

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-and-

JAMES MARLOW



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Transcript of the Reasons on the Voir Dire and Reasons for Sentence of His Honour Judge R.M. Bourassa, in Yellowknife, in the Northwest Territories, on the 13th day of June, A.D., 1991.

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**APPEARANCES:**

Mr. A. Ferguson: For the Crown

Mr. G. Francis: For the Accused

(CHARGED UNDER SECTION 76.1 OF THE LIQUOR ACT)



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THE COURT:

These are my reasons on the voir dire with respect to the admissibility of some evidence, a box and a number of bottles of liquor. The argument being that the Charter of Rights, in particular the freedom from unreasonable or unlawful search and seizure, has been -- the defendant's rights to protection from unreasonable or unlawful search and seizure has been violated.

After hearing the evidence and the submissions of counsel, I conclude that there is no charter violation firstly. The acts that bring the matter to court, at least the search and seizure, were acts that took place between private individuals. There is nothing on the evidence before me that suggests in any way that the pilots involved were acting as agents for the Crown or the Queen or the police. The evidence before me discloses that they were acting as law-abiding citizens seeking to comply with the law, the law being that they could be liable for transporting liquor into a prohibited area. The pilots and the airline involved were concerned that they not breach that law, and that's the only evidence that I have.

They determined, as a matter of policy, that they would check bags for dangerous goods and liquor going in on a plane. The suspicions of Mr. Comerford, the co-pilot and baggage handler were raised because first of all there was no person accompanying that

1 particular box to Snowdrift; secondly, that the box  
2 was much heavier than one would ordinarily or  
3 reasonably expect or that what, in his experience, was  
4 normal; and finally, that it wasn't normal to ship in  
5 this fashion.

6 Mr. Comerford was quite specific that the box  
7 could have contained anything and "we," he said,  
8 "can't just ship 'anything'." I'm conscious of the  
9 fact that they can't ship liquor. The pilot in  
10 command who is responsible for everything that occurs  
11 on his aircraft and who, as I understand it in law,  
12 would be primarily responsible should it had been  
13 determined at a later point in time, for example on a  
14 search by a member of the R.C.M. Police in Snow Drift,  
15 could have been held responsible for this shipment, a  
16 serious repercussion for a pilot, a serious  
17 repercussion for the carrier.

18 Their motivation in opening this box was to comply  
19 and obey a law. It was only after the box was opened  
20 and they were faced with the presence of contraband  
21 that things went decidedly downhill for the  
22 defendant. At that point the pilots and the  
23 dispatcher or ticket agent, Miss Lalonde, not knowing  
24 what to do, faced with a possible infraction of the  
25 law, did what I think any responsible citizen should  
26 do, they phoned the police. And at that point the  
27 police investigated and determined on reasonable and

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probable grounds that an offence may have been committed.

I can find nothing on the evidence before me which would constitute or cloak the pilots or the carrier with a quasi-state role. The evidence before me is they were just trying to protect themselves, the Charter not applying between private citizens, and I don't think I need to go further.

Out of abundant caution, keeping in mind that the Court ought not to play, as it were, with Charter considerations, but if I'm wrong and it is seen in light of other jurisprudence that is not before me that the actions of the pilots and the carrier are quasi-state actions visa-a-vis the defendant, in my view there is still no violation. This was an administrative search by private citizens and I believe it's the R vs. McKinnley Transport Case, a decision of the Supreme Court, Justice Wilson determined that administrative searches may involve a lesser standard in terms of considering whether or not there has been a breach of the Charter. As Justice Hugessen said in the Federal Court of Appeal in College of Physicians and Bishop, "in short there is a difference in kind between the tramp of jackboots and the sniff of the inspector of drains."

In a nutshell, if I'm wrong and the Charter does apply, in my view there is no violation. The search

1 was reasonable, a lesser standard applies, there is  
2 virtually, in my view, no expectation of privacy in  
3 terms of either carrying on luggage, shipping boxes,  
4 or shipping your own goods on aircraft, and the sniff  
5 of the inspector of drains determining that there is  
6 liquor in my view would not outrage the public by any  
7 means, the level of expectation of privacy being so  
8 low in this matter.

9 (SUBMISSIONS ON CONVICTION BY DEFENSE)

10 THE COURT: Well, I'm satisfied the offence is  
11 made out beyond any reasonable doubt, I have no  
12 evidence of the exercise of due diligence. On  
13 sentence?

14 (SPEAKING TO SENTENCE BY CROWN AND DEFENSE)

15 THE COURT: Well, the accused or the Court has to  
16 sentence the accused on a charge of attempting to  
17 transport liquor into a prohibited area. It's obvious  
18 on the facts and the accused's record, the accused  
19 knows it's a prohibited area, he knew what he was  
20 doing, and he was attempting to ship a substantial  
21 amount, and I take three bottles as a substantial  
22 amount, into the dry area, that liquor causes problems  
23 generally and specifically in Lutsel K'E or Snowdrift  
24 is something I can take judicial notice of. The  
25 number of charges in that community following acts of  
26 violence, death, injury, dismemberment, all involving  
27 liquor is a nonstop litany.

1           As well, the chief of that community has struggled  
2 long and hard and local members of that community are  
3 struggling to keep liquor out to avoid the problems  
4 that are implicit and inherent with the abuse of  
5 liquor and to heal that community from all of the  
6 ravages of liquor. And this accused sits back in  
7 Yellowknife and virtually seeks to undermine the  
8 community will expressed in the local bylaw and  
9 plebiscite. It's not to be countenanced.

10           It's not the accused's first offence, it's his  
11 first offence at attempting to transport, but he's  
12 been convicted of previous offences of possession of  
13 liquor in a prohibited area and on the last occasion a  
14 fine of \$350 had no -- obviously had no impact on  
15 him.

16           The Crown is asking for a fine, I find myself in a  
17 position where my inclination would be to impose a  
18 term of imprisonment. I think the Court has to make  
19 it very clear that it will support and will enforce  
20 community efforts such as this in no uncertain  
21 terms. The community will has been expressed by a 60  
22 percent vote on a plebiscite, that can't be  
23 ignored. The problems that follow with the abuse of  
24 liquor can not be ignored. This man knows better and  
25 deliberately chose to contravene the law. Financial  
26 penalties have not deterred him.

27           The Crown Attorney represents the public at large

1 as a quasi Minister of Justice and is not requesting  
2 imprisonment. I would point out to Mr. Marlowe that  
3 he is as close, in my view, of going to jail as he  
4 possibly can for offences of this nature. Were it not  
5 for the position taken by the Crown Attorney I would  
6 be considering -- in fact, I've considered it, I would  
7 be imposing a term of imprisonment. You know  
8 better. You're old enough. Enough is enough, Mr.  
9 Marlowe, you keep liquor out of the community. If you  
10 don't like the law then you work in a democratic way  
11 and have the law changed.

12 I'm assuming and I'm confident that the Crown will  
13 take note of this, if you're back before the courts  
14 again for a conviction of a prohibition offence the  
15 Crown will be in a position to say to this Court or  
16 the next Court 'he was warned, he still won't obey,'  
17 and you can take your knocks that you may  
18 deserve. Stand up please. There will be a term of  
19 imprisonment of one day together with a fine of \$500  
20 in default of payment two months in jail.

21 MR. FRANCIS: Your Honour, I'm sorry, did I hear Mr.  
22 Ferguson correctly when he read the Act saying that  
23 there it was an either/or situation?

24 THE COURT: No, it isn't either/or.

25 MR. FRANCIS: Sorry.

26 THE COURT: Do you require time to pay the fine?

27 THE ACCUSED: I'd say about six months because I'm

1 not working or anything.

2 THE COURT: There will be three months to pay the  
3 fine, Mr. Marlowe, you can always make application  
4 under the Fine Option Program. I don't think I can  
5 impose -- I don't think anyone has ever talked about  
6 it, but can a victim of crime surcharge exceed what  
7 the maximum fine is once you add it on? I wouldn't  
8 think so off the top of my head, but I'm not going to  
9 impose a victim of crime surcharge anyway, so I'll  
10 avoid the issue, but counsel may want to tuck that  
11 into your leisure time some Sunday afternoon at 9  
12 o'clock at night.

13 MR. FERGUSON: We'll look at the Victims of Crime Act  
14 for the Northwest Territories, it is contained in  
15 there. So I'm sure that Sunday morning will --

16 THE COURT: Well, it's a surcharge it may --

17 MR. FERGUSON: It's over and above and separate and  
18 apart from anything else.

19 THE COURT: That's right. Well, I'm not going to  
20 impose it anyway. I'm imposing the maximum fine in my  
21 view the surcharge will be a hardship. Subject to the  
22 appeal period the liquor siezed will be destroyed.

23 MR. FERGUSON: Thank you, Sir.

24 THE COURT: Is that everything?

25 MR. FERGUSON: Everything for this morning unless --

26 MR. FRANCIS: The day imposed in jail is the day in  
27 court today?

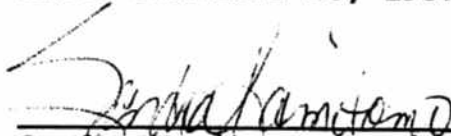


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THE COURT:                    There will be no warrant.  It's a  
warning to your client.

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Certified Pursuant to Practice Direction #20  
dated December 28, 1987.



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Sandra Kamitomo  
Court Reporter