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 against a conviction under s.36(3) and s.40(2)(a) of the *Fisheries Act* dismissed subject to an amendment of the conviction to exclude all reference to June 1st 1991.

Heard at Yellowknife on April 21st and 22nd, and July 21st 1994

Judgment filed: July 22nd, 1994

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

Counsel for the Appellants: John Donihee, Esq.
Ms. Priscilla Kennedy

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

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REASONS FOR JUDGMENT

I. Introduction

1 The Commissioner of the Northwest Territories appeals against the conviction, entered against the Crown in right of Canada as represented by him, of unlawfully depositing or permitting the deposit of a deleterious substance (sewage) in water frequented by fish (Koojesse Inlet) at the Iqaluit sewage lagoon at or near the Town of Iqaluit in the Northwest Territories on and between June 1st and 10th 1991, in violation of s.36(3) and contrary to s.40(2)(a) of the *Fisheries Act*, R.S.C. 1985, c. F-14.

2 Should that appeal fail, the Commissioner also appeals against the sentence imposed by the trial judge in the Territorial Court in respect of that conviction. The sentence consists of fines totalling $49,000 plus a penalty by way of payment order,

pursuant to s.79.2(f) of the *Fisheries Act*, in the amount of $40,000. Neither of these amounts has been paid to date, an order of this Court suspending their payment until the appeals have been determined having been made on April 8th, 1994.

3 These appeals are opposed by the Crown represented by counsel on behalf of the Attorney General of Canada. And the Crown cross-appeals against the sentence mentioned.

4 To avoid confusion, I shall refer to the first mentioned appellant as "the Commissioner" and to the last mentioned appellant as "the Crown".

5 It may be mentioned that the Commissioner is the chief executive officer of the Northwest Territories pursuant to s.3 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27, having the responsibility of administering the government of these Territories under instructions from time to time given by the Governor General in Council or the Minister of Indian Affairs and Northern Development of Canada, as provided by s.4 of the Act. The powers of the Commissioner include those vested before September 1st 1905 in the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as declared by s.5 of the Act.

6 The conviction and sentence under appeal were entered in summary conviction proceedings governed by Part XXVII of the *Criminal Code*, under s.34(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21. The appeals are therefore likewise governed by that Part.

7 For convenience of reference, each of the decisions of the trial judge now

challenged on appeal is reported as *Canada (Environment Canada) v. Northwest Territories (Commissioner)*, [1994] 1 W.W.R. 430, 441 and 459; 12 C.E.L.R. (N.S.) 25, 37 and 55 (N.W.T. Terr.Ct.).

8 Submissions by counsel on the sentence appeals have been deferred pending the determination of the conviction appeal. What follows is therefore restricted to the conviction appeal.

II. Issues

9 Four issues call for determination:

1. Is s.36(3) of the *Fisheries Act* unconstitutionally vague?
2. Was the conviction precluded by the issuance of a licence pursuant to the *Northern Inland Waters Act*, R.S.C. 1985, c. N-25?
3. Did the trial judge err in law as to the test he applied to determine if the Commissioner committed the *actus reus* of the offence charged?
4. Was the verdict reached by the trial judge unreasonable and unsupported by the evidence?

III. Vagueness

1. Subsection 36(3) of the *Fisheries Act*

10 This provision reads:

(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deleterious substance may enter any such water.

11 Subsection 36(3) must of course be understood within its context. The immediate context, to which it refers, is subsection 36(4); and that subsection makes specific reference to subsection (5). These additional subsections read as follows:

(4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of

(a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or

(b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5).

(5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing

(a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);

(b) the waters or places or classes thereof where any deleterious substance or classes thereof referred to in paragraph (a) are authorized to be deposited;

(c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;

(d) the quantities or concentrations of any deleterious

substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;

(e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and

(f) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.

2. The wider context: definitions

12 Section 34 of the *Fisheries Act* states:

34. (1) For the purposes of sections 35 to 43, "deleterious substance" means

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

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

and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c);

"deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

"fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;

"water frequented by fish" means Canadian fisheries waters.

(2) The Governor in Council may make regulations prescribing

(a) substances and classes of substances,

(b) quantities or concentrations of substances and classes of substances in water, and

(c) treatments, processes and changes of water

for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsection (1).

13 The language of s.36(3), read in the context of s.34, is to be understood in accordance with the following specific definitions in s.2 of the Act:

2. In this Act,

"Canadian fisheries waters" means all waters in the

fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada:

* * *

"fish" includes shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

14 The expression "no person" in s.36(3) includes reference to the Commissioner. More precisely, as provided by s.3(2) of the Act:

(2) This Act is binding on Her Majesty in right of Canada or a province.

15 The term "province" includes the Northwest Territories, pursuant to s.35(1) of the *Interpretation Act*. It is therefore immaterial whether the Commissioner is classed as a representative of Canada or of the Northwest Territories, for purposes of s.36(3) of the *Fisheries Act*.

3. The test for unconstitutional vagueness

16 The Commissioner relies upon the unanimous decision of the Supreme Court of Canada in ***R. v. Nova Scotia Pharmaceutical Society***, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289, 15 C.R. (4th) 1, 93 D.L.R. (4th) 36, 10 C.R.R. (2d) 34, 43 C.P.R. (3d) 1, 114 N.S.R. (2d) 91, 31 A.P.R. 91, 139 N.R. 241 in support of his submission that subsection 36(3) of the *Fisheries Act*, as fisheries legislation, fails to delineate an area of risk and creates a "standardless sweep" of law enforcement, as interpreted by the courts to date, so that it is so vague and overbroad that a conviction almost surely follows from the decision to prosecute, all contrary to s.7 and s.1 of the *Canadian Charter of Rights and*

Freedoms, which provide (in reverse order):

> 1. The *Canadian Charters of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> * * *
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

17 In the *Nova Scotia Pharmaceutical Society* case it was held that "the threshold for finding a law vague is relatively high". Furthermore:

> The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness ... These two rationales have been broadly linked with the *corpus* of principles of government known as the "rule of law", which lies at the core of our political and constitutional tradition.

a. Fair notice to the citizen

> Fair notice to the citizen, as a guide to conduct and a contributing element to a full answer and defence, comprises two aspects.
>
> First of all, there is the more formal aspect of notice, that is acquaintance with the actual text of a statute. In the criminal context, this concern has more or less been set aside by the common law maxim, "Ignorance of the law is no excuse", embodied in s.19 of the *Criminal Code*, see *R. v. MacDougall*, [1982] 2 S.C.R. 605, 1 C.C.C. (3d) 65, 142 D.L.R. (3d) 216. ... In any event, given that, as this court has already recognized, case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not of central concern in a vagueness analysis.
>
> ... There is also a substantive aspect to fair notice, which could be described as a notice, an understanding that some

> conduct comes under the law ...
>
> Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values held by society. It is no coincidence that these enactments are often found vague ...
>
> Hence, aside from a formal aspect which is in our current system often presumed, fair notice to the citizen comprises a substantive aspect, that is an understanding that certain conduct is the subject of legal restrictions.

b. Limitation of enforcement discretion

> ... A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.
>
> * * *

d. The scope of precision

> This leads me to synthesize these remarks about vagueness. The substantive notice and limitation of enforcement discretion rationales point in the same direction: an unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague.
>
> ... Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
>
> By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate.

> They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.
>
> Indeed, no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk ...
>
> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use terminology of previous decisions of this court, and therefore fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.
>
> e. Vagueness and the rule of law
>
> ... The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

4. Applying the test

18 Recent decisions of our highest court which apply the test enunciated in the *Nova Scotia Pharmaceutical Society* case may be noted. In *R. v. Morales* (1992), 77 C.C.C. (3d) 91, 17 C.R. (4th) 74 (S.C.C.), the difficulties inherent in the doctrine of unconstitutional vagueness are illustrated by the dissenting reasons of Gonthier J. (L'Heureux Dubé J. concurring), especially since Gonthier J. had, only months before, written for the unanimous court in the *Nova Scotia Pharmaceutical Society case*. The court was also divided in *R. v. Finta* (1994), 20 C.R.R. (2d) 1 (S.C.C.), though there again the dissenting minority joined with the majority in applying *Nova Scotia Pharmaceutical Society*.

19 Both in the *Nova Scotia Pharmaceutical Society* decision and in *R. v. Finta* the court declined to strike down the impugned legislation as unconstitutionally vague. That ground of challenge succeeded, however, in *R. v. Morales*.

20 In the case of *Nova Scotia Pharmaceutical Society* the court upheld as valid, in the face of a challenge of unconstitutional vagueness, the somewhat generally expressed provisions of what is now s.45(1)(c), (2) and (2.2) of the *Competition Act*, R.S.C. 1985, c. C-34. The provisions there impugned were considered to be a pillar of the Act, which was held to be "central to Canadian public policy in the economic sector". It is noteworthy that the court made the point that s.45(1)(c), then s.32(1)(c),

> ... must not be taken in a vacuum. Its interpretation is conditioned, first of all, by the purposes of the Act. Furthermore, its content is enriched by the rest of the section in which it is found and by the mode of inquiry adopted by courts as they have ruled under it. These are matters of law ...

21 In *R. v. Morales*, Lamer C.J. for the majority held that the expression "public interest" had not received a consistent and workable meaning from the courts, as that expression appeared in s.515(10)(b) of the *Criminal Code*. To that extent, then, this provision was held to be unconstitutionally vague and, consequently, inoperative. And the rationale relied upon for the decision was the need for a limitation of law enforcement discretion. Once again it is noteworthy that the court sought an interpretation of the impugned legislation on the basis of decisions reached in the lower courts rather than by formulating one of its own.

22 Finally, in *R. v. Finta*, the court upheld the extraordinary jurisdiction conferred upon Canadian courts by s.7(3.71) of the *Criminal Code* to adjudicate prosecutions of war crimes and crimes against humanity committed outside Canada either before or after the enactment of that law. The expressions "war crime" and "crime against humanity", as defined by s.7(3.76) of the Code, were held not to be unconstitutionally vague. Given the extraordinary reach of this legislation and the widely general scope of these definitions, this case therefore provides a recent illustration of the considerable height of the threshold to be crossed before a law may be declared inoperative on grounds of unconstitutional vagueness.

5. Application of the test in the instant appeal

23 Subsection 36(3) of the *Fisheries Act* was unanimously held to be a valid exercise of federal legislative authority pursuant to s.91(12) of the *Constitution Act, 1867* in *Northwest Falling Contractors Ltd.*, [1980] 2 S.C.R. 292, [1981] 1 W.W.R. 681, 53

C.C.C. (2d) 353, 113 D.L.R. (3d) 1, 32 N.R.541. Although decided before the advent of the *Canadian Charter of Rights and Freedoms*, that case is worthy of note for its examination of the definitions, in the *Fisheries Act* of that day, of the expressions "deleterious substance", "deposit", "fish" and "water frequented by fish", all of which were defined then as they now appear in s.36(3) of the Act.

24 In particular, the court declared in that case (referring to what is now s.36(3) of the Act):

> The definition of "deleterious substance" ensures that the scope of s.33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.

25 This disposes of any suggestion, in my respectful view, that s.36(3) is overbroad in the context of s.91(12) of the *Constitution Act, 1867*; and it goes a long way to dispose of the claim that s.36(3) is overbroad in reference to s.7 (or, if so, s.1) of the *Constitution Act, 1982*. There is no basis for equating s.36(3) with the legislation struck down either in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, [1988] 3 W.W.R. 385, 49 D.L.R. (4th) 1, 25 B.C.L.R. 145, 40 C.C.C. (3d) 289, 84 N.R.1 or in *Fowler v. The Queen*, [1980] 2 S.C.R. 213, [1980] 5 W.W.R. 511, 113 D.L.R. (3d) 513, 53 C.C.C. (2d) 97, 32 N.R. 230.

26 Counsel for the Commissioner argues that s.36(3) is demonstrably overbroad in view of the decision of the British Columbia Court of Appeal in *R. v. Western Stevedoring Company Ltd.* (1984), 3 F.P.R. 487, leave to appeal to S.C.C. denied May 7th 1984, see (1984), 4 F.P.R. 486 (S.C.C.), to restore a conviction for a violation of

s.36(3), where the defendant had adduced evidence to show that the deleterious substance dumped by the defendant's employees had in fact not reached the water but had been contained in large drainage tanks, the outlet from which had yet to be reached by the liquid in the tanks. With great respect, I am unable to agree. The fact that the liquid level in the tanks could rise with the addition of more liquid (in the form of rain or other water, for example) was indicative of an existing risk that the deleterious substance "may enter" the water frequented by fish below the outlet. The risk was foreseeable and real, not merely speculative. In any event, there was also evidence that the deleterious substance had, in fact, entered the water (which was frequented by fish); and it was the trial judge's finding to that effect, based on that evidence, which determined the decision on appeal as it did at the trial level.

27 It is also the Commissioner's submission that the decision of the British Columbia Court of Appeal in *R. v. MacMillan Bloedel (Alberni) Limited* (1979), 4 W.W.R. 654, 47 C.C.C. (2d) 118, leave to appeal to S.C.C. denied June 19th 1979 (*ibid*), shows that s.36(3) is overbroad, since the court there held (it is submitted) that the meaning of "deleterious" in s.36(3) is "not related to a deleterious effect on fish". With great respect, I am unable to agree with this submission. Seaton J.A., delivering the judgment of the court, made the relationship of the expression "deleterious substance" to water frequented by fish perfectly clear, as follows:

> What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To rephrase the definition section in terms of this case: oil is a deleterious substance if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that

> that water is deleterious to fish or to the use by man of fish that frequent that water.

28 As for the argument that s.36(3) creates a "standardless sweep" in legislation providing for a possible penalty of imprisonment, I note that the court in *R. v. Jack Cewe Ltd.* (1987), 4 F.P.R. 271 (B.C.Prov.Ct.) vividly demonstrated, by its acquittal, that a conviction is not inevitable once a decision has been made to prosecute an alleged violation of s.36(3) of the *Fisheries Act*. And, as counsel for the Crown has reminded the Court, s.78.6 of the Act provides:

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

29 No mention of *R. v. MacMillan Bloedel (Alberni) Limited* is made in the later decision of the Supreme Court of Canada in the *Northwest Falling Contractors Ltd.* case. That later decision does not, in my respectful view, either expressly or impliedly overrule the earlier decision. And the still later decision in *R. v. Jack Cewe Ltd.* is noteworthy for having been made, without hesitation or question, on the basis of *R. v. MacMillan Bloedel (Alberni) Limited*, some five years after the coming into force of s.7 of the *Constitution Act, 1982*.

5. Conclusion

30 The Commissioner's challenge to s.36(3) of the *Fisheries Act* on grounds of unconstitutional vagueness amounting to a breach of s.7 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, must fail. The impugned legislation has not been shown to lack fair notice to the citizen, be it in formal or substantive terms; and it has not been shown to create a "standardless sweep" having insufficient limitations on its enforcement. Subsection 36(3) is not unintelligible; certainly, it is no less intelligible than the legislation upheld by our highest court in the *Nova Scotia Pharmaceutical Society* case and in *R. v. Finta*.

31 In coming to this conclusion, I have endeavoured to approach the challenge posed to the legislation without considering the circumstances of the offence charged, as revealed in the evidence. In doing so, I have followed the approach adopted in *Canadian Bar Assn. v. British Columbia (Attorney General); Law Society of British Columbia v. British Columbia* (1993), 101 D.L.R. (4th) 410 (B.C.S.C.) per Lysyk, J. at page 438. However, I note that a contrary approach was adopted by the Ontario Court of Appeal in *R. v. Canadian Pacific Ltd.* (1993), 22 C.R. (4th) 238, 13 O.R. (3d) 389 *sub nom. Ontario v. Canadian Pacific Ltd.*, leave to appeal to S.C.C. granted on February 10th 1994. If this contrary approach should prove to be the more appropriate one, it is perhaps as well to say that it strongly reinforces the conclusion which I have already reached using the more abstract and diffuse approach urged upon me by counsel for the Commissioner.

32 It is perhaps as well to add that I have reached the foregoing conclusion

quite independently of the trial judge's reasons for his judgment dismissing the Commissioner's motion to quash or dismiss the information before the Territorial Court in this case on the ground that the information fails to disclose an offence known to law on the ground that s.36(3) of the *Fisheries Act* is unconstitutionally vague, in breach of s.7 of the *Constitution Act, 1982*, pursuant to s.24(1) of the latter enactment. Those reasons speak of an application to have s.36(3) "struck"; though that, it seems to me, was beyond the jurisdiction of the Territorial Court. That aside, I agree generally with the reasons of the trial judge; but I have endeavoured not to repeat them here since they are already reported as earlier mentioned.

IV. The Licence

1. The Commissioner's submission

33 It is submitted on behalf of the Commissioner that a contravention of s.36(3) of the *Fisheries Act* cannot be found, in law, when the act or omission giving rise to the contravention is in compliance with a licence validly granted pursuant to the *Northern Inland Waters Act*, R.S.C. 1985, c. N-25.

34 The trial judge held that the licence on which the Commissioner relies is irrelevant to the issues before the Court since the licence was not issued to the Commissioner (or to Her Majesty The Queen, as represented by the Commissioner) but was instead issued to the Town of Iqaluit.

35 This is not disputed by the Commissioner. It is the Commissioner's

submission that he is nevertheless entitled to rely on the licence, since he was at all material times acting on behalf of the Town of Iqaluit in relation to the Iqaluit sewage lagoon and its operations.

36 Furthermore, it is said on behalf of the Commissioner that the *Fisheries Act* must be understood and applied harmoniously with the *Northern Inland Waters Act* so as to give due recognition and effect to a licence issued pursuant to the latter Act. If these statutes are in conflict, it is argued that the latter Act must prevail, not only because it was enacted later in time than the first mentioned Act but also because its licensing provisions are specific whereas s.36(3) of the *Fisheries Act* is general in scope. In any event, s.36(4) of that Act exempts the Commissioner as a licensee (or acting on behalf of a licensee) under another federal statute such as the *Northern Inland Waters Act*.

2. The Crown's position

37 Crown counsel opposes the Commissioner's submission. It is the Crown's position that the trial judge was correct in ruling the licence to be irrelevant.

3. The terms of the licence

38 On January 9th 1991 licence numbered N5L4-0087 was issued to the Town of Iqaluit by the Northwest Territories Water Board pursuant to the *Northern Inland Waters Act* and the *Northern Inland Waters Regulations*, C.R.C. 1978, c. 1234, enacted under that Act. The licence, except for the conditions thereto attached (to which I shall refer below) reads as follows:

NORTHWEST TERRITORIES WATER BOARD

Pursuant to the Northern Inland Waters Act and Regulations the Northwest Territories Water Board, hereinafter referred to as the Board, hereby grants to

TOWN OF IQALUIT
(Licensee)

of IQALUIT, NORTHWEST TERRITORIES
(Mailing address)

hereinafter called the Licensee, the right to alter, divert or otherwise use water subject to the restrictions and conditions contained in the Northern Inland Waters Act and Regulations made thereunder and subject to and in accordance with the conditions specified in this licence:

Licence Number	N5L4-0087 (RENEWAL)
Water Management Area	NORTHWEST TERRITORIES 05
Location	IQALUIT, NORTHWEST TERRITORIES
Purpose	TO USE WATER FOR MUNICIPAL PURPOSES AND DISPOSE OF MUNICIPAL WASTES
Quantity of Water Not to be Exceeded	800,000 CUBIC METRES PER YEAR
Rate of Use of Water Not to be Exceeded	800,000 CUBIC METRES PER YEAR
Effective Date of Licence	JANUARY 1, 1991
Expiry Date of Licence	DECEMBER 31, 1995

This Licence issued and recorded at Yellowknife includes and is subject to the annexed conditions.

Northwest Territories Water Board

(Signed)
"PAMELA R. LeMOUEL"
Witness

(Signed)
"DAVE NICKERSON"
Chairman

Approved by
(Signed)
"TOM SIDDON"
Minister of Indian Affairs and Northern Development

39 The conditions attached to the licence include the following:

GENERAL CONDITIONS

PART A

1. Scope

This Licence allows for water use and waste disposal for municipal purposes at the Town of Iqaluit, Northwest Territories.

2. Definitions

In this Licence: N5L4-0087

"Act" means the Northern Inland Waters Act;

"Regulations" means Regulations proclaimed pursuant to Section 29 of the Northern Inland Waters Act;

"Board" means the Northwest Territories Water Board established under Section 8(1) of the Northern Inland Waters Act;

"Licensee" means the holder of this Licence:

* * *

"waste" means waste as defined by Section 2(1) of the Northern Inland Waters Act:

* * *

"Sewage" means all toilet wastes, greywater and commercial wastewater.

* * *

4. This Licence is issued subject to the conditions contained herein with respect to the taking of water and the depositing of waste of any type in any waters or in any place under any conditions where such waste or any other waste that results from the deposit of such waste

may enter any waters. Whenever new Regulations are made or existing Regulations are amended by the Governor in Council under the Northern Inland Waters Act, or other statute imposing more stringent conditions relating to the quantity or type of waste that may be so deposited or under which any such waste may be so deposited this Licence shall be deemed, upon promulgation of such Regulations, to be automatically amended to conform with such Regulations.

* * *

11. Compliance with the terms and conditions of this Licence does not absolve the Licensee from responsibility for compliance with the requirements of other Federal and Territorial legislation.

* * *

CONDITIONS APPLYING TO WASTE DISPOSAL

PART C

1. The Licensee shall discharge all piped and pumpout sewage waste using the facilities as identified in Drawing No. 86-5175-TR1 entitled "Municipality of Iqaluit Sewage and Water System - Overall Plan" dated March 1987, or as otherwise approved by the Board in accordance with Part D of this Licence.

2. All waste discharged from the facilities as identified in Part C, Item 1, shall meet the following effluent quality standards during open water periods:

PARAMETER	MAXIMUM AVERAGE CONCENTRATION
BOD_5	180 mg/L
Suspended Solids	120 mg/L
Fecal Coliform	2.0×10^5 CFU/dL

The pH shall be above 6 and there shall be no visible sheen of oil and grease.

• • •

40 The term "waste", to which Part A, Item 2 of the General Conditions of the Licence refers, is defined by s.2(1) of the *Northern Inland Waters Act* as follows:

> 2. (1) In this Act
>
> "waste" means
>
> (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water to an extent that is detrimental to its use by man or by any animal, fish or plant that is useful to man, and
>
> (b) any water that contains a substance in such a quantity of concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water to the extent described in paragraph (a),
>
> and without limiting the generality of the foregoing, includes anything that, for the purposes of the *Canada Water Act* is deemed to be waste.

4. The scope of the licence

41 Licences such as that now under consideration derive their legal effect only from the statute under which they are issued; and their scope is restricted to the legislative scope of the statute. This licence was issued pursuant to s.11 of the *Northern Inland Waters Act*. As appears from s.11, such a licence authorizes the licensee "to use waters, in association with the operation of a particular undertaking described in the

licence", and no other waters. The term "waters" is defined by s.2(1) of the Act, as follows:

> 2. (1) In this Act
>
> "waters" means waters in any river, stream, lake or other body of inland water on the surface or underground in the Yukon Territory and the Northwest Territories.

42 As appears on the face of the licence, the licensee's right to use water thereunder is subject to the restrictions and conditions contained in the *Northern Inland Waters Act*. Section 7 of the Act provides:

> 7. (1) Except in accordance with the conditions of a licence or as authorized by the regulations, no person shall deposit or permit the deposit of waste of any type in any waters or in any place under any conditions where the waste or any other waste that results from the deposit of the waste may enter any waters.
>
> (2) Subsection (1) does not apply to the deposit of waste in waters that form part of a water quality management area designated pursuant to the *Canada Water Act* if the waste so deposited is of a type and quantity and is deposited under conditions authorized by regulations made by the Governor in Council under paragraph 18(2)(a) of that Act with respect to that water quality management area.

43 Bearing in mind the restrictive definition of "waters" in s.2 of the Act, and the use of that term in s.7 (and elsewhere) in the Act, it is readily apparent that this term refers only to inland waters as opposed to waters of the sea, whether "internal waters" or "territorial sea" waters as defined by s.3 of the *Territorial Sea and Fishing Zones Act*, R.S.C. 1985, c. T-8. And, as already noticed, the expression "water frequented by fish" is defined by s.34(1) of the *Fisheries Act* to mean "Canadian fisheries waters", which is

in turn defined by s.2 of that Act to mean waters in the "territorial sea", "internal waters" and "waters in the fishing zones" of Canada. No mention is there made of "inland waters".

44 The licence issued to the Town of Iqaluit in this instance therefore could not in law, and so did not, authorize the Town (or anyone on its behalf) to use waters other than as defined by the *Northern Inland Waters Act*; and, more particularly, it did not authorise the use of "internal waters" on the sea coast included in "Canadian fisheries waters" by the definition in s.2 of the *Fisheries Act*.

45 Quite apart from that, it is furthermore all too clearly apparent from Part A, Items 4 and 11 of the General Conditions of the licence that nothing stated or intended in it absolves the licensee, or anyone acting on its behalf, from responsibility for due compliance with the requirements of the *Fisheries Act*. Even if the effluent quality standards described in the Conditions Applying to Waste Disposal, Part C, Item 2 of the licence are to be understood as applying only "during open water periods", nothing in the licence authorized the Commissioner (or anyone acting for or under him) to deposit any deleterious substance, or permit such deposit, in violation of s.36(3) of the *Fisheries Act*.

5. Conclusion

46 It is therefore not necessary to consider the basis upon which the trial judge ruled that the licence was irrelevant. The licence provides no defence in law to the charge that there was a violation of s.36(3) of the *Fisheries Act*.

47 Nor is it necessary to consider whether, and to what effect, the

Commissioner was acting on behalf of the Town of Iqaluit so as to be able to claim that he was covered by the licence. And since the licence is inapplicable to the matter at hand, there is no need to consider whether the Commissioner (or anyone acting under him) was misled into an officially induced error by reason of the licence.

48 Finally, it is not necessary to consider the statutory interpretation arguments advanced by counsel for the Commissioner with reference to any conflict between the *Northern Inland Waters Act* and the *Fisheries Act*. I see no conflict between these statutes, each of which applies within its own domain. The conditions of the licence make it clear, in any event, that the *Fisheries Act* is paramount so far as the licence is concerned, if indeed these statutes should overlap or give rise to any conflict. That being so, there is no basis upon which the Commissioner can invoke s.36(4) of the latter Act to justify the offence charged, even if the licence could have the status of "regulations" under s.36(4), which is not the case, on the evidence.

V. The "*actus reus*"

1. Strict Liability

49 In her submissions on behalf of the Commissioner with respect to the unconstitutional vagueness argument, counsel took the position that the offence of which the Commissioner has been convicted is one for which a term of imprisonment may be imposed. I have proceeded on that basis in considering the argument although I notice that s.40(2) of the *Fisheries Act* does not provide for the imposition of a term of imprisonment, even on default of payment of a fine, for a first offence. The conviction

under appeal is for a first offence only. Subsection 40(2) of the Act states;

> 40. (2) Every person who contravenes subsection 36(1) or (3) is guilty of
>
> (a) an offence punishable on summary conviction and liable, for a first offence, to a fine 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.

50 Counsel's position is, for all that, nevertheless correct in my view since the provisions of s.36(3) of the *Fisheries Act* must be read in the same way and subject to the same requirements of constitutionality and general law whether the offence is, or is not, a first offence. I have therefore proceeded on that basis not only in reference to the constitutional question but also in what follows.

51 It is common ground between the parties, in any event, that the offence in this case must be regarded as one of strict liability pursuant to the criteria recognized in *R. v. Sault Ste Marie*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, 3 C.R. (3d) 30, 85 D.L.R. (3d) 161, 7 C.E.L.R. 53, 21 N.R. 295. That is the basis on which s.36(3) and s.40(2)(a) of the *Fisheries Act* are discussed here.

52 As in the prosecution of any offence of strict liability, it was not necessary for the Crown to go further than establishing in evidence, beyond a reasonable doubt,

each of the essential elements of the offence known as the *actus reus*, in order to obtain a conviction; there was no obligation on the Crown to also show that the Commissioner acted with *mens rea* or "guilty knowledge".

2. Alleged Errors

53 On behalf of the Commissioner it is submitted that the trial judge erred in finding that the Crown had established in evidence, beyond a reasonable doubt, that the Commissioner (1) "permitted the deposit" of a substance that was (2) "deleterious" in (3) "water frequented by fish, to wit: Koojesse Inlet".

(a) "permitted the deposit"

54 The term "deposit", as it is defined by s.34(1) of the *Fisheries Act*, is to be understood within the context of s.40(5)(a) for the purposes of s.36(3) of the Act. Paragraph 40(5)(a) states:

> 40. (5) For the purposes of any proceedings under subsection (2) or (3),
>
> (a) a "deposit" as defined in subsection 34(1) takes place whether or not any act or omission resulting in the deposit is intentional.

55 In *R. v. Sault Ste Marie*, Dickson J. (as he then was) made the following statement:

> It may be helpful ... to consider in a general way the principles to be applied in determining whether a person or municipality has committed the *actus reus* of discharging, causing, or permitting pollution within the terms of s.32(1),

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

56 The offence in that case was created by s.32(1) of the *Ontario Water Resources Act*, R.S.O. 1970, c.332, an enactment in many important respects analogous to s.36(3) of the *Fisheries Act*. The principles governing the interpretation and application of the Ontario provision are equally applicable to the interpretation and application of s.36(3) of the latter Act. These principles are fully consistent with para. 40(5)(a) of that Act. Lack of action to prevent the deposit of a deleterious substance into water frequented by fish, a deposit which ought to have been foreseen and which could have been prevented by the exercise of due diligence, therefore violates s.36(3).

57 The trial judge cited the relevant principles which had been laid down in *R. v. Sault Ste Marie*, in his reasons for judgment on the issue of guilt delivered on August 27th 1993. And while he did not quote the entire passage from that case which I have set out above, he did quote the essential portion of it. It is plain that he had the relevant principles in mind. And although he did not quote the following passage from that case, it is equally plain that he applied it in a complete and thoroughgoing manner:

> The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges", "causes", or "permits" thje pollution will be a question of degree, depending on whether it is actively involved at the point where the pollution occurs, or whether it merely passively fails to prevent the pollution.

58 This was the nature of the test applied by the trial judge to the evidence before him. It was the proper test to be applied. The question now posed to this Court is whether that test was however properly applied.

59 First of all, did the Commissioner have control over the Iqaluit sewage lagoon? At trial, both ownership and control over the lagoon by the Commissioner was admitted as a fact by counsel on his behalf. It is immaterial whether the Commissioner's ownership and control was as principal or as agent, or partly one and partly the other. On the basis of the admission, the trial judge could and did find that the Commissioner in fact controlled the lagoon at the time of the offence charged, and had done so for some years before.

60 Secondly, did the Commissioner control or should the Commissioner have controlled the lagoon's seaward dyke so as to prevent any overflow or, as events proved, a bursting of the dyke with the lagoon's contents being discharged beyond the dyke? This question, in turn, leads to the further question: whether the overflow and bursting of the dyke, with its consequences, were outside the control of the Commissioner. If there was only a reasonable doubt on that point, the Commissioner was entitled to an acquittal on the ground that the Crown had failed to prove each element of the *actus reus* of the offence charged.

61 That was the basis on which a majority of the British Columbia Court of

Appeal upheld the acquittal in *R. v. Rivtow Straits Ltd.* (1994), 12 C.E.L.R. (N.S.) 153, affirming (1992), 8 C.E.L.R. (N.S.) 16 (B.C.S.C.).

62 The trial judge, on the evidence, did not find any reasonable doubt on the point. He rejected the Commissioner's submissions that the overflow and rupture of the dyke were caused either by modifications made by another federal department or agency to the slopes and drainage above the lagoon or by an Act of God in the form of exceptionally warm weather leading to an unusually sudden and heavy flood of water down those slopes, none of which (it was submitted on behalf of the Commissioner), was foreseeable or within the Commissioner's control.

63 Having reviewed the evidence, I hold that it was reasonably capable of supporting the trial judge's conclusion that the Commissioner in fact did passively permit what ultimately occurred when the dyke of the lagoon gave way, since the Commissioner was responsible for its control and was aware of the risk from an earlier instance of dyke failure in 1987.

(b) "deleterious"

64 It is submitted on behalf of the Commissioner that the trial judge failed to apply "the test" for what is "deleterious" as formulated in the *Northwest Falling Contractors Ltd.* case. Furthermore, counsel for the Commissioner reminds the Court: "Not one dead fish was ever reported as a result of the failure of the sewage lagoon".

65 Reliance is also placed on *R. v. Cominco Ltd. - Cominco Ltee.* (1993), 11 C.E.L.R. (N.S.) 61 (B.C.Prov.Ct.), by counsel for the Commissioner, for the proposition

that there was no evidence before the trial judge as to the element of deleteriousness of the deposit since no test samples were taken at the time of the spill or soon thereafter.

66 I am unpersuaded by these submissions that the trial judge erred in finding, as he did, that the contents of the sewage lagoon had been shown, on the evidence before him, to be beyond a reasonable doubt "deleterious" within the meaning of s.36(3) and s.34(1) of the *Fisheries Act*. Once again, a review of the evidence reveals that it was reasonably capable of supporting the trial judge's factual finding on this point.

(c) "water frequented by fish, to wit: Koojesse Inlet"

67 The evidence that a significant spillage of the contents of the sewage lagoon flowed downslope across the ice still present (early in June 1991, at Iqaluit on Baffin Island) after the dyke burst, is of course only circumstantial. Those contents, according to the evidence, consisted of 56,000 cubic meters of untreated sewage. This can be restated, for ease of comprehension, as 12 million gallons of untreated sewage.

68 There is not a shred of evidence to cast the slightest shadow of doubt on the conclusion reached by the trial judge that some, if not all, of the lagoon's contents reached and entered the waters of the sea lapping the shore of Koojesse Inlet at a distance of about one or two hundred meters below the lagoon. That was the only reasonable conclusion to be reached on the evidence.

69 The Court House at Iqaluit is located within a similar short distance from the waters (and, of course, seasonal ice) of Koojesse Inlet. The very name "Iqaluit" is well known in that part of the Northwest Territories to connote fishing. These are tidal

waters, as the evidence mentions, forming an arm of the sea. It is a notorious fact that seagoing vessels, on which the population of Iqaluit relies for many supplies and provisions brought there regularly by "sealift", are to be seen anchored in Koojesse Inlet when the ice permits (usually within a relatively short time after the period when the lagoon spilled its contents in 1991).

70 No attempt was made, quite understandably, on behalf of the Commissioner, to advance any proof pursuant to s.40(5)(b) of the *Fisheries Act*, which states:

> 40. (5) For the purposes of any proceedings under subsection (2) or (3),
>
> (b) no water is "water frequented by fish" as defined in subsection 34(1), where proof is made that at all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish.

71 This element of the *actus reus* of the offence charged was also established, on the evidence before the Court and to the satisfaction of the trial judge, beyond a reasonable doubt.

3. Conclusion

72 In reviewing the evidence I have borne in mind the principles enunciated by the Supreme Court of Canada in *R. v. Yebes*, [1987] 2 S.C.R. 168, [1987] 6 W.W.R. 97, 36 C.C.C. (3d) 417, 59 C.R. (3d) 108, 43 D.L.R. (4th) 424, 17 B.C.L.R. (2d) 1, 78 N.R. 351, and reaffirmed in *R. v. Burns* (1994), 165 N.R. 374 (S.C.C.).

73 Having reviewed the evidence as a whole, with particular attention to the submissions made on behalf of the Commissioner, I find no merit in the submission that the *actus reus* of the offence charged was not established, as to each element, beyond a reasonable doubt; and there is furthermore no merit in the submissions made on behalf of the Commissioner to the effect that the trial judge's factual findings in respect of the *actus reus*, or any of them, were unreasonable except as follows.

VI. Events of June 1st 1991

74 I accept the submission made on behalf of the Commissioner that the evidence before the trial judge cannot support the factual finding that the unlawful deposit of sewage took place on June 1st rather than June 2nd 1994. The conviction under appeal must therefore be amended accordingly.

VII. Defence of Necessity

75 The Commissioner having permitted the sewage lagoon to overflow and burst its dyke so that the dyke required immediate repair; and having taken no measures whatever to prevent that from occurring or to be in a position to make adequate repairs in an emergency; the defence of necessity is not available in answer to the charge, particularly for the period of June 3rd to 10th 1991 (both dates inclusive). The trial judge did not err by omitting even to mention that defence, given the evidence before him.

76 The relevant law is discussed in *Perka v. The Queen*, [1984] 2 S.C.R. 232, 14 C.C.C. (2d) 385, 42 C.R. (3d) 113, [1984] 6 W.W.R. 289, 13 D.L.R. (4th) 1, 55 N.R.

1, in which it was held (per Dickson J. for the majority) that:

> If the accused's "fault" consists of actions whose clear consequences were in the situation that actually ensued, then he was not "really" confronted with an emergency which compelled him to commit the unlawful act he now seeks to have excused. In such situations the defence is not available.

77 The most that can be said for the actions taken during the period June 3rd to 10th 1991 (both inclusive) is that they may be considered in mitigation of sentence, in so far as those actions were taken by or on behalf of the Commissioner.

VIII. Extra-curial Evidence

78 No substantial wrong or miscarriage of justice arose from the references made by the trial judge to the publication **Health of Our Oceans**, published in March 1991 by the Marine Environment Quality Group, Conservation and Protection Branch, Department of Environment of Canada. There was ample evidence, quite apart from anything in that publication, to sustain the factual findings made by the trial judge as to the deleterious nature of the contents of the lagoon deposited in the waters of Koojesse Inlet.

79 In my respectful view, the verdict of the trial judge could have been no different had he made no reference to this publication.

IX. The Application to Re-open

1. The trial judge's exercise of discretion

80 It is well established that a trial judge may, in the exercise of a proper judicial discretion, either allow or disallow a party to re-open that party's case before judgment: *Scott v. The Queen* (1990), 61 C.C.C. (3d) 300, 2 C.R. (4th) 153, 43 O.A.C. 277, 116 N.R. 361 (S.C.C.); *R. v. Hayward* (1994), 86 C.C.C. (3d) 193 (Ont. C.A.). And an appellate court will not interfere unless it is shown that the trial judge failed to exercise that discretion judicially: *R. v. Lessard* (1976), 30 C.C.C. (2d) 70, 33 C.R.N.S. 16 (Ont. C.A.).

81 The trial judge heard the application to re-open the Commissioner's case at some length, from both the Commissioner's and the Crown's side. He then delivered his decision to reject the application, together with his extensive oral reasons for that decision, all of which is in the trial record. It is unnecessary to repeat those reasons here. It is enough that they show his thorough grasp and painstaking consideration of the submissions made on behalf of the Commissioner and that he found them nevertheless to be wanting. He exercised his discretion judicially. That ends the matter.

2. The estoppel argument

82 No authority has been offered on behalf of the Commissioner in support of the submission that the Crown in right of Canada was estopped from challenging or disputing the validity of data published officially by an agency or department of the Crown in right of Canada. It is always open, in my respectful view, to the Crown in its prosecutorial aspect to challenge or dispute any such data if it is in the interests of justice

to do so in the course of a prosecution. Nor, I should think, would the Crown as a defendant be estopped from doing so, in the interests of justice, in the course of a prosecution.

3. Crown disclosure

83 It is argued that the Crown failed to disclose in advance the evidence which it led in rebuttal of the Commissioner's defence evidence. This alleged failure was argued on behalf of the Commissioner as an alternative basis for his application to re-open his case. However, that basis or ground for the application was abandoned by counsel for the Commissioner, since it would have required the filing of affidavit material and could have led to complications for the Commissioner's counsel in representing his client. Moreover, no objection was taken, at the time, to the evidence led by the Crown in rebuttal, on the ground of non-disclosure; even though cross examination of the Commissioner's witness for the defence should by then have alerted the Commissioner's counsel that the Crown was aware of frailties in that witness's testimony, which frailties were made apparent by undisclosed information. It is too late now to raise the non-disclosure, on this appeal, in these circumstances.

X. Disposition

84 The appeal against conviction is dismissed subject to the conviction being amended to exclude reference to June 1st 1991.

85 The appeals against sentence shall now be heard. Costs may be spoken to at that time also.

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

Yellowknife, Northwest Territories
July 22nd, 1994

Counsel for the Appellants: John Donihee, Esq.
Ms. Priscilla Kennedy

Counsel for the Respondents: 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