TC CIV 93 002

Court Number 193-14379

IN THE TERRITORIAL COURT

OF THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN
AS REPRESENTED BY ENVIRONMENT CANADA

- and -

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

RULING ON NON-SUIT APPLICATION
BY HIS HONOUR JUDGE R.M. BOURASSA
JULY 20, 1993

Appearances:

J. CLIFFE, Esq.:
B. WEBBER, Esq.: — Counsel for the Crown

J. DONIHEE, Esq.:
R. SECORD, Esq.:
D. JENKINS, Esq.:
P. KENNEDY, Esq.: — Counsel for the Defence

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At the close of the Crown's case, the Defendant made application to dismiss the Information on the ground that the Crown had failed to call sufficient evidence on all the essential elements of the case. This is commonly known as a non-suit application and amounts to a dismissal of the charges on its merits. **Walker** v. **The King** [1939] S.C.R. 214, 71 C.C.C. 305.

According to law, my obligation is determine whether there is any evidence, direct or indirect, upon which a jury properly instructed could convict. Reasonable doubt is not the threshold at this point -- but rather whether a prima facie case has been made out. **R. v. Carpenter** (No. 2), (1982) 1 C.C.C. (3rd) 149, 31 C.R. (3rd) 261 (Ont. C.A.); **R.** v. **Morin**, [1963] 3 C.C.C. 159; **Girvin** v. **The King**, (1911), 45 S.C.R. 167.

For a prima facie case to be made out, there must be some evidence on each essential element involved in the prosecution.

The Defendant is charged with three offences contrary to Section 33 of the **Fisheries Act**. These charges followed the collapse of a sewage lagoon dyke in Iqaluit, N.W.T. June 1, 1992.

The Defendant admitted responsibility for the operation and/or ownership of the sewage lagoon at the time of the offence (transcript April 19, p. 3, line 13). On this basis, it appears that other Informations charging this Defendant and the Town of Iqaluit were withdrawn. The Town of Iqaluit was the holder of a Water License issued pursuant to the **Northern Inland Waters Act**. This license authorized the use of certain waters for municipal purposes and the discharge thereof after such use -- meeting certain requirements -- into a treatment facility. Presumably this facility was the sewage lagoon, although there is no reference to it in the Water License. At the time of the incident, a transfer of the ownership/operation of the sewage lagoon from the Defendant to the Town was being negotiated or implemented. The Town had not yet assumed responsibility for the work however.

The relevant sections of the **Fisheries Act** read as follows:

> "36 (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other substance may enter any such water.
>
> 36 (4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
>
> a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in council under any Act other than this Act; or
>
> b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5)."

In this prosecution pursuant to Section 33 of the Act, the Crown must ultimately prove, beyond a reasonable doubt, that:

1) between 1 June and 10 June, 1992
2) this accused -- a person --
3) at Iqaluit, N.W.T.
4) did unlawfully deposit or permit the deposit
5) of a deleterious substance -- sewage --
6) in a place
7) under circumstances where the substance could or did get
8) into waters frequented by fish.

At this point the onus is proof of a prima facie case, that is to say some evidence on each is essential.

The Defendant argues that the Crown has not met the evidentiary onus upon it with respect to all the essential elements of the case that have been addressed in the evidence. In addition, the Defendant argues that there is another essential element that the Crown has missed completely: the Crown has not proved that Section 36 (4) of the **Fisheries Act** does not apply. That is to say, the Crown has not proved that the Defendant was not authorized pursuant to subsection (4).

The Defendant has cited no authorities in support of this contention.

I agree with the submissions of the Crown that Section 36 (4) is an exemption prescribed by law from the application of Section 36 (3) of the **Fisheries Act**. It seems clear that the Act simply provides that no offence occurs if the actus reus is legally authorized.

Section 794 of the **Criminal Code**, which has application to these summary conviction proceedings pursuant to the **Interpretation Act**, Section 34(2) provides that:

> "794 (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information.
>
> (2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information."

This onus that lies upon the defendant to prove an exemption is a long understood and accepted one in law. The defendant's very argument was canvassed by the British Columbia Court of Appeal in **R. v. Daniels** (1990), 60 C.C.C. (3), 392, and rejected. There the Court ruled that the Crown, in a **Fisheries Act** prosecution, did not have to prove that an accused did not have a Minister's permit to take shellfish in a contaminated area.

In addition, this onus has been examined by the Supreme Court of Canada in **R. v. Lee's Poultry Ltd.** (1985), 17 C.C.C. (3rd) 539 in light of Section 11 (d) of the **Charter of Rights** and no conflict was found with the presumption of innocence.

Accordingly, there is no obligation on the Crown to prove or disprove anything about the Water License -- the exemption, exception, proviso, excuse or qualification allegedly provided by it or its relevance to the charges before me at this point in the prosecution. The Defendant may well be able to rely upon it at a later time when it presents its defence, if any.

In my view at this point the Water License, held by a third party, is irrelevant and has no application to the Defendant's motion for non-suit.

I therefore reject this defence argument.

With respect to the essential elements of the Crown's case I am satisfied that, at the close of the Crown's case, there is some evidence on all of them, including these: I have admission of operation and/or ownership of the lagoon by the Defendant; the Defendant is a person in law; the deposit occurred in Iqaluit, N.W.T. at the times set out in the Information from the Defendant's lagoon; the sewage waste was a substance deleterious to fish and that it reached the waters of Koojesse Inlet which are frequented by fish.

While there may still be room to argue the sufficiency of the evidence beyond a reasonable doubt, and some of the evidence adduced by the Crown appears vulnerable, I find that the Crown has placed some evidence before the Court on all of the essentials required and that a prima facie case has been made out.

The Defendant's application is dismissed.

R.M. BOURASSA, JUDGE