CR 02428

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN
on the information of Neil
Bruce Scott, Enforcement
and Compliance Officer

Respondent
and Cross-Appellant

- and -

THE COMMISSIONER OF THE
NORTHWEST TERRITORIES

Appellant
and Cross-Respondent

Appeal by the Commissioner of the Northwest Territories against sentence dismissed. Cross-appeal by the Crown allowed and sentence varied. Costs of an application to adjourn the appeal awarded against the applicant Commissioner in an amount of $10,000.

Heard at Yellowknife on July 22nd 1994

Judgment filed (following written submissions): November 14th 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Appellant: John Donihee, Esq.

Counsel for the Respondent: John D. Cliffe, Esq.
Brett O. Webber, Esq.

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REASONS FOR JUDGMENT

1 The Commissioner of the Northwest Territories appeals against the sentence imposed on him by a judge of the Territorial Court upon his conviction of a contravention of s.36(3) of the *Fisheries Act*, R.S.C. 1985 c. F-14 (as amended) pursuant to s.40(2)(a) of that Act. The Commissioner's appeal against the conviction was dismissed on July 22nd 1994.

2 In addition, the Crown (represented by the Attorney General of Canada) cross-appeals against the sentence and asks for costs of the appeal against conviction.

3 The sentence comprises a fine together with a payment order pursuant to s.79.2(f) of the *Fisheries Act*. The fine, totalling $49,000, is calculated by adding

$40,000 for an initial major contravention on June 1st 1991 together with $1,000 for each of the nine days immediately following, when that contravention was found to have continued (as charged). The payment order is in a further amount of $40,000. The grand total to be paid is therefore $89,000 as ordered by the sentencing judge.

4 These appeals come before this Court at the first appellate level under Part XXVII of the *Criminal Code*.

5 Although the conviction appeal was dismissed, the conviction was amended by deleting June 1st 1991 and substituting June 2nd 1991 as the first day of the period during which the offence was committed. The period was thereby reduced to nine days from the ten mentioned in the conviction at first instance. It is not in dispute, however, that the material facts remain otherwise unchanged for the purposes of this appeal.

6 Pursuant to s.822 of the *Criminal Code*, s.687 applies. It reads as follows:

> 687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> (b) dismiss the appeal.
>
> (2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

7 The sentence under appeal is not "fixed by law" in the sense that it cannot be varied. The first step to be taken, therefore, is to determine the fitness of that sentence.

8 Clearly, the amendment made to the conviction requires a reconsideration of the sentence, if only because the period during which the offence continued has been shortened by one day. In that sense, at least, the sentence no longer fits the facts set forth in the conviction.

9 Both parties submit that the amount of the fine is inappropriate. For the Commissioner it is argued that the amount is excessive, in all the circumstances; and, in the alternative, that a token fine would suffice with the bulk of the penalty being instead in the form of a payment order pursuant to s.79.2(f) of the *Fisheries Act*. Crown counsel contends that the total penalty, be it in the form of a fine or a payment order, should be of a magnitude which better reflects the seriousness of the violation as recognized by Parliament in that Act; and which likewise better reflects the circumstances of the case. It is also urged on behalf of the Crown that the fine should be increased, rather than reduced, to better compensate the Crown for the expenses which it incurred in the prosecution of the trial.

10 In addition, the Commissioner submits that the present payment order should be set aside or varied at least in part, having regard to the implications of the order for other parties, not party to the case, who are thereby affected.

11 These submissions require at least a brief examination of the facts established in evidence at trial, both in reference to the offence and in reference to the offender (nominally the Commissioner, but in reality the officials who had responsibility for the events comprising the offence in question).

12 In addition, it is to be noticed that s.40(2) of the *Fisheries Act* was amended in 1991 (with effect on Assent, which was given on January 17th of that year). The amended subsection reads:

> 40. (2) Every person who contravenes subsection 36(1) or (3) is guilty of
>
> (a) an offence punishable on summary conviction and liable, for a first offence to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
>
> (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

13 Prior to the amendment, the maximum fine upon summary conviction for a violation of s.36(3) of the Act was $5,000 for a first offence and $10,000 for a second offence. The 1991 amendment therefore represents a substantial increase in public recognition of the potential gravity of such an offence.

14 Furthermore, the *Fisheries Act* was then also augmented, as to the penalties which a court may impose in such cases, by the addition of s.79.2, which states:

> 79.2 Where a person is convicted of an offence under this Act, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:
>
> (a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation or repetition of the offence;

> (b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;
>
> (c) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;
>
> (d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the commission of the offence;
>
> (e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;
>
> (f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;
>
> (g) directing the person to post a bond or pay into court an amount of money the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement mentioned in this section;
>
> (h) directing the person to submit to the Minister, on application by the Minister within three years after the date of the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances; and
>
> (i) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this Act.

15 For present purposes, counsel agree that I need only consider paragraph 79.2(f). I have nevertheless quoted the entire section here so that the context of that paragraph may be more conveniently understood.

The Facts

1. The offence

16 The facts of the offence are more fully set out in the reasons given by the sentencing judge both on conviction (reported at (1994) 1 W.W.R. 441, 12 C.E.L.R. (N.S.) 37) and on sentence (reported at (1994) 1 W.W.R. 458, 12 C.E.L.R. (N.S.) 55). I shall summarize here.

17 On or about June 2nd 1991, the west dyke of the Iqaluit sewage lagoon washed out, releasing approximately 56,000 cubic metres (or 12.3 million gallons) of raw untreated sewage and municipal waste directly into the waters of Koojesse Inlet, an arm of the sea within Frobisher Bay on the south shores of Baffin Island, these being waters frequented by fish. The material flowing from the lagoon into the sea was a "deleterious substance" as defined by s.34 of the *Fisheries Act*, which reads in part:

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

> and without limiting the generality of the foregoing includes
>
> (c) any substance or class of substances prescribed pursuant to paragraph (2)(a),
>
> (d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and
>
> (e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c);
>
> * * *
>
> (2) The Governor in Council may make regulations prescribing
>
> (a) substances and classes of substances,
>
> (b) quantities or concentrations of substances and classes of substances in water, and
>
> (c) treatments, processes and changes of water
>
> for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsection (1).

18 It is to be noted that the terms "fish" and "fish habitat" are defined by the *Fisheries Act*, as follows:

> 2. In this Act,
>
> "fish" includes shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.
>
> 34. (1) For the purposes of sections 35 to 43,
>
> "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

19 In convicting the Commissioner, the Territorial Judge found that this event

occurred as a result of the Commissioner's lack of due diligence.

20 The sewage lagoon was located in a depression bounded by elevated ground on three sides. It was located a few hundred metres from the town site of Iqaluit, a very short distance from the tidal waters of Koojesse Inlet. The contents of the lagoon were contained by the existing hills and two dykes, of which the main one was known as the west dyke. The lagoon is a natural drainage basin for the surrounding area. It held approximately 56,000 cubic metres (or 12.3 million gallons) of sewage and municipal waste when full.

21 The west dyke had failed completely on two specific previous occasions. In one instance it was washed out by a high tide. On another, in 1987, Spring run-off from the surrounding hills flooded the lagoon causing the dyke to give way. A diversion ditch was then dug in an attempt to divert such run-off away from the lagoon. The evidence shows that the west dyke had failed no less than five times in the ten years immediately before the occurrence of the offence now under consideration. These facts were known to departmental officials under the Commissioner.

22 The diversion ditch dug following the 1987 dyke failure was not maintained. At the time of the offence in question that ditch had become so shallow that it was unable to contain the run-off at a point where the ditch made a right angle turn. As a result, the run-off entered the lagoon, already overfull, causing it to overflow and burst the dyke.

23 A major construction project had been undertaken on the lagoon's

watershed earlier in 1991. This involved the construction of roads, aircraft taxi-ways, hangars and barracks, all quite close to and uphill from the lagoon. Among other things, the project included the replacement of nearby drainage culverts, increasing their capacity and altering the topography. These works made it possible for an increased flow of water to pour into the lagoon, given the state of the diversion ditch. Though all this was known to officials under the Commissioner, nothing was done to better protect the lagoon.

24 June 1st 1991 was warmer than usual for that time of year at Iqaluit. Snowmelt began to run off the high ground above the lagoon. It overran the drainage ditch at the right angle turn and flowed into the already overfull lagoon. The results earlier mentioned then followed on or about June 2nd 1991.

25 Repairs were immediately made in haste by municipal officials acting *ad hoc* in default of any contingency plan or resources for the purpose on the part of the Commissioner. These repairs were nevertheless insufficient to prevent the continued seepage of raw sewage from the lagoon into the waters of Koojesse Inlet, at an estimated rate of five gallons a minute or 7,200 gallons a day. This seepage continued for the eight days immediately following, that is to say from and including June 3rd to and including June 10th 1991.

26 Quite apart from public health concerns which lie beyond the scope of the *Fisheries Act*, the evidence before the Territorial Judge led him to find that the outflow from the lagoon was in fact toxic to "fish" as defined by the Act. It is immaterial that "not one dead fish was ever reported as a result of the failure of the sewage lagoon".

Iqaluit is named for the presence of fish in the waters here in question; it is and has long been a centre of aboriginal fishing activity.

27 The circumstances in which the offence took place do not reveal that this occurrence was the result of any unforeseeable, unpreventable, or completely unexpected event amounting to an "Act of God", or that the Commissioner (or his officials) should be absolved of all responsibility because of the contributing actions of a third party. And the licence relied upon by the Commissioner which had been issued to the Town of Iqaluit pursuant to the *Northern Inland Waters Act*, R.S.C. 1985, c. N-25 is of no avail to the Commissioner given the limited scope of that Act, and consequently of the licence. Nor is the licence to be considered in extenuation of the Commissioner's lack of due diligence, in the circumstances, given that the Commissioner and his officials cannot be looked upon as lacking competent legal advice. There is nothing to show that the Commissioner (or anyone under him) was misled into any officially induced error by reason of the licence, in the sense that any official or tribunal acting under either the *Northern Inland Waters Act* or the *Fisheries Act* was responsible for any such inducement.

2. The offender

28 The Commissioner is the chief executive officer of the Northwest Territories pursuant to s.3 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27, having the responsibility of administering the government of these Territories under instructions given from time to time by the Governor General in Council or the Minister of Indian Affairs and Northern Development of Canada, as provided by s.4 of the Act. And while the powers

of the Commissioner include those vested before September 1st 1905 in the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as declared by s.6 of the Act, the office of Commissioner was, at the relevant times, held by an official of the Government of Canada with deputy ministerial rank. Nevertheless, by 1991, the functions exercised by the Commissioner in person had become largely ceremonial and their executive character had become restricted to the point that he could by then be regarded as holding a constitutional position analogous to that of a provincial Lieutenant Governor, his administrative and executive powers being exercised almost exclusively through the Executive Council of the Northwest Territories (and its ministerial members, acting through their subordinates in the public service of the Northwest Territories).

29 For purposes of the sentence under appeal, it is therefore the Executive Council and its members, more particularly those having responsibility for matters which encompass the offence in question, and not the Commissioner as an individual, whose actions or lack of action are to be considered. These officials are today (as they were in 1991) in the appropriate position to formulate public policy and take administrative and executive action on behalf of the Commissioner, so as to ensure that subordinate officials in the public service of the Northwest Territories conduct the business of the Territorial government in such a manner that the offence will not be repeated and so that other such offences are prevented from occurring. The Commissioner, for present purposes, is therefore only a convenient nominal or symbolic representative of those who have the relevant political authority and the means to exercise it.

30 I have, since the inception of the appeal, described the defendant appellant

as the Commissioner more for purposes of clarity and conciseness of expression than anything else. It is, besides, extremely confusing to see the Crown mentioned as both prosecutor and defendant in a case subject to criminal procedure. By describing the defendant appellant in less than regal terms, I have endeavoured to focus attention on both the subordinate constitutional status of that party and the present-day political realities of government action in the Northwest Territories at the Territorial level.

31 To illustrate this further reference may be had to the statement made in the Legislative Assembly of the Northwest Territories on February 15th 1989 (No. 8-89(1), by the Honourable Dennis Patterson, M.L.A., then Government Leader) on the subject of environmental contaminants. In that statement the Government Leader, speaking on behalf of the Executive Council (and, by implication, the Legislative Assembly as a whole) declared that the problems posed by such contaminants "will not be resolved without strong, deliberate and co-ordinated action by all levels of government, industry, the scientific community and the support of the public". He went on to add:

> Mr. Speaker, environmental contaminants are a complex issue. The dangers of contaminants and how they get into wildlife resources is not fully understood, nor is it easy to translate information on the problem into the aboriginal languages of the Northwest Territories.

32 That the Commissioner, meaning the Government of the Northwest Territories as a whole, was thus well aware of the importance of environmental issues in 1991, is therefore self-evident. It is not without all relevance, perhaps, that the Government Leader who made these statements was also the Member of the Legislative Assembly for Iqaluit.

The Payment Order

33 Under the order made by the sentencing judge pursuant to s.79.2(f) of the *Fisheries Act*, the Commissioner is required to pay $40,000 to the Department of Environment of Canada "for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories".

34 The order then goes on to specify that this sum is to be used for purposes which I have paraphrased as follows:

> 1. $20,000 for designing, constructing and operating a marine life aquarium at the Science Institute at Iqaluit with the intention that the aquarium shall serve as a focal point for research and study of marine life and promote related educational objectives (the project to be one of the federal Department of Environment whether or not in partnership with the federal Department of Fisheries and Oceans, the federal Department of Indian Affairs and Northern Development, or the Arctic College Environmental Technology Program).
>
> 2. $20,000 (with any accrued interest) for the facilitation of studies, research or other programs related to the improvement of sewage and waste treatment in the Northwest Territories.

35 On behalf of the Commissioner, it is submitted that this order goes beyond the scope of s.79.2(f), which only empowered the sentencing judge to direct the payment of an appropriate amount to "Her Majesty ... for the purpose of promoting the proper management and control of fisheries and fish habitat or the conservation and protection of fish or fish habitat".

36 It is immediately apparent that the order, except for its reference to the Department of Environment of Canada in lieu of "Her Majesty", is couched in both the

general terms of s.79.2(f) and additional terms which purport to give specific content to the general terms. It is the additional terms which give rise to objection on the part of the Commissioner.

37 The objection goes further than the specific purposes mentioned. It is contended, in my view correctly, that parties not before the Court are mentioned in the order in a manner which purports to bind them. For instance, the aquarium is contemplated as to be constructed and operated at the Science Institute, an entity not represented before the sentencing judge and whose consent to involvement is not shown as having been given. There is nothing in the *Fisheries Act* which in any way empowered the sentencing judge to so involve the Science Institute in the project. Likewise, although the Department of Environment of Canada was evidently involved in the initiation of the prosecution in this case, that Department was not itself represented before the sentencing judge. Nothing in the Act empowered him to make an order with binding effect on that Department.

38 Although these submissions may seem mere legal formalism, it is readily apparent that they do have actual substance. The sums mentioned in the order are *ex facie* mere token amounts, given the purposes to which they are to be directed. There is nothing in evidence to show that there is any realistic expectation that the money would ever be spent for those purposes.

39 Not that the design, construction and operation of a marine life aquarium at Iqaluit, whether at the Science Institute or elsewhere, does not appear to be very

laudable, should the necessary funding and many other requirements be forthcoming. Leaving aside the argument that the order is *ultra vires* since "marine life" encompasses more than "fish" and "fish habitat", even as those terms are inclusively defined by the *Fisheries Act*, it is enough to say that the order nonetheless raises too many other questions, in the absence of evidence which would provide satisfactory answers, to be allowed to stand in respect of its additional specific terms.

The Fine

40 As already noted, the amendment made to the conviction requires that the fines imposed for the June 1st and 2nd 1991 violations be reconsidered, in any event.

41 The total fine of $49,000 is approximately equal in amount to the out-of-pocket expenses incurred by the Crown in the conduct of the trial. This does not include any counsel fees or costs of preparation by counsel. It might be thought, therefore, that a fine of this amount would serve as at least partial compensation to the Crown in respect of its necessary prosecution expenses. The objection that any fine would be merely an intergovernmental transfer of the taxpayer's dollars could thus be met on the basis that those dollars should be allocated from the offender's bank account rather than from the federal Consolidated Revenue Fund.

42 Had the Commissioner acknowledged his responsibility for the offence by entering a guilty plea, thus eliminating the need for a trial, those out-of-pocket expenses need not have been incurred. And other burdens of conducting the trial could thus have

been minimised. In that event, no doubt, the remorse which would have been evidenced could have been taken into account when it came to imposition of the sentence. No such responsibility was acknowledged and consequently no remorse was shown. The absence of due diligence which led to the offence was instead followed by a brazen denial of all responsibility for it.

43 It was of course fully within the legal right of the Commissioner to enter a plea of not guilty and to then insist on strict proof by the Crown of the offence charged. Likewise, it was open to the Commissioner to challenge the constitutional validity of s.36(3) of the *Fisheries Act* and to argue all the legal defences that counsel saw fit to raise, as occurred. The case was thus vigorously fought, as the record amply shows, on every conceivable issue which legal ingenuity could devise. Having taken that course, it hardly seems fitting that the Commissioner should now, nevertheless, be able to escape the full rigour of the law.

44 In the circumstances, the fine of $49,000 does not fit either the offence or the offender, who comes before the courts not as an unlettered pauper but as the representative head of a government which is possessed of powers and resources well beyond those of any individual, and most private corporations or municipal institutions, in the Northwest Territories.

Sentencing Principles

45 Since the sentence is not a fit one, in all the circumstances, it must be

varied accordingly, within the limits prescribed by the *Fisheries Act*. To that end, consideration must be given afresh to the applicable sentencing principles as argued on this appeal.

1. Protection of the public

46 The anomalous position of the Commissioner as an offender in a purely nominal sense who merely represents the government (and the particular officials) responsible for the offence suggests that whatever sanction the Court is to impose must be one which will be clearly seen by the public as more than a mild reprimand and certainly not as condonation. The public deserves to have its laws respected by its governments, and their officials, who owe us all no less than that. If it takes a prosecution and a sentence to bring this about, then so be it. In this sense, the Court is duty bound to act to protect the public, so far as necessary and within the Court's powers, from the actions (or inaction) of governments or officials who flout the law. They must not be allowed to do so with impunity.

2. Denunciation and deterrence

47 The sentencing judge recognized and applied these principles. Both parties are in agreement that these are the primary principles to be applied in sentencing in this case. They disagree only as to the manner of their application.

48 For the Commissioner, it is contended that the conviction is sufficient in itself by way of denunciation and deterrence. After all, the penalty for a second offence

could be much more severe than that for a first offence, as in this case. The conviction has the effect of hereafter exposing the offender to a much higher scale of punishment.

49 It is the Crown's position that a much more significant sentence, in terms which will come widely to public attention as judicial condemnation of the offence, is required in all the circumstances of this case if the decision of the Court is to be respected.

3. Gravity and magnitude of the offence

50 As already noted, the public through Parliament recognized the potential gravity of violations of s.36(3) of the *Fisheries Act* when it substantially increased the scale of penalties for such violations in 1991, indeed only six months before the offence took place. The ridiculously small scale of those penalties before then was an open invitation to offenders to look upon them as no more than "the price of doing business as usual".

51 The actual effect of the offence on the environment at Koojesse Inlet is not known, although it is said that some studies show that it had minimal impact. It is argued on behalf of the Commissioner that the contents of the lagoon which reached the sea were to a considerable extent quite rapidly biodegradable. Those contents were not confined to organic material normally found in human sewage, however, since the evidence shows that the lagoon also contained "municipal waste", which in today's world would include the chemicals in detergents and other items of common household use.

52 In terms of potential harm, as recognized in 1989 by the statement in the Legislative Assembly, and in terms of sheer volume, this was a major violation of s.36(3) of the *Fisheries Act*. And when due account is also taken of the identity and public status of the offender, that aspect of the matter is placed beyond all question.

4. Aggravating and mitigating factors

53 The lack of due diligence shown by the offender is the *gravamen* of the offence and is, therefore, not in itself an aggravating factor. What does aggravate the seriousness of the offence is the history of previous incidents of failure of the lagoon, well-known to the offender before the offence occurred; it is against this notorious background that the seriousness of the offence is to be measured, in terms of aggravation.

54 It is furthermore an aggravating feature that the offender stood in a position of special public responsibility towards the environment, as acknowledged in the statement to the Legislative Assembly in 1989, even if the *Fisheries Act* lay outside the sphere of that responsibility. We all know, today, that the environment is a seamless web of which no part is disconnected from the rest.

55 There are no mitigating factors revealed in the evidence before the Court, apart from the absence of evidence that the contents of the lagoon were more than just potentially harmful in the longterm. The plea that a third party contributed to the offence remains unsubstantiated. On the evidence, whatever was done by that third party, it remained the Commissioner's responsibility to exercise due diligence to prevent the

offence from occurring; and that was not done. Nor was the unusually warm weather a mitigating consideration. Due diligence required that it be reckoned with; and it was not. As for the licence, it cannot be regarded as a mitigating circumstance for the reasons already mentioned. Finally, the Commissioner's arguments at trial and on this appeal, that the provisions of s.36(3) of the *Fisheries Act* are unconstitutional, lack all merit in support of a plea of mistake as to the law made in good faith. The Commissioner is not to be equated with a simple municipal garbage collector.

5. Proportionality

56 Taking all these factors and circumstances into account, I am driven to conclude that both the fine and the payment order must be varied, notwithstanding the evident pains taken by the very experienced sentencing judge in crafting the penalties which he imposed.

57 In reaching that conclusion, I have not ignored the fact that some $300,000 was expended by the Commissioner to restore the lagoon to operating condition (and, presumably, the condition to which it should have been brought before the offence occurred, so as to prevent its occurrence). I assume that this includes clean-up costs. The lagoon was at all times the property of the Commissioner, who remained in control of it and continued to operate it after the restoration. That amount is therefore not to be regarded as a part or in mitigation of any penalty to be judicially imposed. It does, however, reflect to some degree on the lack of due proportionality between the offence and the offender, on the one hand, and the sentence under appeal on the other hand.

The Sentence

58 Before the sentencing judge, Crown counsel took the position that a publication order should be made pursuant to s.79.2(f) of the *Fisheries Act*. This was opposed on behalf of the Commissioner. In the result, no such order was made; and the Crown has chosen not to pursue the point in this appeal. I therefore do not include any such order in the sentence of the Court.

59 The payment order is varied as follows:

1. it shall be in the amount of $100,000 in lieu of the $40,000 in the sentence under appeal;

2. the $100,000 shall be paid no later than forthwith upon expiry of the period within which this sentence may be appealed;

3. it shall be paid to Her Majesty the Queen in right of Canada;

4. it shall be used by Her Majesty to promote the conservation and protection of fish or fish habitat in the waters of or adjacent to the Northwest Territories;

5. such use may include the design, construction or operation of an aquarium, at Iqaluit, whether or not in conjunction with other concerned government agencies or individuals, as the Department of Environment of Canada may approve; and

6. such use may include the funding or conduct of programs approved by the Department of Environment of Canada related to sewage and waste treatment and disposal, so as to meet the requirements of the *Fisheries Act* in relation to the Northwest Territories.

60 The fine is varied to a total of $100,000 which includes $1,000 a day for

the period of seepage from and including June 3rd 1991 to and including June 10th 1991. The Commissioner shall have until the expiry of the period of any appeal from this sentence within which to pay the fine in the usual manner.

61 The total penalty imposed under the *Fisheries Act* is therefore increased from $89,000 to $200,000.

Costs

62 Section 826 of the *Criminal Code* makes the following provision for an award of costs:

> 826. Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.

63 The fact that the Commissioner was a representative of the Crown, assuming that to be the case for purposes of argument, does not prevent an award of costs being made against him: *R. v. Ouellette*, [1980] 1 S.C.R. 568, 52 C.C.C. (2d) 346, 15 C.R. (3d) 372. And see *R. v. Pawlowski* (1993), 20 C.R. (4th) 233 (Ont. C.A.).

64 This is clearly not a case for an award of costs against the Crown as prosecutor. The question remains as to whether any costs are to be awarded against the Commissioner.

1. The application to adjourn the appeal hearing

65 On April 8th 1994 I directed that costs should be addressed by counsel at the conclusion of these appeal proceedings. That has now been done. On that occasion, I had dismissed the Commissioner's application to adjourn the hearing of his conviction appeal *sine die*.

66 That application was supported by an affidavit of the then Acting Deputy Minister of Justice of the Northwest Territories, in which he alleged that differing standards for the treatment of municipal sewage effluent were being applied by the federal Department of Environment, on one hand, and the federal Department of Indian Affairs and Northern Development, on the other, in the exercise of their respective authorities under the *Fisheries Act* and the *Northern Inland Waters Act*. As a consequence, it was said that, depending on the appropriate standard, the Government of the Northwest Territories may be required to incur considerable capital expenditures to upgrade municipal sewage treatment systems on pain of further prosecution under the *Fisheries Act*.

67 The affidavit went on to say that, as a result of these public policy concerns, the Minister of Justice of the Northwest Territories had entered into correspondence with the Deputy Prime Minister and Minister of Environment of Canada to attempt to resolve these concerns by meetings of their officials, it being the position of the Territorial Minister that, if satisfactory progress could be made (at the policy level) between the two governments, then the Commissioner would abandon his appeal. No mention was made, in the affidavit, of the Crown's cross-appeal against sentence. Nor was any mention made of the fact that the Commissioner had not paid any part of the

penalty imposed upon him by the judge of the Territorial Court, no attempt having been made on behalf of the Commissioner to obtain a judicial stay of execution in that respect.

68 Crown counsel submits that the grounds for that adjournment were inappropriate in the circumstances; it appeared, indeed, that what was being attempted was nothing short of political interference with the Court's conduct of the appeal. I find this to be no more than a reasonable characterization of the situation. An award of costs of the day, in an amount to compensate the Crown for the need to attend and appose the application, is in my view entirely justifiable. Moreover, to mark the Court's disapproval of the application, the amount of those costs should be fixed in an amount which may serve to impress on those responsible for it that they should avoid any repetition of the type of conduct there shown.

69 I therefore fix the amount of the costs to be paid by the Commissioner to the Crown, in respect of the application to adjourn, in the amount of $10,000.

2. The conviction appeal

70 With the sole exception of the factual issue of whether the offence commenced on June 1st 1991 or on June 2nd 1991, as to which the Commissioner's appeal against the conviction was technically successful, the remaining issues raised by him in that appeal were resolved in favour of the respondent Crown.

71 The Commissioner says that this was not a "test case" and that no oblique motive existed in his conduct of the appeal. The Crown submission is that the contrary

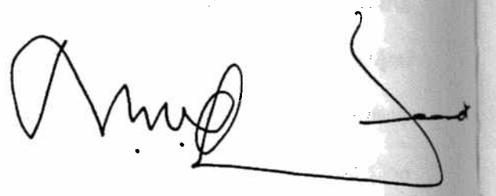
is the case. I agree with counsel for the Commissioner that the Court should not be quick to find an oblique motive merely because the Commissioner's cause was vigorously pursued, even if in the end it was all for naught. The "test case" line of authority is inapplicable, it seems to me, where the prosecuting Crown has been successful.

72 Nor do I find merit in the Crown's contention that the Commissioner's constitutional challenge to s.36(3) of the *Fisheries Act* placed the administration and enforcement of that provision in jeopardy across Canada. The Territorial Court has no jurisdiction beyond the Northwest Territories any more than this Court. Had either court ruled against the Crown on that challenge, there was still another level of appeal before it could become a national issue with legal consequences of a binding character. There were arguable contentions put before both the Territorial Court and this Court on the matter. That those contentions failed on both occasions is not, in itself, a ground for the award of costs against the unsuccessful contender.

73 Nevertheless, the record shows that the Commissioner did not hesitate to "pull out all the stops" in the course of both the trial and the appeal, forcing the Crown to go the limit, for its part. It was of course the Commissioner's legal right to do so. And the Deputy Minister's affidavit sheds some light on the reasons for that course being taken. A financial consequence far greater than the penalty which could properly be imposed in this case was clearly dictating the Commissioner's response to the prosecution, quite apart from the political consequences which might flow from a conviction.

74 In conclusion, I decline to make an award of costs against the Commissioner in respect of either the trial or the appeals to this Court, other than that above mentioned. These costs shall be paid contemporaneously with the fine.

75 Counsel on both sides are to be complimented upon the completeness and thoroughness of their submissions, for which I express my appreciation.



M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
November 14th 1994

Counsel for the Appellant: John Donihee, Esq.

Counsel for the Respondent: John D. Cliffe, Esq.
Brett O. Webber, Esq.

CR 02428

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN on the information of Neil Bruce Scott, Enforcement and Compliance Officer

Respondent
and Cross-Appellant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES

Appellant
and Cross-Respondent

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE M.M. de WEERDT