

IN THE MAGISTRATE'S COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

FRANK DUNTRA and JOSEPH VICTOR BERTRAND

Trial held at Fort Liard, Northwest Territories.
July 28th, 1977

Reasons for Judgment of:

His Worship Magistrate R.W. Halifax

Counsel on the Hearing:

Mr. R. Hendry, for the Crown

Mr. E.L. Oddleifson, for the Accuseds

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REASONS FOR JUDGMENT OF HIS WORSHIP

MAGISTRATE R.W. HALIFAX

The accuseds are both seperately charged in informations sworn on the 27th day of July, A.D. 1977 at Fort Liard in the Northwest Territories, as follows:

both "that Frank DUNTRA on or about the 7th day of July A.D. 1977 at or near the Muskeg River in the Northwest Territories did leave the vicinity of a fire, to wit: a camp fire, without totally extinguishing said fire contrary to Section 10 of the Forest Protection Ordinance."

and "that Joseph Victor BERTRAND on or about the 7th day of July A.D. 1977 at or near the Muskeg River in the Northwest Territories did leave the vicinity of a fire, to wit: a camp fire, without totally extinguishing said fire contrary to Section 10 of the Forest Protection Ordinance."

As these matters were tried on the same evidence this judgment and the comments herein apply to both Frank DUNTRA and Joseph Victor BERTRAND.

The relevant section of the Forest Protection Ordinance being 1974 R.S. N.W.T. Chapter F-8, reads:

Section 10

"No person shall leave the vicinity of a fire, other than a fire kindled in a stove, furnace or other device suitably designed and capable of confining it, that he has set out, started or kindled until he has totally extinguished it."

The facts out of which these charges arose are very clear. On July 7th, 1977, the accuseds, Frank DUNTRA and Joseph Victor BERTRAND together with Jimmy Duntra, Archie Bertrand and Harry Bertrand had left Fort Liard, Northwest Territories, and proceeded to the Muskeg River area to spend the day fishing. During the day the fishing party stopped on the bank of the Muskeg River and the two accuseds built a fire in an old camp fire spot in order to cook some fish. The evidence indicates that both the accuseds and others use this camp fire spot fairly regularly when in this area fishing. Upon completion of the lunch of fried fish, both accuseds together with one of the others in the party threw all the burning wood into the river and then proceeded to pour several containers of water (approximately three gallons) over the fire area and then covered the fire area with wet mud. About fifteen minutes later both accuseds as well as Archie Bertrand and Jimmy Duntra indicated that the fire was out, that there was no smoke, and the accused Joseph Victor BERTRAND indicated he also stirred the fire area and could see no smoke. Later that day, being July 7th, 1977, just when the party got back to Fort Liard it was raining and the evidence of Gene Earl, Resource Management Officer stationed at Fort Liard, N.W.T., indicates that approximately one inch of rain fell on July 9th, 1977 as well. On July 11th, 1977

around three o'clock in the afternoon three men from Mr. Earl's party dropped at the camp fire area, followed shortly by Mr. Earl and others. At this time a forest fire was burning out from the area of the camp fire spot and resulted in two thirds to three quarters of an acre being burned. Mr. Gene Earl who has twenty years experience and training together with more than two hundred forest fires gave evidence, after being declared an expert witness, that the source of the forest fire was a camp fire made at the camp fire spot on the bank of the Mackenzie River, which was established to be the same camp fire spot used by the accuseds four days earlier. Mr. Earl indicated that the camp fire was in a moss area and that the moss and other combustible articles under the camp fire burned under the ground for possibly two to five days and then flared up above ground. There was also some evidence indicating other persons were in the area between Thursday, July 7th, 1977 and Monday, July 11th, 1977 and specifically Saturday, July 9th, 1977, however there is no positive indication that anyone else started a camp fire at the same site.

At the end of the trial, both Counsel requested the opportunity to provide written argument on the point of mens rea with regard to this offence and judgment was therefore reserved to October 21st, 1977 at Fort Liard with written argument to be provided no later than September 6th, 1977. Up to October 13th, 1977 written argument had not been received from the Crown Counsel and a letter dated September 29th, 1977 was received from the Defence Counsel indicating that he was unable to support in law

the argument that mens rea is required before a conviction under Section 10 of the Forest Protection Ordinance could be found and therefore he was not submitting written argument. In my view the conduct of both counsel in failing to provide written argument when they requested the opportunity is completely unprofessional and of very grave concern as it indicates a lack of responsibility on the part of both Counsel especially in their duty to the Court when written argument was Ordered to be provided by September 6th, 1977.

With regard to the offence charged herein I turn to consider whether this is a strict liability offence rather than one requiring mens rea. Section 10 of the Forest Protection Ordinance as set out above is similar to provisions in various other statutes. Generally speaking, there is a presumption at common law that mens rea is an essential ingredient of all cases that are criminal, however several categories of offences have been created by statute regarding individual conduct. I refer to the majority judgment of Ritchie J. in REGINA v. PIERCE FISHERIES LTD. (1970) 5 C.C.C. 193, 12 D.L.R. (2d) 591, 1971 Vol. 12 C.R. 272 at page 278 and as stated therein:

"Whether the presumption arises in the latter type of cases is dependent upon the words of the statute creating the offence and the subject matter with which it deals."

Basically there are three categories where the presumption of mens rea being an element does not arise, namely:

- (a) Acts which are not criminal in any real sense but are acts which in the public interest are

prohibited under a penalty.

(b) Public nuisances.

(c) Proceedings which although criminal in form are really only a summary made of enforcing a civil right.

One must look at the words of the statute creating the offence and the subject matter with which the offence deals to see if the presumption that mens rea applies to the offence has been displaced. If the statute adds a new crime to the criminal law, then generally the presumption applies. However in what has been called quasi criminal acts which deal with health, safety and other matters of a public interest wherein penal sanctions arise in order to place responsibility on the conduct of individuals the presumption may not apply.

Turning to Section 10 of the Forest Protection Ordinance I have no doubt that the intention of this section is to protect the forests against possible fires thereby protecting the forests and wildlife, which is of general public interest. This is the type of offence which category (a) above stated applies. I do not think a new crime has been added to the criminal law nor do I think the stigma of a criminal offence would attach to a breach of this section. I have also had the opportunity of reviewing the unreported decision of Tallis C.J. (S.C.N.W.T.) in THE QUEEN v. ARMANDO BERTON, August, 1976, which deals with a similar situation under a By-law of the Town of Fort Smith. After a careful consideration of the above cases as well as the cases cited therein I am of the opinion that Section 10 of the Forest

Protection Ordinance creates a strict liability offence, one in which the presumption of mens rea does not arise and therefore knowledge or intent on the part of the accuseds is not a required element of the offence charged.

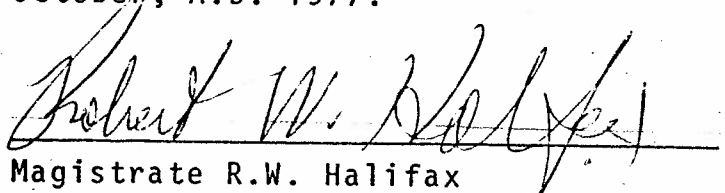
To now deal with the facts, there is no doubt the two accuseds kindled the camp fire on July 7th, 1977 and that four days later on July 11th, 1977 a small forest fire occurred in the same area. The only issue is whether it was their camp fire which was responsible for the forest fire due to the fact that they did not totally extinguish the camp fire. I have reviewed carefully the evidence of Gene Earl as to the source of the forest fire. His evidence at one point indicated that there could have been an underground fire for two or three days and at another point indicated he has seen underground fires burn for up to six weeks. Mr. Earl indicated the forest fire could have been a result of any camp fire at the site. I point out that this site is one of very few camp fire sites in the area and at least two other persons were in the area on July 9th, 1977 who may or may not have had a camp fire at the site in question. As well, the evidence indicates that at this time of year people go to the Muskeg River area almost daily.

It seems to me that the forest fire could have been started by a camp fire made at the site sometime before or after the camp fire of the accuseds and in fact possibly any camp fire made at the site four to six weeks prior to July 11th, 1977. However the only direct evidence of a camp fire is the camp fire made by the accuseds which in the circumstances would be the only

camp fire of any interest to the prosecution of the offence charged. I also point out that a great degree of care was taken by the accuseds' party to extinguish their camp fire. Considering all these factors I find I am left with some doubt as to whether the resulting forest fire was caused by the accuseds failure to totally extinguish their camp fire. The difficulty I have is whether the doubt is a reasonable doubt, but especially in cases of strict liability offences one must be very careful.

As a result I feel I have no alternative but to give effect to my doubt in favour of the accuseds. I therefore find the accuseds, Frank DUNTRA and Joseph Victor BERTRAND not guilty of the offence charged.

DATED at the Town of Hay River in the Northwest Territories, this 14th day of October, A.D. 1977.


Magistrate R.W. Halifax