SC CR 76 007
cf. 1976 4 WWR 104



IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANADA TUNGSTEN MINING CORPORATION LIMITED,

Appellant

and

HER MAJESTY THE QUEEN,

5-Mar-1976

Respondent

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE W. G. MORROW

This matter came on before me as an appeal *de novo* from both conviction and sentence. Deputy Magistrate L. S. Eckardt on June 27th 1975 found the appellant guilty on three counts and imposed a total of $10,000.00 in fines. On the appeal before me the evidence placed before the learned Magistrate was by agreement filed as a transcript and exhibit.

Because of the nature of the argument presented to me the wording of each count is produced below:

"Count 1. between the twelfth day of June, 1974 AD, and the seventeenth day of June, 1974 AD, at or near Tungsten, NWT approximate location 61°58' North Latitude by 128°13'30" West Longitude did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33 (2) of the Fisheries Act.

Count 2. between the twenty fourth day of June, 1974 AD, and the twenty eighth day of June, 1974 AD, at or near Tungsten, NWT approximate location 61°58' North Latitude by 128°13'30" West Longitude did unlawfully permit the deposit of a

" deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33 (2) of the Fisheries Act.

Count 3. between the second day of July, 1974 AD and the sixth day of July, 1974 AD, at or near Tungsten, Northwest Territories approximate location 61°58' North Latitude by 128°13'30" West Longitude did unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish, contrary to Section 33 (2) of the Fisheries Act."

The evidence is for the most part agreed upon. In fact most of it is made up of an agreed statement of facts coupled with oral evidence directed mainly to explaining the many coloured photos which purport to portray an almost daily situation found at the site.

At all pertinent times the appellant was owner and operator of a mining operation located at 61°58' North Latitude by 128°13'30" West Longitude. (Just to the east of the Yukon-Northwest Territorial Boundary in the Mackenzie Mountains and adjacent to the Flat River). The appellant's operation included an assembly of buildings, equipment, and in particular an oil storage tank. The site is held under N.W.T. lease No. 2457. It is agreed that the tank fed oil to the steam boiler, the Mine Manager's house and the recreation hall.

On June 10, 1974, oil was visible to the appellant in the Flat River in an area some distance below the oil storage tank. Thinking the visible oil was related to the tank the tank was turned

off and drained. There was no leak in the tank itself. The next day, June 11 oil was still visible in the river so the Mine Manager sent telex messages to the President of the appellant company and to the Inspector of Mines and Controller of Water Rights (at Yellowknife).

From this time on while several dates must be referred to, it can be taken that, certainly, following June 12 appellant's representatives were busy trying to clean up the problem as well as ascertain the source of the oil.

On the 12th of June Environment Canada was contacted and based on suggestions from this department trenching combined with peat and straw was tried. By June 13th Wishart Robson, Senior Technician of Environment Protection Service, Whitehorse had arrived to inspect the site. Efforts to stem the flow by placing booms and by burning are now resorted to. By June 17 it was apparent these efforts were not very effective so an oil absorber known as Con-Wed was ordered from Calgary. Consultants were recommended and by June 16 a Jim McKay, consultant was brought in by the appellant. Plastic film is now used to line the first trench and burning continues down through June 24.

By June 25, Ken Weagle, Senior Biologist, Environment Protection Service, Whitehorse, and others have arrived and following his inspection the decision to divert the river around the affected area was made.

Oil slick and flock is still observed by June 26th. Burning continues. Authorization to divert the river was given June 28th and the formal written authority was brought in on July 3rd. Dyking and diversion proceeded through July 4 and was completed July 6th, at which time the flow of oil downstream was cut off.

Meanwhile on July 5th appellant's personnel located a fuel pipe which had been leaking and was found to be the source of the oil leaking into the river. This pipe was part of the fuel distribution system supplying heating oil from the storage tank to several buildings. It had been completely closed and insulated until opened for the inspection. There had been no metering system or regular pressure tests in effect designed to detect any oil leakage from the tank or pipe.

It is agreed that between the dates June 12 to 17th, June 24 to 28th, and July 2 to July 6th, 1974 diesel or fuel oil which had escaped from the pipe did seep through the ground and did enter the waters of the Flat River but the company did not consent thereto.

Finally it was agreed that Flat River is water frequented by fish and that diesel or fuel oil is a deleterious substance.

The Crown's case rests on Section 33(2) of the *Fisheries Act*, 1970 R.S.C. C F-14 (as amended C. 17, 1st Supp.) to the effect:

> " (2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance

"may enter any such water."

It is agreed that subsection (4) has no application.

Crown Counsel argues that this section creates absolute liability, that the absence of *mens rea* is no defence, and that the appellant here must bring itself under subsection (8) to gain an acquittal. One of the more recent decisions relied on for this proposition is *R. v. Jordan River Mines Ltd.*, 1974 4 W.W.R. 337. At page 339, Osler, D.J. quoting in part from *R. v. Pierce Fisheries Ltd.*, 1971 S.C.R. 5; 12 C.R.N.S. 272;1970 5 C.C.C. 193; 12 D.L.R. (3d) 591 holds:

> "In my view, the offences charged fall under that 'wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to the presumption that *mens rea* is an essential ingredient.'"

I am in entire agreement with this enunciation of the law and with the Crown's submission here. See also the judgment of this Court in *Monkman v. The Queen*, 1972 3 W.W.R. 686.

While counsel for the appellant did not seriously take a contrary position to the above, he did rely heavily on subsection (8), taking the position that some of the harshness of the *Pierce Fisheries* judgment has been removed by this new amendment and that on the facts his client can show itself as satisfying the "unless" portion of this new section.

Section 33(8) is to the effect:

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

Appellant counsel presented many arguments but mainly he relied on two main submissions -- taking the general position that the dates specified in the charges did not represent dates where there was evidence of a breach and in any event the appellant had amply satisfied the burden put on it by Section 33(8).

The main submissions should be set forth although I may in examining them treat one or more together for convenience.

(1) On the days charged the appellant did not permit the deposit of oil in the tank -- there was no oil in the tank.

(2) On the days charged the appellant did not permit the deposit of the oil in the ground where it did enter the water.

(3) On the days charged, although the appellant had knowledge that oil was deposited in the ground where it may and did enter the water it did not consent to the deposit of the oil in the ground where it did enter into the water.

(4) On the days charged the appellant exercised all due diligence to prevent the commission of the offence.

It is quite true that the cause of the leaking of oil was found to be the faulty fuel pipe rather than the oil tank which had earlier been assumed by the appellant to be the trouble. Whether the weight and consequent pressure from the oil in the tank before it had been pumped out may have been a contributing factor or not does not in my view change things. Appellant is charged with three offences that it did "unlawfully permit the deposit of a deleterious substance at a place where it did enter water frequented by fish." The dates of the infringements chosen by the Crown are June 13, 14, 15, 16, 25, 26, and 27th and July 3, 4, and 5th. It is not for me to speculate as to why the Crown did not cover the full span from June 10, the date when the oil was first seen in the water, up to July 6th when controls became effective. On the evidence before me I am left with no alternative but to conclude that from June 10 up to July 6th a deleterious substance, namely oil, was leaking from a defective fuel pipe which formed part of the appellant's installation and plant and that that same oil was seeping through the ground and entering the waters of Flat River. Certainly it is agreed that such escape and seepage did take place on each of the dates set forth in the specific charges.

It is admitted that the appellant did not consent to this escape. This is quite true in the sense that the appellant did not willingly wish to have such a leakage take place, did not willingly open a valve or permit some similar event to take place.

If consent or the lack of consent in the above context were the full test of liability then the appellant would probably have a full defence. But surely "consent" as used here must be read in proper context. Surely it is related to the vicarious aspect of liability, and is intended as a relaxation of the strict liability which would otherwise result from the effect of Sec. 33(2) alone where before the passing of Sec. 33(8) acts of employees could be taken to bind an employer in the strictest sense.

Oil spills, leakages or seepage of the type found in the present case are all accidental. They are probably never intended: *R. v. Power Tank Lines Limited,* (unreported Prov. Judge J. D. Ord, Ontario Prov. Ct. 28 Jan. 1975). Certainly the appellant did not consent to the deposit of the oil in the ground from whence it did enter the water in the sense of willingly agreeing or hoping for such result. But to avoid liability the appellant must couple lack of consent with a behaviour or consciousness which in effect shows it was not blind to the consequences of the possibility as well as the consequent danger of a leakage such as is found in the present case.

The general approach to the problem is beautifully expressed in *Sweet v. Parsley,* (1970) A.C. 132 where Lord Diplock states at page 163:

> "Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which

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

I must now see whether the appellant, on the agreed facts, can come within the latter portion of Sec. 33(8) namely: "that he exercised all due diligence to prevent its commission."

As I understand part of appellant counsel's submission, his client moved with alacrity to obtain hay, moss and later an absorbent material, his client commenced burning processes, trenching and finally completely changed the river course. Again here I am reminded by counsel that the charges refer to specific days and that certainly with respect to Count No. 3 the diversion of the river was perhaps delayed by the Governmental people being unable to deliver the formal approval until July 3rd. It is clear that the appellant from the first moment of discovery, and I do not have to review the facts here, acted responsibly and with alacrity. There was no attempt to hide the affair from the authorities. Rather every effort was made to consult with those responsible for the environment and to act upon their advice. In excess

of $39,000.00 was spent by the appellant before the problem was under control.

In my view, however, these efforts, laudable as they may be, go more properly to alleviate penalty, rather than affect liability. They are all after the event.

I cannot read the wording of Sec. 33(8) except to require "due care and diligence" to refer to preventing the leak not to correcting the leak or reducing the damage. It is quite true, as was argued, that to prevent the leak in the present case, to set up inspections to look for weaknesses in the installations such as are found at appellant's plant may be difficult. The fact of the matter is that no such tests appear to have ever been made since the plant was erected, and certainly no routine ever laid down for opening the packing around the offending pipes to see if erosion was taking place.

The appellant's plant is situate in a mountainous terrain, where extremes of climate are common, and where its very remoteness makes it more necessary perhaps to show care. No matter what, the primary responsibility for proper installation, repair, and maintenance as well as inspection must always rest with an appellant as is found here. There is no basis in fact or in law wherein I can find even a small effort which could be termed due "diligence to prevent."

There remains the question of fine. By Sec. 33(6) provision is made for a maximum fine of $5,000.00 per day. A total

of 10 days are covered by the three counts. I have already observed that the behaviour of the appellant when the oil leakage was found should be taken into consideration. It is important as well, however, to keep in mind the deterrent effect of convictions and resultant consequences in the present type of offence. The magnitude and impersonal nature of present day industrial, mining, and similar operations makes it doubly important that the penalty not be so small as to invite breaches as to make it worth while to gamble on not being detected: *R. v. Kenaston Drilling (Arctic) Ltd.*, (1973) 12 C.C.C. (2d) 383.

The learned Deputy Magistrate levied fines of $2500.00 on Count 1, $5,000.00 on Count 2, and $2500.00 on Count 3.

I do not think that in the present case the full punitive effect of the law should apply particularly in respect to Count No. 3 where it may be that some delay in cutting off the leak resulted from the appellant waiting for a formal permit to divert the river rather than proceeding to act immediately it had word that authorization had been given.

In the result, the appeal is dismissed without costs, on Count 1 the fine shall be $1,000.00 per day or a total of $4,000.00, on Count 2 the fine shall be $1,000.00 per day or a total of $3,000.00, and on Count 3 the fine shall be $400.00 per day or a total of $1,200.00.

I am indebted to both counsel for their help in argument. Some of the many cases referred to me were: *R. v. Standard Oil Co.*

*of B.C.*, (18 Nov. 1974, Judge J. S. P. Johnson, Prov. Ct. B.C., unreported); *R. v. Cypress Anvil Mining Corporation*, 5 Nov. 1975 Mag. D. R. O'Connor, Mag. Ct. Yukon, unreported); *R. v. Jack Cewe Ltd.* (10 Dec. 1974, Judge F. K. Grimmett, C.C.J., B.C. unreported); *R. v. Elf Oil Exploration and Production Canada Ltd.*, (30 April 1974, Ch. Mag. P. B. Parker, Mag. Ct. N.W.T. unreported); *R. v. Imperial Oil Ltd. et al*, (20 Nov. 1975, Judge M. I. Catliff, C.C.J. B.C., unreported); *R. v. MacMillan Bloedel Industries Ltd.*, (1974) 13 C.C.C. (2d) 459; *R.v. Cherokee*, 1973 3 O.R. 599; *R. v. 'M.V. Allunga'* 1974 4 W.W.R. 435; and *R. v. Kirby* (8 May 1972, Judge J. S. P. Johnson, Prov. Ct. B.C. unreported).

W. G. Morrow,

Yellowknife, N.W.T.
March 5, 1976.

Counsel:

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