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TC CR 84,035

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

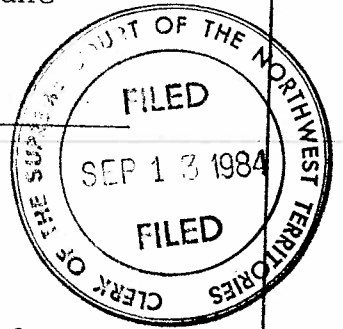
IN THE MATTER OF:

HER MAJESTY THE QUEEN

VS

ROBINSONS' TRUCKING LTD.

Transcript of the Oral Judgment Delivered by His
Honour Judge R. M. Bourassa, sitting at Yellowknife
in the Northwest Territories, on Thursday, June
21st, A.D., 1984.



APPEARANCES:

MR. G. BICKERT: Counsel for the Crown

MS. G. LANG: Counsel for the Defence

(COPY AS EDITED BY PRESIDING JUDGE.)

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1 THE COURT: To fully respond to the issues raised during
2 trial, these written reasons, incorporating and elaborating
3 the oral reasons previously given have been prepared.

4 The defendant, Robinsons' Trucking Ltd. has been
5 tried for two offences contrary to s. 33(2) of the Fisheries
6 Act, RSC 1970 c F-14 as amended.

7 "...That on or between the 1st and 2nd of March
8 AD 1984 Robinson's Trucking Ltd. did deposit
9 or permit the deposit of a deleterious substance,
10 namely fuel oil in water frequented by fish or
11 in a place under conditions where such deleterious
12 substance may enter such water, namely the
13 Cameron River..."

14 and that,

15 "...on or about the 7th of March, 1983, at or
16 near Ross Lake in the Northwest Territories, did
17 deposit or permit the deposit of a deleterious
18 substance namely fuel oil, in water frequented
19 by fish, or in a place under conditions where
20 such deleterious substance may enter such water,
21 namely Ross Lake contrary to Section 33(2) of the
22 Fisheries Act."

23 Separate trials were conducted on each alleged
24 offence, however on consent of Crown and Defence some
25 evidence given on the first trial was applied to the
26 second trial. This being in accordance with the law as
27 set out in a number of decisions particularly Matheson v.

1 The Queen (1981) 59 C.C.C. (2d) 289, and R. v. Carver
2 (1979) 34 N.S.R. (2d) 541 (SC App. Div.)

3 I would note that each case, the facts, exhibits and
4 evidence relating thereto have been considered separately
5 and my conclusions on each arrived at independantly
6 of the other, however, for the sake of convenience I will
7 deal with both offences in these reasons.

8 The findings and decisions of this court are as
9 follows:

10 The defendant operates an extensive trucking enterprise
11 based in Yellowknife, N.W.T. Its experience in the
12 trucking industry as it exists in the Northern
13 environment extends over seventeen years. The defendant
14 has grown and prospered over the years from a four truck
15 operation at its inception to its present size of in
16 excess of 100 trucks plus related support and other
17 equipment.

18 The defendant's president, namesake and driving
19 force has in excess of 30 years in the industry and
20 specifically, experience with Winter Roads.

21 At all material times, in both cases, the defendant
22 was executing its contractual obligations in delivering
23 fuel oil from Yellowknife to Lupin Gold Mine over a
24 winter road of approximately 400 miles. Ninety-two tractors
25 (trucks) and tankers (trailers) were being utilized for
26 this.

27 A portion of the winter road was a public road known

1 as the Ingraham Trail; a road which gives access to
2 various public and private recreational facilities, lakes,
3 camping grounds, cottages, fishing holes and the like.

4 At one point, the Trail near its end crosses the
5 Cameron River. The bridge and its approaches are a
6 hazard to any traffic. The road continues on over
7 innumerable frozen lakes and portages until it ends
8 at Lupin.

9 The defendant had contracted to carry 3.7 million
10 gallons of fuel oil, quantities of cyanide and other
11 substances over that road during the winter of 1982 and
12 1983. This represented a significant increase in the
13 defendant's work and in order to discharge its obligations
14 it resorted to hiring tractors, tankers and drivers as
15 a unit. Of 75 tractor/tankers that worked out of
16 Yellowknife forty were "leased" units.

17 Driving winter roads is difficult at the best of
18 times. The extremes in temperatures, treacherous road
19 surfaces and other elements all combine to make accidents,
20 that is to say, motor vehicle accidents inevitable. This
21 fact is confirmed by both Crown and Defence witnesses.

22 In both cases before the Court, leased units of
23 tractor/tankers were involved. In both cases the drivers
24 were from the South and totally inexperienced with winter
25 road conditions; neither had ever travelled this road
26 before; neither had anything more than marginal experience
27 pulling fuel tankers; and in both cases, the drivers

1 arrived in Yellowknife, loaded their tankers with fuel
2 oil and were sent on their way without the benefit of
3 any kind of briefing as to road hazards, oil spill
4 response techniques, emergency procedures or a driving
5 skills test or checkout. The defendant says "I
6 figured if they owned a truck they could drive it".

7 In both cases the tractors involved were not
8 equipped with radio communications, emergency equipment -
9 not even a shovel.

10 There is evidence before me that there are, and have
11 been, numerous types of damage control kits commercially
12 available, "off the shelf" at marginal cost. These
13 kits are designed to cope with the precise problems that
14 the defendant was confronted with, indeed their
15 utilization would have prevented the very actus reus.

16 I find that the fuel oil carried by the defendant
17 and involved in each case is a "deleterious substance"
18 i.e. deleterious to fish within the meaning of the Act.
19 Proof that fish were present at the material times or that
20 the water itself was rendered deleterious is not
21 required. See R. v. Canada Forest Products (1978) 7
22 C.E.L.R. and R. v. MacMillan Bloedel (1979) 4 W.W.R. 654
23 BCCA.

24 On the evidence, I find that Ross Lake and the
25 Cameron River are waters frequented by fish.

26 The Cameron River Incident.

27 On March 1, 1983, a tractor and tanker left Yellowknife

1 loaded with 7400 gallons of fuel oil. The driver was
2 unable to negotiate the North approach to the bridge.
3 While trying to reverse the tractor and tanker slipped
4 off the road and rolled over. Fuel oil started leaking
5 from the tanker vents. The tractor/tanker were lying
6 approximately 150 - 200 feet uphill from the Cameron
7 River. Sometime later, the defendants' president arrived
8 with more equipment and salvage operations commenced.
9 Approximately 3,500 gallons of the fuel oil escaped
10 during these operations. It fell to the snow covered
11 ground and not surprisingly acted in accordance with
12 its nature as a liquid and flowed down hill into the
13 Cameron River - both over and under the ice. Ultimately,
14 evidence of fuel oil contamination was found in both
15 fish and quiet areas downstream.

16 Ross Lake Incident.

17 On the 7th of March, another of the defendants'
18 "leased" units was travelling across the ice on Ross
19 Lake in clear daylight when the driver lost control at a
20 curve in the road resulting in the tractor/tanker rolling
21 over and coming to rest on its side. Again fuel oil began
22 to leak from the vents. As in the earlier incident, the
23 vents could not be closed for want of as little as a
24 wooder lever.

25 By the time the defendants' salvage equipment arrived
26 some five hours later, and righted the tanker approximately
27 2000 gallons had leaked out onto the surface of the ice

1 road, into the lake through cracks in the ice and
2 under the snow beyond the road's perimeters. In early
3 summer there was still significant evidence of oil
4 on the surface of the lake.

5 I am satisfied that on all of the evidence the Crown
6 has established a prima facie case in each case. It is,
7 of course, open to the defendant to resist conviction
8 by establishing on the balance of probabilities that
9 it exercised "all due diligence" to prevent the actus reus

10 What is actus reus? The defendant argues that the
11 words in the Act "...did deposit or permit the deposit..."
12 relates to the overturn of the vehicles. That is to say
13 'permitting the accident' and that the due diligence
14 defence is related to the accidents/rollovers
15 themselves. Evidence was called describing the poor
16 conditions of the road, the bridge, the ice and the
17 like. The defendant argues secondly that once the roll-
18 overs occurred, due diligence was exercised in the
19 salvage, containment and following clean up procedures.

20 The offence is - and I paraphrase - 'the depositing
21 of fuel oil in water frequented by fish'. The actus
22 reus is causing or permitting those two substances from
23 coming together.

24 "The depositing itself of a deleterious
25 substance is not a wrongful act; the wrongfulness
26 of the act is depositing such a substance in
27 water frequented by fish..."

per McCarthy J R. v. Canadian Pacific Limited, FPR p.99,

1 B.C. Prov. Ct. Feb. 11, 1977.

2 To succeed, the due diligence defence must relate to
3 that act and the events leading to that act. One can
4 operate a motor vehicle in a careless and even a
5 negligent fashion or spill fuel oil without falling
6 under the provisions of s. 33(2).

7 Ideally, the defendant had at least three opportunities
8 to avoid or prevent the prohibited act, and therefore three
9 opportunities to exercise all due diligence. They are,
10 (1) The prevention of accidents or rollovers, (2) The
11 prevention of oil spills after an accident or rollover, and
12 (3) Preventing the oil from reaching the water which
13 could be effected by proper land based containment and
14 clean up.

15 What duty of care lies upon the defendant?

16 The duty is a flexible one:

17 "The extent the accused must go in exercising
18 due diligence will depend upon the circumstances
19 of each case. The standard of care required
20 must be commensurate with the seriousness of
the injury."

21 Stuart CJ, YTC R. v. Gander 62 C.C.C. (2d) 326.

22 That rollovers are inevitable is a given fact; two
23 principles must flow from that fact, one that the
24 defendant minimize the accident rate as best as possible;
25 and two that the defendant is forewarned of the very real
26 risk and danger of an oil spill and an offence under
27 the Act.

In both these cases the defendant did nothing to

1 minimize the risk of an accident. The new drivers were
2 not briefed, trained or familiarized with what was
3 expected of them. They were simply loaded and put on
4 the road. This is just not enough.

5 With respect to the second point - under these
6 conditions can it be said that the defendant exercised
7 "all due diligence" (my emphasis)?

8 In the Cameron River case, the defendant itself through
9 its president admitted to "being caught with our pants
10 down". Upon arriving at the scene (the tanker still
11 leaking through the vents for want of a method to
12 close them) it was determined that the only way to
13 drain the tanker which had to be done prior to righting
14 it, was to allow a quantity of fuel oil to escape until
15 the level in the tank was low enough to admit an
16 evacuation hose. In conducting this operation a large
17 quantity of fuel oil escaped onto the ground when the
18 hatch was opened. The defendant had equipment on site to
19 protect and salvage the truck and tanker but absolutely
20 no equipment to effect such a draining without spillage.

21 The defendants' actions were strictly ad hoc
22 demonstrating a complete lack of planning or forethought.
23 This was the scene on site notwithstanding the ready
24 availability of 'off the shelf' equipment which would
25 have solved the defendants' problems.

26 The defendant was still in a position to prevent the
27 prohibited act by the exercise of all due diligence in

1 preventing the fuel oil from flowing into the Cameron
2 River. For the same reasons given above, it was unable
3 to do so. Lacking even a shovel and a few meters of
4 plastic sheeting the defendant was reduced to attempting
5 to make a catchement basin and dyke with a broken
6 windshield. It didn't work and the fuel oil escaped
7 into the river.

8 Throughout the salvage efforts the defendant
9 appeared more concerned with the costs involved in terms
10 of man power and equipment rather than its obligations
11 under the Act. I cannot conclude that all due diligence
12 was exercised in the prevention of the spill or in
13 preventing the oil from reaching and entering the
14 Cameron River.

15 Dealing with the Ross Lake incident: The defendant
16 arrived at the scene with salvage equipment and was
17 confronted with substantial quantities of oil leaking
18 from the vents. This time the defendant brought some
19 plastic which was used to make a rough catchement basin
20 from which the fuel was pumped into a standby tanker.
21 The job was poorly done - much oil escaped. When the
22 tanker was emptied, the defendant ignited the oil on the
23 roadway and just left. Later, investigators found
24 oil under the snow hundreds of feet from the road limits.
25 As in the Cameron River incident the defendants' actions
26 reveal a low priority to the obligations imposed under
27 the Act; a virtual absence of any proper equipment,

1 trained personnel or dedicated oil spill prevention
2 equipment.

3 The defendant virtually admits this by stating that
4 the Corporate officer in charge "...was in my bad books
5 for a while". The effort as a whole does not display
6 the exercise of all due diligence.

7 Ice is porous and inevitably fissured. For the
8 purposes of this case I find that oil on the ice is "in
9 the water" within the terms of s. 33(2).

10 In R. v. Westcoast Reduction Ltd. 1 FPR, May 1, 1973,
11 Selbie B.C. Prov. Ct. J.:

12 "The substance involved, fuel oil, is proven
13 deleterious, therefore there is no need to prove
14 the receiving waters were rendered deleterious."

15 In summary therefore - the defendant operates a business
16 to which a real certainty of risk to the public is
17 present. This risk is manageable using inexpensive
18 readily available technology and a modicum of skill.

19 The defendant was virtually unprepared in equipment
20 or planning to meet this risk. The defendant did not
21 exercise all due diligence prior, during or after the
22 respective rollovers. The defendant is convicted on
23 each charge.

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25 The text of this transcript varies
26 from this Reporter's verbatim notes
27 taken at this hearing, such
variation having resulted from
editing by the presiding judge.

Laurie Ann Young
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Court Reporter