TC CIV 93 003

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 OF HIS HONOUR JUDGE R.M. BOURASSA
ON CONSTITUTIONAL CHALLENGE
TO SECTION 36 (3) FISHERIES ACT ON GROUNDS
OF VAGUENESS TO SECTION 7 OF THE
CANADIAN CHARTER OF RIGHTS
JULY 22, 1993**

Appearances:

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RULING ON CONSTITUTIONAL CHALLENGE TO SECTION 36 (3) FISHERIES ACT ON GROUNDS OF VAGUENESS CONTRARY TO SECTION 7 OF THE CANADIAN CHARTER OF RIGHTS

The Defendant is on trial for three alleged contraventions of the **Fisheries Act**, R.S.C. 1985, c. F-14. The charges arise out of an incident on June 1, 1992 in Iqaluit, N.W.T. It is alleged, inter alia, that a sewage lagoon dyke, under the care and control of the Defendant, failed under foreseeable circumstances, discharging the contents of the lagoon -- raw sewage -- into Koojesse Inlet, a body of water frequented by fish.

The Defendant contests the constitutionality of Section 36 (3) of the **Fisheries Act**, R.S.C. 1985, c. F-14, arguing that it offends the doctrine of vagueness in that it fails to delineate an area of risk and creates a "standardless sweep"; that it is overly broad. In addition, that it does not meet the proportionality test set out in Section 1 of the **Charter of Rights and Freedoms** as described in **R.** v. **Oakes** (1986) 26 D.L.R. (4th) 200. The Defendant applies to have the section struck as unconstitutionally vague.

VAGUENESS

The doctrine that the Defendant seeks to invoke "... can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate." **Regina** v. **Nova Scotia Pharmaceutical Society** et al, 93 D.L.R. (4th).

The impugned sections of the **Fisheries Act** read:

> "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 deleterious substance that results from the deposit of the deleterious substance may enter any such water.
>
> (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)."

The doctrine of vagueness was considered by the Supreme Court of Canada in **R.** v. **Nova Scotia Pharmaceutical Society Ltd.** 93 D.L.R. (4th) 36. Reference should be made to the case in full. This decision represents the most comprehensive review and statement of the doctrine to date. In addition, it sets out the parameters of the doctrine and some considerations for its application.

The Supreme Court summarized its analysis of prior decisions on the issue as follows:

"The foregoing may be summarized by way of the following propositions:

1. Vagueness can be raised under s. 7 of the **Charter**, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the **Charter in limine** on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on **Charter** rights be prescribed by law. Furthermore, vagueness is also relevant to the 'minimal impairment' stage of the **Oakes** test: **Morgentaler, Irwin Toy, Prostitution Reference.**

2. The 'doctrine of vagueness' is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion: **Prostitution Reference, Committee for the Commonwealth of Canada.**

3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist. **Morgentaler, Irwin Toy, Prositution Reference, Taylor, Osborne.**

4. Vagueness, when raised under s. 7 or under the s. 1 **in limine**, involves similar considerations: **Prostitution Reference Committee for the Commonwealth of Canada.** On the other hand, vagueness as it relates to the 'minimal impairment' branch of s. 1 merges with the related concept of overbreadth: **Committee for the Commonwealth of Canada, Osborne.**

5. The court will be reluctant to find a disposition so vague as not to qualify as 'law' under s. 1 **in limine**, and will rather consider the scope of the disposition under the 'minimal impairment' test: **Taylor, Osborne.**"

The court went on to consider the relationship between vagueness and overbreadth and agreed with the statement of the Ontario Court of Appeal in **R. v. Zundel** (1987)35 D.L.R. (4th) 338:

> "Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad."

The Supreme Court of Canada then stated:

> "For the sake of clarity, I would prefer to reserve the term 'vagueness' for the most serious degree of vagueness, where a law is so vague as not to constitute a 'limit prescribed by law' under s. 1 **in limine**. The other aspect of vagueness, being an instance of overbreadth, should be considered as such."

The theoretical foundations for the doctrine of vagueness are:

A) Fair notice to the citizen. Comprised of two aspects: 1) the formal aspect of notice that is to say acquaintance with the actual text of a statute; and 2) a substantive aspect, "an understanding that some conduct comes under the law." Further described as "a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment on the role that the legal enactment plays in the life of society. (p. 53)

B) Limitation of law enforcement discretion. "A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute." (p. 54)

C) The scope of precision. It was acknowledged and recognized by the Supreme Court that language use is an imprecise art and some generality is permissible if not inevitable. The court went on to observe that "a vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria." (p. 57)

A number of other decisions rendered subsequent to the **Pharmaceuticals** case have considered the doctrine and its application. In **Canadian Pacific Limited** and **Her Majesty the Queen in Right of Ontario**, May 19, 1993, Ont. C.A. (unreported) the court, in upholding a provision of the **Environmental Protection Act** prohibiting discharge of contaminants, stated at p. 19:

> "It has been settled by this court that when dealing whether or not a statutory provision is impermissibly vague the issue is to be determined by an examination of it in relation to the circumstances of the particular case not by an examination of the provisions in relation to an hypothetical set of different circumstances."

and further on:

> "The issue, therefore, is to decide whether in the light of the circumstances of this case, the provisions of s. 13 (1)(a) are so lacking in precision that they do not give sufficient guidance for legal debate."

THE FISHERIES ACT

The impugned section has been in force and applied in the courts in Canada since July 15, 1970. It has undergone minimal amendment.

In considering whether or not Section 36 (3) is unconstitutionally vague, reference may be made to other portions of the Act that relate directly to the impugned section. These are definitions, qualifications and defences. The provisions of some enactments may stand in isolation unaffected by neighbouring sections -- such as the examination of the "public interest" basis for detention in **R.** v. **Morales**, (1993) 77 C.C.C. (3d) 91, but here the impugned section is fleshed out by those definitions, qualifications and defences and in my view they must be examined together in order to determine if the components of the doctrine of vagueness are present.

These are:

Section 34 (1) of the Act defines "deposit":

> "deposit" means any discharging, spraying, releasing, throwing, dumping or placing;

Section 40 (5)(a) of the Act qualifies "deposit":

> (a) a "deposit" as defined in subsection 34 (1) takes place whether or not any act or omission resulting in the deposit is intentional;

Section 34 (1) of the Act defines "deleterious substance":

> 34 (1) For the purposes of sections 35 to 43, "deleterious substance" means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish, or fish habitat or to the use by man of fish that frequent that water.

These words have been judicially considered.

Regina v. **Macmillan Bloedel (Alberni) Ltd.** (1979) 47 C.C.C. (2d) 118 at pp. 121-122.

Section 34 (1) of the Act defines "water frequented by fish" and Section (2) of the Act defines "Canadian fisheries waters":

"water frequented by fish" means Canadian fisheries waters.

"Canadian fisheries waters" means all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada.

Section 40 (5)(b) qualifies the phrase "water frequented by fish":

40 (5)(b) no water is "water frequented by fish", as defined in subsection 34 (1), where proof is made that at all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish.

The phrase "water frequented by fish" has been judicially considered:

Macmillan Bloedel (Alberni) case, supra, at p. 120

Section 2 of the Act defines "fish":

(a) parts of fish,
(b) shellfish, crustaceans and any parts of shellfish, marine animals, and
(c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

Section 78.6 of the Act provides for the defence of due diligence to an offence under the Act:

> "78.6 No person shall be convicted of an offence under this Act if the person establishes that the person
>
> a) exercised all due diligence to prevent the commission of the offence; or
>
> b) reasonably and honestly believed in the existence of facts that, if true, would render that person's conduct innocent."

Prosecution under this Act may be by summary conviction -- as is the case here -- or by indictment. In addition to fines and possible imprisonment, there are a variety of other sanctions provided for.

Section 36 (3) of the Act has been judicially characterized by the Supreme Court of Canada in **Northwest Falling Contractors Ltd.** v. **The Queen**, (1980) 53 C.C.C. (2d) 253, in the following terms:

> "Basically, it is concerned with the deposit of deleterious substances in water frequented by fish, or in a place where the deleterious substance may enter such water ... In essence, the subsection seeks to protect fisheries by preventing substances deleterious to fish entering into waters frequented by fish."

The British Columbia Court of Appeal in **R.** v. **Macmillan Bloedel (Alberni) Ltd.** (1979) 47 C.C.C. (2d) 118, observed that Parliament's intention, and the thrust of the section, was intentionally stricter than it could have been. That the intention was legislatively "to exclude each part of the process of degradation". (p. 122)

In my view, the sections referred to comprise a detailed, comprehensive, "strict" and thorough legislative regime to protect and preserve the fishery. I cannot find an overbreadth in approach or result.

The constitutionality of Section 36 (3) of the **Fisheries Act** was considered by the supreme Court of Canada in **Northwest Falling Contractors** v. **The Queen** (1980) 53 C.C.C. (2d) 353 and upheld -- but vagueness was not in issue at that time. It is therefore correct to state that subject to considerations of vagueness the section is constitutional.

ANALYSIS

The broad question is whether this enactment is so seriously vague as not to constitute a "limit prescribed by law". The answer is arrived at by considering the content of the concept.

Fair Notice:

Section 36 (3) of the **Fisheries Act** is a strict liability offence prosecuted in criminal court with criminal sanctions. It is not a civil matter. The Defendant is presumed to know the law pursuant to Section 19 of the **Criminal Code**.

> "Section 19 Ignorance of the law by a person who commits an offence is not an excuse for committing the offence."

In my view there is a core concept in our society that, generally, harm to the environment is wrong, deserving of punishment and properly subject to control by law. I use the word 'environment' in its broad or public contest. The degradation of a fishery to a fisherman is no doubt a fishery matter. To the ship's Captain whose slops are degrading the fishery it may be a shipping matter. However, to the ordinary citizen it is pollution of the environment. Protection and preservation of the environment -- the

prevention of pollution -- includes the protection and preservation of the fishery. The two concepts are not mutually exclusive.

The Defendant has argued at length there is a distinction to be drawn between the two. In my view, the courts have answered the matter. The **Fisheries Act** is primarily concerned with preservation and protection of the fishery. From a different perspective, it is also legislation having to do -- to some extent -- with pollution. Nothing turns on this in my view. In dealing with the notion of values with respect to pollution, following the criteria set out in the **Pharmaceutical** case at page 307. The following is noted:

i) The "rules" set out in sections 34 - 42.1 of the Act and related case law are not as intricate as those specified for homicide.
ii) Everyone has an inherent knowledge that pollution is wrong and that the protection of the aquatic and marine environment is a national concern.
iii) There is a deep-rooted perception that pollution cannot be tolerated whether one comes to this perception from an ascetic, economic, moral, political, scientific or sociological stance.
iv) Therefore it would be expected that pollution will be punished by the state.
v) Pollution is indeed punished by the state and pollution trials and sentencing receive publicity.

(Refer to **Pharmaceutical case, supra,** p. 307; **Sault Ste. Marie case, supra,** p. 374; **Regina v. Crown Zellerbach Canada Ltd.** (1988) 40 C.C.C. (3d) 289 at p. 315; **Her Majesty the Queen in Right of Canada et al v. Friends of the Oldman River Society et al** (1992) 88 D.L.R. (4th) 1, at p. 7)

To argue that this does not apply to a consideration of vagueness, specifically notice, in Section 36 (3) of the **Fisheries Act** because the Act has to do with fisheries and not pollution, is untenable.

I reject the argument there is an absence of subjective understanding that some conduct that impacts on water and fish may be regulated. This substratum of values is reflected in the numerous statutory enactments designed to protect and conserve the

natural environment found at municipal, provincial and federal levels. This core concept has been implicitly acknowledged in almost every case dealing with what I generally classify as 'environmental cases'. In using the 'environment' here, I refer to all aspects of the environment -- including pollution, fish and their habitat. It includes notably **R.** v. **Nova Scotia Pharmaceutical Society Ltd.**, **Regina** v. **Royal Pacific Sea Farms Ltd.**, **Boyle C.C.J. Co.**, Court of Vancouver, June 26, 1989; **R.** v. **Satellite Construction Ltd.**, (1992) C.E.L.R. (N.S.) 215; and **Regina** v. **Bata Industries Ltd.** (No. 2) (1992) 70 C.C.C. (3d) 394.

In my view, the **Fisheries Act**, Section 36 (3) relates directly to elements of our society's substratum of values.

Enforcement discretion and scope of precision:

Is Section 36 (3) a standardless sweep? Does it practically guarantee a conviction? In my opinion, it does not. The enactment sits at an apex of numerous definitions -- standards -- refining and honing Parliament's intentions. While it has been observed that the standard is strict and broad, it is a standard that a Defendant may examine, challenge and debate. Indeed, some standards now applied in Section 36 (3) prosecutions have in fact emanated from such legal debate. A review of the abridgments, texts and case law with respect to this section of the **Fisheries Act** reveals that the courts have given it a fairly constant and settled meaning over the past years, but not at the expense of foreclosing debate. The enactment is detailed and comprehensive. Even in isolation, the very words of the section set out standards: "deleterious", "deposit", "permit", "frequented by fish".

In my view, the wording of the prohibition contained in Section 36 (3) cannot be placed in the same category as the words that have

failed this test, such as: "Likely danger to health" -- **R.** v. **Mortentaler** (1988) 44 D.L.R. (4th) 385; "public interest" -- **R.** v. **Morales**, (1993) 77 C.C.c. (3d) 91; "undue exploitation of sex" -- **R.** v. **Butler** (1992) 70 C.C.C. (3d) 129; "any business or undertaking, commercial or otherwise" -- **Committee for Commonwealth of Canada** v. **Canada** (1991) 77 D.L.R. (4th) 358; and "hatred and contempt" -- **Canada** v. **Taylor** (1990) 70 D.L.R. (4th) 358.

There have been numerous prosecutions pursuant to Section 36 (3) of the Act since its enactment and many convictions. Equally, there have been numerous acquittals following trials. It cannot be advanced that the Defendant has no possible way of defending himself on this charge. In my view, the impugned section sufficiently and intelligibly delineates an area of risk allowing a Defendant to recognize what to avoid, striking a fair balance between generality and specificity, between enforcement of values and the rights of an accused, leaving ample room in its language for legal debate and a mediating role for the judiciary.

The circumstances of this case consist of the failure of a sewage lagoon dyke resulting in the deposit of it in excess of 50,00 cubic meters of raw sewage into the waters of Koojesse Inlet which are frequented by fish.

The Defendant is charged with the offence of depositing or permitting the deposit of this waste. The parameters of the legal debate to follow those charges are precise, detailed and clearly set out in the Information:

> "Count 1:
> Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 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 a place, to wit: the intertidal area of Koojesse Inlet

immediately southwest of the west dyke of the Iqaluit sewage lagoon, under conditions where the said deleterious substance may enter water frequently 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**.

Count 2:
Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 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 a place, to wit: the intertidal area of Koojesse Inlet immediately southwest of the west dyke of the Iqaluit sewage lagoon, under conditions where the said deleterious substance entered 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**.

Count 3:
Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 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 4 (2)(a) of the **Fisheries Act**.

In conclusion, I find no vagueness in Section 36 (3) of the **Fisheries Act** so as to sustain an argument under Section 7 of the **Charter**. I am unable to find that the enactment is so vague as to not satisfy the requirement that a **Charter** limitation be "prescribed by law".

The Defendant's application is dismissed.

R. J. BOURASSA, JUDGE