

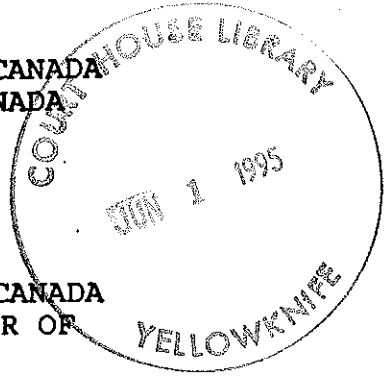
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

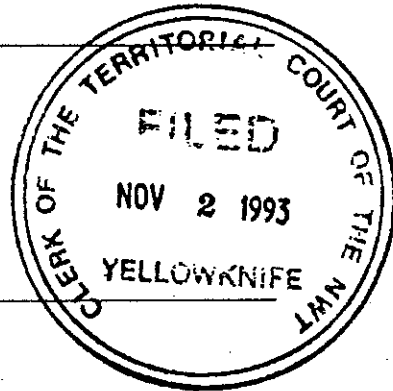
HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY ENVIRONMENT CANADA

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE COMMISSIONER OF
THE NORTHWEST TERRITORIES



REASONS FOR SENTENCING OF
HIS HONOUR JUDGE R.M. BOURASSA
FILED: November 2, 1993



APPEARANCES:

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REASONS FOR SENTENCING

The Defendant is to be sentenced for a contravention of Section 36 (3) of the Fisheries Act over a period of ten days. After trial, the Defendant was convicted for an offence set out as follows:

Count 3:

Between the 1st day of June, A.D. 1991 and the 10th day of June, inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36 (3) of the Fisheries Act and did thereby commit an offence contrary to Section 40 (2) of the Fisheries Act.

On June 1, 1991, the west dyke of the Iqaluit sewage lagoon washed out, releasing approximately 56,000 cubic meters, or 12.3 million gallons, of raw, untreated sewage and municipal waste directly into the waters of Koojesse Inlet, which are waters frequented by fish. This event occurred as a result of the Defendant's lack of due diligence.

I have set out the full facts in my Reasons for Judgment and will not repeat them here.

In any sentencing a balance has to struck in weighing the various factors that have been identified in jurisprudence. This balancing must be undertaken with a goal in mind. Until recently, in these

kind of cases the goal has been deterrence. This goal has recently been re-articulated by the Canadian Sentencing Commission. Their approach has been adopted by the Ontario Court of Appeal in *R. v M. (G)* (1992) 11 OR (3d) 225, where Abella J. cites the Commission's definition with approval:

The fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions, thereby contributing to the maintenance of a just, peaceful and safe society.

The principles to be taken into account are well known and I will not continue with yet another repetition of them. In particular, I acknowledge the considerations discussed in, inter alia, *R. v. City of Sault Ste Marie; Re Friends of the Oldman River; R. v. Gulf of Georgia Towing; R. v. United Keno Hill; R. v. Kenaston Drilling Ltd.; R. v. Echo Bay Mines Ltd. (Ayotte TCJ); R. v. Canada Marine Drilling Ltd.; R. v. Panarctic Oils Ltd.; R. v. Robinson's Trucking Ltd.; R. v. British Columbia; Canada v. Canada.*

SENTENCE RANGE

As a result of the amendments to the Fisheries Act of January 17, 1991, the sentencing parameters available have been broadened significantly. Firstly, the maximum fine for a single offence has been raised from \$50,000 to \$300,000.

40. (1) Every person who contravenes subsection 35 (1) is guilty of

(a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars, and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

(b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

Secondly, the Act now provides for a variety of Orders that may be against a Defendant.

79.2 Where a person is convicted of an offence under this Act, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:

(a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation or repetition of the offence;

(b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;

(c) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;

(d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the commission of the offence;

(e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;

(f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;

(g) directing the person to post a bond or pay into court an amount of money the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement mentioned in this action;

(h) directing the person to submit to the Minister, on application by the Minister within three years after the date of the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances; and

(i) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this Act.

These changes in the law represent a major increase in the scope and severity of the sanctions that may be brought to bear against a defendant. Furthermore, these changes make many of the sentencing ranges indicated by other, earlier decisions of little assistance. This dramatic increase has been brought about by Parliament, no doubt to reflect the public's concern. These amendments reflect those concerns for the environment generally, and for fish and fish habitat specifically. In my view, it indicates a direction with respect to sentences: that significant sanctions be applied to achieve the purpose of the legislation.

In applying the law it is my view that the courts must be careful not to defeat the express intention of Parliament by a process of judicial nullification. Sentences must reflect many things: one of them must be the scale at which they are set by Parliament.

It is trite to note that the legislation provides for no minimum penalty. In a proper case, a minimal sanction could be imposed. It is also trite to state that the highest fine is reserved for the worst offender and the worst factual situation. These principles remain unchanged; however, in my view, the scale has been changed and those principles have to be applied on the new scale.

Recognizing that every offence and every offender is different, a mid-range offender and offence should expect financial sanctions in the \$150,000 range. If this scale of sanctions is too severe, then the legislators, not the courts, should reduce the maximum and the scale.

Chief Justice Lamer stated in *Re Friends of Oldman River*:

The protection of the environment has become one of the major challenges of our time.

The courts are constituted to apply the law. Under the rule of law, the courts are the protectors of the public welfare of the environment. The courts must meet the challenge. If the courts do not act, there is no one left to act.

THE NATURE OF THE DEFENDANT:

It is argued that, inasmuch as the Defendant is a Government, any fine or financial penalty is unnecessary and/or inappropriate, if not pointless. It is argued that a fine would amount to the transfer of the same tax payers' money from one government's consolidated revenue fund to another's. It is suggested that, as governments operate "not for profit", financial penalties should be minimal.

In this vein, Perry Co. Ct. J. stated in *R. v. Quesnel (City)* [1987] BCJ:

I am rather inclined to the view that one should be circumspect when you are dealing with a municipal corporation because the fact is it is the taxpayers who have to pay in cases of that kind.

In my respectful view, a more compelling argument may be made for the opposite perspective, that government Defendants should

receive no special consideration. Indeed, that very fact may be taken in aggravation in the proper case.

Shaw J., in *R. v. British Columbia* 66 BCLR (2d) 84 makes it clear:

Governments are much involved in many activities that can harm fisheries.

Governments can commit offences as readily as humans or corporations. They are not immune to breaking the law. For that reason only, the concepts of deterrence and encouraging respect for the law are just as relevant as they are to other kinds of defendants.

There is an additional element: our constitution is premised upon the goals of "Peace, Order and Good Government". We regularly charge our governments, at all levels, with duties and regulatory roles that we do not trust or want the private sector to undertake: health care, police, in some cases automobile insurance, pensions, unemployment insurance. The list is lengthy. It may very well be that we entrust governments with such duties because of the absence of the potentially corrupting profit motive or special interest consideration. We want to believe that governments will act in the broad public interest and not in a narrow selfish manner. We look to governments to protect us from incompetence or conduct compromising the public welfare.

If this hypothesis is correct, governmental conduct resulting in an offense against the law is not something that should be taken lightly. It is the antithesis of good government and arguably constitutes a breach of trust.

Distinguishing governments from other defendants is not without precedent. Dickson J. in *R. v. Sault Ste Marie* distinguished the

2. Providing some or all of this money for the purposes of designing, constructing and operating a marine life aquarium at the Science Institute in Iqaluit. This aquarium would display local fauna for the purpose of educating the community about the complexity of the marine ecosystem, the diversity of marine life and the biological and social impact of man upon this ecosystem. Partners in this project would include the Department of Fisheries and Oceans, Department of Indian Affairs and Northern Development, and the Arctic College Environmental Technology Program; and/or
 3. Providing some or all of this money to fund a community cleanup project for the banks of the Sylvia Grinnell River (lower 5 km. of the river towards its mouth) to remove barrels, construction waste, oil residue, scrap metal and other unsightly waste and potential contaminants.
- c) By way of preventative/remedial Order, rebuild the sewage lagoon.

Except for the publication Order (which is resisted), the Defendant agrees that the suggested Orders would be an acceptable disposition from its point of view, provided, of course, that the total financial cost of implementing the Orders not be too substantial. The Defendant also points out that the sewage lagoon has already been rebuilt and an Order in that regard is not needed.

Counsel have referred me to a number of similar decisions arising from unreported cases in British Columbia. They are similar in that at the sentencing stage the Crown and Defence both apparently negotiated and agreed upon joint representations for making specific Orders by way of disposition and sanction. Some courts, in turn, have endorsed those Orders.

I am not inclined to approach the sentencing of this Defendant in a similar manner for these reasons:

When the Sentencing Commission speaks of the sentence, it is of course speaking of a process that culminates with a sentence. The

powers and responsibility of government from large and small corporate contractors with these words:

It must be recognized, however, that a municipality is in a somewhat different position by virtue of the legislative power which it possesses and which others lack. This is important in the assessment of whether the defendant was in a position to control the activity which it undertook and which caused pollution. (p. 377)

I am strengthened in this approach by the decision of the Court of Quebec in *Canada v. Canada* 10 CELR (NS). This case involved the destruction of lobster beds by government agents. In it, Decost J. states:

In my humble opinion, the court must be much more severe when such a disaster is caused by agents of an arm of the Crown, since it is precisely the Crown on which the public relies to protect both the resource species and the environment.

...we believe that the fine should be set at \$100,000; this fine is demanded by the need for general deterrence, and to make Public Works Canada employees take greater responsibility, in my humble opinion. (my emphasis)

ORDERS PURSUANT TO SECTION 79

Crown counsel has suggested that the court make a number of Orders pursuant to Section 79:

- a) Publication pursuant to Section 79.2 (c) of the **Fisheries Act**;
- b) Payment pursuant to Section 79.2 (f) of the **Fisheries Act** for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories by:
 1. Providing some or all of this money for the purposes of facilitating any studies and programs related to the improvement of municipal sewage and waste treatment in the Northwest Territories; and/or

sentence is the final expression of the law. There is as much social utility in prosecution and conviction as there is in sentencing offenders. The whole process of enforcing the laws that reflect community values contributes to the acceptance of and respect for those values and the law. Want of enforcement diminishes respect for law which may give rise to cynicism and other negative attitudes about the rule of law. In other words, want of enforcement may bring the administration of justice into disrepute.

Prosecution may be a very expensive proposition, especially when the Defendant has extensive resources available to it. In this case the Defendant pleaded not guilty, as it was entitled to. Successful prosecution required witnesses from across Canada and many days of evidence. I have no doubt that a significant expense was incurred. The Defendant could have pleaded guilty and used that in mitigation. It chose not to.

One can easily foresee situations where prosecutorial officials may decide, or be compelled, not to prosecute obvious offenders simply because of the expense involved. That expense may be a function of the power and resources of the offender, undermining the concept of equal application of the law.

This is why in imposing sentence in this case generally, and in particular, in weighing the options before me of: a) endorsing jointly submitted orders; b) imposing a fine; or c) a combination of both, I am of the view that there should be a financial penalty by way of fine. The fine may then be used to defray some of the costs of prosecution.

In my view, Orders made pursuant to Section 72 (i) should be related to the delict before the court. Care must be taken not to impose requirements upon a Defendant that have little if anything to do with the events that bring it to court in the first place.

The power that Parliament has given Courts must be exercised judicially and carefully and not as a blank cheque for an environmental wish list. It is with this in mind that I choose not to order the Defendant to clean up a nearby river as laudable as the project may be.

A publication Order pursuant to Section 79 would normally be appropriate. It appears that publicity with respect to a conviction is an anathema to the people that carry on business sheltered behind a corporate shell. Public announcement of their corporate offences, or their role, is to be avoided. This may well stand as proof in itself of the deterrent value of such publication. In this case the media has taken an interest and there has been ample publicity to date. I feel that any Order by me will be redundant, however, that may not always be the case. Most trials escape the attention of the media, and in those cases a publication Order will surely be appropriate.

The Defendant argues that the \$300,000 plus the cost of repairing and rebuilding the lagoon may properly be taken into consideration in determining sentence. I disagree. It was the Defendant's duty to provide the facility involved. To get credit for repairing what it did not build or maintain properly in the first place would be to encourage incompetence, if not defeat the very purpose of the legislation.

As Ayotte, TCJ stated in *R. v. Echo Bay Mines Ltd.* 3 FPR 47:

Similarly, while the response to the spill and the subsequent plans and efforts to upgrade and change the fuel handling system show a serious concern to prevent any future occurrences such as this, they are after the fact as it were. The legislation is not intended to encourage compliance after the environmental mishap but rather to demand compliance before those mishaps occur so as to prevent them.
(my emphasis)

FACTUAL ASPECTS

In mitigation, I acknowledge that the Defendant has not been convicted of any prior offences.

This event did not come to pass as the result of the conscious or active conduct of the Defendant such as in *R. v. Panarctic Oils Ltd.* Here, the Defendant simply - as far as I can determine - abandoned its responsibility. The lagoon with all its problems was forgotten. While the result of offences of omission or commission may well be the same, in my view under the general heading of Criminality of Conduct, the latter case is usually more aggravating.

However, there is a major aggravating feature with respect to the facts of this case. As stated, the Defendant's failure to exercise due care and attention was virtually absolute. There was little in the evidence that might be considered as the exercise of due care and attention. Notwithstanding its public duty in this regard, the existence of the sewage lagoon and dyke were wholly absent from the Defendant's consciousness. This is aggravated significantly when one considers that: a) the lagoon had a long and recent history of problems; the dyke had failed five times in ten years; and b) that the Defendant had the policy, the necessary engineering and scientific studies, the management and operational guidelines all in hand that, if applied, would have prevented the offence.

SENTENCE

For these reasons I have determined to sentence the Defendant using a combination of fine and an Order contemplated by Section 79, taking the total effect into account.

For the events of June 1, 1991:

Fine	\$ 40,000
For each day of seepage due to faulty repair - \$1,000 x 9:	
Fine	9,000
By way of Payment Order	40,000

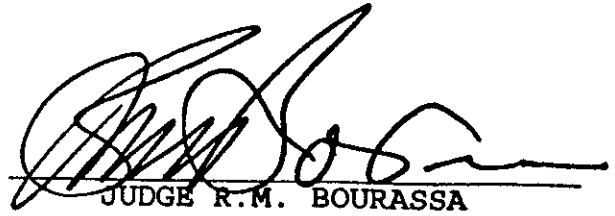
This represents, in total, a penalty of \$89,000 for the Defendant's default.

The Payment Order is as follows:

Pursuant to Section 79.2 (f) of the Fisheries Act, I order the Defendant to pay the sum of \$40,000 in trust to the Government of Canada for payment to the Department of Environment, (Environment Canada) District Accounting Office, Box 2970, Yellowknife, Northwest Territories X1A 2L2, for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories by:

- 1) allocating \$20,000 of this sum for the purposes of designing, constructing and operating a marine life aquarium at the Science Institute, Iqaluit, N.W.T. This aquarium is to serve as a focal point for research and study of marine life and to promote related educational objectives. This project of the Department of Environment may be in partnership with the Department of Fisheries and Oceans, the Department of Indian Affairs and Northern Development, and the Arctic College Environmental Technology Program.

- 2) providing the balance of the funds remaining, \$20,000, together with accrued interest, to facilitate, in whole or in part, any studies, research or programs directly related to the improvement of municipal sewage and waste treatment in the Northwest Territories.



JUDGE R.M. BOURASSA