Cite as: R. v. Wentworth Valley Developments Ltd., 1992 NSCO 48

CANADA C.A.M. No. 7430

PROVINCE OF NOVA SCOTIA

COUNTY OF CUMBERLAND

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT

FOR DISTRICT NUMBER FIVE

HER MAJESTY THE QUEEN - APPELLANT

- and -

WENTWORTH VALLEY DEVELOPMENTS LIMITED,
DAVID K. WILSON and PETER WILSON
- RESPONDENTS

HEARD: At Amherst, Nova Scotia, before the Honourable Judge H. J. MacDonnell, a Judge of the County Court for District Number Five

DECISION: October 14, 1992

COUNSEL: A. J. Morley, for the Appellant

W. D. Dunlop and C. F. Cox, for the Respondents

D E C I S I O N

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D E C I S I O N

1992, October 14, MacDonnell, H. J., J.C.C.:

The Respondents were acquitted by His Honour Judge Clyde F. Macdonald, a Judge of the Provincial Court of Nova Scotia, on the following charge:

"that DAVID K. WILSON of Truro, County of Colchester, Province of Nova Scotia, and PETER WILSON and WENTWORTH VALLEY DEVELOPMENT LIMITED of Wentworth, County of Cumberland, Province of Nova Scotia, between the 1st day of April, 1990 and the 30th day of April, 1991, at or near Wentworth, in the County of Cumberland, Province of Nova Scotia, did

> unlawfully carry on work or undertaking that resulted in the harmful alteration of fish habitat, contrary to Section 35(1) of the Fisheries Act, being Chapter F-14 of the R.S.C., 1985, as amended."

The Crown has appealed the Respondents acquittal on the following grounds:

> The Learned Trial Judge misdirected himself at law on the following:
>
> (a) The burden to be discharged by the Defendant in providing the defence of due diligence;
>
> (b) The application of the test to establish the defence of due diligence and in particular:
>
> > (i) the learned trial judge misdirected himself by taking into consideration restorative measures carried out by the defendant(s) subsequent to the date of the alleged offence;
> >
> > (ii) and further the learned trial judge misdirected himself in holding that the defendants' obligation to exercise due diligence did not include an obligation to check the effectiveness of the defendants' preventive measures.

Sections 35(1); 78.2 and 78.6 of the **Fisheries Act**, c.F-14, R.S.C. 1985, as amended, read:

> 35.(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> 78.2 Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted.

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

Judge Macdonald in delivering his decision concluded by stating:

> " Applying the test enunciated in **R. v. City of Sault Ste. Marie**, I find that the defendant company, Peter Wilson and David K. Wilson, have established on the balance of probabilities, by credible evidence, that they exercised all due diligence in the circumstances.
>
> In reference to Section 78.6 of the **Fisheries Act**, I find that the defendant company, Peter Wilson and David K. Wilson, exercised all due diligence to prevent the commission of the offence.
>
> For the above reasons, I therefore find the three defendants Peter Wilson, David K. Wilson and Wentworth Valley Development Limited, **NOT GUILTY** of the charge under Section 35(1) of the **Fisheries Act**."

The issue in this Appeal is:

> "Did the Trial Judge properly interpret the evidence presented at trial in finding that the Respondents exercised all due diligence to prevent the commission of the offence?"

There is little dispute about the facts as disclosed by the evidence, which can be summarized as follows:

Wentworth Valley Development Limited, the corporate Respondent, operates a recreational facility including a ski area at Wentworth, in the Province of Nova Scotia. The Respondents,

David K. Wilson and Peter Wilson, are directors and officers of the corporate Respondent.

On November 21, 1988, Charles A. MacInnes, an employee of the Department of Fisheries and Oceans Canada, noticed siltation in the Wallace River, which he traced back to the corporate Respondents' recreational property. This fact was brought to the attention of the manager of the corporate Respondent.

During the summer of 1990, an area of the recreational property owned by the corporate Respondent, known as "The Bunny Hill" was changed by bulldozing large amounts of earth to alter the grade, and install two rope tow lifts for the ski operation.

In July of 1990, Fisheries Officers again contacted an employee of the corporate Respondent, and informed him that siltation flowing into an unnamed tributory of the Wallace River from the corporate Respondents' recreational property was causing a problem with fish habitat.

Evidence at trial indicated that in the summer of 1990 the corporate Respondent, in conducting its' remodelling of the bunny hill were aware of problems due to erosion causing water and silt to be discharged from it's property into the adjoining waterways. The corporate Respondent took certain steps to halt this erosion, including in the Fall of 1990 placing hay bales in certain water courses to limit the flow.

On April 9th, 1991, Lewis Thompson, an employee of the Department of Fisheries and Oceans Canada, noticed silt was running into the Wallace River. He traced the source of this silt back to the corporate Respondents' recreational property. Being

unsuccessful in contacting officials of the corporate Respondent, he contacted Vicky Rogers, an employee of the corporate Respondent, who indicated that she would bring the problem to the attention of the operations manager of the Corporate Respondent.

On April 30th, 1991, a number of employees of the Department of Fisheries and Oceans returned to the area, and established that an unnamed tributary running into the Wallace River was a fish habitat, and that the fish habitat had been harmfully altered as a result of the silt flowing from the corporate Defendants' recreational property into the said tributary.

Rainfall records introduced into evidence indicated that there had been very heavy rainfall in the area on April 9th, and 10th, with lesser amounts on April 21st and April 22nd, 1991. There was some evidence that the silt flowing into the unnamed tributary came from a collapse of a waterway bank in the area of the bunny hill on the Corporate Respondents recreational property as a result of the heavy rain on the 9th or 10th of April.

Following the laying of the charges against the Respondents, they took steps to stabilize the situation by installing geotech material and increasing the height of a riprap installation and succeeded in correcting the problem which had led to the damage to the fish habitat.

The Trial Judge in delivering his decision made the following findings of fact:

> "(1) heavy rainfall contributed to the erosion problem. The erosion problem happened suddenly;
>
> (2) the defendant company, Peter Wilson and David K. Wilson, took all reasonable precau-

tions to prevent water run-off and movement of silt or sedimentation into the unnamed tributary;

(3) the erosion problem was indeed an unexpected occurrence and was not reasonably foreseeable by the defendant company, Peter Wilson and David K. Wilson;

(4) the silt in the unnamed tributary was due to the sudden erosion of the ski hill gulley, accompanied by an extremely heavy outflow of water that overtaxed the existing drainage system on the ski hill property. The drainage system could not accommodate the overflow and the mixture of sediment and water flowed into the unnamed tributary;

(5) the defendant company, Peter Wilson and David K. Wilson, took comprehensive and calculated steps to prevent the run-off of silt into the unnamed tributary, albeit, the end result was failure."

Counsel for both the Crown and the Respondents, in their submissions referred to the due diligence test as set out in **R. v. City of Sault Ste. Marie** (1978) 40 C.C.C. (2d) 353. In delivering the judgment of the Supreme Court of Canada, Dickson, J. (as he then was) stated at p.373:

> " 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."

At p.374 he stated:

> "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."

Then, at p.377 he stated:

> "Where an employer is charged in respect of an act committed by an employee acting 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. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself."

Crown Counsel submits that the Respondents had available to them the resources and expertise to prevent the commission of the offence, and were forewarned of the possibility of silt damaging the fish habitat in the adjoining streams and brooks, however, they did not take any steps to prevent the occurrence. It is further submitted that the verdict of the Trial Judge was unreasonable in light of the evidence, and in particular his finding that straw bales were reconstituted. It is argued that neither the corporate Respondent or its' principals or employees took any steps to prevent the occurrence, despite their warning by officials from the Department of Fisheries and Oceans. It is suggested that the circumstances leading to the damage to the

fish habitat in the unnamed tributary were reasonably foreseeable, and had been brought to the attention of the Respondents, and thus the due diligence test as set out in various cases had not been met.

In support of the Crown's submissions are cited **R. v. D'Entremont** (1990) 96 N.S.R. (2d) 176; **R. v. D'Entremont** (1990) 96 N.S.R. (2d) 177; and **R. v. Yebes** (1987) 59 C.R. (3d) 108.

Counsel on behalf of the Respondents submits that the burden of proof as to whether the Respondent took all reasonable care depends on the finding of fact of the Trial Judge. Provided that the proper test has been considered by the Trial Judge, his findings of fact should not be reversed on Appeal.

It is argued on behalf of the Respondent that the Trial Judge only referred to work done by the Respondents to correct the situation following the laying of the charge and did not rely on this fact in arriving at his decision. It was only referred to by the Trial Judge to show that the Respondents took every step available to them once the un-anticipated erosion occurred.

It is argued that the Respondents took all appropriate steps to moniter the operation of the precautionary methods set up to deal with the run off, and that the system worked. However, the heavy rain on April 9th and 10th was an event which could not be anticipated, and was the cause of the damage found by the officers at the end of that month. As the Trial Judge found that the Respondents had taken all reasonable precautions to guard against erosion, thus the requirements of Section 78.6 of the Fisheries Act had been met, and the Appeal should be dismissed.

A review of all the evidence produced at Trial, indicates

that the Trial Judge made findings of fact based on the evidence introduced at the Trial.

Findings of fact cannot be reversed on Appeal, unless the verdict is unreasonable or cannot be supported by the evidence. The test to be applied in determining on Appeal whether a verdict is reasonable was set out by the Supreme Court of Canada in **R. v. Yebes** (1987) 36 C.C.C. (3d) 417, where McIntyre, J. stated at p.430:

> "The concept of reasonableness is clearly expressed in the section which speaks of an unreasonable verdict. Therefore, curial review is invited whenever a jury goes beyond a reasonable standard. In my view, then **Corbett** is the governing case and the test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.
>
> The function of the Court of Appeal, under s. 613(1)(a)(i) of the **Criminal Code,** goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence."

It is well established law that findings of fact cannot be reversed by an Appeal Court unless there be some palpable and overriding error on the part of the Trial Judge.

As stated by Ritchie, J., in **Stein Estate et al. v. The Ship "Kathy K" et al.** (1975), 6 N.R. 359 at p.366:

> "While the Court of Appeal is seized with the duty of re-examining the evidence in order

> to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial."

Mr. Justice Spence in **R. v. Stewart** (1976), 12 N. R. 201 said at pp. 211-2:

> "...I do not think that any appellate court is free to vary the findings of fact made by the learned trial judge or inferences which the learned trial judge drew from the evidence unless one can say that there was no evidence upon which the learned trial judge could make such a finding...."

We have been invited, in effect, to substitute findings of facts contrary to those of the trial judge. Again see Ritchie, J., in **"Kathy K"** at p.364:

> "I think that under such circumstances the accepted approach of a court of appeal is to test the findings made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability."

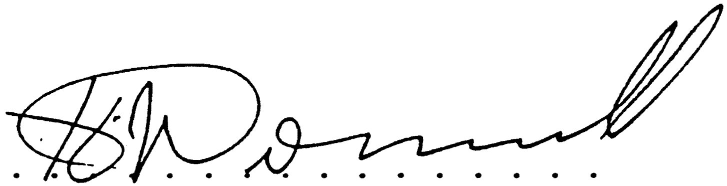
In **R. v. Starvish**, 79 N.S.R. (2d) 137, MacDonald, J., in paragraph 8 said:

> " Judge Reardon had the distinct advantage of seeing and hearing the various witnesses including Capt. Starvish. He concluded that the latter had taken all the care that a reasonable man might be expected to take under the circumstances to avoid crossings into Canadian waters. In other words Judge Reardon found that Capt. Starvish had shown that he was not negligent in crossing the Hague line. This was a finding of fact. It was reasonable and it was supported by the evidence. It is my opinion therefore that Judge Haliburton exceeded his jurisdiction in reversing such finding. In R. v. Gillis (1981), 45 N.S.R. (2d) 137; 86 A.P.R. 137; 60 C.C.C. (2d) 169 (C.A.), Mr. Justice Jones speaking for this court said that although the Crown has a right of appeal on questions of fact in summary conviction cases, a verdict of acquittal should only be set aside where it is "unreasonable

or cannot be supported by the evidence".
See also: R. v. Harper, [1982] 1 S.C.R. 1;
40 N.R. 255, at p.14; 65 C.C.C. (2d) 193,
at p.210."

After reviewing and re-examining the transcript of evidence, and after giving full consideration to the submissions of Counsel, I find that the Trial Judge's verdict is reasonable and one that he could have reached on the evidence before him. I find no error on the part of the Trial Judge respecting his assessment of the facts or application of the law.

The Appeal is dismissed, with costs to the Respondents which I fix at $750.00.



. . . .
H. J. MacDonnell,
Judge of the County Court
for District Number Five