

R. V. Berton, 2004NWTSC67

S-1-CR20030000120

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

ARMANDO BERTON

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Reasons for Judgment held before  
 The Honourable Justice J.Z. Vertes, at  
 Fort Smith in the Northwest Territories on  
 the 1st Day of September A.D., 2004.

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APPEARANCES

A.D. Fox, Esq.

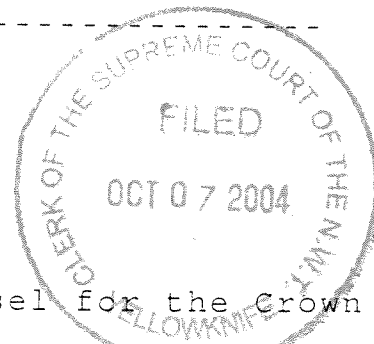
The Accused

D.R. Lebel

Counsel for the Crown

Represented Himself

Court Reporter



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Section 127 of the Criminal Code

1 (PROCEEDINGS RESUMED 1 SEPTEMBER 2004 AT 9:30)

2 **THE COURT:** Good morning. I had an  
3 opportunity to review the evidence and to  
4 consider the arguments. You can have a seat Mr.  
5 Berton. I am going to deliver my decision in  
6 this case now.

7 The accused is charged under Section 127 of  
8 the Criminal Code. That section says, in effect,  
9 that everyone who, without lawful excuse,  
10 disobeys the lawful order made by a court of  
11 justice is, unless a punishment or other mode of  
12 proceeding is expressly provided by law, guilty  
13 of an indictable offence.

14 Specifically, the accused in this case,  
15 Armando Berton, stands charged that on or about  
16 the 18th day of June, 2003, being bound by an  
17 order made by Chief Judge Halifax of the  
18 Territorial Court on May 15th, 1997, an order  
19 made pursuant to Section 12.2 of the  
20 Environmental Protection Act of the Northwest  
21 Territories, he did, without lawful excuse,  
22 disobey that order by storing contaminants on a  
23 property, described in these proceedings as Lot  
24 1038 Plan 1397 in the Town of Fort Smith in  
25 circumstances under which such storage was  
26 prohibited by the terms of the order.

27 The order of 1997 arose out of the

1 prosecution of Mr. Berton on four charges  
2 contrary to the Environmental Protection Act.  
3 Two of the charges related to discharge of  
4 contaminants on two lots, Lot 39 and Lot 1038,  
5 and the other two related to noncompliance with  
6 inspectors' orders. He was convicted of those  
7 charges and fined. In addition, as permitted by  
8 that Act, the presiding judge at that time, Chief  
9 Judge Halifax, issued an order which required Mr.  
10 Berton to comply with certain conditions  
11 including:

12 (a) to prepare and submit a clean-up plan  
13 for the two lots within a period of 30 days;

14 (b) to clean up and restore the two lots  
15 within three months;

16 (c) to pay, within four months, the sum of  
17 \$23,900 to the Government of the Northwest  
18 Territories to cover a portion of the cost of  
19 research and analysis related to the  
20 prosecutions;

21 (d) a requirement that, if either of the two  
22 lots are to be used for storage of contaminants  
23 in the future, then that property must be  
24 properly fenced and secured with locked access,  
25 there must be proper signage as to no smoking, as  
26 to where fire stations are located, and as to  
27 what the contents are that are being stored

1           there. And further, that all storage barrels  
2           must be placed on proper foundations and properly  
3           secured either with liners or berms or both as  
4           approved by the Government's Department of  
5           Resources Wildlife and Economic Development.

6           It is this last condition that the Crown  
7           alleges has not been obeyed.

8           I should note that these dispositions from  
9           the 1997 prosecution were appealed by the accused  
10          to the Supreme Court and his appeal was dismissed  
11          in July of 1998.

12          In this case, Mr. Berton represented  
13          himself. While he may not have argued the case  
14          as smoothly or eloquently as a lawyer may have on  
15          his behalf, he managed to articulate various  
16          reasons why the charge should be dismissed. I  
17          note in this regard that Mr. Berton is no  
18          stranger to the court system. I must say that,  
19          overall, I think he put forward every argument  
20          that was available to him.

21          The evidence for the Crown was provided by  
22          Mr. Bernard Bergman, a compliance enforcement  
23          officer with the Department of Resources,  
24          Wildlife and Economic Development. He has been  
25          employed by the government for 27 years and has  
26          received training in respect of petroleum  
27          handling and spills control.

1 I want to say this first.

2 There were several attacks made during the  
3 course of the trial impugning Mr. Bergman's  
4 credibility and integrity. I found nothing in  
5 the evidence to substantiate such attacks. I  
6 found Mr. Bergman's evidence to be credible and  
7 reliable and free of any bias against the  
8 accused.

9 Mr. Bergman testified that on June 18th,  
10 2003, he attended at Lot 1038. He described the  
11 property as a waste dump for industrial materials  
12 of all kinds, including petroleum products. He  
13 saw numerous containers and storage barrels, some  
14 leaking. He found a heating oil tank on its side  
15 with a large pool of oil underneath it at one  
16 end. He found a large bolted tank with waste  
17 fuel or bunker oil inside. There was seepage  
18 around it. The integrity of the tank was  
19 compromised, in his opinion. Pictures of both of  
20 these were entered as exhibits. He observed a  
21 500 gallon oil tank with oil in it just sitting  
22 directly on the ground. There were a large  
23 number of gear oil containers and drums  
24 containing tar. None of the protective measures  
25 required by the 1997 order for the storage of  
26 contaminants had been implemented.

27 Mr. Bergman testified that he had met with

1 the accused on numerous occasions prior to 2003  
2 to go over the requirements of the 1997 order.  
3 Mr. Berton had even been prosecuted in August of  
4 1998 on four charges of failing to comply with  
5 the 1997 order (specifically of failing to comply  
6 with conditions (a), (b) and (c) outlined  
7 previously). Those convictions were appealed and  
8 the appeal was dismissed in November of 1998.  
9 Mr. Berton, certainly, was aware of the order and  
10 its requirements.

11 Mr. Berton did not claim that he did not  
12 know of the requirements imposed by the 1997  
13 order. He also did not claim that he was not  
14 storing contaminants on the property. He  
15 admitted that the large bolted tank contained  
16 about ten to 12,000 gallons of bunker oil in June  
17 of 2003. He admitted that it still contains  
18 about five or 6,000 gallons. His evidence, in  
19 its essential features, came down to saying that  
20 there was not as much contaminant on the property  
21 as Mr. Bergman claimed; that he has not brought  
22 any new contaminants onto the property; that any  
23 spills or leakage have been cleaned up; that most  
24 of the contaminants that were on the lot in 1997  
25 have been emptied or moved off; that the cost of  
26 putting in the protective measures required by  
27 the 1997 order is prohibitive; and that he saw no

1 purpose in putting in place most of those  
2 protective measures.

3 So, in my opinion, the Crown has satisfied  
4 the essential requirements for a conviction under  
5 Section 127 of the Criminal Code. It is  
6 indisputable that the accused knew about the  
7 requirements of the order and he consciously did  
8 not obey it. He admits storing contaminants on  
9 that property and he admits not putting in place  
10 any of the protective measures required by the  
11 order.

12 And this is the point that was emphasized by  
13 Crown counsel. The question is not whether  
14 others in the community have to meet the same  
15 requirements. The question is not whether Mr.  
16 Berton can or cannot store contaminants on this  
17 property. The question is whether he was storing  
18 contaminants on Lot 1038 on June 18th, 2003. If  
19 the answer is "yes", then the next question is  
20 were the requirements of the 1997 order met.  
21 Clearly, the answer to that is "no".

22 So, does Mr. Berton have a lawful excuse for  
23 not obeying the order?

24 He said that the order was not lawfully made  
25 because he was not given an opportunity to  
26 address it back at the sentencing hearing in  
27 1997. But, he appealed the sentence and the

1 appeal was dismissed. He had an opportunity to  
2 argue back then that the order was unlawful but  
3 the appeal court upheld it.

4 Also, it is well established in law that a  
5 charge of disobeying a court order is not  
6 answered by the assertion that the order was  
7 erroneously made or even that it is void. The  
8 proper course is to move directly to have the  
9 order quashed or to appeal it. The validity of  
10 the order cannot be collaterally attacked on a  
11 charge of disobeying it. It was a valid order  
12 that had to be obeyed unless it was set aside in  
13 a proceeding dealing directly with the question  
14 of its validity.

15 Mr. Berton also argued that he has been  
16 prosecuted for this crime before and the Crown  
17 should be precluded from prosecuting him again.  
18 It is true that he was convicted in 1998 of  
19 failing to obey this order. The particulars of  
20 that prosecution did not relate to the specific  
21 condition not obeyed in this current  
22 prosecution. And it is not a matter of whether  
23 he can be prosecuted today or any other day. The  
24 issue is, as reflected in the charge, whether on  
25 June 18th, 2003, he was guilty of disobeying the  
26 1997 order or any aspect of it.

27 The fact that the accused has been



1 previously prosecuted and convicted of not  
2 obeying this order is no impediment to this  
3 prosecution or any future prosecution should it  
4 again develop that the accused is not obeying the  
5 terms or any specific term of this order.

6 As I said before, the order is in place, it  
7 is continuing in force. It has not been set  
8 aside and until it is set aside on an application  
9 brought directly for that purpose, it must be  
10 obeyed.

11 The previous prosecution also answered the  
12 question of whether there is any other mode of  
13 proceeding expressly provided for by law (a  
14 stipulation contained within Section 127 of the  
15 Code). My colleague, Justice Schuler, on the  
16 appeal heard by her in November of 1998, found  
17 that there was no other mode of proceeding, and  
18 thus, Section 127 of the Criminal Code is the  
19 appropriate avenue for prosecutions relating to  
20 noncompliance with such orders as this made under  
21 the Environmental Protection Act. That  
22 conclusion was not appealed further; it stands  
23 uncontradicted; and, I respectfully follow it in  
24 this case.

25 Mr. Berton also argued that he should not be  
26 held liable because he is not the owner of the  
27 property. The evidence shows that his wife is

1 the registered owner.

2 The fact that the accused is not the  
3 registered owner of Lot 1038 is, in my opinion,  
4 immaterial. The order is directed to him. The  
5 order requires him to take certain measures.  
6 There was ample evidence of his use and control  
7 of the property. The obligation to comply with  
8 the order is his and his alone.

9 Mr. Berton also submitted that he could not  
10 afford to do what the order requires him to do.  
11 That may be true (although he presented no  
12 specific evidence as to his financial  
13 circumstances). But, even assuming this to be  
14 true, the proper recourse is not to ignore the  
15 order. Mr. Berton could have, and should have,  
16 made an application to modify the terms of the  
17 order. Also, there was no evidence of his  
18 attempting to do what he could do to comply with  
19 the order. All the evidence points to the  
20 undeniable conclusion that the accused did  
21 practically nothing to comply with the order  
22 between 1997 and 2003.

23 Finally, I want to address what has been an  
24 underlying theme of the defence position. That  
25 theme, to put it generally, is one of persecution  
26 by the authorities, whether they be the  
27 Government of the Northwest Territories or the

1 Town of Fort Smith.

2 I have no doubt that Mr. Berton has been or  
3 can be a productive businessman. He obviously  
4 knows a lot about petroleum products. He may  
5 even be doing a service by collecting and  
6 attempting to recycle waste petroleum products.

7 I also have no doubt that he has had  
8 long-running battles with the authorities in Fort  
9 Smith. I have heard his witness, Mr. Burk, talk  
10 about that to a great extent. I don't, by any  
11 means, want to denigrate or criticize what Mr.  
12 Burk said on the accused's behalf. I accept what  
13 Mr. Burk said. There has been, obviously, a long  
14 history of problems. But a criminal court, and  
15 I, as a judge, sitting in this case, is not in a  
16 position to arbitrate or mediate these disputes  
17 or even to determine who is right or wrong in  
18 these long-running disputes. All I can do is  
19 determine, as the law requires me to do in any  
20 criminal case, whether the Crown has proven its  
21 case beyond a reasonable doubt. I am called on  
22 to determine whether the Crown has proven beyond  
23 a reasonable doubt that the specific charge  
24 before me today, that is, did Armando Berton, on  
25 June 18, 2003, disobey the order made by Chief  
26 Judge Halifax in 1997 and did he do so without  
27 lawful excuse. My conclusion is that the Crown

1 has so proven.

2 Therefore, for these reasons, the accused  
3 stands convicted as charged.

4 Now, Mr. Fox, Mr. Berton. The next step is  
5 to move towards the sentencing hearing.

6 MR. BERTON: Yes.

7

8 REASONS FOR JUDGMENT CONCLUDED  
9 -----

10 I, Douglas R. Lebel, Court Reporter, hereby  
11 certify that I attended the aforementioned trial  
12 and took faithful and accurate transcript of my  
13 shorthand notes to the best of my skill and  
14 ability.

15 Dated at the City of Calgary, Province of  
16 Alberta, this 24th day of September A.D., 2004.

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Douglas R. Lebel

C.S.R. (B.C.)