

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

CAMERON BEAVERBONES

AND BETWEEN:

HER MAJESTY THE QUEEN

-and-

ALEXANDER RICHARDSON

WRITTEN REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE ROBERT D. GORIN

Heard at: Hay River Northwest Territories
Date of Decision: November 9, 2015
Date Application Heard: September 15, 2015
Counsel for the Crown: Sébastien Lafrance
Counsel for the Accused: Michael Hansen

[Northwest Territories Fishing Regulations, C.R.C., c.84, ss. 21 & 18;
Fisheries Act, R.S.C. 1985, c. F-14, ss. 6 & 78]

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INTRODUCTION

[1] Both defendants are charged with setting nets and fishing in waters during a closed season contrary to sections 21 and 18 of the *Northwest Territories Fishery Regulations*, C.R.C., c.847, thereby committing offences contrary to section 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14, as amended. They are charged separately. However, since the relevant facts are identical in respect of the question I must now answer, it is appropriate to deal with both cases at the same time in one decision.

[2] Both defendants challenge the authority of the Regional Director who made the variation order that purported to close the waters in question at the relevant time. They submit that: the Regional Director-General of the central and arctic

region of the Department of Fisheries and Oceans has been delegated by statute the power to make such orders; and that he improperly subdelegated that authority to the Regional Director.

[3] Section 6(1) of the *Fisheries Act* states:

6.(1) Where a close time, fishing quota or limit on the size or weight of fish is fixed in respect of an area, the Regional Director-General, may, by order vary that close time, fishing quota or limit in respect of that area or any portion.

[4] The presumption of regularity as it applies to official acts provides that where it has been proved that an official act has been done, it will be presumed until the contrary is established, that that act complied with any necessary formalities and that the person who did it was duly appointed. Since it is a presumption it can be rebutted and the onus therefore is on the defendants to establish that the Regional Director who made the variation order was not duly appointed or otherwise authorized to do so.

[5] For the reasons that follow, I find that the defendants have discharged their onus.

ANALYSIS

[6] The evidence before me consists solely of an Agreed Statement of Facts provided by counsel. The agreed facts sets out that the Regional Director-General delegated his authority to make variation orders to the Regional Director and that it was the Regional Director who made the variation order that the defendants violated.

[7] The Agreed Statement of Facts initially refers to “signing authority” for the Regional Director-General having been provided to the Regional Director and refers also to the Regional Director “signing on behalf of” the Regional Director-General. I think it important to state that had the facts been that the Regional Director-General had simply directed the Regional Director to sign variation orders for the Regional Director-General, after the Regional Director-General had

determined such an order was appropriate, I would have had great difficulty in finding that any genuine subdelegation whatsoever had occurred.

[8] However, near its conclusion, the Agreed Statement of Facts ultimately makes it clear that the Regional Director-General had, in fact, subdelegated his actual decision making power to decide and make variation orders to the Regional Director.

[9] The position advanced by the defendants is based on the principle *Delegatus Non Potest Delegare*, which has its roots in the law of agency. Strictly speaking, it provides that an agent cannot delegate his authority further without his principal's express or implied permission. The rationale behind the principle is that the initial delegation to the agent occurred as a result of the confidence the principal placed specifically in him. The principle also applies to administrative law in cases where, as in this case, a legislative body has provided a public official with statutory powers. However, it should be noted that in Canada the principle has long been recognized as one of statutory interpretation as opposed to a strict rule of law; see John Mark Keyes, *From Delegatus to the Duty to Make Law*, (1987) 33 McGill LJ 49, 70-71.

[10] The relevant Canadian jurisprudence provides that in cases where the decision in question is "legislative" as opposed to "administrative", there is a general presumption against the power to delegate one's statutory authority. The defendants submit that the decision to make a variation order is legislative in nature and that therefore the presumption applies. I agree. However, since it is simply a presumption I must also determine whether it has been rebutted.

[11] The case of *R. v. Corcoran* (1999), 181 Nfld. & PEIR 341, 19 Admin. LR (3d) 305, 44 WCB (2d) 488, (Nfld.S.C.), was a case decided by Adams J. of the Newfoundland Supreme Court, sitting in his capacity as a summary conviction appeal court. The fact pattern was, in many respects, quite similar to the present matters. In *Corcoran*, the appellant had fished during a close time that had been imposed pursuant to a variation order. The order had been made by the Acting Regional Director after the Regional Director-General had, in writing, subdelegated that task to him for a few days during the Regional Director-General's absence.

[12] At paragraph 8 of his judgment, Adams. J. framed the issues he had to determine as follows:

- (1) Is the variation of a close time under the Fisheries Act and Fishery Regulations an administrative act or a legislative act?
- (2) However characterized, can the Regional Director General of Fisheries and Oceans delegate his power to declare a close time?
- (3) If the Regional Director General can so delegate, was F.L. Slade a person to whom the power could be or was properly delegated?

[13] He determined that the making of the variation order was a legislative act. However he also found that the presumption against the power to subdelegate that power had been rebutted. Finally, he found that the Acting Regional Director was a person to whom the Regional Director-General could delegate that power. Accordingly the defendant's conviction was upheld.

[14] After having reviewed the submissions provided by counsel, along with the relevant jurisprudence, I agree with the analysis of Adams J. set out in in paragraphs 12 through 34 of *Corcoran* and for the same reasons find that the variation of a close time pursuant to the *Fisheries Act* is a legislative act, but that the Regional Director-General may subdelegate that power. My analysis is very close to that of Adams. J. and while I see no reason to duplicate it in its entirety for the purposes of this judgment, I find the reasoning set out in the following paragraphs to be particularly compelling:

30 Section 4 of the Atlantic Fishery Regulations states:

"A Regional Director-General may, by order, vary any close time or fishing quota fixed by these Regulations."

31 In my respectful view, in looking at the issue of delegation of the powers granted under the Act, a proper interpretation of its real purpose and object requires a reading into Section 4 of the Regulations after the words "a Regional Director-General" the words "or any person authorized by him or her" in the absence of a clear statutory intention to the contrary, which I do not find in the Act. The conservation and management of fish stocks requires a flexible, modern approach to achieve its ends. As stated by Handrigan, P.C.J. in Drake, supra (who did not make a specific finding in that case that the variation of a close time is an administrative act) at paragraphs 42 and 43:

"It is submitted by the accused that there is no proof before the court that the

groundfish fishery for cod was closed at the time of this incident. In particular, reference is made to s. 91 of the Atlantic Fishery Regulations. This stipulates that the close time for recreational fishing for groundfish is January 1 to January 31 in any year. This period is, however, purely nominal and is subject to variation. The procedure for variation is delegated to the office of the Regional Director-General who may issue a "variation order" setting dates other than those prescribed by the Regulations for the closure of the fishery.

In fact, the dates chosen for the proscription of fishing activity for any species is generally only nominally stated in the Regulations that pertain to that species: *R. v. Arenburg* (1988), 87 N.S.R. (2d) 164; 222 A.P.R. 164 (Co. Ct.). This is not simply a matter of convenience. It reflects rather the sensitive nature of the fisheries and the need to respond quickly to deal with quotas and rapidly changing conditions. A variation order can be issued much more readily than can a change be made to a regulation. As a consequence, the authority for change is vested in the Regional Director-General who can act quickly and respond to local conditions as they change, sometimes quite dramatically. Such has been the nature of the groundfish fishery in the Atlantic Region in the last several years."

32 It cannot have been the intention of Parliament or the Governor in Council that the incumbent in the Regional Director General's chair can only act personally in the exercise of powers granted to him or her or if it was, it ought to have been so expressly stated. In the absence of such a restriction, there is an implied authority in this case for the Regional Director General to appoint a person to act in his place in his temporary absence: *R. v. Harrison*, [1977] 1 S.C.R. 238.

[emphasis mine]

[15] I find that for substantially, the same reasons set out in paragraphs 35 – 50 of *Corcoran*, the Regional Director-General may subdelegate to the Regional Director the power to make a variation order for a brief period of time when there are pressing circumstances of such a nature that the subdelegation is necessary from a practical standpoint.

[16] However, there are important facts in the present case quite distinct from those of *Corcoran*. As stated, in *Corcoran*, the subdelegation was in writing and was for a duration of only a few days while the Regional Director-General was absent. As can be seen at paragraph 32 of the excerpt I have already quoted, in finding the delegation to the Acting Regional Director, to be valid, Adams J. to a large extent focused on its brief nature. At paragraph 43 his judgment further states:

... It would be impossible to expect the incumbent in the office of Regional Director-General to be personally present to effect required orders at all times. It is reasonable in the context of the Act for that person to be entitled to appoint a person to carry out his duties on a temporary basis.

[emphasis mine]

[17] Moreover, at the end of paragraph 49, he states:

...In a modern state, important matters of public administration could be pointlessly delayed because a particular official is on vacation, is ill for a day or is otherwise away from his or her office on legitimate business.....

[18] Finally, at the penultimate paragraph of *Corcoran*, the judgment concludes:

On the facts of this case, having regard to the purpose and object of the Act, and in light of the memorandum from E.B. Dunne authorizing F.L. Slade to act in his behalf for a couple of days in his absence, I am satisfied that the delegation was lawful and that the variation order is valid.

[emphasis mine]

[19] The brief nature of the subdelegation in *Corcoran* can be contrasted with the present case, in which it appears to be of a wholly indefinite duration. The following paragraphs of the Agreed Statement of Facts are particularly pertinent to the indefinite nature of the subdelegation and the reasons behind it:

[2] *Variation Order No. NT-2014/2015-203 was signed September 12, 2014 by [S.G.] for [D.B].*

[3] *[D.B.] is the Regional Director-General of the Central and Arctic Region of the Department of Fisheries and Oceans. (“Regional Director-General”).*

. . .

[6] *Reporting directly to [D.B.] is [S.G.], who is the Regional Director of Aquaculture, Conservation and Protection as well as Resource Management and Aboriginal Affairs for Central and Arctic Region.*

[7] *[D.B.] has been Regional Director General for over three years.*

[8] *[S.G.] has been Regional Director for over three years.*

[9] [S.G.] *has never acted as Regional Director-General.*

[10] *Starting prior to [D.B.'s] appointment as Regional Director-General it has been the policy of past Regional Directors-General to delegate signing authority for variation orders issued under s. 6(1) of the Regulations ("Variation Orders") to the Regional Director.*

[11] *[S.G.] is unaware of any specific meeting that dealt with the Variation Order signing authority delegation, any record of such a meeting or any such delegation being reduced to writing.*

[12] *It was [D.B.'s] policy to continue that delegation to [S.G.] upon [S.G.] appointment to Regional Director, and [D.B.] verbally directed [S.G.] some time prior to 2014 to sign Variation Orders on behalf of the Regional Director-General.*

[13] *As regional Director-General [D.B.] travels an average of three days per week including meetings in Ottawa with other senior members of the Department including the Minister, meetings with officials from the United States regarding co-management of the Great Lakes, and travel to the satellite offices throughout the Central and Arctic region.*

[14] *[D.B.] is seldom out of electronic contact with his office and is accessible unless flying or in meetings.*

[15] *[D.B.] believes the decision of past Regional Directors-General to delegate Variation Order signing authority to Regional Directors was made by reason of timeliness of signing the Variation Orders as well as the physical availability of the Regional Director-General given the job's travel demands.*

[19] [D.B.] cannot recall having signed a Variation Order as Regional Director General prior to April 1 2015.

[20] As of March 2015, the Regional Director-General has signed all Variation Orders.

[21] As of July 11, 2015, [D.B.] has started signing all Variation orders personally. From March 10, 2015 to July 11, 2015 they were signed by the Acting Regional Director General by reason of [D.B.'s] medical leave.

[20] The agreed facts also indicate that due to the fact that variation orders can now be signed for multiple bodies of water, there has been a dramatic decrease in how many are required in the Arctic Region. In 2012/2013, 131 orders were made (although 0 orders were made the year before). At the present time approximately 20 variation orders are signed every year in Nunavut and the Northwest Territories.

[21] As well, the agreed facts provide that the regional director general was absent from the office for reasons of duty travel or annual leave during the 7 occasions on which variation orders were signed from January to the end of September 2014 with the sole exception of September 12, 2014.

[22] Given the indefinite duration of the subdelegation that occurred in the present case, I would add the following fourth question to the three that were posed by the court in *Corcoran*:

If the Regional Director-General was able to delegate the power to declare a close time; and (in this case) the Regional Director was a person to whom the power could be delegated: was the nature and scope of the delegation otherwise permissible?

[23] The overall jurisprudence differentiates between subdelegation by a statutorily empowered official and delegation by a minister of the Crown. Many cases provide that where powers conferred on a minister are exercised by individuals in the department, the *delegatus* rule of interpretation should not be applied, or more often, that since the minister and his staff cannot be legally separated, no actual delegation occurs; see *Carltona v. Commission of Works*,

[1943] 2 All ER 560 (C.A.). It is only in those cases where the Act expressly requires that the power be exercised by the minister personally, that the power may not be exercised by a department official. Therefore, in the absence of such a statutory provision, a minister's "delegation", if it can be called that, could arguably be for an indefinite period of time.

[24] On the other hand, in the case of a statutorily empowered official, the "alter ego" principal, set out in the foregoing paragraph, does not apply and subdelegation cannot be unfettered. As noted by Sara Blake in her text, *Administrative Law in Canada*, 5th ed. (LexisNexis Canada, 2011), even in cases (unlike the matters before me) where the official in question has express statutory authority to subdelegate, the scope of the subdelegate's discretion should be defined along with guidelines for the exercise of that discretion. Unlimited discretion should not be conferred: *Law Society of New Brunswick v. Pelletier*, [1989] NBJ no 34, 59 DLR (4th) 401 (N.B.C.A.); *C.E. Jamieson & Co. (Dominion) Ltd. v. Canada (Attorney General)*, [1987] FCJ no 826, 46 DLR (4th) at 29-33 (T.D.); *Western Canada Wilderness Committee v. British Columbia (Minister of Environment & Parks)*, [1988] BCJ No. 436, 25 BCLR (2d) 93 (S.C.)

[25] In the present case, the subdelegation was not temporally limited. Rather, it was indefinite in duration. While one might argue that the subdelegation was not unlimited in that it pertained only to the making of variation orders, the agreed facts appear to provide that the Regional Director-General did not supervise the making of the variation orders by the Regional Director. Furthermore, it appears that Regional Director-General had not put in place guidelines, written or otherwise, to assist his subdelegate.

[26] In this case the Regional Director has no specific memory of the current Regional Director, D.B, subdelegating to him the power to make variation orders. He recalls that the subdelegation was a long-standing practice that was continued under the present Regional Director-General. However the agreed facts provide that the subdelegation was made, albeit orally, where they state at paragraph 12:

[12] It was [D.B.'s] policy to continue that delegation to [S.G.] upon [S.G.'s] appointment to Regional Director, and [D.B.] verbally directed [S.G.]

some time prior to 2014 to sign variation orders on behalf of the Regional Director General.

[27] However, as stated, the subdelegation was indefinite in duration and although it appears to have pertained only to the making of variation orders it was not further defined. There were no further limits or guidelines to the delegation. While I do not conclude that a subdelegation must necessarily be in writing, a written delegation would have been highly desirable in that the delegate would have had a resource that could be referred to when necessary. Both the subdelegator and the subdelegate would have had a record of what was said and when.

[28] I have concluded that facts that appear to be pertinent to why the Regional Director-General subdelegated his power to make variation orders for an indefinite period of time did not justify such a subdelegation. I find that there is no implied authority to subdelegate in such a fashion pursuant to the *Fisheries Act*. In short, I find that in this case, the Regional Director-General did not sufficiently delineate the subdelegate's discretion and that the subdelegation was therefore invalid.

[29] In this regard I agree with the written submissions of counsel for the defendants, Mr. Hansen where he states:

14. The analogous question of the issuance of variation orders in the context of national parks was considered in R. v. Young, [2001] ABPC 38, 283 AR 140 at par. 14, The Alberta Provincial Court found that the temporary absence of the sub-delegator was an essential element, because it is the subject delegator's absence that constitutes the aspect of necessity required for a necessarily implied authority to sub-delegate.

15. The reason for restricting the sub-delegation to an appointment to act during a temporary absence is based on the concern set out by the Federal Court in Antonsen v. Canada (Attorney general), [1995] 2 F.C. 272 (T.D.) at par. 31:

The law has long set its face against ill-defined powers of subdelegation and interpreted such strictly. Decision-making by subdelegates, based on broad and undefined powers, can too easily lead to the real reasons for a decision being obscured (although such is not the situation in this case); such authority can too easily be exercised in an unfair manner.

16. As set out in the case of R. v. Morton, [2015] FC 575 at para. 83:

For the exercise of a delegated power to be proper, the delegation must provide for standards, rules and conditions to guide the decision-making process...the license must contain objective standards or criteria governing the exercise of discretion. Unlimited discretion cannot be conferred on a sub-delegate, and supervisory control over the delegate should be retained.

CONCLUSION

[30] I find that in order for a public official such as the Regional Director-General to subdelegate his statutory authority the following questions must be determined:

- [i] Is the act in question legislative or administrative?
- [ii] However characterized, can the public official subdelegate the act in question?
- [iii] If so, is the subdelegate a person to whom the power can legitimately be subdelegated?
- [iv] If so, is the nature and scope of the subdelegation otherwise permissible?

[31] In this case, I have concluded that the Regional Director-General may subdelegate to the Regional Director the power to make a variation order. However, the subdelegation must be for a brief and defined period of time and must be necessary from a practical standpoint. Additionally, the Regional Director should provide guidelines on how to exercise the subdelegation.

[32] Because in this case, the subdelegation was of an indefinite duration, I find that the order of September 12, 2014 that both defendants are alleged to have breached have been invalid.

[33] In concluding this matter, I would be remiss if I did not thank both lawyers for the high quality of their assistance.

Robert David Gorin
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 16th day of
November, 2015.

Date: 2015 11 16

File: T2-CR-2015-000001

File: T2-CR-2015-000002

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