

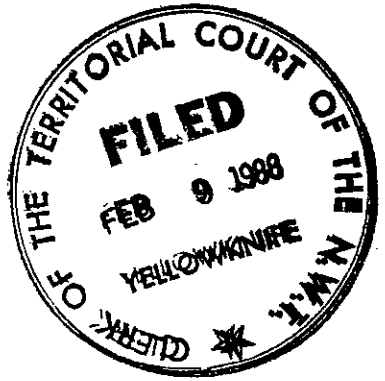
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

HER MAJESTY THE QUEEN

and

JOSEPH AGLUKKAQ



Heard at Yellowknife, N.W.T.

Decision Reserved: December 16, 1985

REASONS FOR JUDGMENT

of

His Honour Judge R. M. Bourassa

APPEARANCES:

- | | |
|----------------|--|
| Ms. L. Wall | Counsel for the Crown |
| Ms. E. Bengts | Counsel for the Defence |
| Mr. B. Funston | Counsel for the Government
of the Northwest Territories |

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The Defendant is a resident of Gjoa Haven, N.W.T., and is before the Court on a charge of possession of liquor, contrary to the Gjoa Haven Liquor Prohibition Regulations and Section 3 thereof. The issue before the Court is the constitutionality of those Regulations.

The Government of the Northwest Territories, no doubt in response to the depredations that alcohol has wreaked across the North, has provided for 'local option' prohibition or restriction similar to that which was in force in many parts of Canada in the 1930s. The Liquor Ordinance, Revised Ordinances of

the Northwest Territories, 1974, CL-7, provides as follows:

Section 120

- (5) Where at a plebiscite under subsection (1) at least sixty per cent of the votes cast by the qualified voters of the settlement or area indicate that the possession, purchase, sale or transport of liquor ought to be restricted in the settlement or area, the Commissioner shall declare the settlement or area a restricted area.
- (6) When a settlement or area has been declared a restricted area, the Commissioner shall make regulations to carry into effect the result of the plebiscite and may prescribe the penalties that may be imposed for violations of the regulations. 1974(1st), c.7, s.2.

Section 121

The Commissioner may, subject to this Ordinance, make regulations...

- (j) respecting any other matter necessary or advisable to carry out effectively the intent and purpose of this Ordinance. 1970(2nd), c.12, s.117.

Pursuant to this enactment by the Legislative Assembly, and following a regularly held plebiscite, the Commissioner of the Northwest Territories made the following Regulations known as the **Gjoa Haven Liquor Prohibition Regulations**:

- (2) All that portion of the Territories that lies within 20 kilometers of the buildings and the settlement of Gjoa Haven, commonly known as the Settlement Office, is declared to be a prohibited area.
- (3) No person shall purchase, sell, transport or possess liquor within the prohibited area as described in Section 2.

- (4) Every person who violates any provision of these Regulations is guilty of an offence and liable on summary conviction to a fine not exceeding \$500, and to a term of imprisonment not exceeding 30 days, or both.

A further element must be noted: This legislative scheme of things was changed in 1983, in that the sections of the **Liquor Ordinance** referred to above were repealed and replaced by the **Liquor Act**, Statutes of the Northwest Territories, 1983, c. 26, s. 46(7) & (8). These provisions basically repeated the provisions of Section 120 and 121 of the **Liquor Ordinance** with one exception -- that being that the Commissioner was no longer to declare a Settlement or area restricted; that function is now to be performed by "The Executive Member" who is also responsible for making the Regulations.

The Defendant before the Court is now in jeopardy of being convicted pursuant to a Regulation made under the repealed **Liquor Ordinance**. The question before the Court is whether or not those Regulations retain their validity under the new **Liquor Act**.

At first blush the answer appears to reside in Section 25 of the **Interpretations Act**, Revised Ordinances of the Northwest Territories, 1974, c. 1-3, which states as follows:

Section 25 - Where an enactment is repealed in whole or in part, and other provisions are substituted by way of amendment, revision or consolidation -

- (a) all regulations made under the repealed enactment remain in force, insofar as they are not inconsistent with the substituted enactment, until they are annulled or others made in their stead.

However, Defence argues that Sections 120 and 121 of the **Liquor Ordinance** are ultra vires and therefore Regulations made pursuant to that **Ordinance** are void ab initio. That even though the **Liquor Act** corrects the defect which would render Sections 120 and 121 ultra vires, the Regulations under the old law remain void. They do not exist in law and cannot support a conviction today.

I agree. The doctrine of ultra vires applies to the power of a delegate to enact subordinate legislation. See **McEldowney vs Forde**, [1969] 2 All England Reports, 1039(H.L.). Clearly, subordinate legislation is subject to the doctrine of ultra vires, and in that regard I refer to **The Principles of Administrative Law**, D.P. Jones and A. De Villars, Carswell, 1985, and **Laker Airways Limited vs The Department of Trade**, A.E.L.R. [1977] 2 All E.R., p. 182.

In my view, Sections 120 and 121 of the **Liquor Ordinance** were ultra vires of the Northwest Territories Legislative Assembly in that they purported to direct the

Commissioner of the Northwest Territories, and thereby limited his executive power as contained in Section 5 of the **Northwest Territories Act**, R.S.C. 1970, c. N-22, and that reads:

- (5) The executive powers that were, immediately before the 1st day of September, 1905, vested by any laws of Canada and the Lieutenant Governor of the Northwest Territories, or of the Lieutenant Governor of the Northwest Territories and Council, shall be exercised by the Commissioner so far as they are applicable to and capable of being exercised in relation to the Government of the Northwest Territories as it is constituted at the time of the exercise of such powers.

This same issue was apparently considered by the Privy Council in the **Initiative and Referendum Act**, 1919, 48 D.L.R., 18 (P.C.), where the Court held that legislation that purported to compel the Lieutenant Governor of the Province of Manitoba to submit certain proposed laws to a public vote and rendered him powerless to prevent such legislation from becoming actual law if approved by a majority of the voters was ultra vires.

The parent legislation being, in my view, ultra vires, it follows that the subordinate legislation cannot stand and is void ab initio. Can the subordinate legislation now find life-giving blood in the new legislation, being the **Liquor Act**, Statutes of the Northwest Territories, 1983, c. 26?

In my view, no. The subordinate legislation is void ab initio, having had no valid authority for its enactment, it cannot now, after the fact, be brought to life by virtue of the new legislation, but remains stillborn.

In light of these findings it is clear that the Defendant cannot be convicted, notwithstanding his plea of guilty.

A handwritten signature in black ink, appearing to read 'R. M. Bourassa', with a long horizontal flourish extending to the right.

Judge R. M. Bourassa