

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

CLAYTON CAPOT-BLANC



FURTHER WRITTEN REASONS

of

His Honour Judge Thomas B. Davis
for an Order made on February 10th, 1988,
on Non-Forfeiture of Seized Liquor.

APPEARANCES:

S. AITKEN

Counsel for the Crown

J. LILLEGRAN

Counsel for the Defence

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On February 10th, 1988, at Tuktoyaktuk, Northwest Territories, following the dismissal of a charge of keeping liquor for sale in violation of the **Liquor Act**, I ordered that the seized liquor bottles which were produced as exhibits, be returned to the rightful owner rather than allowing the liquor to be forfeited pursuant to Section 117(3) of the **Liquor Act**.

Section 117(3) of the **Liquor Act** reads as follows:

Where no application has been made for the return of any liquor or other thing seized under Subsection 116(2) or an application has been made but upon the hearing thereof no order of restoration has been

made, the liquor or other thing seized is forfeited to the Government of the Northwest Territories to be disposed of in such manner as to the Board seems just.

My order was based on the observation that if the charge were dismissed, there would be no direct relationship between the possession of liquor and any offence under the **Liquor Act**. It was my opinion that the automatic forfeiture of such lawfully possessed liquor would be contrary to fundamental justice or would constitute an abuse of power or would be a violation of the **Constitution Act**.

Liquor is not an unlawful substance, although the manufacture and distribution and possession of it has been designated as unlawful unless authorized or licenced by the appropriate authorities.

Narcotics and some designated drugs are themselves designated as unlawful substances, and the manufacture, distribution and possession of them has been held to be unlawful except in very limited and restricted circumstances, specifically authorized by licenced authority. The automatic forfeiture of

such unlawful substances from their possessors does not seem unjustified under any legal principles since the possession of such substances has been in itself designated as an unlawful act.

Subsection (4) of Section 117, which upon a conviction being entered, causes forfeiture of seized liquor or things that are produced as evidence of an offence, is not in violation of any principle of Canadian Law.

Possession of liquor, even in substantial quantities, is lawful unless it has been proven to have been possessed for the purpose of sales, at which time such possession becomes unlawful under the **Liquor Act** pursuant to Section 77(b) which reads as follows:

77. Except as provided in this offence or the Regulations, no person shall
- (a) expose liquor for sale;
 - (b) keep liquor for sale; or
 - (c) sell or offer to sell liquor.

The purpose of the **Charter** is to regulate the relationship of an individual with the Government. Section 21 constrains governmental action inconsistent with the rights and

freedoms specifically guaranteed in other provisions of the Charter. The Charter applies to individual judicial actions and rulings, including the actions of a Justice of the Peace in issuing a search warrant, which contravenes the Charter. (Southam Inc. and The Queen, 1982, 70 C.C.C., (2d) 264, and R. vs Rothbotham, as summarized in 13 W.C.B. 105 by the Ontario High Court.)

It is acknowledged that Section 8 of the Charter does not apply to the seizure of real property. Both searches and seizures of goods are often required during investigations into possible offences. (Becker vs R., (Alta) (1983) 148 D.L.R. (3d) 539.)

The concern of the Court today is related only to the goods seized, their care, possession and ownership, following such seizure. Mere administrative convenience cannot justify a limitation on, or a violation of, a Charter right or freedom. (Singh vs Minister of Employment, 1985, 1 S.C.R., 177, 17 D.L.R. (4th) 422.)

The convenience of prescribing forfeiture of legally seized goods exceeds any valid objective or purpose of legislation which legally authorized their initial seizure.

Although it would be more convenient to have the goods forfeited, upon failure of the owner - victim to make application to a Court for their return, should this convenience interfere with or override one's right to possession in his property, even if that property is temporarily the subject of an investigation by police or of a civil or criminal judicial process?

The initial seizure of goods in a police investigation, resulting in the laying of a charge is to assemble evidence, facts and exhibits to establish the offence. Such seizure might temporarily eliminate the use or consumption of the seized articles, but surely, the avoidance of their use or consumption is different from a temporary loss of possession in the goods.

If the seized goods are proven to have been the subject of or used in the commission of an offence, then forfeiture may well be, and often is, a valid and proper disposition by a Court. Forfeiture may also be a valid consequence after conviction has been entered, as is the case under Section 10(8) of the **Narcotics Control Act**, if the Minister directs such forfeiture.

Failure to apply within the prescribed time period for the return of seized goods, under the **Narcotic Control Act**, does

not automatically result in forfeiture, as the accused person or the owner of the goods is not precluded from taking civil action for the return or recovery of the seized property. (**Smith vs R.**, 1975, 27 C.C.C. (2d) 252. 1975, 67 L.R. (3d) 177 (Federal Court T.D.)).

Where no conviction is entered under the **Narcotic Control Act**, a British Columbia County Court has found that the seized goods remain with the inherent jurisdiction of the Court and the Court should exercise its jurisdiction by ordering the return of the goods or order a forfeiture, as the Court sees fit, based on the evidence adduced. (**R. vs Newstead**, 1981, 59 C.C.C. (2d) 510.)

The possession of a narcotic or an illicit drug is itself an offence, making the delivery of seized drugs to the Minister, and his subsequent disposition of them a reasonable consequence. Section 10(7) of the **Narcotic Control Act**, by delivering any other thing seized to the Minister does not cause automatic forfeiture, but allows the Minister to dispose of those things by either forfeiture or by the return to the appropriate and lawful owner.

Under the **Liquor Act** of the Northwest Territories, a peace Officer may seize, by Section 116(2)(a), any liquor that is, in the opinion of a Peace Officer, unlawfully kept or had for unlawful purposes.

The **Act** then purports by Section 117(3) to authorize the forfeiture of any liquor or other thing seized, and places the control over such seized goods in the Liquor Licensing Board.

The transfer to the Board of such control of the seized goods usurps the inherent jurisdiction of the Court over exhibits, if such seizure had as its purpose the production of exhibits for proof of an unlawful act.

The seizure of lawful goods, such as liquor which is kept, but not contrary to the **Act**, is not authorized, as the **Act** only authorized seizure of liquor and packages in which it is unlawfully kept in contravention to the **Act** - Section 116(2)(a).

When the Court finds the accused did not have the seized liquor for sale, then the liquor has not been shown to be "kept contrary to this **Act**", and such liquor is nothing more than any other type of exhibit. The exhibit then must be subject to

an order of the Court, but by standards of Canadian jurisprudence, should not automatically be forfeited to the Liquor Board.

The time limitation period of 30 days (Section 117(1)) in which to file an application for the restoration or return of seized goods is unreasonable.

To allow the Section to remain would give excessive and abusive powers to the police who upon knowing of the purchase of quantities of liquor by any citizen, could search and seize all liquor in a community to avoid excessive consumption by people, on the belief that some people have the liquor for the unlawful purpose of becoming intoxicated in a public place.

Such an inappropriate seizure would then put an unreasonable burden on the public to apply to a Justice in a Court within 30 days for the return of lawfully held liquor.

From the basis of fundamental justice, this liquor, lawfully held and inappropriately seized, or the liquor found not to be held for purposes contrary to the Act, should not be automatically forfeited and should not even be subject to the 30

day limitation period without the continuing jurisdiction of the Justice or a Court to dispose of the goods.

The Automatic Forfeiture penalty purported to exist under Section 117(3) is a power that can be classified as arbitrary, despotic and autocratic and is beyond the proper bounds of legislative authority.

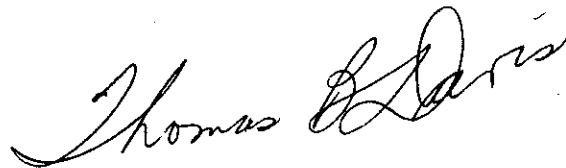
Automatic Forfeiture of seized goods which are not proven to have been held for an unlawful purpose also violates the law in that the seizure then becomes a form of expropriation without compensation. It has always been a principle of law that one's possessions are free from confiscation without compensation.

When no conviction follows a trial relating to a seizure of goods, those being the subject matter of the charge, then there is no further any valid relationship of the goods to any offence and such goods should be returned to the appropriate owner.

Section 117(3) of the **Liquor Act** of the Northwest Territories violates the above stated principles of justice

causing me to find the Subsection to be in violation of fundamental justice.

I, therefore, order the return of the seized liquor to the rightful owner following my earlier dismissal of the charge before the Court on June 28th, 1988.

A handwritten signature in cursive script, reading "Thomas B. Davis". The signature is written in dark ink and is positioned above the printed name.

Judge Thomas B. Davis