CONTROL

PROVISIONS OF THE FISHERIES ACT

prepared by
Environmental Protection Service
Environment Canada

PART I: Cases From Other Law Reports

PART II: Unreported Decisions From Transcripts

PART III: Unreported Judicial Comments on Sentencing

Prepared by
John E. MacLatchy
September, 1976
and recopied October, 1980
with headnotes by Michael J. Hardin

Volume 1 was prepared by photocopying the judgments that were available. While the quality of the copies was not uniform, these cases have been recopied with Volume 2 so that all case law on this subject may be conveniently found together.

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UNDER SECTION 33 OF THE FISHERIES ACT

	Defendant	Offence	Facts	Relevant Sections	Issues Argued
1/1A	Stearns-Roger Engineering	33(2)	silting stream by bulldozer	33(11) 33(8)	deleterious to fish, fish eggs definition of fish, acquital, act preformed by agent
2	Jordan River Mines	33(2)	tailings spill	33(11)	mens rea not required, water frequented by fish, convicted
3	McTaggart	30	destruction of spawning grounds and eggs		constitutional law, mens rea, sec 30 valid federal legislation, sea coast and inland fisheries, convicted
4	Callaghan	33(2)	dumping of garbage and human waste in stream		no evidence introduced that garbage is a deleterious substance under 33(11), acquital
5/5A	Churchill Copper	33(2)	tailings spill	33(7) 33(8)	mens rea not required, injunction granted, appeal by stated case, conviction
6	MacMillian Bloedel Industries	33(2)	gravel washing, silting stream	33(8)	offence committed by employees, convicted company not exercising due diligence
7	Pacific Logging	33(3)	logging debris in stream	33(8)	Crown failed to prove that subsidiary company was the agent of defendant parent company, acquital
8	Jack Cewe	33(2)	silt from gravel operation		act of God, heavy rain, reasonable doubt, acquital

BRITISH COLUMBIA COURT OF APPEAL

McFarlane, Branca and Taggart JJ.A.

Regina v. Stearns-Roger Engineering Co. Ltd.

Fisheries — Depositing "deleterious substance" in water frequented by fish — Meaning of "fish" — Fish not including embryo fish in eggs — Accused acquitted where only eggs disturbed — The Fisheries Act, R.S.C. 1970, c. F-14, ss. 30, 33, as amended by R.S.C. 1970, c. 17 (1st Supp.), s. 3.

Appeal from the decision of Munroe J., reported at [1973] 2 W.W.R. 669, 10 C.C.C. (2d) 374. Appeal allowed.

[Note up with 11 C.E.D. (West. 2nd) *Fisheries*, s. 3; 22 C.E.D. (West. 2nd) *Words and Phrases*.]

J. S. Maguire, Q.C., and *L. T. Doust*, for appellant.

L. P. Jousca, for the Crown.

22nd June 1973. The judgment of the Court was delivered by

McFARLANE J.A. (orally):—We need not call on you in reply, Mr. Doust.

The appellant was acquitted by a Provincial Court Judge at Kamloops on an information containing two counts laid under s. 33(2) [re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3(1)] of the

Fisheries Act, R.S.C. 1970, c. F-14. The first count was that the appellant unlawfully deposited a deleterious substance in a place, to wit, the Thompson River, under a condition where such deleterious substance may enter water frequented by fish. The second count was that it did unlawfully and knowingly permit such a deposit.

The Crown appealed on questions of law by way of stated case to a Judge of the Supreme Court. The matter came for hearing before Munroe J. and on his consideration of the stated case he determined that the finding of the Provincial Court Judge was wrong in law and he directed that the case be disposed of accordingly. The appellant now appeals to this Court from the judgment of Munroe J. [[1973] 2 W.W.R. 669, 10 C.C.C. (2d) 374].

The stated case includes, by reference, the reasons for judgment given by the Provincial Court Judge at the time of his decision and I will quote a paragraph from it because it sets out succinctly, I think, all the facts necessary for the purposes of our decision today. The Provincial Court Judge said:

"Now, the facts in this case as I see them are relatively clear and quite simple. On November 4, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22 and 24, 1971, the defendant company as head contractor caused one of the subcontractors to work in a salmon bed in the North Thompson River near Lornex Development. The result of this work it would seem to be clear on the overwhelming evidence was the stirring up of silt from the river bottom and causing this silt to be deposited downstream or a certain amount of it. The evidence of Mr. Cooper, the expert, was quite clear and I find from what he says that the effect of the sediment going downstream would be to reduce the survival of salmon eggs in the downstream spawning beds. It is also quite clear that at the time these events took place there were eggs only in the spawning grounds and not alevin, which according to Mr. Cooper would be expected around the end of February. Hence, then in November when this work is [I think the learned Judge meant "was"] being done the damaging effect, if any, would be only on salmon eggs."

In the stated case itself the point is emphasized in this way, where the Provincial Court Judge states the facts for the purposes of the stated case: "I also held that there is no evidence that what was done was harmful or could be harmful to fish." I should add that the Provincial Court Judge in his judgment also stated that the appellant had caused considerable damage to the spawning bed and that a charge might well have been

laid successfully under s. 30 of the Fisheries Act. I need say no more about that.

Counsel on this appeal are agreed that the matter for decision depends upon a correct interpretation of the relevant provisions of the Fisheries Act, particularly s. 33(2) and the definition of "deleterious substance" which is found in s. 33 (1) [en. R.S.C. 1970, c. 17 (1st Supp.), s. 3(2)].

Section 33(2) reads:

"33. (2) Subject to subsection (4) [and I interpolate that counsel agree that is not relevant], 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

I will not read the whole of the definition of "deleterious substance", which is divided into two paragraphs, but I point out that in each the essential quality is that the quality of the water be rendered deleterious to fish or to the use by man of fish that frequent the water.

It seems to me, therefore, that the first question for decision is whether or not s. 33(2), on a proper interpretation, shows the intention to deal with the deposit of a substance in water where the effect of the deposit is to injure or damage eggs only and not fish; in other words, are eggs included in the meaning of the word "fish" in that subsection and in the definition?

In my opinion, on a proper interpretation the word "fish" in those parts of the statute does not include fish eggs. My reasons for that conclusion are principally these: first, that subs. (2) itself speaks of water *frequented* by fish. I cannot conceive of any natural or reasonable interpretation of the word where one could speak properly of water being frequented by eggs. Secondly, by s. 30 of the statute (which, in my view, it is proper to consider on the question of interpretation) we find this:

"30. The eggs or fry of fish on the spawning grounds shall not at any time be destroyed."

It seems to me that in that s. 30 Parliament has deliberately made a distinction between eggs or fry on the one hand and fish on the other.

I am, therefore, of the opinion that where damage to eggs only and not to fish has been shown there is, as a matter of law, no evidence of an unlawful deposit within the meaning of s. 32.

Munroe J. on one aspect of the case agreed with the argument of appellant's counsel that the bulldozer or "Cat" itself was not a deleterious substance within the meaning of the definition which I have read. I agree with that conclusion made by Munroe J.

There was a further question raised as to whether, in the circumstances disclosed by the stated case, it could be said that there was a deposit of a substance within the meaning of s. 33(2). In the view which I take of this case I think it is unnecessary and therefore inadvisable to express a view as to the meaning of that word "deposit" in the section.

The stated case concludes by stating:

"The question upon which the opinion of the Court is desired is whether, upon the above statement of facts and argument, I came to a correct determination and decision in point of law."

In my opinion, there was no error in law on the aspects which I have discussed in the determination made by the Provincial Court Judge and if I am right in that then, whatever may be said about other questions, he was right in rendering a verdict of acquittal.

I would therefore allow the appeal and restore the verdict of acquittal.

This does not mean that this Court approves of what was done in the Thompson River. We are dealing with a question of law here.

[1973] 2 W.W.R. 669

BRITISH COLUMBIA SUPREME COURT

Munroe J.

Regina v. Stearns-Roger Engineering Company Ltd.

Fisheries — Depositing "deleterious substance" in water frequented by fish — Bulldozer stirring up silt from river bed — Silt deposited on eggs in spawning ground — The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), as re-enacted by 1970 (1st Supp.), c. 17, s. 3(1).

Respondent, by its agent, used a bulldozer along the banks of the Thompson River; in so doing some 2,000 feet of salmon spawning grounds were destroyed and in addition silt was stirred up from the river bed and carried further downstream, where it was deposited on other salmon spawning grounds, destroying some of the eggs by cutting off the supply of oxygen. Respondent was charged, under s. 33(2) of the Fisheries Act, with depositing or permitting the deposit of a deleterious substance in water frequented by fish. The Provincial Court Judge dismissed the charge. On a case stated, *held*, the appeal should be allowed; the silt was a "deleterious substance" added to the water within the meaning of s. 33(11) of the Fisheries Act; it mattered not how the silt was added to the water, nor that it was not introduced into the water from abroad; what mattered was that the quality of the water was degraded thereby and rendered deleterious to fish; "fish" must be taken to include fish in embryo, in the form of eggs in a spawning ground.

[Note up with 11 C.E.D. (2nd ed.) *Fisheries*, s. 3: 22 C.E.D. (2nd ed.) *Words and Phrases*.]

L. P. Jensen, for the Crown.

L. T. Doust, for respondent.

23rd January 1973. MUNROE J.:—Appeal by way of stated case from the decision of Bendrodt Prov. J., whereby he dismissed charges against the respondent at the close of the case for the Crown on the basis that there was no evidence upon which a conviction could reasonably be entered. Count 1 of the information alleged in effect that the respondent had unlawfully deposited a deleterious substance in the Thompson River and Count 2 alleged in effect that the respondent had knowingly permitted such deposit, both contrary to the provisions of the Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2) [re-en. 1970 (1st Supp.), c. 17, s. 3(1)].

Evidence led by the Crown established prima facie that the respondent, as general contractor, had caused or knowingly permitted one of its subcontractors to work a D-7 bulldozer on the river bank and in the Thompson River. Such work resulted in a physical destruction and removal of about 2,000 feet of salmon spawning grounds, including the redds or nests which form the egg incubation bed in which the female salmon lays the eggs and the male salmon fertilizes them. In addition, the said work caused stirring up of silt from the river bottom. Some of that silt was carried downstream and over and through salmon spawning grounds, thereby damaging or destroying some of the eggs for want of oxygen and thus reducing the number of fry that will emerge from the redds, though such silt was not proved to be harmful to fish actually swimming in the river.

The learned Judge held that there was no evidence that, contrary to s. 33(2) of the Act, a "deleterious substance" had been "deposited" in the waters of the Thompson River (being water frequented by fish). From that decision this appeal is brought by the Crown.

Section 33 of the Fisheries Act appears under the heading of "Injury to Fishing Grounds and Pollution of Waters". I quote relevant portions thereof:

"33. (2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water . . .

"(11) [en. 1970 (1st Supp.), c. 17, s. 3(2)] For the purposes of this section and section 33.1,

"'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 deleterious to fish 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 deleterious to fish or to the use by man of fish that frequent that water."

It is the submission of counsel for the respondent that no deposit of a deleterious substance was proved to have been made in the water of the Thompson River because: (1) fish (as distinct from eggs) were not hurt by the silt; (2) no "deposit" was made in the water of any substance, since the bulldozer merely stirred up the silt that was already in the

water; (3) the bulldozer itself was not a "substance", deleterious or otherwise; and (4) s. 33(2) only prohibits the introduction into water of some foreign substance (such as effluent from a mill) that is harmful to fish.

It is my respectful opinion that:

1. The bulldozer is not a "deleterious substance" as defined by s. 33(11) and accordingly no offence under s. 33(2) was committed per se by the respondent in causing or permitting the operator of the bulldozer to tear up and damage the salmon spawning ground.

2. The silt which was put or placed in the water by the activities of the bulldozer was a "deleterious substance" as defined in s. 33(11). It was "added to" the water and its addition altered the quality of that water so that the water then became hurtful, harmful or destructive of salmon eggs and such harm to eggs rendered the water "deleterious to fish" in general and also to "the use by man of fish that frequent that water".

Prior to the use of the bulldozer, the water of the river was not harmful to the salmon eggs; after the addition of the silt, the water became so. It matters not how the silt was added to the water. What matters is that the quality of the water was degraded thereby. Once it is proved that such addition was harmful to the habitat or propagation of fish, the water must then be said to have been "rendered deleterious to fish or to the use by man of fish that frequent that water". Having regard to the obvious intention of Parliament to protect water frequented by fish and thus to preserve the source of fish for the public good, I hold that the word "fish" appearing in s. 33(11) means the whole race of fish and thus includes embryo fish in salmon eggs in salmon spawning grounds.

3. The silt was "deposited" in the water immediately it was put or placed therein, from whatever direction and in whatever manner.

4. A deleterious substance can be deposited in the water in the manner here alleged by the Crown, that is, by stirring-up of the river bed, and need not be introduced into the water from abroad.

The questions submitted for the opinion of the Court are both answered in the affirmative.

The matter is remitted to the learned Provincial Court Judge for completion of the trial in the light of this opinion.

BRITISH COLUMBIA PROVINCIAL COURT

Ostler D.J.

Regina v. Jordan River Mines Ltd.

Fisheries — Deposit of "deleterious substance" in waters frequented by fish — Whether mens rea an essential ingredient — The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), as re-enacted by R.S.C. 1970, c. 17 (1st Supp.), s. 3(1).

The deposit of a deleterious substance in water frequented by fish, contrary to s. 33(2) of the Fisheries Act, is an offence of absolute liability in which mens rea is not an essential ingredient. To support a finding that waters are frequented by fish it is not necessary to show that there is an abundance of fish therein; the fact that fish, in however small quantities, are found in the waters is enough.

[Note up with 11 C.E.D. (West. 2nd) *Fisheries*, ss. 3, 12; 22 C.E.D. (West. 2nd) *Words and Phrases*.]

R. B. Hutchison, for the Crown.

I. G. Nathanson, for defendant.

13th December 1973. OSTER D.J.:—The defendant company is charged that:

"Count 1. The informant says that Jordan River Mines Ltd., between the 24th and 25th days of June, A.D., 1973, did unlawfully deposit a deleterious substance in a place, to wit: a settling pond at or near the Jordan River, in the County of Victoria, Province of British Columbia, under a condition where such deleterious substance may enter water frequented by fish, contrary to the provisions of Sub-Section 2 of Section 33 of the Fisheries Act as amended.

"Count 2. The informant says that Jordan River Mines Ltd., between the 24th and 25th days of June, A.D. 1973, did unlawfully deposit a deleterious substance, to wit: mine wastes and tailings in water frequented by fish, to wit: Jordan River in the County of Victoria, Province of British Columbia, contrary to the provisions of Sub-Section 2 of Section 33 of the Fisheries Act as amended . . .

"Count 4. The informant says that Jordan River Mines Ltd., did between the 24th and 25th days of June, A.D. 1973, at or near Jordan River, in the County of Victoria, Province of British Columbia, neglect to comply with an Order made under the Pollution Control Act, 1967, to wit: allowed a positive discharge of mine tailings to the Jordan River as prohibited by its permit issued pursuant to the Pollution Control Act, 1967, on the 9th day of August, 1971, and amended October 4th, 1971 and June 22nd, 1973, contrary to Section 20A of the Pollution Control Act, 1967."

Briefly put, the circumstances are these: By a strange coincidence, on the two successive days mentioned in the charge, separate breaks occurred in the lines carrying tailings from the mine operation to the sea. These leaks resulted in the deposit in the Jordan River of a substantial quantity of tailings which had a "siltation effect" on the river bottom. The mines superintendent testified that these leaks occurred because: (a) timber bracing secured by six-inch spikes inexplicably disappeared from the position where the main tailings pipeline broke and this was not discovered until after the event; and (b) an integral part of the disposal system was an underground pipe which, it was subsequently found, had never been completely connected. The Pollution Control Act, 1967 (B.C.), c. 34, s. 20A [re-en. 1970, c. 36, s. 12; am. 1972, c. 45, s. 8], reads in part as follows:

"20A. Every person is guilty of an offence against this Act and liable, on summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding three months, or to both, and if the offence is of a continuing nature, to a fine not exceeding five hundred dollars for each day the offence is continued, who

"(*a*) contravenes any provision of this Act, the regulations, or any order made under this Act, or refuses or neglects to comply with this Act, the regulations, or any order made under this Act".

And the permit which forms part of the order issued pursuant to the Act provides that "The Permittee shall not allow a positive discharge to the Jordan River or any other freshwater watercourse."

The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2) [re-en. R.S.C. 1970, c. 17 (1st Supp.), s. 3(1)], reads:

"(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water";

and the defendant is charged with "depositing".

From these facts there emerge for determination three principal questions:

(1) *Are these offences of strict liability requiring no mens rea?* Mr. Nathanson, in his assiduous and persuasive argument, submitted that the inclusion of the word "permit" in the section introduces the element of mens rea into the offence and I have carefully considered the cases which he cited and upon which he relied. Further support for this assertion is found in the case of *Regina v. Can. Motor Lamp Co. Ltd.*, [1967] 1 O.R. 484, [1967] 2 C.C.C. 210. But that case was not followed in *Regina v. Industrial Tankers Ltd.*, [1968] 2 O.R. 142, 10 Cr. L.Q. 346, [1968] 4 C.C.C. 81, which latter case I follow. In my view, the offences charged fall under that "wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to (the presumption that mens rea is an essential ingredient)": per Ritchie J. in *Regina v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5 at 13, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591; see also *Regina v. Barrie* (1970), 13 Cr. L.Q. 371 (Ont.); *Regina v. Churchill Copper Corpn. Ltd.*, [1971] 4 W.W.R. 481, 5 C.C.C. (2d) 319, affirmed 5 C.C.C. (2d) 324n, affirmed 8 C.C.C. (2d) 36 (B.C. C.A.); *Regina v. McTaggart*, [1972] 3 W.W.R. 30 at 32-33, 6 C.C.C. (2d) 258 (B.C.); *Regina v. Standard Meats Ltd.*, [1973] 6 W.W.R. 350, 24 C.R.N.S. 257, 12 C.P.R. (2d) 137, 13 C.C.C. (2d) 194 (Sask. C.A.).

But, in the alternative, if mens rea is a necessary ingredient, it may be found in the failure of the defendant — having regard to the explicit stipulation in the permit — to make a comprehensive inspection and subsequent surveillance of the equipment. Irrespective of who made the original installation, the defendant company had the power, the means and the duty, following the issuance of the permit, to prevent this occurrence.

Certainly the defendant did deposit mine waste and tailings in the settling pond under conditions where it may — and in fact did — enter the Jordan River, in contravention of the order contained in the permit issued pursuant to The Pollution Control Act, referred to in count 4.

(2) *Is the Jordan River "water frequented by fish"?* In February of 1973 one Langer, an employee of the Department of the Environment (Fisheries) — and a witness whom the Court accepted as an expert in biology, and specifically fish and aquatic ecology — conducted shock experiments in the river between the British Columbia Hydro plant and the Jordan River Mines premises and collected fish, two steelheads

and one bullhead. These were not adult fish and in the opinion of the witness they had not been to the ocean and had always resided in the stream. That witness was convinced that fish frequent the river and it was his opinion that they did so in June of this year. In March of 1973, fisheries officer McNairnay probed the Jordan River in the same area with an electrical device and found two steelhead fingerlings and a bullhead. In October of 1973 an employee of the British Columbia Hydro, during the course of a pumping operation in this area of the river, found three chum salmon, each of about ten pounds, "very much alive". It is true that an "Annual Report of Salmon Stream and Spawning Grounds" of Environment Canada for the year 1972 (Ex. 8) indicated that "no fish showed" in the Jordan River; but there is evidence that this report refers to the adult form of fish and, in any event, it does not follow, because an "eyeball" inspection of the stream on 15th and 29th August and 9th September 1972 was negative, that it is not inhabited by fish. The evidence is to the opposite effect and, on the evidence of these witnesses, I am quite satisfied that the Jordan River is, and was at the material time, "water frequented by fish".

(3) *Was this deposit a "deleterious substance"* as defined in s. 33(11) [en. R.S.C. 1970, c. 17 (1st Supp.), s. 3(2)] of the Fisheries Act, the relevant portion of which reads:

"(11) For the purposes of this section and section 33.1,

"'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 deleterious to fish or to the use by man of fish that frequent that water, or . . . "?

The use of the word "means" makes that definition exhaustive: *Gaysek v. The Queen*, [1971] S.C.R. 888, 15 C.R.N.S. 345, 2 C.C.C. (2d) 545, 18 D.L.R. (3d) 306; *Regina v. Collins*, [1973] 1 O.R. 510, 10 C.C.C. (2d) 52, 31 D.L.R. (3d) 532, affirmed 41 D.L.R. (3d) 232 (C.A.). Mr. Langer, who delivered an interesting lesson in biology and ichthyology, explained how these tailings, by settling on the bed of the stream, would destroy the food of fingerlings (which I find defined in the dictionary as "small fish") by preventing the growth of algae by means of blocking out sunlight and oxygen and, with a "sandpaper" effect, forcing the fish food out of the environment. He said that without such growth there could be no fish and that the introduction of the tail-

ings into the river was definitely deleterious to the fish. Despite Mr. Nathanson's skilful questioning, I found the evidence of this witness cogent and convincing.

The definition of "deleterious substance" was considered by Munroe J. in the case of *Regina v. Stearns-Roger Engineering Co. Ltd.*, [1973] 2 W.W.R. 669, 10 C.C.C. (2d) 374 (B.C.), where the material under consideration was silt, a substance similar in nature and effect to the tailings deposited in this case; and at p. 671 of the [W.W.R.] report, Munroe J. said:

"2. The silt which was put or placed in the water by the activities of the bulldozer was a 'deleterious substance' as defined in s. 33(11). It was 'added to' the water and its addition altered the quality of that water so that the water then became hurtful, harmful or destructive of salmon eggs and such harm to eggs rendered the water 'deleterious to fish' in general and also to 'the use by man of fish that frequent that water'."

The determination of Munroe J. was reversed in the Court of Appeal, [1974] 3 W.W.R. 285, 12 C.C.C. (2d) 260, 37 D.L.R. (3d) 753, but that honourable Court did not enunciate upon the finding of the learned Judge as hereinbefore set out. The ratio of the decision of the Court of Appeal is to be found at p. 262 of the [C.C.C.] report, where McFarlane J.A. said, "I am, therefore, of the opinion that where damage to eggs only and not to fish has been shown there is, as a matter of law, no evidence of an unlawful deposit within the meaning of s. 32." The learned Judges of appeal declined to express a view as to the meaning in the section of the word "deposit". I think that no question arises in that connection in this case because clearly the tailings were "deposited" in the river (Webster's Seventh New Collegiate Dictionary: "deposit . . . 2b: to let fall (as sediment)"); the substance was "added to" the water (Webster: "add, 1b: to come together . . . by addition").

I find that the defendant did deposit a deleterious substance in the river and is guilty on all three counts.

BRITISH COLUMBIA COUNTY COURT

Grimmett Co. Ct. J.

Regina v. McTaggart

Fisheries — Destruction of eggs on spawning ground — Whether mens rea an element of offence — The Fisheries Act, R.S.C. 1970, c. F-14, s. 30 — Whether ultra vires.

Section 30 of the Fisheries Act reads: "30. The eggs or fry of fish on the spawning grounds, shall not at any time be destroyed," and it creates an offence, triable summarily, of absolute liability of which mens rea is not an essential element: *Regina v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591 applied.

Section 30 does not contravene the powers granted to the provinces by s. 92-13) of the B.N.A. Act, 1867, to legislate exclusively in relation to property and civil rights, and is therefore, intra vires.

[Note up with 11 C.E.D. (2nd ed.) *Fisheries*, ss. 3, 12.]

H. M. Snider, for appellant.

D. Kier, for the Crown.

25th January 1972. GRIMMETT Co. Ct. J.:—This is an appeal from the conviction made in the Provincial Court on a charge laid under s. 30 of the Fisheries Act, R.S.C. 1970, c. F-14, formerly R.S.C. 1952, c. 119, of destroying the eggs or fry of fish on the spawning grounds.

No evidence was adduced at the hearing of the appeal as counsel agreed upon the facts as set forth in the reasons for judgment of the Provincial Court Judge as follows:

"1. The accused and his wife are the owners of certain lands over a portion of which Murray Creek runs.

"2. In the original Crown grant of these lands from the Provincial Crown there was contained no reservation of stream or watercourses.

"3. In the fall of 1969 Mr. McTaggart received written permission from the Water Rights Branch to do certain de-

fined work on the creek to lessen erosion. The work consisted primarily of placing large rocks at the bend in the creek and was completed in 1969.

"4. On 9th July 1970 Mr. Donald Udy, a conservation officer, and a fisheries officer attended on the lands in question and observed a bulldozer driven by one Austin Jensen, under the direction of the accused, scooping gravel out of Murray Creek. Also present was a dump truck.

"5. I find as a fact that this portion of the creek was a spawning ground and on 9th July 1970 there were fry present in the immediate area of the bulldozer and, as a result of the actions of the bulldozer, fry were killed. This area of Murray Creek is defined in the regulations of the Fisheries Act as spawning grounds.

"6. Evidence was quite clear that immediately upstream from Mr. McTaggart's property the Municipality of Langley had constructed a large culvert necessitating blasting, etc. In my opinion this evidence was not relevant and I have disregarded it.

"7. There can be no doubt that this portion of Murray Creek is non-tidal and non-navigable."

Three grounds of defence were submitted on behalf of the appellant and I shall state each of these grounds, my decision thereon, and a brief reason for such decision.

The first ground is that the Fisheries Act contains no provision for the procedure to be followed for a breach of s. 30, which reads as follows:

"30. The eggs or fry of fish on the spawning grounds, shall not at any time be destroyed."

I am unable to find anywhere in the Act any provision to the effect that any one who breaches this section is guilty of an offence and liable on indictment or summary conviction to such or such a penalty, as is commonly found in most statutes. The matter is covered, in my opinion, by the application of ss. 61 and 65 of the Fisheries Act and s. 27(1)(*b*) of the Interpretation Act, R.S.C. 1970, c. I-23. The respective sections are as follows:

"61. Except as herein otherwise provided, every one who violates or prepares to violate any provision of this Act, or any regulation, is liable to a penalty of not more than one thousand dollars and costs, and, in default of payment, to

imprisonment for a term not exceeding twelve months, or to both."

"65. Except in so far as in this Act is otherwise specially provided all penalties and forfeitures incurred under this Act or under any regulation are recoverable and enforceable by summary proceedings taken under the provisions of the *Criminal Code* relating to summary convictions."

"27. (1) Where an enactment creates an offence . . .

"(*b*) the offence shall be deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence".

A perusal of these sections discloses that s. 61 of the Fisheries Act provides a penalty for a violation of any of the provisions of the Act; that s. 65 of the Fisheries Act provides for summary proceedings under the Criminal Code, R.S.C. 1970, c. C-34, relating to summary conviction, and that s. 27(1)(*b*) of the Interpretation Act provides that the offender is punishable on summary conviction in the absence of an indication that the offence is an indictable offence. There is no indication that breach of s. 30 is an indictable offence so the procedure must, therefore, be by way of summary conviction.

The second ground of defence is that mens rea is a necessary ingredient and there was no proof of same. I believe it is common ground that there is no proof whatever that the appellant had any intention of committing any unlawful act, nor did he have any knowledge that such an unlawful act was being committed. On this ground of defence, I find that mens rea need not be proven and that s. 30 creates an absolute prohibition. The case of *Regina v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, is a most applicable guide on this point. The dictum of Ritchie J. in this Supreme Court of Canada decision, as found on p. 199, defines the issues:

"Generally speaking, there is a presumption at common law that *mens rea* is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to any such presumption. Whether the

presumption arises in the latter type of cases is dependent upon the words of the statute creating the offence and the subject-matter with which it deals."

In my opinion, the case at bar comes within the category of a statute enacted for the regulation of individual conduct in the interests of the general welfare of the public.

The third ground of defence is that the said s. 30 is ultra vires the Parliament of Canada in that it contravenes the powers granted to each province under s. 92(13) of the B.N.A. Act, 1867, to legislate exclusively as to property and civil rights in the province.

The relevant portions of the B.N.A. Act applicable to the case at bar are as follows:

"91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, . . .

"12. Sea Coast and Inland Fisheries . . .

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, . . .

"13. Property and Civil Rights in the Province."

The leading case on this subject appears to be *Regina v. Robertson* (1882), 6 S.C.R. 52, 2 Cart. 65. Certain portions of the judgment of Ritchie C.J.C. are applicable, and they are as follows [S.C.R. p. 110]:

"In construing the *British North America Act*, I think no hard and fast canon or rule of construction can be laid down and adopted by which all acts passed as well by the Parliament of *Canada* as by the local legislatures upon all and every question that may arise can be effectually tested as to their being or not being *intra vires* of the legislature passing them. The nearest approach to a rule of general application

that has occurred to me for reconciling the apparently conflicting legislative powers under the *British North America Act*, is what I suggested in the cases of *Valin v. Langlois* (1879), 3 S.C.R. 1 at 15, and *Citizens' Insur. Co. v. Parsons; Queen Insur. Co. v. Parsons*, 4 S.C.R. 215 at 242, reversed on the merits but affirmed on constitutional questions (1881), 7 App. Cas. 96, 1 Cart. 265, with respect to property and civil rights, over which exclusive legislative authority is given to the local legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative powers of the Dominion Parliament. But while the legislative rights of the local legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think such latter rights must be exercised so far as may be consistently with the rights of the local legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of *Canada*. And this view I think was clearly in the mind of the Privy Council when in *Cushing v. Dupuy* (1880), 5 App. Cas. 409 at 415, 1 Cart. 252, in speaking of the powers of the dominion and provincial legislatures, it is said in the judgment of the Privy Council by Sir *M. E. Smith*:—

"'It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, *so far as a general law relating to those subjects might affect them*.'"

At p. 123:

"To all general laws passed by the Dominion of *Canada* regulating 'sea coast and inland fisheries' all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting

the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either."

From these dicta, I come to the conclusion that the Federal Parliament may pass such laws as may be necessary "for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large".

For the above reasons, I feel that the appeal must be and is, therefore, dismissed, and the conviction against the appellant confirmed.

Prince Edward Island Supreme Court
At Trial, Nicholson, J.
April 20, 1972.

FISHERIES - CANADA FISHERIES ACT, SECTION 33 - CHARGE OF DISCHARGING A DELETERIOUS SUBSTANCE INTO WATER FREQUENTED BY FISH - FARM AND HOUSEHOLD REFUSE CONSISTING OF CANS, PAPER, TWINE, BOTTLES AND HUMAN WASTE - MEANING OF "DELETERIOUS SUBSTANCE" - SUPREME COURT ON APPEAL BY WAY OF TRIAL DE NOVO HELD THAT IT WAS NOT PROVED THAT MATERIAL WOULD RENDER WATER DELETERIOUS TO FISH - CONVICTION QUASHED.

The supreme court allowed the accused's appeal by way of trial de novo and quashed the conviction of the accused. The accused was charged with discharging a deleterious substance into water frequented by fish contrary to Section 33(2) of the Canada Fisheries Act.

The accused dumped farm and household refuse consisting of cans, paper, twine, bottles and human waste into a stream. The court held it was not proved that any of the material was a "deleterious substance" as defined in Section 33(11) of the Fisheries Act.

STATUTES JUDICIALLY NOTICED:
Fisheries Act, R.S.C. 1970, c. F-14, s. 33.

Appeal by way of trial de novo from a conviction before His Honor James B. Johnston, Provincial Magistrate for Prince Edward Island.

KENNETH R. MacDONALD, for the appellant,
BERT G. CAMPBELL, for the respondent.

NICHOLSON, J.: The appellant was convicted on the 15th day of July, 1971 by Provincial Magistrate James B. Johnston of the charge "that he did on or about the 11th day of June, A.D. 1971 at or near New Perth in Kings County, Prince Edward Island knowingly discharge a deleterious substance to wit; barn and house garbage, into the Dewar Stream which empties into the Brudenell River which water is frequented by fish, contrary to Section 33 sub-section 2 of The Fisheries Act". Upon this conviction he was sentenced to pay a fine of $100.00 together with $2.00 costs and in default of payment of the fine and costs to be imprisoned in Kings County Gaol at Georgetown for the term of thirty days.

The Appellant was convicted upon a plea of guilty to the said charge having been entered by Kenneth R. MacDonald, an attorney acting on behalf of the Appellant. On the hearing of the appeal Mr. MacDonald acknowledged that it was his error that a plea of guilty had been entered and that he had not actually interviewed the Appellant until after the conviction was made against him. The plea of guilty having been entered by mistake I allowed the appeal to proceed, accordingly a "trial de novo" under Part XXIV of the Criminal Code was proceeded with.

Four witnesses were called on behalf of the prosecution namely: Arthur MacDonald, Patrick John Heppell, Foch MacDonald and Everett Roy Clow.

Arthur MacDonald is a farmer who lives at New Perth in Kings County. On the afternoon of June 11th, 1971 he was on a road known as the Collins Road when he met the Appellant driving a farm tractor which was towing a trailer loaded with garbage. The road on which the Appellant was travelling passes over the Dewar stream by means of a road bridge. Arthur MacDonald saw the Appellant with the load of garbage travelling towards "the brook" (Dewar stream). He says there was bailer twine and cans on the load. He saw the Appellant return along the road a short time later after the load on the trailer had been dumped. He went back to the stream where he saw "a whole bunch of junk in the stream" including bailer twine and other things such as he had seen on the Appellant's trailer. He says that it would appear that the garbage was "dumped over the end of the bridge". He also says he had been down to the stream two or three minutes before he met the Appellant and there was no garbage in the stream at that time. This witness is about 75 years of age and a lone time resident in the area. He says the stream is frequented by fish and that the stream flows into Brudenell River. After he went back and saw the

garbage in the stream he contacted the R.C.M.P.

5 Constable Patrick John Heppell is a member of the R.C.M.P. stationed at Montague in Kings County. He says that after talking to the witness Arthur MacDonald he went down to the stream in question where he saw "*a certain amount of garbage, coffee jars, cans, pickle bottles, household garbage*". He then tells of how he went to the Appellant's farm where he talked to the Appellant. His evidence is, in part, as follows:

Q. Were you talking to him?
A. I was. I confronted him with the garbage being there and he stated he had taken his trailer down this side road by the stream and was going to dump the garbage on his property and he made a turn down by the bridge and some of the garbage might have accidentally fallen off.

Q. Into the stream?
A. Yes. And he stated to me after I told him some had found its way into the stream if it had come off his trailer I expected him to clean it up and he stated he would.

6 Foch MacDonald is a fisheries officer with the Federal Fisheries Department. On June 12th, 1971 after talking to the witness Arthur MacDonald he along with a fellow fisheries officer went to the stream in question. His evidence of what he found in the stream, and of what he did, is as follows:

Q. As a result of your contact with Mr. MacDonald what did you do?
A. Accompanied by Fisheries Officer Roy Clow I proceeded to the stream in question and checked the stream for report of the garbage that was in it and I found in that stream the following:--

Q. You took notes at that time?
A. Yes. This was taken on the 12th of June. Tomato cans, bean can, coffee bottle, kam

and klik cans, oil cloth, paper cartons, pieces of barn stansions, binder twine, BonAmi can, fruit cocktail can, toilet paper and disposable diapers, human waste and Heinz vinegar bottle. After checking it, we then proceeded to the home of the accused Curtis Callaghan. Mr. Callaghan was not at home. We went back to the office and on Monday the 14th of June about approximately 8:30 in the morning I went to Mr. Callaghan's residence again and he met me in the yard. When I mentioned the garbage he said, "what the hell is going on here. I have already been talking to the R.C.M. Police on Saturday and told them I would clean the garbage out of the water". I then informed him that I would have to report the incident to my District Protection Officer, Mr. Farrar and there might be a charge laid against him.

Foch MacDonald says the stream where the garbage was found is frequented by trout.

7 Everett Clow is also a Federal Government Fisheries Officer and he was at the stream with Foch MacDonald. He saw in the stream all the materials mentioned by Foch MacDonald. He also says the stream is frequented by trout.

8 The appellant gave evidence on his own behalf. His evidence is, in part, as follows:

Q. Did you put items on this day in there?
A. Not in as far as usual. The maintainer dug the ditch out, you couldn't get in, so therefore it was put on the bank along the side of the stream.

Q. On the side of this brook?
A. Yes.

Q. These items that were listed today by Mr. MacDonald were these the items you had in garbage in that particular day?
A. Yes.

Q. All of them?
A. Yes.

Q. There was tomato, beans, cans, klik cans, oil cloth, stansions and disposable diapers, you took all of those down there that day?
A. Yes.

Q. How far from the water did you put them?
A. The most would be several yards.

Q. Would you have put them on the bank?
A. Yes, up on the bank.

Q. How high would the bank be there?
A. It would be 6 or 7 feet.

. . . . . .

Q. Did you meet Mr. MacDonald when you were going in with the load?
A. Yes.

Q. You say nobody saw you, MacDonald did not see you?
A. Nobody saw me unloading it.

9 From the foregoing evidence I find as a fact that the Appellant knowingly discharged the garbage he was hauling and unloading from his trailer into the Dewar stream. And I also find that the stream at the place where the garbage was discharged or unloaded is frequented by fish.

10 Before the Appellant can be convicted it must be established that the garbage comprised a "deleterious substance" under the provisions of the Fisheries Act. As I have said the offence is alleged to have been committed on June 11th, 1971 against "Section 33 sub-section 2 of the Fisheries Act". Section 33 of the Fisheries Act (R.S.C. 1970 Chap. F. 14) provided as follows:

> 33. (1) No one shall throw overboard ballast, coal ashes, stones, or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is

carried on, or leave or deposit or cause to be thrown, left or deposited, upon the shore, beach or bank of any water or upon the beach between high and low water mark, remains or offal of fish, or of marine animals, or leave decayed or decaying fish in any net or other fishing apparatus; such remains or offal may be buried ashore, above high water mark.

(2) No person shall cause or knowingly permit to pass into, or put or knowingly permit to be put, lime, chemical substances or drugs, poisonous matter, dead or decaying fish, or remnants thereof, mill rubbish or sawdust or any other deleterious substance or thing, whether the same is of a like character to the substances named in this section or not, in any water frequented by fish, or that flows into such water, nor on ice over either such waters.

(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

(4) The Governor in Council may by order deem any substance to be a deleterious substance for the purposes of subsection (2).

(5) Every person who violates any provision of this section is guilty of an offence and is liable upon summary conviction,
(a) for the first offence, to a fine of not less than one hundred dollars and not more than one thousand dollars or to imprisonment for a term of not less than one month and not more than six months, or to both such fine and imprisonment; and (b) for a second and each subsequent offence, to a fine of not less than three hundred dollars and not more than two thousand dollars or to imprisonment for a term of not less than two months and not

more than twelve months, or to both such fine and imprisonment.

I believe that from the nature of the prosecution the fisheries officers may have been under the impression that Section 33(2) of the Fisheries Act on June 11, 1971 was as stated above. However, Section 33(2) of the Fisheries Act was amended by 18-19 Elizabeth II Chap. 63 section 3 which provides as follows:

> 3. (1) Subsection (2) of section 33 of the said Act is repealed and the following substituted therefor:
>
> (2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.
>
> (2) Subsections 4 and 5 of section 33 of the said Act are repealed and the following substituted therefor:
>
> (4) Subsection (2) does not apply (a) to the deposit of waste of a type, in a quantity and under conditions authorized by regulations made by the Governor in Council under any other act in any waters with respect to which those regulations are applicable, 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 such waters; or (b) to the deposit of a deleterious substance of a type, in a quantity and under conditions authorized by any regulations made by the Governor in Council under this Act for the purposes of this subsection in any water with respect to which those regulations are applicable, 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.

(5) Any person who violates any provision of this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for each offence.

(6) Where an offence under subsection (5) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

(7) Where a person is convicted of an offence under this section, the court may, in addition to any punishment it may impose, order that person to refrain from committing any further such offence or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the court, will or is likely to result in the committing of any further such offence.

(8) In a prosecution for an offence under this section or section 33D, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

(9) Notwithstanding that a prosecution has been instituted in respect of an offence under this section, the Attorney General of Canada may commence and maintain proceedings to enjoin any violation of any provision of this section.

(10) No civil remedy for any act or omission is suspended or affected by reason that the act or omission is an offence under this section, and where, by reason of the occurrence or existence in, upon or adjacent to

any water frequented by fish of any condition resulting from an act or omission by a person that is an offence under this section, the Minister directs any action to be taken by or on behalf of the Crown to repair or remedy the condition or reduce or mitigate any damage to or destruction of life or property that has resulted or may reasonably be expected to result from its occurrence or existence, the costs and expenses of and incidental to the taking of such action, to the extent that such costs and expenses can be established to have been reasonably incurred in the circumstances, are recoverable by the Crown from that person with costs in proceedings brought or taken therefor in the name of Her Majesty in any court of competent jurisdiction.

(11) For the purposes of this section and section 33A,

(a) 'deleterious substance' means
(i) 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 deleterious to fish or to the use by man of fish that frequent that water, or
(ii) 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 deleterious to fish or to the use by man of fish that frequent that water.

and without limiting the generality of the foregoing includes

(iii) any substance or any substance that is part of a class of substances prescribed pursuant to paragraph (a) of subsection (12),
(iv) any water that contains any substance that is part of a 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 (b) of subsection 12, and
(c) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (c) of subsection (12); and

(b) 'water frequented by fish' includes all waters in the fishing zones of Canada.

(12) 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 subparagraphs (iii) to (v) of paragraph (a) of subsection (11).

This section was proclaimed in force on July 15th, 1970. It will be seen that this most recent amendment to the Fisheries Act makes substantial changes in the law. Whatever may have been the situation of the Appellant prior to the amendment referred to above it it my opinion that the substances which the Appellant is charged with having put into the Dewar Stream do not or at least have not been proved to come within the definition of "deleterious substance" as defined by the Fisheries Act, Section 33(11). There was nothing to show that all or any of the substances in question "if added to any water would degrade or alter or form a part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequent that

water". The substances not coming within Section 33 11(a)(i) are clearly excluded from the other parts of the section defining "deleterious substances".

11 The result is that the appeal is allowed, the charge against the Appellant is dismissed, the conviction and sentence is quashed. There will be no order as to costs on the appeal.

Appeal allowed.

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REGINA v. CHURCHILL COPPER CORP. LTD.

British Columbia Court of Appeal, Maclean, McFarlane and Nemetz, JJ.A. May 3, 1972.

Appeal — Stated case — Provincial Judge stating case — Appellant's remedy where not satisfied with case as stated.

Section 738 (now s. 768) of the *Criminal Code* does not confer jurisdiction on a superior Court Judge to make an order showing cause why a case should not be stated where one has been stated but not to the satisfaction of the appellant. Where the case stated is one which does not satisfy the appellant and he wants something else stated, his remedy is to apply to the Judge hearing the stated case to remit the case to the summary conviction Court for amendment.

Appeal — Stated case — Questions as to sufficiency of evidence — Not proper questions on stated case — Cr. Code, 1953-54, s. 731.

APPEAL by the accused from the decision of Macdonald, J., 5 C.C.C. (2d) 324*n*, dismissing the accused's application for an order pursuant to s. 738 of the *Criminal Code* directing Arkell, D.C.J., to show cause why a case should not be stated from the accused's conviction, 5 C.C.C. (2d) 319, [1971] 4 W.W.R. 481, for depositing deleterious substances in a river contrary to s. 33(2) (rep. & sub. 1969-70, c. 63, s. 3(1)) of the *Fisheries Act*, R.S.C. 1952, c. 119 (now R.S.C. 1970, c. F-14).

R. C. Gardner, for accused, appellant.
R. M. Hayman, for the Crown, respondent.

The following judgments were delivered orally:

MACLEAN, J.A.:—I will ask my brother McFarlane to give the first judgment.

MCFARLANE, J.A.:—On May 4, 1971, this appellant was tried before His Honour Judge K. F. Arkell, a District Judge of the Provincial Court at Fort Nelson, and convicted upon the charge that near the confluence of the Racing River and Delano Creek in the Province of British Columbia, between the 12th and 25th days of February, 1971, it did unlawfully deposit a deleterious substance in the said Racing River, being water frequented by fish, contrary to the provisions of the *Fisheries Act*, R.S.C. 1952, c. 119 [now R.S.C. 1970, c. F-14], and amendments thereto.

The Provincial Court Judge was acting under the summary conviction provisions of the *Criminal Code*.

On May 19, 1971, the appellant applied to the Provincial Court Judge to state a case under s. 734 [now s. 762] of the *Criminal Code*. The application was based upon the ground that "the conviction is erroneous in point of law by reason that", and then sets out six alleged grounds of error.

Arkell, D.C.J., stated the case, which is dated May 28, 1971 [5 C.C.C. (2d) 319, [1971] 4 W.W.R. 481], in which, as required by the provisions of the statute, he set out his findings of fact on the evidence which he had heard. He went further, and to a considerable degree set out a summary of the evidence upon which he made those findings of fact.

The appellant then applied to the Supreme Court of this Province under the provisions of s. 766(1) of the *Criminal Code*, for an order that the summary conviction Court show cause why a case should not be stated. That application was heard by Macdonald, J., and was dismissed on August 18, 1971 [5 C.C.C. (2d) 324*n*]. This appeal is brought from that dismissal.

The first answer taken by Mr. Hayman, on behalf of the Crown, to this appeal is that s. 766(1) of the *Criminal Code* does not apply, or, as he put it, is not available to the appellant in these circumstances. That is another way of saying, and the way I would prefer to say it is, that the subsection does not confer jurisdiction on Macdonald, J., to make the order which he was asked to make in this case. I agree with that submission.

I have already pointed out that the Provincial Court Judge in this case did not refuse to state a case. He stated a case in which, having stated his findings of fact and some of the evidence, he propounded for determination by the Supreme Court one question which was clearly a question of law.

In my opinion, where the case stated by the Provincial Court Judge is one which does not satisfy the appellant and he wants something else stated, the Judge hearing the stated case, under s. 766(1) of the *Criminal Code*, has the power, where he considers it proper, to remit the stated case to the summary conviction Court for amendment. As I say, I would dismiss this appeal on that ground alone, but I think I should add something more in view of the nature of the arguments which have been presented and what was said by Macdonald, J., when he dealt with the application.

He found that of the six grounds raised in the application for the stated case, one was purely a question of law. That is now conceded. I think it was conceded by the Crown, and the case stated was certainly stated properly with respect to that ground.

As to the others, Macdonald, J., said [at p. 324]:

> In my opinion grounds numbered 1, 2, 3 and 6 are all questions as to the sufficiency of evidence and therefore the learned Judge was right in declining to state a case respecting them.

I respectfully agree with that conclusion of Macdonald, J. He proceeded:

> Ground No. 5 is as follows:
>
> "That your Honour did err in finding that there was any admissible evidence that the offence was committed by an employee or agent of the accused."

> I find this question unintelligible. It does not help that the affidavit in support of this application indicates that it intended to propound a question as to admissibility of certain evidence let in by the Judge.

Assuming, as counsel for the appellant has contended here, that that question was intended to raise and that it should be interpreted so as to raise the question whether at the trial the Provincial Court Judge had admitted in evidence evidence that was inadmissible to prove that a certain person was an employee or agent of the appellant, I am of the opinion that the decision of Macdonald, J., was right on the facts of this case because the affidavit to which the appellant referred shows that there was evidence that the person in question did at a certain time state that he held the office of superintendent. It follows from that that the question whether he was an employee, responsible employee of the appellant, was one of inference and fact to be drawn from that evidence. Now, in referring to that affidavit I do not overlook Mr. Hayman's objection to the introduction of that affidavit in these proceedings. It does seem to me that in a case where a Provincial Court Judge does not refuse to state a case, but actually states one, in which he sets out his findings of fact, that the affidavit is probably not properly admissible. It is not necessary to decide that question finally on this appeal, and I do not wish to be understood as doing so. I have simply referred to it as material put forward by the appellant to support his contention, and in my view it not only fails to support his contention, it rebuts it.

For these reasons I would dismiss the appeal.

MACLEAN, J.A.:—I agree.

NEMETZ, J.A.:—I would dismiss the appeal for the reasons given by my brother McFarlane save and except the first point raised by Mr. Gardner as to whether or not s. 766(1), might be available under certain circumstances. With that exception I agree entirely with what my brother has said.

MACLEAN, J.A.:—The appeal is dismissed.

Appeal dismissed.

REGINA v. CHURCHILL COPPER CORPORATION LTD.

British Columbia Provincial Court, Arkell, D.C.J. May 28, 1971.

Environmental law — Water pollution — Discharge of deleterious substance into waters frequented by fish — Whether mens rea essential ingredient of offence — Fisheries Act, R.S.C. 1952.

The offence of depositing or permitting a deposit of a deleterious substance of any type in water frequented by fish created by s. 33(2) (rep. & sub. 1969-70, c. 63, s. 3(1)) of the *Fisheries Act*, R.S.C. 1952, c. 119 (now R.S.C. 1970, c. F-14) is an offence of strict liability and *mens rea* is not an essential ingredient. Even if *mens rea* were required once it is shown that a responsible employee of a defendant company has knowledge of the act complained of, *mens rea* is established.

[*R. v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, [1971] S.C.R. 5, 12 C.R.N.S. 272, apld; *Sweet v. Parsley*, [1969] 2 W.L.R. 470, [1969] 1 All E.R. 347, refd to]

Environmental law — Water pollution — Sentence — Protection to society and deterrent to others — Five-thousand dollar fine plus order refraining company from depositing substance in river — Fisheries Act, R.S.C. 1952, s. 33(7).

TRIAL of accused on a charge of depositing deleterious substance in river contrary to *Fisheries Act* (Can.).

I. J. Nathanson, for accused.
R. M. Hayman, for the Crown.

ARKELL, D.C.J.:—Churchill Copper Corporation Ltd. were charged that near the confluence of the Racing River and Delano Creek in the Province of British Columbia, between February 12 and 25, 1971, they did unlawfully deposit a deleterious substance in the said Racing River, being water frequented by fish, contrary to the provisions of the *Fisheries Act*, R.S.C. 1952, c. 119 [now R.S.C. 1970, F-14], and amendments thereto.

On Tuesday, May 4, 1971, the said charge was heard before me at the Court-house in the Village of Fort Nelson by way of summary conviction.

The relevant provisions of the *Fisheries Act*, as amended on June 26, 1970 [rep. & sub. 1969-70, c. 63, s. 3], are as follows:

> 33(2) 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 such deleterious substance that results from the deposit of such deleterious substance may enter any such water.
>
> (5) Any person who violates any provision of this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for each offence.
>
> (6) Where an offence under subsection (5) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.
>
> (7) Where a person is convicted of an offence under this section, the court may, in addition to any punishment it may impose, order that person to refrain from committing any further such offence or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the court, will or is likely to result in the committing of any further such offence.
>
> (8) In a prosecution for an offence under this section or section 33B, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.
>
> (11) For the purposes of this section and section 33A,
>
> (a) "deleterious substance" means
>
> (i) 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 deleterious to fish or to the use by man of fish that frequent that water, or

Churchill Copper Corporation Ltd. leased district Lot 1369 in the Peace River District, containing 356 acres and encompassing the confluence of the Racing River and Delano Creek for mill site and town site purposes on June 28, 1968, for a period of five years, and between February 12 and 25, 1971, the said Churchill Copper Corporation Ltd. were opera-

ting a copper mine and a mill for refining copper situated and located at the confluence of the Racing River and Delano Creek.

Discharge effluent was carried by a flume from the refining mill to a settling pond contained within a dyke, and the settling pond had overflowed and was overflowing between February 10th and February 24th, causing a greyish black effluent to run from the settling pond into the Racing River.

The water within the Racing River above the mill site was clear in colour and contained sufficient taxa (fish food) to support fish life, whereas downstream from the mill site the colour of the river was greyish black, being caused by a six-inch deposit of silt and fine powder-like slime which, when microscopically examined, was irregular in shape, had sharp edges and was highly abrasive. At a point approximately 400 yd. downstream from the mill site there were not sufficient taxa in the water to support fish life, and the effluent from the mill which had overflowed from the settling pond had degraded the water quality to the point where it was detrimental to fish and could even be toxic to fish life, causing their death, and was, in fact, a deleterious substance, as stated in evidence by Morley Edward Pinsent, B.Sc., M.Sc., Regional Fisheries Biologist, the Wildlife Branch, Department of Recreation and Conservation, Province of British Columbia.

Three local fishermen stated in evidence that they had caught a considerable number of grayling and Dolly Varden fish in both the Delano Creek and the Racing River, and from this evidence I found as a fact that the Racing River was water frequented by fish.

After holding a *voir dire* the evidence disclosed that the local superintendent of the Churchill Copper Corporation Ltd. mill had stated on February 11, 1971, to the local conservation officer, "The settling pond is frozen and has been running over for the last four days", and from this evidence I found as a fact that the mill superintendent, as a responsible employee of the defendant company, had knowledge of the discharge of the effluent, being a deleterious substance, from the mill settling pond into the Racing River.

The majority of the submissions of the defence were directed to whether or not the Court should accept or reject certain evidence. Since I accept the evidence of the witnesses called for the prosecution, and their evidence stands uncontradicted, I have drawn certain inferences from that evidence, and have made my findings of fact accordingly.

On the question of the applicable law, it was submitted by defence counsel that the element of "mens rea" is an essential

ingredient of this offence. It was submitted by Crown counsel that the Court should follow the decision of the Supreme Court of Canada in *R. v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, [1971] S.C.R. 5.

In *R. v. Pierce Fisheries Ltd.* the Supreme Court of Canada held that the offence of violating s. 3(1) (*b*) of the Regulations to the *Fisheries Act* is an offence of strict liability, of which "mens rea" is not an essential ingredient. At p. 202 Ritchie, J., states:

> In considering the language of the Regulation, s. 3(1) (*b*), it is significant, though not conclusive, that it contains no such words as "knowingly", "wilfully", "with intent", or "without lawful excuse", whereas such words occur in a number of sections of the *Fisheries Act* itself which create offences for which *mens rea* is made an essential ingredient.
>
> . . . . .
>
> This appears to me to be a clear indication of the fact that in making provision for offences under the *Fisheries Act*, Parliament was careful to specify those of which it intended that guilty knowledge should be an essential ingredient.

Also in the *Pierce Fisheries* decision, Ritchie, J., referred to the English case of *Sweet v. Parsley*, [1969] 2 W.L.R. 470, [1969] 1 All E.R. 347, where Lord Pearce states at p. 431:

> Parliament might, of course, have taken what was conceded in argument to be a fair and sensible course. It could have said, in appropriate words, that a person is to be liable unless he proves that he had no knowledge or guilty mind. Admittedly, if the prosecution have to prove a defendant's knowledge beyond reasonable doubt, it may be easy for the guilty to escape. But it would be very much harder for the guilty to escape if the burden of disproving mens rea or knowledge is thrown on the defendant. And if that were done, innocent people could satisfy a jury of their innocence on a balance of probabilities. It has been said that a jury might be confused by the different nature of the onus of satisfying "beyond a reasonable doubt" which the prosecution have to discharge and the onus "on a balance of probabilities" which lies on a defendant in proving that he had no knowledge or guilt. I do not believe that this would be so in this kind of case.

Also in *Sweet v. Parsley*, Lord Diplock states at p. 487:

> Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may

be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it *unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation* (see *Lim Chim Aik* v. *The Queen* [1962] A.C. 160, 174).

(The italics are my own for emphasis.)

Parliament, in the 1969-70 amendments to the *Fisheries Act*, obviously adopted the "fair and sensible course" suggested by Lord Pearce in *Sweet v. Parsley* when they enacted s-s. (8) of s. 33.

Also, as stated by Lord Diplock in *Sweet v. Parsley*, the inference is not to be lightly drawn that this is an offence of absolute liability, "*unless* there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation". Here the defendant company could "promote the observance of the obligation" imposed by the *Fisheries Act* by the adoption of direct supervision, inspection and improvement of their operation.

In s-s. (2) of s. 33 of the *Fisheries Act*, there are no such words as "knowingly", "wilfully", "with intent" or "without lawful excuse", and I am satisfied that this is an Act which is in the public interest, is prohibited under a penalty, and does not " 'add a new crime to the general criminal law' " as stated by Ritchie, J., at p. 279 with reference to the decision in *Sherras v. De Rutzen*, [1895] 1 Q.B. 918.

I am therefore of the opinion that s-s. (2) of s. 33 of the *Fisheries Act* is an offence of strict liability, of which "mens rea" is not an essential ingredient.

Even if I have erred in law and "mens rea" is an essential ingredient of the offence, I am satisfied that it has been established on the knowledge of the superintendent, a responsible employee of the defendant company.

Accordingly, I have found the defendant company guilty as charged. In speaking to sentence, it was submitted by defence counsel that pollution in a river in such a remote area is not as serious as pollution in a river near a city like Vancouver, which is perhaps to suggest that city fish are more important than country fish. The provisions of the *Fisheries Act* and the penalties to be imposed thereunder are equally applicable to all parts of Canada, remote or otherwise.

To serve as a protection to society, and also as a deterrent, a fine of $5,000 has been imposed, in addition to an order being made pursuant to s-s. (1) of s. 33 that Churchill Copper Corporation Ltd. refrain from depositing or permitting the deposit of any deleterious substance in the Racing River.

Verdict of guilty entered.

NOTE: On August 18, 1971, an application was made to Macdonald, J., for an order pursuant to s. 738 of the *Criminal Code* directing Arkell, D.C.J., to show cause why a case should not be stated. The following is his judgment dismissing the application:

R. C. Gardner, for accused, appellant.
R. M. Hayman, for the Crown, respondent.

MACDONALD, J.:—The appellant moves for an order pursuant to s. 738 of the *Criminal Code*, 1953-54 (Can.), s. 51 [now s. 766, R.S.C. 1970, c. C-34] directing His Honour Judge K. F. Arkell, District Judge of the Provincial Court at Fort Nelson, to show cause why a case should not be stated pursuant to application to him dated May 19, 1971.

The learned Judge on May 4, 1971, acting under Part XXIV of the *Criminal Code*, convicted the appellant upon the charge that "near the confluence of Racing River and Delano Creek in the Province of British Columbia, between the 12th and 25th days of February, 1971, they did unlawfully deposit a deleterious substance in the said Racing River, being water frequented by fish, contrary to the provisions of the Fisheries Act, Chapter 119, and amendments thereto." The application for a stated case alleged that the conviction was erroneous in point of law in six respects. On May 28, 1971, the Judge stated a case as to only one of these grounds. That one clearly involves a question of law. In my opinion grounds numbered 1, 2, 3 and 6 are all questions as to the sufficiency of evidence and therefore the learned Judge was right in declining to state a case respecting them. Ground No. 5 is as follows:

That your Honour did err in finding that there was any admissible evidence that the offence was committed by an employee or agent of the accused.

I find this question unintelligible. It does not help that the affidavit in support of this application indicates that it intended to propound a question as to admissibility of certain evidence let in by the Judge.

The application must be dismissed.

REGINA v. MACMILLAN BLOEDEL INDUSTRIES LTD.

Provincial Court of British Columbia, Haig-Brown, Prov.Ct.J.
August 2, 1973.

Environmental law — Depositing deleterious substances — Defence that company "exercised all due diligence" — Defence requiring successful communication of adequate instructions from company to employees on job — General instructions only given and vaguely understood — No supervision during operations — Accused convicted — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), (8).

TRIAL of the accused on a charge contrary to s. 33 (2) of the *Fisheries Act* (Can.).

A. Sarich, for the Crown.
V. A. Stephens, for accused.

HAIG-BROWN, PROV.CT.J.:—It appears from the evidence that during several days immediately prior to November 28, 1972, four employees of MacMillan Bloedel Industries Ltd. (Eve River Division) undertook a gravel-washing operation near an unnamed tributary of Palmerston Creek, which in turn is a tributary of the Adam River, which enters salt water some 12 miles north-east of Sayward on Vancouver Island, British Columbia. These employees were Gordon William Benner, assistant grade foreman, Peter Charles Daw, cat operator, Nick Seminoff, shovel operator and Les Smith, truck driver. A fifth employee, Allen Gerald Dent, logging manager, closed off the operation on November 28th.

Mr. Benner gave evidence that a hole was dug in such a manner that water flowed into it from a small creek (the tributary of Palmerston Creek, variously referred to as the Unnamed Creek or Tributary A, and hereinafter referred to as Tributary A). The gravel was washed in this hole by dipping the bucket of the shovel. He said that before washing, the gravel "didn't stand up too good", but after washing, it was "harder and drier and packed down better". Water from the pit overflowed across the road and back into the creek. He estimated the creek to be 3 to 6 in. deep and 2 ft. wide. He noticed on the last day of operation that the creek was murky.

Mr. Daw said that he dug a hole and let water in from the creek, Tributary A. He estimated the creek to be 5 to 6 in. deep and 3 ft. wide. He said the gravel was "kind of mushy" and they were trying to "clean the material to get the muck out". He did not see any overflow from the pit but "some leaked into the creek and some out across the road." He said "we looked down at the creek on the last day and it was murky looking". In cross examination he said: "I know you are not supposed to go and mess around with rivers." The decision to do so was made in discussion with Mr. Benner, his superior. He described the water coming in from the creek as a "trickle".

Mr. Seminoff, the shovel operator, said that the water coming into the hole or pit, dug by himself and the cat operator, was diverted from the creek. He estimated Tributary A to be 3 ft. wide and not over 6 in. deep. The pit was 15 ft. x 20 ft. and 5 ft. deep. The operation continued for three or four days. The truck moved 12 yd. of washed gravel each trip at the rate of four trips an hour through seven-hour productive days. He also noted that the creek was murky on the last day, apparently referring to Palmerston Creek, "5,000' downstream from where we were working".

Mr. Vernon Duncan Skogan, a boom man for the company, said he had observed salmon 600 to 800 ft. into Palmerston Creek from the Adam River and had also observed salmon carcases washed down from higher up. He said that he travelled daily to work over a small bridge across Palmerston Creek 800 to 900 ft. above its confluence with Adam River. In the latter part of November he noted that the creek was very discoloured and that this was a cause of discussion among employees of the company.

From the above evidence I conclude without difficulty that employees of the respondent company conducted a gravel-washing operation in a pit near Tributary A for some four days in late November, 1972, probably November 24th to 27th, until they were stopped on November 28th. There is conflict as to the state of the weather, but there can be no doubt that conditions were very wet and there had been some heavy rain. A substantial quantity of gravel was washed, probably in excess of 1,300 cubic yards. The operation was successful in that mushy material that would not pack or settle was converted into drier and harder material that packed down fairly well. It is clear that the washing removed substantial quantities of fine and soft material to achieve this objective.

There is some uncertainty as to the amount of flow that was entering and leaving the pit, and Mr. Seminoff's evidence of the size of the pit at 15 ft. x 20 ft. conflicts with the later evidence of fisheries supervisor Fielden that it was 100 ft. x 75 ft. Mr. Fielden's evidence is supported by rather unclear photographs (ex. 8), but I conclude without difficulty that the pit was very much larger than 15 ft. x 20 ft. and that Mr. Fielden's estimate is probably quite close.

As to the amount of water that was flowing into the pit, the preponderance of evidence is that at least a major portion of Tributory A was diverted into the pit and, with some allowance for seepage, a similar amount was flowing out and finding its way back into the creek. Some of the witnesses did not notice overflow across the road until the last day, but their evidence also indicates that they did not notice the murky state of the creek until the last day of the operation when, presumably, their attention was drawn to it.

Fisheries supervisor Fielden made an inspection of the site and the general area on November 29th. He followed Tributary A to Palmerston Creek, making several stops on the way and noticing that the bottom of the creek was "very, very silty". Fifty feet below the road he put a stick in the creek and measured "6" of mud on the bottom". Two hundred and fifty

feet farther down he measured 3 in. of mud. At Palmerston Creek he went 75 to 100 ft. downstream of the entry of the Tributary A and found half an inch of mud. He went upstream from the entry of Tributary A on Palmerston Creek and found "no visible evidence of mud".

He then drove down Palmerston Creek to the bridge and there found visible deposits of fresh mud. He observed no fresh silt at the confluence of Palmerston Creek and Adam River.

On November 30th, Mr. Fielden returned to the area and took bottom samples from Tributary A and Palmerston Creek at several points. These samples became exs. 3 to 7 in the present proceedings and are Nos. 1 to 5 in the analyst's report (ex. 15). Sample 1 (ex. 3) from Tributary A 50 ft. downstream from the gravel pit, and sample 2 (ex. 4) from Palmerston Creek 100 ft. downstream from the entry of Tributary A, each showed 100% of fine material, classified by sieve analysis as containing 60.2% and 53.5% of silt respectively. In contrast to this, sample 3 (ex. 5) taken from Palmerston Creek 75 ft. upstream of the entry of Tributary A, showed only 57.7% fine, of which 0.2% analyzed as silt; sample 5 (ex. 7) taken from Tributary A, 50 ft. upstream from the road, showed only 5.7% of fines and 0.11% of silt.

Taken with the evidence of the men who worked the gravel-cleaning operation, I hold these samples to be inescapable and conclusive evidence that large amounts of fine materials, more than half of it silt (smaller than .074 mm. diameter as defined by Mr. Langer) was washed down and deposited in Tributary A and beyond there into Palmerston Creek from the gravel washing of the previous days. I can find no other rational conclusion.

Mr. Otto Emil Langer, a biologist and a specialist in fisheries biology, employed by the Department of Environment, gave expert evidence as to the effects of such material on fish life. He pointed out that fines (a term that includes larger material such as sand) enter the gravel, decrease its permeability and can thereby reduce the survival of eggs, alevins and fry. Such entry may cause eggs and fry to suffocate and may form a barrier to fry emerging from the gravel. In addition, it may smother invertebrates on which the young fish feed and the coarser material such as sand has an abrasive effect that removes algae from the rocks. This abrasive material may also damage the gills of both adults and fry, possibly to the point of suffocation. He noted that sediment "has a greater effect on [fish] survival than any other factor" and

was of the opinion that the material in Mr. Fielden's samples from points downstream of the pit would have been deleterious substances and "not hospitable for survivial". He said that much of the material would have been deposited in the "meandering, low energy area of the stream where salmon spawn" and in the month of November would have been harmful to eggs and alevins and might prevent the emergence of fry from the gravel later on.

Referring to his own samples, Nos. 1a to 5a in ex. 15 (exs. Nos. 10 to 14) taken March 28, 1973, from approximately the same places as Mr. Fielden's samples, Mr. Langer pointed out that lesser amounts of fines and silts were to be expected in March than in November because of flushing, and pointed out that this was confirmed by reduced amounts of both fines and silt in samples 3a and 5a respectively, taken from Palmerston Creek above the entry of Tributary A and from Tributary A above the gravel pit.

For the defence, Mr. Terrence Edward Howard, a water quality research specialist with the B. C. Research Council, gave expert evidence. He felt that he would have conducted the investigation somewhat differently and was of the opinion that much of the materials analyzed as less than .074 mm. in diameter in ex. 15 would not have settled out in 24 hours (67%). He qualified this by saying that much depends on "the type, concentration and duration of the exposure". He was of the opinion that fines and silt are capable of harming fish. He also was of the opinion that salmon could not pass the log jam obstruction upstream of the bridge that was present at the time of his visit March 26, 1973. In cross-examination, Mr. Howard agreed that it was not impossible for materials less than .074 mm. in diameter to settle out, especially if flowing along the stream bottom. He readily accepted certain findings to this effect referred to in International Pacific Salmon Fisheries Commission Bulletin No. XVIII (1965) dealing with the effects of transported stream sediments. He again agreed that silt and temperature in streams are major factors affecting the production of fish.

From the evidence of both prosecution and defence experts, I am able to conclude, with complete safety, that the material I have found to have been deposited in Tributary A and Palmerston Creek by the gravel-washing operations of November, 1972, is deleterious within the meaning of the Act and potentially extremely harmful to fish and other aquatic life. I find further that the nature of the material is such that much of it would be readily transported downstream and in the course of

such transportation significant quantities of it, especially of that part entrained near the stream bottom, would be deposited on the productive gravel and drawn into it. These effects, having regard to the quantity of the material, the evidence of displacement afforded by the samples of November, 1972, and March, 1973, and the visual observations of Mr. Skogan and Mr. Fielden in late November, 1972, extended a great distance downstream, certainly into water frequented by fish.

I have considered s. 33(8) [enacted R.S.C. 1970, c. 17 (1st Supp.), s. 3(2)] of the *Fisheries Act*, R.S.C. 1970, c. F-14, which sets up certain defenses for an employee. I find from the evidence that the employees on the gravel pit job had not been adequately instructed by the company. The strongest claim put forward is that they had received "general instructions"; the evidence of the employees all too clearly shows that this was only vaguely and generally understood. There was no attempt whatsoever in advance of the gravel washing to ascertain its possible consequences, and there was no attempt whatsoever to check for such consequences at any time during the operation. There was no check or supervision of the operation by senior officials during the four days it continued. I find that this falls far short of the "exercise of all due diligence" referred to in s. 33(8). I would emphasize, as I have before, that "due diligence", in my opinion, requires successful communication of adequate information and instructions from the company right down to the man on the job.

I find the defendant company: Guilty.

Accused convicted.

BRITISH COLUMBIA COUNTY COURT

Cashman Co. Ct. J.

Pacific Logging Company Limited v. The Queen ex rel. Gosling

Fisheries — Putting debris in water frequented by fish — Logging done by independent contractor for owner — Onus of proof of offence under The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3).

Appellant was charged with knowingly and unlawfully putting or permitting to be put debris into water frequented by fish, contrary to s. 33(3) of the Fisheries Act. It had, by written agreement, contracted with the M. company, a wholly-owned subsidiary of appellant, to log certain lands of which it was the owner; the M. company had subcontracted the work to another, by whom the alleged offence had been committed.

Held, the Crown had failed to establish that the alleged offence was committed by an agent or employee of appellant; the fact that the M. company was wholly owned by appellant and the fact that appellant's logging supervisor gave directions as to how the work was to be done did not, without more, give rise to the relationship of employer and employee, or principal and agent: *McAllister v. Bell Lumber and Pole Co.*, 45 B.C.R. 30, [1931] 3 W.W.R. 767, [1932] 1 D.L.R. 803; *Performing Right Society v. Mitchell & Booker (Palais de Danse) Ltd.*, [1924] 1 K.B. 762; *St. John v. Donald*, [1926] S.C.R. 371, [1926] 2 D.L.R. 185 applied.

[Note up with 11 C.E.D. (West. 2nd) *Fisheries*, s. 12.]

R. B. Hutchison, for appellant.

A. I. MacDonald, for the Crown.

3rd May 1974. CASHMAN Co. Ct. J.:—This is an appeal from a conviction made 27th June 1973 by the learned Provincial Judge under s. 33(3) of the Fisheries Act, R.S.C. 1970, c. F-14, and comes before this Court by way of trial de novo pursuant to s. 68 of that Act.

The facts are that the appellant company owns certain lands situate on Little Shaw Creek located approximately 20 miles west of Lake Cowichan. By an agreement made 3rd January 1972 the appellant company agreed with T. W. MacKenzie Logging Ltd. (hereinafter referred to as "MacKenzie Logging") that it would log the timber situate on that property. MacKenzie Logging in turn subcontracted the falling of the timber to Lens Logging Ltd. MacKenzie Logging is a wholly-owned subsidiary of the appellant company and Lens Logging Ltd. is owned 50 per cent by MacKenzie Logging and 50 per cent by private individuals. Between 1st March 1973 and 1st May 1973 Gordon Gosling, a conservation officer employed by the Fish and Wildlife Branch of the provincial government, viewed the site of the logging operation and took a number of photographs, 17 of which were entered as exhibits. These photographs clearly show that logs and debris were in fact put into the creek.

There is no evidence as to who felled the logs or allowed the debris to enter the creek, athough one may reasonably draw the inference that this must have been done by employees of Lens Logging Ltd.

The place where the logs were felled and debris entered Little Shaw Creek is above a waterfall and it is clear that no fish frequent that part of the stream.

After the charges were laid, Mr. Gosling and a biologist from the Fisheries Department visited the stream below the falls and found trout and coho fry present at that point. A photograph entered as Ex. 2Q shows the lower reaches of

the stream and appears to show a normal creek and indeed that was the biologist's evidence. The evidence of the biologist and Mr. Gosling indicates to me that whatever debris entered the stream above the falls had little or no effect on the fish or fry found below the falls.

Mr. Patrick Solmie, the logging supervisor for the appellant company, was called by the Crown and he testified that he was in charge of the Little Shaw Creek area and responsible for telling the operator how to conduct his operations. The agreement of 3rd January 1972 required MacKenzie Logging to observe all laws applicable to this operation and included in para. 6 (see the following proviso):

"6. The Contractor covenants and agrees to observe and carry out: . . .

"c) All orders and regulations of the Government of Canada now or hereafter in force relating in any way to logging, booming or hauling operations herein contemplated".

On 14th February 1973 Mr. Solmie wrote the Fish and Wildlife Branch at Nanaimo and enclosed a copy of the logging plan for 1973 which included the Little Shaw Creek area and inquired as to what would be required in order to provide for the protection of fish and wildlife. No reply was ever received to that letter until 28th May 1973 after the charges had been laid and no reference to the Little Shaw Creek is made in that reply.

The information upon which the conviction was founded reads in part as follows:

"That Pacific Logging Ltd. being engaged in logging during the period March 1, A.D. 1973 and May 1, A.D. 1973 at or near Little Shaw Creek in the Province of British Columbia did knowingly and unlawfully put or permit to be put debris into water frequented by fish or that flows into such water."

After the evidence was concluded, the Crown applied for an amendment to the information as it was evident that the information as originally laid was duplicitous. That amendment was allowed and reasons given for so doing were delivered at that time.

The information before the Court then read, in part, as follows:

"That Pacific Logging Ltd. being engaged in logging during a period March 1, A.D. 1973 and May 1, A.D. 1973 at or

near Little Shaw Creek in the Province of British Columbia, did knowingly and unlawfully permit to be put debris into water that flows into water frequented by fish".

The appellant elected to call no evidence on the charge as originally laid and when given an opportunity to do so on the amended information, again elected to call no evidence.

The charge here is laid under s. 33(3) of the Fisheries Act. By an amendment in 1970 (contained in R.S.C. 1970, c. 17 (1st Supp.), s. 3), s. 33 was amended to include a further subsection relating to proof of the offence and designated as subs. (8).

The subsections applicable to this case therefore are the following subsections:

"(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water . . .

"(8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

This being a federal statute it is within the competence of Parliament to pass legislation penal in nature and where a statute uses the word "knowingly" that word must be interpreted in its ordinary meaning. In this case the Crown must prove knowledge on the part of the appellant. There is no evidence that Mr. Solmie was aware that logs and debris had been allowed to enter Little Shaw Creek or that he was in the vicinity of the Little Shaw Creek logging operation between the periods specified in the information. The Crown asks that I impute such knowledge to the appellant from the mere fact that Mr. Solmie had the power to direct the manner in which the operator would conduct the logging operation.

In my view to draw such an inference I must find that that power is consistent with knowledge of what did occur and inconsistent with any other rational conclusion. On those

bare facts I am not prepared to draw the inference of knowledge the Crown seeks to have me draw.

If subs. (3) stood alone, as it did before the addition of subs. (8), I would have little difficulty in finding that the Crown has failed to prove the guilt of the appellant beyond a reasonable doubt as is incumbent upon the Crown in this as in every other case criminal in nature.

However subs. (8) provides that if the Crown establishes that the offence was committed by an "*employee* or *agent* of the accused" (the italics are mine) then the accused must establish "that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

The appellant contended that neither MacKenzie Logging nor Lens Logging Ltd. comes within either of the categories specified in the statute and submits, firstly, that both of these persons are in any event independent contractors and, secondly, that even if MacKenzie Logging is an agent or employee of the appellant, then the appellant's liability cannot extend to responsibility for agents or employees of MacKenzie Logging, and submits that if Lens Logging Ltd. is an agent or employee of MacKenzie Logging it is not either an agent or employee of the appellant.

There is no evidence as to the precise relationship between MacKenzie Logging and Lens Logging Ltd. The evidence is simply that Lens Logging Ltd. did the falling and that being so that company must be the party that placed the logs and debris in Little Shaw Creek.

The Fisheries Act as amended contains various definitions but I am unable to find in the statute any definition of either "agent" or "employee". The Interpretation Act, R.S.C. 1970, c. I-23, does not define either of these terms.

The agreement made between the appellant and MacKenzie Logging contains the following paragraph:

"26. It is expressly understood and agreed between the parties that the relationship between them herein is that of principal and independent contractor and the employees of the Contractor are not to be deemed to be employees or agents of Pacific in any respect."

It is not seriously contended that MacKenzie Logging was an agent of the appellant and in my view no such relationship arises in the circumstances of this case. The contract

does not grant any authority, expressed or implied, in MacKenzie Logging to act on behalf of the appellant and certainly there is no evidence that the appellant ever ratified anything done by MacKenzie Logging.

We are therefore left with the question of whether MacKenzie Logging can be said to be an "employee" of the appellant. If MacKenzie Logging is not an employee of the appellant then it matters not what relationship existed between MacKenzie Logging and Lens Logging Ltd.

The contract clearly specifies that MacKenzie Logging is not either an agent or an employee of the appellant. However the fact is that the logging supervisor of the appellant says that he was responsible for telling the operator, that is to say, MacKenzie Logging, how to conduct his operation.

The general proposition is that a servant is a person subject to the control of his master as to the manner in which he is to do his work, whereas an independent contractor is one who undertakes to produce a given event and is not under the order or control of the person for whom he does it and may use his discretion in things not specified beforehand: *McAllister v. Bell Lumber and Pole Co.*, 45 B.C.R. 30, [1931] 3 W.W.R. 767, [1932] 1 D.L.R. 802.

In *Performing Right Society v. Mitchell & Booker (Palais de Danse) Ltd.*, [1924] 1 K.B. 762 at 767, McCardie J. had this to say:

" . . . the question whether a man is a servant or an independent contractor is often a mixed question of fact and law. If, however, the relationship rests upon a written document only, the question is primarily one of law. The contract is to be construed in the light of the relevant circumstances."

That passage was cited by Anglin C.J.C. in *St. John v. Donald*, [1926] S.C.R. 371 at 381, [1926] 2 D.L.R. 185. In that case the contract gave wide power to the city to control the acts of the contractor and contained these words [p. 380]: "The contractor shall attend to, and execute, without delay all orders and directions which may from time to time be given by the engineer in connection with the contract".

At p. 381, the learned Chief Justice went on to say this:

"Wide as are the powers of interference and control thus reserved to the city, their mere existence does not *in se* suffice to make the contractor and his workmen in carrying out the work contracted for the servants of the city. It may,

as Sir Frederick Pollock says (Law of Torts, 12th Ed., p. 80-81), sometimes

" 'be a nice question whether a man has let out the whole of a given work to an "independent contractor" or reserved so much power or control as to leave him answerable for what is done.'

"But in the absence of actual interference by the employer or his representative in exercise of the power thus reserved resulting in the injury for which damages are claimed — here there was none — the authorities seem to be reasonably clear that the mere reservation, to quote Smith's Law of Master and Servant, (7th Ed., p. 238).

" 'by contract (of) general rights of watching the progress of works which the contractor has agreed to carry out for him, of deciding as to the quality of the materials and workmanship, of stopping the works or any part thereof at any stage, and of dismissing disobedient or incompetent workmen employed by the contractor will not of necessity render (the employer) liable to third persons for the negligence of the contractor in carrying out the works.' "

Following that he then sets out the passage from *Performing Right Society v. Mitchell & Booker*, supra, quoted above and then goes on to say this:

"He proceeds to discuss the criteria indicated by the authorities for determining whether the relationship of the employed to the employer is that of independent contractor or of servant, and then says that

" 'The final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of the detailed control over the person alleged to be the servant. This circumstance is, of course, only one of several, but it is usually of vital importance.' "

Applying those tests to the circumstances here I am of the opinion that the Crown has failed to establish that what was done here was done by an agent or employee of the appellant and that being so the onus imposed by subs. (8) does not apply in the circumstances of this case.

The fact that MacKenzie Logging is a wholly-owned subsidiary of the appellant does not make that company an employee or agent. The association of these companies may affect their respective liabilities in other areas of the law but that does not alter the basic proposition that each corporation is a separate legal entity.

In any event I might say that had I found that subs. (8) applied here I would have been satisfied that the appellant has established, in the sense that that term has been judicially defined in *Regina v. Appleby*, [1972] S.C.R. 303, [1971] 4 W.W.R. 601, 16 C.R.N.S. 35, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, as part of the Crown case that it did not consent to the commission of the offence and did exercise due diligence to prevent its occurrence. The agreement and the letter of 14th February 1973 clearly indicate that to be the case.

The appellant served notice under The Constitutional Questions Determination Act, R.S.B.C. 1960, c. 72, upon the Attorney General for British Columbia and the Attorney General for Canada. No one appeared on behalf of the Attorney General for Canada and Crown counsel stated that he had received no instructions from the Attorney General for British Columbia on this aspect of the matter. Mr. Hutchison argued that s. 33(3) does not regulate fishing but rather attempts to regulate logging and land clearing being matters of property and civil rights which can only be legislated upon by the province.

As I have found that the Crown has failed to prove the offence charged, as amended in this Court, I refrain from dealing with the constitutional question.

The appeal is allowed and any fines paid shall be returned to the appellant.

REGINA v. JACK CEWE LTD.

County Court of Westminster, British Columbia, Grimmett, Co.Ct.J. January 30, 1975.

Environmental law — Water pollution — Permitting deposit of sediment in river — Offence of strict liability — Accused attempting to control deposit of sediment — Abnormal amount of rainfall rendering accused's precautions useless — Defence of Act of God available — Accused should be acquitted — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

[*R. v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1965-69] 3 N.S.R. 1; *R. v. McTaggart* (1972), 6 C.C.C. (2d) 258, [1972] 3 W.W.R. 30, refd to]

Environmental law — Water pollution — Permitting deposit of sediment in river — Evidence that because of abnormal conditions on date charged sediment would have entered the river regardless of accused's operation — Accused acquitted — Doubt whether accused "permitted" deposit — Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

APPEAL by the accused by way of trial *de novo* from its conviction for unlawfully depositing sediment in a river contrary to s. 33(2) of the *Fisheries Act* (Can.).

D. D. G. Milne, for accused, appellant.
D. R. Kier, for the Crown, respondent.

GRIMMETT, Co.Ct.J.:—This is an appeal from the conviction and sentence by the Provincial Court of the appellant on the charge that "JACK CEWE LTD., on or about the 21st day of December, A.D. 1972, did unlawfully permit the deposit of a deleterious substance, sediment, in water frequented by fish, to wit: the Coquitlam River, in the Municipality of Coquitlam, in the Province of British Columbia". The sentence imposed was a fine of $3,500.

The appellant, a body corporate, carries on, *inter alia*, the operation of a gravel pit adjacent to the Coquitlam River in the Municipality of Coquitlam and has done so since 1952. The operation includes the digging, removal and sale of gravel from the pit. The appellant's property has an area of 360 acres of which 25 to 30 acres have been developed in the pit operation.

Mr. Langer, a qualified expert in biology and fish life, testified that on December 21, 1972, he found large deposits of sediment in the Coquitlam River, more particularly at the points marked .13 to .19 shown on the sketch (ex. 2).

It was admitted that the Coquitlam River is a river frequented by fish and I am satisfied by the evidence of Mr. Langer that the sediment found in the river on the day in question would be deleterious to fish. The only question therefore remaining to be determined is whether the appellant permitted the deposit of the sediment in the river.

In order to determine this question it is necessary, in my opinion, to discuss the nature of the property, the actions of the appellant over the years and the weather during the period in question.

As mentioned above, the gravel pit is adjacent to the Coquitlam River and there is no doubt there have been problems in the past — in particular from slide areas which are indicated by red arrows on the sketch (ex. 2). The appellant realized the problem existed and in fact hired a civil engineer, Mr. Cunliff, in 1967 to investigate and solve the problem of the loss of prime material to the Coquitlam River. Mr. Cunliff reported in 1968. Later, in co-operation with the Municipality of Coquitlam, settling basins were constructed in an effort to solve the problem. Apparently, these settling ponds were not effective and washed out during the period in question. Mr. Cunliff testified that the average rainfall for this area for the month of December is 20.49 inches (see ex. 26). A check of the daily precipitation in December for Coquitlam Lake (considered to be the same as the area in question) covering a 10-year-period, indicates a high total for the month to be 45.02 inches and a low of 14.83 inches and for the month of December, 1972, 33.30 inches. It is also interesting to note that the rainfall during the six days preceding December 21st (the day in question) was 16.71 inches, a little over the half of the total for the whole month of December and was followed by 1.55 inches on December 21st. According to Mr. Cunliff this amount of precipitation would carry silt, sediment and even gravel. Mr. Cunliff further testified, and it must be emphasized he is an engineer with considerable experience, that it would be very difficult to say that the removal of gravel by the appellant increased the amount of silt going into the river.

Mr. Hazelaar, an employee of the Municipality of Coquitlam, testified that he has inspected the gravel pits in the municipality since 1970, that he conducted tests on 14 gravel pits, that the municipality is trying to minimize the amount of silt entering the Coquitlam River, that so far no solution has been found, that with streams flowing into the Coquitlam River through settling ponds the sediment will not settle if there is a heavy flow, that the appellant has tried to find a solution to the problem and on December 21, 1972, could not have done anything more and that if it ceased operation it would not improve the situation. He did, however, testify

that the appellant's operation increases the possibility of silt getting into the river.

He also testified that if no gravel pit had ever been there, there would be no problem on two streams but it would be impossible to control two other streams. He further testified that the situation was controlled in 1973, but, unfortunately, we do not have any evidence of the amount of precipitation for 1973, which, of course, would have a bearing on the effectiveness of the measures taken in that year.

Mr. Cewe, president of the appellant company, testified that settling ponds had been built with their engineer's advice and under the supervision of the Municipality of Coquitlam. He also testified that on December 21, 1972, and prior to that, the operation of the gravel pit had never contributed to the sediment in the river. He further testified that he and the appellant had entered into an agreement with the Municipality of Coquitlam which will result in this area becoming a beautiful park — and that the appellant is contributing to a trust fund to be used in the development of the park. The contribution is 3.5¢ per ton on all material removed from the property.

There is no doubt that in this charge under s. 33(2) [am. R.S.C. 1970, c. 17 (1st Supp.), s. 3(1)] of the *Fisheries Act*, R.S.C. 1970, c. F-14, there is an absolute prohibition and *mens rea* may not be proven: see *R. v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, [1971] S.C.R. 5, and *R. v. McTaggart* (1972), 6 C.C.C. (2d) 258, [1972] 3 W.W.R. 30. This, of course, would not be the case if an Act of God were involved. It has been argued by the Crown that the amount of rainfall during the period could reasonably have been expected and would therefore not be an Act of God but I am not satisfied as to this proposition. The amount of rainfall which fell in the six-day period preceding the date of the alleged offence would, in my opinion, amount to an Act of God. In addition, the evidence of Mr. Cunliff and Mr. Cewe to the effect that this silt or sediment would have entered the river regardless of the operation of the appellant creates a doubt in my mind that the appellant "permitted" the deposit of the sediment in the river. I believe this to be a reasonable doubt and the appellant shall have the benefit of it.

The charge is dismissed. The appeal is allowed and there will be an order for the return of the fine.

Appeal allowed.

PART II

UNREPORTED JUDGEMENTS UNDER SECTION 33 OF THE FISHERIES ACT

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ISSUES INVOLVED IN UNREPORTED JUDGMENTS

UNDER SECTION 33 OF THE FISHERIES ACT

	Defendant	Offence	Facts	Relevant Sections	Issues Argued
1	Reichhold Chemicals	33(2)	phenols		defective evidence, waters frequented by fish, acquital
2	Kamloops Pulp and Paper	33(2)	silting/stream	33(6) 33(8)	mud slide from road construction by contractor (agent), $5000 fine
3	Weyerhaeuser	33(3)	mill debris		debris into water, knowingly essential ingredient in information under sub-section 33(3), acquital
4	Cardinal River Coals	33(2)	fine coal wastes	33(11)	deleterious without toxicity, damage to stream, $2000
5	West Coast Reduction	33(2)	fats, oil, emulsion	33(7)	evidence gathering, toxicity injunction sought, $2000
6	Rayonier	33(2)	pulp mill works		abuse of process of the court, admission of elements of offence, $3000
7/11	Imperial Oil, B.C. Hydro	33(2)	oil spill	33(8)	due diligence established on appeal, municipal sewer, party to offence under Section 21 of Criminal Code, acquital
8	Standard Oil	33(2)	oil spill	33(8)	agent, scope of authority, Section 11, Interpretation Act, guilty
9	Capt. J. Tindale	33(2)	dispersants		toxicity of oil dispersant
10/12	Canada Tungsten	33(2)	oil spill	33(8)	period of time in which due diligence was exercised, strict liability
13	B.C. Forest Products	33(2)	dispersant	33(11)	toxicity testing, expert witnesses, evidence, meaning of deleterious substance, acquital

ISSUES INVOLVED IN UNREPORTED JUDGMENTS UNDER SECTION 33 OF THE FISHERIES ACT

	Defendant	Offence	Facts	Relevant Sections	Issues Argued
14.	Busat	33(3)	debris of bridge		meaning of debris
15.	MacMillan (#1) Bloedel	33(2)	pulp mill	33(1)	deleterious substance
16.	MacMillan (#2) Bloedel	33(3)	slash and logging		water frequented by fish, tirbutary

BRITISH COLUMBIA PROVINCIAL COURT

Shaw J.

Regina v. Reichold Chemicals (Canada) Limited

Environmental law -- Water pollution -- Chemical spill -- Deposit of a deleterious substance in water frequented by fish -- Failure by Crown to establish chemical characteristics of substance deposited -- Deleterious nature not proven -- Charge dismissed -- Fisheries Act, R.S.C. 1952, c. 119, s. 33(2).

The accused was charged that it did unlawfully and knowingly permit a chemical substance, namely water-soluble, hydroxylated aromatic compounds characteristics of phenol-like materials to pass from its plant and into a nearby creek that flowed into Burrard Inlet. The charge was laid after a fish kill occurred in the inlet near the point of entry of the creek.

Held, the charge was dismissed. The evidence failed to prove that the substance deposited was still deleterious upon reaching the fish-bearing waters of Burrard Inlet. Moreover, the results of analysis introduced by the Crown failed to establish the chemical characteristics of the substance deposited with the particularity necessary to show that it was deleterious.

November 13, 1969.

REGINA	)	REASONS FOR JUDGMENT
	)	
VS	)	OF JUDGE OF THE
	)	
REICHHOLD CHEMICALS (CANADA) LIMITED	)	PROVINCIAL COURT OF
	)	
	)	BRITISH COLUMBIA
	)	
		James K. SHAW

HOLDEN at the City of Port Moody, British Columbia the 13th day of November, A.D. 1969.

REICHHOLD CHEMICALS (CANADA) LIMITED is charged that between May 15th 1969 and May 31st 1969, at or near the City of Port Moody, Province of British Columbia, it did unlawfully and knowingly permit a chemical substance, to wit - water soluable, hydroxylated aromatic compounds characteristic of phenol-like materials, to pass from the Reichhold Chemicals (Canada) Limited plant, situate in the City of Port Moody, Province of British Columbia, into a creek, locally called Schoolhouse Creek that flows into Burrard Inlet, British Columbia, a water frequented by fish. This charge is laid under Section 33(2) of the Fisheries Act. Reichhold Chemicals (Canada) Limited says, through its counsel, that it is a good corporate citizen and that it is very conscious of any pollution problem it may create and that it would not knowingly permit any such situation to arise. In the light of the evidence of this case, this submission is just sanctimonious chip-chap in so far as the present situation is concerned. The evidence is that on May 16th 1969, officials of the Department of Fisheries told a Mr. MacDonald, who apparently is an engineer at the Reichhold Chemical plant in Port Moody, that there had been a fish kill. He was shown the dead fish and samples and he said that he would look into the matter. Clearly nothing was done by the Company, for on May 28th 1969 the same situation prevailed at the leaking pump. All the evidence shown and available to Mr. MacDonald, and presumably his Company, would have indicated, at least on the surface, that there could well have been a connection between the leaking pump and the fish kill. It is pure nonsense for the Company to claim that it is a good corporate citizen in the face of this failure to rectify the situation. Significantly Mr. MacDonald was not called to give evidence and I can only infer from this that either he or his Company failed to give the situation the prompt attention it deserved.

The relevant portion of Section 33(2) of the Fisheries Act is as follows:- "No persons shall knowingly permit to pass chemical substances or any other deleterious substances or thing in any water frequented by fish or that flows into such water". I think the phrase "or any other deleterious substance" as used in the Section applies to the matters that preceded it, and in particular applies to chemical substances. In other words, the chemical substances which are alleged to have been passed into waters frequented by fish, those chemical substances must, in my view, be deleterious substances and not inert or non-deleterious substances. There is some

ambiguity in the Information, for it alleges that Reichhold Chemicals (Canada) Limited permitted a chemical substance - and particulars of that substance are given - to pass from the plant into a creek locally called Schoolhouse Creek that flows into Burrard Inlet, British Columbia, a water frequented by fish. This last phrase, a water frequented by fish, is of concern to me. Does this phrase apply to the waters of Schoolhouse Creek or does it apply to the waters of Burrard Inlet? I think that any ambiguity there may be in the Information must be resolved in favour of the accused; and in my view, with that principle in mind, the waters frequented by fish are the waters of Burrard Inlet. In any event, there was no evidence to show that Schoolhouse Creek was a water frequented by fish, although there is considerable evidence to show that the Port Moody Arm of Burrard Inlet is a water frequented by fish. Has the Crown established beyond a reasonable doubt that the "water soluable, hydroxylated aeromatic compounds characteristic of phenol-like materials" was a deleterious substance at the time it reached the mouth of Schoolhouse Creek and entered the Port Moody Arm of Burrard Inlet? Clearly there were dead fish at the mouth and this creates a strong suspicion, when one follows the chain back to the leaking pump, that the substance leaking from that pump caused the fish kill. Of the samples taken on May 22nd 1969, the sample taken in Schoolhouse

Creek upstream of the Reichhold Plant, the sample taken from the tributary of Schoolhouse Creek, and the sample taken downstream of the Reichhold Plant at about the Railway Bridge, all those samples gave a reading of .34 parts per million. At the same time the highest reading in Schoolhouse Creek itself was 340 parts per million and this was about one foot below the upwelling. As the readings upstream and downstream from the plant were the same, I can only infer that the effluent from the plant did not contribute to the conditions already prevailing both upstream and a reasonable distance downstream and on to the mouth of the creek.

The testing of the samples was done by Mr. Graham by way of a spectro-photometric system. This test disclosed the pure phenol, phenols and phenolic resins in solution in the samples. The test could not distinguish between pure phenol and phenolic resins, and it is clear from the evidence that certain phanolic compounds are far less toxic or deleterious than others. Unfortunately the distinction between the pure phenol and the phenolic resins cannot be distinguished by means of this test. This type of testing for the purpose of a criminal prosecution was unsatisfactory, and inconclusive in its results. To my mind the best test was that attempted by the Department of Fisheries, but which was scrubbed as distilled water was used. If I understand it correctly, this

test placed fish in known quantities of phenolic solutions under controlled conditions from which clear results could be obtained. I think that this type of test should have been done again, for to my mind it was the only real way of showing whether or not the effluent from the property of Reichhold Chemicals (Canada) Limited, which when added to the natural phenols already in the creek and in the Port Moody Arm, was deleterious to fish by the time it reached the mouth of Schoolhouse Creek. By reason of the foregoing I have a very real doubt that the chemical which Reichhold Chemicals did in fact pass into Schoolhouse Creek, and which was then dissipated in Port Moody Arm, was deleterious, this doubt I must by law exercise in favour of the accused.

Accordingly the case is dismissed.

James K. SHAW

Judge of the Provincial Court
of British Columbia

Port Moody, British Columbia

BRITISH COLUMBIA PROVINCIAL COURT

Van Male J.

Regina v. Kamloops Pulp and Paper Company Limited

Environmental law -- Water pollution -- Deposit of deleterious substance in water frequented by fish -- Construction of logging road under direction of accused's subsidiary resulting in deposit of mud and silt into stream -- Material deposited deleterious -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8), 33(11).

While building a logging road for a subsidiary company of the accused, an independent contractor deposited mud and silt into a ravine from which it was eroded and carried through a tributary into a creek where salmon spawned. The accused was charged with an offence under s. 33(2) of the Fisheries Act.

Held, the accused was found guilty. Fish were present in the creek at the material time and expert testimony proved the deleterious nature of the material deposited. Moreover, there was a sufficient relationship established between the accused and its subsidiary as to make the accused liable for the acts of the independent contractor.

P. Jensen, for the Crown.
A. Berna, for the accused.

June 17, 1971.

C A N A D A

PROVINCE OF BRITISH COLUMBIA

COUNTY OF YALE

IN THE MATTER OF

REGINA VS

KAMLOOPS PULP AND PAPER COMPANY LTD.

BEFORE HIS HONOUR JUDGE S. VAN MALE — KAMLOOPS, BRITISH COLUMBIA — JUNE 17, 1971

O R A L J U D G M E N T

Mr. P. Jensen - appearing on behalf of the Crown.

Mr. A. Berna - appearing on behalf of the Defendant.

THE COURT: This matter came on before me here in Kamloops on April the 7th and continued through April the 8th of this year.

The essential facts may be briefly stated. Some time in mid-October of 1970 Finn Creek, a tributary to the North Thompson River, was noted to be carrying an unduly large amount of mud and silt. The fact that the lower region of Finn Creek provides a spawning ground for both Chinook and Coho salmon was not disputed at trial.

An examination of the upper area of Finn Creek revealed a quantity of dirt or clay fill resulting from the construction of a logging road and as a result water entering or mixing with the fill slipped or ran into a tributary of Finn Creek. The dirt was carried by Finn Creek across the spawning grounds and finally deposited in the North Thompson River. The question before this Court is simply whether or not the defendant is guilty of an offence under the Fisheries Act, the amended Section Three One which reads as follows:

"Subsection Two of Section Thirty-three of the (2) of the said Act is repealed and the following substituted therefor:

> Number (2), 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

And deleterious substance is defined in Section Eleven (A):

> "Number (1): 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 deleterious to fish or to the use by man of fish that frequent that water or --"

It goes on to Section (2) which we are not concerned with.

The Crown introduced through counsel exhibits "one", "two" and "three", being a letter from the Registrar of Companies stating that the company was a good company in good standing at the time the incident took place in the fall of 1970 and a Certificate of Incorporation and a certificate that the company

was presently in good standing. Written application by the Defendant was made to the District Forester on August the 27th of 1970 to cut a right of way and construct roads in accordance with a map on which the proposed road was shown. Exhibit number "five" came in as a letter from the District Forester dated September the 3rd, 1970 and stated in part:

"Road construction can continue at your own risk in accordance with construction specifications indicated in your aforementioned letter."

And that, of course, is the previously mentioned letter of application with map attached of August the 27th, 1970.

The evidence established that the defendant or more correctly K. P. Wood Products Ltd. proceeded to have the road constructed and I accept the evidence that the road was not located in accordance with the location as proposed by the defendant and accepted by the Forester.

The Fisheries Officer Aurell, who worked in the North Thompson area and particularly in the area of Finn Creek, some nine miles above Avola, had made several inspections of the Finn Creek spawning beds and had made fish counts prior to the incident in question. On October the 19th, 1970 he noticed mud and silt in or on the spawning beds and he travelled up the creek some ten miles where he still found a heavy concentration of mud and silt in the water. He had to turn back because of road conditions and the following day, October the 20th, he returned to the spawning grounds and sampled, dug in the spawning grounds where he found alvines that were still alive. He then contacted one Mr. Jacob Volkers regarding the change of the location in the road and the mud and silt in the water. The following day Aurell and Volkers, in the company of a forestry representative, visited the site of the mud slide on the tributary to Finn Creek. Aurell took a series of pictures which came in as exhibits "eight" to "eighteen", showing the clay or mud fill and the progression of the material down the ravine to Finn Creek.

He gave evidence of the water being heavily silted and muddy and his evidence was that the water of Finn Creek was clear above the place where the tributary carrying the mud and silt entered.

The Crown introduced evidence as to the life cycle of salmon through the expert witness Boyd and the effect of transferred sediment on eggs and alvines in gravel spawning beds through one Cooper. Neither expert had visited the Finn Creek area either at the time of the incident or afterwards and their evidence was accepted on the general aspect as indeed, I suppose, it was expected to be. The Court accepted the evidence that transported silt or mud is detrimental to salmon eggs or alvine.

The Defendant called two experts. One Terrance Howard, a biologist with B. C. Research who gave evidence of going to Finn Creek some five months later and digging down through some eight feet of snow and obtaining a sample of the soil which purportedly found its way into Finn Creek. He gave further evidence which was not disputed as to settling speeds and oxygen content. And Mr. Herman, another Fisheries Biologist employed by Weyerhauser out of Washington accompanied Mr. Howard to the area of Finn Creek and gave evidence as to the state of the spawning grounds as he saw them then in March of 1971. And the evidence of these two experts was notseriously questioned and the Crown accepts their evidence as it accepts the evidence of the Crown expert witnesses on a very wide and general basis.

The defendant company asks this Court to consider the change of the location of the road as a change made in the best interests of the environment or at least, as an alternative route less likely to cause mud and silt to enter the waterways. This Court has not concerned itself particularly in, and does not concern itself with the change of location and accepts the evidence of the defendant that Amstutz and Kriese and, indeed,

Spears Construction Limited followed normal road building procedures and they did not expect the soil to be washed or carried to the creek.

The fact remains, however, and this Court finds that the soil was transported to the North Thompson River and the spawning grounds on the lower Section of Finn Creek.

This Court finds further on the evidence of the experts that the deposit of mud or silt on the beds is detrimental to the eggs, to the alvine, or the embryo of fish which live in the gravel beds. The degree of damage cannot be established by the evidence before this Court, but I have no hesitation in finding that the substance deposited on the beds did have a damaging effect.

As to the definition of what is a deleterious substance I rely not on the cases which were cited, but on the plain reading of Section Eleven (A) (1).

As to the relationship of Kamloops Pulp and Paper and K.P. Wood Products I find that the Crown has established a relationship between the two companies that makes the defendant responsible

for the road and its construction. Indeed the original application accepted at their own risk was on Kamloops Pulp and Paper Limited stationery and was signed by Volkers who was employed and paid by Kamloops, K.P. Wood Products Company Ltd. and I find that on the total of the evidence that it is established that the defendant had knowledge and consented to the building of the road in spite of the fact that Spears Construction Company Ltd. was paid by K. P. Wood Products Limited.

On the total of the evidence before the Court I unhesitatingly accept the evidence of Aurell who was on the scene and who made notes and who took pictures and on this evidence, coupled with the opinions of the experts and I include all of the experts, the four of them, that silt is damaging to the life cycle of salmon and I find that the defendant is guilty as charged.

Mr. Berna raised an argument, re the Martin case, but I am of the opinion that that has been resolved by an amendment to the Interpretation Act and I need not deal with it at this time.

We move on next to the area of the fine and I wonder if either counsel has a submission to make on a fine?

MR. BERNA: Before we get to the fine, Your Honour, did you direct your mind to possibly, possibly you did, to Thirty-three (8)?

THE COURT: Thirty-three (8) questions a prosecution under an offence under Section thirty-three, is that the section?

MR. BERNA: Yes.

THE COURT: I did direct my mind to it. It caused me some concern.

MR. BERNA: You do not wish to make any comments on it?

THE COURT: I think I have covered in what I have said about the relationship between the two companies and the construction company.

MR. JENSEN: Your Honour, the position of the Crown in regard to sentence of this matter is simply to refer you to the new amended Section Thirty-three, Subsection Five which provides that a violation of Section makes the accused liable to a fine not exceeding five thousand dollars for each offence. I would then refer you to subsection 6 which says that where an offence has been committed under Subsection 5 and

it is committed on more than one day and it is continued for more than one day it shall be deemed to be a separate offence for each day that the offence is committed or continued. And I would submit that the evidence before you is clear that the offence was committed at the very least on the 19th, 20th and 21st days of October and I would therefore ask that you consider all of the circumstances of the case and that a substantial fine be levied for each of those dates.

MR. BERNA: Your Honour, on the evidence of Amstutz and the other Crown witness, the other person who worked with Amstutz it was very clear that this dirt was deposited in this gulley on only one day. Now, the effects of it may have, the signs may have resulted for a period beyond one day, but it was very clear that they only did this on one particular day and what I would suggest to you is that subsection six is committed on more than one day. It wasn't. The dirt was pushed into this heretofor dry gulley on one particular day. Now, "or is continued" and I would suggest to you that this means that there is no break, but there is a continuation over a period and this would be, for example, if effluent were being discharged and it were just continuous, if it were for Monday and it kept right on Tuesday and so on, but in this particular case the dirt was pushed in on one particular day and that was from the witnesses called by the Crown.

Secondly I would just add that I think it was reasonably clear that the people who were hired to do this work were not novices, were experienced logging road builders and the actual deposit of this dirt into that gulley was, of course, by these people and I am saying that the defendant took all reasonable precautions to do a good job.

I accept that, indeed, the defendant appears to have hired competent help and seemed to be co-operative with both the Forestry and the Fisheries over any problems that arose in the area and I think that should be taken into consideration. I might point out in reply to Mr. Jensen's suggestion that it continued for a number of days, there really is no, the information just charges two days and that is all that I am prepared to deal with here. In view of the fact that the defendant company did appear to co-operate and assist when they could, the Forestry and the Fisheries, and that they hired competent people, I am going to divide the fine in half and I am going to fine them a total of five thousand dollars.

It will be twenty-five hundred dollars for day one and twenty-five hundred dollars for day two.

(Court concluded.)

Certified:

BRITISH COLUMBIA PROVINCIAL COURT

D.M. MacDonald Prov. Ct. J.

Regina v. Weyerhaueser Limited

Information -- Sufficiency -- Word "knowingly" omitted from Information -- Mental element essential to the offence -- Information a nullity -- Charge dismissed -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3).

The accused was charged that it "did unlawfully permit debris to be put into water frequented by fish" contrary to s. 33(3) of the Fisheries Act. The subsection in question allowed charges of putting debris into water frequented by fish or knowingly permitting debris to be put into such water.

Held, the information was a nullity and the charge was dismissed. The word "unlawfully" could not replace the word "knowingly" when such a deposit was charged, and therefore the omission of an essential element from the information made it invalid.

R. v. Rozonowski (1926),45 C.C.C. 193; *R. v. Brooks* (1950), 100 C.C.C. 164; *R. v. Solowoniuk* (1960), 129 C.C.C. 272; *R. v. Rese*, [1968] 1 C.C.C. 363; *Brodie and Barret v. The King*, 1936 S.C.R. 188; refd to.

P. Jensen, for the Crown.
A. Berna, for the accused.

March 13, 1972.

C A N A D A
PROVINCE OF BRITISH COLUMBIA
COUNTY OF YALE

IN THE MATTER OF
REGINA
VS.
WEYERHAEUSER LIMITED

BEFORE HIS HONOUR)
JUDGE D. M. MACDONALD) KAMLOOPS, BRITISH COLUMBIA
MARCH 13, 1972

-9-

J U D G M E N T

Mr. P. Jensen - appearing on behalf of the Crown.

Mr. A. Berna - appearing on behalf of the Accused.

THE COURT: May I see the information and the section of the Act as well.

MR. JENSEN: That is the information, Your Honour.

THE COURT: Thank you.

MR. JENSEN: And here is a consolidation of the act.

THE COURT: Thank you.

The accusedj Weyerhaeuser Canada Limited, formerly known as Kamloops Pulp and Paper Limited and K.P. Wood Products Limited, have been charged that on or about the 20th of September, A. D. 1971, at or near Finn Creek in the County of Yale, Province of British Columbia did unlawfully permit debris to be put into water frequented by fish, contrary to subsection 3, Section 33 of the Fisheries Act as amended.

The charge has been laid under Section 33, Subsection (3) of the Fisheries Act which reads as follows:

> "No person engaging in logging, lumbering, land clearing or other operations shall put or knowingly permit to be put any slash, stumps or other debris into any water frequented by fish or that flows into such water or on the ice, over such water or at a place from which it is likely to be carried

"into either such water."

It is clear from the wording of the Section that the Crown has two alternatives under which they may proceed. They may charge a person that they did put a debris into the water frequented by fish or they may charge a person that they did knowingly permit to be put debris into water frequented by fish.

In this regard I have referred myself to a decision of the British Columbia Supreme Court, Rex versus Rozonowski, reported in 45 Criminal Cases at page one nine seven.

In this particular case the accused was charged that he did unlawfully permit his premises to be used as a gambling house contrary to Section 228 (a) of the Criminal Code as it was at that time. Section 228 of the Criminal Code as it read at that time is as follows:

> "Anyone who has charge or has control of a premises knowingly permits such premises to be used for the purpose of a disorderly house is liable to summary conviction

"to a fine of two hundred dollars."

And Mr. Justice MacDonald ruled that one of the essentials necessary to convict a person under the above offence is that the person charged must have knowingly permitted such premises to be used for the purposes described.

He went on to say that in the conviction there was no mention of this essential element, that is to say, the word "knowingly". The conviction would not be objectionable if it were not for the fact that the word "knowingly" was used in the Statute and thus made an essential part of the offence.

The pertinent words in the Statute as dealt with by the Supreme Court Judge were, "knowingly permitted".

The pertinent words in the Statute with which I must refer myself are the words "knowingly permit". In the case that I have just cited the accused had been charged and convicted of unlawfully permitting these premises to be used in the way that was alleged. These words "unlawfully permitting", are very

similar to the words contained in the charge that is presently before this Court; that is to say the words "unlawfully permit".

In Regina versus Rozonowski the Court ruled that the conviction was defective and it quashed same.

It would follow that this Court is certainly bound by this decision unless there has been some change in the laws since the time that this particular decision was rendered. In that regard I have referred myself to some of the cases that have taken place since.

In Rex versus Brooks reported in one hundred c.c. at page one six two, a decision of the County Court in Ontario, the Judge held that where a Statute required the doing of an act knowingly as a condition of liability the Coruts have uniformly held that an information must allege the guilty knowledge and the omission of the word "knowingly" in the information or indictment is a fundamental defect.

In Regina versus Solowniuk, reported in Volume 129 of the Canadian

Criminal cases at Page 272, a decision of the British Columbia Court of Appeal, the accused was convicted of unlawfully obstructing a police officer in the execution of his duty. Section one hundred and ten (a) of the Criminal Code. The section under which the charge was laid in this particular case, reads as follows:

> "Everyone who resists or wilfully obstructs a police officer in the execution of his duties is guilty of an offence."

And in this particular case the Court held that the conviction would have to be quashed on the grounds that the information omitted or did not include an essential element of the charge, that is to say, it did not charge that the accused wilfully obstructed the police officer as required by the section, creating the offence.

It would seem that the higher Courts ruled that if a statute contains a section that some act be done knowingly or wilfully, the information laid under the section must also allege this, and where

these words are omitted and the word "unlawfully" is used instead the information is defective and any conviction based thereon must be quashed.

Now, in this regard Crown Counsel has submitted a written argument to this Court and in his argument he has pointed out the decision of the Ontario Court of Appeal rendered by Mr. Justice Laskin.

Now, this decision is Regina versus Rose and it is reported in the Canadian Criminal Cases, 1968, Volume (1), page 364. In this particular case the accused was charged and I will not go into the full extent of the charge as it names numerous people, but he was charged that in the months of August and September in 1966 in Toronto he did unlawfully conspire, together with certain people, to commit indictible offences; namely, to wilfully interfere with the lawful enjoyment of private property of a certain person and also to unlawfully damage public property,

and it describes the wilful interference and the unlawful damage in the indictment.

This section under which the accused was charged, Section 372 (1) (a) of the Canadian Criminal Code reads as follows:

> "Everyone commits mischief who wilfully destroys or damages property--"

the word used in the section is "wilfully".

In one portion of the indictment the word "wilfully" was used, in the other portion of the indictment the second element thereof, the word "unlawfully damage" instead of "wilfully damage" was used. This particular Court held, and I quote from the Judgment on Page 365:

> "The statement in the information respecting private property uses the term 'wilfully' which is an essential ingredient of the substantive offences under Section 372. The term is not used in particularizing the conspiratorial object in relation to public property; instead the word 'unlawfully' is used. The question thus is whether this is a sufficient allegation of a criminal conspiracy. (It was not disputed that had the conspiracy alleged an agreement to violate Section 372 (3) and (4), a defect in the subsequent particularization of these offences would not have rendered the information open to successful attack.)
> "The question is important

> "because, in my opinion, there is insufficient evidence to implicate the accused Rose in the conspiracy alleged as to private property, but there is abundant evidence to associate him with a conspiracy respecting public property if such an offence is properly charged."

He does go on to say:

> "The Crown does not contend that 'unlawfully' and 'wilfully' have necessarily a common meaning, and I need not cite cases to show that they do not. What is said is that the allegation of conspiracy -- the agreement being admittedly the gist of the offence-- imports wilfulness in the specification of the offence in relation to public property."

He went on further and in the last paragraph on page 366 he states:

> "Having regard to the charge of conspiracy, I am loath to countenance a lesser standard for charging such an offence than would be required if the object was charged as a substantive offence."

In those words this judge seems to indicate that had the substantive offence been charged, in this particular case that is to say had this person been charged with damaging a public property, then he seems to conclude that the word "wilfully" would have

been required in the charge. He states it quite clearly in this particular sentence and then he seems to go on and say however, because these people here have been charged with conspiracy to commit an offence, that the picture has changed and the same standard does not apply.

And I think essentially because of this, this Court has no alternative but to distinguish this decision. He goes on further and he said:

> "In this connection I must advert to the extended meaning of 'wilfully' prescribed by Section 371 (1) of the Criminal Code in these words:
>
> '371 (1) Everyone who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this part wilfully to have caused the occurrence of the event.'"

Here again there is an additional factor here that the Court relied upon in coming to the conclusion that the word "unlawfully" would suffice, but this is not the situation that I have

before me here today. The leading case on this question of what must be contained in a charge is the decision Brodie and Barret versus the King which is reported in 1936 Supreme Court Reports page 188. This is the decision of the Supreme Court of Canada. This decision was followed by our British Columbia Court of Appeal on two occasions and this decision seems to say that the charge or the statement must contain all the allegations of matter essential to be proved and must be in words sufficient to give the accused notice of the offence with which he is charged.

This is the Supreme Court of Canada and it is followed in the decisions that I stated that I quoted. Nobody can question the fact that the word "knowingly" is an essential portion of this charge. It was left out and the word "unlawfully" was placed in it's stead. The result of this is that these procedings have been a nullity right from the beginning. There has been no

charge before this Court and because of that I am not able to deal today with the merits of this case.

I have no alternative but to dismiss the charge and I do so.

(Court adjourned.)

I hereby certify the foregoing to be a true and accurate record of these proceedings.

WILFRED [illegible] KLINGSAT
OFFICIAL COURT REPORTER

ALBERTA PROVINCIAL COURT

Rolf Prov. Ct. J.

Regina v. Cardinal River Coals Ltd.

Environmental law -- Water pollution -- Deposit of deleterious substance in water frequented by fish -- Fish and other organisms adversely affected by coal fines -- Water in question still frequented by fish despite impact of industrial activity -- Accused convicted -- Fisheries Act, R.S.C. 1952, c. 119, ss. 33(2), 33(11).

Effluent from the accused's coal processing facilities containing high concentrations of suspended coal fines was deposited in a nearby creek and the company was charged with an offence against s. 33(2) of the Fisheries Act.

Held, the company was found guilty. Expert testimony had shown that the adverse effects on the fish and other organisms in the creek were sufficient to identify the material in question as a deleterious substance. Even though industrial activity had rendered the creek marginal habitat, it was still a fishery within the meaning of the statute, as fish, given an opportunity, would frequent the creek in significant numbers.

B.D. Patterson, for the Crown.
M.D. MacDonald, for the accused.

March 20, 1972.

IN PROVINCIAL JUDGES' COURT

JUDICIAL DISTRICT OF EDMONTON

REGINA

VS

CARDINAL RIVER COALS LTD.

JUDGMENT

Edmonton, Alberta
March 20, 1972.

PROCEEDINGS held in Provincial Judges' Court, Municipal Courts Building, Edmonton, Alberta, on the 20th day of March, A.D. 1972, before Provincial Judge

C. H. KOLF, Q.C.,

D.D. PATTERSON, Esq.,.....Appearing for the Crown,
M.D. MACDONALD, Esq.,.....Appearing for the Defence,
C.G. McCrae.....Student Court Reporter.

THE COURT: Gentlemen, this matter is for decision this afternoon respecting Cardinal River, docket #3039, right? It relates to the Luscar Creek and the Cardinal River operation of that period. Are you ready, gentlemen?

MR. MACDONALD: Ready, sir.

MR. PATTERSON: Ready for the decision, sir.

THE COURT: With respect to this charge, gentlemen, I am required to ascertain whether the manner in which Cardinal River Coals Limited operated their Luscar Creek strip mining operation was, in fact, deleterious in itself, or part of a continuing process which produced a deleterious effect upon Luscar Creek as of the 18th of June, 1971.

The charge was laid under the provisions of the Fisheries Act being chapter 119 of the Revised Statutes of Canada, 1952, and amendments

THE COURT: (cont) thereto.

The evidence was adduced by experts and other witnesses for the Crown as to whether "effluent" in the form of coal fines suspended in water was deleterious. The source of the coal fines was in the Luscar Creek storage and loading silo (which is later referred to as the coal silo), as the washings from the coal dust accumulation beneath the said coal silo.

This washing procedure was introduced by the company to prevent explosion and fires from reoccurring. I digress for a moment to indicate that apparently they have had this difficulty earlier and this was the precautions introduced so that it wouldn't happen again. Needless to say, it was a most reasonable precaution and a most important procedure. This "effluent" unfortunately found its way into Luscar Creek. Much evidence was adduced by the Crown as to the effect on the creek environment, particularly as it affected the stream bottom, the habitat of the benthic vertebrates, and generally the bottom fauna which sustains fish spawning, hatching of eggs, growth of the fry, and the well-being and survival of the adult fish.

By virtue of this fairly regular

THE COURT: (cont) injection of effluent from the coal silo, it was also pointed out in evidence that such injections would totally obscure the bottom of Luscar Creek for approximately four and one half miles downstream from the point of input.

It was generally agreed that suspended solids in water have an adverse effect on the stream in the following manner: 1) effect on the fish food, that is, bottom fauna, in that siltation on a long term basis would change or eliminate it, thus effectively eliminating the fish. 2) on the fish food itself in that by the restriction of the sunlight, the process of photosynthesis is slowed down or stopped, thus restricting the production of the food sustaining the fish population. There is no doubt that the expert witnesses for both the Crown and the defendant company, minimizes this, albeit to different degrees, the basic degree of difference being that the expert witness Griffing for the company bases his conclusion on the basic premise that Luscar Creek is no longer a typical mountain stream, but is a marginal creek at best.

3) Spawning is affected and it is to be noted that we are concerned mainly with the rainbow trout, although eastern brook trout are also present. Rocky riffles are the spawning areas

THE COURT: (cont) for these fish, because both horizontal and vertical flow of water over the eggs is essential to provide sufficient oxygen for them to successfully hatch. On this there appears to be no basic disagreement. Witnesses are also agreed that June and July are the critical months for spawning by rainbow trout whereas eastern brook trout spawn in the fall.

4) The fourth area of concern is that the hatching eggs are sticky and siltation would stick to them after they have been laid, therefore suffocating them and preventing their hatching, or at best, limiting their hatching. 5) high turbidity in the water would choke the adult fish or more likely drive them away to try and relocate in another portion of the stream, temporarily or permanently. As pointed out, there appears to be no disagreement as to these basic principles, but only as they apply to this particular stream.

The witness Paul Paetkau explained the short term effect of the effluent being injected into the stream. His conclusion is that the injection of the effluent at this time of year, and we are talking about the 18th of June 1971, because it is the spawning season, (I think he used the term critical period), is deleterious not only because of the siltation, but

THE COURT: (cont) primarily because of the scouring action on the stones of the stream by the effluent in the water. It will upset the balance of the fish environment to the detriment of the fish on a short term basis. The long term effects is serious because the natural recovery of the stream is prevented. The fish numbers become reduced or become non-existent in the stream.

Tests show there are only four year old trout in very limited numbers in the section of Luscar Creek where the effluent from the coal silo was injected into the stream, for a distance of approximately four and one half miles downstream, (my distance of four and a half miles is fairly rough). It is interesting to note that Cardinal River Coals Limited has been operating this strip mining operation on Luscar Creek since 1969. Section 33 subsection 11 of the Fisheries Act states as follows: (i) A "deleterious substance" means any substance that, if added to the 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 deleterious to fish or to the use by man of fish that frequent that water, or (ii) any water that contains a substance in such quantity or concentration, or that has been

THE COURT: (cont) so treated, processed or changed, by heat or other means, etc. and we are basically not concerned with that portion of the Section 33, subsection 11, paragraph 1 is the primary governing section.

In this instance I find as a fact that the water used to flush out the coal silo had suspended therein coal fines and is therefore a deleterious substance as previously noted. It was in sufficient quantities and volume to make Luscar Creek completely black so as to obscure the stream bottom from view for a significant distance downstream, and that it was injected into the stream on the regular occasions of washing out the coal silo. I find it a fact that the coal fines suspended and the effluent thus produced and which found its way into the creek, to be the deleterious within the contemplation of Section 33, subsection 11 of the Fisheries Act, because of siltation but more importantly because of the scouring process of the effluent. In this respect, I accept the description and the conclusions of the witness Paul Pachkau.

The next question is whether or not Luscar Creek is "a stream frequented by fish" -- set out in the Fisheries Act above noted. From

THE COURT: (cont) and one half miles of Luscar Creek which was the subject of a good deal of evidence before this Court, is indeed marginal as described by the witness Griffing. This is due to the manmade changes to Luscar Creek resulting from the many workings starting back as far as 1912. The statute doesn't define the degree of degradation or numbers of fish required to make it a fishery. These therefore becom a question of fact. I find it a fact that the said Luscar Creek is a fishery under the statute and that fish, given an opportunity, would frequent the stream in significant numbers.

I further find that the injection of the effluent was part of the continuing process causing degradation of the stream. In this I am supported by the company's own actions in providing additional and, it is hoped, adequate facilities, such as increasing the capacities of the settling ponds, drilling into the old workings to get rid of the effluent resulting from the preparation of coal for shipment, and produced by washing out the coal dust from beneath the coal silo. I commend the company for their efforts in this and I trust the appropriate communication is maintained with the Department of the Environment in this matter.

This conduct of the company confirms

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The next question is whether or not Luscar Creek is "a stream frequented by fish" as set out in the Fisheries Act above noted. From the evidence adduced I am satisfied that the six

THE COURT: (cont) and one half miles of Luscar Creek which was the subject of a good deal of evidence before this Court, is indeed marginal as described by the witness Griffing. This is due to the manmade changes to Luscar Creek resulting from the many workings starting back as far as 1912. The statute doesn't define the degree of degradation or numbers of fish required to make it a fishery. These therefore become a question of fact. I find it a fact that the said Luscar Creek is a fishery under the statute and that fish, given an opportunity, would frequent the stream in significant numbers.

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This conduct of the company confirms

Judgment -

THE COURT: (cont.) my findings of fact that as reasonable persons considering the measures they introduced prevent fire on the inside of the workings, it should have taken similar reasonable steps to prevent the effluent from the coal silo finding its way into Luscar Creek. They did not do this until after the event of this charge. Up to this point their attitude to the pollution of the stream was such that it amounted to complete indifference.

Having made those findings of fact I can come to no other conclusion, gentlemen, but that the company is guilty as charged, and I so find.

This leaves me with the most difficult of problems, namely, the penalty to be imposed. As stated several times throughout the course of the trial, man's requirements in the name of the public good must be measured against the inevitable destruction or upset of the balance of his environment. Man too is part of the ecology and I have made that statement several times throughout the trial because it appears to me the extreme right wing of ecology, if that is the correct way of stating it, seems to forget we too are part of the environment, and that the environment is also to be enjoyed by man. Unfortunately he is the most destructive force in nature. It is this destructive force

Judgment -

THE COURT: (cont) that must be curbed, but not to the exclusion of his needs or to the well-being of the greater community. When you look to other major corporations such as the Hinton pulp mill and its relation to the Athabasca River, Calgary Power and the evident trouble with Lake Wabamun, the City of Edmonton, in that it has piled salt and chloride laden snow on the ice of the North Saskatchewan River, to cite only a few cases, and what they have been allowed to do to our environment all in the name of the good of society as a whole, then the severe penalty set out in the Fisheries Act is most severe particularly when there appears to be such a grave disparity as to who in fact is prosecuted.

Having come to these conclusions and having unburdened myself with respect to some of my private views, I therefore impose a fine of $2,000 and in default of payment enforcement. I refuse to make any order with respect to any of Cardinal River Coals Limited Luscar Works, for the company in this particular instance has shown an awareness of the problem, and a most commendable willingness to keep pollution to a minimum, while at the same time maintaining its production quotas and continuing as an integral part of the province's contribution to the gross national product. Are there any questions,

Judgment -

THE COURT: (cont) gentlemen?

MR. MACDONALD: No questions.

MR. PATTERSON: No questions at this time, sir.

THE COURT: What about the other case, gentlemen?

MR. PATTERSON: Sir, the plea has been recorded. The case was set for today for setting of a date. My learned friend indicated to me some views he might have on it. He might express them to you, sir.

THE COURT: Mr. MacDonald?

MR. MACDONALD: I would like three weeks to a month to consider my position on the other trial, sir. I have the reporting to do and I would like that consideration of time. I do not think that is unreasonable.

THE COURT: Remanded to 9:30 a.m., 17th of April for fixation or the 24th of April.

MR. MACDONALD: 17th of April is fine, sir.

MR. PATTERSON: I would like to keep this in mind, sir.

MR. MACDONALD: I am sorry to interject, I have a possible date in Calgary before the Court of Appeal so perhaps the 24th would be the more convenient time.

THE COURT: I have no objection to the 24th under the circumstances. As I have indicated I am of

Judgment -

THE COURT: (cont) the view this company has taken commendable steps to prevent a further and continuation of the problem we have listened to.

MR. PATTERSON: The only thing is that these things have gone on for many months. We would like to see something else, perhaps the Court has been very co-operative to date in arranging time for us. My only further suggestion would be that perhaps we could both consult with you as to when Mr. MacDonald's decisions and instructions are confirmed as to arranging a satisfactory date. I realize time is not that available to the Court.

THE COURT: How about the 24th of April, gentlemen. If you come to any conclusions, made any decisions, receive any further instructions from your clients, Mr. MacDonald, then perhaps you can get together and always attend upon me in my chambers.

MR. PATTERSON: I wish to thank the Court for the indulgence shown to both the Crown and myself in this matter.

THE COURT: I found it most interesting. Do you require time to pay?

MR. MACDONALD: 30 days.

THE COURT: Time to pay, 24th of April.

BRITISH COLUMBIA PROVINCIAL COURT

Selbie Prov. Ct. J.

Regina v. West Coast Reduction Ltd.

Environmental law -- Water pollution -- Deposit of fats and oils in water frequented by fish -- Chemical analysis and determination of lethality proving harmful nature of substances -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

The accused was charged with unlawfully depositing a deleterious substance in water frequented by fish after a malfunction in its plant caused the release of a large quantity of fats, oils and emulsions thereof into a nearby harbour.

Held, the accused was convicted. That the company had deposited the material in question was shown by the admissions of its employees and their attempts to clean it up. Although tests conducted by government officials on the spilled substances were open to technical criticism, nonetheless they showed that the substances in question were lethal to fish and were capable of depleting the oxygen from the water into which they were put. Even though fish could possibly avoid the area, the evidence showed beyond a reasonable doubt that the waters in question were frequented by fish and therefore the Crown had discharged its burden.

Environmental law -- Water pollution -- Sentence -- Deposit of deleterious substance in water frequented by fish -- Two thousand dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

Where the accused has failed to take adequate measures to remedy a defect which caused both an earlier spill and the one which constituted the present offence, nonetheless the objectives of deterrence and protection of the public interest may be met by a fine of two thousand dollars, as the incident in question was not of the most serious type.

Environmental law -- Water pollution -- Order to refrain forcing plant to cease operations -- No order issued -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(7).

Upon conviction of an accused under s. 33(2) the Court may not make an order pursuant to s. 33(7) which compels the corporation convicted to take positive steps to remedy the defect which cause the offence, nor does the latter provision allow an order compelling the company to cease operations.

D. Berger, for the Crown.
J.C. Bouck, for the accused.

May 1, 1973.

CANADA
PROVINCE OF BRITISH COLUMBIA
COUNTY OF VANCOUVER
CITY OF VANCOUVER

REGINA

VS.

WEST COAST REDUCTION LTD.

BEFORE: W. S. SELBIE, PROVINCIAL JUDGE

VANCOUVER, B.C.
MAY 1, 1973

APPEARANCES

D. BERGER, ESQ. APPEARING FOR THE PROSECUTION
J. C. BOUCK, ESQ. APPEARING FOR THE DEFENCE
M. E. BELLAMORE COURT RECORDER/TRANSCRIBER

REASONS FOR JUDGMENT AND SENTENCE

MR. BERGER: Good morning, Your Honour.

THE COURT: Yes, Mr. Prosecutor.

MR. BERGER: Calling number one, Your Honour, Regina vs. West Coast Reduction Limited.

THE COURT: The defendant company is charged on or about the 22nd of September, 1972 did unlawfully deposit a deleterious substance, to wit, oils and greases in water frequented by fish, namely, the waters of Burrard Inlet, County of Vancouver, Province of British Columbia. There's no problem, of course, with Jurisdiction in this matter. The fact is I find from the evidence there is as follows. Some time around noon on September the 22nd of 1972, through a malfunctioning of the reduction system of the plant in question a large quantity of fats and oils and emulsion were deposited through the plant's sewage system into an area of Burrard Inlet. Mr. Prosecutor, if you can control some of this please I'll wait for them. This was the second such occurrence during that year. I reject the possibility on the evidence that this substance may have come from other unidentified and unknown linkages to the sewer. On the evidence I find it came from the accused's plant and it appeared to have been observed first by an employee of that company because when the National Harbours Board boat, skippered by Captain Coughlan, came on the scene there was a person at that time from the plant throwing some substance onto the soill. This boat stood by to await the National Harbour's Board Police who

arrived in the person of Corporal Forrest, who was shortly joined by the Harbour Master, Captain Holland. And they spoke to Mr. Diamond of the defendant company who, in effect, apologized for the spill and offered to clean it up. He also admitted a prior spill in July of 1972 of a similar nature, and indicated to the Harbour Master and the Constable it's cause. That is, the malfunctioning of the plant itself. In the interim two men of the complainant company -- defendant company began an attempt to corral the spill using an oil boom from a small skiff. And while doing so Mr. Carscadden, the Fisheries Officer, arrived and observed the spill which was on the surface and under the surface to a fair degree according to him. Now, about the same time Mssrs. Trasolini and Siddhu (?), I think that's the name, and Watkins arrived from the Environmental Protection Service and conducted an investigation. The Officials were taken on a tour of the plant by one of its employees and were explained -- where it was explained how the accident had occurred. And I'll now refer to the evidence of Mr. Trasolini of the Environmental Protection Service. He made visual observations of the spill and also took samples. His procedure on the evidence was as follows. Prior to coming to the scene he equipped himself with two thirty-two ounce jars and one plastic container. Bottles were washed and provided in the Lab for purposes such as he was using them for. He didn't wash them himself. Plastic containers are steamed clean prior to being assigned and he didn't do that either. But this is apparently the procedure adopted by the Service and as an employee of that Service I see no reason to doubt his knowledge of its internal workings, at least, to that extent. He was also equipped with a new plastic bucket. Prior to taking the samples in the bucket and then into the jars and container he added no contaminants or preservatives to assist or detract from the condition of the sample. He didn't use and wasn't aware of any different standard sampling techniques than what he was using. He merely filled the bucket from the spill and then filled the containers. He kept the samples overnight and the next day delivered the bottles to Mrs. Pummell for analysis and the plastic container to Mr. Watts for testing. Mrs. Pummell gave evidence regarding her analysis of the spill and, in effect, her test was to measure the amount of oxygen that would be consumed by the breakdown of the product in the water. She performed her tests according to herknowledge and in cross examination it was obvious that she wasn't aware of other studies and recommended testing techniques. The effect of this on the evidence, of course, is problematical. There is no suggestion that her methods were improper. At worst it would, perhaps, not be as exact as could be. There isno suggestion either, aside from a mathematical error in her calculations, that her results were wrong when conducted according to her training. Only the text writers

may be critical of her procedure. In sum I'm not satisfied on the cross examination conducted from this book that her findings should be ignored, at worst they would, perhaps, be entitled to little weight. The C.O.D., according to her, was very high thus reducing oxygen available to marine life which I think one could assume would act in a deleterious way on sea life, that is, on fish. Mr. Watts was called to give his findings from the contents of the plastic container. His object was to find the test concentrations which live fish could survive in. It consisted of various concentrations with water added of the spill and one control sample where no spill was added, to which fish were exposed and a brief conclusion from these tests would be that on the basis of the tests the spill was not only deleterious but definitely fatal when it was present in the water. The test was objected to in cross examination on a number of grounds. Firstly, fresh water was used rather than ocean water. Secondly, the type of fish was not contiguous to the water at that time in the Inlet. Thirdly, because of oxygenation manually applied the spill was kept in suspension instead of rising to the top and staying there as was the situation on the water. Fourthly, temperature was not adequately regulated. Fifthly, no control sample from actual waters of the Inlet was used. And, sixthly, the weight factor and number of fish per tank were not adequately regulated, at least, according to a text book referred to by the Defence. There may be more objections to his evidence but those are the main ones. Now, while all of this may be true and may act as a pall on the testing methods used by the Department one fact seems to me comes out. Whatever the water, the concentration of fish, the temperature, etc. all these fish exposed to the spill died. And under similar conditions those not exposed did not die. Therefore, is it safe to say in the circumstances that the spill contributed to their death and with the greatest of respect how can I come to any other conclusion but that so long as that spill is in the water it oxygenated to such an extent that it suffocates the natural sea life. This is a layman's conclusion based on the totality of the opinions of these two experts. Their evidence coupled with the visual evidence of the parties who gave it in Court may not be of the absolute technical best but its weightiness draws me, inevitably, to that conclusion anyway. Now, from further evidence of divers of the National Harbours Boardand members of the Fisherie Department who gave evidence on the marine life in the vicinity of the outlet I'm satisfied the Crown has proved that these waters were frequented by fish. The fact that a fish may avoid the contaminated area is not the point. The area hereinvolved and charged was part of the tidal area known as Burrard Inlet and that is an area frequented by fish as set out in the Act. The purpose of this legislation, of course, is obviously to avoid the contamination of any

part of these waterways of which Burrard Inlet is one. From all the evidence I'm satisfied the Defendant Company has committed the offence alleged and I find it guilty. I'll hear you, Mr. Bouck, on sentence.

BOUCK: Thank you, Your Honour. Now first of all, Your Honour, ...

(COUNSEL SPEAKS TO SENTENCE)

COURT: Well Counsel have certainly given me lots of leeway from minimum fine to the maximum. There aren't that many cases of this nature that have been before the Courts. There is the two that have just been referred to and right off hand I can't think of any others. In considering penalties on this type of offence I have to consider the public's growing concern with the protection of the environment. I think I've got to also make a fine that will reflect the need to impress on persons or companies that positive steps must be taken to remedy these defects. And that if positive steps are not taken then it will be to their detriment. I don't know if I'm putting it properly but perhaps I'm saying that I don't feel that a find should be nothing more nor less than a licence so that it would be easier to accept the fine then to have the matter fixed. The fine, therefore, must reflect, as I say, the need to impress upon the company that, if for no other reason than their own books, it is better to fix the matter than to leave it go. Because that's what happened here. These people had a similar spill on July the 12th according to the person who is the owner or general manager who has given evidence, or, whose statement is in here. Nothing -- if something was done or if tests were made, nothing was done until December when an exactly similar type of spill occurred. Now the fact that it's going to cost a lot or nobody can find a better method of doing it can't effect this that much. If you can't run a plant like that without depositing this stuff in the Inlet well I'm afraid that you'llhave to -- the plant must be relocated to some place where, if there is a spill, it will not be deleterious in the manner in which this one was. The maximum fine is five thousand dollars. I must reflect the seriousness that this matter is looked upon by the Legislature. On the other hand I can't see that this is the most serious type. One of the cases referred to by Counsel for the Prosecution was a heavy and a large gasoline spill. I think that, perhaps, would be a little more serious than the situation that came here. In any event, there will be a fine on all the circumstances of two thousand dollars in default of payment distress.

BERGER: The Crown is also asking for an order under Section 33(7) that the Company refrain from depositing any deleterious substance ...

(ARGUMENT BY COUNSEL)

COURT: This Section is permissive, it's in two parts. It says:

"Where a person is convicted of an offence under this section, the court may, in addition to any punishment it may impose, order that person to refrain from committing any further such offence"

Now in my mind that must presuppose an intention, a willful intention, on the part of the person convicted. I cannot see how I can order someone not to allow an accident to happen. "Order that person to refrain from committing any further such offence". This was an accident, that's accepted by all parties. I don't think that that particular portion of that section is applicable. It goes on to say:

"to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the court, will or is likely to result in the committing of any further such offence."

It seems to me the only way I could do that would be to order the company to shut down. I can't order them to fix what is there because the Act does not empower me. The only thing I could do is tell them to cease operations and I do not consider that any section in any Act was meant to go that far. I'm going to exercise my discretion and make no order unto this. If this continues, if there are further accidents, further Court actions may be taken and further fines up to and including five thousand dollars may follow. But I must keep into mind this is a first conviction of this type of offence. The fine will stand there will be noorder on that subsection. Do you need time on this Mr. Bouck?

BOUCK: Yes, Your Honour, I'd like two weeks.

COURT: Two weeks to pay.

COURT: Until the 15th of May.

BOUCK: Thank you, Your Honour.

BERGER: Your Honour, there are two remaining Counts on the Information, Count one and Count three. I'd ask that be put over ...

(PROCEEDINGS CONCLUDED RE COUNT TWO)

W. S. SELBIE,
Judge of the Provincial Court
of British Columbia

I hereby certify the foregoing to be a true and accurate report of the evidence and proceedings herein.

M. Claire Gallamore
A duly sworn Court Recorder
5/8/73 (MEB) ..

BRITISH COLUMBIA PROVINCIAL COURT

Bowen-Colthurst Prov. Ct. J.

Regina v. Rayonier Canada Limited

Courts -- Abuse of process -- Federal authorities contributing to development of provincial standards for accused's mill -- Mill still in violation of federal statute even if meeting provincial requirements -- No abuse of process in bringing charges under federal legislation -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

The accused applied to have two charges brought against it under s. 33(2) of the Fisheries Act dismissed on the grounds that they were an abuse of process of the court.

Held, there was no abuse of process and the trial would proceed. Participation by federal officials in the formulation of pollution standards for inclusion in a provincial licence granted to the accused did not preclude the federal Crown from laying charges under the subsection in question even if compliance with the provincial instrument would still have resulted in violation of the federal enactment. Nor could it be said that the federal Crown had consented to the offences even though the federal minister responsible for fisheries allegedly assured a provincial minister that proceedings against the accused would not be instituted if the provincial requirements were met. Finally, the defence failed to show that the proceedings were founded upon oblique motives.

Held, the accused was found guilty on two charges of depositing a deleterious substance in water frequented by fish.

Environmental law -- Water pollution -- Sentence -- Deposit of pulp mill effluent in water frequented by fish -- Depletion of oxygen by effluent causing fish kills -- Fine of fifteen hundred dollars per count -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

Where the federal authorities are aware for some time before bringing charges under the Fisheries Act that an infraction of s. 33(2) is occuring, and where they participate in setting requirements for the operation in question which would not ensure adherence to the Act, and the offences charged are the first of this kind brought against the accused, the appropriate penalty is a fine of fifteen hundred dollars on each count charged.

D.R. Kier, for the Crown.
E.C. Chiasson, for the accused.

March 6, 1974.

CANADA
PROVINCE OF BRITISH COLUMBIA
COUNTY OF NANAIMO
DISTRICT OF PORT HARDY

Port Hardy, B.C.
March 5 & 6, 1974

SUMMATIONS AND JUDGES DECISION IN THE CASE OF REGINA VS. RAYONIER

Proceedings before Judge T.G. Bowen-Colthurst

SUMMATIONS AND JUDGE's DECISION IN FISHERIES VS. RAYONIER CASE HELD IN PORT HARDY, B.C. ON MARCH 5 AND MARCH 6, 1974.

MR. CHIASSON:

Your Honour, I left with you yesterday exerpts from various authorities and I don't propose to review those again today though the argument that was made yesterday was made in advance of plea and I will incorporate it if I may now in terms of the legal foundation for the position that I am taking. Essentially that is that you should decline jurisdiction in this case at this point on the grounds that these proceedings are in abuse of the process of this court. That is my first position. My second position is that there should be an acquittal because as a matter of defence. The factual issues that I argue about the abuse of process constitute a defence either because the proceedings are an abuse of process or because the federal Crown has effectively consented to the circumstances which gave rise to the charge under the Fisheries Act.

THE COURT:

Do you mind if I interrupt you as you go along? That will help clarify my thinking. You say that these proceedings if they continue would constitute an abuse of the process of this court therefore I should decline jurisdiction or possibly as Mr. Justice Munroe has said stay it. Do you say alternatively I should acquit on the grounds of abuse of process or that the evidence is such that it raises a defence to the question of innocence or guilt?

MR. CHIASSON:

Yes.

all here till at least 6:30 and if the additional time would be of use to Your Honour.

THE COURT:

Thank you very much. We will adjourn then until 3:30.

COURT ADJOURNED TILL 3:30 p.m.

As council may have anticipated by reason of the fact that I took a little longer than I said I was going to I have arrived at a decision in this matter. I can see no justification having arrived at a decision for reserving. I can see not justification having arrived at a decision for reserving the matter. The only reason for reserving would be that I would reduce my reasons to writing. This no doubt would be more articulate than giving my reasons as I am about to do orally. When I say orally I do have some notes but I will not be filing any written reasons. At the outset I would like to express my appreciation to council for the assistance that I have received in this case. Assistance that was as a result of careful preparation on behalf of both council which has certainly lightened the burden of my duties in this matter. I will of course not only be giving my decision in this matter but I will be giving my reasons for my decision. In the course of those reasons, and I say this more for the benefit of the members of the public and people that are connected with the defendant company. In giving these reasons I will not be referring to all the evidence that we heard in the past day and a half nor will I be referring to all the submissions that were made to me by council but I want it clearly understood that in arriving at my decision I have given careful consideration to all the evidence that I have

heard, to the Exhibits that have been filed and I listened attentatively to submissions of council and I am satisfied that I followed the submissions carefully and they have been carefully considered before I arrived at any decision. The defendant company faces two charges under section 33 - 2 of the Fisheries Act. An Act of the Parliament of Canada. Prior to any plea being taken from the defendant, Mr. Chiasson made an application to quash or stay the proceedings on the grounds that the prosecution constitutes an abuse of the process of this court. Mr. Chiasson applied to lead evidence in support of his application. The Crown, as I recall, objected to evidence being led at that stage of the proceedings. In any event I ruled that the trial would proceed and that the defendant could introduce evidence during the trial and renew the application at a later time. The defendant declined to enter any plea quite properly feeling that it might prejudice the position taken initially that this was an abuse of the process of the Court and by pleading it would be admitting that there was such jurisdiction. As a result I entered a plea of not guilty on behalf of the defendant. The Crown called their witnesses but relied on certain admissions made on behalf of the defendant. Under the circumstances that have developed I can understand the defendant wishing the application to be dealt with first. Council no doubt considered that the admissions which he was aware were going to be made were completely irrelevent to his application to have a stay on the grounds of abuse. He may further have felt that such admissions would not only be irrelevent but there was a possibility that they might be prejudicial to the application. I have gone into this

in some detail because I have concluded that it is my view that the admissions are irrelevent to that application and I want to assure council that I have completely disabused my mind of those admissions and of the subsequent evidence that did not relate to the application. I have had many years at the Bar prior to my appointment and I am fully able to disabuse my mind completely and not take these matters into consideration when arriving at such a decision. The defendant called evidence to support, after these admissions were made, the submission that the proceedings were an abuse of the process of this court. The defendant not only introduced oral evidence but there were certain letters and certain maps that were introduced by consent and marked as Exhibits. The Crown then called rebuttal evidence after the defence had finished. The defendant then renewed its submission that the proceedings should be quashed or stayed on the grounds that they were an abuse of the process of this court and Mr. Chiasson argued that in the alternative the defendant was entitled to an acquittal. The first matter which I considered was as to whether I have jurisdiction to prevent an abuse of the process of this court and Mr. Chiasson referred me to the case that is in the Canadian Criminal Cases entitled Regina vs. K which is a 1971 decision of our Supreme Court of British Columbia citation being 5 C.C.C. (2nd) 46 the decision was a decision of Mr. Justice Munroe and in that decision he referred to the Osborne case which was mentioned by Mr. Kier in his argument and Mr. Justice Munroe concluded in that case that such jurisdiction does exist. Towards the end of his judgement he says "proceedings upon the second information

should be stayed on the ground that they are so oppressive as to constitute an abuse of the process of the court." I am satisfied on the basis of that judgement that I as the presiding judge in this court would and should exercise such jurisdiction in appropriate cases so I am satisfied that I have this jurisdiction. My next consideration was as to whether in this case the Crown is attempting such an abuse and accordingly I should either quash or stay the proceedings or acquit the defendant. The defendant made three main submissions. The defendant submitted that the proceedings were oppressive, that the Crown had in effect consented to any infractions which are alledged in the charges and thirdly that the Crown had oblique motives or an oblique motive for laying the charges. I may not have took those three submissions too well but I will be elaborating on them. Mr. Chiasson may have suggested at one point that oppression comes under the heading of abuse and the other two points constitute grounds for acquittal. In any event in my view all three points that were mentioned should be dealt with under the heading of abuse and that is how I am going to deal with them. Dealing first with the submission that these proceedings were oppressive. It is common ground between the parties that this defendant company operates a pulp mill in the area concerned. The mill was built in 1917. The mill presently employes approximately 500 persons in its operation and that it cannot produce and not violate Section 33 Subsection 2 of the Fisheries Act. In other words it seems to be common ground that any time the mill operates there will be a violation and in support of the submission with regard to oppression Mr. Chiasson said that

the Federal Officers helped establish the standards which the company is bound by and the standards are such that even if they are adhered to infractions could still occur. Section 33 Subsection 2 of the Fisheries Act provides in part that no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish. I do not consider it an abuse of the process of this court to charge the defendant with an infraction or infractions of that sub section even if the mill were built in 1917 and employs 500 persons and can't operate without violations. Nor do I consider the fact that added to that Federal authorities assisted Provincial authorities to establish standards for the company under the Provincial Pollution Control Act changes the situation at all. That is creates an abuse of the process of this court. I considered very carefully the facts that I understand are not an issue and that is the light in which I considered them. The facts that this mill was built in 1917, that it employs such a large number of employees and no doubt not only the employees but the families of the employees are affected by the fortunes of their employer and I also considered carefully that in this particular case it is accepted that the mill can not operate without violating Section 33 Subsection 2. If the mill operates it discharges effluent and they would be a violation. However I do not consider the defence of abuse of process of this court to be available on the grounds that a law is oppressive. In my view such a defence is only available if the use of laws are used in an oppressive manner. If a law is oppressive then the remedy is for Parliament or

the Legislature as the case may be to change it and not for the court to decline to enforce it. It should not be concluded from this that I am of the view that Section 33 Sub section 2 of the Fisheries Act of Canada is opressive. It is not necessary for me to make any decision in that connection and I have not. Turning now to the matter of the Crown consenting to these infractions. The defendant introduced evidence or from the evidence it emerged that on March 30, 1973 there was a Letter of Transmittal and a Permit from the Director of the Provincial Pollution Control Branch to the defendant company. The provisions contained in that document were appealled to the Control Board by the company and their decision was given on August 7, 1973 in the form of a letter from the chairman of the Board to the council for the company which is Exhibit 3. On September 25, 1973 an appeal was launched to the Cabinet from the decision of the Pollution Control Board and Exhibit 10 was filed which was the Notice of Appeal. On October 22, 1973 the two charges were laid alledging infractions on September 10, 1973 and September 20, 1973. It is common ground that the hearing before the Cabinet took place early in November, 1973. As I have already mentioned council for the defendant introduced a number of letters and they were entered as exhibits by consent. In connection with the submission that the Crown consented to these infractions the defence relies strongly on a number of those letters particularly the letter of December 21, 1972 which was entered as Exhibit 4 and was a letter from Mr. McLaren, Regional Director for the Pacific Region, an officer of the Federal Fisheries Department, to Mr. Venables a Director of the Pollution

Control Board. I have considered these letters carefully. The defence further relies on the letter Exhibit 5 from Mr. Heskin, Manager of the Pollution Abatement Branch a branch of the Federal Department of Fisheries, to Mr. Klassen, Chief of the Industrial Division of the Pollution Control Branch in Victoria and also on Exhibit 6 which was a letter from Mr. McLaren to Mr. Venables which was dated March 5, 1973 and the Letter of Transmittal and the Permit were dated March 30, 1973. The defence also relied on the cross examination of the witness which was called by way of rebuttal by the Crown. Mr. Goyette gave evidence on the part played by Federal officials in the hearings to which I have referred and the preparation of the contents of the Letter of Transmittal and Permit which were entered as Exhibit 1 and the defence admits these all go to show that there was an overt participation on the part of the Federal authorities in setting provincial standards applicable to the defendant company and these standards are similar to the standards the Federal authorites intended to impose and he relied upon the letter Exhibit 8 which was a letter from Mr. McLaren to an officer of the defendant company. The defence says that the Federal authorities had in effect agreed to these standards which even if complied with it would still result in infractions of Sub section 2 of Section 33 of the Fisheries Act and that under these circumstances this prosecution constitutes an abuse of process. I do not agree with this submission. In my view the participation of the Federal authorities which I find as a fact occurred in the setting up of the provincial standards does not constitute consent to infractions of the Fisheries Act nor does the decision to formulate by the Federal authorities

similar regulations. The third point that the defendant relied upon was that the Crown had oblique motives for laying these charges and the defendant relied chiefly on the letter of October 24th written by Mr. Davis the Federal Minister to the Honourable James Lorimer who is a Minister of the Province of British Columbia and in addition Mr. Chiasson asked me to draw inferences not only from this letter Exhibit 7 but also from the evidence as a whole that the motive for the laying of this charge was, as I refer to it in my own expression, obliquein the sense that it is used by the Supreme Court of Canada. It is a word that I think covers precisely what Mr. Chiasson has in mind as far as the motive is concerned. There is no direct evidence as to any oblique motive on the part of the person who laid the information or on the part of any of his superiors or the Honourable Jack Davis or anyone responsible for the laying of this information. When I say direct there is no evidence that in the course of a conversation it was said that these charges were laid for political purposes or these charges were laid to put this particular company out of business. There is nothing direct. It is only by inference that I am being asked to conclude that there are oblique motives. Inferences to be drawn from the letter Exhibit 7 and inferences to be drawn from the evidence as a whole and I have concluded that it would be pure speculation and surmise on my part to conclude that the motive or motives for laying these two charges were oblique. I do not agree with the defendant's submission in that connection. I should mention and I want to make it clear that in the course of Mr. Kier's submission I asked him

specifically as to what grounds he considered the questions and answers that occurred in his cross examination of the only witness that was called for the defendant company. The witness said that on the two particular days in question, September 10th and September 20th, 1973, the company had adhered to certain standards laid down in the Permit and the Letter of Transmittal and Mr. Kier cross examined him as to other days and there was objection but I allowed it in but said I would like argument as to its relevance. I asked Mr. Kier as to his position and as I understood the position he took it was only relevant as far as going to the question of whether there were oblique motives on the part of Mr. Davis or anyone else in the laying of these charges. In my view that evidence was doubtful that that evidence was relevant to issue and in considering this matter of oblique motive I disabused myself of that evidence and disregarded it entirely. I certainly did not consider it at all with regard to any other issue so it was only with that issue but with all the issues. I dieregarded it. These three points that I have dealt with with some care and which I understand cover the position taken by the defence may well go to mitigation of sentence but they do not in my view constitute a defence. Having rejected these defences which in my view went, as I already said, to the matter of the abuse of the process of this court and which I felt should be determined initially I then considered the questions of whether or not the Crown had proven the guilt of the accused beyond a reasonable doubt. As I said the Crown's case consisted of admissions by the accused. Then, of course, there was further evidence in the form of defence evidence

direct and cross examination by the Crown and the rebuttal evidence. I considered the admissions carefully and I am satisfied beyond any reasonable doubt the admissions in themselves are sufficient evidence to prove the defendant guilty on both counts and I so find. Would it be convenient to speak to sentence at this time?

MR. CHIASSON AND MR. KIER:

Yes.

MR. KIER:

The facts are already before Your Honour. The Crown is alleging that on the 10th of September, 1973 there was a fish kill at the head of Neurotsis Inlet at the mud flats South of the mill and the Fishery officer paced off an area 100 yards by 100 yards and estimated there were three herring per square yard which comes up with a figure from 15,000 to 20,000 to 30,000 herring that were dead at that time in the mud flats. He said the fish had their mouths open and according to his belief they died of asphyxiation. That is a questions of opinion. He is just an ordinary fisherman who hold that belief. There is no question that there was a considerable quantity of fish killed at the time and this is what led the charges to be laid. The second day, September 20th, was the day that the Fisheries Officers could get to the mill and take samples. The samples were taken from the sewers. There are two sewers. The South sewer had 0 oxygen in the adjacent water and the North sewer had 2 parts per million. There must be 5 to 7 parts of oxygen per million in order for fish to survive. The ranges below that in the Inlet were all the way approximately 5 miles North of the mill to the head of the Inlet which would

be 3 miles South of the mill. In that area it was below 5 parts per million of oxygen. The submission of the Crown is that on both occassions there was a violation of the Act. The Fisheries Department and Environment Service are aware that this is a daily act and that is why they have had negotiations continue with the corporation. My submission is that in dealing with the Pollution Control Board alone and not getting down to square one with the Environment Protection Service the company has been negligent in being a proper corporate citizen in the province of British Columbia. They should have taken more adequate steps since this section came into force which was in 1969 or 1970. They should have taken more adequate steps to get in touch with fisheries and work out a suitable arrangement. If it had been done the pollution would still be continuing for some time but the charges would not have been laid if proper steps had been taken. I might say that after the Pollution Control Board hearing last summer the mill was trying to cut down production so as to improve the quality of the water. I understand it shut down over Labour Day weekend and this was the start up. It was the third or fourth day of the start up and by that time the herring had gotten into the Inlet and the oxygen was being depleted and they had no where to go and they are a surface fish and of course this is mostly a surface condition so they died. If the mill had not shut down the herring would probably not have gotten all the way into the Inlet they would have turned around and gotten out of there. The effluent itself is harmful to fish. Even if there is oxygen in the water along with the effluent the effluent will still kill fish. The maximum penalty Your Honour that can be imposed under the Act is $5,000 on each count. That is in Section 33

Sub section 5 Your Honour. That maximum was given in Kamloops by Judge Archel. That was one of the first pollution charges under that Act and he imposed a $5,000 fine. There was one count. A pond was overflowing into a river and killing fish. I do not know how serious the case was but I do not think it was as serious as this. I was on the case of Regina vs. Columbia Cellulose some three years ago in Prince Rupert. It was similar circumstances as here. There had been a strike and the mill had been shut down for about two weeks and the fish had come into the Inlet and been killed when the mill started up again. The Crown requested the Judge not to impose Section 33 Sub section 7 to shut the mill down. I am again asking Your Honour not to do that in this case because it is inappropriate. We still have to have pulp mills operating. There was a $3,500 fine there. Recently Your Honour they have been charged once more by Fisheries Officers in Prince Rupert. The other one I am referring to is Judge Goulet of Burnaby. He had the case of Cewe Ltd. It was a gravel pit in the Coquitlam River area and during a heavy rain the gravel was washed off into the river and interfered with the fish eggs. He found the corporation guilty on one count and I believe the fine was $3,500. His Honour did make an order to have the company take proper steps to get the gravel pit operation in proper condition before the rains came this fall. That decision is under appeal. In the case here Your Honour may well consider that the maximum penalty is required here to deter not only this corporation but other ones who may be inclined not to obey the laws of Canada with respect to environmental control and pollution.

It may be cheaper to take these methods here than to try to stall off as long as possible without taking proper and prompt adequate steps to make their mills more in line with the environmental aspect of our law. I believe at the present time Your Honour nothing concrete has been developed with the Fisheries service yet with respect to the toxicity. Even if they meet these requirements of 4 parts per million at the government testing station that that is the subsistence level in that area that a fish may survive. That is approximately 10 or 11 miles away from the mill. We still have this deadly serious effluent going into the Inlet at a rate of 30 to 40 million gallons which requires 500,000 pounds of oxygen and a pound of oxygen as Your Honour may well surmise is a considerable amount of oxygen. It is almost difficult to understand how much oxygen that would mean. In view of this the Crown is asking for a very serious penalty be imposed in this case on both counts.

MR. CHIASSON:

Your Honour I am going to ask you to suspend sentence on this company quite contrary to the position my friend has taken. I am going to ask that on the basis of the facts and circumstances of this particular situation. I don't understand my friend when he says "don't shut the mill down." They are not asking you to shut the mill down but then he says fine them $5,000 a day for staying open. I don't understand that position and I don't think it is a position Your Honour should find inviting. I also don't understand my friend when he says make an example of this mill because as he well knows in this province their are two sulphite pulp mills. There are none other. There is the Port Alice mill and the Prince Rupert mill. The fact is that the Port

Alice mill is committed to spend some $50 million within a time frame which is a time frame the Federal government authorities have asked for. The fact is the Prince Rupert mill has done nothing at this point in time and how it is the Port Alice mill is to be an example with respect to some other mill and that be a just result I can not fathom. Your Honour the Honourable Jack Davis told the Honourable James Lorimer that if this company agreed to comply with the terms of the B.C. Pollution Control Branch Permit that would insure that this company would not prosecuted by the Honourable Jack Davis' Department. When this letter Exhibit 7 was written this company was complying with the B.C. Government Permit notwithstanding Mr. Davis' assurances to the Cabinet Minister in British Columbia and notwithstanding the fact that the company was adhering to that permit the company was charged and is here today. I think that is a very relevant fact in assessing any form of penalty. Your Honour has held that the proceedings are not an abuse of process and that is a decision that we have taken and we are not concerned with that at this point but the points that I raised to Your Honour in the context of the abuse of process and particularly the words of the Federal Cabinet Minister to the British Columbia Cabinet Minister and particularly the fact that this company has been complying with the B.C. Permit which permit was dictated to by the Federal authorities is surely evidence which is crucial and relevant in assessing a penalty on this company. I urge Your Honour that it is evidence of sufficient weight for Your Honour to suspend sentence in this matter. My friend refers to the toxicity problem. The fact is as I am instructed that the

Federal authorities have not indicated any toxicity standard which they think would be realisticly obtained at the Port Alice mill which is any higher than that to which the company is now committed. While it is true that there is a higher Federal standard in terms to the regulations those regulations do not apply to this mill. From a practical and realistic standard both the company and the Federal authorities know that the toxicity standard in the regulations can not be achieved in the present time frame. Itcan not be achieved by the end of December, 1978 nor has it been asked for. The issue of toxicity in terms of the fish kill I suggest is not a relevant issue. There is no evidence what so ever that toxicity had anything to do with the death of the herring. There are no measurements of toxicity on that date. The suggestion is that the fish asphyxiated so this problem of toxicity I suggest Your Honour is not a relevant issue of this case. My friend talks about the quality of the oxygen. My friend says that 5 to 7 parts per million is the required oxygen for fish to survive. My instructions are that that is not correct that the level is 2 parts per million. I think Your Honour will note that the level standard is set at 4 and surely a Government agency would not set it at 4 if that was lethal to fish. Basically in my position with respect to sentence I urge Your Honour as follows: firstly I urge all of the matters that I urged on Your Honour in my arguments on abuse of process. Secondly I note that this is a first offence for this company. That is a relevant feature. My friend indicated to Your Honour the fact that the mill had been down for 3 or 4 days. The circumstance of the fish kill on

September 10th was a peculiar phenomenon in terms of natural phenomenon. In fact in terms of operational phenomenon. There was what is described as a plankton bloom in the Inlet at a point in time just prior to the fish kill. A plankton bloom occurs when the plankton in the water blooms and puts a great deal of oxygen into the water. The water becomes super saturated with oxygen. It is a theory and it is possible that that fact played a significant part in drawing the fish into the Inlet in the first place. That is an unusual occurrance.,so the event that my friend says gave rise to at least one of the charges is an event that was peculiar and strange. The mill was down for the Labour Day weekend, the fish were intrigued by the water that was super saturated with oxygen and then an unfortunate event took place when the mill started up again. On September 10th, and again I suggest this is a very relevant for Your Honour in determining sentence, on September 10th and on September 20th this mill was in full compliance with the provisions of the B.C. Permit. The company fully agrees there were days in September and days in August when it was not in compliance but on the days of this charge it was in full compliance. I say in summary Your Honour that the basic facts of the unfortunate events coupled with the general circumstances I would urge an acquital in this matter. I particularly stress the position that was taken by the Honourable Jack Davis and his assertion to another Cabinet Minister that no charge would be laid in the very circumstances that existed on the dates with respect to which these charges have been laid. I think that Your Honour is a key factor in determining sentence with respect to this company. Thank you.

MR. KIER:

Your Honour may I raise one point?

THE COURT:

I would prefer you not to but I will not stop you if it is some mis statement. I am going to deal with this matter, very difficult matter, of sentence at this time. As with regard to my decision of innocence or guilt I will give reasons for my decision with regard to the sentence. There is a difference however between these reasons and my earlier reasons in that the reasons I am giving now are purely extemporaneous in that I have not reserved to consider them at all. This is probably the most difficult duty a judge faces is trying to determine what the appropriate sentence would be. In giving my reasons as to the matter of innocence or guilt I mentioned that the three points that had been made by the defence, that is the matter of oppression, consent of the Crown to infractions and oblique motives for laying the charge may go to mitigation of sentence. I realize now I put that very poorly. I meant of course that the circumstances upon which the defendant company relied in support of those points may go to mitigation and I have considered a number of those circumstances because Mr. Chiasson has in effect asked and reminded me of the evidence upon which he relied. It seems to me in this case there is a mitigating circumstance that the authorities were presumably aware for some time that when this mill operates there is a breach of the Fisheries Act for how long I can not say because I do not know how long this section has been in force. I considered also the matter of the participation by the Federal authorities in setting

the provincial standards and that as Mr. Chiasson pointed out the standards are similar to the ones they themselves apparently intend to impose on the defendant company and that even if these standards are complied with it would be possible to breach the statute of the Fisheries Act. I also considered that Mr. Chiasson mentioned that it was a first offence. I listened carefully to the penalties that have been imposed on other cases but I find difficulty in comparing sentences in one case to the case that I am dealing with. That is in deciding a penalty I find it difficult to try and compare other sentences the overflowing of a pond, the washing out of gravel from a gravel pit particularly to me it does not seem to me to be of too much assistance to me. I considered all this and the submissions made to me in this case but there are mitigating circumstances but I am faced with two violations of the Fisheries Act. Mr. Chiasson very ably submitted that a suspended sentence would be appropriate. A suspended sentence would be appropriate in my view when with an individual I am hopeful in suspending sentence I may be instrumental in that individuals rehabilitation which of course does not apply, at least in my view this certainly does not apply in this case. I think a suspended sentence would be appropriate if there is just a strictly technical violation. I don't think that applies in this case. There has been an infraction of this act and I think that I have a duty to impose a real, not just a nominal, penalty. I think under all the circumstances that an appropriate penalty would be to fine the company on count 1 the sum of $1,500 and to fine the company on count 2 the sum of $1,500. The Crown has

specifically asked me not to make any order as to referred to in the Act asking the mill to refrain and I am not making any such order. Again I would like before closing these proceedings to express my appreciation and gratitude to council. I would like to know if the company needs time to pay the fine. In my view those provisions are applicable equally to a corporation as to an individual. Do you have an application Mr. Chiasson?

MR. CHIASSON:

Yes. Unfortunately the mill manager has returned to Port Alice and I do not know how long it would take for a cheque to clear and I am instructed the fine would be paid from Port Alice. Normally I would suggest two weeks but I don't know what if any problems he may have in this area so I was wondering if we might have a month.

THE COURT:

Would a month be sufficient?

MR. CHIASSON:

Yes. It is really a matter of the processing of the cheque.

THE COURT:

Do you have any objections Mr. Kier?

MR. KIER:

None Your Honour.

THE COURT:

The fines on count 1 and count 2 will be payable on or before April 8, 1974. Thank you.

BRITISH COLUMBIA PROVINCIAL COURT

J.J. Anderson Prov. Ct. J.

Regina v. Imperial Oil Limited and British Columbia Hydro & Power Authority

Environmenal law -- Water Pollution -- Oil Spill -- Deposit of a deleterious substance in a place under conditions where it entered water frequented by fish -- Neither accused exercised all due diligence -- Both accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

Imperial Oil Limited (IOL) supplied fuel oil to a bus depot operated by British Columbia Hydro & Power Authority (Hydro). With the assistance of Hydro's employees, IOL's driver forcibly removed the cap from a fill pipe connected to an abandoned underground storage tank on the premises in question after failing to locate the correct fill pipe. Fuel was deposited into the abandoned tank with the result that it emerged from a dip pipe in the furnace room floor, flowed into a sump connected to the sanitary sewer system, and eventually reached the waters of Vancouver Harbour.

Held, both accused were convicted of depositing a deleterious substance in a place under conditions where it entered water frequented by fish. Hydro failed to exercise due diligence to prevent the commission of the offence (1)by failing to remove the abandoned fill pipe from the vicinity of the correct one, (2) by obscuring the position of the correct fill pipe by positioning it below the surface of the surrounding pavement, and (3) by failing to use an adequate plug to ensure that oil could not emerge from the dip pipe in the furnace room floor. Nor could IOL claim this defence, as it was vicariously liable for the acts of its employee who, despite his instructions, forcibly removed the incorrect cap and filled the abandoned tank when he ought to have realized that this procedure was wrong.

A.D. Louie, for the Crown.
H.M. Suiker, for the accused Imperial Oil Limited.
R.L. Louie, for the accused British Columbia Hydro & Power Authority.

November 7, 1974.

CANADA)
)
PROVINCE OF BRITISH COLUMBIA)
)
COUNTY OF VANCOUVER)
)
CITY OF VANCOUVER)

REGINA VS.

IMPERIAL OIL LIMITED
RED STAR PETROLEUM LIMITED
BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

BEFORE: J. J. ANDERSON, PROVINCIAL JUDGE

VANCOUVER, B.C.

NOVEMBER 7, 1974

APPEARANCES

A. D. LOUIE, ESQ.	APPEARING FOR THE CROWN
H. M. SUIKER, ESQ.	APPEARING FOR THE ACCUSED IMPERIAL OIL LIMITED
R. L. LOUIE, ESQ.	APPEARING FOR THE ACCUSED RED STAR PETROLEUM LIMITED and BRITISH COLUMBIA HYDRO AND POWER AUTHORITY
M. LOLAND & V. BOLICK	COURT RECORDERS
M. LOLAND	TRANSCRIBER

(PROCEEDINGS HEREUPON RESUMED PURSUANT TO ADJOURNMENT)

V. BOLICK — COURT RECORDER
M. LOLAND — TRANSCRIBER

THE COURT: Yes, Mr. Louie, I know what you're here for.

MR. A. LOUIE: Call number nineteen and twenty-one on Your Honour's list, Imperial Oil Limited and B.C. Hydro and Power Authority.

THE COURT: I see Mr. Suiker here and Mr. Louie.

MR. SUIKER: Yes, Your Honour.

THE COURT: I'm sorry to have asked you gentlemen to wait and to wait so long. I had all my material, unfortunately, with me and I left it in the office this morning. I was ready to deal with this, but I should have had all my notes and everything ready to go. I won't relate the facts, as I had intended to do, to save time. I am satisfied with some regret that under the provisions of Section 33(3) neither B.C. Hydro nor Imperial Oil Company exercised all due diligence to prevent the commission of this offence. Insofar as Hydro is concerned, I am satisfied that their failure to exercise all due diligence can be noted in the position of the old pipe, in the position of the new pipe which was partly obscured and somewhat below the general level of the remaining pavement, the fact that they were

content with a wooden plug in the vent, which itself blew out, of course, when the oil was forced in and flooded their basement. I also find that they failed to notify the Imperial Oil Company or its people who came around to clean up of the location of the sump discharge, namely, into the City sewerage system. Imperial Oil, I think, is fairly obvious in that the fact that the young driver had the opportunity to look at his card and to note that he was called upon to deliver the oil into a brass outlet; his diligence, if I can put it that way, in seeking help with a hammer and coal chisel in getting the top off the plug of the old tank, which should have been an indication to him that there was something wrong. B.C. Hydro, after the event, seems to have been prepared to leave the cleanup of the oil to Imperial Oil Company, and I think it's only proper for me to comment on this time that Imperial Oil Company at that time carried out the cleanup in what I would think would be a most commendable manner in any way that it could be said. Indeed, so far as B.C. Hydro is concerned, it is in evidence that it was never cleaner than after Imperial Oil had cleaned it up. I think Imperial Oil also acted at this stage with what diligence they could in trying to get somebody from the City to find out where the sewer led, that Imperial Oil attempted on their own behalf to try to find out the outlet of the sewer and to alleviate any possible damage. They made their

report at the first opportunity to the City; they made their report at the first opportunity to the Harbour Master. I am satisfied that the oil was discharged as a result of the facts which were alleged by the Crown. As a fact, I am also satisfied that oil is a substance which is deleterious to fish. On that basis, I find both the parties, B. C. Hydro -- I might say, Mr. Louie, that I'm not impressed with the statutory -- with your argument as to the statutory exclusion of B. C. Hydro's liability. I find them both guilty. The matter which, however, has concerned me and concerned me somewhat throughout the whole of the trial is the fact that the very outlet which was unfortunately the one which the oil flowed through on this particular occasion is used by the City of Vancouver to discharge raw sewage into the waters of Burrard Inlet, the raw sewage having been indicated by the biologist who was called also to be a substance which is deleterious to fish. The matter has given me some concern, that the City of Vancouver apparently is allowed to continue its practice of pumping a deleterious substance into the waters of Burrard Inlet without letter hindrance, and two other organizations are called upon the mat to answer in a court of law for doing substantially the same thing. I suppose maybe oil is a substance which is readily identifiable and quickly visible and I suspect about which there has been a certain emotional aspect which has come into play. However

I am quite prepared to hear counsel as to what, if any, fine should be imposed. Who do I speak to first, Mr. Suiker?

MR. SUIKER: I might say, Your Honour, that with regards to sentencing, as I look on it, there are actually two steps here. There's the step where Your Honour has found that there was not due diligence exercised, but it's my submission that actually you've got to go all the way to the outfall.

THE COURT: Hm hmm.

MR. SUIKER: In other words, if Imperial Oil Limited had been able to get somebody from the City, the necessary steps could have been taken to actually have stopped and confined the outfall, the sewage -- and I would say that having regard to the conduct of Imperial Oil Limited throughout these proceedings and I think you will recollect that there was even evidence given that with regards to these caps you can't just rely on the card because there's the possibility of change. And so I would submit that a nominal fine in these very unusual circumstances, they're almost, you know, was a humorous situation even though it was unfortunately one of these things that is contributing to thepollution and that's what we're concerned about. But I think in these very unusual circumstances I would suggest a nominal fine.

T.H. COURT: Do you have anything to add, Mr. Louie?

MR. R. LOUIE: No, I have nothing to add, Your Honour. I would like to point out what Hydro has done since the accident.

THE COURT: Well, I can well imagine that it will never happen again, Mr. Louie.

MR. R. LOUIE: I am sure it will never happen again. At the moment, Your Honour, there is a sign over both caps and this is a metal sign and it reads, "Fuel Oil", and it's approximately six feet off the ground directly above the two caps. The incorrect cap has now been welded all the way around/close as to the --

THE COURT: And the staff has been informed not to lend a hammer and a coal chisel to anybody that wants to try to open it, I presume.

MR. R. LOUIE: There is a red metal tag affixed to the incorrect cap. That reads, "Do Not Use." And it is also Hydro's intention, pending the disposition of this action, to remove entirely that incorrect cap and to blacktop the whole area, Your Honour.

THE COURT: In the meantime, they might put a proper plug on the vent, Mr. Louie, if it occurs to them. Well, I must agree with Mr. --

MR. A. LOUIE: Your Honour, --

THE COURT: Yes, Mr. Louie. Now, what can you --

MR. A. LOUIE: May I interrupt you and speak to sentence?

THE COURT: I suppose you should.

MR. A. LOUIE: Although my friends have both asked for a nominal fine, it should be pointed out on the record that this is a statutory provision regulating certain actions of people and companies in regards to watching their method of operation, so to speak, i

regards to handling certain pollutants as oil in case of, in this case, oil, and that might in circumstances as did occur in this case, enter into the harbour. Now, the standard of care, as you have stated, is one that is beyond the reasonable man, a higher standard of care than in an ordinary case, as stated in the Regina versus Kirby case. But the Kirby case also states that the reasons for this type of legislation is to protect the general public in the interests of the public.

THE COURT: Well then, Mr. Louie, you would get back to the point that has concerned me more than anything else. Is the City of Vancouver being allowed without letter hindrance to pump raw sewage twenty-four hours a day, three hundred and sixty-five days in the year, into the very waters that you're complaining of now?

MR. A. LOUIE: With all due respect, Your Honour, we have no evidence in regards to the fact that it's being pumped continuously. However, the point, though, is that out of this error or oversight of the companies, there is damage done that is in excess of thousand -- thousands of dollars which were in fact a civil matter which is proceeding after this case. There is an instance of many thousands of dollars damage that has to be paid by somebody. This is no slight matter. The only point the Crown --

THE COURT: Well, I'm not here to deal with that, am I?

MR. A. LOUIE: No.

THE COURT: No.

MR. A. LOUIE: But the Crown states that a nominal fine would make this look as if it's a trifle case, but it isn't. It's a case which is, in its end result, could cost somebody hundreds of -- hundreds of dol -- thousands of dollars.

THE COURT: Well, as you tell me, that matter is being canvassed in the civil courts and undoubtedly there will be the proper remedy applied in that situation, --

MR. A. LOUIE: That's correct.

THE COURT: -- so I don't think that I should concern myself there. I have to consider what I think at this stage with what I consider a reasonable fine under the particular circumstances of a breach of the statutory provisions of the Fisheries Act. I do not believe that this calls for a substantial or exemplary fine. I believe the conduct of both of the parties, and particularly that of Imperial Oil Company, following the event itself and following those items which I find to be their lack of due diligence, and this was the result of the driver's error at the time, I find that the conduct was certainly commendable. There will be a fine accordingly against each of the defendants of one thousand dollars, and I feel that's as nominal a fine as I can make under the circumstances and --

MR. SUTKER: May I make a submission on this, Your Honour?

THE COURT: You will have your opportunity to speak to the

question of time to pay.

MR. SUIKER: No, it's not that. What concerns me is at the outset of the trial I raised a preliminary question. As I see the situation here, there is one offence. If I can go to Section 33(5), it says, "Any person who violates any provision of this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for each offence." Now, my concern is here that surely there is only one offence, and I --

THE COURT: But there are two offenders, Mr. Suiker.

MR. SUIKER: Yes. No, but there's only one offence.

MR. A. LOUIE: My friend, I think, is indicating that the Crown proceeded on three counts, Your Honour, on an Information.

MR. SUIKER: And they charged us jointly and severally, too. And what concerns me is that, you know, how can you in fact find us guilty of an offence and yet also find Mr. Louie's client also guilty of an offence, because there is only one offence, and that was there was only one spill. And I raised this as a preliminary point to my friend --

THE COURT: Mm hmm.

MR. SUIKER: -- and I raised it at the outset, and I think myself that the drafting of the charge or a penalty section actually creates not a joint and several contributory liability, but only a liability for a separate offence, and there's no provision whatsoever for contributions. And so I find difficulty with the penalty section.

THE COURT: Well, you may have a point, Mr. Suiker, but that I think will have to be decided somewhere else. I find that there is one offence but two offenders. I'm certainly finding, I think, Count One is the easiest one for me to impose the fine on. Insofar as Count Two and Count Three are concerned, they are, as far as I can see, substantially exactly the same offence and they will of course be dismissed against both defendants.

MR. SUIKER: Thank you.

THE COURT: I imagine, what, a month time to pay is more than adequate --

MR. R. LOUIE: Yes.

THE COURT: -- to go through all the machinery of both B.C. Hydro and -- all right, thank you.

MR. SUIKER: Thank you, Your Honour.

MR. A. LOUIE: That's all the matters I have, Your Honour.

THE COURT: Thank you, Mr. Louie.

(CONCLUDED)

J. J. ANDERSON

Judge of the Provincial
Court of British Columbia.

I hereby certify the foregoing to be a true and accurate report of the evidence and proceedings herein.

[illegible]
Official Court Reporter

BRITISH COLUMBIA PROVINCIAL COURT

J.S.P. Johnson Prov. Ct. J.

Regina v. Standard Oil Company of British Columbia Limited

Environmental law -- Water pollution -- Gasoline spill -- Deposit of a deleterious substance in water frequented by fish -- Incident caused by employee of corporate agent of the accused -- Accused failed to exercise all due diligence in respect of its installation -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused, through its corporate agent, operated a bulk plant for the storage and sale of petroleum products adjacent to a harbour. While transferring gasoline from one tank to another, an employee of the agent allowed the receiving tank to overflow. Three hundred gallons of gasoline passed through an opening in a cement wall surrounding the tanks and flowed into the sea.

Held, the accused was convicted on a charge of depositing a deleterious substance in water frequented by fish. Even though the person who caused the spill was not directly employed by the accused, nonetheless he acted as their agent during the incident in question as he regularly operated the accused's machinery and sold its products. While the employee may not have been specifically authorized to undertake the transfer of fuel which resulted in the offence, such transfers were legitimately part of his duties at other times and therefore it could not be said that he acted beyond the scope of his authority and thus exonerated the accused.

Further, as the defences provided in the legislation had supplanted those found in the common law, the accused could not escape liability by claiming it had committed no *actus reus*. Nor was the statutory defence contained in s. 33(8) available to it, as the failure of the cement wall to contain the spilled gasoline indicated that the accused had exercised less than all due diligence in the construction, maintenance and inspection of its operation.

R. v. Churchill Copper Corporation Ltd. (1971), 5 C.C.C. (2d) 319; *The Queen v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5; *Sweet v. Parsley*, [1969] 2 W.L.R. 470, 1969 1 All E.R. 347; *R. v. Industrial Tankers Ltd.* (1968), 4 C.C.C. 81; *Blaker v. Tillstone*, [1894] 1 Q.B. 345; *Commissioners of Police v. Cartman*, [1896] 1 Q.B. 655; *R. v. Teperman and Sons Ltd.*, [1968] 4 C.C.C. 67; *Tesco Supermarkets v. Nattrass*, [1972] A.C. 153; *R. v. Cates* (1909), 14 B.C.R. 280; *R. v. Labrie* (1914), 23 C.C.C. 349; *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.*, [1961] A.C. 807; *R. v. Jordan River Mines Ltd.*, [1974] 4 W.W.R. 337; *The Vessel "Dilkara" v. The Queen*, unreported, B.C.C.A.; *R. v. Sam Constentino Ltd.*, [1966] 1 C.C.C. 79; *R. v. The "M.V. Allunga"*, [1974] 4 W.W.R. 435; *R. v. Canadian Legion* (1971), 14 Crim. L.Q. 106, (1971) 21 D.L.R. (3d) 148; refd to.

F. Haar, for the Crown.
H.P. Legg, Q.C., for the accused.

January 20, 1975.

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

DISTRICT OF POWELL RIVER
COUNTY OF VANCOUVER
PROVINCE OF BRITISH COLUMBIA

R E G I N A
V.
STANDARD OIL COMPANY
OF BRITISH COLUMBIA LIMITED

Trial: November 18, 1974

BEFORE: His Honour Judge J. S. P. Johnson

Mr. F. Haar, Counsel for the Crown

Mr. H. P. Legg, Q. C., Counsel for the Defence

REASONS FOR JUDGEMENT

The accused, who I shall refer to as Standard Oil is charged on an Information with two counts under Section 33(2) of the Fisheries Act of Canada.

> Count 1 - "on or about July 11, A. D., 1974, at Powell River, in the Province of British Columbia, did UNLAWFULLY deposit a deleterious substance, to wit: gasoline, in water frequented by fish."
>
> Count 2 - "on or about July 11, A. D., 1974, at Powell River, in the Province of British Columbia, did UNLAWFULLY permit the deposit of a deleterious substance, to wit: gasoline, in water frequented by fish."

the difference between the counts then being "did unlawfully deposit" and "did unlawfully permit the deposit".

Standard Oil pleaded not guilty to both counts.

Standard Oil is the owner of land and the installations thereon of a gasoline products bulk plant situate in the Municipality of the District of Powell River, British Columbia. This bulk plant is located on the foreshore adjacent to the Powell River boat harbour. The installation includes six large fuel tanks and two smaller tanks, a cement wall surrounding the tanks on three sides towards the sea. The floor of the bulk plant area is clay. There is a walkway over the cement wall to the harbour to a float used for the selling of gasoline products to boats. In order to supply gasoline to the marine float gasoline is transferred from one of the large tanks to one of the smaller tanks of about 3,000 gallons; at the time of transfer a purple dye is added to the gasoline and it is then designated marine gasoline.

The bulk plant is operated by Andy Culos Ltd., agent of Standard Oil. Andy Culos is a principle of the agent corporation and although not the majority shareholder, he is the manager of the business. On July 11, 1974 at about 4:30 p. m., Andy Culos left the bulk plant. There were no other employees left except a young man sixteen years of age named Michael Keddy, who was to keep the marine float open for sales until 8:00 p. m.. Keddy was not too busy with boat sales, so, about 6:15 p. m., he operated the necessary valves and switches to fill the marine tank with gasoline from a large tank and to add the purple dye. After starting the tank filling process, he then left the marine tank and went back to the marine float about 200 feet away. Keddy returned to the marine tank after 10 to 12 minutes and found that gasoline had escaped from the marine tank and was flowing on the clay floor of the bulk plant. Keddy then turned off the marine tank filling equipment and immediately phoned Andy Culos, who attended in about five minutes. Andy Culos phoned the Powell River Fire Marshall and subsequently the Fire Department

attended and assisted to prevent any fire danger. The Fire Department crew gathered about 300 gallons of gasoline from the floor of the bulk plant and they directed high pressure water from hoses on the harbour area outside the bulk plant cement wall.

About five minutes after seeing that the gasoline had escaped from the filling tank Keddy noticed that the gasoline had escaped through the cement wall and was flowing onto the surface of the water in the harbour. Andy Culos saw the gasoline spreading over the water on his arrival at the plant and described the gasoline as going through the cement wall at a point near the walkway to the gasoline float and at a point where the wall was covered by the wood covering. Andy Culos had been working at this plant since about 1956, and the plant and the wall had been inspected regularly by Standard Oil. The clay floor had some gradient so that rain water would gather at the low side of the plant near the walkway and water would lay in puddles up to a foot deep against the wall. Andy Culos said that he was very surprised that the wall had not retained the gasoline which had escaped from the marine tank. He had been of the opinion that the cement wall and the clay floor were constructed, inspected and maintained in such a way that the gasoline spill would not escape. He had no explanation of why the gasoline did in fact escape into the harbour water.

The Fire Marshall examined the gasoline flowing on the harbour side of the cement wall and described the flow about 1" to 2" deep by 1½" to 2½" wide, coming from the ground at the base of the wall and flowing into the water. The description I accept of the amount of gasoline that entered the water was a surface area along about 200 feet of foreshore in a triangle shape from a narrow point where the gasoline

entered the water getting wider along the foreshore to a width of about 30 feet. Andy Culos estimated this amount of gasoline to be about 300 gallons.

From the evidence I heard I find that gasoline is a deleterious substance and this gasoline from the Standard Oil bulk plant entered water frequented by fish on July 11, 1974 at Powell River, the Province of British Columbia.

One of the defences of Standard Oil is that Standard Oil did not deposit or permit the deposit of this gasoline and that Standard Oil is not liable or responsible for the acts of Keddy and that they are not guilty of either offence because Keddy is not an employee or agent of Standard Oil within the meaning of Section 33(8) of the Fisheries Act which is as follows:

> "In a prosecution for an offence under this section or section 33(D), it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

It is important to examine in detail the acts, duties, relationship and responsibilities of Keddy as I accept them given in evidence.

Keddy was a new employee of Andy Culos Ltd., having been employed the previous March. There are two youths hired to operate the marine float, the other youth had worked the year before and had more experience than Keddy and worked the morning to afternoon shift; Keddy worked the afternoon to

to evening shift. Keddy's prime duty was to sell gasoline products to the boats at the float in the harbour. Keddy was being taught by the other experienced youth to fill the marine tank with purple gas for the marine float. Andy Culos said that Keddy was not authorized to fill the marine tank on his own and that his responsibility was to leave this for the other youth in the morning. Keddy said that he had on one previous occasion filled the marine tank on his own, Andy Culos did not know about it. At the time of this incident Keddy was the only person at the bulk plant. Keddy said that he had had some instructions from Andy Culos, particularly that he should not leave the marine tank while it was filling. This is exactly what Keddy did and this would appear to be the reason for the spill.

Keddy was not an employee of Standard Oil. He was an employee of Andy Culos Ltd., which company was the contractual agent of Standard Oil. Does Sec. 33(8) include employees of agents or was Keddy also an agent of Standard Oil in addition to Andy Culos Ltd.?

The Defence further argues that if it were found that Keddy was an agent of Standard Oil then Standard Oil is still not liable for the acts of Keddy because Standard Oil had no knowledge that Keddy was acting as their agent and, in addition, in this case, Keddy was acting beyond the scope of his authority and Standard Oil was not then responsible for acts of such an agent.

It is then necessary to define the word "agent" as contained in Sec. 33(8) of the Fisheries Act. The word does not have any definite meaning but does describe a relationship between parties that happens to exist. English

and Empire Digest Volume 1, Agency Part 1(4), page 311

> "No word is more commonly and constantly abused than the word "agent".

Part 1(6)

> "An agent in the general sense of the word is any person who happens to act on behalf of another (Lord Alverstone, C.J.) - R. v Kane, [1901] 1 K.B. 472".

Section 11 of the Interpretation Act of Canada says;

> "11. Every enactment shall be deemed remedial, and shall be given such fair large and liberal interpretation as best ensures the attainment of its object."

The charges in this case are under Sec. 33(2) of the Fisheries Act which is environmental control legislation. It is therefore necessary to look at the objects of the legislation and the interpretation of this Act and other environmental legislation to interpret this Act.

The object or intent of this type of legislation is for the protection of the health and welfare of the community and the Fisheries Act and other similar Acts have been interpreted that there is an absolute liability against those who are in breach of the provisions of the Act.

The law on this subject and the interpretation of Sec. 33 of the Fisheries Act was well canvassed by my brother Judge Arkell in the often referred to case of R. v Churchill Copper Corporation LTd., 5 CCC (2d) p. 319 at page 322;

> "In R. v. Pierce Fisheries Ltd. the Supreme Court of Canada held that the offence of violating s. 3(1)(b)

of the Regulations to the Fisheries Act is an offence of strict liability, of which 'mens rea" is not an essential ingredient. At p. 202 Ritchie, J., states"

"In considering the language of the Regulation, s. 3(1)(b), it is significant, though not conclusive, that it contains no such words as "knowingly", 'wilfully", "with intent", or "without lawful excuse", whereas such words occur in a number of sections of the Fisheries Act itself which create offences for which mens rea is made an essential ingredient.

. . . . . .

This appears to me to be a clear indication of the fact that in making provision for offences under the Fisheries Act, Parliament was careful to specify those of which it intended that guilty knowledge should be an essential ingredient.

Also in the Pierce Fisheries decision, Ritchie, J., referred to the English case of Sweet v. Parsley, [1969] 2 W.L.R. 470 [1969] 1 All E.R. 347, where Lord Pearce states at p. 481:

"Parliament might, of course, have taken what was conceded in argument to be a fair and sensible course. It could have said, in appropriate words, that a person is to be liable unless he proves that he had no knowledge or guilty mind. Admittedly, if the prosecution have to prove a defendant's knowledge beyond reasonable doubt, it may be easy for the guilty to escape. But it would be very much harder for the guilty to escape if the burden of disproving mens rea or knowledge is thrown on the defendant. And if that were done, innocent people could

satisfy a jury of their innocence on a balance of probabilities. It has been said that a jury might be confused by the different nature of the onus of satisfying "beyond a reasonable doubt" which the prosecution have to discharge and the onus "on a balance of probabilities" which lies on a defendant in proving that he had no knowledge or guilt. I do not believe that this would be so in this kind of case."

Also in Sweet v. Parsley, Lord Diplock states at p. 487:

"Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom

> the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see Lim Chim Aik v. The Queen [1962] A.C. 160, 174).

(The italics are my own for emphasis.)

Parliament, in the 1969-70 amendments to the Fisheries Act, obviously adopted the "fair and sensible course" suggested by Lord Pearce in Sweet v. Parsley when they enacted s-s.(8) of s.33.

Also, as stated by Lord Diplock in Sweet v. Parsley, the inference is not to be lightly drawn that this is an offence of absolute liability, "unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation". Here the defendant company could "promote the observance of the obligation" imposed by the Fisheries Act by the adoption of direct supervision, inspection and improvement of their operation."

R. v. Industrial Tankers Ltd., CCC 1968, Vol. 4, p. 81, is case dealing with oil pollution under Ontario legislation (Ontario Water Resources Commission Act) with some similarity in circumstance as this case which deals with the matter of the liability of corporation for the acts of their employee in respect to the absolute liability under environmental legislation. The facts of the case are set out at page 82;

> "The facts may be summed up as follows: Industrial Tankers, Ltd., is a company which since January, 1966, has been the lessee of lands and a building on the east bank of Morrison

> Creek in the Town of Oakville, in the County of Halton, in the Province of Ontario, which shall be referred to hereafter as "the company".
> The company operates a fleet of industrial tanker trailers, carrying among other cargoes, machine oil, and has facilities on the premises for cleaning the tanker trailers from time to time, and for discharging the waste into the sanitary sewer system of the Town of Oakville, with the consent of the town. Since January, 1966, the procedure for cleaning the tanks was to steam them and drain them into a pit which was located inside the building on these lands. The waste material was gathered into interceptors located in the pit and the remaining water was discharged into a drain in the building which was connected to the sanitary sewer system of the Town of Oakville, with the consent of the town.
>
> Blair Douthwright is an employee of the company, whose job it was at the time in question to clean the tanks. Douthwright's instructions given to him from time to time, and in particular in January and June, 1966, were that all cleaning was to be done inside the building and under no circumstances was any cleaning to be done on the lot and under no circumstances was anything to be discharged into the ground or into Morrison Creek.
>
> On the evening of June 15, 1967, one of the tankers was parked on the lot, about 30 feet from the edge of Morrison Creek. Douthwright checked the valve on the tank and believed it to be shut. In fact, it was open. He then climbed to the top of this tanker and opened the manhole to examine the inside to determine whether the tank needed cleaning. As soon as he opened the manhole, the vacuum,

which had kept the remainder of the machine oil inside the tank, was released causing about ten gallons to pour on the ground, and some of it escaped from the ground into Morrison Creek, causing a milky discolouration of the creek. When Douthwright noticed this happening, he shut off the valve at the bottom of the tank and he claimed that the valve is such that it is impossible to tell for certain whether it is open or shut. Douthwright claimed that he had no intention to dump the oil or to pollute the creek, and that this was an isolated case, and an accident.

His Honour Judge Sprague says, starting at page 86:

"The general object of the Ontario Water Resources Commission Act is to preserve the purity of water in the Province of Ontario, and s.27(1) is specifically aimed at prohibiting pollution.

In Blaker v. Tillstone, [1894] 1 Q.B. 345 at pp. 347-8, Lord Coleridge, C.J., said:

"The object of the Act is that people shall not be exposed to the danger of eating and drinking poisons..."

This would appear to apply, with perhaps some qualifications, to s.27(1) of the Ontario Water Resources Commission Act. Reference is made to: Hobbs v. Winchester Corp., [1910] 2 K.B. 471.

In construing s.27(1) of the Act, the reasons given by Lord Russell of Killowen, C.J., in Comdissioners of Police v. Cartman, [1896] 1 Q.B. 655 at pp.657-8, are helpful:

"The learned magistrate believed that the respondent bona fide gave instructions to his barman that no drunken persons should be served and that he intended those instructions to be acted upon; but the question is whether that fact affords any answer to the charge.

In considering this question, we must see what is the object of the Act, and how far that object would be effected or defeated if the construction contended for by the respondent were given to this section. There can be no question as to the object of this section: it was intended in the interest of public order to prevent the sale of intoxicating liquors to drunken persons. It must be remembered that the persons from whom alone intoxicating liquors can be obtained are licensed persons: how do they carry on their business? From the nature of the case it must be largely carried on by others on their behalf; it is true that sometimes the licensee keeps in his own hands the direct control over his own business; but in the great majority of cases it is not so, the actual direct control being deputed to other persons: are the licensees in these latter cases to be liable under the section for the acts of others? In my opinion they are, subject to this qualification, that the acts of the servant must be within the scope of his employment. The scope of the manager's authority in my view receives its limitation from the scope of his employment: authority is given him to do all acts within the scope of his employment. It makes no difference for the purpose of this section that the licensee has given private orders to his manager not to sell to drunken persons; were it otherwise, the object of the section would be entirely defeated..."

It is common knowledge, perhaps within judicial knowledge, that industries in this industrial age have a great capacity to pollute the waters. The magnitude and impersonal nature of present day industrial operations are such that it is usually impossible to trace pollution to any individual. It often happens that the

source of the pollution is simply a drain or culvert which comes from within the plant or factory. Industrial operations are usually such a complex combination of man and machinery and equipment that it is impossible to contribute the pollution to an act of any single employee.

Where it is possible to trace the pollution to the act of an individual employee, the corporation should not be able to hide behind the corporate mask, and rely on the fact that the instructions have been given to the employees not to do the forbidden act, particularly where the only way of proving the act is by calling the employee of the corporation as a witness for the prosecution. At best, evidence that an employee has acted contrary to instructions is a matter for mitigation of the penalty: Cundy v. Le Cocq (1884), 13 Q.B.D. 207.

The company is liable for the act of its employees within the scope of their employment.

R. v Teperman and Sons Ltd., C. C. C. 1968, Vol. 4 p.67 is a judgement of the Ontario Court of Appeal dealing with the Construction Safety Act of Ontario and finds that a corporation may be liable for the acts of their agent by reason of public policy in matters dealing with danger to human life. Schroeder, J.A. says at page 74:

> "An examination of the statute makes it plain that its scope and object is to promote the safety of workmen employed in the construction industry or engaged in the alteration, repair, demolition or moving of buildings or like projects. A consideration of its terms and objects points to the statute as one enacted for the protection and safety of a large class of the public, and its prohibitions are not such as fall within the proper domain of criminal law. Mens rea is not a necessary ingredient of the offences with which we are

> concerned in the present case and a constructor, whether a natural person or a corporate body, is vicariously responsible for breach of the pertinent provisions committed by any servant or agent, even though he is unaware of them, in those cases where the conduct constituting the offence was pursued by such servant or agent within the scope or in the course of his employment: Coppen v. Moore (No.2), [1898] 2 Q.B. 306.

and at page 77:

> "It is now well settled in Canada that a corporation can be convicted of some offences, particularly those involving a dereliction of duty to avoid danger to human life or limb: Union Colliery Co. v. The Queen (1900), 31 S.C.R. 81, 4 C.C.C. 400. Statutory offences from which mens rea is excluded as an essential ingredient present no difficulty and a limited company can, as a general rule, be indicted for the criminal acts of its human agents where the circumstances are such that the agents' acts or omissions are to be considered the acts or omissions of the company. The act or omission of the agent while exercising the authority delegated to him may, in the interest of public policy, be imputed to his employer by imposing penalties upon the corporation for which he is acting."

Could then Keddy be described as the agent of Standard Oil when he opened the valves of the marine tank that caused the gasoline spill?

The tank installations and machinery that Keddy handled was the property of Standard Oil. Keddy's job was to handle and sell Standard Oil products. The contractual agent of Standard Oil,

Andy Culos Ltd., was a body corporate and only manner in which the machinery could be operated was by the physical actions of an employee of Andy Culos Ltd. It is not the intent of the legislation that a corporate body could hide from absolute liability from the actions of their employees or agents by a chain of corporate bodies. The liberal interpretation of the Fisheries Act is that any person within the scope of their authority who handles the machinery of the corporation is the agent or the employee of the corporation.

I find that Keddy was an agent of Standard Oil and did act within the scope of his authority. To the defence that Standard Oil did not know Keddy and had no knowledge that he would operate their machinery, I find that Standard Oil knew that some employee of Andy Culos Ltd., would operate the machinery to fill the marine tank and Standard Oil did not need to know the particular person performing that act, see Sec. 33(8) of the Fisheries Act. The installation was there, the hand of some person was required to perform those functions. The following cases have been referred to to come to this conclusion.

The House of Lords case Tesco Supermarkets Ltd. v. Nattrass [1972] A.C. 153 at page 171;

> "Reference is frequently made to the judgment of Denning L.J. in H. L. Bolton (Engineering) Co. Ltd., v T. J. Graham & Sons Ltd. [1957] 1 Q.B. 159. He said, at p. 172:
>
> "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more

> than hands to do the work and cannot be said to represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

The corollary of this statement is that the hand that holds the tools of the corporation is the employee or agent of the corporation. And, at page 176 as to knowledge of a corporation;

> "It has not been suggested that Tesco (i.e. the limited company) could not be held to have committed the offence. In this connection reference may be made to a passage in the judgment of Viscount Reading C.J. in Mousell Brothers Ltd. v. London and North-Western Railway Co. [1917] 2 K.B. 836. He said, at p.844:
>
> "Prima facie, then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not a party to, the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master. Under the Food and Drugs Acts there are again instances well known in these courts where the master is made responsible, even

though he knows nothing of the act done by his servant, and he may be fined or rendered amenable to the penalty enjoined by the law. In those cases the legislature absolutely forbids the act and makes the principal liable without a mens rea."

As to the matter of Keddy acting within the scope of his authority, I find a sufficient similarity in the facts of R. v. Industrial Tankers Ltd., supra, in that case the employee did an act which he was instructed not to do which resulted in the oil spill and the corporation was found liable.

Keddy did an act which he was being trained to do, he did the act at a time when he was instructed not to perform this duty. The distinction in the cases seems to be that if the employee had not at any time, or in any way, the authority to perform the duty and did in fact do the offensive act, it may be held to be beyond the scope of that employee's authority, but if the employee had the authority to do the act at some time that it may be within the scope of his authority. When the barman, whose regular duty is to sell liquor, sells liquor from the premises after licence hours, the licencee is still liable for his employee. R. v. Cates (1909) 14 B.C.R. 280, but where the cook, whose job is not to sell liquor, sells liquor from the premises after hours, the licencee is not liable. R. V. Labrie (1914) 23 C. C. C. 349 (Sask.).

In addition, if any employee is left as the sole person in charge of the employer's establishment, then it may be interpreted that the employee is authorized to operate the whole premise on the employer's behalf and the employer may be liable for any prohibited acts of the employee. R. v. Canadian Legion - Vol. 14, 1971-72, Criminal Law Quarterly, p. 106.

The second general defence raised by Standard Oil is that of latent defect and defence counsel argues that the cement wall

surrounding the bulk plant was built to contain petroleum products spilt in the plant and that this wall contained water, was regularly inspected and that the leak of gasoline through the cement retaining wall was the result of a latent defect after Standard Oil had exercised all due dilligence and that this, in law, is a good defence. Riverstone Meat Co. Pty. Ltd., v. Lancashire Shipping Co. Ltd., (1961) A.C.H.L. (E.), 807, and particularly from Viscount Simonds judgment page 843, quoting the decision Coody J. of the Supreme Court of British Columbia.

"Two Canadian cases may also be mentioned in the interest of uniformity. In Australian Newsprint Mills Ltd. v. Canadian Union Line Ltd., it was said by Coady J. in the Supreme Court of British Columbia: "It seems to me that the due diligence "imposed by the statute and as interprated by the authorities is "not made out by evidence that this duty someone else was "engaged to perform on the behalf of the defendants—someone on "whom the defendants relied and in whom the defendants had "confidence. The duty of the defendants was to exercise due dilligence and this applies to their servants and agents and that duty is absolute, except as to latent defects not discernible "by the exercise of due diligence." The learned judge supports this proposition by reference to numerous authorities, many of which I have cited. The other case is Canadian Transport Co. Ltd., v. Hunt, Leuchars & Hepburn Ltd., The City of Albernı, which contrasts the liability of the shipowner under the Water Carriage of Goods Act and his right to limit his liability under the Canada Shipping Act, 1934."

This case is also interesting in respect to delegation of a responsibility by a contractual relationship and that the corporation delegating the authority is still liable for the acts of the employee of the independent contracting.

H. L. (E.) 1961, Riverstone Meat Co. Pty. v. Lancashire Shipping Co. Ltd.,

> "and the obligation imposed on the shipowner in the work of repair is one of due dilligence by whomsoever it may be done, even when the work delegated to the independent contractor calls for technical or special knowledge or experience, and the negligence was not apparent to the shipowner."

The defence further relies on the law that no actus reus is a defence to a strict liability charge. It should be noted that the words "strict liability", Pierce case, "absolute liability", Churchill Copper case, R. v. Jordan River Mines Ltd., (1974) 4 WWR 337, and the unreported decision of the Court of Appeal of British Columbia, The Vessel "Dilkara" v. The Queen, and the words "absolute prohibition", Ontario Court of Appeal decision, R. v. Sam Constentino Ltd., 1966, Vol. 1. C. C. C. 79 have the same meaning in that mens rea is not a defence in these cases. But the law is that if there has not been any actus reus on the part of the person charged with the offence, they will not be convicted in a strict liability case. Defence counsel sites as an authority the case R. v. M. V. Allunga (1974) 4 WWR 435. This case was in respect to an oil spill and a charge under S. 5 of the Oil Pollution Prevention Regulations.

Regina v. "M. V. Allunga".

Defendant was charged under S. 5 of the Oil Pollution Prevention Regulations with discharging a pollutant, namely, oil, into the waters of New Westminster harbour. The discharge was due to the failure of coupling in a sea-water ballast line which passed through a fuel oil tank; the defect was latent and the discharge could not have been prevented by the exercise of reasonable care since the failure of the coupling could not have been foreseen. Held, the charge should be dismissed; although the offence with which defendant was charged was one of strict liability, it did not follow that once the actus reus was proved there was no defence available; there must be shown a mind willing to do the act constituting the offence before it can be said to be complete: Regina v. King, [1962] S.C.R. 746, 38 C.R. 52, 133 C.C.C. 1, 35 D.L.R. (2d) 386 applied:"

The 'Allunga' case should be compared with the similar 'Dilkara' cases, supra, which was submitted by crown counsel. This was also a charge under Sec. 5 of the Oil Pollution Prevention Regulation which is under the provisions of the Canada Shipping Act, R.S.C. 1970, Chap. S-9. The facts of the 'Dilkara' case, which I find have some similarity to the case at hand, is that the ship was taking on fuel at North Vancouver, the engineer miscalculated the quantity required and the full tanks over-flowed causing a spill in the harbour. The defence was that there was an electrical alarm on the tank to warn when the tank was close to full and the pumping could be stopped, in this instance there was a malfunction of the electrical alarm unit and this resulted in the oil

spill. The 'Dilkara' judgment says in part, Per Curiam

"Counsel for the appellant put his argument on the basis that in a prosecution of a ship for an offence it is sufficient proof that the ship has committed the offence to establish that the act or neglect that constitutes the offence was committed by any person on board the ship. That submission is based upon the decision of this court in Regina v. The Vessel "Aran" (1973) 9 C.C.C. 179.

"Counsel for the appellant put his argument on the basis that in a prosecution of a ship for an offence it is sufficient proof that the ship has committed the offence to establish that the act or neglect that constitutes the offence was committed by any person on board the ship. That submission is based upon the decision of this court in Regina v. The Vessel "Aran" (1973) 9 C.C.C. 179.

It was contended on behalf of the appellant that because of the judgment in Regina v. The Vessel "Aran" (supra) section 757 must in effect be read as providing:

"In a prosecution of a ship for an offence under this Part, it is sufficient proof that the ship has committed the offence to establish that the act of discharging oil was committed by...any person on board the ship."

It was then submitted that the failure of a person on board the ship to use an alternative means to that recommended by the shipbuilders to calculate the quantity of oil required is not the act of discharging oil and such person cannot be taken to have committed the act

which constitutes the offence. It was further submitted that the act of discharging oil occurred as a result of a latent defect in an automatic sounding alarm system and was not committed by a person on board.

Counsel for the appellant conceded that the Act imposes upon the ship an absolute liability and it is not necessary for the Crown to prove mens rea on the part of the ship acting through those on board her. That proposition was accepted by this court in the judgment in Regina v. The Vessel "Aran" (supra) where it was also held that it is not necessary for the Crown to prove the specific act or neglect which caused the offence to take place. At page 181 of that judgment, Bull, J.A. said:

"I agree with the reasoning of the learned Judge of the Supreme Court for his rejection of that submission. In my opinion the onus on the Crown to establish an offence under s.761 [now s.752] of the statute, and s.5 of the Regulations, is merely to prove that an act or a neglect which under the enactment is declared to be, or to constitute, an offence, has occurred and that that was committed by the master or a person on board the vessel. The statute provides various other acts and other neglects than 'discharge of oil...' which are declared to be, or to constitute, offences. For example, it is an offence under s.763(1) [now s.754(1)] for a ship to fail to comply with certain requirements of a pollution prevention officer, and it is an offence under s.763(2) [now s.754(2)] for a

for a ship to enter certain waters without having a particular certificate on board. Also it is an offence for a ship to contravene any of a long list of regulatory provisions enacted under s.739 [now s.730] both of a mandatory and of a prohibitory nature. Section 766 [now s.757], on the language of which the appellant relies, has application to all offences committed by a ship and not merely to the offence of discharging a pollutant contrary to s.761 [now s.752]. In that context, it is clear that the words 'act or neglect that constitutes the offence' in s. 766 [now s.757], refer to the thing done or omitted to be done that is declared to be an offence and not, as the appellant says, to the reason for, or the cause of, that thing being done or omitted to be done. The latter view would mean that the phrase 'constitutes the offence' would be tortured to mean 'caused the offence' or 'brought about the offence'. That view I must reject. It follows that, in the case at bar, all the Crown had to prove was that a discharge of oil or an oily mixture emanated from the ship and that a person, identified or not, on board the vessel caused that discharge, and it was not necessary to show what particular conduct or what particular omission of that person resulted in the discharge taking place."

I think that when Bull, J. A. used the word "caused" in the last sentence of the foregoing passage, he used it in the sense of "committed".

In view of the foregoing judgment it seems to me it

is not open to the appellant to contend that because a defective alarm failed to sound the resulting discharge of oil was attributable to the fault of some person not on the ship. The inescapable facts are that the persons on the vessel were filling her tanks with fuel; they were actively in control of that operation, including the estimation of the quantity of oil to be taken on board; the ordering of fuel; and the giving of orders to those on the fuel barge to commence and stop the pumping of fuel from the barge to the ship. Liability for a discharge of oil being absolute it is no answer for the appellant to say the discharge would not have occurred but for the fault of persons not on board or because at an earlier stage, a miscalculation as to the quantity of oil to be ordered had occurred."

The article of Don R. Stuart on Mens Rea, Vol. 15 1972-73, The Criminal Law Quarterly, Page 160, contains some interesting observations of the laws of Canada respecting strict liability and the elements of actus reus, starting page 175.

After reading the words of Sec. 33(8) Fisheries Act "unless the accused establishes that the offence was committed without his knowledge or consent, and that he exercised all due dilligence to prevent its commission", and considering that this section was amending legislation 1969-70, C. 63 and considering the intent and object of this section of the Fisheries Act as environmental control legislation, I find that the actus reus defence per se is not a defence to an offence under Sec. 33(2), partly on the basis of the 'Dilkara' case.

The cases recognize, R. v. Industrial Tankers, that Commercial enterprise have large and numerous installations which are potentially dangerous to deposit a deleterious substance in water frequented by fish and if this offence does occur then there

may be a very substantial damage to the environment and the health and welfare of the community. The legislation places a very heavy onus on persons who should own or operate such installation not to commit the offence. The person must "exercise all due, dilligence to prevent" the environment damage and in a prosecution under this act it is for the person charged to prove that "all due dilligence" has been exercised, because the words of the section are "unless the accused establishes." The defences in common law to charge of strict or absolute liability are not applicable, the defence to the offence is found in the legislation. In the Fisheries Act, Sec. 33(8) is the defence to a charge under Sec. 33(2). In the Oil Pollution Prevention Regulations, Sec. 6, is the defence to a charge under Sec. 5 and Sec. 10-12 are the defences to a charge under Sec. 9.

The meaning of the word "due dilligence" means not only the acts of the person charged, their employee or agent at the time of the offence, but also "due dilligence" in the construction, maintenance and inspection of the installation. For the purpose of this case I do not need to go this far, but it may be that the person is required to prove not only that the installation was properly constructed and maintained, but that which was constructed was the best and most advanced construction possible to prevent the environmental damage. It may not be enough to say a cement retaining wall was built to prevent a gasoline spill without additionally proving that a cement wall was the best type of construction to prevent the spill.

I find the facts in this case to be that Standard Oil did construct a cement retaining wall intended to prevent a gasoline spill such as occurred here, there is no evidence as to how or exactly when the wall was built or by whom, or

if the wall was properly constructed. There is no evidence as to inspection or maintenance of the wall. Culos said there was inspection by Standard Oil of the plant installation, but he did not give evidence if the wall at the point of the leak was inspected. The Fire Marshall described the flow of gasoline through a hole in the cement wall, there is no evidence as to how the hole was created. The onus was on Standard Oil to prove that they did exercise all due dilligence to prevent that hole being in the wall and thus prevent the gasoline spill, they did not discharge that onus. As a comparison, in the 'Allunga' case, the defence admitted all the evidence of the Crown except guilty and then gave a very detailed technical set of facts as to how the spill occurred.

Since I have found that Keddy was the agent of Standard Oil while operating Standard Oil machinery that caused the deposit of the gasoline into the Powell River harbour, I find Standard Oil guilty of Count 1.

Since Count 2 is a similar charge on the same facts, I find Standard Oil not guilty, Count 2.

His Honour Judge J. S. P. Johnson
Date of Judgment: January 20, A. D., 1975.

BRITISH COLUMBIA PROVINCIAL COURT

G.H. Johnson Prov. Ct. J.

Regina v. Captain J. Tindale

Environmental law -- Water pollution -- Oil dispersant -- Depositing deleterious substance in water frequented by fish -- Permitting deposit of deleterious substance in a place where it may enter water frequented by fish -- Substance lethal to fish under laboratory conditions -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(11).

The crew of a vessel of which the accused was master attempted to disperse a spill of oil from the ship by using a chemical substance. The accused was charged with one count of permitting the deposit of a deleterious substance in a place under conditions where it may enter water frequented by fish and with a second count of depositing a deleterious substance in water frequented by fish.

Held, the accused was convicted on both counts. Even though laboratory experiments which showed that the substance in question was lethal to juvenile salmon were carried out under conditions which did not duplicate those in the waters affected, they showed that the substance was deleterious. In addition, expert testimony established that the dispersant dramatically increased the toxicity of oil in water. The evidence further established that the deposits had taken place and that the waters in question were frequented by fish and therefore the essential elements of the offence had been made out.

Miss J. Maykut, for the Crown.
J.M. MacKenzie, for the accused.

April 23, 1975.

CANADA)
PROVINCE OF BRITISH COLUMBIA)
COUNTY OF VANCOUVER)
CITY OF VANCOUVER)

REGINA

VS

CAPTAIN J. TINDALE

BEFORE: G. H. JOHNSON, PROVINCIAL JUDGE

VANCOUVER, B. C.
APRIL 23, 1975.

APPEARANCES

MISS J. MAYKUT — APPEARING FOR THE CROWN
J. M. MacKENZIE, ESQ. — APPEARING FOR THE DEFENCE
J. WAKEFIELD — COURT RECORDER
J. MURAO — TRANSCRIBER

REASONS FOR JUDGMENT

Now, in the case of Regina versus Captain J. Tindale, Captain J. Tindale was charged, Count One, that at the City of Vancouver, Province of British Columbia, on or about the 19th day of December, A.D., 1974, did unlawfully permit the deposit of a deleterious substance in a place under conditions where such deleterious substance may enter waters frequented by fish.
And, Count Two, that at the City of Vancouver, province of British Columbia, on or about the 19th day of December, A.D., 1974, did unlawfully deposit a deleterious substance in waters frequented by fish, contrary to the form of the statute in such case made and provided.
Now, I find the facts to be that on the 19th day of December, 1974, at about three-thirty o'clock in the afternoon an oil spill occurred in the area of the Seaboard Number Two Dock located in North Vancouver, in the Province of British Columbia. The ship, Rachel of Monrovia, was berthed at Seaboard Dock Number Two, and as a result of Mr. Thomas Carscadden, a Fisheries Officer, from the Environmental Protection Services of the Department of the Environment attending Seaboard Dock Number Two at approximately three-thirty p.m. on the 19th of December, 1974, and from his conversation, short though it was, from his observations of the dock and surrounding water, I'm satisfied on this evidence that the oil that was spilled into the water came from

the ship, Rachel of Monrovia. The water involved in the area of Seaboard Dock Number Two is the water contained in part of Burrard Inlet. Also, from the observations of Mr. Carscadden and his evidence and the evidence of a Mr. Phillip Johnson, a longshoreman, I'm satisfied that not only did the oil come from the vent holes in the ship, Rachel of Monrovia, but also that several members of the crew attempted to shove coffee cups down the scuppers to try and plug them up. Mr. Johnson. when he saw this, placed a phone call with the result that Mr. Carscadden came upon the scene a short time later. Mr. Johnson also observed the crew members during -- dump sawdust on the deck of the ship and also saw some of the crew members dumping Ganlem from a can into the water of Burrard Inlet on the port-side of the ship, Rachel of Monrovia. From the evidence of the expert in oil dispersant, Mr. Guy Hebert, I'm satisfied on his evidence that Ganlem is an oil dispersant; it's a whitish colour and when you mix Ganlem with oil you do so to make it immersible in water. Not all dispersants do this but Ganlem does. Ganlem is a toxic dispersant and when mixed with oil increases the toxicity of the oil to a very marked degree. I'm also satisfied on the evidence of Mr. Carscadden that there are fish living throughout the waters of Burrard Inlet of various species; Lynn Creek, the Seymour River and the Indian River all flow into Burrard Inlet and the young fish known as Fry of various species come out of these rivers into the waters of Burrard Inlet in the early Spring of each year. Mr. Carscadden took a sample of the milky substance from the bow rail of the docket, the side of the ship, Rachel of Monrovia, and he also spotted several five gallon containers of a brilliant orange and black colour and he seized one containing some white powder. He also observed this milky white substance right up against the ship's rail and some of it on the deck of the ship while the clean-up was being effected by the crew. The milky substance was still in the water and drifting to the rear of the ship. Mr. Ronald Watts, head of the bioassay laboratory of the Environmental Protection Services located in the Pacific Environmental Institute in West Vancouver, B.C., was qualified as an expert in bioassay test on fish as to the limits to withstand toxic substances. On April the 15th, 1975, at fifteen hundred hours Mr. Watts conducted a test of the milky substance taken from the dock by Mr. Carscadden, set up another control solution. Cohoe fry were placed in the test vessel identical with the control. The temperature was regulated but Mr. Watts admitted that the temperature of eight degrees centigrade was not necessarily the temperature of the water on December the 19th, 1974, at three-thirty p.m. in the area of the Seaboard Dock

Number Two, nor was the test solution the same as the salt water near Seaboard. The test solution was checked after fifteen minutes, a half hour, one hour and two hours, for fatalities in the fish and there were none. However, on the -- I must check this date from my notes, yes, on the 17th day of April, 1975, there were five cohoes dead in the test solution and there were no deaths in the control. Mr. Watts conceded that the length of time of exposure is important in toxicity of substances. Because of the length of time between the taking of the sample of the milky solution by Mr. Carscadden and the test conducted by Mr. Watts a certain amount of detoxification would take place. The test solution was in the ratio of sixty grams of the milky substance to twenty-five thousand grams of the salt water. Mr. Watts agreed that the toxicity of a substance in the water depended to a large degree on the concentration of the substance in the water. I'm satisfied on the evidence of Mr. Watts that the deposit of Ganlem in the ratio of sixty grams of Ganlem diluted in twenty-five thousand grams of salt water renders that solution toxic to small fish, and that clearly, the presence of Ganlem in salt water in that ratio is toxic to these small fish. Mr. Carscadden did not take a sample of the milky salt water of Burrard Inlet on the port-side of the ship, Rachel of Monrovia, after the Ganlem was deposited into these waters by the crew. I'm satisfied on the evidence that four or five, five gallon cans of this oil dispersant, Ganlem, was poured over the side of the ship. Also, there is not any evidence as to what the ratio was of the Ganlem contained in the salt water on the port-side of the ship, nor was a sample of this solution taken by Mr. Carscadden at the time of the oil spill. It is clear from the following cases that the offence of depositing a deleterious substance in water frequented by fish contrary to Section 33, subsection 2 of the Fisheries Act is an offence of strict liability and mens rea is not required, (see the Queen versus Pierce Fisheries Limited 1975, CCC, 193, and Regina versus Jordon River Mines Limited, 1974, 4 Western Weekly Reports, at 337).

Section 33-11-A defines a deleterious substance:

> a) A deleterious substance means that any substance that if added to any water would degrade or alter or form part of a process of degradation or alteration to the quality of that water so that it is rendered deleterious to fish or to be used by man or fish that frequent that water, or --"

and it goes on.

Even though an actual sample of the mixture of Ganlem, salt water was not taken from the waters on the port-side of the Rachel of Monrovia, and there was not any evidence as to what ratio of Ganlem volume to the volume of the salt water at that time, nor the temperature of the water at the

time of the oil spill the evidence of what happened to the small cohoe fish is outlined by Mr. Watts and his further expert testimony that the small cohoe fish were coughing, suffering from stress after being in the substance taken from the guard rail of the dock, and the further evidence of Mr. Hebert that the mixing of the oil dispersant, Ganlem, with the oil dramatically increases the toxicity of the oil. I'm satisfied that the Ganlem that was deposited in the waters of Burrard Inlet on the port-side of the ship, Rachel of Monrovia, was a deleterious substance, and that its deposit in Burrard Inlet near Seaboard Dock Number Two degraded and altered the quality of that water in the immediate vicinity of the berthed ship, Rachel of Monrovia, and that it was harmful to any fish present in that immediate area. I'm also satisfied that the Crown has established that these waters of Burrard Inlet in the area of Seaboard Dock Number Two were frequented by fish and that the contamination of the water was caused by the oil dispersant, Ganlem, being deposited in the water by some of the crew members of the ship, Rachel of Monrovia, while they were attempting to arrest an oil spill from that ship and contain and disperse the oil that was spilled into the waters of Burrard Inlet. I'm satisfied that the sample of the milky solution taken by Mr. Carscadden from the bow rail of the dock, Seaboard Number Two, was a mixture of water and Ganlem deposited there from that ship, and would have eventually entered the waters of Burrard Inlet along with the Ganlem already in the waters of that inlet and on the side of the ship, Rachel of Monrovia.

I'm satisfied on all of my findings beyond any reasonable doubt, and I find the accused guilty of both counts as charged.

G. H. JOHNSON,

Judge of the Provincial Court
of British Columbia.

I hereby certify the foregoing to be a true and accurate report of the evidence and proceedings herein.

A duly sworn Court Recorder.
29/4/75 jm

NORTHWEST TERRITORIES MAGISTRATE'S COURT

Eckardt Dep. Mag.

Regina v. Canada Tungsten Mining Corporation Limited

Environmental law -- Water pollution -- Oil spill -- Permitting the deposit of a deleterious substance at a place where it entered water frequented by fish -- Strict liability offence -- Due diligence exercised only after the fact -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8).

The accused was charged with three counts of permitting the deposit of a deleterious substance at a place where it entered water frequented by fish after fuel oil leaked from a pipeline located at its operations and entered a nearby river.

Held, the accused was convicted. The offence was one of strict liability and therefore the Crown did not need to show *mens rea*. Nor could the accused avail itself of the defence provided by s. 33(8). While the company may have done everything reasonable to remedy the problem and mitigate its effects once the offence became apparent, a consideration of its conduct prior to the events in question indicated a failure to exercise all due diligence to prevent the offence from occurring.

The Queen v. Pierce Fisheries Ltd., [1971] S.C.R. 5; *R. v. Jack Cewe Ltd.* (1975), 23 C.C.C. (2d) 237; *R. v. Churchill Copper Corporation Ltd.* (1972), 5 C.C.C. (2d) 319; *R. v. Jordan River Mines Ltd.* (1974) 4 W.W.R. 337; *R. v. Industrial Tankers Ltd.*, [1968] 4 C.C.C. 81; refd to.

Orval J.T. Troy, Q.C., for the Crown.
John A. Bourne, Q.C., for the accused.

June 27, 1975.

IN THE MAGISTRATE'S COURT OF THE NORTHWEST TERRITORIES

REGINA
V.
CANADA TUNGSTEN MINING CORPORATION LIMITED

REASONS FOR JUDGMENT OF HIS WORSHIP DEPUTY MAGISTRATE L.S. ECKARDT

CROWN COUNSEL: ORVAL J.T. TROY, Esq., Q.C.
DEFENCE COUNSEL: JOHN A. BOURNE, Esq., Q.C.

In this case the defendant company is charged that:

"Count 1, between the twelfth day of June, 1974 A.D., and the seventeenth day of June, 1974, A.D., at or near Tungsten, N.W.T. approximate location 61° 58' North Latitude by 128°13' 30" West Longitude did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33(2) of the Fisheries Act.

"Count 2, between the twenty fourth day of June, 1974 A.D., and the twenty eighth day of June, 1974 A.D., at or near Tungsten, N.W.T. approximate location 61° 58' North Latitude by 128° 13' 30" West Longitude did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33(2)

of the Fisheries Act.

"Count 3, between the second day of July, 1974, A.D., and the sixth day of July, 1974, A.D., at or near Tungsten, Northwest Territories, approximate location 61°58' North Latitude by 128°13' 30" West Longitude did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33(2) of the Fisheries Act."

The Fisheries Act, R.S.C. 190, c. F-14, s.33(2) [re-en. R.S.C. 1970, c. 17 (1st Supp.), s.3(1)], reads as follows:

"(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water";

and the accused is charged with "depositing".

In view of the facts and circumstances of the instant case subsection (4) aforesaid is not applicable.

At the opening of the hearing Counsel materially assisted the Court by agreeing to and entering as Exhibits the following:

Ex.(1) - a Statement of Agreed Facts.

Ex.(2) - a book of photographs containing twenty-one photographs (lettered A to U inclusive) depicting various scenes taken at the area in question including "clean-up" operations.

Ex.(3) - a blueprint plan of the mining site in question.

The Statement of Agreed Facts (Ex. 1) contains the following 25 facts, namely:

1. The Company is the proper Defendant.

2. The situs is at or near Tungsten, Northwest Territories approximate location 61°58'N Latitude, by 128°13'30"W Longitude.

3. Between the dates June 12 to June 17, June 24 to June 28, and July 2 to July 6, A.D. 1974, the Company was the owner and operator of the Mining Company operation complete with associated buildings and equipment and particularly the oil storage tank in question located at the site described above under authority of NWT Lease No. 2457. The tank fed oil to the steam boiler, the Mine Manager's house and the recreation hall.

4. On Monday, June 10, oil was visible to the Company staff in Flat River in an area some distance below the oil storage tank in question. It was considered that the visible oil could be related to the oil storage tank and it was shut off and the tank drained. The Manager's house and recreation hall were hooked up to separate tanks and the steam boiler was moved to the power house. There was no leak in the tank itself.

5. On Tuesday, June 11 oil was still visible in the Flat River and John Kervin, Mine Manager, sent telexes to the Inspector of Mines and Controller of Water Rights in Yellowknife with a copy to F.E. Hall, President of the Company, advising of the visible oil and asking for assistance.

6. On Wednesday, June 12 John Kervin, Mine Manager, phoned Dorothy Chisholm, Company representative in North Vancouver, asking for material to contain the oil and to get advice. Dorothy Chisholm phoned B.C. Research Council which recommended she approach Environment Canada. Environment Canada suggested trench and peat moss or straw be employed and suggested John Kervin phone

Colin Wykes, Manager of Yukon Environmental Project in Whitehorse, which was done. Dorothy Chisholm arranged to expedite 40 bales of hay from Watson Lake to Tungsten and 20 bales of peat moss were despatched by truck from North Vancouver to Tungsten, N.W.T. Wishart Robson, Senior Technician of Environment Protection Service, Whitehorse, and George Leschyson, proceeded to Tungsten.

7. On Thursday, June 13 Robson and Leschyson arrived at Tungsten and conducted an inspection of the Mining property where they observed oil entering the Flat River immediately adjacent to the mining property. At the time the Company was ditching parallel to the river and bisecting areas where oil was seeping into the river to intercept the flow. Upon the advice of Mr. Robson, three booms were placed across the river to intercept or cut off the flow of oil from downstream. The Company employees were also advised by Mr. Robson to begin burning off accumulated flock from the river booms. This situation continued until June 17. The use of the straw and peat moss was not very effective. CON-WED Oil Absorber was recommended and the Company ordered it from CIL, Calgary to arrive at Watson Lake on June 14.

8. On Friday, June 14 a second trench was begun about forty feet upflow from the first and parallel to the river. The burning of oil was begun in the second trench. CON-WED Oil Absorber arrived and was deployed in the first trench and the booms.

9. On Saturday, June 15 Mr. Colin Wykes, District Manager of Environment Protection Service, Whitehorse, recommended calling in consultants from Edmonton and the Company agreed and consultants were contacted. The burning continued.

10. On Sunday, June 16 Jim McKay, Consultant, arrived and advised lining the first trench with plastic film on the stream side, which was done. The burning continued.

11. On Monday, June 17 Messrs. Robson and Leschyon left Tungsten. Kenneth Weagle, Senior Biologist, Environment Protection Service, Whitehorse, reported by telex to Dave Gee, Regional Manager, Water Forest and Lands, on the current situation and reported that the Company had been very co-operative. The burning continued.

12. On Tuesday, June 18 to Monday, June 24 the burning continued.

13. On Tuesday, June 25 Messrs. Ken Weagle, Wishart Robson and Lawrence Solsberg arrived at the Company's mine site and noted that fires were still burning in the trenches which had been dug to intercept the flow of oil. The investigators also observed a slick of oil on the river and accumulations of flock material along the river bank. A decision was made to divert the river around the affected area.

14. On Wednesday, June 26 the investigators inspected the site of the spill with Mr. Neils Jacobson, Department of Indian & Northern Affairs. The slick was observed on this day and fires were burning in one of the trenches. Flock was also observed along the banks and the booms were still in position on the river. Mr. Weagle contacted Sandy Lewis of Environment Protection Service, Yellowknife, to obtain authorization to divert the river.

15. On Thursday, June 27 Messrs. Weagle, Solsberg and Robson left Tungsten. The burning continued.

16. On Friday, June 28 Ron R. Wallace, Senior Project Biologist, telexed C. Wykes advising the diversion of the river was authorized and to advise the Company. The burning continued.

17. On Wednesday, July 3 Mr. Wishart Robson arrived at Tungsten with a letter from C. Wykes giving the Company permission to divert the river. A portion of the downstream diversion dyke had already been completed by the Company but actual diversion was being held up until formal approval was given. Mr. Robson conducted an inspection of the site. Fires were burning in the trench and a slick was noticed on the water, there was also flock accumulating in places along the banks and along the booms which were still in place.

18. On Thursday, July 4, the dyking and diversion of the river continued. The burning continued.

19. On Friday, July 5, 1974 Company personnel located a fuel pipe which had previously been leaking and which was contained in a box that had been completely closed and insulated until it was opened during this inspection. This

leaking pipe was found to be the source of the oil which was leaking into the Flat River. The pipe in question was part of a fuel distribution system which supplied heating oil to the several buildings from the aforesaid storage tank belonging to the Company. There had been no metering system or regular pressure tests in effect designed to detect any oil leakages from the tank or pipe. The dyking and diversion of the river continued. The burning continued.

20. On Saturday, July 6 the dykes and the diversion of the river were completed and flow of oil downstream was cut off and the two booms repositioned. The burning continued.

21. On Sunday, July 7 improvements to the dykes were made by lining them with plastic membrane. The burning continued.

22. On Monday, July 8 Mr. Robson left Tungsten.

23. Between the dates June 12 to June 17, June 24 to June 28 and July 2 to July 6, A.D. 1974 diesel or fuel oil which had escaped from the pipe did seep through the ground and did enter the waters of Flat River, but the Company did not consent thereto.

24. The Flat River is water frequented by fish.

25. Diesel or fuel oil is a deleterious substance.

From these agreed facts it is conceded that:

(a) The water in question, namely, the Flat River, is water frequented by fish.

(b) The deposit was a deleterious substance.

Counsel for the accused however did not concede that the offences in question are ones of strict liability requiring no mens rea and, in that regard, relied interalia on the lone dissenting Judgment of Cartright, C.J. in Regina v. Pierce Fisheries

Ltd. (1971) S.C.R. 5; a Judgment of F.K. Grimmett, C.C.J., in the unreported 1974 British Columbia case of Her Majesty the Queen v Jack Cewe Ltd. from the County Court of Westminster holden at New Westminster; and a Judgment of J.D. Ord, Prov. Ct. Judge in the unreported 1975 Ontario Provincial Court case of Regina v. Power Tank Lines Limited. In Regina v. Pierce Fisheries Ltd. (supra) the respondent company was charged with the offence of being in possession of undersized lobsters contrary to s.3(1)(b) of the Lobster Fishery Regulations. The question for determination by the Supreme Court of Canada was whether mens rea was an essential ingredient to be established by evidence on a charge of violating the said s.3(1)(b) of the Lobster Fishery Regulations. The circumstances were somewhat extenuating in that, out of 50,000 to 60,000 lbs. of lobsters found in the accused company's possession, only 26 of them were undersized. Furthermore, it was conceded on the evidence that none of the officers or responsible employees of the company had any knowledge of that fact and indeed specific instructions had been given to its officers, responsible employees and dealers not to buy undersized lobsters. The learned Chief Justice applying the principle to the words of the charge against the respondent company that unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind, was of the opinion that the respondent was entitled to a finding of not guilty. In support of his opinion the Chief Justice stressed the expressfinding of fact that the

respondent had no knowledge, factually or inferentially, that any of the lobsters on its premises and under its control were undersized, and that the regulation in question did not declare in specific and unequivocal words (as he thought it should) if it was intended to create an offence of absolute liability in the public interest.

The other eight members of the court however did not agree with the learned Chief Justice and Ritchie, J., in delivering the majority judgment (p. 14), adopted the reasoning of Wright, J. in Sherras v. De Rutgen (1895) 1 Q.B. 918 @ 921 which reads as follows:

> "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfullness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered ----------the principle classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush, J. in Davies v. Harvey L.R. 9 Q.B. 433, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty."

His Lordship went on to say that the Lobster Fishery Regulations were obviously intended for the purpose of protecting lobster beds from depletion and thus conserving the source of supply for an important fishing industry which is of general public interest; and concluded by saying that he was of the opinion that the offence of violating subs. (1)(b) of s.3 of the Lobster Fishery Regulations was an offence of strict liability

of which mens rea is not an essential ingredient. Accordingly the appeal was allowed and the case remitted to the Provincial Magistrate to be dealt with in accordance with the majority judgment as delivered by Ritchie, J.

The other two cases mentioned aforesaid, namely, Her Majesty the Queen v. Jack Cewe Ltd., and Regina v. Power Tank Lines Limited, are both readily distinguishable from the instant case on the facts. The charge in the former case was dismissed because, in the opinion of the Court, the particular circumstances in the case amounted to an Act of God. In my opinion no such circumstances existed in the case at bar. In the latter case the accused corporation was charged with two counts under The Environmental Protection Act of Ontario, and one count under The Ontario Water Resources Act. The circumstances and the resultant charges arose out of a motor-vehicle accident in which no legal liability rested on the driver of a truck (the property of the defendant company) which was carrying 3000 gallons of bunker oil at the time. The learned Provincial Court Judge in that case held that, under the aforementioned Ontario Statutes, the Crown had no onus requiring it to prove mens rea, but queried as to whether or not this was sufficient to justify holding the defendant company to be an insurer of oil when transporting it on a highway. The court ultimately registered convictions against the defendant expressing the belief that a person or company which causes oil to be carried upon the highway must accept a certain foreseeable risk of accident no matter by whom caused.

On the issue on the instant case as to whether or not the offences in question are of strict liability requiring no mens rea, I respectfully subscribe to and adopt the reasoning of Ritchie, J., in Regina v. Pierce Fisheries Ltd. (supra)and rule that offences of violating s.33(2) of the Fisheries Act are offences of strict liability of which mens rea is not an essential ingredient.

It is noted that similar decisions have been handed down in several recent British Columbia environmental cases including Regina v. Churchill Copper Corp. Ltd. (1972) 5 C.C.C. 2nd 319; and Regina v. Jordan River Mines Ltd. (1974) 4 W.W.R. 337.

It follows that, in my opinion, the aforementioned three decisions relied upon by learned counsel for the defendant company in the case at bar do not assist him in this case.

The real issue remaining is: Has the offence been proven?; and in that regard I will now deal with ss.8 of s. 33 of the Fisheries Act which reads:

> "(8) In a prosecution for an offence under this section or section 33.4 it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

The underlining is my own.

Mr. Bourne, in his assiduous and persuasive argument on behalf of the accused submitted (i) that, in effect, the alleged offence should be confined to the accused's oil storage tank referred to in Exhibit (1); (ii) that the accused did not consent to the commission of the offence; (iii) that the accused used all due diligence on the days in question to prevent its commission; (iv) that the days in question, according to the Information were June 13 to 16 inclusive, June 25 to 27 inclusive, and July 3 - 5 inclusive, all in the year 1974; (v) that after June 10, 1974, the accused did not permit oil to be in the said storage tank (same having been shut off and drained on June 10, 1974); (vi) that on Monday, June 10, 1974, oil was first noticed in the Flat River by an employee of the accused and reported forthwith to the authorities; and (vii) that the accused did not permit oil to be in the ground but, on the contrary, took all possible steps to remove it from the ground and to prevent it from entering into the Flat River.

It should be noted that the said oil storage tank fed oil to the steam boiler on the mining site, the Mine Manager's house and the recreation hall by means of a pipe or pipes leading from the tank to various places on the mining site. The pipes in question (or at least some of them) including the one hereinafter particularly referred to, were contained in what appears to be a long "flume-like" box. (see Ex. 2 - photos B, V & W) - hereinafter referred to as

the said "pipe box". This pipe box, hitherto completely closed and insulated, was on Friday, July 5, 1974, opened up and inspected, revealing that a fuel pipe contained in the said pipe box was found to have been leaking. This leaking pipe was found to be the source of the oil which had been leaking into the Flat River. Said pipe was part of the fuel distribution system which supplied heating oil from the aforementioned oil storage tank to the several buildings on the mining site (see Ex. 2 - photo W). On June 11th oil was still visible in the Flat River adjoining the accused's mining site. On June 13th oil was observed entering the Flat River immediately adjacent to the mining property. On June 25th and 26th oil slicks were observed on the river adjacent to the mining property and accumulations of "flock" material along the river banks. On July 3rd "flock" was seen to be accumulating in places along the banks of the Flat River.

According to the Crown witness, Mr. Wishart Robson, Senior Technologist with Environment Canada, "flock" is a name which his Department has given to a material which forms when diesel oil or fuel mixes with water (see Ex. 1 - photo C).

While Mr. Bourne's argument is indeed ingenious, I am unable to agree with his submission that the Court should only take into consideration events which occurred subsequent to June 10, 1974, in dealing with the charges in question. To agree with defence counsel's submission the Court would have

to disregard a very important part of ss. 8 of s.33 of the Fisheries Act, namely, the last eleven words of the sub-section which are, "and that he exercised all due diligence to prevent its commission".

The underlining is my own.

In my opinion it is implicit in the reading of these words that, in dealing with the question of innocence or guilt in a case such as this, the court has to be concerned in what was done if anything before June 10, 1974, to prevent the commission of the alleged offences. Such is the plain and ordinary meaning of the words in question and the very essence of the case.

I have not the slightest difficulty on the facts in finding that the accused in the instant case did not exercise all due diligence to prevent the commission of the offences alleged in the Information. It follows that I find the accused guilty on all three counts.

(L. S. ECKARDT)
Deputy Magistrate
Northwest Territories

Yellowknife, N.W.T.
June 27, 1975

BRITISH COLUMBIA COUNTY COURT

Catliff C.C.J.

Imperial Oil Limited and British Columbia Hydro & Power Authority

v. The Queen

Environmental law -- Water pollution -- Oil spill -- Deposit of deleterious substance in water frequented by fish -- Exercise of all due diligence by first accused -- Second accused not guilty as party to the offence -- Appeal allowed -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(8), 33(11); Interpretation Act, R.S.C. 1970, c. I-23, s. 27; Criminal Code, s. 21.

The two accused were convicted in Provincial Court on a charge of depositing a deleterious substance in water frequented by fish after an employee of Imperial Oil Limited (IOL) delivered fuel oil by mistake to an abandoned storage tank on the premises of B.C. Hydro & Power Authority (Hydro). The oil escaped from the tank, passed through the municipal sewage system, and entered Vancouver Harbour. On appeal by way of trial *de novo*,

Held, the appeal was allowed and both accused were acquitted. While the substance deposited was deleterious and the offence was one of strict liability, IOL brought itself within the defence provided by s. 33(8) of the Fisheries Act by establishing that the offence was committed without its knowledge or consent and that it exercised all due diligence to prevent it. In specific, IOL had given proper instructions to its employee, and had also done everything reasonable to prevent such incidents after a similar accident occured on Hydro's premises on a previous occasion.

Even though Hydro's employees had assisted IOL's in the act that constituted the offence, it too was acquitted. Hydro could only have been found guilty as a party, but since the assistance of its employees was merely incidental to the matter and in no sense for the purpose of furthering the offence, Hydro was not guilty.

The Queen v. Pierce Fisheries Ltd., [1971] 5 S.C.R.; *R. v. Churchill Copper Corporation Ltd.*, [1971] 4 W.W.R. 481; [1971] 5 C.C.C. (2d) 319; affd [1971] 5 C.C.C. (2d) 324; affd [1972] 8 C.C.C. (2d) 36 (B.C.C.A.); *R. v. McTaggart*, [1972] 3 W.W.R. 30; [1972] 6 C.C.C. (2d) 258; *R. v. Jordan River Mines Ltd.*,[1974] 4 W.W.R. 337; *R. v. Kirby*, unreported, B.C. Prov. Ct., May 8, 1972; *R. v. Standard Oil of B.C. Ltd.*, unreported, November 18, 1974; *R. v. F.W. Woolworth Co. Ltd.* (1974), 3 O.R. (2d) 629; refd to.

A.D. Louie, for the Crown, respondent.
Heber Suiker, for the accused Imperial Oil Limited, appellant.
R.L. Louie, for the accused British Columbia Hydro & Power Authority, appellant.

November 20, 1975.

IN THE COUNTY COURT OF VANCOUVER

HOLDEN AT VANCOUVER

HER MAJESTY THE QUEEN	)	REASONS FOR JUDGMENT
AGAINST	)	OF
IMPERIAL OIL LIMITED and BRITISH COLUMBIA HYDRO & POWER AUTHORITY	)	HIS HONOUR JUDGE CATLIFF

Counsel for Imperial Oil Limited:	Heber Sulker, Esq.
Counsel for British Columbia Hydro & Power Authority:	R.L. Louie, Esq.
Counsel for the Crown:	A.D. Louie, Esq.
Dates of Hearing:	11, 12, 15, 16, 17, 18 September 1975.

This is an appeal by way of trial de novo from a conviction of the Defendants on 2 December 1974 by His Honour Judge J.J. Anderson on a charge that the Defendants did unlawfully deposit a deleterious substance, oil, in a place under conditions where such oil entered water frequented by fish contrary to Section 33(2) of the Fisheries Act.

The charge arose out of an incident on 5 November 1973 when a large quantity of bunker fuel was delivered to the Larwell Bus Depot on Beatty Street in Vancouver. In circumstances which I shall relate the fuel was pumped in error through a fill pipe into a small abandoned underground tank from whence it spilled out through a dip pipe on to a furnace room floor. The oil then spread across the floor and into drainage sumps from where it found its way into the storm sewer on Beatty Street and was carried along the sewer until it reached the outfall in Vancouver Harbour.

The fuel was delivered by an employee of the Defendant Imperial Oil Limited ("Imperial Oil") to the bus depot which are premises occupied by the Defendant British Columbia Hydro & Power Authority ("B.C. Hydro") under a lease and operated by a subsidiary company. There are two underground fuel storage tanks at the bus depot. The first has a capacity of about five hundred gallons and has not been in use for many years. The second, which is in every-day use, has a capacity of two thousand gallons. Both tanks are filled by means of pipes which exit at ground level about two feet from the north wall of the bus garage. The fill pipe of the abandoned tank is two and a half inches in diameter and projects some few inches out of the ground. The fill pipe for the tank in use is about four inches in diameter and exits at ground level about six inches from the other fill pipe. On 5 November 1973 the fill pipe to the abandoned tank had been fitted with a bung cap and spot welded. The fill pipe in use was capped with a circular brass plate containing a depressed slot in its top surface by means of which the cap could be screwed loose. The words "automatic" were engraved in a semi-circle around the perimeter of the brass cap. The brass cap was set slightly below the black-topped surface of the area.

At about 9:45 p.m. on 5 November 1973 the delivery man, a Mr. Donoghue arrived by truck at the bus depot to make a delivery of some two thousand gallons of bunker fuel known as Fuel 46. Donoghue had been working for Imperial Oil for only a short time and was making his first delivery to these premises. He saw a sign on a wall which said "46 Fuel". He saw the old fill pipe projecting from the black top, but as it looked "peculiar" he was not sure it was the

right one and he roamed around. He said he could not see any other fill cap. He went back to his truck and looked at his delivery card.

Each delivery man is supplied by Imperial Oil with a card in respect of each of the premises he visits. The card contains a variety of information including a space for special delivery instructions. Donoghue's delivery card (Exhibit #7) contained the following special delivery instructions:

> "Inter-Bus route)(Del. near gauge
> East of wash rack door 4½ ft.
> the far fill cap 0 Brass one -
>
> CONTACT DEPOT MASTER
> BEFORE DEL."

In addition to these special delivery instructions, Exhibit #7 contained a rough sketch of the garage building including the location of the wash rack and the apparent location of the brass cap which is marked on the sketch by a circle with a line in the middle of it and the words "oil fill".

After looking at his card, which Donoghue remembered showed a "brass one", he went outside to look again, but could still see only the old fill pipe with its bung cap. He said he was still not convinced and so returned to his truck to call the dispatcher at the Imperial Oil office. At the time the dispatcher received the call there was sitting not too far away from him his supervisor, Mr. Cleaver, who heard Donoghue's call over a speaker. Donoghue told his dispatcher that he was not sure that the fill pipe he had located was the right one and pointed out that it had a small cap. In his evidence,

Mr. Cleaver said that he advised the dispatcher to tell Donoghue to check his delivery card and find someone at the depot who knew where the right cap was. Mr. Cleaver also said he told the dispatcher to tell Donoghue that the fill cap might be in the neighbourhood of the garbage cans.

Donoghue had apparently looked under the garbage containers, but had found nothing there. He said that there were also some tires three or four feet from the old fill cap and he removed these tires but found nothing underneath.

Donoghue then made enquiries from a boy who was nearby washing buses. The boy referred him to a mechanic in the garage. The mechanic came out of the garage and pointing in the general vicinity of the old fill pipe told Donoghue "this is where we've been filling for years". Apparently this convinced Donoghue that the fill pipe he could see was the right one so he returned to his truck to get wrenches to take the bung top off. With these tools he tried to remove the bung cap but could not do so. He then asked the boy washing buses if he could give him some tools. The boy referred Donoghue to a Mr. Hargreaves who was a mechanic and leading hand in the garage and, in fact, the senior employee on duty in the garage that evening. (It is not clear from the evidence whether Hargreaves was the mechanic Donoghue first spoke to. Hargreaves denies it.) Hargreaves gave Donoghue a special tool designed to remove bung caps, but Donoghue was again unsuccessful and returned to Hargreaves and told him he could not get it off. Hargreaves got a hammer and chisel and came outside with Donoghue and tried to take the bung cap off with these tools. Hargreaves was unsuccessful and returned to the garage. Donoghue took

up the hammer and chisel or used his own hammer and chisel - the evidence is not clear - and was able to collapse the cap and extract it. Having opened the old fill pipe Donoghue was then able with the help of an adaptor to connect up to his truck and proceeded to deliver 2000 gallons of oil at a rate of between 80 and 100 gallons a minute into the old fill pipe. After he had finished and was ready to disconnect the boy came out and said he could smell oil in the basement. Donoghue went down to the basement and saw that the floor was covered with oil. He returned to his truck and called his dispatcher who advised him to take precautions against fire. Donoghue then returned to the basement and opened the door into the boiler room. He saw oil guzzling up from a hole in the boiler room floor and flowing towards and down a drain near the wall. At this time the furnace in the boiler room was alight and Donoghue did what he could to prevent the oil on the floor from getting into the furnace. Sometime later Donoghue returned to the area of the fill pipe and was shown the brass cap by a B.C. Hydro employee Mr. Peterson. Donoghue said he had looked in the same area a half dozen to a dozen times but had not seen it. It was clearly visible when Mr. Peterson showed him it and he could only suggest that the fact that it was slightly recessed must have obscured it or that it had been covered up by something.

It is to be remembered that the brass cap was only some six inches away from the old fill pipe and in my view must indeed have been covered up in some way before Donoghue made his delivery. It is almost inconceivable to me that Donoghue and Hargreaves while working on the bung cap some six inches away would not have seen the brass cap unless it had been covered up. There was some inconclusive evidence about debris in the area and evidence that the garage roof had recently been repaired and that old bits of asphalt and tar were lying around. This evidence does not satisfy me as to how the brass cap was covered up, but, as I say, I am satisfied that it must have been camouflaged in some manner because otherwise Donoghue and Hargreaves would surely have noticed it.

The evidence showed that a pipe to enable a dip-stick to measure the oil in the old tank (called at trial a dip pipe) ran from the tank and emerged at floor level in the basement furnace room.

It is to be inferred from the evidence that the bunker fuel delivered by Donoghue after filling the abandoned tank was then forced up this dip pipe and bursting through the cap at the top of the pipe overflowed on to the boiler room floor. The evidence suggests that there may already have been a substantial quantity of fuel in the abandoned tank.

There had been an incident in April 1973 concerning the abandoned tank when another Imperial Oil delivery man had also connected up to the wrong fill pipe and had started pumping fuel into the old tank. On this occasion the fuel in excess of the old tank's capacity had not been able to escape via the dip pipe because the bung in it had held. As a result the delivery man had noticed a reversal of pressure at the fill pipe entrance

and had immediately stopped delivering. There was no evidence as to how this earlier mistake had come about. There was evidence that the mistake had not been discovered until a day or so later when the furnace ran out of oil and it was then deduced that delivery had been made to the wrong tank. A discussion had followed between representatives of B.C. Hydro and Imperial Oil with the latter suggesting that steps be taken by Hydro to see that the possibility of a fuel delivery to the wrong tank could not happen again. A B.C. Hydro official had then instructed an employee to spot weld the bung cap on to the old fill pipe. This had been done but the fill pipe was otherwise left as it had been. No steps had apparently been taken to remove the oil which had been pumped into the abandoned tank in April and it was therefore presumably still there on 5 November 1973.

If the dip pipe bung had held when the old tank became filled Donoghue might well have been made aware that something was wrong as had happened on the previous occasion. Instead the bung apparently gave way. The evidence of the Imperial Oil employee, Mr. Arcano, who was in thefurnace room shortly after the first incident in April, was that the bung he had found being used to plug the dip pipe in the furnace room floor was a poorly fitting rough wooden plug with a rag around it. After Arcano had dipped the tank he had replaced the plug by screwing it finger tight and then stamping on it with his foot.

Having emerged from the dip pipe and on to the floor of the furnace room, the fuel oil spread across the room and into a sump and also under the furnace room door

and into another sump nearby. Once in the bus depot drains the oil proceeded into the regular sewer on Beatty Street. This sewer takes the storm and sanitary flow from a large area of downtown Vancouver. It starts at Beatty Street and leads north to its outfall underneath the Ocean Wharves Dock in Vancouver Harbour.

When noticed by the Harbours Board Police, the oil emerging from the outfall had spread some two hundred feet out from the Ocean Wharves pier and along its length for some five hundred feet. This oil slick when seen was spreading slowly. A sample was taken of the oil which proved to be Bunker Fuel 46.

On the basis of these facts the Defendants were charged with an offence under Section 33(2) of the Fisheries Act, R.S.C. 1952, c. 119, as amended ("the Act") which provides as follows:

> "(2) ...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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

On behalf of Imperial Oil it was submitted that:

(1) The Crown had not proved the deposit of a deleterious substance;

(2) The offence was not one of strict liability and required proof of mens rea;

(3) Imperial Oil had established thedefence of due diligence under Section 33(8) of the Act.

On behalf of B.C. Hydro it was submitted (in addition to (1) and (2) above) that:

(4) The Crown had not proved a "deposit" of oil;

(5) B.C. Hydro could only be guilty if at all as a "party" offender under Section 21 of the Criminal Code but the conviction of a party offender to an offence of strict liability nevertheless required proof of mens rea of which there was none;

(6) B.C. Hydro is immune from prosecution as an agent of the Crown;

(7) B.C. Hydro had established the defence of due diligence under Section 33(6) of the Act.

I shall deal with these submissions in turn.

(1) Has the Crown proved the deposit of a deleterious substance?

Section 33(11) of the Act defines "deleterious substance" (inter alia) as:

> "(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 itis rendered deleterious to fish or to the use by man of fish that frequent that water, ..."

The Crown satisfied me by evidence of laboratory experiments that Fuel 46 if added to water degrades that water so that it is rendered deleterious to fish that frequent that water. It was submitted that the water referred to in Section 33(11) is water frequented by fish and that the water used by the Crown in its laboratory experiments with fish was not water frequented by fish. The Crown's evidence, however, was that the water used in the experiments was taken from Burrard Inlet at a point offshore from West Vancouver, sixty feet below lowest tide and three hundred feet from the shore. It was conceded during the trial that Burrard Inlet is a body of water frequented by fish. The water used in the Crown's laboratory experiments designed to test the effect of Fuel 46 was therefore water frequented by fish.

Mr. Suiker also submitted that as there was no evidence, or no sufficient evidence, that the oil seen on the water by the Harbours Board Police on 6 November 1973 at Columbia Wharf had degraded the water in Burrard Inlet I should find that the Crown had not proved a deposit of a deleterious substance. He points out for example that no evidence was adduced by the Crown to show the effect on the bunker fuel of its journey through the sewer from Beatty Street to the harbour at the end of which it might have become innocuous to fish. The point as I understand it is that the words "that water" in Section 33(11) have reference only to the water alleged to be degraded at the actual site of the spill. I do not consider that the words "that water" are to be so construed. In my view they refer to the words "any water" earlier in the subsection. The words "any water" would include the water at the site of a spill, but are clearly not limited to it. The only qualification to be attached to the words "any water" is that such water must be proved to be frequented by fish. As I say, the water used by the Crown's expert in his experiments was water taken from Burrard Inlet which is water admittedly frequented by fish.

(2) Whether an offence under Section 33(2) of the Fisheries Act is one of strict liability.

Mr. Suiker submitted that the common law pre-

sumption that mens rea was an essential ingredient in the proof of a criminal offence was not displaced in this case. He submitted that in Section 33(2) a new crime was added to our criminal law casting a stigma upon anyone convicted of it and that therefore proof of mens rea was essential. I was referred to The Queen v. Pierce Fisheries Limited (1971) S.C.R. 5 where the Supreme Court of Canada dealt with the necessity of proof of mens rea in an offence of being in possession of lobsters of a length less than that specified in the schedule contrary to Section 3(1)(b) of the Lobster Fishery Regulations made pursuant to Section 34 of the Fisheries Act. At pages 13 and 14 Mr. Justice Ritchie observes:

> "Generally speaking, there is a presumption at common law that mens rea is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to any such presumption. Whether the presumption arises in the latter type of cases is dependent upon the words of the statute creating the offence and the subject-matter with which it deals.
>
> . . .
>
> The case most frequently cited as illustrating the limits of the presumption that mens rea is an essential ingredient in all offences and the exceptions to it, is Sherras v. De Rutzen((1895) 1 Q.B. 918), where Wright J. said, at p. 921:
>
> > There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered...
>
> The learned judge then went on to say:
>
> > ...the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush J. in Davies v. Harvey, L.R. 9 Q.B. 433, are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty."

At page 17 Mr. Justice Ritchie concludes:

> "In view of the above, it will be seen that I am of opinion that the offence created by s. 3(1)(b) of the Regulations falls within the first class of exceptions referred to by Wright J. in Sherras v. De Rutzen, supra, and that it should be construed in accordance with the language in which it was enacted, free from any presumption as to the requirement of mens rea.
>
> In considering the language of Regulation 3(1)(b) it is significant, though not conclusive, that it contains no such words as "knowingly", "wilfully", "with intent" or "without lawful excuse", whereas such words occur in a number of sections of the Fisheries Act itself which create offences for which mens rea is made an essential ingredient."

In my view Section 33(2) of the Act should for the same reasons be construed free from any presumption as to the requirement of mens rea. Section 33(2) is in form an absolute prohibition and free of the words referred to by Ritchie, J. which occur in other sections of the Act. The offence charged falls in my view within the class of acts "which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty".

I am fortified in my view by the following decisions in all of which it has been held that the offence under Section 33(2) of the Act is one of strict liability. R. v. Churchill Copper Corporation Ltd. (1971) 4 W.W.R. 421; 5 C.C.C. (2d) 319; affirmed 5 C.C.C. (2d) 324 n; affirmed 8 C.C.C. (2d) 36 B.C.C.A.; R. v. McTaggart (1972) 3 W.W.R. 30; 6 C.C.C. (2d) 258 (B.C.); R. v. Jordan River Mines Ltd. (1974) 4 W.W.R. 337 and R. v. Turby and R. v. Standard Oils

of B.C. Ltd. unreported decisions dated respectively 8 May 1972 and 18 November 1974 of Provincial Court Judge J.F.T. Johnson (the former being confirmed on appeal under File 1072/72).

(3) Has Imperial Oil established a defence of due diligence?

Section 33(8) of the Act provides:

> "In a prosecution for an offence under this section ... it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

It was not disputed at trial that if an offence was committed under Section 33(2) it was committed by Donoghue, an employee of Imperial Oil, without the knowledge or consent of Imperial Oil. The real issue was whether Imperial Oil had established that it had exercised all due diligence to prevent its commission.

Crown Counsel submitted that Imperial Oil was remiss in three respects.

It was first suggested that Imperial Oil should have done something more after the first incident in April 1973 than ask B.C. Hydro to do something about the abandoned fill pipe. Mr. Cleaver of Imperial Oil said that after the first incident he asked Mr. Peterson to do something about the pipe and Mr. Peterson said he would. Mr. Cleaver also said that a week later after another delivery of oil the driver had reported to him that the fill pipe was welded shut. Crown Counsel suggests that Cleaver should have insisted on something more being done, but there was no evidence that even if Cleaver had suggested that welding the bung cap to the old pipe was insufficient B.C. Hydro would have taken any further steps in the matter. B.C. Hydro were of course in control of their premises and in my view Mr. Cleaver did all that was required after the first incident by discussing the problem with Peterson and satisfying himself that the problem had been taken care of in the way it had.

It was next submitted that the delivery card should have made it clear that there were two pipes. In my view the delivery card did make this clear by making reference to "the far fill cap" and describing it as a brass one with a diagram of its surface appearance.

Finally it was suggested Mr. Cleaver did not exercise due diligence when he failed to tell Donoghue when Donoghue telephoned the dispatcher that there were two delivery pipes. Mr. Cleaver, as I have said, did tell Donoghue that he should look at his delivery card and find someone at the depot who knew where the right fill cap was.

It is true of course that Cleaver was aware of the delivery to the wrong tank some six months before and might have told Donoghue specifically that there were two pipes. However, he was aware that the old fill pipe had been welded shut and could quite properly have assumed in my view that the problem Donoghue was having in locating the brass cap would be solved once he referred again to his card and consulted someone at the garage. This of course is what he advised Donoghue to do. There was no evidence that Cleaver had the slightest suspicion Donoghue

ould break open the old fill pipe or that an employee of B.C. Hydro would help him do it. Nor do I think it reasonable to suppose that Cleaver should have foreseen the possibility of Donoghue breaking open the oil fill pipe cap particularly as he had been told it had been welded on.

I am satisfied that Imperial Oil made every reasonable effort once the accident had been discovered to clean up the oil, to alert the authorities and to do what was necessary to minimise possible damage. In my view Imperial Oil has established that the offence was committed without its knowledge or consent and that it exercised all due diligence to prevent its commission. Having established the statutory defence under Section 33(8) of the Act Imperial Oil is entitled to be acquitted.

(4) Has the Crown proved a "deposit" of oil by B.C. Hydro?

In my view, B.C. Hydro can only be convicted, if at all, as a "party" to the offence charged. To convict B.C. Hydro as a principal offender would require proof that B.C. Hydro did itself "deposit" the offending oil. The chain of events which resulted in the oil emerging into the waters of Vancouver Harbour started with the delivery of oil into the wrong fill pipe. In my view this was the "deposit" referred to in the charge and this deposit was made by Imperial Oil. I do not regard the emergence of the oil from the dip pipe on to the furnace room floor and its flow across the floor into the sumps and thence into the sewer system as a "deposit" by B.C. Hydro. "Deposit" is defined in the Shorter Oxford English Dictionary to mean (inter alia) "to lay, put, or set down". I do not consider these definitions appropriate to describe the participation

of B.C. Hydro in this incident. It is to be borne in mind that B.C. Hydro were not charged with "permitting" a deposit in which case different considerations would have applied.

(5) Does a conviction of a "party" offender to an offence of strict liability require proof of mens rea?

Section 21(1) of the Criminal Code which is made applicable to this offence under Section 27 of the Interpretation Act, R.S.C. 1970, c. 1-23, provides that:

> "(1) Every one is a party to an offence who
> (a) actually commits it,
> (b) does or omits to do anything for the purpose of aiding any person to commit it, or
> (c) abets any person in committing it."

In my view the evidence that Mr. Hargreaves assisted Donoghue in removing the welded bung cap and the evidence with regard to the inadequate dip pipe cap is evidence from which I could conclude that B.C. Hydro is a party to this offence under Section 21(1)(b) if I were to apply the same principle of strict liability to a party offender and I have concluded I should apply to the offence itself.

Counsel for B.C. Hydro submits, however, that the Crown must prove mens rea as an essential ingredient and has referred me to the case of R. v. F.W. Woolworth Co. Ltd. (1974) 3 O.R. (2d) 629. The facts in brief of this case are that the accused's store manager (Fawcett) rented a counter and floor space to a salesman (Healey) so that he could demonstrate and sell pens during store hours. Healey employed a man called McPhee to do the actual demonstrating and selling. McPhee made false representations to the public about the price of the pens contrary to the Combines Investigation Act. Healey was the author of the representations

Fawcett had no control over the manner of the demonstrations and gave no prior consideration or approval to the false representations.

The Ontario Court of Appeal held that there was evidence to support a conviction of Healey and McPhee: the question was had the Crown properly connected the accused F.W. Woolworth Co. Ltd. ("Woolworth") with the false representations. After deciding that Woolworth could not be vicariously liable for the acts of Healey and McPhee the Court considered whether Woolworth was guilty as a party under Section 21 of the Criminal Code because it had done or omitted to do something for the purpose of aiding Healey and McPhee commit the substantive offence. At page 637 Kelly, J.A. said:

> "As has been stated by Lord Reid in Sweet v. Parsley, (1970) A.C. 132, there is a presumption that mens rea is an essential element of every offence unless some reason can be found for holding that it is not necessarily so; when Parliament has chosen to create an offence of absolute liability the Courts must carry out its will but only to the extent that Parliament's intention to displace the presumption is clearly stated. In enacting s. 33 Parliament had the option of including in the Act provisions extending culpability for the infraction of the section to those other than the actual perpetrators in which even the Courts would have been called upon to interpret the scope of the words used by Parliament to convey its intention. However, instead of so doing Parliament has chosen to rely upon the extension by s. 21 imported into any offence created by statute."

After quoting Sec. 21 of the Criminal Code Kelly, J.A. continues on page 638:

> "There are two principal reasons for holding that Woolworth was not a party to the offence charged:
>
> 1. Even with respect to offences of strict liability the alleged aider must know that he is aiding. Although it is not necessary that it be proven that he know that the conduct he is aiding constitutes an offence it is necessary that the accused be proven at least to have known the circumstances necessary to constitute the offence he is accused of aiding."

At page 639 Kelly, J.A. concludes:

> "... I am of the view that, it not having been shown that Woolworth had knowledge of the facts which constituted the offence, it could not be convicted as an aider by the application of s. 21. I use knowledge in this connection as actual knowledge as defined by Devlin, J., (in Roper v. Taylor's Central Garages (Exeter), Ltd., (1951) 2 T.L.R. 284) that is, actual knowledge or deliberate ignorance which is the equivalent of actual knowledge.
>
> 2. There is another reason why I am of the opinion that the convictions cannot stand. Section 21 requires that an alleged party must do or omit to do something for the purpose of aiding the principal to commit the offence. That purpose must be the purpose of the one sought to be made a party to the offence (Sweet v. Parsley (1970) A.C. 132) but if what is done incidentally and innocently assists in the commission of an offence that is not enough to involve the alleged party whose purpose was not that of furthering the perpetration of the offence."

The present offence alleges a deposit of fuel oil in a place under conditions where such oil entered water frequented by fish. The essential facts which constitute that offence are in my view (a) the deposit of oil in the abandoned tank; (b) its escape through the dip pipe on to the furnace room floor; and (c) its further escape through drains into the sewer and thence to Vancouver Harbour. There is no evidence that B.C. Hydro had knowledge of these facts in the sense referred to by Kelly, J.A. It is true that Hargreaves assisted Donoghue to gain entry to a fill pipe, but there is no evidence that Hargreaves knew this fill pipe led to the small abandoned tank. Furthermore, it seems clear to me that whatever aid employees at B.C. Hydro gave to Donoghue in committing the offence such aid was given

incidentally and innocently and in no sense for the purpose of aiding him to commit it.

For the foregoing reasons I conclude that B.C. Hydro cannot be considered a party to this offence and must, therefore, be acquitted of it. Accordingly I need not deal with the further submissions made by Counsel for B.C. Hydro.

In the result I allow the appeals of the Defendants and find each of them to be not guilty of the offence with which they are charged.

Michael I. Catliff,
C.C.J.

VANCOUVER, BRITISH COLUMBIA,
20 November 1975.

NORTHWEST TERRITORIES

SUPREME COURT (Yellowknife 1354-C)

Morrow J. 5th March 1976

Canada Tungsten Mining Corporation Limited v. The Queen

Fisheries — Pollution — Fuel pipe from storage tank leaking oil into river — Mens rea not essential — No method of testing pipe — No due diligence to prevent leak — The Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2), (8), as re-enacted by R.S.C. 1970, c. 17 (1st Supp.), s. 3.

The appellant was convicted on three counts of unlawfully permitting oil to enter a stream frequented by fish contrary to s. 33(2) when oil had escaped from a fuel pipe carrying oil from a storage tank. There had been no metering system or regular pressure tests to detect leaking from the tank or pipe. The appellant argued under s. 33(8) that the leak had not been with its consent and knowledge and therefore it was not liable. *Held*, s. 33(2) created an absolute liability and the absence of mens rea was no defence; s. 33(8) applied only to a situation of vicarious liability. The appellant's efforts to locate and stop the leak, and to clean up the damage, while laudable, were after the event and did not affect liability, particularly as the appellant had not used due "diligence to prevent" the leak. *Monkman v. The Queen*, [1972] 3 W.W.R. 686, 7 C.C.C. (2d) 77 (N.W.T.); *Regina v. Kenaston Drilling (Arctic) Ltd.* (1973), 12 C.C.C. (2d) 383, 41 D.L.R. (3d) 252 (N.W.T.) referred to. *Regina v. Jordan River Mines Ltd.*, [1974] 4 W.W.R. 337 (B.C.); *Sweet v. Parsley*, [1970] A.C. 132, [1969] 1 All E.R. 347 applied.

J. A. Bourne, Q.C., for appellant.

O. J. T. Troy, Q.C., for the Crown. (12 pp.)

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANADA TUNGSTEN MINING CORPORATION LIMITED,

Appellant

and

HER MAJESTY THE QUEEN,

Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE W. G. MORROW

This matter came on before me as an appeal *de novo* from both conviction and sentence. Deputy Magistrate L. S. Eckardt on June 27th 1975 found the appellant guilty on three counts and imposed a total of $10,000.00 in fines. On the appeal before me the evidence placed before the learned Magistrate was by agreement filed as a transcript and exhibit.

Because of the nature of the argument presented to me the wording of each count is produced below:

"Count 1. between the twelfth day of June, 1974 AD, and the seventeenth day of June, 1974 AD, at or near Tungsten, NWT approximate location 61°58' North Latitude by 128°13'30" West Longitude did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33 (2) of the Fisheries Act.

Count 2. between the twenty fourth day of June, 1974 AD, and the twenty eighth day of June, 1974 AD, at or near Tungsten, NWT approximate location 61°58' North Latitude by 128°13'30" West Longitude did unlawfully permit the deposit of a

" deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33 (2) of the Fisheries Act.

Count 3. between the second day of July, 1974 AD and the sixth day of July, 1974 AD, at or near Tungsten, Northwest Territories approximate location 61°58' North Latitude by 128°13'30" West Longitude did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33 (2) of the Fisheries Act."

The evidence is for the most part agreed upon. In fact most of it is made up of an agreed statement of facts coupled with oral evidence directed mainly to explaining the many coloured photos which purport to portray an almost daily situation found at the site.

At all pertinent times the appellant was owner and operator of a mining operation located at 61°58' North Latitude by 128°13'30" West Longitude. (Just to the east of the Yukon-Northwest Territorial Boundary in the Mackenzie Mountains and adjacent to the Flat River). The appellant's operation included an assembly of buildings, equipment, and in particular an oil storage tank. The site is held under N.W.T. lease No. 2457. It is agreed that the tank fed oil to the steam boiler, the Mine Manager's house and the recreation hall.

On June 10, 1974, oil was visible to the appellant in the Flat River in an area some distance below the oil storage tank. Thinking the visible oil was related to the tank the tank was turned

off and drained. There was no leak in the tank itself. The next day, June 11 oil was still visible in the river so the Mine Manager sent telex messages to the President of the appellant company and to the Inspector of Mines and Controller of Water Rights (at Yellowknife).

From this time on while several dates must be referred to, it can be taken that, certainly, following June 12 appellant's representatives were busy trying to clean up the problem as well as ascertain the source of the oil.

On the 12th of June Environment Canada was contacted and based on suggestions from this department trenching combined with peat and straw was tried. By June 13th Wishart Robson, Senior Technician of Environment Protection Service, Whitehorse had arrived to inspect the site. Efforts to stem the flow by placing booms and by burning are now resorted to. By June 17 it was apparent these efforts were not very effective so an oil absorber known as Con-Wed was ordered from Calgary. Consultants were recommended and by June 16 a Jim McKay, consultant was brought in by the appellant. Plastic film is now used to line the first trench and burning continues down through June 24.

By June 25, Ken Weagle, Senior Biologist, Environment Protection Service, Whitehorse, and others have arrived and following his inspection the decision to divert the river around the affected area was made.

Oil slick and flock is still observed by June 26th. Burning continues. Authorization to divert the river was given June 28th and the formal written authority was brought in on July 3rd. Dyking and diversion proceeded through July 4 and was completed July 6th, at which time the flow of oil downstream was cut off.

Meanwhile on July 5th appellant's personnel located a fuel pipe which had been leaking and was found to be the source of the oil leaking into the river. This pipe was part of the fuel distribution system supplying heating oil from the storage tank to several buildings. It had been completely closed and insulated until opened for the inspection. There had been no metering system or regular pressure tests in effect designed to detect any oil leakage from the tank or pipe.

It is agreed that between the dates June 12 to 17th, June 24 to 28th, and July 2 to July 6th, 1974 diesel or fuel oil which had escaped from the pipe did seep through the ground and did enter the waters of the Flat River but the company did not consent thereto.

Finally it was agreed that Flat River is water frequented by fish and that diesel or fuel oil is a deleterious substance.

The Crown's case rests on Section 33(2) of the *Fisheries Act*, 1970 R.S.C. C F-14 (as amended C. 17, 1st Supp.) to the effect:

> " (2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance

"may enter any such water."

It is agreed that subsection (4) has no application.

Crown Counsel argues that this section creates absolute liability, that the absence of *mens rea* is no defence, and that the appellant here must bring itself under subsection (8) to gain an acquittal. One of the more recent decisions relied on for this proposition is *R. v. Jordan River Mines Ltd.*, 1974 4 W.W.R. 337. At page 339, Osler, D.J. quoting in part from *R. v. Pierce Fisheries Ltd.*, 1971 S.C.R. 5; 12 C.R.N.S. 272;1970 5 C.C.C. 193; 12 D.L.R. (3d) 591 holds:

> "In my view, the offences charged fall under that 'wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to the presumption that *mens rea* is an essential ingredient.'"

I am in entire agreement with this enunciation of the law and with the Crown's submission here. See also the judgment of this Court in *Monkman v. The Queen*, 1972 3 W.W.R. 686.

While counsel for the appellant did not seriously take a contrary position to the above, he did rely heavily on subsection (8), taking the position that some of the harshness of the *Pierce Fisheries* judgment has been removed by this new amendment and that on the facts his client can show itself as satisfying the "unless" portion of this new section.

Section 33(8) is to the effect:

> " (8) In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

Appellant counsel presented many arguments but mainly he relied on two main submissions -- taking the general position that the dates specified in the charges did not represent dates where there was evidence of a breach and in any event the appellant had amply satisfied the burden put on it by Section 33(8).

The main submissions should be set forth although I may in examining them treat one or more together for convenience.

(1) On the days charged the appellant did not permit the deposit of oil in the tank -- there was no oil in the tank.

(2) On the days charged the appellant did not permit the deposit of the oil in the ground where it did enter the water.

(3) On the days charged, although the appellant had knowledge that oil was deposited in the ground where it may and did enter the water it did not consent to the deposit of the oil in the ground where it did enter into the water.

(4) On the days charged the appellant exercised all due diligence to prevent the commission of the offence.

It is quite true that the cause of the leaking of oil was found to be the faulty fuel pipe rather than the oil tank which had earlier been assumed by the appellant to be the trouble. Whether the weight and consequent pressure from the oil in the tank before it had been pumped out may have been a contributing factor or not does not in my view change things. Appellant is charged with three offences that it did "unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish." The dates of the infringements chosen by the Crown are June 13, 14, 15, 16, 25, 26, and 27th and July 3, 4, and 5th. It is not for me to speculate as to why the Crown did not cover the full span from June 10, the date when the oil was first seen in the water, up to July 6th when controls became effective. On the evidence before me I am left with no alternative but to conclude that from June 10 up to July 6th a deleterious substance, namely oil, was leaking from a defective fuel pipe which formed part of the appellant's installation and plant and that that same oil was seeping through the ground and entering the waters of Flat River. Certainly it is agreed that such escape and seepage did take place on each of the dates set forth in the specific charges.

It is admitted that the appellant did not consent to this escape. This is quite true in the sense that the appellant did not willingly wish to have such a leakage take place, did not willingly open a valve or permit some similar event to take place.

If consent or the lack of consent in the above context were the full test of liability then the appellant would probably have a full defence. But surely "consent" as used here must be read in proper context. Surely it is related to the vicarious aspect of liability, and is intended as a relaxation of the strict liability which would otherwise result from the effect of Sec. 33(2) alone where before the passing of Sec. 33(8) acts of employees could be taken to bind an employer in the strictest sense.

Oil spills, leakages or seepage of the type found in the present case are all accidental. They are probably never intended: *R. v. Power Tank Lines Limited*, (unreported Prov. Judge J. D. Ord, Ontario Prov. Ct. 28 Jan. 1975). Certainly the appellant did not consent to the deposit of the oil in the ground from whence it did enter the water in the sense of willingly agreeing or hoping for such result. But to avoid liability the appellant must couple lack of consent with a behaviour or consciousness which in effect shows it was not blind to the consequences of the possibility as well as the consequent danger of a leakage such as is found in the present case.

The general approach to the problem is beautifully expressed in *Sweet v. Parsley*, (1970) A.C. 132 where Lord Diplock states at page 163:

> "Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which

> "would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject matter of a statute is the regulation of a particular activity involving potential danger to public health, safety, or morals, in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sentences, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care."

I must now see whether the appellant, on the agreed facts, can come within the latter portion of Sec. 33(8) namely: "that he exercised all due diligence to prevent its commission."

As I understand part of appellant counsel's submission, his client moved with alacrity to obtain hay, moss and later an absorbent material, his client commenced burning processes, trenching and finally completely changed the river course. Again here I am reminded by counsel that the charges refer to specific days and that certainly with respect to Count No. 3 the diversion of the river was perhaps delayed by the Governmental people being unable to deliver the formal approval until July 3rd. It is clear that the appellant from the first moment of discovery, and I do not have to review the facts here, acted responsibly and with alacrity. There was no attempt to hide the affair from the authorities. Rather every effort was made to consult with those responsible for the environment and to act upon their advice. In excess

of $39,000.00 was spent by the appellant before the problem was under control.

In my view, however, these efforts, laudable as they may be, go more properly to alleviate penalty, rather than affect liability. They are all after the event.

I cannot read the wording of Sec. 33(8) except to require "due care and diligence" to refer to preventing the leak not to correcting the leak or reducing the damage. It is quite true, as was argued, that to prevent the leak in the present case, to set up inspections to look for weaknesses in the installations such as are found at appellant's plant may be difficult. The fact of the matter is that no such tests appear to have ever been made since the plant was erected, and certainly no routine ever laid down for opening the packing around the offending pipes to see if erosion was taking place.

The appellant's plant is situate in a mountainous terrain, where extremes of climate are common, and where its very remoteness makes it more necessary perhaps to show care. No matter what, the primary responsibility for proper installation, repair, and maintenance as well as inspection must always rest with an appellant as is found here. There is no basis in fact or in law wherein I can find even a small effort which could be termed due "diligence to prevent."

There remains the question of fine. By Sec. 33(6) provision is made for a maximum fine of $5,000.00 per day. A total

of 10 days are covered by the three counts. I have already observed that the behaviour of the appellant when the oil leakage was found should be taken into consideration. It is important as well, however, to keep in mind the deterrent effect of convictions and resultant consequences in the present type of offence. The magnitude and impersonal nature of present day industrial, mining, and similar operations makes it doubly important that the penalty not be so small as to invite breaches as to make it worth while to gamble on not being detected: *R. v. Kenaston Drilling (Arctic) Ltd.*, 1973) 12 C.C.C. (2d) 383.

The learned Deputy Magistrate levied fines of $2500.00 on Count 1, $5,000.00 on Count 2, and $2500.00 on Count 3.

I do not think that in the present case the full punitive effect of the law should apply particularly in respect to Count No. 3 where it may be that some delay in cutting off the leak resulted from the appellant waiting for a formal permit to divert the river rather than proceeding to act immediately it had word that authorization had been given.

In the result, the appeal is dismissed without costs, on Count 1 the fine shall be $1,000.00 per day or a total of $4,000.00, on Count 2 the fine shall be $1,000.00 per day or a total of $3,000.00, and on Count 3 the fine shall be $400.00 per day or a total of $1,200.00.

I am indebted to both counsel for their help in argument. Some of the many cases referred to me were: *R. v. Standard Oil Co.*

of B.C., (18 Nov. 1974, Judge J. S. P. Johnson, Prov. Ct. B.C., unreported); *R. v. Cypress Anvil Mining Corporation*, 5 Nov. 1975 Mag. D. R. O'Connor, Mag. Ct. Yukon, unreported); *R. v. Jack Cewe Ltd.* (10 Dec. 1974, Judge F. K. Grimmett, C.C.J., B.C. unreported); *R. v. Elf Oil Exploration and Production Canada Ltd.*, (30 April 1974, Ch. Mag. P. B. Parker, Mag. Ct. N.W.T. unreported); *R. v. Imperial Oil Ltd. et al*, (20 Nov. 1975, Judge M. I. Catliff, C.C.J. B.C., unreported); *R. v. MacMillan Bloedel Industries Ltd.*, (1974) 13 C.C.C. (2d) 459; *R.v. Cherokee*, 1973 3 O.R. 599; *R. v. 'M.V. Allunga'* 1974 4 W.W.R. 435; and *R. v. Kirby* (8 May 1972, Judge J. S. P. Johnson, Prov. Ct. B.C. unreported).

W. G. Morrow,

Yellowknife, N.W.T.
March 5, 1976.

Counsel:

Appellant: J. A. Bourne, Q.C.
Crown: O. J. T. Troy, Q.C.

BRITISH COLUMBIA COUNTY COURT

Cashman C.C.J.

Regina v. British Columbia Forest Products Ltd.

Environmental law -- Water pollution -- Deposit of deleterious substance in water frequented by fish -- Deleterious nature of substance not proven -- Appeal dismissed -- Acquittal upheld -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(11).

The accused was charged with depositing a deleterious substance in water frequented by fish after its employees used a chemical substance to disperse a small amount of oil from the surface of the sea adjacent to its premises on the British Columbia coast. After the charge was dismissed at trial, government officials undertook two sets of experiments to show that the substance in question was deleterious, and the Crown appealed to the County Court by way of trial *de novo*.

Held, the appeal should be dismissed. While the substance was shown to be lethal to fingerling rainbow trout in freshwater under laboratory conditions, this evidence was of no consequence as such fish never occurred in the waters in question. Moreover, the Crown had failed to relate the quantities of the substance in the experiment to those which were alleged to have been deposited. Nor did the second set of experiments assist the Crown's case, as there was a reasonable doubt that the sample of chemical which was shown to be lethal to green sea urchins in Atlantic seawater was the same material as was alleged to have been deposited. Even if it were, the Crown failed to prove that green sea urchins were indigenous to the waters affected and failed to account for the differences between Pacific and Atlantic seawater. There being no evidence at all of the effects of the substance on the marine life of the waters in question, the deleterious nature of the chemical dispersant had not been proven.

R. v. Peebles, unreported, B.C.C.A., December 3, 1970; *Wilband v. The Queen*, [1967] S.C.R. 14; *R. v. Churchill Copper Corporation Ltd.*, [1971] 4 W.W.R. 481; *The Queen v. Imperial Oil Limited and B.C. Hydro and Power Authority*, unreported, B.C. Co. Ct., November 20, 1975; refd to.

H.J. Wruck, for the Crown, appellant.
L.M. Candido, for the accused, respondent.

June 17, 1976.

IN THE COUNTY COURT OF NANAIMO

HOLDEN AT NANAIMO, B.C.

BETWEEN:

REGINA

APPELLANT

AND:

BRITISH COLUMBIA FOREST PRODUCTS LTD.

RESPONDENT

REASONS FOR JUDGMENT

OF HIS HONOUR

JUDGE CASHMAN

PLACE OF TRIAL: NANAIMO, B.C.

DATES OF TRIAL: MAY 17, 18, 19, 20, 1976.

COUNSEL FOR THE APPELLANT: H. J. WRUCK, ESQ.

COUNSEL FOR THE RESPONDENT: L. M. CANDIDO, ESQ.

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The Respondent Company was charged on an Information containing two counts. A trial was held before His Honour Judge Bowen-Colthurst, of the Provincial Court of British Columbia, at Duncan, British Columbia, and following the trial of this matter by Order made the 18th day of June, 1975, the learned Provincial Court Judge dismissed Count 2 of the Information which reads as follows:

> "At Crofton in the County of Nanaimo, in the Province of British Columbia, on or about the 9th day of August, A.D. 1974, did unlawfully deposit a deleterious substance in waters frequented by fish, contrary to the form of the statute in such case made and provided."

From that acquittal the Crown appeals and this matter came on by way of Trial de Novo.

This charge is laid under Section 33(2) of the Fisheries Act, Chap. F14, R.S.C., 1970, as amended by Chapters

17 (1st Supp.) Sec. 3 and now reads as follows:

> "(2). 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

Subsection (4) has no application to these proceedings.

At the opening of this Appeal, it was stipulated by the Crown by way of particulars, that the deleterious substance referred to in the Information is a substance known as Oilsperse 43.

To succeed on such a charge the Crown must prove that (1) a person, (2) deposited a substance, (3) in waters frequented by fish, (4) that such substance is deleterious.

In this case, the Defendant Company did deposit a substance obtained from a 45-gallon oil drum labelled Oilsperse 43 into the waters of Osborn Bay at Crofton, British Columbia, on or about August 9th, 1974.

At that time a barge moored at a dock approximately 150 ft. from shore spilled a small amount of bunker sea fuel, estimated by various witnesses at from 2-3 barrels to 5-15 barrels, into the waters of Osborn Bay. The employees of the Defendant Company, under the direction of Mr. Efford, endeavoured to contain the spill by the use of a boom measuring some 800 ft. in length around the barge and by the use of a sawdust-type material on the barge itself to prevent further escape of the fuel into the waters and by the use of a substance manufactured apparently for the express purpose of dispersing oil, labelled Oilsperse 43. This substance was at that time manufactured by a company known as DiaChem of B.C. Ltd. and is now known by the name of DiaChem Industries

of Canada Ltd. which operates from a plant in Burnaby, British Columbia.

From the evidence of Mr. Poliakoff, the Chemist and a principal of the DiaChem companies and the inventor of Oilsperse 43, I have little doubt the substance manufactured in 1974 and the substance manufactured today are substantially the same.

Mr. Efford testified that he put a quantity of Oilsperse 43 into the water contained within the boom area and agitated the water by the use of a fire hose. He said that the water would be further agitated by the current running at the rate of 0.5 knots and that at that time a boom-boat was going back and forth about its regular duties which would have the effect of further agitating the water.

From the totality of the evidence, there is no doubt that the waters of Osborn Bay are in a tidal area and that when the oil spill first occurred the tide was rising.

Mr. Poliakoff said that Oilsperse 43 was then a new product on the market. The label from the drum used by Mr. Efford contained no directions for its use. That is not the case today. A five-gallon container of Oilsperse 43 purchased around March 1976 contains a label with extensive instructions for the use of that product.

Several Officers of the Crown attended at the oil spill on August 9th, 1974 and observed what was occurring at that time. Mr. Paulsen, a Marine Surveyor employed by the Canadian Coast Guard, called on behalf of the Crown, had amongst his other duties those of pollution prevention.

He attended at this oil spill and he said he suggested to Mr. Efford that perhaps he should not be using this dispersant. He said Mr. Efford replied that he had used it before and that he took full responsibility. Mr. Paulsen also quite fairly said he thought that Mr. Efford was doing his best to contain the oil spill, a fact that seems amply apparent on the facts of this case.

Mr. Epp, a Fisheries Officer, also attended on August 9th, 1974. He did not obtain a sample from the drum of Oilsperse 43 used by the Defendant Company, nor did he see fit to take a sample of water from Osborn Bay either inside or outside the boom area. Not only that, but he conducted no investigation whatsoever into the marine life existing at that time in Osborn Bay. All he could say was that generally cod, salmon and some shellfish are to be found in the Straits of Georgia. Osborn Bay is located on Stuart Channel off Georgia Straits.

No one at that time conducted any investigation or experiments to determine what effect the use of Oilsperse 43 might have on the marine life of Osborn Bay.

On March 9th, 1976, following the filing of the Notice of Appeal on July 10th, 1975, Mr. Thomas Carscadden, a Fisheries Officer, who in effect is the Investigating Officer on this Appeal purchased a five-gallon can of Oilsperse 43 from DiaChem Industries of Canada and sent two jars of the contents of that five-gallon drum to Mr. Ronald Watts, a Biological Technician employed by Environment Canada, and who is the head of the Bio-Assay Laboratory at North Vancouver, British Columbia. Mr. Watts then proceeded to conduct a series of bio-assays in freshwater using fingerling trout, estimated in age at 4-5 months and measuring 1½ inches long.

to this water he added various quantities of Oilsperse 43 and observed that there were lethal results from the addition of some quantities of Oilsperse 43 to the fresh water over a period of some 96 hours.

The evidence satisfies me that the Bunker sea fuel did not remain in the waters of Osborn Bay any longer than 48 hours.

Mr. Watts was not qualified as an expert and did not attempt to give any expert opinion with respect to the various tests he conducted and no other witness for the Crown sought to explain the results of these tests or in any way equate these tests to the conditions which existed in Osborn Bay at any particular time let alone on August 9th, 1974.

It is clear from the evidence of Mr. Wells and both Dr. Alderdice and Dr. Groves, called on behalf of the Defence, that the fingerling trout used at that stage of their development are freshwater fish and are never found in saltwater.

It was the opinion of Dr. Alderdice, a biologist at the Pacific Biological Station at Nanaimo, and employed in the capacity of a marine biologist for 25 years, 23 years of which have been spent at Nanaimo, that comparing the effect of any substance on freshwater fish in freshwater and then attempting to draw some conclusions as to what might happen to fish in saltwater, was, as he put it, like comparing apples and oranges.

There was no attempt to equate or interpret or in any way explain the effect of Mr. Watts' experiments upon freshwater fish in freshwater or to equate the quantities used by Mr. Watts in his experiments, to the quantity said by Mr. Efford to have been used by him to disperse the bunker sea fuel in Osborn Bay. I can find little assistance in the evidence of Mr. Watts.

All that can be said of Mr. Watts' experiments is that it appears that if Oilsperse 43 is added in sufficient quantities to freshwater, in static conditions, it does alter the quality of that water so that it then becomes deleterious to fingerling trout which at that stage of their development frequent freshwater. The failure of the Crown by any evidence to equate the quantities of Oilsperse 43, used by the Defendant Company on August 9th, to what one can glean from the experiments of Mr. Watts, in my view render his experiments totally useless in coming to a determination in this case, notwithstanding the view of Section 33(11)(a) of the Fisheries Act which the Crown urges upon me and which I will deal with later.

The Crown then called a Mr. Peter Wells, the head of the toxidity section of the Environment Canada Laboratory at Dartmouth, Nova Scotia. Mr. Wells holds a degree of Master of Science in Biology and is currently working on his Ph.D. He testified that he had conducted some tests using what he believed to be Oilsperse 43 in saltwater obtained from the Atlantic Ocean.

I cannot accept his evidence as to the tests he conducted using the first quantity of Oilsperse 43 he says he used because there is no evidence from which I can properly conclude that the substance he used in those tests is in fact the substance produced by DiaChem Industries Ltd. and accordingly I disregard that evidence of Mr. Wells. There is no evidence that Mr. Wells had ever seen Oilsperse 43 before that date and his evidence cannot therefore come within the type of expertise

of narcotic analysis in the way referred to Regina v Peeblen an unreported decision of the British Columbia Court of Appeal on December 3, 1970 nor Wilband v The Queen (1967) S.C.R. 14, at 21.

Mr. Carscadden testified that after obtaining the five-gallon can of Oilsperse 43 from DiaChem Industries of Canada Ltd., he also took from that another two jars of the substance and forwarded it in a sealed container to the Environment of Canada Laboratory at Dartmouth, N.S. Mr. Wells says he received a box containing two jars of a liquid and one of these jars was broken when received. The other however was intact and received in a sealed condition in a box which was securely fastened. That jar however was not produced in Court and there is therefore no evidence that the jar received by Mr. Wells is one of the jars sent to him by Mr. Carscadden. There is no evidence as to the precise mode in which it was sent, but suffice it to say that it was not sent by the accepted method of registration as is commonly used where exhibits are sent for scientific analysis. The container in which this material was sent did not accompany Mr. Wells when he came to British Columbia to testify in this case which is the usual procedure in prosecutions criminal in nature.

While there are decisions of the Ontario Court of Appeal relating to the Narcotic Control Act and the Food and Drug Act to the effect that in this day and age sending exhibits by registered mail would be considered to be an appropriate way of proving continuity; nonetheless, in all of those cases and in any cases of which I am aware the substance or in some cases the container used to contain such substance sent for analysis, or in this case experimentation, is always produced in Court so that the Court may be assured that the substance has not been tampered with, or is in fact what was sent.

The Defence submits that since continuity has not been proven I should not consider the evidence of Mr. Wells as to what he did with respect to the substance said to have been sent to him and alleged to be Oilsperse 43. The Crown on the other hand submits that I am permitted to draw the inference that what was sent by Mr. Carscadden was Oilsperse 43 and that was what was used by Mr. Wells in the conduct of experiments he says he conducted using sea urchins in saltwater obtained from the Atlantic Ocean. As I have said Mr. Wells' expertise in Oilsperse 43 is not comparable to that of narcotic analysts.

In prosecutions of offences, criminal in their nature, it is incumbant upon the Crown to prove its case beyond a reasonable doubt and this applies to continuity as well as to other matters the Crown must prove.

While it seems likely that what was received by Mr. Wells was that sent by Mr. Carscadden I cannot say beyond a reasonable doubt that what was received by Mr. Wells was received in the same state in which it was forwarded by Mr. Carscadden and that being so the Crown has failed to show beyond a reasonable doubt that the substance used was Oilsperse 43.

What the Crown is inviting me to do is to place inference upon inference. Firstly I am asked to infer from the evidence of Mr. Poliakoff that the substance used and labelled Oilsperse 43 by the Defendant Company was the same substance obtained by Mr. Carscadden and alleged to have been sent to Mr. Wells. Mr. Poliakoff, when shown the label from the 45-gallon drum which came from the Defendant Company, did not seem at all sure that it was a label from a drum of Oilsperse 43 manufactured by his Company.

While I am prepared to draw the inference from his evidence and from the label itself that it must have come from

his company I am not prepared to put upon that a further inference that what was obtained by Mr. Wells in the shipment which he received from Mr. Carscadden must therefore be that which was put into the water of Osborn Bay by the Defendant Company.

In any event, Mr. Wells did conduct experiments using green sea urchins in static saltwater in outdoor tanks and found that sufficient concentrations of the substance received when put into the water did have a deleterious effect upon some of the sea urchins, which he says he collected from a bay near the laboratory at Dartmouth.

Mr. Wells was invited to give an opinion and make certain calculations upon assumptions from the evidence and to apply what he learned of the effects on green sea urchins in Nova Scotia to the saltwater of Osborn Bay. He did indeed give such an opinion but later he candidly conceded in cross-examination by Mr. Candido that his calculations were quite inapplicable to the evidence specified by Counsel for the Crown.

This being so, the only conclusion one could possibly draw from the evidence of Mr. Wells is that what he put into the saltwater tanks in Dartmouth, N.S. and into which he had put green sea urchins did have a deleterious effect when placed in sufficient quantities in static saltwater upon the green sea urchins which he used in his experiments.

Mr. Wells was asked if green sea urchins exist in the Straits of Georgia. While he was able to determine what other colours of sea urchins exist in the Straits of Georgia he was not able, except by reading a paper from an author whose qualifications were not disclosed to this Court to determine whether green sea urchins do exist in the Straits of Georgia. Dr. Alderdice said that he did not know whether green sea urchins existed in Osborn Bay. When asked to comment upon the tests conducted by Mr. Wells, he said he couldn't see that those tests could have application. He said it was simply a matter of doing a more appropriate test and in his opinion the only valid test to determine the effect on marine life, of any substance, would be to attempt in some way to duplicate the conditions which exist in the body of water under consideration and that to do otherwise might lead to erroneous conclusions.

Dr. Groves, a witness called on behalf of the defence, while not primarily a marine biologist as was Dr. Alderdice, nonetheless gave useful testimony as to the effect of tides and currents and from his evidence I have no doubt that both of these phenomena must have a diluting effect upon any substance put into tidal waters.

There is no evidence as to what happens to Oilsperse 43 once it is put upon the water. There is no evidence as to whether it remains at the top of the water or whether it sinks to the bottom of the water or whether it mixes in the water or just exactly what does happen when it is put into the water. Indeed, the only direct evidence as to the effect of Oilsperse 43 was that given by Mr. Poliakoff, a Crown witness, who said that it was his view that when Oilsperse 43 was used under proper supervision it represented one of the more environmentally safe methods of cleaning up oil spills. He said that only a constant concentration of Oilsperse 43 over a long period in seawater might be toxic to fish and in saying that he included moving seawater. He did say however that he thought the amount of Oilsperse 43 said to be used by Mr. Efford was more than he would have liked to have seen used in the circumstances. He

conceded that at that time no instructions were placed upon the product as to how it was to be used, which is not the case today. The label on the five-gallon drum purchased by Mr. Carscadden contains extensive instructions as to its use. My understanding of Mr. Poliakoff's evidence was that when Oilsperse 43 is used it breaks up the bunker sea fuel and prevents it from joining together so that it will sink to the bottom. From that evidence I conclude that Oilsperse 43 always remains on the surface of the water. If that is so there is no evidence as to the effect on fish or other marine life.

It is beyond question that the Fisheries Act is a statute designed to protect the environment of Canada and imposes strict liability upon those who violate its provisions.

In my view mens rea does not apply to a prosecution under Sec. 33(2) of the statute and indeed that is conceded by Counsel for the Respndent.

There is no need to specify the reasons for that conclusion. I simply adopt what was said by the majority Judgment of the Supreme Court of Canada in The Queen v Pierce Fisheries Ltd. (1970) 12 D.L.R. (3d) 591 and more recently by Arkell, D.C.J. of the British Columbia Provincial Court in Regina v Churchill Copper Corp. Ltd. (1971) 4 W.W.R. 481, a case which concerned the same section. I agree with the conclusions of the learned Provincial Judge with respect to what he there had to say on the subject of mens rea.

In the circumstances of this case I have no hesitation in saying that if mens rea did apply I would

acquit the Respondent company because I am satisfied beyond any doubt whatsoever that what the Respondent's employees did was to attempt to clean up an oil spill by use of a product commercially manufactured, presumably under the laws of this country, to attain such ends. In my view, the Respondent Company did what any good citizen would be expected to do and that is to minimize the effect of the pollutant sea oil that escaped from the barge into the water.

It is hardly surprising that the Defendant Company through their counsel takes the position that in these circumstances the company in effect acted as a good samaritan and raises strong objections to its prosecution by those charged with the duty of protecting the environment of this country and whom one would hope would be concerned to educate not only the Respondent but all citizens of Canada as to the appropriate steps to take in such situations.

Indeed it appears from the evidence of Mr. Wells that little is done by this Department of our Government to educate those who might become involved by accident or otherwise is oil spills, a situation one can only hope will be shortly rectified.

There can be no doubt that on the day and at the place in question the Defendant Company did deposit a substance into the waters of Osborn Bay and Osborn Bay contains waters frequented by fish.

The real question is whether the substance deposited into the waters of Osborn Bay, adjacent to Stuart Channel and the Straits of Georgia and within the coastal waters of British Columbia, is a substance deleterious to fish that frequent those waters.

It would be possible to conclude from the unexplained evidence of Mr. Watts' experiments that Oilsperse 43 may well have a deleterious effect upon freshwater fish in fresh water in static conditons.

I turn now to consider the definition of deleterious substance as contained in subsection (11) of section 33. The Crown submits and it is obvious from reading the section, that only subparagraph (a) of subsection 11 could apply to the circumstances of this case. That subsection reads:

> "(11). For the purpose of this section...
> "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 deleterious to fish or to the use by man of fish that frequent that water,..."

The Crown's contention in this regard put in its simplest terms is that on a prosecution in a case of this nature all the Crown need do is show that if a substance is added to any water and if it is proven that substance is deleterious to fish in that water, then without more the Crown has shown that such substance is deleterious to fish in all other waters.

The Crown says that to come to that conclusion one should apply section 11 of the Interpretation Act, Chap. I-23, R.S.C. 1970 which reads as follows:

> "Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

Section 12 of the Interpretation Act in reference to preambles and marginal notes says this:

> "The preamble of an enactment shall be read as a part thereof intended to assist in explaining its purport and object."

It should be noted that the preamble to Section 33 of the Fisheries Act reads as follows:

> "Injuries to fishing grounds and pollution of waters"

Without more one would think the purpose of those portions of the Statute is to prevent injury to fish and pollution of waters, that is, to protect the environment.

As I understand the submission of Counsel for the Crown he says that words "fair" and "liberal" applies only to the prosecution and not to the defence. Surely when one reads any Statute it must be fair to all citizens of Canada and not alone the Crown.

The Respondent's submission is that it would be reasonable and logical to expect that those responsible for the prosecution of offences such as this would seek to find out the effect on the kind of fish to be found in the kind of waters, the subject of the charge. Respondent's counsel points to the evidence of Dr. Alderdice that not only is there a difference between the chemical properties of fresh and salt water but there are also differences in the chemical properties of salt waters to be found in the Atlantic and those of the Pacific. Respondent's counsel submits that the only logical way of interpreting Section 33(11)(a) is that it must be confined to the kind of waters referred to in the charge which on the evidence, at Crofton, is Pacific salt water.

Counsel for the Crown referred to a number of unreported decisions of various Courts. The only one in my respectful opinion of those submitted by Counsel for the Crown that I find of assistance is a decision of His Honour Judge Catliff of the County Court of Vancouver, in an

unreported decision of Her Majesty The Queen against Imperial Oil Limited and British Columbia Hydro & Power Authority decided November 20th, 1975. The learned County Court Judge had this to say about Section 33(11)(a):

> "(1). Has the Crown proved the deposit of a deleterious substance?
> Section 33(11) of the Act defines "deleterious substance" (inter alia) as:
> "(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 deleterious to fish or to the use by man of fish that frequent that water, ..."
> The Crown satisfied me by evidence of laboratory experiments that Fuel 46 if added to water degrades that water so that it is rendered deleterious to fish that frequent that water. It was submitted that the water referred to in Section 33(11) is water frequented by fish and that the water used by the Crown in its laboratory experiments with fish was not water frequented by fish. The Crown's evidence, however, was that the water used in the experiments was taken from Burrard Inlet at a point offshore from West Vancouver, sixty feet below lowest tide and three hundred feet from the shore. It was conceded during the trial that Burrard Inlet is a body of water frequented by fish. The water used in the Crown's laboratory experiments designed to test the effect of Fuel 46 was therefore water frequented by fish.
> Mr. Suiker also submitted that as there was no evidence, or no sufficient evidence, that the oil seen on the water by the Harbours Board Police on 6 November 1973 at Columbia Wharf had degraded the water in Burrard Inlet I should find that the Crown had not proved a deposit of a deleterious substance. He points out for example that no evidence was adduced by the Crown to show the effect on the bunker fuel of its journey through the sewer from Beatty Street to the harbour at the end of which it might have become innocuous to fish. The point as I understand it is that the words "that water" in Section 33(11) have reference only to the water alleged to be degraded at the actual site of the spill. I do not consider that the words "that water" are to be so construed. In my view they refer to the words "any water" earlier in the sub-section. The words "any water" would include the water at the site of a spill, but are clearly not limited to it. The only qualification to be attached to the words "any water" is that such water must be proved to be frequented by fish. As I say, the water used by the Crown's expert in his experiments was water taken from Burrard Inlet which is water admittedly frequented by fish."

While the learned Judge there interpreted the

words "any water" and "that water" more liberally than I would be prepared to do nonetheless if one applies that interpretation to the facts of the case at bar, proof that fish in freshwater are affected by exposure to added Oilsperse 43 falls far short of proof that fish in Pacific saltwater are similarly affected.

Had the Crown here done as was in the Imperial Oil case and obtained water from somewhere in Georgia Strait and then shown that fish in that water were adversely affected by the addition of Oilsperse 43 to that water then the Crown would have provided evidence such as that which must have been within the contemplation of Parliament when it enacted Section 33(11).

The evidence of Dr. Alderdice stands uncontradicted that not only is there a difference between fresh and salt water but likewise between saltwater from different bodies of sea water.

When one adds to that the fact that there is no evidence beyond a reasonable doubt that green sea urchins exist in the waters off Crofton, the Crown evidence falls far short of that degree of proof beyond a reasonable doubt which is expected in prosecutions of this nature.

To interpret Section 33(11)(a) in the manner suggested by Crown Counsel would be to impose an absolute liability for putting anything into waters frequented by fish. I am not satisfied that the Parliament of Canada intended any such thing.

On the whole of the evidence I find that the

Crown has failed to prove its case beyond a reasonable doubt and accordingly the Appeal is dismissed.

I might add that in the circumstances of this case if it were in my power to do so and were I asked to do so I would strongly consider awarding costs against the Crown.

J.C.C.

DATED at Nanaimo, British Columbia,

this 17th day of June, A.D. 1976.

BRITISH COLUMBIA PROVINCIAL COURT

Barnett J.

Regina v. Busat

Fisheries -- Putting debris into water frequented by fish -- Proper meaning to be attached to term "debris" -- Material deposited by accused encompassed -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3).

The accused constructed a crude bridge consisting of a number of logs covered with mud across a small stream. On a charge under s. 33(3) of the Fisheries Act alleging the act of putting debris in water frequented by fish, the accused argued that the word "debris" did not encompass the structure he had implanted in the stream.

Held, the accused was found guilty. Having regard to the purpose of the legislation in question and the mischief it addressed, it was clear that the prohibition had been breached.

A.E. Vanderburgh, for the Crown.
J. Hogg, for the accused.

October 24, 1975.

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

HELD AT WILLIAMS LAKE

REGINA VS BUSAT

REASONS AND JUDGMENT

OF HIS HONOUR JUDGE G. G. BARRETT

OCTOBER 2nd, 1975

A.E. PETTERSEN for the Crown

J. [illegible] for the Accused

Mr. Busat is a person engaged in logging operations. He is charged under Section 33 (3) of the Fisheries Act, R.S.C., 1970, Chapter F-14, with having put debris into waters frequented by fish.

Section 33 (3) reads:

No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

In early May, 1975, Mr. Busat was working at a location he reached by crossing Chimney Creek, which is frequented by fish. At the point of crossing the creek runs through a meadow located upon privately owned ranch land. There was an old plank bridge across the creek but it would not accommodate Mr. Busat's logging equipment..

The old bridge was therefore demolished and the wreckage of it was simply left in the immediate vicinity.

A culvert was then placed in the creek and filled over. When it proved unsatisfactory, it was pulled out and again, the twisted wreckage was simply left in the immediate vicinity.

Two large logs were then placed in the creek parallel to the direction of flow. A number of small logs were then cut and placed across the creek, resting upon the large base logs. The surface thus created was then covered with mud and dirt. This crude creation was apparently Mr. Busat's concept of a bridge.

Immediately after all this Chimney Creek flooded. The flood waters covered the meadow above the so called bridge. While some seasonal flooding of such creeks is to be expected in this area, I have no doubt that Mr. Busat's work substantially the cause of this flooding by restricting the flow of water within the creek bed.

As a result of the flooding, water surrounded the wreckage of the old bridge and the culvert. The sorry scene this resulting is depicted in photographs taken by Mr. MacNeill and entered as Exhibits 1 to 4, during the Trial.

I do not find it necessary to decide who destroyed the old bridge. I am satisfied that the debris resulting from this and also the remains of the culvert were initially placed upon ground not covered by water but later encompassed by the floodwaters. Therefore, to be precise, I do not think it can be said that Mr. Busat put this debris into waters frequented by fish.

It is clear that the real wrong done here was the so called construction of a new bridge, and not the careless desolition of the old one.

Mr. Busat's counsel submits that the term "debris" cannot be associated with the construction of the new bridge. In support of this submission he relies upon the definition of the word "debris" appearing in dictionaries. The Shorter Oxford English Dictionary, 3rd Edition provides a typical definition:

"Debris —— The remains of anything broken down or destroyed....."

Therefore, because it is said that Mr. Busat's operations were constructive rather than destructive, it is submitted that the case must fail.

In my view, this argument offends common sense and overlooks general principles of statutory interpretation.

If Mr. Busat had been engaged in the construction of a new logging road alongside a creek and had haphazardly pushed broken tree trunks and dirt into the creek, I cannot conceive that anybody would suggest that the offence charged here had not been committed. But because Mr. Busat calls the logs and dirt he pushed into Chimney Creek a bridge, it is submitted that he has not committed the offence with which he is charged.

I have been unable to find any reference to any previous decision interpreting Section 33 (3) of the Fisheries Act and I have also been unable to find any previous decision interpreting the word "debris".

In "Maxwell on The Interpretation of Statutes" 12th Edition at page 75, the learned author states:

"The words of a statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject, or in the occasion on which they are used, and the object to be attained."

The learned author further states at page 58:

"Individual words are not considered in isolation, but may have their meaning determined by other words in the Section in which they occur."

A basic principle of statutory interpretation requires that the Court consider the mischief aimed at by a particular enactment. This principle has been considered in countless decisions since Lord Coke reported the decision by the Barons of the Exchequer in Heydon's Case in 1584.

In my opinion, Mr. Busat did precisely what Section 33 (3) of the Fisheries Act prohibits. To dignify his work by calling it a bridge is questionable. To say that he did not put debris into Chimney Creek would be to overlook the reality of the situation and to frustrate the obvious meaning and purpose of the legislation.

Mr. Busat, I find you guilty.

A Judge of the Provincial Court of British Columbia.

BRITISH COLUMBIA COUNTY COURT

Proudfoot C.C.J.

Regina v. MacMillan Bloedel Industries Limited

Environmental law -- Water pollution -- Deposit of deleterious substance in a place where under conditions where it may enter water frequented by fish -- Changes in material deposited rendering it non-deleterious prior to entry into fish-bearing waters -- Accused acquitted -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(2).

Under instructions from the accused, employees of a second company had disposed of a quantity of log conditioning water on the accused's premises with the result that the water in question flowed into the Fraser River. Four samples of this liquid were collected: the three most distant from the river were deleterious, while the one nearest the river was not. The accused was acquitted at trial and the Crown appealed.

Held, the appeal should be dismissed. While the water in question was deleterious when discharged, it become totally innocuous prior to entry into the river, and therefore the Crown had failed to prove an essential element of the offence.

H.J. Wruck, for the Crown.
I.G. Nathanson, for the accused.

March 17, 1976.

No. 916/75

IN THE COUNTY COURT OF VANCOUVER

HOLDEN AT VANCOUVER

REGINA	)	
	)	
APPELLANT	)	REASONS FOR JUDGMENT
	)	
V.	)	OF
	)	
MACMILLAN BLOEDEL INDUSTRIES LIMITED	)	HER HONOUR JUDGE PROUDFOOT
	)	
RESPONDENT	)	

Counsel for the Crown/Appellant: R.J. Wenck, Esq.

Counsel for the Respondent: I.G. Nathanson, Esq.

Date of Hearing: March 17th, 1976.

This matter comes on before me by way of appeal (trial de novo) from the Provincial Court, judgment of His Honour Judge Bendrodt made on June 16th, 1975, wherein he directed that the Respondent MacMillan Bloedel Industries Limited be acquitted of the charges. There are two counts initially in the notice of appeal; however, Counsel for the Crown withdraws Count 2. Accordingly the charge before this Court is as follows: the Respondent,

> "At the City of Vancouver, Province of British Columbia, on or about the 21st day of March, A.D. 1975, did unlawfully deposit a deleterious substance in a place under conditions where such deleterious substance may enter waters frequented by fish; contrary to the form of the statute in such case made and provided."

The facts are not in issue and pursuant to Section 736(5) of the Criminal Code a statement of admissions was made and filed as Exhibit 1. This charge was proceeded with under Section 33(2) of the Fisheries Act, R.S.C. 1970, c. 63, which reads as follows:

> "(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

Paragraphs 19, 20 and 21 of the statement of facts which are not in issue clearly establish that the log conditioning water was a deleterious substance as defined in the Fisheries Act. Paragraph 18 of the statement of facts clearly establishes that the substance was not a deleterious substance at that point. Each of these paragraphs refers to a sample taken commencing with Sample 4 taken at the point of discharge to Sample 1 being taken at the point of entry into the Fraser River. The Sample 1 taken, as referred to in Paragraph 18, was that nearest to the Fraser River. It appears what occurred was a deleterious substance was discharged approximately one thousand feet from where it entered the Fraser River. Some filtering process took place as this substance moved along. Accordingly when Sample 1 was tested, this being the nearest to the river and the furthest from the point of discharge, it was found to be not deleterious.

The Crown's position is simply that their onus is discharged once they have proved that the substance discharged was deleterious. The onus on the Crown would have been discharged if the substance analyzed in Samples 1 to 4 were proved to be deleterious; then thereafter and prior to entry in the Fraser River were deleterious and/or on the evidence before me became totally innocuous prior to entry into the Fraser River. It follows the Crown has not brought themselves within the appropriate section.

The appeal is dismissed.

Patricia M. Proudfoot,
C.C.J.

VANCOUVER, BRITISH COLUMBIA,

May 6th, 1976.

Pursuant to Section 736(5) of the Criminal Code of Canada and for the purposes of the within trial the Defendant, MacMillan Bloedel Industries Limited, hereby admits as follows:

(1) MacMillan Bloedel Industries Limited (hereinafter referred to as the Defendant) owned a piece of property situate at 3512 South Kent Street, in the City of Vancouver, in the Province of British Columbia (hereinafter referred to as the said property) from January 1, 1974 to December 31, 1974 inclusive and including March 21, 1974.

(2) The Defendant operated a plywood plant at the said property from January 1, 1974 to December 31, 1974 inclusive and including March 21, 1974.

(3) The Defendant owned three tanks, which were situate on the said property from January 1, 1974 to December 31, 1974 and including March 21, 1974.

(4) On March 21, 1974, the three tanks mentioned in paragraph (3) of these Admission of Facts contained approximately 15,000 to 20,000 gallons of water (hereinafter referred to as log conditioning water), which was at times heated up to a temperature of 100°F.

(5) The log conditioning water had been used at one time on a daily basis during the winter of 1974 to defrost logs by depositing up to 300 frozen logs into the log conditioning water for a period of four to eight hours.

(6) Before depositing the frozen logs into the log conditioning water the bark was removed from each frozen log.

(7) On March 21, 1974 MacMillan Bloedel Industries Limited decided that log conditioning water would no longer be required.

(8) The Defendant hired A. & A. Anderson Septic Tank Limited to remove the log conditioning water from the three tanks located on the said property.

(9) A. & A. Anderson Septic Tank Limited was directed by the Defendant on March 21, 1974 to discharge the log conditioning water from the three tanks into a certain portion of the Defendant's property near the Fraser River in the City of Vancouver, in the Province of British Columbia.

(10) A. & A. Anderson Septic Tank Limited did remove the log conditioning water out of the tanks and pumped it into their trucks on March 21, 1974.

(11) In accordance with the instructions received from the Defendant, A. & A. Anderson Septic Tank Limited took the log conditioning water in and about the area designated by the Defendant and there discharged the log conditioning water into the ground.

(12) A total amount of 2,000 gallons of log conditioning water flowed from the place of discharge by A. & A. Anderson Septic Tank Limited into a ditch and through a culvert (hereinafter referred to as the said culvert) which discharged the log conditioning water into a ditch (hereinafter referred to as the said ditch) along Boundary Road in the City of Vancouver, in the Province of British Columbia, which lead into the Fraser River, which was also situate in the City of Vancouver, in the Province of British Columbia.

..../2

..../3

(13) The said ditch along Boundary Road where the log conditioning water was discharged from a culvert into the said ditch was approximately forty to fifty yards from the Fraser River.

(14) The total distance that the log conditioning water travelled before it entered into the Fraser River was approximately one thousand feet.

(15) Certain portions of the log conditioning water entered the Fraser River, which is situate at the City of Vancouver, in the Province of British Columbia.

(16) Four samples of the log conditioning water were taken by an Environmental Protection Services Officer of the Department of Environment on March 21, 1974.

(17) Sample No. 1 was taken at the said culvert where the log conditioning water was discharged into the said ditch along Boundary Road in the City of Vancouver, in the Province of British Columbia.

(18) Sample No. 1 was then tested by a qualified biologist and found not to be a deleterious substance within the meaning of the Fisheries Act, Chap. F-14, S.C.

(19) Sample No. 2 was taken at a point where the log conditioning water entered the said culvert.

(20) Sample No. 2 was then tested by a qualified biologist and found to be a deleterious substance within the meaning of the Fisheries Act, Chap. F-14, S.C.

(21) Sample No. 3 was taken from the Defendant's property where the initial discharge of the log conditioning water was made by A. & A. Anderson Septic Tank Limited.

(22) Sample No. 3 was then tested by a qualified biologist and found to be a deleterious substance within the meaning of the Fisheries Act, Chap. F-14, S.C.

(23) Sample No. 4 was taken from the Defendant's three tanks located at the said property.

(24) Sample No. 4 was then tested by a qualified biologist and found to be a deleterious substance within the meaning of the Fisheries Act, Chap. F-14, S.C.

(25) Log conditioning water has a tendency of exhibiting unstable characteristics as a result of its chemical composition.

(26) Between January 1, 1974 and December 31, 1974 and including March 21, 1974 fish frequented the Fraser River situate at the City of Vancouver, in the Province of British Columbia.

MacMILLAN BLOEDEL INDUSTRIES LIMITED

per _____

Counsel for the Defendant,
MacMillan Bloedel Industries
Limited.

BRITISH COLUMBIA PROVINCIAL COURT

Hogg J.

Regina v. MacMillan Bloedel Industries Ltd.

Fisheries -- Unlawfully putting debris in water that flows into water frequented by fish -- Logging operation under control of the accused resulting in deposit of debris into tributary of stream flowing into fish-bearing river -- Strict liability offence -- Accused convicted -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(3).

The accused was charged with unlawfully putting debris in water flowing into water frequented by fish after a logging operation under its control resulted in the deposit of a considerable quantity of wood waste into a tributary of a stream that in turn flowed into a fish-bearing river.

Held, the accused was convicted. The offence was one of strict liability and therefore the Crown was not obliged to prove *mens rea*.

The Queen v. Pierce Fisheries Ltd. (1971), 12 D.L.R. 3; *Attorney-General of Canada v. Brydon*, [1975] 2 W.W.R. 705; refd to.

Fisheries -- Sentence -- Putting debris in water that flows into water frequented by fish -- Accused fined fifteen hundred dollars -- Fisheries Act, R.S.C. 1970, c. F-14, s. 33(5).

While the offence was not an extremely serious one, the accused had carelessly breached an agreement made with fisheries and forestry officials to log the area in question in a lawful manner. However, taking into account the size of the company and the rectification of the damage which it had undertaken, the public interest was protected by a fine of fifteen hundred dollars.

H.J. Wruck, for the Crown.
D.W. Shaw, for the accused.

April 5, 1976.

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

HOLDEN AT QUEEN CHARLOTTE CITY

(Before: His Honour Judge G.P. Hogg)

Queen Charlotte City, B.C.,

April 5, 1976.

R E G I N A

V S

MAC MILLAN BLOEDEL

INDUSTRIES LTD.

J U D G M E N T (ORAL)

H.J. WRUCK, ESQ. Counsel for the Crown

D.W. SHAW, ESQ. Counsel for the Defendant

HOGG, G.P. (Oral):

This is a charge against MacMillan Bloedel Industries Ltd. that it did on or about the 14th day of April, 1975, while engaged in logging, unlawfully put debris in the waters that flow into waters frequented by fish, to wit, the Yakoun River, in the County of Prince Rupert in the Province of British Columbia, contrary to the provisions of Section 33(3) of the Fisheries Act, amended.

There's a second count on the Information.

On August 22nd, 1975, judgment was reserved on Count 1. Mr. Shaw appeared for MacMillan Bloedel and argued sentence in the event of a conviction. Mr. Wruck appeared for the Prosecution and judgment was reserved. I am prepared to give judgment now.

There was in reality no dispute as to the facts. Mr. Eckard Mendel, Forest Ranger, Queen Charlotte City, testified for the Prosecution. His job for a year and a half on the Queen Charlotte Islands had been to report, inspect and manage tenures and cutting permits and in the course of his duties he investigated what was known as Cutting Permit No. 39. He first became involved with that permit, which was a permit held by the Defendant, on February 3, 1975, when a written application from MacMillan Bloedel was made for an amendment to the permit, to permit logging on an area other than the area covered by the permit. As a result of that application, an arrangement was made between Mendel, Paul Chapman, and Kieth Hebron, the Fisheries Officer, to visit the site.

The site covered by Permit No. 31, as the application for an amendment covered, covered part of Graham Island including parts of the Yacoun River and King Creek, as shown on a map which I think was marked Exhibit 1. In any event, as a result of that joint inspection, they went out again on February 4th to inspect King Creek and the three men decided that the portion of the creek above the road could be protected in such a way as to permit logging and to allow logs to be felled across the creek without damaging the creek. Because of the steepness of the slope towards the creek, these three gentlemen, Mr. Chapman, of course, representing the Defendant, decided that what could not be felled across the creek could be yarded across so as not to touch the water. They also decided that below the creek the trees were to be felled away from the creek and away from the tributary, King Creek being a tributary which flows into the Yakoun River, as I understand it.

On the basis of that inspection, this witness, Mandel, drew up a memorandum of what had been agreed upon and wrote a letter to the company. On receipt of that letter, Mr. Chapman and Mr. Murchison, I think it was, stated that there would be no problem protecting the creek, that it could be done and would be done and there would be no problem in protecting the tributaries of King Creek. It was arranged that Mr. Chapman would telephone the Fisheries Department and the Forestry Branch when the logging had begun so that a further inspection could be made. Chapman said that logging would start about April 1st. Chapman is the Divisional Engineer for MacMillan Bloedel on the Inlands, or he was at this time, and was responsible for the engineering work which included the laying out of the blocks and the looking after of the resources of the forest.

The stream, when the logging commenced or before the logging commenced, was in a natural state. There was no disturbance and no debris whatever in the stream on February 6th.

In April, this witness received certain information and as a result of that information he and the Fisheries Officer, Hebron, went to the area where they met Chapman and another employee and they found the creek full of debris with logs and debris in the tributary of King Creek, both above and below the tributary and the creek itself. Chapman said he had no idea what had happened but he accepted full responsibility and he had no excuse and according to this witness, that made the credibility gap very wide, whatever he means by that. It's my understanding that this logging had been contracted out and because of a lack of communication the logging was not done in the way which the company intended it to be done or directed it to be done. The tributary was full of trees, branches and whole logs that had been felled. It was almost impossible to see the water and there was a six foot depth of material on the creek.

The exhibits, the photographs showed the damage to the creek. There were a number of photographs, Exhibits 4, 5, 6, and 7. In addition to that, there were a large number of slides which showed the damage pretty well as this witness described it, and from those slides you could see the logs in the tributary match the stumps of the trees that had been cut. This witness said that from his experience he would say that they had undercut purposely to guide them directly into the creek. They were fresh cuts, not more than two or three weeks old. He testified that there were fish in the Yakoun River and that he himself had caught several fish in the river shortly before April 15th.

Now, that is pretty well the evidence. He was cross-examined at some length and he stated that there had already been logging on the west block, he didn't pay particular attention to the west block. He didn't notice any logging near the streams in that block. There was some discussion about logging in the west block and as far as I can remember there was no suggestion that timber would have been felled into the stream on the west block. I did O.K. the cutting of timber across the stream above the road area. Because of the physical condition of the stream, I O.K.'d the cutting of timber across it above the road area. We agreed that the trees could be felled across the draw with no damage to the creek. The odd piece of debris would land in the creek but that would be of no significance. The stream would be free flowing and clear.

The witness was then asked if two or three of the trees below the creek in the east block were leaning towards the creek and he admitted they were but he said that's why we got George Murchison, he was an expert and he said they could be felled away from the creek. It was also suggested to the witness that it was agreed that they could be felled across the creek but he denied it. According to Murchison, they could all be felled away from the creek. It was the area below that caused them to get Murchison. He admitted that the tributary is just a few feet wide, not more than two or three feet, that the depth is, in places, only three or four inches but in other places in pools up to about a foot. It also contains alot of twists and turns. He admitted that the tributary was still flowing but it had been diverted 10 or 20 feet in a number of places. He said that very shortly afterwards he asked MacMillan Bloedel to clean up the debris and gave them a month to do so. He went out within the month for a further inspection and was completely satisfied with the way MacMillan had cleaned up the debris and he was satisfied with the results. He said that the damage in the net result would be minimal. I don't understand that because on re-direct he said what he meant was it would be minimal compared to damage that might have been done had it happened in Area A rather than in Area B, but on re-direct he said there was much more than minimal damage, there was alot of damage.

Hebron also gave evidence. He was the Fisheries Officer. He said he'd been four years in the Charlottes. Previous to February 4th he had called a joint inspection with Kendel in Area A. There were no recently cut logs or debris at all. "It was what we called a virgin stream that could be capable of allowing coho to spawn. The inspection was for the purpose of determining whether timber could be cut without jeopardizing the stream itself. Our purpose was that none of the logs or debris would end up in the stream. They assured us there would be no problem at all. It would be logged with minimal damage, if any. All timber would be felled across or high lifted so they would not touch the stream." Chapman said this is a critical area, they would be in touch with us. As the Department of Fisheries received no word, another inspection was made on April 16th. The stream had been completely diverted in some places and debris had been piled to six feet high in some places.

There were two admissions made by counsel; that MacMillan Bloedel Industries was engaged in logging in the King Creek area between February and May of 1975, and secondly, that the Yakoun River is frequented by fish.

On cross-examination, it had been said that the initial inspection was with Chapman and Murchison. I can't recall whether we inspected any other area. At first there was just the two of us, we went and got Murchison. Perhaps Murchison was not with us when we first discussed the tributary but he was the second time. He was asked whether there were trees in the downstream area leaning over the stream and said there were several that were questionable. It was agreed that upstream they could be felled across the stream but not touch it. Downstream there were no trees and it was agreed they could be felled across. The tributary along King Creek to the Yakoun River was two and a half miles. I think that's an error on my part. The distance, I think, from the tributary along King Creek to the Yakoun River is two and a half miles.

Now, on that evidence, Defence argued first that there was no indication that any of the debris went into the Yakoun River; 2) there was no proof of any harm to any fish; 3) there was full and complete acceptance of the blame by the Defendant; 4) this happened by mistake, that the right-of-way fallers needed work and that the work had been contracted out by MacMillan Bloedel Industries. The debris, in the end result, was cleaned up in full, there was no damage.

Now, on that evidence, I must decide whether MacMillan Bloedel Industries Ltd. did unlawfully put debris into waters that flow into waters frequented by fish, to wit, the Yakoun River, contrary to the provisions of Section 33 (3) of the Fisheries Act, as amended. The section reads as follows:

> "No person engaged in logging, lumbering, land clearing or other operations shall put or knowingly permit to be put any

slash, stumps or other debris into any waters frequented by fish or that flows into such water or on the ice over either such water or the place from which it is likely to be carried into either such water."

It is my opinion that that section is what is called a strict liability section. In other words, it is a complete prohibition. Mens rea, in my opinion, is not an element of the offence. It is not really a criminal offence. The section is there for the purpose of protecting the public and it must be complied with. It's true that the section contains the word "knowingly" in part of it. "No person engaged in logging, lumbering, land clearing or other operations shall put or knowingly permit to be put any slash, stumps", and so on. I don't think that changes the situation.

There was no evidence that anyone other than MacMillan Bloedel Industries Ltd. or their sub-contractors put the debris into that creek. The principals of strict liability were reviewed by the Supreme Court of Canada in the Queen vs Pierce Fisheries Ltd., 12 D.L.R. 3, p. 591; (1971) (S.C.R. 5). In that case the Respondent Company was charged with a violation of the Fisheries Act which makes it an offence to possess an undersized lobster as defined in the Schedule. The evidence showed that out of fifty to sixty thousand lobsters brought into the plant on the day in question, some 26 were undersized. Neither the officers of the company or any responsible employee was found to have any knowledge of the presence of the undersized lobsters. The question was whether or not the offence was one of strict liability and the Court, with Chief Justice Cartwright dissenting, held that it was.

Mr. Justice Ritchie, with whom the majority of the Court agreed, set out three classes of cases wherein the presumption of mens rea is not applicable. Firstly, acts not criminal in the real sense of the word but acts prohibited under penalty for the public good. Secondly, public nuisances. Thirdly, criminal proceedings which are really summary means of enforcing a civil right. He stated this: "If the purpose of the Statute is to add a new crime to the general criminal law it is natural to suppose that it is to be read subject to the general principals according to which that law is administered but other considerations arise wherein matters of police, of health, of safety, or the like, where legislatures adopt penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced."

In my opinion, the true object of this sub-section is to regulate an activity pro bono publico and not to create a new criminal offence. The Pierce case was referred to in 1975 in the case of Attorney-General of Canada vs Brydon (1975) 2 W.W.R. 705 (C.A.). In that case, a farmer was convicted of having delivered to the grain pool, grain in excess of the quota allotted to him

under the Canada Wheat Board Act. The farmer had got into the habit of following directions of his agent as to how much grain he had delivered to the authorities and by an honest mistake the agent mislead the farmer as to the amount of grain he'd already delivered and acting on the word of the agent, the farmer delivered grain in excess of his quota. It was held by the Court of Appeal in Manitoba that the offence was one of strict liability, that the Act in question was to provide for the orderly distribution of grain and that such provision was in the public interest and that therefore, it made no difference whether it was an honest mistake or not.

I find that this is a strict case of strict liability. I find that the tributary did flow into King Creek, it did flow into the Yakoun River and that the Yakoun River is water frequented by fish. That being so, I find the Defendant guilty.

Now, as to sentence. It was suggested to me that a heavy penalty was indicated should I find the Defendant guilty. I think one previous conviction was proved in which--put it this way, a conviction very close to here in which the fine was $1500. The maximum penalty is $5000. It was argued before me that this tributary contained so very little water that the likelihood of any debris at all reaching the waters that had been admittedly waters containing fish, was slight. In other words, the tributary was, in places, two or three inches deep and a few inches in width. It was more of a trickle than a real tributary. There was no evidence one way or another as to whether debris from that rivulet if you like, would reach King Creek and would eventually reach the Yakoun.

In view of the fact that there was no evidence, I think I must assume that there is a strong possibility that some, at least, of the debris would reach the Yakoun River. Whether or not it would interfere with the fish spawning is a matter of speculation. I do not consider this offence extremely serious except insofar that the Defendant, through its servants, did breach an agreement that they had made with the Forestry and Fisheries authorities. I am reasonably satisfied that it was done--certainly wasn't done deliberately, I think it was done carelessly, I think there was a lack of communication between the Defendant Company and the men who actually did the falling. I think the Defendant Company, when it was brought to its attention, immediately did all in its power to rectify the damage that had been done and I take that into consideration.

Now, as to an amount, I cannot help but take judicial notice the fact that MacMillan Bloedel Industries Ltd. is one of the largest corporations, one of the largest public corporations in Canada and that the fine, no matter what fine is imposed, is in all likelihood not going to be borne by the shareholders.

It is borne, in the final analysis, probably by the taxpayer. Whether that's so or not, the difference between $5000. and $1000. or even $100. for that matter, is not really a great importance nor is the amount of that fine a deterrent to a company that deliberately wishes to defy the provisions of these Statutes. The public, on the other hand, must be made aware that these Acts are there to be obeyed. They are there for the protection of the whole of the public and a fair fine under the circumstances is $1500. and I fine the Company that amount.

Count #2 was withdrawn or rather there was a Stay of Proceedings.

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the proceedings herein to the best of my skill and ability.

Genevieve M. Bekar
Official Court Recorder.

PART III

UNREPORTED REMARKS ON SENTENCING
UNDER SECTION 33 OF THE FISHERIES ACT

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REMARKS ON SENTENCING FOLLOWING GUILTY PLEAS

Company	Fine	Nature of Offence and Issues Considered
Whonnock Lumber	$3000 33(3)	Damage to spawning grounds
K.P. Wood Products	$3500 33(2)	Sawdust on ice, long delay before remedial action taken
Finning Tractor and Equip.	$ 750 33(2)	Oil allowed to reach water, warning to Company not given by letter nor given to officer of Company, remedial action taken
Federated Co-operative	$3000 33(3)	Barge load of debris dumped into lake, injunction to refrain granted,
Cardinal River Coals	$7500 33(2)	Coal fires silting stream, no toxicity, $200,000 to be spent to remedy
Columbia Cellulose	$1500 33(2)	Pumping failure, red liquor from pulp mill, Pulp and Paper Effluent Regulations not applicable to the Defendant's mill (p.73)
Giant Yellowknife Mines	$2000 33(2)	Tailings spill, deterrent, large expenditures for prevention

BRITISH COLUMBIA PROVINCIAL COURT

Guinet Prov. Ct. J.

Regina v. Whonnock Lumber Company Limited

Fisheries -- Sentence -- Deposit of debris in water frequented by fish -- Spawning channel damaged by logging operations -- Accused negligent in failing to ascertain existence of spawning area and failing to prevent damage to it -- Three thousand dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(3), 33(5).

Darragh Vamplew, for the Crown.
John Fraser and William Ferguson, for the accused.

January 28, 1971.

MGM..

PROVINCIAL COURT OF BRITISH COLUMBIA

CRIMINAL DIVISION

HOLDEN AT CHILLIWACK

(Before His Honour Judge A. M. Guinet)

C A N A D A	)	R E G I N A
PROVINCE OF BRITISH COLUMBIA	)	vs
COUNTY OF WESTMINSTER	)	WHONNOCK LUMBER COMPANY LIMITED

Chilliwack, B.C.

January 28, 1971.

DARRAGH VANPLEW, Esq., appearing for the Crown,

JOHN FRASER, Esq., and WILLIAM FERGUSON, Esq., appearing for the Defendant Company.

REMARKS OF HIS HONOUR AT SENTENCING

. . . . . .

THE COURT: Well, I think I can agree with defence counsel that this is not a situation to impose the maximum penalty. On the other hand, I am really, I think, trying to impose a penalty which will indicate that the practice of doing things that are likely to harm fish is a serious matter and it must be made obvious that it is serious.

It would seem to me that the cost of reconditioning the spawning channel is not a thing that should be too much on my mind. It may give me some impression of the seriousness of the matter, but by and large I would think that this is a civil matter between the Fisheries Department and Whonnock Lumber.

I am more concerned with the principle of harm that is done and loss sustained by the public generally and a loss of the fish. I feel that I have to quote a substantial figure. I think it is impossible to reach anything that is going to be what other judges would reach. I think it is, unfortunately, a matter somewhat of guesswork.

I do think that this is a substantial logging operation obviously done for substantial profit. When a corporation that is licenced to do this and allowed to go in there to do it, they should be able under ordinary circumstances to obtain all the technical advice that is necessary to prevent the doing of harm.

I think that they have been quite remiss in not knowing of the existance of this spawning channel. I would think that when they are operating in an area where there are streams, that it would be one of the first things that they would have to check, would be what possible harm their operations would do to the fish in that stream and to find out if there are any special problems in relation to fish. This they apparently did not do and I think that is a negligent act of some considerable consequence.

I am imposing a penalty by way of fine in the amount of $3,000.

. . . . . .

I hereby certify the foregoing to be a true and accurate transcript of the proceedings herein.

Deputy Official Court Reporter

BRITISH COLUMBIA PROVINCIAL COURT

D.M. MacDonald Prov. Ct. J.

Regina v. K.P. Wood Products Ltd.

Environmental law -- Water pollution -- Sentence -- Permitting deposit of deleterious substance in a place under conditions where may enter water frequented by fish -- Emission of partially burned and unburned sawdust onto ice covering river -- Accused negligent in implementing remedial measures -- Three thousand five hundred dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused was convicted on a charge of permitting the deposit of a deleterious substance in a place under conditions where it may enter water frequented by fish after a considerable quantity of partially burned and unburned sawdust was emitted from its plant onto the ice covering the North Thompson River. The evidence showed that the sawdust would adversely affect fish by obstructing the flow of fresh water over salmon spawning beds and depleting the oxygen from the water through decomposition.

Held, the appropriate fine was three thousand five hundred dollars. The delay by the company in rectifying the problem required a more serious penalty to be imposed in order to satisfy the objective of deterrence.

L.P. Jensen, for the Crown.
A.S. Berna, for the accused.

July 2, 1971.

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BEFORE HIS HONOUR JUDGE D.M. MacDONALD

KAMLOOPS. B.C.

JULY 2, 1971.

REGINA

VS

K.P. WOOD PRODUCTS CO. LTD.

L.P. JENSEN, Esq., appearing for the Crown.

A.S. BERNA, Esq., appearing for the Accused.

S E N T E N C E

THE COURT: The Accused company is charged under Section 33, subsection 2 of the Fisheries Act, the section in this particular Act that was proclaimed on the 15th of July, 1970 They are charged that, "on or about the 21st day of January, A.D. 1971, did unlawfully permit the deposit of a deleterious substance in a place, to wit: at or near the North Thompson River, under a condition where such deleterious substance may enter water frequented by fish."

The deleterious substance alleged in the Information was partially burned or unburned sawdust and was deposited on the snow and the ice on the North Thompson River during the winter time and specifically deposited on the ice on the 21st day of January, 1971.

I believe that in a case like this the Court has to take into consideration the series of events that led up to the day that

this charge was laid. It would appear that the Accused company had purchased the mill in question in 1966 and that when it purchased this mill it would be in the words of Defence Counsel "in a deplorable condition. The Fisheries Department officers examined the situation, as far as the record before the Court indicates, in the month of October, 1969, and at that time they observed that the sawdust was going out of the burner and settling into the North Thompson River. The Fisheries Department officers made two more visits in October, on the 5th and 6th, and they emphasized to the mill staff at that time that the escaping sawdust from the burner must be stopped.

The Company did make some efforts at this time to repair the burner, however the condition persisted and the burner continued to emit sawdust onto the ice and snow on the North Thompson River during the winter of 1969 and 1970. During this time the Fisheries Department officers visited the mill several times and emphasized that they must take some positive action to stop the situation from proceeding. Again steps were taken by the company from time to time, including an expenditure of $10,000.00, however these repairs were, as far as the burner was conderned which again cost them a considerable

amount of money, of little avail and the situation persisted.

Now, I am concluding from the evidence that the sawdust was deposited each operating day onto the river, on the snow and ice. It is true that during certain times the mill was shut down and during these times the situation wouldn't exist. Now, the extent of the deposits becomes clear to this Court when one considers the evidence that during the winter time the deleterious substance was observed for a half mile below and a half mile above the mill and these deposits were heavily concentrated for one thousand feet above the mill and one thousand feet below and throughout the width of the river.

Now, until recently this type of situation would possibly not concern very many people, however it has been put before the Court that the sawdust in the river has two effects:

(1) the sawdust disturbs the normal flow of intergravel water and in this way cuts off oxygen supply to salmon eggs

(2) Sawdust deposits undergo a decay process as a result of microbial activity, and consequently tend to use up the oxygen supply percolating through the stream bed.

Now, the Court has been told that the North Thompson River is a spawning area and

in my opinion this sawdust flowed some thirty miles below the mill so this is clearly a situation that is serious in the sense that the deposit of the deleterious substance is very great.

The maximum fine is $5,000.00. The purpose of this particular statute is to preserve one of our most valuable resources, salmon and fisheries, and in this particular case I am aware that this company had knowledge and they had been advised on at least a dozen occasions to deal effectively with the problem and to stop depositing this sawdust in the river and on the ice on the river.

I have no alternative here but to conclud that in spite of continuing pressing requests, later demands, to remedy this situation, the Accused company failed to do so. It is true they did take steps and they did take action from time to time to remedy this situation. It is also true that the action they took was inadequate and it didn't stop sawdust from going into the river.

I am advised today they have taken action or steps to remedy the situation. I don't know what they are, but apparently they are effective in that Mr. Goodman, Fisheries Officer, advised the Court there is a marked difference between the amount of sawdust flying from this burner as opposed to January

of this year. Now, this seems to indicate to this Court that there was a remedy available and it is regrettable indeed that this remedy wasn't effected some two years ago. I believe I must take this into consideration when I am assessing the penalty This is not a case where the Fisheries Officer sees the sawdust being emitted into the river as they did here and at that time, or after a short period, and maybe after one warning or so they laid a charge. One might say in that type of situation where there was no knowledge of the damage that was being don that the Court should assess a nominal fine. This is different. These people knew for some considerable length of time the damage they were doing and although they did take some steps those steps weren't adequate. If they could take steps in the last little while that were adequate they could have done it when the matter was first brought to their attention.

I have given the matter considerable thought and I feel there is a duty on the Courts to assess a penalty, where the circumstances are such as they are here today, that is going to give effect to the Statute and provide some form of deterrent to other people who would choose to ignore the particular situation I am dealing with here

It must be made clear such a situation cannot and won't be tolerated.

I believe looking at the over all facts and the whole of the evidence presented to me I should assess a penalty that is a heavy one.

It is the decision of this Court that K.P. Wood Products Co. Ltd. be assessed a fine of $3,500.00, in default distress. In the light of your remarks this Court wouldn't make an order under Section 33-7 of the Act.

I HEREBY CERTIFY THE FOREGOING
TO BE A TRUE ACCURATE RECORD
OF THE PROCEEDINGS

DON [illegible]
DEPUTY OFFICIAL REPORTER

BRITISH COLUMBIA PROVINCIAL COURT

Greig Prov. Ct. J.

Regina v. Finning Tractor and Equipment Co. Ltd.

Environmental law -- Water pollution -- Sentence -- Oil spill -- Permitting deposit of deleterious substance at a place where it may enter water frequented by fish -- Mitigating factors justified less severe penalty -- Fine of seven hundred and fifty dollars -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused was convicted of an offence against s. 33(2) of the Fisheries Act after its employees caused the deposit in question through faulty procedures for cleaning up an accidental spill of oil.

Held, a fine of seven hundred a fifty dollars was levied. The satisfactory remedial action taken by the company to prevent any further infractions was the most important factor in mitigating sentence, but also considered were the small size of the spill and the accidental circumstances under which it occurred.

L.P. Jensen, for the Crown.
A.S. Berna, for the accused.

October 20, 1971.

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BEFORE HIS HONOUR, JUDGE R.W. GREIG.

KAMLOOPS, B.C.
October 20, 1971.

REGINA

VS

FINNING TRACTOR AND EQUIPMENT CO. LTD.

P. JENSEN, ESQ., appearing for the Crown.

A. BERNA, ESQ., appearing for the Defence.

REASONS FOR JUDGEMENT

GREIG, JUDGE: (Orally) I think the submissions are brief enough and the evidence is all before me now so far as the question of sentence is concerned. It would serve no useful purpose I think to adjourn the matter of sentencing until later. I had thought of doing that so that we could see what the Pollution Control people would do, but I think we're looking at another month or so and I don't like to adjourn it that long, it's something that's been before us now for a month and a half anyway so we should deal with it.

The portion of the testimony introduced by the Crown that concerned me most in so far as sentence was concerned was the suggestion that the company had in effect been warned about this kind of problem on at least two previous occasions. However, Mr. Moore's testimony leaves me in some doubt that any warning as such was ever communicated effectively to him, and although we didn't have Mr. Anderson as a witness we do have

the evidence of Mr. Moore to the effect that Mr. Anderson is not an officer or director apparently of the company, and Mr. Moore's evidence also that he is at the plant on an average of three and a half days a week and that he lives in Kamloops and presumably would be available should any formal warning have been thought necessary, and there's nothing to indicate that any formal written notice or warning or instruction was ever delivered to the defendant company through Mr. Moore or anyone in the capacity of an officer or director of the company.

I think, therefore, that it is fair to say that what we're dealing with here is in every sense a first offence. The discharge apparently was one not directly into the river in the sense that the defendant company dumped fuel oil or grease oil directly from some container into the river, nor is it, it would appear, any kind of discharge into the river which was intentional, and I'm not overlooking the fact that there is ample authority for the proposition that Mens Rea is not an element in the offence that we're concerned with here. However, it is a factor to be considered in sentencing certainly. The quantity of oil which was discharged, or combination of oil and detergent which together would appear to constitute a deleterious substance although the evidence that we have from the expert is really relative to oil alone I think. In any case the quantity of the deleterious substance is in some doubt and

may be perhaps in total anything from five to twenty gallons in a diluted form, certainly not by a direct dumping, it was mixed with a large quantity of water and although it apparently entered the river in a consentration far in excess of what is normally considered safe, it was under circumstances in which the servants of the defendant company had apparently endeavoured by the wrong means to dispose of an accidental spill. All of that as I say is not significant so far as the offence itself is concerned, the commission of the offence, but is of some importance when considering sentence. The more important factor in sentencing is that I'm satisfied by what the defence has said that the company is doing everything it can at present to implement a plan which the witnesses to-day have indicated would seem to be one which will probably prove effective in avoiding any future damage to the river system from this kind of spillage and they have been delayed in their efforts to implement the plan principally it would seem by the difficulty with the Pollution Control Board.

The further question then is whether any injunction should be ordered. But it would seem to me that in as much the Pollution Control Board seems to be investigating not only the matter of the soil content and doing this by percolation tests and otherwise but they're obviously enquiring into it on certain other bases, and any injunction which the Court might order now would in all probability complicate the compliance by the defendant company and might even conceivably conflict with something which the Pollution Control Board might decide was necessary or helpful in deciding upon a system to be approved.

I think, therefore, that a fine alone would suffice and I should emphasize in dealing with the matter now that the fine which will be imposed, although considerably less than the maximum, is not intended to be any condoning of spillage or any expression by the Court of an opinion that such spillage is anything but a serious matter. But it is being dealt with on the basis that we're concerned with an accidental spill which has occurred on one occasion only in so far as the evidence is concerned, although I'm not overlooking that the Department has been concerned for some time, but so far as notice to the defendant that that is the situation, and principally because the plans which the defendant company has prepared and which the company is prepared to implement as soon as they are authorized to do so by the Provincial Government seem to be adequate both in the opinion of the Company's own engineers and the expert called by the Crown.

The fine will be $750.00, time to pay November 1st.

Prov. Court Judge.

Certified transcript of proceedings as recorded pursuant to Order in Council No. 1650.

BRITISH COLUMBIA PROVINCIAL COURT

Arkell J.

Regina v. Federative Cooperative Limited

Fisheries -- Sentence -- Permitting the deposit of debris in water frequented by fish -- Knowledge of statutory prohibition attributed to management of the accused corporation -- Penalty required to ensure deterrence -- Fine of three thousand dollars -- Order to refrain -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5), 33(7).

The accused corporation was convicted on a charge of permitting the deposit of debris in water frequented by fish contrary to s. 33(3) of the Fisheries Act after a load of wood waste was dumped from one of its barges into Shushwap Lake.

Held, a fine of three thousand dollars was imposed and the company was ordered to refrain from further dumping. Knowledge of the statutory prohibition was to be attributed to the officers of the corporation even if the resident manager claimed ignorance of it. Accordingly, a severe penalty was required to ensure that this company or others like it would not commit similar offences.

L.P. Jensen, for the Crown.
D.S. McTavish, for the accused.

December 16, 1971.

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BEFORE HIS HONOUR JUDGE K. ARKELL

Salmon Arm, B.C.

December 16, 1971.

REGINA

VS

FEDERATED CO-OPERATIVE LIMITED.

L.P. JENSEN, Esq., appearing for the Crown.

D.S. McTAVISH, Esq., appearing for the Defence.

SENTENCE

THE COURT: (Oral) The accused Company, Federated Co-operative Limited, is charged that on or about the 5th day of September, A.D. 1971, in the County of Yale and Province of British Columbia, while engaged in lumbering did unlawfully permit debris to be put into water frequented by fish, namely Shuswap Lake, Contrary to the Provisions of Section 33 of the "Fisheries Act" as amended.

Subsection 3 of Section 33 of the "Fisheries Act" as enacted on July 15, 1971, states:

> "No person engaged in logging, lumbering, land clearing or other operations shall put, knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water or on the ice over either such water or at a place where it is likely to be carried into either such water."

Subsection 5 of Section 33 states that:

> "Any person who violates any provision of this section is guilty of an offence and liable under summary conviction to a fine not exceeding $5,000.00 dollars for each offence."

Subsection 7 states:

> "Where an offence under subsection 5 is committed on more than one day or is continued more than one day it shall be deemed to be a separate offence for each day on which the offence is committed on continues."

Subsection 7 states:

> "Where a person is convicted of an offence under this section the Court may in addition to any punishment it may impose order that person to refrain from committing any further such offence and cease to carry on any activities apecified in the order, the carry on which in the opinion of the court will, or is likely to result in committing of any further such offence."

Here the accused Company, Federated Co-operative Limited, has entered a plea of "guilty" to this particular charge under Section 33 of the "Fisheries Act." This morning and this afternoon I have heard considerable evidence on the question of the appropriate sentence that should be imposed in this case. After hearing the evidence of Mr. Perrson, the manager, local manager of Federated Co-operative Limited, Salmon Arm, there is no doubt in my mind that there is a considerable economic benefit that is conferred upon the people in this area by the operations of this particular company. However, I am also aware that it appears we have now reached the time that we must decide whether the economic benefit exceeds the damage, the environmental damage that is being caused through these operations that are being conducted by various industries throughout this country.

Unfortunately this problem is a problem that is

not that of the court. It's a problem of the Legislators who are elected by the people of this country to enact legislation, and they must decide what are the appropriate measures that must be taken to cope with this environmental problem as opposed to the economic difficulties that may be inflicted by the enforcement of these various Acts and regulations.

In this case the Parliament of Canada enacted subsection 3 of Section 33 and they have made it a specific offence for any person engaging in logging to put, or knowingly permit to be put, any slash, stumps or debris into any water frequented by fish. In this case on September the 5th of 1971 it is obvious that Federated Co-operative Limited did put debris into water frequented by fish, namely the Shuswap Lake.

In speaking to mitigation on sentence it was suggested on behalf of the Defendant Company that the resident manager was not aware of Section 33 of the "Fisheries Act". Even accepting this to be a fact, I find it extremely difficult to understand why any person, particularly at the present time when in all the newspapers throughout the country there is continuous hue and cry by environmentalists as to the damage that is being caused to the environment within which we must live--even if Mr. Perrson was not aware of Section 33 I fail to understand why he would not, as a man concerned about our environment,

take some steps or make some effort to find out what the regulations and laws were within which he must operate his business. Ignorance of the law of course is never an excuse.

Here I am concerned with only one particular operation, the operation that occurred on September 5th when this barge was loaded with debris and then subsequently dumped into the Shuswap Lake. I am not concerned with any of the other problems with which the company may be faced regarding the prevention of pollution in this area.

However, I am satisfied on the facts before me that the officers, members of the management who were responsible for the operation of the company were, or certainly should have been aware of the Federal Statute that had been enacted on July 15, 1970, and yet, perhaps inadvertently and certainly negligently, they knowingly allowed this debris to be hauled into the water and dumped into Shuswap Lake. Because of this prior knowledge I am satisfied that there must and should be a penalty imposed that will serve not only as an objective detterent to other companies who would perhaps negligently operate their business in a similar manner, but also subjectively against Federated Co-operative Limited who have obviously in this case simply ignored the particular law enacted under the "Fisheries Act."

I am therefore going to impose a fine against this company of $3,000.00, and the question of the

order to refrain from carrying on an committing any further such offence under subsection 7 of Section 33, it is obvious in this case that if a general order were made that it would be not only injunctive but perhaps prohhitive for the company to carry on their operations. However, in speaking to sentence Counsel for the defendant Company did refer to the distinction between debris, which according to his submission included barks and limbs as opposed to merchantable timber, and I am satisfied that there can and should be an order made in this particular case that the defendant company, Federated Co-operative Limited, should be ordered that they must refrain from dumping debris into the Shuswap Lake, and in order to be more definitive I mean by "debris" to include as defined in Webster's Dictionary, "scattered fragments, wreckage or drift accumulation." And I refer to "dumping" to be a specific pertinent act of dumping rather than something which occurs accidentally or through an act of God over which of course the defendant Company has no control.

I HEREBY CE[illegible] FOREGOING
TO BE A [illegible] RECORD
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DEPUTY OFFICIAL REPORTER

ALBERTA PROVINCIAL COURT

Rolf Prov. Ct. J.

Regina v. Cardinal River Coals Limited

Environmental law -- Water pollution -- Sentence -- Deposit of deleterious substance in water frequented by fish -- Contamination of creek with coal fines from pit dewatering operation -- Fifteen days charged -- Fine of five hundred dollars per day -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused was convicted of depositing a deleterious substance in water frequented by fish contrary to s. 33(2) of the Fisheries Act. The charges were arose when the company pumped a large quantity of water contaminated with high concentrations of coal fines into a creek which flowed by its open pit mines.

Held, there was a five hundred dollar fine imposed for each of the fifteen days charged. While, on the one hand, the company appeared to be prepared to take considerable risks to keep its mines in operation, on the other, ineffectual communication with the regulatory authorities may have contributed to the problem.

B.D. Patterson, for the Crown.
M.D. MacDonald, for the accused.

April 24, 1972.

IN PROVINCIAL JUDGES' COURT

JUDICIAL DISTRICT OF EDMONTON

REGINA

vs

CARDINAL RIVER COALS LIMITED

J U D G M E N T

Edmonton, Alberta
April 24, 1972

PROCEEDINGS held in Provincial Judges' Court, Municipal Courts Building, Edmonton, Alberta, held on the 24th day of April, A.D. 1972 before Provincial Judge

C. H. ROLF, Q.C.

B. D. PATTERSON, Esq.,..... Appearing for the Crown,
M. MACDONALD, Esq.,..... Appearing for the Defence,
Doreen J. Happner,..... Student Court Reporter.

THE COURT: You were remanded to today for the fixation of a trial date, gentleman. I understand that there may be an application. Is that correct, Mr. Macdonald?

MR. MACDONALD: That is correct, sir.

THE COURT: There is a not guilty plea on record?

MR. MACDONALD: I am going to apply, then, on behalf of the defendant Cardinal River Coals, to change that plea to guilty.

THE COURT: On the application of the accused, through counsel to change the plea from one of not guilty to one of guilty. Record the plea as guilty, please.

What are the circumstances, please Mr. Patterson. May I see that information. There

THE COURT: (cont) are several days alleged aren't there. Now many days are there alleged?

MR. PATTERSON: Fifteen days in all, sir.

THE COURT: Fifteen?

MR. PATTERSON: Yes, Your Honor, if the ...

THE COURT: Yes, I'm listening.

MR. PATTERSON: Might say before opening, sir, that the circumstances here are somewhat involved. It would be proper to refer to the previous hearings as to certain findings, although many similar findings were made in the, in this particular case. I don't think it's necessary to go into the details; those findings are admitted, including the deleterious effect of the substance involved. But you will note on the information, sir, that the information charges a total of 15 days; 6 days in June and 9 days in July. There is an interruption there between the 22nd of June and the 5th of July, which I think, as may have some significance to the Court in considering the circumstances surrounding the committing of the offense and perhaps relative to the appropriate penalty. The investigation commenced on the 17th of June by Mr. Lane as a result of certain informations that he had received relating to the 15th of June. This is when it first came to the attention of the Wildlife Division that

MR. PATTERSON: (cont) the creek was running black, and as a result the Detective asked them why the creek was running black. This, sir, is in the area where the defendant carried on the actual mining, strip mining operation, and it is in an area adjacent to a large strip mining pit, which has a creek affected, Cabin Creek, runs adjacent to this pit, the offense consists of the pumping of quantities of water from the pit on the days set out in the information, indirectly into Cabin Creek. I have some photographs to, in fact, illustrate, if the Court is interested, but in effect the photographs show two six-inch pipes and one ten-inch pipe come from the pit where pumps were mounted in the pit to drain the pit, and the pipes were noted running intermittently from time to time on the days mentioned, and directly into the creek. The findings were that the samples of the water, firstly, from the pipes themselves and then the usual sampling pattern was followed to sample the water as to suspended solids above the point to entry, and when we deal with the over-all picture, this is a tributory creek.

Cabin Creek is a creek that enters into Gregg River, which in turn is the tributory of the MacLeod River, that I think Your Honor is familiar

MR. PATTERSON: (cont) with. That system is from the other creek. The suspended solids in the effluent were recorded on two days. On one day the suspended solids were 78,000 some odd parts. On the other day the suspended solids were 2,005. The, I think, this bears some significance as to the actual quantity of material that entered the creek.

Calculations indicate, sir, that with this volume the pipe I think this is a considerable estimate, the pipe that is capable of discharging 700 gallons per minute, maybe I am wrong. In any event, it was estimated, for the purpose of these calculations, as discharging 500 gallons per minute, and the daily discharge would amount to, sir, I can check my notes on that.

If we take the average of those two figures that are quoted to you, sir, it would be an average discharge of five tons per hour. In rough figures, we get a concentration at the mouth of the Cabin Creek of slightly less than half a ton per hour, so we got the major portion of this coal settling into the creek. We do, there are some significant readings, I think , are of some significance with the parts per million in the Gregg River. We are well over the background level. Parts per

MR. PATTERSON: (cont) million were about one-hundred and, were 180 I believe, sir, and the background level, still, I think, this is something, sir, is in the vicinity of 15 miles below Cabin Creek 7 parts per million, 15 yards above Cabin Creek 2 parts per million.

So, in other words, sir, we have a clean streak. Now, the, I think the time is of some significance. This was done, this fluid was injected in the months of June and July which was the spawning time for the fish that were found in the area; Rainbow Trout and Eastern Brook Trout. The opinion of the investigators in this matter was that the entire length of Cabin Creek would have been completely silted in and would have the effects that Your Honor, I think, is familiar with. Cabin Creek was, prior to this, a spawning ground for fish coming from the larger river, the Gregg River. The information does indicate, too, sir, that this was a, we had the term put before this Court, a typical mountain stream with little or no previous ...

THE COURT: With little or no real argument about it this time.

MR. PATTERSON: No, this is ... The fauna sampling is, summarized up briefly, they indicate that there were clear water samples above the point of effluent

MR. PATTERSON: (cont.) 158, and 95; just two points above. Below they range from 0 to 15 in June and 0 to 29 in September which, I think, clearly indicates that this part of the fishery was certainly wiped out. The, I think it is of significance, sir, that the problem arose and I am sure my friend is going to make reference to the necessary and uncontrolled causes of the rain, the nature, and the creek that emptied into the pit which created a problem in so far as the continued operation of the mine. In other words, the pit was filled with large, partially filled with large quantities of water which prevented the continued operation of the pit. On that aspect, sir, I think that this was in the spring of '71 that attempts were made to divert a creek which borders the, which in this case is Cabin Creek, which borders the pit. The calvert apparently proved ineffective in that it broke away in part and contributed water to the river bed and this was one of the sources of the water. The, and the other source being the natural rain run-off. I suggest, sir, that this was perhaps something that the company should have anticipated.

The, I am sure my friend is aware of the remedial action that was taken, and point out what this remedial action was. However, it is my informa-

MR. PATTERSON: (cont) tion that the remedial action took place the following the 20, the last day mention - in the charge; I believe the 18th of July. It is my information it was on the 22nd or thereabouts. The action being to pump the water into another mine work and thereby avoid the water entering direct.

13 THE COURT: I remember a phrase from the Plant Manager, the Works Manager, in the last trial was they were having quite a time with Cabin Creek.

14 MR. PATTERSON: Yes, sir.

15 THE COURT: This is one of the reasons or the uses they had for the Luscar Creek.

16 MR. PATTERSON: Yes, I agree with the Court, and this is the, and I understand and following this, of course, very extensive and costly procedures are now being planned or are in the process of being carried out. However, I think it is of some significance that this matter apparently was avoided by, and was finally culminated by the pumping of the water down into the old mine shaft. And I have, or my people have no information to what that might have cost, in any case it was done. But it was not done until ...

17 THE COURT: But your principles are satisfied from their investigations and so forth that the company is, in fact, carrying out the extensive

THE COURT: (cont) operations in order to remedy the situations, are they?

MR. PATTERSON: Yes. There is no information to the contrary, sir, and the information is that, of course, following the date mentioned in the charge there was no further, or recurrence of this offense. No more water was pumped into the creek. However, I mentioned earlier, sir, that as you will see from the information there is a break in the times. Now, what my principles advise is that during that period the 17th to the 23rd, the entire situation was investigated. Contact was made with the management, including the Manager, the Superintendant, the Engineer, and the proplem was discussed and I think, at least the inference I get, is that it was concluded at that time, - alright, they were fully aware of this, that there would be no further recurrence and as a result, the Division took no, made no further investigation at that time, assuming that it had been brought home. But to their surprise they learned later on in July, information was brought to their attention that in the early parts of July that there was a recurrence and they, of course, went out and investigated and that's where we find the date the 5th of July and following, when exactly the same thing was going on as had occurred earlier.

MR. PATTERSON: (cont) And, which I think is perhaps the Court could also draw conclusions from that.

THE COURT: Is there anything you wish to say, Mr. Macdonald, or I am sorry, have you ...

MR. PATTERSON: Perhaps there is just one more other thing. I think that it is clear that the authority under which the defendant operated was an order from the Department of the Provincial Board of Health which, in fact, said that no run-off should enter any bodies of water. I appreciate that this might well have been possible to comply with. However, there does not appear to have been any liaison between the defendant company prior to this problem arising to perhaps either have that order remanded or give some relief or to discuss the possible alternate procedures.

The only other thing, the other thing I would like to refer to, sir, there are, there are cases on this which, I think I sited to Your Honor at the last hearing. However, we were dealing with the question of finding whether or not it was guilt or innocence, and no particular reference was made to the penalty imposed. I suggest, sir, that the cases may be of some direction as to guidance to the taking into consideration by the Court. I note the cases I am summarizing are these, sir. There is the

MR. PATTERSON: (cont) Churchill Copper case. It is a case from a different type of situation.

THE COURT: Is that the Salmon River case?

MR. PATTERSON: This was the river in NorthernB.C.

THE COURT: Yes.

MR. PATTERSON: There was one they, were charged with one day, a maximum fine of $5000 was imposed. There was the, I got it marked as the Barrie case in the City of Barrie, pollution of Lake Erie. It was under a different Act, sir, however this involved diverting sewage. The maximum penalty $5000 was imposed in that particular case. There is, in Alberta, the decision of British American Oil which was a decision prior to the change in the increase of the penalty. In that case there was one day effluent. Maximum fine $1000; former Judge of this Court, Judge Stilwell. There is the case of Crown Zellerback, a case involving slashings from a logging operation entering the river and having a deleterious effect. Three days in that case. There was a fine of $4000 for three days imposed. Kamloops Pulp and Paper involved a river tributory to the North Thompson, a salmon spawning area. In this case, it was a mud slide that affected the spawning beds. The mud had entered the creek for a period of two days. The

MR. PATTERSON: (cont) Court in that case imposed a penalty of $2500 for each day, or $5000. A recent case unreported, but in the Court here in Edmonton involving an oil company ...

THE COURT: $1000. I am familiar with that case.

MR. PATTERSON: Your Honor is familiar with that. I don't have any particular comment as to what the penalty should be. I feel, sir, that is a matter for the Court. The circumstances of the case which I think may have some application are before Your Honor as to the matter of sentencing.

THE COURT: Thank you, Mr. Patterson. Mr. Macdonald, have you anything to say with respect to the company?

MR. MACDONALD: With respect to penalty, Your Honor?

THE COURT: Well, whatever you have to say.

MR. MACDONALD: Might say that my friend has given a fair description as to how the events arose out of which the charge was by. I add one thing to that, though. He says there is a lack of communication between the two parties. I suppose that is obvious from the nature of the circumstances of the events. I would like to add from the point of view of the company, that the original calvert that gave way and shown in those photographs; photographs 1, 2 and 3 are the calvert, photograph 4 and 5, sir, show it in

MR. MACDONALD: (cont) its end conclusion in June of 1971, after it has given way. We requested permission to build that calvert to diverse the creek around the end a 50 feet deep pit in the fall of 1970 which was by my information is in September. Permission was granted in December which necessitated our building a diversion creek in the winter time. I think that was our undoing, if I can put it that way, sir.

It wasn't, I don't think I have an Act to God situation, because I don't think our calverts stand the test of good, good, good engineering practises. But, in any event, this came upon us, and that's this one thing that the practical company problem. The second thing is that my friend said in relation to the alternate pumping route which was eventually established and which are shown in this folder right from the pit, up the hill, along the hill, and now, pumps in the underground works. You must realize, Your Honor, that when we did pump them into the underground workings, we did so with permission. Everything we do up there is with permission of the Government, and we did it almost as soon as possible, and we didn't have permission to pump into the underground works until about July of 1971. I

MR. MACDONALD: (cont) might qualify that by saying that we probably got the permission in May or June of '71, but we didn't get the system into operation until 70, until July 20th of '71. What I am saying, sir, is that everything we do up there is with permission. Everything, and therefore, to each reaction there is a reaction, and hence we have used an alternate form, but, I think my learned friend might say to you in countering that, "Remember the position of the Government. They weren't sure what would happen if we did pump into the underground workings."

They were scared that it might eventually get into a river somewheres else. And these things have to be tested. That's why there was delay in getting an alternate course. Now, one further thing, that I want to show you, Your Honor. In arriving at this decision, I would like to treat both charges, the one that has been subject matter of a trial, and this charge as the one. I think I can say to the Court without any reservation at all that the cost to this company as a result of the problems that arose last June are in the area of $200,000. The document that I have just given you relates primarily to a request by the Government made to the company in October or the Fall of 1971, asking the, asking the

MR. MACDONALD: (cont) company, the Government asked the company what they proposed to do with run-off problems in the area of Cabin and Luscar Creeks. You can see the proposal that was made there, it's $110,000. Now that's an estimate by the consulting firm, that is contained on page 6 of the document. My people inform me, my, the company informs me, sir, that they hope that they can have a substantial run at that cost figure and I hope to reduce it by as much as one-third. So a true picture is $60 to $70,000 in that, in that area. Now, added to that must be the cost of the pumping system that has been set up in the two photographic folders that I showed Your Honor. My information is to the effect that this cost in the area of $40,000. I think the Court could quite properly say to me, "All of these things perhaps should have been done in the first place." It may well be true, but I would like to take the position before the Court that we are hand in glove with the Government in everything we do. Everything we do up there, we must receive permission from the Government. My learned friend did not, or one thing he neglected to mention, in relation to the suspended solids that were imposed upon this creek. Again, I think that he will agree with me as was admitted in the last trial; no toxicity

MR. MACDONALD: (cont) to fish; somewhat obvious of the resulting of disturbances to this stream. I think it's also fair for me to comment, Your Honor, on the fact that if the company is allowed to proceed in, proceed as originally applied, applied for by the company with their mines in operation, they will probably mine and in effect obliterate a substantial portion of Cabin Creek which my learned friend says that we have damaged in June. I am suggesting to you, sir, that any clear view of our mining proposal at the time we went into that area, contemplated extensive mining in the length of Cabin Creek, and extensive workings because Cabin Creek goes right over one of the coals, see. I suggest that to you not because we are flagrant, not because we are in any way high handed, but it was clearly within the scope of our procedures. I hope that the Court will not intercede at this point in an attempt to, attempt to lay down a regulation as to whether or not we can or cannot do something. I would ask the Court to take judicial notice of the fact that, that the Environment Conservation Board in this Province has in December and January of 1971 and 1972, January 1972, held public hearings throughout this Province on the question of strip mining in the Province of Alberta and

MR. MACDONALD: (cont) the, if I can be allowed to digress for a moment; one of the big questions that I think would be before that Board involved really two things.

There is one theory that is called the Theory of Replacement which means that the coal company has to replace the actual grade levels of what they found before they went in there. And the other theory is what I call the Area Theory which means that the coal company should be allowed to do what they want within an area of the earth. Apply for mine lease. And they should do this with impunity so long as they comply with the reclamation standards, that the Government will set up. Now, these standards have not been set up, they have not as yet been proposed, and they are in the area of being set up. I suggest that the Government has in that regard, sir, a great deal of hold upon the company in relation to what they do in a given area. And, I am not sure that we are violating these standards because there are no standards, there are no standards set up. I simply say that to the Court to remind the Court that I don't think the deterrent aspect of this claim is an important one because we are very closely locked in with the Government, and the company must abide by

MR. MACDONALD: (cont) those regulations as proclaimed by the Government. I am sure that this will be the subject matter of an on-going debate and I am sure that we will abide by those rules and regulations. I would therefore like to say in summation that we, I would like, I would ask for it, to treat the matter as two offenses. My learned friend has said that we pumped on an intermittent basis, the basis over a period of time, and I agree. But, when I say two offenses, I mean the offenses which the Court has already dealt with in relation to Luscar Creek and another offense in relation to Cabin Creek.

Because it is, in effect, one problem created by one set of circumstances and in carrying on the mining operation which we were prevented from doing, the mine was closed from June the 5th to June the 9th. There was, I don't want to be inferior. There were three or four, there were two pits in operation at the time. I think the contemplation now is three or four. So one pit was closed, sir, I don't mean the mine completely closed up, but a substantial portion of the work force of the mine was affected. I am not saying that the whole mine was closed. And in this regard, I would say one set of circumstances, one set of events that has caused

MR. MACDONALD: (cont) the problem and I think Your Honor's fine in the previous case as a total fine in relation to those circumstances should be the same in this case. I'm not saying Your Honor's fine in the previous case in relation to each count of this case, sir. I'm saying Your Honor's fine in the previous case related all the circumstances in this case. The Court may not feel that this is warranted. I would like to say that from the point of view of the company that we have ...

31 THE COURT: Really, what you're saying is that there are two offenses that occurred here, and if I impose a $2500 fine in each and make them actually $5000; although there are several ways of getting at something like that.

32 MR. MACDONALD: The arithmetic is pretty simple; you divide by the number of counts and that's the number you get, sir, in light of the circumstances.

33 THE COURT: Anything else?

Well gentlemen, in this particular instance I can fully appreciate what the difficulties have been with respect to the Crown, and I believe I am fully aware of the difficulties you are faced with, or that the company has been faced with. I am most interested in the suggestion that the standard has not, in fact,

THE COURT: (cont) been promulgated or arrived at, and as you have pointed out will be subject to a great deal of debate and dialogue.

There were some attitudes which came, became very clear in the previous trial which I believe are pertinent to this particular proceeding before the Court today. One is that the company, in desperation, was prepared to sacrifice anything to keep going and the other thing is, of course, that the company and the Department of the Environment or the Environmental Conservation Board were not in that a close communication once this operation actually went ahead. The maximum penalty is $500 or $5000, I should say, per day of offense which would make $750,000 maximum penalty available to the Court in this particular instance. In addition to this, there could be an order actually closing down their works until such time as they were to be operated in a fashion suitable and acceptable to the Department of the Environment or the Government, in a broad term. There are 15 days involved in this matter. I like your argument, Mr. Macdonald, however I am afraid I cannot quite accedeto it. Under the circumstances, the penalty will be $500 per day, which makes a total of $7,500. In default of payment - enforcement. And

THE COURT: (cont) for exactly the same reasons as I stated in the last trial, I will not make an order with respect to the operation or the remedying of the company's works because I am satisfied that that the company is fully aware of the situation at this time and is taking active and concrete, and expensive steps in order to comply with the requirements of the Government at this time and to work hand in glove with them. I trust for the future operation of this mining venture, to the benefit of the company and to the benefit of the Government and the people involved. How long will you require to get that money, Mr. Macdonald?

MR. MACDONALD: Friday will be fine, sir.

THE COURT: I will give you until the 15th of May, then - time to pay.

MR. MACDONALD: Thank you.

THE COURT: The only order then with respect to the company will be that they co-operate with the Department of the Environment. Thank you very much, gentlemen.

F R O M T A P E D P R O C E E D I N G S

Certified a correct transcript,

Doreen J. Heppner
Student Court Reporter

Edmonton, Alberta
May 4, 1972
/3

BRITISH COLUMBIA PROVINCIAL COURT

Ward Prov. Ct. J.

Regina v. Columbia Cellulose Co. Ltd.

Environmental law -- Water pollution -- Sentence -- Deposit of deleterious substance in water frequented by fish -- Company continued to operate pulp mill despite failure in waste disposal system -- Fish kill resulted -- Circumstances mitigating sentence -- Fifteen hundred dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The accused pleaded guilty to a charge of depositing a deleterious substance in water frequented by fish. Due to a failure in its waste disposal system, the company had diverted effluent from one disposal site to another, and a large fish kill resulted.

Held, the appropriate fine was fifteen hundred dollars even though the offence was one of absolute liability. While it was an error in judgement on the part of the company not to cease operations when the waste system failed, nonetheless there was no evidence that the company acted with knowledge of or with a reckless disregard for the consequences. Moreover, enforcement action had only been taken recently even though the statutory prohibition in question had been in force for many years.

The Queen v. Pierce Fisheries Ltd., [1971] S.C.R. 5; refd to.

R. Allan Gould, for the Crown.
D.G. Waddell, for the accused.

November 11, 1972.

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

HOLDEN AT PRINCE RUPERT

BEFORE HIS HONOUR JUDGE D.W.S. WARD

PROVINCIAL COURT JUDGE

REGINA VS. COLUMBIA CELLULOSE CO. LTD.

SECTION 33 (2) FISHERIES ACT

ON THE 10th and 11th OF NOVEMBER, 1972

-21-

FOR THE PROSECUTION: R. ALLAN GOULD, ESQ.

FOR THE DEFENCE: D.G. WADDELL, ESQ.

REPORTER: JEAN MURDOCH

NOVEMBER 11th, 1972

JUDGE'S DECISION

The Defendant corporation has pleaded guilty to an offence under Section 33(2) Fisheries Act, being RSC 1970 c F-14 as amended by RSC 1st Supplement c 17. The particulars allege that the defendant corporation:

> "on or about the 13th day of October A.D. 1972, did unlawfully deposit a deleterious substance in water frequented by fish, to wit: Wainwright Basin, County of Prince Rupert, Province of British Columbia".

The evidence of the Crown as to the facts and the Defence in mitigation established that at 10:50 p.m. 12 October 1972, the discharge of waste from the Sulphide Mill, commonly known as "Red Liquor", through a pipe from the Mill under Porpoise Harbour and across Ridley Island into Chatham Sound was interrupted by a failure of the pump in this effluent system. The pump stopped first as a result of a power failure but when power was restored half an hour later, the pump failed to restart and it was found that the impellor and shaft had been so damaged that they needed replacing. A decision was made at this time not to shut the Sulphide Mill down but to divert the effluent through the sewer system and into Lagoon 1 where it eventually drained through Lagoon 2 into Wainwright Basin and Porpoise Harbour.

The decision not to shut the Mill down was taken because it would have taken 4-5 hours to have cleared the effluent lines and normally the

pump could have been repaired in this time. In fact, it took until 4 p.m. the next day, some 17 hours, before the repair was effected, because certain spare parts were not available, and during the whole of this time the effluent had been thus directed for as long as a week without affecting fish but on this occasion, the situation had been aggravated by the abnormally small tidal fluctuation which diminished the flushing action of the tide.

On 19 October 1972, however, Mr. Freeman, an experienced Fisheries Officer, found dead fish, mostly herring, around the floats on Porpoise Harbour adjacent to the Mill, and around the shores of both Porpoise Harbour and Wainwright Basin. He estimated their numbers to be "many thousands." Subsequently, Mr. Webster, a qualified engineer with the Environmental Protection Service of the Department of the Environment, took samples of the water in Porpoise Harbour and Wainwright Basin on 20, 21, 22 and 23rd of October and found Dissolved Oxygen content to be less than 2 mgs./litre and sometimes less than 1 mg./litre. He explained that the so-called "Red Liquor" waste from the Sulphide Mill is composed mainly of carbo-hydrates which deplete the dissolved oxygen in water through bacterial action. The minimum amount of dissolved oxygen in water to sustain fish is considered by the Department to be 5 mgs./litre although some observers think 3-4 mgs. sufficient and there have been records of 2 mgs. but not less.

The Pulp and Paper Effluent Regulations P.C. 1971-2281, which came into force on 2 November 1971, provide for certain standards of bio-chemical oxygen demand for effluents from Pulp Mills and if these standards are met, they constitute a defence to an offence under s 33(2) of the Fisheries Act. However, these regulations do not yet apply to the Defendant's Mill and according to Mr. Webster, the effluent from the Mill at present falls short of a standard acceptable to his Department.

The Defence adduced evidence through Dr. Edward Becker, a forest products pollution expert, a former employee of the Defendant Company and now its consultant, that since January 1971, the Company had spent some $1,275,000.00 in improving the effluent system from the Sulphide Mill. Before these measures were taken, the dissolved oxygen level in Wainwright Basin was 0-2 mgs./litre. The effluent system is working approximately 95% of the time which is a normal standard of reliability for pulp mill equipment. Often the disruption of the effluent system is beyond the Company's control and he cited incidents when the pipe under Porpoise Harbour had been damaged by an object dragged across the line and by the wash from a ship manoeuvering in the harbour. The Company had carried out continuous toxicity and dissolved oxygen tests and had kept the Environmental Protection Service advised of the tests and of its overall plan for effluent control. Mr. Kreut, the technical manager of the Company, stated that since the incident

leading to this charge, leaks were found in the pipe under Porpoise Harbour from which approximately 25% of the effluent was escaping. The Mill was subsequently shut down for 18 hours to carry out further repairs whereby 24 hours production was lost and the Mill was again closed on 8 November and remains closed at the present time. As a result, the Company had lost some $110,000.00 in production and spent $10,000.00 in repairs. Further, some 90-95 employees had lost $16,000.00 in wages.

On these facts the Crown urges me, in view of a previous conviction under this section on 3 September 1970, when the Company was fined $3000.00, to impose the maximum penalty of $5000.00 provided under s 33(5) but requests that I do not exercise any of the powers conferred on the Court by ss (7).

The assessment of the penalty in these circumstances must be viewed against the sociological and political background of today. The protection of our environment has become, rightly in my opinion, one of the most urgent demands of society and this demand is increasingly reflected in environmental legislation. Society today is no longer prepared to suffer pollution for purely economic reasons. However, the new legislation must be fairly applied and above all the Courts must resist their being used for political purposes and demonstrate their traditional independence.

Sec. 33(2) Fisheries Act has been in force for many years but it was not invoked against the Company until the section was amended in 1970 and the penalties considerably increased. Presumably, the pollution from the Mill up to that time was tolerated by the community and condoned by the Fisheries Service for economic considerations.

Since its conviction in September 1970, the Company has improved the standard of the effluent and cooperated with the Department of the Environment in trying to achieve acceptable levels. This has not yet been accomplished to the satisfaction of the Fisheries Service but it seems obvious to me that before this incident, fish were able to exist in Porpoise Harbour and Wainwright Basin in large numbers in view of the evidence of Mr. Freeman as to the number of fish killed and their location.

In my opinion, it was an error in judgement on the part of the Company in not closing down the plant when the pump failed. Further, as the pump was essential to the continued operation of the effluent system, the Company should have made certain that in the event of its failure, its repair could be effected promptly. But, considering the circumstances as a whole, there was no evidence that the Company acted with the knowledge, or with a reckless disregard, that the effluent diversion would cause such a massive fish kill.

I cannot find, therefore, that the Defendant's

liability for this offence, absolute as it is by virtue of the decision of the Supreme Court of Canada, in the Queen v Pierce Fisheries Ltd. (1971) SCR 5, warrants the maximum fine demanded by the Crown. In my opinion a fine of $1500.00 will meet the ends of justice and I so fine the Defendant Corporation.

D.W.S. WARD
Provincial Court Judge

NORTHWEST TERRITORIES MAGISTRATE'S COURT

Smith Mag.

Regina v. Giant Yellowknife Mines Limited

Environmental law -- Water pollution -- Sentence -- Deposit of deleterious substance in water frequented by fish -- Breach of tailings dam resulting in spill of highly toxic wastes onto ice covering nearby watercourse -- Accused taking adequate remedial measures -- Two thousand dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The corporation was found guilty of violating s. 33(2) of the Fisheries Act after a breach in the dyke surrounding its tailings disposal area caused the release of a large quantity of highly toxic effluent onto the ice covering Yellowknife Bay.

Held, the appropriate fine was two thousand dollars. The company was taking adequate remedial measures involving the expenditure of large sums of money, and accordingly, the objective of deterrence could be achieved by imposition of less than the maximum penalty.

O.J.T. Troy, Q.C., for the Crown.
D.H. Searle, Q.C., for the accused.

February 24, 1975.

IN THE MAGISTRATE'S COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GIANT YELLOWKNIFE MINES LIMITED

HEARD BEFORE:

His Worship, Magistrate F. G. Smith, Q.C. sitting in the Court House, in the City of Yellowknife, N.W.T. on Monday, February 24, 1975.

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PORTION OF TRIAL PROCEEDINGS

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APPEARANCES:

O. J. T. Troy, Esq., Q.C. — For the Crown

D. H. Searle, Esq., Q.C. — For the Defence.

C. Adams,
Court Clerk.

THE COURT: Well, Mr. Troy, have you any comments as to sentence?

MR. TROY: Sir, I'd like to point out to you the punishment section which is found on page 2 of Chapter 17, First Supplement --

"Any person who violates any provision of this Section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for each offence."

THE COURT: And the offence is one day --

MR. TROY: One day here, Sir. I this was a matter of several days, the next Section allows for --

THE COURT: An offence for each day?

MR. TROY: Deemed to be an offence for each day, up to five thousand dollars for each day. I would like to point out to the Court, but I am not seriously asking the Court to consider putting it into operation - but this legislation was considered so serious that power has been given to the Court under Subsection 7 --

"Where a person is convicted of an offence under this Section the Court may, in addition to any punishment, it may order that person to refrain from committing any further such offences, or to cause to carry on any activity specified in the order, the carrying on of which in the opinion of the Court will, or is likely to result in the committing of any further such offence."

I just point that out to show how serious this matter is, and I am not asking that the Court invoke that Section on a first offence. This is the first offence for this Company, and I do wish to point out the principles that have been established in respect to penalties that have been imposed for what I suppose we call Environmental Pollution Control Legislation by the Government.

I would like, Sir, to point out that in the original Revised Statutes text, although it was a different offence, under Chapter F.14, Revised Statutes of Canada, I'd like to refer you to Section 33 (2), and this was 1970, printed by the Queen's Printer, but Section 33 (2) -- if you look at Section 33 on page 11 - 12 of Chapter F. 14, and look at the bottom of Subsection 5, you will notice that Section 33 has been in existence since 1960-61, Chapter 23, Section 4, and at that time when the Revised Statutes came out - Section 33 (2) at that time was an analogous section to the one that is now in effect, and that one states --

"No person shall cause or knowingly permit to pass into, or knowingly permit to be put any lime, chemical substance, or drugs, poisonous matters, dead or decayed fish or remnants thereof, mill rubbish or sawdust, or any other deleterious substance or thing, whether the same is of a like character to the substance named in this section or not, in any water frequented by fish, or the closing of such water, or on ice over either of such waters."

Now, that is a little different offence than the present one, but at that time the offence section said --

"Every person who violates any provision of this Section is guilty of an offence and is liable upon summary conviction for the first offence to a fine of not less than a hundred dollars and not more than a thousand dollars, or imprisonment for a term of not less than one month and not more than six months, or both such fine and imprisonment; and for a second and each subsequent offence to a fine of not less than three hundred dollars and not more than two thousand dollars, or a term of imprisonment for a term of not less than two months or not more than twelve months, or both such fine and imprisonment."

And that was amended, Sir, in Chapter 17, First Supplement, and the present Section which I read out earlier in these proceedings, Section 33, Subsection 2, which was found on page 661, Chapter 17, First Supplement -- it's the very first page in the book --but the punishment section now since these amendments to this Act, to amend the Fisheries Act, 1969-70, Chapter 63 - the punishment section there, Sir, now is changed. The Crown is taking a much severer look at this type of penalties. The penalty is somewhat different than the one before the amendment. Now it reads --

"No person shall deposit or permit the deposit of deleterious substances under any conditions where such

deleterious substance may enter waters frequented by fish."

Now, the penalty section now is - any person who violates any provision of this section is guilty of an offence and liable on summary conviction, as Mr. Searle pointed out, to a fine of five thousand dollars.

Now, the first type of case we had in the North with ice involved in and which the Supreme Court of the Northwest Territories became involved in, was not quite an environmental or protection legislation, in that it involved the industrial storage of dynamite and explosives which a company had stored on an island in the Mackenzie Delta, and in that particular case - which was appealed by the Crown - and that was the case of the Queen vs Pat McNulty Limited, and they were charged under the Explosives Act of unlawfully failing to comply with the directions made in pursuance to the provisions of the Explosives Act in regard to storage; and then there was a second count in regards to unlawfully storing explosives, that is - twenty-six hundred cases of dynamo-hydro mix --it's an explosive, in an unlicenced magazine, contrary to the regulations.

Now, Mr. Justice Morrow -- that case was appealed, because in the lower Court the Court saw fit at Fort Good Hope - and the Court at that time was Chief Magistrate Parker as he then was, I believe - that was in 1971, March 1971 - on a plea of guilty Magistrate Parker

saw fit to fine twenty-five dollars and Count number one and fifty dollars on Count number two.

Now, the Crown appealed, and Mr. Justice Morrow increased the penalty. I am not too sure what the maximum penalty was, but it was certainly more than twenty-five or fifty dollars, and Mr. Justice Morrow pointed out in that case --

"It is quite true the accused respondent here, which was an admitted expert in explosives and the handling of explosives, took immediate remedial action after they were given the order by the inspector when some time had elapsed, by putting a full time watchman on the site. It was suggested by the Counsel, and I accept the suggestion, that it was better than the regulation itself. However, if that is so, I would have expected such an experienced company to put a watchman there at the very beginning. So, if anything, it probably emphasizes the danger that was inherent in the explosives being left the way they were, and is a clear breach of the regulation under this Act.

It seems to me we hear a lot from the press and in the newspapers and television and so on about the ecology of the North, and all that type of thing, and how it must be protected; and yet, despite that, it seems to me as I travel around the Country, the corporations from Eastern Canada and the United States show almost total disregard of this situation. They almost show contempt for the Country,

as if they think we are wild aborigines wandering around from camp to camp, with the way they handle it.

The area where this explosive was located was a very active area. Right now there ships going by; there are barges going by. This summer, and I am sure if we were to examine last year, you would take it as quite common to see barges going up and down that area. I would find it difficult to understand that such an experienced corporation would be in such contempt of the regulations.

Accordingly, with reluctance, I have reached the conclusion that the penalties as charged are inadequate. I am allowing the Crown's appeal in respect of each of the charges. On number one, the fine will be increased to three hundred dollars, and on number two it will be increased to one hundred dollars.

There will be a direction that the explosives that have been impounded will be available to the respondent Company for immediate disposal, and if the Company fails within a reasonable time to take the proper steps, there will be a direction that the police will take it in hand and dispose of it, and any expenses incurred will be charged as an additional fine on Count number one against the Corporation. There will be no costs added."

Now, in that particular case the reason for the appeal by the Crown was that the fines were inadequate and were too lenient and out of proportion to the severity

of the penalty provided by the law, and that the learned Chief Magistrate failed to give adequate consideration to the deterrent effect of the imposition of punishment to these offences, having regard to the circumstances existing in the Northwest Territories.

Now, the next case was R. vs Kenniston Drilling and this was a case that was heard before a Justice of the Peace in Inuvik, and Kenniston Drilling was charged under the Territorial Land Use Act for unlawfully conducting a land use operation in a land management zone without a land use permit. In other words, they moved equipment across the Tundra contrary -- without a permit, and of course, there's laws that say this can't be done without a proper permit and without obeying the regulations of the Territorial Land Use Act, and the Territorial Land Use Act itself, and in that particular case in the original instance the Justice of the Peace, Mr. Barney McNeil, fined this Company one hundred dollars and costs of four dollars, and that was on a guilty plea.

It had been pointed out to him at that time that the maximum penalty for that offence would be five thousand dollars for each day that the offence was committed. This offence only occurred on the one day.

Now, Mr. Justice Morrow, on appeal, laid down some principles in respect to these types of environmental precautions and the principles regarding sentencing, and

in his judgment which was brought down at Inuvik on May 9, 1973, Mr. Malcolm McConnell was acting for the appellant, and the Crown - I was acting on behalf of the Crown -- Mr. Justice Morrow pointed out in the Inuvik appeal the main concern expressed by the Crown is to bear in mind the existing circumstances in the Northwest Territories, and the sentence of the Court did not give sufficient consideration to the deterrent effect.

And then I should point out to you -- I pointed out, Sir, what were the facts in respect of the violation. I am not going to go into those facts in detail, but there was a violation of the Territorial Lands Act, Section 3.3, Subsection 1, which provides for a penalty of five thousand dollars; and then again, the same is in the Fisheries Act, for each day, and it's similar environmental protection legislation.

He points out that it would be readily seen -- after reviewing the legislation Mr. Justice Morrow pointed out --

"It can be readily seen from the above that, except in the case of an emergency that threatens life and property, in Regulation 17, Subsection 2, there is a full prohibition against land use operators.

There is no suggestion that the present appeal came within the Section. The problem posed by the appeal is as to whether in this type of case a marginal fine should

be allowed to stand when the Parliament of Canada has by Section 3.3 (2) made each day the offence continued a separate offence.

It is correct to say that in the present appeal one day only is involved, but Crown Counsel argues that to, in effect, place a possible fine of five thousand dollars per day shows a serious view taken by Parliament.

Counsel has been unable to cite any reported cases that can be said to bear directly on the subject. I am not unaware of the general principles that should be considered in sentencing for the commission of the crime. It is my opinion the offence is such as is provided for in the present legislation and requires, perhaps, a special approach. I would be remiss as a Judge in this Territory if I did not take notice of the need and purpose of the present legislation to protect and control the use of the surface of the land -- the land which, although tundra of nature and frozen over for many months each year, is nonetheless a delicate land, easily damaged, but once damaged impossible to repair. This is without any mention of possible use that our original inhabitants - in this case Eskimo, may still be making of it, and how their way of life may be still dependant on its being preserved in its natural state.

It may very well be that in the present case no actual damage took place, but surely the test to apply

in approaching the question of sentence should be less a concern of what the damage was, but more a concern of what the damage might have been.

In cases of this kind, to fine a Corporation such as the present one a mere one hundred dollars is to, in effect, invite breaches, to invite the gamble. Where incoming rewards are big enough the persons or corporations will only be encouraged to take what might be termed a calculated risk.

It seems to me that the Court should deal with this type of offence with resolution -- should stress the deterrent with a high cost, in the hope a chance will not be taken because it is too costly.

Keeping in mind the good record of the present respondent, but applying the above principles, I allow the Crown's appeal and fine the Kenniston Drilling the sum of two thousand dollars. The Company will have thirty days in which to pay."

Now, that was driving an automobile without a permit across the Tundra after the closing season.

Now, Sir, Mr. Searle mentioned Pan Arctic is a Company that is 45 per cent owned by the Government, but it is a private Corporation, and many large Corporations in Canada hold an interest and shares in that Company, so it's not only a Government Corporation, but the whole mining industry is involved in many aspects of that operation and

have many representatives on the Board of Directors.

Now, in the Pan Arctic case they were charged with failing to comply with a condition of one of their land use permits, and that was in respect to the retention of drilling effluent from a drilling site and it spilled over from a sump and went down over a hill into a gully and into water.

Now, that case took place on November 16, 1973, and there was a guilty plea in respect to one day, and that was the day when the Land Use Inspectors arrived there and saw the spill. The whole operation was almost completely over at that time and they were fined three thousand dollars. It was very high up in the Arctic, that particular spill.

That one was done before Chief Magistrate Parker.

Then there was another -- there's one in respect to Gulf Oil, and that was in respect to failing to comply with an operating condition in respect to not maintaining -- well, it says - "Sumps and pits constructed in such a manner that fluids contained therein cannot spread to surrounding land."

Now, that is similar to this situation, but it's a violation of the permit, rather than having the material reach the waters frequented by fish.

Now, on March 22, 1974, there was a plea of

guilty and this Company was find twenty-five hundred dollars.

On that matter I don't know whether that was before a Magistrate or before -- I think it was before Mr. Justice Morrow sitting as a Magistrate, wasn't it?

MR. SEARLE: Yes.

MR. TROY: There was a big legal argument involved in this matter, as the one charge was a nullity, but that is irrelevant to my argument here today.

But then the last one, Sir, was a charge against Elf Oil, and that one was before Magistrate Parker, and that was on April 29, 1974, and this was in relation -- this was under the Fisheries Act, the same Section we are dealing with here, and this was unlawfully permitting the deposit of deleterious substance in a place where it did enter water frequented by fish.

This was in the MacKenzie Delta, and Elf had taken over a fuel site, and had brought in their storage tanks, and unfortunately one of these big tanks burst or leaked, and there was quite a leakage that went down into water that was frequented by fish, and there was a tremendous effort made by Elf to correct the situation, and the due diligence exception was raised in this case as a defence, and Magistrate Parker, after hearing the facts, saw fit in his judgment of the facts that he couldn't find the Company exercised due diligence to prevent the pollution, and his

opinion on the facts of this case was that the diligence was after the event, rather than before.

MR. SEARLE: Mind you, I disagree with his view. I represented the Company at the time.

MR. TROY: In any case, Counsel didn't see fit to appeal, so there was no question by either Counsel for the Crown or the enforcement officers, the Defence or by anyone that Elf Oil wasn't a good corporate citizen. In fact there was no question in relation to Gulf Oil or the Kenniston Drilling one, and there's no question that Giant isn't trying to be a good corporate citizen, but I submit that is not the issue. The legislation has nothing to do with whether you are a good corporate citizen or not, or whether you are taking or making amends after the fact.

The important thing is that this type of thing cannot be allowed, and Parliament saw fit to make appropriate legislation.

Now, Magistrate Parker in the Elf Oil case made some comments in connection with the penalty, and said the penalty as mentioned of five thousand dollars did not actually --"in infractions of this type I believe the maximum penalty is really too low"; and there was no question in that case that Elf Oil had spent a considerable amount of money cleaning up.

MR. SEARLE: Forty thousand dollars as I recall.

MR. TROY: It was a lot of money, but it wasn't as big a leak, a seepage. It was only a fuel tank -- old fuel tanks stored there, and they had taken over that site from some other Company, but then he goes on to say --

"It is only the one case. Certainly these people - although in my view they made a poor decision by getting in there, that is in regards to storing in there - they cooperated, and I was impressed by the way they gave their evidence, and I felt that the witnesses for the Company were very fair."

So in that case he imposed a fine of two thousand dollars, but that was in a place, Sir, that was out in the Delta where drilling operations were going on. It was not in a heavily populated area, and these particular laws were in force for five years; and you have here both sides of the story today, and I think it has been quite fairly presented by both sides; and the Crown takes the position in this case that, because of the serious toxicity of the deleterious substance that did get into Yellowknife Bay, that the Court should consider in the circumstances of this case to impose the maximum penalty of five thousand dollars.

MR. SEARLE: Your Worship, just two seconds -- two seconds --

I am not so sure -- my memory doesn't serve me very well, but I am not so sure the Crown didn't take that view in some of the other cases as well, in that it is

up to the Court to decide what the appropriate punishment might be.

The only thing that we have to say is that the Kenniston case showed a fine of two thousand dollars, Pan Arctic - three; Gulf twenty-five hundred and Elf - two thousand. They were all under either the same or similar legislation, with the identical maximum of five thousand dollars per day, so they're all, we submit, very good and recent guidelines for the Court.

The reason the Elf fine of two thousand dollars was lower than the others was because of the time and trouble and effort they obviously spent in cleaning up the oil spill and the expenditure, as I recall it, having been Counsel in that case for Elf, was something, I believe, in the nature of forty-five thousand dollars. Now, I am using my memory, but I am relatively sure that that's what it was.

MR. TROY: It was something like that, Your Worship.

MR. SEARLE: In this case, I submit that you have virtually the same situation. Admittedly the spill on the ice may here have been larger, but so, too, of course, was the expenditure by an additional twenty thousand dollars just in clean-up, followed immediately, of course, by the one hundred and eighty-five thousand dollars in improving dikes and what you have heard; and this year a further sum earmarked in the neighbourhood of five hundred and fifty --

six fifty. With those sums of money, surely the Court is satisfied that this Company not only was, but intends to be responsible, and as a result what's important is the principle and not the maximum fine, which surely is imposed where you have got a real "bad cat" who walks away from the mess; and surely that's what the maximum is intended for, and this is definitely not the case here.

THE COURT: I will adjourn for five minutes.

MR.TROY: Sir, just before we adjourn -- The money spent on clean-up, Sir, was a necessary expenditure to be expected. I think what the Crown is interested in is that there be no future occurrences, and if this money and proposed plan of expenditure is going to be made, perhaps the Court should consider that the Court is given some assurance that this plan will be carried through to its fulfilment.

MR. SEARLE: Well, we don't indicate plans without the intention of fulfilling it, and indeed, it will be imposed by the water licence.

THE CLERK: This Court is adjourned for five minutes.

---Adjournment at 4:32 p.m.

---Upon resuming at 5:05 p.m.

THE COURT:

In considering the sentence that ought to be imposed on Giant Yellowknife Mines, the defendant, I only have one of the sentencing principles to consider, and that is the principle of deterrence.

The defendant, in my opinion, is a concerned and responsible corporate citizen. It was aware before the spill that measures to control the mill tailings and effluent was indicated, and was carrying through with a control program, when events caught up and passed them by the serious spillage of deleterious substances into the Yellowknife Bay.

After that event occurred, a more ambitious program involving the expenditure of close to a million dollars was instituted.

At present no spillage is occurring, if I understand the evidence, and will not occur again.

Parliament has indicated its concern with offences of this kind by fixing the maximum penalty of five thousand dollars a day, which is a considerable increase over its previous penalty.

This charge is for one day, and the Crown has asked for the maximum penalty to be imposed as a deterrent.

Comparing the maximum penalty with the cost of the control program now being instituted, I am driven to the conclusion that the defendant is not particularly concerned with the size of the penalty that I am empowered to impose,

but much more with its corporate image, which, if it is seriously damaged, renders it difficult to operate in a climate of hostile public opinion.

This is the real deterrent. It knows that it simply cannot carry on by shaving nickels from this aspect of its operations. In this regard the Corporation has in the past demonstrated its concern by spending large sums of money on environmental control, particularly dust control.

I have listened to the Crown cite the various penalties imposed on other corporations for similar offences. These corporations were equally concerned to comply with the environmental control regulations under which they operated.

I can do no better than by imposing a penalty similar in size. I therefore fine Giant Yellowknife Mines the sum of two thousand dollars.

MR. SEARLE: Naturally, Giant doesn't need time to pay, except for it now being after five. It will do so tomorrow, with your leave, Sir.

THE COURT: Yes. Well, that will be all.

THE CLERK: This Court is adjourned.

I hereby certify that the foregoing is a true and accurate transcript of the portion of the said proceedings requested.

R. Hobbs, Reporter.