IN THE PROVINCIAL COURT OF NOVA SCOTIA
**Citation:** R. v. Craig R. Nichols, 2004 NSPC 14

**Date:** 20040204
**Docket:** 1358334, 1358335, 1358336
**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Craig R. Nichols

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| **Judge:** | The Honourable Judge Alan T. Tufts |
| **Heard:** | January 20, 2004, in Kentville, Nova Scotia |
| **Oral Decision:** | February 4, 2004 |
| **Counsel:** | Lloyd Lombard, for the Crown<br>Robert Stewart, Q.C., for the Defendant |

**By the Court: (orally)**

[1] This is the matter of R. v. Craig R. Nichols. Defendant is charged with three counts under s. 27(9) of the **Revenue Act Regulations**. It is alleged that he was unlawfully using marked diesel fuel or oil as it is referred to in the said **Regulations**.

[2] The facts are undisputed. The Revenue Tax Inspector found traces of dye in three of the defendant's trucks. These were large tractor-trailer type motor vehicles. The concentration of dye was less than that prescribed for marking diesel fuel, which I will address later. The defendant is a farmer and operates a commercial farming operation. The trucks are used in that operation.

[3] The defence raises three issues, namely:

1) the three motor vehicles, ie., the trucks are “machinery and apparatus” used in a commercial farming operation and hence marked diesel fuel is permitted to be used;

2) the Certificate of Analysis is defective because it refers to dye prescribed by the Minister rather than the Commissioner, which the Regulations provide, and finally,

3) the defendant exercised due diligence.

[4] The relevant sections of the **Revenue Act Regulations** are made pursuant to s. 12 of the **Revenue Act of Nova Scotia**. Section 27(9) of the **Regulations** says as follows:

> No person shall use marked gasoline or marked diesel oil for any purpose other than for a purpose which is permitted under this part.

[5] Section 29 of the **Regulations** provides that evidence of marked diesel oil in a fuel tank of a motor vehicle is *prima facie* proof that the tax has not been paid. Section 30 of the **Regulations** provides that a certificate signed by a

Provincial Analyst is *prima facie* proof of the facts stated in such a certificate. Section 22(2) of the **Regulations** provide in part as follows:

> (2) Marked diesel oil may only be purchased, stored or used;
>
> (j) subject to Section 25 to operate;
>
> (i) machinery and apparatus when used in a commercial farming operation by a farmer.

[6] Section 25(f) of the **Regulations** provides that s. 22(2)(j), the section just referred to, does not apply to diesel oil used in the operation of any motor vehicle.

[7] Section 26 includes the provisions related to the marking of diesel oil. Section 26(1) provides that diesel shall be marked in a manner prescribed in the section and in particular ss. (2) of s. 26 by addition of a dye prescribed by the Commissioner.

[8] I will now deal with each of the issues raised by the defence, starting with issue number one.

ISSUE NUMBER 1

[9] A careful reading of s. 22(2)(j) of the **Regulations** clearly shows this section is subject to s. 25 of the **Regulations**. Section 25 clearly provides that the section relied upon by the defence, ie., machinery and apparatus used in a commercial farming operation does not apply to motor vehicles. These trucks are motor vehicles, notwithstanding they are used in a commercial farming operation. It is regrettable that s. 25 was not referred to earlier by counsel. It may have avoided much of the submissions and deliberations on this point.

ISSUE NUMBER 2

[10] It is only dye of the type prescribed by the **Regulations** which gives rise to the presumption contained in s. 29 referred to above. Hence, the Crown must show a presence of the proper dye. I agree that any presence of the dye would engage the operation of s. 29, notwithstanding, as here, the concentrations of the dye fall below the prescribed level. It is the type of dye, not its concentration, that raises the presumption contained in s. 29. The type of dye prescribed is that referred to in s. 26 and that type is a type prescribed by the Commissioner.

[11] The three Certificates of Analysis all refer to "the dye prescribed by the Minister" and then prescribe the concentration by reference to a percentage of the requirement set out in Regulation 26(3)(a). There is no reference in the Certificate to the **Regulations** when describing the type of dye other than a simple reference to that prescribed by the Minister. The Certificate, of course, is proof of its contents, however, the defence maintains that a dye prescribed by the Minister, absence any other description, is not evidence of a dye prescribed by the Commissioner pursuant to s. 26 of the **Regulations**.

[12] The defence argues that the Minister may have prescribed other dye and this description of the Commissioner by reference to the Minister does not include the required proof. I agree with the defence's argument. The description of the dye referred to in the Certificate as "prescribed by the Minister" is not a sufficient description of the dye which is referred to in the **Regulations** s. 26(2).

[13] The Regulation, prior to April 19, 2000 in fact referred to the "Minister". The **Regulations** were amended by N.S.R. 60/2000 filed April 26, 2000 by changing "Minister" to "Commissioner". Obviously the Department did not alter the form of its Certificate accordingly. I might add had the Certificate made reference to the type of dye prescribed in s. 26 of the **Regulations** my decision on this point may have been different.

[14] Furthermore, I have not been referred to any authority in the **Public Service Act**, that is the Act under which the Commissioner is appointed, which satisfies me that a prescription made by the Minister is the same as that made by the Commissioner. The result of all this is that there is no proof, at least no proof beyond a reasonable doubt, that the diesel oil was "marked" in accordance with the **Regulations**.

[15] While it is not now necessary to deal with the defence's final argument, in my opinion, it is not sustainable in any event. The defendant in such circumstances has the burden to establish the defence of due diligence. He must show that:

1) he reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or

2) he took all reasonable steps to avoid the particular event.

In my opinion this defendant did neither, or there is certainly no proof of that.

[16] However, because of the deficiency in the Certificate, the Crown has failed to show beyond a reasonable doubt that the diesel fuel in question was “marked”, the defendant is found not guilty.

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ALAN T. TUFTS, J.P.C.