2002 NWTTC A13

T-1-CR2002001756

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

ALEJANDRO PEREZ

Transcript of the Oral Reasons for Judgment by The Honourable Judge B.A. Bruser, at Yellowknife in the Northwest Territories, on November 15th A.D., 2002.

APPEARANCES:

Mr. P. Falvo: Counsel for the Crown

Ms. K. Payne: Counsel for the Accused

Under s. 124(1)(a) *Immigration and Refugee Protection Act*

1 THE CLERK: Alejandro Perez.
2 THE COURT: Good afternoon.
3 MS. PAYNE: Good afternoon, sir.
4 THE COURT: I have given this matter a great
5 deal of thought since we were last in court on it.
6 The last date was October 31st. The more thought
7 that I have given to it, the longer the judgment has
8 become and so for this reason, I apologize for the
9 length of it but it is lengthy. I do not see that I
10 can do justice to this without it being as lengthy
11 as it is about to be.
12 Before I begin, is there anything further from
13 the Crown?
14 MR. FALVO: No, Your Honour, thank you.
15 THE COURT: Is there anything further from
16 the defence?
17 MS. PAYNE: No, sir.
18 THE COURT: The accused is charged that on or
19 about the 25th day of June, this year, at
20 Yellowknife, he knowingly contravened a provision of
21 the *Immigration and Refugee Protection Act*. The word
22 "knowingly" has been placed into the charge for
23 reason.
24 The nature of the allegation is that he did so
25 by failing to comply with a condition under the Act;
26 that is, a foreign national may not work or study in
27 Canada unless authorized to do so under the Act.

1 The Crown's case rested after an Agreed
2 Statement of Facts was entered as Exhibit 1.
3 Paragraph 1 states,
4 Alejandro Perez, also known as
Alejandro Perez Sanchez, the
5 defendant, is a foreign national
from the Republic of Colombia.
6
7 The issue of the accused being a foreign
8 national is therefore resolved by the very first
9 paragraph of the agreed statement.
10 Paragraph 2,
11 The defendant is presently 31
years of age.
12
13 I shall summarize the remainder of the facts by
14 means of a chronology.
15 June 7, 1999: Issued Canadian visitor Visa.
16 August 24, 1999: Enter into Canada.
17 December 31, 2000: Expiry of visitor's Visa.
18 In January of 2001, the defendant re-entered
19 Canada after having gone into the United States.
20 Re-entry was by means of his student status at the
21 time.
22 March 30, 2001: Employment authorization
certificate issued.
23
24 April 16th, 2002 was to be the expiry of the
25 employment authorization certificate. This date of
26 April 16th, 2002 is prior to the alleged offence
27 date of June 25th, 2002.

1 August 30, 2001: Application made for permanent residency.

2

October 31, 2001: Consulate General confirmed
3 receipt of application for permanent residency.

4

December 20, 2001: The accused travelled to
5 Colombia, his homeland, for a Christmas visit.

6

January 8, 2002: He returned to Canada at Calgary.

7

8 And here I will read paragraphs 13 to 18 from

9 the agreed facts.

10 The defendant returned from Colombia to Canada on January
11 8th, 2002. As the defendant was in the process of clearing
12 customs at the Calgary, Alberta airport, immigration officer
13 Vernon Overdevest noted the defendant's Canadian visitor
14 Visa had expired on December 31st, 2000.

15

The defendant was detained while
16 the circumstances of his immigration status were
17 investigated. He was given an opportunity to contact a lawyer,
18 and given a list of lawyers and their phone numbers but he was
19 unable to get through to one. The defendant's luggage was
20 searched. He was taken to a high security area where he was
21 photographed, fingerprinted, stripped of his clothing and his
22 watch, strip-searched, required to shower and covered with
23 delousing powder, issued a uniform akin to hospital greens
24 to wear, administered a TB test, and taken to a locked cell where
25 he stayed several hours.

26 Upon confirmation that the defendant had current employment
27 in Yellowknife, a valid employment authorization

1 certificate and an application for permanent residency pending
2 with the Department of citizenship and Immigration
3 Canada, and which was due for a decision by June or July 2002,
4 Officer Overdevest exercised his statutory discretion and issued
5 to the defendant a Minister's Permit. The Minister's Permit
6 authorized the defendant to enter Canada and return to
7 Yellowknife notwithstanding the lapse of the defendant's
8 immigration status. A true copy of the said Minister's Permit
9 which the defendant received from Overdevest on January 8th,
10 2002 is exhibited at tab 4.

11 At the time the Minister's Permit was issued to the
12 defendant, Officer Overdevest recommended to the defendant two
13 courses of action regarding the extension of the defendant's
14 employment authorization. Those recommendations were: One, to
15 contact the Department of Citizenship and Immigration
16 Canada in Yellowknife and inquire on the need for such an
17 extension; or two, to send a request to CIC case processing
18 centre in Vegreville, Alberta to seek and obtain an extension.
19

20 Officer Overdevest further informed the defendant that the
21 Minister's Permit, which had been issued to the defendant,
22 did supercede the need for a student authorization. Exhibited
23 at tab 5 is a copy of a statutory declaration solemnly
24 declared by Officer Vernon Overdevest on June 26th, 2002.

25 Following the interview with Officer Overdevest, the
26 defendant was given a fine in the amount of $200 for what was
27 described on the receipt as a "minor violation Immigration

1 Act". Mr. Perez paid this amount in full. He was then permitted
2 to enter Canada and returned to Yellowknife. Exhibited at tab 6
3 is a copy of this receipt.

4 I continue with the chronology in the same form
5 as before.

6 January 8, 2002: The Minister's Permit was issued.
7 It was valid to June 30th, 2002 (five days after the alleged offence date).

8 April 2, 2002: The accused mailed to Citizenship
9 and Immigration Canada an
10 application to extend the employment authorization.
11 Fourteen days after that, the previously issued employment
12 authorization certificate was due to expire.

13 April 24, 2002: An application for the extension of the employment authorization
14 was refused. This was because it
15 was missing a job validation from the Department of Human Resources
16 Development Canada.

17 May 1, 2002: The accused's employer, here in Yellowknife, applied for the
18 required job validation from the Department of Human Resources
19 Development Canada.

20 May 27, 2002: The accused applied for an extension of the Minister's
21 permit which would have expired June 30th.

22 June 18, 2002: The Department of Human
23 Resources Canada issued a job validation for a period of 12
24 months.

25 June 19, 2002: The accused mailed to Citizenship and Immigration
26 Canada processing centre the job validation letter to perfect the
27 application for an extension of the employment authorization.

I now go to paragraph 26 of the agreed facts.

> At approximately 2 p.m. on Tuesday, June 25th, 2002, Department of Citizenship and Immigration Canada immigration officer Leona Martin and Royal Canadian Mounted Police officer Corporal Brian Glover attended at the office premises of Guy Architects at 4917-52nd Street in Yellowknife, Northwest Territories, to investigate a suspected offence by the defendant pursuant to Section 124(1)(a) and Section 30(1) of the *Immigration and Refugee Protection Act*.
>
> The defendant was observed to be working at a work station in the rear of the office. The defendant also answered a telephone call to Guy Architects which was placed by immigration officer Martin from immediately outside the office while the defendant was under observation inside the office by Corporal Glover. The defendant identified himself by name at the beginning of the telephone call.
>
> The defendant was polite and cooperative with the investigators and produced to the investigators all of the immigration documents that he had in a file at the office.
>
> The defendant was confronted by the officers with the fact of the apparent expiry on April 16th, 2002 of the defendant's employment authorization. The defendant explained to the officers that it was his understanding that the Minister's Permit issued in Calgary on January 8th, 2002 had superceded the requirement for a valid employment authorization.

1

2 Counsel have agreed that the alleged offence is
3 one of strict liability. I have had some pause for
4 concern about that agreement because of the use of
5 the word "knowingly" in the charge as framed. I
6 respect, however, the research that counsel have
7 done, their experience, and the respective positions
8 that they have taken which have merged on that point
9 and for these reasons I proceed on the basis that
10 this is in law an offence of strict liability.
11 Because I accept the joint position that this
12 is an offence of strict liability, I find it
13 instructive to review the leading Canadian case on
14 that issue, City of Sault Ste. Marie.
15 I find lying, amidst the Sault Ste. Marie
16 principles, the basis for my conclusions regarding
17 the issue of due diligence which, as counsel are
18 agreed upon, is a defence to a strict liability
19 offence. I have relied on the judgment cited at
20 (1978), 2 S.C.R. 1299 but I have downloaded it from
21 from the Quick Law site and so the page numbers that
22 I have don't exactly match. I don't think that is a
23 cause for concern because you know the citation that
24 I am referring to.
25 The judgment for the Court was delivered by
26 Dickson, J., as he then was. Under the heading "The
27 Mens Rea Point", he had the following to say:

1 Public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests.

4 This, I am confident, is an important reason why counsel analyzed the appropriate section of the Act as strict liability.

7 I continue:

8 The doctrine proceeds on the assumption that the defendant could have avoided the prima facie offence...

11 There is, I find, a clear prima facie offence. This much indeed is in the Agreed Statement of Facts - he was working after April 16th, 2002.

14 I continue with the quote,

15 ...through the exercise of reasonable care and he is given the opportunity of establishing, if he can, that he did in fact exercise such care. The case which gave the lead in this branch of the law is the Australian case of Proudman v. Dayman (1941), 67 C.L.R. 536, where Dixon J. said, at pages 540 and 541,.

21 (I will be coming back to the Australian theme. This is a central component of my reasons.)

23 'It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting license. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a

general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence'.

And Dickson, J., in referring to the Australian case says,

> This case, and several others like it, speak of the defence as being that of reasonable mistake of fact. The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused's defence was that he reasonably did not know of the status: e.g. permitting an unlicensed person to drive, or lacking a valid license oneself, or being the owner of property in a dangerous condition. In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in the principle, the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused's behaviour was negligent in bringing about the forbidden event when he knew the relevant facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence.

Further along, Dickson, J. refers to an Ontario Court of Appeal judgment of Custeau (1972), 2 O.R. 250, where the same point was referred to in this way:

1 In the case of an offence of strict liability, it has been
2 held to be a defence if it is found that the defendant
3 honestly believed on reasonable grounds in a state of fact
4 which, if true, would render his act an innocent one.
5
6 The Supreme Court in the Sault Ste. Marie
7 judgment also referred with favour to
8 recommendations made by the Law Reform Commission to
9 the Minister of Justice in March 1976. The following
10 is a quote referred to in Sault Ste. Marie from the
11 Commission's report. I am referring to it because I
12 find that it is instructive in the analysis process:

13 An accused should never be convicted of a regulatory
14 offence if he establishes that he acted with due diligence,
15 that is, that he was not negligent. In the working paper,
16 the Commission further stated at page 33, "let us recognize the
17 regulatory offence for what it is - an offence of negligence -
18 and the law to ensure that guilt depends upon lack of reasonable
19 care".

20 Dickson then goes to say,

21 The view is expressed that in regulatory law, to make the
22 defendant disprove negligence - prove due
23 diligence - would be both justifiable and desirable.
24

25 The Supreme Court is saying that the defendant
26 disproves negligence; this is the same as
27 establishing due diligence.

1 I return to the Australian theme. Dickson, J.
2 had this to say further along in his judgment in
3 Sault Ste. Marie:

4 The Courts are following the
lead set in Australia many years
5 ago...

6 And then in a later paragraph,

7 In a normal case, the accused
alone will have knowledge of
8 what he has done to avoid the
breach and it is not improper to
9 expect him to come forward with
the evidence of due diligence.
10

11 This is what Mr. Perez has done, he has come
12 forward. He told the officers at the time that he
13 was confronted by them on June 25th of what his
14 understanding was and he testified in court about
15 his understanding and how he had arrived at it.
16 I continue with Sault Ste. Marie:

17 In this doctrine, it is not up
to the prosecution to prove
18 negligence. Instead, it is open
to the defendant to prove that
19 all due care has been taken.
This burden falls upon the
20 defendant as he is the only one
who will generally have the
21 means of proof.

22 I will skip a sentence and continue:

23 While the prosecution must prove
beyond a reasonable doubt that
24 the defendant committed the
prohibited act...
25

26 This has been established in the case of
27 Mr. Perez, because he was working without

1 authorization,

2 ...the defendant must only
establish on the balance of
3 probabilities that he has a
defence of reasonable care.

4

5 The onus on Mr. Perez is one of a balance of

6 probabilities. It goes no further than that.

7 There are three categories of offences

8 identified in Sault Ste. Marie.

9 The first of them:

10 Offences in which mens rea,
consisting of some positive
11 state of mind such as intent,
knowledge, or recklessness must
12 be proven by the prosecution
either as an inference from the
13 nature of the act committed, or
by additional evidence.

14

15 That category is what we call a mens rea or

16 full mens rea offence. For example, the word

17 "knowingly", as is contained in the charge before

18 me, is a word that will frequently trigger the

19 operation of a full mens rea offence. But, counsel

20 have asked me to proceed on the basis of strict

21 liability.

22 The second category in Sault Ste. Marie is the

23 strict liability category.

24 Finally, there are offences falling within a

25 third category, being offences of absolute

26 liability, of which there is no question that this

27 is not one of those.

1 I have remarked that the accused testified. I
2 have referred to the nature of his testimony. I turn
3 my attention now to the details of it.
4 He began by saying that his understanding of
5 the employment authorization was that it replaced
6 the student authorization that he previously had
7 used to attend university at McGill. According to
8 his understanding, the employment authorization was,
9 to use his word, the "ruling" permitting him to
10 remain in Canada.
11 As for the Minister's Permit, he said that his
12 understanding was that it superceded the prior
13 documents that he had.
14 I digress now from his evidence to the
15 statutory declaration of Officer Overdevest at
16 Tab 5, and then I will return to the evidence of the
17 defendant. There is support for some of what the
18 accused testified about in this declaration. Part of
19 it reads as follows:
20 That on 08 January 2002, I did counsel (Perez Sanchez)
21 Alejandro to pursue two courses of action regarding the
22 extension of his employment authorization, to contact CIC
23 Yellowknife and inquire on the need for such an extension; or
24 two, to send off a request to the case processing
25 centre-Vegreville, to seek and obtain the extension.
26
27 This paragraph has been incorporated into the

1 Agreed Statement of Facts.

2 At the second page of the declaration, there

3 are two lines and they read:

4 Furthermore, the subject was
counselled by this immigration
5 officer that the Minister's
Permit issued to him did
6 supersede the need for a student
authorization.

7

8 The evidence of the defendant that he was told

9 the Minister's Permit superceded other documentation

10 has therefore a measure, and not an insignificant

11 measure, of support from the immigration officer

12 himself although the details of what was superceded

13 are not agreed upon.

14 In particular, the defendant, when asked to

15 comment upon Tab 4, the Minister's Permit, said that

16 he understood that it superceded the employment

17 authorization and the student Visa "sticker".

18 He recalls being counselled by Officer

19 Overdevest. He said that his understanding of what

20 Officer Overdevest had said was that he had to renew

21 the employment authorization by June 30th, 2002. The

22 inference from that part of his evidence is clear,

23 it is one that I draw, and it is that the date of

24 April 16th had been superceded in his mind by the

25 Minister's Permit and that he now had until June

26 30th to renew or extend the employment

27 authorization.

1 He said, in court, that the Minister's Permit
2 says nothing prohibiting him specifically from
3 working.
4 The defence is not correct in saying that
5 unless there is a prohibition specifically
6 delineated that one is allowed to do the act that is
7 not prohibited. This would be illogical and
8 unworkable. Otherwise, documents like this would go
9 on indefinitely. It would have to list many things
10 that a person could not do.
11 But, there is a kernel of reason to what the
12 accused testified about because this permit,
13 prepared by Officer Overdevest, did contain a
14 prohibition, and I quote it, "not authorized to
15 leave and re-enter".
16 It would not necessarily be unreasonable to
17 believe that because that prohibition was
18 specifically included and because there was not a
19 specific prohibition against working that the permit
20 did allow him to work. But that is not the end, by
21 any means, of my reasoning; I continue with the
22 evidence of the defendant.
23 He said, "what was in issue there was my
24 employment authorization and my ability to come into
25 Canada".
26 What did he mean?
27 One has to look at the overall context of his

1 testimony and weigh it against other evidence and
2 assess it in that light to understand what he meant.
3 Did he mean that he was conceding that he
4 understood that there was a separate employment
5 authorization or was he saying that this permit
6 embodied an employment authorization?
7 When asked about his understanding of the
8 situation as at June 25th, 2002, he described it
9 this way. He was expecting: (1) an answer to his
10 request for an extension of the employment
11 authorization; (2) an answer for ongoing permission
12 to remain in Canada; (3) an answer to his request
13 for permanent residency.
14 When I assessed and weighed his evidence, I had
15 in mind that in cross-examination, he testified that
16 he has about a 70 percent understanding of spoken
17 English. He said that where he feels there are
18 gaps, he relies on others to help him.
19 Upon a careful and thorough cross-examination,
20 he remained consistent. He said that the permit, as
21 he understood it, superceded previous documents and
22 he identified them in cross-examination - a student
23 authorization, the visitor Visa, and the employment
24 authorization.
25 He began working in the second week of April
26 2001 with Guy Architects.
27 As for his reading comprehension, he said that

1 he is able to read all of the applicable government
2 documents. What I infer from that piece of his
3 testimony, and which I find to be a reasonable
4 inference and from which I therefore make a finding
5 of fact to be weighed along with the other facts, is
6 that because he is able to read all of the
7 government documents, he did not see any need to go
8 to anybody else for help in understanding them. This
9 places a hole in the argument of the Crown that the
10 accused had a lackadaisical attitude and should have
11 gone to get help. His understanding, at the risk of
12 being overly repetitious, is that he now had until
13 June 30th to worry about extending his authorization
14 to work in this country.
15 He understood the student authorization allowed
16 him to be a student. He knew an employment
17 authorization allowed him to have employment. He
18 knew that that the employment authorization document
19 by itself had nothing to do with his ability to come
20 into Canada or having been here, to leave and then
21 to re-enter. He conceded that Officer Overdevest
22 explained that the Minister's Permit was what
23 allowed him to come into Canada at Calgary on
24 January 8th. Without it, he conceded that he could
25 not have remained here.
26 He also made it clear that he understood on
27 January 8th that the visitor's Visa had expired and

1 any problem regarding it was resolved by the
2 Minister's Permit.
3 Toward the end of his cross-examination, the
4 defendant said that on January 8th, the issue was
5 not employment, it was getting into Canada. But, the
6 immigration officer, at that time, made it clear
7 that the employment authorization could be extended.
8 The argument of the defence is, by way of
9 summary on the material points, as follows.
10 Defence counsel says that on January 8th, 2002,
11 the Minister's Permit, according to the accused's
12 understanding, superceded all other documentation
13 and therefore the April 16th deadline was no longer
14 a deadline; it ceased to have relevance. The
15 employment was extended by the permit given by
16 Officer Overdevest in the form of a Minister's
17 Permit to June 30th, 2002.
18 With that in mind, the accused planned all his
19 subsequent actions with the later date as being the
20 deadline and he did not have to be concerned about
21 April 16th. And that is why, defence counsel says,
22 the accused waited until April 2nd, 2002 to apply
23 for the employment extension.
24 The accused says he knew it took a long time
25 for various government offices to act and to respond
26 to him and by doing this on April 2nd, he would have
27 plenty of time before June 30th. I believe him. I

1 believe that from his experiences with government,
2 he knew that it took quite a while for government to
3 respond and that problems could develop and there is
4 no way, I find, that he would have waited until
5 April 2nd if he had any sense that April 16th was
6 still his deadline.

7 The defence concedes that the accused's
8 understanding of what Officer Overdevest said was
9 not correct but that the misunderstanding by
10 Mr. Perez does not make him guilty.

11 I have already referred to that part of the
12 defence argument having to do with the lack of a
13 prohibition against employment in the Minister's
14 Permit.

15 The defence also says that the accused was led
16 into error because of what happened on January 8th.
17 I don't know that defence counsel was actually
18 arguing officially induced error, at least if she
19 did I have no note of it and no independent memory
20 of it but, in any event, what happened there was not
21 clearly spelled out to Mr. Perez and because of
22 that, he should not be faulted for what occurred
23 later on.

24 The Crown concedes that the accused is allowed
25 to demonstrate due diligence. Crown counsel further
26 conceded that if the accused's belief from January
27 8th, 2002 was reasonable in the circumstances, he

1 has a valid defence.

2 The Crown at that point began to fire its
3 cannons by arguing that the evidence shows a
4 deliberate neglect of his responsibilities under the
5 law. He waited, the Crown says, too long to apply
6 for the employment authorization extension. He had
7 "a lackadaisical attitude" toward his employment
8 obligations and he could have clarified this without
9 any difficulty. But, he didn't do anything after
10 January 8th until April 2nd.

11 The defence, after having heard me inquire as
12 to whether this is a mistake of law which would mean
13 that a strict liability defence could not lie, said
14 it is not a case of mistake of law, the accused did
15 make efforts to comply; he wasn't erroneously
16 interpreting the law, he was erroneously
17 interpreting the facts that occurred on January 8th
18 and the process that would have to be followed.

19 The issue, Ms. Payne says, is not mistake of
20 law but rather what he was told on January 8th. This
21 reply then neatly brackets the way defence counsel
22 opened the argument.

23 My assessment, in weighing the totality of the
24 evidence, leads me to the following findings in
25 addition to those that I have already spelled out.

26 The defendant, during his brief stay in Canada,
27 had the ability to read and he understood that it

1 was essential to have proper documentation to enter
2 into and to remain in Canada, to be a visitor, to be
3 a student, and to have employment.
4 The array of documentation, insofar as he has
5 been concerned, has included at least: a passport to
6 enter into Canada, a visitor's Visa, a student
7 authorization, an employment authorization, a
8 Minister's Permit, a permanent residency
9 authorization, an application to extend his
10 employment authorization, a Human Resources Centre
11 job validation, and a foreign worker application.
12 In the face of this astounding pile of
13 government requirements, it is fortunate that
14 Mr. Perez remained here to benefit us with his
15 specialized skills in the field of architecture.
16 Instead of a thank-you note, Mr. Perez has been
17 detained in a holding cell in Calgary, photographed,
18 fingerprinted, strip-searched, covered with
19 delousing powder, and more, all on January 8th,
20 2002, fined $200 for a "minor violation" of the Act,
21 and ultimately charged with the present offence
22 punishable on summary conviction, which is the way
23 that the Crown proceeded, by a fine of up to $10,000
24 or six months imprisonment or both.
25 What did he do to warrant such heavy-handed
26 state sanctions?
27 He mistakenly re-entered Canada, not in a

1 covert manner, not with false documents, not by
2 lying, not by attempting to run. He entered Canada
3 to work, in Yellowknife, where he has continuously
4 worked after a visit back to his homeland of
5 Colombia. It is not alleged that he had contraband
6 with him. He didn't have drugs. It is not alleged
7 that he is part of a Columbian drug cartel or that
8 he was involved in any other sinister organized
9 activity.
10 The Crown has not alleged that he worked from
11 April 16th to June 25th, 2002 but only that he
12 worked one day. He was not, by operation of law,
13 permitted to do so without proper documentation. In
14 fact, the evidence is clear that he worked more than
15 one day. But that's what he is charged with and
16 that's what I am dealing with - a one-day event.
17 As I said earlier, the Crown has proven the
18 act. Has Mr. Perez on a balance of probabilities
19 shown that he took all reasonable care? What would
20 a reasonable person have done in his circumstances?
21 A reasonable person would have had the
22 Minister's Permit, as he had. It specifically
23 allowed him until June 30th, 2002 to remain in
24 Canada.
25 The permit recognized that he was employed. It
26 recognized in what city he was working and with
27 whom. It contained a statement that he was not

1 authorized to leave and then to re-enter. In other
2 words, if he left, he would not, on the authority of
3 that permit, be permitted to come back into the
4 country.

5 The maker of the permit did not identify, and I
6 indicated this earlier, a second negative that the
7 permit was not an employment authorization. It only
8 went partway in recognizing where he was working.

9 Officer Overdevest did specifically tell
10 Mr. Perez that the permit superceded a student
11 authorization, and he did counsel the defendant
12 about extending the employment authorization. But,
13 as far as the defendant understood, the permit
14 superceded all of his prior documentation including
15 the employment authorization. I do not reject his
16 evidence in that regard.

17 I find his testimony to be credible. I find it
18 to be consistent and inherently so. I find it to be
19 plausible given his somewhat restricted
20 understanding of the English language.

21 I find as a fact that he honestly believed on
22 January 8th, 2002 that the Minister's Permit allowed
23 him to remain in and to work in Canada until June
24 30th, 2002 thereby extending the previous employment
25 authorization which would have expired April 16th,
26 2002. He did, however, understand that he would
27 have to apply to extend the authority to work past

1 June 30th. A compelling piece of evidence
2 supporting my finding is that he did in fact wait
3 until April 2nd to apply for the extension for
4 employment authorization. I do not find that he
5 waited because of a lackadaisical attitude. It had
6 nothing to do with that at all. He had always been
7 persistent and timely in other documentation that he
8 had had to acquire. The wait until April 2nd is
9 consistent with the understanding that he had until
10 June 30th.

11 I find it of interest that the document, at Tab
12 7, entitled "Application to Change Terms and
13 Conditions or Extend My Stay in Canada" includes a
14 number of things that a person can apply for:

15 (A) an extension of visitor/tourist
16 status;

17 (b) a student authorization;

18 (c) employment authorization or
19 extension;

20 (d) extension of Minister's Permit;

21 (e) reinstatement of visitor status.

22 What he applied for on that date, the 2nd of
23 April, 2002, was an extension of employment
24 authorization. He would have had no need to apply
25 for an extension of the Minister's Permit because
26 once he got the permission to extend his employment,
27 in his view, that's all that would be required, he

1 would then be allowed here to work. We see in this
2 document a marrying of authority to stay in Canada
3 with an employment authorization and that's how
4 Mr. Perez, even before April 2nd when he filled out
5 the form, understood the Minister's Permit to
6 operate - a marrying of the authority to remain here
7 and to work can both be covered by the same
8 document.
9 I realize that the documents are different and
10 that they serve different functions but they can
11 serve those two functions in each document and I
12 could see how Mr. Perez could understand this
13 because in the Minister's Permit there is a
14 reference to employment. That's what I mean by a
15 marrying of two things in one document but for
16 different purposes and with different consequences.
17 In all of these circumstances, it is reasonable
18 for Mr. Perez to have thought that the Minister's
19 Permit was also an employment authorization of sorts
20 in the sense of allowing him to work at least until
21 June 30th. Then that document would die and he
22 would have to apply for further authority by way of
23 an extension of an employment authorization. He
24 didn't think that he needed both a Minister's Permit
25 and a separate employment authorization and that's
26 the point of this, that's what he was thinking. I
27 believe him.

1 I return to the Australian passages in Sault
2 Ste. Marie. I indicated at the outset that I would
3 be coming back to it.
4
5 It is one thing to deny that a necessary ingredient of the offence is positive knowledge of
6 the fact that the driver holds no subsisting license. It is
7 another to say that an honest belief founded on reasonable
8 grounds that he is licensed cannot exculpate a person who
9 permits him to drive.

10 And then the interpretation on that from the
11 Supreme Court of Canada, "the reason is that the
12 offences in question have generally turned on the
13 possession by a person...of an unlawful status..."
14 Initially, when I was reviewing the material
15 and the law, I saw this as a case of mistake of law
16 in which case due diligence would not have been
17 available.
18 Upon more careful reflection, I see this,
19 instead, as a situation in which the accused, in the
20 circumstances facing him, reasonably believed in a
21 mistaken set of facts, that is, permission to work
22 in Canada past April 16th but up to June 30th,
23 which, if true, would have made his employment
24 lawful.
25 Additionally, I find that Mr. Perez took all
26 reasonable steps to avoid working unlawfully. A
27 reasonable person would have done the same thing.

Not all people would have done the same thing. There is a difference. Some may have gone further than Mr. Perez. But that is not the test of due diligence. Rather, it embraces all reasonable care in the circumstances. Due diligence does not demand taking all possible measures and therein lies a critical distinction.

I am strengthened in these conclusions by the consistent openness of the defendant. He has done nothing deceptive from beginning to end.

Earlier I expressed some reservation about this being strict liability. On the basis of it being strict liability, I find the accused not guilty because he has met the test of due diligence.

It may be that counsel are incorrect.

I think it would be a shame if they were incorrect, the matter were appealed, and a new trial were ordered on the basis that the wrong test was applied.

I will now, for what remains of these reasons, proceed on the basis that this is a full mens rea offence based on the use of the word "knowingly" in the charge.

Section 30(1) is blunt,

> A foreign national may not work or study in Canada unless authorized to do so under this Act.

1 The Crown chose the word "knowingly", and I
2 will, for the purposes of this part of the judgment,
3 assume that the Crown did so because it is an
4 essential ingredient.
5 If he knowingly had to fail to comply with the
6 condition, there is no question the Crown has not
7 proven mens rea. My findings of fact from the
8 strict liability analysis should bear that out, and
9 there is no need to repeat them. The Crown's case
10 would fail. I would, if it is a full mens rea
11 offence, find the accused not guilty for those
12 reasons too.
13 That should do it.
14 Mr. Perez, I hope things have been going better
15 for you and that all documentation from here on in
16 will be understood clearly. I'm sure that once you
17 understand it all clearly, you will honour and obey
18 it and contribute to this fine country that we have.
19 Is that it for today?
20 THE CLERK: Yes, sir.
21 MS. PAYNE: Sir, if I could make an
22 application. Mr. Perez is -- had to surrender many
23 documents to the Immigration department and the
24 Crown or the RCMP. Sir, can there be an order
25 requiring or permitting Mr. Perez to get that
26 documentation back?
27 THE COURT: I will need to hear the position

1 of the Crown.
2 MS. PAYNE: Thank you, sir.
3 MR. FALVO: Your Honour, I am advised that
4 the documents were seized under the *Immigration Act*
5 and that there is a separate immigration process
6 that is ongoing. And for that reason, the Crown
7 would be opposed to that, sir. But that might be
8 something that the Crown would need further time to
9 refine a position on.
10 THE COURT: In any event, I will ask this:
11 Were the documents seized to be evidence in this
12 trial? Are they in some way connected to this trial
13 given the Agreed Statement of Facts?
14 MS. PAYNE: That was my understanding, sir.
15 MR. FALVO: Yes, sir.
16 THE COURT: They are supportive underlying
17 documents that give rise to the agreed facts?
18 MR. FALVO: Yes, sir.
19 THE COURT: They can be held by the Crown to
20 the end of the appeal period but at the end of the
21 appeal period, they are to be returned to the lawful
22 owner. It may be at the end of the appeal period, a
23 hearing would be required to determine lawful
24 ownership.
25 MS. PAYNE: Thank you, sir.
26 THE COURT: Of course it is open to the Crown
27 to return them sooner, if everything is in order.

1 MR. FALVO: Yes, sir, and that was not
2 something that I came prepared to discuss at length,
3 so the Crown's position could change.
4 THE COURT: Thank you again, we will close
5 court.
6 **(AT WHICH TIME THE REASONS FOR JUDGEMENT CONCLUDED)**
7 Certified pursuant to Rule 723
8 of the Supreme Court Rules.
9
10
11
12
13 Lois Hewitt,
Court Reporter
14
15
16
17
18
19
20
21
22
23
24
25
26
27