

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN, on the information and  
complaint of W. S. Wong, Senior Safety Officer,  
Workers' Compensation Board of the Northwest  
Territories & Nunavut

Appellant

- and -

Ninety North Construction and Development Ltd.

Respondent

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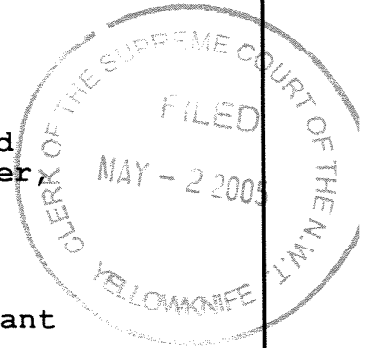
Transcript of a Ruling at an Appeal delivered by The  
Honourable Justice J.Z. Vertes, in Yellowknife, in the  
Northwest Territories, on the 28th day of April, A.D. 2005.

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APPEARANCES:

Mr. G. Malakoe: Counsel on behalf of the Appellant  
Ms. S. Kay: Counsel on behalf of the Respondent

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Charge under s. 1(a) *Environmental Tobacco Smoke*  
*Work Site Regulations*





1 THE COURT: Counsel, I want to start by  
2 thanking both of you for the thoroughness of your  
3 written submissions and oral argument. As a  
4 result of that, I have been able to consider the  
5 relevant point on this appeal and I find that I  
6 need not reserve but can give you my decision  
7 now.

8 I should say that some of the points that we  
9 discussed during the hearing may indeed be worthy  
10 of further in-depth consideration but perhaps  
11 that is better left for another day when the  
12 issues are confronted directly.

13 In this case the Appellant Crown appeals the  
14 acquittal of the Respondent Company on a charge  
15 contrary to section 1 of the *Environmental*  
16 *Tobacco Smoke Work Site Regulations* which were  
17 made under the authority of section 25 of the  
18 *Safety Act* empowering the Commissioner to make  
19 regulations generally to protect the safety and  
20 health of workers.

21 Section 1 of the Regulations states that:  
22 ...an employer shall control the  
23 exposure of workers to environmental  
24 tobacco smoke at an enclosed work  
25 site by prohibiting smoking in the  
26 enclosed work site.

27 The charge was that on or about May 20th,

1           2004, at the Capital Suites construction site in  
2           Inuvik, Northwest Territories, the Respondent  
3           Company failed to prohibit smoking in an enclosed  
4           work site, contrary to that Regulation.

5           I must say that the evidence at the hearing,  
6           in my opinion, was often unfocussed and  
7           confusing, which to some extent led to what I  
8           have concluded was a misapprehension of the  
9           essential point at issue in the case by the  
10          Justice of the Peace presiding at the hearing.

11          The prosecution's case was succinctly  
12          described at the hearing by the prosecutor at the  
13          time when he said:

14                 "I'm going to make it clear that the  
15                 charge is failing to prohibit  
16                 smoking on May the 20th and, in  
17                 particular, creating a designated  
18                 smoking area, in my submission, in  
19                 violation of the regs and, as well,  
20                 by not taking sufficient steps to  
21                 cause the smoking to be prohibited."

22          It seems quite clear from the way that the  
23          prosecution case proceeded, and from the  
24          submissions, that the entire focus of the  
25          prosecution was on the allegation that there was  
26          a sign placed upon the door to the site  
27          superintendent's office which said "Designated

1 Smoking Area". The evidence was that the site  
2 superintendent's office was an enclosed work  
3 area, i.e. an area where work was done, and the  
4 safety officer who testified at the hearing was  
5 quite clear in his evidence that he observed that  
6 sign on the doorway to the site superintendent's  
7 office on the date in question. So that was the  
8 focus of the prosecution case. The focus was not  
9 whether smoking had in fact occurred on some  
10 other date in that office; the focus was on the  
11 action of the company in designating that  
12 enclosed work area as the designated smoking area  
13 in contravention of the Regulations.

14 Now I should point out that the Regulations  
15 do authorize an employer to permit smoking in a  
16 designated smoking area, although the  
17 Regulations, in section 3, specify that it is to  
18 be a designated smoking structure outside an  
19 enclosed work site. This is pertinent because,  
20 of course, of the nature of the evidence  
21 presented on behalf of the Respondent Company at  
22 the hearing.

23 The Justice of the Peace in his decision  
24 accepted the evidence of the safety officer that  
25 there was smoking taking place in the trailer in  
26 question. The trailer, it is undisputed, was  
27 divided into two parts with two entrances: one

1 was the site superintendent's office where work  
2 was done, and there was no argument made before  
3 the Justice of the Peace that the site  
4 superintendent's office was not an enclosed work  
5 site as that term is used in the Regulations; and  
6 the other part of the trailer with another  
7 entrance was apparently a lunch room or used as a  
8 lunch room. There was no evidence or argument  
9 made at the hearing that the lunch room was used  
10 for anything other than a lunch room.

11 The Justice of the Peace accepted, as I  
12 said, the safety officer's evidence that there  
13 was smoking taking place in the trailer. The  
14 Justice of the Peace was not specific in saying  
15 where he thought the smoking was taking place but  
16 it seems to me to be a logical conclusion, or at  
17 least a logical assumption, that if he's  
18 accepting Mr. Wong's evidence on that point,  
19 Mr. Wong's evidence was that he saw smoking  
20 taking place in the superintendent's office.

21 The Justice of the Peace, though, then goes  
22 on to the next question which is related to the  
23 question of an enclosed work place. He says:

24 "It appears that if the smoking took  
25 place at the work site office area,  
26 which is on the north end of the  
27 trailer, then this would be an

1 enclosed work place. If there was  
2 smoking in there, then it would be  
3 smoking in an enclosed work place.  
4 It appears that if it was on the  
5 south end, and Mr. Stube had  
6 indicated that he believed that it  
7 was on the south end, apparently  
8 that area itself would not qualify  
9 as an enclosed work place. The  
10 Crown went to great lengths with  
11 Mr. Wong to determine that it was at  
12 an enclosed work place on the  
13 trailer."

14 Later on in his conclusion, the Justice of  
15 the Peace says:

16 "The question is, was this smoking  
17 taking place in an enclosed work  
18 place. I do not believe the Crown  
19 has made out their case for this."

20 So we have on the one hand the focus of the  
21 prosecution being that the company violated the  
22 Regulation by placing a sign designating as a  
23 smoking area a place that could not be a  
24 designated smoking area. This was in direct  
25 contravention of the Regulation.

26 The Justice of the Peace, however,  
27 considered the issue to be whether smoking was

1 taking place in an enclosed work place, and this  
2 is where, in my respectful view, there was a  
3 misapprehension of the evidence. His focus  
4 should have been on the question as framed by the  
5 prosecution.

6 This is a regulatory offence; it is not a  
7 criminal offence.

8 As a regulatory offence it is, as everyone  
9 recognized at the hearing, a strict liability  
10 offence, which means that if the Crown  
11 establishes the act that *prima facie* amounts to  
12 an offence, then there is a burden on the  
13 defendant to show that it took all reasonable  
14 measures to avoid committing the offence, to  
15 avoid the prohibited act.

16 The Regulation here speaks of the obligation  
17 to prohibit smoking in an enclosed work site. It  
18 seems to me that a breach of the Regulation can  
19 be committed by an act of omission, i.e. by not  
20 taking any steps whatsoever to prohibit smoking,  
21 or by an act of commission, that is by doing  
22 something that violates that Regulation. It is  
23 that latter type of conduct that is at stake  
24 here.

25 The prosecution's position was that the  
26 company took a deliberate step to violate the  
27 Regulation by designating the superintendent's



1 office as the smoking area.

2 The evidence of Mr. Wong established a *prima*  
3 *facie* case.

4 The defence presented at the hearing was to  
5 the effect, in answer to that point, that there  
6 was a designated smoking area but that designated  
7 smoking area was the lunch room and that the sign  
8 that Mr. Wong said was on the site  
9 superintendent's office door was in fact on the  
10 lunch room door. But there was no direct  
11 admissible evidence that the sign was on the  
12 lunch room door on May 20th. The only evidence  
13 was evidence from Mr. Stube, who was not there on  
14 May 20th, who said that steps were taken to  
15 designate the lunch room as the smoking area;  
16 that he saw photographs of the sign on the door  
17 but he did not know when those photographs were  
18 taken; and he could not say when he saw those  
19 photographs. So as Mr. Malakoe said, there is  
20 nothing in Mr. Stube's evidence that necessarily  
21 would contradict the evidence of Mr. Wong, that  
22 on May 20th Mr. Wong saw that sign on the site  
23 superintendent's door. It certainly appears from  
24 the Justice of the Peace's reasons that he relied  
25 to some extent on Mr. Stube's evidence in coming  
26 to his conclusion that the prosecution had failed  
27 to prove its case.

1           So we have here a positive defence, a due  
2 diligence defence - essentially the defence  
3 saying we designated the smoking area, it was the  
4 lunch room, the sign was on that door. Well if  
5 that was the defence, then there was a  
6 requirement to consider the next question as to  
7 whether the lunch room could be designated as the  
8 smoking area. I have serious doubts about that,  
9 but that was a question that was not discussed at  
10 the hearing and it was not analyzed by the  
11 Justice of the Peace. Hence my conclusion that  
12 there was a misapprehension of the evidence and  
13 issues in this case by the Justice of the Peace.  
14 His focus was on whether there was proof of  
15 smoking actually taking place in that enclosed  
16 area when in fact the whole premise of the  
17 Crown's case rested on the evidence of Mr. Wong,  
18 his direct evidence to the effect that he saw the  
19 sign on the site superintendent's door on May  
20 20th. That was the question that should have  
21 been answered. If there was to be evidence  
22 presented to contradict, or evidence relied on to  
23 contradict that point, then because it is such an  
24 essential point of this prosecution, then it  
25 should have been evidence that was properly  
26 admissible and certainly not evidence that is  
27 based on something that was not even in evidence,

1           such as the photographs that Mr. Stube referred  
2           to, photographs that he himself did not take,  
3           could not say when they were taken, and did not  
4           have with him to present to the court.

5           Furthermore, I think there should have been,  
6           in exploring the due diligence aspect of the  
7           case, an analysis of why the company thought it  
8           could designate the lunch room as the designated  
9           smoking room. It may be that some mistake of  
10          fact or a mistaken reliance issue is available,  
11          but of course these were not explored during the  
12          hearing. I think if the issue can be focussed,  
13          and if the issue had been more focussed and the  
14          evidence had been directed to that issue  
15          specifically, then I think it would have been  
16          clearer to the Justice of the Peace as to the  
17          real question that he needed to answer.

18          One can discuss at great length the type of  
19          offence created by this Regulation - whether  
20          ongoing conduct can amount to an offence; whether  
21          ongoing lack of conduct can amount to an offence;  
22          whether, for example, as in this case, evidence  
23          of smoking in the site superintendent's office on  
24          other days and other times can amount to the  
25          offence. But I do not think it would be fair to  
26          the company to recast the prosecution in some  
27          other way than how it was put at the original

1 hearing. As I said, the basis of the  
2 prosecution, it seems to me, was simply because  
3 of the sign that the safety officer said he  
4 observed on the site superintendent's office on  
5 May 20th. If there was to be some other basis of  
6 the prosecution, then it should have been made  
7 clear to the company. But it was that question  
8 that was lost in the evidence and I think led the  
9 Justice of the Peace to misapprehend the point  
10 that he had to decide.

11 I do not want to be seen as being overly  
12 critical of the Justice of the Peace because, in  
13 all fairness, I think there was quite a bit of  
14 confusion in the evidence and I think it could  
15 have been presented in a far more clearcut  
16 manner.

17 In my opinion the verdict cannot stand and  
18 therefore I will set it aside and direct that a  
19 new trial be held before a different Justice of  
20 the Peace, or perhaps counsel can agree to move  
21 this into Territorial Court.

22 As I said previously, counsel, I want to  
23 thank both of you for your submissions, they  
24 certainly helped to clarify in my mind what the  
25 essential point here was.

26 I am simply going to ask that one of you  
27 take out a formal order and the other one consent

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to it, and that can be entered in due course.

Any questions?

MR. MALAKOE: No, sir, thank you. Ms. Kay?

MS. KAY: No, sir.

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Certified to be a true and accurate transcript pursuant to Rule 723 and 724 of the Supreme Court Rules of Court.

*Awright*  
\_\_\_\_\_  
Annette Wright RPR, CSR(A)  
Court Reporter

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