Date: 1998 07 30
Docket: CR 03433

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ARMANDO BERTON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Appeal of sentences imposed on convictions under the *Environmental Protection Act*, R.S.N.W.T. 1988, c.E-7.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories
on July 23, 1998

Reasons filed: July 30, 1998

Counsel for the Appellant: Thomas McCauley

Counsel for the Respondent: Brad Allison

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ARMANDO BERTON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

[1] This is a summary conviction appeal. Counsel for the Appellant advised at the outset of argument that he was abandoning the appeal from conviction and would proceed with the appeal from sentence only.

[2] The Appellant was convicted after a two-day trial heard by the Chief Judge of the Territorial Court on four charges under the *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, as follows:

> 1. On or between the 23rd day of October 1995, A.D. and the 11th day of October 1996, A.D., at or near lot 39 plan 14 in the Town of Fort Smith, Northwest Territories, discharge or permit the discharge of a contaminant into the environment, contrary to section 5(1) of the *Environmental Protection Act* R.S.N.W.T. 1988, C. E-7 thereby constituting an offence under section 12(1)(a) of the *Environmental Protection Act* R.S.N.W.T. 1988, C. E-7.
>
> 2. On or between the 23rd day of October 1995, A.D. and the 11th day of October 1996, A.D., at or near lot 1038 plan 1397 in the Town of Fort Smith, Northwest Territories, discharge or permit the discharge of a contaminant into the Environment,

contrary to section 5(1) of the *Environmental Protection Act* R.S.N.W.T. 1988, C. E-7 thereby constituting an offence under section 12(1)(a) of the *Environmental Protection Act* R.S.N.W.T. 1988., C. E-7.

3. On or between the 7th day of November 1995, A.D. and the 11th day of October 1996, A.D., at or near lot 39 plan 14 in the Town of Fort Smith, Northwest Territories, fail to comply with an order issued on October 30, 1995, pursuant to section 6(1) and section 7(1) of the *Environmental Protection Act* R.S.N.W.T. 1988, C. E-7, thereby constituting an offence under section 12(1)(b) of the *Environmental Protection Act,* R.S.N.W.T. 1988, C. E-7.

4. On or between the 7th day of November 1995, A.D. and the 11th day of October 1996, A.D., at or near lot 1038 plan 1397 in the Town of Fort Smith, Northwest Territories, fail to comply with an order issued on October 30, 1995, pursuant to section 6(1) and 7(1) of the *Environmental Protection Act* R.S.N.W.T. 1988, C. E-7, thereby constituting an offence under section 12(1)(b) of the *Environmental Protection Act* R.S.N.W.T. 1988, C. E-7.

[3] It should be noted that for each of the two lots or sites involved, there was a conviction for discharging a contaminant into the environment and for failing to comply with orders issued under the *Act*. The orders in question were made in October of 1995, approximately 18 months prior to the trial, by an inspector pursuant to the powers given in ss. 6(1) and 7(1) of the *Act*. Counts 3 and 4, set out above, each involved failure to comply with two orders: with respect to each of the sites the inspector had ordered that the Appellant stop the discharge of the contaminants and clean up the property.

[4] The trial Judge imposed fines of $10,000.00 on each of counts 1 and 2 and $15,000.00 on each of counts 3 and 4, and gave the Appellant a year to pay the total amount. In addition, he made the order attached as Schedule "A" to these Reasons for Judgment.

[5] The Appellant was not represented by counsel at the trial.

[6] Counsel for the Appellant on the appeal put forward a number of arguments in support of the appeal, which may be summarized as follows:

1) that the trial Judge failed to make the inquiry under s. 734(2) of the *Criminal Code*, which provides that a court may fine an offender only if the court is satisfied that the offender is able to pay the fine; or, alternatively, that the trial

Judge failed to take into account the representations made by the Appellant after the fines were imposed but before time to pay was ordered;

2) that the trial Judge should have considered what alternate measures were available, such as requiring the Appellant to pay to rectify the problems on the properties;

3) that the term in the order requiring the Appellant to pay the costs of further testing is vague and uncertain;

4) that there was no evidence before the court to substantiate the sum of $23,900.00 claimed by the Crown as the costs of analyses and which the Appellant was ordered to pay;

5) that since the level of contamination in the soil was not conclusively proven, the trial Judge should have given the Appellant the benefit of the doubt and found that the contamination was minimal and sentenced him on that basis;

6) that the fines and order imposed are out of proportion to the offences committed.

[7] The relief requested by the Appellant is that the fines imposed by the trial Judge be reduced and made concurrent for the offences which pertain to the same lots and that the provisions in the order which require payments by the Appellant be struck. If the fines are reduced, the Appellant asks that the time to pay them be extended.

1. Failure to Make an Inquiry Under s.734(2):

[8] Section 734(2) of the *Criminal Code* does not say that the sentencing judge must conduct an inquiry into the means of an offender to pay a fine. It says that the court must be satisfied that the offender is able to pay the fine. In many cases, particularly where there is a guilty plea and facts read into the record which relate only to the specific offence before the court, the court will have no information about the financial circumstances of the accused and will have to inquire about his or her ability to pay a fine.

[9] In this case, the trial Judge heard two days of evidence about the Appellant's operations on the sites in question. The Appellant was the manager of the two commercial lots, one of which was owned by his wife and the other by a company of

which he and his son were at the time the directors. The sites are two distinct premises, not adjacent to each other.

[10] The evidence given by the accused was that he had been collecting or buying gallons of used or discarded oil over 30 years. It appears from his evidence that he was using the two sites for storage for the gas or working on them with the gas before title was actually put in the name of his wife and the company referred to above. A gas station had at one time been located on one of the sites.

[11] In his evidence, the Appellant indicated that during the past 30 years, between 260,000 and 300,000 gallons of fuel had been processed on both the sites. He said that he was the only person in the area collecting used oil. He referred to looking after most of the spills around town and to working at the dump for many years. He also referred to having equipment to remove soil. He said he used the oil for heating his "shop". He also said he saved on average $1.00 per gallon in this way.

[12] The Appellant heard the submissions of Crown counsel at the trial, in which fines in the amount of $10,000.00 for each count were suggested. In his own submissions, the Appellant made no reference to any inability to pay fines in that amount. Based on the trial evidence that the Appellant was operating a business and in the absence of any submission by the Appellant that he was not in a position to pay the fines suggested by the Crown, the trial Judge was entitled to be satisfied that the Appellant was able to pay.

[13] It was only after the trial Judge imposed the fines that the Appellant made reference to his financial circumstances. When asked how long he would need to pay the fines totalling $50,000.00, he replied that he doubted that he could afford to pay any of them and that he found them unfair. When given a year to pay, he said that would not be enough time because he had other financial problems and a lot of tax to pay.

[14] The above-noted remarks by the Appellant do not, in my view, indicate a lack of means to pay the fines or to comply with the monetary terms of the order. They indicate only that the Appellant had other financial obligations. The trial Judge considered what the Appellant said in giving him one year to pay and told the Appellant that he could seek an extension of the time to pay, but that he would have to show that he needed the time and that he had not simply ignored the fines.

[15] On the hearing of this appeal, no evidence was presented as to the Appellant's financial circumstances and there was no evidence that he has made any attempt to pay any part of the fines imposed or complied with any of the terms of the order or sought

an extension of the time to pay from the trial Judge. No evidence was presented that the Appellant is unable to pay the amounts ordered.

[16] In my view, an appellant who pleads that he is unable to pay fines imposed at trial and complains that his means to pay were not assessed by the trial Judge has an obligation to substantiate his lack of means before the appeal court. It is not sufficient to say only that the trial Judge did not adequately inquire into the Appellant's means without showing that in fact the Appellant does not have the means to pay. I agree with Lane Prov. J., who noted in *R. v. Lopes et al.* (1996), 18 CELR (N.S.) 299 (Ont.) that evidence of any mitigating circumstances, such as financial situation and capacity to pay or otherwise, is the responsibility of the appellant.

[17] In my view the lack of evidence on this appeal distinguishes this case from *R. v. Tracy* (1992), 71 C.C.C. (3d) 329 (B.C.C.A.). There, the Court referred to a number of cases in which it has been held that it is an error in principle for a sentencing judge to impose a fine without investigating the accused's ability to pay a fine. The Court held that the trial judge had made an appropriate inquiry but that the fine imposed, along with the default time and time to pay ordered, resulted in the circumstances in an unfit sentence. The Court was persuaded by the evidence of the accused's attempt to pay the fine by instalments that there was no suggestion of wilful refusal or neglect to pay.

[18] Here, as I have said, there is no evidence that the Appellant has made any attempt to pay the fines and no evidence which would allow me to conclude that he is unable, rather than simply refusing or neglecting, to pay.

[19] I am satisfied that the trial Judge had sufficient evidence before him about the Appellant's means and that he took into account what the Appellant said about his financial situation in deciding on the time to pay. Accordingly, I find no error in principle and no contravention of s. 734(2). However, even if it could be said that the trial Judge should have conducted an inquiry as to the Appellant's financial circumstances, I would not give effect to this ground of appeal as there was no evidence before me that the Appellant is unable to pay the amounts ordered.

2. <u>Alternate Measures:</u>

[20] It was submitted on behalf of the Appellant that the trial Judge should have considered alternate measures as a principle of sentencing and that, because of the various orders available to the court under s. 12.2 of the *Environmental Protection Act*,

any monetary sanction ought not to have been imposed by way of a fine but should instead be applied to clean up the sites.

[21] In my view, this submission does not really involve alternate measures. Alternate measures are measures outside the court process, such as are provided for under s. 717 of the *Criminal Code*. However, once the case is before the court and the accused has been convicted after trial, the court must sentence within those sanctions prescribed by law.

[22] The legislation clearly contemplates both punishment for the offences under the *Act* and orders which are directed at clean up of any site or contamination which is the subject matter of a prosecution.

[23] Section 12(1) of the *Act* provides for the maximum fines and terms of imprisonment for the offences for which the Appellant was convicted.

[24] Section 12.2 of the *Act* provides for orders which may be made in addition to any other punishment which may be imposed under the Act:

> 12.2 Where a person has been convicted of an offence under this Act, in addition to any other punishment that may be imposed under this Act, the court may make an order with one or more of the following terms:
>
> (a) prohibiting the person from doing any act or engaging in any activity that may result in the continuation or repetition of the offence;
>
> (b) directing the person to take any action that the court considers appropriate to remedy any harm to the environment that results or may result from the act or omission that constituted the offence;
>
> (c) directing the person to take any action that the court considers appropriate to avoid any harm to the environment that may result from the act or omission that constituted the offence;
>
> (d) directing the person to publish, in the manner determined by the court, the facts relating to the offence;
>
> (e) directing the person to notify, at his or her own cost and in a specified manner, any person aggrieved or affected by the person's conduct of the facts relating to the offence;

> (f) directing the person to post a bond or pay an amount of money into court that will ensure compliance with any order made under this section;
>
> (g) cancelling or suspending any permit or licence issued under this Act or other regulations;
>
> (g.1) directing the person to pay the cost of any research or analysis related to the prosecution of the offence;
>
> (g.2) any further terms the court considers appropriate in the circumstances; and
>
> (h) requiring the offender to comply with any other reasonable conditions that the court considers appropriate and just in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the offence or committing other offences under this Act.

[25] In my view, this is not a case where minimal or token fines would have been appropriate along with an order under s. 12.2 because orders had already been made by an inspector under the *Act* and the Appellant had not complied with those orders. Something significantly more than that was required by the time the matter came before the trial Judge. Accordingly, I do not accept that he made any error in imposing substantial fines.

3. The Term of the Order requiring the Appellant to Pay the Cost of Further Testing:

[26] The Appellant's argument is that this term in the order is vague, particularly since the guidelines had changed between the time the inspector's orders were made and the time of trial and they may change yet again. It was not submitted that the guidelines could not be identified; according to the transcript of the evidence at trial and the exhibits filed, the guidelines are those made by the Minister pursuant to his authority under the *Environmental Protection Act*.

[27] In making this part of his order, the trial Judge said the following:

> ... if further testing is required, to ensure that the sites meet the guidelines, the cost of that testing will be that of the accused. Considering the amount of testing and extra costs that had to be incurred in this matter because of the lack of response by the accused, in my view, the department and the taxpayer of this country should be entitled to recover that.

[28] The trial judge's jurisdiction to include this term in his order lies under section 12.2(g.2) of the *Act*: "any further terms the court considers appropriate in the circumstances".

[29] In my view this term of the order is not uncertain. The term immediately preceding it in the order requires the Appellant to clean up the sites to meet the guidelines standards in existence at the time the order was made. He was given three months to do that. In my view, the condition for payment of the testing costs must be read in conjunction with the term for clean up. There is accordingly no uncertainty as to which guidelines are referred to - they are the guidelines in force at the time the order was made. If testing is required to ensure that the sites meet those guidelines, the Appellant pays for the testing.

4. Lack of Evidence to Substantiate the $23,900.00 Cost of Analyses:

[30] In his submissions on sentence, Crown counsel at the trial told the trial Judge that the total cost for analyses conducted in connection with the prosecution was $32,000.00. He gave the trial Judge a breakdown of what was included in that figure and asked that the court order recovery from the Appellant of $23,900.00 of it.

[31] The Appellant did not comment on the figure of $23,900.00 in his own submissions. He did ask, after the order had been made, whether the trial Judge considered that the analyses for which the costs were incurred were not necessary because it was not illegal for him to be in possession of the material in question. That submission was addressed by the trial Judge, who pointed out that the analyses were done and the costs incurred because the Appellant had failed to clean up the sites as required by the orders.

[32] I find no merit in this ground of appeal. The Appellant did not challenge the figures presented by Crown counsel at trial. Nor does his counsel now suggest that the figures were inaccurate or the costs not incurred as a result of this matter. It was suggested that as a matter of principle where an accused is unrepresented the Crown should provide proof, in the form of invoices or other documentation, of costs which it seeks to have the accused pay. Clearly, had the Appellant challenged the costs or asked for proof of same, proof would have been necessary. But he did not challenge them. He simply questioned whether the analyses were necessary at all, and the trial Judge held that they were. In my view, absent any challenge by the Appellant at trial, and absent

any evidence on this appeal that there was in fact anything wrong with the amount claimed, this is not a ground upon which to disturb the order of the trial Judge.

5. The Lack of Evidence as to the Level of Contamination:

[33] The Appellant relied for this ground mainly on the underlined part of the following excerpt from the trial Judge's remarks on sentence:

> The looks of those properties as disclosed by these pictures leaves a lot to be desired as to the method in which these contaminants are stored, to start with, and the fact that there's obviously been a lot of leakage in some of these barrels. The pictures disclose that it has not been cleaned up, and it has just continued to leak on top and contaminate more. That you are able to say that there is only about 50 yards of contaminated soil is just a guess, because nobody is able to give any evidence as to the depth of the contamination or whether it's migrated at this stage...

[34] Counsel for the Appellant argued that the trial Judge was unable to come to a conclusion as to the depth and quantity of the contamination in the soil. He submitted that the only evidence in that regard was that of the Appellant. I was not referred to, nor was I able to find, any specific reference by the Appellant in his evidence to 50 yards of contaminated soil, but it is clear from the Appellant's evidence that he was of the view that the contamination was not anywhere near as extensive as suggested by the expert witnesses who testified for the Crown.

[35] As I understand the Appellant's argument, it is that the trial Judge ought to have treated the contamination as minimal because the only evidence on that point was that of the Appellant, and ought therefore to have imposed a sentence which was based on a minimal offence or offences.

[36] The trial Judge was alert to the fact that the expert witnesses could not be specific as to the extent of the contamination. That is evident from his remarks on sentence, quoted above, as well as the following passage from his remarks on conviction:

> Now, obviously the evidence that has been put before the Court indicates that on both sites there was hydrocarbon contaminants in the soil that was tested, and of course, the graphs that disclose the type of hydrocarbons cover a various range of hydrocarbons. It is not just asphalt or very heavy hydrocarbons. There are also other lighter hydrocarbons involved in the samples that were taken, and that has to be taken into consideration, as well. And, of course, the lighter hydrocarbons can dissipate somewhat faster and perhaps cause more damage.

> The difficulty, of course, here is that we seem to get off to some degree on a track of about how much the damage is, and we do not know that at this stage. Mr. Berton has taken the position that it is just a bit of minor surface stuff. Dr. Wallace, of course, has indicated, but without further testing, and obviously not knowing how deep the contamination is, is of the view that there is a good possibility that the contamination may be much more substantial.
>
> But regardless, there is contamination of the areas on both site 1 and site 2, at least as far as the samples that have been taken; but I think it is fair to say that one can also see just from the pictures that have been provided and a description thereof that there is contamination around various barrels. The further evidence indicates that there is a number of barrels that were leaking for possibly a number of reasons: one, perhaps, because of expansion from heat, others because of damage to barrels or that are not properly sealed.

[37] The trial Judge went on to say that he would rely on the expert evidence that was called by the Crown rather than what was testified by the Appellant, "who would like to have the Court think that he is an expert with regard to these matters just because of his experience in working around fuel". In my view, that was a finding of credibility, with which this court is not entitled to interfere absent some overriding error.

[38] The expert evidence was that the levels of certain of the contaminants found in the tested soil on the sites far exceeded the established guidelines. The possibility, based on scientific studies of such contaminants, of neurological effects in humans was also referred to. The Appellant himself gave evidence that over many years over two hundred thousand gallons of oil had been dealt with on the sites. There was also evidence from the witness Dr. Wallace as to the expected costs to bring the sites up to the guidelines standards and that, with respect to at least one of the sites, damage was accruing every minute because of leaking barrels on the property.

[39] The passages noted above show that the trial Judge took into account the inability of the experts to be precise as to the extent of the contamination. He found, based on the expert evidence which he accepted, that the situation was serious and cause for concern. There is no indication that he misapprehended the evidence in that regard.

[40] It should be noted that what the trial Judge treated as an aggravating factor was not the extent of the contamination, but rather the Appellant's failure to comply with the orders to clean up the sites, even a year and a half after those orders were made. In this connection, the trial Judge found troublesome the Appellant's attitude that although not

much clean up work was required (which was contradicted by the expert witnesses), he had simply been too busy to attend to it.

[41] I find no error in the way the trial Judge dealt with the evidence, or lack of evidence, as to the actual extent of the contamination. The question in the end is whether the sentence imposed is unfit in all the circumstances of the case. The test is as set out by the Supreme Court of Canada in *R. v. McDonnell* (1997), 114 C.C.C. (3d) 436 (at 448):

> ... in the absence of an error of principle, failure to consider a relevant factor, or overemphasis of the appropriate factors, a sentence should only be overturned if the sentence is demonstrably unfit.

[42] This leads to the final argument put forward by the Appellant.

6. <u>Whether the Punishment Imposed was Proportionate to the Offences:</u>

[43] The Appellant submitted that the fines and the order are out of proportion to the offences committed.

[44] Section 718.1 of the *Criminal Code* sets out as a fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[45] The maximum punishment on each count for which the Appellant was convicted is a $300,000.00 fine or six months imprisonment or both. Also, pursuant to s. 13 of the *Act*, a separate offence could have been charged and a separate penalty imposed for each day the contravention of the *Act* continued. These are indications that contamination of the environment is considered a serious offence.

[46] Counsel for the Appellant submitted that some of the fines should have been concurrent. However, if fines are to be imposed, they have to be imposed separately on each count; they cannot be made concurrent. If appropriate, the amount of the fine on any count can be adjusted so as to affect the total payable: *R. v. Ward* (1980), 56 C.C.C. (2d) 15 (Ont. C.A.).

[47] There were aggravating factors in this case which were properly taken into account by the trial Judge. Approximately 18 months had elapsed since the inspector's orders were made yet by the time of trial the sites had not been cleaned up. The Appellant had

made very little effort to do any clean up and then only when barrels were empty of oil and it was easy for him to move them. There had also been continued leaking of oil over the 18 months and thus continued contamination of the sites.

[48] No cases were submitted by the Appellant on the issue of unfitness of the fines or the order imposed. I acknowledge that the caselaw submitted by the Crown involves corporate accused. The trial Judge recognized that he was not dealing with a corporate accused when he said, just before imposing the fines:

> Now, I appreciate you aren't a big oil company, Mr. Berton, but on the other hand, you have to recognize that you have responsibilities in this regard when you are dealing with contaminants. And you failed, in my view woefully failed, to meet the standard required.

[49] Each case must be judged on its own facts. Obviously there may be reason to treat large, multinational corporations more severely because the corporations are in a position to cause more significant damage and have the resources to ensure that it does not occur or to rectify any damage. Punishment of a large corporation must also be significant so as to ensure that any monetary penalty is not absorbed as merely another cost of doing business: *R. v. United Keno Hill Mines Limited* (1979), 10 CELR 43 (Yukon Terr. Ct.). The latter consideration should also apply when the offender, though not a corporation, is operating a business in connection with which the contamination occurs.

[50] In this case, the Appellant was contaminating the sites in the course of operating a business. He was making or saving money from his use of the used oil. He made virtually no effort to deal with the contamination when it was brought to his attention. He showed little remorse, saying that little was needed to clean up the sites while at the same time acknowledging that he simply had not taken the time to do anything about it. He not only did not comply with the inspector's orders to clean up what had already occurred but he allowed continued contamination of the sites. In these circumstances, both general and specific deterrence were paramount considerations.

[51] It has not been shown that the fines imposed were outside the range for such offences committed by individuals in the Appellant's circumstances.

[52] Having considered the case as a whole, I am unable to say that the fines or the order imposed are disproportionate to the offences or the offender or that they are otherwise unfit. Therefore there is no basis upon which to intervene and the appeal is dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 30th day of July, 1998

Counsel for the Respondent: Brad Allison

Counsel for the Appellant: Thomas McCauley

CR 03433

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

ARMANDO BERTON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE V.A. SCHULER