Fisheries and Oceans
Gulf Region

Pêches et Océans
Région du Golfe

Protection and Regulations Branch
Direction de la Protection et réglementation

CASE LAW ON FISHERIES OFFENCES

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Her Majesty the Queen v. Earnest Clark Campbell (Cty Ct. of Vancouver, 1984), *The Fisheries Act* does not purport to deal with the sale of fish generally. 10-M

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R. v. Williams (N.S. S.C.A.D., 1970), Section 7(c) of *Coastal Fisheries Protection Act* is clear and unambiguous when read in the context of the whole of Section 7. 10-N

Fishery Regulations, s.3(1)(b) - Unlawful possession of lobster on unlicensed vessel requires proof of "mens rea" as well as possession.

(b) Reverse Onus (See also Charter Decisions)

R. v. Appleby (S.C.C., 1971) Standard of proof required to rebut statutory presumption created by reverse onus clause is proof by a balance of probabilities. 12-B

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PEACE OFFICERS (Term Includes Fishery Officers)

(a) Arrest

R. v. Biron (S.C.C., 1975) Section 450(1)(b) *C.C.* - Interpretation of - A peace officer may arrest someone he finds "apparently" committing an offence. 13-A

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(b) Obstruction

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(c) Reasonable and Probable Grounds

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Jean Roberge v. Her Majesty the Queen (S.C.C., 1983) Whether use of firearms reasonable depends on circumstances. S.450(1)(b) *C.C.* should be read as if word "apparently" contained in section. Also, must be "apparent" to reasonable person that accused committing an offence. 13-F

(d) Other

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(b) Mitigating Circumstances

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PROCEDURAL MATTERS

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R. v. Robert Arnold Porter (N.S. Prov. Mag. Ct., 1979) Information should state specific item in a schedule. Partial enforcement of regulations by Department of Fisheries constitutes usurpation of the powers of the Governor in Council. 16-B

R. v. Canadian Industries Ltd., (N.B.C.A., 1980) If word or phrase omitted from information, it may be sufficient if information refers to section of the act under which accused charged, s.510 *Criminal Code*. 2-H

Paul Royka v. Her Majesty the Queen (S.C. Ont. C.A., 1980) Informations - Even though section under which accused charged does not by itself create an offence, this alone does not entitle accused to succeed on appeal. 4-E

R. v. Paul and Copage (N.S.S.C.A.D., 1977) Reference to a repealed section in the information is not a fatal defect. 9-C

Her Majesty the Queen v. Burton Hubbard, (N.B. Ct. of Q.B., T.D., 1983), An information drafted in the words of the section which create the offence, is not void for uncertainty. 16-C

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Gavin et al. v. The Queen (P.E.I. S.C., 1956) Broad interpretation given to s.34 *Fisheries Act* after noting the object of legislation and the similarity in wording in s.34(7)(g) with that of s.91(12) *B.N.A. Act*. - both contain phrase "sea-coast and inland fisheries". 2-J

Regina v. MacMillan Bloedel Limited (B.C.C.A., 1984), If an enactment is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly. 10-K

Her Majesty the Queen v. Earnest Clark Campbell (Ct. Ct. of Vancouver, B.C., 1984), The particular legislative intent of regulations must be determined in the context of the *Fisheries Act* and the regulations made under it. A construction of a regulation which makes it impossible for Crown to prove its case is preferable to construction that may make it impossible for an accused to defend his case. 10-M

R. v. Nicholas et al. (N.B. Prov. Ct., 1978), Under *Statutory Instrument Act* the court is required to take judicial notice of federal statutory regulations. 9-K

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The Queen v. Robert Laidler (N.S. Prov. Mag. Ct., 1983), Section 11 of *Interpretation Act* R.S.C. 1970, C.I-23 requires the purposive approach to interpretation of federal statutes. Where a statute open to two interpretations an interpretation should be chosen which favours the liberty of the subject in the absence of compelling reasons to contrary. 4-G

R. v. Baker (B.C. Cty. Ct., 1983), Cardinal principle in the interpretation of statutes is that if there be two 4-H

inconsistent enactments it must be seen if one cannot be read as qualification of other.

STRICT LIABILITY (See Offences)

TERRITORIAL JURISDICTION

The Schooner "John J. Fallon" v. His Majesty The King, (S.C.C., 1917) Powers possessing barren islands entitled to control marginal seas. Term "coast" in treaty of 1818 between U.S. and Britain, not confined to mainland coast. 5-H

Gavin et al. v. The Queen (P.E.I.S.C., 1956) As s.7(b) Lobster Fisheries Regulations does not precisely describe area to be regulated past low water mark, legislative jurisdiction not given to regulate past this area. 2-J

R. v. Davies (Nfld. S.C.C.A., 1977) Seal Protection Regulations have no application outside territorial waters of Canada. 1-A

John M. Fudge v. His Majesty the King (Ex. Ct. of Canada, 1940) Ship found violating laws within 3 mile limit, can be pursued beyond this limit. 5-G

Miller v. Webber (S.C.N.S. 1910), The federal Parliament has the authority to demand licence fee from fishermen within 3 miles of provincial foreshore waters when purpose is to regulate and protect the fisheries for the benefit of general public. 2-Q

TREATIES (See Indians)

UNAVOIDABLE CAUSE (See Defences)

R. v. Davies

Newfoundland Supreme Court

Court of Appeal

October 2, 1977

Certiorari not barred by s.710 *Criminal Code* because there was no trial on the merits of the case. Seal Protection Regulations have no application outside territorial waters of Canada - therefore, attempt to extend jurisdiction was "ultra vires" the powers of the Governor in Council.

Facts -

The accused was charged with violating the provisions of the Seal Protection Regulations, in that he operated a helicopter less that 2,000 feet over seals on the ice and landed a helicopter less than half a mile from seals on the ice. These operations took place within area defined in the Seal Protection Regulations as the Front Area at a point approximately 50 miles due east to Ship Harbour Head.

After the accused appeared and pleaded not guilty to the charges, he applied for an order of certiorari to quash the charges on the ground that the Regulations were inapplicable outside the territorial waters of Canada. The Newfoundland Supreme Court, Trial Division, allowed the application. The Crown now appeals.

Submissions Put Forward by the Crown

1. The learned Judge erred in finding that the application for certiorari was not barred by section 710 of the *Criminal Code*.

2. In passing the *Fisheries Act*, Parliament was exercising its jurisdiction under Section 91 of the *British North America Act*. In this Act, power was delegated to the Governor General in Council to make regulations, inter alia, for the proper management and control of the fisheries. Subsequently counsel argued that it would be impossible to manage and control the seal fishery unless the legislation extended beyond Canadian fishery waters.

.../2

Reasoning of the Court -

Whether or Not Application for Certiorari Barred by S.710 *Criminal Code*

Furlong, C.J.N. -

Section 710 is quite specific and where the merits have been tried and an appeal might have been taken but was not, the application is barred. This case never reached the stage where the merits were tried; no evidence of fact was raised and the matter was disposed of by a preliminary objection in point of law or jurisdiction.

...I can see no reasons why these proceedings can be construed as being contrary to Section 710 of the *Criminal Code*.

Jurisdiction of Parliament Outside Territorial Waters

Gushue, J.A. -

Section 34 of the *Fisheries Act* gives the Governor in Council the right to make specific types of regulations and also the power to generally make regulations "for carrying out the purposes and provisions of this Act." Nowhere in section 34, or in any other part of the Act, is the right given to extend a fishing zone beyond the "twelve mile limit" (now two hundred miles)... The attempt therefore ... to extend jurisdiction beyond the twelve mile fishing zone, was "ultra vires" the powers of the Governor in Council.

Appeal dismissed.

Cite: 14 N. and P.E.I.R., 1
33 A.P.R.

Possible Ramifications of Decision:

1. *Fisheries Act* has no application outside the territorial waters of Canada.

2. Certiorari - not barred by s.710 *Criminal Code* when there has been no trial on the merits of the case.

Regina v. Rita McRae and His Honour Judge K. Scherling

Supreme Court of British Columbia

July 16, 1980

S.58(3) *Fisheries Act* does <u>not</u> give fishery officer absolute discretion as to whom and how much he may sell seized fish for. Application for certiorari not granted because "no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".

Facts -

On August 3, 1978, a fishery officer acting under the *Fisheries Act* apprehended a Mrs. McRae and seized 76 sockeye salmon from her. The Department of Fisheries did not have adequate storage facilities to preserve the fish, so they retained two fish for evidentiary purposes. The remaining 76 fish were sold on August 4, 1978 to the Salvation Army for the price of one dollar. The Court was advised that this sale was made pursuant to a pre-determined Department of Fisheries policy. -- "Re Disposal of Indian Food Fish" -- returning fish seized in this way to the people served by the Salvation Army. The authority was said to be given by section 58(3) of the *Fisheries Act*.

Approximately a year after the original seizure the trial of Rita McRae proceeded. The Court withdrew one of the counts and stayed proceedings on the remaining counts.

Mrs. McRae then requested the return of her property. The Department of Fisheries, for its part, took the position that Mrs. McRae was entitled only to one dollar; the proceeds received from the disposition of the 74 sockeye salmon. On September 13, 1979 Judge Scherling made an order whereby he directed the Department of Fisheries, "to return an equivalent of seventy-six sockeye salmon to Rita McRae, to be delivered on or before October 13, 1979."

The Crown now applies by way of certiorari to quash the order of Judge Scherling.

The legislation that is relevant to this application is as follows:

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Fisheries Act

Section 58(3) Where, in the opinion of the person having custody of an article, goods or fish seized pursuant to subsection (1), that article, goods or fish will rot, spoil or otherwise perish, that person may sell the article, goods or fish in such manner and for such price as that person may determine.

Bill of Rights

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination... the following human rights and fundamental freedoms, namely,

a) the right of the individual to... enjoyment of property and the right not to be deprived thereof except by due process of law;

b) the right of the individual to equality before the law and the protection of the law.

Submissions Put Forward by the Crown

Counsel for the Crown submits that the learned provincial court judge (Scherling) exceeded his jurisdiction when he made the order to return the fish to Mrs. McRae. Accordingly, they feel that there is no discretion by this court to refuse the application of "certiorari" where the decision is "void ab initio" [void from the beginning] by lack of jurisdiction.

Reasoning of the Court -

The learned judge notes those decisions where judges have commented on the Court's discretion to allow or refuse an application for "certiorari" to quash an order of an inferior Court. He then concludes... I have a discretion to exercise as to whether or not I will grant the application for certiorari to

quash. In doing so, I must keep in mind the principle that an application based on lack of jurisdiction militates strongly in favour of the issuance of the writ rather than refusal.

I must also consider the following circumstances:

1. The Fishery officer... seized all the fish owned by Rita McRae, when the legal objective would have been completely satisfied if only 2 fish had been seized.... Mrs. McRae has now been improperly deprived of her property for 2 years.

2. ...The Department of Fisheries offered Mrs. McRae one dollar as full compensation for her property, thereby imposing an unauthorized punishment upon a citizen against whom they did not proceed with charges.

3. The Department of Fisheries refrained from complying with the order of Judge Scherling and waited 4½ months before launching this petition for an order of certiorari to quash the order.

4. Crown Counsel submitted that if Mrs. McRae was dissatisfied with the one dollar compensation she must sue in federal court and thereby be required to incur further months of delay, costs, and the continual deprivation of her property.

5. The only justification advanced for the fishery officer's actions in giving away the property is the stated "policy" of the Department of Fisheries and that Department's interpretation of the provisions of Section 58(3) of the *Fisheries Act*.

As to this interpretation, recent cases have clearly established that when an officer is making an administrative decision that affects the interests of a member of the public, that officer is required to exercise his administrative function with fairness. The fact that Parliament has seen fit to delegate the decision as to appropriate terms of sale of the seized fish to the sole

.../4

discretion of the officer does not negate the duty of fairness. What occurred here, of course, was not a "sale" but a donation of articles, a procedure not contemplated or authorized by section 58 of the *Fisheries Act*.

All of these factors have been considered and in exercising my discretion, I attach considerable significance to the fact that the course of conduct the applicant wishes to justify and continue, in my opinion is a direct contravention of section 1(a) and (b) of the *Bill of Rights*.

I have indicated, and for the reasons given, it is my conclusion that s.58(3) does not justify the expressed policy of the Department of Fisheries. Accordingly, upon weighing these respective considerations, I conclude that I should not aid the applicant by granting the application for certiorari.

Application dismissed.

Cite: Unreported.

Possible Ramifications of Decision:

1. When selling seized goods under s.58(3), the fishery officer should make every reasonable effort to obtain as close to the market value as possible for the property being sold.

2. When determining "policy" the Department of Fisheries should ensure that there is no conflict with other federal legislation such as the *Bill of Rights*, or *The Canadian Charter of Rights and Freedoms*.

R. v. Martin

New Brunswick Court of Queen's Bench, Trial Division

Judicial District of Northumberland

January 8, 1982

Trial Judge not bound to give reasons for rejecting evidence. Duty of appellate court regarding findings of fact by trial judge - should not overturn unless clearly wrong.

Facts -

This is an appeal by the Crown from the acquittal of the accused on a charge:

> That Norman H. Martin....did unlawfully have in his possession lobster less that two and one half inches in length contrary to and in violation of s.3(3)(b) of the Lobster Fishery Regulations.

A fishery officer, Donald Durelle found 16 small lobsters among those which had been dumped from the respondent's catch into the crates of the buyers. He states that these crates were empty when Martin's lobsters were dumped into them. On the other hand, the respondent's witnesses, were not so clear but seemed to be saying the opposite; i.e. - that the crates were not empty and that the lobsters Durelle measured could have belonged to someone else. The learned trial judge found himself unable to state beyond a reasonable doubt that the crate had been empty and acquitted the accused. He gave no indication as to whether or why he was rejecting the evidence of one side. The crown appealed this decision to the Court of Queen's Bench.

Reasoning of the Court -

An appeal court may not substitute its view of the facts for those of the trial judge unless the latter was so clearly wrong that properly instructing himself on the laws he could not possible have found as he did.

.../2

A trial judge, should, but is not bound to, give his reasons for accepting some evidence and rejecting others, and he may not arbitrarily reject clear uncontradicted evidence without reason.

While, on the typed record, I would have come to a different conclusion, the decision is not clearly wrong. In fact, it is quite possible, having heard and seen the witnesses for the learned Provincial Court Judge to have been left with a doubt as to the actual situation. He would then have had no alternative except to acquit.

Appeal dismissed.

Cite: 38 N.B.R. (2d) 205
100 A.P.R.

Possible Ramifications of Decision:

1. Gives position of appeal court with respect to questions of fact.

2. When appealing a case should not appeal on questions of fact unless the trial judge was very clearly wrong in his interpretation of those facts.

3. If judge rejects clear and uncontradicted evidence, he must give reason for so doing.

4. Demonstrates that in cases dealing with a mens rea offence as here, all the accused has to do is raise a reasonable doubt.

Her Majesty the Queen v. Pius Hébert

Court of Queen's Bench of New Brunswick

Trial Division

#Docket # B/M/74/83

It is not the responsibility of the appeal court to substitute its own deductions for those of the trial judge if judge's verdict can be substantiated by evidence.

Facts -

We have here an appeal lodged by the Deputy Crown Prosecutor against the acquittal of the accused charged with the illegal fishing of lobster. The charge is based on section 19 of the *Fisheries Act*.

The grounds of appeal were that the judge who heard the case was incorrect in his interpretation of the word "fishing" and in finding that the respondent had not fished as defined under the terms given under the Act.

Reasoning of the Court -

The judge hearing the case does not seem to have misinterpreted the legal definition of fishing. It appears from his remarks that he accepts that the lifting of a lobster trap into the boat constitutes an act of fishing according to the law. However, the judge chose to believe the accused when he claimed to have a lawful excuse to act as he did ... Another judge could easily have arrived at another conclusion based on the stated facts. However, it is not the responsibility of the appeal court to substitute its own deductions for those of the trial judge if the judge's verdict can be substantiated by the evidence.

If the trial judge's verdict can be substantiated by evidence appeal court will not substitute its own deductions.

Appeal dismissed.

.../2

Possible Ramifications of Decision:

1. If trial judge's verdict can be substantiated by evidence, case should not be appealed.

2. Judge accepts that the lifting of a lobster trap into a boat constitutes the act of fishing.

Robert D. Ward v. Her Majesty the Queen
Court of Queen's Bench of New Brunswick
Trial Division
January 27, 1984
(Docket # S/M/145/83)

"Forthwith" under s.18(22) New Brunswick Fishery Regulations means within a reasonable time under the circumstances in the case, promptly and with reasonable dispatch.
The duty of appellate court includes a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on relevant issues. It does not have right to reassess evidence for purpose of determining guilt or innocence.

Facts -

On the night in question the appellant and a companion were drift netting for shad in the St. John Harbour. They were in a 12 foot wooden boat equipped with a 7½ h.p. outboard motor as well as a set of oars. The fishing process involved letting out of the net and allowing it to drift with the tide. The net in question was some 300 feet in length and would then be hauled into the boat and any fish in it would be removed.

Presently, two fishery officers came alongside the boat. A conversation ensued between the fishery officers and the fishermen. The fishery officers then left. Later when the fishery officers returned the appellant's boat was headed towards the wharf. One of the fishery officers called out asking whether the appellant had any fish. The appellant told him that he had one shad and one salmon. The salmon was not tagged.

It should be noted, here, that when the fishery officers came over to the boat the appellant was operating the outboard motor. There was also evidence that the harbour was choppy and that one of the oars was broken.

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The evidence of the appellant was to the effect that the salmon was in the net and that time would be consumed in disengaging the salmon from the net in order to tag it. Fishery officers contradicted this testifying the salmon was under the net and simply lying on the bottom of the boat. The trial judge accepted the evidence of the fishery officers to the extent that there was a contradiction on this point. In fact he made a specific finding to the effect that even if the salmon was still engaged in the net it would have been a simple matter to tag it.

The appellant was convicted of having in his possession a salmon which was not affixed with a salmon tag in accordance with the New Brunswick Fishery Regulations. He is now appealing.

The pertinent regulations provide as follows:

S.18(22) Every person who catches and retains a salmon shall forthwith affix thereto a salmon tag set out in Schedule XI.

The issue here is whether under subsection 18(22) the accused was in violation of having to forthwith affix a salmon tag.

Reasoning of the Court -

The trial judge considered the meaning of the word "forthwith" and held it to mean "within a reasonable time under the circumstances in the case, promptly and with reasonable dispatch". This appears to be an application of proper considerations when dealing with the meaning of "forthwith".

The trial judge reviewed the evidence and found again as a fact that the appellant had adequate opportunity to tag the salmon before he was checked by the fishery officers. Under the circumstances he found that the salmon had therefore not been tagged "forthwith" and found the accused guilty as charged.

... The duty of an appellate court was referred to by Mr. Justice Estey in *R. v. Harper* (1982) 40 N.R 255 at p.268:

.../3

> An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate-tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgement, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.

In my opinion the trial Judge dealt with the evidence and assessed it. I cannot find a lack of appreciation of relevant evidence or a complete disregard of any area of the evidence.

Accordingly, I dismiss the appeal.

Cite: Unreported.

Possible Ramifications of Decision:

1. Outlines role of appellate court; a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues.

2. Given meaning of word "forthwith" as found in the regulations.

Re Shoal Lake Band of Indians No. 39 et al. and The Queen in the Rights of Ontario

Ontario High Court of Justice

July 13, 1976

Constitutional law - Recognition that federal and provincial legislative authority overlap in field of fishing - *B.N.A. Act*, 1867, ss.91(12), 92(5). The delegation by Parliament of administrative authority to a provincial Minister and officials, including authority to issue licences and to impose conditions on those licences, is a proper exercise of Parliament's legislative authority.

Facts -

Application by a member of an Indian Band for judicial review of the imposition by the Ministry of Natural Resources of fishing quotas with respect to a lake straddling the boundary between Ontario and Manitoba.

Counsel for both parties agree that the matter is urgent. It concerns the imposition of fishing quotas which affect the applicants in the commercial fishing which they undertake in Shoal Lake.

The applicants are Indians residing on the reserve on the shores of Shoal Lake in the District of Kenora. Their reserve encompasses lands in Western Ontario and Eastern Manitoba. The lands are the subject of Treaty No. 3 of 1873. It is quite apparent that the forebears of the applicants have fished in the area for many centuries. Those applicants, as well, have fished the area and since licences were first issued in 1970, they have held commercial fishing licences for Shoal Lake.

There are on the shores of that lake, two Indian bands, the applicants and the members of Band No. 40. There were seven commercial licences issued for Shoal Lake. Four of these licences were held by the Indian bands, two each by Band No. 39, the applicants, and by Band No. 40.

The bands comprise slightly over 200 people each. The material indicates that in each band some 16 families rely primarily on the commercial fishing for their livelihood.

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Northwest Falling Contractors Limited v. Her Majesty the Queen

Supreme Court of Canada

July 18, 1980

Constitutional Law - To determine constitutional validity of a section, must ascertain true nature and character of the legislation.
Federal power to control and regulate fisheries resource includes authority to protect those creatures forming a part of the system.
Procedure - Charge not multiplicitous if accused knows the case he has to meet or is not prejudiced in the preparation of his defence by ambiguity in the charge.

Facts -

The appellant was charged in an information that, (Count 1) he did unlawfully deposit a deleterious substance into water frequented by fish... (Count 2)... that he did unlawfully permit the deposit of a deleterious substance into water frequented by fish... (Count 3)... that he did unlawfully permit the deposit of a deleterious substance in a place under such conditions where such deleterious or any other deleterious substance that results from the deposit of such deleterious substance may enter water frequented by fish...

(All of these counts are contrary to section 33(2) of the *Fisheries Act*).

Before any plea had been entered, the appellant applied to the Supreme Court of B.C. for an order of prohibition. This application was dismissed and this decision confirmed on an appeal to the Court of Appeal of British Columbia. The appellant, with leave, then appealed to this court.

There are several grounds for appeal.

Augumenta Put Forward by the Appellant.

Firstly, the appellant attacks the validity of subsection 33(2) on the grounds that it is not legislation in relation to "Sea Coast and Inland

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Fisheries" (section 91(12) *B.N.A. Act)*, but that it is legislation in relation to the (a) pollution of water generally, or is (b) legislation for the protection of all animal life in the water. This latter argument is founded upon the definition of fish in section 2 of the Act. It is said that this definition is too broad.

As to the former argument, the appellant points to the very broad definition of "water frequented by fish" in subsection 33(11) which refers to "Canadian fisheries waters" which under section 2 includes "all waters in the territorial Sea of Canada and all internal waters of Canada". He also refers to the broad scope of the definition of "deleterious substance".

Secondly, the appellant also contended that an order of prohibition should have been granted because the charges contained in the information were multiplicitous.

Reasoning of the Court -

Argument that Legislation for the Protection of All Animal Life

The *British North America Act* is not a mere authority to legislate in relation to "fish" in the technical sense of the word. The judgements in this court and in the Privy Council have construed "fisheries" as meaning something in the nature of a resource... Shellfish, crustaceans, and marine animals, which are included in the definition of "fish" by section 2 of the Act, are all part of a system which constitutes the resource. The power to control and regulate that resource must include the authority to protect all these creatures which form a part of that system.

Argument that Legislation in Relation to Pollution of Water Generally

The task of the court in determining the constitutional validity of subsection 33(2) is to ascertain the true nature and character of the legislation. It is necessary to decide whether the subsection is aimed at the protection and preservation of fisheries. In my opinion it is.

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 water frequented by fish. This is a proper concern of legislation under the heading of "Sea Coast and Inland Fisheries".

Multiplicitous Charges Contained in Information

Applies the test put forward in *The Queen v. Sault Ste. Marie.* This test states that,

> the primary test should be a practical one, based on the only valid justification for the rule against duplicity; does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge?

The fact that there are several counts, each alleging a different mode, does not make it any more difficult for the accused to know what case he has to meet or to prepare his defence. He is not placed in greater jeopardy if the counts relate to one offence, because, in view of the judgement in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, he could not be convicted on more than one count.

Appeal dismissed.

Cite: Unreported Case.

Possible Ramifications of this Decision:

1. Section 33(2) of the *Fisheries Act* is constitutionally valid.

2. Demonstrates what should be noted ("true nature and character") in determining whether legislation is constitutionally valid.

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3. Gives some indication of the importance of statute interpretation.

4. Demonstrates one way in which constitutional cases become important with respect to the Department of Fisheries.

5. Generic charges in an information will not be considered multiplicitous if they are unambiguous.

Her Majesty the Queen v. G. E. Barbour Company Limited

New Brunswick Provincial Court

1983

There must be some permanent damage sustained to convict under s.33(1) of the *Fisheries Act*. Constitutional Law - s.33(1) of the *Fisheries Act* is "intra vires" the Federal Parliament provided it is interpreted narrowly.

Facts -

The Defendant G. E. Barbour Company Limited was charged that, he did unlawfully carry on work resulting in the harmful alteration, disruption or destruction of fish habitat contrary to s.21(1) of the *Fisheries Act* at or near Rocky Bend, South West, Miramichi River.

In August 1982, Mr. Ralph Brenan, President of G. E. Barbour Company Limited and other local camp owners met with federal government representatives to discuss their position with respect to obtaining permits to restore their salmon pools. The federal officials told them that no permits would be granted and explained that since the early part of 1980 all applications for the restoration of salmon pools in the Miramichi region had been turned down. The officials also specifically mentioned two possible downstream effects if restoration was allowed. These effects were possible unravelling of the river bed and possible siltation of downstream spawning beds.

As a result of this decision, Mr. Brenan took his case directly to the Minister of Environment. The Minister issued a permit for water course alteration; authorizing the Defendant to restore local pools. In the process of restoring these pools, the Defendant had a bulldozer put into the river to excavate material. The work done by the bulldozer is the subject matter of the proceedings.

Submissions Put Forward by the Defendant

The Defendant contends that s.30(1) of the *Fisheries Act* is "ultra vires" the Federal Parliament. He claims that this is a matter completely within

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provincial property rights and the fact that bulldozing may have harmed fish habitat is irrelevant.

Reasoning of the Court -

....The question to be answered is whether s. 33(1) is ultra vires the Federal Parliament.... Section 33(1) is intra vires the Federal Parliament. It appears reasonable that section 33(1) must prohibit only those works and undertakings that are in actual contradiction or conflict with the effective protection or preservation of a fish habitat. It therefore matters not if one is in possession of a provincial permit under the *Clean Environment Act*, for one may still be in contravention of the federal act. However, for both acts to be compatible section 33(1), must be interpreted narrowly.

Thus the question to be answered is whether the work carried out by the defendant company is in contravention of section 33(1). There is no evidence to support any finding that the work damaged any spawning grounds or unravelled the river bed in any manner. There is evidence to support the finding that the work caused the movement of <u>some</u> juvenile salmon. It apears that these fish could return after a month of two. There is no evidence to support the finding that the work carried out would decrease or injure the juvenile fish population or alter their habits in a harmful way. This Court finds that the work must have some permanency in order to convict under this section. It is clear that little is known about the mobility and habits of the juvenile salmon and this lack of scientific knowledge of these habits is the main reason that the Crown must fail, for the court cannot convict on speculation.

Accused acquitted.

Cite: Unreported Case.

Possible Ramifications of this Decision:

1. Demonstrates lack of detailed scientific evidence as to inventory of salmon in Miramichi system or the lack of evidence of the action in that system.

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2. Section 33(1) of *Fisheries Act* is "intra vires" the Federal Parliament.

3. Where it appears that federal legislation could encroach on provincial jurisdiction [Property and Civil Rights s.92(13)] if legislation is given wide interpretation, federal legislation must be interpreted narrowly.

Attorney-General of Canada v. Aluminum Co. of Canada Ltd.

Supreme Court of British Columbia

August 5, 1980

Constitutional Law - s.20(10) of the *Fisheries Act* is "intra vires". Minister is acting within his jurisdiction under this section if he is acting to preserve the fishery. Minister given power to determine discharges of water as he represents the public interest.

Facts -

The Attorney-General has brought a motion before the court for a mandatory injunction. An order is sought compelling the Aluminum Company of Canada to comply with the directions of the Minister of Fisheries and Oceans regarding the quantity of water to be released through the defendant's Skins Lake Spillway into the bed of the Nechako River to ensure the safety of migrating salmon and the flooding of their spawning grounds. The Minister relies on section 20(10) of the *Fisheries Act*, which empowers him to require the escape of sufficient volumes of water for the safety of fish and the flooding of the spawning grounds. Alcan says this is unconstitutional; that it encroaches on provincial jurisdiction. The Company relies on the water license it holds from the province.

Basically there are three issues to be determined here.

1. Is section 20(10) of the *Fisheries Act* "intra vires"?

2. If so, is the Minister acting within his jurisdiction in determining that an order should be given regarding water discharges?

3. Who should be given power to determine the discharges of water that will be necessary?

Reasoning of the Court -

Section 20(10) is directed to the safety of fish and the flooding of their spawning grounds. The Minister's power is wide, but it is a power conferred for

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the protection of the fishery and not one which purports to allow him to regulate other activities unconnected with the fishery.

...If the Minister reaches the opinion that he must act to preserve the fishery, then he is not overstepping the boundary of federal jurisdiction if he gives orders for the discharge of water in order to flood the spawning grounds.

But if the Minister's opinion is not founded on any evidence, if extraneous considerations having nothing to do with the preservation of the fishery have been decisive, or if the Minister's orders are simply arbitrary, then the Courts will intervene.

(As to issue 3), the Minister represents the public interest. The power ultimately must be his.

The Attorney-General of Canada has shown that he has the right to act under s.20(10) - and that the balance of convenience supports the issuance of a mandatory injunction.

Cite: Unreported, Docket # C80 3064

Possible Ramifications of Decision:

1. Determination that s.20(10) of *Fisheries Act* is "intra vires".

2. Demonstrates conflict between private (business) and public interests.

Regina v. Isaac

Nova Scotia Court of Appeal

November 19, 1975

If provincial law relates to use of Indian land it does not apply on Indian Reserves - as province does not have legislative power. S.88 *Indian Act* merely declares the extent to which provincial laws apply to Indians.

Facts -

The appellant, an Indian was charged and convicted of unlawfully having in his possession a rifle upon a road in Nova Scotia contrary to s.150(1)(b) of the *Lands and Forests Act*. This section reads as follows:

1. Except as provided in this Section, no person shall take, carry or have in his possession any shot gun cartridges loaded with ball or with shot larger than AAA or any rifle,

.....

(b) upon any road passing through or by any forest, wood or other resort....

The question to be decided here is whether a provision of a Nova Scotia Act regulating the hunting of game applies to an Indian hunting on an Indian Reserve?

Reasoning of the Court -

I take it that,...if a particular provincial law, in this case a game law is construed as being legislation relating to the use of Indian reserve land, then such legislation does not apply to Indian reserves or as Mr. Justice Martland said in commenting on *Corporation of Survey v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 38,

> Once it was determined that the lands remained lands reserved for Indians, provincial legislation relating to their use was not applicable.

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Support for the proposition that game laws on reserves are laws relating to the use of Indian land within the exclusive federal domain can be noted in the delegation of regulatory power effected by sections 73(1) and 81 of the *Indian Act*. These sections authorize regulations by order in council or band by-laws to be made for the protection and preservation of fish and game on reserves...

In part II of my reasons, I conclude that Indians on Nova Scotia reserves have a usufructuary right in the reserve land, a legal right to use that land and its resources... That legal right is possibly a supervening law which in itself precludes the application of provincial game laws, but it is, I think, more properly considered as an "Indian land right" which is inextricably part of the land to which the provincial game law cannot extend.

We need not, however, rely on aboriginal theories or "Indian title" concepts to establish that hunting is a use of land and its resources. To shoot a rabbit, deer or grouse on land especially Indian reserve land, is as much a use of that land as to cut a tree on that land,...

The provincial game law in the present case necessarily affects Indian land rights and is thus excluded from applying to the appellant on the reserve. Does section 88 override that principle and subject the appellant to a law which without that section would not apply?

Section 88 merely declares that valid provincial laws of general application to residents of a province apply also to Indians in the province. It does not make applicable to Indian reserve land a provincial game law which would have the effect of regulating use of that land by Indians...

Appeal allowed.

Cite: 13 N.S.R.(2d) 460

Possible Ramifications of Decision:

1. If provincial law clearly a land use law it cannot apply on a reserve.

R. v. Sacobie and Paul

(204/79/CA)

New Brunswick Court of Appeal

December 11, 1979

Under s.27(2) of the *Interpretation Act* and s.455 and 720 of the *Criminal Code*, any person, including provincial attorneys-generals are entitled to bring an information or indictment for violations of non-criminal federal statutes.

Facts -

A fishery officer, acting under the authority of the *Fisheries Act*, laid an information charging the respondents with committing an offence against the New Brunswick Fishery Regulations contrary to s. 61(1) of the *Fisheries Act*. After the two defendants entered pleas of not guilty, the learned Judge requested counsel to enter their appearances. The Crown Prosecutor states that he appeared "as counsel and agent for the Attorney-General of the Province of New Brunswick". No one appeared on behalf of the Attorney-General of Canada. The Judge held that only the Federal Attorney General or his counsel or agent may prosecute violations of the *Fisheries Act*, and without calling on the informant to conduct the prosecution, he dismissed the information. The Attorney-General of New Brunswick is now appealing.

Reasoning of the Court -

Parliament has the exclusive right to legislate who may institute proceedings brought for the violation of Federal Statutes other than criminal law; who may conduct such procedings and which, if any, Attorney General may assume control of such proceedings. Parliament has enacted such legislation, viz. s.27(2) of the *Interpretation Act* which provides as follows:

S.27(2) All the provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the *Criminal Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

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This subsection adopts the provisions of the *Criminal Code* relating to the prosecution of summary conviction and indictable offences.

Section 455 of the *Criminal Code* provides:

S. 455 Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence, may lay an information.....

There is no restriction on that broad delegation if authority to be found in the *Criminal Code*. Therefore, subject to any restrictions to be found in particular Federal legislation... which require previous authority from either the Provincial Attorney-General or the Federal Attorney-General, anyone may lay an information for an indictable offence.

The same is true in relation to summary conviction offences. Section 720 of the Code defines "informant" as meaning "a person who lays an information".

There is likewise no restriction in the *Criminal Code* limiting who may lay an information charging the commission of a summary conviction offence....

Also, Parliament in its definition of Attorney-General, (in section 2 of the *Criminal Code)* specifically states that the Attorney General of Canada is only included in the meaning of "Attorney General" for the purpose of the prosecution of a violation of any Act of Parliament or regulation made thereunder, other than one under the *Criminal Code;* where the prosecution is instituted at the instance of the Government of Canada and the proceedings are conducted by or on behalf of the Federal Government.

Appeal allowed.

Cite: 28 N.B.R. (2d) 288
63 A.P.R.

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Possible Ramifications of Decision:

1. Any confusion that existed concerning who can lay an information is clarified by this decision.

2. Demonstrates how other federal statutes such as the *Interpretation Act* apply to the *Fisheries Act*.

Fowler v. The Queen

Supreme Court of Canada

June 17, 1980

Section 33(3) *Fisheries Act* - "ultra vires" because section is not limited to actual or potential harm to fisheries but is a blanket prohibition of types of activity within provincial jurisdiction.

Facts -

The accused carried on a logging operation which involved dragging logs across a stream used for the spawning of salmon and the rearing of fry. This process deposited debris in the stream bed. Fowler was charged with unlawfully putting and permitting to be put, debris into the water frequented by fish, contrary to section 33(3) of the *Fisheries Act*. The accused is now appealing.

At issue here, is whether section 33(3) is within the legislative competence of the Parliament of Canada. This section provides as follows:

> s.33(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps, or other debris into any water frequented by fish of that flows into such water, or on the ice over either such water, or at a place from a place from which it is likely to be carried into either such water.

Reasoning of the Court -

The criteria for establishing liability under s. 33(3) are indeed wide.....

Section 33(3) makes no attempt to link the prescribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the court to indicate that

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the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of the sea coast and inland fisheries and is ultra vires of the federal Parliament.

Appeal allowed.

Cite: 113 D.L.R. (3d) 513

Possible Ramifications of this Decision:

1. Care should be taken when drafting legislation to ensure that the legislation links the prescribed conduct to actual or potential harm to fisheries.

Regina v. Chiasson

New Brunswick Court of Appeal

March 11, 1982.

Constitutional Law - Whether s.50 of the *Fish and Wildlife Act*, provincial legislation, is ultra vires, - Under s.92(13) and 92(16) of the *B.N.A. Act*, the provinces may regulate hunting, including regulations directed at safeguarding persons and property from those engaged in hunting as in s.50 *Fish and Wildlife Act*. Duplication of federal legislation by the provinces does not render it inoperative. It appears that there must be operational conflict.

Facts -

The case arose out of the following circumstances. An information was laid against André Chiasson charging that he "being in possession of a firearm for the purpose of hunting, did discharge a firearm without due care and attention and did commit the offence of careless hunting contrary to and in violation of s.50(1) of the *Fish and Wildlife Act*.

Section 50 provides that,

> every person who, being in possession of a firearm for the purpose of hunting, discharges, causes to be discharged or handles a firearm without due care and attention commits the offence of careless hunting.

At the end of the trial counsel for Chiasson submitted that s.50(1) was ultra vires as being in conflict with s. 84(2) of the *Criminal Code*.

S.84(2) provides,

> every one who, without lawful excuse, uses, carries, handles, ships or stores any firearm or ammunition in a careless manner or without reasonable precautions for the safety of other persons

.../2

(a) is guilty of an indictable offence and is liable to imprisonment

(i) in the case of a first offence, for two years, and
(ii) in the case of a second or subsequent offense, for five years; or

(b) is guilty of an offence punishable on summary conviction.

The argument was accepted both in the Provincial Court and in the Court of Queen's Bench and the Crown now appeals. Two issues arise:

(a) Is s.50(1) of the *Fish and Wildlife Act*, (1980) ultra vires?

(b) If so, is it inoperative because its area of application is substantially covered by s.84(2) of the *Criminal Code?*

Reasoning of Court -

The section impugned in this case is valid legislation of a local matter or of property and civil rights [92(3) or 92(16)].

...Section 50 of the *Fish and Wildlife Act*, 1980 is intra vires and continues in operation notwithstanding the existence of s.84(2) of the *Criminal Code*. There can be no confusion about the purpose of the legislation in the present case and so no interference with federal law. The two pieces of legislation can operate side by side.

Mr. Justice LaForest follows the decisions in the recent cases; notably *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978) 25 N.R. 1 which state that operational conflict with federal laws must be established to warrant declaring a provincial law inoperative.

Appeal allowed.

Cite: 66 C.C.C. (2d)

N.B. Leave to appeal to the Supreme Court of Canada was granted June 7, 1982.

Possible Ramifications of Decision:

1. Puts forward the current position with respect to "paramountcy" (Paramountcy of Federal Legislation - only where operational conflict between provincial and federal provisions).

2. Gives some idea of the extent to which a province can legislate without encroaching on federal jurisdiction.

Re Canadian Industries Limited;
R. v. Canadian Industries Limited
Docket (84/80/ CA)
New Brunswick Court of Appeal
September 9, 1980

Constitutional Law - Application of *R. v. Northwest Falling Contractors Ltd.* (1980), 32 N.R. 541. Parliament has power to designate federal agents to lay informations and to conduct prosecution of offences under *Fisheries Act*. If word or phrase omitted from information, it may be sufficient if information refers to section of act under which accused charged s.510(5) *Criminal Code*.

Facts -

The accused company, was charged that it,

> did unlawfully deposit a deleterious substance, namely water containing mercury exceeding 0.00250 kg. per reference tonne of chlorine in the water of the Restigouche River at Dalhousie, New Brunswick contrary to the provisions of s.33(2) of the *Fisheries Act*...

Later, the information was amended by the addition of the words "being frequented by fish" after the words "Restigouche River" wherever they appeared in the information.

The accused applied for an order of prohibition to prevent the judge of the Provincial Court from hearing the trial.

The grounds relied upon by C.I.L. were as follows:

1. Subsection (2) of section 33 of the *Fisheries Act* is "ultra vires" the parliament of Canada insofar as it is legislation relating to the exercise of proprietary rights. [Section 92(13) *B.N.A. Act.*].

.../2

2. That the right to prosecute alleged violations of s.33(2) of the *Fisheries Act* has been delegated to the Province of New Brunswick pursuant to a Canada-New Brunswick Accord for the Protection and Enhancement of Environmental Quality and therefore, an officer of Environment Canada did not have the authority to lay the information...

3. That the allowance of the Crown amendment of the information by the addition of the words "being water frequented by fish" was not supported by evidence as required by s.732(2) of the *Criminal Code* and therefore the information without the amendment discloses no offence known at law.

Reasoning of the Court -

Response to Ground 1 -

On July 18, 1980, the Supreme Court in a unanimous decision in *R. v. Northwest Falling Contractors Ltd.* 32, N.R.. 541 upheld the constitutional validity of s.33(2) of the *Fisheries Act* and it follows that C.I.L.'s application for an order of prohibition insofar as it is based on ground 1 must fail.

Response to Ground 2 -

The power to designate federal agents to lay informations and to conduct the prosecution of offences against the *Fisheries Act* and regulations made thereunder is clearly within federal competence. However, I find nothing in the Accord which refers to any provision of the *Fisheries Act* or any regulation made thereunder or which confers any power, exclusive or otherwise, upon provincial authorities to conduct the prosecutions of violations under the act. But even if the Accord could be interpreted as an attempt to confer exclusive power upon the province of New Brunswick to enforce the *Fisheries Act* ... it appears that the Accord was entered into without legislative sanction or executive authority and therefore does not have the force of law.

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Response to Ground 3 -

In my opinion, C.I.L. was reasonably informed of the nature and substance of the 14 offences alleged against it. The information specified the time and place of the alleged offences and the section and subsection of the *Fisheries Act* alleged to have been violated. I am also of the opinion that s.510(5) of the *Criminal Code* was applicable to render the information sufficient. That subsection reads:

> S.510(5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

... The application of Canadian Industries Limited for an order of prohibition is not supportable on any of the grounds upon which the application was based and accordingly should be dismissed.

Application dismissed.

Cite: 31 N.B.R.(2d) 178
75 A.P.R.

Possible Ramifications of Decision:

1. Canada - New Brunswick Accord for the Protection and Enhancement of Environmental Quality does **not** confer exclusive power upon the province of New Brunswick to enforce the *Fisheries Act* or any regulation made thereunder.

2. Where a phrase or word has been omitted from an information, it is not necessarily void if the information makes reference to a section, subsection, paragraph or subparagraph that creates the offence charged.

3. Demonstrates the application of section 510 of the *Criminal Code*.

Re Johnson

Supreme Court of Canada

January 26, 1982

S.18 of the *B.N.A. Act* - clear authority empowering the Parliament of Canada to repeal, alter, or abolish pre-confederation laws of Newfoundland. Regulation 24 *Seal Protection Regulations* so alters the provisions of s.15 of *Seal Fishery Act* as to make it ineffective as part of the laws of Newfoundland.

Facts -

Four men were charged that at approximately 50 miles north of Cartwright, Labrador in the province of Newfoundland they did kill seals contrary to Section 15 of the *Seal Fishery Act*. These men applied for a writ of prohibition to prohibit the prosecution on the grounds that section 15 was repealed by Regulations 24 of the Seal Protection Regulations made pursuant to the *Fisheries Act*. The Newfoundland Supreme Court, Trial Division allowed the application and granted a writ of prohibition on the grounds that s.15 no longer disclosed an offence in law. The case was appealed to the Court of Appeal, but was dismissed. It is now being appealed to the Supreme Court of Canada.

The Sections of the acts relevant to this decision are as follows:

British North America Act

3. *The British North America Act*, 1867 to 1946, shall apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada.

18(1). Subject to these terms, all laws in force in Newfoundland at or immediately prior to the date of union shall continue therein as if the union had not been made, subject nevertheless to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the Province of Newfoundland according to the authority of the Parliament or of the Legislature under the *British North America Acts*, 1867 to 1946...

.../2

Seal Protection Regulations

24. No person shall hunt for or kill a seal during any day

(a) in the Gulf Area, during any period before 0600 hours or after 1800 hours, Atlantic Standard Time...

Seal Fishery Act

S.15. No seals shall be killed by the crew of any steamer or sailing vessel, or by any member thereof, on any Sunday... in any year, nor shall seals, so killed, be brought into any port in this province in any year under a penalty of two thousand dollars...

Reasoning of the Court -

(T)he provisions of s.18 of the *British North America Act* in my opinion constitute clear authority empowering the Parliament of Canada to repeal, alter or abolish pre-confederation laws of Newfoundland such as the *Seal Fishery Act* in so far as those laws relate to matters over which parliament is accorded "authority under the *British North America Acts* 1867 to 1946" which undoubtedly include "Sea Coast and Inland Fisheries" by virtue of s.91(12) of the act...

In my opinion the particular law with which we are here concerned is expressed in Regulation 24 of the Seal Protection Regulations and while that Regulation does not expressly repeal s.15 of the *Seal Fishery Act*, the provisions of the former enactment so alter the provisions of the latter as to make it ineffective as part of the law of Newfoundland...

The following constitutional question was also stated for consideration:

Is section 15 of the *Seal Fishery Act* of the Province of Newfoundland within the legislative authority of the Province of Newfoundland under section 92 of the *British North America Act*, 1867?

I would answer the question in the negative as I am of the opinion that s.15 of the *Seal Fishery Act* is confined to the regulation of the killing of seals, a matter to which the exclusive legislative authority of parliament extends under s.91(12) of the *British North America Act*, "Sea Coast and Inland Fisheries".

Appeal dismissed.

Cite: 36 Nfld and P.E.I.R. 2
101 A.P.R.

Possible Ramifications of Decision:

1. Section 15 of *Seal Fishery Act* - no longer law.

2. Made aware of what happens to those laws enacted in Newfoundland prior to Confederation when there is valid federal legislation.

Gavin et al v. The Queen

Prince Edward Island Supreme Court

March 16, 1956

Lawful excuse, - The prosecution is not bound to prove absence of inapplicable lawful excuse. International Law - As s.7(b) Lobster Fishery Regulations does not precisely describe area, extension of legislative jurisdiction past low water mark not given. Constitutional Law - s.15 of Lobster Fishery Regulations dealing with retaining of undersize lobsters not ultra vires federal parliament, - legislation necessarily incidental to effective legislation regarding fisheries. *Fisheries Act* - s.34(1)(g) [Now 34(a)] by necessary implication gives Governor in Council authority to regulate with respect to possession and retention of fish.

Facts -

This is a series of appeals from 21 decisions of a Stipendiary Magistrate, for Prince County, involving 17 convictions of fishermen for retaining "short" lobsters in contravention of s.7(b) of the Lobster Fishery Regulations for the Maritime Provinces and Quebec and 4 convictions of canners for retaining "short" lobsters in contravention of s.15 of the same regulations.

Section 7(b) - imposes restrictions on the time and size of the lobster catch in certain areas of the Gulf of Saint Lawrence. Section 15 makes it an offence to retain undersize lobsters.

There are numerous grounds of appeal. However, only those that are relevant to the decision will be stated.

Grounds for Appeal for Convictions under s.7(b) Lobster Fishery Regulations.

1. Apart from statute the realm of England and of Canada, extends but to the shore. Any 3 mile or other limit must, in accordance with International Law, be fixed by statute or treaty and not by regulation, and the Act is silent in this regard.

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2. Section 7(b) of the Regulations is consequently "ultra vires".

Grounds for Appeal for Convictions under s.15 Lobster Fishery Regulations

1. a) S.15 of the Regulations provides that no one shall retain short lobsters "without lawful excuse".

b) "Lawful excuse" is defined in the Act. One of its meanings (it has two) has no application to the present appeals. The other meaning is as follows:

ii) The unintentional or incidental catching of any fish that may not then be taken, when legally fishing for other fish.

c) Yet the appellants who are canneries were convicted under s.15. The appellants will argue that such canneries were never catching fish or fishing at all, and that s.15 is applicable to fishermen only and not to canneries.

d) In any event, the Crown offered not one word of evidence at any time in proof of the absence of lawful excuse, although the burden of proving the absence of lawful excuse was on the crown.

2. S.15 of the regulations is "ultra vires" in that it is legislation primarily concerning property and civil rights within the province.

3. The deliberate omission from s.34 of the Act, which provides for regulations, of the words "retain" and "possess" indicates Parliament's intention to withhold from the Governor in Council the power to regulate "retaining" or "possessing".

4. "Fisheries" in s.34(g) of the Act is not the fisheries of the *B.N.A. Act.* s.91(12), but has the restricted meaning given by the definition in the Act.

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Reasoning of the Court -

Section 7(b) of Lobster Fishery Regulations

The most important and most far-reaching ground of appeal is this one... (I)nternational law has recognized the right of states to extend their legislative jurisdiction for 3, 5, 12 or 21 miles beyond low-water mark for certain purposes and with certain restrictions, such extension can be authorized only by an Act of a competent parliament or legislature.

Section 34 appears to confer a delegated authority on the Governor in Council to determine a relevant limit for fishing operations beyond low-water mark. The remaining question is whether or not, that authority has been validly exercised?

As there is no general enactment, either by Parliament or in the regulations, prescribing the limits within which s. 7(b) is to be effective, we must look to the specific description in s.7(b). The description gives no adequately clear indication of the area intended to be regulated, and neither contains nor imports any definition of the "waters thereof" which can be included by legislation only...

...I find that the places of the 17 alleged offences against s.7(b) are not shown, either by the wording of the section or by the evidence, to be within the limits of the area intended to be regulated. The 17 convictions and sentences for violation of s.7(b) of the Regulations should therefore be quashed.

Section 15 of the Lobster Fishery Regulations

Response to Issue 1 -

A defendant for whom no lawful excuse is available cannot escape conviction because the prosecution has failed to establish the absence of lawful excuse which is not applicable ... If an act has been done by a defendant in

circumstances which do not admit of any lawful excuse, it follows that he must have acted without lawful excuse.

Response to Issue 2 -

It is true, ...that possession and retention of fish, especially after landed, are normally the subject of exclusive provincial jurisdiction relating to property and civil rights. It is, however, settled law that the Dominion has power to enact all provisions which are properly ancillary and necessarily incidental to effective legislation upon a subject falling within any of the clauses expressly enumerated in s.91 of the *B.N.A. Act*, even though such provisions encroach on what would otherwise be an exclusively provincial field under s.92.

Response to Issues 3 and 4 -

I am not insensible to the merits of the arguments raised by appellants' counsel in support of his grounds numbered 3 & 4. The limited meaning of "fishery" in the definition in the *Fisheries Act* and the omission from s.34 of any specific power to make regulations respecting possession and retention of fish, create difficult judicial problems and endanger the validity of the relevant Regulations. I have, come to the conclusion that the context requires a broader interpretation of s.34 of the Act than is admitted by the appellants.

Despite the absence of any specific power to regulate possession or retaining, it is difficult to see how the proper management and regulation of the fisheries could be effected in the absence of some control of possession. The power to enact s.15 is therefore conferred by necessary implication by s.34(1)(g) of the *Fisheries Act*.

Convictions and sentences should be confirmed (with respect to cases against canners).

Cite: C.C.C. Vol. 115, 315

Possible Ramifications of Decision:

1. Basic principles set forth with respect to "lawful excuse".

2. Principles regarding territorial jurisdiction set forth.

3. Determination that s.34 gives Governor in Council authority to regulate "possession or retaining".

4. Demonstrates the principle that even if legislation enacted by one power (here the Federal Parliament) encroaches on the jurisdiction of the other power, this legislation will not be "ultra vires" if it only incidentally affects the other's jurisdiction.

Bayer v. Kaizer

Nova Scotia Supreme Court

1894

Constitutional Law **- Stream is considered an inland fishery under Section 91(2) of the *B.N.A. Act*. The power to regulate inland fisheries involves power of forfeiture and the power to go on private land to detect and prevent violations.**

Facts -

The plaintiff was in possession of land bordering a stream under an agreement to purchase. He set up a net in this stream. The defendant, on the other hand was not a fishery officer but was acting as an assistant to an officer. This defendant entered onto the land of the plaintiff and seized this net. The plaintiff brought an action for trespass and trover for entering the plaintiff's land and removing the net. The defendant was convicted and now appeals.

He claims justification for his actions under two sections of the *Fisheries Act*. These two sections provide as follows:

Section 14 - From six o'clock in the afternoon of every Saturday to six of the clock in the forenoon of the following Monday, in non-tidal waters, nets or other apparatus used for catching fish must be so raised or adapted as to admit free passage of fish...

Section 17 (now Section 38) - In the discharge of his duty any fishery officer or other person or persons accompanying him, or authorized to such effect, may enter upon or pass through or over private property without being liable to trespass.

Reasoning of the Court -

Graham, E.J. - The Judge of the County Court has held that s.14 is "ultra vires" the Parliament of Canada. If the judgement was carried to its legitimate

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conclusion all of the regulations made for the protection of inland fisheries would be "ultra vires". I think that on this point the judge is mistaken.

...When there is power to regulate inland fisheries, it is absolutely necessary, in order to have the regulations carried out, that power be given to go on private property. There would be no means of carrying out the regulations unless such power were given. Having given the power to make regulations it also must be taken to have intended that power should be given to go on private property to see whether the regulations were being violated, and if so, to prevent it.

Then it is said that the provision for the forfeiture of the net is excessive; that it interferes with property and civil rights. I think that it is necessary to the carrying out of the regulations that this power of forfeiture should be given... I think that the provision is a reasonable one.

Appeal allowed.

Cite: N.S.R. 1894, 280

Possible Ramifications of Decision:

1. Determination that a stream is an inland fishery and thus falls under s.91(12) of the *B.N.A. Act*.

2. Makes statement with respect to forfeiture and the right of the fishery officer to enter private property - says it is essential in order to carry out regulations.

The Queen v. Christian A. Robertson

Supreme Court of Canada

April 28, 1882

The Miramichi in certain places is non-tidal river - In these areas no public right of fishing exists. Constitutional Law - Exclusive jurisdiction over property rights in fisheries belongs to provinces under s.92(3) *B.N.A. Act.* Licence given by Federal Minister of Fisheries does not permit fishing, in non-tidal waters where bed owned by province or private owner except with owner's permission as this relates to property and civil rights s.92(13).

Facts -

The Minister of Marine and Fisheries of Canada, purporting to act under the powers conferred by him, executed on behalf of Her Majesty to the petitioner an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the South West Miramichi River in New Brunswick for the purpose of fly-fishing therein. The area being thus described in the special case agreed to by the parties:

> Price's Bend is about 40 to 50 miles above the ebb and flow of the tide. The stream for the greater part from this point upward, is navigable for canoes, small boats, flat bottomed scows, logs, and timber... The stream is rapid. During the summer, it is in some places on the bars very shallow.

The petitioner (lessee) was interrupted in the enjoyment of his fishing under the lease by other fishermen who also claimed exclusive right of fishing in this part of the river. The petitioner, attempting to assert and defend his claim brought this action.

The questions involved in the case submitted, resolve themselves substantially into these:

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1. What are the rights of fishing in a river or a portion of a river such as is that part of the Miramichi from Price's Bend to its source?

2. Do the rights of property therein belong to the Provincial Government, or their grantees, or to the Dominion Government or their licensees, or have the Dominion Government or the Provincial Government, legislative control over such proprietary rights?

3. Can the Dominion Parliament authorize the Minister of Marine and Fisheries to issue licences to parties to fish in rivers such as that described where the lands are ungranted, or where the Provincial Government has before or after confederation granted lands that are bounded on or that extend across such rivers?

Reasoning of the Court -

Response to Issue 1 -

I am of the opinion that the Miramichi, from Price's Bend to its source is not a public river on which the public has a right to fish and though the public may have an easement or right to float rafts or logs down, and a right of passage up and down in canoes, and, in times of freshet in the spring and autumn, or whenever the water is sufficiently high to enable the river to be so used, I am equally of opinion that such a right is not in the slightest degree inconsistent with an exclusive right of fishing, or with the rights of owners of property opposite their respective lands "ad milieum filum aquae" (to the middle thread of the river); or when the lands on each side of the river belong to the same person, the same exclusive right of fishing in the whole river so far as his land extends along the same.

Response to Issues 2 and 3 -

... I cannot discover any intention in the *British North America Act* to take from provincial legislatures all legislative power over property and civil rights in fisheries, such as we are now dealing with, and so give the Parliament

of Canada the right to deprive the province or individuals of their rights of property therein, and to transfer the same or the enjoyment thereof to others, as the licence in question affects to do.

I think Mr. Justice Fisher in *Steadman v. Robertson* (2 Pugs & Bur.599,) took a correct view of the law. I have arrived at like conclusions viz : that it was not the intention of the *The British North America Act*, 1867, to give the Parliament of Canada any greater power than had been previously exercised by the separate legislatures of the provinces; that is the general power for the regulation and protection of the fisheries; that the act of the Parliament of Canada, recognizes that view, and while it provides for the regulation and protection of the fisheries, it does not interfere with existing exclusive rights of fishing, whether provincial or private but only authorizes the granting of leases where the property and therefore the right of fishing thereto belongs to the Dominion, or where such rights do not already exist by law; that the exclusive right of fishing in rivers such as the Miramichi at Price's Bend and from thence to its source, as described in the case, exist by law in the provincial government of New Brunswick or its grantees; that any lease granted by the Minister of Marine and Fisheries to fish in such fresh water non-tidal rivers, which are not the property of the Dominion, or in which the soil is not in the Dominion, is illegal; that where the exclusive right to fish has been acquired as incident to a grant of the land through which such river flows, there is no authority given by the Canadian Act to grant a right to fish, and the Dominion Parliament has no right to give such authority; and also that the ungranted lands in the province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is the crown as trustee for the benefit of the people of the province, exclusively, and therefore a licence by the Minister of Marine and Fisheries to fish in streams running through provincial property or private lands is illegal, and consequently the lease or licence issued to the suppliant is null and void.

Appeal dismissed.

Cite: 6 S.C.R. 52

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Possible Ramifications of Decision:

1. Federal power to legislate goes no further than what may be necessary for legislating generally and effectively for the regulation, protection and preservation of the fisheries in the interest of the public.

Attorney General for the Dominion v. Attorney General for the Provinces of Ontario, Quebec and Nova Scotia

Privy Council

May 26, 1898

S.91(2) *B.N.A. Act* confers only legislative powers, not proprietary rights. Interpretation of what was included in the transfer by the provinces to the Dominion by the term "Public Harbours" and by the phrase "Rivers and Lake Improvements" in Schedule 3 of the *British North America Act*. A tax by way of licence as a condition of the right to fish is within the powers of the Dominion Legislature.

The questions involved in the case submitted, resolve themselves substantially into these:

1. Whether the beds of all lakes, rivers, public harbours, and other waters, or any and which of them situate within the territorial limits of the several provinces, and not granted before confederation, became under the *British North America Act* the the property of the Dominion?

2. What rights were given to the Dominion with respect to fisheries and fishing rights?

3. Has the Dominion Parliament jurisdiction to authorize the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in non-navigable or navigable waters?

Response to Issue 1 -

It is necessary to deal with the several subject matters referred to separately, though the answer as to each of them depends mainly on the construction of the 3rd schedule to the *British North America Act*. By the 108th section of that Act, it is provided that the public works and property of each province enumerated in the schedule shall be the property of Canada. That

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schedule is headed "Provincial Public Works and Property to be the Property of Canada", and contains an enumeration of various subjects numbered 1 to 10. The fifth of these is "rivers and lake improvements".

Lake and River Improvements

Upon the whole their Lordships, after careful consideration, have arrived at the conclusion that the court below was right, and that the improvements only were transferred to the Dominion....It is to be observed that rivers and lake improvements are coupled together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them coupled together. Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals...

Public Harbours

With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada... (As to the question of what falls within this description), their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description of "public harbour".

...It must depend, to some extent, at all events, upon the circumstances of each particular harbour which forms a part of that harbour.

Response to Issue 2 -

The 91st section of the *British North America Act* did not convey to the Dominion of Canada any proprietary rights in relation to fisheries.

Only legislative rights were conferred under the heading "Sea-Coast and Inland Fisheries" in section 91(12)... It must be remembered, however, that the power to legislate in relation to fisheries does necessarily to a certain extent enable the legislature so empowered to affect proprietary rights.

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Response to Issue 3 -

In addition, however, to the legislative power conferred by the 12th item of s. 91, the 4th item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of licence as a condition of the right to fish.

It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a licence in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention.

Cite: [1898] A.C. 700

Possible Ramifications of Decision:

1. Clarification of what is meant by the term "Public Harbours" and the phrase "Lake and River Improvements" in Schedule 3 of the *British North America Act*.

2. Determination that s.91(2) of the *British North America Act* confers only legislative powers, not proprietary rights in fisheries.

3. A tax by way of licence as a condition of the right to fish is within the powers of the Dominion Legislature.

Attorney General For Canada v. Attorney General For Quebec

Re Quebec Fisheries

Judicial Committee of the Privy Council

November 30, 1920

A public right of fishing in tidal waters exists in Quebec. As this is not a proprietary right, Dominion Parliament has exclusive jurisdiction to deal with it.

Facts -

Appeal from the Quebec Court of King's Bench, sub nom *Re Quebec Fisheries* is an action to determine the right of fishing in the tidal waters of the province of Quebec.

The Magna Charta (1215) established that a public right to fish in tidal waters exists. This right, however, only has application where the common law of England prevails. It therefore has no application in the province of Quebec.

Reasoning of the Court -

A right in the public to fish in tidal waters was created in Quebec by a series of statutes enacted in the old provinces of Upper and Lower Canada prior to and at Confederation. As the public right was not proprietary the Dominion Parliament has in effect exclusive jurisdiction to deal with it... The result of this is that a province cannot grant exclusive rights to fish in waters where the public has a right to fish.

Judgement accordingly.

Cite: 56 D.L.R. 358

Ramifications of Decision:

1. Determines that public right of fishing exists in Quebec.

In 1977, the applicants were notified of the intention of the provincial Government to fix quotas for Shoal Lake. After this, several letters were sent to the commercial fishermen on Shoal Lake. On May 18, 1979, it was announced that the Minister had approved a delay in the application of quotas on Shoal Lake until January 1, 1979.

... There is material field on behalf of the respondent indicating that the decision to apply a quota to Shoal Lake was based upon extensive scientific studies. There was clearly a reasonable foundation and basis for the Ministry to take the step of imposing quotas, although there is a conflict between the experts who have studied the matter for the provincial Government and the applicants as to the necessity of imposing quotas and their extent.

Reasoning of the Court -

The division of the quotas, applied by the Ministry of Natural Resources, appears to be questionable and at least on its face unfair. Before quotas were applied there were, as I say, seven licences for fishing on Shoal Lake. Four of those licences were held by two Indian bands. A study was made of the total catches taken from Shoal Lake in the years 1970 to 1978. It demonstrates that the two bands in all but one year took very considerably more than the 40% of the total catch which their present proposed quota allots to them. Thus, neither in the numerical division of licences nor in a consideration of the catches does the division appear to be fair on its face. There may well be valid explanations for the proposed division but none was put forward.

I cannot leave this topic without mentioning how difficult the question of quota needs be both by those who must apply them and for those who must be bound by them. It is a difficult subject which should be approached with reason and goodwill. The Province on its part should consider the problems of the applicants and approach the situation with a sense of sympathy and understanding. Commercial fishing is a major source of income for the applicants. It may indeed be their sole means of achieving economic independence. When an isolated band is faced with the loss of the means of its income an angry, irrational

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response will be expected. The loss of a right to fish as they see fit, is contrary to the history and tradition of countless generations of their people.

The issues that are raised in this case break down into two headings. The constitutional issue by which the applicants attack the validity of the legislation, and secondly, whether or not the applicants have been treated fairly in the sense that the word is used in the applicable authorities.

Turning now to the issues raised with regard to constitutional problems. First, it is said that the Province of Ontario could not restrict or impose a quota upon fish taken by the applicants from the waters of Shoal Lake lying within the boundaries of the Province of Manitoba. That, indeed, was conceded by counsel on behalf of the Province of Ontario. However, in my view, the Province for some time took a rather high-handed attitude. There appears attached as an exhibit to the affidavit of Robin Greene, a letter dated March 15, 1978, from the Ministry in the following terms (to Chiefs Redsky and Greene, p.2):

> As for the Manitoba waters of Shoal Lake (Snowshoe and Indian Bays) the province of Manitoba, in the early 1960's, gave Ontario the Mandate to manage these waters as though they were Ontario waters and to include them under our commercial fishing licences. All catches from these areas are included in your quota and must be reported on your monthly return.

In light of that letter the application with regard to the waters lying within the Province of Manitoba was quite properly brought before the Court. In my view, the applicants are entitled to a declaration that the Ontario Fishery Regulations, SOR / 63-157, do not apply to those waters of Shoal Lake lying within the Province of Manitoba.

It was then submitted that the language of s.34 of the *Fisheries Act*, R.S.C. 1970, C-F-14 as amended [R.S.C. 1970 (1st Supp.), c.17, s.4] authorizes a variance of the quotas fixed by Regulations. Here it was said that the quota

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was fixed not by Regulation but by the commercial fishery licence itself, and was therefore invalid.

Section 34 of the *Fisheries Act* provides as follows:

> 34. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing may make regulations.
>
> (f) respecting the issue, suspension and cancellation of licences and leases;
>
> (m) authorizing a person engaged or employed in the administration or enforcement of this Act to vary any close time or fishing quota that has been fixed by the regulations.

It was argued that by s.34(m) it was apparent that the scheme of the Act required the passage of a Regulation to fix quotas before "some authorized person" could vary it. It was submitted that there could not be a variation of a Regulation without a Regulation. That argument cannot succeed.

The *Fisheries Act* contemplates means and methods of control distinct from and in addition to Regulations.

As a result of the decision in *A.G. Canada v. A.G. Ontario, A.G. Quebec and A.G. Nova Scotia,* [1898] A.C. 700, the federal government adopted a policy that has been continued to this time. The policy confines federal action in relation to fisheries in the Provinces to the enactment of the Fisheries Legislation and entrusting its administration together with the administration of the related provincial legislation to any provincial ministers and officials. That step was taken to avoid any difficulties that might arise as a result of the overlapping jurisdiction. In pursuance of that policy, federal Fishery Regulations, are

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enacted under the authority conferred by the *Fisheries Act (Canada)* for each province. Those regulations passed for the province of Ontario are entitled: The Ontario Fishery Regulations. The authority to administer the Ontario Fishery Regulations is delegated to provincial Ministers and officials.

In my view, the *Fisheries Act (Canada)* and the Ontario Fishery Regulations passed pursuant to the federal Act, constitute the substantive law pertaining to licences for commercial fishing in the waters of Ontario. The federal act by means of the Regulations passed pursuant to it, adopted the machinery provided by the *Ontario Game and Fish Act* as to the issuance of the commercial fishing licence.

It is apparent that the *Fisheries Act (Canada)* contemplates the imposition of restrictions on fishing for the purposes of management, control, conservation, and protection of fish. Section 34 of the federal act specifically provides that Regulations may be made for those purposes. The requirement of licences as a method of control is also contemplated by the *Fisheries Act (Canada)* because s.34(f) provides for the issue, suspension, and cancellation of licences.

The federal Ontario Fishery Regulations provide that except with respect to angling, no person "shall, except under a licence prescribed therefore; take or attempt to take fish by any means" (s.12). Section 31(1)(4) of those Regulations makes provision for authorized types of licences and empowers the Ministry to specify the terms of the licences. The same federal Regulations define licence to mean "an instrument issued under *The Game and Fish Act*, 1961-62, Ontario". "Minister" is defined to mean the Minister of Natural Resources for Ontario and includes any person authorized to act on his behalf.

The expression "issued under *The Game and Fish Act*, 1961-62, Ontario" should, in my view, be interpreted to mean in the manner provided by the Ontario Act. The substantive requirement for the licence is provided for in the Ontario Fishery Regulations. Section 38(2) of the *Ontario Game and Fish Act* provides that the Minister may authorize a person to issue licences and the licences in this case were issued by an authorized person.

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The delegation by the Parliament of Canada to the Provinces of administrative authority including the authority to issue licences and to impose conditions on those licences seems to be quite proper under the circumstances.

It was alternatively argued that the licences must be issued by the Minister of Fisheries or anyone authorized by him. It was submitted that there was no such licence issued by the Minister of Fisheries or by anyone authorized by him and therefore the licences were void. This submission cannot be accepted. The relevant legislation has already been set out. The reasons for my decision on this point will be somewhat repetitious but should be set out.

As I stated earlier, the provisions of the federal *Fisheries Act* comprise the substantive law with respect to licences for commercial fishing in Ontario. There is adopted pursuant to those Regulations the machinery provided by the *Game and Fish Act*, R.S.O. 1970, C.186 for the issuance of required licences. Although the *Ontario Game and Fish Act* provides that a licence may be issued by the issuer of a licence, his family and employees, that provision does not, in my opinion, apply to the licence to be issued under the federal *Fisheries Act*. Such a licence can only be issued by the issuer of licences under the *Game and Fish Act*. Indeed the issuer of licences is by Order in Council so designated. Although it is cumbersome, the machinery is adequate to comply with the provisions of the *Fisheries Act*.

It was next contended that the Government of Canada had illegally delegated its powers to the Government of Ontario. It was said that the delegation constituted a complete abdication of its powers and this was specifically prohibited.

This submission must fail. I cannot accept the argument that the Minister of Natural Resources is not a subordinate authority. Any Minister or Ministry (federal or provincial) must be subordinate to the Parliament of Canada which can, in my view, delegate authority to a Minister or Ministry.

I now turn to the submission which gave me the greatest concern. It was argued the application of the quotas should be set aside on one of three

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grounds. First, that the Act imposing the quotas fell within the purview of the *Statutory Powers Procedure Act*, 1971 (Ont.) c.47, and that the *Statutory Powers Procedure Act*, 1971 requirements had not been complied with. It is said, in the alternative that if the *Statutory Powers Procedure Act* did not apply, then the order sought should be granted on the grounds that the act of the licence issuer imposing constituted a quasi-judicial act and thus was properly reviewable before the Court. Lastly, it was submitted, that even if the issuer of the licence was carrying out an administrative function, there is a duty incumbent upon him to act fairly and that this obligation had not been met.

The Statutory Powers Procedure Act, 1971, is not, in my view, applicable to this situation. Section 3(1) provides:

> 3(1) Subject to subsection 2, this part applies to a proceedings by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act, or otherwise by law to hold or to afford to the parties to the proceedings an opportunity for a hearing before making a decision.

It is to be noted that the subsection includes the words "by an Act of the Legislature...". Here, although the route is tortuous, the licence issuer was acting pursuant to the provisions of a federal statute, the *Fisheries Act (Canada)*, and the provisions of federal Ontario Fishery Regulations, and not by way of an act of the Legislature.

The imposition of the quotas, I have concluded, was an administrative act or function. The distinction between a quasi-judicial act and administrative act has always been hazy, and has always caused the courts a great deal of concern. Fortunately, I need not concern myself with that problem. I need only determine whether those acting on behalf of the respondent have acted fairly.

The later correspondence from the Ministry, the number of meetings with the applicants, and the postponement of the imposition of quotas, taken together satisfy me that the representatives of the respondent have acted fairly.

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I shall, as a result **dismiss the application** (save as to the finding that the quotas do not apply to the portion of Shoal Lake that lies within Manitoba).

Cite: 25 O.R. (2d) p. 334.

Possible Ramifications of Decision:

1. When applying quotas the Department should consider the percentage of the total catch taken by the respective parties.

2. Shows how the federal Parliament can delegate administrative authority - with respect to fisheries. - i.e. By means of regulations the federal *Fisheries Act* adopts the machinery provided by the *Game and Fish Act* with respect to administrative authority.

3. Held that the delegation by Parliament of administrative authority to a provincial Minister and officials, including the authority to issue licences, is a proper exercise of Parliament's legislative authority.

4. Gives some indication of how the province should approach the matter of applying quotas. [The province should consider the problems of the applicants and approach the situation with a sense of sympathy and understanding].

Ex Parte Wilson

October 17, 1885

Michealmas Term, XLIX, Victoria

Though the Charter of the City of St. John grants right of fishery in harbour to the corporation for benefit of inhabitants, Federal Parliament has right under s.91 *B.N.A. Act* to regulate times and manner of setting nets.

Facts -

James Wilson was convicted for unlawfully setting nets for catching fish in Harbour of City of Saint John between Saturday evening and Monday morning in contravention of s.13(14) of the *Fisheries Act* (31 Vic. cap. 60). He is now appealing.

His argument is basically that as the fishing priveleges in the harbour belong to the city, they can not be affected by the legislation of the Dominion Parliament and did not come under the provisions of the *Fisheries Act*.

Reasoning of the Court -

... (T)he sole question is, whether s.s. 14 of s.13 of the *Fisheries Act* applies to the Harbour of the City of St. John.

The ownership of fishing rights and priveleges, does not exempt the owner from the duty of conforming to the regulations passed for the general protection of the fisheries.

Appeal not allowed.

Cite: 25 N.B.R. 209

Possible Ramifications of Decision:

1. Power impliedly given to Parliament to interfere with civil rights in provinces so far as may be necessary to give affect to such regulations.

Miller v. Webber

In the Supreme Court of Nova Scotia

August 8th, 1910

The Federal Parliament has the authority to demand licence fee from fishermen within 3 miles of provincial foreshore waters when purpose is to regulate and protect the fisheries for the benefit of the general public.

Facts -

This action was brought against a fishery officer, for taking the plaintiff's net. The fishery officer's defence was that he was justified under s.47, subsection 7 of the *Fisheries Act*. This section provides that,

> No one shall use a bag net, trap net or fish pound, except under special licence granted for capturing deep-sea fishing other than salmon.

It is alleged by the fishery officer that the net in question was a trap net and that there was no licence.

Later, sec.92 makes provision for the confiscation of any nets or appliances used in contravention of the Act, and another section provides for the removal of the same.

The plaintiff for his part contends that, inasmuch as the net was set in waters (not being a public harbour), within three miles of the shore, and the land belonging to the province, this statute of the Parliament of Canada is ultra vires or inapplicable in respect to fisheries in those waters.

Reasoning of the Court -

After concluding that the net was indeed a trap net, the learned judge went on to decide whether or not the provision is ultra vires the Parliament of Canada.

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... The legislation which comes in question, in this case is legislation to regulate and protect the fisheries for the benefit of the general public and any licence fee is but a tax, true, a very unproductive tax, to help the government out in protecting the fisheries. Protection is a very expensive item. In two cases these provisions have been recognized, and the distinction between legislative powers touching the fisheries, and the ownership is pointed out. One of these cases is *Attorney General of Canada v. The Attorney-General of Nova Scotia* (1898), A.C. 112. Here it was stated:

> (I)t must be remembered that the power to legislate, in relation to fisheries, does, necessarily, to a certain extent, enable the legislature so empowered to affect proprietory rights. An enactment, for example, prescribing the times of year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which, it was admitted, the Dominion Legislature was empowered to pass), might very seriously touch the exercise of proprietary rights, and the extent and scope of such legislation is left entirely to the Dominion Legislature.

After this decision was written, the following provisions found a place in the *Fisheries Act*, sect 4:

> "Nothing in this Act contained shall be taken to authorize the grant of fishing leases conferring the exclusive right to fish in property belonging, not to the Dominion, but to some province thereof.

I think there is no doubt but that that provision would be construed to cut down anything in the Act itself which might otherwise be ultra vires, and certainly, to prevent the making, under the Act, of regulations by order in council or licences which would be ultra vires.

The action must be dismissed.

.../3

Cite: 8 E.L.R. 460 (N.S.)

Possible Ramifications of Decision:

1. In certain circumstances the Department of Fisheries has a right to issue licences within 3 miles of the shore even though land belongs to province.

2. There is distinction between legislative powers touching the fisheries and ownership of the property.

Rex v. Smith

Ontario Court of Appeal

June 19, 1942

The prohibitions of the Ontario Game and Fisheries Act are enforceable within the limits of a military camp in the Province, although the Dominion Parliament could enact overriding legislation under its power to make laws in relation to militia and defence.

Where an overseer, was acting not merely as an overseer but as a peace officer the charge can only be laid properly under s.168 of the *Criminal Code*.

Facts -

The accused in appealing from three convictions under the *Game and Fisheries Act*, R.S.O. 1937, C.353. The convictions are (1) for unlawfully using fire-arms to wit a .22 rifle for the purpose of hunting or shooting any bird or animal, without the authority of a licence or permit... (2) for unlawfully hunting partridge when the hunting of such birds is prohibited by law... (3) for unlawfully interfering with an officer, in the discharge of his duty. All of the offences are alleged to have been committed within the Petawawa Military Camp Reserve, the title to which is in the Crown in the right of the Dominion of Canada.

Contentions Raised by the Defendant:

Three points are argued before the court which are applicable to the charges. They are as follows:

1. that the Camp Reserve, being the property of the Crown in the right of the Dominion, the provincial statute and the regulations made under it can have no application to the Camp Reserve as that would constitute an interference with the proprietary right of the Crown,

2. that the reserve being vested in the Crown in the right of the Dominion as part of the defences of Canada, all legislative power with relation thereto is in the Dominion to the exclusion of the Province, and

.../2

3. lastly, that the Overseer was acting as a peace officer within the meaning of section 168 of the *Criminal Code* and that s.63(9) of the *Game and Fisheries Act* trespassed upon the provision of the *Criminal Code*.

Reasoning of the Court -

Response to Contentions #1 and 2

It seems to me that the first two contentions made are misconceived. The *Game and Fisheries Act* - in any event such part of it as is relevant here - is not concerned with land. Its purpose is the protection of wild game and of fish, and its prohibitions are directed against persons within the Province, and their conduct. Let it be assumed for the purpose of this case that the right to hunt and to shoot game within the limits of the Camp Reserve belong to the Crown in right of the Dominion as owner of the soil, what does that avail the appellant? He has no property right either in the soil or in the shooting. Neither has he any licence from the Crown to hunt to shoot game. In no sense is any right of the Crown infringed or restricted by a provincial law that says nowhere within Ontario shall the appellant, without a licence use firearms for the purpose of hunting or shooting any bird or animal, or hunt partridge out of season.

No doubt the Dominion Parliament, under its power to make laws in relation to Militia, and Naval Service and Defence, could pass laws in relation to this Camp Reserve that would prevail over any provincial legislation with which was in conflict. We are not referred, however, to any such Dominion legislation. The mere fact that the Dominion has acquired and uses this Reserve for Dominion purposes does not remove either the land itself or the persons upon it, wholly outside provincial jurisdiction, as if it were foreign territory.

The appellant in doing the acts complained of, was not performing any military duty, nor otherwise acting in the service of the Crown, nor with its authority or permission. He was in no better position than any private person would have been.

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Response to Contention #2

... Another point of law was raised in respect to the conviction for unlawfully interfering with an officer, the Game and Fisheries Overseer, in the discharge of his duty ... An overseer has very extensive powers under s.63 of the *Game and Fisheries Act*, including the power to arrest, without process, the power of search and the power of seizure. On the occasion here in question the overseer was proposing to put the Sargeant-Major under arrest within the limits of the Camp Reserve. I think he may fairly be considered as acting on that occasion as a peace officer and not merely as an overseer. The conviction for obstructing an officer should, therefore be quashed on the specific ground that the charge could only be laid properly under s.168 of the *Criminal Code*.

The appeals as to the other two convictions wil be dismissed.

Possible Ramifications of Decision:

1. Mere fact that the Dominion has acquired and uses this reserve for Dominion purposes does not remove either the land itself or the persons upon it, wholly outside provincial jurisdiction, as if it were foreign territory.

2. Given purpose of such acts as the *Ontario Game and Fisheries Act*.

3. When an overseer is proposing to arrest the accused for a violation of the *Game and Fisheries Act*, was really acting not merely as an overseer but as a peace officer, a charge can only properly be laid under the *Criminal Code*, s.168.

Rex v. Wagner

Manitoba Court of Appeal

May 10, 1982

A province has no power to make a regulation declaring unlawful the catching of certain fish at certain seasons, in inland provincial waters.

Facts -

This case is concerned with appeals by two accused for having fish in their possession during a closed season. The case deals primarily with that conviction brought under the *Game and Fisheries Act*, 1930 (Man.).

Rex v. Wagner

With respect to this latter conviction the following information should be noted. When the fish was seized in the possession of the accused who was conveying it in his car on the highway, it had been cleaned and cut in pieces wrapped in separate parcels, and the roe of it put in a pail as caviar from which it was argued that it was then in merchantable condition and a merchantable article.

The issue here is whether the learned magistrate had jurisdiction to try the accused under the Manitoba statute, the *Game and Fisheries Act* while there still remained in force the Dominion statute the *Fisheries Act*, R.S.C. 1927, C.73?

The relevant sections of the various acts will now be noted.

Fisheries Act, R.S.C. 1927, C.73

S.29 No one ... shall ... have in his possession any fish ... during a time when fishing for such fish is prohibited by law.

[The special regulations for the Province of Manitoba passed by Order of the Governor-General in Council pursuant to the said Act, provide by clause

.../2

14(8) that it shall not be permissible at any time of the year to fish sturgeon in the waters therein defined and which are the waters in which the fish in this case was caught.]

The *Manitoba Natural Resources Act* was passed in 1930, approving the agreement respecting the transfer of Natural Resources from the Dominion to the province of Manitoba. Section 10 is the only section therein relating to fisheries.

> 10. Except as herein otherwise provided all rights of fishery shall, after the coming into force of this agreement, belong to and be administered by the Province, and the Province shall have the right to dispose of all such rights of fishery by sale, licence or otherwise, subject to the exercise by the Parliament of Canada of its legislative jurisdiction over sea-coast and inland fisheries.

Game and Fisheries Act, 1930, (Man.) c.15

> S.100(1) It shall be unlawful for any person ... to ... have in his possession any fish ... caught during a time when fishing for such fish is prohibited by law.

[This is the section under which the conviction was made.]

Reasoning of the Court -

> Prendergast, C.J.M. - It was urged that as Manitoba has now been expressly given by the agreement its fishery rights which include the granting of leases and licences, it must have the power to regulate them. Undoubtedly so, but not by establishing a close season, which is conclusively settled by s.10, which expressly declares the granting of those rights, as already stated, to be still subject to the Dominion's legislative jurisdiction over sea-coast and inland fisheries.

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Mr. Justice Prendergast then goes on to discuss the case of *A.G. Canada v. A.G. Ontario*, [1898] A.C. 700 [See 2-M] and concludes that the enactment of fishery regulations and restrictions is not within the legislative powers of provincial legislatures.

... I would hold that with respect to the matters considered, the said provincial Act and regulations are of no force and effect, not on the ground that there is overlapping of the two jurisdictions in such a way that that of the Dominion prevails, but as being wholly ultra vires of the Province.

Therefore, I would answer "no" to the issue posed and quash the conviction.

Mr. Justice Denniston in his decision discusses another aspect of the case.

One further point remains to be considered. Granted that the Dominion may protect the fish in the water, and specify the methods of taking them from the water and the times during which they may be so taken, does the Dominion lose jurisdiction over the fish when it passes into the possession of a third party?

To hold that a person who, as in this case, has his motor car at the fishery ready to receive the fish when landed, and who is apprehended on the bridge over the Lac du Bonnet River from which the right to prosecute has passed from the Dominion to the Province as soon as the fish have left the fishery would be sterilize the prohibitory regulation.

Rex v. Tomasson et al.

This case is the converse of the preceding case. Here, the accused was tried under the Dominion Act.

Reasoning of the Court -

For the reasons given in *Wagner's case*, I think he was properly tried and convicted.

... The Magistrate raises a further question as to the validity of the

.../4

appointment of Skaplason and Pearson as fishery officers for the Dominion, as it appears that being fishery officers for the Province an attempt was made by an omnibus Order-in-Council by the Governor-General in Council, to make all provincial fishery officers, officers of the Dominion as well, and that these two men had not taken the Dominion oath of office as prescribed by section 6 of the Dominion *Fisheries Act*.

I do not think this point, even if well taken, invalidates the conviction. It was made, and the confiscation of the fish was made, by the Magistrate and not by the fishery officers under their statutory powers.

Conviction Upheld.

Cite: [1973] 3 D.L.R. 679

Possible Ramifications of Decision:

1. Demonstrates type of reasoning followed with respect to constitutional cases concerning fisheries.

2. See application of *A.G. Canada v. A.G. Ontario* [1898] A.C. 700. [See 2-M].

R. v. Forest Protection Limited
New Brunswick Supreme Court, Appeal Division
May 25, 1979

An agent of the Crown is liable to prosecution under section 71 of the *Fisheries Act*.

Facts -

Thirty charges were laid against Forest Protection Limited by the Concerned Parents Group Inc. This latter group was opposed to the aerial spraying of New Brunswick forests for spruce budworm. The charges included the pollution of water frequented by fish contrary to section 33(2) of the *Fisheries Act* and the improper use of pesticides contrary to the *Pest Control Products Act*. Forest Protection Limited applied for orders of certiorari and prohibition to quash the informations against it and to prevent the court from proceeding with them. The applications were dismissed in the New Brunswick Supreme Court, Queen's Branch Division. Forest Protection Limited is now appealing.

The relevant ground of appeal is that,

Forest Protection Limited is and has been at all times a servant of the Crown in Right of the province of New Brunswick and as such, it is not subject to the proceedings under...and it is immune to prosecution under the *Fisheries Act*.

Reasoning of the Court -

I find nothing in the material submitted nor as a result of my own research on the question which assists me in reaching a firm opinion on the question. I shall therefore seek to apply the test stated in the *Westeel-Rosco* case. The test is as follows:

> Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it.

.../2

(Westeel - Rosco Limited v. Board of Governors of South Saskatchewan Hospital Centre et al (1976), 11 N.R. 514.)

I note, first of all, that s.3(1) of the *Forest Service Act* provides:

> 3(1) The Lieutenant-Governor in Council shall maintain a forest service for the purpose of
>
> (a) protecting the forests from fire, insects, and diseases.

I infer that this responsibility of the Lieutenant-Governor in Council could be discharged by the employment of persons having the status of employees within a department or branch of the Government. It could be performed through the employment of an independent contractor, or through a company owned and controlled by the Crown in right of the Province.

.....The company is used by the Government of New Brunswick as its instrument to perform the budworm spray program and to all intents and purposes, the company and the work which it performs, is totally controlled by official designated or appointed by the Government or its officials....The degree of control which the Government has over the activities of F.P.L. is, in my opinion, as complete and detailed as the control which it could exercise over its own employees had the Government chosen to perform the spray operations with its own forces, and chartered air craft and pilots to carry out the spraying operations.... F.P.L. in the conduct of the spruce budworm program is a servant of the Government of New Brunswick.

.....The question now to be considered is what immunity from prosecution does the Crown in right of the Province of New Brunswick possess in respect of prosecutions (a) for offences against the *Fisheries Act* and regulations made thereunder?

Section 71 of the *Fisheries Act* reads:

> S.71 This act is binding on Her Majesty in Right of Canada or a Province and any agent thereof.

In my opinion, no other objective can be attributed to s.71 than that Parliament intended to make the prohibitions contained in the act applicable to the Crown both in the right of Canada and the Provinces and any agent thereof.

Appeal dismissed with regard to those informations laid under the *Fisheries Act*.

Cite: 25 N.B.R. (2d) 513
51 A.P.R.

Possible Ramifications of Decision:

1. Agents of the Crown cannot claim immunity under the *Fisheries Act*.

2. With respect to offences committed under the *Fisheries Act*, government agents, will be held accountable for their actions.

3. To determine whether a particular body is an agent of the Crown note the nature and degree of control the Crown exercises over it.

R. v. Kinch

Prince Edward Island Supreme Court

Nicholson, J.

September 26, 1974

Autrefois convict - Plea open to accused in summary conviction proceedings. Court allowed accused after close of evidence to withdraw plea of not guilty and substitute please of autrefois convict. S.246 *Criminal Code* and s.38 *Fisheries Act* not similar offences, accused not in peril of conviction under s.38 when accused tried for assault under s.246.

Facts -

This case arose out of the examination by fishery officers of a lobster catch on board a lobster boat. The owner of the lobster boat was charged and convicted of assault of a fishery officer contrary to section 246 of the *Criminal Code*. The owner was also charged and convicted of obstruction of a fishery officer contrary to section 38 of the *Fisheries Act*. The fishery officer was assaulted subsequent to the initial acts of obstruction by the owner of the boat. The accused now appeals from this conviction and sentence.

[It should be noted that before the Summary Conviction Court the accused pleaded not guilty and there was no application to change that plea. Also, these proceedings are taken under Part XXIV of the *Criminal Code* (Summary Convictions)].

Submissions Put Forward by the Appellant

After the evidence for the prosecution and defence was presented, it was submitted that the appellant's "defence" to the charge against him under the *Fisheries Act* was "autrefois convict". In otherwords, the accused alleged that he was previously charged and convicted of the same offence under section 246 of the *Criminal Code*.

In order to determine if the plea of "autrefois convict" is applicable in this case there are several issues that have to be determined. These issues can be stated as follows:

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1. Whether a plea of autrefois convict can be entered on proceedings under Part XXIV of the *Criminal Code?*

2. Whether or not the Appellant should be granted leave at this stage of the trial to withdraw his plea of not guilty and be allowed to enter the plea of autrefois convict?

3. Whether or not the plea or defence of autrefois convict can be successfully maintained by the appellant in the circumstances of this case?

Reasoning of the Court -

Response to Issue 1.

It has been suggested that the special pleas of autrefois acquit, autrefois convict, and pardon are only in trials of indictable offences under Part XVII (Section 535 to 537).... In my opinion the special pleas referred to in sections 535 to 537 of the *Criminal Code* are not restricted to trials of indictable offences. The defences raised by such pleas as autrefois acquit and autrefois convict are ancient and well recognized by the common law. I have no doubt that they are open to any accused person and where such pleas can be established they afford a complete answer for an accused person.

Response to Issue 2.

This question presupposes that the "defence" of autrefois convict cannot be raised on the general plea of "not guilty". I am not deciding that the "defence" of autrefois convict cannot be raised on a plea of not guilty; however after carefully considering the whole question of the rights of an accused person to plead or raise the defence of "autrefois convict" in summary conviction proceedings I am inclined to the view that the provisions of section 737(1) of the *Criminal Code* providing that "the defendant is entitled to make his full answer and defence" would preclude any decision that such a "defence" is not raised on the accused's plea of "not guilty". The rights of accused persons

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to present a full answer and defence must be scrupulously safeguarded by the Court and I am therefore of the opinion that if necessary the Appellant should have leave to change his plea from not guilty to autrefois convict.

Response to Issue 3.

...It is an offence under section 38 of the *Fisheries Act* to obstruct or wilfully resist the officer in examining a catch of lobsters; whereas obstructing or wilfully resisting such an examination would not be an offence under section 246 (2)(c)(i).... It is my opinion that the Appellant.... was not under any peril of conviction of charges under section 38 of the *Fisheries Act*. A charge under Section 38 of the *Fisheries Act* is distinct and different from a charge under s.246(2) of the *Criminal Code*. The *Fisheries Act* is distinctive federal legislation designed to protect and regulate the fishing. Having dismissed the Appellant's plea of autrefois acquit I must consider what effect, if any, the provisions of section 11 of the *Criminal Code* may have on the prosecution. Counsel for the Appellant did not refer to section 11 of the *Criminal Code* in his argument at the trial. That Section, however, should be considered. It provides as follows:

> 11. Where an act or omission is an offence under more than one Act of the Parliament of Canada....a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.

This section of the Code deals with the so-called "double jeopardy" rule. The defence of "double jeopardy" is closely allied to the special pleas of autrefois acquit and autrefois convict.... "(T)he fact that both offences may arise out of the same act or acts does not result in a person being convicted twice for the same offence. Parliament in its wisdom created these separate offences and the Court must give effect thereto". In my opinion the defence of "double jeopardy" as contemplated by section 11 of the *Criminal Code* does not apply in this case.

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Appeal dismissed.

Cite: 7 Nfld. L P.E.I.R., 34

Possible Ramifications of Decision:

1. "Autrefois convict" is available as a plea in summary conviction proceedings.

2. Made aware that s.246(2) of the *Criminal Code* and s.38 of the *Fisheries Act* are not similar offences.

3. True test of when a plea of autrefois acquit is applicable is not the similarity of facts but of offences and whether the accused person was in peril of conviction of the second charge on the first trial.

4. "Double jeopardy" - the fact that both offences may arise out of the same act does not result in a person being convicted twice for the same offence.

Regina v. Texaco Canada

Nova Scotia Magistrate's Court

May 31, 1979

Constitutional Law - Section 33(2) *Fisheries Act* not "ultra vires" of Federal Parliament - follows decision in *Northwest Falling Contractors Ltd. v. R.* (B.C.S.C., 1978). Due diligence - not accepted as defence as inspection procedure was not satisfactory. Section 33(11) *Fisheries Act* - Furnace oil "deleterious" because of tremendous rate of flow observed pouring into Halifax Harbour at sewer outlet.

Facts -

On December 14, 1979 there was a substantial loss of furnace fuel oil from a bulk storage tank owned and operated by Texaco Canada. The source of the leak from the pipeline system was through a cast iron pipe fitting, cracked at its flange, which was located 38 inches below surface level. The fitting was part of the delivery system from the storage tanks to the loading area for delivery trucks.

A considerable quantity of the oil escaped into Halifax Harbour and as a result the Texaco Company was charged that,

> it did unlawfully deposit a deleterious substance to wit : oil in a place under conditions where such oil may enter the waters of Halifax Harbour being waters frequented by fish contrary to section 33(2) of the *Fisheries Act*.

Other relevant facts concerning the oil spill will now be noted.

In the summer of 1977, certain modifications were carried out at the Texaco plant. Two of the three storage tanks were relocated. The discharge in question came from the middle tank, about 150 feet from the cracked flange. Donald Potter, the assistant superintendent for Texaco had been present when the parking area was filled in. He said the pipe was laid into a bed of crushed stone and the flange was within a few inches of the retaining wall. Another

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modification was the paving over of the loading area for the trucks which included the cracked flange.

About 1939, Texaco's predecessor - the McColl-Frontenac Company had spent considerable funds to endyke the storage compound, and Texaco has since constructed facilities. Texaco's chief engineer for the Atlantic region testified that the dike was in reasonable condition, and could be expected to contain a massive spill. There were three small holes in the dike wall to allow the release of rain water. To his recollection, there was no drain in the dyked area.

The weather had been exceptionally cold for December, and Rohrer said that frost was found when the cracked flange was excavated.

Four issues were considered by the court.

1) The constitutionality of section 33(2) of the *Fisheries Act*.

2) Whether or not Halifax Harbour was a habitat of fish?

3) Was the furnace oil as deposited in the harbour deleterious?

4) Did the furnace oil escape under such circumstances as to make Texaco guilty of the charge?

Reasoning of the Court -

Response to Issue 1 -

The Court follows the reasoning put forward in *Northwest Falling Contractors Ltd. v. R.* (B.C.S.C., 1978) that,

> legislation that has as its objectives the regulation, preservation or protection of fisheries, fishing, and fish is validly enacted federal legislation...

Response to Issue 2 -

Section 33(2)... deals with deposits "in water frequented by fish and section 33(11) defines this phrase to include "all waters in the fishing zones of Canada". There was evidence at the trial, not seriously challenged that this is the basis for my finding that Halifax Harbour is water frequented by fish. Alternatively, I would have to consider that the Harbour is within a fishing zone of Canada giving zone its natural meaning.

Response to Issue 3 -

...James Edward Currie, a Texaco employee for 19 years, put the loss at 29,032 gallons after the company carried out its daily reconciliation program.

Wayne L. Pierce, the informant estimated the flow at 10 gallons a minute and said it was running out as fast as it was running in.

Pierce, and another Crown witness, Patrick McGonigal, marine surveyor with the Coast Guard gave evidence as to the spread of oil on the harbour. On the 14th, the latter flew over the harbour in a helicopter and saw oil from the A. Murray MacKay bridge to Imperoyal and Point Pleasant Park.

(Evidence was also given by scientists concerning the leak).

Considering all the evidence - scientific and law - I find that a deleterious substance, furnace oil, came from the Texaco plant into the Halifax Harbour.

My principal ground is the rate of flow observed pouring into the harbour at the sewer outlet.

Response to Issue 4 -

Section 33(8) of the *Fisheries Act* provides that the defendant can escape liability by establishing that he "exercised all due diligence". I must

(therefore) weigh the evidence and decide on a balance of probabilities whether Texaco established that it exercised all due diligence.

One question to be answered with respect to this defence is that posed in *R. v. The Corporation of the City of Sault Saint Marie* (1978), 40 C.C.C. (2d) 253. This is,

> ...whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system?

...I am driven to the conclusion that the inspection procedure was not satisfactory. I make this a finding - in other words, there wasn't due diligence. The facts which support this finding are, the enormous loss of oil before detection which indicated a lack of proper monitoring procedures, the leaving open of drains within the dyke, the lack of knowledge of three senior employees of the drains outside the dyke into which the oil could flow, the dyke wall did not contain the oil indicating a lack of proper care in maintenance, and there was the change in the parking area which created new conditions.

But one other question remains. Granted, as I have found, that there was fault in Texaco's inspection procedure, what effect is there in the fact that the open ditch led to an unknown sewer into Halifax Harbour?

I am of the opinion that the company is responsible, once it fails in the defence of due diligence, for a natural result of its fault. The natural result of an escape of oil may be unpredictable and unforeseen, but certain physical laws will be followed - the most important being that a liquid will seek lower levels.

Accused convicted.

Cite: Unreported.

Possible Ramifications of Decision:

1. See decision in *R. v. Northwest Falling Contractors* followed - section 33(2) not "ultra vires" of federal parliament.

2. Demonstrates how it is determined whether "due diligence" is acceptable as defence [i.e. weigh all evidence and decide on balance of probabilities.].

3. Made aware that s.33 *Fisheries Act* - strict liability section.

4. See example of what constitutes "deleterious substance" for s.33(11) of the *Fisheries Act* and how it is found to be such.

Paul Royka v. Her Majesty the Queen

Supreme Court of Ontario

Court of Appeal

1980

Informations - Evem though section under which accused is charged does not create an offence - does not entitle accused to succeed on appeal. Lawful Excuse - s.8(a) of Ontario Fishery Regulations does not have meaning ascribed to this term as set out s.2 *Fisheries Act*. Given what constitutes lawful excuse for purposes of s.8(a).

Facts -

Paul Royka, a commercial fisherman, docked his boat at the Kingsville Harbour. When his catch for the day was weighed, it was found that of the total catch of perch, 19% were undersized. The evidence indicated that Royka intended to sell his total catch including the undersized perch through the Kingsville Co-operative.

Royka was charged and convicted of having unlawfully retained a quantity of undersized yellow perch taken by commercial fishing in excess of 10% of the total catch of yellow perch, contrary to section 65(1) of the Ontario Fishery Regulations. Royka is now appealing.

Legislation Relevant to this Appeal

Ontario Fishery Regulations

Section 8. No person shall retain, keep out of the water or have in his possession without lawful excuse

(a) a fish named in Column 1 of an item of Schedule 8 taken by commercial fishing...

.../2

Section 61. Except as herein otherwise provided, everyone who violates or prepares to violate any provision of this Act, or any regulation, is liable to a penalty of not more than one thousand dollars and costs, and, in default of payment, to imprisonment for a term not exceeding twelve months, or to both.

Section 65(1) Subject to subsection (2) and notwithstanding anything else contained in these Regulations, where a person takes fish by means other than angling, he may retain a quantity of any underweight or undersized fish of any species not exceeding ten per cent of the total weight of that species taken at that time...

In order to come to a decision, the learned judge determined (1) whether s.65(1) of the Ontario Fishery Regulations created an offence and (2) the meaning of lawful excuse in s.8(a) of the Ontario Fishery Regulations.

Reasoning of the Court -

Does section 65(1) of the Regulations create an Offence?

The provision which creates the offence is s.61 of the Regulations quoted above. Accordingly, s.65(1) alone does not create an offence. This defect in the information does not, of itself, entitle the appellant to succeed on this appeal. I am satisfied that by reason of s.732(1) and 755(4), before its re-enactment by [Can. 1974-75-76, c.93, s.94 of the *Criminal Code* and the absence of any prejudice to the appellant for the reasons which I shall give with respect to the meaning and effect of "without lawful excuse"] this ground of appeal cannot succeed.

Meaning of Lawful Excuse

I turn now to the meaning of "lawful excuse" in s.8(a). It has been submitted that its meaning in this case is furnished by the definition of this term in s.2 of the *Fisheries Act*, which I shall repeat:

> the unintentional or incidental catching of any fish that may not then be taken, when legally fishing for other fish.

With respect, I am unable to accept that s.2 of the Act furnishes the definition of lawful excuse for s.8(a) of the Regulations. Together with s.15 of the *Interpretation Act*, R.S.C. 1970, c I-23, which reads:

> 15. Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

One is also obliged to consider section 3(1) of that Act which reads:

> 3(1) Every provision of this Act extends and applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act...

Accordingly, if a contrary intention appears in the Regulations it does not automatically follow that "lawful excuse" in s.8(a) has the meaning ascribed to it in s.2 of the Act.

The origin of s.8(a) of the Regulations preceded the enactment of s.2 of the *Fisheries Act*. It first appeared as s.12 of the Special Fishery Regulations and provided that,

> No one shall retain or take out of the water <u>without lawful excuse</u>, any species of fish named in this section...

At that time (1922), it could not have been contended that what later became the *Fisheries Act* definition of "lawful excuse" applied to s.12.

Examining the words themselves of the statutory definition, it can be seen that they are really directed toward a prohibition of taking fish at certain times - "that may not then be taken..." a closed season prohibition.

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Since it is directed by Parliament to a prohibition against taking fish at a certain time, as an exception to it, the statutory definition fits awkwardly in a context prohibiting the retention of undersized or underweight fish - no matter when they were taken.

Further, s.8(a) has to read in its context. Part of its context is s.65 of the Regulations. This latter section should be read as intending to provide some relief, by way of exception, to the prohibition of retention in s.8(a) and similar provisions. Section 65 really makes no sense and serves no useful purpose, if the words "without lawful excuse" in s.8(a) enabled a commercial fisherman to retain the whole of his undersized catch, no matter what percentage of the total catch it might be, merely because it was caught unintentionally or incidentally - which would be the case if without lawful excuse meant only what s.2 of the Act says it means.

For all of these reasons, I think that a "contrary intention" appears from the Regulations and that it cannot be said that s.15 of the *Interpretation Act* requires that "lawful excuse" in section 8(a) be confined to the definition of these words in the Act.

In the absence of a special definition being given to "lawful excuse", its meaning has to be determined from the object of the legislation in which it appears and the subject matter of its immediate context. As far as s.8(a) of the Regulations is concerned it would be a "lawful excuse" if the undersized fish were being retained in circumstances and for a purpose that clearly did not run afoul of the object of the legislation. While there is no need to be more definitive than this, I can give a relevant example which may be helpful. If a fisherman had made reasonable efforts to avoid catching undersized fish and then segregated that portion which exceeded 10 percent of the total catch (and which he could not return, alive, to the water pursuant to s.10 of the Regulations) with the intention of turning them in to a conservation officer of the Ministry, this would be a "lawful excuse". Possession in such circumstances has been considered to be a defence to other kinds of possession offences...

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Appeal dismissed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Outlines situation when definition of "lawful excuse" as set out in s.2 of the *Fisheries Act* will not apply.

2. How to determine meaning of "lawful excuse" when s.2 *Fisheries Act* does not apply.

3. Defect in information does not of itself, entitle accused to succeed on appeal.

The King v. The "Mary C. Fischer"

Exchequer Court of Canada

July 18, 1929

Foreign vessel entering Canadian waters. Situation falls within meaning of "unavoidable cause", s.183 *Customs Act*.

Facts -

The "Mary C. Fischer" was found within Canadian territorial waters. According to the defence the entry into Canadian waters was occasioned by the fact that in anchoring where the the vessel did the crew or the one man who was in temporary command during the illness of the master, thought that he was without the three-mile limit and anchored at a place which in the dark he believed to be outside Canadian territorial waters. The "Mary C. Fischer" was seized for contravention of s.183 of the *Customs Act*. The defendant now brings this action for declaration as to the validity of this seizure.

The question to be determined here is whether the entry of the "Mary C. Fischer" in the circumstances was "an avoidable cause" within s.183 of the *Customs Act?*

Reasoning of the Court -

I have come to the conclusion that in the special circumstances of this case it must be held to be so. For this reason, that the sole man in charge had after two days' battling with the elements, with a very sick comrade below, in a very courageous and pertinacious manner, ...having had only a few hours' sleep - two or three hours' sleep in seventy-two hours, ... (I)n the circumstances, it would be a harsh, and to my mind an unconsciousable stand to take that he must then be regarded as a mariner in ordinary conditions and called upon to take such precautions as would in other circumstances be required by this Court. In other words, he was prevented from doing what he otherwise would have done, or should otherwise have done, ...

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Judgement accordingly.

Cite: [1929] 4 D.L.R. 679

Possible Ramifications of Decision:

1. Although unusual circumstances demonstrate what would constitute "an unavoidable cause".

Her Majesty The Queen v. Rendell Genge

In the Supreme Court of Newfoundland

Trial Division

1983

When considering defence of due diligence under s.6(b) of the Atlantic Fishery Regulations, must consider not only the catching aspect, but also the retention aspect of offence.

Should be cautious when applying and following decisions that deal with different regulations, then the case at hand.

Facts -

Rendell Genge was charged that he,

> "did catch and retain codfish in Division 4R by means of a Class E vessel at the time specified in a notice stating that the fishing quotas as varied had been taken, contrary to section 6(b) of the Atlantic Fishery Regulations thereby committing an offence punishable under section 61(1) of the *Fisheries Act*.

The facts as determined by the learned trial judge, and as set forth in the stated case are as follows:

1. The defendant on or about the 30th day of September, 1982, was fishing for shrimp near Point Riche, Newfoundland, being in division 4R, and being one of the divisions referred to in section 6.

2. The defendant caught and retained 1,688 pounds of shrimp and 6,804 pounds of codfish;

3. The defendant caught and retained codfish which exceeded 10 percent of the total weight of all fish on board his vessel which was not a prohibited species;

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4. The defendant had no intention of segregating the excess by-catch or turning the excess by-catch over to the Department of Fisheries; and

5. The defendant had no intention at any time to forward any monies which he would have received with respect to the excess by-catch to either the Receiver General of Canada or the Department of Fisheries.

The accused was acquitted by the trial judge and counsel for the Attorney General of Canada is now appealing by way of stated case.

There are two relevant issues here.

Reasoning of the Court -

Response to Issue 1

I agree with the learned Provincial Court judge that in the circumstances outlined it certainly appears that the defendant used due diligence and care in fishing for shrimp and it was probably plain bad luck that he caught such a large proportion of codfish. However, had the defendant segregated the fish at least there would have been some evidence of an intention not to retain all of the codfish taken in excess of the permissible 10 percent. In my opinion by not segregating the fish or having any intention of ever segregating the excess by-catch of codfish it is apparent that he had no intention of turning the excess by-catch over to the Department of Fisheries or forwarding any monies to the Receiver General for Canada or the Department of Fisheries. It is in this area that the defendant failed to exercise due diligence.

... It seems apparent to me that to ignore the retention of the section would entirely defeat its object and purpose.

Response to Issue 2

Because the regulations in *R. v. Royka* (52 C.C.C. (2d), p. 368) and other facts are different and because that case dealt primarily with the interpreta-

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tion of "lawful excuse" as appearing in the Ontario regulations I am not at all certain that the learned Provincial Court Judge could have applied and followed that decision on the facts of this case ... No doubt *Royka* is relevant on certain points in issue and on that basis is helpful.

Acquittal is set aside.

Cite: Unreported.

Possible Ramifications of Decision:

1. When considering defence of due diligence under Atlantic Fishery Regulations should consider that aspect of the offence relating to the **retention** of the codfish as well as the **catching** aspect.

2. Caution must be exercised when applying and following decisions that consider different regulations than the case at hand.

The Queen v. Robert Laidler

In the Court of the Provincial Magistrate

Nova Scotia

November 25, 1983

Section 11 of *Interpretation Act* R.S.C. 1970, C. I-23 requires the purposive approach to the interpretation of all federal statutes.
Where a statute open to two interpretations an interpretation should be chosen which favours the liberty of the subject in the absence of compelling reasons to contrary.
Defence of due diligence not available when error is mistake of law.
No evidence to support defence of "officially induced mistake of law".

Facts -

The defendant is charged that ... he did operate an aircraft, not being an aircraft on a scheduled flight plan, within 2,000 feet of a seal on the ice contrary to Section 11(5)(b) of the Seal Protection Regulations, thereby committing an offence against section 61(1) of the *Fisheries Act* R.S.C. 1970 C. F-14.

The facts are not in dispute. The defendant is employed by IMP Group Limited as a pilot. On March 25, 1983 the Canadian Broadcasting Corporation chartered an aircraft from IMP to transport several of its employees to film the sea hunt and the vessel the "Sea Shepherd". The defendant was the pilot on this charter flight.

Prior to his departure he filed a "VFR flight plan" which he described in his testimony as being a legal requirement setting out the route, the number of people on board, the fuel on board, the purpose of the flight, etc. The stated purpose of the flight was to obtain photographs in the area south of Grindstone, Magdalen Islands. The flight plan did not disclose the flight would be made over an area containing seals on ice.

The defendant flew the crew from Halifax to Grindstone Airport. As he approached the Magdalen Islands he contacted the airport, was given the position of the Sea Shepherd and set up a left hand orbit at 140 knots around an area

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containing the vessel. He remained in this area for about 40 minutes, flying well below cloud over ice flows containing seals at heights varying from a high of 1,000 feet to a low of 700 feet.

On March 25 the defendant was unaware of the regulation in question. The regulation did not appear in Transport Canada's Manual and he was never advised of it. No permission was obtained for this flight from the Minister of Fisheries for Canada.

Counsel for the defendant raised several defences and argued that the defendant should be found not guilty on the following grounds:

1. The Crown has failed to prove beyond a reasonable doubt that the aircraft, operated by the defendant, was not a "commercial flight operating on a scheduled flight plan";

2. If the burden of proving the exception is upon the defendant by reason of s.730(2) of the *Criminal Code* of Canada, the defendant has brought himself within the exception;

3. The offence charged is one of strict liability, the defence of due diligence is available to the defendant and he has proved the defence on a balance of probabilities;

4. Officially induced error (or colour of right).

Reasoning of the Court -

Response to Arguments 1 and 2.

Since I am satisfied the phrase "except for commercial flights operating on scheduled flight plans" is an exception prescribed by law, *Criminal Code* s.730(2) applies and the burden of proving that exception is on the defendant. The defendant says the aircraft was hired for a commercial purpose and the

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defendant scheduled (i.e. pre-arranged with the C.B.C. T.V. crew) the flight for a particular date and time, filed a detailed plan of that flight with the Department of Transport and the plan was approved by it.

Section 11 of the *Interpretation Act*, R.S.C. 1970, C. I-23 provides:

> 11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

Thus Section 11 has been said to require the "purposive approach to the interpretation of all federal statutes".

In my opinion the object of Section 11(5)(b) of the Seal Protection Regulations is to control the altitude at which aircraft are to flight so as not to constitute a danger to the seals and their pups at a time when the seals resort to the ice flows for the purpose of breeding and rearing their young.

The regulation exempts "commercial flights operating on scheduled flight plans" and persons who obtain the consent of the Minister of Fisheries for Canada.

While the interpretation of any statute entails giving effect to the intention of Parliament or the Legislature to produce a result which is consistent with justice and common sense, it is an oft stated rule that where a statute may be open to two interpretations, an interpretation should be chosen which favours the liberty of the subject in the absence of compelling reasons to the contrary.

While the *Fisheries Act* and Seal Protection Regulation do not define "commercial flights" or "scheduled flight plans", guidance as to the meaning of these words may be found in several regulations made pursuant to the *Aeronautics Act*, R.S.C. 1970, C. A-3.

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Applying some of these definitions to the instant case it is my view that a 'commercial flight' is a flight by an aircraft where payment, consideration, gratuity or benefit, directly or indirectly has been charged, demanded, received or collected by any person for the use thereof.

...While there is a sense in which a flight plan or flight itinerary is a schedule, i.e. it is a statement containing the details of a flight as required by the regulations, it is my opinion this is not its meaning in the section under consideration having regard to the purpose of the section. Such an interpretation would in my view, defeat what I believe to be the object of the regulation.

The defendant was operating a charter commercial service. Arrangements were made with the purchasers of the service on an "ad hoc" basis. One would to concede that if the service is to operate smoothly, the parties to the arrangement should reach a consensus on the time of the flight, its destination, its price and so on. Indeed a flight plan or itinerary would have to be filed and some of this information would be necessary for inclusion in the plan.

I would hold therefore that 'commercial flights operating on scheduled flight plans' are:

> flights by an aircraft where payment, consideration, gratuity or benefit directly or indirectly, has been charged, demanded, received or collected by any persons for the use thereof and where the service is being conducted or operated according to "flight plans scheduled", that is, designated to be performed at a fixed time or times in the future; flight plans according to a statement of times of projected operations or recurring events and as a time table.

It follows then that I am satisfied the defendant does not come within the exception prescribed by law.

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Response to Argument 3

The defendant submits further that the offence is one of strict liability. He argues he carried out the flight in the reasonable and honest (though, in fact, mistaken) belief that, by conforming to the requirements and regulations of Transport Canada, he would be carrying out a lawful flight. Since he flew in accordance with all the air regulation, air navigation orders and other publications of Transport Canada which is the department having jurisdiction of air carrier operations in Canada, he honestly and reasonably, though mistakenly, believed that the approval by the Department of Government which regulates air traffic (Transport Canada) would not preclude disapproval of it by another Department of the same Government (Fisheries and Oceans Canada).

In my opinion the Seal Protection Regulations enacted pursuant to the *Fisheries Act* is a regulatory or public welfare offence, enacted for the general welfare of the Canadian public, as well as the welfare and protection of the seals. As Mr. Justice Dickson stated "public welfare offences would prima facie be in the second category", that is strict liability. *(R. v. Sault Ste. Marie,* 3 C.R. (3d) p. 30. ...The defence is available "if the accused reasonably believed in a mistaken set of facts, which if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event." The burden is on the defendant to prove the defence on a balance of probabilities.

Characterizing a mistake as one of fact or law has often been difficult. Granville Williams has defined the difference in his work Criminal Law : The General Part, London, Stevens & Sons Ltd., 2nd ed. pp. 278-9 as follows:

> "Generally speaking a fact is something perceptible by the senses, while law is an idea in the minds of men. The distinction may be illustrated by reference to marriage ... A mistake as to whether a marriage has been celebrated may be either a mistake of fact or a mistake of law. It is a mistake of fact if no ceremony has been performed; a ceremony is a fact, of which a cinematograph picture could be taken. But

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> the mistake is one of law if, though the ceremony has been performed, there is a misunderstanding of the rules of the law governing the validity of the ceremony...

The definition of a fact as something perceptible by the senses needs qualification in one respect. A state of mind is also a fact, though not directly perceptive by the senses. If A believes that B has a certain intention when in truth he has not, there is a mistake of fact.

... With respect, I cannot agree with the defence submission that the defendant's mistake was a mistake of fact. Not only was the defendant required to fly in accordance with the *Aeronautics Act* and the Regulations made thereunder, but he was also required by law to ensure that any operation by him of an aircraft over seals on ice not be operated at an altitude of less than 2,000 feet. He simply did not know of the existence of the regulation, was ignorant of it and I am unable to treat his mistake otherwise than as a mistake of law. The regulation was published in the Canada Gazette on February 26, 1982 SOR/82-269. Having found the mistake was one of law, S.19 of the *Criminal Code* applies. To quote Mr. Justice Ritchie in *R. v. MacDougall* 31 C.R. p. 1 at p.11:

> "The failure to appreciate the legal duty imposed by that law (S.250(3) of the *Motor Vehicle Act* of Nova Scotia) is of no solace to the appellant (defendant).

For the reasons stated the defence fails.

Response to Argument 4.

I am satisfied there is no evidence to support the defence of "officially induced mistake of law". There is no evidence that an official of Transport Canada or Fisheries Canada made an error which misled the defendant or caused him to act as he did. If the defendant were to rely on this defence, it seems to be a prerequisite for its application would be knowledge by the official that the purpose of the flight would require the aircraft to fly at an altitude of less than 2,000 feet over seals on ice. This fact was not disclosed to any official either in writing or orally.

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For all these reasons, I find the defendant guilty as charged.

Cite: Unreported.

Possible Ramifications of Decision:

1. Given rules of statutory construction:

   (a) When interpreting statutes, the intention of the legislation must prevail.

   (b) Guidance as to the meaning of words in statutes may be obtained by looking at other statutes.

   (c) When a statute may be open to two interpretations, an interpretation should be chosen which favours the liberty of the subject in the absence of compelling reasons to the contrary.

2. Defence of due diligence not available when error is mistake of law.

3. Given the purpose of Section 11(5)(b) of the Seal Protection Regulations.

4. Told what constitutes "commercial flights operating on scheduled flight plans".

5. It is held that the Seal Protection Regulations are a public welfare offence. [Thus, they are strict liability offences.]

6. Given circumstances when defence of "officially induced mistake of law would apply".

R. v. Baker

British Columbia County Court

June 3, 1983

Interpretation of statutes - Cardinal principle in the interpretation of statutes is that if there be two inconsistent enactments it must be seen if one cannot be read as a qualification of other.

Even if mistake better described as one of mixed fact and law, should be treated as mistake of fact and therefore providing a defence to strict liability offences.

Facts -

The appellant, a member of the Squamish Indian Band, was convicted of two counts contrary to the British Columbia Fishery (General) Regulations, C.R.C., 1978, c.840 made pursuant to the *Fisheries Act*, R.S.C. 1970, c. F-14, Paragraph 6 of the Squamish Band Bylaw No. 10 (made under the authority of s.81(o) of the *Indian Act*, R.S.C. 1970, c. I-(6) permitted band members to fish upon band waters "at any time and by any means...". The appellant believed, based on his and other band members' fishing customs, that the waters where he was fishing were within the reserve boundaries, although in fact they were not.

Reasoning of the Court -

The offences are characterized as strict liability cases, and as such, as I understand the law, a mistake of fact is, in appropriate cases, a defence. The mistake of fact alleged by the appellant is that he had fished the area in question for a lengthy time as had other members of the Squamish Indian Band and that he understood that the area in question was part of the band reserve and that he was entitled to fish in that area by virtue of an Indian band by-law.

The provisions of the *Fisheries Act* [R.S.C. 1970, C. F-14] and the regulations, which form the basis of the charge, and the band bylaw in paragraph 6 of Bylaw No. 10, are clearly prima facie in conflict. Without quoting the regulations, they prohibit fishing and possession of fish except as set out in the regulations.

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Paragraph 6 of the Bylaw simply says,

> Members of the Squamish Indian Band shall be permitted to engage in fishing upon Squamish Indian Band waters at any time and by any means except by the use of rockets, explosive materials, projectiles, or shells.

The appellant believed that the waters where he was fishing were within the boundaries of the reserve and that paragraph 6 of the bylaw applied to it.

We have had a series of cases cited to me about the manner in which I should attempt to interpret the regulations and the bylaw in a case where they are apparently in conflict ... I content myself with citing *Tilardeau et al. v. Church*, [1972] 6 W.W.R. 450, a decision of Berger J. in which he cites several cases with approval, and in particular, the passage at page 456:

> I take it to be a cardinal principle in the interpretation of the statute that if there be two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other.

My interpretation of the two sets of regulations is that the Indian Band bylaw is effective within the boundaries of the Reserve and that the application of the *Fisheries Act* and regulations in a case where a properly drafted and enacted Indian Band bylaw is in existence ceases at the boundary of the reserve if the two are in conflict. Thus, I come to the conclusion that if the appellant had been fishing in water within the boundary of the Reserve he would have been protected from the charges laid by the bylaw.

The Crown while not seriously contending before me that this interpretation of the regulations of the bylaw was incorrect, submitted that the mistake made by the appellant was a mistake of law and not a mistake of fact. On the authority of *R. v. MacDougall* (1982), 31 C.R. (3d) 1 (S.C.C.), a mistake of law is not a defence as ignorance of the law is no excuse. The question that has given me

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the most difficulty in the hearing of this appeal is whether the error made by the appellant was an error in fact or an error in law. I think that it involves a question of fact. It may involve a question of law, but in my view, it is essentially one of fact. I concede, however, that it may be better described as mixed fact and law.

In *R. v. Davidson* (1971), 3 C.C.C. (2d) 509 (B.C.C.A.) at 516, Nemetz, J.A. as he then was stated,

> If indeed there was a mistake of law, then juxtaposed with that mistake was a mistake of fact ... As was said by Dickson, J. in *Thomas v. The King* ... in any case, in the distinction between mistakes of fact and of law, a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law.

Accordingly, I propose to treat the mistake here as a mistake of fact.

Appeal allowed, convictions set aside.

Cite: [1983] 4 C.N.L.R. 73

Possible Ramifications of Decision:

1. Mistakes of mixed fact and law treated as mistakes of fact and as such can be a defence to a strict liability offence.

2. Given rule of statutory construction (i.e. where there are two conflicting statutes) and see application of rule.

Her Majesty the Queen v. Thomas Edward Burns

New Brunswick Court of Queen's Bench

January 16, 1984

Unlawful fishing in scheduled water - Proof of "scheduled waters".

Facts -

Thomas Edward Burns was charged that he ... at or near Quahan Landing, on the Little Southwest Miramichi River, ... did unlawfully fish by angling with other than an artificial fly in scheduled waters, contrary to section 18, subsection 21(a) of the New Brunswick Fishery Regulations. He was acquitted and the crown is now appealing.

The only issue was whether the accused had been fishing in "scheduled waters" within the meaning of s.18(21) of the Regulations.

Reasoning of the Court -

The evidence indicated that the Federal Fishery Officers observed the Respondent fishing with a spinning rod, reel, line, and spinner with worm attached on the date and at the place specified in the information.

The only evidence was that of the Crown witness and the only point in issue before the Court was whether the Respondent was fishing in scheduled waters, that is, the Little ... of the Little Southwest Miramichi River.

The evidence was that the Defendant was fishing from the shore casting towards the island in this river. The main channel of the river ran on the far side of the island and the lesser one on the side where the Respondent was fishing. Off to the Respondent's right was what has been referred to as a bog. This body of water either came from the Little Southwest Miramichi River or was spring fed or perhaps a combination of both.

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R. v. Myles et al.

Newfoundland District Court

December 3, 1975

Proof required when dealing with circumstantial evidence - guilt must be rational conclusion based on inferences drawn from proven facts, no conclusion can be rational conclusion that is not founded on evidence.

Facts -

This case arose out of a charge of hunting caribou during the close season contrary to the *Newfoundland Wildlife Act.* Section 2(f) of *The Wildlife Act* defines hunting as follows:

> (f) "hunting" includes chasing, pursuing, worrying, following after or on the trail of, or searching for, wild life whether or not the wild life is is then or subsequently captured, injured or killed...

On March 20, 1975 two wildlife officers departed by helicopter for the purpose of surveying a herd of caribou. When they came across the herd, they appeared to have been harrassed. The caribou were running at fast rates of speed and were also not where the officers expected to find them.

The ground in the area showed recent snowmobile tracks. From the tracks, it was possible to note that the snowmobiles had moved from hilltop to hilltop. It was concluded that this was done in order to determine the location of the herd. Also, it is common knowledge that caribou and moose feed on the hilltops as more vegetation is available here. The officers testified that there were four distinct snowmobile tracks. These tracks had been freshly made within the past hour.

The officers followed the snowmobile tracks and came across the carcass of a slaughtered caribou. They continued to follow the tracks until a few miles later they came across a cabin by a pond. Four men and four snowmobiles were at this site. The officers landed and questioned the men. The men advised the wildlife officers that they were ice fishing. Apparently, one of the men was

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carrying a fish auger. The officers testified however, that from a helicopter it was very easy to observe the ponds and ice, and that there was no evidence or indication whatsoever that anyone had attempted to fish through the ice in that area.

After questioning these men, the officers then went back and started to retrace the tracks left by the four snowmobiles parked at the cabin. Approximately 2 to 3 miles from the parked snowmobiles, the officers observed an area where the snowmobiles had stopped and the drivers had gotten off their machines. Here, they discovered buried in the snow two rifles with magazines loaded. It was apparent that these rifles had been buried within the past hour or so.

The four men were charged and convicted of "hunting" and are now appealing.

[It should be noted that although the evidence would appear to indicate that the four men were hunting there were no witnesses who actually saw the men hunting and there was no direct evidence.]

The issue to be decided here is whether the evidence is adequate and satisfactory to establish beyond a reasonable doubt that the appellants were in fact guilty of the offence as charged.

Reasoning of the Court -

We are compelled to inquire into the law respecting circumstantial evidence. This necessitates a consideration of the principle or rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. [The rule in *Hodge's Case* is a rule adopted by the Court for the purposes of instructing a jury or for a judge sitting alone to instruct himself when the evidence is circumstantial].

After having reviewed the numerous authorities respecting the rule in *Hodge's Case* I am inclined to the interpretation as given in *Regina v. McIver*, [1965] I C.C.C. 210 where McRuer, C.J.H.C. stated:

> The rule makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one.

I have already indicated in the case at Bar, that there is no direct evidence as such, that the appellants committed the offence as charged. I have had to review therefore, all of the evidence in order to determine the guilt or innocence of the appellants based on the general rule from *Hodge's Case*.

I am satisfied beyond a reasonable doubt that the circumstances and facts are consistent with the Appellants having committed the offence as charged and also that I am satisfied beyond a reasonable doubt that the circumstances and facts are such as to be inconsistent with any other reasonable or rational conclusion than that the appellants were the individuals, "hunting" the caribou within the definition of Section 52(f) of *The Wildlife Act*.

Appeal dismissed.

Cite: 9 Nfld and P.E.I.R. 123

Possible Ramifications of Decision:

1. Given law respecting circumstantial evidence.

2. Given good working definition of *Hodge's Case*.

3. See how this rule is applied in actual fact situation.

G.A. Percy Smith v. Her Majesty the Queen

New Brunswick Court of Queen's Bench, Trial Division

October 1, 1982

Confession Rules - Statement made by accused in presence of person in authority not admissible in evidence unless Crown shows that statement is free and voluntarily made. If statement made to third party but admission made in direct response and to satisfy request by person in authority - issue of voluntariness still must be dealt with.

Facts -

On August 1, 1981 the Assistant Game Warden reported to his superiors that Percy Smith had used the same tag on two salmons. His superiors decided to search the High Bridge Camp. Percy Smith is the manager and director of this camp. Four provincial game wardens and two R.C.M.P. officers went to this camp to search the premises.

Upon arriving at the camp, one of the game wardens approached Mr. Smith and his friend Johnson. He expressed a desire to see a fish that Mr. Smith had caught that morning. Mr. Smith asked Johnson to "get that fish I caught this morning". The fish in question turned out to be an untagged Atlantic salmon which was fully prepared for consumption and was in a mostly frozen state.

The game warden after effecting the seizure of this fish told Mr. Smith that they would like to have a look at his freezer. Mr. Smith replied, "yes no problem" or "by all means". Four untagged salmon were found in the freezer and seized.

Mr. Smith was charged that "he did unlawfully have in his possession portions of Atlantic salmon to which there was not affixed a tag."

The learned Provincial Court Judge convicted Mr. Smith with respect to the first salmon seized and acquitted him with respect to the other four fish found in the freezer.

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Mr. Smith now appeals the conviction while the Crown cross-appeals the acquittal.

The relevant provisions of the *Fish and Wildlife Act* read as follows:

1 (1) In this Act "possession" includes the right of control or disposal of any article, irrespective of the actual possession or location of such article.

1 (2) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person; or;

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person...

Reasoning of the Court -

Reasoning With Respect to the Four Untagged Salmon

...I fully agree with the learned trial judge with respect to his findings relating to the four salmon; there was no admissible evidence whatsoever to indicate that the appellant had "any right of control or disposal" with respect to such salmon as referred to in section 1(1) of the Act or indeed any admissible evidence that the appellant had possession by virtue of section 1(2).

Furthermore, if the statement by the appellant to the Game Warden is to be taken as an acknowledgement by the appellant that he owned the freezer, such statement certainly constituted an admission of a single fact which formed a link in the chain of proof against the accused, and as such, was subject to the usual "confession" rules.

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That statement or admission by the appellant to a person in authority was only admissible if the Crown proved it to the satisfaction of the Court, to be a voluntary statement or admission, which was not done. Therefore the statement was not admissible.

Because this statement was not admissible as evidence, the Crown's case against the appellant is so weak that his reasons for acquittal with respect to the four salmons are obvious.

Reasoning with Respect to the First Salmon Seized

The Crown's case against the appellant with respect to the one untagged salmon was based solely on the fact that the appellant gave directions to one Mr. Johnson to "get the fish I caught this morning" at the request of the game warden.

...The statement of the appellant directing his friend Johnson "to get the fish I caught this morning" was, in substance, an admission on the part of the appellant that he had a "right of control" or "right of disposal" with respect to such fish and was certainly a statement or an admission of an incriminating nature.

Although this statement of the appellant acknowledging a "right of control" or "right of disposal" of fish was not directed to a person in authority, such statement or admission was made in direct response to, and to satisfy a request by a person in authority.

As such, the incriminating statement was subject to the test of voluntariness. It was not subjected to this test and therefore the statement is inadmissible.

Appeal allowed.
Cross-appeal dismissed.

Cite: Unreported.

N.B. Appeal dismissed by the New Brunswick Court of Appeal - March 22, 1983

Possible Ramifications of Decision:

1. Sets forward rules with respect to "confessions".

2. If faced with this type of situation in future, Crown should attempt to prove that statement was "voluntary".

R. v. Mosher

Nova Scotia Supreme Court, Appeal Division

(Docket # S.C.C. 00027)

January 11, 1980

In order to convict an accused of failing to maintain a fishing logbook as supplied by the Regional Director General contrary to section 25(1) of the Atlantic Fisheries Regulations, the Crown must prove that the logbook was "supplied" by the regional director.

Facts -

The master of a large fishing vessel was charged that he failed "to accurately maintain a fishing logbook as supplied by the Regional Director-General" of Fisheries contrary to s.25(1) of the Atlantic Fisheries Regulations. The conviction was set aside by the county court. The Crown is now appealing.

Reasoning of the Court -

Mr. Justice MacKeigan agreed with the decision made by Judge Clements in the County Court. His Honour Judge Clements set aside the conviction on the primary ground that the Crown had not proved the logbook to be the one "supplied" by the Regional-Director.

N.B. (It should be noted that the provision in 25(1) has been since amended as of May 23, 1979 to require accurate maintenance of a logbook "approved" by a Director-General).

Appeal dismissed.

Cite: 37 N.S.R. (2d) 91
67 A.P.R.

Possible Ramifications of Decision:

1. Crown should be prepared to prove allegations made.

The A.J. Franklin

Vice - Admiralty Court

February 10, 1871

Evidence justified a charge of "fishing" being laid, even though no fish were actually seen caught.

Facts -

The "A.J. Franklin" was a vessel owned in the State of Massachusetts. It was sighted in the midst of a mackerel fleet at Broad Cove. As a result, the vessel was overhauled by Captain Tory of the cutter Ida, but was let go with a warning as there was not enough evidence to charge with fishing at the time. Later, more evidence was obtained by those men who were part of the mackerel fleet. Some of this evidence can be stated as follows:

1. The "A.J. Franklin" was in the position to catch mackerel. [i.e. The crew were preparing for fishing on the starboard side which is the invariable usage].

2. She had her mackerel lines out and they [the crew of the "A.J. Franklin"] were heaving bait.

3. She was hove to, jib down, foresail and mainsail up, and sheets off on port side, as is usual in fishing for mackerel.

[It should be noted however, that none of the witnesses saw any mackerel caught nor any fish thrown over from the "A.J. Franklin".]

After having received this subsequent information, Captain Tory seized the vessel. At this time several declarations were made by the crew of the "A.J. Franklin" which indicated that they had been fishing.

Reasoning of the Court -

I look upon the throwing of bait - the heaving to with sheets off, and the

.../2

jib down, and the vessel thus lying in the position to catch mackerel with the mackerel lines out, and hauled in on the approach of the cutter - these circumstances, coupled with the declaration and actions of the crew and captain of the "A.J. Franklin", bring the case clearly within the meaning of the Dominion Acts of 1868 and 1870, as fishing, and subject the vessel and her cargo to forfeiture, although no mackerel are proved, except by the declarations of the crew to be taken.

Cite: 1871 V.A.R. 89

Possible Ramifications of Decision:

1. Demonstrates type of evidence needed to charge with fishing.

The King v. Smith

Supreme Court of Nova Scotia

December 30, 1909

A constable's affidavit (declaration of statement of facts) may be accepted as proof of service of summons.

Facts -

A man convicted under the provisions of the *Fisheries Act* is now appealing on several grounds. One of these objections is that there was

> No proof of the service of the summons to compel the appearance of the defendant; that the proof of service was by affidavit of the constable who served the same, and endorsed on the writ of summons.

Reasoning of the Court -

The learned judge in the course of his judgement, addressed this objection. He stated,

> The proof of service I hold sufficient to satisfy the trial magistrate that the defendant had been duly served; and under the provisions of section 718 of the *Criminal Code*, the magistrate, so far as this point is involved, had jurisdiction to hear and determine the case in the absence of the defendant who did not appear.

Order for discharge.

Cite: C.C.C. Vol. XVI, 425

Possible Ramifications of Decision:

1. A peace officer's affidavit is proof of service of summons.

Her Majesty the Queen v. Patrick Savory

Provincial Magistrate's Court

County of Shelburne, Nova Scotia

1974

The proportion of haddock to other fish caught should have indicated to accused that he would exceed permitted level.

Facts -

The accused is charged that in the Northwest Atlantic Ocean... he did unlawfully fish for haddock contrary to section 11(1) of the Northwest Atlantic Fisheries Regulations (P.C. 1974-75).

It was found that of a total of 70,413 pounds of fish caught by the accused, 51,360 pounds or 73% were haddock.

Reasoning of the Court -

It is the view of the Court that under the circumstances herein where the accused caught 70,413 pounds of fish, 51,360 pounds of which were haddock, that the accused did in fact fish for haddock within the meaning of the regulations.

The Regulation in question provides:

11(2) A person fishing for species other than haddock in a division of subarea referred to in section (1) may catch and retain haddock if the quantity so retained does not exceed the greater of five thousand pounds and ten per cent of the total weight of fish on board his vessel.

This regulation permits catching of haddock while fishing for other species up to 5,000 pounds or ten per cent of the total catch, whichever is greater, and for the accused to continue fishing operations beyond the point where it should have been obvious to him that his proportion of haddock would inevitably exceed the permitted limit, was an act on the part of the accused that ought to have indicated to him that he was violating the law.

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Penalty Imposed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Intent can be inferred from evidence.

John M. Fudge v. His Majesty the King

Exchequer Court of Canada

April 25, 1940

Admissible Evidence - admiralty charts prepared and published under governmental authority, Light List Book published by Department of Transport giving height of every lighthouse in Canada and log-books. Where conflict exists as to position of ship and one ship has proper nautical equipment and the other does not, evidence of former should be taken. If ship found violating laws within 3 mile limit, can be pursued beyond 3 mile limit and lawfully seized on high seas.

Facts -

The claimant John Fudge, claims the return of his vessel seized on August 27, 1937.

On the 27th of August, the "Laurier", a cutter employed by the Dominion Government, was attempting to locate the "Geneva Ethel", a vessel reported to be hovering off the coast. When this vessel was located, the "Laurier" proceeded on its course, but kept a check on the position of the "Geneva Ethel" by bearings. The "Geneva Ethel" was kept under observation and her course noted on admiralty charts.

When it was believed that the "Geneva Ethel" was within 3 miles off the coast, the log was set in order to ascertain her position. A bearing was taken; the line of bearing placed the "Geneva Ethel" within 3 miles from shore. The "Laurier" for her part proceeded southwest until her sounding machine registered a depth of 11 fathoms. At that point Shipwreck Point lighthouse bore from the "Laurier" southwest by west one half west; the sextant was used and a vertical angle of the lighthouse was taken; the angle indicated was 21 minutes, which meant a distance of 2.3 miles from the "Laurier" to the lighthouse. [It should be noted that to determine this "vertical angle", the officers made use of the Light List Book. This publication put out by the Department of Transport gives the height of every lighthouse in Canada]. The above data corresponds with the entries in the cutter's log-book, an exhibit whereof was filed as exhibit K.

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At this point, the "Laurier" signalled the "Geneva Ethel" to stop. This signal was not heeded, but instead the "Geneva Ethel" proceeded to the high seas. The "Laurier" seized this ship and alcohol, liquor, and cigarettes not included in the manifest were discovered. These were the facts as stated by the crew of the "Laurier".

John Fudge on the other hand gives a somewhat different account. He estimated that the "Geneva Ethel" was $4\frac{1}{2}$ miles from shore when signalled to stop.

Reasoning of the Court -

On behalf of the respondent we have the evidence of men equipped with modern nautical instruments who were in a position to fix ... with a sufficient degree of precision, the location of the "Geneva Ethel"...; on the other hand there is the uncorroborated testimony of the owner and master of the schooner, lacking the proper nautical instruments, having kept no record whatever of his course and speaking entirely from memory.

After carefully perusing the evidence, I feel disposed to accept that evidence adduced on behalf of the Crown; it seems to be more trustworthy and more reliable.

Objections were raised by counsel for claimant: 1st against the production and use of the admiralty chart as evidence; 2nd against the use by the master of the "Laurier" of the vessel's log-book to refresh his memory...

In connection with the admissibility of admiralty charts prepared and published under governmental authority, the learned judge follows *Rex v. Bellman.* This case stated that admiralty charts officially prepared under government authority are admissible in evidence. As regards the log-book, they are also admissible [See Halsbury's Laws of England, 2nd ed., vol. 13, 683, No. 762].

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Counsel for claimant further objected to the use of the Light List Book. The objection is, in my opinion, unfounded. This light list issued by the Department of Transport is work made by officers of the Crown and it is presumed that they acted in accordance with their duty and have stated nothing in their survey contrary to the facts.

. . . . .

Contrary to the contention set forth by counsel for the claimant, I am of the opinion that the "Laurier" had the right to pursue the "Geneva Ethel" beyond the three-mile limit and search and seize on the high seas.

Judgement accordingly.

Cite: [1940] Ex. C.R. 187

Possible Ramifications of Decision:

1. Made aware, of what types of documents are admissible evidence - i.e. log-books and government publications. As to the latter we are told why they are admissible.

2. Which evidence is accepted when there is a conflict in the facts as to the position of a ship and why.

3. That a ship can be pursued past the limit of 3 miles if it has committed an offence in Canadian territorial waters.

N.B. **[It should be noted that by the *Territorial Sea and Fishing Zones Act*, R.S.C. 1970, c. T-7 the territorial limit has been extended].**

The Schooner "John J. Fallon" v. His Majesty the King

Supreme Court of Canada

June 22, 1917

A foreign vessel is liable to seizure for fishing or preparing to fish within 3 marine miles from the shores of an island. - Barren islands entitled to control over marginal seas. Term "coast" - in the treaty of 1818 by which U.S. renounced right to fish within 3 miles of British territory not confined to mainland coast.

Facts -

This is an appeal from the judgement of a Nova Scotian judge in admiralty condemning the defendant schooner, a U.S. fishing vessel as forfeited to the King. The vessel was forfeited because she was found fishing within three marine miles of St. Paul's Island, Nova Scotia; this island being a part of "the coast" of Canada, in contravention of the *Customs and Fisheries Protection Act*, R.S.C., Ch. 47.

Basically, there are three issues to be determined:

1. Whether the proof was sufficient to establish the fact of the vessel having been "fishing or preparing to fish" within three marine miles of the Island of St. Paul?

2. Whether St. Paul's Island is included within the phrase "coasts, bays, creeks, and harbours of Canada?"

3. Whether any treaty or convention is in force permitting the inhabitants of the United States to fish in the locality where the appellant ship was found?

Reasoning of the Court -

Response to Issue 1 -

Davies, J. - The only answer made by the officers of the condemned ship was that

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they were not within the three mile limit and that they had no intention to break the law. In most of these cases of alleged violation of the treaty of 1818 by fishing vessels, this excuse is generally set up. But even supposing that the excuse of non-intention to fish within the limits was advanced in good faith, the evidence in my judgement places the fact of the vessel very much within the limit of three miles beyond any question.

Response to Issue 2 -

In my judgement, "any of the coasts" is large enough and definite enough to embrace such an island lying off the mainland as St. Paul's is admitted to be.

It has always been claimed, treated, and utilized as part of the King's Dominions in America and so far as I have been able to find no trace exists of any claim having been set up since the treaty by any foreign nation.

Response to Issue 3 -

The principal contention was that by the treaty of 1783, the right was granted to the inhabitants of the United States to fish on the "coast, bays and creeks" of all British Dominions in America, and that the renunciation by the United States expressed in article 1 of the treaty of 1818, by which the United States renounced forever any right or claims by its inhabitants to fish within three marine miles of British Coasts in America, with certain exceptions, not at present material, must be restricted in its application to those localities over which, by the accepted doctrines of international law, the British sovereignty prevailed; and it is argued that the extension of territorial sovereignty over the marginal seas (the three mile distance from the shore) is not recognized in the case of a small, unoccupied and unproductive island such as St. Paul's Island.

This contention is quite without foundation. A power possessing a barren island is entitled to protect its property; and control over the marginal seas is just as essential for this purpose in the case of a barren island as in the case of a small highly productive one.

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Appeal dismissed.

Cite: Vol. L.V.S.C.R. 348

Possible Ramifications of Decision:

1. Island of St. Paul is included within term "coast" in treaty of 1818 between U.S. and Britain.

2. A power possessing barren island is entitled to control the marginal seas in order to protect its interests.

The learned Provincial Court Judge, who seems to have misunderstood the evidence, concluded that he was not satisfied beyond a reasonable doubt that the particular area where the Respondent was fishing was not a tributary. This decision is clearly contrary to the evidence which was before the court.

In the circumstances the appeal is allowed and the verdict is set aside. **A verdict of guilty will be entered.**

Cite: Unreported.

Possible Ramifications of Decision:

1. Standing legal agents should ensure that judge clearly understands the evidence given to him.

Regina v. Michael Hodder

Newfoundland District Court

May 8, 1984

Island waters proof of - Although incumbent upon Crown to prove either that waters were above low water water mark or were inland, it would be unusual in Newfoundland to find a river in which tide at low water would run upstream for three hundred yards. Therefore a fishery officer's evidence that area was above low water mark should be an authoritative statement.

Facts -

On June 21, 1981 Samuel Caines, a constable of the Royal Canadian Mounted Police stationed at Gander, Newfoundland, together with Fishery Officer Horace Gillingham of George's Point, Gander Bay, Newfoundland proceeded in a police patrol car to Barry's Brook at George's Point, arriving there a few minutes later. They followed Barry's Brook upstream 75 to 100 yards above the main road and parked their car there. They then walked along a trail to the waterfalls on Barry's Brook, where they say a person, later identified as Marvin Hodder, standing beneath the falls holding a long stick 10 to 12 feet long. They saw him poking the stick into the stream and they observed that several salmon then came downstream and skidded over the water amongst the rocks in a shallow area of the river about 12 feet from where Marvin was standing ... Then Constable Caines saw a third person who he identified as the respondent, with a long-handled dip net in his hand. He saw the respondent dip up a fish from the water with it and then start to walk toward the shore. He approached the respondent and took the dip net with the salmon in it from him. Cst. Caines estimated that the waterfalls area was about 250 yards inland at this point, and well above low water mark, spring tide, being 75 to 100 yards south of the highway running between the waterfalls of Barry's Brook and the seashore. There were no signs posted in the area indicating that this was a no-fishing zone. Cst. Caines under cross-examination, admitted that he did not know exactly where the low-water mark was located as he was not familiar with area.

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Fishery Officer Horace Gillingham, who accompanied Cst. Caines, also testified. He had been a fishery officer in that area for the previous 12 seasons. He said that on the occasion in question he went with Cst. Caines to do a patrol on Barry's Brook ... (H)e observed the respondent to take a salmon from the river with a dip net several feet downriver from Marvin ... He said this area is about 300 yards upstream. He did not see the salmon go into the net, but he saw it when it was raised up by the respondent.

The court held that it was not satisfied with the proof offered as to the location of the low water mark spring tide, and as this was an essential element of the offence, he dismissed the charge.

The respondent was charged under s.10(1) of the Newfoundland Fishery Regulations which provides as follows:

> 10(1) Subject to subsections (4) and (5), no person shall fish for, catch or kill or attempt to fish for, catch or kill any fish in any inland waters other than by angling.

The expression "inland waters" is defined in s.2 of the regulations as follows:

> 2. ... "inland waters" means any other waters within the Province that are above low water spring tide or that are inland of a line between points marked by caution notices posted under authority of the Regional Director General at or in the vicinity of the mouth of a river or stream flowing into the sea.

Reasoning of the Court -

... There is no doubt that the evidence clearly established that the respondent was engaged in the process of catching salmon in the wters of Barry's Brook when seen by the two officers. I am satisfied also that the conduct of the

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respondent in participating in the capture of a salmon would be activity in contravention of s.10(1) of the Fishery Regulations if the area in which he operated was in fact inland waters as defined in s.2 of the Fishery Regulations.

It is clear from the evidence that Barry's Brook is a salmon stream which runs through the community of George's Point in Gander Bay and that the scene of the alleged salmon poaching operation was above the bridge on the highway over the river through the settlement of George's Point and about 250 to 300 yards inland upstream.

Spring tide is defined in Collins English Dictionary as follows:

> "spring tide n.1 either of the two tides that occur at or just after new moon and full moon when the gravitational attraction of the sun acts in the same direction as that of the moon, reinforcing it and causing the greatest rise in tidal level. The highest spring tides (equinoctial springs) occur at the equinoxes."

From this it is clear that inland waters within the definition of that term in s.1 of the Fisheries Regulations would extend onshore from the low water mark occurring during the spring tides, which is the time when the tide is at its highest and lowest points each month. It would be most unusual in this province to find a river in which the tide at low water mark would run upstream for 300 yards. A matter of such rarity would surely be a matter of common local knowledge.

In declaring that the area in question was above low water mark, Gillingham was speaking as a fishery officer whose duty it was to inform himself as to the prohibited fishing areas on Barry's Brook. Having declared that the portion of the river in which the respondent caught the salmon was upstream and was above low water spring tide, his testimony should have been accepted in evidence as an authoritative statement because of its official character. Gillingham was not cross-examined as to the means of his knowledge of the level of Barry's Brook at

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the waterfalls in relation to low water spring tide, and without an unfavourable finding as to his credibility, his assertion should have been regarded as uncontradicted, credible evidence. There was, therefore, sufficient evidence before the trial judge to prove that the respondent's activity in catching a salmon by means of a dip net in inland waters of Barry's Brook clearly contravenes s.10(1) of the Fishery Regulations.

In this matter a prima facie case was made out upon the evidence of a police officer and a fishery officer against the respondent for the offence with which he was charged, and the appeal must therefore be allowed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Case points out what constitutes sufficient evidence of inland water.

2. In the province of Newfoundland, most unusual to find river in which the tide at low water would run upstream for three hundred yards.

Regina v. Lloyd Hodder

Newfoundland District Court

May 8, 1984

While presence of person at scene of crime raises strong presumption of involvement, not sufficient evidence to convict if not seen to perform any act which would connect him with crime.

Facts -

The accused was observed walking in the river towards fishery officers at a time when the accused's brothers were involved in illegal salmon fishing. The respondent, however, did not participate in the crime.

Reasoning of the Court -

While the accused's presence at the scene of the crime raised a strong inference that he was involved in a crime, nevertheless he was not seen to make any move or perform any act which could connect him with the offence then being committed by his brothers.

In these circumstances, in my view, there was not sufficient evidence before the trial judge to warrant a finding that he was guilty of the offence of illegally taking salmon from Barry's Brook.

Cite: Unreported.

Possible Ramifications of Decision:

1. Presence at the scene of crime is not sufficient to convict a person if he is not seen to perform any act connecting him with the crime.

Phair v. Venning

New Brunswick Supreme Court

1882

Tenant at will entitled to be treated as riparian owner. Statutory Interpretation - Where disharmony exists between two sections of act, the section causing conflict must be limited in its operation so as to alleviate discord.

Facts -

This was an action for trespass to land and for an assault.

The plaintiff, a tenant at will, was fishing for salmon in the South West Miramichi River. Whilst so engaged, the defendant, a fishery officer came and took his rod and reel away from him. The officer believed that his action was justified on the ground that the plaintiff was unlawfully fishing without a licence from the Minister of Marine and Fisheries contrary to an order in council dated the 11th June, 1879. The defendant was convicted and now appeals.

The issues to be determined are as follows:

(1) Whether the 19th Section of the *Fisheries Act*, under which the order in council was professed to have been made, authorized the making of such an order to affect the rights of fishing in non-tidal waters?

(2) Whether a tenant at will has the same rights as a riparian owner, as far as regards the right of fishing.

N.B. [A third issue arises here, but was not included, as the principle stated has been changed by virtue of s.39 of the *Fisheries Act*]

Reasoning of the Court -

Response to Issue 1 -

If the construction of the 19th section of the *Fisheries Act* is as contended for by the defendant, and a riparian proprietor and owner of the bed

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of the river, has no right to fish upon his own property without a licence from the Minister of Marine and Fisheries, then *The British North America Act* has interfered with and derogated from, the exclusive right of fishing which the grantee of the land claimed by the plaintiff had at the time the Act was passed. But I think that is not the proper construction of the 19th section, which must be read in connection with the second, so as, if possible, to give effect to both of them. If the words of the 19th Section authorizing the Governor to "forbid fishing except under the authority of leases or licences", could have no application except to cases where there was an exclusive right of fishing, I should say they could not operate at all, because *The British North America Act* gave Parliament no such authority and without express authority. Parliament would have no power to prohibit persons who had the exclusive right of fishing, as incident to the ownership of the land, from fishing without a licence... But it is not necessary to construe the 19th section or the regulation of June, 1879 as being intended to apply in cases where there is an exclusive right of fishing, because there is power given to the Minister of Marine & Fisheries to grant leases and licences in other cases. The prohibitory words, therefore, of section 19 and of the order in council, may well be held to apply to such cases, and full effect be thereby given to them without in any way conflicting with the provisions of section 21. I therefore think there is not necessarily any conflict between the 2nd and 19th sections, and that the order in council cannot have the general application contended for by the defendant, but must be limited in its operation to cases where there is no exclusive right of fishing.

Response to Issue 2 -

It is true that the plaintiff proved no legal title to the land where he was fishing, but he was lawfully in possession of it under an agreement to purchase from the grantee, and had a right to maintain an action against any person who could not show an authority for what he did.

New trial refused.

Cite: (1882), 22 N.B.R. 362

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Possible Ramifications of Decision:

1. A tenant at will (or person lawfully under possession) is entitled to be treated as a riparian owner, with respect to the right of fishing.

2. What should be done when disharmony exists between sections of *Fisheries Act*.

Rose v. Belyea

Supreme Court of New Brunswick

October 12, 1831

The right of fishing in a public navigable river belongs to the public and not to the owners of the lands bounded on the river.

Facts -

This was an action for trespass. The damage complained of was the tearing of the plaintiff's net by the defendant, while the plaintiff was fishing with it in the St. John river, within the ebb and flow of the tide, opposite to the land of the defendant, who claimed the exclusive right of fishing there.

Reasoning of the Court -

The soil of a public navigable river is in the Crown, and the right of fishing belongs to the public. Since *Magna Charta* the Crown cannot grant the exclusive right of fishing in a public navigable river to a private individual. The claim set up by the defendant, of the exclusive right to fish in front of his own land, entirely fails.

Cite: 12 N.B.R. 109

Possible Ramifications of Decision:

1. Sets forward basic principle with respect to fishing rights - in tidal waters.

Cuberra v. Minister of Fisheries and Penney

Docket Number A-817-81

Federal Court of Appeal

December 6, 1982

Section 6(9) *Coastal Fisheries Protection Act* - Any goods not ordered to be forfeited are to be returned to the person from whom they were taken once there has been a conviction and/or a fine. A statute giving the Crown the right to seize and detain goods should be strictly construed.

Facts -

The Crown seized 28 tonnes of salt fish from two fishing vessels under the provisions of the *Coastal Fisheries Protection Act*. After a trial, the fisherman was convicted, fined, and 1.5 tonnes of fish were ordered forfeited to the Crown. The fisherman applied for the return of 26.5 tonnes of fish or the sale proceeds thereof. The Federal Court of Canada, Trial Division dismissed the fisherman's claim. The fisherman is now appealing.

Arguments Put Forward -

The appellant puts forward several arguments. Firstly, he submits that the respondents are under a statutory duty to return to him the salt fish seized. He relies upon the provisions of section 6(9) of the *Coastal Fisheries Protection Act*. This section provides that,

> 6(9) Where a fishing vessel or goods have been seized under subsection (1) and proceedings in respect of the offence have been instituted, but the fishing vessel or goods or any proceeds realized from the sale thereof under subsection (4) are not at the final conclusion of the proceedings ordered to be forfeited, they shall be returned or the proceeds shall be paid to.....

Secondly, the appellant states that to give effect to the claim of the Crown is contrary to the *Canadian Bill of Rights*. The relevant sections provide as follows:

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1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist.....

   (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate not withstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared.....

The Crown for its part suggests that to order payment to the Appellant of the proceeds of sale of the goods not forfeited, would be to make the appeal of the Crown useless, since any increased fine or increased forfeiture would probably not be collectible from the Appellant, his ships having left the jurisdiction.

Reasoning of the Court -

Response to Argument 1.

In my opinion, the words "final conclusion of the proceedings" should be interpreted to refer to the conclusion of the proceedings under the *Coastal Fisheries Protection Act* before the Provincial Court Judge by his decision to convict the accused, to fine them and to forfeit one and one-half tonnes of salt fish.... Nothing remains to be done in those proceedings before the Provincial Court Judge and, in my view, the application of the Crown for leave to appeal against sentence to the Court of Appeal is the commencement of a separate proceeding.

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I find some support for the view which I have taken of the meaning of section 6(9) in the French version of that section which reads "mais que celles-ci ne se terminent pas par une ordonnance portant confiscation"...and contains no reference to "final".

Response to Argument 2.

....(I)t seems to me that the provisions of the *Canadian Bill of Rights* requires a court to construe provisions such as section 6(9) of the *Coastal Fisheries Protection Act* strictly. This section should not be construed to permit retention of goods not forfeited or the proceeds of sale of such goods after payment of any fine imposed by the judge who convicts.

As to the submission put forward by the Crown, the Crown is never in the position of having security for payment of fines which may be imposed on persons accused of having committed criminal offences, unless a statute so provides.

Appeal allowed.

Cite: 45 N.R. 618

Possible Ramifications of Decision:

1. Gives a clear definition of "final conclusion of the proceedings"

2. Where there is a possibility that section conflicts with the *Bill of Rights*, (or *Charter of Rights*) the provision should be strictly interpreted.

3. When section of statute not clear, clarification may be obtained by consulting dictionary or French version of the section.

4. Any goods not ordered to be forfeited should be returned to the owner after a judgement is given by the court.

R. v. Vassallo

Prince Edward Island Supreme Court

MacDonald, J.

November 24, 1981

In order to seize an object from a person who has not been arrested or charged the police officers must have reasonable grounds for believing that a (1) serious offence has been committed..(2) that the article in question is either the fruit of the crime or is the instrument by which the crime was committed (3) ...that the person in possession of it has committed the crime, (4) The police must not keep the article, nor prevent its removal for any longer than necessary, (5) The lawfulness of the conduct of the police must be judged at the time.

Facts -

In the spring of 1981, the seals were close to the shore of Prince Edward Island. As a result, the Federal Department of Fisheries opened the hunt to land-based people from the island. Many spectators came to observe the proceedings. One of these spectators, a woman called Narca Moore-Craig began taking pictures. Upon so doing, a fishery officer arrived on the scene and demanded that she give him the film as she was violating the Seal Protection Regulations. When she resisted, the fishery officer waved over two R.C.M.P. officers. One of these officers, seized the film from the woman, by prying open her hand. In the process, Moore-Craig suffered a cut thumb. The R.C.M.P. officer was charged with assault contrary to s.246 of the *Criminal Code*. He is now appealing his conviction.

The R.C.M.P. officer puts forward several arguments in his defence. They are as follows:

(1) By section 118 of the *Criminal Code* he was required to assist the fishery officer when such assistance was requested.

Section 118 provides as follows:

118 Everyone who

(a) .....

.../2

(b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so is guilty of...

(2) Further, he states that s.25 of the *Criminal Code* affords protection as a result of any action brought against him by reason of his carrying out the instructions of Arsenault even if it be found that Arsenault was acting illegally on seizing the film.

Section 25 provides that;

> 25 (1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law... is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(3) The officer also refers to section 11(6) of the Seal Protection Regulations as authorization for his actions. By that paragraph no person shall, unless they are the holder of a license or a permit, approach within a half nautical mile of any area in which the "seal hunt is being carried out".

The appellant contends that Moore-Craig was within a half-nautical mile of the seal hunt and had breached the regulation. In the appellant's submission this breach brings into effect section 58(1) of the *Fisheries Act* which would permit the seizure of the film. The relevant portion of the section reads as follows:

> 58(1) A fishery officer may seize any fishing vessel, vehicle, fishing gear, implement, appliance, material, container, goods, equipment, or fish.....

.../3

Reasoning of the Court -

The principal reason for the failure of this appeal is that the woman, (Moore-Craig) at no time was placed under arrest. Mr. Justice MacDonald applied the criteria listed by Denning, M. R., in *Ghani v. Jones*, [1969] 3 All E.R., 1700 to determine when police officers are justified in taking an object from a person, who was not arrested or charged. These criteria can be summarized as follows:

(1) Police officers must have reasonable grounds for believing that a serious offence has been committed.

(2) The police officers must have reasonable grounds for believing that the article in question is (1) either the fruit of the crime, (2) the instrument by which the crime was committed, or (3) is material evidence.

(3) The police officers must have reasonable grounds to believe that the person in possession of it has (1) committed the crime, or (2) is implicated in it, or (3) is an accessory to it, or at any rate his refusal must be quite unreasonable.

(4) The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations.

(5) The lawfulness of the conduct of the police must be judged at the time and not by what happens afterwards.

Based on the above-mentioned criteria, the R.C.M.P. officer was not justified in seizing the film, because the criteria listed by Denning, M.R. were not met.

As to the other arguments put forward by the appellant the learned judge made the following comments:

.../4

Section 118

I cannot agree with the appellant that section 118 places any absolute requirement upon him, (the appellant) to answer and abide by the request of another peace officer. Firstly, such an interpretation cannot be gained from this section itself as it indicates that a person may have a reasonable excuse for declining the request. Secondly, if a peace officer were to be given the protection the appellant seeks, it would soon lead to an abuse of the law. Any police officer knowing that a certain action would be illegal for him to do could merely make a formal request to another police officer to assist him and the latter officer after doing the illegal act could claim protection.

Section 11(6) of the Seal Protection Regulations

...I am unable to agree that this section is of any benefit to the appellant. First, I am not convinced that Moore-Craig was within a half nautical mile of the seal hunt. Secondly, the appellant would have me equate the meaning of the seal hunt with the definition of "sealing" or "seal hunting" as set out in section 2(1)(l) of the *Seal Protection Act*. This would lead to absurdities as the definition in 2(1)(h) includes the transporting of seal pelts from the place where they are killed...

Section 58 of the *Fisheries Act*

Lastly, I can't agree that section 58 of the *Fisheries Act* can be construed wide enough to encompass a film within the meaning of any items listed in that section. For instance, I do not believe that a film could be classified as "equipment" used in connection with the commission of an offence under the regulations.

Further, on this aspect of the case, the appellant would fail to qualify for protection under section 25 of the *Criminal Code*. It would be difficult to find that the appellant acted on reasonable and probable grounds in taking the film in circumstances where he was a police officer and had jurisdiction over the alleged offence...

Appeal dismissed.

Cite: 34 Nfld. & P.E.I.R., 491
95 A.P.R.

Possible Ramifications of Decision:

1. Legislation should not be interpreted in such a way that it would lead to absurdities.

2. Before a seizure is made without arrest or warrant the fishery officer should ensure that the above-mentioned requisites are present.

3. When an officer is requested to aid another officer under s.118 of the *Criminal Code*, he is not required to do so if he has a reasonable excuse.

4. On the basis of public policy, the power of seizure accorded to authorities has been given a very narrow interpretation. This was done in order (i) to prevent the infringement of individual rights and liberties as guaranteed by the charter without due cause, and (ii) to check possible abuses by the authorities.

5. Accordingly, the items listed in s.58, i.e. "equipment", have also been narrowly defined.

Earnest Campbell et al v. Unitow Services (1978) Ltd.

Supreme Court of British Columbia

Docket No. C830434

February 8, 1983

S.58(1) *Fisheries Act* - Valid seizure - when person having authority enters upon the premises and intimates the intention of seizing goods.
S.58(2) *Fisheries Act* - does not impliedly delegate authority to fishery officer to make a direction concerning the person to whom delivery of a seized good may be made.

Facts -

This is an application for the recovery of specific property (two trucks), pending the outcome of an action made pursuant to section 52 of the *Law and Equity Act*. The petitioners were charged with unlawful sale of fish contrary to section 37 of the British Columbia Fishing (General) Regulations. As a result of this charge, Unitow Services (1978) Ltd., acting on the instruction of fishery officers, purporting to exercise authority under s.58(1) and s.58(2) of the *Fisheries Act*, towed the vehicles from the petitioners' homes. In the case of each seizure a fishery officer attended at the home of the petitioner, served him with a summons, told him that his vehicle was being seized, and afforded him an opportunity to retrieve certain articles from the vehicle. Now, the vehicles are in the physical custody of Unitow. It should be noted here that the Minister did not personally direct the delivery of the vehicles into the custody of Unitow. Nor had any official in the Minister's Department given such direction, apart from the fishery officers themselves.

The relevant sections of the *Fisheries Act* are sections 58(1) and 58(2). These sections provide that,

58(1) A fishery officer may seize any fishing vessel, vehicle,.....

58(2) Subject to this section, any... vehicle... seized pursuant to subsection (1) shall be retained in the custody of the fishery officer making the seizure or shall be delivered into custody of such person as the Minister directs.

.../2

Submissions Put forward by Petitioner

Counsel for the petitioner says that the conditions prescribed for seizure of the vehicles under s.58(1) and for their retention under s.58(2) have not been complied with, and if either of these two branches of his submission succeed, the petitioners are entitled to return of their vehicles.

With respect to the seizures counsel for the petitioners points out that section 58(1) authorizes a fishery officer and only a fishery officer, to seize a vehicle. In other words, counsel suggests that in order to meet the requirements of this subsection, it would be necessary for the fishery officer to personally operate the two trucks.

Reasoning of the Court -

Response to s.58(1) Argument

I am of the view that this branch of the submission cannot succeed. Even the strictest construction of s.58(1) will not, in my opinion, sustain this contention.

The seizure of a chattel may be validly effected where the person having authority to seize informs the person in possession of the chattel of the proposed seizure and where, at the time of giving such notice, the former is in a position actually to lay hands on the goods if his authority is disputed.

Response to s.58(2) Argument

(I)t was common ground among counsel at the hearing that the lawfulness of the delivery into Unitow's custody turns on whether, in the circumstances, Unitow met the requirement of being "such a person as the Minister directs".... As earlier noted, the fishery officers directed delivery of the vehicles into the custody of Unitow. The question arises therefore as to whether s.58(2) authorizes a fishery officer to make a direction on behalf of the Minister, concerning the person to whom delivery of a seized vehicle may be made? It does

.../3

not do so expressly, and I do not believe it does so by necessary implication. In the context of this and the preceding subsection in fact, a contrary implication is invited. Subsection (1) expressly authorizes a fishery officer to effect a seizure and subsection (2) expressly authorizes him to retain custody of the article seized. It would have been easy to provide in the subsection that the fishery officer could, as well, provide direction as to delivery into the custody of another. Subsection (2) does not do so. Whoever else might be authorized to provide direction on behalf of the Minister, the clear implication is that the fishery officer himself is not.

As to Unitow being directed to perform such duties...there is nothing to indicate that the company had express or implied authority to provide direction on behalf of the Minister of Fisheries and Oceans under s.58(2) of the *Fisheries Act*.

I conclude that the petitioners are entitled to succeed on the basis that a condition stipulated by s.58(2) has not been complied with.

Application granted.

Cite: Unreported.
Docket Number C830434
Vancouver Registry

Possible Ramifications of Decision:

1. Interpretation of sections 58(1) and 58(2) given.

2. Note strict interpretation given to statute encroaching on the rights of subject.

3. When attempting to interpret subsections compare with other subsections in relevant section.

4. No implied delegation of authority in section 58 of the *Fisheries Act*.

R. v. Callaghan

Prince Edward Island Supreme Court

Nicholson, J.

April 20, 1972

In order to convict an accused of discharging a deleterious substance, it must be proved that the substance comes within the definition of this term as set out in section 33(11) of the *Fisheries Act*.

Fishery Officers should be aware of amendments to the *Fisheries Act* if they are to prosecute successfully.

Facts -

The appellant was convicted on July 15, 1971 that he did.... knowingly discharge a deleterious substance; barn and house garbage into the Dewar Stream which empties into the Brudenell River which water is frequented by fish, contrary to section 33(2) of the *Fisheries Act*.

An attorney acting on behalf of the appellant entered a plea of guilty. This was a mistake. Because such a mistake was made, the appellant was allowed to appeal.

From the evidence, it was found that the appellant knowingly discharged the garbage into the stream. Before the appellant can be convicted, however, it must be established that the garbage comprised a "deleterious substance" under the provisions of the *Fisheries Act*.

The sections of the *Fisheries Act* that are relevant to this case are sections 33(2) and 33(11). They provide as follows:

S.33. (1) Subsection (2) of section 33 of the said Act is repealed and the following substituted therefore:

(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water...

.../2

S.33(11) For the purposes of this section and section 33A, (a) "deleterious substance" means (1) 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 deleterious to fish or to the use by man of fish that frequent that water,...

Reasoning of the Court -

It appears from the nature of the prosecution that the fishery officers may have thought that section 33(2) of the *Fisheries Act* (R.S.C. 1970 Chap. F. 14) the repealed section was still in force. This section provided that,

S.33(2) No person shall cause or knowingly permit to pass into,... lime, chemical substances or drugs, poisonous matter, dead or decaying fish, or remnants thereof, mill rubbish or sawdust or any other deleterious substance or thing, whether the same is of a like character to the substances named in this section or not,...

...Whatever may have been the situation of the appellant prior to the amendment referred to above it is my opinion that the substances which the appellant is charged with having put into the Dewar Stream do not or at least have not been proven to come within the definition of "deleterious substance" as defined by the *Fisheries Act*, section 33(11). There was nothing to show that all or any of the substances in question "if added to the water would degrade or alter or form a part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequent that water".

Appeal allowed.

Cite: 3 Nfld. & P.E.I.R. 107

.../3

Possible Ramifications of this decision:

1. Fishery Officers should pay stricter attention to new amendments to *Fisheries Act*.

2. Interpretation of "deleterious substances" - What falls within definition?

3. Appears to be narrower definition of "deleterious substance" - therefore possibly less convictions under this section.

4. Have to **prove** that the substance which the appellant is charged with having put into the water **comes** within the definition of "deleterious substance" as set out in s.33(11) of the *Fisheries Act*.

Regina v. Imperial Oil Enterprises Limited

Nova Scotia Magistrate's Court

March 6, 1978

Oil deleterious only if present in certain concentrations or greater - Crown failed to demonstrate concentration in water affected.

Facts -

A malfunction in the accused's refinery resulted in the release of approximately one hundred gallons of oil into Halifax Harbour, and the company was charged with depositing or permitting the deposit of a deleterious substance in a place where it may enter water frequented by fish contrary to section 33(2) of the *Fisheries Act*.

In order to obtain a conviction, the Crown must prove three things:

1. That the waters of Halifax Harbour are waters frequented by fish.

2. That the defendant company deposited or permitted the deposit of oil in a place under conditions where such oil may enter the waters of Halifax Harbour.

3. That the oil was a deleterious substance.

Reasoning of the Court -

Issue 1 -

Several witnesses indicated that they had been fishing within the waters of Halifax Harbour. I'm satisfied that the waters of the Halifax Harbour was at the material time "water frequented by fish".

Issue 2 -

The cause of the oil deposit in the water sewer system was a leak in cooler

.../2

E-210 and the conditions under which the oil might and in fact, did enter the waters of Halifax Harbour was the impossibility of its escape elsewhere except by means of the separator which could not and did not prevent its escape. The water sewer system, the separator and cooler E-210 were at all material times owned and entirely within the control of the defendant company.

Issue 3 -

According to the evidence of a Doctor P. Wells, (an expert on the toxic effect of oil in water) the toxic effect of oil in water depends upon its concentration and if the concentration were fifty parts of oil to one million parts of water, it would be acutely toxic to the fish and therefore deleterious to fish... From the evidence, I am uncertain as to the quantity of oil either along the shorelines outside the boom area, or washed up against the rocks, so much that I cannot say that the concentration of oil and water in that area was fifty parts or more of oil to one million parts of water...

Now I will readily concede that the exhibits introduced in court contained more by visual inspection, more than 50 parts of oil to 1,000,000 parts of water. That I have no difficulty in at all, but if that is the simple test and a simple test only, then it would seem to me to follow that any time there was a little dab, shall we say, of oil lying upon any body of water, however large, that if one scooped that up in a bottle, you would always have fifty parts of oil in one million parts of water and if so factor, that would be deleterious to fish and that would mean to say that any - a little spill, however small, would always, if that were the test, be toxic and therefore deleterious. Now I can't bring myself to that view without some evidence [and none has been given]... The good doctor was not prepared to say that oil in combination with water was deleterious or toxic.

... I cannot conclude, and do not, that there is proof beyond a reasonable doubt, that the oil deposited, however large the quantity, is totalling at least one hundred gallons, at one time, was a deleterious substance within the meaning of the *Fisheries Act*.

.../3

Accused acquitted.

Cite: Unreported.

Possible Ramifications of Decision:

1. Gives test for toxicity.

2. Oil in combination with water not necessarily deleterious or toxic.

3. Halifax Harbour is an area frequented by fish.

Regina v. Irving Pulp and Paper Limited (No. 1)

New Brunswick Provincial Court

October 1, 1976

Procedure for toxity as prescribed by the Regulations must be conformed with in order to bring substance within meaning of deleterious substance in s. 33(11) of the *Fisheries Act* and within s.3(2) of the Pulp and Paper Effluent Regulations.

Facts -

Irving Pulp and Paper Limited was charged that it did deposit a deleterious substance namely water containing pulp mill waste contrary to the provisions of section 33(2) of the *Fisheries Act*. In Schedule D of the Pulp and Paper Effluent Regulations SOR/71-578, a specific procedure applicable to this type of mill was given for determining the toxity of such waste. Government authorities however did not follow this method, but instead conducted the test according to a new method.

The relevant section of the Pulp and Paper Effluent Regulations are as follows:

> 3(1) For the purpose of paragraphs (c) and (d) of the definition of "deleterious substance" in subsection 33(1) of the Act, the following are hereby prescribed as deleterious substances:
>
> .....
>
> (c) toxic wastes deposited by a mill.
>
> (2) For the purpose of paragraph (1)(c) "toxic waste" is any waste that is found to be toxic when tested in the manner described in Schedule D.

Reasoning of the Court -

It is the opinion of this Court that the Court cannot convict Irving Pulp and Paper Limited as charged since the Court has failed to bring the accused corporation within the *Fisheries Act* and the aforementioned Regulations. Therefore a verdict of not guilty is entered.

Not guilty.

Cite: Unreported.

Possible Ramifications of Decision:

1. Clarification of requirements with respect to testing for toxity - [regulations must be conformed with].

Regina v. Marbar Holdings Ltd. and Compac Construction Ltd.

B.C. Court of Appeal

March 23, 1984

S.33(2) *Fisheries Act* - Once determined that substance is deleterious and has been deposited, the offence is complete without ascertaining whether water itself was thereby rendered deleterious.

Facts -

The appellant Compac Construction was prepared to build an apartment on land owned by its associate company, Marbor Holdings Ltd. Two large excavations had been made and, it having been a wet spring, it was necessary to drain them.

On April 29th, 1981, a habitat protection officer with the Ministry of Environment visited the site and became concerned that the water in the excavations was contaminated by hog fuel leachate, a substance which the Judge was told could be toxic to fish. Subsequently, an official of the Ministry spoke to the president of these companies and advised him that the leachate should not be allowed to be pumped into nearby Hastings Creek (the habitat of fish), nor should it be pumped into the storm sewer system, which emptied into the creek.

... The appellants began pumping the material from their property into the storm sewer system.

In response to a complaint the same official and a colleague attended at Hastings Creek and found that below the storm sewer outfall the creek was black and foaming. They concluded and it is clear on the evidence, that the leachate waters were being pumped from the excavations and were finding their way into the creek via the storm sewer.

The officials collected three large samples of water for testing. An LT-50 Bioassay Test was performed on each sample. Thirty kilograms of each sample were placed, undiluted, into a test vessel. For each sample there was a corresponding control vessel which was filled with dechlorinated top water. Ten fish were placed into each test vessel and the following results were obtained: in

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the one taken from the storm sewer two of the ten fish died after a 96-hour - test; the sample taken from the front excavation, which excavation is of little concern to this case, was negative but in the one taken from the back excavation all ten fish died within five minutes.

Reasoning of the Court -

Mr. Corbett for the companies submitted that the Judge erred in holding that the substance deposited in the creek was proven to be a "deleterious" substance within the meaning of the definition of that word in s.33(2) of the *Fisheries Act*.

Mr. Corbett argued that the experiments were defective principally because the Crown witness Watts gave no evidence of the adding of the contaminated sample if added to any other water would degrade or alter it.

The Chief Justice followed the reasoning set forth in *Regina* v. *MacMillan, Bloedel (Alberni) Limited* 1979 4 W.W.R. 654. Here it was stated:

> Once it is determined that Bunker C. oil is a deleterious substance and that is has been deposited, the offence is complete without ascertaining whether the water itself was thereby rendered deleterious.

The second submission was that the Judge erred in holding that the substance, even if deleterious, was proven to be deleterious at the point the same was discharged into water frequented by fish ... It is clear that there was sufficient evidence for Judge Leggatt to infer that the deleterious substance found into water where it would be deleterious to fish frequenting those waters.

I would, therefore, **dismiss the appeal.**

Cite: Unreported.

.../3

Possible Ramifications of Decision:

1. Once it was determined that the substance deposited is deleterious, the offence was complete without ascertaining whether the water itself was thereby rendered deleterious.

2. Given what is considered sufficient evidence for the appeal court judge to infer that a deleterious substance was deposited by the accused.

Regina v. The Corporation of the District of North Vancouver

In the Provincial Court of British Columbia

July 22, 1982

When Dept. of Fisheries is dealing with another governing body that has committed an offence under s.33(2) *Fisheries Act* by the continuing exercise of one of its duties, the Dept. should discuss with the party the potential damage to the environment and explore possible solutions before laying charge.
When deposit of deleterious substance is due to the planned operation of elaborate and costly system already in place, there are 3 options in determining appropriate system and all depend on availability of reasonable alternatives.

Facts -

On July 9, 1982 the Provincial Court found the District of North Vancouver guilty of two counts of depositing a deleterious substance (sewage) into Hastings Creek, a tributary of Lynn Creek in North Vancouver.

This case deals with what should be the appropriate sentence.

Reasoning of the Court -

In the case of *Regina v. United Keno Hill Mines Limited,* Unreported, 1980, it was felt that four major factors should be considered when sentencing. These are as follows: (1) the nature of the environment and its fragility; (2) secondly the extent of the injury caused to that environment; (3) the offender and (4) general considerations such as the criminality of the conduct and extent of the efforts to comply with the law on the part of the accused, that of remorse on the part of the accused, the size and wealth of the corporation, etc.,.

After considering these four matters, the judge goes on to discuss sentencing in the situations (as here) where the occurence is due to the planned operation of an elaborate and costly system already in place. He feels that here, different considerations should govern.

.../2

... In my view there are three options and they all depend on the availability of reasonable alternatives:

1. If there is no known technology to replace that which by its very operation violates environmental legislation, it would be absurd to impose any fine at all. If deterrence is impossible, attempts at it should not be undertaken.

2. If there exists the possibility for a change in the system, but one which is not in general use and is, as yet, generally unproven at least in this jurisdiction, the Court should consider a penalty which will, in effect, force further investigation into that alternative or others. In other words, the penalty should be more than a licence to carry on as before, but less than might be imposed in an aggravated case.

3. If there exists known technology, which is in widespread use elsewhere, which is within the financial capabilities of the defendant, and which hs been avoided in the past on the grounds of budgetary priorities, the penalty should be substantial enough to express the Court's disapprobation and force a change in the defendant's priorities.

Before relating this case to those alternatives, there are a few other considerations which deserve some mention. This is the first charge laid against any municipality in British Columbia for this type of offence arising from discharge of fresh sewage. The evidence before me shows that although this sewage system has been in operation for many years, there was not, before the laying of the charge, one single approach made to the defendant by the Department of Fisheries and Oceans to discuss potential damage to the environment and to explore possible solutions. It need hardly be emphasized that section 33(2) of the *Fisheries Act* is extremely far-reaching and coupled with the penalty provisions of the Act gives federal fisheries officers considerable power. It may well be that the Department of Fisheries and Oceans considers itself to be primarily an organ of policy-setting and enforcement and that it does not feel it has the capacity to negotiate or discuss solutions with potential offenders. If that is so, in my view it is a very short-sighted way to view things.

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Whether it likes it or not there are and will be occasions like this one where a political, rather than a policing approach, is to the advantage of everyone, principally the public for whom the environment is being preserved. (I use the word "political" in its best sense and certainly not in any derogatory sense).

I must emphasize, however, that these comments are made in the context of the facts of this case where another governing body is charged and continuing exercise of one of its duties and responsibilities.

Now having considered the evidence presented regarding alternative measures, I am satisfied that this case falls into the second category of the three outlined. Necessity is often deemed the mother of new technology, and in my view, that may well be the case here. Bearing that in mind, I would summarize my conclusions on sentence as follows:

1. The spill was relatively minor as was the damage caused, however, with a better response in the repair system about which I have commented, it could have been even less.

2. The culpability of the defendant corporation is tempered by the fact that there was no negligence as such...

3. Penalty here should not be based to any great extent on the deterrence of this municipality. It knows that a second conviction will carry a minimum fine of fifty thousand dollars.

4. Since I am satisfied that there are alternatives to the inevitable fouling of spawning grounds, but that those alternatives require long-range investigation and planning, the fine here must be reasonable in light of the defendant's lessened culpability while still being sufficient to spur an active search for new methods.

For all of those reasons, I sentence the defendant corporation, the District Municipality of North Vancouver to pay a fine on Count 1, of five thousand dollars; on Count 2 of two thousand dollars.

.../4

Cite: Unreported.

Possible Ramifications of Decision:

1. Gives options for sentencing under s.33(2) of the *Fisheries Act* when the cause of the offence is due to the planned operation of an elaborate and costly system already in place.

2. Gives indication of approach Department should take with respect to offences of this kind. (i.e. Before the laying of the charge the Department should meet with the other party to discuss potential damage to the environment and to explore possible solutions.

Regina v. The Corporation of the District of North Vancouver

British Columbia Court of Appeal

January 16, 1984

(Docket # CA 830164)

The defendant appealed from his conviction in the county court and in the court of appeal. The sole issue in these two courts was whether the appellant had satisfied the judge that the defence of due diligence should apply.

Rasoning of the Court -

As I read the reasons of both the Provincial Court judge and the County Court judge they did indeed consider the defence of due diligence. They concluded on the evidence that the defence was not made out. With those conclusions I agree and would dismiss the appeal.

The appeal is accordingly dismissed.

R. v. Jacques

New Brunswick Provincial Court

January 6, 1978

Non-treaty Indians are not exempt from the provisions of the *Fisheries Act*. The Proclamation of 1763 did not reserve fishing rights to the Indians.

Facts -

The accused non-treaty Micmac Indian was caught fishing with a net without a license or permit on the Restigouche River within the province of New Brunswick.

The defence of the accused, is that he has Aboriginal Rights and is entitled to fish in the fishing grounds of his ancestors because his rights have not been extinguished or taken away.

Reasoning of the Court -

In coming to a decision, the judge took note of the historical background with respect to Aboriginal Rights. He concluded that the accused who was a registered Indian of the Micmac Tribe is a non-treaty Indian. He then went on to deal with the *Proclamation of* 1763 and its effects on aboriginal rights. ....There is not a word mentioned anywhere in the *Royal Proclamation of* 1763 of anything to do with fishing....And, certainly with the interest that was evinced by England, France, and other European countries in the fisheries off the Grand Banks and in the Gulf of Saint Lawrence, if there was any intention to reserve any fishing rights in these waters, to anybody by the *Proclamation of* 1763, the word fishing would certainly have been included, but it was not included....

So the question to be decided, is, whether or not it is a valid claim, that a registered Indian, not covered by any treaty, had Aboriginal Rights to fish in the Restigouche River.

Judge Ayles follows the judgement in *Regina v. Derrickson.* Here, Chief Justice Laskin of the Supreme Court of Canada stated:

.../2

> We are all of the view that the *Fisheries Act* and the Regulations thereunder which, so far as relevant here, were validly enacted, have the effect of subjecting the alleged right to the control imposed by the Act and Regulations.

Under the circumstances, I have to find the accused, guilty as charged.

Accused convicted.

Cite: 20 N.B.R. (2d) 576
34 A.P.R.

Possible Ramifications of Decision:

1. Being a non-treaty Indian is no defence to a charge under the Federal *Fisheries Act*.

2. *The Proclamation of 1763* did not reserve fishing rights to Indians.

Kruger and Manuel v. The Queen

Supreme Court of Canada

May 31, 1977

If an enactment does not extend throughout province or is in relation to one class of citizens then not a law of general application and by s.88 of the *Indian Act* will not apply to Indians on reserve.

Facts -

The appellants, Jacob Kruger and Robert Manuel are Indians living in British Columbia. Between September 5, and September 8, 1973, they killed four deer while hunting for food during the closed season. The acts of hunting took place upon the unoccupied hunting ground of the Penticton Indian Band. The accused did not have permits authorizing them to hunt and kill deer for food during the closed season. Such permits were readily obtainable by local native Indians and both appellants have obtained permits in the past. The appellants are now appealing their convictions.

It is contended on behalf of the appellants that the British Columbia Court of Appeal erred in several respects, namely;

1. In ruling that the *Wildlife Act*, 1966 B.C. was a law of general application within the meaning of that phrase in s.88 of the *Indian Act*.

2. In ruling, in effect, that s. 88 of the *Indian Act* constituted a federal incorporation by reference of certain provincial laws rather than a statement of the general principles relating to the application of provincial laws to Indians.

Reasoning of the Court -

Issue 1 - Laws of General Application

There are two indicia by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout

.../2

the territory, the inquiry is at an end and the question is answered in negative. If the law does extend uniformly throughout the jurisdiction, the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application...

Apply these criteria to the case at bar. There is no doubt that the *Wildlife Act* has a uniform territorial operation. Similarly, it is clear in object and purpose the Act is not aimed at Indians...

Issue 2 - Referential Incorporation

There is in the legal literature a juridical controversy respecting whether s.88 referentially incorporates provincial laws of general application or whether such laws apply to Indians ex proprio vigore [of their own force].

...On either view of this issue the present appellants must fail. If the provisions of the *Wildlife Act* are referentially incorporated by s.88 of the *Indian Act*, the appellants, in order to succeed, would have the burden of demonstrating inconsistency or duplication with the *Indian Act* or any Order, Rule, Regulation or by-law made thereunder. That burden has not been discharged and, having regard to the terms of the *Wildlife Act*, manifestly could not have been discharged.

If s. 88 does not referentially incorporate the *Wildlife Act*, the only question at issue is whether the Act is a law of general application. Since that proposition has not been here negatived, the enactment would apply to Indians ex proprio vigore (of its own force).

Appeals dismissed.

Cite: 34 C.C.C. (2d) 377

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Possible Ramifications of Decision:

1. Sets down test to determine whether law one of general application - (1) whether the enactment extends uniformly throughout territory, (2) whether it is in relation to one class of citizens in object and purpose.

2. If s.88 *Indian Act* seen as referentially incorporating provincial laws of general application - Indians will have burden of demonstrating inconsistency or duplication with the *Indian Act* in order to render law inapplicable to Indians.

3. If such provincial legislation is seen to apply ex proprio vigore - it will have to be determined if law one of general application.

4. Provincial laws of general application apply to Indians whether by virtue of incorporation by s.88 of the *Indian Act* or whether such laws apply by their own force.

R. v. Paul and Copage

Nova Scotia Supreme Court, Appeal Division

December 13, 1977

Reference to a repealed section in the information is not a fatal defect. *Land and Forests Act* applies to Indians as its main purpose and object is the protection of game. Regulatory offences exceptions to presumption of mens rea.

Facts -

This case arose out of charges against the accused of hunting without a licence. The accused Indians were found in the possession of firearms during the hunting season off the reserve. The accused were charged and acquitted of hunting without a licence. The Crown now appeals.

Three issues arise here:

1. Is the information void because the informations refer to a repealed section?

2. Does s.152(1)(b) of the *Lands and Forest Act* apply to Indians not on a reserve?

3. Whether mens rea is an essential element in the particular violation described?

The relevant sections of the *Land and Forests Act* for this appeal, provide as follows:

> 152(1) No person not being the holder of a licence issued under clause (a) or (c) of subsection (1) of section 164 shall take, carry or have in his possession,
>
> a) in or upon any forest, wood or other resort of moose or deer; or

.../2

b) upon any road passing through or by any forest, wood or other resort; or...

Since March 11, 1975, Section 164(1) has provided that,

164(1) The Governor in Council may make regulations defining non-resident and resident big game and small game licences and determining the fees therefore and the terms and conditions upon which such licences may be issued by the Minister.

Before this period, the section provided as follows:

164(1) Any person authorized by the Minister may issue

(a) to a non-resident, upon payment of a fee of forty dollars, a non-resident's big game licence authorizing the licensee to hunt and kill deer and bear;

. . . . .

(c) to a resident, upon payment of a fee of four dollars, a resident's big game licence authorizing the licensee during the open season for deer to hunt and kill deer;

Reasoning of the Court -

Response to Issue 1 -

There can be no question that a licence to hunt big (or small) game was required prior and subsequent to the repeal and re-enactment of s.164 of the Act. Section 152 and the informations refer to a licence requirement provided for in a section of the Act that is now non-existent: such requirement does, however, exist in the regulation made under the present s.164 to which I have referred. For such reason and in light of s.23 of the *Interpretation Act*, R.S.N.S. 1967, c. 151, I am of the view that the reference to the repealed section in the information (and in s.152 of the Act) is not a fatal defect. I would venture to suggest that consideration might be given to an appropriate amendment to s.152.

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Response to Issue 2 -

In my view Part III of the *Lands and Forests Act* is valid provincial legislation, as being designed basically for the protection of game within the province...(I)ts effect upon Indians, off a reserve, over whom the Parliament of Canada has exclusive jurisdiction under s.91(24) of the *British North America Act*, is only incidental to its true object. Therefore, Indians on lands other than "Indian lands" are subject to the *Lands and Forests Act*, such legislation not being a law that deals with Indians qua Indians.

Response to Issue 3 -

When interpreting regulatory offences, the courts have generally taken the approach that (u)nless the enactment, by express words or necessary implication, requires intent, it is not required.

In Part III of the *Lands and Forests Act*, section 123(1) makes it an offence to... take or hunt or pursue with intent to kill or take, any caribou, any moose, any deer, etc. Section 126(1) provides that "no person shall hunt, chase or kill, or pursue with intent to kill or take any moose, caribou, or deer with a dog". Section 132(1)(a) makes it an offence to kill, take, hunt or pursue with intent to kill or take any hare...

Since as indicated some offences under the Act require mens rea it appears to me that the legislature did not intend that such was to be an element in the offence created by s.152(1)(b). It is my belief that this section creates an offence of absolute prohibition.

Appeal allowed.

Cite: 24 N.R.S. (2d) 314
32 A.P.R.

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Possible Ramifications of Decision:

1. Effect of referring to repealed section in information.

2. Methodology used to determine into what category offence falls (i.e. absolute liability, strict liability, or mens rea offence).

3. To determine whether provincial legislation applicable to Indians look at object of act in question. [Does it affect Indians only incidentally?]

N.B. [It should be noted that *R. v. Sault Ste. Marie* (1978) had not been decided at the time this case came before the Court. Mr. Justice McDonald, however, recognizes the existence of the category of "strict liability" and makes his judgement accordingly].

R. v. Saulis

New Brunswick Court of Queen's Bench

Trial Division, Dickson J.

May 9, 1980

The *Fisheries Act* and Regulations subjects the right of Indians to the controls imposed by the Act and Regulations and the existence of treaty rights is no defence.

Facts -

The accused Indian was charged that he did unlawfully fish for a salmon with a net, without a license, contrary to and in violation of section 17, subsection (2) of the New Brunswick Fishery Regulations. At the time, the accused was not on a reserve. He also claimed exemption under various Indian treaties. The provincial court judge dismissed the information. The Crown is now appealing.

The essential ground of appeal relied upon by the Crown is that the trial judge "wrongly applied the law to the evidence as was agreed upon between the parties".

Reasoning of the Court -

It appears that the judge founded his dismissal of the charge on the notion, that an Indian residing on a reserve, when fishing on any water regardless whether located on or off a reserve, is not subject to the provisions of the *Fisheries Act* or its regulations. This notion appears in turn to have been founded on the contention that section 73 and 81 of the *Indian Act* negative the applicability of the *Fisheries Act* or its regulations to Indians living on a reserve.

Even if there were merit in the suggestion that the provisions of the above-mentioned sections of the *Indian Act* negative the application of the *Fisheries Act* and its regulations to some aspect of Indian fishing, it is apparent from a reading of the sections that such could not conceivably be the case where fishing takes place other than on a reserve.

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... As to any possible applicability of the treaties and proclamations referred to above, that matter has been conclusively settled insofar as this court and, the court below are concerned. The judge then quotes the following dictum from *R. v. Nicholas;* a decision of the New Brunswick Court of Appeal. This decision stated that,

> .....the issue....has been settled conclusively in the case of *Derrikson v. R.*, (1976) 6W.W.R. 480; where the court held that the *Fisheries Act* and Regulations made thereunder have the effect of subjecting the alleged rights of Indians to the controls imposed by the *Fisheries Act* and the Regulations.

Appeal Allowed.

Cite: 30 N.B.R. (2d) 146
70 A.P.R.

Possible Ramifications of Decision

1. Reiteration of decision made in earlier cases dealing with similar matters.

R. v. Dedam, Sommerville and Ward

New Brunswick Provincial Court

July 25, 1983

***Fish and Wildlife Act*, S.N.B. 1980, C.F. 14.7 was held to be inapplicable to Micmac Indians hunting and fishing on their reserves.**

Facts -

On the 16th of August 1982 the three accused were found in possession of two Atlantic salmon at Becks Brook, County of Northumberland and Province of New Brunswick, to which there were not affixed tags as prescribed under the *Fish Inspection Act of New Brunswick*, and their respective Regulations, in violation of section 57(1) of the *Fish and Wildlife Act of New Brunswick*.

The three accused were intercepted by game wardens one-quarter mile inside the Tabusintac Indian Reserve at Tabusintac, New Brunswick.

The three accused are Indians according to the *Indian Act* and reside at Burnt Church Indian Reserve in the County of Northumberland and Province of New Brunswick.

The accused pleaded that they were entitled to fish on an Indian Reserve under the Treaty of 1779.

Reasoning of the Court -

Judge Bertrand applied the reasoning set forward by Hughes C.J.N.B. (as he then was: see 9-H) in *R. v. Paul* (1980) 30 N.B.R.(2d) 545 and concluded that the Treaty of 1779 is a valid treaty; that by virtue of section 88 of the *Indian Act* it renders the *New Brunswick Fish and Wildlife Act* inoperative on Micmac Indian Reserves "between Cap Tormentine and Bay de Chaleur".

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... There, then remains the question of whether the Treaty of 1779 protects the three accused as Micmac Indians, from the application of the *New Brunswick Fish and Wildlife Act*.

Counsel for the Crown contends that there is insufficient evidence to prove that any of the three accused is a "descendant" of the signatories of the Treaty of 1779. He rests his argument on the testimony of the defence witnesses who admittedly were unable to establish descendancy by actual proof, beyond doubt.

I think the question can be answered in two parts:

(a) that of "descendancy".

(b) the degree of proof requied to establish descendancy.

Dealing with (a) first. *The New Brunswick Fish and Wildlife Act*, is, in my opinion, a so-called public welfare statute whose purpose is the protection and management of certain public resources, namely the supply of fish and wild game within the Province of New Brunswick. Such statutes do not require proof beyond reasonable doubt, as a rule, but by preponderance of reasonable evidence.

... (T)he defence presented the testimony of two witnesses, knowledgeable in matters of Indian geneaology and tradition. The learned judge after hearing the testimony of these witnesses concluded,

I am of the opinion that the evidence presented to the court concerning the tribal ancestry of the three accused is sufficient, for the purpose of this case to establish that they are Micmac Indians and they are accepted as such among the Micmac Indians.

In view of the above I find the defendants not guilty.

Accused acquitted.

Cite: 51 N.B.R. (2d) p. 347
134 A.P.R.

Possible Ramifications of Decision:

1. Demonstrates what constitutes sufficient evidence to establish connection by descent with original group of Indians with whom treaty was made.

2. See application of *R. v. Paul* (1980), 30 N.B.R. (2d) 545.

R. v. Nicholas et al.

New Brunswick Provincial Court

June 12, 1978

Under *Statutory Instruments Act*, S.C. 1970-71, C.38, S.23 the court is required to take judicial notice of federal statutory regulations.
***Fisheries Act* and its regulations paramount over any Indian treaty rights.**

Facts -

The accused Indians were apprehended fishing by illegal means at a dam fishway, where fishing was prohibited under the *Fisheries Act*, R.S.C. 1970 C. F-14, s.25(1).

The defence put forward three contentions. They are as follows:

1. That the land on the east bank of the Tobique River where the fishway is established was never properly surrendered and therefore is still part of the Tobique Indian Reserve;

2. That under treaties and proclamations Indians have an aboriginal right to fish for his or their own use by any means at any time within the bounds of or contiguous to Reserve lands.

3. The third contention was based on section 7 of the *Fisheries Act* of Canada which reads as follows:

> 7. The Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued, leases and licences for fisheries or fishing, wherever situated or carried on, but except as hereinafter provided, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.

The defence contention was that this section makes provision for a ministerial discretion or policy.

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R. v. Cope

No. S.C.C. 00321

Nova Scotia Supreme Court

Appeal Division

December 29, 1981

The treaty at 1752, made with a band of 90 Micmac Indians does not exempt the Micmac's from the Fishing Regulations of the *Fisheries Act*.

Facts -

The accused Indian was charged with possession of trout over the limit permitted by the Nova Scotia Fishing Regulations under the *Fisheries Act*, R.S.C. 1970, C. F-14, S. 34. The accused, who was not on an Indian reserve at the time of the offence, pleaded that the treaty at 1752 gave Indians the right to fish and that he was exempt from the fishing regulations. The accused was convicted and now appeals. He claims immunity from the federal fishery regulations because of the unique and "specifically expressed negociated rights contained in a treaty, viz., the 1752 Treaty".

The question to be decided in this appeal is whether the Provincial Magistrate's Court erred in holding that the treaty of 1752, made between Thomas Hopson, Governor of Nova Scotia and Jean Baptiste Cope, did not exempt the accused Micmac Indian from the Nova Scotia Fishery Regulations made pursuant to the *Fisheries Act*.

Reasoning of the Court -

MacKeigan, C.J.N.S. - In my opinion, the treaty of 1752 cannot be given the effect for which the appellant strives. The learned trial judge did not err in finding that the treaty did not exempt the appellant from the federal fisheries regulations... The only words in the treaty that have any conceivable bearing on the question of rights of hunting and fishing are the first few words of clause 4. They provide as follows:

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> It is agreed that the said Tribe of Indians shall not be hindered from, but have full liberty of hunting and fishing as usual.

...By these words the British merely affirmed the Indians' already existing "full liberty of hunting and fishing as usual" (emphasis added). This clause is no more than a general affirmation of the aboriginal right. It falls very short in words and substance from being a grant by the Crown of a special franchise or privilege replacing the more nebulous aboriginal rights.

Jones, J.A. ....With respect, this issue has been determined by the decisions of the Supreme Court of Canada in *Sikyea v. The Queen* and *R. v. George*.

Appeal dismissed.

Cite: 49 N.S.R. (2d) 555
96 A.P.R.

Possible Ramifications of Decision:

1. Treaty of 1752 does not limit scope of the Nova Scotia fishing Regulations under the *Fisheries Act*.

2. Reiterates statements made in *R. v. George*, [1966] 3 C.C.C. 137 (S.C.C.) and and *Sikyea v. The Queen*, 50 D.L.R. (2d) 80

Simon v. The Queen

Supreme Court of New Brunswick, Appeal Division

September 19, 1958

To claim immunity by virtue of treaty [here, treaty of 1725 and/or 1752] have to establish connection, by descent or otherwise with original group of Indians with whom treaty was made.

Facts -

Simon, an Indian was registered under *The Indian Act* as a member of the band of Micmacs. He was convicted for a violation of the New Brunswick Fishery Regulations as he set a net in the Richibucto River above a certain point. He is now appealing his conviction.

Submissions Put Forward by the Appellant

The appellant claims immunity by virtue of the 1752 treaty which had been negociated by the Governor of Nova Scotia with a tribe of Micmac Indians. He relies on Article 4 of this treaty which reads: "It is agreed that the said Tribe of Indians shall have free liberty of hunting and fishing as usual." In the alternative, the appellant claims immunity under an earlier Boston Treaty of 1752.

Reasoning of the Court -

The treaty of 1752 was not made with the Micmac nation or Tribe as a whole but only with a small group of Micmac Indians inhabiting the eastern part of what is now the Province of Nova Scotia with their habitat in or about the Shubenacadie area..... The appellant made no effort to establish any connection, by descent or otherwise, with the original group of Indians with whom the 1752 treaty was made. Likewise, no evidence was given with respect to the 1725 Boston Treaty. The appeal, therefore, must be dismissed.

Appeal dismissed.

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Cite: 43 M. P. R. 101
C. C. C. Vol. 124,110

Possible Ramifications of Decision:

1. Indians not establishing connection by descent or otherwise can not claim immunity under treaties.

R. v. Polchies

New Brunswick Court of Appeal

December 14, 1982

Construction of Indian treaties - Indian treaties to be liberally construed but under no reasonable construction can promise made by Indians be converted into one made by Crown. Proclamation of 1763 does not absolve Indians from liability as it is not statute of the Parliament of Canada.

Facts -

Richard Polchies and Melvin L. Paul were charged separately with hunting wildlife by means or with the assistance of a light contrary to s.33(1) of the *Fish and Wildlife Act*. David L. Paul and John E. Paul were jointly charged with unlawful possession of a deer contrary to s.58 of the Act. All of the appellants are Maliseet Indians and members of the St. Mary's Reserve, but the relevant hunting under all the charges took place near Fredericton outside the reserves. These 4 Indians are appealing their convictions.

Submissions Put Forward by the Appellants:

Counsel for the appellants argued that the trial judge erred:

a) by ruling that the provisions of a treaty dated September 24, 1778 did not overrule the provisions of the *Fish and Wildlife Act* in view of s.88 of the *Indian Act*.

b) by not considering the application of the *Royal Proclamation* of 1763 to the particulars of the matters before him.

Reasoning of the Court -

Issue (a) Treaty of 1778

The arrangements of 1778 appear in a document that records a meeting between the British Indian authorities and the Indians... The document really

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contains no promises on behalf of the Crown, but it does set forth a number of promises made on behalf of the Indians. Among these promises is one upon which the appellants particularly rely. It reads as follows:

> I do promise that I will not take part directly or indirectly against the King... but that I will follow my hunting and fishing in a peaceable and quiet manner.

This document for the purposes of these appeals constitutes a document. The real question is whether the clause just quoted is capable of being construed as securing a right to hunt that overrides provincial game laws under s.88 of the *Indian Act*.

I cannot so construe it. I agree that Indian treaties should be liberally construed, but under no reasonable construction can one convert a promise made on behalf of the Indians to one made on behalf of the Crown.

Issue (b) Proclamation of 1763

I need not enter into the question of the application of the *Proclamation* to this province, because even on the assumption it does apply, I do not think the argument affords a defence to the appellants. Provincial laws of general application apply to Indians as well as to other subjects.

It is true that s.88 in addition to the exceptions for treaties already discussed, makes these laws subject to any act of the Parliament of Canada, but though the *Proclamation* may, when applicable, have the force of a statute, it is not a statute of the Parliament of Canada.

Appeal dismissed.

Cite: 43 N.B.R.(2d) 450
113 A.P.R.

.../3

Possible Ramifications of Decision:

1. *Proclamation of* 1763 does not absolve Indians from liability under provincial laws of general applications as it is not a statute of the Parliament of Canada.

2. Indian treaties not to be construed beyond what is reasonable.

R. v. Paul

Docket (110/CA/78)

New Brunswick Court of Appeal

July 18, 1980

Treaty of 1779 applicable to Micmac Indians at Redbank Reserve - treaty specifically applies to Micmac Indians between Cape Tormentine and Baie de Chaleur. To have paramount effect, a treaty need not create rights in Indians, but may merely recognize a pre-existing right.

Facts -

The accused, a registered Indian trapped a beaver on the Red Bank Indian Reserve. Later, he was found outside the limits of this reserve in possession of an undressed beaver skin without a licence or permit contrary to s.72(2) of the *Game Act* of New Brunswick. The evidence indicates that it was the intention of the said Indian to sell the beaver skin to a fur dealer. The accused was convicted and now appeals.

The question raised by the appeal is whether section 88 of the *Indian Act* provides a defence for the appellant. This section provides as follows:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any other matter for which provision is made by or under this act.

Reasoning of the Court -

Hughes, C.J.N.B., dismissed the applicability of the treaties of 1725 and 1752 for reasons cited in *R. v. Simon* (1958) 124 C.C.C. 110. He then goes on to determine the applicability of the treaty of 1779.

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The Treaty of 1779

In the Treaty, it appears the only term which refers to hunting is in the following:

> That the said Indians and their Constituents shall remain in the Districts beforementioned quiet and free from any molestation of any of His Majesty's Troops or other, his good subjects in their Hunting and Fishing.

It is obvious the term cannot be construed as a grant of the right to hunt and fish but, giving the term the most liberal interpretation it is possible to bear, it could and probably should, in the circumstances, be interpreted as a recognition of a pre-existing right which the Indians had exercised from time immemorial and consequently may be treated as a confirmation of that right free from molestation by British troops and subjects.

There is no evidence as to what constituted "the Districts"... I would interpret it to mean the Micmac Indian Reserves between Cape Tormentine and Baie De Chaleur including the Red Bank Reserve and the Indians having a right to live on those reserves.

...If an Indian has a treaty right to trap a beaver, it certainly would be implied that he has right to possession of it.

Appeal allowed.

Cite: 30 N.B.R.(2d) 545
70 A.P.R.

Possible Ramifications of Decision:

1. Treaty of 1779 applicable to Indians on reserves between Cape Tormentine and Baie de Chaleur.

2. In determining whether a treaty will render provincial law inapplicable, it is not necessary for treaty to create rights, it is enough, if it recognizes pre-existing rights. Effects of this is widening of scope of the phrase "terms of treaty" in s.88 *Indian Act*.

Rex. v. Syliboy

Inverness County Court, Nova Scotia

September 10, 1928

The treaty of 1752 applies only to very small body of Micmacs living in the eastern part of Nova Scotia.

Facts -

The defendant, a Cape Breton Indian, who is the grand chief of the Micmacs of Nova Scotia was convicted under the *Lands and Forests Act*, (1926) N.S.C.4 of having in his possession fifteen green pelts, fourteen muskrats and one fox. He made no attempt to deny having the pelts. Indeed, he frankly admits that he has them. He claims however that as an Indian, he is not bound by the provisions of the Act, but has by treaty the right to hunt and trap at all times. The treaty relied upon is that of 1752.

Reasoning of the Court -

Observe the date 1752. Cape Breton between 1748 and 1763 was not part of Nova Scotia. It was owned and governed by the French, while Nova Scotia was a colony of Great Britain. It will be remembered that the defendant is a Cape Breton Indian... But, says his counsel, the Micmac Tribe throughout Nova Scotia, including Cape Breton, is one and indivisible, and the treaty was made with the Tribe... The language of the treaty not only lends no support to this contention, but shows that it is untenable.

"The following Treaty of Peace", reads the minutes of the Council, "was signed.... with the Micmac Tribe of Indians, inhabiting the Eastern Parts of this Province" computed to be ninety in number. Cope, Chief Sachem of the Tribe of Micmacs claimed authority over only forty.

Eight years before there had been three hundred Indians engaged in the attack on Canso all from "the Eastern Parts of this Province" which shows that Cope and the others who joined with him in the Treaty, really represented only a small portion even of these very Indians they claimed to represent....

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In the face of this evidence there can be no doubt, I think, that the treaty relied upon was not made with the Micmac tribe as a whole but with a small body of that tribe living in the eastern part of Nova Scotia proper, with headquarters in and about Shubenacadie, and that any benefits under it accrued only to that body and their heirs...

Appeal dismissed.

Cite: C.C.C.[Vol L.] 389

Possible Ramifications of Decision:

1. Treaty 1752 only applies to the Micmac tribe living in the eastern part of Nova Scotia.

2. Indicates how it is determined whether treaty applies to a specific tribe.

Four Indian Chiefs gave testimony regarding meetings held with two Federal Ministers ... The Minister of Fisheries ... met with the Indian Chiefs of New Brunswick. He outlined to the Chiefs that his Ministerial policy was established and recognized the following four areas: (1) conservation, (2) Indian Food Fishery, (3) commercial fishing, and (4) sport fishing.

Each of the Chiefs testified that the Minister wanted the Indians to be able to continue fishing for food. He also promised to set up committees to study the Indian fishery.

The Chiefs also further testified of another meeting that took place on the St. Mary's Indian Reserve in the City of Fredericton.

Before addressing the contentions put forward by the defence, the learned judge made the following statement:

... I am satisfied that it was not essential to the Crown cases respecting alleged violations of the New Brunswick Fishery Regulations made under the *Fisheries Act* of Canada, as the Supreme Court of Canada decided by a 7 to 2 decision in a 1976 case, *R. v. Steam Tanker "Eugenia Chandris"* (1976), 8 N.R. 338 et seq., that "the Court must take judicial notice of Federal Regulations as required by section 23(1) of the *Statutory Instruments Act*.

Response to Contention #1

I now turn to the defence argument that the location in question was never validly surrendered and therefore still form part of the Tobique Indian Reserve.

While it is not in the power of this Court to determine the question of lawful title to lands the court is bound by the provisions of Chapter 4 of the Acts of the legislature of New Brunswick, 1958 entitled *An Act to confirm an agreement between Canada and New Brunswick respecting Indian Reserves*.

The schedule of Reserve lands includes Tobique Indian Reserve.

The preamble and pertinent sections express the matter concisely as follows:

> Whereas since the enactment of the British North America Act, 1867, certain lands in the Province of New Brunswick set aside for Indians have been surrendered to the crown by the Indians entitled thereon.

... To my knowledge this legislation has not been challenged. I therefore can only conclude that the Fishway being on the east bank of the Tobique River is on validly surrendered lands and does not form part of the present Tobique Indian Reserve.

Response to Contention #2

The general principle is stated in *R. v. Williams* (1958), 120 C.C.C. 34 where it was held that the words of a treaty granting or creating a reservation does not "give sanctuary to Indians from the operation of the general law of the Province."

It is my view that the *Fisheries Act* of Canada and the New Brunswick Fishery Regulations made thereunder are part of the general law of the Province.

In the case of *Francis v. the Queen*, 2 N.B.R. (2d) 14 (N.B.C.A.), Hughes C.J.N.B. was of the following opinion:

> The New Brunswick Fishery Regulations were passed, not under authority of provincial legislation, but, under section 34 of the *Fisheries Act* of Canada, a Federal Statute. It is clear, therefore, that the Regulations are in no way affected by Section 87 (now section 88, which is identical) of the *Indian Act*.

Chief Justice Hughes goes on further to state at page 23:

> ...legislation of the Parliament of Canada and regulations made thereunder, properly within section 91 of the *British North America Act* 1867, are not qualified or in any way made unenforceable because of the existance of rights acquired by Indians pursuant to Treaty.

... The *Francis* case received support in the case of *R. v. Derriksan* (1977), 16 N.R. 231 (S.C.C.) wherein it was decided that "assuming the accused, (an Indian), had an aboriginal right to fishing, that such a right was subject to regulations imposed by validly enacted federal laws."

... In the final analysis I hold that treaty rights do not take paramountcy over the general law and that Indians are subject to the *Fisheries Act* of Canada and the Regulations made thereunder.

Accused convicted.

Cite: 22 N.B.R. (2d) 285.
39 A.P.R.

Possible Ramifications of Decision:

1. Made clear that *Fisheries Act* and its regulations are paramount over any Indian treaty rights.

2. Policy decisions do not override Federal legislation.

3. Land on the east banks of the Tobique River where the fishway is established was validly surrendered by *An Act to confirm an Agreement between Canada and New Brunswick respecting Indian Reserves.*

4. Under the *Statutory Instruments Act* the court was required to take judicial notice of federal statutory regulations.

N.B. - This case was appealed to the New Brunswick Supreme Court Appeal Division, June 12, 1979 and was dismissed.

Aubrey Roberts v. Her Majesty the Queen
In the County Court of Vancouver Island
February 7, 1983

Appropriate method of measuring a net under s.14(1)(a)(ii) of the Pacific Commercial Fishery Regulations given.

Facts -

The appellant was stopped by fishery officers on a routine check of nets. The fishery officers made three measurements, two at the scene when the net was in the water, or in the process of being reeled onto the drum on the fishing vessel, and the third time while the net was drying while lying on a deck in the Campbell River.

The appellant was charged with contravening reg. 14(1)(a)(ii) of the Pacific Commercial Salmon Fishery Regulations, (R.C. 1978. C.823) of using a purse seine of more than fifty meters in depth and thereby committing an offence contraty to s.51(1) of the *Fisheries Act*. He was convicted of this offence and now appeals.

Other relevant facts are as follows:

1. The two fishery officers had relatively little practical experience in measuring nets; one officer had 5 years experience and the other officer 2 years experience. On the other hand the appellant had some 31 years of experience in the fishing industry.

2. As well, the appellant was a net maker.

3. The standard of proof required here is proof beyond a reasonable doubt.

Regulation 14(1)(a)(ii) of the Pacific Commercial Salmon Fishery Regulations under which the accused was charged provides that,

.../2

Regina v. McNally

Prince Edward Island Supreme Court

Tweedy, J.

March 22, 1963

"A public oyster fishing bed" is (a) any area restricted by the reglations from being so designated as a public fishing area, (b) any area not under special license and lease.

Facts -

The accused was convicted of taking oysters from a "public fishing bed" during the closed season contrary to s.16(1) of the Prince Edward Island Fishery Regulations. The accused now appeals this conviction.

The main question to be decided is as to the meaning of the words "at the public oyster fishing beds".

Reasoning of the Court -

....From a careful consideration of the statutes the Regulations and the cases, it appears to me that a public oyster fishing bed is,

(a) any area not under special licence and lease;

(b) any area restricted by the regulations from being so designated as a public oyster fishing area.

No definition of "public oyster fishing bed" is given in the said Statute or the regulations. The words, therefore, would take their usual, normal or natural meaning.

It was contended on behalf of the appellant that this was not a public oyster fishing bed. However, the area was not under lease and it is not described in the statute or regulations as not being a public area so I cannot see how that contention stands.

.../2

Another contention was that there were no oysters in this area except those brought in by the appellant or others and placed there. There is provision for doing this but unless the person doing so has a lease or licence, I am unable to see how he can acquire any exclusive right to fish there after the season is closed.

Appeal dismissed.

Cite: C. C. C. 1963 Vol. 3. 368

Possible Ramifications of this decision:

1. Gives a clear definition of "public oyster beds".

2. When no definition given in the Act, the word or phrase (i.e. public oyster beds) take on their usual, normal, or natural meaning.

Regina v. McCauley

Provincial Magistrate's Court, Nova Scotia

Nichols, Prov. Mag. Ct. J.

October 26, 1973

Section 7(c) *Coastal Fisheries Protection Act* - **The person actually doing the act of throwing overboard the cargo is the person to be charged. If the crown can not establish that a proper signal was given by the government vessel to bring to, this is a valid defence.**

Facts -

The accused is charged that: he threw overboard part of the vessel's cargo, after being signalled by a government vessel to bring to, contrary to section 7(c) of the *Coastal Fisheries Protection Act*.

The defence puts forward two arguments. Firstly, the defence states that the accused is the wrong person charged and that the crewman should have been charged. Secondly, they state that the proper signal to heave to was not given.

Reasoning of the Court -

This court finds that the legislation clearly indicates that the person doing the wrongful act alleged is the person to be charged, not the master, or the owner of the vessel.

... There is no indication before the Court that a reasonable man would identify the outboard motor board used by the officers as a government vessel. There were no distinguishing marks such as Coast Guard flag and the flag of the Fisheries Department and again what reasonable man would assume that the outboard motor was a Government vessel?....No proof by the Crown of proper signal to bring to has been given... Accordingly, the accused is found not guilty.

.../2

Accused acquitted.

Cite: 14 C.C.C.(2d) 573

Possible Ramifications of Decision:

1. Government vessels should be recognizable as such.

2. The person actually throwing overboard the cargo should be the person charged under section 7(c) of the *Coastal Fisheries Protection Act*.

3. Proper signal should be used by fishery officers to "bring to" vessels.

R. v. Paul

New Brunswick Court of Queen's Bench, Trial Division

Judicial District of Fredericton

Dickson, J.

Sentencing under the *Fisheries Act*, s.38 - Where the alternative punishment of a fine is imposed the amount of that fine is statutorily fixed.

Facts -

The accused was charged with wilfully obstructing a fishery officer engaged in the execution of his duty contrary to section 38 of the *Fisheries Act* and with unlawfully transporting salmon contrary to s.6.1(8) of the New Brunswick Fishery Regulations. The accused pleaded guilty and was sentenced to a fine of $10.00 or 1 day imprisonment on the first charge and to a fine of $50.00 or 5 days imprisonment on the second. The Crown is appealing from these sentences.

The ground of appeal in respect of the first sentence in that: the learned trial court judge erred in imposing an illegal sentence in that section 38 of the *Fisheries Act* prescribes a fine of $100.00.

Section 38 provides that:

> Every one who resists or wilfully obstructs any fishery officer..... is guilty of an offence punishable [in this case by summary conviction]..... and liable to a term not exceeding six months imprisonment with hard labour or to a fine of $100.00.

The ground of appeal of the sentence imposed on the second charge is that: the learned trial court judge erred in imposing a sentence that was manifestly inadequate and did not give sufficient consideration to the deterrent aspects of sentencing.

.../2

Reasoning of the Court -

First Charge

It is apparent that where the alternative punishment of a fine is imposed on summary conviction the amount of that fine is statutorily fixed at one hundred dollars....(T)he learned provincial court judge in imposing sentence, appears to have erroneously construed the section as providing for a maximum fine in that amount.

Second Charge

...(I)t is apparent that in fixing the fine at the level at which he did the Judge was influenced in some degree by three factors, viz., firstly, that the fishery officers concerned had engaged in a high-speed chase along a busy highway; secondly, that the accused could probably have obtained with little difficulty a permit under the *Fisheries Act* to transport the salmon; and thirdly, that because there existed some possibility that the accused's vehicle might be ordered by the Minister to be forfeited, the amount of the fine should be decreased. In my view none of these factors should properly have been taken into consideration in fixing the punishment.

Appeal allowed.

Cite: 36 N. B. R. (2d) 652
94 A. P. R.

Possible Ramifications of Decision:

1. Makes clear that under Section 38 of the *Fisheries Act* the amount of the fine is statutorily fixed at $100.00.

The Society of Prevention of Cruelty to Animals v. Skiffington

Newfoundland District Court

Judicial Center of Gander

May 9, 1978

Interpretation of "Captive Animal" under section 2(b) of the *Protection of Animals Act* - Something more than the mere capturing of the animal is necessary before it can be said to be in confinement or captivity.

Facts -

The defendant fisherman and a companion drove one of deveral dolphins onto a shoal of a harbour. They then clubbed it several times, damaged one of its eyes and drove an eel spear into its breathing hole. The two were apprehended by fisheries officers, who shot the maimed animal. The accused was charged with cruelty under section 3(a) of the *Protection of Animals Act*. This section provides, that

> S.3 If any person
>
> (a) shall cruelly beat, kick, ill-treat, abuse... or to otherwise... mutilate, torture, infuriate, or terrify... any animal,...or shall, by doing...any act, cause any unnecessary suffering...to any animal;... such person shall be guilty of cruelty within the meaning of this Act...

There has been cruelty within the definition of section 3(a).

However, the question remains as to whether the dolphin as found and captured by the respodent is a creature of the kind intended to be protected by the *Protection of Animals Act*. The act in section 2(a) defines "animal" by stating that it "means any domestic or captive animal".

Reasoning of the Court -

It would appear...on a proper interpretation of section 3 of the *Protection of Animals Act* that this section was intended to protect from acts of cruelty, animals in captivity or confinement.

.../2

The dolphin in question here had been found swimming in a bay bounding the Atlantic Ocean of which it was an inhabitant. Under these circumstances it clearly was not a domestic animal under any definition of the word.

As to the dolphin being in captivity, the learned judge reviews the decisions made in *Rowley v. Murphy*, [1963] Q.B., 43 and *Steel v. Rogers* [1912] 28 T.L.R. 198, two cases on point. He stated that, in both of (these cases) something more than the mere capturing of the animal is necessary before it can be said to be in captivity or confinement within the meaning of the *Protection of Animals Act* [1911]; of England which is substantially similar to our own statute. In the case at hand, the dolphin was in the process of being captured. Though the animal had apparently been subdued, it was still alive and though unlikly, it might yet have escaped capture. In these circumstances it cannot be said that the dolphin was a captive animal....Therefore, this animal is not entitled to the protection from acts of cruelty provided by section 3 of the act.

Accused acquitted.

Cite: 19 Nfld. P.E.I.R. 145
50 A.P.R.

Possible Ramifications of Decision:

1. Section 3(a) has been given a strict and narrow interpretation by the courts and an accused should not be charged under that section unless the animal falls under the definitions of "domestic" or "captive" animal.

R. v. Crawford

New Brunswick court of Queen's Bench

Trial Division, Higgins, J.

April 15, 1980

Licensed fishery - What constitutes - A non-functional weir is not a fishery within the meaning of s.2 of the *Fisheries Act*.

Facts -

The accused held a drag seine license entitling him to fish anywhere in the Bay of Fundy. Another man had a permit to operate a herring weir in "Little Musquash Cove". The weir was built, but was wrecked and rendered useless by a storm. The next day the accused closed off the cove with his seine, having heard there were herring in the cove, some of which had escaped from the weir. The accused was charged with fishing in the fishery covered by the herring weir permit contrary to s.21 of the *Fisheries Act*. The accused was convicted and appealed.

Reasoning of the Court -

It is my view that the "Little Musquash Cove" was not a fishery within the act. By definition in section 2 of the Act, a fishery is "that area in or which...a weir is used, set, placed or located, and the area... in which the fish may be taken by the... weir... and also... the weir... used in connection therewith.

There was no weir as defined in the regulations where the appellant set his shut-off seine and therefore the appellant did not take... fish in any water within any fishery...If there were no fishery, there consequently could also be no requirement to secure the licencee's permission.

Appeal Allowed.

Cite: 29 N.B.R. (2d) 435
66 A.P.R.

.../2

Possible Ramifications of Decision:

1. The terms and definitions in the Act must be satisfied before the Crown may resort to the enforcement provisions of the legislation. In particular, a non-functional weir is not a fishery as defined under s.1 of the *Fisheries Act*.

R. v. Hynes

Nova Scotia County Court for District #7

March 10, 1982

S.28 of the Atlantic Fisheries Regulations - meaning of the word "dump" as distinguished from "discarding". "Dumping" encompasses the wholesale non-selective dumping of entire nets of fish or large portions thereof.

Facts -

The defendant, was charged that he as master of a fishing vessel did unlawfully permit to be dumped from a fishing vessel... cod, contrary to s.28 of the Atlantic Fishery Regulations, P.C. 1979, 266.

An international observer, who was aboard the fishing vessel at the time of the alleged offence noted "that some of the catch were being discarded into the ocean and that happened a number of times; a number of sets". It was the small cod that were being discarded. These small fish are of no commercial value. It was contended that it has been the practice for many years to discard these small fish. In addition, it was submitted that dumping "is to dump everything that you take aboard and discarding is just discarding the scrap and fish of no value".

The defendant was convicted of the above-mentioned charge and is now appealing.

The ground of appeal relevant to this decision is as follows:

Whether the learned trial judge erred in interpreting the word "dump" as it is used in Regulation 28 of the Atlantic Fishery Regulations as including any discarding of any amount, however small, of fish of any size from a vessel, which interpretation resulted in the conviction of the appellant being appealed from.

(In other words, what is the meaning of the word "dump" as contained in section 28?)

.../2

Reasoning of the Court -

In discarding, the catch is gone over, the good is picked out and the rest thrown away. In dumping, the catch is not gone over, but is all thrown away.

When one looks at the dictionaries, "dump" is defined as meaning:

1. to unload;
2. let fall in a heap or mass, and
3. to throw down in a lump or mass as in tilting anything out of a car.

When this is coupled with the special meaning given by the fishing industry to the word "discard" one must conclude that dumping is somewhat different from discarding. Dumping would appear to encompass the wholesale nonselective dumping of entire nets of fish or large portions thereof.

Appeal allowed.

Cite: 52 N.S.R. (2d) 39
106 A.P.R.

Possible Ramifications of Decision:

1. Meaning of "dump" in s.28 Atlantic Fisheries Regulations is clarified.

2. When interpreting a statute - where no definition has been given - general practices should be noted and dictionaries should be consulted.

Her Majesty the Queen v. Gordon Burton

In the Supreme Court of Newfoundland

Court of Appeal

May 11, 1983

Section 35 *Fisheries Act* - A search warrant is not required (in other than a permanent dwelling place) if the fishery officer has reasonable and probable grounds to believe that fish, taken in contravention of the Act or regulations made thereunder, may be found therein.

Facts -

Two fishery officers had received complaints that undersized lobsters were being sold in the Twillingate, New World area. In particular, they received a complaint that Gordon Burton, the accused, was selling small lobsters. The two officers checked two lobster boxes belonging to the accused, although Mr. Burton was not present at the time. These boxes were anchored 100 feet from the accused's home. Undersized lobsters were found in these boxes. In the trial court, the judge dismissed the charge. He held that a warrant was required under section 35 to conduct such a search. Since the officers searched without a warrant, there was a violation of the accused's rights against unreasonable search and under section 8 of the *Charter of Rights and Freedoms*. The illegally obtained evidence was therefore ruled inadmissible under section 24(2) of the *Charter*. The Crown now appeals.

The trial judge's ruling was based on his interpretation of section 35 of the *Fisheries Act*. The issue therefore before this court is:

Did I err in law in holding that fishery officers required a judicially authorized search warrant in order to conduct a lawful search of Gordon Burton's lobster boxes under the authority of section 35 of *The Fisheries Act?*

.../2

Section 35 provides:

35. Any fishery officer may search or break open and search any building, vehicle, vessel or place other than a permanent dwelling place where he believes, on reasonable and probable grounds, that any fish taken in contravention of this Act or the regulations, or anything used in contravention thereof, is concealed.

Submissions Put Forward by the Respondent

...(C)ounsel for the respondent contends that because the authority to search was not expressly stated to be "without a warrant" the Court should assume, as did the trial judge, that a fishery officer can only enter on private property and search in accordance with the provision of the Act after he has first obtained a warrant to conduct the search.

Reasoning of the Court -

I do not accept that argument. It is one thing to put in or take out words from a statute to express more clearly what the legislature did say, or must from its own words be presumed to have said by implication; it is quite another matter to amend a statute to make it say something it does not say. It is the duty of the Court to interpret a statute, not to amend it.

In clear and unambiquous language, section 35 provides that the same officer may enter and search any other private property with a search warrant. To make his entry lawful, however, he must have reasonable and probable grounds to believe that fish, taken in contravention of the Act or regulations made thereunder, may be found therein.

In this case the trial judge found as a fact that the fishery officer had reasonable and probable grounds to believe that fish taken in contravention of the Act would be found on the property.....The search was therefore lawful and not in contravention of section 8 of *The Charter of Rights and Freedoms*.

Appeal allowed.

Cite: Unreported Case.

Possible Ramifications of Decision:

1. Section 35 *Fisheries Act* - does **not** require a search warrant - there must be "reasonable and probable grounds".

2. Duty of the Court is to interpret a statute, not to amend it.

Her Majesty the Queen v. David Harrison

Supreme Court of Ontario - Court of Appeal

October 20, 1982

Statutory Interpretation - By s.11 *Interpretation Act*, the *Fisheries Act* is a remedial enactment - therefore must be given fair, large, and liberal construction and interpretation as best ensures the attainment of its objectives. To "furnish" true return pursuant to s.48 *Fisheries Act* - manager of business must complete form and forward to the Ministry.

Facts -

Mr. Harrison was charged that he did "unlawfully fail to furnish a true return containing particulars of all fish bought... as requested, contrary to section 48 of the *Fisheries Act.*"

David Jones, a conservation and fishery officer prepared a letter to Mr. Harrison requesting information specified by s.48 of the *Fisheries Act*. He took this letter as well as a supply of "return forms" to Harrison who refused to fill out the forms. Harrison testified, however, that although he would not fill out the forms, he did not refuse to make available at his place of business all the required information.

Harrison was acquitted. The learned judge held that it was sufficient if the accused gave the required information to the fishery officer when he attended at his place of business. He arrived at this conclusion after defining "furnish" in s.48 of the *Fisheries Act* to mean to hand the form to the fishery officer when he attends on the accused. The Crown now appeals.

Reasoning of the Court -

By s.11 of the *Interpretation Act* R.S.C. 1970, C.I.-23, the *Fisheries Act* is deemed to be a remedial enactment and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.....

.../2

The word "furnish" is defined in The Shorter Oxford English Dictionary to mean, inter alia:

> To provide or supply with (something necessary, useful or desirable)..... To supply what is necessary.

As used in both s.48 and 50, the word "furnish" is an active verb: in its ordinary sense it encompasses many means of supplying or providing the necessary item. In our view, the context of both sections requires that the word "furnish" be given its ordinary, broad interpretation.

Pursuant to section 48 the manager of a fresh fish business must "furnish" a true return "upon request". To say it is sufficient that the manager make the information available at his place of business is to alter the obligation imposed by the section. The manager is clearly obligated to furnish a "true return" and this obligation arises upon a request. The attendance of the fishery officer at the manager's place of business is not required by the section. The fact that what is to be furnished is a "true return" connotes an active effort to make the return by the person so obligated.

We are all of the view therefore that to "furnish a true return" pursuant to s.48 of the *Fisheries Act*, the manager of a fresh fish business must complete the form provided and forward it to the ministry.

Appeal allowed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Clarification of what is required by section 48 of the *Fisheries Act*.

2. To determine meaning of specific word in section look at ordinary dictionary meaning, as well as context.

3. Gives some direction as to how *Fisheries Act* is to be interpreted.

S.14(1) No person fishing for salmon shall

a) use a purse seine that is

i) more than 400 m. or less than 270 m. in length, measured along the stretched corkline when the seine is wet.

ii) more than 50 m. or five and three quarter strips, whichever is the lesser, in depth, and...

Reasoning of the Court -

The essence of this appeal is that the first two measurements made by the officers are nothing more than estimates, and in making that submission the appellant relies upon what was said by the fisheries officers that what they made was guestimates.

The appellant and the fishery officers differ as to the measurement of the depth of the mesh. The appellant says that the depth of the mesh is $4\frac{1}{2}$" whereas the fishery officers say that it is 4 7/8". By measuring the net in this fashion the fishery officers calculated a depth slightly in excess of 66 meters.

One issue in this case is whether the appropriate place to measure a net is while it is in the water or whether a net can be measured on dry land. There is also evidence from which it appears that when the officers measured the net on dry land they may very well have pulled the net vertically which would have the effect of making the meshes somewhat deeper then would be the case if the net was pulled horizontally.

It might be noted that the measurement of the length of a purse seine is "along the stretched corkline when the seine is wet". Is it therefore reasonable to measure the depth of such a net when it is dry and particularly when it is measured here in what the trial Judge described as a "benign" position.

.../3

Furthermore, if the length is to be measured not only when wet but as well when stretched should not the depth be also measured when the net is stretched lengthwise, that is, horizontally? Viewed in this way it may not be appropriate to measure the depth of the net on dry land as was done here by the fishery officers.

... The appellant also testified that he ordered the net with a mesh size of four and one half inches. He produced an invoice to show that to be the size of the meshes in this net.

... In my respectful view, the verdict was not supported by the evidence. Accordingly, **the appeal is allowed.**

Possible Ramifications of Decision:

1. The Department of Fisheries should determine the most appropriate method of measuring a net and standardize the method.

2. Experience of fishery officers versus experience of fishermen will be considered when examining the evidence.

3. Fishery officers should be aware of the standard of proof required (i.e. balance of probabilities or beyond a reasonable doubt), under the more commonly used sections of the *Fisheries Act* and regulations.

4. Fishery officers should be aware of what is required under the regulations and how various subsections may relate to others. (i.e. Here, under s.14(1)(a)(ii) the measurements of the length of a purse seine is "along the stretched corkline when the seine is <u>wet</u>. This suggests that the depth of the net under s.14(1)(a)(ii) should also be measured when wet.

5. Before appealing a case, standing legal agents should ensure that there is sufficient evidence.

Regina v. Aubrey Roberts
British Columbia Court of Appeal
November 23, 1983
(Docket # CA000175)

[See 10-I]

This case was appealed and confirmed in the Court of Appeal. The reasoning given was as follows:

... It seems to me that the evil which the Regulation seeks to limit is fishing with a purse seine which when in use, is more than 50 meters in depth. The Regulation opens with the words "no person fishing". Fishing is defined in the *Fisheries Act* as follows:

> Fishing means fishing for, catching or attempting to catch fish by any method.

Furthermore section 14(1)(a)(ii) provides that "no person fishing for salmon shall use a purse seine"... and I emphasize the use of the word "use". All of this leads me to the conclusion that the language of Regulation 14 is designed to preclude a person in the process of fishing using a purse seine that is more than 50 meters in depth. As the language stands, it seems to me that that depth must be ascertained while the net is in use for the purpose of fishing. The only evidence here is of a measurement taken otherwise than when the net is in use for the purpose of fishing. That being the case, I think this **appeal must fail.**

Cite: Unreported.

Regina v. MacMillan Bloedel Limited

British Columbia Court of Appeal

January 20, 1984

Meaning of "fishery" given. To be identified as a fishery, the area would have to contain fish having a commercial value or perhaps of sporting value. Rules of Construction - If an enactment is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly.

A provincial court judge convicted MacMillan Bloedel of carrying on,

> "work that resulted in the harmful alteration, disruption or destruction of fish habitat in an unnamed tributary of the Tsitika River contrary to s.31 of the *Fisheries Act* ...."

The company was carrying out logging operations near a small stream ("an unnamed tributary of the Tsitika River") which is the natural habitat of small and unusual fish measuring about four to five inches in length and never exceeding six inches in length. This has been the habitat of this specie of fish for hundreds of years. They have no commercial or sporting value. There are two waterfalls, at least creating "impassable barriers" between the habitat of this specie of fish and the sea which prevents their getting to the sea and prevents, also, anadromous fish from reaching this portion of the stream.

Before the trial judge and the appeal judge, counsel for the company argued that although the fish were within a "fish habitat" as defined by the *Fisheries Act* they were not in "a fishery, either directly or indirectly and that, therefore the *Fisheries Act* did not relate to them. The trial judge rejected this submission, one of the reasons being apparently that he considered that the small fish were part of "the ecology of the stream" and that if the Act was inapplicable to them they would "soon cease to exist to the inevitable deterioration of the entire system." The appeal judge said there was no evidence to support this conclusion, but that there was evidence to support the conclusion

.../2

that logging operations of the company had resulted "in the harmful alteration, disruption or destruction of fish habitat". Nevertheless, he allowed the appeal holding that the *Fisheries Act* was applicable only to a fishery and that the particular portion of the stream where these small fish are found is not a fishery or part of one:

> ... To be identified as a fishery the area involved in this appeal would have to contain fish having a commercial value, or perhaps a sporting value, or would have to form part of the habitat of the anadromous fish below the waterfalls. None of these conditions has been established. The appeal is allowed and the conviction quashed.

Section 31 of the *Fisheries Act* provides:

> 31(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

The Crown is now appealing this decision.

The issue before the court is whether the *Fisheries Act* extends to the place on Russell Creek affected by the logging done by the respondent.

Reasoning of the Court -

Mr. Justice Esson is in agreement with the appeal court judge who followed the reasoning put forward in *Regina v. Somerville* (1972) 32 D.L.R. (3d) 207.

... In that case a section of the *Canadian What Board Act* was narrowly interpreted by the Supreme Court of Canada to keep it within the objective of the *Act*. The defendant had transported grain across a provincial border contrary to a clearly expressed absolute prohibition of such transport. However it was held that since the transporting of grain was entirely for the defendant's own need, and there being no trading in grain by the defendant and no commercial transaction, the statutory provisions should not apply.

.../3

It appears to me, therefore, that in this case the *Fisheries Act* should not apply because the stream in question was not a fishery or part of one. To be identified as a fishery the area involved in this appeal would have to contain fish having a commercial value, or perhaps a sporting value; or would have to form part of the habitat of the anadromous fish below the waterfalls.

I would dismiss the appeal.

Per Craig, J.A. (dissent) - The trial judge concluded that the fish affected were part of the ecology of the stream. The power to control and regulate the fisheries resource must include the authority to protect all those creatures which form a part of the system. Thus, the "fisheries resource" could not be intended to mean simply fish having commercial or sporting value.

Appeal dismissed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Given definition of what is a fishery.

2. Given rule of statutory construction - Legislation should be interpreted so that its operation is restricted to matters within the power of the enacting body.

Terry, Robert Edward Morgan and Patsy Rae Morgan

v.

The Department of Fisheries and the Environment

Federal Court of Canada, Trial Division

July 19, 1978

The words "notwithstanding anything in these regulations" in s.29(1) of the Fishery Regulations, dealing with Indian Food Licences, do not necessarily prevent applicability of closure orders.

Reasons given why interlocutory injunction to prevent Department of Fisheries from exercising conservation powers of closure not given.

Facts -

A motion was brought by the plaintiffs for an interlocutory injunction to prevent the respondent from exercising its conservation powers of closure under the *Fisheries Act*, R.S.C. 1970, C. F-14. A closure was ordered for July 17 and 18. The plaintiffs were issued Indian Food Licences under section 29 of the Regulations of the *Fisheries Act*.

Submission of the Plaintiffs

The plaintiffs' case, in essence, is that food licences, under s.29 of the applicable Regulations, were issued to them for specified areas and perhaps for specified methods of fishing. The government department, it is said, by exercising its conservation powers of closure, has in effect altered the terms of those licences. It is said that this cannot be done. Reliance is placed on the words "Notwithstanding anything in these Regulations...", found in s.29(1).

The Plaintiff argues those words exclude the power, in s.4 of the Regulations, to order temporary or permanent closures which may affect the fishing periods earlier permitted when the fishing licences were issued.

Reasoning of the Court -

Without finally deciding the point, it seems to me it is equally open to

.../2

say that the words in Regulation 29 merely permit, or enable, Indians to fish for certain species, in certain areas, and by certain methods, which are otherwise, in the Regulations, prohibited to other citizens; that the words do not prevent the applicability, by closure or other means, of other conservation means.

I am of the view there is a fair question to be tried. But it should be at a trial and full hearing, not on an interlocutory application such as this.

The only period of closure involved before this court is July 17 and 18. The period of time remaining today, July 18 is small. The loss, if any, to the plaintiffs in that short period, is not, as I see it, irreparable or disastrous when that is considered, along with, what I conceive the finely-balanced legal question of right, the balance of convenience is on the side of refusing the discretionary and drastic remedy of interlocutory injuction. The fair course in my view, is to have the legal issues determined at trial.

Cite: [1980] 2 C.N.L.R. 103

Possible Ramifications of Decision:

1. Held that the words "Notwithstanding anything in these regulations" contained in s.29 of the Regulations do not necessarily exclude the power in s.4 of the Regulations to order closures affecting the fishing periods permitted at the time food licences were issued.

2. See possible reasons for excluding interlocutory injunction. Here interlocutory injunction refused because:

   (1) of the short period between the time of the hearing and the end of the closure.

   (2) the possible loss to the plaintiffs is so small.

3. When these reasons are considered along with the finely balanced legal question of right, the balance of convenience is on the side of refusing the discretionary remedy.

Her Majesty the Queen v. Earnest Clark Campbell

In the County Court of Vancouver

January 26, 1984

The *Fisheries Act* does not purport to deal with the sale of fish generally. Statutory Construction - The particular legislative intent of regulations must be determined in the context of the *Fisheries Act* and the regulations made under it. A construction of a regulation which may make it impossible for the Crown on occasion to prove its case is preferable to a construction that may make it impossible for an accused to defend his case.

Facts -

The Crown appeals the acquittal of the respondent Campbell on three charges of selling salmon contrary to s.37 of the British Columbia Fishery (General) Regulations.

At trial there was admitted into evidence the affidavit of a fisheries officer who deposed that there was no record of an Earnest Clark Campbell being issued a commercial fishing licence in 1982.

Section 37 of the British Columbia Fishery Regulations provides:

> 37. No person shall buy, sell or barter fish or portions of fish unless the fish were lawfully caught under a commercial fishing licence.

The trial judge found as a fact that the accused was not a holder of a commercial fishing licence. The accused was acquitted because the trial judge held that the fish were not lawfully caught under a commercial fishing licence. The trial judge held that the onus was not on the accused to prove the fish he sold had been lawfully caught under a commercial fishing licence; that, he said, "would put every vendor of fish in the country at their peril in dealing with fish".

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Submission Put Forward By The Crown

1. On this appeal the Crown submits it was not obliged to prove that the fish sold by the accused was not "lawfully caught under a commercial fishing licence". It is submitted that s.37 prohibits the sale of fish generally and that the onus at trial was on the accused to prove that he came with the exception contained in s.37. The Crown relies on s.730(2) of the *Criminal Code* which burdens an accused with proving that an exception prescribed by law operates in his favour.

2. The Crown further submits that it may have an "impossible" burden if required to prove all the ingredients of a charge under s.37 as it will rarely be able to discover who caught the fish - a fact more likely to be known to the seller.

Reasoning of the Court -

Response to Submission 1

Section 730(2) of the *Criminal Code* provides:

> "(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, 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 1953-54, c.51, s.702"

... Whether s.730(2) applies or not in this case depends on the proper construction of s.37. Is the latter intended to prohibit the sale of fish generally, as the Crown submits, so that there is no need to negative the exception? Or is s.37 to be construed as merely prohibiting the sale of fish unlawfully caught without a commercial fishing licence? The particular legislative intent of s.37 must be determined in the context of the *Fisheries Act* and the regulations made under it.

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The Act regulates, inter alia fishery leases and licences, seal, and salmon fishing and injury to fishing grounds. The Act does not purport to deal with the sale of fish generally.

The British Columbia Fishery (General) Regulations, as amended, regulate fishing generally in the Province. There are a number of sections in Part I that refer to the sale of fish.

... Parliament has dealt with three types of fishing: commercial, sport, and Indian food fishing. The Act and the regulations made under it regulate all aspects of such fishing including the licensing of fishermen and their vessels and the regulation of what fish may be caught and how. But nowhere can there be gleaned an intent to regulate the sale of fish generally. In my view, s.37 is not intended to do so. Rather it prohibits the sale of certain fish, viz. fish caught unlawfully and without a commercial fishing licence. Such a prohibition is intended, in my view, as an adjunct to the regulation of commercial fishing. The Crown submits that the ambit of s.37 is not to be confined to fish unlawfully caught by non-commercially licensed catchers. In my view, that is precisely the ambit of s.37.

It follows that, in my view, s.730(2) has no application to this page. Accordingly, as the Crown failed to prove an essential ingredient of the charges, the accused was properly acquitted.

Response to Submission 2

The Crown submits that it may have an "impossible" burden if required to prove all the ingredients of a charge under s.37 as it will rarely be able to discover who caught the fish - a fact more likely to be known to the seller. My answer to this is that the accused's "peculiar knowledge furnishes no working rule" for determining whether or not an exception exists to the fundamental obligation of the prosecution to prove every element of the offence charged. Furthermore, it may be equally impossible for a vendor of fish to prove that the fish he sells were lawfully caught under a commercial fishing licence. A

construction of s.37 which may make it impossible for the Crown on occasion to prove its case is preferable to a construction that may make it impossible for an accused to defend his.

The appeal is dismissed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Given rules of statutory construction.

R. v. Williams

N.S.S.C.A.D.

September 17, 1970

Section 7(c) of *Coastal Fisheries Protection Act* is clear and unambiguous when read in the context of whole of section 7.

Facts -

An accused fisherman was charged with throwing crgo overboard after a signal was given to the accused to bring to, contraty to section 7(c) of the *Coastal Fisheries Protection Act*. Section 7(c) reads as follows:

> 7 Every person is guilty of an offence who
>
> ...
>
> (c) after signal by a government vessel to bring to, throws overboard or staves or destroys any part of the vessel's cargo, outfit or equipment...

The respondent was acquitted by the Magistrate before who he appeared and a trial de novo was held. The learned County Court Judge decided against the respondent on the facts but acquitted him on the ground that s.7(c) refers only to "government vessel and that's the only vessel that's mentioned there". It follows from this interpretation that the words "the vessel's" could not mean the respondent's vessel but must mean the government vessel.

Reasoning of the Court -

I cannot agree with the interpretation placed on s.7(c) by the learned County Court Judge .... I cannot conceive that this was the legislative intent.

The only other result to which the interpretation of the learned County Court Judge leads is that s.7(c) is meaningless. I do not believe it is. It must be read in the context of s.7 as a whole and so read, its meaning is quite clear. I quote s.7 in full:

.../2

7. Every person is guilty of an offence who

(a) being master or in command of a fishing vessel,

(i) enters Canadian territorial waters contrary to this Act, or

(ii) without legal excuse, the proof whereof shall lie on him, fails to bring to when required so to do by any Protection Officer or upon signal of a government vessel;

(b) being aboard a fishing vessel, refuses to answer any questions on oath put to him by the Protection Officer;

(c) after signal by a government vessel to bring to, throws overboard or staves or destroys any part of the vessel's cargo, outfit or equipment; or

(d) resists or wilfully obstructs any Protection Officer in the execution of his duty.

The section, which is grammatically all one sentence, deals in (a) with offences by a person who is master of or in command of a fishing vessel. There then follows clauses (b) (c) and (d) which I think, on a proper construction of these clauses, deal with offences by persons "being aboard a fishing vessel". It follows therefore that s.7(c) refers first to a government vessel and secondly to a fishing vessel from which a person aboard has thrown overboard, staved or destroyed any part of her cargo, outfit or equipment. The words "the vessels" relate back not to the government vessel which has signalled but to the fishing vessel on which the person charged is aboard.

In coming to my conclusion as to the proper interpretation of s.7(c) of the *Coastal Fisheries Protection Act* I have not been unmindful of the submission made by counsel for the respondent that the Act is a penal statute and should be strictly construed. The learned author of Maxwell, on Interpretation of Statutes, 12th ed., stated at p.246:

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> The effect of the rule of strict construction might be summed up by saying that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail, to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. If there is no ambiguity, and the act or omission in question falls within the michief of the statute, the construction of a penal statute differs little, if at all from that of any other.

In my opinion there is no reasonable doubt of the meaning of s.7(c), nor ambiguity, and the act in question falls clearly within the mischief of the statute. The principal of strict construction of penal statutes therefore does not assist the respondent.

Appeal allowed.

Cite: 2 N.S.R. (2d) 409

Possible Ramifications of Decision:

1. Given interpretation of s.7(c) of *Coastal Fisheries Protection Act*.

2. Given rule of statutory construction - i.e. 7(c) should be read in the context of s.7 as a whole in order to determine its meaning.

Her Majesty the Queen v. Jean Claude Allain
Court of Queen's Bench of New Brunswick
February 14, 1984

Under s.38 *Fisheries Act* fishery officer "executing his duty" if he investigates when confronted with a situation that seems suspicious.
Fishery Officer permitted to investigate when confronted with a suspicious situation.
Interpretation of phrase "execution of duty" found in s.38 of *Fisheries Act*.

Facts -

A fishery officer was on a surveillance patrol at Neguac at approximately 8 p.m. While travelling on a street parallel to the shore, he noticed a truck parked near the shore, with a trailer hitched behind it. The truck was in the position of a vehicle that has launched a boat. Suddenly, he heard the sound of a motor boat coming toward the vehicle. At this point, the fishery officer lit his flashlight and identified himself. The accused at this point caught the fishery officer by the arms and held him. Minutes later the accused released him. Jean-Claude Allain, the accused, was accused of obstruction but was acquitted.

The crown is now appealing this acquittal.

The grounds for appeal are based on the fact that the trial judge incorrectly interpreted section 38 of the *Fisheries Act* and that he was in error in finding that the officer was not executing his duty during the incident in question.

Reasoning of the Court -

The trial in the case centred his attention on the question of whether the inspector was executing his duty, although he accepts that the officer was indeed on patrol in the exercise of his duty. He seems to feel that the officer did not have sufficient preliminary information to have the right to intervene as a fishery officer.

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With all respect, I believe that the judge in the case committed an error in law by giving the interpretation that he did to section 38.

... The trial judge seems to accept, as a fact that there was an obstruction. The whole of the testimony also supports the conclusion that this obstruction was voluntary.

Since the judge's decision is based exclusively on the officer's power to investigate, I believe that the appeal should be upheld, and that the accused should be found guilty. In the field of fisheries, if an officer could not investigate when confronted with a situation that seems suspicious, the act relating to the protection of the fishery would become impossible to apply.

Appeal allowed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Tells us the powers of a fishery officer under suspicious circumstances.

2. Gives indication of what constitutes suspicious circumstances that would allow fishery officer to investigate.

3. Gives interpretation of phrase "in the execution of his duty" contained in s.38 *Fisheries Act*.

Her Majesty the Queen v. Canadian Marine Drilling

In the Territorial Court of the Northwest Territories

November 3, 1983

Court must be on guard to see that large corporations do not avoid large fines and responsibility for their illegal actions by establishing a network of small corporations.

Reasons for sentence given following the corporate accused's conviction on a charge of permitting the deposit of a deleterious substance into water frequented by fish, contrary to s.33(2) *Fisheries Act*.

Facts -

The accused had accumulated a large amount of waste without the means of disposing it and with no plans for its disposition, the waste being simply stored. A barge containing some of the waste leaked and although the accused reacted quickly to begin salvage and damage containment procedures, the leakage continued over several days. There was no evidence of environmental damage but that was not a critical or significant factor.

Tuktoyaktuk Harbour is a body of water frequented by fish, and it is admitted that the slops contained oils, which are deleterious substances, within the meaning of the Act.

The defendant corporation is convicted of an offence that;

> "On or about the 2nd day of September, 1981 at or near the Hamlet of Ruktoyaktuk in the Northwest Territories, did permit the deposit of a deleterious substance, oil, in the water frequented by fish, to wit: Tuktoyaktuk Harbour, contrary to section 33(2) of the *Fisheries Act*".

Reasoning of the Court -

This matter is for sentencing today.

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Fillion v. New Brunswick International Paper Co.

New Brunswick Supreme Court, Appeal Division

February 13, 1934

Licences granted under *Fisheries Act* to set nets confer only a non-proprietary right as one of the public generally. Purpose of *Fisheries Act* is enunciated.

Facts -

The respondent bought fishing equipment from another man. He was told that the amount he paid included a sum for the fishing rights in the specific vicinity. No documentary title, however, was given to him. The respondent also obtained 4 licences from the Department of Marines and Fisheries to fish for smelts. Fournier, a fishery officer, gave him instructions as to where he might set his nets. Approximately a month later, the mill started to operate. The respondent then brought an action against the company. He complained that the mill wrongfully polluted the water where he had a right to fish, fouled his nets, and kept the water from freezing. He received judgement and the company now appeals.

There are two questions to be determined in this appeal:

1. Whether the respondent has a several (private) right of fishing?

2. Whether there was negligence by the mill?

N.B. [The reasoning with respect to these 2 questions will be noted to the extent that they might affect the Department of Fisheries]

Reasoning of the Court -

Several (Private) Right of Fishing.

The respondent had no right to fish "in a given place". The fishery officer had no power to grant a several fishery and whether the Minister had such power under s.7 of the Act does not arise in this case. It follows that

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the respondent who otherwise would have been prohibited from fishing in the waters below low water mark was permitted to do so by virtue of his licences. By the express provision of these documents he acquired no soil right from the Crown in the right of the Dominion of Canada;...

Negligence

The other branch of the claim remains to be considered. The plaintiff must first establish a duty by the defendant to the plaintiff to exercise... What is the duty? It does not arise from the provisions of the *Fisheries Act* ...

The provisions of the statute ... are directed to the preservation of fish life, not to the protection of the property of individuals...

Appeal allowed.

Cite: (1934) 3 D.L.R. 22

Possible Ramifications of Decision:

1. Demonstrates what is conferred by fishing licences under *Fisheries Act*.

2. Enunciates purpose of *Fisheries Act* ... directed at preservation of fish life and <u>not</u> to the protection of the property of individuals.

The terms absolute liability and strict liability have been used interchangeably in the cases. For the purposes of this manual, the terminology used by Dickson, J. in *R. v. Sault Ste. Marie* will be followed. His classification is as follows:

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

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving he took all reasonable care.... These offences may be properly called offences of strict liability.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing he was free of fault.

Regina v. D'Entremont

Provincial Magistrate's Court, Nova Scotia

Nichols, Prov Mag. Ct. J.

November 9, 1973

Lobster Fishery Regulations, s.3(1)(b) - offence of unlawful possession of lobster on unlicensed vessel requires proof of "mens rea" as well as fact of possession.

Facts -

The accused, Geoffrey D'Entremont, captain of the M. V. "Reciprocity" is charged that he did have on board the M. V. "Reciprocity", lobsters contrary to section 3(b) of the Lobster Fishery Regulations. This section provides that,

> 3(b) No person shall have, on board any boat or vessel, any lobster or portion of any lobster, unless that vessel is licensed for and is engaged in lobster fishing or is transporting lobster pursuant to section (5).

The M.V. "Reciprocity" is engaged in the scallop fishery and usually carries a crew of sixteen. On the day in question, the boat had docked when lobsters were found on the vessel in a jute bag hidden near the scallop drag gallows. The Captain was not on board the vessel at the time the lobsters were found. Also, Captain D'Entremont indicated in his evidence that he had no knowledge of the existence of these lobsters. In fact, he had given strict orders that any lobsters caught in the drags (the fishing apparatus of a scallop vessel) were to be thrown overboard immediately..... The key question here for decision is whether the accused had possession of the lobsters.

Reasoning of the Court -

The principles of contruction of this statute which makes possession of a forbidden substance an offence was laid down by the Supreme Court in *Beaver v. The Queen* (1957), 118 C.C.C. 129 where it is stated by the majority:

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> .....The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance.

Applying this principle to the words of the charge against the accused in the case at bar, the express finding of fact that the accused has no knowledge, factually or inferentially, of any lobsters on this vessel, and under his control, leads to a finding of not guilty.

The court also responded to the submission put forward by the Crown that the special authority of the accused who was master of the M. V. "Reciprocity" makes the accused responsible for all deeds and misdeeds which occur on his vessel. It stated,

> Shipping law does not make the captain of a vessel responsible for the illegal acts performed by other persons or crew members upon a vessel in the absence of knowledge of these acts or activities by the captain of the vessel. To vest such authority in the captain of a vessel.. would cast upon him a responsibility of such onerous proportion that he would be rendered incapable of effectively carrving out his responsibilities.

Accused acquitted.

Cite: 15 C.C.C.(2d) 395

Possible Ramifications of Decision:

1. Possession offences - mens rea necessary ingredient unless statute otherwise provides.

2. Qualification of the decision rendered in *R. v. Pierce Fisheries Ltd.* [1970] 5 C.C.C. 193.

3. Offences committed by crew member of vessel do not automatically make captain responsible.

Regina v. Appleby

Supreme Court of Canada

June 28, 1971

Standard of proof required to rebut statutory presumption created by reverse onus clause is proof by a balance of probabilities. Reverse onus clauses compatible with section 26(f) *Canadian Bill of Rights* that states that a person presumed innocent until proven guilty.

Facts -

The accused was charged with having care and control of a motor vehicle while his ability to drive was impaired by alcohol or a drug contrary to s.222 [now s.234] of the *Criminal Code*.

The sole question of law upon which leave to appeal to this court was granted was:

> that the Court of Appeal for British Columbia erred in holding that the degree or standard of proof required to rebut the statutory presumption created by s.224A(1)(a) of the *Criminal Code* is not proof by a balance of probabilities but only proof raising a reasonable doubt?

Submission Put Forward by The Respondent

In the course of his argument, Counsel for the respondent stated that "reverse onus clauses" ran contrary to the provisions of Section 2(f) of the *Canadian Bill of Rights*. Counsel felt that if provisions were so construed as to raise a rebuttable presumption of guilt it would "deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law." [S.2(f) *Canadian Bill of Rights*].

Reasoning of the Court -

Ritchie, J. - With all respect, it appears to me that if the Court of Appeal of British Columbia were correct in holding that it is enough to rebut the

presumption created by the words "shall be deemed" as they occur in s.224A(1)(a), for the accused to raise a reasonable doubt as to whether or not he entered the motor vehicle for the purpose of setting it in motion, then it would, in my view follow, that the Crown has established the basis of the presumption beyond a reasonable doubt, it must also give similar proof of the facts which the statute deems to exist and expressly requires the accused to negate. This is exactly the burden which the Crown would have to discharge if the section had not been enacted, and in my view such a construction makes the statutory presumption ineffective and the section meaningless. The burden required therefore is by a preponderance of evidence or by a balance of probabilities.

Canadian Bill of Rights Argument

It seems to me that... the words "presumed innocent until proved guilty according to law" as they appear in s.2(f) of the *Canadian Bill of Rights*, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients.

Laskin, J. - ...(T)he presumption of innocence gives an accused the initial benefit of a right of silence... What I have termed the initial benefit of a right of silence may be lost when evidence is adduced by the Crown which calls for a reply (such as in the case of a reverse onus clause)... It would be strange, indeed, if the presumption of innocence was viewed as entitling an accused to refuse to make any answer to the evidence against him without accepting the consequences in a possible finding of guilty against him. The presumption does not preclude either any statutory or non-statutory burden upon an accused to adduce evidence to neutralize, or counter on a balance of probabilities, the effect of evidence presented by the Crown. Hence I do not regard s.2(f) *Canadian Bill of Rights* as addressed to a burden of adducing evidence, arising upon proof of certain facts by the Crown even though the result of a failure to adduce it would entitle the trier of fact to find the accused guilty.

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Appeal allowed.

Cite: (1971) 3 C.C.C.(2d) 354
(1971) 4 W.W.R. 601
16 C.R.N.S. 35
21 D.L.R.(3d) 325
[1972] S.C.R. 303

Possible Ramifications of Decision:

[As there are reverse onus clauses in the *Fisheries Act*, the case is indeed relevant to the Department.]

1. Statement of what standard of proof is required by accused to rebut statutory presumption - must be proved on "balance of probabilities" or by "preponderance of evidence".

2. This decision also gives **possible** indication of how reverse onus clauses may be treated with respect to section 11(d) of *The Canadian Charter of Rights and Freedoms*. This section provides,

> 11. Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independant and impartial tribunal.

Pichette v. Deputy Minister of Revenue

Quebec Court of Appeal

February 11, 1982

When classifying offence as strict liability or mens rea, use of words such as "wilfully" or "intentionally" only facilitates ascertainment of legislative purpose, and may be overridden by context.

Facts -

The accused was charged with wilfully having evaded or attempted to evade the payment of moneys, contrary to s.62(d) of the *Quebec Revenue Department Act*. At trial, counsel for the accused admitted all the facts charged except that he acted "wilfully". Counsel for the accused moved for non-suit, alleging absence of proof of intent, this being a mens rea offence. The motion was dismissed and the accused was found guilty after having offered a defence. He appealed against his conviction on the ground that the trial judge should have granted the motion.

Section 62(d) of the *Quebec Revenue Department Act* provides as follows:

S.62 Whoever...

(d) wilfully, in any manner, evades or attempts to evade compliance with a fiscal law or payment of a duty imposed under such a law;...

is guilty of an offence...

Reasoning of the Court -

The learned trial judge dismissed the motion for non-suit as he concluded "que le mot 'volontairement' de l'article 62(d) de la Loi du Ministère du Revenu n'avait aucune importance et était redondant". This "redundancy" (and I now turn to the respondent's factum) would have been based on the fact that the words "éludé ou tenté d'éluder", as found in the Act, necessarily imply a voluntary (or wilful) act by the appellant.

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I agree with this finding, for the words "evades" or "attempts" to evade clearly imply some positive action. This is strong language, particularly for the attempt, and it imports a mental element, even without the qualifying adverb. True, in the opinion of Dickson, J. words such as "wilfully" and "knowingly" would place offences almost automatically into the first of the three categories - but this perhaps puts the matter too strongly and I prefer the observation of Jacoby and Létourneau in "Les soubresauts de Sault Ste. Marie et le droit pénal du Québec" (1981), 41 R. du B., that "L'utilisation de mots magiques, tels "volontairement, intentionnellement", peut sans aucun doute faciliter l'interprétation de l'intention législative".

And so it does, for Parliament is never deemed to speak without a purpose. But that is all it does - facilitate - and there may be occasions when the context overrides the "magic word" but here it does not; indeed, it strengthens it.

I therefore conclude that, on the face of it, the enactment in question falls into the first of Dickson J.'s three categories, that is to say, is a "mens rea offence".

Appeal allowed; new trial allowed.

Cite: 29 C.R. (3d) 129

Possible Ramifications of Decision:

1. Use of words such as "wilfully" or "intentionally" do not automatically lift an offence from one of strict liability to one of mens rea - only facilitates such an implication.

2. Note context to make determination whether offence one of mens rea or strict liability.

R. v. Morrison and MacKay

(S.C.A. 00375)

Nova Scotia Supreme Court, Appeal Division

February 15, 1979

To determine whether offence one of strict liability, absolute liability or mens rea, (1) note how section worded, (2) determine legislative intent of section, and (3) look at other decisions.

Facts -

The case arose out of a charge against the accused of carrying of carrying an unencased or undismantled rifle in their vehicle at night contrary to s.123(2) of the *Lands and Forests Act*.

On November 25, 1977, the two accused set out in a van on a hunting trip. They each had a rifle which was in the back of the van, fully exposed. Before leaving on this trip, they had secured the necessary licences and a copy of the regulations issued by the Department of Lands and Forests.

The men were stopped by a game warden. When asked, they stated that they did not know the guns had to be encased or that encased meant "to be wrapped in a blanket". It should be noted that the Regulations given to the accused did not contain s.123(2)(a); a section containing the definition of the word "encased". The regulations did contain however, a general regulation that provided that,

s.1. No person shall take, carry or have in his possession

(a) Any rifle, shotgun or other firearm during the period from one hour after sunset to one hour before sunrise, unless it is so encased or dismantled that it cannot be readily fired or made operable.

.../2

The accused were acquitted in the Provincial Court of the charge. A subsequent appeal by the Crown was dismissed in the County Court. The Crown now appeals on the following question of law:

That the learned Judge on Appeal erred in law in holding that an offence under section 123(2) of the *Lands and Forests Act* was not an offence of absolute liability.

Reasoning of the Court -

It appears obvious to me that Mr. Justice Dickson's conclusion in *R. v. Sault Ste. Marie* that the offence charged was one of strict liability was influenced to a large extent by the presence therein of the words "cause" and "permitted".

Sections 123(2), (2A) and (3) of the *Lands and Forests Act* were obviously enacted to prohibit night hunting and are couched in absolute terms, viz., "no person shall..." rather than the "cause" or "permit" language employed in the offence charged in the *Sault Ste. Marie* case.

In *R. v. Paul and Copage*, another case involving absolute liability, s. 152(1) of the *Lands and Forests Act* was held to be an absolute liability offence. Both s.152 and 123 under which the accused here are charged are found in Part III of the Act. Part III is entitled "Game" and is designed basically for the protection of game within the province.

The legislative intent in enacting s.123 of the Act was, of course, to stop night hunting. The section is worded in clear, commandment like language and, in my opinion, creates, and was intended to create, an offence of absolute liability as such is defined in the *Sault Ste. Marie* case.

Appeal allowed.

Cite: 31 N.S.R. (2d) 195
52 A.P.R.

Possible Ramifications of Decision:

1. Demonstrates some of the methods used to determine whether offence one of strict liability, absolute liability or mens rea.

R. v. Biron

Supreme Court of Canada

1975

Interpretation of s.450(1)(b) *Criminal Code* - Now, a peace officer may arrest someone he "apparently" finds committing an offence. When one peace officer arrests an accused and then hands him over to a second peace officer, the second peace officer is justified in taking the accused into custody - even if arrest by first officer is not lawful.

Facts -

The Montreal Police made an authorized raid on a Montreal Bar on October 24, 1970. Biron, the accused, was at the bar while the raid was taking place. He refused to co-operate with the police; verbally abusing them and refusing to give his name.

Biron was arrested inside the restaurant by a Constable Maisonneuve. He was led outside by a Constable Gauthier for questioning. He was then handed over by Gauthier to Constable Dorion who took him to the police wagon. Biron protested his arrest at this point and a scuffle with Constable Dorion ensued.

Biron was charged with creating a disturbance in a public place by shouting contrary to s.171(a)(i) of the *Criminal Code*. He was also charged with resisting a peace officer contrary to s.118. He was convicted of both offences before a judge of the Municipal Court. A trial de novo was held in respect of the s.171(a)(i) offence. He was acquitted of this offence of "creating a disturbance by shouting" on the ground that there was no evidence that he was shouting, as was alleged in the information. Biron then appealed the s.118 conviction to the Quebec Court of Appeal and was acquitted. The Crown now appeals.

The question in issue is as to whether the charge against Biron of resisting Dorion in the execution of his duty must fail because of his successful appeal from conviction under s.171(a)(i) of causing a disturbance?

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Submissions Put Forward on Behalf of Biron

It is argued that Biron had not been lawfully arrested because Maisonneuve's right to arrest him for a summary conviction had to be based on s.450(1)(b) of the Code which provides;

> 450(1) A peace officer may arrest without warrant
>
> . . . . .
>
> (b) a person whom he finds committing a criminal offence.

It is submitted that Maisonneuve did not find Biron committing a criminal offence because he was acquitted on the charge laid against him.

Reasoning of the Court -

It is certainly of public importance that the peace officer should be able to exercise the power of arrest promptly... In my opinion the wording used in paragraph (b), which is oversimplified, means that the power to arrest without a warrant is given where the peace officer finds a situation in which a person is "apparently" committing an offence.

In the present case, Constable Maisonneuve observed an apparent offence being committed by Biron. Thus, ... the resistance offered by Biron to Dorion constituted an offence.

Even if the arrest by Maisonneuve was not lawful, it is my view that Biron was guilty of the offence charged. It was Maisonneuve who made the arrest, not Dorion. The resistance with which Biron was charged was resistance to Dorion... Section 31(2) of the *Code* provides that Dorion was justified in receiving Biron into custody... Dorion who was a part of the police force conducting the raid, reasonably believed that Gauthier, who turned Biron over to him, had witnessed a breach of the peace.

.../3

I interpret the word "justified" in s.31(2) as meaning that Dorion had lawful sanction to receive Biron into his custody. He received him into his custody in the course of performance of his duties as a peace officer at the scene of a raid. Biron offered resistance to him in the execution of his duty.

Appeal allowed.

Cite: (1975) 30 C.R.N.S. 109
23 C.C.C. (2d) 513
59 D.L.R. (3d) 409
(1976) 2 S.C.R. 56

Possible Ramifications of Decision:

1. Now, power to arrest without warrant under s.450(1)(b) given where peace officer finds situation in which person "apparently" committing an offence. [Person doesn't have to be actually committing an offence].

2. Possibly, facilitates arresting process - peace officer doesn't have to worry about being liable for false arrest, if person not actually committing an offence.

3. As to second reasoning given - could give away to abuse of power by peace officers. [i.e. peace officers could effectively conspire together to arrest an individual].

N.B. [It should be noted that the events giving rising to this case took place during the October Crisis of 1970. This may partly explain the decision].

Bradley v. Town of Woodstock

New Brunswick Court of Queen's Bench

1978

When peace officer receives information from informant, he should investigate the reliability of these facts before making arrest. If this step not taken may not be possible for peace officer to use s.450 and s.25 *Criminal Code* as justification for his actions - as by not investigating he is not acting on "reasonable and probable grounds".

Facts -

Bradley was at a fair with his girlfriend and her two cousins. Suddenly, two uniformed men grabbed him by both arms and informed him that he was under arrest. He was taken to the police station where he was searched for narcotics. Apparently, an informant had told the police that Mr. Bradley might have narcotics. The police officers did not investigate the matter, but arrested Mr. Bradley solely on this information.

After finding nothing the police apologized and took Bradley back to the fair grounds. Bradley now brings on action for false arrest, assault and false imprisonment.

The issue to be determined here is whether the peace officers had "reasonable and probable grounds" to arrest, detain, and search Bradley?

Reasoning of the Court -

...(T)here is a great difference between the case in which a peace officer acts entirely upon his own initiative and one where he acts at the behest of a private citizen accusing another person of serious charges. In this other case, ...it is the duty of the officer to take preventive action and investigate the matter. This was not done in the present action. It is clear I find that Constable Jordan acted solely upon the information given to him by a questionable informant without taking any appreciable time to observe Mr.

.../2

Bradley or to test or investigate the reliability of the information which was given to them, which turned out subsequently to be erroneous.

...I am of the view (therefore), that Constable Jordan did not have reasonable and probable grounds to believe that Mr. Bradley had committed or was about to commit an indictable offence.

Judgement for plaintiff.

Cite: (1978), 22 N.B.R. (2d) 45

Possible Ramifications of Decision:

1. Should not automatically rely on information given by informant [Should investigate matter].

2. If this procedure not followed and suspect is arrested, officer may not be able to rely on s.450 or s.25 of *Criminal Code* as justification for his actions.

Her Majesty the Queen v. William Dougal Quinlan

Supreme Court of Ontario, Court of Appeal

December 5, 1978

The accused should be informed of the reason for his arrest. Arrest without warrant should be on reasonable and probable grounds.

Facts -

This is an appeal by the Crown from the acquittal entered by Judge MacMillan after a trial before him wherein the accused was charged that he did unlawfully assault a police officer while engaged in the lawful execution of his duty.

Reasoning of the Court -

Police officer did not advise the accused of the reason for the arrest and the circumstances were not such as to relieve the officer from that duty. At the time of the arrest there was no reasonable apprehension of a breach of the peace, and there was no evidence tendered as to the purpose of the arrest.

Under such circumstances the trial judge was correct in holding that arrest was unlawful.

Appeal dismissed.

Cite: Unreported.

Possible Ramifications of Decision:

1. When placing an accused under arrest, the fishery officer should ensure that the accused is given a reason for the arrest.

2. If not, the fishery officer may be liable for charge of false imprisonment.

R. v. Goreham

Nova Scotia Supreme Court, Appeal Division

May 5, 1976

Lying does not amount to obstruction of a police officer in the execution of his duty where the officer does not believe the falsehood.
If an information omits an essential element of an offence it is not void if it describes an offence. The information should only be amended, however, if the evidence is sufficient to prove the offence.

Facts -

This case arose out of a charge of obstructing a protection officer contrary to The Northwest Atlantic Fisheries Convention Act Regulations. The accused, a fisherman transferred an illegal haddock catch to another boat and when asked by an officer "where are your fish?", the accused replied, "I pitched them overboard". The officer did not believe the accused's untruthful answer and seized the fish from the other boat.

It should also be noted in this case that several mistakes were made on the information. Firstly, the information stated that the accused "did unlawfully obstruct a protection officer contrary to section 15(e) of the North Atlantic Fisheries Regulations instead of section 15(d)". Secondly, the information omitted the work "wilfully" where the same appears in the statute. Section 15(d) reads as follows:

> Every person who, resists or wilfully obstructs any protection officer in the execution of his duty... is guilty of an offence.

The trial judge acquitted the accused. The Attorney-General of Canada is now appealing.

The sole issue here is whether or not the actions of Larry Goreham in dumping his fish onto another boat and then lying about what he had done with them did in law constitute obstruction.

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Reasoning of the Court -

In giving reasons for his decision, the learned judge commented on the effects of the mistakes in the information. In my opinion the insertion of the words "subsection (e)" in the information instead of "subsection (d)" was merely a typographical mistake and of no consequence.

There can be no doubt that the omission of the word "wilfully" from an information where the same appears in the statute in relation to the offence is an omission of an essential ingredient. ....In my opinion, based on the facts of this case, the information is not void ab initio as it does describe, albeit barely, an offence.

To determine if the information should be amended, reference must be made to the facts to decide if the evidence does establish that the respondent wilfully obstructed the prosecution in the execution of his duty.... It seems to me that it would be under the circumstances, impossible to say in any rational sense that the conduct of the respondent in deliberately attempting to mislead the officer was not done wilfully.

As to the obstruction charge, it is clear that Officer Murphy did not believe the respondent's untruthful answer. As Constable Murphy was not misled by the accused, the accused could not be guilty of the substantive offence of obstructing. His actions though did constitute an attempt to obstruct...Thus the learned magistrate was correct in acquitting the respondent on the charge of obstruction.

Appeal dismissed.

Cite: 17 N.S.R. (dd) 441

Possible Ramifications of Decision:

1. In order for lying to constitute "obstruction" the fishery officer must believe what the accused tells hims.

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2. Greater awareness of the fine line between "obstruction" and "attempted obstruction".

3. Less charges dropped because of omissions on informations.

4. More care should be taken to ensure that information is written up properly.

R v. Mood

Nova Scotia Supreme Court, Appeal Division

April 26, 1976

Failure of a fisherman to pay for fish as promised, does not amount to wilful obstruction.

Facts -

The accused caught a quantity of haddock in excess of the legal limits permitted under the Northwest Atlantic Fisheries Regulations. The fishery officer seized this excess and agreed to sell these fish to the accused. The accused did not pay for the fish as promised. The accused was then charged that he did unlawfully obstruct a protection officer in the execution of his duty contrary to section 15(c) of the Northwest Atlantic Fisheries Regulations. The accused was acquitted of this charge and the crown is now appealing by way of stated case.

Reasoning of the Court -

The duty that Officer Murphy performed was the seizure of the fish. However, once he agreed to sell them to the respondent he obviously released them from seizure and in my opinion the failure of the respondent to pay for the fish although it obviously would support a civil action for the price of the goods sold and delivered, does not amount to a wilful obstruction of Officer Murphy in the execution of his duty.

Appeal dismissed.

Cite: 17 N.S.R. (2d) 407

Possible Ramifications of Decision:

1. Clarification of what constitutes obstruction.

2. If a similar situation arises in the future, the action should be enforced by civil action.

Jean Roberge v. Her Majesty the Queen

Supreme Court of Canada

March 24, 1983

S.450(1)(b) *C.C.* should be read as if word "apparently" contained in Section [i.e. a person whom he apparently finds...]. Also, must be "apparent" to reasonable person.

Peace officer having lawful authority under s.450 *Criminal Code* to arrest a person in one province and in pursuing leaves province, still retains his status of peace officer for the purposes of s.25(4) *C.C.*. Whether use of firearms reasonable, depends on circumstances.

Facts -

A police officer in the course of his duties had stopped a car just before the bridge that crosses from Quebec into New Brunswick. While questioning the driver he saw coming toward the bridge, a taxi being driven on the wrong side of the road and travelling at a high speed. As a result, the police officer got into his car and began to pursue the taxi. By doing so, he left Quebec and crossed over to Campbellton, New Brunwick. It should be noted here that the police officer was driving an unmarked car and did not have a red flasher.

The policeman attempted to get the car to stop at various intervals by activating his siren, signalling, overtaking and blocking, but to no avail. The police officer then took out his gun and fired two warning shots into the air. The chase continued until the taxi stopped. At this point, the police officer got out of his car and started to walk toward the taxi. Upon so doing, the taxi started to move and the police officer fired three shots towards the taxi; puncturing a wheel and putting two holes in the fender.

Following the incident, the police officer was charged in New Brunswick for having, without lawful excuse used his revolver "in a careless manner contrary to and in violation of s.84(2)(b) of the *Criminal Code*". He now appeals.

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Additional facts were brought forward in this Court concerning the incident. Some of this information is as follows:

1. Mr. Chassé (the taxi driver) had drank beer before making the trip back to New Brunswick. In fact, when the R.C.M.P. arrived at his door after the incident he was advised by his wife not to give a statement as he had had too much to drink.

2. Mr. Chassé did not go to the police station for protection when pursued even though the station was close to the area where he was at the time.

3. Mr. Chassé had been a taxi driver of long experience and had often driven customers as well as himself to the Quebec side. [The judge therefore found it difficult to accept that he did not recognize the uniform of the Quebec Police Force].

The relevant sections of the *Criminal Code* for this appeal are as follows:

S.450(1) A peace officer may arrest without warrant. . .

(b) A person whom he finds committing a criminal offence

S.25(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law... is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and everyone lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

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Three issues have to be determined in this court, namely;

1. Could the peace officer arrest Mr. Chassé under s.450(1)(b) of the *Criminal Code?*

2. Whether at the time he used his gun he had the protection of s.25(4) of the *Criminal Code*, even though he was in a different province?

3. Was his use of the firearm reasonable?

Response to Issue 1 -

The learned Judge applied the reasoning laid down in *R. v. Biron*, [1976], 2 S.C.R. 76 in determining whether the police officer could arrest Mr. Chassé under s.450(1)(b). Here it was stated that,

> the wording used in paragraph (b), which is oversimplified, means that the power to arrest without a warrant is given where the peace officer finds himself in a situation in which a person is apparently committing an offence....

In reference to this reasoning, the learned Judge in this court stated that,

> I do not read the test laid down in *R. v. Biron* as suggesting that it is sufficient that it be "apparent" to the police officer even though it would be unreasonable for the peace officer to come to that conclusion. Surely it must be apparent to a reasonable person placed in the circumstances of the arresting officer at the time.

He then concludes, stating that,

> Having read the record, I am of the view that, under the circumstances of this case, Constable Roberge's assessment of the situation to the effect that Mr. Chassé was commit-

ting the criminal offence of dangerous driving was made on reasonable and probable grounds.

Response to Issue 2 -

The question here, is of some importance, as the protection afforded an arresting citizen under s.25(1) is by s.25(3) much more limited than that under s.25(4).

...(M)y view is that, in a country such as ours, where there are over 15,000 kilometres of interprovincial and territorial frontiers, it is unreasonable to make so drastic a variance in the protection afforded our police officers under s.25(4) when they are in pursuit of a criminal dependent solely upon the officer crossing a border.

...Immediate arrest and the need for pursuit as a means to that end are essential to policy considerations that should not be defeated by stripping peace officers in the middle of a chase of their protection under s.25(4).

Response to Issue 3 -

Angers, J. of the Court of Queen's Bench was in my view right in law when assessing the reasonableness of Roberge's use of his firearm... (H)e found that the force resorted to under the circumstances was not excessive, which by implication means that the force had become "necessary to prevent the escape by flight" and that "the escape could not be prevented by reasonable means in a less violent manner.

This finding is one of fact with which this court cannot and should not interfere, unless we find that his conclusion is unreasonable and cannot be supported by the evidence... This is clearly not the case, Roberge had more than once attempted to stop the car by signalling, activating his siren, overtaking and blocking the car with his own, all to no avail. Furthermore, the escalation

of force resorted to was not disproportionate to that of the suspicion Chassé must have created in Roberge's mind as he persisted in his flight notwithstanding all those warnings.

To conclude, I would therefore allow the appeal, quash the Court of Appeal's judgement and restore the acquittal entered by the Court of Queen's Bench.

Appeal allowed.

Cite: Unreported.

Possible Ramifications of Decision:

As the definition of *peace officer* includes fishery officer, these officers are directly affected by this decision.

1. Gives interpretation of s.450(1)(b) *Criminal Code*.

2. States that if officer crosses border into another province while pursuing he still has justification for his actions under s.25(4) of the *Criminal Code*.

3. Whether use of firearms will be considered reasonable depends on circumstances.

Regina v. Scoretz

British Columbia Court of Appeal

June 13, 1980

Nothing in the *Fisheries Act* indicating that fishery officers must exercise their power to search in a reasonable manner.

Facts -

A fishery officer received an anonymous call from an informer who stated that there were illegal halibut aboard a fishing vessel. After watching the vessel for a few days, the fishery officer boarded the vessel to carry out the search. The owner was upset by this and started to swear at the officer. He then picked up a hose, turned up the pressure, and threatened to hose the fishery officer off the boat. At this point the fishery officer went in search of his supervisor. The supervisor came aboard the vessel, spoke to the owner, and a search of the vessel was conducted.

The owner was charged that he did unlawfully resist or wilfully obstruct a fishery officer in the execution of his duty. He was acquitted of the charge; the judge resting his decision on the ground that fishery officers must exercise their power to search reasonably.

Reasoning of the Court -

It is apparent... that there has been an error in law by the Provincial Court Judge, there being no basis upon which it can be said that the fishery officers must exercise their powers to search in a reasonable way.

The appeal will be allowed accordingly and a new trial directed.

Appeal allowed.

Cite: Unreported.

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Possible Ramifications of Decision:

1. No section of *Fisheries Act* - states that fishery officers must exercise their power to search in a reasonable manner.

2. Indicates that lawyers employed by Department of Fisheries were ill-prepared in the provincial court as they apparently were unaware that **no** section of the *Fisheries Act* provides that a search must be conducted in a reasonable manner.

3. Lawyers employed by the Department of Fisheries should be knowledgeable of the various sections of the *Fisheries Act*.

N.B. [It should be noted that now, by section 8 of *The Canadian Charter of Rights and Freedoms*,

(8) Everyone has the right to be secure against unreasonable search or seizure.]

R. v. Fraser

Docket No. G.D.C. - 1578

P.E.I. Supreme Court

December 12, 1979.

Absolute discharge in lieu of conviction. A minimum sentence would have been legislated if parliament had intended that an absolute discharge should not apply to offences such as those under The Lobster Fishery Regulations.

Facts -

A fisherman was charged under The Lobster Fishery Regulations for possession of undersized lobsters. The fisherman did not know he had such lobster, because his crew was instructed to throw them back into the water. The trial judge found the fisherman guilty and gave an absolute discharge. The crown appealed, submitting that an absolute discharge was not a proper sentence for such an offence, because the sentence was not in the public interest.

Reasoning of the Court -

If (parliament) had intended that an absolute discharge should not apply to offences such as those under The Lobster Fishery Regulations, it could easily have provided a minimum punishment for such offences. Parliament has not done so, and, consequently, it must be conceded that there are cases in which an absolute discharge could be granted to persons guilty of offending those regulations and that such a "sentence" would not be contrary to the public interest.

.....In my opinion, the excellent past record of the respondent as a good fisherman taking an active part in conservation programs related to the fishery weighs heavily in favour of an absolute discharge rather than a conviction.

Appeal dismissed.

Cite: 28 Nfld. P.E.I.R. 175

79 A.P.R.

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Possible Ramifications of Decision:

1. Qualification of the decision in *R. v. Pierce Fisheries* (1970), 12 D.L.R. (3d) 591.

2. Mitigating circumstances may be taken into consideration.

3. Possibly more absolute discharges will be given as a result of this decision.

Gillis v. The King

Prince Edward Island Supreme Court

December 18, 1935.

Mitigating cirumstances may reduce amount of fine to be paid.

Facts -

In the fall of 1933, the accused applied to the local fishery warden or guardian for a license to fish quahaugs and to lay off ground on which he could fish. The fishery warden, believing he did not have the authority, referred the accused to a Mr. Neil McLeod, the head fishery guardian. When the accused went to see Mr. McLeod, he was not there, so he left the licence fee with another man. Upon not receiving the license the accused went back several times to the local fishery warden to see if the license had been sent and whether instruction had been given to lay ground. No instructions had been received and the local fishery guardian refused to set off grounds on which he could fish. The accused then went to fish on grounds that had not been set out for fishing quahaugs, but he only got ten.

In the meantime, Mr. McLeod had written the accused a letter returning the $10.00 (for the license fee) and informing him that Biddeford River where the appellant wanted to fish was not open for the fishing of quahaugs. The accused claims that he had not received this letter when he fished for quahaugs. He also did not fish after receiving this letter.

An information was laid against the appellant for fishing quahaugs without a license and a conviction was obtained by which the accused was fined in the sum of $30.00 together with $17.50 in costs. The accused now appeals from this conviction.

Reasoning of the Court -

The appellant was rightly convicted of fishing quahaugs without a license, but I am of the opinion that there are mitigating circumstances which should be

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taken into consideration. The appellant had sent in the fee for the license. He caught only ten quahaugs. He did not fish after receipt of the head fishery guardian's letter refusing the license. The fine is altogether disproportionate to the offence. The Magistrate's conviction will be sustained but the fine will be reduced to the nominal sum of $1.00 without costs in the Magistrate's Court.

Conviction Affirmed.

Cite: C.C.C. Vol. LXV 127

Possible Ramifications of Decision:

1. A fine may be reduced if the circumstances warrant (It appears, however, that circumstances must be rather exceptional).

R. v. Doucette

Prince Edward Island Suprene Court

Tweedy, J.

March 5, 1974

Purpose of Lobster Fishery Regulations - to protect lobster beds from depletion in the general public interest. By s.646(5) of the *Criminal Code* the court can give the accused time to pay if it appears that the accused cannot pay his fine immediately.

Facts -

The accused was convicted of the charge that he fished for lobster without lawful excuse, in the waters of the Lobster Fishing District, during the closed season specified in the schedule for that district contrary to section 3(1)(i) of the Lobster Fishery Regulations and a punishment was imposed upon him of a fine of $500.00.

The accused appealed. The ground for the appeal is that the sentence was grossly excessive considering the loss to the appellant, the magnitude of the offence, and the means of the appellant to pay the fine. The argument was also put forward that the appellant be given time to pay the fine.

Reasoning of the Court -

Mr. Justice Tweedy follows the decision in *The Queen v. Pierce Fisheries Ltd.* (1970), 12 D.L.R. (3d) 591 where it is stated:

> ....that the Lobster Fishery Regulations are obviously intended for the purpose of protecting lobster beds from depletion.....

As to the sentence being grossly excessive, s.646(5) of the *Criminal Code* provides that,

> S.646(5) Where a court imposes a fine, the court shall not, at the time the sentence is imposed, direct that the fine be paid forthwith unless

.../2

(a) the court is satisfied that the convicted person is possessed of sufficient means to enable him to pay the fine forthwith.

From the evidence... it is apparent that the Appellant is not possessed of sufficient means to enable him to pay the fine forthwith and that he desires time for payment of the same. In this case, therefore, I would dismiss the appeal, convict the accused of the offence as charged, impose a penalty of $500.00 to be paid on or before the close of the Lobster Fishery Season....

Appeal allowed in part.

Cite: 6 Nfld. & P.E.I.R. 100

Possible Ramifications of Decision:

1. Made aware that s. 646(5) and (6) of the *Criminal Code* enable the court to give the accused time to pay his fine.

2. Indicates why Lobster Fishery Regulations have been enacted (One method of informing people).

There has been no evidence of submissions with respect to the size and wealth of the defendant, or that the defendant is unable to pay a maximum fine. As I have already indicated, the defendant is a wholly owned subsidiary of Dome Petroleum Limited.

... As the evidence has disclosed, the defendant is a wholly owned subsidiary of Dome Petroleum, and I believe the Court must be on guard to see that large corporations do not avoid large fines or responsibility for their illegal actions by establishing a network of small corporations.

In assessing the penalty for breach of this Act, the court must consider the source or origin of the chain of events, both in a physical sense and an attitudinal sense because they both combine to create the problem. To find those sources is, in some instances, to illuminate the basic problem and provide a focal point for the Court's efforts at deterrence.

In my view, the originating element in an attitudinal sense, is the lack of, or insufficient planning by, the defendant for what I consider obviously foreseeable contingencies. The defendant created a problem concomitantly creating a solution. It appears that little thought was given to the disposition of the slops until it became too large a problem, a high liability legally and financially, for the defendant to ignore. If this defendant or others similarly engaged, for that matter are going to create waste, it is incumbent upon them to create a waste disposal system. Waste disposal is not the same as waste storage.

The sentence today must, as much as possible, bring home to this defendant and others that the obligation is upon them to protect the public from the risks of their enterprise, and this must include provision for disposition of waste <u>before</u> waste is created.

The defendant has solved the physical problem of slops: ... (I)t would appear ... that the physical source of the danger and the physical source leading up to the events of September 2, has been eliminated. It would appear,

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therefore, that no further threat exists in that regard, but in my view, the Court must consider the attitudinal source as continuing, and that that must be a subject of some consideration with respect to deterrence.

It is submitted that the defendant expended $244,560 as a result of its efforts to contain and then clean up this spill, and it is suggested that the Court ought to consider that expenditure in some mitigation. I am not persuaded that I should do so for two reasons: first, the cost, whatever it is, is as a direct result of the defendant's own conscious acts and omissions -- its crime, and I do not believe any defendant can come to the court asking that expense be taken into mitigation; and secondly, I am not satisfied that the figures represent an accurate breakdown of the actual costs incurred by the defendant.

... The defendant has pleaded guilty, but the use of that fact in mitigation has to be tempered with the fact that the defendant was inescapably caught, I accept, however, in substantial mitigation, that upon seeing the crisis shortly after it occurred, the defendant acted promptly and with all the resources required to contain the spill and clean-up later. Due to past planning and some forethought, the defendant was able to draw from a substantial inventory of equipment, materials, and trained personnel. It made provision for this kind of emergency in the past, and this forethought prevented what would have been a disastrous spill of oil had the whole three hundred thousand gallons contained in the barge escaped into Tuktoyaktuk Harbour.

Balancing these factors together with the other factors commonly considered in sentencing in environmental situations of cases, the court must impose an appropriate penalty. The penalty must not only fit the crime and represent a balance of those factors, but it must also fit within the limitations imposed by way of the method of prosecution. Originally, the defendant had been charged with an offence alleging,

> Between the 31st day of August 1981 and the 5th day of September, 1981, at or near the Hamlet of Tuktoyaktuk, in the Northwest Territories, did permit the deposit of a deleterious substance, ... contrary to section 33(2) of the *Fisheries Act*.

.../4

That information was withdrawn prior to plea and replaced by an Information which forms the basis for the sentence today, alleging one count for September 2 only.

The maximum penalty is, therefore, pursuant to section 33(5); $50,000. Had the Crown proceeded with the original Information and obtained convictions thereunder by virtue of section 33(6), the maximum penalty would be $300,000. The Court does not question the right of the Crown to choose the method and manner of prosecuting. That is its function, and it is not the function of the Court. That choice, however, does affect the Court's Scope or range in assessing penalty.

... The Crown's election, as it were, represents a prosecutorial choice of procedure reflecting the prosecutor's view of the seriousness of the offence.

I point out, at this juncture, that the defendant was spending sixty to ninety thousand dollars per month per barge for slop storage. I am told there were, at one point in time, ten barges used for slop storage for one year. This amounts to in excess of seven million dollars ($7,000,000) for the ten barges moored in Tuktoyaktuk Harbour. Whether the barges were moored there for one year or a lesser period is unclear from the evidence. In any event, I am prepared to conclude that the defendant was willing to spend, and able to spend, millions of dollars for the temporary storage of slops.

This storage must express its grave reservations with respect to the significance and deterrent effect of a fine scaled to a maximum of $50,000 on a defendant willing and able to spend these kinds of sums for slop storage.

Notwithstanding the above, however, a virtually unused and potentially far reaching and effective sentencing tool remains in the Court's hands, and that is section 33(7).

It is clear to me, that through this section, a convicting Court may intervene in the internal and external operations of a corporation. In fact, it

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may be able to pierce the corporate veil in a significant way, if, in the opinion of the Court, its actions will or are likely to prevent the commission of any further offence.

In proper circumstances, this section may, perhaps, be used for orders such as restitution, compensation, affirmative action, clean-up or even an order to a defendant to restock a body of water with fish; all, of course, provided that the order is or will likely prevent further offence by the defendant. It would appear to be that such an order making a defendant liable financially for damage brought as a result of its activities could have a significant and positive effect as a deterrent.

I mention subsection 7 as a caution to this defendant that, in the future, there may be repercussions for illegal conduct which, as I have already indicated, go far beyond fines in their effectiveness. This court will not hesitate to use this tool in future cases with any defendant where the circumstances warrant.

There will be a fine of $20,000. In default, distress.

Cite: Unreported.

Possible Ramifications of Decision:

1. Court must be on guard to see that large corporations do not avoid large fines and responsibility for their illegal actions by establishing a network of small corporations.

2. In assessing the penalty for a breach of the *Fisheries Act*, the Court must consider the source of origin of the chain of events.

3. Section 33(7), a potentially far reaching and effective sentencing tool remains in the Court's hands.

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4. The Crown has the right to choose the method and manner of prosecuting. It should be noted that this choice will affect the Court's scope or range in assessing the penalty. - i.e. - Here the Crown choose to withdraw the information that alleged that the offence had occurred between the 31st August and the 5th day of September and replaced it with an information alleging one count for September 2 only. As a result, the maximum penalty pursuant to s.33(5) was $50,000. Had the Crown proceeded with the original Information and obtained conviction by virtue of section 33(6), the maximum penalty would be $300,000.

5. The objective behind sentencing, here, is to bring home to the defendant and others that the obligation is upon them to protect the public from the risks of their enterprise.

Her Majesty The Queen v. Burton Hubbard

In the Court of Queen's Bench of
New Brunswick, Trial Division
March 7, 1983

An information drafted in the words of the section which create the offence, is not void for uncertainty. Statutory Construction - Not permissible to treat provision as void for mere uncertainty.

Facts -

This is an appeal from a judgement of a Judge of the Provincial Court rendered the 30th day of August, 1982 in which the Respondent was found not guilty of the charge that he, on or about the 30th day of June, A.D. 1982, at or near Cassilis, in the County of Northumberland and Province of New Brunswick, did unlawfully have in his possession a salmon without a salmon tag affixed to it in accordance with subsection 22 to 24, of the *Fish and Wilflife Act of New Brunswick* or *Fish Inspection Act of New Brunswick,* contrary to Section 18 subsection 28 of the New Brunswick Fishery Regulations, as amended.

Although three grounds of appeal were given, the learned trial Judge only deals with one of these grounds. It is as follows:

> That the learned trial Judge erred in law in finding that the information, drafted in the words of section 18, subsection 28 of the New Brunswick Fishery Regulations, was confusing and consequently was void ab initio

Reasoning of the Court -

Section 18(28) of the New Brunswick Fishery Regulations as amended under which the present charge was laid reads:

> "No person shall be in possession of any salmon unless a salmon tag is affixed thereto in accordance with subsections

.../2

R. v. Oickle

Nova Scotia Provincial Magistrate's Court

Carver, J.

January 10, 1977

A person cannot be in possession of an object without having knowledge of its existence.

Facts -

The accused was charged with unlawful possession of illegal ammunition, contrary to section 150(1)(b) of the *Lands and Forests Act* (N.S.) The accused was the driver of a car which had illegal ammunition locked in the trunk. The accused was not aware of the presence of the ammunition.

Issue: Whether Mr. Oickle had possession of the illegal ammunition?

Reasoning of the Court -

In order to determine whether there is possession, Mr. Justice Carver examined the authorities. In the case of *Regina v. Woodrow* (1846), 15M 1 W 404, Pollock in the course of his reasons for judgement noted:

> ....a man can hardly be said to be in possession of anything without knowing it. Alderson, B. in the same case noted.... I am not in possession of anything which a person has put into my stable without my knowledge. In the case of hand, Mr. Oickle was not aware that the ammunition had been put in his trunk. Having taken the above authorities into consideration, I find that Mr. Oickle was not in possession of the illegal shells.

Action dismissed.

Cite: 33 N.S.R. (2d) 146
41 A.P.R.

.../2

Possible Ramifications of Decision:

1. "Possession" of ammunition contrary to s. 150(1)(b) of the *Lands and Forest Act* is a mens rea offence.

Her Majesty the Queen v. Kelly Terrence

Supreme Court of Canada

March 24, 1983

A constituent and essential element of possession under s. 3(4)(b) of the *Criminal Code* is a measure of control on part of person deemed to be in possession.

Facts -

The accused was charged with "unlawfully having in his possession a Chevrolet....", contrary to section 33(a) of the *Criminal Code*.

The facts are as follows:

The accused was watching T.V. when a friend, Hayes, dropped by and asked him if he wanted to go for a ride in his brother-in-law's new car. The accused believing the car belonged to Hayes' brother-in-law went. Shortly after the car turned onto a highway, an O.P.P. cruiser gave chase. When Hayes finally slowed down because of an O.P.P. roadblock, the accused jumped from the moving vehicle and ran into the adjoining field.

The accused was convicted in the Provincial Court. The Court of Appeal quashed this conviction. The Crown now appeals.

The important question raised by this appeal relates to the true meaning to be attached to the word "possession" as the same occurs in section 3(4)(b) of the *Criminal Code* and more particularly whether "possession" as there employed imports control as an essential element. Section 3(4)(b) reads as follows:

(4) For the purposes of this Act,...

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

.../2

Reasoning of the Court -

I agree with the Court of Appeal that a constituent and essential element of possession under s.3(4)(b) of the *Criminal Code* is a measure of control on the part of the person deemed to be in possession by that provision of the Criminal Code.

Appeal dismissed.

Cite: Unreported.

Possible Ramifications of Decision:

1. "Control" essential element of possession under s.3(4)(b) - no conviction without evidence of this element.

R. v. King

New Brunswick Court of Queen's Bench, Trial Division

Judicial District of Fredericton

Dickson, J.

March 18, 1982

An information declaring "unlawful possession of the carcass of a deer or any part thereof", is not duplicitous but merely contains an alternative method of committing the offence."

Facts -

The defendant was charged that he did

> ...unlawfully have in his possession... the carcass of a deer (sic) or any part thereof, contrary to and in violation of section 58 of the *Fish and Wildlife Act* of New Brunswick.

Section 58 of the *Fish and Wildlife Act*, R.S.N.B., 1973, C.F.-14.1 provides:

> S.58 Every person who at any time has in his possession the carcass of a moose or deer or any part thereof, except in accordance with the Act and the regulations, commits an offence.

The defendant was convicted and now appeals on the grounds that,

The learned trial judge erred in finding that the information upon which the accused was convicted was not void for duplicity or multiplicity.

Reasoning of the Court -

Mr. Justice Dickson follows the test put forward in *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353: Is the accused prejudiced in the preparation of his defence by ambiguity in the charge? From this he concludes that "in the

.../2

instant case the accused could in no way be prejudiced by that phrasing of the charge which was employed". And only one offence is to be found at the focal point of the charge, namely, that of unlawfully having in possession some portion of a deer's carcass.

Appeal is dismissed.

Cite: 38 N.B.R. (2d) 535
100 A.P.R.

Possible Ramifications of Decision:

1. Demonstrates application of test of multiplicity as put forward in *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353.

R. v. Robert Arnold Porter

Judge P. R. Woolaver

N. S. Provincial Magistrate's Court

November 1, 1979

Information should state the specific item in a schedule. - Partial enforcement of regulations by the Department of Fisheries constitutes usurpation of the powers of the Governor in Council.

Facts -

The accused is charged that he did unlawfully fish for herring with a purse-seine during the closed season in the waters described in Schedule IV contrary to section 14(5) of the Atlantic Coast Herring Regulations. Section 14(5) reads as follows:

> No person shall fish for herring with any gear set out in column 1 of an item of schedule 4 in any waters described in column 2 of that item during the period set out in column 3 of that item.

(In Schedule 4 there are 8 items forbidden by Section 14(5) of the regulations).

The evidence also discloses that the aforementioned closed season has rarely, if ever, been enforced. Indeed such officials have made it known to herring fishermen that it was not the intention of the Department of Fisheries to enforce such closed seasons.....

Reasoning of the Court -

It is the view of the Court that the failure of the information to allege which item of the schedule that the accused is charged with violating does not give the accused sufficient notice of the breach of the law alleged against him. The accused therefore ought not to be asked to make answer to a charge expressed in such broad terms.

.../2

The partial enforcement of the closed season as set out in Regulation 14(5) as passed by the Governor in Council amounts to a change in the said Regulations in the substitution therefore of a new Regulation made by the officials of the Department of Fisheries. This substitution constitutes usurpation by the officials of the Department of Fisheries of the powers of the Governor in Council given to him by Parliament, to the point where in the absence of notice to such fishermen as the accused it ought not to be enforced.

.....The Department of Fisheries....have visited upon the said Regulation 14(5) a degree of confusion among herring fishermen such as to make it impossible for them to know when it was lawful to fish and when it was not lawful to fish....I am further satisfied that insufficient effort was made by the Department of Fisheries to inform the fishermen including the accused as to the state of the law on the date of the alleged offence.

For the aforementioned reasons, I find the accused not guilty of the offence of which he is charged.

Accused acquitted.

Cite: Unreported case.

Possible Ramifications of Decision:

1. Demonstrates the specificity required when writing up information.

2. If there is to be only partial enforcement of a regulation, the Department of Fisheries should ensure that fishermen are aware when such regulations will be enforced or possibly Regulations should not only be partially enforced.

R. v. Poker, Maleck, Mastenpeo and Mastenpeo

Newfoundland District Court, Judge's Criminal Court

Index D.C.J.

August 13, 1981

The wording of section 17A(2) is clear and unambiguous. The accused has a right to seek the Minister's consent to have either s. 84 or s. 85 of the *Summary Jurisdiction Act* apply to s.17A of the *Wildlife Act*.

Facts -

The defendants appealed their sentences after having been convicted of unlawful possession of moose contrary to section 17A(1)(i) of the *Wildlife Act*. In the lower court, a recording was not made of "the proceedings". A report on sentencing was available although this document was written some time after the actual hearing.

The ground of appeal relevant to the decision is as follows:

That the learned trial judge erred in his interpretation of section 17A(2) of the *Wildlife Act* and in his interpretation of section 84 of the *Summary Jurisdiction Act*. Section 84 of the *Summary Jurisdiction Act* deals with the power to reduce penalties.

Section 17A(2) of the *Wildlife (Amendment) Act* provides that:

> 17A(2) - Section 84 and 85 of the *Summary Jurisdiction Act* shall not, except with the consent of the Minister of Justice, be applied in disposing of a prosecution for an offence under this section or in imposing punishment for any such offence.

Counsel for the appellants states that an application was made before the learned trial judge to seek the consent of the Minister of Justice under the provisions of 17A(2). He argued that where the words and intention of the legislature are clear they should be applied. He submitted that the intention

.../2

of 17A(2) is quite clear and therefore the accused has a "right" thereunder to seek the Minister's "consent" to have either section 84 or 85 of the *Summary Jurisdiction Act* become applicable.

Reasoning of the Court -

In my opinion, the wording of section 17A(2) is clear and unambiguous ...I accept this argument without any reservation whatsoever. In doing so, it follows that I accept the submission that such an application was made before the learned trial judge under 17A... [As there was no recording of the hearing, the judge relied on the trial judge's apparent dissatisfaction with 17A(2) in the "Report on Sentencing" in order to make such an inference].

In the result...I hold the sentence imposed by the learned trial judge must be set aside.

Appeal allowed.

Cite: 32 Nfld. & P.E.I.R. 181
91 A.P.R.

Possible Ramifications of the Decision:

1. Interpretation of statutes - should **not** leave out relevant phrases when interpreting.

2. Section 84 and 85 of the *Summary Jurisdiction Act* cannot be resorted to without the consent of the Minister of Justice. Hence, the Minister's involvement in the administration of the Act is heightened.

3. Demonstrates the effects of the *Summary Jurisdiction Act*.

(22) to (24), the *Fish and Wildlife Act of New Brunswick* or the *Fish Inspection Act of New Brunswick*".

I am of the opinion that the information, drafted in the words of the Section which creates the offence is not void for uncertainty. Section 510 of the *Criminal Code*, made applicable to the present offence by virtue of section 729(1) thereof is as follows:

Section 510(1): Each count in an indictment shall in general apply to single transaction and shall contain and is sufficient if it contains in substance a statement that the accused committed an indictable offence therein supplied.

(2) The statement referred to in subsection (1) may be

(a) in popular language without technical averments or allegations of matters that are not essential to be proved,

(b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence, or

(c) in words that are sufficient to give to the accused notice of the offence with which he is charged.

This section under which the Respondent is charged creates in my opinion one offence.

It is agreed by Counsel that the Provincial Acts themselves do not provide for the affixing of tags but that the Regulations enacted under those Acts do. Since this is the case, the Respondent submits, inter alia, that the Section is void for uncertainty.

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Halsbury's Law of England, 3rd Edition, Vol. 36, p. 389 reads:

> It is not permissible to treat a statutory provision as void for mere uncertainty, unless the uncertainty cannot be resolved, and the provision can be given no sensible or ascertainable meaning and must therefore be regarded as meaningless.

It would appear to me that the proper interpretation is that where a tag is affixed in accordance with the Regulations passed under the authority of the Provincial Act, when the Act itself is silent, it is a logical conclusion that they are therefore affixed in accordance with the Act; and that it therefore not necessary that the specific regulations be cited.

I therefore conclude that the information as laid under the authority of Section 18(28) of the New Brunswick Fishery Regulations, as amended, is not void for uncertainty.

I am of the opinion that I **must allow the** appeal, set aside the verdict, and order a new trial.

Cite: Unreported.

Possible Ramifications of Decision:

1. Section 510 *Criminal Code* sets out what is necessary for an information to be valid.

2. Given Rule of Statutory Construction - It is not permissible to treat a statutory provision as void for mere uncertainty, unless the uncertainty cannot be resolved.

R. v. Ross

British Columbia County Court

1945

Breach of Ministerial Order where no knowledge or notice - not compatible with justice that person be convicted.

Facts -

The accused, in company with three companions went to Cowichan Lake with the intention of hunting and fishing on September 7, 1944. Between September 8 and 10, 1944 the four companions indulged in some hunting activities. On the 10th, the accused and his companions were accosted by forest and game officials. They were told at this time, that the said District was declared a closed district as from 12 o'clock noon September 8, 1944, by order of the Minister of Lands pursuant to the power conferred upon the said Minister by subsection (1) of s.119 of the *Forest Act*, without first obtaining from the Forest Branch a written permit. As a result, the companions were charged and convicted of unlawfully and in violation of the provisions of the *Forest Act* of entering this district. The accused is now appealing.

The ground of appeal relevant to the decision is as follows: that there was no promulgation of the order and the appellant had no knowledge or notice of the order, at any material time.

Reasoning of the Court -

There does not appear to be any provisions in the *Forest Act*, or any other act, that I can find, requiring promulgation of such an order, nor any provisions excluding such a requirement.

I think it hardly compatible with justice that a person may be convicted and penalized, and perhaps lose his personal liberty by being committed to jail in default of payment of any fine imposed, for the violation of an order of which he had no knowledge or notice at any material time.

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It therefore follows that the appeal herein is allowed.

Appeal allowed.

Cite: [1945] 1 W.W.R. 590
[1945] 3 D.L.R. 574
84 C.C.C. 107

Possible Ramifications of Decision:

1. Where no knowledge or notice of ministerial order - no conviction.

2. Attempts should be made to bring ministerial orders to attention of general public if convictions for breaches are desired.

R. v. Dagley

(S.C.A. No. 00391)

Nova Scotia Supreme Court, Appeal Division

June 14, 1979

The only time a statute will not be given a meaning is when it is truly impossible to do so. It is a court's duty, by applying the usual principles of construction and interpretation, to try to ascertain which meaning was intended by the legislators.

Facts -

The respondent fisherman was charged under section 11(1)(b) of the Northwest Atlantic Fisheries Convention Act Regulations of having a quantity of haddock in excess of the amount made pursuant to the regulations.

It was held in both the trial and county court that the newspaper notice where this regulation was published would be ambiguous to an ordinary reasonable man. The notice, therefore, lacked any effect and the accused was acquitted.

The newspaper notice reads as follows:

> "The quantity of haddock that may be caught and retained by a person should not exceed the greater of five thousand pounds and ten percent of the total weight of fish on board his vessel.

The Crown appeals this decision.

The issue before this court is whether the learned County Court Judge erred in finding that the published notice was not clear and was ambiguous in the use of the words "shall not exceed the greater of five thousand pounds and ten percent of the total weight of fish on board his vessel"?

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Reasoning of the Court -

....Only if the problem is insoluble and no meaning can be detected, may an enactment like this be held to create no offence in law. Here, however, I have no real difficulty in construing the phrase. I find no grammatical error in it or other problem in determining its meaning... The phrase does not make a comparison or require the disjunctive "or". It rather requires a selection of one of the two listed amounts.

Appeal allowed.

Cite: 32 N.S.R. (2d) 421
54 A.P.R.

Possible Ramifications of Decision:

1. Clarifies the meaning of Section 11(b) Northwest Atlantic Fisheries Regulations.

2. Interpretation of statutes - court will always attempt to give meaning to statute (lack of clarity and having two or more possible meanings are not grounds for finding an enactment unenforceable).

3. Demonstrates how similar phraseology (i.e. the greater of A and B) should be read when it appears in other sections of the *Fisheries Act* or the regulations.

Regina v. Darcy Dale Worthington

In the County Court of Westminister

British Columbia

February 10, 1984

The onus is with the accused person to assert his or her rights under the *Charter*.

Facts -

This is an appeal from a conviction under section 235 of the *Criminal Code*, refusal to take a breathalyzer test.

Counsel for the appellant argues that a charge under section 235 and on the corresponding charge of blowing over the requisite percentage of blood alcohol, there is self-incrimination involved. Therefore, he argues that there should be an onus on the Crown to inform such an accused person of his rights to retain and instruct counsel without delay.

Reasoning of the Court -

... As compelling as that argument is, it seems to me that the *Charter* is designed to give citizens of this Country certain rights which they must themselves put forward.

Learned Crown counsel cites Mr. Justice Seaton in the recent Court of Appeal decision in *Regina v. Collins* as indicating that the onus is with the accused person to assert his or her rights under the *Charter*. I believe that that is the way the *Charter* has been designed by our Parliament.

In this case, the police officers, at no time, were asked directly by the learned Defence counsel whether or not they had, in fact, informed this accused Worthington of his right to retain and instruct counsel ... I do not think it can be a valid point for the Defence counsel to expect the Crown to discharge an onus of showing in that a case a citizen's rights have been violated. Indeed,

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if the evidence is silent, it would appear to me that one should interpret that rights have not been violated until the accused person or citizen show that they have, and then, of course, what steps the Court is going to take because of the infringement then come into play after section 24 of the *Charter*.

I dismiss the appeal.

Cite: Unreported.

Possible Ramifications of Decision:

1. See application of *R. v. Collins* [See 20-J].

2. Held that onus is with the accused person to assert his or her rights under the *Charter* if he or she feels they have been violated.

Her Majesty the Queen v. William S. Trask

In the Supreme Court of Newfoundland

1981

Docket # 181

There is no difference in substance between the intent and meaning of section 2(c) of the *Bill of Rights* and section 10 of the *Charter*. The *Charter* does not intend a transformation of our legal system or the paralysis of law enforcement.

Facts -

This is a Crown appeal by way of stated case, from the acquittal of the respondent by Judge O.M. Kennedy of the Provincial Court of a charge laid under section 236(1) of the *Criminal Code*. The trial judge's disposition of this matter was based on his interpretation of section 10(b) of the *Canadian Charter of Rights and Freedom* as contained in the *Constitution Act*, 1982.

On May 15, 1982, an Information was laid against the respondent alleging that he had, on May 6, 1982, unlawfully driven a motor vehicle when the alcohol level exceeded 80 mg. of alcohol per 100 ml. of blood, contrary to s.236(1) of the *Code*. At the trial of the matter, the respondent pleaded "not guilty". The evidence indicated that, after having been stopped by the police, he was given a breathalyzer demand under section 235(1). He acceded to this demand and accompanied the police officer to the local detachment office and submitted to the test. The police officer stated in his evidence that he did not inform the respondent, prior to administering the test, of his rights under section 10(b) of the *Canadian Charter of Rights and Freedoms;* namely, the right to retain and instruct counsel without delay and to be informed of that right. Following a motion made by counsel for the respondent, the trial judge held that there had been a detention of the respondent and dismissed the charge because of non-compliance with section 10(b).

... Here, we are dealing with a demand made under section 235(1) to accompany a peace officer for the purpose of providing breath samples in order that the

.../2

proportion of alcohol in a person's blood be determined. Section 235(1) states as follows:

> 235(1) Where a peace officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two hours has committed, an offence under section 234 or 236, he may, by demand to that person forthwith or as soon as practicable, require him to provide then or as soon thereafter as is practicable, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician referred to in subsection 237(6) are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood and to accompany the peace officer for the purpose of enabling such samples to be taken.

It is common ground that there was no arrest involved here. Further, the respondent voluntarily accompanied the police officer to the R.C.M.P. detachment office where he submitted to the test without objection.

Issue in Case

The question is thus whether in these circumstances, i.e., acceding to the demand of the police officer for the purpose of complying with the statute, he could be said to have been detained.

Reasoning of the Court -

The learned judge quotes from *R. v. Chromiak* (1980) 1 S.C.R. 471, a decision made under the *Canadian Bill of Rights* by the Supreme Court as follows:

> It appears to me to be obvious that the word "detention" does not necessarily include arrest, but the words "detain" and "detention" as they are used in s.2(c) of the *Bill of*

.../3

> *Rights*, in my opinion, connote some form of compulsory restraint and I think that the language of s.2(c)(iii) which guarantees a person "the remedy of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful" clearly contemplates that any person "detained" within the meaning of the section is one who has been detained by due process of law.
>
> ...Detained means held in custody as is apparent from such provision as s.15 of the *Immigration Act*, R.S.C. 1970, C. I-2.

After having quoted from this judgement, the learned judge comes to this conclusion.

Thus, the Supreme Court found that there was no detention. As to its applicability to the present case, I can discern no difference in substance between the intent and meaning of section 2(c) of the *Bill of Rights* and section 10 of the *Charter* which would warrant another finding. The *Charter of Rights and Freedoms* creates no new rights in this regard, but rather constitutionally guarantees existing rights. I agree on both counts with the observations of Zuber, J.A. in *R. v. Altsheimer* 29 C.R. (3d) 276 at page 282, that:

> "... the *Charter* does not intend a transformation of our legal system or paralysis of law enforcement".

Further, even if the contention of the respondent that he was detained within the meaning of section 10 of the *Charter* and that section 10(b) requires the peace officer provision, nevertheless I am unable to accept the contention that the evidence should be excluded under s.24(2).

The evidence was not obtained in contravention of the *Charter*. It was properly obtained in accordance with the provisions of the *Criminal Code*. There is no evidence that the accused had any reasonable excuse to refuse to provide

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samples of his breath. If he had been informed of his right to retain and instruct counsel and had indeed consulted counsel, counsel would have undoubtedly advised him of his obligation to provide the samples demanded. To admit evidence of the certificate under these circumstances could not possibly bring the administration of justice into disrepute. In my view the opposite is true.

... I note, however, that there is no unanimity of opinion on this point, as seen from the many Provincial Court decisions in particular, and even found in the few decisions rendered to date by superior courts of various provinces.

The verdict of acquittal is set aside and the matter is remitted to the Provincial Court for continuation of the trial in light of the above answers.

Cite: Unreported.

Possible Ramifications of Decision:

1. Held that words "detain" and "detention" in s.10(b) of the *Charter* connote some form of compulsory restraint.

2. Those decisions made under *Canadian Bill of Rights* s.2(c) are applicable to s.10(b) of the *Charter*.

3. Held that the *Charter* does not create new rights under s.10(b) but constitutionally guarantees existing rights.

4. Also, see application of s.24(2) of the *Charter of Rights*.

R. v. Therens

Saskatchewan Court of Appeal

April 15, 1983

The word "detention" in s.10(b) of the *Charter* should be given its ordinary meaning.

Under s.24(1) *Charter* there is a wide discretion by the courts to exclude evidence obtained in violation of the *Charter*, as distinct from the duty under s.24(2) to exclude such evidence where its admission would bring the administration of justice into disrepute.

The *Charter* should not be blunted or thwarted by technical, legalistic, or unduly restrictive applications.

Facts -

The accused lost control of his motor vehicle and it collided with a tree. A police officer made a demand for a breathalyzer test under s.235(1) of the *Criminal Code*. The accused accompanied the police officer to the police station and there supplied samples of breath. At no time was the accused informed of any right to retain and instruct counsel. The accused's charge of driving with excess alcohol in his blood was dismissed, the trial judge ruling that s.10(b) of the *Canadian Charter of Rights and Freedoms* had been violated and that the breathalyzer certificate should be excluded under s.24(1) of the *Charter*. The Crown appealed by way of stated case.

The questions of law posed on the stated case for the decision of this court are:

1. Did the court err in law in holding that that the accused person, Paul Mathew Therens, had been detained within the meaning of s.10 of the *Canadian Charter of Rights and Freedoms?*

2. Did the court err in law in holding that it had a power to exclude evidence under subsection (1) of s.24 of the *Canadian Charter of Rights and Freedoms* whether or not admitting the evidence in question would bring the administration of justice into disrepute?

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In order to deal with the issues, it is desirable to quote the following provision of the *Criminal Code:*

> 235(1) Where a peace officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two hours has committed, an offence under section 234 or 236, he may, by demand made to that person forthwith or as soon as practicable, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician referred to in subsection 237(6) are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

Reasoning of the Court -

Response to Issue 1

... I am of the opinion that the principles enunciated in *Chromiak v. R.*, [1980] 1 S.C.R. 471 and *R. v. Dedman* (1981), 32 O.R. (2d) 641 are not determinative of the issues in this case. While cases under statutes such as the *Bill of Rights*, R.S.C. 1970, App. III, may be of interpretative assistance, it must be remembered that the *Charter* stands on an entirely different basis. It is not a mere canon of construction for the interpretation of federal legislation...

Our nation's constitutional ideals have been enshrined in the *Charter* and it will not be a "living" charter unless it is interpreted in a meaningful way from the standpoint of an average citizen who seldom has a brush with the law. The fundamental rights accorded to a citizen under s.10(b) should be approached on the basis of giving the word "detention" its popular interpretation, in other words its natural or ordinary meaning. The implementation and application of

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the *Charter* should not be blunted or thwarted by technical or legalistic interpretations of ordinary words of the English language. Using this approach, our citizens will not be blunted or thwarted by technical or legalistic interpretations of ordinary words of the English language. Using this approach, our citizens will not be placed in a position of feeling that the statements in the *Charter* are only rights in theory. If these rights are to survive and be available on a day to day basis we must resist the temptation to opt in favour of a restrictive approach. If a restrictive interpretation is given to the word "detain" then this will be tantamount to saying that the law does not recognize rights under s.10(b) as applying to an accused before arrest.

Applying this approach to the within appeal, I am of the opinion that there was evidence in which the learned trial judge could find that the respondent was "detained" within the meaning of s.10(b) of the *Charter*. It was clearly open to the learned trial judge to find that there was a temporary restraint falling short of formal address which amounted to a "detention" in the ordinary sense of the word. In the circumstances of this case, the law authorizes a peace officer who has reasonable and probable grounds to believe that the accused has committed an offence under s.234 or s.236 within the preceding two hours, to exercise a temporary restraint on the liberty of the accused for the purpose of carrying out procedures authorized by law. This temporary restraint on the accused may be imposed without the necessity of a formal arrest but there is no reason why s.10(b) of the *Charter* should not apply. An obstreperous or knowledgeable citizen might trigger his arrest and consequently the application of the *Charter* by attempting to run from the peace officee or alternatively by refusing to accompany him to the location of the breathalizer machine - in this case at the police station. From the standpoint of the law and social policy, this would not be a desirable situation. On the other hand, the average citizen would acquiesce in the demand made by a peace officer rather than suffer the potential embarrassment of further proceedings that could arise. Surely the rights under s.10(b) of the *Charter* are to be extended to the rank and file members of society who may have little contact with the justice system. When you consider the circumstances of this case and in particular the contents of the demand that was made to him, it cannot be said that the respondent accused was free to

.../4

depart as he pleased. To say he was not detained is simply a fiction which overlooks the plain meaning of words from the viewpoint of an average citizen. An officious bystander would have no difficulty in concluding that the respondent was detained and would probably feel that at the very least, that the peace officer had taken the respondent into temporary custody. While they do not deal directly with the interpretation of the word "detention" as set forth in s.10(b) of the *Charter*, many of the decided cases dealing with false arrest or false imprisonment have captured the average citizen's concept of detention in a very realistic way.

I accordingly conclude that Question 1 must be answered in the negative. In disposing of this question as I have, it should be pointed out that on this appeal by stated case direct to this court, it is not necessary nor advisable that I should express any opinion as to the applicability of s.10(b) of the *Charter* when a person has been signalled to stop at a road block, or for a road check under the *Vehicles Act*, R.S.S., 1978, C. V-3, or under the A.L.E.R.T. program. Different considerations may apply in such situations and the issue will no doubt be fully argued in later cases.

In arriving at the above conclusion I am not unmindful of the observations of Zuber, J.A. in *R. v. Altseimer* (1982), 38 O.R. (2d) 783; in which he stated inter alia, that the *Charter* does not intend a paralysis of law enforcement. I agree with that observation but, in the circumstances of this case, I would point out the application of s.10(b) would not pose any hardship for law enforcement officers.

Response to Issue 2.

... In interpreting s.24(1) of the *Charter*, I proceed on the footing that the courts are now charged with special responsibility to help fulfil the realization of our constitutional ideals enshrined in the *Charter*.

In this case the learned trial judge expressly found that one of the respondent's rights as guaranteed by the *Charter* had been infringed ... However,

.../5

learned counsel for the appellant asserts that in respect of evidence, once the court determines that an infringement or denial of a right has occurred, it is still necessary for the court to further determine whether the accused has established that the admission of evidence, having regard to all the circumstances, would bring the administration of justice into disrepute; if it is not so established by the accused to the satisfaction of the court, then the evidence must be admitted even though obtained as result of the infringement or denial of a right guaranteed by the *Charter*.

This approach to s.24 of the *Charter* calls for careful consideration because in many criminal cases such an interpretation would result in no effective remedy for an infringement or denial of a fundamental right. I prefer to look upon s.24(1) of the *Charter* as a sincere attempt on the part of society to provide full and adequate remedies for the violation of fundamental rights and freedoms. To have a right or freedom without an adequate remedy is to have a right or freedom in theory only - a hollow or empty right. If the term "remedy" is s.24(1) does not authorize a trial judge to impose discretionary sanctions against the admissibility of evidence where it is appropriate and just to do so, then in many cases the denial or infringement of a fundamental right guaranteed under the *Charter* would give rise to no remedy in a criminal case unless resort could be had to the more drastic remedy by way of stay of proceedings. In some criminal cases the only appropriate and just remedy, given a breach of a fundamental right or freedom, would be the exclusion of evidence. Under s.24(1) the infringement of a fundamental right or freedom does not automatically result in the exclusion of evidence obtained in violation of constitutionally protected rights. Such a step is only taken when the court concludes that it is appropriate and just to do so.

I would accordingly answer issue 2 in the negative, and, in doing so, I also adopt with respect, the following reasons of the learned trial judge:

The remedy sought by the accused in this case is to have me exclude the evidence of the results of the breathalyzer tests.

.../6

... After having given a great deal of consideration to the argument of counsel for the Crown, I have reached the conclusion that the power of the court to exclude evidence is not limited to cases falling within the scope of s.24(2) of the *Charter*.

Section 24(1) provides that when any right or freedom guaranteed by the *Charter* has been infringed or denied, the person whose right or freedom has been infringed or denied has the right to apply to the Court to obtain "such remedy as the Court considers appropriate and just in the circumstances". That must surely include the power to exclude evidence, if the court considers that to do so would be "appropriate and just in the circumstances".

I can find nothing in the language of s.24(2) which is capable of being interpreted as limiting in any area the very broad powers that have necessarily been conferred on the Courts under s.24(1) in order that they may discharge their duty to grant remedies to persons whose rights and freedoms, as guaranteed by the *Charter* have been infringed or denied.

I regard s.24(2) not as limiting the provisions of s.24(1) but rather as strenghtening the enforcement mechanism by providing that, in the particular circumstances set forth in s.24(2), the Court shall exclude the evidence.

In my view, then, under s.24(1), the Court, on an application under the section, has a discretionary power to exclude evidence if the Court considers that to do so would be "appropriate and just in the circumstances". Under s.24(2) the Court must exclude evidence if

(a) the Court concludes that such evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter*,

and

(b) it is established that, having regard to all the circumstances, the admission of evidence in the proceedings would bring the administration of justice into disrepute.

.../7

The above approach taken by the learned trial judge leans in favour of emphasizing the fundamental rights guaranteed by the *Charter*. I endorse such an approach because, in my approach, this court should not balance away the respondent's constitutional guarantee under s.10(b) to be informed of the right to counsel. If the trial judge in this case cannot exclude the evidence under s.24(1), then perhaps no other remedy or sanction is available unless the court entertains an application for the far more drastic remedy of a stay of proceedings. The framers of the *Charter* have clearly specified certain constitutional safeguards for an accused person which courts should strive to uphold rather than balance away on the footing that only minimal risks are involved. I think that it is far safer for the courts to emphasize the constitutional guarantees instead of substituting words not mentioned in s.10(b) and s.24...

In the result, **the appeal is dismissed.**

Cite: 33 C.R. (3d) p. 204

Possible Ramifications of Decision:

1. A common sense approach is taken to the meaning of "detained" in s.10(b) of the *Charter* - i.e. The court reasons that even if the subject has not been arrested, he has been temporarily deprived of liberty and it is not meaningful to speak of his freedom to leave.

2. Given an expansive definition of s.24(1) *Charter of Rights*. [i.e. That there is a wide discretion to exclude evidence obtained in violation of the *Charter*, distinct from the duty under s.24(2) to exclude such evidence where its admission would bring the administration of justice into disrepute.

3. Given methodology in general for interpreting the *Charter*. The *Charter* should not be blunted or thwarted by technical, legalistic, or unduly restrictive interpretations.

.../8

4. The learned judge is of the opinion that the principles enunciated in *Chromiak v. R.*, [1980] 1 S.C.R. 471, a case decided under the *Bill of Rights*, are not determinative of the issues under the *Charter* for the *Charter* stands on an entirely different basis. This is in contrast to *R. v. Trask* [See 20-B].

Her Majesty the Queen v. Lou Rocher

In the Supreme Court of the Northwest Territory

May 13th, 1983

Licensing requirements under s.22 Northwest Territories Fishery Regulations, C.R.C. 1978, C.847, s.22 offend against the *Canadian Bill of Rights*, by reason of racial discrimination.

Facts -

This appeal calls into question the licensing requirements of the Northwest Territories Fishery Regulations, C.R.C. 1978, c. 847 enacted under the *Fisheries Act*, R.S.C. 1970, c.F-14, s.34, as those requirements stood on the date of the alleged offence (December 1, 1980). Several grounds of appeal were argued, but the only ground of any merit is that the requirements of the Regulations offend against the *Canadian Bill of Rights* 1960, c.44, by reason of racial discrimination.

The facts are not in dispute. The appellant, at the time in question, was fishing through the ice with a gill net off Burwash Point in Yellowknife Bay, which was then outside the limits within which he was authorized to engage in commercial fishing under his commercial licence. He was fishing to provide food for his dog team, which he used for winter transportation. He did not have a licence authorizing him to engage in fishing for that person ("domestic fishing" under the Regulations) at that place and time. The conditions made it impossible for him to fish in the area of which he held his commercial licence, at the time in question.

... The appellant was not an "Indian", and "Inuk" or a "person of mixed blood", as defined in the regulations.

The offence of which the appellant was convicted and in respect of which conviction he now appeals is created by subsection 5(1) of the Regulations:

> 5(1) No person shall engage in fishing of any kind except under authority of a licence or permit.

.../2

That subsection must, however, be read in conjunction with and subject to section 22 of the Regulations:

> 22. Notwithstanding subsections 5(1) and 7(1), an Indian, Inuk, or person of mixed blood may fish without a licence by his traditional methods for food for himself, his family or his dogs.

Appellants Submission

The appellant's submission is that if he were an Indian, Inuk or person of mixed blood (in the sense of the Regulations), since he was fishing without a licence, by his traditional methods, for food for his dogs ... He submits that he has been subjected to racial discrimination under the Regulations by being prosecuted for fishing without a licence in circumstances where, if he were an Indian, an Inuk or person of mixed blood (as defined by the Regulations), he should not even have been charged (or convicted, if charged in error). He says that his offence, in effect, is purely "racial".

On that basis, the appellant invokes the *Canadian Bill of Rights*, more particularly the following:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (b) the right of the individual to equality before the law and the protection of the law;
>
> .....
>
> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian*

.../3

> *Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared...

... The licence which the appellant should have had, according to the Regulations, was one issued under section 23:

> 23. A domestic fishing licence may be issued to a person who is a Canadian citizen or a permanent resident and who has resided in the Northwest Territories for a period of not less than two years and needs fish for food for himself, his family and his dogs.

Reasoning of the Court -

... Bearing in mind, that to be eligible for a domestic fishing licence one must not only be a citizen or permanent resident of Canada but must also "need fish for food" for oneself, one's family and for one's dogs, under the Regulations, the class of persons so eligible is readily seen to be restricted to those who, like the appellant, live off the open land and its waters, the year round. Others, who may keep dogs for sport or show, or as pets, and who gain their livelihood in the wage economy, do not appear to qualify. If this view of section 23 is correct, as I believe it to be, this puts the appellant in essentially the same class, in terms of lifestyle and livelihood, as those who are exempted from licensing under section 22, the only difference being the racial factor.

... It appears, furthermore, that the exemption purportedly given by section 22 of the Regulations applies, according to its terms as enacted, to persons other than "Indians" whether in the sense of the *Indian Act* or the wider sense recognized in Reference re the Term "Indian", so as to be available to the majority of the population of the Northwest Territories, being persons classed as "Indians" in that wider sense, or persons "of mixed blood" (commonly called "Metis" in the Mackenzie Valley area) within the intendment of section 22,

leaving a minority (of which the appelant is one) which is subjected to the domestic fishing licence requirement and is unable to rely on the s.22 exemption, on racial grounds only. It is as if the Regulations made it an offence to be of pure Caucasian or Negro race while engaged in domestic fishing without a licence in the Northwest Territories.

... The federal objective presumably in mind when section 22 of the Regulations was enacted was the preservation of aboriginal rights and freedoms in relation to domestic fishing by "Indians" in the widest sense of that term, although it is at best doubtful that this objective can be met by section 22.

... As the number of individuals living off the open land and its water in the Northwest Territories must be diminishing every decade, and as few of these in any event are outside the scope of section 22, there would appear to be no impairment of the objective being attained, and possibly even an enhancement of prospects for its attainment, if the words of racial qualification were to be removed. If that is done, persons who may well be entitled at law to enjoy, aboriginal rights and freedoms but who are now excluded from the scope of section 22 will also be included, provided that they are engaged in fishing for food for themselves, their families or their dogs by their traditional methods.

... I have concluded tht the words of racial connotation in section 22 of the Regulations must be removed in order that the section may be construed and applied so as not to abrogate, abridge or infringe upon the rights and freedoms of persons such as the appellant, more particularly the right of the individual to equality before the law without discrimination by reason of race, as required by the *Canadian Bill of Rights*.

The appeal is allowed.

Cite: Unreported.

.../5

Possible Ramifications of Decision:

1. Demonstrates how section of regulations may offend the *Canadian Bill of Rights*, Section 1, [or now s.15(1)] of the *Canadian Charter of Rights*, s.15(1).

2. Greater care needed when enacting regulations.

Regina v. Oakes

Ontario Court of Appeal

1983

A reverse onus provision cannot be justified as a reasonable limitation of the right to be presumed innocent under s.1 of the *Charter of Rights* in the absence of a rational connection between the proved fact and the presumed fact.

Facts -

The constitutional issue arises on an appeal by the Attorney-General of Canada from the acquittal of the respondent, on a charge that the respondent on or about December 1981 unlawfully had in his possession a narcotic to wit : cannabis resin for the purpose of trafficking contrary to s.4(2) of the *Narcotic Control Act*. The facts giving rise to the appeal are not in dispute. On the evening of December 17, 1981, Constable Hatfield of the London Police Department observed the respondent seated in the driver's seat of a motor vehicle parked near a tavern in London, Ontario. The respondent was searched and eight one gram vials of cannabis resin in the form of hashish oil were found in his pants pocket. The respondent was arrested and taken to the police station where, upon a further search of the respondent $619.45 was found.

The respondent called no evidence on phase 1 of the trial and the trial judge found he was in possession of the drug. Following this finding, counsel for the respondent at the trial contended that s.8 of the *Narcotic Control Act* violates the right of an accused to be presumed innocent, guaranteed by s.11(d) of the *Canadian Charter of Rights and Freedoms*.

The trial judge held that s.8 of the *Narcotic Control Act* is rendered inoperative by s.11(d) of the *Charter* except where the Crown first leads evidence "upon which it could be concluded beyond a reasonable doubt that the purpose of the possession was to traffic."

... The trial judge then acquitted the respondent of the offence charged, stating he was not satisfied beyond a reasonable doubt that the respondent was

.../2

in possession of a narcotic for the purpose of trafficking and found the respondent guilty of possession only.

The Attorney-General of Canada appeals against the acquittal on the grounds of law that the trial judge erred in holding that s.8 of the *Narcotic Control Act* is rendered inoperative by virtue of s.11(d) of the *Canadian Charter of Rights and Freedoms*.

The relevant provisions of the *Narcotic Control Act*, the *Canadian Charter of Rights and Freedoms*, and the *Canadian Bill of Rights* will now be given.

Section 3 of the *Narcotic Control Act*, in part reads:

> 3(1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.
>
> (2) Every person who violates subsection (1) is guilty of an indictable offence and is liable...

Section 4(2) of the *Narcotic Control Act* provides:

> 4(2) No person shall have in his possession any narcotic for the purpose of trafficking.

Section 4(3) provides that every person who violates s.s.(2) is guilty of an indictable offence and is liable to imprisonment for life.

Reasoning of the Court -

After noting those decisions made under the *Canadian Bill of Rights* and the American decisions respecting the "presumption of innocence", the learned justice makes the following conclusions:

A reverse onus provision which, on proof of certain facts by the prosecution, casts on the accused the burden of disproving on a balance of probabilities an essential element of the offence does not, however, contravene the right

.../3

to be presumed innocent guaranteed by the *Charter*, provided that the reverse onus by way of exception to the general rule is a reasonable limitation of that right such as can be demonstrably justified in a free and democratic society.

The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors, including such factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or by both criteria; (b) the difficulty of the prosecution making proof of the presumed fact, and (c) the relative ease with which the accused may prove or disprove the presumed fact. Manifestly, a reverse onus provision placing the burden of proof on the accused with respect to a fact which is not rationally open to him to prove or disprove cannot be justified.

Great weight must be given to Parliament's determination with respect to the necessity for a reverse onus clause in relation to some element of a particular offence .... However, a reverse onus provision, even if otherwise justifiable by the above criteria, cannot be justified as a reasonable limitation of the right to be presumed innocent under s.1 of the *Charter* in the absence of a rational connection between the proved fact and the presumed fact. In the absence of such a connection the presumption created is purely arbitrary.

As I have previously indicated, the right to be presumed innocent guaranteed by the *Charter* is wholly illusory if Parliament can require a jury to convict an accused of an offence in the entire absence of proof of any fact or facts which rationally tend to prove that an essential element required by the definition of the offence exists. A rational connection between the proved fact and the presumed fact exists where the proved fact and the presumed fact exists where the proved fact raises a probability that the presumed fact exists.

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In deciding whether such a rational connection exists the courts should attach due weight to Parliament's determination, if Parliament has addressed the question. Where empirical data might validate an inference that would not appear to be warranted by common experience, I would be prepared to examine any information made available to Parliament in enacting the reverse onus legislation and which might tend to establish a rational connection between the proved fact and the presumed fact. No such material was put before us in this case.

I have reached the conclusion that s.8 of the *Narcotic Control Act* is constitutionally invalid because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic). Moreover, upon proof of possession, s.8 casts upon the accused the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence.

Where the possession of a narcotic drug is of such a nature as to be indicative of trafficking, the common sense of a jury can ordinarily be relied upon to arrive at a proper conclusion. Accordingly, there is no need for a statutory presumption.

Initially, I was attracted to the view held by some trial judges, in the cases previously referred to, that s.8 was constitutional but inoperative in those cases where the accused possessed only a small quantity of a narcotic drug which did not indicate that the drug was possessed for the purpose of trafficking. After careful consideration I have rejected that view. Parliament has made no distinction based upon the quantity of drugs possessed, and I do not think we are entitled to rewrite the statute. Parliament, if it had wished to do so, might have decided that possession of a specified quantity of a certain drug was more consistent with trafficking than possession for personal use, and could have made the possession of a specified quantity presumptive evidence that the drug was possessed for the purpose of trafficking. If Parliament had made that determination (and assuming that the determination was not capricious), I would be disposed to think that it would be a determination that Parliament is

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constitutionally empowered to make. Since, however, Parliament has not addressed that issue, I do not think the courts should undertake the rewrite the statute by applying it on a "case by case" basis even if we were entitled to do so, and I think we are not. The presumption created by s.8 is in the nature of a mandatory presumption. Its constitutional validity must be determined by an analysis of the presumption divorced from the facts of the particular case.

I would, therefore, **dismiss the appeal.**

Cite: (1983) 2 C.C.C. (3d) 339
C.R. 193

Possible Ramifications of Decision:

1. Courts not entitled to rewrite statute when interpreting by applying provisions of Federal Statute on case by case basis.

2. The determination of the constitutional validity of a reverse onus provision must be determined by an analysis of the presumption divorced from the facts of the particular case.

3. Threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offence in question. [Given several of the factors to be considered when determining threshold question].

4. Great weight to be given to Parliament's determination with respect to the necessity for a reverse onus clause in relation to some element of a particular offence.

5. A reverse onus provision cannot be justified as a reasonable limitation of the right to be presumed innocent under s.1 of the Charter in the absence of a rational connection between the proved fact and the presumed fact. In the absence of such a connection the presumption created is purely arbitrary.

Charles A. Quinlan v. Her Majesty the Queen

In the County Court of Nova Scotia

October 24, 1983

Ban on Sunday Fishing imposed by section 7(3) of the Lobster Fishery Regulations (CRC 1978-817) is a violation of Section 2(a) of the *Charter of Rights* because it is a ban serving the religious conscience of majority in District 4(a).

Facts -

The defendant was convicted of the following charge:

> No person shall set or haul a lobster-trap on a Sunday in any lobster fishing district, other than Lobster Fishing District Nos. 9, 10a, 10b, and 10d, or offshore Fishing District A.

He now appeals. His main ground for appeal is that section 7(3) of the Regulations violates section 2(a) of the *Constitution Act*, 1982.

The relevant provision of the *Charter of Rights* reads as follows:

Section 2. Everyone has the following freedoms,

(a) Freedom of conscience and religion...

In essence the appellant submits that the ban discriminates against persons whose religious faith does not call for the observance of the Sabbath on Sunday.

Reasoning of the Court -

The appellant cites the of *Henry Birks and Sons (Montreal) Ltd. v. Montreal and Attorney General of Quebec* (1955) S.C.R. 799 as authority for the contention that the "true reason" for the ban was religious. The learned judge, here, follows the reasoning put in this case and quotes Mr. Justice Rand as follows:

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> The ban on Sunday fishing prescribes what in essence is a religious obligation.

I have come to the conclusion that the ban on Sunday fishing imposed by section 7(3) of the Lobster Fishery Regulations CRC 1978 Chapter 817 is a violation of section 2(a) of the *Charter of Rights* in that it is bsically a ban serving the religious conscience of a majority in the area of District 4(a).

Section 2(a) of *Charter of Rights* provides fundamental freedoms - a serious violation cannot be justified as a reasonable limitation in a free and democratic society. Section 7(3), therefore, is declared to be unconstitutional and inoperative.

Appeal allowed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Gives some indication of how the *Charter of Rights* does and will affect the Department of Fisheries.

2. Department of Fisheries in enacting similar regulations should be guided by this decision.

R. v. Maillet

New Brunswick Court of Appeal

March 13, 1984

(Docket # 254/83/CA)

Section 3(3)(b) Lobster Fishery Regulations - If not established that alleged offence occurred within relevant district view most favourable to accused taken - i.e. assumed that accused was fishing elsewhere. Thus, where accused reasonably attempts to comply with the law by bona fide following a practice whereby potentially undersized lobsters were set aside for accurate measurements at convenient time, he has exercised sufficient diligence to escape liability.
Offence of having undersized lobster strict liability offence. Thus accused's intention or lack of it was irrelevant. The regulation of the fisheries in the manner prescribed in the section in no way violates s.6(2) of the *Charter of Rights*.

Facts -

The appellant and helper were lobster fishing from the appellant's boat. A Department of Fisheries boat approached flying its "L" flag. The fishery officers boarded the appellant's boat and found undersized lobsters in two buckets. The entire catch was seized and subsequently sold. The appellant was charged and convicted of having in his possession lobster less than 2.5 inches in length contrary to s.3(3)(b) of the Lobster Fishery Regulations. This conviction was appealed to the Court of Queen's Bench and was upheld. The appellant now seeks to appeal to this court.

Other additional information is as follows:

1. No evidence was addressed and the case was proceeded upon at trial and on appeal on the basis of agreed facts.

2. It was agreed that the lobsters in the buckets were mixed lobsters right near the measure.

.../2

Reasoning of the Court:

Before addressing the issues at hand, Mr. Justice LaForest made the following comments:

Proceeding on the basis of agreed facts has clear disadvantages. Some facts or their implications may not be as clear to persons not familiar with an activity as it is to the parties. Thus counsel had to explain to us that a double catch indicated catches made on two successive days and that persons on a vessel accosted by a Department of Fisheries boat flying its "L" flag were required to suspend all their activities. That is hardly the best way to establish facts. What is more the respondent on this appeal sought to deny any knowledge that "the helper was not involved in the measurement of lobster that season". I do not think these additional matters are very much material, but as will be seen later there are deficiencies in the statement of facts that might well have been corrected had the parties proceeded in the usual way by calling witnesses.

The first issue addressed was whether or not there was possession.

It is difficult to maintain that the appellant was not in possession of the lobsters that form the subject matter of the charge. He was obviously in control of them and he apparently intended to control them. Whether or not he intended to possess undersized lobster is irrelevant, for it is clear from *R. v. Pierce Fisheries Ltd.*, (1977) S.C.R. 5 that the offence is one of strict liability. Mens rea is not required. Some other defence must, therefore, be established if he is to escape liability.

After establishing that there was in fact possession the learned judge went on to decide **whether the defence of due diligence applied.**

In addressing this issue, it is important that the scheme of the legislation and the context in which it is to be applied be carefully examined...

.../3

... The relevant provisions read as follows:

3(1) No person shall, in any district or portion thereof described in Column 1 of any item of Schedule 1,

...

(b) fish for or have in possession any lobster of a length that is less than the length specified in Column III of that item.

(2) A person fishing for lobsters in any district described in Column I of an item of Schedule I shall measure each lobster at the moment it is removed from the trap and, if the length of the lobster is less than the length specified in Column III of that item, shall return it to the water immediately.

(3) No person shall at any time fish for, sell or have in possession any lobster

...

(b) that is less than $2\frac{1}{2}$ inches in length.

... It was not established whether or not the alleged offence in this case occurred within the specific districts and, taking the view most favourable to the accussed, it must be assumed that he was fishing elsewhere.

From the fact that s.3(2) expressly requires that a person fishing in any of the specific districts referred to must measure each lobster the moment it is removed from the trap, and if it is undersized, return it immediately to the water, there is an implication that a less rigorous practice will be tolerated elsewhere.

If, therefore, the evidence is sufficient to establish that the appellant

.../4

was reasonably attempting to comply with the law by bona fide following a practice such as that described in *Zoel Maillet v. The Queen* (1984), 51 N.B.R. (2d) 84. [Here, the accused were following a practice described in a publication of the Department of Fisheries of segregating undersized lobster from lobsters of acceptable length by placing them in separate containers with a view of checking their sizes at a convenient time after emptying the traps]. I would be prepared to hold that he had not exercised sufficient diligence in attempting to comply with the law to escape liability.

Here, the trial judge appears to have convicted the accused on the basis that s.3(2) applied and that no reasonable explanation was given for not returning the lobsters immediately to the water as contemplated by that provision. The judge on appeal held that s.3(2) governed the situation. In convicting the accused on this ground on the facts as we have them, the trial judge committed an error of law and accordingly I would grant leave to appeal and allow the appeal. I would quash the conviction and order a new trial.

Finally, the appellant also argues that the *Charter of Rights* ensures to every citizen the right to gain his livelihood. It is difficult to understand how the regulation prevents him from gaining his livelihood. The regulation of the fisheries in the manner prescribed by the section in no way violates the provisions of the Charter.

For the reasons given, I would grant leave to appeal and *allow the appeal.* The conviction should be quashed and a new trial ordered.

Cite: 53 N.B.R. (2d) 69
138 A.P.R.

Possible Ramifications of Decision:

1. It was stated in the case that proceeding on the basis of agreed facts has clear disadvantages. Some facts or implications may not be as clear to persons not familiar with an activity as they are to the parties involved.

.../5

[i.e. - meaning of double catch or that persons on a vessel accosted by a Department of Fisheries boat flying its "L" flag were required to suspend all their activities]. Thus, should attempt to clarify terms that might be unfamiliar to other parties.

2. Also, by proceeding on the basis of agreed facts there were deficiencies in the statements of facts. It was suggested in the judgement that these deficiencies might well have been corrected had the parties proceeded in the usual way by calling witnesses.

3. Demonstrate one way regulations are interpreted - i.e. by stating that a very rigorous practice applies in one district, it is implied that a less rigorous practice will be tolerated elsewhere.

4. In determining whether the defence of due diligence applies it is important to examine the scheme of the legislation and the context in which it is to be applied.

5. Reiteration of law given with respect to defence of due diligence.

6. Here, the regulation of the fisheries in the manner prescribed by the Section in no way violates the provisions of s.6(2) of the *Charter of Rights*. In other cases, it is possible that the method of regulating the fisheries may violate s.6(2) of the *Charter*.

Her Majesty the Queen v. Randall James Hartley and Ronald Graham

In the County Court of Yale, B.C.

October 27, 1983

Docket # 593 C.C.

Justice of the Peace could not issue a search warrant if the grounds for believing the offence was committed are given by the informant orally at the time the written information is sworn, but not under oath.

Section 8 *Charter* - A search carried out under the authority of an illegal search warrant would constitute an unreasonable search under s.8 of the *Charter*.

S.24(2) *Charter* - A search conducted as here on the authority of an illegal warrant would bring "the administration of justice into disrepute".

Facts -

This is an application under section 24(2) of the *Constitution Act*, that evidence obtained pursuant to a search warrant executed by police officers on the dwelling, house of the accused, Randall Hartley, be excluded on the grounds that the admission of such evidence would bring the administration of justice into disrepute.

The Court held a voir dire to determine the circumstances under which the search warrant was issued and executed. The police officer testified that he went to the residence of the Justice of the Peace and had a discussion with him and presented him with an Information which he swore to in front of the Justice of the Peace. The Information reads as follows:

> "Canada, Province of British Columbia. This is the Information of Cst. Robert Cumming, Peace Officer, of Merritt, in the province of British Columbia, hereinafter called the 'informant', taken before me, the undersigned Justice of the Peace in and for the Province of British Columbia.

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> The informant says that he has reasonable grounds to believe and does believe that there is in a dwelling-house, to wit, the dwelling-house of Randall Hartley, at #7 Alvin Douglas Motel, in the City of Merritt, Province of British Columbia, a narcotic, to wit, Cannabis (marijuana) by means of the above Act has been committed, namely, the offence of possession of cannabis and that his grounds for so believing are as follows:
>
> Confidential Information:

The Information was sworn by the officer in front of the Justice of the Peace on the 16th day of July, 1982. The officer stated that the Justice of the Peace required him to advise what in fact, the confidential information was, and he stated that he informed him of the discussion.

I concluded from the officer's evidence that the discussion he had with the Justice of the Peace was a somewhat casual discussion and the statements that he made to the Justice of the Peace as to the information that he had, the grounds that he had for believing that there was marijuana in the alleged premises, were not given to the Justice of the Peace under oath.

Reasoning of the Court -

Section 10(2) of the *Narcotics Control Act* stipulates that before a Justice of the Peace can issue a search warrant, he must be satisfied by information upon oath that there are reasonable grounds for believing that there is a narcotic by reason of which or in respect of which an offence under the *Narcotic Control Act* has been committed in a certain dwelling house.

I can understand the officer's concern for wanting to keep the name of his informant confidential; nevertheless, under section 10(2) of the *Narcotic Control Act*, a Justice of the Peace cannot issue a warrant unless he is provided with those reasonable grounds referred to in the section under oath. The issue

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to be resolved is, do the words "Confidential Information" standing by themselves provide the reasonable grounds referred to in subsection (2) of section 10 of the *Narcotic Control Act*.

The information sworn by the officer in this case, as I stated, simply contained in the area referred to as "his grounds for so believing", the words "Confidential Information".

The position of the Defendant here is tht the words "Confidential Information" do not constitute reasonable grounds upon which a Justice of the Peace could issue a search warrant.

... I am satisfied on the authority of *Rex v. Solloway & Mills*, 53 C.C.C. 271 and *Imperial Tobacco Sales Company of Canada Limited and Attorney-General of Alberta*, (1941), 1 W.W.R. 401, which are both appellate court decisions in two different provincial jurisdictions, that the words "Confidential Information" in the Information of Constable Cumming were not sufficient to allow the Justice of the Peace to hold that he had reasonable grounds to believe there was a narcotic in the premises of the Accused Hartley by means of which an offence had been committed.

I have reservations that a Justice of the Peace can issue a warrant where the grounds are not stated in the Information but are given by the informant orally under oath at the time the Information is presented and sworn. I am certain that a Justice of the Peace could not issue a search warrant if the grounds for believing the offence was committed are given by the informant orally at the time the written Information is sworn, but not under oath. It would seem apparent from the cases that the grounds would have to be set out in the information. There would be no necessity to disclose the informant's name, that a statement along these lines, that the officer had confidential information in this case from a reliable source that the Accused Hartley had stated that there was a substantial amount of marijuana in his residence or words to the general effect, so long as they do spell out what his grounds for belief were, would have sufficed.

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For the reasons stated, I would hold that the information here was inadequate, that on this Information the Justice of the Peace could not have, under section 10(2) of the *Narcotic Control Act*, acting judicially issued this warrant. I would find that the warrant is in fact, invalid and illegal.

Section 8 of the *Constitution Act* reads as follows:

> Everyone has the right to be secure against unreasonable search or seizure.

I would hold that a search carried out under the authority of an illegal search warrant would constitute an unreasonable search.

... I would find that the evidence obtained in this case was obtained in a manner that infringed on the Accused Hartley's rights against unreasonable search.

The question then to be resolved is, has it been established here that the admission of the evidence obtained under this search warrant in these proceedings would bring the administration of justice into disrepute?

The error here was not of a technical or frivolous nature. We are not here really concerned with the conduct of the police officer as he did not deliberately search on a warrant that he knew was illegal. The law is, as I have stated, at least in my humble opinion, that if the informant does not set out the grounds for his belief that an offence is taking place, then the Justice of the Peace simply cannot be satisfied that there are reasonable grounds to believe that an offence is taking place in the premises. If this is the case no warrant should issue.

I am satisfied that the sanctity of a person's dwelling is so firmly ensconced in this country, as it was and has been in England right back to the Magna Charta, that a search conducted as it was here on the authority of an illegal warrant, would arouse grave concern in any community in this land, and that the admission in court of evidence obtained in this fashion would, I

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believe cause concern to most citizens, and in causing that concern bring the administration of justice into disrepute.

It is the decision of this Court that the evidence obtained under this search warrant be excluded.

Cite: Unreported.

Possible Ramifications of Decision:

1. Grounds for belief that an offence has been committed are to be set out in the information. The words "Confidential Information" are not sufficient to allow Justice of the Peace to believe that he had reasonable grounds to believe that an offence was being committed on the premises of the Accused.

2. Held that a search carried out under the authority of an illegal search warrant would constitute an unreasonable search. [In contrast to this decision, note, *Her Majesty the Queen v. R. Huntley Gordon]* [Unreported See 20-M].

3. Held also, that a search conducted on the authority of an illegal warrant would bring the administration of justice into disrepute. This case, therefore, gives some indication of what may be considered to "bring the administration of justice into disrepute". Contrast this case with *R. v. Collins* [See 20-J] where the evidence was admissible and not held to bring the administration of justice into disrepute.

Her Majesty the Queen v. Blaise Kevin Corbett

In the Court of the General Sessions of the Peace

In Kitchener, Ontario

March 22, 1984

Challenging the validity of evidence obtained pursuant to a warrant by way of motion under s.8 of the *Charter* does not interject a new element into the process that was not there before the enactment of the *Charter*.
Principles relevant to the validity of a search warrant given.

Facts -

I have been asked to find that evidence obtained in a search conducted on March 2, 1984, pursuant to a search warrant issued the same day was obtained contrary to s.8 of the *Charter of Rights* since the information on which the warrant was based is defective and the Justice of the Peace who issued the warrant failed to act judicially.

The information was sworn by Officer Rosenburg, a police officer, before Betty Ann Futher, Justice of the Peace, on March 2, 1983. The warrant was issued shortly thereafter. Later that same day Officer Rosenburg and three other police officers entered the premises named in the warrant and found therein, and seized approximately 20 grams of marijuana and fourteen 5-gram containers of hash oil.

Officer Rosenburg testified at the voir dire that the warrant, Exhibit A, was issued after a perusal of the information sworn by him. This information is as follows:

> "The informant [of course that is Officer Rosenburg], says that he has "reasonable grounds for believing and does believe that there is a certain dwelling house, namely the dwelling house of Blaise Corbett at 66 Mooregate Crescent, Apartment No. 606, Kitchener, Ontario in the said Judicial District of Waterloo, a narcotic, to wit: Cannabis resin oil

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> by means of or in respect of which an offence under the *Narcotic Control Act* has been committed, namely the offence of possession of a narcotic to wit: cannabis resin oil, for the purpose of trafficking, contrary to the *Narcotic Control Act*, s.4(2)". His grounds for so believing are that "I have received reliable information from a previously tested source that Blaise Corbett is in possession of a large quantity of cannabis resin oil".
>
> The second paragraph: "I have received previous information concerning Blaise Corbett having narcotics at his residence specifically cannabis resin oil. Both sources of information are independent from each other".

... Officer Rosenburg testified in examination in chief and cross-examination, that the previously tested source referred to in paragraph one of his grounds for belief, referred to an informer who had three or four times provided him with accurate information respecting other persons involved in the drug trade.

As to his second ground for belief, Officer Rosenburg testified he could not recall but this corrobative information came from another police officer, either viva voce or by way of an occurrence report.

Reasoning of the Court -

Mr. Westman (counsel for the accused) in his initial submissions pointed out that prior to the *Charter*, the correct practice was to challenge the validity of a search warrant by way of certiorari. Since a promulgation of the *Charter*, however, an alternative route came into existence, namely, a challenge to the validity of evidence obtained pursuant to a warrant on the basis of s.8 coupled with s.24(1) of the *Charter*. This was the route chosen by the accused and I have no hesitation in accepting jurisdiction: if the warrant was improperly issued, the evidence was obtained and is inadmissible at trial, failing the applicability of the exception set out in s.24(2).

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The principles relevant to the validity of a search warrant have been established by various cases decided both before and after the *Charter* came into force. These principles may be summarized as follows:

1. Firstly, the Justice of the Peace must act judicially.

2. The second principle corollary to this is that the information put before the justice must contain sufficient details to enable him to be independently satisfied.

3. The third principle is that there must be factual nexus between the alleged offence and the thing or things sought to be seized pursuant to the search warrant. The information must therefore reasonably specify, not only the alleged offence, but also the things sought to be seized with sufficient particularity to relate them to that offence.

4. The fourth and last principle is that there must be some connection established between the things sought to be seized and the place in respect of which the search warrant is sought.

The learned counsel for the accused submitted firstly that, as he put it, "apparently there were no questions asked by the Justice of the Peace, relevant to this information before she signed the warrant. There is no evidence of this ... and the accused has the burden for proof, on the balance of probabilities in this regard. In the absence of such proof the presumption omnia praesenumter rite et solennitar esse acta remains undisturbed.

We must, therefore, turn to the information itself. There is no doubt that it established the nexus between the alleged crime and the thing sought to be seized as evidence thereof ... The grounds of belief that this substance could reasonably be expected to be found at the residence of Blaise Corbett are set out in the second paragraph of the grounds in the information, "I have received previous information concerning Blaise Corbett having narcotics in his residence.

.../4

However, Mr. Westman suggests that the grounds as set out in the information are insufficient to support any judicial and independent decision of the learned Justice of the Peace to issue the warrant ... The law does not contemplate or require that the Justice of the Peace conduct a full-fledged inquiry; it simply requires that the grounds of the information be such as to permit a reasonable person independently to satisfy himself that a warrant should issue.

In my view, the information here perfectly satisfied this requirement. The first ground sets out Officer Rosenburg's reasonable belief, based on information directly given to him by an informant; the second ground provides corrobative support, althouth I may interject here had the second ground been the only ground for the officer's belief, it would have been insufficient and defective and any warrant based thereon might have been bad, since the belief of one policeman based on the belief of another does not, as Mr. Justice Mitchell pointed out in *Re Kerwin and the Queen*, (1982) 3 C.C.C. (3d) 264 "mean that the grounds are in fact reasonable".

Here the first ground could lead to no other conclusion but that the warrant should issue.

... It may be pointed out that all the cases to which I was referred involved applications by way of certiorari. Does the fact that the motion before me is based on s.8 of the *Charter* interject a new element? I think not... If a search warrant is issued on the basis of a valid information, as I found it was here, any search authorized thereby is reasonable.

Cite: Unreported.

Possible Ramifications of Decision:

1. Given principles relevant to the validity of a search warrant.

.../5

2. The law does not contemplate or require that the Justice of the Peace conduct a full-fledged inquiry; it simply requires that the grounds of the information be such as to permit a reasonable person independently to be satisfied that a warrant should issue.

3. The fact that the motion, here, is brought under s.8 of the *Charter* rather than certiorari does not interject a new element.

R. v. Collins

British Columbia Court of Appeal

March 22, 1983

S.8 *Charter* - Reasonable suspicion may form the basis of reasonable grounds for conducting a search. This knowledge may be proved by way of hearsay. Under s.24(2) of the *Charter* the administration of justice will not be held in high regard if evidence is regularly excluded.

Facts -

Ruby Collins (appellant) and her husband Richard were charged with the possession of heroin for the purpose of trafficking.

The facts are not in dispute. Constables Rodine and Woods of the Drug Section of the R.C.M.P. were on duty at Gibsons, a small community near Vancouver. They took up a surveillance post near a pub in the village. There they saw the appellant and another woman seated at a table. A short time later the pair were joined by Richard Collins and another man. About 15 minutes later, Collins and the stranger left the pub and drove in a car to a trailer park a short distance from the pub. The police followed them. They searched the car and there found heroin, some multi-coloured balloons, and other paraphernalia. Richard Collins was arrested. At 4:15 P.M., Constables Rodine and Woods returned to the pub. The appellant and her companion were still there. Constable Woods then described what happened:

> As I approached I quickened my pace. I then grabbed a hold of Mrs. Collins. At that time my impression was that she'd be under arrest. I grabbed her by the throat to prevent her from swallowing any evidence that may be there. In the process we had gone to the floor, taken her off the chair. We had gone to the floor. I observed her at that time move her hand away from her body. I observed a green item in that hand. It was clenched and just a piece of it was showing out. I asked her to open her hand and leave the item on the

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> floor which she did and I subsequently seized a green balloon which had a knot at the top of it. I then picked Mrs. Collins from the floor, handcuffed her, and removed her outside.

Under cross-examination Woods admitted that nothing he had observed had aroused his suspicion concerning drugs with respect to Mrs. Collins. He agreed that up to the point of grabbing Mrs. Collins he was suspicious but had no evidence which would indicate that she had drugs on her person. When questioned as to the force he used when grabbing her by the throat, he said, "Enough force to prevent the swallowing of anything but not enough to cut off circulation or breathing". It turned out that he found no drugs in the woman's mouth. However, on observing her clenched left hand, he ordered her to drop whatever was in it. It was a green balloon containing heroin.

The judge ruled that the appellant was not under arrest prior to the police finding drugs on her person. He found this to be an illegal search because whereas the police had a right under s.10(1)(a), (b), and (c) of the *Narcotics Control Act* to seize and search where he had reasonable belief that narcotics were present on the accused's person, mere suspicion was not sufficient to justify the search.

The principal argument advanced by counsel on the appellant's behalf was that the exhibits (the heroin) should not be admitted in view of the provisions of ss.8 and 24 of the *Charter of Rights*. The judge admitted the exhibits into evidence. Did he err?

Reasoning of the Court -

... Reasonable suspicion may indeed form the basis of a reasonable ground. The judge if pressed by Crown Counsel, could have allowed the constable to state what, aside from his observations, caused his suspicions. However, he was not so pressed. Accordingly, we do not know what this officer had learned from others to arouse his suspicion. In my opinion, it was for the Crown to lay the

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groundwork to show what knowledge the police had. They failed to do so in direct examination and failed to pursue the point during the re-examination. Accordingly, it cannot now be said on what the constable's suspicion was based.

I come, therefore, to the second ground of appeal, namely, whether the evidence so obtained should have been excluded under s.24(2) of the *Charter*.

The Supreme Court of Canada had already commented on the admission of statements made by an accused. Mr. Justice Lamer in *Rothman v. The Queen* (1981) 59 C.C.C. (2d) 30, said this in regard to the admission of statements made by an accused:

> The Judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings.

I wish also to add what was said by Lord Cooper in *Lawrie v. Muir* [1950] S.C. (J) 19 at 26 (and quoted with approved by Cartwright, C.J.C. in his dissent in *Wray:*

> The law must strive to reconcile two highly important interests which are liable to come into conflict (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the state to secure that evidence bearing upon the commission of a crime and necessary to enable justice to be done shall not be withheld from courts of law on any mere formal or technical grounds. Neither of these objects can be insisted upon to the uttermost...

.../4

The judge was fully alert as to the decision in *Rothman* and understood the conflicting interests which come to the fore in interpreting a section such as 24(2). He knew that the constable's suspicion that the accused was in possession of heroin was proved correct. She was guilty. He appreciated that the offence before him was a serious one; that the constable was not acting capriciously or out of malice towards the accused; that the use of the "throat hold" was to prevent the loss or destruction of evidence, and that the admission of the heroin evidence would not be unfair to the accused. Having all these facts before him, he decided to admit the only evidence which could convict her without justifying the use of the throat hold as a general practice, I cannot say that the judge erred in the circumstances of this case.

Mr. Justice Season (with respect to the second issue)

The choice for Canada is spelled out in s.24(2) itself. Evidence that was obtained in a manner that infringed or denied rights or freedoms guaranteed by the *Charter* is not on that account excluded; another ingredient is necessary. That ingredient is dependent on all the circumstances and it deals with the admission of the evidence. It is the admission, not the obtaining, that is the focus of attention, though the manner of obtaining the evidence is one of the circumstances. Evidence improperly obtained is prima facie admissible. The onus is on the person who wishes the evidence excluded to establish the further ingredient: that the admission of the evidence would bring the administration of justice into disrepute. Dispute in whose eyes?

I do not suggest that the courts should respond to public clamour or opinion polls. I do suggest that the views of the community at large, developed by concerned and thinking citizens, ought to guide the courts, when they are questioning whether or not the admission of evidence would bring the administration of justice into disrepute.

When we are deciding whether or not a party who wishes evidence to be excluded hs established that its admission would bring the administration of justice into disrepute, we must heed the lessons drawn from our past and from

.../5

the experience of others. The major lesson is that the adminstration of justice will not be held in high regard if we regularly exclude evidence. I agree with the trial judge that cases in which the evidence should be excluded will be rare.

The trial judge in this case posed the correct question: has it been established that having regard to all the circumstances, the admission of evidence would bring the administration of justice into disrepute? His answer to the question is fully justified by the reasons he gave, and is the right answer.

I would the dismiss the appeal.

Cite: 33 C.R. (3d) 130.

Possible Ramifications of Decision:

1. Held that reasonable suspicion may indeed form the basis of a reasonable ground for search and seizure. However, peace officer should state what aside from his observations caused his suspicion.

2. Two conflicting interests when deciding whether evidence should be admitted under s.24(2) of the *Charter*. - (1) On one hand, the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities and on the other hand, (2) the interest of the state to secure that evidence bearing upon the commission of a crime and necessary to enable justice to be done.

3. Views of community at large ought to guide the courts when they are questioning whether or not the admission of evidence would bring the administration of justice into disrepute.

4. Administration of justice will not be held in high regard if evidence regularly excluded.

Her Majesty the Queen v. Fourteen Twenty-Five Management

In The Provincial Court for Saskatchewan

February 24, 1984

The purpose of s.8 *Charter of Rights* is to protect the individual and not places. Therefore, when determining whether search is reasonable, one looks at the place to determine what degree of privacy the individual may reasonably expect to harbour there.

Facts -

The facts in this case are quite simple. The Regina City Police had received a complaint from a business next door to "The Keg" to the effect that "The Keg" was violating the *Liquor Licensing Act* ... "The Keg" is operated by "1425 Management Limited". . The police attended at the premises at about 2:05 A.M. on the date set out in the Information. At that hour the premises should be closed to the public and consumption of liquor should not be allowed. They observed cars in the customers' parking lot and they observed lights inside the building. From this, we are told, they reached the conclusion that there were people inside the premises. They tried the back door and found it open. They entered. As they entered, they observed an individual run from the area of the kitchen to the bar area. They followed that individual into the bar. Inside the bar they observed two individuals; the individual they had first seen was seated on a bar stool and the second individual was behind the bar. About an arms' length away from the individual on the stool were two beer bottles; one full, one partly consumed. Constable French walked over to where the licence for the premises hung on the wall, wrote down the licence number, walked over to the two bottles, noticed that they were both brands commonly sold in Saskatchewan, felt the bwo bottles, noticed that both were cold and in his words "as if fairly recently removed from a fridge" and then the officers departed.

At the close of the Crown's case the defence made an application under section 24 of the *Charter of Rights and Freedoms* to exclude portions of the Crown's evidence. The grounds for the application are, in the words of Counsel for the Defence, "that section 125 of the *Liquor Act* is contrary to section 8 of the *Charter*.

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This is a prosecution under the *Liquor Licensing Act*, but section 125 of the *Liquor Act* applies mutatis mutandis to the *Liquor Licensing Act*. Section 125 reads as follows:

> 125. - (1) Any officer may, for the purposes of preventing or detecting the violation of provision of this Act, enter at any time into any and every part of any place other than a dwelling house, and make searches in every part thereof and of the premises connected therewith; and nothing in the common law or in any other section of this Act, shall in any way limit, or shall be construed as in any way limiting, the rights and powers conferred by this section or the exercise thereof.

Reasoning of the Court -

In determining the question before the Court I am firmly of the opinion that one must first determine what the *Charter* and in particular section 8, is all about. In its totality, section 8 is not unlike the IV Amendment to the American Constitution. In my opinion, like the IV Amendment to the American Constitution, the purpose is to protect persons not places. One looks at the place to determine if it is one where the person may harbour a reasonable expectation of privacy.

In my opinion the purpose of our *Charter*, and in particular section 8, is to protect the individual and not places. If I am correct in this proposition than one looks at the place to determine what degree of privacy the individual may reasonably expect to harbour there, free from intrusion, or perhaps more accurately, the nature of the privacy he harbours there ... Even if one finds that the privacy which could be expected was not invaded that does not answer the question. A search can not be conducted at will. There must be reasonable grounds and finally the manner in which the search is conducted must be reasonable. In addition, of course, the search is only legal if it is pursuant to some authorization known at law.

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In the case before me I find that the search did not invade any privacy which the management of the premises could reasonably expect to be free from government intrusion.

In reaching this conclusion I hold I am entitled to look at the nature of the place and the legislation which governs that place. The bar area is an area ordinarily open to the public and the activities which are permitted in that area are regulated by the Government under *The Liquor Licensing Act*. Those activities are ordinarily open to public scrutiny and to Government scrutiny. I am entitled to go even further and observe that the licencee applied to the Government for a licence knowing that the premises would be subject to the whole of the *Liquor Licensing Act*, including s.125.

I further find that the police were acting on a reasonable belief. In the first instance, the police were merely investigating a complaint. In the course of that investigation they found cars in the customers' parking lot and saw lights on in the building which led them to conclude that there were people inside at an hour when one would expect all customers to have departed I find that conclusion was reasonable. The search was minimal and as unofficial as a search could possibly be.

Having made the finding that, in relation to the position of the premises entered there was not intrusion upon the privacy which the management could reasonably expect to harbour there is no justification for me making a finding that section 125 is inconsistent with section 8 of the *Charter*, as it relates to that portion of the premises.

The application to exclude the evidence is denied.

Cite: Unreported.

Possible Ramifications of Decision:

1. Sets forward the type of circumstances when it would be reasonable for a peace officer to consider that an offence was being committed and therefore enable him to search the premises.

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2. The purpose of s.8 of the *Charter* is given. i.e. to protect the individual and not places.

3. Similar type of reasoning as was used here, could be used when a fishery officer searches a fishing boat. i.e. It could be argued the activities on a fishing boat are ordinarily open to Government scrutiny.

R. v. Essau

Manitoba Court of Appeal

1983

Section 8 *Charter* - A reasonable belief by police that narcotics would be found in a motor vehicle precludes the possibility that the subsequent search and seizure could be considered unreasonable under the *Charter*.
S.24(2) *Charter* - If evidence does not bring administration of justice into disrepute, does not matter if initial search and seizure was reasonable.

Facts -

The accused, Essau, was charged with possession of marijuana for the purpose of trafficking. He was acquitted on the basis that the evidence resulted from unreasonable search and seizure. The Crown now appeals. The facts of the case are as follows:

Essentially, the evidence against the accused consisted of the testimony of Sargeant Kosachuk of the City of Winnipeg police force, and the exhibits which were tendered as evidence during the course of his testimony. Sgt. Kosachuk indicated that he received a message that an unidentified individual was selling drugs in Kildonan Park in Winnipeg. The person was identified as driving a blue older model car, believed to be an Oldsmobile Cutlass.

Sgt. Kosachuk was in an unmarked police cruiser car and he and a partner began a surveillance at the Main Street entrance to Kildonan Park. Another unmarked police vehicle established a position for surveillance near the other entrance to the park. The surveillance began at approximately 3:30 in the afternoon Sgt. Kosachuk did indeed see a 1968 blue Cutlass Oldsmobile enter the park and later leave the park on three occasions between 3:30 and 4:50. The same vehicle, of course, was involved on all three occasions. When the vehicle left the park on the third occasion, it was stopped by the police. A search of the interior of the car was conducted, and four small bags of marijuana were found in the trunk of the car. On the console of the interior of the car there was another small plastic bag containing about an ounce of marijuana.

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At the time his car was stopped and searched the police ascertained the home address of the accused. A search warrant was obtained, and upon executing the warrant, further bags of marijuana were found, together with marijuana seed. The approximate street value of the marijuana seized from both the car and accused's residence was $1,780.00.

On cross-examination Sgt. Kosachuk said he did not know "for sure" whether the police were stopping the right car or not, but since the car matched the description, and since it entered and left the park on three separate occasions "we had suspected that it was the vehicle in question that we were looking for".

Section 10(1) of the *Narcotic Control Act* is the relevant section governing search and seizure. It provides as follows:

> 10(1) A peace officer may, at any time,
>
> > (a) without a warrant enter and search any place other than a dwelling house and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed
> >
> > ...
> >
> > (c) seize and take away any narcotic found in such place,

Reasoning of the Court -

In my opinion Sgt. Kosachuk has ample reason to stop the accused and search his car. The police had received a tip, which did not identify the kind of vehicle which he was driving. The motor vehicle operated by this accused matched the description perfectly. Moreover, the vehicle was being operated in the vicinity where it was said drugs were being sold. The movements of the car in the vicinity of the park heightened the suspicion. The car entered and exited from the park on three occasions within an hour and twenty minutes. Cruising about in this fashion is wholly consistent with trying to find

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customers for the illicit sale of drugs. In my opinion, had the police not stopped and searched that vehicle they would have been guilty of a dereliction of duty. And having found a narcotic inthe accused's motor vehicle it was entirely appropriate that the police authorities should have obtained a search warrant which upon execution, revealed further drugs at the accused's residence.

I am of the view that the search and seizure of both the accused's car and his residence were reasonable under the terms of s.8 of the *Canadian Charter of Rights and Freedoms* .... The "reasonable belief" which justified the police in this instance precludes the possibility that the search and seizure could be considered "unreasonable" under the terms of the *Charter*.

But even if one were to successfully argue that the search was unreasonable, and that by chance, in spite of unreasonable search, the illicit drugs were found, that evidence against the accused would not bring the administration of justice into disrepute under s.24 of the *Charter*.

... Prior to the *Charter* the law in Canada with respect to the admissibility of illegally obtained evidence was set forth in the majority decision of the Supreme Court of Canada in *The Queen v. Wray*, [1971] S.C.R. 272. Martland, J. who authored the majority judgement, noted that the court has a discretion to exclude evidence even though it be admissible and relevant if it is of slight probative value, and is prejudicial towards the accused. That is established in the judgement of the Privy Counsel in *Noor Mohamed v. the King* [1949] A.C. 182. The discretion to reject otherwise admissible evidence flows from the general duty of a trial judge to ensure that the proceedings are fair for an accused person.

That kind of situation apart, Martland, J., rejects the concept that illegally obtained evidence can be excluded on the grounds that it will bring the administration of justice into disrepute.

The issue as to whether the administration of justice is brought into disrepute by the admission of illegally obtained evidence is now raised by s.24(2) of the *Canadian Charter of Rights and Freedoms*.

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I do not find it necessary to attempt to define what is meant by "bringing the administration of justice into disrepute". Dealing solely with the situation at hand, I would say that the admission of drugs seized from the car and the accused's residence as evidence against him, does not bring the administration of justice into disrepute and in my view that is so whether the initial search and seizure was reasonable or not. The car was stopped, the evidence was found, which in turn led to a further search, and a further search of illicit drugs. There was no trickery, no forced confession, and no situation where the evidence sought to be admitted is highly prejudicial but of tenuous probative value.

The wording of s.24(2) suggests that illegally obtained evidence will continue to be admitted as evidence against an accused, save in those cases where its admission would bring the administration of justice into disrepute.

Appeal allowed.

Cite: 20 Man. R. (2d)b 230

Possible Ramifications of Decision:

1. Gives some indication of what would be considered reasonable grounds for search and seizure and thus not contravene the *Charter of Rights*.

2. Even if evidence obtained in the initial search and seizure was not reasonable does not necessarily bring the administration of justice into disrepute under s.24(2) of the *Charter*.

3. Also suggested that illegally obtained evidence will continue to be admitted against an accused except in those situations where the administration of justice would be brought into disrepute.

Her Majesty the Queen v. Robert Huntley Gordon

In the County Court of Vancouver

April 4, 1984

Docket # CC 831503

Instructions from a superior officer constitute reasonable grounds to search and therefore not a violation of s.8 of the *Charter of Rights*.
A search can be legal (i.e. with a warrant), but conducted unreasonably and therefore infringe s.8 of the *Charter of Rights*.

Facts -

The accused is charged with unlawfully possessing the narcotic cocaine for the purpose of trafficking contrary to s.4(2) of the *Narcotic Control Act*. He seeks to have certain evidence concerning the seizure of the narcotic excluded under s.24(2) of the *Charter of Rights* as having been in violation of section 8 of the *Charter*.

The facts surrounding this charge are as follows:

Corporal Sanderson stated that he gained surreptitious entry without permission to the locked parking area and the trunk of the automobile (belonging to the accused) because he thought he had the lawful right to do so without permission of the owners. Prior to his entry other R.C.M.P. personnel had gained entry to the area, including a locksmith who took impressions of the locks on the access door and on the automobile. Keys were made from these impressions and were used to facilitate the search made by Sanderson. Sanderson testified he searched the trunk of the automobile because he had been instructed to go to the parking lot and find three vehicles believed to be associated with the accused and to search all three of those vehicles if possible. The decision to conduct the search was made by his immediate supervisor.

... The Corporal asked whether his supervisor Sergeant Neville indicated to him the information that he had that Gordon was active in dealing with cocaine or the sources of that information and his answer was "no". He testified that

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that was no urgency to the situation and that a search warrant could have been obtained but he was of the view that one was not required to entitle him to enter the locked underground parking lot and the automobile of the accused Gordon.

As a result of the search samples of cocaine were obtained and the accused was charged.

A voir dire was declared dealing with the obtaining of the imputed evidence. This is my ruling on the admissibility of that evidence.

The Crown relies on s.10(1)(a) of the *Narcotic Control Act* as authority for the officer to conduct the search as he did. Section 10(1)(a) provides:

10(1) A peace officer may, at any time,

> (a) without a warrant enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling-house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed.

Reasoning of the Court -

The first question raised by the accused is whether s.10(1)(a) of the *Narcotic Control Act* infringes s.8 of the *Charter of Rights*.

The learned judge here follows that interpretation that was given in *R. v. Essau* 4 C.C.C. (3d) 530. Here it was stated,

> There may well be a third interpretation that reasonable belief is required for a search of a dwelling-house or of any other place, ... Search for a narcotic in a car, for example, must be based on reasonable belief.

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In my view, this is the correct interpretation of section 10(1)(a).

It seems reasonable, (however), that a police officer should be given some freedom to exercise his discretion, based on experience and knowledge, to determine if there are reasonable grounds and should not be subject to constant supervision. A police officer can only do his job if he is given some flexibility and can exercise his own judgement.

In *R. v. Rao*, the court said section 10(1)(a) arbitrarily distinguishes between dwelling place and other location. I disagree. Our law has always emphasized the importance of the dwelling place. There is a good practical reason for the legislation requiring a police officer to first obtain a warrant before he can search a dwelling place but making no such requirement for other places, i.e. the time element. If a police officer reasonably believes that some person on the street possesses narcotics, section 10(1)(a) allows him to search the suspect immediately without first running to a justice of the peace to get a warrant because by the time he gets the warrant, that person might have left the scene. However, with dwelling places, because of the sanctity of such places and the much less likelihood of disappearance, the police officer has to first obtain a warrant.

I therefore conclude section 19(1)(a) of the *Narcotic Control Act* does not infringe the *Charter of Rights*.

Counsel for the accused next suggests that even if section 10(1)(a) of the *Narcotic Control Act* does not breach the *Charter of Rights*, nevertheless the rights of the accused under s.8 of the *Charter of Rights* have been violated since the searcher, Corporal Sanderson, did not himself have a reasonable belief as to the presence of a narcotic in the trunk of the automobile. In effect the accused says his right guaranteed by section 8 of the *Charter of Rights* has been infringed in that he was unreasonably searched.

In this connection the accused also raised the correctness of the comments in *R. v. Collins* [See 20-J] as to the onus of proof when the accused raises a

defence that his rights have been infringed under the *Charter of Rights*. Section 24(2) of the *Charter of Rights* provides that it is the person who applies under s.24(1) who must "establish that the admission of the evidence would tend to bring the administration of justice into disrepute. The accused here suggests that the comments of Seaton, J.A. in the *Collins* case are obiter dicta and are wrong in law. In that case, Seaton, J.A. stated: "The onus was on the appellant to show on a balance of probabilities that the search was unreasonable".

Defence counsel, submits that the proper view is that the accused need only raise a reasonable doubt as to whether the search was lawful under the *Narcotic Control Act*.

It seems to me the threshold question is whether there was a legal search. Section 10(1)(a) authorizes a police officer to search a person without warrant if he has reasonable grounds to believe the person has narcotics. Therefore, if it is found that the police officer has no reasonable belief, the search is illegal. The Crown has to first prove the legality of the search under the *Narcotic Control Act* as one of the elements of the offence. Then, if the accused raises the *Charter* argument, he has the onus to prove that his rights have been infringed. A legal search can be conducted unreasonably, and similarly, the fact a search is illegal does not necessarily mean it is conducted unreasonably.

I disagree with the suggestion that a legal search has to be a reasonable search. Surely a search can be legal, i.e. with a warrant, but conducted unreasonably and therefore infringe section 8 of the *Charter of Rights*. I suggest in many cases involving section 10(1)(a) of the *Narcotic Control Act* there may be two questions to be answered; (1) whether the search is lawful, and (2) whether the search is reasonable.

I have concluded that instructions from a superior, as here, constitute reasonable belief. Wetmore, C.C.J. in *R. v. Jordan* (unreported), dealing with the same issue as the case at hand said the test to determine if there has been

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reasonable belief based on the "tip" is objective. The court must be satisfied that the advice is not only bona fide received, but that the grounds for that acceptance are reasonable.

Here I find the instructions to Sanderson from Neville were genuinely accepted by Sanderson and that it was reasonable for him to accept these instructions and to carry out the search. Therefore the search was lawful.

Having concluded the search was lawful, I must consider whether the accused has shown on a balance of probabilities that the search was unreasonable.

Since the original search was lawful and the accused has not established that his rights under section 8 have been infringed, that is the end of the matter and the imputed evidence is admissible.

The evidence which was the subject of the voir dire is therefore admissible.

Cite: Unreported.

Possible Ramifications of Decision:

1. The peace officer should be given some freedom to exercise his discretion (based on knowledge and experience), when determining if there are reasonable grounds to search.

2. Given rationale for the requirement that a peace officer first obtain a search warrant before searching a dwelling place.

3. Told that a legal search can be conducted unreasonably and therefore be held to infringe s.8 of the *Charter*. Similarly, the fact that a search is illegal does not necessarily mean it is conducted unreasonbly.

4. Instructions from a superior constitute "reasonable belief" as required under s.10(1)(a) *Narcotic Control Act [Fisheries Act*, s.35] if the court is

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satisfied that the advice is not only bona fide received but the grounds for that acceptance are reasonable.

5. Under s.10(1)(a) of the *Narcotic Control Act*,

(a) the Crown must first prove the legality of the search as one of the elements of the offence.

(b) then, if the accused raises the *Charter* argument (i.e. unreasonable search under s.8 of the *Charter)*, he has the onus to prove on the balance of probabilities that his rights have been infringed.

N.B. [It could be assumed that a similar approach would be taken with respect to s.35 of the *Fisheries Act*].

Her Majesty The Queen v. Bradley Wade Engen

In the Court of Queen's Bench of Alberta

March, 1983

Word "detention" as used in section 10(b) of the *Charter* means a "holding" or "restraining".

Facts -

1. On April 30th, 1982 Constable Earl of the Royal Canadian Mounted Police was on patrol on Railway Avenue in Morrin, Alberta.

2. Constable Earl observed an oldsmobile cutlass motor vehicle being driven with the headlights turned off. The motor vehicle was stopped by Constable Earl, who found the accused to be the driver.

3. Constable Earl noted the Respondent's breath smelled of alcohol and that he had difficulty walking.

4. Constable Earl asked the Respondent to accompany him and escorted him to the police car.

5. Based on his observations, Constable Earl formed the opinion that the Respondent's ability to drive a motor vehicle was impaired by alcohol and at 1:07 A.M., he read to the Respondent the demand for the breathalyzer test; which demand the Respondent understood.

6. The Respondent complied with the demand and accompanied Constable Earl and Eichmann to the Royal Canadian Mounted Police detachment in Drumheller.

7. En route to the Drumheller detachment, the police vehicle was stopped and the Respondent was searched at 1:10 A.M.; as he had not been previously searched.

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8. The police constables arrived at the Drumheller detachment at 1:27 A.M.; being a distance of approximately 30 kilometres from the location where the offence was alleged to have been committed.

9. The Respondent provided two samples of his breath into the breathalyzer instrument operated by Constable Eichmann, a qualified breathalyzer technician.

10. Constable Earl read to the Respondent the Notice of Intention to Produce Certificate and served him with a true copy of the Certificate of Analyses and Notice of Intention to produce certificate.

11. The Respondent was not advised of his right to obtain and instruct counsel.

12. The trial judge found that the Respondent was detained from the time the breathalyzer demand was made until he was released following the tests and that the Respondent's legal rights had been infringed or denied as a result of the failure of the peace officer to advise the Respondent of his right to retain and instruct counsel.

The Crown is now appealing.

One of the grounds of appeal is as follows:

(1) Did I err in law in holding that the Respondent was detained from the time the breathalyzer demand was made?

Reasoning of the Court -

The respondent was at no time arrested nor was he advised to obtain and instruct counsel. The question to be decided is simply - was he detained?

... The appellant points out that the respondent was co-operative at all times and the Royal Canadian Mounted Police Constable did not have to exercise any

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physical or compulsory restraint. A demand was made of the respondent and apparently he freely and voluntarily agreed to accompany the Royal Canadian Mounted Police officer to Drumheller for the purpose of complying with the request. On providing suitable samples he was given an appearance notice, driven back to Morrin, and released.

I cannot find on the stated facts that the respondent was ever detained within the meaning of section 10(b) of the *Charter of Rights and Freedoms*. Detention involves an element of compulsory restraint.

The word "detention" as used in section 10(b) of the *Charter of Rights and Freedoms*, in my view means a "holding" or "restraining". At no time was the respondent held or restrained. Had the respondent refused to accompany the officer or attempted to leave the area, then, and in such event, the officer would have had to advise him he could not leave the area, which would then constitute a "holding" or a "detention". The fact is the respondent voluntarily went along with the officer. I am satisfied on the facts that he was never detained.

The fact that he was searched is immaterial.

In the statement of facts we are told that the respondent was driven back to Morrin and released after having been given an Appearance Notice. Counsel suggested that because the word "released" was used in the stated case that this implied that he had been detained. On the facts it is not evident that the accused was ever detained. On the facts it is not evident that the accused was ever detained.

Under the circumstances Provincial Judge Clozza erred in holding that the respondent was detained at any time.

Cite: Unreported.

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Possible Ramifications of Decision:

1. Reiteration of the fact that detention involves an element of compulsory restraint.

2. Also, held, that when an accused voluntarily goes along with a peace officer, the fact that he is searched is immaterial.

Her Majesty the Queen v. Howard J. Ahearn

In the S.C. of the Province of P.E.I.

February 15, 1983

Docket # GDC-4016

S.10(b) *Charter of Rights* - When a citizen is required on demand, to accompany a police officer for the purpose of giving information which may ultimately incriminate him, his rights have been placed at risk and he is then and there detained within s.10(b). A person may be informed of his rights under s.10(b) by means of verbal or written communication, but caution should be exercised when resorting to latter form of communication.

Purpose of s.25(1) *Charter* to provide remedial provision lacking in the *Bill of Rights*.

Facts -

Sections 10(b) and S.24 of the *Charter of Rights and Freedoms* give rise to the issues on this appeal.

The accused was charged that he did ... having consumed alcohol insuch a quantity that the proportion thereof in his blood exceeded 80 milligrams of alcohol in 100 millitres of blood unlawfully drive a motor vehicle contrary to s.236 of the *Criminal Code*. He was acquitted and the Crown now appeals.

There are three issues in this appeal. These are as follows:

1. Was the respondent detained within the meaning of section 10(b) of the *Charter of Rights?*

2. Was the respondent informed of his right to retain and instruct counsel?

3. Was the Trial Judge correct in rejecting evidence pursuant to s.24(1) of the Charter?

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Reasoning of the Court -

Response to Issue 1

In his written judgement the Chief Provincial Court Judge made the following findings of fact:

> In the case now before the Court the accused was read a breathalyzer demand at 8:52 P.M. and then taken some distance from Tignish to Alberton where he was taken into the breathalyzer room at the Alberton Detachment of the R.C.M.P. at 9:08 P.M. on the same day some 16 minutes later. I don't think that such a time span would be considered a transitory time period as in the case of serving a summons upon an individual and then he was given the first breathalyzer test at 9:30 P.M., some 38 minutes after the demand had been given. I find on the basis of the facts before me that there was in fact a detention of the accused by Constable Murnaghan.

... In the case of *R. v. Chromiak* (1980) 12 C.R. 300 (S.C.C.), Ritchie, J. equated the condition of being detained with being held in custody and concluded that the appellant who had cooperated in furnishing the preliminary sobriety tests and was allowed to go away was at no time detained.

The Supreme Court of Canada has not yet interpreted the word detention in the context of the *Charter*. In my view, its pronouncement in *Chromiak* cannot be taken as a final and definitive resolution of the issue in its present constitutional context. The right to instruct counsel was not only elevated from its quasi-constitutional status but it was reinforced in the *Charter* by Parliament's guarantee - the right to be informed. I am not at all convinced that Parliament intended this right to be invoked upon the instance of every investigation by the police. Indeed, it would be ludicrous, ... to contemplate that every motorist "stopped" by the police for whatever reason would be greeted with the

.../3

information that he had the right to retain and instruct counsel. However, when a citizen is required on demand, to accompany a police officer for the purpose of giving breath samples or other information which may ultimately incriminate him, his rights have been placed at risk; the *Charter's* guarantee is then relevant to him; he is then and there detained within the meaning of s.10(b) of the *Charter*.

I have no difficulty in finding on this appeal, that the learned trial judge was correct in concluding that the respondent was detained within the meaning of s.10(b) of the *Charter of Rights*.

Response to Issue 2

The Crown acknowledges that the respondent was not verbally informed of his right to retain and instruct counsel but maintained at trial that a sign placed in the breathalyzer room was sufficient to fulfill the requirement of the *Charter's* informing guarantee.

The question whether a person is informed of his rights is a question of fact to be determined by the trial judge on the evidence. Obviously, circumstances will dictate the need for different modes to be used in transmitting information. Language, physical or mental disabilities are circumstances which will have to be taken into account. In my opinion, a person may be informed by means of verbal or written communication, although caution must be exercised in accepting a sign on the wall as proof that the *Charter's* guarantee has been sufficiently discharged.

In the instant case, I am satisfied that Chief Judge Carruthers fully considered the relevant evidence which included the statement of Constable Murnaghan that he could not recall the exact wording which the sign contained, estimated its size from twelve to eighteen inches square with lettering from one and one half inches to two inches. Constable Murnaghan could not say whether the respondent could read. The respondent acknowledged having seen the sign but did not remember what it said. The trial judge concluded:

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> I think there should be something more concrete than that put before the court if the court is expected to rely on signs as a means of informing an accused of his rights guaranteed under the *Canadian Charter of Rights and Freedoms*.

This finding reflects, in my opinion, a full and proper assessment of the relevant evidence and ought not to be disturbed on this appeal.

Response to Issue 3.

The learned trial judge clearly invoked s.24(1) and thereby excluded the certificate of analyses. The purpose of s.24 is to provide in the *Charter* a remedial provision which was lacking in the *Bill of Rights*. When a citizen's rights have been infringed or denied, a court of competent jurisdiction is given a broad discretion in ordering a remedy. I am satisfied that Chief Judge Carruthers, having found the respondent was denied his right to be informed provided him an appropriate and just remedy when he rejected the certificate of analyses. In doing so, he has accorded paramountcy to the *Charter* and compelling assurance to the respondent that his constitutional guarantees are more than mere words.

For these reasons, **the appeal must fail.**

Cite: Unreported.

Possible Ramifications of Decision:

1. Here, told that the decisions made under *Bill of Rights*, cannot be taken as a final and definite resolution of the issue under s.10(b) as to meaning of detention and/or detained.

2. Held that when citizen is required, on demand, to accompany a police officer for the purpose of giving information which may ultimately incriminate him, his rights have been placed at risk the *Charter's* guarantee in s.10(b) is then relevant to him; he is then and there detained.

.../5

3. A person may be informed either verbally or by written communication of his rights under s.10(b) of the *Charter*.

4. Here, the rejection of evidence, (the certificate of analyses) provides an appropriate and just remedy when accused is denied right to be informed under s.10(b) of the *Charter*.

Her Majesty the Queen v. Kelly M. Bleich

In the Court of the Queen's Bench

For Saskatchewan

June 1983

Docket # 1247

Court should not balance away the respondent's constitutional guarantee under s.10(b) to be informed of the right to counsel.

Facts -

This is a Crown appeal from the acquittal of the respondent.

The accused was charged that ... Kelly M. Bleich, having consumed alcohol in such a quantity that the proportion thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres did drive a motor vehicle contrary to Section 236 of the *Criminal Code*.

The accused's motor vehicle was stopped in the Regina Beach area in the Province of Saskatchewan on July 4, 1982. The accused was the driver and after the usual observations, Constable Michael Francis Morrissey, a member of the Royal Canadian Mounted Police formed the opinion that the accused's ability to drive a motor vehicle was impaired by alcohol or drugs. The accused was read a demand requiring him to provide samples of his breath and to accompany the officer for that purpose. The accused was read a demand requiring him to provide samples of his breath and to accompany the officer for that purpose. The accused was escorted, and upon arrival there he provided two samples of breath into the breathalyzer instrument. The certificate of Analysis was prepared and served on the accused. In cross-examination the investigating constable said that he did not advise the accused of his legal right to retain and instruct counsel because he had forgotten.

Reasoning of the Court -

In the *Queen v. Paul Mathew Therens*, dated April 15, 1983, a case in which the material facts wee the same, the Court of Appeal for Sasktachewan dismissed

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a Crown appeal and Tallis, J.A. for the majority stated near the end of his judgement:

> "... this court should not balance away the respondent's constitutional guarantee under section 10(b) to be informed of the right to counsel".

The appeal is dismissed.

Possible Ramifications of Decision:

1. See *R. v. Therens*, 33 C.R. (3d) 204 followed. [Note 20-C].

2. Case shows basic application of s.10(b) of the *Charter*.

Her Majesty the Queen v. Ronald Robert Currie

In the Supreme Court of Nova Scotia, Appeal Division

February 15, 1983

Docket # S.C.C. 00637

The words 'detain' and 'detention' in s.10(b) of the *Charter of Rights* connote some form of compulsory restraint.

Facts -

On August 9, 1982 His Honour Nathan Green, Chief Judge of the Provincial Magistrate's Court, acquitted the respondent on the charges that he ...

> Did without reasonable excuse fail to comply with a demand made to him by a peace officer to provide then or as soon thereafter as was practicable samples of his breath suitable to enable an analysis to be made in order to determine the proportion, if any, of alcohol in his blood, contrary to section 235(2) of the *Criminal Code* of Canada.

And further,

> At the same place and time did unlawfully have the care or control of a motor vehicle while his ability to drive a motor vehicle was impaired by alcohol or a drug, contrary to section 234 of the *Criminal Code*.

The foundation of the acquittal was a finding by the late Chief Judge Green that before the act of refusal Mr. Currie was detained by the police and was not thereafter informed of the right guaranteed him by s.10(b) of the *Charter of Rights & Freedoms* to retain and instruct counsel without delay. It should also be noted that the respondent voluntarily agreed to accompany the constable. In consequence of the fact that the accused was not informed of his rights under 10(b), certain evidence relevant to both charges was excluded on the basis set forth in s.24(2) of *the Charter of Rights and Freedoms*, namely that the admission of such evidence in the proceedings would bring the administration of justice into disrepute.

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The Crown now appeals by way of stated case against the determination made by Chief Judge Green. The latter has submitted the following question for our opinion:

> Did I err in law in holding that the respondent was under "arrest or detention" and therefore ought to have been informed by the peace officer of his rights to retain and instruct counsel without delay, within the meaning of section 10 of the *Canadian Charter of Rights and Freedoms?*

Reasoning of the Court -

Because the right to counsel has been exposed to such judicial review it seems to me that had the British Parliament intended to create a more substantial right by s.10 of the *Charter* then that guaranteed by s.2(c) of the *Canadian Bill of Rights* it would have used different terminology. By using language that is very similar to that used by the *Canadian Bill of Rights* to express the right to counsel it is my opinion that Parliament did not intend the word "intention" in s.10 of the *Charter* to bear a markedly broader meaning than that ascribed judicially to the word "detained" in s.2(c) of the *Canadian Bill of Rights* and therefore cases decided with respect to the meaning of the word "detained" in s.2(c) of the *Canadian Bill of Rights* are relevant to a determination of the meaning, scope, and effect of the word "detention" in s.19(b) of the *Charter*.

... The unanimous judgement of the Supreme Court of Canada in *Chromiak*, a case decided under the *Canadian Bill of Rights* was delivered by Mr. Justice Ritchie who, at pp. 307 and 308 of 12C.R. (3d) said:

> It appears to me to be obvious that the word "detention" does not necessarily include arrest, but the words 'detain' and 'detention' as they are used in s.2(c) of the *Bill of Rights*, in my opinion, connote some form of compulsory restraint, and I think that the language of s.2(c)(iii) which guarantees to a person "the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if

.../3

> the detention is not lawful', clearly contemplates that any person 'detained' within the meaning of the section is one who has been detained by due process of law. This construction is supported by reference to ss. 28(2)(b), 30, 136(a), 248 and 250 of the *Criminal Code*, where the words "to detain" are consistently used in association with actual physical restraint.

The phrase "due process of law" is a broad concept which has not received in this country in this country (at least to date) the expanded meaning given it in some jurisdictions in the United States of America. Mr. Justice Ritchie in *Curr v. The Queen*, [1971] S.C.R. 889 said at p. 185:

> "... in my opinion, the phrase 'due process of law' as used in s.1(a) [of the *Canadian Bill of Rights*] is to be construed as meaning 'according to the legal processes recognized by Parliament and the courts of Canada".

Applying such definition to Mr. Justice Ritchie's interpretation of the word 'detention' in the *Chromiak* case it is obvious that the ratio of that case is that to be detained within the meaning of s.2(c) of the *Canadian Bill of Rights* a person must be involuntarily detained by operation of some legal process. There must be a form of compulsory restraint.

What both s.2(c) of the *Canadian Bill of Rights* and s.10 of the *Charter* contemplate is a form of arrest or detention, that is reviewable by habeas corpus. A condition precedent to the invocation of the remedy of habeas corpus is that the applicant be in custody - *Rex. v. Keeper of Halifax Jail* (1918), 52 N.S.R. 299, rarely now are persons arrested who either refuse to comply with a breathalyzer demand or who comply and fail the test. The practice, at least in this jurisdiction, appears to be to release such persons on an appearance notice. From a practical point of view, therefore, if a recipient of a breathalyzer demand was deemed to be detained within the meaning of s.2(c) of the *Canadian Bill of Rights* or s.10(c) of the *Charter* rarely; if ever, could he have the validity of such detention determined by way of habeas corpus.

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Insofar as the breathalyzer provisions of the *Code* are concerned I would not subscribe a different meaning to "detention" in the context of s.2(c) of the *Canadian Bill of Rights* on the other hand and s.10(c) of the *Charter* on the other. In my opinion detention within the meaning of s.10 of the *Charter* insofar as it relates to s.235(1) of the *Code* is that type of compulsory restraint defined and explained by Mr. Justice Ritchie in the *Chromiak* case.

Section 235(1) of the *Code* does not contemplate either arrest or involuntary or compulsory restraint of the individual in order for the breath sample demand to be made. The individual is free to decline to comply with the demand and the law provides a sanction if such refusal is not founded on reasonable grounds.

Even if the recipient of a breath sample demand under the *Criminal Code*, s.235(1) can be said to be 'detained' in the broader sense of that word because either his "liberty" or "security of person" is adversely affected (*Charter*, s.7) the requirement of reasonable and probable grounds in *Code* s.235(1) provides a mechanism for examining the reasonableness of the demand. The test of reasonableness is also the cornerstone of the *Charter* because the rights thereunder are not absolute but are by s.1 subject to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society.

One can envisage factual situations where a motorist stopped by the police and given a *Code* s.235(1) demand may be said to be "detained" within the meaning subscribed thereto in the *Chromiak* case. This case, however, is not one of them. Mr. Currie was found by the late Chief Judge Green to have agreed "to accompany Constable Clarke to the Halifax Detachment for the purpose of the breathalyzer test".

There is here no element of involuntary restraint. His freedom of choice was not restricted - he was given the option of accompanying the police or not. He chose to go with the officer without indicating any reluctance to do so and without being threatened with detainment if he refused.

.../5

In consequence of all the foregoing it is my opinion that Mr. Currie was not "detained" by either Constable Clark or Constable Pike within the meaning of s.10 of the *Charter*. It follows that s.10(b) of the *Charter* has no application to the particular facts of this case and consequently the question submitted for our opinion must be answered in the affirmative.

Cite: Unreported.

Possible Ramifications of Decision:

1. Told that Parliament did not intend the word 'detention' in s.10 of the *Charter* to bear a markedly broader meaning than that ascribed judicially to the word 'detained' in s.2(c) of the *Bill of Rights*. Thus, cases decided with respect to the meaning of the word 'detained' in s.2(c) of the *Bill of Rights* relevant to a determination of the meaning, scope, and effect of the word 'detention' in s.10 of the *Charter*.

2. Reiteration that in order to be detained there must be a form of compulsory restraint.

on a different meaning now that they appear in a statute which is part of the nation's constitution, rather than in the *Canadian Bill of Rights*. At the risk of over simplification, many post-Charter cases seem to have proceeded on the basis that a reserve onus provision is contrary to the presumption of innocence according to law, and such a provision can be sustained only if it passes a further test under s.1 of the *Charter;* that the reverse onus constitutes a reasonable limitation prescribed by law, as can be demonstrably justified in a free and democratic society.

In *Regina v. Oakes* (1983) 2 C.C.C.(3d) 339 Martin, J.A. stated that the "threshold question" is whether the reverse onus clause is a reasonable limitation.

With great respect, I should have thought that the threshold question is whether a reverse onus clause violates the presumption of innocence according to law in the *Bill of Rights* and in the *Charter*. If it does not, then the enquiry need go no further. If it does, then the reverse onus might still be saved if it falls within the description of a reasonable limitation as can be demonstrably justified in a free and democratic society.

I do not suggest that every reverse onus clause must be dealt with in the same way. Some, like s.8 of the *Narcotic Control Act*, may be so cast as to violate the presumption of innocence.

I have no difficulty, in the present case, based on the unanimous decision of the Supreme Court in *R. v. Appleby* (See 12-B) in concluding that the reverse onus provision found in s.106.7(1) of the *Code* does not contravene the presumption of innocence according to law, and it is therefore valid.

If I am wrong in this approach, - if the threshold issue is whether the reverse onus provision is a reasonable limitation under s.1 of the *Charter* then I arrive at the same result. In the *Oakes* case (1983), 2 C.C.C.(3d) 339, Martin, J.A. came to the conclusion that the reverse onus provision in s.8 of the *Narcotic Control Act* was invalid because of a lack of a rational connection between proof of possession and the presumption of an intention to traffic. Other reverse onus clauses have been upheld as representing reasonable

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Her Majesty The Queen v. Arnold Godfried Schwartz

In the Court of Appeal of Manitoba

December 16, 1983

Docket # 144/83

When determining whether "reverse onus" provision contravenes the *Charter of Rights*, s.11(d) the threshold question is whether a reverse onus clause violates the presumption of innocence according to law in the *Charter of Rights*.

Facts -

The Crown has appealed the acquittal of the accused ... by Barkman C.C.J. (now C.C.C.J.) sitting in appeal on the record from the conviction of the accused by Allen, P.C.J. on two charges of possessing restricted weapons for which he did not have registration certificates.

One of the grounds of appeal advanced was that the learned judge of appeal erred in law in ruling that section 106.7(1) of the *Criminal Code of Canada*, R.S.C. 1970, Chap. C-34, was invalid because it contravened section 11(d) of the *Canadian Charter of Rights and Freedoms*. The impugned section of the *Code* places the onus on the accused of proving that he was the holder of registration certificates for the restricted weapons. Section 1(d) of the *Charter* provides for the right of an accused to the presumption of innocence.

Reasoning of the Court -

Huband, J.A. puts forward the following reasoning with respect to this ground of appeal.

... I now turn to the constitutional issue. Barkman, C.C.C.J. ruled that 106.7(1) was invalid in that it contravenes s.11(d) of the *Charter of Rights and Freedoms*.

... Things have taken a different turn since the passage of the *Charter of Rights*, even though the wording remains precisely the same as the *Bill of Rights*. The view has been expressed that the words "... according to law", take

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limitations because there is a logical connection between proven facts and the presumption against the accused which he is called upon to rebut.

In the present case, the reverse onus provision is of an entirely different character than the reverse onus provision in s.8 of the *Narcotic Control Act*. ...(T)he purpose of the reverse onus provision contained in s.106.7(1) is the convenient proof of what should be a readily ascertainable fact. Even in this case the Crown must establish certain things: possession by the accused of a restricted weapon. It is true that mere possession of a restricted weapon does not logically lead to an inference that the weapon is unregistered. But proof of registration is so easily provided by the accused himself, that it becomes reasonable to require the accused to answer an onus upon him at that point. In the *Oakes* case, Martin J.A. envisaged a limited class of cases where the reasonableness of a reverse onus provision would not turn on a rational connection between the proven fact and presumed fact, but rather on a matter of pure convenience. On p.356 he indicates that convenience will not often justify a reverse onus provision as being a reasonable limitation, and then adds these words:

> " ... The argument from convenience is permissible only where the defendant has more convenient access to the proof, and where requiring him to go forward with the proof will not subject him to unfairness or hardship".

I think that is an accurate description of the onus which is imposed upon this accused by virtue of s.106.7(1). The defendant has more convenient access to proof.

In my view, this onus provision would fall within the class of cases where convenience makes reasonable the limits prescribed by law on the presumption of innocence.

Appeal Allowed.

Cite: Unreported.

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Possible Ramifications of Decision:

1. Gives an alternative "threshold question" to that given in *R. v. Oakes* to determine whether a reverse onus clause violates the presumption of innocence according to s.11(d) of the *Charter of Rights*.

2. Gives the situation where the reasonableness of a reverse onus clause does not turn on a rational connection between the proven fact and the presumed fact, but rather on a matter of pure convenience.

3. Believes questions to be asked when determining the validity of a reverse onus clause are as follows:

    1. Whether there has been a violation of the right to be presumed innocent (Section 11(d) *Charter)* and;

    2. If so, whether such a violation can be demonstrably justified as a reasonable limit (Section 1 of the *Charter)*.

R. v. Bourgoin

N.B. Prov. Ct.

January 13, 1984

For a reverse onus clause to be constitutionally valid, the connection between the proved fact and the presumed fact must, at least, be such that the existence of proved fact rationally tends to prove that the presumed fact also exists. S.107, of the *Fish and Wildlife Act*, a reverse onus provision, was held to be arbitrary, unreasonable and constitutionally invalid.

Facts -

Gerald C. Bourgoin is charged on one information containing two counts alleging violations of regulations under the *Fish and Wildlife Act* of New Brunswick. The first count alleges that he did illegally angle for salmon by means of bait on Crown reserve waters, contrary to s.21(1) of Regulation 82-103 under the *Fish and Wildlife Act*. The second count alleges that he did fish simultaneously for sport while acting as a guide contrary to s.22(3) of the same Regulation.

The defendant had a licence to fish salmon, but not on Crown reserve waters. He did, however, have a Guide I licence. This latter licence would allow him to fish for the holder of a Crown reserve licence; i.e., show him how to fish, but not fish simultaneously with him, for s.22(3) of Regulation 82-103 under the *Fish and Wildlife Act* provides:

> No licensed guide I shall angle simultaneously with any person whom he is accompanying as a guide.

Defendant's Submission with Respect to First Count

Mr. Levesque, counsel for the defendant, submits that the reverse onus provision in s.107, supra, infringes the "presumption of innocence" provision contained in s.11(d) of the *Charter of Rights and Freedoms*, and this is of no force or effect ... In addition thereto, counsel for the defendant submits that

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even if the defendant knew that Rioux (the other party) was fishing illegally, he was not a party to the offence committed by Rioux. He submits that there is no duty on a person to prevent another from committing an offence.

Reasoning of the Court -

Response to Second Count

Considering first, the second count against the defendant, on the facts as presented, I am satisfied beyond any reasonable doubt that the defendant was aware, while he was fishing, that Rioux was fishing. All essential elements of this offence have been established beyond any reasonable doubt. Accordingly, I do find the defendant, Gerald C. Bourgoin, guilty of the violation of s.22(3) of Regulation 82-103 under the *Fish and Wildlife Act*.

Response to the First Court

As to the first count, the Crown relies on the same evidence to prove its case. There is no evidence that the defendant angled for salmon by means of bait on Crown reserve waters. Rather, the evidence points to the defendant fishing by a method known as fly-fishing. This method of fishing is not unlawful. This method of fishing is not unlawful, provided the individual fishing has the proper licence; or, if he has a Guide I licence, that he not fish simultaneously with a person for whom he is acting as a guide.

At issue is the constitutional validity of s.107 of the *Fish and Wildlife Act*, upon which the Crown relies to prove its case against the defendant. Section 107 provides as follows:

> A person over the age of fifteen years who accompanies another person at the time when the other person commits an offence under this Act is a party to the offence and is liable to the penalty prescribed for the offence unless he proves that the offence was committed without his knowledge and consent.

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In this case, the other person committing the offence is Mario Rioux. The evidence at trial indicated that Rioux was charged with the offence of angling for salmon by means of bait.

... I am of the view that there was a duty on the defendant to "do something" to try and prevent the illegal taking of fish. The evidence established that the defendant is a guide, and as such, hs taken an oath to endeavor to prevent the illegal taking of fish or wildlife and to adhere to the provisions of the *Fish and Wildlife Act* and regulations. However, s.107 is not limited in its application to persons of a certain class, such as guides or others who have a duty, under the Act, to "do something" when they see an offence being committed under the Act or regulations. The section applies to anyone over the age of fifteen years who accompanies another person at the time when the other person commits an offence under the Act. Even if one were inclined to take the view that the statutory provision is a reasonable one on the evidence in this particular case, our Court of Appeal has decided that the constitutional validity of questioned portions of a statute should not be decided on a "case by case" basis. In *R. v. O'Day* (1983), 46 N.B.R. (2d) 77, Hughes C.J.N.B. in considering the constitutional validity of s.8 of the *Narcotic Control Act* stated the following:

> The presumption created by s.8 is in the nature of a mandatory presumption. Its constitutional validity must be determined by an analysis of the presumption divorced from the facts of the particular case.

In considering the constitutional validity of s.107 of the *Fish and Wildlife Act*, one must ignore that the defendant in this case is a guide.

In *R. v. Oakes* (1983), 2 C.C.C. (3d) 339 it was held that a reverse onus clause did not necessarily contravene the presumption of innocence secured by the *Charter*, provided such a provision is reasonable. The provision would only be constitutionally invalid where it is unreasonable.

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Section 107 of the *Fish and Wildlife Act* is aimed not at assisting the Crown in proving its case against the person who was actually committing the offence. It is aimed at imputing guilt upon the person or persons who happen to be with the person committing the offence at the time he commits it. I find a lack of a rational connection between the proved fact and the presumed fact. Proof that an offence was committed by one person compels the tries of fact to find that the offence was also committed by the person or persons accompanying him at the time. The element of participation or encouragement by the person accompanying may be totally lacking. The act of accompanying need not even in circumstances which would give rise to a reasonable inference that the person accompanying was a party to the offence within the terms of the definition of a party to an offence in s.16 of the *Summary Conviction Act of New Brunswick.* The person accompanying could be present under the most innocent of circumstances, and be forced into court with the burden of establishing lack of knowledge and consent.

The presumed fact is not one which is rationally open to the accused to disprove.

... Furthermore, since s.107 applies to all offences under the *Fish and Wildlife Act* and regulations, for certain offences a convicted person may be liable to a fine of $1,000. and imprisonment for two (2) months.

In my view, s.107 contravenes the accused's right under s.11(d) of the *Charter* to be presumed innocent until proven guilty at law.

... Accordingly, *Gerald C. Bourgoin is acquitted* of illegally angling for salmon by means of bait on Crown reserve waters.

Accused acquitted on count one,
convicted on count two.

Cite: 52 N.B.R. (2d) 352
138 A.P.R.

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Possible Ramifications of Decision:

1. Held that s.107 of the *Fish and Wildlife Act* arbitrary, unreasonable and constitutionally invalid.

2. Made aware that reverse onus clause does not necessarily contravene the presumption of innocence in s.11(d) of the *Charter* if provision is reasonable.

3. For reverse onus clause to be reasonable and hence constitutionally valid, the connection between the proved fact and the presumed fact must, at least be such that the existence of the proved fact and the presumed fact, must, at least, be such that the existence of the proved fact rationally tends to prove that the presumed fact also exists.

4. The constitutional validity of questioned portions of statutes are not to be decided on "case by case basis". Instead valdity determined by an analysis of the presumption divorced from facts of particular case.

5. With respect to reverse onus clauses courts seem to following the reasoning put forward in *R. v. Oakes* (1983), 2 C.C.C. (3d) 339.

R. v. MacDonald, Gillis and McMillan

New Brunswick Court of Queen's Bench

Trial Division

October 19, 1983

Docket # S/M/185/83

S.109 *Fish and Wildlife Act* violates the presumption of innocence guaranteed by s.11(d) of the *Charter* and was not saved by section 1 as it was not a reasonable limit prescribed by law.

Facts -

It is alleged that the incident in question occurred on the 17th of November, 1982 at or near Clear Brook, McDougall Lake Road, in Charlotte County.

The attention of forest rangers on duty that night was attracted at approximately 2:05 A.M. to the flash of a light in the area in question. Shortly thereafter the headlights of a vehicle came on in the same area. These rangers met and passed the vehicle and then after turning and proceeding in the opposite direction met what appeared to be the same vehicle. This vehicle was stopped and the appellants McDonald and Gillis were found therein. A search of the vehicle was conducted, no arms nor lights being found the two appellants were allowed to leave.

This vehicle was stopped again about 3:15 A.M. in the same general area and at this time all three appellants were in the same vehicle. Again a search was made and no arms or lights were found.

Subsequently through the assistance of a tracking dog, a rifle with an attached scope and a battery with a connecting wire going to a sealed beam light were found a short distance from where the vehicle had been noted being stopped at approximately 2:05 A.M.. These items were then left in place while law enforcement officers waited for someone to reclaim them. At some point later in the morning the rifle in fact was moved some 50 yards. During the time when this rifle was moved the vehicle was seen to be in the area. In due course, the vehicle was stopped and all three appellants arrested and charged with hunting at night.

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The trial judge reviewed the evidence and stated,

> ... (I)t's clear to me that at least one of the occupants of the car was, during the course of the evening, in possession of at least the rifle and probably the light and battery at the same time, although there was no evidence of them having used it while the game wardens were in a position to observe them.

The matter for which these appellants were convicted is a violation of s.33(1) of the *Fish and Wildlife Act*, C. F-14 I. The Act provides as follows:

33(1) Every person commits an offence who

(a) hunts wildlife in the night.

The *Fish and Wildlife Act* further provided as follows:

109. Where on the prosecution of a person with respect to an offence under paragraph 33(1)(a) or (b) it is proven that the person charged or any person accompanying the person charged with such offence was at the time and place where and when such offence is alleged to have been committed, in possession of

(a) a firearm
(b) a light capable of being used to attract wildlife; or
(c) any device that can be used as an aid to night vision,

the onus shall be on the person charged to prove that he did not commit the offence charged.

[This section was repealed during the last sitting of the N.B. legislature].

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Submission Advanced on Behalf of the Appellants

The argument advanced on behalf of the appellants is that an application on section 109 of the *Fish and Wildlife Act*, providing that a person charged or any person accompanying the person charged with an offence under section 33(1)(a) of the *Fish and Wildlife Act* who happens to be in possession of any of the items mentioned in section 109 and must therefore "prove he did not commit the offence charged", reverses the onus of proof of guilt and therefore deprives the accused of being presumed innocent until proven guilty.

... The question remains as to whether or not such a provision is justified under section 1 of the *Charter of Rights* which provides as follows:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Reasoning of the Court -

If one applies the reasoning of Martin, J.A., in *R. v. Oakes* (1983) 2 C.C.C. (3d) 339, one would have to find within the proof of the fact of possession of a gun or light by one of the parties of a group a fact that rationally tends to prove the essential element of the offence in this case of hunting for wildlife. There are many circumstances where one could have possession of a gun or light and in such circumstances not be actually hunting. One may be intending to hunt or making preparations for hunting but the mere possession of such objects does not rationally tend to prove the act of hunting.

For the above reasons I therefore hold that section 109 of the *Fish and Wildlife Act* was constitutionally invalid.

Appeal allowed.

Cite: 54 N.B.R (2d) 65
140 A.P.R.

Possible Ramifications of Decision:

1. At times, reverse onus provisions may be justified by s.1 of the *Charter* as being a reasonable limit prescribed by law.

2. See *R. v. Oakes* (1983) 2 C.C.C. (3d) 339 being followed.

R. v. Carroll

P.E.I., S.C. in banco

1983

Meaning of "right to be presumed innocent" as contained in s.11(d) of the *Charter of Rights* given. Under realm of the *Constitution Act*, 1982 presumption of innocence envisages a law subject only to reasonably prescribed limits demonstrably justified in a free and democratic society.

Facts -

The respondent was acquitted on a charge that he did unlawfully have in his possession for the purpose of trafficking in the narcotic cannabis resin, contrary to s.4(2) of the *Narcotic Control Act*, R.S.C. 1970, C. N-1. In acquitting the respondent the trial judge held that s.8 of the *Narcotic Control Act* contravened s.11(d) of the *Constitution Act*, 1982 in that the reverse onus clause contained in s.8 was contrary to the respondent's right to be presumed innocent under the *Constitution Act*.

Submission of the Appellant

The basic submission of the appellant is that s.8 of the *Narcotic Control Act* created an evidentiary burden upon the respondent, as contrasted with a legal burden, and as such does not violate s.11(d) of the *Charter*.

Reasoning of the Court -

Before considering the question of whether it is a persuasive burden or an evidential burden that is to be dealt with, it is necessary to consider the wording of s.8 of the *Narcotic Control Act* to determine the amount of evidence the accused is required to produce to discharge the burden. If the burden may be discharged upon raising a reasonable doubt, ... the question becomes academic.

While there have been numerous ways of detailing the rebutting evidence

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required according to the presumption that is being dealt with, the present case would appear to call for the rebutting evidence to be on a balance of probabilities. In the case of *R. v. Appleby* [1972] S.C.R. 303 it was held that that the word 'establishes' as it occurred in s.224 A (1)(a) of the *Criminal Code* required an accused to rebut the presumption on a balance of probabilities.

Although the interpretation of any word in a statute must be considered in the context in which it is used, I am unable to conclude that any different meaning should be placed upon the word 'establishing' than on the word 'establish' in the *Appleby* case.

... A further preliminary matter to be considered in the meaning to be attached to the words "the right to be presumed innocent" contained in s.11(d) of the *Constitution Act*.

... (I)t may be said that an accused is presumed innocent as long as the prosecution has the final burden of establishing his guilt, on any element of the offence charged, beyond a reasonable doubt.

It becomes necessary to determine the relationship of the two burdens, legal and evidential, in considering the 'burden of proof'.

As stated the burden of proof is generally upon the person who asserts, which means that in criminal trials the burden of proof is on the prosecution to show that the accused has committed the offence charged. This is the legal burden, burden of persuasion or primary burden that remains with the prosecution throughout the trial and is to be contrasted with the evidential burden (or secondary burden) which is the burden of proving a particular fact and which may shift during the trial. Morden, J.A. in *R. v. Sharpe*, [1961] O.W.N. 261 indicated the effect of these two burdens as they are commonly stated in our law:

> The burden resting upon the Crown in a criminal ease of proving the accused guilty beyond a reasonable doubt is a

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> matter of substantive law and never shifts from the Crown - that of adducing evidence - may shift in the course of a trial depending upon the evidence adduced.

When describing the evidential burden as used in the context of the Crown having to prove a fact, one is speaking of the Crown's familiar burden of bringing forth sufficient evidence to make out a prima facie case of guilty. The amount of evidence that the Crown is required to produce at this stage is at the best nebulous but it must be sufficient evidence to permit a jury to find the accused guilty beyond a reasonable doubt. However, it is to be noted that even if the Crown meets the evidential burden, it does not follow that a jury must find the accused guilty but only may find him guilty. If the Crown has established their prima facie case, the matter can be turned over to the jury, at which time the burden of persuasion or the legal burden comes in to effect, and he who has that burden at common law must convince the jury as to his position or lose his case.

It can, therefore, be said that when the Crown has the evidential burden and has made out a prima facie case, which the defence has left unanswered, a jury or judge may convict the accused. However, if a legal burden is in issue and has been left unanswered, a jury or judge may convict the accused. However, if a legal burden is in issue and has been left unanswered, the jury or judge must convict the accused.

With the above distinction in mind of the use of the two senses in which the "burden of proof" is used it can be seen that the *Narcotic Control Act* is construed is of utmost importance.

The manner in which the burden of proof or onus may shift is through the use of a presumption. Presumptions may be irrebutable or rebuttable and it is in the latter context to which I will refer to them.

... Upon the prosecution proving that a narcotic was involved and that the accused had possession of it, a rebuttable presumption of law arose calling upon

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the accused to disprove the presumption. It is at this juncture that the question of which burden of proof is involved arises.

... (P)resumptions may be classified as either evidential or persuasive, according to whether they relieve the prosecution, once the basic fact is found, of its persuasive or evidential burden with respect to the presumed fact .... It can also be said that in determining whether or not we are dealing with an evidential burden or a persuasive burden there is generally used two forms of language in imposing an evidential burden. The first being those enactments that state that upon certain facts being proven such will be 'prima facie' evidence of some other matter. Secondly, where certain facts once proved are "in the absence of any evidence to the contrary" proof of some other matter. On the other hand use of the words 'establish', 'prove' or 'show' following the decision in *Appleby* leads to the conclusion that a persuasive burden is being imposed.

... Perhaps the strongest reason for holding that s.8 involves a persuasive burden is based on the fact that the intention to traffic is an element of the offence charged and falls within the scope of the comment of Laskin, C.J., when he stated that the Crown had the duty of proving all elements beyond a reasonable doubt. [*R. v. Appleby*, see 12-B].

Having made the above finding, counsel for the respondent would submit that persuasive presumption infringes s.11(d) of the *Constitution* being in violation of the presumption of innocence. In answering this submission, it is necessary to review the decision in *Appleby* where the majority of the court concurred in the decision of Ritchie, J. holding s.2(f) of the *Canadian Bill of Rights*, which contained the right of the presumption of innocence, was not infringed by the statutory presumption contained in s.224A(1)(a) of the *Criminal Code*. The reasoning of Ritchie, J., was based on the famous judgement of Viscount Sankey, L.C. in *Woolmington v. The Director of Public Prosecutions*, [1935] A.C. 462, and Ritchie, J., held that a provision that places a burden to establish or prove an essential fact upon the accused would not conflict with s.2(f) because Viscount Sankey, L.C., had stated the reasonable doubt rule was subject to statutory exceptions.

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Assuming that Ritchie, J., was referring to s.2(f) of the *Bill of Rights* as not being infringed by a persuasive burden being placed upon an accused because of the presence of a statutory imposed burden of proof, the following points should be borne in mind when considering his judgement. First, the reference of Viscount Sankey, L.C. to any 'statutory exceptions' may be considered as obiter and not forming part of the 'rule' in *Woolmington* as the case only dealt with a burden of proof in relation to the common law.

... Secondly, Viscount Sankey was not concerned with a jurisdiction that had placed restrictions as our *Charter* has, on statutory powers. Furthermore, it can also be said that at the time *Appleby* was decided the presence of a constitution may have made a vast difference in the decision of Ritchie, J., containing as it does the 'supreme law' provisions of s.52. In my opinion s.52 overrides any statutory provision that contravenes the 'right' of a person, subject only to 'reasonable limits' prescribed in s.1 of the *Constitution Act*. To hold otherwise, that is to make a 'right' subject to statutory exception such a proposition cannot have weight at the present time.

While the decision of Ritchie, J., in *Appleby* might be distinguished on the above noted points specific reference should be made to the actual words that he used. He indicated that the presumption of innocence envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain facts have been proved by the Crown in relation to such ingredients. Today, under the realm of the *Constitution Act* it would be more appropriate to say that the presumption of innocence envisages; a law subject only to reasonably prescribed limits demonstrably justified in a free and democratic society.

... Proof that the accused was in possession of one marijuana cigarette would not, in my opinion satisfy the Ritchie, J., test as being proof of a fact in relation to an ingredient of an offence and most definitely would not satisfy Laskin, C.J.'s, test of a rational connection as enunciated in *R. v. Shelly* (1981), 37 N.R. 320. Finally, although Ritchie, J., nor Laskin, C.J., made specific reference as to whether they were dealing with a persuasive or

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evidential presumption in *Appleby* the opinion of Laskin, C.J., would appear to indicate that at least he and Hall, J. were speaking of the effect of a persuasive burden.

Therefore, I would conclude that s.8 of the *Narcotic Control Act*, referring to persuasive burden, infringes s.11(d) of the *Constitution* unless saved by s.1 to which I shall shortly refer.

Secondly, if it does not infringe s.11(d) the Crown has not made out a prima facie case by proving facts in relation to the ingredient of intention to traffic, whether one follows the Laskin, C.J. rational connection test or that enunciated by Ritchie, J. possession of six grams is insufficient.

Unless a provision falls within s.1 of the *Constitution Act*, there cannot be a requirement that an accused must prove an essential positive element of the Crown's case other than by raising a reasonable doubt. The presumption of innocence cannot be said to exist if by shifting the persuasive burden the court is required to convict even if a reasonable doubt may be said to exist.

In view of my conclusion that s.8 of the *Narcotic Control Act* infringes s.11(d) of the *Constitution Act*, consideration must also be given to the question of whether s.8 is a reasonable limitation on the presumption of innocence that be demonstrably justified in a free and democratic society. There appears to be no question that the burden of proving the resonableness of the limitation is placed upon the Crown.

The accused, (here), is being required to establish, on the balance of probabilities, that his possession was not for the purpose of trafficking. Such a burden is not reasonable when one considers the risk that is involved of being found guilty despite a reasonable doubt that may exist in the mind of the court. Neither can the placing of a persuasive burden upon an accused be justified merely because it is said we are dealing with a serious charge and because it is a matter about which society is concerned. There are many more serious

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offences where there is no requirement for the accused to prove his intent ... It is much more reasonable to expect a court to reach its decision with the final burden on the Crown rather than have the accused attempt, and most likely fail, to raise doubt on a balance of probabilities.

In my opinion the social need to obtain a conviction for trafficking does not outweigh the right of a citizen to be proven guilty beyond a reasonable doubt. The interest of justice under s.4(2) is not being harmed by a requirement that the Crown prove its case, on all elements of the charge, beyond a reasonable doubt. The day a legislature takes away the right of a citizen to be proven guilty, beyond a reasonable doubt, will foreshadow the end of a free and democratic society.

Appeal dismissed.

Cite: 40 Nfld and P.E.I.R. 147

Possible Ramifications of Decision:

1. Given difference between persuasive and evidential burden of proof.

2. Given the meaning of the phrase "right to be presumed innocent" as contained in s.11(d) of the *Charter* - an accused is presumed innocent as long as the prosecution has the final burden of establishing his guilt, on any element of the offence beyond a reasonable doubt.

3. Held that those cases that were decided under the *Bill of Rights* i.e. *R. v. Appleby* [1972] S.C.R. are of little use in coming to a decision under the *Charter of Rights*.

4. Those cases referring to persuasive burden of proof infringe s.11(d) of the *Charter* unless saved by s.1 of the *Charter*. Thus, a different method of reasoning is used here than was noted in *R. v. Oakes*.

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Her Majesty The Queen v. Samuel David Douglas

In the County Court of Westminister

February 2, 1984

(Docket #403/83)

No conflict between s.58 Federal *Fisheries Act* and s.89 of the *Indian Act* - S.89 only applies to civil proceedings. S.58(5) by purporting to enable forfeiture to Crown of any vessel, vehicle, article, etc., "in addition to any punishment imposed" offends s.11(h) *Charter of Rights*.

What constitutes "unreasonable seizure" - the seizure of chattels for security for payment of a possible future penalty is contrary to the presumption of innocence under the *Charter*.

Fishery Guardian not given power of seizure under s.58 *Fisheries Act* - Fishery officer not the same thing as Fishery guardian.

Facts -

The appellant was found guilty of resisting a peace officer, (Mr. Lario), and of obstructing a peace officer when the appellant, an Indian, attempted to prevent seizure of a pick-up truck on the Cheam Indian Reservation. Federal fisheries personnel alleged the truck had been used in connection with the illegal sale of salmon.

The relevant sections of legislation are as follows:

Section 58(1)(a) of the *Fisheries Act:*

"58(1) A fishery officer may seize any fishing vessel, vehicle, fishing gear, implement, appliance, material, containers, goods, equipment or fish where the fishery officer on reasonable grounds believes that

(a) the fishing vessel, vehicle, fishing gear, implement, appliance, material, container, goods or equipment has been used in connection with the commission of an offence against this Act or regulations".

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Section 89(1) of the *Indian Act:*

> "89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian."

Reasoning of the Court -

The first task is to examine the purpose of Section 89. Reading it in its context, which includes section 88 to 90 and is headed "Legal Rights", it is impossible to conclude that the section has any but civil intendment. Nothing there can be taken to suggest a bar to appropriation of property for a legally justifiable purpose under a criminal or quasi-criminal enactment.

The learned judge in coming to his decision also addressed other significant issues. These are as follows:

Charter of Rights

A closer look must be taken of section 58 of the *Fisheries Act*. Section 58 has two purposes. One of these is as follows:

> Section 58(5) purports to enable forfeiture to the Crown of any vessel, vehicle, article, goods or fish seized under 58(1) where a person has been "convicted of an offence under this Act or the regulations". The forfeiture may be ordered by the Minister or the convicting court" in addition to any punishment imposed".

The penalty of forfeiture, if added to another punishment, offends the *Charter of Rights* which promises:

> any person charged with an offence has the right if finally found guilty an punished for an offence, not to be tried or punished for it again...

Section 58 of the *Fisheries Act* must give way to the *Charter* in this aspect.

Civil Remedy

The alternative purpose of section 58 is to permit seizure of chattels for security or for possible sale "under execution" in the event a conviction is found and a fine is imposed. Such a course of action comes to the application of a civil remedy to enforce a criminal or quasi-criminal penalty.

Section 89 of the *Indian Act* prohibits that departure from practice. I say it does absolutely but, if I am wrong, then the benefit of ambiguity cited in the cases must go to the appellant.

Further, if I am wrong in my finding of illegality in respect to one of the two branches of section 58, but right in the other, the Crown cannot now claim to have followed the sole legal path.

To state that claim, the seizure officer would have had to advise the appellant, at the time of the particular purpose of the seizure.

If someone seeks to seize an Indian's chattels, he must tell him by what authority he does so. If it is for a legal purpose - such as evidence - then the seizure must be accepted. If not, the Indian or anyone acting on authority is entitled to resist.

In any event, it is wrong that <u>any</u> accused should be forced to post security for payment of a possible future penalty that might be imposed upon conviction. Such a seizure is unjust and is contrary to the presumption of innocence.

It is, in Charter terms, "an unreasonable seizure".

Authority of Personnel

The person in charge of the seizure here was Glen Lario, a "fishing

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guardian" appointed under section 5(3) of the Act. He has thereunder the powers of a police constable.

It was he who was alleged to have been obstructed and to have been resisted. It was he who was named in the information. Presumably a fishing guardian in exercise of his equivalent police constable powers could appropriate chattels reasonably believed to have an evidentiary purpose.

But a fishery guardian is not given the power of seizure under section 58. The right is reserved to personnel bearing the appointment "fishery officer". Mr. Lario is not a fishery officer.

Nowhere in the transcript is there testimony to show that the truck seizure was for possible use of the vehicle as evidence or, for that matter, is it anywhere suggested that the vehicle was needed for further investigation of any alleged offence.

... Mr. Lario was not acting in the execution of his duty. The appellant is entitled to succeed on this ground.

The Information

There are deficiencies in the evidence insofar as it is intended to prove the particulars set out in the information. The appellant was charged that he did unlawfully obstruct a peace officer, to wit, Glen Lario in the execution of his duty and that he did unlawfully resist the same Glen Lario.

... Mr. Lario testified that he advised the appellant: "I am arresting you for the obstruction of a fishery officer" and the information names him as the person obstructed. A fishery officer is not the same thing as a fishery guardian. An officer obtains his authority under section 5(1) of the *Fisheries Act*. A guardian obtains his authority under section 5(3) of the Act.

... Next, should the information have described Mr. Lario as a peace officer? I think not.

A guardian has the powers of a police constable given him by the Act. An officer does not.

A peace officer includes a police constable under the definition section of the *Criminal Code* but that is not to say everyone who has "the powers of a police constable" is a peace officer.

The charges should have been laid and the information sworn specifically pursuant to the *Fisheries Act*. The path to error is illuminated at page 42 of the transcript where it is pointed out that these charges were conceived under *the Criminal Code*, section 118.

The statute in this case is the *Fisheries Act*, not the *Criminal Code*.

The appeal is allowed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Decides that s.89 of the *Indian Act* applies only to civil proceedings. Thus, it is not in conflict with s.58 of the *Fisheries Act*.

2. Demonstrates how s.58 *Fisheries Act*, dealing with forfeitures, does not conform with the *Charter of Rights*.

3. Demonstrates what would be an unreasonable seizure under the *Charter of Rights*.

4. Made aware that a fishery guardian is **not** the same thing as a fishery officer and how this difference can become important. For example, a fishery guardian is not given the power of seizure under section 58.

5. Fishery guardians should lay charges and swear informations specifically pursuant to the *Fisheries Act*. [They are given the powers of a police constable for "the purposes of this Act"].

The Queen v. Wayne Nicholas et al.

In the Provincial Court of New Brunswick

1984

Maliseet Indians have aboriginal rights to fish under Proclamation 1763 as entrenched in s.25(a) of the *Charter of Rights*, but these rights are subordinated to section 1 of the *Charter*.

Interpretation of s.35 *Charter of Rights* - aboriginal and treaty rights are constitutionalized prospectively, so that past (validly enacted) alterations of extinquishments continue to be legally effective, but future legislation which purports to make any further alterations or extinquishments is of no force or effect.

Facts -

The accused were charged with wilfully obstructing a fishery officer in the execution of his duty, contrary to and violation of s.38 of the *Fisheries Act* being Chapter F-14 of the Revised Statutes of Canada, 1970.

By a statement of facts agreed to by both counsel for the Attorney General of Canada and for the defendants, it was agreed that,

1. All of the defendants did at the time and place referred to in the informations obstruct a federal fishery officer subject to the special defences raised.

2. That at the time and place referred to in the informations the defendants, Gerald Roland Bear and Wayne Nicholas, did fish by use of a gill net in non-tidal waters.

3. That the fishery officers when obstructed were attempting to arrest the defendants in relation to the use of the said gill nets in non-tidal waters.

Two of the contentions that were put forward by the defendants are as follows:

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Contention #1

1. That under treaties, and specifically, the Royal Proclamation of 1763, as entrenched in section 25 of the *Canadian Charter of Rights*, the Maliseet Indians at Tobique Indian Reserve have an aboriginal right to fish by any means, at any time, within the bounds of the Reserve lands;

Contention #2

2. That the aboriginal and treaty rights of the defendants to fish at the relevant time and place was recognized and affirmed under section 35, Part II, of the *Constitution Act, 1983*.

Reasoning of the Court -

Response to Contention #1

The defence submits that the defendants are aboriginal people and that their aboriginal or treaty rights to fish are guaranteed under section 25(a) of the *Canadian Charter of Rights and Freedoms*. Section 25(a) reads as follows:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763.

The pertinent passage of the Royal Proclamation is as follows:

> "and whereas it is just and reasonable, and essential to our interest, and the security of our Colonies, that the several national or tribes of Indians with whom we are connected, or who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominions and

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> Territories, as, not having been ceded to or purchase by us, we reserved to them, or any of them as their Hunting Grounds.

It is my view that the term "hunting ground" in the Royal Proclamation of 1763 should include a recognition of the right of the Indians to also use the lands reserved unto them for fishing. In this I intend to give a liberal interpretation of the passage, in concordance with Dickson J. in *R. v. Nowegijick*, a Supreme Court of Canada decision pronounced 25 January 1983, where he said:

...It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of Indians.

...It is my view that the reference to Colonies and the Nations of Tribes of Indians therein include the provice of Nova Scotia which in territory, at that time, took in most of the Province of New Brunswick.

Although it can therefore be said that the defendants are aboriginals wherein their fishing rights are recognized by virtue of section 25(a) of the *Charter of Rights*, I find that these rights are subordinated to section 1 of the *Charter* and consequently to the regulatory enactments of the New Brunswick Fishery Regulations. The *Fisheries Act* and the Regulations thereunder are prohibitory and have for effect the purpose of conservation and management of the fisheries. Section 1 of the *Charter* reads as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It is also noteworthy that there are provisions in section 6.1 of the New Brunswick Fishery Regulations respecting the issuing of a licence to an Indian to fish for food, subject to terms, the purpose of which are to ensure the proper management and control of these fisheries. There was no evidence of any

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compliance with the Regulation, nor with Regulations pursuant to section 73(1)(a) of the *Indian Act*, which provides for the protection of fish on reserves.

For the reasons given in the three preceeding paragraphs, I do not consider it necessary for the Crown to introduce further evidence that would demonstrate the reasonable limits prescribed by the *Fisheries Act* and Regulations.

Response to Contention #2

I finally come to the last argument raised by the defence which consists of the entrenchment of the fishing rights of the defendants by virtue of section 35 of the *Constitution Act*, 1982.

Prior to the enactment of the *Constitution Act*, 1982, on 17 April 1982, any Treaty rights that come into conflict with Federal legislation such as *The Fisheries Act* and Regulations, the Federal legislation overruled the treaties.

In the book Canada Act 1982, Annotated, by Peter W. Hogg, published by the Carswell Company Ltd., Toronto, in 1982 Professor Hogg, in dealing with Section 35 states as pages 82-83:

> The word "existing" in s.35 makes clear tht aboriginal or treaty rights which are acquired in the future are not protected by s.35. Section 35 can only apply to aboriginal or treaty rights which are acquired before April 17, 1982. If we assume that those rights have in the past been vulnerable to legislative alteration or existing extinquishment, then s.25 could be given one of three effects. The first and most radical, interpretation of s.35 is that the rights are "constitutionalized" retroactively so that all legislation, past as well as future, which purports to alter or extinquish the rights is rendered of no force or effect. S.25 (1), and the rights are restored to their original unimpaired condition. This interpretation of s.35 is not particularly plausible in light of the words "existing" and "recognized" in s.35(1), not to mention the unpredictable and undoubtedly far reaching ramifications of the interpretation.

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A second possible interpretation would treat s.35 as recognizing Native Rights precisely as they existed on April 17, 1982, that is to say, not only subject to all alterations or extinquishments previously enacted, but also subject to continuing vulnerability to future legislative change. The interpretation of s.35 is also implausible because it gives no effect to the word "affirmed", and it makes s.35 redundant since s.25 already saves all the rights referred to in s.35.

A third possible interpretation of s.35 finds the middle ground between the two extreme views stated. The third interpretation is that aboriginal and treaty rights are "constitutionalized" prospectively, so that past (validly enacted) alterations or extinquishments continue to be legally effective, but future legislation which purports to make any future alterations or extinquishments is of no force or effect. This interpretation of s.35 would "freeze" Native Rights in their condition on April 17, 1982, is a plausible one which gives effect to the words "existing" and "recognized" while still allowing the word "affirmed" to produce a constitutive effect.

It is my opinion that the third interpretation of Professor Hogg is the correct one.

I find, for all of the above reasons that each of the defendants are **guilty as charged.**

Cite: Unreported.

Possible Ramifications of Decision:

1. Given the various possible interpretations of s.35 of the *Charter of Rights.*

2. See the application of section 25 of the *Charter.*

Regina v. Hare and Debassige

District Court of Manitoulin, Ontario

September 9, 1983

When considering Indian cases it is important to consider the history, oral traditions of the specific tribe and the surrounding circumstances at the time of the treaty.

S.35(1) *Constitution Act*, 1982 removes any doubt there may have been regarding the validity and efficacy of earlier agreements or treaties entered into with native people.

Any abrogation, derogation or variance of treaty rights must be accomplished by legislation that is (a) clear and unequivocal, (b) gives some indication that Parliament was aware of the existence of the rights which it sought to infringe and reflects an intention on the part of Parliament to exercise its power of abrogation, derogation, or variation.

Facts -

The accused were charged with fishing without a licence by means of a gill net contrary to s.12(1) of the Ontario Fishing Regulations, C.R.C. 1978, C.849 made pursuant to the *Fisheries Act*, R.S.C. 1970, C. F-14 and with transporting fish taken within Ontario in a manner prohibited by those regulations. The fish were taken on lands covered by the Manitoulin Treaty of 1862 and the accused Indians relied on article 6 of that treaty which provides that "all the rights and privileges in respect to the taking of fish in the lakes, bays, and creeks and water within and adjacent to the said island, which may be lawfully exercised and enjoyed by the white settlers thereon, may be exercised and enjoyed by the Indians". The accused were convicted at trial, the trial judge finding that the rights to fish given to the Indians by article 6 were subject to change from time to time as the rights of settlers were changed and, accordingly, the rights of the Indians to fish on the treaty lands were the same as those of all other persons, and were subject to the Ontario Fishery Regulations. The accused appealed from their conviction.

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Reasoning of the Court -

I concur with the finding of Collins, J. in the case of *Debassige v. The Queen* that the Manitoulin Treaty of 1862 was a treaty within the meaning of s.87 (now s.88) of the *Indian Act* and that the accused/appellant was entitled to rely upon those treaty rights. He allowed the appeal with which he was dealing and set aside the conviction ... I further find that the said treaty is a "treaty" in the purest sense of that word and within the meaning of that word as it appears in s.35(1) of the *Constitution Act, 1982*.

It is to be noted that in his judgement referred to above, Collins, J. took some pains to consider the background and surrounding circumstances at the time the Manitoulin Treaty of 1862 was signed. That he was both wise and correct to so do is confirmed some fifteen years later by this observation of MacKinnon, A.C.J.O. in *R. v. Taylor & Williams* (1981), 62 C.C.C. (d2) 227 at pp 232-3, 34 O.R (2d) 360:

> Cases on Indian or aboriginal rights can never be determined ina vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as post wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the Courts not create, by a remote, isolated current view of events, new grievances.

The Associate Chief Justice went on to hold at pp. 235-6:

> ... In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned.

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> Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians, if another construction is reasonably possible.

It is clear from the terms of the treaty tht there was no intention to provide for an abrogation, derogation from or variation of the rights which were given the white settlers. It would be grossly unfair to conclude that there was an intention to permit the abrogation, derogation from or variation of the rights which were given to Indians. To so hold would be to cast doubt upon the honour of those negotiating on behalf of the Great White Father, i.e. the Sovereign.

At the time the treaty was signed, Manitoulin Island was occupied only by Indians, which was the intent of the Treaty of 1836. It was the purpose of the Manitoulin Treaty of 1862 to open the island for white settlers. It is therefore not surprising that the futuristic phase, "may be lawfully exercised by the white settlers" is used, because that group of people had no rights with respect to the taking of fish on the island at the time the treaty was signed. To expand, the simple meaning of the words of article 6 by implying the existence of the additional words "rights of the white settlers as they may be varied by law from time to time" would be to employ a method of interpretation of Indian treaties at variance with the principles of interpretation outlined by MacKinnon A.C.J.O. in *Taylor and Williams*, supra.

Having found that the Manitoulin Treaty of 1862 gave the forefathers of the appellants (and therefore the appellants) the right to take fish from Lake Manitour by using a gill net, I must still determine whether or not that right has been extinguished or overridden by subsequent legislation.

It is the position of the Crown that whatever rights to fish may have been given the Indians by the Treaty of 1862 have nevertheless been changed or abrogated by the Ontario Fishery Regulations which were proclaimed under the

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provisions of the *Fisheries Act*. To support this position, the Crown relies heavily upon *R. v. George*, [1966] 3 C.C.C. 137 and on *Sikyea v. The Queen*, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80. One of the propositions set forward in these cases that is relevant to the case at hand is as follows: "Parliament has the power to breach Indian treaties if it so wills". As I see it, the questions to be determined are: (a) by what means may such treaties be breached or the rights granted thereunder be abrogated or varied, and (b) does the *Fisheries Act* and regulations passed thereunder comply with any such requirements?

(a) **How may Parliament exercise its right to abrogate or breach an Indian treaty such as the Manitoulin Treaty of 1862?**

... In 1979, the Ontario Divisional Court had an opportunity to consider how a government might extinguish or abrogate Indian aboriginal or treaty rights. In *R. v. Taylor and Williams* (1979), 55 C.C.C. (2d) 172 at p. 176, Trainor states that,

> ... the intention of the Sovereign to extinguish Indian title or any aspect of it must be be clear language, and the onus of establishing extinguishment is open the Crown.

The learned justice went on to quote from the judgement of Hall, J. in *Calder et al. v. A.G.B.C.* (1973) 34 D.L.R. (3d) p. 145 at p. 208 as follows:

> Hall, J. states: "Once aboriginal title is established, it is presumed to continue until the contrary is proven". And at p.404 S.C.R., p. 210 D.L.R., he quoted from Davis J. in *Lipan Apache Tribe v. United States* (1967), 180 Ct. Cl. 487, who had stated:
>
> "... In the absence of a clear and plain indication in the public records that the sovereign intended to extinguish all of the (claimants') rights in their property, Indian title continues...".

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While those observations were made primarily with respect to aboriginal rights or which may have been granted by the *Royal Proclamation of 1763*, they surely must be taken to apply to treaty rights, which would be of at least equal, if not superior status.

There is one further matter which I feel I may consider in determining how I should view the rights which I have found were given to the forefathers of the appellants in the Manitoulin Treaty of 1862. While there may have been some doubt in the minds of jurists regarding the extent and validity of the treaty rights of Indians as they were called upon to interpret them in earlier years, there can be no such doubt in the minds of anyone called upon to deal with those rights today. Section 35(1) of the *Constitution Act, 1982* provides as follows:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Subsection 35(2) of the Act brings the Indian people of Canada within the provisions of ss.(1). While the Constitution Act, 1982 does not create new rights for Indian people, it recognizes and affirms (my emphasis) existing rights, and in my mind at least, removes any doubt there may have been regarding the validity and efficacy of those earlier agreements or treaties entered into with the native people of Canada. In fact, s.88 of the *Indian Act* in effect gives the treaties equal status with Acts of Parliament vis-à-vis Acts of the provincial legislatures. There is no doubt that Parliament can unilaterally abrogate any such treaty, just as it can unilaterally abrogate any treaty with a foreign country or repeal one of its own statutes. It is equally clear that Parliament can unilaterally vary any such treaty just as it can amend one of its own statutes.

However, it is my opinion that any abrogation, derogation or variance of treaty rights must be accomplished by legislation which is (a) clear and unequivocal in its terms; (b) gives some indication that Parliament was aware of the existence of the rights upon which it seeks to infringe; and (c) reflects an intention on the part of Parliament to exercise its power of abrogation, derogation or variation.

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(b) Does the *Fisheries Act* and regulations made thereunder conform with the above requirements?

I have neither been referred to nor have been able to find anything in the *Fisheries Act* or the Ontario Fishery Regulations passed thereunder or in the predecessors of such Act or regulations which indicates to me that Parliament even remotely considered in any way the treaty fishing rights bestowed upon various bands of native people in Canada as well upon the forefathers of the appellants under the Manitoulin Treaty of 1862. There is nothing in the Act or regulations that indicates to me either that Parliament or the Governor in Counsel even recognized the existence of such treaty rights, much less that they intended to unilaterally abrogate or derogate from those rights when the Act was passed and amended or when the amending regulations were promulgated.

To illustrate, let us assume the Treaty of 1862 had been signed with the Government of the United States of America. I believe it highly unlikely that the Government of Canada could legally enact legislation which would have the effect of unilaterally derogating from or varying American fishing rights under such a treaty without specifically and unequivocally spelling out that intent in the relevant statute.

I believe that the judgements of Sissons, J. and Johnson, J.A. in *Sikyea* indicate clearly that at the time the Government of Canada entered into the *Migratory Birds Convention Act* to implement that convention, the government was fully cognizant of the rights of the Indians and Eskimos; because special provisions were made in the convention and in the Act and regulations to give members of those races special rights not available to other citizens of Canada. Johnson, J.A. held that by implication, other rights of those people were abrogated.

The Crown has also relied upon the judgement of the Supreme Court of Canada in *R. v. Derricksan* (1976) 31 C.C.C. (2d) 575, 71 D.L.R. (3d). In that case, the court held that the *Fisheries Act* and regulations were validly enacted and had the effect of abrogating or derogating from alleged aboriginal rights.

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While aboriginal and treaty rights now have the same status and recognition by virtue of s.35(1) of the *Constitution Act*, 1982 such was not the case in 1976. I do not feel *Derricksan* is authority for the proposition that the *Fisheries Act* and regulations effectively abrogates or varies treaty rights.

For all of the above reasons, I find that while the appellants were in fact violating the provisions of s.12(1) of the Ontario Fishery Regulations at the time and place alleged in the informations they were exempted from the provisions of those regulations by virtue of the rights and benefits to which they were entitled under article 6 of the Manitoulin Treaty of 1862.

Appeals allowed.

Cite: 8 C.C.C. (3d) 541

Possible Ramifications of Decision:

1. Gives methodology for interpreting those cases dealing with Indian cases - i.e. should consider the history and oral traditions of the tribes concerned, and the surrounding circumstaces at the time of the treaty.

2. Any abrogation, derogation or variance of treaty rights must be accomplished by legislation which is (a) clear and unequivocal in its terms, (b) gives some indication that Parliament was aware of the existence of the rights upon which it seeks to infringe; and (c) reflects an intention on the part of Parliament to exercise its power of abrogation, derogation or variation.

3. Nothing in *Fisheries Act* that indicates that Parliament intended to unilaterally abrogate or derogate from those fishery rights bestowed on Native people.

4. S.35(1) *Constitution Act*, 1982 may change the effect of those decisions made before the coming into effect of the *Constitution Act*, (notably *R. v. Derricksan* (1976) 31 C.C.C. (2d).

Her Majesty the Queen v. Peter Joe Augustine

Provincial Court of New Brunswick

April 25, 1984

Reiteration of interpretation of s.35 of *Charter of Rights* as given in *Regina v. Wayne Nicholas et al.*

The *Treaty of Paris* and *Royal Proclamation of* 1763 apparently confirmed certain aboriginal rights in present day New Brunswick.

Facts -

Peter Joe Augustine and Joe Augustine were charged that on or about the 18th of September 1981 they unlawfully hunted wildlife in the night on the Salmon River Road, (not on a Reserve), County of Kent, Province of New Brunswick contrary to and in violation of Section 33, Subsection (1)(a) of the New Brunswick *Fish and Wildlife Act*, being Chapter 14.1 R.S.N.B. and amendments thereto.

The facts are not in dispute and the defendants rely on their treaty rights of 1779 as well as the *Royal Proclamation of 1763* and the *Constitution Act of* 1982 as a defence.

Reasoning of the Court -

The Crown admits and I find as a fact that the accused are both Micmac Indians governed by the treaty of 1779 and prior treaties and rights never since abrogated.

... As reserves did not exist in Nova Scotia (New Brunswick) at the time of signing the 1779 treaty hunting and fishing rights were not restricted in my opinion to nonexistent reserves. By its literal wording the *Treaty of 1779* applied to all parts of present day New Brunswick where the Micmac hunted and fished from Cape Tormentine to the Baie of Chaleurs.

The treaty specifically referred to all tribes of Micmac Indians between Cape Tormentine and the Bay of Chaleurs. In the Gulf of St. Lawrence inclusive.

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... Kent County clearly falls within the area of the treaty. The game wardens have clearly molested the Micmac Indians in their treaty rights and charges against them must be discussed and the game taken returned.

As the rights to hunt and fish within the treaty districts were never changed by provincial law before confederation or federal law after confederation those rights constitute existing rights under section 35(1) of the *Constitution Act*, 1982.

The burden of proving all the essential ingredients of an offence beyond a reasonable doubt is upon the crown. Should an Indian hunt in an area or undefined district a reasonable doubt would exist, the doubt must be resolved in his favour.

The Crown further submits the *Royal Proclamation of* 1763 does not affect New Brunswick.

By the *Treaty of Utrecht*, France 1713 ceded Acadia to Great Britain. The northern border of Acadia was undefined. France retained Cape Bretain, Prince Edward Island etc. It is said Fort Beausejour was built as an attempt to define the northern limit of the territory ceded. Such would appear to be the case and is apparently supported by case law. The *Treaty of Paris* and the *Royal Proclamation of* 1763 apparently confirmed certain aboriginal rights in present day New Brunswick. This is supported by the case law presented.

Accused acquitted.

Cite: Unreported.

Possible Ramifications of Decision:

1. Case misleading - would tend to think from this judgement that *Proclamation of 1763* absolves Indians. This is not the case. Note *R. v. Polchies* 43 N.B.R. (2d) 450 - (See 9-G).

.../3

2. Goes one step farther than *R. v. Paul* 30 N.B.R. (2d) 545 (See 9-H) and decides that the treaty of 1779 applies to all parts of present day New Brunswick where the Micmac hunted from Cape Tormentine to the Baie of Chaleurs.

3. Reiteration of interpretation of s.35 as noted in *The Queen v. Wayne Nicholas*. (See 20-W).

Adam Eninew & Joseph Bear v. Her Majesty the Queen

In the Court of Appeal

for Saskatchewan

April 26, 1984

Docket # 1054 & 1169

The enactment of s.35(1) of the *Constitution Act* does not exempt the accused from the operation of the *Migratory Birds Convention Act*.

Facts -

As these two appeals involve the same issue, they were heard together.

The appellant Eninew was charged that he did unlawfully hunt migratory game birds out of season contrary to s.5(4) of the Migratory Birds Regulations made pursuant to the *Migratory Birds Convention Act*, R.S.C. 179, s.1.

Bear, on the other hand, was charged that not being the holder of a permit that authorized him to do so, he did unlawfully have in his possession a migratory game bird during a time when the taking of such birds was prohibited, thereby committing an offence contrary to s.12(1) of the *Migratory Birds Convention Act*.

It was admitted that Eninew was at all times an Indian within the meaning of the *Indian Act* and as such was entitled to the benefits of any and all treaty rights contained in Treaty #10.

A similar admission was made in regard to the appellant Bear. The only difference was that Bear was entitled to treaty rights under Treaty #6.

... It is common ground that prior to the enactment of the *Constitution Act* the appellants as treaty Indians, did not have the right to hunt contrary to the *Migratory Birds Convention Act*. This follows from such cases as *R. v. Sikyea* [1964] S.C.R. 642, *R. v. George* [1966] S.C.R. 267 ... etc.,.

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Submission By the Appellants

The thrust of the appellants' argument is that the enactment of Section 35(1) of the *Constitution Act* made such cases inapplicable to this situation. They contend that the rights given by the respective treaties must stand as they did when the treaty was concluded, unmodified by subsequent jurisprudence.

The pertinent clause of Treaty #6 reads as follows:

> Her Majesty further agrees with her said Indians that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, ...

[The corresponding clause in Treaty #10, under which Eninew claims, is very similar].

Reasoning of the Court -

The rights so given were not unqualified or unconditional. In each case the right to pursue the avocation of hunting was subject to such regulations as may from time to time be made by the Government of Canada. Regulations made under the *Migratory Birds Convention Act* are the type of regulations which were contemplated in Treaties #6 and 10. The purpose of the *Migratory Birds Convention Act* is to conserve and preserve migratory birds including mallard ducks. That purpose is of benefit to the appellants. Indeed it was said that the Indians in general, and the appellants in particular are concerned with and practise conservation. They would not hunt ducks during the summer nesting season. They would be affected by the regulations only during the "spring-fly-in". They would accept as reasonable regulations such as those aimed at preserving the existence of the whooping crane.

.../3

It follows that the treaty rights can be limited by such regulations as are reasonable. The *Migratory Birds Convention Act*, and the regulations made pursuant to it, based as they are on international convention are reasonable, desirable limitations on the rights granted.

... The result is that the enactment of section 35(1) of the *Constitution Act* does not exempt the appellants in this case from the operation of the *Migratory Birds Convention Act*.

The appeals are therefore dismissed.

Cite: Unreported.

Possible Ramifications of Decision:

1. Given the effects of s.35(1) of the *Constitution Act*.

2. The purpose of the *Migratory Birds Convention Act* is to conserve and preserve migratory birds, which purpose was of benefit to Indians as well. Accordingly, the limitation of treaty rights by regulations enacted pursuant to the Act are reasonable.

[It could be assumed that analogous reasoning would be taken under the *Fisheries Act.]*

R. v. Tenale et al.

British Columbia Court of Appeal

December 21, 1982

An order is a regulation under *Statutory Instruments Act*. Only under certain circumstances can a person be convicted of contravening a regulation, when regulation not published in the Canada Gazette.

***Fisheries Act* does not authorize Governor in Council to delegate regulation making power to a provincial minister.**

Facts -

The respondents, non-treaty Indians, caught fish in a stream where fishing was prohibited by the British Columbia Non-tidal Waters Sport Fishing Order. The Order was made by the British Columbia Minister of the Environment pursuant to s.58(1) of the British Columbia Fishery (General) Regulations (C.R.C. 1978, c.840, as amended), and in accordance with s.58(1) was published in the British Columbia Gazette. The Regulations were made by the Governor in Council pursuant to s.34 of the *Fisheries Act*, R.S.C. 1970, C.F-14.

The section in the *Fisheries Act* authorizing regulations reads:

> S.34 The Governor in Council may make regulations carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations
>
> (m) authorizing a person engaged or employed in the administration or enforcement of the Act to vary any close time or fishing quota that has been fixed by the regulations.

Pursuant to that section, the Governor in Council has made and amended from time to time regulations called British Columbia Fishery (General) Regulations. Part IV of the Regulations, C.R.C. Vol. III c.840 as amended S.O.R. 178-555, vests certain powers in a person described as the "Minster", defined thus:

.../2

"Minister" means the Minister of Recreation and Conservation for British Columbia.

Section 58(1) of the Regulations provides:

58.(1) Where the Minister, in a notice published in the British Columbia Gazette describes by name or by metes and bounds waters in British Columbia and specifies in respect of those waters,

(a) a daily catch limit for a species of fish,

...

no person shall in those waters...

The Order made pursuant to the Regulation appeared in the British Columbia Gazette of April 1st, 1980, under the number B.C. Reg. 86/80.

Filed March 14, 1980

Fisheries Act (Canada)

Pursuant to section 58(1) of the British Columbia Fishery (General) Regulations made under the *Fisheries Act* (Canada), the Minister of Environment orders that effective midnight, March 31, 1980, B.C. Reg. 231/73 is repealed and the attached notice of restrictions on fishing in the specified waters substituted.

C.S. Rogers
Minister of the Environment

Reasoning of the Court -

In my view, except for the narrow authority contained in (m), s.34 of the *Fisheries Act* does not authorize the Governor in Council to give regulation

.../3

making power to another. Both the broad introductory words of s.34 and the specific provisions that follow contemplate the Governor in Council making the regulations. I see nothing in the Act to suggest that Parliament contemplated that the Governor in Council could pass that power to another.

There is another ground upon which the Order can be ruled unenforceable. Section 11(2) of the *Statutory Instruments Act*, S.C. 1970-71-72, C.38 provides:

> 11(2) No regulation is invalid by reason only that it was not published in the Canada Gazette, but no person shall be convicted of an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the Canada Gazette in both official languages unless...

[The provisos do not apply here]

In my view, the Order that was published in the British Columbia Gazette is a regulation as that term is defined in the *Statutory Instruments Act*. The failure to publish in the Canada Gazette means that the respondents cannot be convicted of an offence consisting of contravention of the regulation. A number of arguments were made on behalf of the Crown to justify non-publication. None of them are persuasive.

In the result, I would grant leave and **dismiss the appeal.**

Cite: [1983] 2 C.N.L.R. p.152

Possible Ramifications of Decision:

1. Governor in Council cannot delegate regulation making power to a provincial minister.

2. Only in certain circumstances can a person be convicted of contravening a regulation when regulation not published in the Canada Gazette. Therefore, if a regulation is not to be published in Canada Gazette, the Department of Fisheries should make sure that the regulations falls within the exceptions laid out in s.11(2) of the *Statutory Instruments Act*.

Her Majesty the Queen v. Leonard Kelly et al

Court of Queen's Bench of New Brunswick

November 15, 1983

When sentencing, judge should consider whether sentence will constitute a deterrent. Some measure of uniformity is desirable when dealing with a statute which is in force throughout Canada.

Facts -

This is an appeal by the Crown, from sentence, after guilty pleas by seven accused respondents, on 8 charges of digging for clams in a restricted area. Each individual was fined $10.00 on each charge.

The grounds of appeal are the same in all cases:

"...that the learned trial judge:

(a) Did not consider the deterrence aspect of sentencing when he imposed sentence on the repondent.

(b) Did not take into proper account the possible serious consequences of the offence.

Reasoning of the Court -

It seems reasonable that a fine of $10.00 will not constitute a deterrent to any person digging clams for sale.

... (T)he courts must take account of (1) the gravity of the offence, (2) the incidence of the crime in the community; (3) the harm caused by it, either to the individual or the community; and (4) the public attitude toward it.

.../2

Also, uniformity of sentence is always desirable. ...Because each offence and each individual is different it is impossible to aim at uniform sentences for a particular crime. Nevertheless, unless the circumstances are unusual the court should be aware of the "usual" sentence in the particular offence involved and attempt to avoid marked disparity.

I would **allow the appeal** and fine each of the accused the sum of $75.00 for each office, or in default of payment to one month in jail.

Cite: Unreported.

Ramifications of Decision:

1. When arguing case the standing legal agents should raise the issue of the deterrent aspect of sentencing.

2. Should make judge aware of the possible consequences of the offence. [i.e. Here, the sale of shellfish from contaminated area can produce a serious public health hazard], so that he will sentence accordingly.

3. Standing legal agents should ensure that judge is aware of "usual sentence" in the particular offence involved. For example, here, the trial judge imposed a fine of $10.00. On appeal it was discovered that fines for this type of fine usually involve a fine of $50.00 or more.

Her Majesty the Queen v. Donal Titus Edwards

In the Court of Queen's Bench

of Alberta

March 20, 1984

Docket # 8303 0414 57

Judge should take judicial notice of prevalence of particular kind of conduct in area when sentencing.

Facts -

This is an appeal from sentence, brought in this Court pursuant to the rules governing summary convictions.

The appellant pleaded guilty before His Honour Provincial Court Judge Dimos on November 21, 1983 on four counts laid under s.42 of the *Wildlife Act* R.S.A., 1980 C. W-9. This section makes it an offence to traffic unlawfully in wildlife. In the case of the first two counts the meat was that of moose, elk, and deer. In the case of the third count the meat was moose meat. In the case of the fourth count the meat was that of moose and deer. The maximum sentence for any such offence is a fine of $1,500. or six months imprisonment. The learned Provincial Judge imposed a fine of $1,400. on each of the four counts.

The appellant also pleaded guilty to one count laid under s.20 of the *Wildlife Act*, which makes it an offence to unlawfully have wildlife in his possession. The meat in this instance was that of a female mule deer. The maximum sentence is a fine of $1,000. or three months imprisonment. The learned Provincial Judge imposed a fine of $900. or in default of payment, imprisonment for three months.

Submission of the Appellant

Counsel for the appellant contends that the fines imposed were excessive, having regard to the accused, a man of 42 years of age, who has no record of convictions, has a good work record, and entered a plea of guilty. He contends

.../2

that the fines were virtually the maximum, and that the imposition of a fine on such a sale should be reserved for cases in which there is litle hope for rehabilitation.

Reasoning of the Court -

Counsel for the appellant, on appeal, takes issue with the learned trial judge's having characterized the conduct of the appellant as "indiscriminate slaughter" and his having asserted, without evidence to support his statement, that this type of indiscriminate slaughter and sale of game could well result in great loss and damage to our wildlife population". I can find no merit in the complaint of counsel for the appellant. A sentencing judge is entitled to apply his general knowledge of conditions in the community, such as the prevalence of a particular kind of conduct that violates the *Criminal Code* or some other statute. The trial judge observed that he had noted that what he described as a "mass slaughter of game and wildlife for the purpose of gain" and, he added fish - had been on the increase in recent months. He took such knowledge into account in deciding to what extent the principle of general deterrence was of significance in deciding upon the appropriate penalty in the case before him.

I accept the trial judge's premise that, although this was a first conviction, a severe penalty was justified by the need to deter not only this accused but others from this type of conduct. Once he decided that imprisonment was inappropriate, he had to determine the proper amount of fine. In doing so, apart from the need to emphasize the gravity of the offence, he ought to have taken two conflicting considerations into account. One was that the accused ought not to be allowed to profit from his offences. The other is the means of the accused to pay a fine. ... While there was no evidence as to his means, there was no suggestion that he was without means.

In all the circumstances, I cannot say that the learned trial judge erred in principle or that the sentence was not fit.

The appeal is dismissed.

Cite: Unreported.

Possible Ramifications of Decision:

1. When deciding the appropriate penalty a trial judge when sentencing should take judicial notice of the prevalence of the particular kind of activity in the area.

2. A severe penalty is justified when there is a need to deter not only this particular accused but others from this particular type of conduct.