Environment Canada Environnement Canada
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VOLUME 3

FISHERIES POLLUTION REPORTS

PROSECUTIONS UNDER THE POLLUTION CONTROL AND HABITAT PROTECTION PROVISIONS OF THE FISHERIES ACT

July 1984

Canada

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PROSECUTIONS UNDER THE POLLUTION CONTROL AND HABITAT PROTECTION PROVISIONS OF THE FISHERIES ACT

Prepared by

Environmental Protection Service
Environment Canada

in co-operation with

Pacific and Freshwater Fisheries Service
Fisheries and Oceans Canada

and

Canadian Environmental Law Research Foundation

Edited by

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VOLUME 3

RAPPORTS SUR DES POURSUITES ANTI-POLLUTION

POURSUITES JUDICIAIRES ENGAGÉES EN VERTU DES DISPOSITIONS ANTI-POLLUTION ET DES DISPOSITIONS POUR LA PROTECTION DE L'HABITAT PRÉVUES DANS LA LOI SUR LES PÊCHES

Préparé par

Service de la protection de l'environnement
Environnement Canada

en co-opération avec

Le Service des Pêches dans le Pacifique et en eaux douces
Pêches et Océans Canada

et

La Fondation canadienne de recherche du droit de l'environnement

Édité par

John E. MacLatchy
Robert K. Timberg

Juillet, 1984

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I would also like to thank Mr. Otto Langer and Mr. Digby Kier for sending me copies of numerous cases. Mr. Langer of the Habitat Management Unit, Fisheries and Oceans Canada, New Westminster, B.C. has frequently appeared as an expert witness in cases under sections 31 and 33 of the Fisheries Act. Mr. Kier of the federal Department of Justice in Vancouver has frequently appeared as crown counsel in cases under sections 31 and 33. Thanks should also go to all the other people who have sent me copies of judgments of various cases over the past few years.

I would also like to thank the staff of the Word Processing Unit of the Environmental Protection Service for their patient efforts in typing the text.

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PREFACE

Volume 3 of Fisheries Pollution Reports (3 F.P.R.) primarily contains reasons for judgments for cases under the pollution control provisions (section 33) and the habitat protection provisions (section 31) of the Fisheries Act. A few cases under other sections of the Fisheries Act are also reported where the issues are relevant to sections 33 and 31.

In the last two years a few judgments have been rendered under the Ocean Dumping Control Act and the Clean Air Act, and these cases are included near the end of this Volume. These two statutes are administered by Environment Canada.

Conventional law reports ordinarily contain only the court's reasons for judgment. Fisheries Pollution Reports also include remarks on sentencing and, in some cases, arguments by counsel before the courts. Since judgments and transcripts are available for a relatively small number of cases under sections 33 and 31 of the Fisheries Act, these additional materials on sentencing and arguments by counsel hopefully will be useful to some readers.

Volume 1 of the Fisheries Pollution Reports was prepared in 1976 by simply photocopying the judgments that were available. Volume 2 of the Fisheries Pollution Reports was published in 1980 in the conventional format of law reports. Volume 2 and reprinted Volume 1 are available as a single volume. Volume 3 contains cases that were before the courts in 1980 to 1983. Some appeal decisions that were rendered in early 1984 were added to the end of this volume during final editing.

FISHERIES POLLUTION REPORTS

VOLUME 3

CASES REPORTED

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VOLUME 3

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VOLUME 3

CASES REPORTED

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VOLUME 3

CASES REPORTED

OCEAN DUMPING CONTROL ACT CASES

CLEAN AIR ACT CASES

APPEALS RECEIVED DURING FINAL EDITING

SUPREME COURT OF CANADA

SACOBIE AND PAUL v. A.G. OF CANADA

LASKIN, C.J. AND RITCHIE, BEETZ, ESTEY, MCINTYRE, CHOUINARD, AND WILSON JJ.

Ottawa, February 9, 1983

Authority of provincial Attorney-General to conduct prosecution under a federal statute other than the Criminal Code — Fisheries Act — New Brunswick Fishery Regulations — Interpretation of Criminal Code.

Appeal by Defendants from judgment of New Brunswick Court of Appeal (see 2 Fisheries Pollution Reports 259).

An information was laid by a fishery officer who was an employee of the federal government. A Crown Prosecutor appeared as counsel and agent for the Attorney General of New Brunswick. The provincial judge dismissed the information and the N.B. Attorney General appealed the dismissal of the information. The New Brunswick Court of Appeal allowed the appeal. While the federal Attorney General has exclusive jurisdiction to prosecute the case if he appears, the provincial Attorney General has exclusive jurisdiction if the federal A.G. does not appear to prosecute a case under the *Fisheries Act*. The defendants appealed to the Supreme Court of Canada.

LASKIN, C.J. (orally for the Court): -

We are all of the opinion that the appeals fail and must be dismissed. We do not think that there is here any constitutional question and we agree with the conclusions reached on construction by the New Brunswick Court of Appeal. There will be no order as to costs.

BRITISH COLUMBIA COURT OF APPEAL

R. v. BLACKHAM'S CONSTRUCTION LTD.

MCFARLANE, TAGGART, AND HUTCHEON, JJ.A. Vancouver, December 16, 1980

Fisheries Act, R.S.C. 1970, c. F-14, as amended - s. 31(1) - British Columbia Gravel Removal Order, SOR/76-698 - Statutory interpretation of regulation - Meaning of "no person shall remove gravel" so clear as to allow interference with private rights of property.

The respondent, Blackham's Construction Ltd., removed gravel from an area which, although originally dry land, was a channel of the Fraser River and hence a "fishing habitat" within the meaning of s. 31(5) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended. A regulation under the *Fisheries Act*, the British Columbia Gravel Removal Order, SOR/76-698, stated in part:

> *2. No person shall remove from, or displace gravel within, the normal high water wetted perimeter of any portion of stream, river or other body of water that is frequented by fish otherwise than under the authority of and in accordance with a permit in writing issued by the Regional Director or a fishing officer.*

The respondent was charged for violation of s. 31(1) of the *Fisheries Act*, and for breach of the gravel removal regulation. At Provincial Court, the respondent was acquitted on the basis that s. 31(1) and the regulation were *ultra vires*. On appeal, the County Court found that s. 31(1) and the regulation were *intra vires*, but they were found to be insufficiently clear so as to apply to the respondent.

On an application by the Crown for leave to appeal, *held*, leave to appeal is granted, the appeal is allowed and the respondent is convicted.

Based on the principle in *Kienapple v. the Queen* (1974), 15 C.C.C. (2d) 524, the Crown conceded that there should not be convictions under both s. 31(1) of the *Fisheries Act* and the regulation. Therefore, only charges emanating from the regulation were pursued.

The argument of the respondent that the effect of the regulation is expropriation without compensation and, therefore, that legislation which so affects private rights of property must be clear, is untenable given the phrase "no person shall remove gravel...". Moreover, clause number four of the regulation "...contains specific provisions regarding the effect of a permit which may be issued to an owner to remove gravel from an area to which otherwise the gravel removal order would apply...". That language is clear and imparts no ambiguity or uncertainty and therefore applies to the respondent.

D.R. Kier, Q.C., for the Crown, appellant.
J. Cram, for the respondent.

(Editor: The decision of the B.C. County Court is reported at 2 Fisheries Pollution Reports 242)

MCFARLANE, J.A. (Orally) (TAGGART and HUTCHEON, J.J. A. concurring): - This is an application by the Crown for leave to appeal the acquittal of the respondent upon four counts contained in an Information to which I will refer more specifically in a moment. The proceedings were by way of summary conviction proceeding tried before a Provincial Court Judge in Chilliwack, who acquitted the respondent.

On the Crown's appeal to the County of Westminster the Crown's appeal was dismissed by His Honour Judge Grimmett.

The application for leave to appeal is brought here from that decision.

The respondent was charged, so far as this appeal is concerned, under an Information containing four counts. The first and third (the second of which was called count number seven) related to offences alleged to have occurred, one on the 21st of November, 1978 and the second on the 23rd of that month and were laid under the provisions of a Regulation made by the Governor General in Council, under the authority of the *Fisheries Act*, being Chapter F-14 of the Revised Statutes of Canada 1970. The particular regulation is known as the British Columbia Gravel Removal Order SOR/76-698, which, I think I said, was passed under the authority of that Act.

The other two counts which are involved were presented under Section 31, subsection (1) of the *Fisheries Act*.

The provisions are as follows:

FISHERIES ACT

Section 31(1). "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."

Section 31(5) "For the purposes of this section and sections 33, 31.1 and 33.2, "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."

BRITISH COLUMBIA GRAVEL REMOVAL ORDER

"2. No person shall remove gravel from, or displace gravel within, the normal high water wetted perimeter of any portion of a stream, river or other body of water that is a spawning ground frequented by fish otherwise than under the authority of and in accordance with a permit in writing issued by the Regional Director or a fishery officer."

"4. A permit issued under Section 2 or 3 shall not be construed as permitting a person

(a) to alter the configuration of a river, stream or body of water without permission from the provincial authority having jurisdiction in the matter; or

(b) to remove gravel from or displace gravel within a place unless he is owner of that place or acts on behalf of such owner."

Upon the presentation of the appeal to this court, which was heard yesterday, counsel for the Crown conceded that there should not be convictions on the counts laid under the regulation and convictions under the counts laid under Section 31 subsection (1). I agree that that is a proper concession based upon the principle known as that of the *Kienapple* case.

In those circumstances, I have little more to say regarding the counts which relate to Section 31 subsection (1) of the *Fisheries Act* and I will devote most of my attention from here on to the counts alleging a breach of the regulation.

I think I should turn to the essential fact of the matter, with this preface: That counsel for the respondent, on his presentation of the answer to the Crown's application yesterday, told the court that all of the facts necessary to establish proof of the alleged offences are admitted on behalf of the respondent.

The nature of the defence I will mention in a moment.

With that preliminary observation, I take the essential facts of the matter from the findings made by the County Court Judge in his reasons for judgment:

The facts relating to the case are not in dispute, and the material facts are:

1. The area involved is either owned by, or that portion not owned is leased, by the Respondent.

2. Both parts, either owned or under lease, were alienated from the Crown by Crown grants late in the last century, and are held in fee simple by the Respondent or its lessor as ultimate successor in title from the original Crown grantees.

I interpolate at that point that the titles so described as being held in fee simple are proved by certificates of indefeasible title issued either to the respondent or to its lessor under the relevant provincial legislation.

I continue with the County Court Judge's findings of fact:

3. All of the area involved was originally dry land but subsequent to the Crown grants, according to the surveyor witness, Turnbridge, in the 1930's or 1940's, the Fraser River changed and a channel of the river became established, still exists, and it is from part of this area of the river that the Respondent is in the business of gravel removal.

4. The area from which the Respondent is removing gravel is a "fishing habitat" as described in the Fisheries Act.

The Provincial Court Judge, as the basis for his decision of acquittal, found that Section 31 subsection (1) of the *Fisheries Act* and the British Columbia Gravel Removal Order were both *ultra vires*, that they had been in the one case enacted by Parliament and, on the other, passed by the Governor in Council without constitutional jurisdiction to enact them.

The County Court Judge, on appeal, appears to me to have given effect to the argument presented on behalf of the Respondent, that although the section of the

Fisheries Act and the regulation be *intra vires*, they, nevertheless, are not expressed in such sufficiently clear language to apply to the respondent so as to prevent its carrying on what it considered its lawful business on property owned or leased by it.

The County Court Judge concluded his reasons for judgment with these words:

> *It of course must be presumed that the prohibition was enacted for "the regulation and protection of Fisheries". So too, and applying this principle, surely the Fisheries Act cannot, in the absence of express words, in effect prohibit the Appellant herein from carrying on its business of gravel removal from property over which it has exclusive rights of ownership.*

I think the County Court Judge made a slip here. When he said "appellant" he meant "respondent".

In this court, when Counsel for the Crown opened his argument with the intention expressed of supporting his submission that the legislation and the regulation are *intra vires*. Mr. Cram, counsel for the respondent, helpfully, rose and informed the court that he did not contend that the legislation and the regulation were *ultra vires*. He conceded and, in my opinion, entirely correctly, that the section to which I have referred and the regulation, are *intra vires*. He told us also that he had never contended otherwise during the whole of this proceeding. He did proceed, however, consistently, to contend that the language used in the subsection and in the Gravel Removal Order were not sufficiently clear to apply to the respondent. He said that because, he contended, the effect of those provisions is, as he put it, to expropriate, or otherwise to prevent the lawful carrying on of a business of extracting removal without any compensation being given to the person whose business and property rights were so affected.

His contention was based upon the principle, which I do not think anyone denied, that if the effect of legislation be to so interfere with the private rights of property it must be clear or that result must follow by necessary implication.

The question, therefore, is one of interpretation of the statutory provision and of the order.

The opening words of the relevant clause in the Gravel Removal Order are simply these:

> *No person shall remove gravel...*

In my view, in their context, that language is perfectly clear and it allows of no suggestion of ambiguity or uncertainty. To suggest that the words "no person" must be read as excluding persons in the position of the respondent is, in my view, quite untenable, and that is particularly so when reference is made to clause number 4 of the same order which contains specific provisions regarding the effect of a permit which may be issued to an owner to remove gravel from an area to which otherwise the gravel removal order would apply.

I think this view of the language used in the order and, incidentally, also in the section, to which I will not refer more specifically, is in accord with the comment of Chief Justice Laskin, Chief Justice of Canada, in the comparatively recent decision, *Interprovincial Co-operatives Ltd. v. The Queen* (1975) 5 W.W.R. 382. At page 413 of that

report, the Chief Justice, after referring to a decision in the case of *The Queen and Robertson*, which I will mention again in a moment, said this:

> *Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization.*

I think the opinion I have expressed on the interpretation of the relevant provisions here is also in accord with the recent decision of the Supreme Court of Canada in *The Queen and Fowler* in June of 1980 (the reference I have is 32 National Reporter, page 230) and the judgment of the Supreme Court in the case of *Northwest Falling Contractors Ltd.* which, so far as I know, is not yet reported, but was pronounced on July 18th, 1980.

I should mention that respondent's counsel and the County Court Judge relied particularly on a decision of the Supreme Court of Canada in a case of *Venning v. Steadman*, which is reported in (1883) 9 S.C.R. page 206. I think that decision is distinguishable, and it ought to be distinguished so as to have no application to the problem involved in this appeal. I will not take time to discuss it at any length, but will merely point out first that it involves the interpretation of another statute. Such interpretations are helpful, but by no means reliable guides for interpreting other statutes.

Secondly, it was an action for damages for trespass and assault based upon an alleged interference with the right of a riparian owner to fish on a river crossing his property.

The specific issue of interpretation involved in that case is, in my opinion, an entirely different one than that involved here as appears from a reading of the judgments of Chief Justice Ritchie and Mr. Justice Henry in that case.

Another authority upon which counsel for the respondent relied in particular was *The Queen and Robertson* to which Chief Justice Laskin referred in the Manitoba case.

Again, I think that case is one clearly distinguishable here and I will not take the time at this moment to discuss it further. I do not think that it has any determinative force in arriving at the disposition of the present appeal.

Counsel for the respondent did present to us in argument that the question placed before the court in this appeal is not a question of law alone.

If he were right in that, of course, we would lack jurisdiction to interfere with the judgment of the County Court Judge because of the provisions of Section 771 of the *Criminal Code*.

I do not accept that argument. I think that the question involved here is a question of law alone within the meaning of that section of the *Code*. It is purely a question of the interpretation of the provision of the statute and of the regulation. There is no issue regarding essential facts. Therefore, I reject that objection on the part of counsel for the respondent.

Counsel for the Crown has asked that the court, in the circumstances, upon allowing the appeal, should exercise the power conferred by Section 613 of the *Criminal Code* and order that a conviction be entered.

In the circumstances, counsel for the respondent agreeing that nothing is to be gained by returning the case to the County Court, or to the Provincial Court, I think that is the course that should be followed.

I would, therefore, grant leave and allow this appeal and order conviction of the respondent to be entered on counts 1 and 7.

The appeal is allowed and convictions entered accordingly.

It is the judgment of the court that the sentence to be imposed here is that of a fine of $100.00 in respect of each of the two counts.

Judgment accordingly.

NEW BRUNSWICK PROVINCIAL COURT

R. v. CANADIAN INDUSTRIES LIMITED

AYLES A.C.J. Campbellton, May 19, 1981

Defences - Act of Good - Seasonal accumulations of snow and ice not Act of God.

Defences - Due diligence - Failure to properly monitor and maintain treatment facilities for chemical by-products of chlor-alkali plant - Failure to take reasonable precautions where plant repair work damaged treatment facilities - Defence of due diligence unavailable.

Fisheries Act, R.S.C. 1970, c.F-14, as amended - 14 charges under s.33(2) - Charges dismissed because of defect in Information.

Over the course of ten months, deleterious substances including mercury from the accused's plant entered the Restigouche River thereby contaminating it. The causes of the various events of contamination included an overflow from a holding pond due to a build-up of ice and snow, spring run-off from building roofs where mercury condensate accumulated during the winter, leakage from treatment facilities into the plant sewer, an overflow of a chemical storage tank due to a faulty tank level indicator, a collapse of a large sewer system resulting in flooding of a substantial portion of the plant area and leakage into the plant sewers from a faulty valve and a hole in the wall of a liquid waste pit.

On 14 charges under s.33(2) of the Fisheries Act, R.S.C. 1970, c.F-14, as amended, held, the Information is quashed and the charges dismissed.

The Information was laid by a government official who swore as informant to the truth of the allegations. However, because the informant was not present at the accused's plant on the days that the alleged offences occurred, he could not be said to have "personal knowledge" of the charges. Accordingly, the Information is defective in form. The Information should have been laid according to Form 2 where an informant has not personal knowledge but rather states that he has reasonable and probable grounds to believe and does believe the truth of the allegations. While paragraph 732(3)(c) provides a procedure for remedying a defect as to form, by permitting the information to be amended, this requires the Information to be re-sworn. Because the two-year limitation period has passed, this curative provision cannot be employed. Consequently, the Information is defective and should be quashed, or in the alternative any amended and re-sworn Information would have to be dismissed as out-of-time.

But for the defect in form of the Information, the accused would have been found guilty on all counts. The defences of Act of God and due diligence were not available. Seasonal accumulations of snow and ice do not constitute an Act of God. The latter defence failed due to the accused's "reckless and negligent" failure to monitor and maintain its treatment facilities and its further failure to take reasonable precautions where plant repair work could damage those facilities.

R. Hynes, for the Crown.
R.J. Tingley, for the accused.

AYLES A.C.J.: - The accused, Canadian Industries Limited, a body corporate (herein referred to as C.I.L.) was charged before me on an information sworn to by Philip Henneberry, an officer of Environment Canada on June 14, 1979.

The said information contained fourteen (14) counts under s.33(2) of the Fisheries Act of Canada c.F-14 R.S.C. 1970 as amended. The original informations were amended to delete the word "reference" and add the words "being water frequented by fish" so that all fourteen (14) charges read as follows:

> "on or about the 24th day of February, the 22nd day of March, the 21st day of July, the 22nd day of July, the 14th day of August, the 15th day of August, the 16th day of August, the 17th day of August, the 18th day of August, the 21st day of August, the 22nd day of August, the 23rd day of August, the 24th day of August and the 26th day of December, A.D., 1978, did unlawfully deposit a deleterious substance, namely water containing mercury exceeding 0.00250 Kg per tonne of chlorine in the water of the Restigouche River, at Dalhousie, New Brunswick, being water frequented by fish, contrary to the provisions of s.33(2) of the Fisheries Act, being c.F-14 of the Revised Statutes of Canada 1970 and amendments thereto.

In addition thereto, particulars were filed as follows:

PARTICULARS:

A. WITNESSES

1. Mr. M.G. Williams, P. Eng.
   6100 Young Street, Halifax, Nova Scotia

2. Mrs. Joan K. Day, Project Engineer
   16th Floor, Bank of Montreal Tower
   5151 George Street, Halifax, Nova Scotia

3. Mr. Phil Hennebury, Head Field Surveys Section
   16th Floor, Bank of Montreal Tower
   5151 George Street, Halifax, Nova Scotia

4. Mr. Collin Nixon, Manager C.I.L.
   Dalhousie, N.B.

5. Mr. L.C. Clifford, Employee C.I.L.
   Dalhousie, N.B.

6. Mr. Joe Kozak, E.P.S.
   16th Floor, Bank of Montreal Tower
   5151 George Street, Halifax, Nova Scotia

7. Mr. David Gaylor, Employee C.I.L.
   Dalhousie, N.B.

8. Mr. Vaklav Kresta - Environment New Brunswick
   Fredericton, New Brunswick

9. Police Officer who will serve papers

B. TIME OF DAY THAT OFFENCES OCCURRED

I would like to point out that I discussed with the E.P.S. people this matter and we cannot provide you with the exact time the offences happened, except the information we have most of the samples were taken at 8:00 a.m. on each day that an offence has been committed, except for the one on February 21st, which occurred at approximately 11:30 p.m. All of these offences happened between the 24 hour period of 8:00 a.m. on the one day and 2:00 a.m. on the next day.

Several objections were taken on preliminary motions, namely that; the amendments were not supported by the evidence and therefore disclosed no information known to law and also that s.33(2) was ultra vires and that the right to prosecute alleged violations had been delegated to the Province of New Brunswick.

These preliminary objections were taken upon an application of Prohibition and it was decided that the order was not supportable and the application dismissed.

The matter then came on before me on January 19, 1981. Because of the absence of two Crown witnesses, whom I ruled were properly served to appear at that time and place, I ordered the matter adjourned over until January 20, 1981. At that time the hearing into the merits of the fourteen (14) counts began.

The evidence of Mr. Colin Nixon who was Works Manager for C.I.L. at the dates in question is that: The C.I.L. plant located in Dalhousie, New Brunswick is a small chlor-alkali plant built some 17 years ago. This plant employs an electro chemical process to produce caustic soda and chlorine. The process used is the electrolysis of sodium chlorine brine. The brine is made from sodium chloride rock salt which is brought to a desired concentration by being saturated with water, this full strength brine goes through the plant and returns to be re-saturated again.

The mercury is in the vessel in which the electrolysis takes place. The mercury being the moving cathode that splits the brine in the electrolysis, chlorine is given off in the cells and collected and the sodium ions are dissolved in the mercury, forming mercury amalgam which then goes into another water containing cell and then water therein reacts with the sodium ions to form caustic soda which releases the hydrogen and the mercury is then circulated back to the brine cell.

However, not all the mercury returns to the brine cell. The rock salt contains a significant amount of impurities such as calcium sulfate. The insoluble material is removed by separation and by chemical treatment to give a sludge and this sludge mixture is contaminated with the mercury amalgam.

The sludge is first deposited in a clarifier and allowed to de-water after which it was then removed and deposited at a point west of the sludge bed shown on Exhibit "P-9" as a "Clarifier Sludge Pit". This "pit" is not lined in any way but is simply a hole in the ground or earth at that particular area and could contain approximately one million gallons of liquid. This sludge was allowed to further de-water and this water drained off and down into the "Clarifier Sludge Pit". This sludge was periodically removed and buried in specially prepared lined pits under license to the Provincial Government. This dry mass of sludge built up west of the pond and the encroachment of the sludge that had gone into the pond was dredged out and this material was transported to a burial site near the Allied

Chemical Plant on land owned by C.I.L. at Dalhousie Junction, New Brunswick. One of the lots was plastic lined and the others were lined with 8" x 9" blocks of peat moss. (Bearing in mind the fact that the water in this sludge was contaminated with mercury it would appear that part of the residual mercury would be captured in the snow and ice buildups in the winter and in the summer would probably mostly run off into the "Clarifier Sludge Pit" and some could be drained off by groundwater and seepage eventually into the Restigouche River.)

The contaminated water was then transferred to the small pond called "Holding Pond" on Exhibit P-9, which was, at the time of the offences alleged in the fourteen (14) counts herein, also an unlined hole in the ground. Apparently prior to 1978 the water from the "Clarifier Sludge Pit" was transferred to the "Small Holding Pond" by means of a siphon. Sometime prior to Mr. Nixon's arrival it was decided to dig an unlined ditch in earthen materials between the two ponds and allow the contaminated water to enter the "Small Holding Pond" until it was full at which time the ditch was dammed up with soil to stop the flow. Mr. Nixon said at page 59 of January 21, 1981 as follows:

> "I can tell the Court what I know as the fact, I neither saw it constructed nor knew anything about it until the incident happened but investigations showed that a narrow ditch was dug between the top ponds, just below the surface of the level of flow till sufficient water had been transferred into the small treatment pond and then it was dammed to stop the flow."

This "Small Holding Pond" was the pond in which the water was chemically treated to remove the mercury therein as mercury sulfide. The mercury sulfide is allowed to settle to the bottom and the superlightened, supernatant liquor is then pumped into the sewer system.

Before the sewer empties into the river it goes under the effluent measuring building which takes samples of the waste water at the rate of a drop every second by means of a flume called a "Parshall Flume" and a chemical determination is made on these samples calculated daily in order to comply with the "Chlor-Alkali Regulations" made pursuant to s.33(13) of the said Fisheries Act Canada 1970 as amended. (Again it is to be noted that this "Holding Pond" was unlined at the time of the charges herein but was finally lined sometime in the summer months of 1979, lined with peat moss and multi-layered Black P.B.C. to

> "improve the security of the pond",

at page 83 line 20, January 21, 1981:

> "it was well know that the government agencies would have liked to have those ponds lined."

Also to be noted the evidence on page 85:

> "I was saying that in 1979 when it was pointed out that there was some slight encrustations, very slight encrustations on some rocks near the water line which was significantly below the pond levels, these were determined to contain traces of mercury. But I think it's also worth noting that that entire hillside is weeping water from natural springs.")

According to the evidence of Mr. Colin Nixon, Works Manager, and Mr. Larry Clifford, Works Engineer, Mr. Nixon being totally responsible for the C.I.L. operation in Dalhousie during all the times pertinent to the fourteen (14) counts herein. In their capacity as Works Manager and in his absence, Mr. Clifford in his capacity as Works Engineer submitted to Environment Canada monthly reports required by Law pursuant to Regulation under the Fisheries Act entitled Chlor-Alkali Mercury Liquid Effluent Regulations being Chapter 811 Consolidated Regulations of Canada, 1978 as amended to date.

These reports were introduced and received as exhibits as follows:

Exhibit P-2 covered the date of the charge under Count No. 1.

Exhibit P-3 covered the date of the charge under Count No. 2.

Exhibit P-6 covered the date of the charge under Counts No. 3 and 4.

Exhibit P-4 covered the date of the charge under Counts No. 5 to 13 inclusive.

Exhibit P-5 refers to Counts No. 1 to 13 inclusive.

Exhibit P-7 covered the date of the charge under Count No. 14.

Exhibit P-8 refers to Count No. 1.

Exhibit P-9 Plot plan showing outline of Plant including Holding Pond and Clarifier Sludge Pit.

S.6(3) of the above noted "Chlor-Alkali Regulations" provides for the submission of monthly reports and the data to be reported therein and the total accounting of all mercury entering, used or leaving the plant.

A "deleterious substance" is defined in s.33(11) as well as being defined in particular in the said "Chlor-Alkali Regulations" in s.4 as follows:

"For the purpose of paragraph (c) of the definition "deleterious substance" in subsection 33(11) of the Act, mercury from the operations or processes of a plant is hereby prescribed as a "deleterious substance."

"Water frequented by fish" is defined in s.33(11) to mean, Canadian Fisheries waters and the Restigouche River at Dalhousie, New Brunswick, I have determined to be waters frequented by fish and being Canadian Fisheries Waters of which I take Judicial Notice.

S.5 of Chapter 811, Chlor-Alkali Mercury Effluent Regulations reads as follows:

"Subject to these Regulations, the owner of a plant may deposit mercury contained in effluent if the actual deposit of mercury in any day does not exceed 0.00250 kilogram per tonne of chlorine times the reference production rate of that plant."

Section 6 to 10 of the said Regulations sets forth the procedure required to collect, measure and analyse the actual deposit of mercury from these plants, s.6(1) provides for the daily composite samples and s.6(2) provides for the reporting of Unusual Occurrences where a composite sample cannot be obtained and the flow of effluent cannot be measured.

THE EVIDENCE IN PARTICULAR:

Count No. 1, February 24, 1978

Exhibit P-8 which consisted of a two page letter together with a five-page report with a plan attached dated March 8, 1978 signed by D.C. Gaylor who was Process Development Engineer gave us an accurate and complete report of what happened on February 24, 1978. Sometime around 11:30 p.m. on that date a breach occurred in the large "Clarifier Sludge Pit" resulting in the loss of an estimated 100,000 gallons of mercury contaminated water off the plant property. Estimated loss of mercury was 3.6 kilograms. Prior to the overflow the small "Holding Pond" was empty (that is, the plant was not batch treating at that time). The report continues to say that the flow of water continued on eventually to the Bay (meaning Restigouche River).

I note that on page 2 of the report the following:

"During the month of February, the pond level was observed to be increasing once again due to increased water usage in the plant and the unusually mild weather conditions experienced. The large settling pond was covered with an indeterminable thickness of ice and thus the exact liquid level was unknown."

And on page 3:

"It is possible that the level of the pond rose above the level of the dam in the channel, some water overflowed, and eventually eroded the dam to a point where a continuous stream between the two ponds was created. Further erosion from increased flow both widened and deepened the channel very quickly. It is also possible that the movement of ice caused by the rising level of water in the large settling pond weakened the dam in the channel to a point where a breach occurred."

I also note on page 3 as follows:

"TABLE 1 - SUMMARY OF Hg. ANALYSES - SEWER COMPOSITE SAMPLES

Sample Time - Date	Hg. Concentration (ppm)
2:00 P.M. - 8:00 P.M. Friday, Feb. 24, 1978	0.02
8:00 P.M., Feb. 24 - 2:00 A.M., Sat., Feb. 25, 1978	0.67) composite samples
2:00 A.M. - 8:00 A.M. Feb. 25, 1978	0.29) contaminated
8:00 A.M. - 2:00 P.M. Feb. 25, 1978	0.03) by flow
2:00 P.M. - 8:00 P.M. Feb. 25, 1978	0.02

Table 1 illustrates that some contamination of the sewer took place although no significant increase in flow on the flow recording chart located in the effluent building was indicated at the time the incident occurred.

> Based on the observed decrease in level of ice in the large settling pond following the incident (15"), the total loss of mercury contaminated water was estimated at 100,000 gallons. This loss figure is also based on the estimated actual holding volume of the small pond (50,000 gallons). A loss of this quantity at 8 ppm Hg. resulted in a release of approximately 3.6 kg of mercury to the environment."

It is difficult to discover how they arrived at a figure of only 100,000 gallons lost into the environment, since their estimate on Figure 1 - Plant in Exhibit P-8 shows 150,000 gallons lost from large pond and the statement that 100,000 gallons capacity "Holding Pond" it had retained 50,000 gallons of the overflow. I find that very difficult to accept based on the fact that this water from the large pond was flowing downhill on into this small pond that was full of ice and snow. In that short space of time, the water would not have apparently melted the snow and ice in the smaller pond very quickly and it would appear that the estimate of 100,000 gallons is on the low side by quite a substantial margin.

The defense cross examined Mr. Nixon and attempted to show that based on additional information that came into their hands in June or July, 1978 they determined that the loss from the large pond was only 50,000 gallons, see Transcript page 26, June 22, 1981 and that therefore the reported discharge would be 1.8 and not 3.6 kilograms of mercury.

There were a lot of questions and discussions concerning the averaging provisions of s.10(2) of the Regulations (c. 811) which reads as follows:

> *"Where a plant accumulated, for treatment by a batch process, all or a portion of the effluent discharged by the plant over a period of more than one (1) day and deposits the treated effluent on one (1) day, the owner may, for the purposes of Section 5, attribute the mercury deposited in that day equally to those days on which the effluent was accumulated."*

When one looks at the provisions of this regulation it becomes quite obvious that the incident on February 24, 1978 where the 50,000 to 150,000 gallons of mercury contaminated water was released, does not come under this section. This section provides that a plant can "accumulate for treatment by a batch process" over a period of time and then deposit it on one day and average if for the number of days in which the effluent has been gathered.

The evidence of Mr. Nixon is to the effect that the effluent and sludge on the "Clarifier Sludge Pit" was not treated. In fact it was only in the "Holding Pond" that treatment was done. The evidence disclosed that no treatment had been going on for months prior to this incident and none of the effluent that escaped had been treated for the removal of mercury therefrom.

I am satisfied, therefore, that s.10(2) does not in any way apply in this case.

On page 11 of January 22, 1981 Mr. Nixon states that the sampler would not take into account the flow rate. That it was not flow rate dependent and therefore a large surge of water contaminated or otherwise it would not pick it up. This would appear to be a very serious shortcoming in the testing procedure. If the flow of water increased by two or three or five times the flow of mercury going out could theoretically increase by two, three or five times and no true picture of the amount of mercury going through the sewer

would be obtained and the plant could, in theory, up the deposit to suit their needs thus defeating the purposes of these Regulations. A simple device to record the flow rate would seem to be a partial solution to this problem somewhat similar to the meter used to check the flow of water pumped into the clarifier each day, according to Mr. Nixon, 5000 gallons per day.

The accused alleges that with regard to s.33(3) of the Fisheries Act and the question of all due diligence that because of the build up of ice and snow that it was an act of God that created the breach and that they immediately tried to repair the breach after it was discovered. They also alleged that this water did not go into the Restigouche River on February 24, 1978. This is untenable when one considers that Mr. Nixon in his evidence said that most of the runoff was going into the sewer at Manhole No. 7 on Plan P-9 and that the Unusual Occurrence Report P-8 Mr. Gaylor also stated the water went "thence into the Bay".

I am satisfied that the overflow did in fact enter the waters of the Restigouche River and the amount of mercury escaping was measured correctly. All the water certainly did not go directly into the river but as far as I am concerned it was "deposited" on that day and in the usual course of nature the balance flowed into the river when the spring thaw came. S.33.4(3)(a) defines deposit as follows:

> *"a "deposit" as defined in subsection 33(11) takes place whether or not by act or omission resulting in the deposit is intentional".*

As far as the construction of the ditch is concerned, Mr. Nixon says on page 59, line 24 to 32 of January 21, 1981:

> "I neither saw it constructed nor knew anything about it until the incident happened"

these are his words. Yet he was in complete charge of this plant. I fail to understand why he would not be familiar with this system and not leave it up to some foreman named Ken Savoie to decide on how the transfer of this contaminated water would be made.

This defective method as indicated by the breach and according to the expert testimony of the Engineer, Mr. Williams, was very unsafe and insecure and was improperly used and constructed.

The accused company cannot say that this offence was committed without its knowledge and consent when in fact its servants or agent built this ditch, allowed this dangerous condition to exist and indeed the manager in charge did not even examine or look at this dangerous method of removing water from one pond to the other, but, I recognize that Mr. Nixon only arrived at the plant in the late fall of 1977.

I am satisfied that the company had knowledge of this defect and was careless or reckless and should have known or ought to have known the dangers involved in this slipshod procedure.

I am also satisfied that because of this carelessness and lack of appreciation by the person responsible for the operation of this system that the Company did not "exercise all due diligence to prevent its commission". I consider this to be the grossest kind of negligence dealing with a dangerous substance in the manner and ways outlined so far.

The unlined pits and ditch and the allowance of such a large buildup all winter not knowing how much water was in the pit because of the buildup of ice and snow. Anything that the Company did, after the fact, to prevent any further breach cannot assist the Company to prove due diligence.

Count No. 2, March 22, 1978

According to the evidence of Mr. Nixon, this incident came about as a result of mercury condensing on the roof during the winter from the downdraft fans. This was trapped there in the winter and during the runoff from the roof some mercury was carried with it.

He went on to explain that in the cell room there is a certain amount of mercury in the air which is legislated by the Clean Air Act. He contended that this mercury had already been accounted for and reported as an air emission also.

The witness, Nixon, on page 105 and 106 of transcript of January 21, 1981 agrees that there would be a high concentration of mercury on the roof and he was aware that his phenomenon could occur and there was no method to treat the water at any time prior hereto, it went directly into the storm drain. As soon as the result was determined the following day, the water was redirected inside the plant and the level reduced to normal the next day.

Here again I find the company negligent on that - reasonable precautions were not taken and as a matter of fact, a lack of precaution existed in something that should have been known to anyone operating such a plant.

The defence is based on the fact that this particular mercury had already been accounted for. I cannot accept that argument. If this mercury had in fact escaped into the atmosphere and remained there it would not have created any problem. The fact is, however, that it did not escape into the air but remained on the roof and environs and eventually was deposited in the Restigouche River. The fact that the Company knew or should have known that this situation could exist leads me to conclude that there was negligence on the part of the Company and again a lack of all due diligence.

Counts No. 3 and 4, July 21 and 22, 1978

According to the letter from the Company attached to Exhibit P-6, the following incident occurred:

> "Following the incident, the treatment pond pumping system was thoroughly backwashed with water to prevent further contamination of the plant sewer. Care is now taken to keep the suction pipe of the pond pump well above the bottom of the pond and a safe distance away from the pond bank at all times to prevent a similar recurrence."

It is to be noted that this mercury sulphide sludge which came from a section of the small treatment pond bank is the very sulphide that the treatment removes from the contaminated water. This sulphide is very high in mercury content and it is not surprising that if any of this concentrated sulphide were to get into the sewer system it would cause high readings. I note the wording of the last part of the letter -

"care is not taken to keep the suction pipe of the pond pump well above the bottom of the pond and a safe distance away from the pond bank at all times to prevent a similar recurrence."

This certainly proves negligence on the part of the Company, anyone allowing such an event to happen is clearly not taking reasonable or any precautions to see that this event will not happen.

In this case also, there is no excuse and it certainly cannot be maintained that the Company used "all due diligence" when the fact is they used none at all.

As far as allowing the averaging provisions in this particular case, I do not have sufficient evidence on which to decide whether s.10(2) of the Regulations could be applied. In any event, I feel that it is unnecessary for me to do so because the fact is that s.10(2) only comes into play involving water that has been treated. This sulphide had been removed from the water as a result of that treatment and was not "treated effluent" as envisaged by s.10(2) of the Regulations.

Counts No. 5, 6, 7, 8 and 9, August 14, 15, 16, 17 and 18, 1978

The report of Mr. Nixon, P-5 to Fisheries Canada stated that:

"On August 14, 1978, abnormal mercury levels and pH readings were observed in the plant effluent. Immediate investigation of effluent at the various manholes indicated a serious acidic condition which was giving rise to mercury pick up in the tank truck loading area. This condition was the direct result of an overflow of weak sulphuric acid (approx. 70-72%) to a waste sump. Acid proceeded to overflow to the road scale pit and thereafter via the scale pit drainage line to sewer.

The initial overflow of the weak acid from the storage tank was the direct result of a faulty tank level indicator. The acid overflowed into the scale pit due to the total collapse of an underground 6" vitrified clay drain line between the waste sump and an inside process sump.

Once discovered, the contents of the sump and scale pit were neutralized and flushed with water under controlled conditions."

And that certain action has been:

"Follow-up Action:

a) Spent acid level indicator has been repaired and its reliability is under investigation.

b) A schedule of visual checks of tank levels has been initiated.

c) Material is on order to repair the underground drain line with 8" PVC sewer line.

d) The road scale pit drain line to sewer will be sealed to eliminate potential sewer contamination.

Refer to drawing 1."

According to Mr. Nixon again on page 107 line 20 on, a sulfuric acid tank was overfilled due to a faulty tank level indicator and this acid then flowed to a process collection pit. It could not drain back into the process because of the collapse of an underground six inch clay drain pipe. Had this pipe not collapsed, there would have been no spills in the sewer. Because of the collapse of this pipe some of the acid overflowed into the road scale pit where it was then washed into the sewer.

The letter indicated that:

"which was giving rise to mercury pick up in the tank loading area."

In his evidence Mr. Nixon adds that this diluted acid will dissolve elemental mercury that might be present in the sewers and cause the mercury level to rise.

It is to be noted that in the letter no reference is made to this, in fact, it states:

"once discovered, the contents of the sump and scale pit were neutralized and flushed with water under controlled conditions."

Certain steps were then taken by the Company to repair the underground line with 8" PVC sewer line to repair the level indicator, to check the level visually and the road scale drain pit was sealed off to eliminate potential sewer contamination.

It is apparent again that the maintenance system, in not noting the faulty level indicator and in not taking the precautions such as checking to see that all drains are working properly and that the scale pit drain line where mercury may be drained directly into the sewer line, is to me negligent and showed again that no reasonable precautions had been taken by the Company to prevent such an event from happening. Again "all due diligence" had not been taken by the Company to prevent this problem.

Counts No. 10, 11, 12 and 13, August 21, 22, 23 and 24, 1978

On page 2 of P-5, the report to Fisheries Canada we find the explanation for the incident giving rise to the charges for these four dates and page 115 transcript January 21, 1981, Mr. Nixon states:

"A. On the 21st there was a total failure of the large sewer system, the west sewer system which carries almost all of the process water from the plant, it collapsed, there was immediate flooding in the plant itself and on the surface and we believed that mercury containing sediment from the area of the clarifiers and from the sludge around the sludge pit had entered into the sewer and caused the increased levels that we detected.

Q. Do you know how this... this here pipe how... why it collapsed?

A. I would believe that it collapsed as a result of pile driving operations adjacent to the area which commenced on the 15th.

Q. I show you the diagrams attached to Exhibit P-5, Mr. Nixon, and there is a line drawn between manhole three and manhole two.

A. Yes

Q. Is it in the vicinity that that pipe collapsed?

A. Correct, well we believe so.

Q. And it's right under the... where the new brine settler is located, is it not?"

From this evidence and from the above report, I find that the increased levels were caused by the collapse of the 15" vitrified clay main sewer line at a depth of 15 feet had collapsed. The sewer was shown to have collapsed in the area where 37 x 25 feet "H" piles had been driven to support the bank for a new brine settler.

Mr. Nixon was aware that they were driving piles in this area and admitted on page 116 of the transcript of January 21, 1981 that to his knowledge nothing was done to prevent the collapse of the line before the driving of pile and further said that engineers were responsible for this decision who assured him that there was a big enough set in margin so that it would not be unsafe.

Mr. William, transcript page 56, January 22, 1981 who is a professional consulting engineer said at line 20 to 29:

"A. With regard to driving the "H" piles?

Q. Yes

A. Well, I could not agree with the information I had heard. I would never have driven piles and I have been in situations where I have driven piles adjacent to sewers, I've excavated, there are several ways you can handle it in good engineering principles rather than either driving a pile to the pipe or breaking the pile due to vibrations."

Again on transcript at page 60, line 1 to 18:

"Q. On the comments you've made so far regarding the driving of the piles, Mr. Williams, would the quality of the pipe itself have any ah... would that be relevant to the problem?

A. Well, I understand that is, that is a PVC electrified clay pipe, from what I heard and that is a very weak structural pipe, it would even be in my opinion that one would take more care than necessary having known that that is a material that the sewer is built out of than say concrete or some other material, concrete pipe. It's a very brittle pipe, it's hardly in use today. As a matter of fact, the only plant that I know of in Nova Scotia is now quit making it because nobody would specify, at least, in the consulting business around that I'm use to, you wouldn't specify it."

The letter of September 20, 1978, Exhibit P-5 indicated that the results of the tests by the Parshall Flume were in error because of the fact that it was badly fouled with mercury, rich sand/silt and that the intake was submerged in this material.

After reading in the report "soil analysis in the area of the collapse indicated a content of 2 p.p.m." and further that "mercury undoubtedly entered the sewer system due to leaching of the surrounding soil by process water" and after hearing from Mr. Nixon, on page 115 transcript of January 21, 1981 that:

> "there was immediate flooding in the plant itself and on the surface and we believe that mercury containing sediment from the area of the clarifiers and from the sludge around the sludge pit had entered the sewers and caused the increased levels that we detected."

On this same page the witness, Nixon, also agreed that the sewer pipe collapsed as a result of pile driving operations which had commenced on August 15, 1978, these piles were driven to a depth of 25 feet as per report P-5 page 2, line 9.

I am asked to believe and accept the fact that because there was mercury rich sand/silt fouled the intake of the Parshall Flume that the readings were inaccurate. Yet it is quite clear that until the new sewer line had been installed, this sand/silt mixture must have been continuously entering the sewer system and continually going into the Restigouche River passing through the area where the Parshall Flume was contained. It is not surprising to me that the flume was fouled, as a matter of fact the whole sewer system was fouled because of this incident.

The witness Mr. Nixon, on page 34 transcript of January 22, 1981 line 9 to page 35 line 12:

> "A. At this time, large numbers of samples were taken at the various manholes around the plant and it was determined that there was contamination by mercury rich silt which had been washed down due to the collapse into the sewer system. The testing continued very intensely and in fact results showed that by the 24th the apparent discharges were increasing very significantly, in fact were a maximum on that last day.
>
> Q. These would be at the sampling?
>
> A. At the sampling point, the one used for reporting purposes. Other analysis taken around the system at the various manholes did not confirm these high results. The water was showing a natural fact that the mercury content was significantly lower. At the time, once we had determined this, we went down into the ... down the manhole where the sampling system, the Parshall Flume sampling system was located and found that there was silt trapped on the upstream side of the Parshall Flume, not a lot but sufficient to have the sampling point actually embedded in that silt. So what ... was happening was that we were drawing water, water sample through a bed of mercury rich silt. This was cleaned out immediately, in fact we also cleaned out the little catch pots at the bottom of each of the manholes. And from that maximum that day it dropped down to within the limit on the following day. Other results showed that while we were still having high results from the sampling point on the upstream side of the Parshall Flume we were getting low results downstream of the Parshall Flume so this pointed very clearly that there was contamination at the sampling point that was used for recording purposes."

I conclude from the evidence of Mr. Nixon and I also find that the finding of the silt in the Parshall Flume was only made on the 24th of August, the following day the mercury level was within an acceptable limit. I cannot agree that these high readings of .00915 on August 21, 0.00749 on August 22, 0.01141 on August 23 and 0.01150 on August 24 are to be explained by the fact of this fouling of the intake in the Parshall Flume. This effluent containing silt and soil was going through and no doubt some was retained in the flume. Even if this were part of the reason for the high reading other samples, according to Mr. Nixon were taken. We were never given these results and the only allusion to these results is to be found in P-5 on page 2:

> "The continuous sampler intake was submerged in this material and mercury analysis of effluent samples so taken were found to exceed those of normal uncontaminated effluent by a factor of approximately 2 to 3."

If I were to use the factor of 2 to 3, that is use these figures on the last two days I would still have mercury levels over that allowed. However, on the 21st and 22nd there must have been quite a quantity of silt going through the sewer and we know it had significant amounts of mercury in it:

> "Q. Where did it get contaminated?
>
> A. I believe it was contaminated by the soil which had been washed into the sewer from the vicinity of the clarifier, that area because of the large quantity of clarifier sludge which are moved and which are known to contain mercury, I believe that that would be washed into the sewer as it progressively collapsed and contaminated that particular sewer around there."

and I am convinced from the evidence that this continued on into the 23rd and 24th, because up to that time no proper control was had over the way the effluent was transferred from the plant around the point where the collapse had taken place.

I find that the explanation given is not supported by any concrete evidence of other sampling, simply to say that on August 24th, it was discovered that some silt was in the intake flume and in the catch pots of the manholes and that this was the cause for the high readings to me is unacceptable as being a far fetched hypothesis, as I said, unsupported by fact. Had I been given the result of tests taken above and below the Parshall Flume it may have lent some weight to this theory. In the absence of this evidence, I cannot accept this theory. In fact, what probably did stop the high level is indicated in the evidence of Mr. Nixon on page 120 transcript of January 21, 1981 line 7 to 14:

> "Q. What about the second incident?
>
> A. The second one the water, the sewer system was... had collapsed and we had to pump around it, there was no reason to believe that at the time that that particular water would be contaminated. <u>At some stage, I can't remember exactly when, we redirected the water or much of that water up to the holding pond</u>."

From this evidence, the collapse of the sewer system because of piles driven in that area, the lack of any type of sewer system maintenance or monitoring, I find once more that the Company did not take reasonable precautions and did not exercise "all due

diligence" when they were doing repair work in order to ensure that no damage would be done to the sewer line which they knew to be in this area. I accept the opinion of Mr. Williams as to what his opinion was and to what steps the Company should have taken to protect this sewer line and obviously these steps were not taken.

Count No. 14, December 26, 1978

According to the letter in P-7, acid was leading from a sulfuric acid pump gland which then went through a hole in the concrete wall of the liquid waste pit and on into the sewers.

Again we find that a leaking valve is responsible, in part, in addition to the hole in the concrete wall of the liquid waste pit.

This again indicates to me negligence on the part of the Company. If an adequate maintenance program was in place, this hole could have been repaired and also it should have been easy to detect the leaking valve and replace it. I find that this was not done again indicates negligence, a lack of reasonable precaution that should be taken in a plant where the dangers of leakage are known to be very serious and potentially dangerous to the environment. I am satisfied that the company by its lack of adequate maintenance did not exercise "all due diligence".

THE LAW

The accused alleges that the Company is entitled to the Statutory defense contained in s.33(8) of the Fisheries Act which reads as follows:

> *"In a prosecution for an offence under this section or s.33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."*

It is alleged that because the alleged violations are only known to the company after the fact that there is no way the Company can be vested with knowledge.

I reject this as being a completely erroneous interpretation of what the words "knowledge" and "consent" imply. S.33(8) provides an owner or Company operating a plant with a defense that would absolve the employer or principal and also that in the event of such an occurrence the principal or employer exercised all due diligence to prevent its commission.

The Company was certainly fixed with knowledge of all the events concerning the fourteen (14) counts herein and also can be taken to have consented to the conditions that existed at the time because of the evidence of Mr. Nixon on that point. This is not something that was done by an agent or employer of which the company was unaware of. This was something that occurred in the usual and ordinary course of affairs existing at the C.I.L. and the Company had both "knowledge" and consented to these conditions existing at that time.

As to the question of due diligence in Count No. 1, the defence alleges "Act of God" that was caused by the buildup of snow and ice. It is common knowledge and I take Judicial Notice of the fact that our winters in this part of Canada are generally very severe in January and February and that large buildups of snow and ice can be expected to buildup around this open pit. As far as accumulations of ice and snow and the large quantity of water put into the "Clarifier Sludge Pit" during the winter months of 1977-78 I can only come to one conclusion, that is, that it was a man-made accident over which the Company could have had control if the proper procedures to empty the large pond periodically would have been followed. Such was not the case and the Company cannot be even credited with lack of negligence let alone believing that they had used "all due diligence". They did not do so and were clearly in contravention of this Section 33(8).

The same argument is used again as to Count No. 2, that is, the question of only knowing after the fact. I can only say that if this argument held true, there could never be any charges under these Regulations. Obviously, this argument is unreasonable and cannot be supported.

The defence alleges that as far as Counts No. 3 and 4 are concerned, that the averaging provisions of s.10(2) of the Regulations should be applied which I have pointed out are simply not applicable to the fact that the sludge had slipped off and was sucked into the outlet and into the sewer. The defence alleges that this could not be prevented. Again I cannot agree, the procedure they used at that time was clearly inappropriate and showed carelessness amounting to negligence by the Company. This is not something that could not have been foreseen-any reasonable man could anticipate such a problem.

Again the defence suggest that as to Counts No. 5 to 13 inclusive, the figures were not reliable because of the mercury silt in the Parshall Flume and also that all reasonable care was taken by the Company as to the driving of the piles which were being driven down near the sewer system at this time in August of 1978. Again I have already stated my opinion that the test results were the only results before the Court, as far as I am concerned, give us an accurate reading. The Company had a duty, which it was aware of according to the evidence of Mr. Nixon, to see to it that the pipe driving did not injure the sewer system. They were driving pilings 25 feet deep at a distance of approximately ten feet to 15', at the most from the point where the sewer collapsed. According to Mr. Williams, whose evidence I accept, this was indeed a very improper thing to do under the circumstances. The fact is the pile driving did cause the sewer to collapse and there is no doubt in my mind that the Company was negligent in allowing this event to occur.

The defence further alleges that the particulars submitted by the Crown are insufficient on which the Court can conclude that the word "day" as defined in the Regulations, and the time the offences occurred as alleged in the particulars, can be said to be the same. The particulars only show that all samples, except the one of Febuary 21, 1978 which was taken at 11:30 p.m. were taken at 8:00 a.m. on each day. This bears out the evidence of Mr. Nixon that samples were taken on a 24 hour basis and reported on every 24 hour period at 8:00 a.m. I see no problem whatever with their particulars which are only considered to be additional information given to the accused to allow him to be aware of the exact case that he faces and the exact type of information which he may need in order to properly defend himself against the charges.

I find as a fact that the evidence before the Court supports the charges as set forth in the said counts and the evidence proves the samples were taken within a 24 hour period terminating at 8:00 a.m. on each date from Counts No. 2 to 14 inclusive.

The defence further alleges that the deletion of the word "reference" from the (14) counts leaves the Court with no charge known to law because of the wording of s.5 of the Regulations which section provides how the amount of mercury deposited is to be calculated. The charge as amended contains no mention about the way in which the weight of the mercury, that is permitted to be deposited because of the Regulations, can be determined.

The charge as laid in pursuant to s.33(2) of the Fisheries Act Canada 1970 as amended as follows:

> *"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."*

It is to be noted that s.33(2) says "subject to subsection (4)".

S.33(4)(b) reads as follows:

> *"No person contravenes subsection (2) by depositing or permitting the deposit in any water or place of a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor-in-Council under subsection (13)."*

S.33(4) also refers us to s.33(13) which provides for Regulations for the purpose of paragraph 4(b) of s.33.

Following the decision of the Supreme Court of Canada in the case of *R. v. Steam Tanker "Eugenia Chandris"* 27 C.C.C. 2(d) page 241. The Court is obliged to take Judicial Notice of all Statutory Instrument and thus a Regulation having been determined to be a Statutory Instrument it shall be so Judicially Noticed.

No mention is made in the charge as to the applicable Regulations entitled the "Chlor-Alkali Mercury Liquid Effluent Regulation" being Chapter 811 C.R.C., Vol. VII 1978, made under the Fisheries Act. It is to be noted, however, that each charge mentions the words "namely water containing mercury exceeding 0.00250 kg per tonne of chlorine" thus indicating the particular deleterious substance that was involved herein and giving the defence exact particulars of what it was charged with.

I must here point out that it is s.33(2) of the Fisheries Act that creates the offence, there is no offence created by the said Regulations. I am therefore satisfied that the information recites all the facts and relates them to the relevant section of the Fisheries Act Canada, 1970 as amended, that is impossible for the accused to be mislead In *R. v. Cote*, Vol. 40, Criminal Reports New Series Annotated, page 309, DeGrandpré, J. says:

> *"The golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial."*

When the information recited all the facts and relates them to a definite offence identified by the relevant section of the Code, it is impossible for the accused to be misled (p. 343).

I am satisfied that this particular form of information complies with Section 510 of the Criminal Code of Canada. As long ago as January 22, 1980, the charge having been laid on September 19, 1979 and surely even before that time, but at least at that time, the accused appeared by solicitor and on page 7 and 8 of the transcript of January 22, 1980, noted at bottom of page 7:

"Under the Federal Regulations the Chlor-Alkali Regulations"

and again in a Brief submitted under the signature of Mr. Tingley on February 26, 1980 page 5, it spells out in the second paragraph -- Chlor-Alkali Mercury Liquid Effluent Regulations being P.C. 1977-78 so that I am absolutely and positively satisfied that they knew what they had to defend against.

It is also my opinion that a successful defence of autrefois acquit or convict could be raised pertaining to any of these 14 incidents.

(Before dealing with the Statutory burdens under s.33(4)(a) and s.33(8) and the onus thereunder and the question of which class of offence we are dealing with whether it is a "mens rea" a "strict liability" or an "absolute liability" case there is one other point which was raised and with which I will now deal.)

The defence called as a witness the informant, Phil Henneberry, who was asked a total of six questions and not cross-examined by the Crown or asked any questions at all by way of information or otherwise by the Crown.

He stated that he was an inspector, a Fisheries officer under s.33 of the Fisheries Act employed by Environment Protection Services in Halifax for the past ten years, that he had been the informant who signed the information before Judge Ayles and the only evidence as to his personal information was to ask him if on the specific dates mentioned in each of the fourteen (14) counts, whether or not he was at the C.I.L. working in Dalhousie on any of these days. He answered no that he wasn't there.

At this point in the evidence, a motion to quash was made by Mr. Humphrey, for the accused. The motion was based on the defence's contention that the form used in the information is wrong. He went on to say that because Mr. Henneberry had not been at the plant in Dalhousie on the day of the alleged offences that he did not have personal knowledge and the information should have contained the words according to Form 2 page 665 Criminal Code (if the informant has no personal knowledge state that he has reasonable and probable grounds to believe and does believe).

On the basis of this question simply as to whether or not he was at the C.I.L. plant in Dalhousie on the days in question, I am asked to quash the information on the grounds that he did not have "personal knowledge". Haultain C.J. in *White v. Dunning & Brown* 1915, 21 D.L.R. 528, adapted a very restrictive definition of personal knowledge as meaning nothing less than the actual knowledge of an eye witness. In that case it was determined on the evidence that the informant had no personal knowledge of the circumstances.

In the case of *R. v. Jones* (1971) 3 C.C.C. (2d) 25 Nicholson, J. found as a fact that the informant had no knowledge whatsoever of the events surrounding the arrest of the appellant and said he was a person who admittedly had no personal knowledge of the matter set out in the information.

Counsel also cites the cases of R. v. Lepage (1969) 4 C.R.N.S. - 61 and *McGuffey v. The Queen* 17 C.R.N.S. (1972) 393.

The defence alleges that because he was not on the scene he had a total lack of personal knowledge of the offences. "Knowledge" is defined in Funk & Wagnalls Standard Desk Dictionary as being "A result or product of knowing" "personal" is therein defined as "pertaining to or concerning a particular person"...

I take that to mean the result or product of knowing something about a particular person has knowledge of because he was an eyewitness or because of some information peculiarly within his own knowledge.

In the case of *R. v. Lepage* the accused raised an objection after arraignment prior to plea. The Judge overruled the objection and a plea of not guilty was taken. The Crown was asked to amend, they refused, the accused then adduced evidence that the informant did not have personal knowledge and the information was quashed.

In the case of *White v. Dunning & Brown*, this Judgment was not on the point in issue but in the evidence it was disclosed that the Justice who took the information was aware of the fact that the informant had no personal knowledge but took it anyway in that form.

In the case of *R. v. Jones*, the Court itself raised the objection on Trial de Nova before Nicholson, J. even though it was not raised before or by counsel for the Defence. It was found that there had been a failure to comply reasonably with the provision of the statute and in my opinion the information is defective and should be quashed. The same reasoning is adapted in *R. v. Delorne* 23 C.C.C. (2d) 103 in which the Court refers to the decision in *R. v. Wildefong* (1971) 1 C.C.C. (2d) 45 in which Culleton, C.J. of the Saskatchewan Court of Appeal found that in this case there is a defect in form that could be amended at trial by re-swearing the information. The information coming under the amending provisions of Section 732 (3)(c) C.C.C.

For the purpose of information, in New Brunswick, the Justice who takes an information under s.455.3 of the Code, the section under which this information was laid, is a Provincial Court Judge, because there are no Justices of the Peace who can accept the information. In this case, the information was laid before me by the informant on the 14th day of June, 1979. After seeing that the informant was an officer of Environment Canada and after looking at the 14 counts contained in the information and after having sworn the informant to the truth of the allegations contained in the information, I considered that a case was made out for issuing a summons which I proceeded to do. I did not question the informant as to whether or not he had personal knowledge but I accepted his declaration in the information under oath and was accordingly satisfied the allegations were as set out in the information.

The first allegation made by counsel for the defence about the fact that the informant did not have personal knowledge, was in an Application for Particulars heard before me on November 6, 1979. See Transcript "Application for Particulars" November 6, 1979 page 23 line 10 to 27. Had counsel for the Crown moved to amend the information at that time, I would have no doubt allowed them to do so by making the necessary change and re-swearing the informant.

At the time when the informant was called to testify on January 22, 1981, it was impossible to have him re-swear the information and have it amended because the limitation period of two years had expired. The Crown did in fact ask the Court to apply Section 732 at that point and amend accordingly. If I had granted this motion, I would then be faced with the fact that the information was out of time and have to dismiss.

I found that because of the few questions asked of the informant that I had insufficient evidence to justify me in making a finding that he did not have personal knowledge I ruled that I had before me Exhibits P-2 to P-8 inclusive which were letters and reports sent to the office where Mr. Henneberry was employed and that being the only information, I felt I had insufficient evidence on that point on which to make a decision and ruled that I did not have sufficient evidence to justify a finding of no personal knowledge.

It certainly cannot be said that the informant was an eye witness because this type of offence is not susceptible to such unless Mr. Henneberry had been on the premises himself and been the technician who conducted the sampling and calculated the results thereof. Obviously, he was not and therefore my ruling was in error insofar as my finding that I had insufficient evidence before me to make this finding. Therefore if I am to follow the decision in the case cited I would have to find the information defective and quash it. Code s.732 provides the means of amending defective informations including information defective as to form. S.510 unfortunately is of no help because it deals only with the substance of the offence and not the form in which the information takes. S.773(1) reads as follows:

> *"The forms set out in this Part varied to suit the case or forms to the like effect shall be deemed to be good, valid and sufficient in the circumstances for which, respectively, they are provided."*

Therefore I must find that the form set out in Form 2 was not followed and consequently the information is defective and should be quashed or in the alternative I allow the motion made by Crown Counsel and allow him to amend and to have the charge re-sworn to at which time I would dismiss the charges because the time for laying their information had expired.

I now return to a determination of the Statutory burdens under s.33.4(3)(a) and s.33(8) and the onus thereunder; and that class of offence under the *Sault Ste. Marie* definitions we are now dealing with.

Section 33.4(3)(a) of the Fisheries Act reads as follows:

> *"a "deposit" as defined in subsection 33(11) takes place whether or not any act of omission resulting in the deposit is intentional."*

A reading of this section in my interpretation takes away any defence on the grounds of accidental discharge. Thus the fact that C.I.L. did not have the intention of releasing mercury in excess of the legislation is not in question here. The defence of mens rea is therefore taken away by Statute.

The other Statutory onus is s.33(8):

"In a prosecution for an offence under this section or s.33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission."

This section creates a prima facie case where it is proved that the offence was committed by an employee or agent of the accused unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

In this case, the Company would have had to establish that all those incidents were committed without the Company's direction or approval thus negating wilful involvement and whether the Company exercised all reasonable care by establishing a proper system to prevent commission of these offences and by taking reasonable steps to ensure the effective operation of the system. The availability of this defence will depend on whether all due diligence was taken by those in charge and control of the operations of the plant whose acts are in law the acts of the Company itself.

I am satisfied beyond any doubt that in all the fourteen (14) counts the Company did not meet the standard of reasonable care and were either grossly negligent or so careless as to whether or not such a condition existed that I cannot find where "all due diligence" in preventing commission of those offences can be attributed to the Company. In fact, I find just the opposite. The standard of care is the exercise of "all due diligence", certainly this is not a very high standard for the responsibility for negligence. The Company was required to prove on a balance of probabilities that they had exercised all due diligence something which they have utterly failed to do so in the evidence. The particular matter comes with the category of offences established in the case of *R. v. Sault Ste. Marie* (1978) 2 S.C.R. 1299 as being one of "strict liability" and I will not cite at length from this decision.

The evidence given before this Court satisfies me beyond all reasonable doubt that the Company is guilty of the fourteen (14) counts alleged in the information and, but for the unfortunate defect, which I am unable to cure, I would have found the accused company guilty on all fourteen (14) counts.

Bearing in mind the penalty provision and also bearing in mind that Section 740 of the Criminal Code of Canada applies herein I would have imposed the following penalties for a first offence on each one of fourteen (14) counts as follows:

Count (1) A very serious occurrence caused by a total lack of reasonable precaution by the Company which I find to be grossly negligent and spilling into the water a considerable amount of mercury in excess of 3.8 kg. Very sloppy engineering practices which should never have occurred. Mercury being a very dangerous substance, I would have levied a fine in the amount of $25,000.00.

Count (2) A minor occurrence but one that should have reasonably been foreseen. A fine of $1000.00.

Count (3) Again very negligent operation, one that could easily have been foreseen and prevented. A serious spill. A fine of $10,000.00

Counts (4) (5) (6) (7) & (8) Again negligence in the part of the Company. Not a minor occurrence, one that should have been prevented by proper maintenance. On each of these counts a fine of $2500.00.

Counts (9) (10) (11) & (12) Gross negligence on the part of the Company in allowing piles to be driven in the area above the main sewer pipe was known to pass. Significant amounts of mercury escaped and the explanation concerning the fouled Parshall Flume did not, in my opinion, account for the high readings. I would have imposed fines of $5000.00 on each of these counts.

Counts (13) Again negligent maintenance by the Company comparable to Count (2). A fine of $1000.00.

NEW BRUNSWICK COURT OF APPEAL

R. v. CANADIAN INDUSTRIES LIMITED

HUGHES C.J.N.B., RYAN and STRATTON JJ.A. Fredericton, July 26, 1982

***Fisheries Act*, R.S.C. 1970, c. F-14, as amended - Charges under s. 33(2) dismissed by Provincial Court Judge who found Information to be nullity - Appeal allowed - Problem was defect in form and thus capable of amendment under s. 732 of Criminal Code -Matter remitted to trial Judge to consider motion to amend Information.**

Information - Charges under s. 33(2) of *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, dismissed by Provincial Court Judge who found Information to be a nullity - Appeal allowed - Problem was defect in form and thus capable of amendment under s. 752 of *Criminal Code* - Matter remitted to trial Judge to consider motion to amend.

On an appeal by way of stated case by the Attorney General of Canada from a Provincial Court decision dismissing an Information charging that the respondent did unlawfully deposit a deleterious substance into the Restigouche River contrary to s. 33(3) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, held, the charges were improperly dismissed and the case is remitted back to the trial Judge to consider any motion to amend the Information and to receive such further evidence as the justice of the case may require.

The Information, when laid, implied that the informant had personal knowledge concerning the commission of the alleged offences. In fact, the informant was called as the only witness for the defence, following the close of the prosecution's case. The informant's knowledge was based only on written reports and letters from the defendant and not on personal knowledge of the alleged offences. The trial Judge had held that the Information was therefore a nullity and incapable of being amended, and furthermore, that a fresh Information could not be laid at that point since the limitation period prescribed by s. 64 of the *Fisheries Act* had expired.

The Information however was merely defective and capable of being amended and was not a nullity. The difference between a matter of form and a matter of substance is whether the defect is in the manner of alleging the matter or in the matter itself pleaded. If the former, it is a defect in form and capable of amendment under s. 752 of the *Criminal Code*.

While the trial Judge was correct that a new Information could not be laid at that point, the defective one could have been amended, and the case is therefore remitted to him to consider a motion for amendment and to exercise his discretion with full knowledge that it is within his power to amend.

HUGHES C.J.N.B.: - The Attorney General of Canada, by his agent, has appealed by way of stated case to this Court pursuant to s. 748 of the Criminal Code against the dismissal, by a Judge of the Provincial Court on May 19, 1981, of an information charging that on certain days specified therein between February 24, 1978 and December 26 of the same year, the respondent did unlawfully deposit a deleterious substance in the water of

the Restigouche River in the Province of New Brunswick, being water frequented by fish, contrary to the provisions of s. 33(2) of the *Fisheries Act*, R.S.C. 1970, ch.F-14, and amendments thereto.

The material portions of the stated case read as follows:

1. *On the 14th day of June, A.D., 1979, an information was laid under oath by Phil Henneberry, Officer-Environment Canada of the City of Halifax, in the Province of Nova Scotia, in the following form as amended.*

The informant says that:

"Canadian Industries, a body corporate, carrying on business at Dalhousie, in the County of Restigouche and Province of New Brunswick: on or about the 24th day of February, A.D., 1978, did unlawfully deposit a deleterious substance, namely water containing mercury exceeding 0.00250 Kg per tonne of chlorine in the water of the Restigouche River at Dalhousie, New Brunswick, being water frequented by fish, contrary to the provisions of Section 33(2) of the Fisheries Act, being Chapter F-14 of the revised statutes of Canada 1970 and amendments thereto."

Counts No. 2 to 14 inclusive were the exact same charges as in Count No. 1 for the following days in numerical order: March 22, 1978; July 21, 1978; July 22, 1978; August 14, 1978; August 15, 1978; August 16, 1978; August 17, 1978; August 18, 1978; August 21, 1978; August 22, 1978; August 23, 1978; August 24, 1978 and December 26, 1978.

2. *The said charges were heard before me on January 19 and 20th, 1981 and after having heard all the evidence adduced before me, I rendered judgment on May 19, 1981, whereby I adjudged that the information was defective and should be quashed, or in the alternative if the Crown would have been allowed to amend by re-swearing the information I would then have dismissed the charge because the limitation period would have expired.*

It was shown before me that:

(i) The information was laid before me alleging personal knowledge of the information as to the contents of the information on June 14, 1979.

(ii) The Defence called the informant as a witness who testified that he was not on the premises of Canadian Industries Limited in Dalhousie, New Brunswick on the 24th day of February, A.D., 1978 or any of the dates alleged in Counts No. 1 to 14 of the said information. The Defence then requested I dismiss the charges on the ground of lack of personal knowledge of the informant. The Crown alleged that the fact that the accused Corporation had made reports in writing and letter setting forth facts which, if accepted, were proof that the offences had occurred, did in fact amount to personal knowledge. In the alternative, the Crown requested I amend the information pursuant to Section 732(3) of the Criminal Code of Canada. At that time I agreed with the Crown that it appeared to me that the information was valid on its face and that I didn't have sufficient evidence to justify me in making a finding to the effect that the informant did not have personal knowledge. For that reason I refused to grant the motion to quash, I also refused leave to amend the information

under Section 732(3) of the Criminal Code of Canada. The Defence called no other witnesses.

Subsequently, I reserved judgment until May 19, 1981 at which time

(iii) I found that there was a failure to comply reasonably with the provisions of Section 773(1) of the Criminal Code of Canada and the provisions of Form 2 of the said Code, and therefore the information was defective and should be quashed. In the alternative if I had allowed the Crown to amend at that time by re-swearing the information I would have dismissed the charges because of the limitations period contained in Section 64 of the Fisheries Act Canada, Chapter F-14 RSC 1970 as amended.

3. *The Attorney General of Canada through Counsel attorney in his behalf desires to question the validity of the decision on the grounds that it is erroneous in point of law, the grounds of appeal being:*

1. The trial Judge erred in Law in failing to amend the information during the trial, pursuant to paragraph 732 (3) (c) of the Criminal Code.

2. The trial Judge erred in law by holding that in amending the information, as to the statement of the informant's basis of knowledge, the information would have to be re-sworn.

Following the hearing of argument of counsel on the appeal, this Court on its own motion, pursuant to powers conferred upon it by s. 768(1) (c) of the Code, remitted the stated case to the Judge for amendment in order to have him clarify the basis of his decision to dismiss the information and for his refusal to permit the amendment of the information which counsel for the Attorney General had requested. In response thereto the Judge submitted the following:

1. *The basis of my decision to dismiss the information and refuse to permit the amendment, is I considered that in my opinion it was unjust for me to permit an amendment to be made, at that stage after all witnesses had been heard, creating a prejudice to the defense. I held that the Crown had ample opportunity to amend and had not done so. I exercised my discretion after having stated in my Judgment on page 34, lines 30 to 33,*

> *"Had counsel for the Crown moved to amend the information at that time, I would have no doubt allowed them to do so by making the necessary change and reswearing the informant."*

The words "at that time" in the above citation referred to an application by the defense for particulars dated November 6, 1979, wherein the personal knowledge of the informant was questioned by defense counsel.

2. *I also was of the opinion that, citing from my Judgment at page 35, line 1 to 8,*

> *"At the time when the informant was called to testify on January 22, 1981, it was impossible to have him re-swear the information and have it amended because the limitation period of two years had expired. The Crown did in fact ask the Court to apply Section 732 at that point and amend accordingly. If I*

had granted this motion, I would then be faced with the fact that the information was out of time and have to dismiss."

My conclusion being that the information was a nullity in that it had been improperly sworn to.

In this Province there are no criminal appeal rules governing appeals by way of stated case. Consequently this Court cannot examine the transcript or the exhibits but must apply the law to the facts as stated in the case submitted by the trial Judge. In *Regina v. C. D.* (1973), 13 C.C.C. (2d) 207, Limerick, J.A. at p. 211 made the following observation with which I concur:

If it be necessary to examine the transcript of evidence to determine a question of law as a ground of appeal, a stated case is not the appropriate remedy. That remedy is available only if there be no dispute as to the facts as found by the trial Judge.

From the stated case as amended it appears that the information was laid by Phil Henneberry on June 14, 1979; that the defendant appeared before the trial Judge by counsel and pleaded not guilty to the charges; that on November 6, 1979 counsel for the defendant applied for particulars wherein he brought into question whether the informant had personal knowledge concerning the commission of the alleged offences; that the case was heard on January 19 and 20, 1981 and following the close of the case for the prosecution, counsel for the defendant called the informant Phil Henneberry as a witness for the defense and that from his answers it became questionable whether the informant had personal knowledge that the defendant had committed the alleged offences he charged in the information; that an argument ensued in which counsel for the prosecution argued that certain written reports and letters from the defendant of which the informant had personal knowledge constituted personal knowledge of the commission of the alleged offences and, that, as stated by the trial Judge:

"In the alternative, the Crown requested I amend the information pursuant to Section 732(3) of the Criminal Code of Canada. At that time I agreed with the Crown that it appeared to me that the information was valid on its face and that I didn't have sufficient evidence to justify me in making a finding to the effect that the informant did not have personal knowledge. For that reason I refused leave to amend the motion under s. 732(3) of the Criminal Code of Canada. The defence called no other witnesses.

Subsequently, I reserved Judgment until May 19, 1981 at which time:

(iii) I found that there was a failure to comply reasonably with the provisions of Section 773(1) presumably s. 723(1) of the Criminal Code of Canada and the provisions of Form 2 of the said Code, and therefore the information was defective and should be quashed. In the alternative if I had allowed the Crown to amend at that time by re-swearing the information I would have dismissed the charges because of the limitation period contained in Section 64 of the Fisheries Act Canada, Chapter F-14, RSC 1970 as amended.

The bases for the Judge's decision to dismiss the charges against the defendant appear to have been:

(1) *that because the information was sworn to by the informant who stated the defendant did unlawfully deposit a deleterious substance in the waters of the Restigouche River on certain dates when in fact the informant may not have had personal knowledge of the information was a nullity and unamendable;*

(2) *that a fresh information for the same offences could not be laid because the limitation period of two years prescribed by s. 64 of the Fisheries Act had expired; and*

(3) *that it would have been unjust to allow an amendment to the information after all the evidence had been heard.*

We are not here concerned with the question whether the informant did or did not have personal knowledge that the defendant committed the 14 offences alleged in the information since the trial Judge found that he did not have such personal knowledge and that finding was not brought into question in this appeal. The first issue to be decided, therefore, is whether an information, sworn by an informant who states or implies he has personal knowledge when in fact he has not or may have only reasonable grounds to believe that the defendant committed the offence alleged therein, is a nullity or merely defective. In my opinion such an information is merely defective and therefore amendable under s. 732 of the Code. The onus of proving the defect rests on the defendant, who must prove it by a preponderance of evidence during the course of the trial. When so proved the onus of seeking an amendment to remedy the defect rests on the prosecution, and the power to decide whether an amendment should be allowed must be exercised by the trial Judge under s. 732(5) and (6).

The leading case on the subject of latent defects and the curative provisions of the Code applicable thereto is *Regina* v. *Peavoy* (1974) 15 C.C.C. (2d) 97, a decision of Henry, J. of the Ontario High Court, where the question arose as to whether the informant had reasonable and probable grounds to swear to an information in a summary conviction proceeding. At pp. 103 et seq. Henry, J. stated:

> *The Crown's obligation is to place before the Court an information that is regular on its face and that is not to its knowledge otherwise defective. Where a defect exists, s.732 of the Criminal Code is applicable.*
>
> After quoting the provisions of s. 732 in extenso he continued:
>
> *It is apparent that the section contemplates both defects on the face of the information and latent defects, that is, defects which become apparent only after the evidence discloses them.*
>
> *An objection to a patent defect, that is, a defect on the face of the information, is properly taken by a motion to quash before plea; but if this is not done it remains open to amend with leave of the Judge at trial.*
>
> *Latent defects, which by their nature emerge only after the trial is in progress, are to be dealt with in the course of the trial by the Judge. The Criminal Code clearly contemplates that they may be cured in the discretion of the Judge by way of amendment taking into account the matters in s-ss. (5) and (6) of s. 732.*

The important principle to be borne in mind is that a defect in the information once disclosed cannot be allowed to stand. It must be the subject of adjudication and correction if the integrity of the trial is to be maintained. It was the failure to cure what was found at the trial to be a latent defect in form that led to the setting aside of the convictions in the LePage case 1969 1 C.C.C. 187 and the Jones case (1971), 3 C.C.C. (2d) 25. It is of first public importance that all criminal proceedings should in fact and in appearance be regular on their face. Recognizing that the Courts will enforce this principle, Parliament has provided a mechanism for correcting irregularities in the information or charge where this may be done without injustice to the accused. But this machinery must be invoked where a latent defect becomes apparent at the trial and any necessary amendment must be made before the conclusion of the trial.

In the *Peavoy* case Henry, J. dismissed the defendant's appeal by way of stated case against conviction on the ground the informant did not have reasonable and probable grounds to swear to the information because the defendant failed to demonstrate the informant's lack of grounds on the balance of probabilities to the satisfaction of the Judge of first instance.

In *R. v. LePage (supra)*, the defendant challenged the information on the ground the informant did not have personal knowledge of the allegations in the information and, following the taking of evidence on the question, the trial Judge found as a fact the informant did have such knowledge. Crown counsel thereupon declined to move to amend the information and it was not amended at trial. A conviction having been entered the defendant appealed by way of stated case against his conviction and on appeal the Judge found there had not been reasonable compliance with Form 2 prescribed by the Criminal Code and that the Crown being aware of the facts did not seek to amend the information with the result that no amendment was made at trial. For that reason the appeal was allowed and the conviction quashed.

The *LePage* case, of course, differs from the instant case in that in the latter case counsel in fact moved to amend the information whereas in the *LePage* case no such motion was made.

In *Regina v. Wildefong* (1970), 1 C.C.C. (2d) 45 (Sask. C.A.), where an informant having sworn in an information that he had personal knowledge of the commission of the offence of unlawfully having the care and control of a motor vehicle while his ability to drive a motor vehicle was impaired by alcohol contrary to s. 223 of the Criminal Code of Canada, stated in evidence that he did not in fact have such knowledge. The Court of Appeal held the defect in the information was one of form and not of substance. Furthermore the Court held, whether it was one of form or of substance, it was nevertheless permissible for the trial judge to amend the information to accord with the evidence and to convict on the resworn information. The conduct of the trial was similar to that which took place in the instant case. Counsel for the accused, after the Crown's case was completed, called the informant as the sole defence witness. He admitted he had no personal knowledge of the facts set out in the information. Counsel then closed his case and submitted the information did not comply with the then s. 695(1) of the Code and Form 2. An adjournment having been granted at the Crown's request, Crown counsel on the adjourned hearing applied for and was granted leave to amend the information by adding the words "he has reasonable and probable grounds to believe and does believe that". The motion was granted and the information was resworn in amended form notwithstanding the case for both the Crown and for the defendant had been closed. Culliton, C.J.S., who delivered the judgment of the Court, said at p. 46 et seq:

In the determination of whether a defect in an information is one of form or one of substance, I think the test to be applied was correctly stated by Sheppard, J.A., in delivering the judgment of the British Columbia Court of Appeal in R. v. Edgar and Rea (1962), 132 C.C.C. 396, 38 C.R. 110, 39 W.W.R. 59, when, at p. 398-9, he said:

> The difference between a defect in substance and a defect in form has risen in considering common law pleadings and has been explained as follows:
>
> "The difference between matter of form and matter of substance, in general, under this statute, as laid down by Lord Hobart, C.J., is that: "... that without which the right doth sufficiently appear to the court is form ..." but that any defect "by reason whereof the right appears not" is a defect in substance; Hob. 233. A distinction somewhat more definite is that if the matter pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but that if the fault is in the manner of alleging it, the defect is formal; Dougl. 683." (Bouvier's Law Dictionary, Rawle's Revision, p. 681)."

In the present case no fault can be found as to the sufficiency of the charge; the objection is as to the means of alleging it. Therefore, in applying the test which I have accepted, I must conclude that the defect is one of form and not of substance.

Section 704(3) (c) now section 732(3)(c) of the Criminal Code provides:

> 704(3) A summary conviction court may, at any stage of the trial, amend the information as may be necessary if it appears
>
> (c) that the information is in any way defective in form.

As the trial had not been completed, under this provision, the learned Magistrate had the right to amend the information as he did. It cannot be said that the appellant was misled or prejudiced in his defence or suffered any injustice as a result of that amendment.

The principle to be deduced from the cases which I have examined is that an information in a summary conviction proceeding which was merely defective in form is not void ab initio and consequently is amendable under the powers conferred by s. 732(3) (c) on a summary conviction court.

In my opinion the trial Judge erred in finding the information in the instant case was a nullity, and therefore could not be amended. An amendment could have been made to allege the substance of the offence on the information and belief of the informant if such were the fact. Such an amendment would not have constituted the initiation of a new proceeding notwithstanding that the information had been resworn but rather the continuation of the proceeding under the original information as amended: see Regina v. Peacock *(1954), 108 C.C.C. 129 (Ont. H.C.). See also* R. v. Baldassara *(1973), 11 C.C.C.(2d) 17 (Ont. H.C.) where it was held a defective information, not void for duplicity in the sense of being a complete nullity incapable of rectification but only in the sense that it could not sustain a conviction, could be amended and resworn after the limitation period had expired and that subsequent proceedings including the conviction based on this amended information were valid. The* Baldassara *case was applied by this court in* R. v. Neville *(1980), 31 N.B.R.(2d) 171 at 174 and an appeal against that decision was dismissed by the Supreme Court of Canada in* R. v. Neville *(1981), 40 N.R.I.*

It follows that although the trial Judge was right in concluding that a fresh information could not be laid after the limitation period of two years had expired, he erred in holding that a fresh information was necessary or that the limitations of two years constituted a legal reason for refusing the amendment sought by the Crown in view of the powers of amendment given to a summary conviction court by s. 732 which are to be exercised in accordance with subsections (5) and (6) which read:

(5) The summary conviction court shall, in considering whether or not an amendment should be made, consider

(a) the evidence taken on the trial, if any,

(b) the circumstances of the case,

(c) whether the defendant has been misled or prejudiced in his defense by a variance, error or omission mentioned in subsection (2) or (3), and

(d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

(6) Where in the opinion of the summary conviction court the defendant has been misled or prejudiced in his defence by an error or omission in the information, the summary conviction court may adjourn the trial and may make such an order with respect to the payment of costs resulting from the necessity of amendment as it considers desirable.

This Court cannot overrule the exercise of a discretionary power of a summary conviction court to amend an information provided the court acts judicially and with a correct understanding of its powers. In the instant case, it appears from the material before this Court that in refusing to allow the amendment to remedy the latent defect in the information on January 22, 1981, after the defendant has closed its case, the Court was influenced to some extent, if not decisively, by the erroneous belief that the Court could not amend the information because of the expiry of the two year limitation period. In the stated case the Judge stated that it would have been unjust to allow the amendment after all the evidence had been heard, a proposition which appears to have little if any weight.

For the foregoing reasons I would remit the case to the Judge of first instance pursuant to s. 768(1) (c) of the Code, together with this opinion, and direct that the judgment appealed from be set aside and that the Judge of first instance consider any motion to amend the information in accordance with the powers conferred upon him by s. 732 of the Code, and to receive such further evidence, if any, as the justice of the case may require.

NEW BRUNSWICK PROVINCIAL COURT

R. v. CANADIAN INDUSTRIES LIMITED

AYLES A.C.J. Campbellton, March 18, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - 14 charges under s.33(2) - Information resworn pursuant to decision of Court of Appeal - Accused convicted - Fines of $69,000 on 13 counts.

R. Hynes, for the Crown.
R.J. Tingley, for the accused.

AYLES A.C.J.: - Very well, this matter comes about because of the judgment delivered by the Court of Appeal of the Province of New Brunswick dated July 26, 1982. It being on the 19th of May, 1981 the judgment of this Court was delivered with written reasons, the fourteen (14) counts in the information of Phil Hennebury dated the 14th day of June, 1979 were quashed.

The decision of the New Brunswick Court of Appeal was to remit the case to the Judge of the first instance pursuant to s.768(1)(c) of the Code, together with this opinion and direct that the judgment appealed from be set aside and that the Judge of first instance consider any motion to amend the information in accordance with the powers conferred upon him by s.732 of the Code, and to receive such further evidence, if any, as the justice of the case may require.

So at this point I am prepared to consider any motions that the Crown may make to amend the information in accordance with the powers vested in the Code under s.732.

MR. HYNES

The Crown at this time would like to make a formal motion under 732 of the Code to amend the information from personal knowledge to reasonable and probable grounds to believe. For that purpose we would like to call Mr. Hennebury.

THE COURT

Okay, would you come forward please.

PHIL HENNEBURY Sworn

MR. HYNES

Does the Court have the original information?

THE COURT

The Court has the original information before it.

MR. HYNES

Q. Now, could you give name please?

A. My name is Philip Joseph Hennebury.

Q. And you are the person who laid the information referred to earlier on June 14th, 1979?

A. Yes I am.

Q. Against Canadian Industries Limited?

A. Yes.

MR. HYNES

Perhaps we could show him the original information.

THE COURT

Very well.

MR. HYNES

Q. Does that represent your signature at the bottom of that document?

THE COURT

And the succeeding pages.

MR. HYNES

Q. And the succeeding pages?

A. Yes that's my signature.

MR. HYNES

Q. Now Mr. Hennebury, is it true that you had personal knowledge that Canadian Industries Limited was committing the offences that you laid the information to?

A. No personal knowledge.

Q. What were the grounds of your belief?

A. Reasonable and probable grounds to believe.

Q. And what were the sources of those reasonable and probable grounds?

A. The sources of my information was monthly reports submitted to the Department of Environment by C.I.L.

Q. And these monthly reports that were the source of this information dealt with all of the fourteen (14) counts that are mentioned therein?

A. Yes they did.

Q. Subject to my friends questions, we would at this point like to make amendments to the information to have it read, that the informant has reasonable and probable grounds to believe and does believe that the counts set out in the information are true.

THE COURT

Any questions of this witness?

MR. TINGLEY

Q. As was indicated Mr. Hennebury, the information was sworn to on the 14th of June, 1979, the monthly reports submitted by the accused, C.I.L., when did you see them?

A. I really can't recall the dates exactly.

Q. Well, would they .....

A. Approximately a year or so before that I think.

MR. TINGLEY

Q. They would have been before and not after the swearing of the informations?

A. Before, yes.

Q. Did you take any steps as a result of having seen these reports?

A. In what respect?

Q. Did you do anything?

A. With the reports themselves?

Q. Well, as it relates to the company?

A. No, we just monitored the company regularly, on a regular basis.

Q. There didn't appear to be anything out of the ordinary as it related to these reports?

A. I really don't understand the question.

Q. Well we have before the Court the fact that your grounds for laying the information were these reports, did the reports indicate to you anything out of the ordinary?

A. Oh yes, they indicated to us that there was violations of the regulations.

Q. And did the department do anything as a result of those reports?

A. The person that's in charge of the chlor-alkali industry I believe and I'm not speaking from my own... I didn't do.....

Q. So you can't tell us what ah....

A. No, I can't tell you exactly what other than that we went to justice with the information that we had.

Q. So that's steps that you did take as a result of the reports?

A. Yes sir.

MR. TINGLEY

I have no further questions.

THE COURT

Okay, that's all then Mr. Hennebury, thank you very much.

MR. HYNES

Does the Court wish Mr. Hennebury to resign the original information? I believe, I prefer if the amendment were resigned.

THE COURT

Anything further to say on that point before I ah....

MR. TINGLEY

Well, I was going to make the following comment. Your Honour that ah..... I don't know whether my learned friend is talking about resigned or resworn and I think there's quite a difference with respect to whether or not the information is resworn. Of course we are going to take the position that it can't be resworn. My interpretation of the decision of the Appeal Court is that there is sufficient power

within the Court to amend without it being resworn because of the statute of limitation. Resigning I have no objection to but the difficulty that I think my learned friend is faced with is that, how does one resign an information that must be sworn.

MR. HYNES

Speaking to that, the law is pretty clear that reswearing it does not constitute any difference concerning the limitation period. Indeed I believe there is a New Brunswick judgment of ah....

THE COURT

Neville.

MR. HYNES

Pardon?

THE COURT

R v. Neville.

MR. HYNES

I believe that's the one. I was just looking through the factum.

THE COURT

Page 12 and 13, the bottom of page and ah....

MR. HYNES

Yes, yes.

THE COURT

It apparently says that,

> *"could be amended and resworn after the limitation period had expired and that subsequent proceedings including the conviction based on this amended information were valid."*

And that's the *Baldassara* case applied in this Court and *R.v. Neville* by the Appeal Court of New Brunswick.

MR. HYNES

There's also *R. v. St. Stephen Woodworking* in 72, a judgment of the Court of Appeal, an amendment which is intended to charge neither a new offence nor a

similar offence at a materially different time does not require the reswearing, therefore I guess I would withdraw any reswearing requirement. It doesn't require to make an amendment that doesn't charge a material different.

MR. TINGLEY

So I believe Your Honour before you is the motion to amend.

THE COURT

Yes.

MR. TINGLEY

Well, the only comment I have, I would like to go on the record for this purpose, is that I certainly have some strong reservations with respect to the usurping of your discretionary power by the higher court, however, there is very little that my client can do as a result of the directions that this Court has received. But I just want to point out that I believe, that in the very first instance, that the discretion that was exercised by this Court was a proper discretion and we feel very strongly that what was obviously a decision of the Court in the exercise of his discretion shouldn't have been overturned. In any event, I'm not going to agree to or oppose the motion.

THE COURT

Well, obviously the Court of Appeal has ruled that laches as far as form is concerned are not grounds for the application of judicial discretion and that puts an end to that part of it as far as this Court is concerned.

So I have to deal now with the motion. As far as the Court is concerned, I've always been of the opinion that it does create a new information because of the fact that we have an affidavit, an information I consider to be on the same basis, as an affidavit, it's sworn to before a Judge of the Court specifying certain facts. And of course the facts specified in this particular information are not as they were set out in 1979, therefore in view of the judgment in the *Baldassara* case and the *Neville* case cited in the Court of Appeal judgment, it is my opinion that the affidavit or the information in this particular case, in order to conform to my opinion of what I have stated to be what I think the law is that there should be a reswearing of the information. So I'm going to ask that the informant come forward and reswear the information that is presently before the Court, the fourteen (14) counts.

Do you have anything to say about that?

MR. HYNES

The only comment I have to that is, I do not think it changes the effect of limitation period, it does not constitute a new information.

THE COURT

Oh, I agree with you on that.

MR. HYNES

I have no objections to the reswearing per se except that it is not in my opinion required by the Court of Appeal but for your Lordship, there is a judgment of Mr. Mcnamee that I have seen where he had stated that he felt more comfortable with a reswearing and for that reason I don't have any objection.

THE COURT

Okay now, would you place your right hand on the Bible there Mr. Hennebury. Do you swear that you have reasonable and probable grounds to believe and do believe that the fourteen (14) offences set out in this information, numbered from one to fourteen, in the pages that you just testified were signed and initialed by you on the 14th of June 1979 and signed by you as the information before me on the 14th of June 1979 are true to the best of your belief and knowledge so help you God.

MR. HENNEBURY

Yes I do.

THE COURT

Okay, fine, that's all, thank you very much.

I'm just wondering, there is just one more item, I didn't have the informant sign it again.

MR. TINGLEY

Well I think Your Honour that he indicated that it was his signature, his initials.

THE COURT

You're satisfied with that.

MR. HYNES

I'm satisfied. If the Court wishes him to return and initial it.....

THE COURT

I'll accept that since it's been resworn and it's already been signed, I'm going to accept that on the basis of the *Neville* case.

Very well, so the amendment is allowed and the charge will now read,

> "This is the information of Phil Hennebury, Officer Environment Canada of the City of Halifax, in the Province of Nova Scotia who says that he has reasonable and probable grounds to believe and does believe that, Canadian Industries Limited, etcetera"

Now at that point....

MR. HYNES

At that point I would like to close the case for the crown. We will not be offering any further evidence.

MR. TINGLEY

Your Honour, on instructions from my client, the accused does not wish to introduce any evidence at this time.

THE COURT

Very well. Therefore, the judgment of the Court that was delivered on the 19th of May, 1981.....

MR. HYNES

37 I believe, it starts on 38.

THE COURT

Okay, on page 37 at the bottom of the page, line 27, I'm satisfied beyond any doubt that in all the fourteen (14) counts the company did not meet the standard of reasonable care and were either grossly negligent or so careless as to whether or not such a condition existed that I cannot find where "all due diligence" in preventing a commission of those offences can be attributed to the company. In fact, I find just the opposite. The standard of care is the exercise of "all due diligence", certainly this is not a very high standard for the responsibility for negligence. The company was required to prove on a balance of probabilities that they had exercised all due diligence something which they have utterly failed to do so in the evidence. The particular matter comes within the category of offences established in the case of *R. v. Sault Ste. Marie* 1978 2 S.C.R. 1299 as being one of "strict liability" and I will not cite at length from this decision.

The evidence given before this Court satisfies me beyond all reasonable doubt that the Company is guilty of the fourteen (14) counts alleged in the information and I find the accused company guilty on all fourteen (14) counts.

I therefore come to the part where I am to pass sentence. And I want to know if there are any submissions to be made before I continue with the passing of sentence.

MR. HYNES

Speaking for the Crown, we are quite content with the sentence as previously set out but for the defective information and will not be asking to speak to sentence.

MR. TINGLEY

In light of the comments by my learned friend, Your Honour, I would only put forth to the Court that the sentence as put forth in your judgment of the 19th of May 1981 be in fact concurred in todays date.

THE COURT

Thank you very much. Therefore on pages 38 and 39, count number 1, well, bearing in mind the penalty provisions and also bearing in mind that s.740 of the Criminal Code of Canada applies herein, I would have imposed the following, I am imposing the following penalties for a first offence on each one of the fourteen (14) counts as follows:

Count 1 - A very serious occurrence caused by a total lack of reasonable precaution by the Company which I find to be grossly negligent and spilling into the water a considerable amount of mercury in excess of 3.1 Kg. Very sloppy engineering practices which should never have occurred. Mercury being a very dangerous substance, I levy a fine in the amount of $25,000.00.

Count 2 - A minor occurrence but one that should have reasonably been foreseen. I levy a fine of $1000.00.

Count 3 - Again very negligent operation, one that could easily have been foreseen and prevented, a serious spill. A fine of $10,000.00.

Counts 4, 5, 6, 7 & 8 - Again negligence on the part of the company. Not a minor occurrence, one that should have been prevented by proper maintenance. On each of these counts a fine of $2500.00.

Counts 9, 10 11 & 12 - Gross negligence on the part of the company in allowing piles to be driven in the area above the main sewer pipe where it was known to pass. Significant amounts of mercury escaped and the explanation concerning the fouled Parshall Flume did not, in my opinion, account for the high readings. I do impose fines of $5000.00 on each of these counts.

Count 13 - Again negligent maintenance by the company comparable to Count 2. A fine of $1000.00.

(Editor: Consideration of Count 14 was omitted.)

NORTHWEST TERRITORIES TERRITORIAL COURT

R. v. ECHO BAY MINES LTD.

AYOTTE Terr. Ct. J. Yellowknife, April, 25 1980

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Accused entered plea of guilty to charge under s. 33(2) - Principles of sentencing corporate accused considered - Fine of $7,000.00 imposed.

Sentencing - Accused entered plea of guilty to charge under s. 33(2) of Fisheries Act, R.S.C. 1970, c. F-14, as amended - Principles of sentencing corporate accused considered - Fine of $7,000.00 imposed.

Although it is appropriate when sentencing to take into account the conduct and good character of an accused, these factors are only two of many which must be considered, and there is a limit as to how far they can go to reduce the penalty imposed. It is important to be mindful of the harm sought to be prevented by the legislation and not to place too much emphasis on matters which are only marginally relevant to the substance of the charge. To do otherwise is to encourage a very low standard of compliance.

Furthermore, legislation such as the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, is not intended to encourage compliance with its provisions after an environmental mishap has taken place, but rather to demand compliance so as to prevent the mishap from occurring. Since there are situations where the damage is extensive and not easily repairable, sentences which contain a strong deterrent element must be imposed, notwithstanding laudable conduct by the accused either after the fact or in related areas before the fact.

AYOTTE Terr Ct. J.: - The accused corporation pleaded guilty on January 24th, 1980 to a charge that it

> *did unlawfully between the 1st day of February, 1979 and the 18th day of May, 1979, deposit or permit the deposit of a deleterious substance in Great Bear Lake or in a place under conditions where such deleterious substance may enter Great Bear Lake near Port Radium, Northwest Territories, at the approximate coordinates of 66 degrees 05' north latitude and 118 degrees 01' west longitude, being water frequented by fish, contrary to S. 33(2) of the Fisheries Act, R.S.C. 1970, c. F-14 as amended.*

During the lengthy and most complete submissions to sentence which followed, both counsel asked that formal written reasons for sentence be prepared. Acting on this request I sentenced the accused to pay a fine of $7,000.00 on February 5th, 1980 indicating at that time that written reasons would follow.

It should be noted at the outset that both the guilty plea and the bulk of the submissions to sentence proceeded on the basis of a Statement of Agreed Facts which was filed as exhibit 1 to these proceedings. Without reviewing at length that exhibit 1 consider the following statements to adequately summarize the facts involved:

1. The present charge arose out of an oil spill on the ice of Great Bear Lake sometime between the dates in the charge.

2. This spill was first discovered in late April, 1979 and the final clean-up was completed in mid-July, 1979.

3. As near as can be determined the spill comprised between 11,000 and 12,000 gallons of oil, the bulk of which came from a dislocated coupling in a supply line feeding oil from the main "tank farm" at the defendant's mine to smaller tanks located at the powerhouse.

4. At the material times the fuel lines from which the oil leaked were susceptible to damage by vehicles and machinery, and no regular program of inspection of the distribution and storage systems was in place.

5. The great bulk of the spilled oil was either recovered or burned off and only about 10% of the original spill got into Great Bear Lake.

6. Approximately $100,000 was spent by the defendant on the clean-up and on subsequent up-grading of the fuel distribution system.

It is also pertinent to point out that the Crown has agreed to treat the matter as a single offence even though the legislation, and particularly section 33(6) thereof, permits a separate count for each day of a continuing offence.

It has often been said that the matter of sentence is the most difficult aspect of a Court's duty. The imposition of a sentence which gives adequate weight to such diverse factors as deterrence and rehabilitation while still being perceived as fair to both the defendant and the public interest is a most trying and difficult task. The fact that the defendant is, as here, a corporate entity and not a real flesh and blood person does not make it any less so. There is nothing in our law that I am aware of that indicates that a corporation is entitled to any less consideration than any other person properly before the court. Indeed it appears to me to be simple common sense that a sentence imposed on a corporation may, and very often does, have a direct effect on those people who are intimately bound up with the corporation and its affairs.

Nor is the task of sentence made much easier by the "special approach" which Mr. Justice Morrow indicates is required in cases of this nature. (See *Regina v. Kenaston Drilling (Arctic) Ltd.* (1973), 12 C.C.C. (2d) 383 at page 386). I read those comments as exhorting Courts to have a special concern for the preservation of the delicate Northern environment and in doing so to consider the deterrent element of their sentences carefully. Because of this special concern,

> *...the test to apply in approaching the question of sentence should be less a concern of what the damage was but more a concern of what the damage might have been.*

(*R. v. Kenaston Drilling*, supra at page 386).

I find nothing in the Kenaston decision nor in any of the other cases to which I have been referred which suggests that the deterrent element should be stressed to the exclusion of any other consideration. Indeed, in the Kenaston decision itself the Court kept in mind "the good record" of the defendant in fixing the amount of the fine imposed.

In perusing all the cases listed at the end of these reasons, it is clear that the Courts there had regard to all of the factors usually considered by Courts before imposing sentence and that the deterrent element is merely the foremost, not the only, element that must be considered. In this case I have approached sentence on that basis.

It appears to me that the most aggravating factor against the present defendant is that the measures which could have been taken, even on an interim basis, to prevent a spill such as occurred here were relatively inexpensive and simple. A regular inspection procedure covering the lines in question would probably have been an adequate interim measure until the system was up-graded. The 1979 cost of up-grading the fuel handling system to the point where Mr. Zigarlik, the president of the defendant corporation could say that he felt

> *...we have created an inspection procedure of lines that will prevent further spills pending completion of our underground storage system...*

(Exhibit 3, page 4) was a mere $30,680 (Exhibit 3, Appendix "B"). Considering the time and money spent on other projects during the same period (Exhibit 3, pages 3-4), the failure to take even elementary precautions with a fuel handling system that was from the beginning

> *...amongst some of the less desirable portions of this mine inheritance*

(Exhibit 3, page 1) is certainly a factor adverse to the defendant so far as sentence is concerned.

Taking into account Mr. Justice Morrow's admonition in the *Kenaston Drilling* case that it is the *potential*, not the actual, damage which should concern the Court, this offence, considering the above circumstance, would call for an extremely high fine in the absence of any mitigating factors. Upon considering the evidence adduced at the sentence hearing, I am persuaded that there are other factors present in this case which operate to reduce the amount of the fine involved.

It is clear from the Statement of Agreed Facts that the defendant acted promptly upon the discovery of the oil spill to begin clean-up operations and that they co-operated with the environmental officers and agencies involved. It is also clear that the defendant on its own initiative used techniques which in the result were effective in the clean-up operation. This is particularly important when it is remembered that most of the advice received from environmental authorities concerning methods of clean-up proved ineffective in the special conditions existing at Great Bear Lake at that time of the year.

The attitude of the defendant corporation toward environmental issues generally, as expressed in actions, not words, is a factor which may be taken into account. The uncontradicted evidence presented by Mr. Zigarlik from the witness box is that the company has in the past expended considerable effort to clean up the mine site. Much of the clean-up, according to the evidence, was on account of refuse and general mess left by the previous owner. Noteworthy among these projects were the efforts of the company to improve the method of tailings disposal at the mine site. As I understand it, these and other projects were undertaken on the defendant's own initiative and not as the result of any direction by environmental authorities. In addition it is fair to mention that over $100,000 was spent by the company in the years 1978 and 1979 on a general environmental clean-up program and $203,700.00 is budgeted for this program in 1980. All of this

uncontradicted evidence indicates that by and large the defendant is a concerned corporate citizen in the area of environmental protection. This past record also lends support to Mr. Zigarlik's assertion that the present spill, while it was admittedly the result of a lack of due diligence on the defendant's part, was not the result of a conscious effort to cut costs and escape detection. The following statement from his evidence probably best sums up what happened:

> *We have no knowledge of any significant spill during Eldorado operating days and, other than the present spill in question nothing from Echo Bay (sic). In spite of the volume, one must consider the percentage loss. This sort of year in and year out uneventful fuel transfers no doubt breeds complacency though no excuse it is human nature (sic). (Exhibit 3, page 2).*

Counsel for the defendant submits that the fine imposed should be substantially reduced because of the laudable past record of the defendant, because of the remedial measures it has taken to ensure that further incidents of this nature do not occur and because of the prompt response of his client to this spill when it was discovered. While frankly conceding that the maximum penalty provided by law has been increased tenfold since that case was decided, he suggests that the fines of $1,000.00 per day imposed by Mr. Justice Morrow in *Canada Tungsten Mining Corporation Limited v. The Queen* (unreported) serve as a useful guideline for the Court in this case.

I agree, to a point, with those submissions. As I have already indicated, in accordance with the general principles of sentencing it is appropriate to take into account the conduct and general good character of a defendant in determining sentence. However, those factors are only two of a number of factors which must be considered and, of course there must be a limit to how far those factors can go to reduce the penalty imposed. As always, each case must be judged on its own facts, but in my view it is especially important in cases such as this for the Court to be mindful of the harm sought to be prevented by the legislation involved and not to dilute the force of the law by placing too much emphasis on matters which are after all only marginally relevant to the substance of the charge. To do otherwise would be to encourage a very low standard of compliance. Too much emphasis, for example, on other efforts in the environmental field in determining sentence will encourage corporations to pick and choose those areas of their operations where time and effort will be spent to comply in the knowledge that the penalty for non-compliance in other areas will thereby be substantially reduced. The dangers of such an approach are well-exemplified by this case where time and money were expended by the defendant on the dismantling and disposal of abandoned structures while ignoring repairs to and inspection of a fuel handling known to be less than desirable. While the former efforts are laudable, they can have only a limited effect on the penalty for neglecting a fuel handling system whose malfunction could potentially have much greater and more permanent effect on the environment than the presence of abandoned structures on the mine property.

Similarly, while the response to the spill and the subsequent plans and efforts to upgrade and change the fuel handling system show a serious concern to prevent any future occurrences such as this, they are after the fact, as it were. The legislation is not intended to encourage compliance *after* an environmental mishap but rather to demand compliance *before* those mishaps occur so as to prevent them. Fortunately, in this case the actual damage appears to have been relatively slight though no detailed evidence was presented on that point. There may be cases, however, where the damage will be far more extensive and permanent and where the opportunity to repair that damage will not

be so readily available as it was here. It is with a view to those latter possibilities that Courts must be prepared to impose sentences which contain a strong deterrent element notwithstanding laudable conduct by the defendant either after the fact or in related areas before the fact.

The fine in the present case is thus imposed despite the fact that by agreement of counsel I am dealing with one day only and not a multiplicity of counts and despite the fact that I am satisfied that the defendant corporation is a concerned corporate citizen insofar as the impact on the environment of its operations is concerned based on evidence of its past and proposed conduct. For the record I should also point out that I have given very little weight to the previous record alleged by the Crown. Having sat as the sentencing Court on that occasion, I think it is fair to say that the conviction in that case was based on a technical breach of the statute concerned in circumstances where, even in the Crown's submission, there was no environmental damage and probably no possibility of environmental damage.

I should also say that I have been mindful of the sentences imposed in the other cases cited to me. Both counsel urged one or the other of them upon me as seemed in their view appropriate. With the greatest respect to those who feel otherwise, I feel that any attempt to quantify a sentence or extract some tariff of sentencing from decided cases to be a futile exercise and therefore have relied on the cases cited more to provide general guidelines than for help in fixing the precise amount of the fine imposed. Each sentence must be decided on its own facts and I have tried to apply that principle here.

Finally, I have consulted the following *inter alia* authorities in reaching my decision: *Regina v. ELF Oil Exploration and Production Ltd.* (unreported) (now reported 2 F.P.R. 27); *Regina v. Giant Yellowknife Mines Limited* (unreported); *Regina v. Kenaston Drilling (Arctic) Ltd.* (1973), 12 C.C.C. (2d) 383; *Regina v. Canadian Pacific Transport Company Limited and Canadian Pacific Limited* (unreported) (now reported 2 F.P.R. 209); *Canada Tungsten Mining Corporation Limited v. The Queen* (unreported); *Regina v. United Keno Hill Mines Limited* (unreported) (now reported at (1980), 10 C.E.L.R. 43).

BRITISH COLUMBIA PROVINCIAL COURT

RE: RILEY CREEK

SCHERLING Prov. Ct. J. Queen Charlotte City, June 25, 1980

Fisheries Act, R.S.C. 1970, c F-14, as amended - private informant lays charges under s. 31(1) - damage to Riley Creek by logging activity - agent of provincial Attorney General directs stay of proceedings.

In 1978 the federal fisheries authorities instituted prosecutions against logging activities around Riley Creek. The prosecutions were dropped following federal - provincial discussions, and the logging activity continued. A private informant later swore an information alleging that CIPA Industries Ltd. and others did carry on work that resulted in the harmful alteration of fish habitat contrary to s. 31(1) between March and June 1979.

The agent for the provincial Attorney General directed a stay of proceedings.

R.D. Miller, for the Attorney General of British Columbia.
G.M. Evan, for F.C. Bellas, the private informant.
P.M. Packenhma, for the accused, Biickert.

PROCEEDINGS: -

MR. MILLER

Yes, Your Honour. First calling number one on the list. CIPA Industries, Jack Biickert, Michael Apsey and Waldo Johnson. This matter need not be called because the Crown has directed a stay of proceedings with respect to that matter.

MR. EVANS

Your Honour --

MR. MILLER

It's a private Information. I've intervened and as an agent of the Attorney General for the Province of British Columbia, have directed a stay of proceedings. That has all ready been done.

MR. EVANS

Your Honour, I am appearing for the complainant, Mr. Bellas. I wish to object to that whole procedure. I object to my friend's actions. I question his authority to do so.

THE COURT

Could I get your name for the record?

MR. EVANS

My name is Garth Evans.

THE COURT

Garth Evans?

MR. EVANS

Yes.

THE COURT

And you represent, Mr. Evans, the --

MR. EVANS

Mr. Bellas, who laid the Information.

THE COURT

Right.

MR. PAKENHAM

For the record, Your Honour. I appear for Mr. Jack Biickert --

THE COURT

Yes, Mr. Pakenham.

MR. PAKENHAM

As agent for Mr. Hope.

THE COURT

Yes, I'll hear from you Mr. --

MR. EVANS

Well, Your Honour, I have been taken completely by surprise by this action. My submissions may be somewhat confused. I object to the whole course of action my friend has taken. The matter is a private prosecution and I appeared here this morning with the intention of setting a date for trial.

I doubt my friend's authority to enter a stay. I discussed it with him only a few minutes before Court was called this morning. I question that he has authority to do so. He has not given me any evidence of his authority. I understand he appears here for the Attorney General of British Columbia. This is a Federal matter. I would have thought if anybody had the power to intervene or wished to intervene, it would be the Department of Justice on behalf of the Federal Crown. As I have said, I have had no notice of his intention. Perhaps it's not required by law, but I think common courtesy would require that the complainant be given some notice of the intention. I am not, as I said, very well prepared to argue the matter, but I think that this results in a great circumvention of justice. I also would point out that there are regulations under the Fisheries Act which specifically encourage people to prosecute privately. I would like to refer Your Honour --

MR. MILLER

Your Honour, if I might perhaps save my friend some trouble. As he stated he is not prepared and that is quite apparent from his argument. First of all, I am sure Your Honour is aware of the case of *Regina v. McKay*, a decision of the Saskatchewan Court of Appeal, reported at 9 C.R. (3d); wherein the Saskatchewan Court of Appeal held, what I believe to be is trite law, namely that the general authority in myself to act as agent for the Attorney General is sufficient to direct a stay. I need not have specific instructions from the Attorney General. I can assure Your Honour, I have specific instructions from the Minister. I don't need to make those available to the public. I don't need to make those available to anybody. This matter of directing a stay is a matter between myself and Madam Clerk. The matter has already been accomplished. It is a fait accompli. If my friend wishes to take issue with what I have done here today, there is the appropriate forum. The appropriate forum, of course, is the Supreme Court; where he can go by the way of some sort of prerogative writ. That's his forum. The Provincial Court is no longer his forum. I have taken this case outside the jurisdiction of this Court.

MR. EVANS

Well, I say, Your Honour, that my friend has absolutely no authority to do that and I persist in that. He says that he is appearing on behalf of the Minister. Now, that, I assume, means the Attorney-General of British Columbia, I persist in my submission that in that capacity, he does not have the authority to enter a stay of proceedings. It is totally improper procedure that he has brought to the Court this morning. Apart from completely taking me by surprise and no notice of any intention to do anything of this nature, I have come here this morning after having done a considerable amount of preparation so I would be in a position to advise the Court as to the length of trial and the evidence and to advise my friend, who I expected to appear representing the accused, and I continue in my objection to the whole procedure.

I assume that what my friend is doing, essentially, is standing and saying that 'I am now taking charge of this case on behalf of the Crown' and then going and saying that in that capacity 'I am directing and entering a stay.'

My understanding of the law, is that the Crown has the capacity to do that if he has the authority.

MR. PAKENHAM

If it may assist Your Honour. Mr. Evans' objection to the authority of my learned friend appearing for the Crown might be well taken prior to the decision in the Supreme Court of Canada in *Fowler and the Queen*. As the Court may be aware, that decision was delivered on June 17th, of this year, 1980; a fairly recent decision of the Supreme Court. It has held that the sections under which this prosecution was initiated are ultra vires of the Federal Government and properly within Provincial jurisdiction.

MR. EVANS

Your Honour --

MR. PAKENHAM

Excuse me. If I may just finish?

MR. EVANS

Your are misleading the Court.

You are misleading the Court. I have read the case and it doesn't say that.

MR. PAKENHAM

Well, very well.

THE COURT

I'll hear from Mr. Evans, and then I will hear from you.

MR. PAKENHAM

Thank you, Your Honour.

MR. EVANS

I'm sorry, Your Honour -- I --

THE COURT

Yes, you are acting for the informant anyway, Mr. Evans.

MR. EVANS

That's right. I do apologize I didn't mean to -- I'm naturally am somewhat agitated because of being, as I said, totally taken by surprise this morning. Now I've read the

case of the decision of the Supreme Court of Canada in the *Dan Fowler* case. It deals with essentially, 33(3) of the Fisheries Act which Mr. Justice Martland, speaking for seven Justices finds that Section 33(3) is *ultra vires* to the Federal Government -- for the Federal Parliament. I certainly accept it. There are no arguments on that point. We aren't dealing with Section 33(3); we are dealing with Section 31(1), which is a wholly different section. The part of the case which deals specifically with that provision is on the last page of the decision. I unfortunately only have one copy of it, but I would certainly be very happy to provide Your Honour with it. Mr. Justice Martland deals only with Section 33(3). He says:

> *"Subsection 33(3) makes no attempt to link the proscribed 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 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 sea coast and inland fisheries and is ultra vires of the federal Parliament."*

Now, as I've said, the section in issue here is Section 31(1). It is a wholly different section which states:

> *"No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."*

My submission is that the *Dan Fowler* case has absolutely no application. We're not proceeding under the same section.

THE COURT

Yes. My understanding was that it applied to Section 33. However, I haven't had an opportunity to read the full text of the case.

MR. EVANS

I would be very happy to leave my copy with Your Honour --

THE COURT

No, that's your copy. That's fine. I think, Mr. Pakenham, that's my understanding.

MR. PAKENHAM

Right, Your Honour. That point is fairly conceded. Of course *Fowler* did deal with that section. It is my respectful submission that there is no difference between that - between Section 31 in the terms of the manner with which it was dealt in the Supreme Court and Section 33 which is the focus of the *Fowler* decision. Simply on that basis I would support the proposition advanced by the Crown that it does have the authority to direct a stay of proceedings. In any event, that has already been accomplished.

MR. MILLER

Perhaps -- I don't know why we are going on and on. There is nothing that can be done by Your Honour, with all due respect. I have directed a stay of proceedings in this matter. Your Honour has no statutory or common law authority to do anything other than what I have done. If I have exceeded my authority, that's something that the superior court can deal with. That is not something that a statutory tribunal such as this can deal with. My friend can take whatever action he wants in the appropriate court. As I have stated, if Your Honour will examine the Information you will note that a stay of proceedings has been entered, as directed by myself. That ends the matter today.

MR. EVANS

I just want on the record my very strong objection to my friend's action and I question his authority to do so, and that he can anticipate that that indeed is the case and I am rather inclined to believe that on the law, on that point he is correct. I will certainly be seeking relief from the Supreme Court of British Columbia. I don't want to go silently. I want to make sure that the record shows that we object in the strongest terms to this whole procedure; that it's totally unfair; and that I object also to the manner in which it's been done; without any advice until two or five minutes before Court was called this morning so that I am not in a position to respond.

I can say no more; but I will say that this is not, by any means, the end of the matter.

THE COURT

Fine --

MR. MILLER

Just to clear up the last point. The reason Mr. Evans didn't get any advice was because I never met Mr. Evans until two minutes ago.

MR. EVANS

You were well aware of who the complainant was.

THE COURT

Fine. The objection has been noted and it will appear on the record. I think it's quite clear that the Crown -- or the prosecutor has the discretion to direc a stay of proceedings; and if he has done so the Court -- this Court has no further jurisdiction in the matter.

I might say in passing, I would think that even though the matter is stayed; the Information might be laid again, or this one could be reopened. I think that's perhaps the necessary -- could be done; as can be the application to the Supreme Court as Mr. Miller has indicated.

F.C. BELLAS v. A.G. OF BRITISH COLUMBIA
RE: RILEY CREEK

MUNRO J. Vancouver, September 5, 1980

Court dismisses petition for Judicial Review of the stay of proceedings.

MUNRO J.:-

UPON THE APPLICATION of the Petitioner for Judicial Review of a stay of proceedings with respect to charges contained in an Information sworn by the Petitioner alleging violation of s. 31(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14 as amended, by CIPA Industries Ltd. (formerly Q.C. Timber Ltd.), Jack A. Biickert, Thomas Michael Apsey and Waldo E. Johnson; AND UPON HEARING Garth Evans, Esq., of counsel for the Petitioner, and Donald L. Clancy, Esq., of counsel for the Respondent;

THIS COURT ORDERS that the application on the Petition be and the same is hereby dismissed.

SUPREME COURT OF BRITISH COLUMBIA

ATTORNEY-GENERAL OF CANADA v. ALUMINUM COMPANY OF CANADA LIMITED

BERGER J. Vancouver, August 5, 1980

Fisheries Act, R.S.C. 1970, c. F-14, as amended - s. 20(10) - Refusal to comply with order of Minister of Fisheries and Oceans - Fair question, that s. 20(10) is intra vires - Balance of convenience favours granting of mandatory injunction ordering defendant to comply with order.

In 1952 Alcan was granted a water licence by the Province of British Columbia allowing it to impound and divert the waters of the Nechako River. Alcan then constructed a powerhouse on the river and in the summer of 1980 was discharging water through the powerhouse spillway at a rate of 600 cfs.

The Minister of Fisheries and Oceans concluded that the volume of water being discharged was insufficient to provide for the safety of salmon in the river and for the flooding of their spawning grounds, and under the authority of s. 20(10) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, ordered Alcan to increase the quantity of water being discharged. Alcan refused to do so, arguing that s. 20(10) was unconstitutional and that in any event the increased flow of water was not required.

On a motion for a mandatory injunction compelling Alcan to comply with the Minister's order, *held*, the injunction is granted.

S. 20(10) of the *Fisheries Act* states:

> *The owner or occupier of any slide, dam or other obstruction shall permit to escape into the river bed below the said slide, dam or other obstruction, such quantity of water, at all times, as will, in the opinion of the Minister, be sufficient for the safety of fish and for the flooding of the spawning grounds to such depth as will, in the opinion of the Minister, be necessary for the safety of the ova deposited thereon.*

On a motion for a mandatory injunction, the Minister need establish only "...that he has a fair question to raise regarding the proposition that s. 20(10) is *intra vires*." The Minister has established this in the present case. S. 20(10) "...is directed to the safety of fish and the flooding of their spawning grounds" and in no way allows the Minister "...to regulate other activities unconnected with the fishery."

Furthermore, while the advice received by the Minister to the effect that an increased flow of water was required differed from the advice received by Alcan, these are disputes which can not be quickly or easily resolved on a motion. The Minister represents the public interest and he must ultimately have the power to determine what discharges of water are necessary. Therefore, the balance of convenience favours the granting of the injunction.

J. Haig and *R. Winesanker*, for Attorney-General of Canada, plaintiff.
D. McK. Brown, Q.C. and *D.M. Goldie, Q.C.*, for Alcan, defendant.

BERGER J.: - The Attorney-General of Canada has brought a motion before the Court for a mandatory injunction. An order is sought compelling the Aluminum Company of Canada ("Alcan") 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*, R.S.C. 1970, c. F-14, as amended, 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 that s. 20(10) is unconstitutional, that it encroaches on Provincial jurisdiction. The Aluminum Company relies on the water licence it holds from the Province.

This is a classic case of conflict over resource management in a federal system. Alcan has been given the right to impound the waters of the Nechako River by the Province. It has built one powerhouse, and intends to build another since the water licence granted to it in 1952 allows it to divert 9,500 cfs and the present generating facility at Kemano requires only 4,700 cfs. Alcan therefore opposes any limitation on its right to impound and divert water under the licence granted to it 30 years ago. The Minister, on the other hand, has reached the conclusion that Alcan is not releasing enough water, having in mind the welfare of the salmon migrating through the Fraser system into the Nechako to spawn. Salmon have already been observed in the Nechako. The majority of the salmon are still in the Fraser River system but are working their way swiftly into the Nechako. The Minister says that the salmon will be at risk unless flows are increased. Alcan says they are not at risk. Alcan has been discharging water at a rate of 600 cfs. The Minister's order requires 8,000 cfs.

The Attorney-General has filed affidavit evidence setting out the advice the Minister has received from his scientific advisers. Alcan has filed affidavit evidence setting out the quite different advice of its own scientists.

The first issue is the constitutional issue. The Supreme Court of Canada held as long ago as *The Queen v. Robertson*, 1982 , 6S.C.R. 52 that the federal power to legislate in relation to "Sea Coast and Inland Fisheries" went no further than "what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public...".

There have been two decisions by the Supreme Court recently, on appeal from this Province, which illustrate the limits of federal powers under the *Fisheries Act*. In *Fowler v. The Queen*, (1980), 9 C.E.L.R. 115 the Supreme Court held that s. 33(3) of the *Fisheries Act* was *ultra vires* because the prohibition on the deposit of slash, stumps or debris in water frequented by fish was too wide, and not linked to the protection of fish. In *Northwest Falling Contractors v. The Queen*, (1980), 9 C.E.L.R. 145, s. 33(2), prohibiting the deposit of deleterious substances in water frequented by fish, was held to be *intra vires*; the restricted definition of "deleterious substance" limited the application of s. 33(2) to deposits which threatened fish, fish habitat or the use of fish by man.

This brings me to s. 20(10), which reads:

(10) The owner or occupier of any slide, dam or other obstruction shall permit to escape into the river bed below the said slide, dam or other obstruction, such quantity of water at all times, as will, in the opinion of the Minister, be sufficient for the safety of fish and for the flooding of the spawning grounds to such depth as will, in the opinion of the Minister, be necessary for the safety of the ova deposited thereon.

Alcan says that the power conferred on the Minister here goes far beyond what may be necessary for the protection of fish. So this provision is flawed in the same way as s. 33(3), which was struck down in *Fowler*. That is the argument.

In my view, all that the Minister has to do at this stage is to establish that he has a fair question to raise regarding the proposition that s. 20(10) is *intra vires*. 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 the protection of the fishery, and not one which purports to allow him to regulate other activities unconnected with the fishery.

Alcan argues that Parliament has purported to delegate to the Minister the power to determine the limits of federal jursidiction over fisheries, and thus has sought to usurp the function of the Courts. I do not agree. 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. The Minister cannot exercise a power which Parliament itself does not have. He can do those things necessary to protect the fishery. But he cannot go further.

Alcan has challenged the Minister's opinion. They say it is an uninformed opinion, unsupported by the evidence and arbitrary in its application.

The Minister's order reads:

...It is my opinion that the following schedule of flows will be required from this date until June 30, 1981, in the bed of the Nechako River below Cheslatta Falls to be sufficient for the safety of fish and for the flooding of the spawning grounds to such depth as is necessary for the safety of the ova deposited thereon:

1) *Immediate release of flows from the Skins Lake Spillway sufficient to provide 8,000 CFS below Cheslatta Falls and maintenance of this discharge until August 20, 1980, or until such earlier date as water temperatures permit. (This additional flow is required for cooling because temperatures in the Nechako River have risen sharply in recent days and are approaching the critical level for the safety of migrating and resident salmon.)*

2) *Commencing August 21, 1980, - or such earlier date as per one (above) - reduction of flows to provide one thousand one hundred CFS below Cheslatta Falls by September 1, 1980, and maintenance of this discharge until March 31, 1981. (This discharge level is necessary for successful spawning and incubation of Chinook Salmon.)*

3) Commencing April 1, 1981, increase flow to provide two thousand CFS by April 10, 1981, and maintenance of this discharge of two thousand CFS below Cheslatta Falls until June 30, 1981. (This discharge level is necessary to provide adequate habitat for the rearing of juvenile Chinook Salmon.)

I hereby require the Aluminum Company of Canada to provide release of water from the Nechako Reservoir to meet the foregoing schedule under the authority of subsection (10) section 20 of the Fisheries Act.

The foregoing schedule of flows shall be instituted before June 30, 1980.

I would appreciate being advised on or before 12:00 noon July 29, 1980, whether or not your company will comply with the requirements set out above.

The Minister has relied on advice that when the water temperature exceeds 68°F the salmon are susceptible to infection and disease. Death occurs at temperatures of 75° or more. The temperature of the water depends on the volumes of water and on water flow.

Alcan's advisers disagree with the advice the Minister has received. The order, it is said, overlooks the falling off of water temperatures in August and September. The Minister, they say, is unduly alarmed. Counsel for the Attorney-General says there may be a sudden change in the weather which would put the salmon at risk. The temperature of the water has been in the low 60s in the last few days. But the Minister's advisers say that water temperature can rise from 61° to 68° within as short a period as two days.

These disputes are, in the nature of things, disputes which cannot be swiftly or easily resolved. But someone must have the power to determine the discharges of water that will be necessary. The question is whether the Minister or Alcan should exercise that power. The Minister represents the public interest. The power ultimately must be his.

Alcan has not flouted the law. It has simply said, on legal advice, that it believes the Minister's order is unconstitutional. I have reached the conclusion, however, that Alcan must obey. The Attorney-General of Canada has shown that he has the right to act under s. 20(10) - certainly there is a fair question to be tried - and that the balance of convenience supports the issuance of a mandatory injunction. There will be an order directing Alcan to comply with the Minister's directives.

There is no further matter. The Minister's order purports to regulate the discharges of water from now until June 30, 1981, a period of 11 months. The rate of discharges has been laid down in advance for the whole of this period. The rate of discharge for the period ending August 20th - the immediate period with which I have been concerned on this motion - seems to me to be a reasonable rate of discharge, going no further than what is thought to be sufficient to protect the fish and flood the spawning grounds. Given the urgency of this matter, and the expedition with which it was brought on, there was no attempt at the hearing to canvass the propriety of the orders made by the Minister extending into various phases of the fish cycle up to June 30, 1981. If it should appear that the discharges required by the Minister after August 20th are, on any reading of the evidence, altogether unnecessary, then the mandatory order may be vacated.

Costs in the cause.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CANADIAN FOREST PRODUCTS LTD.
(Fly Ash at Port Mellon Mill)

JOHNSON Prov. Ct. J. Sechelt, October 31, 1980

Fisheries Act, R.S.c. 1970, c.F-14, as amended - Charges under s.33(2) - Discharge of toxic material into water frequented by fish - Defence of due diligence considered - Accused convicted on six charges and fined $20,000.00 on each.

Sentencing - Accused corporation convicted on six charges under s.33(2) of Fisheries Act, R.S.C. 1970, c.F-14, as amended - Need to deter accused and others - $20,000.00 fine on each charge.

The accused corporation negligently allowed a toxic material to enter a water frequented by fish. The toxic material discharged over a substantial period to time, notwithstanding that a Fisheries Officer had pointed out the discharge to the accused's employees and had requested that remedial action be undertaken. The accused was found guilty on six charges under s.33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, and as a deterrent to it and others was fined $20,000.00 on each charge.

Digby Kier, for the Crown.
Duncan Shaw, for the accused.

JOHNSON Prov.Ct.J.: - I find that the evidence I have before me is that Canadian Forest Products Ltd. operate a pulp mill at Port Mellon, County of Vancouver, Province of British Columbia and did so on and between the months of July to November 1979 -- the dates in question.

As a matter of fact, the pulp mill is quite an old one and had been operating -- I think by one employee -- twenty years and is still in operation.

One of the parts of the operation of the pulp mill is that there is certain waste products that must be disposed of and one of these products is what is known as fly ash with some caustic qualities. In order to dispose of it, it is put into a water solution at the point of accumulation in the mill and pumped to a settling pond. For the purpose that, at the settling pond, the water and fly ash separate, and the water is then pumped off, and with a machine, the fly ash residue is removed from the settling pond and then placed directly into trucks or what is referred to as a mill dump area.

There are two settling ponds and so that when one is being filled the other is being emptied and they alternate. The rate of emptying the settling ponds is two or three times a week. The mill operates twenty-four hours a day, seven days a week, and from the information I have, did so during the period in question.

That was the original concept and design of the settling ponds. The mill encountered further problems by having other disposal waste and that included dregs from the mill; and I'm not clear exactly what that composition is. This is a highly technical operation, as to exactly what the various ingredients are. And there is a caustic mud, so called, which is placed in the settling ponds.

The effect of the mud and the fly ash settling is that it changes consistency such that it doesn't settle out as well. The best description that I had of the problem is from the front end loader operator who emptied the settling the diagram, Exhibit 3. And there was a leaching of the material from the dike from the mill dump site into the ditch and then down the ditch through a culvert under the road, further down the road, under another culvert and then into a ditch that went directly into the Rainy River -- which for the purposes of this case is a water frequented by fish.

And I find that it is a fact that it is even more than that, it's a river which sustains spawning fish, it contains numerous varieties of fish. It's a favourite fishing stream for steel head fishermen. It's about sixty to seventy feet wide and runs two to three feet deep at the point of the ditch.

I find that the material which was flowing down the ditch -- and there is ample photographs of it, the black and dark brown liquid with an under-lying layer of a grey greenish muck material -- and I find that over a period of time both the brown dark liquid and grey greenish mud material entered the Rainy River.

I'm satisfied from the evidence that I have received, that this material is a deleterious substance. There's the bioassay of the sample taken on July 11th and the fish tested at 100% concentration and all the fish died within five minutes.

I think if I can characterize the material which has been dumped into the river, with respect to fish, was poison, and that has got to be wrong. It had a caustic type of composition. It had an oily slick type of consistency. The ditch itself as displayed in the photographs I think would characterize it as a normal type of roadside ditch. Appears to be three or four feet deep, three or four feet wide.

The actual flow of the liquid at the time in question was not very substantial. It was described by the fisheries officers as being some 18 to 20 inches wide and 2 to 3 inches deep.

On one of the days, July 11th, the fishery officer paced off the flow and came to the conclusion that the flow that day was one foot per second.

There was some evidence in respect to rainfall. Exhibit 36 is the rainfall chart for Port Mellon. And the evidence of the witnesses that on day of heavy rain that the increased water would not only fall on the dump site area and therefore increase the leaching -- simply because there is more water there and it has to run somewhere, and of course it runs to the ditch and takes some of this material with it.

So that from all the evidence I have come to the conclusion that on days of more heavy rain, there is the likelihood of the leaching, depositing; and the inference that I come to is that it would mean a depositing of that material into the Rainy River.

The July rainfall was 95.6 millimetres. The August rainfall was 38.9. September rainfall was 265.8 millimetres. The October rainfall was 367.78 millimetres. November rainfall was 169.42 millimetres.

From reading all the charts and analyzing the various days, I have come to the conclusion that the rainfall both in July and in November were not more than that which would have been anticipated.

As a matter of fact, July and November put together were less than October, in total.

Now, the matter of whether or not the company used all due diligence to prevent the deposit. The facts are that the fisheries officer attended on July 11th, noticed the deposit of the deleterious substance into the Rainy River. Went to the mill manager, made his complaint and requested that the deposit of this deleterious substance be stopped.

The mill manager turned the problem over to Mr. Matthews, who is the assistant superintendent yard crew who had been working at the mill about two years. Who doesn't have any formal engineering education. And after some discussion with the fisheries officer, it was decided that there should be an increase of the burn around the mill dump site. That is the depositing of piles of gravel around the deposit of this waste material as such that it may stop the leaching.

The fishery officers did nothing further other than view the site on July 12 and did not return until October 26th. On returning October 26th, they found that the same situation was in process as they saw in July. That is that there still was a leaching of this material in the ditch. And they further made complaints. They returned on November 2nd, same condition was continuing.

There was some attempt by putting one load of gravel in one part of the ditch. And then on November 16th, fisheries officers again attended and corrective measures were taken to stop the deposit in the ditch. That is the ditch was substantially cleaned, filled, pumps were installed to remove the crucial material from the ditch, and deposited within the mill sewer system.

During this period of time, the corporation was conscious of the fact that there was a problem and were taking steps for an ultimate solution by preparing the whole of the dump site. And subsequently they did reconstruct the whole of the dump site to alleviate this problem completely. They did this by building the dump site within a cement retaining wall.

Now the evidence I have is that the original settling tanks were built about three or four years ago and when they were built, they were built in such a way that all the runoff from that area, which I find must have been to the engineers knowledge at that time, would be to runoff onto the ditch.

I haven't received a satisfactory explanation and I can't come to any other conclusion that if in fact the engineers had put their minds to this problem initially, to the settling ponds, that they could have built the same type of structure that they did ultimately.

Secondly, if in fact the company had put their minds to the matter of alleviating the deposit of this deleterious substance on the 12th of July in the manner in which they did on the 16th of November, they could have stopped the deposit of the deleterious substance in the Rainy River in the first instance on being notified by the fishery officer.

I find that the mill employees knew of this problem during the whole of the time. The man who was operating the front end loader said that he had seen this problem for some time. He said some of the lab crew monitored this discharge. And since it was on

the company property and as a matter of fact, it could be seen by the mill manager from walking around one of the cat walks -- I find that the company knew of the problem during the whole time of its existence.

I did get the impression that the company did not think it was an extremely serious problem. That the amount of escapement was, in their minds, minuscule and may not have been doing any harm to the fisheries or the environment; and since they were working on a solution that the matter would be allowed to be continued.

I do find that if they had come to the conclusion that they must stop the deposit, they could have done so by various methods. Either the method used on the November 16th or the method used in the interim period of using a cement truck to take away some of this sloppy material, or other solutions could have been found should they have decided that they wished to do so.

And I find that they did not use all due diligence to prevent the deposit of deleterious substance in the Rainy River.

In respect to Count 3, I find the company guilty due to the bioassay sample from that day. I find that the material was deleterious and was deposited in the waters of the Rainy River. On the Kineapple principal you will be found not guilty on Count 4.

I find the company guilty on Count 5. I accept the evidence of the fisheries officer that what he examined on July 12th was the same as that on July 11th and that the depositing the deleterious substance was continuing.

I find him not guilty on Count 6, Kineapple principal.

I'll deal next, because this is a separate argument, but I find him guilty on Count 11. This was a data on which there was a deposit of deleterious substance and the substance was bioassayed and for the other reasons I have given, I find him guilty on 11.

I find him not guilty on Count 12 by the Kineapple principal.

In respect to the dates November 2nd, October 26th and the inclusive dates between July 12th and October 26th, which are all separate charges for different days -- the defense argues that I could not find the accused guilty because there is no bioassay of the materials of that day. They also argue that by the evidence there was a mixing of various materials and on any one day it is not known what the composition of the mix is. And therefore it well may be that on one day there is the substance which is deleterious and another day the substance well may not be. We don't know because the substance was not tested on the other days.

I have the evidence of both the mill manager and one of the chemical engineers in charge of pollution control for the mill. I also have the photographs of the days in question. I have come to the conclusion after listening to all their evidence that there wasn't any thought in their mind that there was any drastic change in the consistency or type of material that was being placed on the mill dump site.

Secondly, the material put on the mill dump site was being placed there and left there for a period of time and that is when the rain fell there and leached out. What I do find from the material from the mill and the combination of it was material which was at all times caustic and was deleterious.

It was so highly deleterious that even though there may have been a change in consistencies from time to time, I find the evidence irrefutable that it must have always been deleterious.

There has been quite a bit of evidence that the problem was worse when it rained, which seems quite reasonable. It can carry away more of this material from the dump site. As far as between the dates of the 12th of July and the 26th of October; and when I look at the September, October rainfall, and after hearing the evidence of those working at the site -- the only rational conclusion is that this problem of depositing of the deleterious substance carried on during those periods of rainfall.

I find the Corporation guilty on Count 1.

In respect to Count 7, the fishery officers attended, examined the site and their evidence is that in their mind the condition in the ditch and the deposit was the same as seen on the other occasions. And for the reasons I found them guilty on Count One, I would come to the same conclusion on Count 7 and I find the company guilty on Count 7 and not guilty on Count 8.

If I didn't say so, not guilty on Count 2 for the same reasons. And for the same reasons I find the company guilty on Count 9 and not guilty on Count 10. Not guilty on 13 and 14, Kineapple principal.

MR. SHAW

Is your Honor supposed to make a ruling in the judgment on the point of constitutional limitation?

COURT

Yes, alright. If I didn't do so, I find no merit in the defense submission submitted here that the interpretation of *R. v. Fowler* and *R. v. Northwest Fowler* are that there is some constitutional argument that this changes the conclusion reached by the Court of Appeal in British Columbia in *R. v. MacMillan Bloedel*. I find that the law is that if the substance is found to be deleterious and if it is proved that it is deposited into the water frequented by fish, then there is no other element or fact required to be proved by the crown for a conviction.

I don't find that *R. v. Fowler or R. v. Northwest Fowler* changes that and I find that the argument advanced is far too narrow an interpretation.

The whole point of the Legislation is the protection of fisheries and the protection of fisheries go to preventing those acts which in any way do, or threaten fisheries to the slightest degree. And it's for the Parliament of Canada to decide that which threatens. And if they decree that the deposit of a deleterious substance in water which is not only occupied by fish, but frequented by fish -- and they put no limitations on the quantities or what or what minimum affect it has -- that's for the Legislation.

In other words, in my mind it is absolutely clear. It says "you shall not deposit into that water". The requirement that the crown must take one step further and say at that time and place there was some deleterious affect, is an onus which is not within the legislation. And I think that is really what the Court of Appeal is saying. I'm bound by the Court of Appeal.

I reject the defense argument.

JOHNSON Prov. Ct. J.: (sentencing) - Thank you. In considering the amount of the fine to be imposed, first I'll take into consideration that there is a previous conviction of this Corporation at this mill. Having been the trial judge on the previous case I know the circumstances of it. And that was a case where it was substantially an accidental spill and it was a one count charge. In that case, an oil line broke. The oil went through the sewer system and out into Thornborough Channel.

This is a somewhat different case in the sense that I find that the deposit of the deleterious substance was by reason of faulty design of their disposal system for toxic substance waste from the mill. And that in the first instance the disposal system was not engineered or constructed in such a way as to prevent this deposit.

Secondly I am still of the impression from this case that when the Fishery Officers attended the mill on July 11th, 1979, that the officers of the mill did not attach the seriousness to the problem as was required.

For example, the mill manager himself is a chemical engineer. There is a staff at the mill of about ten engineers. There's one engineer which is assigned the duty of pollution control and when the problem was brought to the manager's attention, it was referred to the assistant superintendent of the yard crew. A person who had worked in the mill for only two years and had no formal engineering experience. And the actions he took were not in any way effective in curing the problem. As a matter of fact, he could daily see that the problem continued. As a matter of fact, the lab employees monitored the problem.

I had the impression from Mr. Matthews that he thought the problem was minimal. Although the engineering staff of the company did, during this period of time, work at plans for an ultimate solution; they took only half-hearted measures in respect to the problem until it was severely brought to their attention again on November the 17th; and when they made the decision to stop the deposit they did so quickly and easily in relation to expenses and problems of stopping the deposit.

The ditch was filled with gravel and the machines were taken to scoop out the deleterious material from the ditch and where the flow continued, there was a sump pump put in to divert the flow to some other portion of the mill. Now, this did create problems for the mill. In other words, it was backing up the drainage. When it rained the dump site became a swimming pool. But whatever the cost or problems the mill may have had -- balanced against the deposit of the deleterious substance -- that their decision should have been in the first instance to stop the problem immediately.

Now there was some argument advanced through the mill manager that when the deleterious substance was pumped out of the ditch, it would have to be pumped back through the mill and into the drainage system and had to be flowing into the Thornborough Channel in any event.

I don't know whether or not that deposit conformed or did not conform with their pollution control permit. Or whether or not in doing so, that they may have been also continuing to commit the offense of depositing deleterious substances in Thornborough Channel. That would only be an entirely other issue. But I don't think it was for the mill manager to make the decision that if they are going to deposit into the water of

Thornborough Channel, it was better to deposit through the drainage system than to deposit through their pollution control permit. Particularly if the fishery officer attended and said stop this deposit.

The defense has said that to correct the problem cost the company a half a million dollars. I have no doubt that the solutions to some of these problems, where it is not a substantial amount of deposit well may cost substantial amounts of money; but I think the law is quite clear that no matter what the cost to the person carrying on the commercial endeavor, they are not, under any circumstances, by law, permitted to deposit deleterious substances in water frequented by fish.

And that not only this corporation but all corporations must come to realize that they must be extremely conscious of their responsibility in respect to this problem.

I am still of the opinion that I do not take into consideration that in this particular spill, that there were not some dead fish or proof of actual injury to the environment, if in fact there had been that proof. I think the amount of the fine would have been substantially greater than what I'm considering now.

But I think it's a matter of accumulation of deposit that would have to be considered. It's each deposit of each deleterious substance no matter where, into the ocean that essentially in time is going to destroy our environment to the detriment of man himself; unless there is the attitude that everything must be done to preserve the fisheries and the fish habitat.

Taking into consideration that the fine for the first offense is a maximum of fifty thousand dollars and for subsequent offenses is one hundred thousand dollars.

Crown has said that there is a previous conviction. This is acknowledged but I find that the crown would be required to prove notice under 592.1 of the *Criminal Code*, if they were seeking greater punishment by reason of a previous conviction. Therefore I'm limited to the first offense maximum of fifty thousand dollars.

Taking into consideration the amount of the fines in the first instance and taking into consideration that there be fines which are set out by Parliament. In this case I find it appropriate fine of twenty thousand on each count.

NOVA SCOTIA COURT OF THE PROVINCIAL MAGISTRATE

R. v. SHELLY

O'CONNELL Prov. Ct. J. Sydney, November 12, 1980

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Accused convicted of offence under s. 31(1) - Fine of $850.00.

The accused was convicted of an offence under s. 31(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended. While carrying on a logging operation, he had ignored the instructions of two engineers from the Department of the Environment with the result that his activities caused the harmful alteration, disruption or destruction of a fish habitat. A fine of $850.00 was imposed.

G. La Fosse, for the Crown.
M. Whalley, Q.C., for the accused.

O'CONNELL Prov. Ct. J.: The accused is charged at or near East Bay, in the County of Cape Breton, between the 6th day of June 1980 and the 18th day of June 1980, inclusive, that he carried on work that resulted in the harmful alteration, disruption or destruction of a fish habitat, contrary to section 31, subsection 1, of the *Fisheries Act*, being Chapter F-14 of the Revised Statutes of Canada, as amended.

Mr. Whalley made a preliminary objection that the charge should have been laid under section 33, subsection 3, which deals specifically with logging operations, instead of being laid under section 31, subsection 1.

The Court is of the opinion that there is no merit in this submission by the defence. It is the prerogative of the Crown to determine under what section or sections of an enactment an accused is to be charged. I find that the charge is properly laid under section 31, subsection 1, of the *Fisheries Act*.

The accused, Terrance M. Shelly, was carrying on a logging operation at or near East Bay on June 6, 1980. A tree farmer machine was used to assist him in his operation. The evidence is clear that he used a small tributary or brook as a travel way to get his logs out of the woods. This small tributary empties into Gillis Brook and hence into East Bay. On June 4, 1980, the accused was visited at his logging site by two engineers of the Department of the Environment as a result of complaints received by them about siltation, and its resulting ill effects on a fish habitat.

The engineers, Mr. Weaver and Mr. Lewis, noted that the small tributary, referred to above, was approximately two feet wide with two inches of water flowing and was picking up silt. They also observed that the stream was not following a steady course and that there were numerous tire ruts approximately 18 inches wide going through the stream. The accused was seen operating his tree farmer in the stream at a later date and the size of the tire ruts made by the tree farmer at that time were the same size as the tire ruts seen by Mr. Weaver and Mr. Lewis on June 4. The engineers stated, in their evidence, that about 400 feet of the tributary was damaged with the most extensive damage caused down stream with the upper stream in good shape.

The two engineers told the accused, in part, on June 4 the following: He was

1. *only to stay in the stream at the crossing, where access road met the brook;*

2. *not to use the stream or tributary for a travel way;*

3. *to be permitted to get the pulp from a spot down stream;*

4. *not to go beyond place where he had already crossed;*

5. *to stay away from upper region of stream; and*

6. *told to find alternate route.*

There was also some discussion about building a road parallel to the brook and also putting some type of bridge or culvert across the brook.

The defence argued that the accused was never told to shut down his logging operation and that he attempted to carry out the instructions given him by the engineers on June 4. I think it is obvious that the reason the accused was not told to stop his operation on June 4 was to give him an opportunity to remove logs that had been cut. Mr. Whalley, in his argument, stated:

> *My notes say, your Honour, he told him to keep out of the brook except for the one crossing. Never at anytime did he want Shelly to stop.*

It is abundantly clear that if the accused had kept out of the upper stream no charge would have been laid.

Mr. Whalley argued that the accused at some expense built a parallel road and that this showed his good faith. This does not assist the accused in any way because the evidence is overwhelming that the accused did not stay away from the upper region of the stream as ordered by the engineers.

The accused conveniently remembers all details of the conversation with the engineers that assisted him. For instance, he said that he went to the Department of Lands and Forests as suggested by the engineers in an effort to obtain funding for a bridge or culvert over the stream.

Where there is a conflict between the evidence given by the accused and the two engineers as to what transpired on June 4, I accept the evidence of the engineers.

It is clear that the accused ignored the instructions of the engineers issued on June 4. There was little or no damage visible up stream on June 4 but there was considerable damage by June 18. As I have indicated, there is direct evidence that the accused was using the tree farmer in the upper stream after June 4 and there is no question that he was only permitted to go up stream for approximately 50 feet by the engineers and there is no question that he went considerably further up stream than that.

The evidence is clear that the accused travelled far more than the allowable 50 feet suggested by the engineers on June 4. There is no question that he went a considerable

distance up stream in his tree farmer after June 4 and June 6 and the pictures filed show the resulting damage to a fish habitat.

When the accused ignored the instructions of the engineers by going up stream, his work or activity resulted in the harmful alteration, disruption or destruction of the fish habitat.

Competent, expert evidence was lead by the prosecution establishing beyond a reasonable doubt that the tributary in question was a fish habitat within the meaning of section 31, subsection 5, of the *Fisheries Act*, and this was admitted by Mr. Whalley in his argument.

Mr. Whalley argued that this is a mens rea offence. With deference I cannot accept this submission. When one reads the *Sault Ste. Marie* case, it is clear that the *Fisheries Act* is a public welfare enactment and offences under that *Act* are either absolute or strict liability offences.

I am satisfied beyond a reasonable doubt that Terrance M. Shelly did, at or near East Bay in the County of Cape Breton, Nova Scotia, between the 6th day of June 1980 and the 18th day of June 1980, inclusive, carried on work that resulted in the harmful alteration, disruption or destruction of a fish habitat contrary to section 31, subsection 1, of the *Fisheries Act*, being Chapter F-14 of the Revised Statutes of Canada, 1970, as amended.

I further find that the accused did not on a balance of probabilities act reasonably or exercise due diligence. I find the accused *guilty* as charged.

This is a very serious offence and if I was satisfied that all the damage to the tributary had been caused by the accused, the fine imposed would be higher. Although I am satisfied that the accused in his operation did cause substantial damage to the fish habitat.

I am imposing a fine of $850.00, in default of payment four months in the Correctional Centre, to be paid on or before the 1st of February 1981.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. JACK CEWE LTD.

WOODLIFFE Prov. Ct. J.

Vancouver, January 28, 1981
February 13, 1981

Defences - Due diligence not made out in prosecution under s. 33(2) of the Fisheries Act - Accused knew of problem with deleterious substance entering water frequented by fish and could have exercised more control over its operations - No evidence as to what would constitute due diligence or permanently solve problem.

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Permitting the deposit of deleterious substance in water frequented by fish contrary to s. 33(2) - Defence of due diligence not made out.

From time to time, silts, sands and clays from the accused's gravel pit and gravel washing operations entered the Coquitlam River, waters frequented by fish. A number of settling ponds designed to remove these substances from water used in the accused's operations were not properly maintained and monitored.

On 17 counts of permitting the deposit of a deleterious substance in water frequented by fish contrary to s. 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, *held*, the accused is guilty on all counts.

It is not necessary to establish that the Coquitlam River into which the silts, sands and clays were deposited was made more deleterious by the addition of these substances. It is only necessary to establish that the substances are deleterious within the meansing of s. 33(11) of the *Fisheries Act*, and silts, sands and clays certainly are deleterious substances within this meaning.

The defence of due diligence is rejected. The accused has not discharged its burden of providing that it took all reasonable care. The accused was aware of the problem of silts, sands and clays entering the Coquitlam River and could have exercised more control over its operations to greatly minimize the problem. Although no witness could testify as to what would constitute due diligence on the part of the accused so as to permanently solve the problem, a number of respectable opinions were advanced as to how it could be controlled to a great extent.

On February 13, 1981 His Honour Judge Woodliffe fined the accused a total of $190,000.00. In passing sentence, His Honour said in part that the accused should not be persuaded that it is cheaper to face prosecution than to put into place adequate systems of control.

R.H. Wright, L. McFarlane and S. Antifaev, for the Crown.
D.D.G. Milne and *A.E. King*, for the accused.

(Editor: On appeal to the County Court, five counts were set aside and accordingly the total fine was reduced to $140,000 from $190,000 by Oppal Co. Ct.J. on October 6, 1983. See page 472 for County Court decision.)

WOODLIFFE Prov. Ct. J.: The accused corporation (hereinafter referred to as the defendant) is charged with 17 counts of permitting the deposit of deleterious substances in water frequented by fish, and more particularly the Coquitlam River, in the Province of British Columbia. The defendant carries on a large gravel pit, and gravel washing operation on the West side of the Coquitlam River and adjacent to Pipeline Road, near the municipality of Coquitlam in the Province of British Columbia.

With respect to Count 1, the witness Hahn testified that he attended the defendant's properties on November 10th, 1978 and saw dirty water discharging from a culvert under Pipeline Road. The source of the water was the South settling pond, on the defendant's property, flowing toward the washer plant, then west toward the road ditch, down the road ditch, through the culvert and into the Coquitlam River. Sediment samples were taken near the point of entry into the River as set out on Exhibit 3 in these proceedings. At the point of entry into the river there were 7649 mg/l suspended solids. Across the river from the point of entry there were 4590 mg/l suspended solids. Above the point of entry there were 92 mg/l suspended solids.

The witness Hahn's evidence with respect to Count 2 is that on January 20th, 1979 he was at the defendant's property and saw a flow of water coming from the open face of the gravel pit, into a settling pond which appeared to be completely filled in. It overflowed from the pond, into the road ditch through the culvert and into the Coquitlam River. Suspended solids entering the river were 52,100 mg/l; on the East side of the river 7210 mg/l, above 453 mg/l and below 2890 mg/l.

With respect to Count 3, Hahn's testimony was that on February 14, 1979 he observed silty brown coloured water coming from the road culvert and discharging into the Coquitlam River. He found the source of the discharge to be the hillside beyond the washer plant. He saw water coming over the hillside and flowing underneath the area of the washer plant. Some of it entered the South settling pond where it over-flowed and met with the other discharge from the hillside. The discharge then flowed down the hill to the road ditch, through the road culvert and into the Coquitlam River. The water samples which he obtained on that date showed the suspended solids entering the Coquitlam River as follows:

Sample 1 - the point of discharge into the Coquitlam River showed 17,500 mg/l
Sample 2 - towards the East side of the river 9,650 mg/l
Sample 3 - on point down stream from the point of entering into the river 2,350 mg/l
Sample 4 - at a point upstream from the point of discharge 28 mg/l
Sample 5 - at a point upstream from the defendant's property, 15 mg/l.

With respect to Count 4 Hahn attended at the Coquitlam River on the 6th of September, 1979 and noticed that the river was dirty and brown in colour. In attempting to determine the source of the problem he investigated the area known as pit "M". He saw water coming from the area of the washer plant and followed the course of this water through the defendant's properties and into the road culvert and ultimately into the Coquitlam River. On this day he took six samples.

Sample 1 - upstream from the defendant's properties and the suspended solids measured 80 mg/l
Sample 2 - at a point adjacent to the defendant's properties, but upstream from the point of discharge and the suspended solids measured 53 mg/l

Sample 3 - just immediately upstream from the point of discharge measured 68 mg/l
Sample 4 - at the point of entry of water into the Coquitlam River measured 3770 mg/l
Sample 5 - taken in the river just behind the point of entry measured 1,620 mg/l
Sample 6 - below the point of entry, measured 92 mg/l.

Mr. Peatt testified with respect to Count 5 that on September 27, 1979 he attended at the Coquitlam River in the early afternoon and saw no discharge from the Allard pit, which is above the defendant's properties at the Coquitlam River and that the river was clear. In the area of Creek "C" which runs from the Cewe properties, the Creek "C" water was dirty both above and below where equipment from the Municipality of Coquitlam was working. He found the source of dirty water to be running off two access roads from the West of Pipeline Road. He saw equipment operating on these roads and he saw dirty water being churned up by vehicles using the road and this dirty water ran off the roads and directly into Creek "C". He took the following water samples:

Sample 5 - taken from Creek "C" just before it enters the Coquitlam River measured 4830 mg/l
Sample 4 - taken at a point upstream from the confluence of Creek "C". The result was 1 mg/l
Sample 6 - taken at about the entry of Creek "C" into the Coquitlam River, 3920 mg/l
Sample 7 - taken immediately downstream from the point of entry, 632 mg/l

As to Count 6, Mr. Peatt testified that on September 27, 1979 he attended at or near 1641 Pipeline Road and saw a dirty discharge spilling from No. 2 settling pond and entering the Coquitlam River. At the point of entry into the Coquitlam River of this overflow, a sample upstream, (No. 10) showed 4350 mg/l suspended solids. At a point just upstream from 1641 Pipeline, sample No. 8 showed suspended solids of 47 mg/l. On September 27th with respect to Count 7, Mr. Peatt attended at the area of the road culvert and saw a dirty stream coming from the road culvert into the river. He found the source of this water to be from the pit face of pit "M" draining from the yard and into the washer/sorter plant location. The water flowed from the area of pit "M" into the road ditch through the road culvert and then into the Coquitlam River. The samples at the point of entry into the Coquitlam River were as follows:

Sample 12 - 3120 mg/l
Sample 13 - in the channel of the river, 2170 mg/l
Sample 14 - taken downstream, 556 mg/l
Sample 11 - taken upstream from the point of entry, 296 mg/l

With respect to Count 8, Hahn testified that on September 29th he noted the Coquitlam River was a dirty brown colour. There was a flow of water coming from the washer plant area. There was water from the sand pile which joined with this washer plant water, which then flowed out of the pit area to the road ditch, from the road culvert and into the Coquitlam River. Hahn noticed that in the area of pit "M", vehicles were driving back and forth across this flow of water and stirring up loose sediment. He took four water samples, as follows:

Sample 1 - at the point of entry from this water into the Coquitlam River showed the result of 1930 mg/l
Sample 3 - taken in the main stream of the river showed the result 632 mg/l

Sample 2 - taken upstream showed a result of 49 mg/l
Sample 4 - taken downstream showed a result of 86 mg/l

With respect to Count 9, the witness Peatt attended at the Coquitlam River and he noted that a ditch had been constructed from No. 2 pond. There was dirty discharge from the settling pond going directly to the river. Peatt took water samples. These samples showed results similar in effect to those found on the previous eight counts.

The evidence with respect to the remaining eight Counts is similar to those counts already dealt with and, in addition, the observations of the conservation officers, Peatt and Hahn were corroborated to a large extent by a series of photographs which were admitted as exhibits.

Without going into the many areas in the evidence dealing with the nature of the solids that were deposited, and their likely effect upon the fish habitat, I am satisfied by the evidence that the deposits of these silts, sands and clays did indeed constitute the deposit of a deleterious substance in water frequented by fish.

For the purposes of this Section and Section 33.1 and 33.2 "deleterious substance" means:

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

It is not necessary for the Crown to prove that the water into which the deposits were made was as a result made deleterious; it is enough that the substance deposited in the water be deleterious. (*R. v. Macmillan Bloedel (Alberni) Limited*, 12, B.C.L.R. 29).

The effect of these levels of solids were categorized by the witness Langer in summary as follows: 25 parts per million are ideal; 25-80 parts per million is an acceptable level; 80-400 parts per million would impact the productivity of a stream and levels over 400 parts per million will result in very poor fish production.

These deposits occurred as and when alleged to the knowledge of the defendant. I agree with Crown Counsel's submission that it has proved that the defendant has committed the acts and that contrary to showing a lack of knowledge in the accused, the evidence demonstrates long term knowledge in the defendant (through Jack Cewe, Tourand and Cunliffe) of the problem of silt entering the Coquitlam River, and emanating from the defendant's property.

The defendant has a program of control, but has it been adequate in the past, or was it simply a program that it hoped might at least satisfy the Fisheries Department and the Pollution Control Board that it was doing what it could? The Crown has not been able to tell the Court what, if the defendant were exercising due diligence, would permanently rectify this pollution problem. It appears from both Crown and defence witnesses, that the most satisfactory solution is the installation, and maintenance of large settling ponds. There are, and have been a number of settling ponds, but they do not appear to have been properly and systematically maintained by the defendant.

The defendant permitted these deposits of solids as alleged against it, the direct cause thereof arising from its operation in the excavating and removal of gravel. The defendant could have exercised more control than it did, thereby limiting to a great extent, the deposits complained of. The water from the pit face area picked up its solids between the pit face and the settling ponds and ditches through which it travelled. The settling ponds themselves do not appear to have been adequately monitored and maintained. While none of the experts called in this case could provide what they considered to be an ultimate solution for what is obviously a very major problem for the defendant in its operation, a number of respectable opinions were advanced as to the manner in which the deposits could be controlled to a greater extent than heretofore.

From the defendant's evidence, it appears that it is now, as opposed to at the material times, doing a great deal on a planned and researched basis to control these deposits into the Coquitlam River. The programs that they have implemented, may or may not satisfy the "due diligence" burden that is described by Dickson J. in *Regina v. City of Sault Ste. Marie (1978) 40 CCC (2nd) 353 at 373 SCC.*

> *The correct approach in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pearce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.*
>
> *In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on a balance of probabilities that he has a defence of reasonable care.*
>
> *I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:*
>
> *1...*
>
> *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 that he took all reasonable care. This involves a consideration of what a reasonable man would have done in the circumstances. The defence will be 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 ...*
>
> *3...*

I am not required to decide the adequacy of their present program.

In summary, I find that all of the necessary ingredients of the 17 offences have been made out. The defendant has not discharged the burden of satisfying the Court that it took all reasonable care in the circumstances, to prevent the deposits of the deleterious substances. Accordingly, I find the defendant, Jack Cewe Limited guilty on all counts.

WOODLIFFE Prov. Ct. J.: (Sentencing) (February 13, 1981)

In sentencing for these seventeen offences, which the defendant has been found guilty, I find - notwithstanding the able submissions of Mr. Milne - that in this Court's opinion, rather than showing one or at the most eleven offences, the evidence does support the finding of seventeen separate and distinct offences, and it is proposed to deal with those separate and distinct offences by way of penalty.

Now, some of the considerations that have concerned the Court respecting sentence is the nature, of course, of this operation on the Coquitlam River; the continuing, almost daily effect, it can have upon the environment and that is, in particular, the fish habitat of the Coquitlam River. According to the expert evidence the Court has heard, deposits of this kind can and do, indeed, cause heavy and irreversible damage to the fish habitat, and the Coquitlam River as a tributary of the Fraser River is a major spawning stream for salmon. The daily removal of sand and gravel from the banks of this river, and the result of deposits of sand into it may - although the evidence is not really before the Court, but it's certainly an inference based upon the evidence that has been presented - these deposits may already have done serious and irreversible damage to the areas where the deposits in the river have, from time to time, been made. The damage, of course, would be to the food chain or to the reproductive processes of the environment of the fish. We have heard evidence that in ideal spawning situations the recovery percentage of spawners is as high as eighty percent for salmon, but the deposits of deleterious substances may reduce the reproduction to twelve percent or even less and this, as has already been referred to, is very often not reversible according to - is irreversible according to the expert evidence the Court has heard. I find myself wondering why an operator such as the defendant, as a condition of carrying on their operation, should not first be required to demonstrate to the appropriate branches of government that they have emplaced a system of control together with competent staff that will prevent the deposits above what has been described as acceptable levels. It seems that offences of this kind are getting to be rather common in today's social order of things, and we're beginning to appreciate that the effects are much more serious than they were thought to be in the past, and as such they are and should, of course, be a matter of great public concern. It seems to me in dealing with the question of punishment that it should be, to some extent, commensurate with the gravity in all of the circumstances of the offences. The Act does provide what appears on the face of it to be a substantial penalty for the first offence and a much larger penalty for second offences, but certainly in cases such as these the accused persons should not be persuaded that it's cheaper to face a prosecution occasionally than to put into place an adequate system of pollution control. I respectfully agree and adopt what His Honour Judge Johnson said in the *R. v. Construction Aggregates Limited* on October the 31st, 1980 where he says, in dealing with the matter before him:

> *"Taking all those matters into consideration, I think I should give a fine which is going to be a deterrent to other companies, that when they enter into commercial operations, and when they do so on the basis that they undertake to take certain construction and engineering procedures to prevent the deposit of deleterious substances to fish, and they don't carry out what they promise they should do in the first instance - in other words, it is for their own convenience, saving accidents or*

otherwise - then the penalty must be one that would encourage corporations or business enterprises to do everything possible, no matter what the cost to them, to prevent this deposit of the deleterious substance."

Now, I'm going to - on the first four counts, I'm going to impose a fine of fifteen thousand dollars on each count, and on counts five to seventeen inclusive I'm going to impose a fine of ten thousand dollars on each count. According to my calculations, that would make a total of a hundred and ninety thousand dollars.

NOVA SCOTIA PROVINCIAL MAGISTRATE'S COURT

R. v. MacCABE, WILLIAM

MacEWAN Prov. Ct. J. New Glasgow, January 29, 1981

Fisheries Act, R.S.C. 1970, c.F.-14, as amended - Disruption of fish habitat contrary to s.31(1) - Removal of gravel by accused on mistaken belief he owned land - Whether constitutes mistake of fact sufficient to provide defence of due diligence - R. v. The City of Sault Ste. Marie (1978), 7 C.E.L.R. 53 (S.C.C.) followed; R v. Chapin (1979), 8 C.E.L.R. 151 distinguished - Accused convicted - $500 fine later imposed.

The accused removed gravel from gravel bars he believed to be part of his land. The resulting excavations eliminated fish habitat for several hundred feet on the site and disrupted or altered habitat quality for one to three miles downstream.

On a charge of disrupting fish habitat contrary to s.31(1) of the Fisheries Act, R.S.C. 1970, c.F-14 as amended, held, the accused is guilty.

The accused did not take all reasonable steps to avoid the particular event and therefore the defence of due diligence is not available, notwithstanding his mistaken belief that he owned the land and was therefore entitled to undertake such excavations. He had been warned by federal or provincial officers that he should not be removing gravel and he knew there were fish in the river just downstream from the excavation site. He also knew that a permit was required before excavations could be undertaken, but did not apply for one because his neighbours had been denied similar permits.

J.A. Mackay, for the Crown.
Stroud, for the accused.

MacEWAN Prov. Ct. J.: - There's no doubt that this was a fish habitat under the Act (Fisheries Act, R.S.C. 1970, c.F-14, as amended, Fish habitat s.31(5)).

> *"means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes".*

There's no doubt about that. The section (s.31(1)) reads:

> *"No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat".*

I'm satisfied, and I think the defence pretty well admits that this was taken out of there. I'm satisfied that there was a disruption of the fish habitat, and it's proven well, to me, well beyond a reasonable doubt that the defendant, and through, he had his brother working for him, that this gravel was taken out of there. And, also, he says that he just took it off, I'm satisfied it was taken out of an area where it shouldn't be taken, as envisioned by the Act. He said he took it off bars, and that the photographs here, he gave us an idea, Mr. McCabe gave us an idea, a man in construction work and much more versatile in that than I'd be as to the size of it, he says that the photos to him looks like a

great big, but it helps the Court, photos help the Court, and I accept his measurements of where it was taken out, and there's quite a bank there, and I have to keep that, take that into consideration. He says that he felt that he should be able to take it off the bars there. It shows here in photographs 3 or 4, this was well dug in. But in any event, Mr. Stroud says that Mr. MacCabe did this, took it off the bars because he believed it was his land based on the deed here, which is in the law of Land Settlement Board, but I take it Mr. MacCabe, that's the way he's buying it, through the Land Settlement Board, and then when it's paid off you'll get a deed in your own name.

The, and certainly the evidence, especially of, which I've read, the specific evidence by Mr. Descharmes leaves no doubt in my mind that there was disruption of, in various ways, of this area here, which was a fish habitat: hatching of eggs, and the causing of the stream to be polluted, as he says here. Mr. Stroud asked him "Having looked at the photographs and from your knowledge of the stream in particular in your opinion has this fish habitat been altered or destructed and destroyed?" No, this was Mr. Mackay asked this. "On the site for several hundred feet, yes, the fish habitat has definitely been eliminated. Downstream probably for a distance of, it's difficult to evaluate, he said "a mile maybe three the quality of the habitat has been altered, has been lowered". And there's no doubt that this has been done.

So, the Crown, and I think from the tenor of what Mr. Stroud has said, he accepts the fact that fish habitat was altered, destroyed, etc., as required. Then, but he says there's a defence to this, and a defence because of the mistaken fact of the defendant, Mr. McCabe. It's not based on a law, he's not saying, Mr. Stroud isn't saying that ignorance of the law is a defence, it isn't. He's saying this is a mistaken fact, this man, my client believed that this was his land, where he took this from, and he had reason to do that, that the ordinary person would think this was the case and therefore this defence should be available to him. May I point this out. What I'm going to say, for the purpose of my decision is that this is a, this particular clause in the Fisheries Act, I'm going to hold it is a matter, an offence of strict liability as set forth in the *Sault Ste. Marie* case, (1978), 7 C.E.L.R. 53. May I point out when there is then, of course, and here's where the catch is, there is a burden on the defence to prove this defence by a preponderance of evidence, the burden of evidence shifts to the defence. It is not sufficient, once that's raised, and it's considered by the Court as being a strict liability offence, it is not sufficient for the defence just to raise a reasonable doubt. They must do it by way of the civil burden of evidence, by a preponderance of evidence. Having said that, that is the law. Mr. Stroud quoted from the *Sault Ste. Marie* case, and I'll quote again from it (pages 70-71 C.E.L.R.):

> *"Offences in which there is no necessity for the prosecution to prove the existence of mens rea;"*

this is not a section of mens rea, the defence don't have to prove this, I say,

> *"the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care."*

That's what I'm saying, by proving that he took all reasonable care.

> *"This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or"*

and I think this is where we're getting down to the crux of this case,

"if he took all reasonable steps to avoid the particular event."

That is what I, the Court must pose here.

The matter of the Chapin case, (1979), 8 C.E.L.R. 151, no matter what case is considered strict liability, the law says that the burden is on the defence, and it moves over. I've set the law out. Then the court has to decide in each case on the facts, whether the defence have met this burden which has been placed upon them. I read that Chapin case, it's been some time since I did, and Mr. Stroud is right. The wording I think is shall, it's a federal statute, the same as the Fisheries Act, but in that case it was a case of a woman, I think, walking along the edge of a game preserve, or a place for migratory birds, and she either took a shot or shot one of the migratory birds, and all there was was a sign or something and they said, the Supreme Court of Canada said walking along there, you know, you'd be almost impossible to see the sign, and they went on and along that line, and in my opinion the facts on that are not similar to the facts here at all. As I say, the court, in each case on the facts, must decide whether the defence has met its burden.

Now, Mr. MacCabe gave evidence here that he owns this land, and we have as an exhibit here D-1, and properly so, it's bound on the south by the West River. Mr. MacCabe, and this was brought out in cross-examination by Mr. Mackay, has lived there, and he doesn't deny that, he knows where pools are there, and, but in his opinion, he believed that he was entitled to take the gravel off these bars. The first important thing in my opinion, he was warned either federally or provincially, that he shouldn't be taking this material out of there. He still, he said well, it's my land, and I might feel the same way, it's my land and I can take it off there. The Court asks itself, what else did he do. What did he do by way of due diligence to ascertain whether he should be taking this material off there. On page, I'll refer to what was said in the Voir Dire on the examination of Mr. Cox, the answer: "Possibly, could you relate the conversation from Mr. MacCabe approaching you at the stream right up until you left each other?" Answer: "As I started to say, we got into discussion on the effects of his alteration on fish and fish habitat. I asked Mr. MacCabe if he was aware that permission is required and he said yes but he hadn't bothered because his neighbours had applied to do similar things, to do similar things, and had been given a negative response." Also, I'll refer further. In Mr. Cranford's evidence, I believe it was. Let's see, I'll read it entirely, I won't take it out of context. This is in direct examination, Mr. Cranford: "What were you doing and what took place? Can you relate the conversation or any parts of it that you heard?" The answer: "Yes we were doing our electro-fishing at the time and we showed Mr. MacCabe the fish that we had caught, and about that time Donnie Cox and Mr. MacCabe started into a conversation about the effect the work that was done here would have on fish habitat and this conversation went on for a rather lengthy time, about half an hour anyway, and during parts of this conversation I heard that they talked about some of the fish that were in the river. Mr. MacCabe knew that he'd seen fish that were in it, there were different suckers he talked about, and he said the best trout angling pool in the river was just downstream from this site that was excavated." "Try to remember what else was said?" He was asked this. "Oh, he, Don asked if he knew he had to have a permit to do this, he said yes he knew he had to have a permit, but he didn't apply for one because there was a neighbour that had and they were refused. So he didn't apply. Well I had an application in my briefcase," and he gave it to Mr. MacCabe at that time. So the Court, those are the pertinent parts. The Court then asks the question. After receiving these

letters after knowing that neighbours, and there's no doubt the area that's referred to, because it says in the evidence here that they were standing, Mr. Cox's evidence, it was the area right there, and looking at the river there's no doubt that this was part of the area that was a fish habitat. The Court then asks itself, has the defence met this burden as set out in the *Sault Ste. Marie* case, it's called due diligence. Did he use due diligence? If he believed, perhaps he reasonably believed that he had the right to take this out of the river. And, also, it would appear to me to be relevant, the fact that this wasn't a case of a few loads being taken out or of just happening that day. Mr. MacCabe, and others in their evidence pointed out, he, the first thing he said, well was it because of the 15 loads I took out of the interval, the river. He, being a, might have thought that this was part of his land. By the look of the photos, including where the tractor is, and so on, this would certainly, as I've said, it's a fish habitat, it is part of the river. He told his brother to open it up to let fish in and out, but that didn't, the damage was done then. Did he use due diligence in regard to what was done there? In my opinion the defence have not, have not met the burden on the facts, although I say I find that this is an offence of strict liability, they haven't on the facts, met the defence which is required, they haven't proven that the defendant here used due diligence in ascertaining what should be done there, and for that reason the other part is proven, I find on the particular facts of this case, and each one must be taken on its own, that the Crown have proven their case beyond a reasonable doubt, and I find the defendant guilty as charged.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CROWN ZELLERBACH PROPERTIES LTD., FOURSOME DEVELOPMENT LTD., AND CROWN ZELLERBACH CANADA LTD.
(Leachate from Vendev Landfill)

GROBERMAN Prov. Ct. J. Burnaby, February 20, 1981

Defences - Due diligence - Leachate from landfill operation - Charges under s.33(2) of Fisheries Act, R.S.C. 1970, c.F-14, as amended - No system for inspecting for leachate.

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Leachate from landfill operation - Charges under s.33(2) - Defence of due diligence - No system for inspecting for leachate.

The accused, Crown Zellerbach Properties Limited (C.Z.P.L.), owned certain lands which it wished to develop as an industrial site. Since a number of creeks cut through the property, the accused, Foursome Development Ltd., was retained to carry out a landfill operation. The third accused, Crown Zellerbach Canada Limited (C.Z.C.L.), delivered hogfuel for dumping on the lands. When leachate from the landfill operation seeped from the site into the creeks, the accused were charged with a number of offences under s.33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended.

All charges against C.Z.C.L. were dismissed. It merely delivered hogfuel to the site and had nothing to do with either the placement of the hogfuel or the development of the site.

The other two accused however were found guilty. It could not be said that they exercised due diligence to prevent the commission of the offences. Excessive amounts of hogfuel were being dumped on the property, but C.Z.P.L. did nothing to control quantities even though it knew that leachate would result. Furthermore, neither accused had a proper system for inspecting the landfill operation for leachates. Had such a system been in place, and had the accused followed up reasonably from the inspections, possibly due to diligence could have been established.

D.R. Kier, Q.C., for the Crown.
D.W. Shaw, for Crown Zellerbach, accused.
G.P. Cassidy, for Foursome Development Ltd., accused.

(Editor: Fines of $20,000 against C.Z.P.L. and fines of $8,000 against Foursome were imposed. Half of the fines went to the private informant.)

GROBERMAN Prov.Ct.J.: - The Corporate defendants are charged as follows:

"Count No. 1: On or about the 14th day of January, A.D. 1980, at the District of Coquitlam, County of Westminster, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: landfill leachate, in water frequented by fish, to wit: Laurentian Creek, in violation of s.33(2) of the Fisheries Act, R.S.C. 1970.

Count No. 2: On or about the 7th day of January, A.D. 1980, at the District of Coquitlam, County of Westminster, Province of British Columbia, did unlawfully

deposit or permit the deposit of a deleterious substance, to wit: landfill leachate, in water frequented by fish, to wit: Laurentian Creek, in violation of s.33(2) of the Fisheries Act, R.S.C. 1970.

Count No. 3: On or about the 18th day of May, A.D. 1978, at the District of Coquitlam, County of Westminster, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: landfill leachate, in water frequented by fish, to wit: Schoolhouse Creek, in violation of s.33(2) of the Fisheries Act, R.S.C. 1970.

Count No. 4: Between the 18th day of May, A.D. 1978 and the 7th day of January, A.D. 1980, at the District of Coquitlam, County of Westminster, Province of British Columbia, did unlawfully permit the deposit of a deleterious substance, to wit: industrial and domestic refuse, in a place under conditions where the said deleterious substance or any other deleterious substance that resulted from the said deposit of such deleterious substance may enter water frequented by fish, to wit: Laurentian Creek, in violation of s.33(2) of the Fisheries Act, R.S.C. 1970."

S.33(2) of the Fisheries Act, R.S.C. 1970 reads as follows:

"(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."

It was established by the evidence that from a date prior to March 1977 until after January 1980 a landfill project was taking place on and about certain lands situated north of the Lougheed Highway on district lots 46, 47, 48 and 61, Coquitlam, British Columbia. At all material times the lands comprising the landfill site (the site) were owned by Crown Zellerbach Properties Limited formerly known as Vendev Enterprises, Ltd. Vendev Enterprises, Ltd., incorporated in 1973, changed its name to Crown Zellerbach Properties Limited on May 3, 1979. I will refer to Crown Zellerbach Properties Limited as either C.Z.P.L. or Vendev.

Two creeks flow from north to south through the site. Schoolhouse Creek commences from a point north of the lands and flows almost due south through the lands until it connects with Laurentian Creek at the approximate point where the lands touch the Lougheed Highway. Laurentian Creek commences from a point somewhere northeast of the lands. It flows in a south-west direction through the lands until it meets with Schoolhouse Creek. Both creeks then become Schoolhouse Creek and flow into the Fraser River.

What I have endeavoured to describe above is shown with much more clarity on a plan filed as Exhibit 43 and two aerial photographs filed as Exhibits 60a and 60b. Of necessity, the plan (exhibit 43) will become part of my reasons for judgment and I will be referring to it frequently.

C.Z.P.L. planned to develop the site and engaged the defendant Foursome Development Ltd. (Foursome) to carry out a landfill operation for the eventual development of an industrial site.

The contract between C.Z.P.L. and Foursome is dated May 17, 1977. Foursome commenced work in March 1977, withdrew in June 1977, recommenced in October 1977 and continued without interruption until December 14, 1979 and thereafter with dirt fill until March 1980. As a result of the landfill operation, it became necessary to obtain a permit from the Pollution Control Branch. This was obtained on October 13, 1977.

A pollution problem developed in the form of leachates flowing from portions of the landfill operation. Inspections were made at various times by personnel unrelated to the defendants which resulted in the charges before the Court.

The Crown alleges that landfill leachate flowed from the various fill areas on the site into Schoolhouse and Laurentian Creeks. The Crown submits that the defendants deposited or permitted the deposits of a deleterious substance described as landfill leachate into waters frequented by fish. These allegations cover Counts 1 to 3. Count 4 is somewhat more subtle. I will get to that.

All defendants advance the defence of due diligence pursuant to Section 33(8) of the Fisheries Act and the decision of the Supreme Court of Canada in *R. v. City of Sault Ste. Marie*, (1978) 40 C.C.C. (2d) 353. The defence need not be considered unless the Crown establishes a prima facie case. Mr. Cassidy for Foursome submits that the Crown has not made out a prima facie case for a variety of reasons. Mr. Shaw for Crown Zellerbach associated his position with that of Mr. Cassidy but neither argued the points nor cross examined witnesses concerning them. He relies upon the defence of due diligence. However, if Mr. Cassidy succeeds in any arguments relating to a prima facie case, then such success will be shared so far as it may apply to the Crown Zellerbach defendants.

I have examined the evidence thoroughly but I will detail the evidence with more precision than I had originally planned because of the number of points raised by Mr. Cassidy. I will deal with his points at various places throughout this decision.

On May 18, 1978, Wilfred Hebert and Stephen Sames attended on the site. Hebert had been a biologist with the Federal Government Environmental Protection Service until August 1979. He observed black leachate flowing into Schoolhouse Creek and took samples from Schoolhouse Creek three feet from the shore for analysis. He went into the creek and saw a band of leachate flowing through it. Mr. Sames held the funnel. Hebert cleaned the containers prior to collecting two samples and rinsed them with the samples three times. He filled them to the top, sealed the containers and took them to the laboratory in North Vancouver for a bioassay. He went directly to the lab and turned the samples over to Jurgen Bauman on the same date. The samples were collected in red plastic five gallon jerry cans. These containers were returned to Hebert and he kept them under lock and key until August 27, 1979 when he turned his keys and lock over to Otto Langer.

He described the site on May 18, 1978, as follows:

> "A mixture of construction debris, there were metal containers, there was some gyproc, there was some concrete blocks and there was a caterpillar levelling off all of this material that was being dumped and hogfuel put on top of the material that was dumped."

The black leachate came from the edge of the landfill into the creek and was swept downstream.

He took two samples from Schoolhouse Creek. A control sample from an area where the stream was clear and shown on the plan as a green dot in a green square at the top of the plan and named "Control Sample Point" (Exhibit 1). He also took a sample from where the leachate was entering Schoolhouse Creek at the location shown on the plan as a red dot within a red rectangle marked "Sample Site" just below the control sample point (Exhibit 2).

He took and described photographs. Exhibit 3a was taken on April 1, 1979, and shows black leachate flowing into Schoolhouse Creek. He marked this location as "A" on the plan.

Cross-examination by Mr. Cassidy revealed that Hebert brought the containers and used a bucket and funnel in order to fill them. He said it was important not to let air in and that temperature is an important factor. It was important to keep the sample at the same temperature it was in the environment. Mr. Cassidy cross-examined Mr. Sames who stated that he held the funnel while Hebert reached down and scooped the sample into the funnel. This was to prevent spillage. He said that he was aware of sampling techniques described in a handbook.

Hebert said leachate has a rotten egg smell and that even this morning (November 3, 1980) you could smell it. At some places the landfill is right to the edge of the creeks. He said:

> "The landfill site came right to the edge of the water in some areas, you could actually see water going underneath where the fill was."

Leachate dilutes as it flows downstream.

To summarize, Hebert observed leachate on May 18, 1978, when he took the samples. He observed leachate again on April 1, 1979, when he took the photographs, and on November the 3rd, 1980, being the day he gave evidence in court.

Stephen Sames, a biologist with the Department of Fisheries, accompanied Hebert to the site on May 18, 1978. In May of 1978 he observed mounds of hogfuel and wood waste on the site. Today (November 3, 1980) it was all levelled but he observed a pool of leachate. On May 18, 1978, he could smell leachate and saw a stream flowing into Schoolhouse Creek. This was an obvious positive flow. There were other areas where leachate was flowing from sawdust piles.

Sames also filled eight sample jars from the same areas on the site described above. He filled the jars, capped them, placed them in an icebox and then into his truck. He added a preservative and sealed the jars. He took them to the chemistry lab and turned them over to Harjit Grewal on the same date at 1:30 p.m. On May 25 he picked up the bottles, took them to his office and locked them in a refrigerator. Exhibits 5a, b, c and d are samples from the downstream site and Exhibits 4a, b, c and d are samples from the upstream site.

He also took photographs which were entered as exhibits. Photograph 6a was taken on March 24, 1977, and shows hogfuel near the edge of Schoolhouse Creek at the north end of D.L. 61. Photograph 6b shows leachate collecting adjacent to Schoolhouse Creek. Sames was also on the site in February and on May 18, 1978. Only the height of the sawdust differed at the site. In February 1978 there was a large amount of sawdust on the site and he noticed leachate flowing into a stream. Hogfuel leachate results when water is added to sawdust.

Samples were taken from locations within the site on January 7 and January 14, 1980. The exact locations of their source and surrounding circumstances will be reviewed in some detail as Mr. Cassidy argues that leachate samples were not taken from Laurentian Creek on either January 7 or January 14 and the bioassays conducted on the samples are of no assistance to the Crown.

George Dirkson is a biologist with the Environmental Protection Service. He visited the site on January 7, 1980, with Otto Langer to collect leachate samples. He used a clean five gallon jerry can that had been rinsed. He attended the southwest corner of the landfill. He detected an odour of hydrogen sulphide, like rotten egg, and observed a leachate spring, six to eight inches wide flowing towards Laurentian Creek. He took a sample at 2:45 p.m., not from the creek but 12 feet east of Schoolhouse Creek and 30 feet away from Laurentian Creek to the north. This was from the location shown on the plan as a red rectangle with one red dot called "sample site" being the most southerly sample site on the plan.

He took the fuel jerry can sample (Exhibit 44) to a vehicle, wrapped the spout and vent with masking tape, kept it in his possession overnight in a locked vehicle at his residence and delivered it the next morning at 8:00 a.m. to Jurgen Bauman at the lab. He picked it up from Bauman on October 28, 1980, and has had it in his possession since. Bauman did not say who he returned it to but Dirkson said he received it back from Bauman. Continuity of the exhibit has not been broken.

Dirkson also took other samples from the same leachate spring in a bucket that he took to a truck and placed in glass jars (Exhibits 45a and b). On January 8, 1980, he took them to the Environmental Protection Service lab in West Vancouver and turned them over to Grewal. On September 11, 1980, he received them back from Janet Pel. So continuity breaks down with regard to the jars after bioassays had been conducted at the lab.

Another red plastic five gallon jerry can (Exhibit 57) was produced that contained a sample taken by Otto Langer on January 7, 1980, and witnessed by Dirkson, upstream at the control sample point on Laurentian Creek on Schoolhouse Road shown on the plan as one green dot in a green rectangle on lot 5 D.L. 47. Otto Langer took other samples and turned them over to Dirkson. These are two small jars (Exhibits 61a and b) which he turned over to Grewal the next day and on September 11th received back from Pel.

On October 28, 1980, Dirkson attended at the lab and received samples from Bauman that had been collected on January 14, 1980 by Aldcroft. These were two five gallon jerry cans which he kept in a locked property box with other samples until November 3, 1980, when he returned them to Aldcroft.

An empty five gallon jerry can (Exhibit 44) was obtained by Dirkson from the bioassay lab the day before. He smelled and looked inside, there was no residue. He thoroughly rinsed it with leachate before filling it, which he described as a standard procedure. He was aware that samples had to be kept a cool temperature, four degrees Centigrade. He said that January the 7th, 1980, it had been snowing and it was cool or he would have packed the sample in ice. There was no heat in the rear of his truck. His opinion was that a five gallon can sample would not have its integrity effected if kept for 12 hours at 15 degrees Centigrade.

David Aldcroft is a fisheries technician and the informant in this case. On January 14, 1980, at 9:00 a.m. he attended at the site to obtain samples. He attended at the area shown on the plan as a red rectangle with two red dots marked "sample sites" in the southern portion of D.L. 61. It is the only red rectangle on the plan containing two red dots. He took one five gallon sample at that site and a 32 ounce sample. The sample in the five gallon container (Exhibit 49) was taken before it gets to the creek, from the edge of the landfill 20 feet from Laurentian Creek. He was accompanied by Otto Langer and two others.

Aldcroft took two five gallon containers and four 32 ounce glass jars. He sterilized the containers by pouring boiling water into each of them and rinsing them. His method was to scoop up a sample in a 32 ounce jar and pour it into the five gallon container. When the container was full it would be capped and labelled. He described the effluent he was interested in as a black evil smelling liquid coming from the foot of the landfill.

He took a second sample from the edge of the landfill near Laurentian Creek where the effluent ran into the creek 20 feet away (Exhibit 50). He took another 32 ounce sample from where the effluent met Laurentian Creek (Exhibit 51). He took a five gallon can sample and a 32 ounce sample from Laurentian Creek at the control sample point marked on the plan with a green dot in a green rectangle on lot 5 D.L. 47. (Exhibits 52 and 53.) The creek water was clear at that location.

He filled the containers to the brim and capped them. He sealed them and took them to his truck. He took the two five gallon jerry cans (Exhibits 49 and 52) to Bauman between 11:00 and 12:00 a.m. and received them back from Dirkson. He took three 32 ounce jars to Grewal at 1:00 p.m. and received them back from her on January 16, 1980. He said that on January 14, 1980, it was a sunny day with a temperature of approximately nine degrees Celsius. His experience of sample taking is that he attended one lab session at Deer Lake when he was taking a course at B.C.I.T. for obtaining samples. The samples in this case were the only samples that he has ever taken.

Otto Langer is a fisheries biologist employed by the Federal Government in the Department of Fisheries and Environment; that is, Environment Canada.

He was familiar with the work at the site described as the Vendev landfill operation. From approximately February 1977 to January 1980 he visited the site approximately eight times. When he visited the site in February 1977 material had already been dumped on portions of the site. He described the site as follows:

> "The majority of the area was what I would call very low lying peatbogs swamp type area. There was what I would refer to as a poorly drained area and mainly a swamp type shrubbery, brush grasses and some swamp type bog. There was some alder

growing in the area but it was mainly a wet land type vegetation. The number of streams flowed through the site. A couple of them were quite distinct then. There were smaller streams flowing through the site and it would be hard to say how many streams there were in the area but there were one definite stream, Schoolhouse Creek, and Laurentian Creek, some ditches, and some small streams that were flowing through the site elsewhere."

He described his responsibilities as follows:

"It was my responsibility in the Environment Canada to, I was in charge of processing, inspecting and providing comments to be forwarded to the Provincial Government governing wood waste dumping so yes, this would have been my responsibility to monitor this site and pass on our comments to the Provincial Government via our Director."

As to the length of the operation he said it was not completed at the time he gave evidence (November 5, 1980) with material still going on the site. In January 1980 all of D.L. 61 was totally filled in. A small area of D.L. 48 had not been filled.

On May 24, 1978, he made his first detailed inspection. He walked over most of the fill area. Together with others, he did a survey of the total periphery of the site. He noted a lot of material going into the site contrary to recommendations he made to the Provincial Government. He said:

"On that date there was quite a great deal of wood waste material and by wood waste I mean demolition debris, the breaking up of old buildings with the associated concrete cement, concrete foundations broken up, on the wood waste materials it would be best called hogfuel, mainly bark from lumber commercial mills, in fact there was a large amount of gyproc, gyproc from demolition buildings as well as what appeared to be some new gyproc from end trimming from new construction projects, a number of containers including chemical sealants, chemical caulking containers some of which were full. The label on it indicates they were caulking compounds and it had a skull and crossbones on it and I really don't know what the contents were and they were unknown and there were a number of them opened and dumped in the dump, quite a bit of office garbage, letters, papers, that type of material as well as quite a few creosoted timbers that appeared to be ends of telephone poles, that type of thing, so that is the -- generally the type of garbage, a mix of what I would call industrial garbage."

He described sand, silt, and gravel as being inorganic inert fill that will not react with anything or produce anything that will affect the quality of water. He produced a series of photographs he took that day. Exhibit 55c is a photograph of trees alongside Schoolhouse Creek on D.L. 61:

"Showing trees on the left hand side of the photograph and the edge of the fill site on the right hand side of the photograph and you can see over the garbage and demolition debris and that type of material some soil has been dumped and through the edge of the soil you can see some of the debris sticking out and you can see a black what I refer to as leachate, a material coming out of the dump and flowing towards Schoolhouse Creek and a large black pool of the material on the edge of Schoolhouse Creek."

Exhibit 55d is a photograph described by Langer as:

> "Looking into the ditch between Schoolhouse Street and the fill area and this picture shows the area was being as I mentioned it was being filled in the area of the D.L. 61 and this picture shows the same black material that was flowing into Schoolhouse Creek on the other side of the fill this same black material was also flowing into the ditch flowing south down Schoolhouse Street and then into a stream called Laurentian Creek and it is a very oily, blacky, inky looking type of material."

He saw an inky, black material seeping into a ditch from the landfill area. It continued to flow into Laurentian Creek. He saw a black stain flowing down Laurentian Creek. He walked the total length of the Schoolhouse Creek side of the landfill and noticed a black like material flowing into Schoolhouse Creek at a couple of different locations. He described it as a smelly black material, like a rotten egg smell. He was, of course, describing leachate.

On May 14, 1979, he next visited the site. On that date he saw signs of leachate entering Schoolhouse Creek from D.L. 48 which was flowing through the grass at different locations and disappearing into the grass. He observed a trickle flowing towards the stream through dead grass. His next visits were on December 8 and 16, 1979. He said leachate was more obvious on December 16 than on his previous inspections. Leachate was flowing down an unnamed creek on D.L. 48 that was part of the fill site. It flowed down the unnamed creek into a ditch, east along the Lougheed Highway and then into Schoolhouse Creek. Leachate was also flowing in several locations on D.L. 48 through the grass into Schoolhouse Creek. On district lot 61 he observed large volumes of leachate flowing directly into Laurentian Creek. The foam, smell and blackish colour were obvious. The whole stream where Laurentian Creek and Schoolhouse Creek joined at the Lougheed Highway was black.

So on December 16, 1979, there was considerable leachate that was easily observed even from the Lougheed Highway.

On January 7, 1980, Langer attended at the site to collect samples with George Dirkson. He collected a sample on Laurentian Creek at the control sample point shown on the plan as a green dot in a green rectangle in lot 5 D.L. 47. At that point the stream was clear. He collected a sample in a five gallon jerry can (Exhibit 57) by scooping it out of the stream with a clean plastic container, placing it into the jarry can, filling it up and sealing it. There was no odour from the cans and both were rinsed out with material to be sampled. The jerry can was turned over to Dirkson.

Langer produced and described a photograph (Exhibit 58b) by referring to the upper left of the photograph and describing a white area between trees and stating:

> "It is at that location the leachate sample was collected on January 7 and the leachate flowed from the landfill at that location through a group of trees shown in the photograph and entered Laurentian Creek. This stream became discoloured and darker at that point."

Mr. Cassidy argued that on January 7, 1980, the leachate sample was not from Laurentian Creek. The evidence of Dirkson is that his sample was from a leachate spring six to eight inches wide and flowing towards Laurentian Creek. The sample was not from

the creek but 12 feet east of Schoolhouse Creek and 30 feet from Laurentian Creek. Otto Langer's evidence, which I accept, is that the leachate flowed from the sample site into Laurentian Creek as described above. I am satisfied that Dirkson's sample (Exhibit 44) is of the same material that was flowing into Laurentian Creek and the bioassay of that sample is accepted as being a substance that was flowing into Laurentian Creek.

On January 14, 1980, Langer returned to the site with Aldcroft. The leachate volume going into the stream was much greater on that date than any previous date that he had noticed during the previous two years. He noticed leachate entering Schoolhouse and Laurentian Creek at several locations. He referred to the area on the plan shown marked "Sample Sites" with two red dots in a red rectangle on D.L. 61 to the west of lot 4. He said:

> "The leachate volume coming out of that site had changed dramatically and the volume was quite great. It was like a spring shooting more or less almost out of the side of the dump and flowing freely, that's flowing freely out and the hydrogen sulphide or the sulphide smell in that whole area was almost unbearable coming out of that spring in the landfill and at that location the volume was great enough that you could quite easily scoop up the sample in a jar or dipper and that leachate flowed in the channel directly into Laurentian Creek and from that point downstream Laurentian Creek was black and it smelled of sulphide."

He was shown photograph 59a and was asked, "Is that a picture of Aldcroft taking a sample ?" He said:

> "That's correct, this is the location along Laurentian Creek and the southern edge of the fill site on D.L. 61 indicated by two red dots in the box on Exhibit 43. That photograph shows what I described a quite large volume of leachate flowing out of the dump that was quite easy to scoop up."

Mr. Cassidy argued that on January 14, 1980, the leachate sample was not taken from Laurentian Creek. Aldcroft said he took the sample (Exhibit 49) from the edge of the landfill, before it gets to the creek, 20 feet from Laurentian Creek. Aldcroft's evidence and that of Langer that I have just reviewed, convinces me that the sample (Exhibit 49) was from a location described by Langer that "flowed in the channel directly into Laurentian Creek". Therefore, the sample was of material that was flowing into Laurentian Creek and the bioassay of that sample is accepted as being a substance flowing into Laurentian Creek. While it perhaps would have been better for samples of leachate to be taken directly out of the creeks, I cannot seriously criticize the practice of taking a sample of material that was seen to be flowing into the creeks.

Mr. Langer qualified as an expert in the field of stream ecology as it relates to fish. And on the placing of landfill and methods employed regarding aquatic environments and particularly fish. Also, on the nature of substances that leach out of landfill areas and as fish are thereby effected.

As an employee of the Environmental Protection Service, he is responsible for input into the Provincial Pollution Control Branch permit system relating to refuse dumps, including landfill operations such as the Vendev operation, wood waste dumps, municipal dumps, and input into all other water quality pollution matters.

He was asked the effect of the use of wood wastes such as hogfuel and gyproc in landfills. He said:

> "These materials when they are alone and in a dry state generally they are not deleterious to fish but once they are -- water is added to them they will produce a substance and we will refer to that as a leachate that can be very toxic to aquatic life and that is not only fish it can be fish food, the whole food chain. The wood waste material especially bark of the trees, the hogfuel, that kind of thing when exposed to water the sugars of the wood and the tannins, the dark brown inky coloured dye that we have in bark and that will leach out of the wood as well as a series of other compounds and these materials can be quite toxic to fish life and in addition they have a dark they have a very dark colour which they add to the water and this dark colour blocks out the sunlight and without sunlight the waterway cannot function in terms that it cannot produce food because light must enter water to produce food in that waterway for fish life so there is a direct toxic effect. There is a blockage of light and in addition the organic matters that leach out."

He said that hogfuel leachate is toxic in itself.

> "and generally the blacker the leachate is the more hogfuel leachate is in it where we can have a sulphide problem in quite a clear leachate. Here you could smell the hydrogen sulphide and certain of the leachate spring was almost unbearable to stand and therefore we would have had extremely high concentrations in the water and generally if you can smell it is is of high enough concentration to kill fish and the blackness of the leachate indicated quite a bit of hogfuel leachate in that leachate."

He described Laurentian Creek and Schoolhouse Creek as salmon streams; that is, salmonid streams. This lumps together salmon and trout and the streams can support trout as well as coho salmon and stickleback. He was asked if the leachate problem on the site could have been curtailed. He answered:

> "Yes, the use of clean inert fill would have totally eliminated the leaching a leaching problem such as the type of material I described being put on top of the dump. If that type of fill was used throughout the dump there would not have been a problem and if that material would have been used to build a dyke around the fill site, to isolate the site into a sort of cell structure and some of the cleaner demolition debris used in combination with that material we probably would have had next to no leachate problem."

He said that by 1980 the leaching into Schoolhouse Creek had virtually ceased. Over two to three years a good portion of the leachate material will come out of hogfuel if it is exposed to enough water. The worst time period is the first two or three years and the majority of leachate material will leave the wood after three to four years.

Langer was a credible witness and I accept all of his evidence.

With reference to the bioassays, I am really only concerned with six exhibits. All were collected in red plastic five gallon jerry cans. They are Exhibits 1 and 2 which were obtained on May 18, 1978 by Hebert. Exhibits 44 and 57 which were obtained on January 7, 1980 by Dirkson and Langer respectively. And Exhibits 49 ad 52 which were obtained on January 14, 1980, by Aldcroft.

The exact source of each exhibit has been described in detail.

Jurgen Bauman is an aquatic toxicity technician with the Federal Environmental Protection Service and has been so since 1974. He had done over 1,000 bioassays to determine if a substance is toxic to fish.

He received all of the above exhibits. His procedure is to place the samples into 30 litre glass aquariums, then introduce fish to the samples and observe the results. If the fish die, the substance is toxic to fish. If the fish do not die, the substance is not toxic to fish.

Among other arguments, Mr. Cassidy described Mr. Bauman's approach to the testing as cavalier. The testing system appears to be so simple that students in a grade six science class could do it easily. Mr. Bauman has had considerable experience in the field and I found him to be a well-qualified and convincing witness. His opinions and the results of his bioassays on the samples is accepted by the Court.

On May 18, 1978, he received Exhibits 1 and 2 from Hebert. He ran bioassays on the two samples. He used rainbow trout, previously proven healthy, in his test. Ten fish were placed into each tank. In Exhibit 1, the upstream sample, the fish survived over 96 hours. In Exhibit 2, from where leachate entered Schoolhouse Creek, the fish were moribund after 15 minutes and well were dead after 16 hours. His conclusion was that the material in Exhibit 2 was very toxic.

On January 8, 1980, he received Exhibits 44 and 57 from Dirkson. He used three aquariums, two with material from the exhibits and a third containing local water. Exhibit 57, the upstream sample, was not toxic to fish over a 96 hour period. Exhibit 44, the leachate sample, rendered all the fish moribund after 15 minutes and dead within 22 hours. The sample was toxic. The control sample with local water showed no mortalities after 96 hours.

On January 14, 1980, he received Exhibits 49 and 52 from Aldcroft. Exhibit 49, the leachate sample, rendered immediate signs of distress in the fish and all were dead within 10 minutes. The conclusion was that this was very toxic to fish. Exhibit 52, the upstream sample, revealed no fish mortalities over 96 hours.

I have carefully considered the cross-examination of Bauman by Mr. Cassidy and his reference to Exhibit 54 being a Department of the Environment guideline respecting acute toxicity of liquid effluent from petroleum refineries. Mr. Bauman said he was familiar with the publication and said in general, "We follow standards set for ourselves." He said it was a matter of tradition, routine and practice in the lab. He was asked particularly about the temperature of the samples being at four degrees Centigrade. He said in his experience a higher temperature makes the samples less toxic.

I accept his results as accurate and find that the samples in Exhibits 2, 44 and 49 to be very toxic to fish and therefore a deleterious substance as defined in Section 33(11) of the Fisheries Act.

The continuity of these exhibits has been proven. There was certainly no breakdown in continuity from their source to Bauman (who did the bioassays) and back to the person who introduced them in court. The only breakdown in continuity involved jars delivered to

Grewal and then picked up from Pel. However, the results of the analyses to the samples in the jars are of no probative value as the results were not interpreted. I am satisfied that the integrity of the samples (Exhibits 1, 2, 44, 57, 49 and 52) has been established. The manner of collecting and keeping the samples was sufficient to ensure the quality of the samples from their source until examined by Mr. Bauman.

Harjit Grewal, a chemistry lab technician for the Fisheries Department, was called by the Crown. She analyzed samples for chemical oxygen demand (COD), biochemical oxygen demand (BOD), PH, dissolved oxygen (DO), and tested for sulphide.

There is no point in describing her results as they were not interpreted as to toxicity or anything else. Langer described PH as low as four being toxic to aquatic life. No test showed a PH level as low as four either by Grewal or Bauman. Langer also mentioned hydrogen sulphide. How this relates to Grewal's sulphide test results I do not know. I was not told.

I will now consider whether the Crown has made out a prima facie case on each of the four counts.

The offences charged are:

> "Strict liability 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 that he took all reasonable care." (*R. v. City of Sault Ste. Marie* headnote)

At the beginning of this judgment I described the roles of C.Z.P.L. and Foursome in the development of the lands. Foursome did the work on C.Z.P.L. lands. C.Z.P.L. took an active interest in the project through K.W. Tunnycliffe who was aware of the problems as they occurred from time to time.

I will deal with the counts as they relate to C.Z.P.L. and Foursome.

I am satisfied that at all material times Schoolhouse Creek and Laurentian Creek were waters frequented by fish. There was evidence by Hebert, Sames, Aldcroft and Langer that they had seen fish in the creeks at various times. Proof required under s.33.4(3)(b) has not been adduced.

The substances taken from the site for analysis, and by that I mean Exhibits 2, 44, and 49, were proven to be deleterious substances as found earlier in the evidence of Bauman.

The last issue is whether C.Z.P.L. and Foursome permitted the deposit of the deleterious substance as alleged in the information. I have dealt with and rejected the argument of Mr. Cassidy that bioassays of the samples taken on January 7 and 14, 1980, could not be accepted as representing substances from Laurentian Creek.

In this case, landfill leachate produced by the mixture of water and landfill material flowed from the landfill site into the creeks. I am satisfied that such occurrences are

either "leaking", "seeping" or "emitting" and within the definition of "deposit" in s.33(11) of the Fisheries Act and that C.Z.P.L. and Foursome permitted the deposits. A prima facie case has been made out on counts 1 to 3 with regard to C.Z.P.L. and Foursome.

The evidence establishes that the activity of the landfill was continuous from the end of 1977 to early 1980. The evidence of Wilfred Hebert and Otto Langer, together with the evidence of Kenneth Tunnycliffe and Lloyd Campbell to be reviewed later and the results of the bioassays on substances obtained from the site on May 18, 1978, January 7 and 14, 1980, convinces me beyond a reasonable doubt that the continuous nature of the project establishes a prima facie case on count 4 as against C.Z.P.L. and Foursome.

I will now consider the case against Crown Zellerbach Canada Limited (C.Z.C.L.). C.Z.P.L. is a wholly owned subsidiary of C.Z.C.L. C.Z.C.L. delivered hogfuel to the site. It had nothing to do with the placement of the substance or the development of the site. That was someone else's responsibility. C.Z.P.L. provided the hogfuel dumping area for C.Z.C.L. and designated precisely the area where the hogfuel was to be placed. See Exhibit 87, this is a letter with a plan showing the dumping area to be a considerable distance from Schoolhouse Creek and Laurentian Creek.

I have considered all the evidence concerning C.Z.C.L. including the involvement of H.A.C. Summer, the lands and property manager of C.Z.C.L., who became involved in late 1979. His involvement is demonstrated in letters of October 16, 1979 (Exhibit 40), December 4, 1979 (Exhibit 41), and January 30, 1980 (Exhibit 42).

However, it has not been proven beyond a reasonable doubt that C.Z.C.L. permitted the deposit of deleterious substances as alleged in all four counts in the information and the charges against C.Z.C.L. are dismissed.

Any future reference to the defendants in this case will not include C.Z.C.L.

Defences of due diligence pursuant to s.33(8) of the Fisheries Act and the *Sault Ste. Marie* case have been advanced by C.Z.P.L. and Foursome. Each defendant submits that it "exercised all due diligence to prevent" the commission of the offences.

The main thrust of the argument of Mr. Shaw for C.Z.P.L. is that a proper system was set up to prevent the commission of the offences. And his client took all reasonable steps to ensure the effective operation of the system and thereby took all reasonable steps to avoid the commission of the offences.

Three witnesses were called for C.Z.P.L.

1) Kenneth William Tunnycliffe, his immediate superiors in the company were G.A.G. Stamp and F.O. Whipple,
2) Susan Graham, and
3) Sam Johl.

Reference will be made to Lloyd Campbell who was in charge of the landfill project on behalf of the defendant Foursome.

Kenneth William Tunnycliffe was employed by Vendev from July 7, 1975 to September 15, 1978. He was a development assistant to Stamp. His responsibility was to look after the landfill project on a day-to-day basis. It was decided in early 1976 to fill the land owned by Vendev. Vendev utilized Golder Associates (Golder) Consulting Geotechnical Engineers to assist with the project. A summary of Golder's initial recommendations is found in a letter of November 16, 1976 (Exhibit 18). One cannot help but note the quantities of hogfuel described in the letter.

During November 1976 Tunnycliffe said there was a small area of hogfuel on the site east of Schoolhouse Creek but that the surface was flat and level.

The actual landfill operation was to be carried out by Foursome. A letter from Vendev to Foursome on November 30, 1976 (Exhibit 15) invites Foursome to provide "on site management to co-ordinate fill placement" and describes the initial stages of a contract to be entered into between Vendev and Foursome. Tunnycliffe said Foursome was experienced in this type of operation.

So Golder was commissioned as expert soil consultants and Foursome was engaged as a company experienced in landfill operations.

By a letter dated January 20, 1977 (Exhibit 16) from Foursome to Vendev, Foursome agreed to manage the landfill operation as follows:

> "Richmond Landfill will provide the management, on site personnel, all equipment to operate a landfill operation on your properties, and co-ordinate the fill placement, subject to the specifications delivered to us by Vendev Enterprises Ltd."

About February 1977 Tunnycliffe contacted W.G. Hamilton, the Regional Director of the Pollution Control Branch with regard to a pollution control permit. Tunnycliffe said Hamilton advised that preliminary preparation of the site could begin. This was conveyed to Foursome by letter of February 4, 1977 (Exhibit 19). Tunnycliffe said that hogfuel was necessary to provide roads for vehicles on the site and he told this to Hamilton. This is important because the ultimate villain was hogfuel and its use for "trafficability". Tunnycliffe constantly emphasized "trafficability" in connection with the use of hogfuel.

In February 1977 initial steps were taken to obtain a Pollution Control Board permit and on February 11, 1977, an application for a permit under the Pollution Control Act was submitted by Vendev (Exhibit 20). Tunnycliffe said the application contained input from Hamilton and Golder.

Hogfuel and wood chips are mentioned quite prominently in the application with the refuse-disposal site to be located approximately 50 feet from the nearest water course. A copy of the application was sent to Foursome.

On March 4, 1977, Tunnycliffe wrote to C.Z.C.L. (Exhibit 78) providing a site for dumping of "your excess hogfuel and wood chips" free of charge. He said there was no mound of hogfuel on the site at that time to his knowledge but later he said that from March to June 1977 a mound built up which was to be used for vehicular traffic on the site. In cross-examination he was asked if a mountain of hogfuel was delivered between March 6 to 31st, 1977. He answered that he could not comment on the quantity of hogfuel.

Lloyd Campbell said that on March 7, 1977, there was a "mountain" of chips 50 feet high immediately west of lot 42 on D.L. 61. Sam Johl called as a witness by C.Z.P.L. said in chief that in 1977 he trucked hogfuel to the site for C.Z.C.L. and the condition of the site was level. He answered, "No". In cross-examination he said that in February/March 1977 the pile of hogfuel got to 20 to 30 feet high and 30 to 40 feet wide, it stretched from the road back to within five feet of Schoolhouse Creek. This was in an area just south of the area described by Campbell.

I am satisfied that Campbell and Johl are speaking of the same mound of hogfuel and I accept their evidence.

There is no doubt that during the early part of 1977 there was an enormous quantity of hogfuel on the site.

On May 26, 1977, a contract (Exhibit 14) was completed between Vendev and Foursome for Foursome to operate the landfill project from March 1, 1977 to June 30, 1979. As I said earlier, the activities of Foursome continued until March 1980.

By contract, either party could terminate the agreement on 90 days notice. C.Z.C.L. was allowed to dump a reasonable amount of material including hogfuel and wood chips. C.Z.C.L. had an excess of hogfuel (see Exhibit 78). Foursome was to follow the guidelines of Golder.

Golder's letter of May 31, 1977 (Exhibit 79) was brought to the attention of Campbell. This set out that Golder would have a representative on the site at all times during the initial stages of filling and thereafter as deemed necessary.

On June 23, 1977, Foursome wrote to Vendev (Exhibit 21) complaining of the volume of wood waste. Tunnycliffe said C.Z.C.L. still had excessive material available.

A letter from Environment Canada to the Pollution Control Branch dated May 31, 1977 (Exhibit 62) came to the attention of Tunnycliffe. It was also referred to an engineering consultant and an architect. This letter was composed by Otto Langer though under the signature of B.A. Heskin. It was his response to Vendev's application to the Pollution Control Branch for a permit. The letter contains the following:

> "If this site is allowed to be used for the disposal of wood waste materials, provisions within the Pollution Control Act and Pollution Control Objectives for municipal type waste discharges will not be adhered to. The site is seasonally submerged; it has water courses meandering throughout, plus areas of standing water. Because of this high water table, the release of leachates from hogfuel will be inevitable and impossible to control.
>
> In order to protect fisheries resources in Schoolhouse Creek and the Fraser River, we therefore recommend that a permit not be issued."

The application for the permit was delayed due to the use of hogfuel (Exhibit 82). Meetings were held over the hogfuel problem. On June 29, 1977, hogfuel placement ceased at the site.

On September 8, 1977, another letter (Exhibit 73) was sent to the Pollution Control Branch by Environment Canada. Environment Canada seems to back away somewhat from the firm position taken in the letter of May 31, 1977, in that there is not a recommendation that the permit not issue. Tunnycliffe was aware of this letter and sent a copy to Campbell. This letter makes it clear that precautions must be taken to ensure that no leachate flows into the streams.

Tunnycliffe followed this up with more meetings and obtained another report from Golder on September 20, 1977 (Exhibit 85) with recommendations. On September 20, 1977, Vendev wrote to the Pollution Control Branch (Exhibit 22) concerning the application and made particular reference to the proposed placement of hogfuel.

On October 13, 1977, the permit (Exhibit 23) was issued that included a letter of transmittal (Exhibit 63) dated October 13, 1977, which stated inter alia,

> "In conjunction with this permit, you are directed to comply with the following requirements."

One of the requirements was:

> "Adequate precautions are to be taken to ensure that no leachate from the hogfuel fill material reaches Laurentian Creek, Schoolhouse Creek or unnamed creek."

Copies of the permit and letter were forwarded to Foursome.

By letter of November 15, 1977 (Exhibit 24) from Tunnycliffe to Campbell, the dates of the agreement were changed to terminate October 31, 1979, and states that Golder would be called in from time to time to monitor the landfill operation. Foursome was to do everything prudently possible to control leachate.

By memo of November 16, 1977 (Exhibit 86) from Tunnycliffe's superior, Stamp, it was indicated that he had visited the site and found things less than perfect. Tunnycliffe was told to monitor the operation on a frequent basis and raises the problems with Campbell.

On January 13, 1978, a letter (Exhibit 90) to Vendev from Environment Canada indicated that Fisheries and Marine Service had no objection to the development subject to certain recommendations including:

> "6. No leachate from the hogfuel fill should be permitted to enter Schoolhouse or Laurentian Creek. The construction of impermeable dykes adjacent to these water courses and the hogfuel fill should satisfy the stipulation."

Tunnycliffe said Vendev wanted to consult all agencies so they would be familiar with their requirements. Tunnycliffe called Hamilton at the Pollution Control Branch about May 1978 (Exhibit 91) and was told that his inspectors indicated that the site was generally okay. Hamilton had no major concerns about the operation (Exhibit 92).

But a letter from the Pollution Control Branch dated May 25, 1978 (Exhibit 28) said that their inspection of May 24, 1978 indicated severe deficiencies. It mentions leachate development at the upper stream fill area adjacent to Schoolhouse Creek and rejection of

hogfuel. Tunnycliffe wrote to Foursome, referred to the letter of May 25, 1978 and told Foursome to take action.

A letter of June 8, 1978 (Exhibit 31) from Environment Canada to the Pollution Control Branch states that the site was not being managed in accordance with the Pollution Control Board permit. It mentions the leachate problem and recommends an impervious dyke. Tunnycliffe received a copy of this letter and Golder was commissioned to prepare a report.

On June 9, 1978, Golder provided a report (Exhibit 30) which was referred to Campbell. On June the 13th, 1978, there was a meeting at the Pollution Control Branch with Hamilton. Hamilton recommended improved dyking to help control leachates. The results of the meeting were passed onto Campbell by letter of June 14, 1978 (Exhibit 32). This resulted in a further letter to Golder which resulted in another Golder report of July 14, 1978 (Exhibit 33).

On July 17, 1978, Tunnycliffe wrote to Campbell (Exhibit 34) with specific directions and a reference to surplus hogfuel.

An observation is that there was a huge quantity of hogfuel on the site in early 1977 and Tunnycliffe's letter of July 17, 1978 (one and one-half years later) describes an area of surplus hogfuel.

By letter dated July 19, 1978, the Pollution Control Branch advised Vendev (Exhibit 35) that "restriction of the filling programme is removed". Golder's report had apparently satisfied the concerns of the Pollution Control Branch over the structural integrity of the site and the safety of the stream bed.

By letter dated July 24, 1978, from Vendev to Foursome (Exhibit 36), Campbell was required to satisfy Hamilton's concerns as set out in the letter.

Tunnycliffe said he did all he could to see that the Pollution Control Branch permit had been properly adhered to and did all he could to see that the project was properly carried out. Tunnycliffe monitored the site as he was able to and was satisfied that Golder was on the site regularly. He said they were out there each two or three weeks. He was satisfied with the response of Foursome to his suggestions.

In his cross-examination he indicated the plan was to develop the site for light industrial. He was questioned at length about the use of the site as a hogfuel dump by C.Z.C.L. I am satisfied on the evidence that the site was to be developed as planned but C.Z.C.L. had an excess of hogfuel and C.Z.P.L. was going to do all it could to accommodate the disposal of it on the site, in conjunction with the development project. So the purpose was twofold. Firstly, to develop the site, and secondly, to accommodate C.Z.C.L.'s surplus hogfuel disposal requirements.

Tunnycliffe was evasive when questioned on the use of hogfuel. While the evidence is clear that C.Z.C.L. had an excess of hogfuel and needed a place to dump it and while C.Z.P.L. was doing everything to accommodate its parent company, Tunnycliffe insisted that it was only used for "trafficability" and nothing else.

I have concluded that more hogfuel was dumped on the site than was necessary for roads. Tunnycliffe was well aware of the leachate problems from the start. He thought Golder inspected once per month but was not sure. He visited the site once a month, and sometimes more.

When he was referred to Exhibit 21 which was a letter from Foursome complaining of excess wood waste and resulted in Foursome withdrawing its services, he said the hogfuel programme extended over a longer period than anticipated. It went on until June 1977. He said, "We relied on the Pollution Control Board to direct us." Hamilton told Tunnycliffe that he was the sole administrator of the permit and everything was funnelled through him. The programme was designed by our soil consultants.

Tunnycliffe terminated his association with C.Z.C.L. on September 15, 1978. Susan Graham took over.

Susan Graham has been employed by C.Z.P.L. since 1969. In 1976 she became administrative assistant to Dr. Whipple who is the Vice-President and General Manager of C.Z.P.L. She took over as supervisor of the landfill operation for C.Z.P.L. when Tunnycliffe left. She visited the site once a month and sometimes twice or three times a month and made notes on occasion. On October 19, 1978, she visited the site and made a number of notes and referred questions to Campbell. During cross examination she said that she did not see leachates on any visits to the site and did not inspect the streams and did not discuss leachates with her superiors until after the company was charged. On August 30, 1979 a meeting took place concerning the project and there was no mention of leachates. She assumed the problem was solved as she had not been contacted about ongoing concerns. So she left it to someone else to check for leachates. She was aware that the permit said "no leachate" and relied on agencies or Foursome to notify her in that regard.

Vendev had no one check for leachates. Graham did not inspect the total perimeter of the site on a regular basis.

Mr. Shaw submitted that a system was established so far as pollution control was concerned and referred to a portion of the evidence of Otto Langer who is with the Pollution Control arm of the Federal Government. His Department solicits comments from other federal departments and funnels those comments together with their own to the Pollution Control Board to assist it in arriving at a decision as to whether a permit will be issued and the conditions. This was the referral system. Langer said "we get permits referred to us and we comment on them".

Lloyd Campbell gave evidence for Foursome. He was employed by Foursome as the person in charge of the landfill project on the company's behalf.

He and his superior, Gordon Gilley, met with Vendev representatives late in 1976 and commenced to make arrangements for Foursome to operate the landfill project. He was aware of the events that led to the operation of the landfill project including the application for a pollution control permit and the contract between Vendev and Foursome (Exhibit 14).

He testified that at the time of the agreement Vendev had a huge pile of hogfuel on the property and wanted it moved around. This operation was started before the permit had been obtained.

On March 7, 1977, Foursome started to spread the hogfuel with a bulldozer. Campbell described a mountain of wood chips, 50 feet high on district lot 47 west of lot 42. He said we didn't get it spread as it never seemed to go down. "It came faster than we could handle it." The chips just kept coming until June. Somehow the quantity of wood chips made the operation uneconomical for Foursome. Foursome decided to meet with Vendev and until the matter was resolved Foursome stopped its operation. On June 9, 1977, Foursome ceased to operate the fill site due to the hogfuel problems. Campbell described the pile of chips as being as big as when he started.

He believes Foursome resumed the operation after the permit was issued on October 13, 1977.

Campbell phoned Hamilton of the Pollution Control Branch to ask about certain materials. The operation started on the east part of the site opposite lot 42. The northern part was filled first and progressed to Schoolhouse Creek. Then Foursome started on the southern portion of the property.

Campbell said that hogfuel or chips were only used to drive on. There was never any fill placed within 50 feet of any creeks and care was exercised.

On December 13, 1977, Campbell wrote to Vendev (Exhibit 26) concerning the hogfuel and leachate problems. This was only two months after Foursome had resumed operating the landfill. Campbell testified:

> "That we had found that there was such a mountain of hogfuel there that there was no way we would agree to move that pile of hogfuel unless Vendev had made some arrangements with the Pollution Control Board because it was certainly something that we didn't want to become involved with."

He also said:

> "The intended meaning of that was that we wanted to make it very plain to Vendev that that pile of hog was their responsibility, it was nothing to do with our operation, it was there prior to our starting and that any problems that arise out of that pile was to be Vendev's problem, nothing to do with Foursome."

His evidence was mainly to the effect that when he was directed to do something he complied immediately. For example, see Exhibit 28, a letter of May 25, 1978, from the Pollution Control Branch requiring immediate action to correct problems. Campbell said that all the requirements were complied with as he was conscious of the permit. He said he was careful to make sure that people were doing what they were asked to do.

Campbell had this to say about pollution regulations. He was asked what responsibilities Foursome had with respect to observing pollution containment regulations and he answered:

> "Well, I personally felt that we were issued a permit and that there was no way to operate that side other than to totally comply with the permit and I instructed the people that were on the site, I instructed our site superintendent -- many meetings with Tunnycliffe and Stamp -- at Vendev, I told them we would do everything in our power to comply with that, what that permit said and I felt that is the only way that

that site would operate and we didn't want to pollute any streams or take anything that wasn't supposed to be in the permit or anything else. It just wasn't worth the while for us to operate that site for Vendev and I might say that Vendev wanted it made very plain to myself and our employees we were to comply with that permit and we felt that we did everything in our part to comply with that. We tried to operate exactly as stated. If there was a problem we solved it right away. If Hamilton phoned very seldom he phoned me about a problem but he would certainly phone if there was one. Vendev would then get in touch with me and I would get out to the site and rectify whatever the problem was whatever it may be."

Campbell was at the site once or twice a week. When asked if the dykes were waterproof he said he did not know if they were totally waterproof. He said he is not an engineer and did not run tests. He said he used clay from the new courthouse excavation, dumped it and pressed it down. He said that was a proper procedure but did not know if it was 100% or not.

He has referred to Exhibit 28 being a letter of May the 25th, 1978, from the Pollution Control Branch. The letter stated that the filter mat was to be placed in the area of leachate development. Campbell commented that he never agreed that leachate came from the property. He said that Hamilton was not always right. Campbell saw oil coming from the northwest corner of the property and you could not say that it came from the fill.

After December 13, 1979, Foursome reduced its operation to providing dirt for cover material until March 1980.

I would like to remark on the credibility of Lloyd Campbell. He impressed me as a person who is aggressive and enthusiastic in his work. He is confident and self-assured. I do not have any trouble with his honesty but he exaggerates. He exaggerated the quality of his company's work and care with reference to the terms of the Pollution Control Branch permit and its conditions. He was more concerned with the economics of the operation than with the pollution problems which were minor irritants from time to time.

As Mr. Cassidy said, the villain was hogfuel and wood chips.

A situation began in early 1977 and continued until early 1980. A period of three years. When hogfuel is mixed with water a substance known as leachate flows from the fill area. If the substance enters waters frequented by fish it constitutes a deleterious substance.

In early 1977 there was a huge quantity of hogfuel on the site as described by Campbell and Johl. There was so much that Foursome could not handle it and left the project from June to October 1977. It was well known to Vendev and Foursome that leachate would be a problem.

On March 31, 1977, a letter was sent to the Pollution Control Branch from Environment Canada (Exhibit 62) from which I quote:

"The release of leachates from hogfuel will be inevitable and impossible to control."

On September 8, 1977, a letter was sent to the Pollution Control Branch from Environment Canada (Exhibit 73) stating:

> "Precautions must be taken to ensure that no leachate flows into any of the streams. The present hogfuel storage site has created problems that must be resolved."

October 17, 1977, the Letter of Transmittal (Exhibit 63) that accompanied the Pollution Control Board permit stated that:

> "Adequate precautions are to be taken to ensure that no leachate from the hogfuel fill material reaches Laurentian Creek, Schoolhouse Creek or unnamed creek."

This condition was well known to the defendants. It was never negotiated or even discussed.

January 13, 1978 (Exhibit 90), a letter from Environment Canada to Vendev directed:

> "No leachate from the hogfuel fill should be permitted to enter Schoolhouse or Laurentian Creek."

The parties were well aware of the potential leachate problem which was forecast with accuracy as early as May 31, 1977.

The *Sault Ste. Marie* case sets out the test for strict liability offences such as the charges before this Court. See page 374:

> *"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 that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be 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. These offences may properly be called offences of strict liability."*

And page 377:

> *"The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating willful involvement of the accused, and 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."*

Mr. Cassidy argues that Foursome's role was to comply with the directions of Vendev, the Pollution Control Branch and Golder. He submits that Golder carried the burden of monitoring the site and that Foursome was bound by contract to do as directed. I cannot agree. Foursome walked away from the project from June to October 1977 and could have done so again or exercised its right to terminate the contract.

So Foursome throws the onus of site inspection onto Vendev. No one would be in a better position to examine the creeks abutting the landfill than Foursome. Mr. Cassidy suggests that Foursome had a right to believe that to comply with the permit was to comply with the law. It must be remembered that a condition of the permit was:

> "Adequate precautions are to be taken to ensure that no leachate from the hogfuel fill material reaches Laurentian Creek, Schoolhouse Creek..."

Mr. Shaw for C.Z.P.L. advances the proper system theory that he submits was followed with due diligence by C.Z.P.L. He submits that the company hired a competent landfill company (Foursome), a competent soil consultant (Golder), and relied upon the Pollution Control Branch which received input from several federal agencies.

Mr. Shaw submitted that Vendev kept a regular eye on the site and responded quickly to any problems raised by the Pollution Control Branch and referred those problems to Foursome.

Vendev did respond to problems raised by the Pollution Control Branch but did not carry out a sufficient site inspection which, in my opinion, is a serious flaw in the system.

I am also mindful of the differing opinions expressed between the Provincial Pollution Control Branch and the Federal Environmental Protection Services. However, they both agreed, "No leachates". Mr. Shaw cites Langer's opinion as to what could have been done to curtail the leachate problem and submits that the defendants were doomed from the start. For this he relies totally upon the evidence of Langer. However, a letter from Environment Canada to the Pollution Control Branch of September 8, 1977 (Exhibit 73) recognizes the existence of hogfuel on the site and provides guidelines to avoid leachates. The guidelines suggested, "proper site selection" for the disposal of wood wastes. The Pollution Control Branch was aware of the hogfuel before the permit and Letter of Transmission of October 13, 1977 was issued. Had the Pollution Control Branch considered the leachate problems impossible to control, I believe I can conclude that a permit would not have been issued. Mr. Shaw submitted that C.Z.P.L. acted reasonably in looking to the Pollution Control Branch.

The defendants, being well aware of the leachate problem, in my opinion, at the very least had an obligation to carry out regular site inspections of those portions of the creeks abutting the landfill operation. C.Z.P.L. assumed a responsibility to check the site and engaged Golder and Foursome to do so also.

The problem was with hogfuel. The amounts dumped were excessive but Vendev did too little to control the quantity. Vendev well knew that hogfuel would produce leachates but continued to allow excessive quantities to be dumped. Having done this it hired experts to solve the problem it created well knowing the possible results and then submitting that it acted reasonably by developing and following a proper system.

What inspections were carried out by C.Z.P.L.?

Tunnycliffe said Golder was on the site each two to three weeks or once a month, he was not sure. Tunnycliffe visited the site once a month, sometimes more. There was no evidence that he inspected the creeks. Susan Graham was on the site once a month and sometimes two or three times a month but she never inspected the creeks nor directed anyone to do so.

What about Foursome?

Campbell was on the site once or twice a week and there was no evidence that he inspected the creeks or directed anyone to do so.

The inspection for leachates by the defendants was negligible and yet they were well aware of the problem created by hogfuel. For a person to walk the creeks abutting the landfill area once a week would not be too much to expect in the circumstances of this case. The defendants waited to be told about pollution problems by others. They did virtually nothing to initiate any meaningful examinations or investigations of the leachate problem.

It will never be known if the project was doomed from the start as suggested by Mr. Shaw because we will never know the results had reasonable diligence been exercised by the defendants regularly inspecting the creeks abutting the landfill.

In my opinion, regular inspections could have contributed a great deal in reducing the degree of leaching.

It would have been reasonable to expect the defendants to have done more. It would have been reasonable for the defendants to have made regular inspections of the creeks. It was not reasonable for them to expect the pollution authorities to do that for them and wait for complaints.

On January 14, Langer located a spring shooting out of the dump that flowed directly into Laurentian Creek. There was no evidence that this was difficult to locate. In my opinion, both defendants had a duty to inspect in a manner far in excess of what was done. The manner of inspection by the defendants was not reasonable in the circumstances of this case. All reasonable steps were not taken. Had reasonable inspection taken place and had the companies followed up reasonably from that, then perhaps it could be said that due diligence was established. However, that is not the case before me.

The defendants have not established the defence of due diligence and the test set out in the *Sault Ste. Marie* case has not been met.

The defendant companies were involved with the landfill project during the dates set out in the charges. All charges have been proven beyond a reasonable doubt as against the defendants C.Z.P.L. and Foursome and I find them guilty as charged on all four counts.

As I said earlier, all charges against C.Z.C.L. are dismissed.

BRITISH COLUMBIA COUNTRY COURT

R. v. CROWN ZELLERBACH PROPERTIES LTD.

HYDE Co. Ct. J. New Westminster, March 25, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Appeal by Accused from its conviction for violating s.33 (2) - Appeal dismissed - On facts, defences of due diligence and inevitability not established.

On appeal by the accused from its conviction on four counts of violating s.33 (2) of the Fisheries Act, R.S.C. 1970, c.F-14, as amended, held, the appeal is dismissed. The appellant had been notified that release of leachate from its site would be inevitable and impossible to control. Despite this, the appellant chose to proceed and failed to prevent the pollution. The defences of due diligence and inevitability cannot succeed.

D.R. Kier, Q.C., for the Crown, respondent.
D. Shaw, Q.C., for the appellant.

HYDE, J.: - This is an appeal from conviction by His Honour Judge Groberman in the Provincial Court of British Columbia at Burnaby, British Columbia, on February 20, 1981, on four counts of violating s.33(2) of the Fisheries Act R.S.C. 1970.

A short summary of the grounds of appeal is that the learned trial Judge used a standard in assessing due diligence on the part of the appellant which was higher than it should have been; and that the leachate problem which developed was inevitable in any event.

On May 31, 1977, the evidence discloses that notice was sent by the Regional Director General, of the Pacific Region, Environmental Protection Service, Department of Fisheries and the Environment, to the Director, Pollution Control Branch - Water Resources Administration, Ministry of the Environment, Province of British Columbia in Victoria, which included the following paragraphs:

> "If this site is allowed to be used for the disposal of woodwaste materials, provisions within the Pollution Control Act and Pollution Control Objectives for Municipal Type Waste Discharges will not be adhered to. The site is seasonally submerged; it has watercourses meandering throughout, plus areas of standing water. Because of this high water table, the release of leachates from hogfuel will be inevitable and impossible to control.
>
> In order to protect fisheries resources in Schoolhouse Creek and the Fraser River, we therefore recommend that a permit not be issued. Furthermore, the proponent should clean up all waterways perimeters and use clean inert fill only, and ensure that no leachates infiltrate Schoolhouse Creek."

A copy of this letter was sent to the appellant on June 30, 1977, (Exhibit 81). The appellant, despite its being forewarned of the inevitability of pollution resulting from its

bringing onto the property the amounts of hogfuel it did, elected to proceed with those amounts, and did not prevent the accumulation of leachates in the waters on the property frequented by fish.

I have considered the submissions of counsel as they relate to the decision appealed from, and I am in full agreement with the careful and lucid reasons of the learned trial Judge.

The appeals from conviction are dismissed.

The appeal(s) from sentence were not heard in January. They can be set now for hearing before any Judge of this Court. I am not seised of the sentence appeal(s).

BRITISH COLUMBIA PROVINCIAL COURT

R. v. BRACKENDALE ESTATES LTD., DOWAD, AND CANDY

WALKER Prov.Ct.J. Squamish, February 27, 1980

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under ss.31 (1) and 33.1 (1) - On facts, fish habitat destroyed - Accused convicted under s.31 (1) - Consideration of who can make request - Accused convicted.

The accused were charged with an offence under s.31 (1) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. The court found on the facts that a side channel of a creek had been filled in and a fish habitat destroyed. The accused were therefore convicted.

The accused were also charged with failing to provide plans, etc. when requested to do so under s.33.1 (1). The Court found on the facts that a request had been made and concluded that the request need not come directly from the Minister of Fisheries and Oceans but can come from a Fishery Officer.

J. Ruddy, for the Crown.
N. Dowad, for the accused.

WALKER Prov.Ct.J.: - The present case is one which rests, to a large part, on findings of fact, and for this reason I would like to deal with the evidence in some detail. Wherever possible, I shall review the evidence chronologically.

On March 8th, 1979, Fisheries Guardian John Wright arranged a meeting between Wilfred Dowad, one of the Accused, and Federal Fisheries Officer, V.A. Roxburgh. The first part of the conversation dealt with certain problems concerning hogfuel on properties owned by one of the Accused's Companies, not pertaining to this case. The second part of the conversation took place at Dryden Creek, and specifically on or near Lot 1, N.W. 1/4, Section 14, Township 50, Plan 17525, owned by the Accused Company Brackendale Estates Limited, a company of which Mr. Dowad was a Director, and principal managing officer. The Company referred to is a land developer.

According to Federal Fisheries Officer V.A. Roxburgh the essence of the conversation was that Mr. Dowad wanted to build a bridge across Dryden Creek, (indicated in Photographs 6 and 2 of Exhibit 7), that he wanted to fill in a side channel emanating from Dryden Creek at that location, and that he wanted to do some stream clearing.

Federal Fisheries Officer V.A. Roxburgh testified that he advised Mr. Dowad that this work would require permission from the Water Rights Branch, that Mr. Dowad would have to submit plans to the Department of Fisheries, and that upon acceptance, stream clearance could go ahead.

He further testified that on this date Mr. Dowad showed him the side channel which he wanted to fill. He stated that the length of that section of the Creek was approximately 125 feet.

Fisheries Guardian John Wright corroborated Fisheries Officer Roxburgh's testimony, and described in some detail the side channel as being "very heavily overgrown with vine maple willows, it was like a jungle in there". Fisheries Guardian Wright said that it ran about 25 yards, and that it started about 10 to 12 yards below the B.C. Railway, railway tracks.

Fisheries Guardian Wright testified that he had seen the side channel previously, and in fact had removed two dead salmon weighing about 8 pounds each in 1976, when he was employed as a Fisheries Technician. He further stated that he had once had conversation with Mr. Dowad who stated that he wanted to put all of the flow of the side channel into the main stream.

Mr. Dowad described the March 8th meeting considerably differently. He said that he brought Federal Fisheries Officer Roxburgh to the Dryden Creek site, advising him that he wanted to install a culvert and clear out the creek. Mr. Dowad specifically stated that there was no side channel in existence at that time, but that the ground was extremely muddy and wet beside the creek. Mr. Dowad denied that he had told Federal Fisheries Officer Roxburgh that he intended to fill in the side channel so that he might acquire another building lot. He said that he merely advised that he wanted to clear rubbish from the creek.

On March 15th, 1979, Federal Fisheries Officer Roxburgh prepared a letter which he forwarded to:

> W. Dowad (sic)
> 41250 Meadow Rd.
> Brackendale, B.C.

He stated in this letter, inter alia:

"With regards to the stream alteration and the culvert crossing, plans should be submitted to the water licencing board:

> G.E. Harrison
> Regional Engineer
> Water Rights Branch
> 313-6th Street
> New Westminster, B.C.
> Phone 521-9641"

This letter was entered as Exhibit "9".

Later in March, or in early April, Federal Fisheries Officer Roxburgh spoke to Mr. Dowad and asked him whether he had received the above letter. Mr. Dowad stated that he had not, and Federal Fisheries Officer Roxburgh shortly thereafter delivered to him personally a copy of the letter.

Mr. Dowad testified that he had believed that the letter referred to the culvert only, which he would not be installing until 1980, and said that at the time he saw no reason to submit plans and applications for the clearing of the creek.

On an unnamed date in April, 1979, Federal Fisheries Officer Roxburgh stated that he saw what he called a "slight encroachment" on the stream. This was described as fill which had been pushed or brought in, on the south side of the stream bank.

In cross-examination, Federal Fisheries Officer Roxburgh said that he last saw water in the side channel in April, prior to going to Regina on April 12th.

On May 21st, the Accused Nicholas Frederick M. Candy, an employee and shareholder of the Accused Company, pursuant to the instructions of Mr. Dowad performed certain work at or near Dryden Creek, which resulted in these charges being laid. Considerable background evidence was given by Mr. Candy, who was involved both as an employee and shareholder of the Accused Company, as a private contractor, who had supplied the materials for stabilizing the ground at Dryden Creek, and as an Alderman for the District of Squamish.

According to Mr. Candy, prior to 1975, Dryden Creek flowed south of where it presently flows. B.C. Housing Corporation and Dunhill Developments Ltd. had developed a big housing project in Brackendale, north of the site with which we are concerned, the creek was diverted by Standard General Construction, who were also involved in the project and by the Department of Highways, who built a highway not far from the creek, and over the years a considerably extra load of water had to flow through Dryden Creek. Messrs. Candy and Dowad both testified that much silt had formed in the creek as a result of the extra load of water from the building project and the highway, both directly, and from seepage. The purpose of the work on May 21st, therefore, was to clean out this portion of the creek, in order that the new load of water might be better accommodated.

Mr. Candy operated 2 machines; a D6 bulldozer and a rubber tired backhoe. He stated that he cleared the trees which were entangled by the edge of the creek with the bulldozer, and the ground became very muddy. He then spread approximately 40 cubic yards of fill (according to Mr. Candy) (or 30 cubic yards according to Mr. Dowad) around the soggy area, to an average depth of about one foot over a 50 to 20 foot area, to accommodate the backhoe. He then drove the backhoe to the edge of the creek, and cleared out the creek. In addition, he removed a large log, which had been lying perpendicular to the creek, from the creek, which was shown in the Photographs making up Exhibit 16.

According to the Defence witnesses, the filling of the area did not result in a diversion of the side channel, there had not been a side channel, but the area was in fact where the creek had flowed prior to 1975.

One conclusion apparent from the Crown and Defence evidence, and from the on-site inspection which I conducted on October 23rd, 1979, is that there is considerable surface water present, especially during rainy seasons, not forming part of the creek, nor being running water. Moreover, the evidence is confusing, in that the water levels are constantly changing, making descriptions of the creek and conditions pertaining to it wholly dependent on the season.

The Accused Messrs. Dowad and Candy stated that on May 21st, the only water in the area soon to be filled or levelled was in little holes or recesses. They categorically denied the presence of a creek. The resolution of this discrepancy in evidence constitutes the principal conflict in this case.

On May 22nd, the day following the work, Federal Fisheries Officer Roxburgh apparently as a result of information, examined the site. He took a series of pictures which were entered as Exhibit 7, Photographs 1 to 8. Federal Fisheries Officer Roxburgh testified that it was apparent to him that a clearing had been cut into the bush, gravel and fill had been brought to Dryden Creek, up to where the B.C. Railway right-of-way was, and the side channel had been covered. At the downstream edge of the fill, the remains of the side channel could be seen entering Dryden Creek. (Photograph 2) The upstream end of the side channel, that is, that portion which left Dryden Creek was not apparent. Federal Fisheries Officer Roxburgh stated that this portion was completely covered with gravel or fill.

Federal Fisheries Officer Roxburgh states that at that time he could see groups of small salmon fry, in Dryden Creek which had apparently freshly emerged from the gravel.

Federal Fisheries Officer Roxburgh in some detail described the area, with reference to the various photographs comprising Exhibit 8.

He stated that he attempted to locate fry in the gravel of the old streambed, but was unable to do so, due to lack of proper equipment. Federal Fisheries Officer Roxburgh said that he then returned to his office to contact the biologists in his head office.

On May 25th, 1979, Robert Russell, a Biologist ruled an expert witness in Salmon Management and Salmon Rearing Areas, and Tom Cleugh, a Biologist, ruled an expert witness in Salmon Management, Protection and Environment, both employees of the Fisheries Marine Service, Habitat Protection Division, Federal Department of Fisheries, attend the site with Federal Fisheries Officer Roxburgh.

Mr. Russel dug in an area shown by the "X" on Photograph 2 of Exhibit 7, and unearthed a coho salmon fry, fairly recently dead, and he unearthed certain stream insects, described as benthic invertebrates. The "X" is located near that point already described by Crown witnesses, where the alleged side channel re-entered Dryden Creek. Mr. Russel attempted to unearth fry in other locations, in the upstream area but was unsuccessful. He later found a second coho fry in the presence of the Accused Mr. Dowad, who by this time had arrived on the scene. Both fry, entered as Exhibit 12, were located, according to Mr. Russell, under approximately one foot of gravel.

Mr. Russell stated that these fry had apparently just emerged from the gravel, indicating that in his opinion the stream had probably been a rearing area for salmon fry.

He further testified that he believed that the area had recently been a flowing stream, due to the presence of recent fill, the two fry and the presence of the stream invertebrates, which are typically found under rocks in flowing streams. These invertebrates were alive as a result of the presence of a small trickle of inter-gravel water. Under cross-examination Mr. Russell admitted that if the two salmon fry had

hatched in the gravel, and if there had been a drop in water level in the stream, with the continuation of a good inter-gravel flow, the fry might not die. He stated that there were many variables determining their viability.

Mr. Cleugh in all essentials supported Mr. Russell's evidence. He identified the location where the fry were located stating it was about 8' from the confluence of the old streambed and the existing stream. He made pretty well the same observations concerning the area of the alleged fill.

Mr. Cleugh testified that in his opinion the side channel had been an excellent habitat for rearing coho, and that there was a good supply of food insects. To have avoided damage, it would have been necessary for the Accused to have delayed their work until the fry were more developed.

In cross-examination Mr. Cleugh stated:

> "The damage is irreversible. The stream is basically -- cannot be repaired back to its normal state. It's a total loss of habitat."

While the Biologists were making their investigations on March 25th, Mr. Dowad came to the scene. He states that they were digging in an area which was the original gravel work done prior to the recent work performed by Mr. Candy. This area was marked in Photograph No. 2 of Exhibit 7.

Mr. Dowad and Federal Fisheries Officer Roxburgh had a conversation and Mr. Dowad made a statement which has been entered as Exhibit 8. In summary, he said that they had put in the gravel to get access to the creek bed, they removed a tree from the creek, and in his opinion they caused as little damage as possible, and still cleared out the creek.

Mr. Dowad stated that Federal Fisheries Officer Roxburgh did not mention anything about the alleged side channel at that time, and I note that Exhibit 8 does not refer to it. Mr. Roxburgh does not, in his evidence, make it clear why he didn't specifically refer to the side channel in these conversations with Mr. Dowad. It would appear, in reading Exhibit 8, and in examining Mr. Roxburgh's evidence, that he concerned himself more with the clearing of debris from the main part of Dryden Creek, than the filling of the side channel.

On May 28th, Mr. Russell prepared a report dealing with the inspection by him and Mr. Cleugh. This report, entered as Exhibit 11, was addressed to W.J. Schouwenburgh, Chief, Water Use Unit, Habitat Protection Division. An important fact to note is that the comments concerning the existence of a recently-filled-in side channel are at least in part based on his conversation with Mr. Roxburgh.

It is interesting to read in the report the following comment:

> "At this point Mr. W. Dowad (owner of the subdivision property) arrived and spoke with Mr. Roxburgh, regarding filling in of the side channel."

This conversation was not borne out by the oral evidence of either Mr. Russell, Federal Fisheries Officer Roxburgh or Mr. Dowad.

According to Mr. Russell the conversation dealt with pending charges as a result of the destruction of stream habitat and failing to provide plans.

On June 15th, Federal Fisheries Officer Roxburgh spoke to the Accused Mr. Candy at his home in Brackendale, about the work at Dryden Creek. Exhibit 10 consists of typed notes of this conversation made shortly after by Federal Fisheries Officer Roxburgh. Let us examine an important portion of this Exhibit.

"V.A.R. Did Mr. Dowad instruct you to fill in the streambed?

N.C. No, our object was to remove the log from in there. We had to show the stream where to go. If you mean were there any fish in there I saw one about this size (indicating approximately 1 1/2" long)."

Mr. Candy testified that it was during this conversation that he first heard that it was alleged he had filled in a side channel.

Toward the end of July, Mr. Wright, part time Fisheries Guardian, went to the site, and observed that the side channel was no longer there, and the brush formerly covering it had been removed. He further stated that he had walked the area many times previously, and had seen the side channel, as well as the main creek on these occasions.

Mr. Colin Stuart, a Technician with the Water Management Branch, (formerly described as the Water Rights Branch) Ministry of Environment, gave evidence about the procedure required to alter creeks, and stated that no application had been made to his office, which would be the governing authority, for this purpose. He testified that on October 22nd, 1979, he met with Mr. Dowad to discuss his proposal to install a culvert in Dryden Creek, at the conclusion of which he gave him the necessary application forms.

He further stated that Mr. Dowad asked him to look at a site where he had made a change in the stream.

A. "He asked if I would look at another site that -- where he had made a change in the stream which was just upstream of that point. We did look at that and he showed me where he had removed gravel and deposited other gravel in the place where the stream had been flowing.

Q. What did he say about that?

A. Well just that, that he had taken gravel out and deposited material in the stream channel and that he had been charged by the Federal Fisheries for that....."

Mr. Stewart stated further:

"Court: What did he say again please?

The Witness: He had removed gravel from the channel where the stream is now running and deposited it in the channel where it had been running prior to that without first obtaining our Branch approval."

While these statements would appear to be tantamount to admissions of the offences charged, no mention was made in Mr. Stuart's notes, which were read out in Court, of the fact that Mr. Dowad admitted to him that he had removed gravel from a running stream and had put it into where the channel had been. On cross-examination, Mr. Stuart stated that Mr. Dowad had not specifically admitted to filling in the side channel, that he had only used words to this effect, and that he could have said: "We deposited in this area".

Mr. Stuart's evidence in this respect is fairly unreliable, and was seriously shaken on cross-examination.

The final evidence I shall examine is that of Charles Wilson, a Biological Technician from the Department of Fisheries and Oceans. Mr. Wilson stated that he was Co-author of a Report entitled: "Squamish River Spawning Ground Recovery of 1972 Brood Coded-Wire tagged Coho Salmon", entered as Exhibit 13.

He testified that he did work in the Dryden Creek area in the fall of 1975, and winter of 1976. A sketch of the creek appears on Page 12 of his report. He saw the area in February of 1978, and on October 22nd, 1979. Mr. Wilson described in his testimony the creek below the railway crossing as follows:

"The creek existed through a culvert underneath the railway track and for a short section was quite steep, and after that section it -- the gradient decreased, the creek became somewhat wider and was at that point overhung with small alders as I recall, and I would say about a hundred or two hundred yards downstream from the railway culvert the stream broke into two small branches rejoining fifty to sixty yards or less downstream, and then once again the gradient increased and the stream emptied into a series of large deep pools."

In dealing with the two branches he testified:

"The one branch was larger than the other and less overhung with foliage. The smaller branch was quite thickly overhung with small alders as I recall, and was difficult to walk through, I remember that especially as that was necessary in my duties to walk through that area."

The Report described the summary of his field work on page 32.

It must be noted that on the map shown on page 12 of the Report the side channel did not appear. Mr. Stuart stated that its depiction was unnecessary to the survey he was conducting.

He testified that the small branch made up 25-30% of the total flow of the two branches, and that it was approximately 50 to 60 yards long.

Mr. Wilson stated that at the request of Mr. Roxburgh he went to the site on October 22nd, at which time only the main branch existed. The side brush cover from the former branch had been removed, the gradient and water flow as a result had been considerably increased, resulting in a "less likely spawning area for coho". This evidence must be considered in the light that Mr. Wilson was not ruled an expert witness.

Exhibits "1" to "6" are a Certified Copy of Incorporation, Certificates of Encumbrances, and Plans. They have not been dealt with, in that they do not deal with matters in contention.

In determining whether there has been an infraction under s.31(1) of the Fisheries Act, I must decide the following questions of fact:

> "did the Accused carry on work or an undertaking that resulted in the harmful alteration, disruption or destruction of the habitat?"

If I am to find that a side channel existed at Dryden Creek, and that the side channel was covered over by Mr. Candy, pursuant to instructions by Mr. Dowad, I would be forced to come to the conclusion that the habitat was destroyed.

Mr. Cleugh testified, and his testimony has remained undisputed, that the stream cannot be restored, and that there is a total loss of habitat.

I find as a fact that a side channel did exist beside the present Dryden Creek, and that it was filled over by the Accused on May 21st, 1979.

I make this finding chiefly on the testimony of Federal Fisheries Officer Roxburgh who stated that he had a conversation with the Accused Mr. Dowad on March 8th, 1979, regarding filling in the channel; John Wright, Fisheries Guardian, who demonstrated a familiarity with the terrain, and stated that he had seen this side channel on numerous occasions, and Mr. Charles Wilson, who described in detail the side channel. I accept the evidence of these three witnesses as correct. Although the evidence of Mr. Russell and Mr. Cleugh concerning the presence of salmon fry and stream invertebrates tends to support this finding, I do recognize that the ambiguity of this evidence, having regard to the possibility that these animals may have been able to live in an inter-gravel flow. Furthermore, I make the finding of fact acknowledging the failure of Mr. Roxburgh to question Messrs. Dowad and Candy about the filling in of the side channel after the work was done. No specific mention of the side channel was contained in Exhibit "8", the statement of Mr. Dowad to Mr. Roxburgh. This may suggest that at the initial stages of the investigation, Mr. Roxburgh was primarily concerned with the main creek, and not the side channel.

Mr. Candy's statement to Mr. Roxburgh, to the effect that he was showing the channel where to go is close to being an admission of the filling-in of the side channel. This statement would not really make sense if it referred to the removal of a log, or the clearing of debris from the creek.

I have already indicated that I am not assisted by the admission by Mr. Dowad to Mr. Colin Stuart. This admission was significantly shaken in cross-examination.

In accepting the Crown's testimony with respect to the existence of the side channel prior to the Accused's work, I should mention that both Mr. Dowad and Mr. Candy impressed me with their candor. Mr. Dowad was somewhat vague in dealing with whether he in fact discussed with Mr. Roxburgh the filling-in of the side channel prior to the work, and I conclude from his testimony that he was concerned more with important changes, such as the construction of a culvert. It is not necessary for me to conclude that the Accused were untruthful in this respect, but it is sufficient for me to make a finding and I so find that they were mistaken.

The Crown argued in passing that this was an offence of strict liability. While this argument was not fully dealt with, if I were to accept the proposition, the situation would fall within the second category outlined in *R. v. Sault Ste. Marie* 3 C.R. (3rd) 30, on pp. 31-3 of the headnote:

> (2) *offences of strict liability in which there is no necessity for the prosecution to prove mens rea - the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care; the defence will be 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.*

I would in this event find that the Accused did the prohibited act, that they did not take all reasonable care, nor did they take all reasonable steps to avoid the particular event, namely the destruction of the habitat. It is difficult to imagine how the habitat could have been saved or not have been harmed, with the filling of the channel, but assuming that the fish contained therein had been removed, and the habitat somehow replaced by the main channel, a finding of no negligence could be made. No such finding can be made, and the Accused would be liable, assuming strict liability applies.

If the offence is one of absolute liability, the Accused have clearly violated the Section.

The question of parties has not been argued, and it appears to be conceded that the three Accused are equally responsible for the infraction under s.31(1).

I find the three Accused guilty of an offence under s.31(1), Count 1 and 3 in the Information.

The resolution of Count 2, the charge under s.33.1(1) of the Fisheries Act, does not resolve itself solely on questions of fact.

Certain findings of fact necessary to sustain this charge, have already been made, in connection with the s.31(1) charges, Counts 1 and 3.

It is clear from the evidence, and I so find, that the Accused Mr. Dowad and the Accused Brackendale Estates Limited were persons who proposed to carry on work that was likely to result in the alteration or destruction of fish habitat, and that they failed to provide plans or other information to the work, so as to enable the Minister to determine whether the work would result in any alteration or destruction of the fish habitat.

I must determine whether there was a request, by whom it must be made, and whether the Minister of Fisheries and Oceans is the officer to whom the material should be delivered.

These arguments are generally encompassed in headings 2 and 3 of Defence Counsel's submissions. Heading 1 having been dealt with.

To determine the issue of whether there was a request, we must examine the evidence of Federal Fisheries Officer Roxburgh, Mr. Dowad and the letter of March 15th, 1979, entered as Exhibit 9.

The important words in the letter are:

"With regards to the stream alteration and the culvert crossing, plans should be submitted...."

Defence Counsel has argued that this letter is equivocal, and does not indicate that Federal Fisheries Officer Roxburgh and Mr. Dowad had the same set of facts in mind at the conclusion of their meeting on March 8th, 1979.

According to Mr. Roxburgh, Mr. Dowad mentioned the following items of work to be done:

1. Mr. Dowad wanted to build a bridge across Dryden Creek.
2. Mr. Dowad wanted to fill in the side channel to create another building lot.
3. Mr. Dowad wanted to do some stream clearing.
4. Mr. Dowad wanted to remove some brush.
5. Mr. Dowad wanted to remove a log from the Creek.

Federal Fisheries Officer Roxburgh stated that he told Mr. Dowad some stream clearing could go on, but that he would have to submit plans for any other work.

According to Mr. Dowad the items of work that were discussed at this meeting were as follows:

1. Mr. Dowad proposed to install a culvert in the creek, where the roadway crossed.
2. Mr. Dowad wanted to clear the rubbish out of the creek (they had examined debris in the creek, and a large hemlock lying therein).

Therefore, if we accept the evidence of both witnesses as to the topics discussed, we note that a maximum of 6 matters pertaining to Dryden Creek were dealt with:

1. construction of bridge
2. filling in of side channel
3. clearing of debris from creek
4. removal of log from creek
5. removal of brush
6. installation of culvert.

Assuming each of these matter were discussed, let us determine whether they were covered by the letter, or otherwise:

1. construction of bridge: Since this is neither stream alteration or culvert crossing, it has not been dealt with in the letter.
2. filling in of side channel: This is clearly stream alteration.
3. clearing of debris: Verbal permission was given to do this, and therefore the letter did not make reference to it.
4. removal of log from creek: If it could be construed that this was clearing of debris, the verbal permission could cover it.
5. removal of brush: This is neither stream alteration nor culvert crossing, and is not dealt with in the letter.
6. installation of culvert: This is the culvert crossing, and is dealt with in the letter.

I must conclude therefore, that since items 1, and 3-6 do not relate to stream alteration, since item 2 does, and since no other topics were discussed at Dryden Creek, according to both Federal Fisheries Officer Roxburgh and Mr. Dowad, that "stream alteration" can refer only to the filling-in of the side channel. I accept Mr. Roxburgh's testimony to the effect that he had had a conversation regarding the side channel, and I am satisfied that the portion of the letter referring to stream alteration was clear in the minds of Mr. Roxburgh and should have been in the mind of Mr. Dowad having regard to the conversation preceding the letter. I am satisfied that this portion of the letter does in fact comprise an unequivocal demand under the Section.

I see no merit to the argument that Mr. Roxburgh used the word "should" instead of "must" in his letter. The mandatory requirements of the Fisheries Act, are contained in 3.1(1)a, Mr. Roxburgh has drawn the attention of Mr. Dowad to this requirement, by conversation and by letter, Mr. Dowad has received the letter, and in my view the more polite "should" does not in any way impair or lessen the force of the requirement contained in the legislation.

It was argued by Mr. Dowad that the request should have been made to deliver the material to the Minister of Environment, rather than the Minister of Fisheries and Ocean. s.2 of the Fisheries Act defines "Minister of Fisheries and Forest". The Government Organization Act, 1979, 27-28 El II, c.13, s.3 refers to Department and Minister of Fisheries and Oceans. S.33(1) states that the Minister of Fisheries and Oceans shall administer the Acts set forth in Schedule 1, which includes The Fisheries Act. The section further provides that wherever the Minister of Environment or Deputy Minister of Environment are mentioned in the Acts listed in Schedule 1, unless the context otherwise requires this shall mean the Minister or Deputy Minister of Fisheries and Oceans. I am satisfied that Count 2 refers to the correct Minister, who has been properly designated.

The final argument made by Defence Counsel is that the Fisheries Officer is not the person who had the right to make the request, (on behalf of the Minister) pursuant to s.33.1(1).

It has been pointed out that the Act refers to the Minister, it refers to Fishery Officers, and it refers to Fishery Guardians. They are obviously different officials, and although the appointment of Fishery Officers and Fishery Guardians is dealt with in s.5, their respective delegated responsibilities is unclear.

In s.17, we see that the Minister and Fishery Officer are both mentioned, each having separate functions dealing with lobster factories.

In s.18, dealing with licences for lobster pounds, the Minister performs one function, and the Fishery Officer or Fishery Guardian performs another.

In s.27, pertaining to the removal of nets or weirs, certain things may be done by the Minister or a Fishery Officer.

In s.28(2), the structure of fish guards, certain approval can be given by the Minister or such officer as the Minister may appoint to examine it. This section obviously contemplates delegated authority.

How do we deal with the sections containing a combination of roles and how do we deal with s.33.1?

A leading authority on delegation of authority is *Regina v. Harrison* (1976) 3 WWR 536, a decision of the Supreme Court of Canada, referred by Crown Counsel. This decision limits the maximum "delegatus non potest delegare" - "a delegate cannot delegate" by ruling that the Attorney General of the Province does not have to give instructions personally for appeals to be taken to the Court of Appeal. It appears to be sufficient if this authority is granted by the Attorney General, Deputy Attorney General, or an officer of the Department with requisite authority.

I have been asked by Crown Counsel to apply this principle to the case at bar, and find that Federal Fisheries Officer Roxburgh had the delegated authority to make the request pursuant to s.33.1(1).

It is a principle of legislative interpretation that the Courts must make every effort to make sense out of Statutes, which appear less than explicit in certain areas.

This principle is embodied by s.11 of the Interpretation Act, R.S.C. 1970, c.1-23.

> *"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."*

If we substitute "Minister" by "Fishery Officer" through the section cited above, the sections are enforceable, and make sense, notwithstanding any obvious political or administrative difficulties.

I am satisfied that the power to make a request is that type of responsibility which would be exercised at the field level, rather than the Ministerial or upper level of administration, in that the officer functioning at the field level would be the person viewing the work or undertaking. It is my view that this duty is totally compatible with the office of the Fishery Officer, and is a power which the Minister or senior officer would in fact delegate to him.

I find that the request was in proper form, that it was given by the correct official, and I reject this heading of the Defence argument.

I am satisfied that every essential ingredient of Count 2 has been proved, and find Wilfred Dowad and Brackendale Estates Limited guilty of Count 2.

BRITISH COLUMBIA COUNTY COURT

R. v. BRACKENDALE ESTATES LTD., DOWAD, AND CANDY

FISHER Co. Ct. J. Vancouver, March 19, 1981

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Fishery officer entitled to request plans under s. 33.1(1) notwithstanding that section refers to Minister - Power to delegate implicit in section, otherwise administrative chaos and inefficiency would result.

Statutory interpretation - S. 33.1(1) of Fisheries Act, R.S.C. 1970, c. F-14, as amended - Although section refers to Minister, Fishery officer entitled to request plans - Power to delegate implicit in section, otherwise administrative chaos and inefficiency would result.

A Fishery Officer may request plans under section 33.1(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended. Although this section refers only to "the Minister" while another section (33.1(2)) refers to "the Minister or a person designated by the Minister", a power to delegate is implicit in the section. The tasks of a Minister are so many and varied that it is unreasonable to expect that he will personally carry them out. It is to be expected that he will delegate the tasks to deputies and other departmental officials. Any other approach would lead to administrative chaos and inefficiency.

M.J. Dodge, for the Crown, respondent.
N. Dowad, for Wilfred Dowad *et al.*, appellants.

FISHER Co. Ct. J. (orally): - This is an appeal against a conviction recorded by His Honour Judge Walker of the 27th of February, 1980, against the three appellants, arising out of an incident which occurred on the 21st of May, 1979 at Dryden Creek in the District of Squamish, County of Vancouver.

Very briefly, the resultant charge arose out of the fact, as found by the Provincial Court Judge of the accused having landfilled an area adjacent to the Dryden Creek, thereby closing off a tributary of Dryden Creek and thereby affecting the flow of water within the creek to the extent that offences under section 31(1) and 33.1(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, were laid.

There are three counts in the Information appealed from. Count one relates to the appellant limited company and Wilfred Dowad. Count two relates to the limited company and Wilfred Dowad. Count three relates to the appellant Nicholas Candy only. The accused named in each count were found guilty on each count by the Provincial Court Judge.

The issues before me are basically two points in that the points of appeal, one and two, come under one general heading and points five, six, and seven under a second heading.

Mr. Dowad, counsel for the appellants, has abandoned points three, four, and eight of his appeal.

Dealing now with points one and two of the Notice of Appeal, I find against the appellant in that I do not find on the submissions made to me and the reference to the transcript that the Judge, that (is) the trial Judge, did misdirect himself in considering the evidence or in failing to apply the principle in *Regina v. Sault Ste. Marie* 3 C.R. (3d) 30 at pages 31 and 32 and as referred to at page 19 of his judgment and that the totality of the evidence was considered by the trial Judge and that he expressed his finding with the proper appreciation of the defence of mistake as submitted by the appellants' counsel at trial and, although, his ruling following that quotation at page 19 of the judgment does not specifically refer to the word "mistake" I find it carries with it as a logical conclusion of his earlier observations his consideration of that particular defence and, therefore, I do not find that he erred in the application of that authority to the submissions made by counsel. If, however, I am in error in this conclusion, I would in such event apply section 613 of the *Criminal Code*, for in the circumstances of this case, I can find no miscarriage of justice would have occurred if the trial Judge were in error in his application of the principle of *Regina v. Sault Ste. Marie*, for I cannot find that any miscarriage of justice occurred.

The next question for consideration relates to points five, six, and seven of the Notice of Appeal. The issue as stated by counsel is whether Roxburgh, the Fisheries officer, being the complainant in these proceedings solely in his capacity as a Fisheries officer can make a request for plans under section 33.1(1) of the *Fisheries Act*. Appellants' counsel, in his very able submission, argues that such a request by the wording of the statute and such authority being statutorily created must be strictly construed and restricts such request to the Minister or at the very least the Minister must, through his agency, make a request to a Fisheries officer before the Fisheries officer could make application for such plans, specifications, studies, procedures, schedules, analysis.

Mr. Dowad, counsel for the appellant, points to sub-section 2 of section 33.1 for support of his submission in that that section refers to "...the Minister or a person designated by the Minister..." as being a significant reference supporting his proposition that where authority is to be delegated under the *Act*, it is specifically referred to in the *Act* and that as the portion of the section refers to the request for plans, refers to "Minister" only, that the *Act* by design rightfully or wrongfully has by its construction limited the request to the Minister or as Mr. Dowad submits, at the very least to a person specifically authorized or empowered by the Minister to request such plans.

The Crown submits that the authority of *Regina v. Harrison* 1976, 3 W.W.R. 536 and the decision of Dickson, J. speaking for the Supreme Court of Canada has application and that the function of the Fisheries officer who was admitted to be a properly authorized gazetted Fisheries officer pursuant to the *Fisheries Act* was carrying out the administrative function of the Minister and not a legislative function and is of the nature, therefore, of an issue that the Minister is not bound to give his mind to the matter personally. A reference by Dickson, J. to Lord Denning in *Metropolitan Borough and Town Clerk of Lewisham v. Roberts* 1949, 2 K.B. 608 and quoted by Dickson, J. at page 541. It is my view that the judgment of Dickson, J. applies to this case and I adopt his finding at page 542 where he said:

> *I do not think that s. 605(1) requires the Attorney General personally to appeal or personally to instruct counsel to appeal in every case.*

And continuing on with the quotation:

Although there is a general rule of construction in law that a person endowed with a discretionary power should exercise it personally (delegatus non potest delegare) that rule can be displaced by the language, scope or object of a particular administrative scheme.

Continuing on with the quotation:

A power to delegate is often implicit in a scheme empowering a minister to act.

> *...in their application of the maxim delegatus non potest delegare to modern governmental agencies the Courts have in most cases preferred to depart from the literal construction of the words of the statute which would require them to read in the work 'personally' and to adopt such a construction as will best accord with the facts of modern government which, being carried on in theory by elected representatives but in practice by civil servants or local government officers, undoubtedly requires them to read in the words 'or any person authorized by it'.*

Thus, where the exercise of a discretionary power is entrusted to a minister of the Crown it may be presumed that the acts will be performed not by the Minister in person but by responsible officials in his department: Carltona Ltd. v. Commrs. of Works, 1943, 2 All E.R. 560. The tasks of a minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally. It is to be supposed that the minister will select deputies and departmental officials of experience and competence, and that such appointees, for whose conduct the minister is accountable to the legislature, will act on behalf of the minister, within the bounds of their respective grants of authority, in the discharge of ministerial responsibilities. Any other approach would but lead to administrative chaos and inefficiency. It is true that in the present case there is no evidence that the Attorney General of British Columbia personally instructed Mr. McDiarmid to act on his behalf in appealing judgments or verdicts of acquittal of trial courts but it is reasonable to assumed that the "Director, Criminal Law" of the province would have that authority to instruct.

As Mr. Justice Dickson said (page 543), to find the answer relative to whether such authority exists or not "...will depend on the circumstances of the particular case." Here I find that it is reasonable to assume that a Fisheries officer appointed pursuant to this *Act* would have authority to request the plans referred to in the section. I therefore dismiss the appeal.

(Editor: The reductions in sentences are reported at page 482).

BRITISH COLUMBIA PROVINCIAL COURT

R. v. RICHMOND PLYWOOD CORPORATION LTD.

CAMPBELL Prov. Ct. J. Richmond, B.C., April 27, 1981

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Harmful alteration, disruption and/or destruction of fish habitat contrary to s. 31 - Fish habitat created by activities of accused - Any alteration or disruption of habitat of minor nature only - De minimus non curat lex rule applied - No destruction of fish habitat - Accused found not guilty.

The accused corporation was charged under section 31 of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, with the carrying on of a work or undertaking that resulted in the harmful alteration, disruption and/or destruction of a fish habitat. The accused unknowingly created the fish habitat by its use of a portion of its property bordering the Fraser River, and it did not therefore realize that the dumping of waste material in the area in question could constitute an offence under the *Fisheries Act*.

The trial judge found the accused not guilty because any alteration or disruption of the fish habitat was of a minor nature only, and therefore the *de minimus non curat lex* rule is applicable. Furthermore, there was no evidence of destruction of the habitat. There was as well no evidence that the alteration or disruption was harmful; if there was such evidence, the *de minimus* rule is applicable.

P.A. Haigh, for the Crown.
T.C. Marshall, for the accused.

CAMPBELL Prov. Ct. J. (orally): Now, this is the case of *Regina v. Richmond Plywood Corporation Limited* where the defendant company is charged with three counts of unlawfully carrying on a work that resulted in harmful alteration, harmful disruption and/or destruction of a fish habitat. The company is also charged in the alternative with three counts of unlawfully carrying on an undertaking with the same results. All charges are laid contrary to the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, section 31(3), and cover a period between (the) 2nd of March, 1978 and the 15th of May, 1980. The area or site involved is a portion of land or foreshore situated in front of the defendant company's plant and owned by the defendant company and being on the southern edge of the north arm of the Fraser River in the Municipality of Richmond, British Columbia. It is alleged that the work or undertaking by the company consisted of using a portion of that land as a fill area during the period in question.

Behind this case is a sincere effort on the part of all governmental levels to protect the fisheries resources. I can well understand Fisheries officers being zealous in their duties to protect and prevent damage or destruction to any fish habitat so that the fisheries resources may continue and improve to the benefit of everyone. At the same time, the Crown has an obligation in this case involving criminal charges to prove each essential ingredient beyond any reasonable doubt.

In my opinion, the first question to decide in this case is whether the area or site was a fish habitat during the period in question, that is March of 1978 to the 15th of May,

1980. Most of the evidence given during the three-day trial concerned this point. Numerous photographs of the area were submitted by Crown witnesses showing the marshland or wet area caused by the rise and fall of estuary tides in the Fraser River. Experts who visited the area took samples of marine life and plant material and gave evidence on whether this area was a fish habitat.

Fish habitat, as defined in section 31(5), "...means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes." I would point out that most of the evidence given in the photographs or by the experts on their visits to the area were after the period set out in the Information, that is after May 15th, 1980. Very little evidence was given as to the condition of this area as far back as March, 1978. Exhibit 7 is the best photography from the air of the area in question. The series of photographs taken on the ground on or about the 15th of May, 1980 show the area in various stages of tide level. There is ample evidence to show that water does come into the area regularly and the tides change and that there is an entrance and an exit for that water. The photographs also show the plant life existing there and such plants help to produce detritus or food for the fish. Exhibit 25 is a good sketch or diagram of the detritus food web found in marsh habitats. One of the witnesses, Miss Wayne, took samples of marine plants and marine life in this area on or about March 9th of this year. There is also filed as exhibits some series of studies by various research groups concerning the fisheries resources and the importance of fish habitats. While the emphasis in these studies would refer to the salmonid species, it is not limited to that particular species. Indeed, fish is defined also in the *Act* in section 2 and "...includes shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals." It is a very wide definition. And one case which I would refer to is *Regina v. Northwest Falling Contractors Ltd.*, a decision from the Supreme Court of Canada, July 18th, 1980, (reported 1980), 32 N.R. 541, 9 C.E.L.R. 145, 2 F.P.R. 296. And Mr. Justice Martland, page 549 (p. 150 C.E.L.R.), he refers to the definition of fish and says they

> *"...are all part of the system which constitutes the fisheries resource. The power to control and regulate that resource must include the authority to protect all those creatures which form a part of that system."*

One of the documents I came across during the - or at least in the exhibits also lists about fifteen different species of fish. So again I point out that the definition of fish is very wide and includes every kind of marine animal and this would fit within the detritus food web diagram on Exhibit 25.

Defence counsel argued that fish would not be wholly dependent upon such an area and therefore it would not be a fish habitat. It seems to me that there is ample evidence to show that the area could be used as a feeding area or rest area or migration area but not necessarily a spawning area. It does not matter whether the fish depend wholly or partially upon this area as long as there is some dependency that is available to fish, including all the species thereof.

Again I say that most of the evidence on this question of fish habitat comes in after the 15th of May of 1980. It is a reasonable conclusion that it was also a fish habitat immediately prior to the 15th of May, 1980. A site of this nature does not change overnight. Again I say there is very little evidence to show what the area was like way back in March of 1978. We have the opinion of an aerial photographer who said there was

a reduction in marsh area between 1978 and 1979. There is also the opinion of Dr. Lennings that it would have been a fish habitat as of two years ago. Only two opinions, no pictures, no samples of any marine life or plant life going back that far. Such evidence is not sufficient, in my view, to prove that there was a fish habitat in this area as of March, 1978. Nevertheless, for the purposes of these charges I do find that a fish habitat existed in the area in question just prior to the 15th of May of 1980.

The next question to decide is what were the works or undertakings done by the company during the period. Crown subpoenaed two employees of the defendant company as their witnesses to find out what was done and when. Mr. Jung admitted that the company used that portion of their own land adjacent to the river as a fill area. And that residue from burning, called "clinkers" plus other wastes material - dirt, sand and rocks - were dumped there approximately once every two weeks. And this practice started years ago, even as far back as 1972 when the land was purchased by the company.

The fish area is shown on Exhibit 7 and it would show the condition thereof as of approximately the 15th of May of 1980. The irregular shaped area is perhaps approximately 100 feet by 100 feet, about three feet in depth, according to the evidence. Another witness, Mr. Lloyd, from the company was aware also of the clinkers being dumped there but apparently the company was unaware of any offence under the *Fisheries Act* having been committed.

After the visit by the Fisheries officer in May of 1980 the company took immediate steps to place cement slabs around the fill area so that there would be no further extension of the fill area into the marsh land area. That is well shown on Exhibit 9, again an aerial photograph.

Further evidence by the defendant shows that the area in question was once flat land when they had purchased it approximately in 1972 but that quite a bit of sand and gravel had been taken out by trucks, leaving a rough uneven terrain between the river and the plant. Some of this removal was without permission of the company, who then took steps to place a log across the dump road so as to prevent further removal.

It also appears from Mr. Olson, a longtime employee, that they used to haul deadheads, or water-soaked logs, into that area for drying purposes and then to pull the logs back into the river through another exit. It would appear this practice created an entrance and an exit for tidal water which flowed into the uneven area. It seems to me ironic that the company is charged with alteration and destruction of a fish habitat when in fact they may have created one by their usage of that area.

So the works or undertakings as alleged would consist of using a portion of their own land as a fill area. Now, when was that done? There is very little evidence to show it was done during the period in question, that is March of 1978 to May of 1980. It appears that the dumping of fill took place as early as nine years ago when there would have been no such offence as under section 31(1). That section of the *Fisheries Act*, I understand, came into effect as of July of 1977. The only evidence of using the fill area between March of 1978 and May of 1980 is that occasional dumping of clinkers and waste once every two week(s) on top of the fill already placed there or, alternatively, a further expanding of the fill area in the marsh area.

Exhibits 6 and 7, the photographs, show waste materials on the fill area. Again, when was this placed there? Perhaps just the day before the pictures were taken. Again, I find no further evidence of any previous dumping, except through the admissions of the two employees of the company. It would appear to me that the dumping started before the period set out in the Information and that during the period set out there, 1978 to 1980, it was merely adding to the fill which had already been placed. I have some doubt as to whether the dumping or using of the fill area comes within the definition of works or undertakings as set out in the Information. But I will find that creating a fill area for waste material might be considered as a works.

The next question is, did these works or dumping of fill alter, disrupt or destroy the fish habitat? Again, very little evidence is given by the Crown on this point. Only one opinion from an aerial photographer who states that from looking at photographs taken several thousand feet in the air he is of the opinion that there was a 25 percent reduction in the marsh land. That is not sufficient in my view to prove any alteration or disruption or destruction. It is only an opinion. There are no photographs, no measurements, no count of fish life, marine life or plant life to show what the area was like some three years ago. There is opinion evidence given in this case that the fill placed there would destroy some of the marsh land. But only evidence indicates this fill may well have been placed well before March of 1978. If there has been any alteration during the period it would appear to be of a minor nature only and I would at this time apply the law well known as the *de minimus non curat lex* rule. I again say, if there was any alteration during the period it was of a very minor nature. No proof has been given of any extent which would call for a penalty. If there was any alteration or disruption *prior* to the period there would be no offence as of that time.

On the word "destruction", I find there has been no complete destruction of the fish habitat since it does still exist as of today and there is ample evidence to show that there are small fish using that area as a fish habitat. So there has been no destruction. There may have been alteration or disruption but it was of a very minor nature.

The next question which I have to answer is, if there was any alteration or disruption, was it harmful? That is one of the key words set out in the offence and must be proved also. Again I find very little evidence of harmfulness, if there was any alteration or disruption. There is no proof beyond a reasonable doubt that any harm actually occurred; no evidence to show that any less fish or marine life existed on the 15th of May, 1980 as on the 15th of March 1978; no count of fish or marine life early in that period; no photographs of any disruption or destruction. If there was any harm, again I would apply the *de minimus* rule; it is of such a minor nature that no offence has been committed.

So summing it up, I find there has been a fish habitat proven; some evidence of witnesses concerning the placing of waste material on their own land; insufficient evidence of any alteration, disruption or destruction; and if so, there is insufficient evidence of any harmful alteration, disruption or destruction. Accordingly, I find the company not guilty.

BRITISH COLUMBIA COUNTY COURT

R. v. RICHMOND PLYWOOD CORPORATION LTD.

MACDONALD CO. CT. J. Vancouver, October 20, 1981

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Alteration of a fish habitat contrary to s. 31(1) - Fish habitat created by activities of accused corporation - No reason for accused to suspect that use of its property constituted an offence - Decision of Supreme Court of Canada in R. v. Chapin (1979), 95 D.L.R. (3d) 13, 8 C.E.L.R. 151 followed - Acquittal upheld.

The accused corporation dumped ash and clinkers from its steam plant onto its property, pushing the dumped material from time to time towards a low area alongside the Fraser River. It used its property to dry logs which were dragged from the river onto the land, creating two low spots along the riverbank which permitted river water to flow into the low area when tide levels exceeded 14 feet. Consequently, tidal marsh vegetation became established in the low area and a fish habitat was established. Two small fish were found in the low area during periods when it was flooded. The entire area in question was an industrial area and was developed within the parameters of the applicable industrial zoning. The accused had no knowledge that a fish habitat had been created until so notified by the fisheries authorities.

At trial, the accused was acquitted of charges that it carried on a work or undertaking that resulted in the harmful alteration, disruption or destruction of a fish habitat contrary to s. 31(1) of the *Fisheries Act*. The trial judge was of the view that, although s. 31 was applicable, the alteration to the fish habitat was of such a minor nature that the *de minimus non curat lex* rule applied. The Crown appealed the ruling that the rule was applicable, while the accused cross-appealed on the finding that the portion of its land in question constituted a fish habitat within the meaning of s. 31.

With respect to the cross-appeal, there is ample evidence on which the trial judge could have relied to hold that a fish habitat existed. Furthermore, the argument that the effect of the finding of the trial judge is expropriation without compensation is rejected.

With respect to the appeal, it is not necessary to decide whether the *de minimus non curat lex* principle is applicable since there is a remarkable parallel between the present case and *R. v. Chapin* (1979), 95 D.L.R. (3d) 13, 8 C.E.L.R. 151. The accused had no reason to suspect that its use of its property would constitute an offence, and its acquittal is therefore upheld.

(Editor: For an interesting comment on this case, written by counsel for the corporation, see (1982), 7 *West Coast Environmental Law Research Foundation Newsletter* (No. 1), 9-11).

P. Haigh, for the Crown, appellant.
T.C. Marshall, for the respondent.

MACDONALD Co. Ct. J.: - The federal Crown appeals the acquittal of the respondent on six counts of carrying on a work or undertaking that resulted in the harmful alteration, disruption or destruction of a fish habitat contrary to s. 31(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, during the period commencing March 2, 1978 and ending May 15, 1980. The alleged fish habitat is a portion of the respondent's land on the south shore of the north arm of the Fraser River immediately to the east of the Knight Street Bridge. That portion consists of an irregular depression between the dike on which River Road is constructed and the river bank from which sand fill had been removed prior to the purchase of the property in question by the respondent in 1972. The portion of that land in question in these proceedings is roughly equivalent in area to a square having dimensions of 100 feet on each side.

The learned trial judge (Campbell Prov. Ct. J., Richmond, B.C., 27 April 1981) found that the respondent had filled part of the low portion of its land during the period in question, that the portion of the land in question was a fish habitat within the meaning of s. 31, and that the dumping of waste material was a work within the meaning of the section. However, because the learned trial judge was of the view that any alteration during the period in question was of a minor nature only, he applied the *de minimus non curat lex* rule and acquitted the respondent on the ground that the law does not take notice of very small or trifling matters.

The appeal of the federal Crown was on the ground that the learned trial judge erred by applying the *de minimus non curat lex* principle in this case. The respondent cross-appealed on the ground that there was a reasonable doubt as to whether the portion of the lands in question constituted a fish habitat within the meaning of s. 31.

The history of the property in question is of significance. The respondent had for years leased the foreshore in front of the land in question in conjunction with its log storage and sorting operation. In 1972 it decided to acquire this property in order to protect its foreshore rights. Some years prior to 1972, the previous owner had permitted the federal Government to place dredged materials from the north arm of the Fraser River on the land and the level thereof had been raised to a height of some 15 or 20 feet above the highwater mark. The prior owner then sold the dredged material to a contractor for fill and the level of the land was reduced to a flat surface sloping gradually from River Road and the dike on the south to the south shore of the north arm of the Fraser River. Still later, but prior to the acquisition of the property by the respondent, some unauthorized persons had entered on the land and removed further fill from the centre portion thereof, creating the low portion which gives rise to these proceedings.

After the acquisition of the property by the respondent in 1972 it utilized the property in two ways. First, it commenced to dump ash and clinkers from its steam plant onto the property, pushing that material from time to time toward the low area. Evidence at trial established that between March of 1978 and May of 1980 as much as 25 percent of the remaining portion of the low area was filled in this manner. Second, the respondent sought to utilize the property for the purpose of air drying logs which had sunk in its booming and sorting grounds on the foreshore due to becoming waterlogged. These logs were dragged onto the land, left for two or three years and then dragged back into the river. That process created two low spots along the river bank and permitted river water to flow into the low portion of the property when tide levels exceeded 14 feet. The evidence was that at least one tide per day on three days out of every four was sufficiently high to result in the low portion of the land becoming flooded. Over a period

of several years tidal marsh vegetation became established in the low portion of the property, and it is the partial filling of that marsh which is the subject matter of the several counts against the respondent. The learned trial judge remarked that it was ironic that the respondent was charged with the alteration and destruction of a fish habitat when in fact it had created one by its usage of the area.

I shall deal first with the cross-appeal of the respondent. Section 31 of the *Fisheries Act* reads, in part, as follows:

> *31. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.*
> ...
>
> *(3) Every person who contravenes subsection (1) is guilty of an offence and liable*
>
> *(a) on summary conviction, to a fine not exceeding five thousand dollars for a first offence, ...*
>
> *(5) For the purpose of this section and sections 33, 33.1 and 33.2, 'fish habitat' means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.*

In s. 2, the *Fisheries Act* defines 'fish' as including shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages thereof. The learned trial judge found that a fish habitat existed in the portion of the land in question prior to May 15, 1980 and there was ample evidence on which to come to such a conclusion. The respondent argued before me that the land in question is located in an area zoned and utilized generally for industrial use and that when the land was acquired by the respondent in 1972, and in fact until 1977 when the *Fisheries Act* was amended, the fill operation which it conducted was not unlawful. No one in authority informed the accused that this small portion of its land was considered a fish habitat and the practical result of the finding of fact in the court below is that there is now a cloud on the title to the respondent's land. Be that as it may, the respondent concedes that this portion of its land has developed into a tidal marsh, that the marsh growth produces detritous, that such detritous is food for various insects and invertebrates, that fish feed on invertebrates, and that two fish were found in the property in question during periods when it was flooded with such food in their gut.

There was considerable technical evidence adduced at trial by the Crown on the subject of the food cycle relative to Pacific salmon and the importance of marsh areas as a link in that food chain. The Crown's case in respect of this portion of the respondent's land is that this small marshy area is part of the food cycle of the fisheries resource. It is clear from the evidence that insofar as salmon are concerned, the particular area in question, because it is flooded for only short portions of some days and on other days not al all, is depended on only indirectly. The respondent argues that the question of dependence must import to some extent a question of degree. The respondent further argues that because of the height of tide necessary to cause flooding of the site in question and the absence of any proof that fish food would be flushed out into the river as the water receded, the respondent should have been entitled to an acquittal on the ground

of reasonable doubt. While there is some force in those arguments, they break down in the face of the facts in this case. The trapping of two fish in that portion of the respondent's land while it was flooded, even though those fish were not salmon but a stickleback and a sculpin each about 1 inch in length, enables the Crown to avoid reliance upon the establishment of this small marsh area as a link in the food chain of the Pacific salmon.

On the subject of the cloud on the respondent's title and the finding of fact in the court below being tantamount to an expropriation without compensation, I was referred by Crown counsel to a decision of the Court of Appeal of this province, data December 16, 1980, in the case of *R. v. Blackham's Construction Ltd.* (CA800055) (now reported at page 2 in this volume). That case also involved an alleged offence under s. 31(1) of the *Fisheries Act* and one of the issues was whether or not that section of the *Act* is expressed in sufficiently clear language so as to prevent a person such as the respondent in these proceedings carrying on its lawful business on property owned or leased by it. Counsel for the respondent (owner) in the *Blackham's Construction* case contended that the effect of s. 31(1) was to expropriate or otherwise prevent the lawful carrying on of a business without compensation. The Court of Appeal declined to accept that argument and concluded that to suggest that the words "no person" in the section must be read as excluding persons such as the respondent in this case, was quite untenable.

I have come to the conclusion that the cross-appeal of the respondent must fail and it is therefore dismissed.

I turn now to the Crown appeal. Did the learned trial judge err in applying the *de minimus non curat lex* principle in this case? There is no doubt on a reading of the reasons for judgment of the learned trial judge that he was influenced by the small size of the marsh area itself, the fact that not more than 25 percent thereof had been filled during the period in question, and the fact that the actions of the respondent itself had created the conditions which enabled the Crown to establish that the area in question was a fish habitat.

The Crown submits that the scarcity of marsh areas along the north arm of the Fraser makes the destruction which occurred here all the more significant and that the filling of a marsh area 25 feet by 120 feet during the period covered by the charges does not fall within the *de minimus non curat lex* rule. I was referred to *R. v. Ling* (1954), 12 W.W.R. (N.S.) 581 and *Rex v. Peleshaty* 1950, 1 W.W.R. 108 where the principle was applied. In the *Ling* case traces of heroin, measurable only in a scientific way by analysis of dust taken from the pockets of the accused, were found. In the *Peleshaty* case approximately ten drops of intoxicating liquor, an amount insufficient to drink, was found to be outside the scope and reach of the *Act*. I find that I have some reservations as to whether this was an appropriate case for the application of the *de minimus non curat lex* principle. But in view of the conclusions I have reached on another ground I find it unnecessary to resolve that issue.

The respondent conceded in argument that the offence created by s. 31(1) of the *Fisheries Act* is one of strict liability within the reasoning of the Supreme Court of Canada in *R. v. Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161, 7 C.E.L.R. 53, but submitted that the respondent is entitled to an acquittal if, on the facts, it reasonably believed in a mistaken set of facts which if true would render its act innocent. Counsel for the respondent argued that this was an industrial area, that the respondent honestly believed

it had the right to develop its land as it chose within the parameters of the industrial zoning which applied, that it received no notification that the low portion of its land was considered by the authorities to be a fish habitat, and that it had no reason in the circumstances to suspect that the marsh was a fish habitat. The respondent further argued that there was a remarkable parallel between the case at bar and the decision of the Supreme Court of Canada in *R. v. Chapin* (1979), 95 D.L.R. (3d) 13, 8 C.E.L.R. 151.

The *Chapin* case was a prosecution under the *Regulations* promulgated under the *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12. Mrs. Chapin was hunting ducks about 50 feet from a small and inconspicouus pile of soybeans, wheat seeds and wheat. The *Regulations* provided that no person shall hunt within 1/4 mile of any place where bait had been deposited. It was generally accepted that Mrs. Chapin did not know that the grain was there. The trial judge found that Mrs. Chapin believed, on reasonable grounds, in a state of facts (that no bait was there) which if true made her act an innocent one. The Supreme Court of Canada accepted that the offence in the *Chapin* case was a public welfare or regulatory offence designed to protect migratory birds from indiscriminate slaughter for the general welfare of the public and therefore a strict liability offence. The Crown submitted in the *Chapin* case that proof of making all reasonable efforts to ascertain the presence of bait was unavailing to the accused and that what was required was proof of all possible efforts. The Supreme Court refused to accept that submission and held that it was unrealistic to expect Mrs. Chapin to search through swamp, bog, creeks and corn fields, over land and in water, in search of illegal bait and that her reasonable belief that no bait was in the area was a defence. The Court held in the *Chapin* case that an accused may absolve himself on proof that he took all the care which a reasonable man might have been expected to take in all the circumstances or, in other words, that he was in no way negligent.

I find that in the case at bar the respondent had no reason to suspect that its use of this property would constitute an offence. The respondent was quick to co-operate with the Fisheries authorities after receiving advice that they considered the low portion of its land to be a fish habitat. The fact that the actions of the respondent itself in connection with its log drying operation created the tidal marsh and that the land, to the knowledge of the respondent, had shortly before its acquisition been filled to a height of some 20 feet above the high-tide mark, lead me to the conclusion that the respondent was in no way negligent.

Mr. Lloyd, the manager of the respondent was involved in the Fraser River Estuary Study as a representative of the industry. The preliminary conclusions of that study are marked as an exhibit in these proceedings and a map at page 50 of that study purporting to illustrate the location of tidal marshes does contain a dot in the approximate location of this portion of this respondent's land. However, an examination of exhibit 8A provides no clue as to the location of the Knight Street Bridge nor any way of confirming that any of the dots on Mitchell Island are this site. Furthermore, the whole import of the study and the West Water Research Centre booklets on the importance of marsh habitat in respect of the salmon stock are all related to the salmon fisheries and provide, in my view, no warning to the respondent.

I have therefore concluded that the facts of this case fall clearly within the reasoning of the Supreme Court of Canada in the *Chapin* case and that on this ground the acquittal of the respondent must be upheld. The Crown appeal is therefore dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. GREATER VANCOUVER REGIONAL DISTRICT AND GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT

GOVAN Prov. Ct. J. Richmond, May 7, 1981

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Private prosecution under s.33(2) - Considerations when sentencing - Fine necessary, but order under s.33(7) not appropriate.

Sentencing - Considerations followed - Private prosecution under s.33(2) of the Fisheries Act - Fine necessary, but order under s.33(7) not appropriate.

The Union of British Columbia Indian Chiefs commenced private prosecutions against the GVRD and the GVSDD under s.33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. On the morning of the trial, the GVRD and the GVSDD entered pleas of guilty and were each fined $5000.00 and as well placed on probation.

In sentencing the accused, His Honour Judge Govan stated that it is necessary to impose fines, and not suspended sentences, on municipalities and corporations, the amount of the fine depending on the gravity of the pollution. A $5000.00 fine is neither an extraordinarily large amount nor a nominal amount.

Pollution "... is, in part, a legislative problem, and, in part, a political problem". The provincial government has the main responsibility for solving this particular problem since it funds both of the accused, appoints pollution control personnel, etc. The federal government also has a responsibility to solve the problem, but the informant "...should have learned by now that ... the government that gave you the Post Office and the Indian Affairs Department is not the government that I would trust to look after the fishing grounds of this province".

"(T)he public can persuade governments to change their order of priorities so that ..." money is spent on pollution control equipment. It is a matter of choice by elected officials whether a bridge or a football stadium as opposed to a sewage treatment plant is built. The GVRD wishes to build a new headquarters. Perhaps it "... should build a new sewerage plant and stay in rented quarters for the time being."

Although the offence is continuing, no order will be made under s.33(7) of the *Fisheries Act*, which states:

> "Where a person is convicted of an offence under this section, the court may, in addition to any punishment it may impose, order that person to refrain from committing any further such offence or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the court, will or is likely to result in the committing of any further such offence or to take such action specified in the order as, in the opinion of the court, will or is likely to prevent the commission of any further such offence".

Both accused are on probation and should be given an opportunity to solve the problem before the Court is required to step in and make an order. Pursuant to the *Penalties and Forfeitures Proceeds Regulations* (P.C. 1973-1475, June 12, 1973) the private informant receives one-half of the fine. However, the Court is not to be seen as encouraging "... a bunch of people (to line) up at the end of (sewer pipes) with little bottles and chemistry degrees".

M. Rhodes and *M. Kansky*, student-at-law, for the private informant.
P. Butler, for the accused.

GOVAN Prov.Ct.J.: - The way counsel has been building the record I am almost assured of an appeal, I would think.

As I said in the case which I dealt with a week or two ago regarding this same kind of matter, I don't see that I should give some extended reasons for judgment, because, first of all, it is a matter of sentence, and, secondly, there is only, in my view, a limited amount that the Court can do. There is a clear delineation between what courts do and what legislatures and governments do, and I am aware of that dichotomy. Nonetheless, in the proper cases the Court can, and should, exercise the jurisdiction conferred on it by parliament, or the legislature, as the case may be.

In this case, I am prepared to say that I intend to impose a fine on each of the two accused. There has been reference to robbing Peter to pay Paul, but if I were not to impose a monetary penalty then some other municipality might well take the view that municipalities get suspended sentences, or corporations or sewerage districts get suspended sentences, and I think it would depend upon the, the amount of the fine would depend upon the gravity of the pollution.

Now, in this case, let me begin with the Rawn Report, which I think is the foundation document which was handed to me today, and I observe, for the record, that this document, the master plan, is 27 years old. It is from the horse-and-buggy days. In the days when the report was made, we could all park our cars on Georgia Street, street-cars still ran on 41st Avenue, and other things in that era. Now, this plan, however sound it may be, may well be dated by now because of the increase in population. The population has grown in numbers, in absolute numbers. The kind of contaminants in the sewerage system have grown in complexity.

Let me speak, for a moment, about source control. For example, the Nishka Indians wanted the mining company to stop dumping their mine tailings in Alice Arm. That is a form of source control, it appears to me, and one of their chief concerns is radioactive waste, according to the newspaper report that I read.

Now, it is obvious that the sewage plant at Iona Island isn't designed to handle radioactive waste, so that source control for those kinds of chemical substances, formaldehyde, disinfectants, germicides, et cetera, may well be necessary. For example, it was said by one of the expert witnesses that many chemicals, probably originating in hospitals, were found on the bank, on the Sturgeon Bank. That may well be, that while in the past large users of chemicals, like hospitals, may have to treat their own particular kind of chemical sewage before it passes on into the public sewer trunks, if I can call them that, I am thinking of chemical companies like Hooker Chemicals and other large pulp concerns that may have to treat their own chemical waste before dumping them into

the rivers and streams that take them to the oceans, but it is also true that secondary treatment is, in my view, demonstrated, there is a demonstrated need for that kind of treatment in the evidence. The, I believe it is B.O.D. rates, would indicate that.

Now, having said what we have said about this pollution at Iona Island, it is, as far as pollution cases go, of course, serious, because it is on our doorstep. It is not as serious, however, as others that I could mention, and I am thinking, for example, of the Thames River that was mentioned in the evidence, the Rhine River near Germany, the river near Chicago that caught fire it was so polluted, the Mount Canal near Buffalo, the Manangalalea (phonetic) River near Pittsburg, all these rivers have been polluted to a greater extent than the Fraser River. The unique thing about our river is, of course, it is, as counsel described, an aorta of the Province, and certainly so far as the salmon fishing industry it is the aorta.

The problem that we have in regard to pollution is, in my view a political problem -- by that I mean a small "p" political. I don't intend to cast any aspersions on any political parties. Both the government and the opposition parties have been in government during the time when this problem has been building up. I say now it is, in part, a legislative problem, and, in part, a political problem.

Now, it seems to me that the main burden of the solution of this problem must lie with the provincial government which, in fact, really funds the, both of the corporate defendants in this case. They set the laws, they set the tax rates, they appoint the pollution control personnel, they issue the permits, and they are in a position to hire and conduct such studies as necessary to require people to meet the terms of their pollution permits. As I pointed out, in Section 4 it says:

> *"A director shall not issue a permit unless the applicant for it has complied with the regulations and has supplied the plans and specifications and other information that the director requires."*

That is a section of the Pollution Control Act concerning the discharge of effluent or other waste.

Now, it is true that local governments have a responsibility, and the provincial governments have a responsibility, and the federal government might well have a responsibility, but I think that the Informant, and I am thinking of the Indian people, should have learned by now that Ottawa is a long ways away. The government that gave you the Post Office and the Indian Affairs Department is not the government that I would trust to look after the fishing grounds of this province. I think that the people of this province can, and should, take a concern and a vigilance, and make it known to their elected representatives, and require, through public persuasion, that monies be spent on such treatment, if that is the necessary thing, rather than football stadiums, for example. Now, that is a matter of choice by elected officials, whether they build a bridge, another tunnel, a football stadium, or Pier B.C., or a dam on some river. They name some of those monuments after people; but I don't know of any such treatment plant that is named after anyone, unless there was a Mr. Iona at one time; they are not very popular with politicians; but, in any event, I think the public can persuade governments to change their order of priorities so that the river is not polluted.

I am astonished that the federal fisheries branch, which has seen the number of fish caught decrease -- since 1953 the catch has diminished and keeps on diminishing -- I don't know at what point it would ever stop, but, in any event, it seems that only last year did the fisheries department start to study the Sturgeon Bank.

The offence, however, is a grave one in the sense that it is a continuing offence. I am satisfied from what I heard on the last time these defendants were before me, and Mr. Butler's submissions, that the officials in Victoria are aware, and are kept aware, of the fact that this Iona Island plant is no longer capable of meeting the standards which the government itself sets.

One other thing about that fishery, and the fisheries department -- and there is some truth to this generality -- but the Indians themselves managed the fishery for thousands of years quite successfully before the fisheries department came along.

...In the fifties when this Rawn Report was written, there was a great abundance of fish; crabs, clams, oysters, and salmon. They are not abundant now, and part of the reason is obviously related to this pollution problem.

Counsel made mention of a possibility of an order under s.33(7) of the Fisheries Act. I do not think, and I will not make an order at this time, under that sub-section. I don't think it is called for now. The accused are both on probation at the present time. It is a continuing offence, and if there are further repetitions such an order might be made, but I think the options open to the GVRD and the Sewerage and Treatment District -- Well, let me just go back on that for a moment. I understand, when we are speaking about options, that one of the things the GVRD wants to do, apparently, is build a new headquarters. Maybe they should build a new sewerage plant and stay in rented quarters for the time being. I don't think I should make an order under s.33(7) at this time. I think that the various elected and appointed officials should first get an opportunity to rectify the situation before the Court steps in. If there was a long-term continuing problem -- I understand this is the first of these cases -- then I might be persuaded to change my mind.

I think I should close with simply this. In each case, I order a fine of $5000.00 on each of the accused, in default distress. They will have three months time to pay the fine. I don't consider that either an extraordinarily large amount or a nominal amount, but I clearly want to send the signal to the corporate pollutors of our river that the Courts can and will impose fines. Is there anything further, Mr. Rhodes?

MR. RHODES

Your honour, the GVRD is not on probation at the present time; as I understand it, it is the GVSDD that is on probation.

MR. BUTLER

That is so, but, as I understand it, you are setting the same terms, and that would be satisfactory -- which one was charged the last time?

MR. RHODES

GVSDD is a Provincial prosecution.

MR. BUTLER

So would be GVRD as well added to the probation order?

THE COURT

I can make a new probation order, then, and add them, with the same terms.

MR. BUTLER

I don't think the other order has been drawn yet. The Court Clerk is supposed to draw it, and they haven't.

THE COURT

Perhaps, Mr. Rhodes, you take it upon yourself as counsel to draw the order in the appropriate fashion and give the corporate accused the appropriate warnings, and have your friend approve the order as to form, and I will sign it.

MR. RHODES

The other point is with respect to the application made under the Fisheries Regulations for one-half of the fines; the Regulations are not there, but there is a provision in the large book in the library where a private prosecutor is entitled to fifty percent of the fine itself.

MR. BUTLER

I thought it was one-third, and it was at your discretion, as I recall it.

MR. RHODES

I believe it is subject to deduction of legal fees.

THE COURT

I don't have the Regulation here, and although I am endowed by Parliament with the judicial notice that I am required to take of these Regulations I confess that when it has not come to my attention---

MR. BUTLER

I recall watching BCTV about a month ago where someone in the *Crown Zellerbach* case said the judge could award a portion. I suggest that is not appropriate in this case, your honour.

MR. RHODES

Your honour, for the reasons I stated, the idea was to go in both instances toward furtherance of dealing with this kind of problem, and also, I suppose, to defer costs in this instance.

THE COURT

Are you agreed that I could make that kind of an order, Mr. Butler?

MR. BUTLER

I haven't got the section in front of me, but there is a provision in the Act which says -- but basically there are several reasons I am against it. One is that, well I don't need to say what the reasons are, I think it would be wrong for me to say what the reasons are at this stage. I just don't feel that under the circumstances, I will say this, that it would be appropriate in this case that out of that $10,000.00 that anything should go to the complainants. For me to say anything would maybe be misinterpreted at this time.

THE COURT

I understand your unspoken submission. Mr. Rhodes, can you meet the unspoken submission? I think the reason the Court should be loath to encourage people to litigate these kinds of issues by indicating that you would award people -- in other words, we don't want a bunch of people lining up at the end of the sewer pipe with little bottles and chemistry degrees.

MR. RHODES

That I appreciate, your honour, but in this case it is somewhat different. This has been a particularly difficult matter to organize and to set up, and it has taken a lot of court time, and it has produced a clear admission of guilt on the part of the parties. I don't think you are licensing anybody in subsequent offences if the matter is taken in hand by the Court in any way, shape, or fashion. Again, this is a private matter, and the purpose of it -- I think one of the things that came out during the course of the evidence was that obviously the Federal Fisheries Department has a problem in being able to cope with the work it should be doing.

MR. BUTLER

It is not the Federal Fisheries Department that is paying the fine.

MR. RHODES

No, I appreciate that. Had that work been done, as your honour has already observed, we might not have been here at the present time; and, finally, with respect, your honour---

THE COURT

You say it should go to the Informant?

MR. RHODES

It should, your honour.

THE COURT

Mr. Butler, anything further? I understand your submission.

MR. BUTLER

No, I don't---

THE COURT

I think that I will award that to the Informant in this case because of, as it were, the Informant acting as a matter of public interest to bring the matter forward on behalf of the Indian people and the citizens.

MR. BUTLER

I don't know what the amount is under the Act? Fifty percent, $5000.00 would go, but it would be paid in here?

THE COURT

Yes, would be paid through the Clerk of the Court.

MR. RHODES

Thank you, your honour.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. IMP-PAC LUMBER LIMITED

REED Prov. Ct. J. Surrey, June 30, 1981

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Plea of guilty to charge under s. 33(2) - Discharge of deleterious substance caused by human error - Accused cooperated with authorities and took steps to ensure that situation would not arise again - First offence - No need to deter accused, but must deter others - $4,000.00 fine.

Sentencing - Plea of guilty to charge under s. 33(2) of Fisheries Act, R.S.C. 1970, c. F-14, as amended - Discharge of deleterious substance caused by human error -Accused cooperated with authorities and took steps to ensure that situation would not arise again - First offence - No need to deter accused, but must deter others - $4,000.00 fine.

The accused corporation entered a plea of guilty to a charge that it deposited, or permitted the deposit of, a deleterious substance (pentachlorophenol from its lumber treating operation) under conditions where the substance may enter water frequented by fish, contrary to section 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended. This offence, a first for the accused, resulted from human error. Steps have been taken to ensure that the situation does not arise again, and the accused has cooperated fully with the authorities. Accordingly, there is no need to deter the accused, but there is a need to deter others. A fine of $4,000.00 is therefore levied.

R. Miller, for the Crown.
J.H. MacKenzie, for the accused.

Clerk of the Court: Imp-Pac Lumber Limited stands charged on or about November the 13th, A.D. 1980 at or near the Municipality of Surrey, Province of British Columbia did unlawfully discharge or permit the deposit of deleterious substance in a place under a condition where such deleterious substance may enter water frequented by fish contrary to the form of statute in such case made and provided. (Count No. 2).

...

Mr. MacKenzie: Your Honour, the Company, Imp-Pac Lumber Ltd. pleads guilty to that count No. 2.

...

The Crown: ... We are directing a stay of proceedings on Count No. 1.

Now Imp-Pac Lumber Your Honour is a company that operates near the Fraser River, that ... treats lumber ... with what's commonly known as P.C.P.'s... Pentachlorophenols... is an extremely toxic substance... They load up a , what's called a lumber carrier, which a type of machine that

picks up lumber from underneath. They then drive this lumber carrier into a big tank which contains the solution which has the P.C.P.'s within and that soaks up the lumber and then they drive away and the lumber's been treated. This is supposedly to prevent some sort of bacterical stain.... In any event the idea is that when they drive in, there's some sort of over flow tank that takes care of the displacement of the lumber carrier. Obviously when the lumber carrier goes in the solution level goes up and in order to prevent an overflow they have some kind of overflow protection system which didn't function too well, at least on the one occasion that we know of. The results were another problem. When the lumber carriers would leave the dipping tank, as it were, they would drive to another area and drop off the lumber. When they were doing that the solution on the lumber carrier itself and the lumber would simply drop off onto the ground, onto an asphalt pavement. This all took place within some 20 to 40 feet of the Fraser River. The solution itself would flow into the Fraser River and if it didn't, then when the rains came that would mix with this solution and it would be washed into the Fraser River. The outlet tank, as I say, was examined on the date mentioned in the information, on November the 13th of 1980 and when the inspectors were out there, they actually saw this happening. They saw a lumber carrier come in and they saw the solution come out of the tank and they watched where it went and it went into the Fraser and they took three samples. They took samples of the solution itself. They took samples from the sediment on the paved service and they took samples from the water in the Fraser River at the point of entry... They examined it and found that it contained the P.C.P.'s in varying levels, depending on how close they were to the dipping tank. They've done studies on P.C.P. and they determined that it does in fact kill fish. It kills fish at very low levels of concentration and it certainly kills fish at the level of concentration this was at. They took a number of photographs which I intend to tender as an exhibit in this matter to more or less show Your Honour what took place. (description of photographs...). Two problems result from their activities, the stuff coming off the lumber carrier and the lumber itself and the stuff overflowing. The solution they use is terribly toxic because of the way they handled their operations, this terribly toxic material ended up in the Fraser River and I don't think I need say anything about the fact that the Fraser River's got a lot of fish in it and is very important to the economy of this province. The Environmental Protection Service of the Federal Government and of various provincial authorities view this as a very serious matter. ... In this case they're operating virtually right on the banks of the Fraser. They are using a very toxic material and apparently taking no care whatsoever, at least not on the day when the inspectors were out there. There doesn't appear to be any excuse for this type of this activity and it's the type of activity that's so flagrant and so common place that it's jeopardizing the fishing industry in the province and accordingly we are asking for a substantial fine. I'm told a substantial fine in a case as such of this means somewhere in the area of $5,000.00 to $10,000.00. ...

Mr. MacKenzie: Thank you Your Honour. Your Honour, I've prepared some notes for my submission and I'd like to respond to my friend's comments as I go through. I'll be referring to the pictures that my friend has referred to also but before I start Your Honour I just want to point out that if you look at picture number five, Your Honour, you'll see the lumber resting on the paved storage area, you'll see a berm going along the side of the storage area Your Honour. That berm or wall enclosed the entire asphalt storage area and is designed to keep any material which drips off the lumber from going into the river and there are drains in the storage area which lead the material dripping off the lumber back into the tank. That's very clear from both picture number five and from picture number six but I'll get into that in more detail Your Honour.

...
...

Well Your Honour as my friend has indicated, Imp-Pac is a British Columbia company which operates a mill at 130th Street in Surrey and the mill is as my friend indicated, located on the shore of the Fraser River and logs are supplied to the mill by water...

One hundred percent of Imp-Pac's lumber production is directed to the export and overseas markets. And Your Honour - just as some more background - before we get into the actual events, eight years ago, the prior owner of the mill went into receivership and the present owners took over the mill, and I'm instructed spent eight million dollars in modernizing the buildings and machinery. Presently, Your Honour, there are 140 employees at the mill with a gross payroll of 3.5 to 4 million dollars per year. The working conditions at the mill not only satisfy all Workers' Compensation Board requirements, but they in fact exceed those available and are of better quality than those available at other mills in the area, as I'm instructed.

Now Your Honour, getting to the facts in this matter, Imp-Pac treats its green lumber within 24 hours of sawing or processing by complete immersion in a liquid fungicide solution. The solution is contained in the dip tank on the mill premises, which you've seen and as my friend indicated. Lumber carriers enter the dip tank with a load of lumber to ensure that every board is fully covered. ... The tank itself is below ground level, Your Honour. A lumber carrier with a load of lumber enters the tank down a ramp thereby immersing the entire load of lumber in the solution... As my friend indicated the level of the solution rises somewhat as the lumber carriers go into the tank and of course covers the lumber, and after immersion, the carrier leaves the tank and stores the lumber on an asphalt storage area. Your Honour, you can see the lumber stored on the asphalt storage area in picture number seven. I've already indicated to Your Honour the way that Imp-Pac has constructed this storage area. It has an asphalt wall all around the perimeter and there are drains in the storage area that lead the drippings back into the tank. The drains go back into the tank. ... Your Honour the dip tank itself is a five hundred gallon tank set into a steel enclosure,

so that in the event of a rupture, the chemicals will be contained in a sealed perimeter. So you have a tank inside a sealed enclosure, and the tank itself was constructed about 10 years ago, and as as safety feature, Your Honour, when the tank was built, a two inch overflow was provided, and Your Honour will see in picture number one the overflow valve. My friend has already indicated that the point is - if you're going to have an overflow, then you put it into a proper container. During the eight years that the present owners have operated the mill, according to the mill manager, Mr. Montgomery, ... that overflow valve has been closed and he's never ordered that it be opened. It was open in this case and we'll get to that Your Honour. The chemical solution used to control sap stain and mold in fresh cut lumber is pentachlorophenol solution. It's the fungicide presently available and economically feasible for the prevention of microbiological stain on green lumber in the British Columbia forest industry, and for that matter, anywhere in North America - that's what the industry is using. Now there's quite a bit of concern about the use of this solution and the industry is ... doing research to find other solutions, but that's all that's available now.

Your Honour, in 1980 Environment Canada conducted a national inventory of the quantity of chlorophenols used in wood protection facilities and Environment Canada sent its survey questionnaire to Imp-Pac. Imp-Pac cooperated with Environment Canada and provided full information on its use of chlorophenols in the wood protection process and I don't know - Your Honour and my friend didn't mention this - but I assume this is where Environment Canada got the information which led to this prosecution.

Now as far as the actual events are concerned, Your Honour, sometime in 1979, the mill staff began to notice that they were using more solution than normally. The level of the tank kept going down and they had to keep adding water, and this dilution matter was necessary to add more chemicals to maintain the strength of the antistain solution. This had not happended on previous years so they were concerned that something was happening. They thought there might be a crack or a leak and they inspected the tank. That's when the mill superintendent discovered that someone had opened the overflow valve, and we don't know who opened the overflow valve. It was reported to Mr. Montgomery, he ordered the valve be sealed closed and he did this because he understood that it's prohibited to have this type of material going into the environment, and he was also concerned of the price of chemicals. They were losing all this money so the superintendent ordered the valve be sealed shut, and a millright went down and put a seal on the valve but he didn't check to see that it was shut. He sealed it open, but it was sealed with a seal to prevent it from being turned open, and later in the year the Environment Canada people came to the plant to enquire about the facility. ... The Fisheries officer went down there and of course he saw the valve was open. He indicated, as I understand it from Crown Counsel, that the people at the plant were very surprised when he pointed it out to them, and he ordered the seal, - you remember I mentioned the seal having put on, - he ordered the seal to be taken off and the valve to be closed.

What Imp-Pac did is not only did they take the seal off, they plugged that valve completely. They blocked it, so there's no discharge from that valve and there will be no discharge in the future. That cannot occur again so Your Honour when the discharge occurred, it was intermittent. That is, the level would rise and some solution would go out. Now we agree that it's a serious matter. It wasn't a question of a continuous large pipe, for instance in some of the cases, you have millions and gallons going out. So Your Honour, Imp-Pac co-operated fully with Environment Canada's pentachlorophenol inventory and they're willing to change to any other chemical which might become available on the market. Apparently there is no alternative available at the present time, and again I've pointed out that Imp-Pac is aware of the seriousness of working with this fungicide, and the workers and the people who drive the lumber carriers have masks and gloves and proper protective clothing.

On the question of sentence Your Honour ---

The Court: Excuse me.

Mr. MacKenzie: Yes Your Honour.

The Court: What happens as a matter of interest to the overflow now. Where does it go now?

Mr. MacKenzie: It just goes up in the tank. The level just rises Your Honour. The outlet from the tank to the valve is above the present level of the solution, and when the carriers go in, the level simply rises up and it doesn't overflow because the valve has been blocked.

The Court: Well if I understood it correctly, the reason the valve was there in the first place is when the lumber went in the level would go up and some would spill over and hence the valve leading it outward. Am I incorrect?

Mr. MacKenzie: Well that's what happened, Your Honour, but that was - the overflow valve was put in when this tank was built and was not used deliberately to take overflow out of the tank because the company doesn't want to lose the chemicals and the solution. The tank has enough capacity to handle the rising level of the solution as the lumber carriers go into the tank.

The Court: Oh, it struck me that would be a fairly simple answer to it all in the first place. I can't see what the purpose of this valve ever was.

Mr. MacKenzie: Well I'm instructed that the valve was on the tank before the present owners took over the premises Your Honour.

The Court: So nobody knows why it's there?

Mr. MacKenzie: No, Your Honour unless - we don't know why it was there. We call it an overflow valve because that's the way it operated but we certainly never

used it that way. We lost money and solution when it was left open this time.

Well Your Honour I'm instructed as my friend said the idea was to draw off the chemical and hook up the overflow valve to another tank so that you could draw off the - I suppose you could pump it out through the overflow valve into another tank without losing the chemical which is very expensive. The chemical solution that's used is diatox is very expensive.

The Court: Yes.

Mr. MacKenzie: And so we call it an overflow valve, and perhaps that's not a proper way to say that's what happened in this case, but really what in effect it is, it's a valve which can be used to withdraw the solution from the tank and presumably pump it into another proper container.

The Court: Alright then my question was really what is replacing this valve or the solution just going to stay there forever more? Is that the idea now?

Mr. MacKenzie: Well the solution will be in there and some of it will evaporate Your Honour, but if it becomes necessary to empty the tank then they'll simply put a pump and a hose into the front of the dip tank.

The Court: I see, so the net result of all of that, it is impossible now for this ever to occur again?

Mr. MacKenzie: Yes Your Honour. It's been plugged with a steel plug, and it's impossible to operate that valve. You can't get that plug out.

The Court: Alright I understand now.

Mr. MacKenzie: Your Honour I have some general submissions as to sentence.

This is a first offence. This is the first time that Imp-Pac has been charged with an offence under the Canada Fisheries Act and I'm instructed that they've never been charged under the Pollution Control Act either.

As far as cooperation is concerned Your Honour, Imp-Pac has cooperated with the Environmental Protection Service in its pentachlorophenol inventory and acted quickly to prevent a reoccurrence of the discharge once the discharge had been brought to its attention by Environment Canada officials. ...

Your Honour, Imp-Pac is a good corporate citizen. We submit and we admit the discharge occurred and we're very concerned about it. We admit that the solution is toxic, that's why we use it. We have to use it. We're producing lumber for Canada's export trade. We've entered a plea of guilty to the Canada Fisheries Act charge.

Now Your Honour, my next point is that this discharge was not a deliberate discharge. Imp-Pac has not disregarded environmental legislation in a brazen or cavalier manner. Your Honour, section 33(2) is a strict liability section, in my submission that goes to liability and in my submission the Court can take mens rea, that is intent into consideration in levying the fine and I have some case authority for that proposition, Your Honour.

The amount of the discharge is also in my submission taken in consideration, Your Honour, in these cases, and in our submission it was an intermittent discharge, and not a large spill as occurred in many other Fisheries Act prosecutions.

The Court: Would it be fair to say that while the individual amount being discharged at any given moment would be small or relatively so, that it did take place over a long period of time. Obviously the company had no idea this was happening, but from the point when the valve was thought to be welded shut to the point when it was eventually discovered, it seems to me this must have occurred on various occasions. Is that a fair statement?

Mr. MacKenzie: Yes, it is Your Honour. We make it about two or three months that this was occurring Your Honour.

The Court: Thank you. That's fairly said.

Mr. MacKenzie: Your Honour, my friend mentioned the (toxicity) tests, and we don't dispute that. Those are the tests done by Environment Canada, but we would point out Your Honour that there's no evidence given that fish kills in the Fraser River are a result of the discharge, and the point would be without meaning to say that this is not a serious charge and that Imp-Pac did not consider this matter very seriously, any solution that did go into the river would be diluted and perhaps that's why there was no evidence of fish kills in the river.

On quantum of fines Your Honour, my friend has referred to 3,000.00 to 5,000.00 and I must say that I don't disagree with that.

The Crown: Excuse me Your Honour 5 to 10. ($5,000 to $10,000)

Mr. MacKenzie: Alright 5 to 10, I beg your pardon. I'm sorry. I don't disagree strongly with the lower range of that Your Honour. ...

The Crown: I just want to make a brief response Your Honour. My friend has dealt very throughly with the overflow valve problem and has dealt not at all with the PCP's coming off the lumber carrier and the lumber after they had been taken out of the tank.

The Court: I gathered that what your friend said that if indeed they are obviously coming off the lumber but that they could not, if I understood him correctly, enter into the river section because they were taken by way of

sewage into a tank. In other words, when one looked at the photographs that you were provided, the material there would go into drainage. It could not get out and into the ditch leading into the river. I don't want to anticipate his answer to that particular problem but that was my understanding - at least how he answered it.

The Crown: That's not my understanding of the fact, Your Honour. My understanding of the facts is it does in fact drain into that ditch and right into the Fraser. Not to the same degree and it doesn't cause the same problems as did the pipe or the overflow valve but it's certainly a problem and it doesn't seem to have been dealt with it all.

The Court: Well perhaps I should hear him. Thank you for pointing it out. I'd like to hear ... if I've misunderstood what the answer was. Perhaps you might tell me, Mr. MacKenzie, ... does the system that you refer to controlling the liquid shown in pictures 7 and 8, which you've referred to as being some kind of drainage system and my understanding was that it was in a closed circuit as it were. Is that accurate what I'm saying?

Mr. MacKenzie: Yes Your Honour, as you can see from the pictures number 5 and number 6, I think Your Honour followed my explanation exactly and correctly. The solution cannot escape the storage area because the storage area is surrounded completely by that asphalt wall which is designed to keep the solution away from going into the river. Now this picture number 5 does show that ditch and there's water in that ditch and I'm instructed that's runoff from the roof of the dip tank. ... It is a wet day, as you can see, and that's rain water that's run off the top of the dip tank. Now if you go over to ... number 7 or number 8 you can see again that the asphalt wall surrounds the storage area, goes right to the edge of the dip tank and you can't see the drains on this, but there are drains. The storage slopes so that anything that comes off the lumber will go into the dip tank. You can see in picture number 8 that, of course, there was a lot of rain that day, and there's a lot of water around that's not attributable to drippage off the lumber loads.

My friend is correct Your Honour, ... the major problem ... was from the overflow valve and that's where the solution that came out of the overflow valve was going - onto that wood and debris there and right down into the river which is right down at the bottom of this slope.

The Court: I think that's quite clear and I think you've provided an explanation unless the Crown takes issue with the closed circuit, if I could describe it that way, drainage system on the paved area. I think it's important only in one sense and that is the sense that it shows that the company is not careless or unconcerned about the disposition of the chemicals, and I think that, of course, it reflects in the cases as to what kind of diligence people take, what kind of attitude they take. The C.P.R. case, for instance, is one which attitude played a large part, and I think it's important in this case to demonstrate, and unless the Crown takes issue with the last statement, I think the demonstration here has been dealing with the paved surface area, that that is not the cause or even a

contributing cause to the (P.C.P.'s) ... entering into that stream, and the real serious harm was as a result of the valve. I don't know whether you want to pursue it further.

The Crown: No Your Honour.

The Court: First Mr. MacKenzie let me say once again what a pleasure it is to have you and the manner in which you present your case - both in it's written material and in your oral submissions, it shows a complete understanding of your client's problems and also an understanding of the environmental problems which ... have to be faced before the river is killed entirely by the misuse of people constantly treating it as the largest sewer in North America, and I don't mean ... - to place all of the blame ... on your client. This case is a minimal one, and one I find of some considerable interest when one looks at the cases relative to sentencing. For instance as I look quickly to the case in Nova Scotia involving Texaco (2 Fisheries Pollution Reports 215). It was interesting there because in many ways this case sort of resembles that one, and where His Honour Judge McCleave ... on page 223 (2 Fisheries Pollution Reports) sort of looked at the damages and the sorts of things which people can be found to be blameworthy of. He says, and this is the third paragraph or the beginning of the second, whichever it might be.

> *The Court asked him if it could assess the cause of the crack and in order give differential stress material, material fatigue and Act of God*

and then he goes on to deal with the sort of accidental things,

> *"Could the break have been foreseen? I have to think it is not really a matter an act of God when an act of God is a defence since the almighty can be expected to provide Halifax with cold weather at some time during the winter."*

I think he's really saying, apart from the quaintness of that expression, is that in turn there are situations in which accident does intervene and I suppose you could call an act of God, but you could still see that some kind of diligence would have prevented it. I think that case falls within the framework of the case I have before me. The other cases referred to, some of them more flagrant, some of them much more dangerous in terms of total of amount. The larger fines reflecting either repeated offences or offences where warnings were given and none of that seems to be present in this case. What we do seem to have is a human error, well be it a bad one, which in turn led to the pollution which is complained of. I am mindful because I have heard now quite a few of these types of cases either environmental or fisheries. They are closely tied into each other. I'm aware ... of a task force on the environment and the problem of trying as much as able to clean up the Fraser River to allow two great industries, very important industries to this province. I think the lumber industry is certainly to be ranked number one, and fishing is probably two or three or somewhere in the top industry, so

they've got to learn to live at peace with each other, and prevent the extinction of one industry as result of the accidental goings on of another.

There's no question when counsel makes reference to the employment of the lumber industry. It is British Columbia's number one industry. I think the factors that counsel have been referred to have all been amply stated by him. This is a first offence. It's certainly not a deliberate event. It was accidental. It is also equally a consideration that and an indication that when one enters a guilty plea of recognizing one's responsibility, I think generally the view is, well we've entered a guilty plea, that saves everybody a lot of time and money and prosecution and so forth. While that is true, the other ... side of the guilty plea is an acceptance of responsibility when all of the facts are brought home and I think that is an important factor, not only the expediteness of the plea but also the fact that recognition of the error that has been committed. I'm impressed also that this company has cooperated at all times with Environmental Canada officials and indeed in a sense caused the investigation of their property by responding with the information which they did which in turn led to an inspection and in turn led to the and fortunately to the finding of the defect. The situation has been rectified. It can't happen again and I think that also speaks well on behalf of this comapny. The importance then I guess is not so much to this individual company but deterrance generally in the overall programme of trying to preserve the environmental aspects of the Fraser River. That is, as I've mentioned before, a terribly important problem and I'm sure that Imp-Pac and every other mill and similar lumber company along the Fraser River of which there are many. There must be 50 are becoming increasingly aware. There are of course going to be some people who will regard it as a licence to be paid to totally disregard the problems of the environment, and so the fine must reflect that is not going to be treated as a licence to dump whatever people feel into the river. And while I don't think it's necessary to deter this corporate entity, it is obviously necessary to deter others. All of the mitigating factors come together as well and I think I should take those into consideration. The Crown has suggested a range of fines and as have the defense.

I think that in order to appropriately deter others the fine should be a significant one and yet still remembering that this is an individual corporation. The fine will be $4,000.00. Of course there is no default. There's just distress. Once again I thank you most for your able presentations and I thank Crown Counsel who has had to take over the file on very short notice and in his usual fair way has stated his case.

ONTARIO PROVINCIAL COURT

R. v. CYANAMID CANADA INC.

WALLACE Prov. Ct. J. Niagara Falls, August 28, 1981

Due diligence - Accused deposited deleterious substance into water frequented by fish contrary to s. 33(2) of Fisheries Act, R.S.C. 1970, c. F-14, as amended - Accused complying with control order issued under The Environmental Protection Act, 1971, S.O. 1971, c. 86, as amended (now R.S.O. 1980, c. 141, as amended) - Due diligence a defence to prosecution under s. 33(2) only upon completion of control order.

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Deposit of a deleterious substance into water frequented by fish contrary to s. 33(2) - Accused complying with control order issued under The Environmental Protection Act, 1971 - Due diligence not a defence.

Sentencing - Accused guilty of offence under s. 33(2) of Fisheries Act - Many mitigating circumstances - $1.00 fine appropriate.

Cyanamid Canada Inc. discharges effluent containing ammonia from its chemical plant in Niagara Falls into the Welland River. The company is required, under a control order issued under *The Environmental Protection Act*, S.O. 1971, c. 86, as amended (now R.S.O. 1980, c. 141, as amended), to reduce by 1984 discharges of ammonia, among other substances, to the River. The present effluent killed a number of rainbow trout within one minute in a bioassay test. Federal and provincial authorities, however, refused to commence prosecutions against the company for violations of s. 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended.

On a private prosecution for a breach of s. 33(2) of the *Fisheries Act*, *held*, the company is guilty.

The *Fisheries Act* applies to bodies of water such as the Welland River which are not fished commercially. The defence of due diligence, which is available to an accused in a charge under the *Act*, cannot be made out in the present case. Although the company is in compliance with the control order, and is doing all that a reasonable corporation would do, due diligence to prevent an offence in 1984 is not a defence to the offence alleged to have been committed on 23 March 1981. The company is therefore guilty, but in view of the mitigating circumstances is fined only $1.00.

R.K. Timberg, V. Adamson and J. Castrilli, for the private informant.
C.C. Lax, for the accused.

WALLACE Prov. Ct. J. (orally): - Cyanamid of Canada Inc. is charged with one count of depositing a deleterious substance, namely, ammonia effluent, from its Welland chemical plant on Garner Road, into water frequented by fish, namely, the Welland River at the City of Niagara Falls, Ontario, on March 23rd, 1981, contrary to section 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended.

The charge is a private complaint, federal justice and/or fisheries authorities having declined an invitation to prosecute.

The facts in this case are as follows. The accused, Cyanamid Canada Inc., owns and operates a multi-building factory complex situated on the north shore of the Welland River in the City of Niagara Falls, Ontario. There it produces chemical fertilizers of which ammonia is a main component.

On the north bank of the Welland River, at the place where the Cyanamid factory is located, is situate a 36 inch diameter sewer pipe (see the photograph, Exhibit 1) through which from time to time a liquid effluent flows into the Welland River. There was no evidence tracing the path of this pipe nor locating its source. All of the witnesses including defence witnesses, however, referred to this pipe as being the Cyanamid pipe and it is a reasonable inference from all the evidence that the pipe has its source somewhere within the Cyanamid factory premises and that any liquid effluent flowing through the pipe into the Welland River has its source or sources within the Cyanamid plant. I make that inference and I find as a fact that the said effluent is discharged into the Welland River by the accused corporation through the sewer pipe.

The Welland River has its source somewhere in the western portions of the Niagara Peninsula in the Province of Ontario. It then flows easterly for several miles until it reaches the City of Welland, Ontario, where it intersects with the Welland Canal, the latter flowing north and south and providing a passageway for ships to traverse from Lake Ontario, to the north, to Lake Erie, to the south, and return.

The waters of the Welland River flow under the Welland Canal by means of a specially constructed and engineered siphon. The river waters are sucked down and under the canal and come up on the other side of the canal to continue their easterly flow. Because of water pressure changes involved in the siphoning process, no fish can survive passing through the siphon. All fish found in the Welland River west of the Welland Canal therefore are isolated from all fish found in the Welland River east of the Welland Canal.

The Welland River then flows easterly from the Welland Canal for several miles, passes the Cyanamid factory and continues easterly for a few more miles to the Niagara River at a point just above the cataract at Niagara Falls.

Where the Welland River intersects the Niagara River, engineers have constructed a dam which reverses the flow of the Welland River so that Niagara River water is forced to flow into the Welland River. This water together with the Welland River water then flows through a canal or canals constructed by Ontario Hydro and is carried to hydro generating plants, passes through turbines and is subsequently discharged into the Niagara River below the cataract at Niagara Falls. Any fish finding their way into the hydro canal system are doomed.

There are fish in the Welland River, both west and east of the Welland Canal. The fish found west of the canal are more numerous and of a higher quality than the fish found east of the canal. The principal species of fish found in the river east of the canal, that is in the part of the river where the Cyanamid factory is located, is catfish. These fish are not numerous in this eastern area of the river. They are a scavenger fish not prized by sport fishermen. The evidence as to these fish was given by Robert Lewies of the Ontario Department of Lands and Forests and by Dr. Michael Dickman, an Associate Professor of

Biological Sciences at Brock University. Mr. Lewies referred to creel counts of fish made in the Welland River in 1978 and Dr. Dickman referred to recent counts of fish in the Welland River made by one of Dr. Dickman's students under Dr. Dickman's supervision.

On the afternoon of March 23rd, 1981, Dr. Dickman, accompanied by the private complainant in this case, attended at the place where the Cyanamid sewer pipe empties into the Welland River. There was a steady flow of liquid effluent passing through the pipe into the river. Dr. Dickman obtained several pailsfull of the effluent and he also collected several pailsfull of water from the Welland River taken from a point 300 metres upstream from the effluent pipe. These pails were sealed and the effluent and river water were taken to Dr. Dickman's laboratory for testing.

The effluent pouring from the Cyanamid sewer pipe was very hot, it being a temperature of about 38 degrees Centigrade. Dr. Dickman cooled the effluent by placing plastic bags containing ice into the effluent and then removing the bags and any ice or icewater remaining therein. The effluent was cooled to a temperature of 15 degrees Centigrade.

Dr. Dickman then placed the cooled effluent in certain aquariums and he placed Welland River water in certain other aquariums. He then placed certain rainbow trout (fish) in each of the aquariums. The oxygen level in all aquariums was controlled.

Within 51 seconds all fish placed in the aquariums containing effluent were dead. All of the fish in the aquariums containing Welland River water lived for many hours.

The effluent in issue was being deposited into the Welland River under the watchful eyes of Ontario environmental authorities. These authorities acting under the Ontario *Environmental Protection Act*, S.O. 1971, c. 86, as amended (now R.S.O. 1980, c. 141, as amended) had spent more than a year in attendance daily at the Cyanamid factory studying the Cyanamid production processes and preparing an engineering emission study with respect to both air pollution and water pollution. These authorities had complete cooperation and assistance from Cyanamid executives at all times.

The efforts of the Ontario environmental authorities culminated with their issuing to Cyanamid on February 10th, 1978, a Control Order, Exhibit 7, directing and ordering Cyanamid to install certain pollution control equipment by certain dates set out in the Control Order. Certain of the equipment was to be installed during the first year of the order, certain of it to be installed in the second year of the Order and so on until the year 1984, by which time all equipment would be in place.

The Ontario authorities therefore, set up a schedule of priorities concerning pollution control. They gave higher priority to air pollution control than to water pollution control, presumably on the basis that air pollution affecting thousands of citizens was of higher priority than water pollution affecting a handful of catfish.

The cost to Cyanamid by the conclusion of the program in 1984 will be about 20 million dollars. Nine million dollars has been spent by Cyanamid up to the end of 1980 and another three million dollars will have been spent by it in 1981. Thirty-five percent to 40 percent of the pollution control program has been completed. All equipment has been installed on time and Cyanamid is not in default under the pollution Control Order.

At all times the Ontario pollution control and authorities have monitored the progress of Cyanamid. At all times the cooperation of Cyanamid with these authorities has been exemplary.

Some difficulty has been encountered with respect to the installation of equipment at Cyanamid to remove ammonia from its effluent. There was a delay to permit the necessary technology to be developed. Then some processes considered were found unsuitable because they would not function in cold winter weather. Finally a new process has emerged which will function in winter weather and which has the added advantage of permitting a recovery of ammonia removed from the effluent. Approval for this process is expected shortly from the Ontario environmental control authorities. It will then take 19 months to install this process but once it is installed only 10 parts per million of ammonia will remain in the effluent discharged by Cyanamid into the Welland River.

Because of the provisions of section 102(2) (now s. 146(2)) of *The Environmental Protection Act*, 1971, S.O. 1971, c. 86, as amended, and because Cyanamid Canada Inc. is not in default under the provisions of the Control Order issued February 10th, 1978, Cyanamid Canada Inc. cannot be prosecuted under the provisions of the said *Environmental Protection Act*.

Based on these facts, counsel for the accused corporation has argued three grounds for dismissal of the charge before this Court as follows.

Firstly, that the prosecution has failed to prove beyond a reasonable doubt the actus reus of this offence; secondly, that section 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, applies only to waters which support commercial fisheries and does not apply to small streams such as the Welland River which are not fished commercially; and thirdly, that the accused corporation has shown due diligence in its efforts with Ontario environmental protection authorities to abate and to put an end to the discharge of ammonia effluent into the Welland River.

I shall deal with each of these arguments in turn as follows.

Proof of Actus Reus

At no time was any chemical analysis conducted with respect to the effluent discharged from the Cyanamid premises on March 23rd, 1981, and therefore there is no evidence before this Court as to the chemical composition of this effluent.

Various witnesses for the prosecution attempted to show that the effluent contained ammonia by testifying that the effluent smelled strongly of an ammonia odour.

I would not have been satisfied beyond a reasonable doubt based only on the evidence of odour that the effluent contained ammonia. However, the evidence of odour is accompanied by evidence that ammonia is the main component of fertilizers manufactured by Cyanamid. There is also evidence that Cyanamid has been making efforts to install a process to remove ammonia from its effluent. I thus conclude, based on all of the evidence, including the evidence of ammonia odour, that the Cyanamid effluent collected by the prosecution witnesses on March 23rd, 1981, contained ammonia although the concentration of ammonia in the effluent is not proven.

The next issue is whether ammonia or ammonia dissolved in a liquid effluent is a "deleterious substance" as defined by the *Fisheries Act*.

"Deleterious substance" is defined in section 33(11) of the *Fisheries Act* as follows:

> *33(11) For the purposes of this section and sections 33.1 and 33.2 'deleterious substance' means (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequent that water, ...*

The Oxford International Dictionary defines "deleterious" as "physically or morally harmful or injurious."

In the case at bar the prosecution seeks to show that the Cyanamid ammonia effluent is a deleterious substance because of the tests performed by Dr. Dickman wherein all the fish placed in the effluent died within 51 seconds. The defence submits, however, that while Dr. Dickman and Dr. Sprague, a Professor of Zoology at Guelph University, testified that Dr. Dickman followed acceptable test procedures, another prosecution witness, David Wells, a toxicity scientist with the Ontario Ministry of the Environment, testified that a standard bio-assay test requires that dilutions of the effluent be tested, and thus by inference the failure by Dr. Dickman to test dilutions of the effluent casts doubt upon his testing methods and the results of his tests.

Because of the conflict of evidence among prosecution witnesses, I find this defence argument persuasive. However, I also find this issue to be academic because there is direct evidence from Dr. Dickman which I accept that ammonia is harmful to fish in that it causes damage to their gills. In my view this evidence of the injurious effects of ammonia upon fish is sufficient to establish ammonia as a "deleterious substance" as defined in section 33(11) of the *Fisheries Act*.

In coming to this conclusion I follow the decision of the British Columbia Court of Appeal in the case of *R. v. MacMillan Bloedel (Alberni) Limited*, (1979), 47 C.C.C. (2d) 118. In that case the accused corporation spilled 170 gallons of bunker C oil during unloading at its deep sea dock at Alberni Inlet, British Columbia. It was argued that there were no fish in the water under the dock into which the oil was spilled and therefore the oil was not spilled into water frequented by fish.

That argument was rejected by the British Columbia Court of Appeal. At p. 120, Seaton, J.A. said:

> *I think that approach too narrow. It restricts the enquiry to commercial fish present at the moment of the spill in the very drop of water into which the oil was spilled. I am not prepared to accept any of those restrictions. The definition of 'fish' is given in the Act and it is broad. The section does not speak of 'water in which there are fish' but of 'water frequented by fish.' To restrict the word 'water' to the few cubic feet into which the oil was poured would be to disregard the fact that both water and fish move. I think that the learned County Court judge did not err in law when he concluded that this deposit took place into water frequented by fish.*

It was argued that the prosecution was required to prove that after the oil spill the water was made deleterious.

That argument was also rejected by the British Columbia Court of Appeal. Seaton, J.A. at p. 121 said:

> *What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To re-phrase the definition section in terms of this case, oil is a deleterious substance if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that water is rendered deleterious to fish or to the use by man of fish that frequent that water. Applying that test to the findings of fact here, bunker C oil is a deleterious substance. Once it is determined that bunker C oil is a deleterious substance and that it has been deposited, the offence is complete without ascertaining whether the water itself was thereby rendered deleterious. I do not think that the words 'that water' in the definition section mean the water into which it is alleged the accused deposited the substance. Those words refer back to 'any water', at the beginning of the definition; the hypothetical water which would degrade if the oil was added to it.*

Seaton J.A. suggested that the depositing of a teaspoon of oil in the Pacific Ocean could constitute an offence under section 33(2) of the *Fisheries Act* and he continued at p. 122 as follows:

> *Had it been the intention of Parliament to prohibit the deposit of a substance in water so as to render that water deleterious to fish, that would have been easy to express. A different prohibition was decided upon. It is more strict. It seeks to exclude each part of the process of degradation. The thrust of the section is to prohibit certain things, called deleterious substances, being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply.*

Leave to appeal the *MacMillan Bloedel* decision to the Supreme Court of Canada was refused.

The *MacMillan Bloedel* case impliedly overruled and/or refused to follow a number of lower court decisions which held that there had to be proof that the water had been made deleterious or that fish in the water had been harmed. Two of these cases were relied upon by defence counsel on behalf of Cyanamid, namely, *R. v. Great Canadian Oil Sands Ltd.* decided in Alberta Provincial Judges' Court at Fort McMurray by Aime, Prov. Ct. J., on February 23rd, 1977, and *R. v. Great Canadian Oil Sands Ltd.* decided in the Alberta District Court at Edmonton by McClung, Dist. Ct. J., on January 10th, 1978.

I apply the example or analogy referred to by Seaton, J.A. in the *MacMillan Bloedel* case concerning a teaspoon of oil deposited in the Pacific Ocean constituting an offence under section 33(2) of the *Fisheries Act*. It follows that it is not material nor relevant as to what concentration of ammonia was present in the ammonia effluent of Cyanamid and as to what volume of ammonia was deposited into the Welland River on March 23rd, 1981.

I find as a fact on the evidence before this Court that ammonia is a deleterious substance as defined by section 33(11) of the *Fisheries Act* and that Cyanamid deposited that deleterious substance into the Welland River on March 23rd, 1981, and that the Welland River is frequented by fish.

I therefore find that the actus reus of the offence charged has been proven beyond a reasonable doubt.

The Applicability of Section 33(2) of the *Fisheries Act* to Non-Commercial Fisheries

Section 91(12) of the *British North America Act* gives the Parliament of Canada jurisdiction over sea coast and inland fisheries.

In two recent decisions the Supreme Court of Canada has considered the constitutionality of two subsections of section 33 of the *Fisheries Act*.

In the case of *Fowler* v. *The Queen* pronounced June 17, 1980, (2 Fisheries Pollution Reports 286) the Supreme Court of Canada held that section 33(3) of the *Fisheries Act* was *ultra vires* the Parliament of Canada. That subsection prohibited loggers or lumberers from depositing slash, stumps or debris into water frequented by fish. The Court held that this subsection did not link the proscribed conduct to harm to fisheries and it was therefore *ultra vires*.

In the case of *Northwest Falling Contractors Ltd.* v. *The Queen* pronounced July 18, 1980, (2 Fisheries Pollution Reports 296) section 33(2) of the *Fisheries Act*, which is the section under which the accused Cyanamid is charged, was held by the Supreme Court of Canada to be *intra vires* the Parliament of Canada because this subsection is aimed at the protection or preservation of fisheries.

There is no definition of "fisheries" in the *British North America Act*.

The most quoted and accepted judicial definitions of "fisheries" are set out by Newcombe J. of the Supreme Court of Canada in the case of *Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act*, 1914, 1928 S.C.R. 457 at p. 472 as follows:

> *In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows: A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.*
>
> *In Dr. Murray's New English Dictionary, the leading definition is:*
>
> > *The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.*

These definitions were quoted and approved by the Supreme Court of Canada in both the *Northwest Falling Contractors* and *Fowler* cases.

In the case of *March Fishing Co.* v. *United Fishermen and Allied Workers' Union* (1972) 24 D.L.R. (3d) 585 at p. 592 Davey, C.J.B.C. discussed these definitions as follows:

> *The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found, and the right is exercised. Using that definition there is nothing in it to suggest that head of legislative authority is directed to the regulation or control of the rights and obligations as between*

themselves of the employers and employees who engage in the business of exploiting the resource.

Murray's definition is more suggestive of that because it puts the emphasis on the business or industry of exploiting the resource; so because the conduct of business or industry usually requires labour of men working under the direction of management, it might be argued that head 12 includes the regulation or control of the employment inter se of those engaged in the exploitation of the resource.

However, I consider the weight of authority supports the opinion that the subject of the authority conferred upon Parliament is the natural resource itself, and not the relation of employers and employees who are engaged in exploiting it.

In The Queen v. Robertson (1882) 6 S.C.R. 52, concerning the right of Parliament or the Legislative Assembly of New Brunswick to grant fishing rights, Ritchie, C.J., at p. 120 observed in effect that head 12 was directed to subjects affecting fisheries generally, tending to their regulation, protection, preservation, improvement and increase; such general laws as would protect the fisheries as a source of national or provincial wealth.

In the case of *Interprovincial Co-Operatives Ltd. v. The Queen* (1976) 1 S.C.R. 477, Laskin, C.J.C. at p. 495 in a dissenting judgment said:

Rather it (federal power in relation to fisheries) is concerned with the protection and preservation of fisheries as a public resource.

While the judgment of Laskin, C.J.C. in this case is in dissent, the above-quoted portion of his judgment was quoted and approved by the full Court in the *Northwest Falling Contractors* case.

Based on these authorities I conclude that the preservation of a natural resource definition is the correct and judicially accepted interpretation of "fisheries" in section 91(12) of the *British North America Act*. This being so, it follows that it is not material nor relevant whether a particular waterway or body of water is fished commercially. So long as the waterway or body of water contains fish then it contains the natural resource which is within the jurisdiction of the Parliament of Canada to protect.

The Defence of Due Diligence

The defence of due diligence is established by section 33(8) of the *Fisheries Act* which reads as follows:

In a prosecution for an offence under this section or section 33.4 it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

The defence of due diligence was also approved and recognized by the Supreme Court of Canada in the case of *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 7

C.E.L.R. 53 where the Court held that public welfare offences fall into a category between offences where mens rea must be proven and absolute liability offences. This middle group of offences was described by Dickson, J. at p. 374 (pp. 70-71, C.E.L.R.) as follows:

> *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 that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be 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. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.*

At p. 367 (p. 70, C.E.L.R.) Dickson, J. held that the burden of proving due diligence was upon the accused to the standard of balance of probabilities.

It appears to this Court to be obvious that the due diligence to be established must be referable to the specific offence before the Court. The test is whether Cyanamid did all that a reasonable corporation would have done in the circumstances and took all reasonable steps to avoid the outflow of ammonia effluent from its factory into the Welland River on March 23rd, 1981.

The evidence discloses and I find that Cyanamid has done all that a reasonable corporation would have done in the circumstances and has taken all reasonable steps to avoid the outflow of ammonia effluent from its factory into the Welland River as of the year 1984 when all processes required by the Control Order of February 10th, 1978, have been installed and are operational.

I find, however, that due diligence to prevent an offence in 1984 is not an answer to an offence alleged to have occurred on March 23rd, 1981.

There is no evidence before this Court to show that Cyanamid did anything to halt the flow of ammonia from its pipe into the Welland River on March 23rd, 1981, and in my view the accused corporation therefore has failed to establish beyond a balance of probabilities the defence of due diligence.

I appreciate the fact that it would have created a tremendous financial burden upon the accused corporation to have closed and sealed the pipe on or before March 23rd, 1981, and it may have required that the Cyanamid factory be shut down and that many jobs be lost. These factors, however, do not relate to the issue of guilt or innocence with respect to the charge before this Court. They are mitigating factors which will be weighed by this Court in the imposition of sentence.

For these reasons I conclude that all three defences raised fail. The accused corporation is found guilty of the offence before the Court as charged.

There are a multitude of mitigating circumstances in this case which are to the benefit of Cyanamid. I shall enumerate eleven of those mitigating circumstances as follows:

1. There is no evidence that so much as one fish was killed in the Welland River at any time because of the discharge into said river of the Cyanamid effluent.

2. There was evidence that the numbers of fish in the Welland River compare favourably with the numbers of fish in other streams in Southern Ontario.

3. The particular portion of the Welland River where the Cyanamid plant is located east of the Welland Canal is a poor quality fishing area in any event and not a good sport fishing area because the waters there are principally inhabited by catfish.

4. I conclude that the particular area of the Welland River east of the Welland Canal never will be a good fishing area at any time because even if the river water were purified and even if the river were stocked with new fish of a higher quality species, a great many of those fish would be lost because of the hydro waterway system and only a minimal number of fish would remain in the river at any time because of the hydro system.

5. There is no evidence of deterioration of the water because the ammonia effluent was placed therein. The evidence before me revealed that tests of ammonia in the water above the plant were identical in results to tests of the ammonia level in the water below the plant.

6. The effluent was deposited with the approval of the Ontario environmental officials under their daily monitoring and supervision.

7. Cyanamid has spent 9 million dollars to the end of 1980 and will have spent 12 million dollars to the end of 1981 to abate the pollution. By the end of 1984, a total of 20 million dollars will have been spent. This is a substantial financial commitment to the abatement of pollution.

8. There has been excellent cooperation between Cyanamid and Ontario government environmental authorities. A representative of the Ontario Ministry of the Environment gave evidence at trial and was high in his praise of Cyanamid officials.

9. Cyanamid has been prompt in installing the pollution abatement equipment required by the Control Order. There is no default under the Control Order. While there has been a delay in installing the equipment to remove ammonia from the Cyanamid effluent, that delay has been satisfactorily explained, in my view, by the need for time to develop the necessary technology which technology has only recently been perfected.

10. The problem concerning the Cyanamid effluent is of limited duration. It will be corrected and ended by the year 1984 when only ten parts per million of ammonia will remain in the effluent.

11. Any shutting off or closing of the Cyanamid pipe on March 23rd, 1981, or at any other time might require the shutting down of the factory with a loss of jobs and

dire and severe financial consequences to Cyanamid and to many, if not all of its employees.

The penalty section of the *Fisheries Act* which applies to the charge before this Court provides that a fine is the penalty to be imposed by this Court. The maximum penalty permitted is a fine of $50,000 for a first offence. There is no minimum penalty prescribed. The Court, therefore, is left with a wide discretion as to the penalty to be imposed. It is the function of the Court to weigh the severity of the offence before the Court and by the fine imposed to indicate how severe an offence the Court deems the particular offence before it to be. I trust that the penalty that I am about to impose will reflect where I consider this case rests on any scale of severity. In imposing the penalty, I am mindful of the many mitigating factors in this case which I have taken time to enumerate in detail.

On this offence before the Court said to have occurred on March 23rd, 1981, contrary to section 33(2) of the *Fisheries Act*, Cyanamid Canada Inc. is hereby fined the sum of $1.00, in default of payment distress to issue. The Corporation may have one month to pay the fine. The fine is to be paid to the Provincial Court Office in this building.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CANADIAN FOREST PRODUCTS LTD.
(Black Liqueur at Port Mellon Mill)

JOHNSON Prov. Ct. J. Sechelt, September 23, 1981

Sentencing - Plea of guilty to charge under s.33 (2) of Fisheries Act, R.S.C. 1970, C.F-14, as amended - Discharge of toxic chemical into sewer in emergency situation - Old paper mill - Considerations when sentencing - Since not first offence, $25,000.00 fine imposed.

The accused entered a plea of guilty to a charge that it deposited a deleterious substance into water frequented by fish, contrary to s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. 40,000 gallons of a highly toxic chemical (black liqueur) were discharged into a sewer in an emergency situation. The accused was fined $25,000.00, the maximum possible fine being $100,000.00 (this was not a first offence). Although the offence was a single incident arising from an accident which occurred because the mill was old, it was the responsibility of the accused to see that equipment was replaced or repaired so that these accidents would not happen. Furthermore, the accused was wrong in not consulting with environmental authorities before dumping the toxic chemical into the sewer.

D.R. Kier, for the federal Crown.
A. Rowley, for the provincial Crown.
D. Shaw, for the accused.

JOHNSON Prov.Ct.J.: - I have for sentencing Canadian Forest Products, charged under s.33, subsection 2 of the Fisheries Act. That they did, on the 28th of May 1980, unlawfully deposit a deleterious substance into water frequented by fish; which in fact is Thornbrough Channel on Howe Sound in the Province of British Columbia.

I must say that at first consideration, Thornbrough Channel is of the waters of British Columbia, where in fact it's part of the Fisheries of Canada and is an area which is environmentally sensitive to deposit of deleterious substances. There has been sufficient other previous cases that the multiplicity of deposits is, and will be in time, very environmentally damaging to this particular part of the Province.

Canadian Forest Products maintain a mill at Port Mellon which, the evidence is, is quite an old mill; and from the information I have, over a period of time the mill has been up-graded. There has been constant improvements to the mill property, the mill equipment.

There is reference to a case in 1977 where an oil pipe broke and this was the result of the age of the mill. The manner in which the mill was constructed, that there was an oil leak for which the company was found guilty and fined ten thousand dollars ($10,000.00).

This case is very much analogous to that inasmuch as part of the problem was that part of the roofing of the number 2 blow tower fell inside what is a very huge vat, twenty feet in diameter, eighty feet tall. At the bottom of this tank there's a mixing mechanism and the portion of the roof that fell in impeded the mechanism and the tank system simply wouldn't work.

There was contained therein forty thousand gallons of what is known as black liqueur, a highly toxic chemical mixture used in pulp manufacturing, and it became necessary because of this accident, to discharge the contents of the tank.

The management of the mill, in consultation with their senior people, made the decision that they would remove a manhole cover from the bottom of the tank, allowing the contents to flow out into the interior surface of the mill and run down a drainage system which connected with an alkaline sewer outfall which discharges into the Thornbrough Channel.

One of the considerations here is whether or not this was the most appropriate method of discharging the contents of the tank. The crown says that there could have been other methods. They have suggested some methods. The defense says no, there were no other methods because of the high toxicity of the chemicals, the dangers of the chemical and their concern for the mill safety and the safety of the personnel in the mill. That after consultation with the best people, they felt that this was the only safe and reasonable method for carrying out the discharging of the tank.

I have come to the conclusion that although the crown has said that there are other methods, there isn't anything described as sufficiently engineeringly conclusive that what the mill management did was in effect, completely inappropriate or wrong. There were some methods of cleanup, whereby some portion of the forty thousand gallons could be collected in containers, or there were some methods of picking up some of the material off the deck. But as to the overall problem of how to discharge this material, I have not come to the conclusion that the engineers who did make the decision, did make an honest study and decision that this is the only safest and best method of solving the problem. That is, solving the problem without shutting down the mill.

There is evidence that if they had taken the position that to discharge it into the sewer system was absolutely an impossibility, that it would have affected the mill operation. I'm not satisfied that other methods could not have been used if in fact a substantial amount of time and a shutting down of the mill would have resulted and a solution could have been found.

The defense argues that they are subject to Pollution Control Permit from the Provincial Government which allows them to discharge certain effluent; and because of the effluent that they did discharge, that the collected samples showed that they did not exceed their permit level. Although they have pleaded guilty to this case because they did deposit deleterious substances into water frequented by fish and this is contrary to the Fisheries Legislation are paramount to the Pollution Legislation and therefore they are guilty.

The other issue is that once this emergency arose and the management took the matter into consideration, they had the decision of whether or not to consult the Waste Management Control Office in the Province of British Columbia, and/or consult the

Fisheries Officer with their problem. They made the decision that they would not consult any of the regulatory bodies with the problem. That they would find their solution and make their decision to dump the waste.

I find this was an inherently wrong decision on the part of the management in the sense that it was an emergency situation, but it was a situation whereby they knew that they were going to dump forty thousand gallons of the deleterious substance, albeit through their outfall system, but they were going to deposit it into Thornbrough Channel. And from all the evidence I've heard the end result was they didn't exceed their permit level but I can't believe that they were of that knowledge and assured that they would not exceed their permit level.

In other words, they were going to dump that material. How much was going out, how fast it was mixing and the manner in which it was going into the channel -- I'm not convinced they knew exactly what the end result was going to be or what the result was at the final period of the test being taken some hours after the initial discharge.

Therefore, in considering sentencing, I find that one of the matters to take into consideration is that this arose on a single incident arising from an accident which occurred because the mill is getting old and there's a break down in their equipment. Whether or not the company should have contemplated this and should have made their repairs to the equipment long before it breaks down is a matter which was previously considered in the Canadian Forest Products Limited case of their oil spill. Where it's the responsibility of corporations where they do have old equipment, where in fact, they have equipment which may cause environmental damage -- it's the responsibility of the corporation to see that they are replaced or repaired so that these accidents do not in fact happen.

Secondly I take into consideration that because of the previous convictions, they are familiar with the concern of the Fishery Department and the potential of environmental damage and that they are in touch with the person from regulatory bodies; and as I say, they were wrong in not consulting with these people. Not knowing what the results of the consultation would have been, but it would have been in a manner that the best results would have been attained to the satisfaction of all parties. It may have been that the people from the regulatory bodies may have insisted that some other method other than the ones they used would have been the appropriate method of removing this forty thousand gallons of black liquid.

Lastly I find that the company -- that the mill had a permit to make effluent discharge. I think they have misconstrued the terms of their permit. If, in fact, they say we are permitted under this provincial permit to in fact make this discharge, surely the permit is granted and the terms of their permit are of the normal and usual discharge of effluent from the mill, from the structures which are set out in the mill, and the effluent discharge coming from the various portions of the mill into the effluent discharge systems. I find that this particular discharge is not contemplated by the permit.

I can't believe that if the problem was put to the Waste Control Officer and said "well, we're allowed to do this under our permit, aren't we?", and he would have said "yes". I don't believe that in any way that the Provincial government contemplated or gave them the permission to do the act which they did, that was a conscious decision over a period of eighteen hours to discharge forty thousand gallons of black liqueur through their outfall.

In this particular case the crown has given notice that they are seeking greater punishment by reason of a previous conviction and there are two previous convictions.

June 1978 and that's the oil spill which occurred in 1977 for which there was a fine of ten thousand dollars ($10,000.00). There was a conviction October 1980 on which they were found guilty under six counts under s.33(2) of the Fisheries Act for which there was a fine of twenty thousand dollars ($20,000.00) on each count.

There's a substantial difference in that situation in October 1980 and this situation in that the October 1980 situation was not an accidental spill. It was a discharge of an affluent from the plant which was done through a construction such that the plant was negligent in allowing a toxic material to run down ditches and run into the adjacent river; and that the corporation allowed the discharge to continue after Fisheries Officers had attended and pointed out the fact that there was a discharge, and the discharge carried on for a substantial period of time.

This case is that it was a single immediate discharge and it would appear that as soon as the Fisheries Officers attended and requested that certain things be done, they were done immediately. Therefore, because it's a second conviction, maximum fine for the single count is one hundred thousand dollars ($100,000.00).

Taking this act in respect to the responsibility, the degree of negligence, the callousness, and their lack of concern for environmental damage -- I find that because it was accidental, it's not a case whereby a maximum or near maximum sentence would be applied. That is, the original problem was accidental, the actual spill was not. But there nonetheless should be a sufficient fine to deter the corporation from carrying out the depositing of deleterious substances and particularly in this case, without consultation with the Fishery Officers.

Therefore, I find that the fine that would be appropriate; in taking all these matters into consideration; would be a fine of twenty-five thousand dollars ($25,000.00).

I would point out that the initial fine was ten thousand dollars ($10,000.00) for the same type of offense and that I do accept that in 1977 that the corporation did spend something like seven hundred thousand dollars ($700,000.00) on environmental control equipment, and by 1980 they were spending some four million dollars ($4,000,000.00). In 1980 they were spending some seven million dollars ($7,000,000.00). In 1982 they estimate they are going to spend eight million dollars ($8,000,000.00) on environmental improvements.

I think overall the corporation is attempting to some degree to be a good corporate citizen. They are not doing a good job of it and they are not being as cooperative as they should be. But I thing that the matter of the penalties, even at one hundred thousand dollars ($100,000.00) is irrelevant to the amount they are spending.

It's a token deterrence in that sense but I believe they are reacting to the charges and the sentences which are being imposed and therefore the amount imposed at this time will be sufficient to penalize and for the corporation to react to their responsibility.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. BRITISH COLUMBIA FOREST PRODUCTS LIMITED
(Logging near Wakeman River)

DAVIES Prov. Ct. J. October 9, 1981

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Guilty plea to charge under s. 31(1) of unlawfully carrying on a work or undertaking that resulted in the harmful alteration, disruption or destruction of a fish habitat - Only possible reason for actions of company was desire to make a profit - Under circumstances, near maximum fine in order -Fine of $4,000.00 levied.

Sentencing - Guilty plea to charge under s. 31(1) of Fisheries Act, R.S.C. 1970, c. F-14, as amended, of unlawfully carrying on a work or undertaking that resulted in the harmful alteration, disruption or destruction of a fish habitat - Only possible reason for actions of company was desire to make a profit - Trees must be harvested, but fisheries must also be protected - Must consider future generations, even when dealing with a presently remote area - Near maximum fine in order as deterrent - Fine of $4,000.00 levied.

The accused company entered a plea of guilty to a charge under section 31(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, that it unlawfully carried on a work or undertaking that resulted in the harmful alteration, disruption or destruction of a fish habitat. The only possible reason for the company's actions was its desire to make a profit. Although the logging area in which the offence occurred is remote, consideration must be given to the needs of future generations. A near maximum fine is therefore in order to act as a deterrent to the company and to others. Accordingly, a fine of $4,000.00 is levied.

D.R. Kier, Q.C., for the Crown.
D.L. Rice, for the accused.

DAVIES Prov. Ct. J. (orally): In this matter the corporate entity, British Columbia Forest Products Limited, pled guilty to a charge that between the 1st day of July, 1980 A.D., and the 16th day of October, 1980 A.D., near Wakeman River in the Province of British Columbia, did unlawfully carry on a work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat, contrary to section 31(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended. To this charge, through learned counsel, the corporate entity entered a plea of guilty and I then heard extensive argument and evidence pertaining to sentence.

A cutting permit was placed before me and considered and referred to by both learned counsel. In it the terms upon which cutting and logging was permitted in this area was dealt with under Timber Sale Harvesting Licence Number A01389. I'm looking at a photocopy and I may not be accurate as to my numbers. In any event, this permit ran from April the 1st, 1979 to December the 31st, 1980 and dealt with the area concerned. Restrictions on general removal of timber was covered in section five. It states, and as it is important I will read it into my reasons for sentence:

This Licensee shall: (a) not allow any trees, logs, logging debris, or any substance likely to cause pollution to be deposited at any time within any lake or stream; (b) not allow any logs to be skidded, equipment to be operated, gravel to be displaced or any damage to be done within the high-water level of any stream channel; (c) provide all stream crossings with a bridge or culvert the design of which will accommodate maximum stream flow and permit unobstructed fish passage and schedule the construction of all stream crossings as directed by the Forest Officer; (d) not place any obstruction or fill within the high-water level of any stream channel; (e) remove any logging, milling or road-building debris deposited in any stream channel or lake as directed by the Forest Officer; (f) locate landings no closer than two chains from any stream channel and only within areas designated for cutting; (g) direct the falling and yarding of trees away from streambanks and lakeshores except as otherwise designated on the ground and approved by the Forest Officer; (h) not burn slash closer to the streambanks or lakeshores than the distance specified by the Forest Officer; (i) protect from logging and burning damage all streambank and lakeshore shrubs.

Many of these terms have little relevance to the charge before me, but several are of great significance. There was evidence before me that clause (a) was breached, clause (b) was breached, clause (d) was breached, clause (f) was breached, clause (g) was breached, and specifically clause (i) was breached.

Photos marked as exhibits, taken of the area last October, November and this month and filed as Exhibits 1, 2, and 3, clearly indicate extensive change from the area designated in the background. By the background, I mean the background of certain of the pictures where the trees are not fallen. I heard no evidence as to this area prior to logging. I was told that I could expect larger trees because of the soil in the area that's been logged than those left near the waterfall shown in the photographs referred to as the general overlay photograph marked as Exhibit 1, a picture taken on November the 14th, 1980.

The same picture indicates a steel spar and landing. I'm told that landing was some fifty feet. I was told that there's sixty-six feet to a chain, and I have every reason to believe that's absolutely accurate. The landing itself appears in that logs from it point down to the stream bed in question and its obviously right on the banks.

I had some problems in the evidence I've heard because of the excellence of all witnesses. I have come to the reluctant conclusion some of the witnesses for the defendant corporation, while certainly giving me an expert opinion, clarified on every occasion, I don't think were completely frank on occasions with me. I'm not in any way suggesting that they misled me, but when a witness tells me that this area - the overall picture has been enhanced by this sort of conduct, following a plea of guilty, I find great difficulty in accepting his evidence.

I'm satisfied that such a steam flowing into a major fish producing river system such as this Wakeman River's been described, would be considered a potential fish rearing and coho spawning area to anybody with any knowledge whatsoever of the spawning habits of the coho. It's not a trifling ditch into which perhaps a pair of salmon might spawn, and I'm quite satisfied that the defendant company has employed most learned experts in Biology, Ecology, Forestry Management; I've heard from some of those experts and I cannot find it in my heart to accept that if they had any opportunity to avoid this sort of conduct it

would never have happened. I'm satisfied that they would have been against this from the moment if they had any clue that this sort of logging was going on in there. I have to assume they didn't.

I'm further satisfied the defendant corporation has access to and in this case has retained the services of most competent legal counsel. Obviously such men do not personally have anything to do with the day to day operation of a logging operation, and for the purpose of sentencing I feel, and I am using my knowledge that I have obtained inside courtrooms and outside courtrooms during my lifetime, some of the remarks that I'm going to make and some of the conclusions that I'm drawing, I'm basing on my general experience, the photos that are before me, and my - thus I feel enhanced ability to weigh the evidence that I've heard.

I'm satisfied the area in question was logged by use of a mobile steal spar. This I feel is relevant in that it in the ensuing landing to which logs are yarded can be placed wherever the operator wishes, subject to the terrain. I've been given no reason why the landing was so close to the stream, within fifty feet, but presume it was the spot that the wood superintendent or the hooktender felt most advantageous to remove the timber from this setting. One of the photographs show a cable and bardenbell, commonly called a choker, which I'm satisfied is used to attach logs to butt-rigging so they may be yarded to the landing and thence out to the mill. I'm told that this choker was not damaged, it was pinched by the large piece of debris right in the middle of the stream to which it is shown attached in Exhibit 1, photo four. I therefore have come to the conclusion that the butt-rigging and the yarding was either immediately over that log or it was further up and there was sufficient force for that debris to scour down the river to where it's there shown. I can come to no other logical conclusion. There's nothing to indicate that there's anything but rock and gravel below that log that it's pinched to. Why it was left there I can - have no idea, except carelessness on the part of the operators and I don't suggest that the presence of that choker is going to make any grave difference in the overall picture, but it makes me wonder why they didn't take it out. Nothing wrong with it and there's certainly nothing there that I can see that would pinch it so that normal tackle wouldn't remove it. I've drawn a further conclusion from that, that the only reason the butt-rigging would be over that stream is because they were logging right across it. There's no other reason for a butt-rigging to be anywhere in the woods as far as I know except to remove logs. I find that that's clearly a violation of the permit. I have no evidence before me or nothing to make me believe that any ascetic or conservation considerations greatly impress the hooktender who's trying to obtain maximum production from a setting. Experience would lead me to believe that his, in fact his duty is to get the most logs out as quick as he can with the least expense to his employer, and on that rests his future as a hooktender and his hope of promotion. And here the only possible reason I can see for the desecration of this area is profit.

If as suggested by learned defence counsel a token fine of $500.00 were to be imposed, it in all likelihood could be construed as a tacit approval of such conduct and as in all probability the expense of properly logging in this area would far exceed $500.00 it would be financially advisable to so treat this entire area and any other operations that are yet to be logged.

It is my considered opinion that the streams, lakes, and woods of this province belong to the people of this province and the right of Her Majesty and the right of the Province of British Columbia. Those trees have to be harvested and the fisheries have to

be protected and the wild game given adequate cover and protection, and hopefully something left for future generations other than a desert of debris. The area in question is remote from civilization as it is today, but the principle remains. Such conduct must be dealt with firmly. Primarily as a deterrent to this corporate entity and to other corporate entities a near maximum fine is required.

I therefore order the defendant company to pay a fine of $4000.00.

NOVA SCOTIA PROVINCIAL MAGISTRATES COURT

R. v. G.I. WEBSTER

KIMBALL Prov. Ct. J. Kentville, January 28, 1982

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Accused failed to comply with directions of Fisheries officials requiring installation of proper fish-pass - Accused convicted of offences under ss. 20(1), 20(2) and 31(3)(a).

In reviewing the accused's application to construct a dam across a stream on his property, officials of the federal Department of Fisheries and Oceans determined it to be necessary that he install a fish-pass to permit free passage of fish between the pond above and the stream below the dam. The Department directed the form of fish-pass to be installed, but the accused constructed it in a manner that did not provide adequate passage for fish. When the Department directed him to implement one of two alternate solutions, he failed to do so.

On charges of violating ss. 20(1), 20(2) and 31(3)(a) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, *held*, the accused is guilty.

It is established beyond a reasonable doubt that the Minister made a determination in the public interest that the fish-pass was necessary and that, because the form and capacity of the fish-pass did not conform to what in the Minister's opinion would satisfactorily permit the free passage of fish, the accused failed to provide an efficient fish-pass as required by s. 20(1). In addition, he failed to make changes and adjustments as were necessary in the Minister's opinion for efficient operation of the fishway. The responsibilities of the Minister set forth in s. 20(1) were lawfully delegated by him to Department officials in order to assist him in the formation of his opinion and in carrying it out. The *Statutory Instruments Act*, S.C. 1970-71-72, c. 38, as amended, does not apply to the Minister's authority to make a "determination" or to form an "opinion" and does not apply so as to require special notice to the accused that a determination has been made or that failure to comply would constitute an offence.

The work of the accused in constructing the dam resulted in silt in the stream and erosion, causing harmful disruption of the fish habitat. Further disruption of habitat resulted from the inadequate fishway itself which substantially eliminated migration of fish for spawning.

L.M. Lenethen, for the Crown.
M.G. Forse, for the accused.

KIMBALL Prov. Ct. J.: - The defendant is charged as follows:

that at or near Cambridge Station in the County of Kings, Nova Scotia, between the 29th day of September 1980 and the 1st day of December 1980 being the owner of a dam across a stream where the Minister has determined it to be necessary in the public interest that a fish pass should exist did unlawfully fail to provide an efficient fishway of the form and capacity as in the opinion of the Minister would satisfactorily permit the free passage of fish through the same contrary to Section 20, subsection (1) of the Fisheries Act.

AND FURTHER

that he did at or near Cambridge Station in the County of Kings, Nova Scotia between the 29th day of September, 1980 and the 1st day of December, 1980 being the owner of a dam unlawfully failed to make changes and adjustments as would in the opinion of the Minister be necessary for the efficient operation of the fishway therein under actual working conditions contrary to Section 20, subsection (2) of the Fisheries Act.

AND FURTHER

that he did at or near Cambridge Station in the County of Kings, Nova Scotia between the 6th day of July, 1979 and the 12th day of August, 1980 carry on work which resulted in the harmful disruption of a fish habitat contrary to Section 31, subsection (1) of the Fisheries Act and did thereby commit an offence contrary to Section 31(3)(a) of the said Act.

Counts One and Two

The defendant had applied to the Nova Scotia Department of the Environment for permission to build a dam across a tributary of Tupper Lake Brook on his property situated south of Cambridge Station, Kings County, Nova Scotia about two miles south of the No. 1 highway. The application was referred to the federal Department of Fisheries to determine what potential impact the dam would have on the said stream as a fisheries resource. As a result of the investigation by the officials of the Department of Fisheries it was determined to be necessary that a fish-pass be installed by the defendant so as to provide an efficient fishway to permit free passage of fish from the pond above the dam to the stream below and vice-versa.

To effect this goal the dam was to be equipped with two culverts side by side and at one end planks (stop-logs) to control the height of the pond above the dam. The stop-logs were to be in place from May 1st to September 25th and they were to be removed from September 26th to April 30th for spawning and to allow fish to move downstream after hatching to establish themselves and to grow. The sill on which the stop-logs rested was to be at or below stream bed level to ensure free access to the migrations of fish when the stop-logs were removed.

I am satisfied from the evidence that the stop-logs were not removed as required and the sill which was installed by the defendant was not at or below stream bed level as required but was above the natural bed of the stream. In addition the downstream end of the culverts were too high above the natural stream bed. These were 1.92 feet from the bottom of the culvert to the water surface below which was a distance too great to allow fish to get from the stream bed into the culverts. As a result the culverts did not provide adequate passage for the fish. The fish would not be able to jump the height involved to get into the culverts. The Department of Fisheries provided alternative solutions to this difficulty (see Exhibit 13) and directed the defendant to implement one of them. The evidence of Fisheries Officer, Hendrick Norman Sweeny establishes in my opinion, that the defendant, between the 29th day of September 1980, and the 1st day of December 1980 did not implement either of the solutions recommended. During that time the stop-logs remained in place and the lower end of the culvert was still inaccessible to fish as aforesaid. At the material times in my opinion the defendant had failed to provide an

efficient fishway as charged in count one above or to make changes and adjustments as charged in count two.

In Summary

In relation to the first count, I accept the evidence of the Crown and I find the following: (a) that the Minister had determined it necessary in the public interest that a fish-pass should exist in connection with the dam owned by the defendant; (b) that between the 29th day of September 1980 and the first day of December 1980 the said fish-pass was not of the form and capacity to conform with the Minister's opinion, as would satisfactorily permit the free passage of fish through the same; (c) that the defendant, between the 29th day of September 1980, and the 1st day of December 1980, failed to provide an efficient fish-pass of the form and capacity as in the opinion of the Minister would satisfactorily permit the free passage of fish through the same.

In relation to the second count, I accept the evidence of the Crown and I am satisfied beyond a reasonable doubt, that between the 29th day of September 1980 and the 1st day of December 1980, the defendant being the owner of the dam, unlawfully failed to make changes and adjustments as were, in the opinion of the Minister, necessary for the efficient operation of the fishway therein under actual working conditions.

Count Three

I am satisfied from the evidence that between the 6th day of July 1979 and the 12th day of August 1980 that the defendant carried on work at the dam. This is established by the evidence of many witnesses but specifically by that of Mrs. Simpson who was present on July 6, 1979 and witnessed work being carried on. Further there is the evidence of Mr. Cox who made several visits within the above time period and noted the construction progress. In addition the progressive construction of the dam during this time period is shown by way of a series of photographs marked Exhibit 12. In my opinion there is an abundance of evidence through the Crown witnesses, that the carrying on of the said work and the construction of the said dam resulted in the harmful disruption of the fish habitat which existed within the said stream; for example, from the effect of silt in the stream and from the process of erosion. A further harmful disruption of the fish habitat resulted from the inadequate fishway which substantially eliminated upward migration of fish for spawning and thereby cut off 1.6 miles of spawning ground above the dam as well as the 1,200 feet of meandering stream displaced by the pond.

In Summary

In relation to the third count, I accept the evidence of the Crown and I am satisfied that there is evidence beyond a reasonable doubt, that the defendant did between the 6th day of July 1979 and the 12th day of August 1980, carry on work which resulted in the harmful disruption of a fish habitat.

Further to the above findings, and in relation to certain arguments raised by the defendant, I am satisfied that the "determination" of the Minister was lawfully delegated by him to assist him in the formation of his opinion and to assist him in carrying it out. I am satisfied that those responsibilities of the Minister as set forth in section 20(1) of the said *Fisheries Act* are properly delegated by him, as the evidence of the Crown establishes was done in this case. It is my opinion that the reasoning found in *Carltona, Ltd. v.*

Commissioner of Works and Others 1943 2 All E.R. 560, at page 563 *et seq* applies to this case and answers the arguments raised by the defendant in this regard. (See also *R. v. Harrison*, 1977 1 S.C.R. 238, at page 245, per Dickson, J.)

It is my further opinion that the provisions of the *Statutory Instruments Act*, S.C., 1970-71-72, c. 38, as amended, are not applicable to the authority given to the Minister under the *Fisheries Act* to "determine" that it is necessary for the public interest that a fish pass should exist or to the authority given to him to form an "opinion" concerning the free passage of fish through the fish-pass as is set forth in section 20(1) of the said *Fisheries Act*.

It is my further opinion that the said *Statutory Instruments Act* does not apply so as to require special notice by the Crown or the Department of Fisheries to the defendant that a Ministerial determination had been made in the public interest or that failure to comply therewith would constitute an offence and render the defendant liable to punishment. I can find nothing in the *Statutory Instruments Act*, nor do I know of any authority that would require the Crown or the Department of Fisheries to treat these prosecutions, either procedurally or evidentially, any differently than any other prosecutions that come before this Court nor can I find any special provisions as to notice or otherwise that would give the defendant any special status in this matter over and above that which under the law he ordinarily has.

It is my opinion, after due and careful consideration of the evidence that the defendant is guilty to each count as charged. I find him guilty and enter convictions accordingly.

(Editor: Subsequently, the accused was sentenced to pay a fine of $750.00 on each of the first two counts and $1,000.00 on the third count. On appeal to County Court, (see page 174) the fine on the second count was reduced from $750.00 to $50.00).

NOVA SCOTIA COUNTY COURT

R. v. G.I. WEBSTER

MCLELLAN Sup.Co.Ct.J. Truro, August 31, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended, Appeal by accused from conviction for offences under s.20 (1) - Appeal dismissed - Interpretation of s.20 (1) - Applicability of Statutory Instruments Act, S.C. 1970-71-71, c.38, as amended.

Sentencing - Offences arising out of single undertaking - Principles to be applied when sentencing - The fine on the second count reduced from $750 to $50.

Statutory Instruments Act, S.C. 1970-71-71, c.38, as amended - Ministerial determination under s.20 (1) of Fisheries Act, R.S.C. 1970, c.F-14, as amended - Applicability of Statutory Instruments Act.

The Minister of Fisheries may delegate the responsibilities given to him under s.20 (1) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. Furthermore, the determination made by him under this section does not fall within any federal enactment requiring publication under s.11 (2) of the *Statutory Instruments Act*, S.C. 1970,71-72, c.38, as amended. The determination does not come within the definition of "regulation" in s.2 (1) (b) and "statutory instrument" in s.2 (1) (d). The word "determines" has no special meaning apart from its ordinary meaning which must be determined by reference to a dictionary of the English language. As well, the *Statutory Instruments Act* does not apply so as to require special notice by the Crown or Department of Fisheries to the accused that a Ministerial determination has been made in the public interest or that failure to comply therewith will constitute an offence and render the accused liable to punishment.

The determination and the opinion of the Minister under s.20 of the *Fisheries Act* demonstrate Departmental policy and hence are classified as administrative functions of the Minister. It is irrelevant that penal sanctions follow a failure to comply with the determination. Thus there can be no challenge to the determination except on the ground of bad faith.

Under section 755 (6) of the *Criminal Code* an appeal court may vary sentence within the limits prescribed by law for the offences of which the accused has been convicted. In this case, the delicts of the accused arose out of a single undertaking, although the acts were distinct and related to two different periods of time. The principle of sentencing, that sentences ought to run concurrently when the offences arise substantially out of the same conduct of the accused, ought to apply when the penalty is a monetary one, but the principle ought not to be extended to the point where no penalty is imposed under a count. The penalty under the second count is reduced from $750 to $50. The penalty under the first and third counts is confirmed. The total fine is reduced to $1800.

L.M. Lenethen, for the crown, respondent.
M. Forse, and *M.T. Wheeldone*, for the appellant.

MCLELLAN Sup.Co.Ct.J.: - The appellant has appealed his conviction upon three counts laid under the Fisheries Act (R.S.C. c.F-14) alleging, in essence, that when the defendant attempted to construct a dam across a small stream on his property at or near Cambridge in the County of Kings, Province of Nova Scotia, he failed to comply with directions given to him by the Department of Fisheries which would have provided an adequate fishway for fish intending to spawn above the dam and also for fish migrating down stream to the Cornwallis River. A great deal of evidence, much of it of a scientific nature, was given before the learned trial judge; the transcript of evidence runs to 331 pages. Following oral argument and the later submission of written argument to the learned trial judge, he reached a conclusion that the defendant was guilty on all three counts. He was fined $750.00 on each of the first two counts and $1000.00 on the third count for a total of $2500.00.

In the course of his decision, the learned trial judge made impressive findings of fact which are all against the accused -- indeed, the Crown's evidence seemed to have been accepted in toto by him. While these findings of fact are not inviolate, any appellant who seeks to reverse the trial decision faces a difficult task where there is evidence to support those findings. Indeed, under s.613 of the Criminal Code, an appeal court may upset a decision of this kind only where there is no evidence to support it. Conclusions of law are on a somewhat different basis and an appeal court is much freer to reach a different conclusion than that reached in the trial court. As to the trial judge's findings of fact, in this case I am bound to accept them because, in my opinion, there was some evidence to support these findings of fact. I am not overlooking the allegation of the appellant that the learned trial judge did not comment upon certain evidence of the defendant that this stream went dry in the summer months. The appellant's position is that since this evidence was not specifically contradicted by the Crown, it must be accepted. The thrust of this evidence is that the technical evidence adduced by the Crown respecting the suitability of this stream for the propagation of fish ought to have been rejected by the learned trial judge. In the circumstances of this case, I do not think that is a proper conclusion. In his decision the learned trial judge said the following: "In relation to the first count, I accept the evidence of the Crown..." and also, "In relation to the second count, I accept the evidence of the Crown...". From his finding of guilt I think it is implicit that he accepted the Crown's evidence and rejected that of the defendant where there was a conflict. While it may well be true that this stream did go dry in the summer months, there is nothing in the evidence to indicate that the stream might nevertheless still be a viable stream for the propagation of speckled and brown trout referred to in the evidence. It is true, of course, that the Crown's evidence was not directed to this point, but for all I know, the dry spells may occur when the migration of fish upstream or downstream is not essential to their survival. The larger fish may, for example, have gone downstream to salt water while the smaller fish may survive in what pools remain filled even although the flowage has stopped as suggested by the defendant. I cannot quarrel with the learned trial judge's overall assessment of the evidence and I think he was quite within his province when he accepted the Crown's evidence throughout.

If the appellant is to succeed on this appeal, then, his success must turn upon the questions of law which arise herein. Most of these are dealt with by the learned trial judge in his decision.

The first of these questions of law involves the particular wording of the section under which the charges were laid. S.20, sub-section (1) of the Fisheries Act (supra) in its relevant portions reads as follows:

"20 (1) Every slide, dam or other obstruction across or in any stream where the Minister determines it to be necessary for the public interest that a fishway should exist, shall be provided by the owner or occupier with a durable and efficient fishway, or canal around the slide, dam or other obstruction, which shall be maintained in a good or effective condition by the owner or occupier in such place and of such form and capacity as will in the opinion of the Minister satisfactorily permit the free passage of fish through the same;..."

The first point made by the appellant, both in the court below and on this appeal in relation to this section, involves the word "determines" as it is used in the section. The argument is that there is no evidence whatsoever that the Minister of Fisheries made such a determination or that the Minister ever personally brought his mind to bear upon the facts which existed which would enable him to make a determination or reach a conclusion upon the question which arises. The basis for the objection to a determination being made otherwise is the principle expressed in the maxim "delegatus non potest delegare", i.e., that Parliament having delegated to the Minister the power to make the determination, it was not within the Minister's power to delegate that authority to other persons. The learned trial judge rejected this argument. On this point, the learned trial judge said at page 5:

"I am satisfied that those responsibilities of the Minister as set forth in s.20, sub-section (1) of the said Fisheries Act are properly delegated by him, as the evidence of the Crown establishes was done in this case."

He accepted the submissions of counsel which the Crown based upon the two cases referred to in his decision, namely, *Carltona, Ltd.* v. *Commissioners of Works and others* (1943 All E.R. Volume 11, p. 560) and *R.* v. *Harrison* (1977 1 S.C.R. 238). In the *Carltona* case Lord Green, MR, said at p. 563:

"In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them... The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department..."

and at p. 564,

"It has been decided as clearly as anything can be decided, that where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith."

That case was commented upon favorably by Brightman, J. in *Re Golden Chemical Products Limited* (1976 2 All E.R. 543) who pointed out at p. 548 that the court is not so much concerned with a delegation of power as a devolution of power. The *Carltona* case was cited with approval by the Supreme Court of Canada in *Harrison* so that the law of Canada is to be the same as the law in England on this point.

I wish to refer in passing to the finding of fact which is made in the excerpt in the learned trial judge's decision quoted just above. I am referring to the finding relating to the delegation of the authority which was established by the Crown's evidence. In my view, there was ample evidence to support this finding. The evidence came principally from the witness, Ducharme, a senior biologist with the Department of Fisheries and Oceans, whose office was located in Halifax, Nova Scotia. He traced the chain of authority or responsibility from the various field workers up to the Director General of the Department of Fisheries and indicated that the decision or determination in this particular case was made by the acting Director General of the Department of Fisheries. This evidence was not contradicted nor weakened in cross-examination. This was the delegation referred to by the learned trial judge and, in my view, as indicated, the evidence amply supported his conclusion on this point.

The next point of law dealt with by the learned trial judge was the application or non-application of the Statutory Instruments Act (1970-71-72 (Canada) c.38) to the determination made by the Minister under s.20 (1) of the Fisheries Act. It was the contention of the defence at trial and indeed the same question was urged upon this appeal, namely, that the determination of the Minister fell within the provisions of one or more Federal statutes which required either publication of the determination on the basis that it fell within the definition of a statutory regulation and under the appropriate statute the same was not effective until it was either published in the Royal Gazette, or alternatively, it was provided in the enabling statute that publication was not necessary to its validity or in the further alternative until notice of the regulation was given to the persons likely to be affected by it or to the accused specifically. The learned trial judge rejected this argument and I think he was correct in so doing. In my view the determination made by the Minister in the exercise of the authority given to him under s.20 (1) of the Fisheries Act does not fall within any Federal enactment requiring the publication to which I have referred. The defence argument is based upon s.11 (2) of the Statutory Instruments Act (supra) which reads as follows:

> *"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*
>
> *(a) the regulation was exempted from the application of sub-section 1 pursuant to paragraph (c) of s.27, or the regulation expressly provides that it shall apply according to its terms before it is published in the Canada Gazette,*
>
> *and*
>
> *(b) it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of those persons likely to be affected by it."*

To bring the determination made by the Minister under s.20 (1) of the Fisheries Act within the terms of the above section the defence relies upon the definition of a regulation which under sub-section (2) (1) (b) of the Statutory Instruments Act (supra) is to include a statutory instrument made either in the exercise of a legislative power or for the contravention of which a penalty, fine or imprisonment is prescribed by or under an

act of Parliament. Reference is then made to the definition of "statutory instrument" which appears in s.2 (1) (d) which reads as follows:

> *"Statutory instrument' means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, or other instrument issued, made or established..."*

and then follow a number of qualifications which in my view are not relevant to this question. I am not prepared to concede that the determination made by the Minister falls within the definition of a statutory instrument as contended by the appellant. In the first place, it does not seem to fall squarely within any of those documents specifically listed under the definition of "statutory instrument" in s.2 (1) (d) above. Unfortunately, the word "determines" is not dealt with in Bouvier's Law Dictionary, Stroud's Judicial Dictionary (4th ed.) or Black's Law Dictionary (5th ed.) from which I conclude that the word has no special meaning apart from the ordinary meaning to be determined by reference to a dictionary of the English language. According to the Shorter Oxford English Dictionary the meaning which appears to be most apt is that found in the secondary group of meanings, number seven, i.e., "to conclude from reasoning, investigation, etc.". As Mr. Lenethen for the Crown put it in his submission to the learned trial judge, "the definition of 'statutory instrument' refers to various items but does not refer to a 'determination' or a 'decision' made by a Minister where he is authorized to make such 'determination' or 'decision' by an act of Parliament. The Statutory Instruments Act clearly was not intended to apply to the 'determination' to be made by the Minister under sub-section 20, sub-section (1) of the Fisheries Act. It is clear that a s.20, sub-section (1) 'determination' could only be made with respect to one individual or corporation in one specific locality with respect to one specific structure. This 'determination' is clearly not a decision that should be subject to the fairly extensive provisions of the Statutory Instruments Act.". I agree with this, as did the learned trial judge.

The third conclusion of law made by the learned trial judge was that the Statutory Instruments Act (supra) does not apply so as to require special notice by the Crown or the Department of Fisheries to the defendant that a ministerial determination had been made in the public interest or that failure to comply therewith would constitute an offence and render the defendant liable to punishment. He concluded on this particular point that the defendant had no special status in the absence of the notice contended for the defence. While this may in some respects be an extension or an addendum to the second point dealt with by the learned trial judge, I think his comments were prompted by the fact that the defence was contending that in the absence of notice of the determination and the fact that a criminal prosecution could follow in the event of failure to comply with the directions given by the Minister, the defendant could not be convicted. The basis of this argument is the following quotation from Halsbury (3rd. ed. vol. 10, p. 284, para 525) reading as follows:

> *"...ignorance of the law cannot be set up as a defence even by a foreigner, although it may be a ground for mitigation of sentence. However, where a person is charged with contravening a statutory instrument, it is a defence if he proves that the instrument had not been issued by Her Majesty's stationary office at the date of the alleged contravention, unless it is proved by the prosecution that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public or of persons likely to be effected by it or of the person charged."*

That, of course, expresses the law in England but it is not entirely clear that it is the law in Canada. The principle seems to have been adopted by His Honour Judge O Hearn in *R.* v. *MacLean* (1974) 17 C.C.C. ((2d) 84) where His Honour acquitted the defendant of a contravention of a regulation which was unknown to the defendant. The facts were that the defendant had made some inquiry as to the lawfulness of his parking in an area under control of the Halifax International Airport authorities and His Honour made a clear distinction between a statute whose existence is presumed to be known by members of the public regardless of the fact, and a regulation which was difficult to find upon a search being made. As indicated, Judge O Hearn acquitted the accused under the circumstances. The same result may have been reached in *R.* v. *Ross* ((1944) 84 C.C.C. 107), a decision of a court of the County Court of British Columbia and the defence is able to draw some comfort from the text "Criminal Law" 1978 (Mewitt and Manning) who seem to admit that real ignorance of the criminality of an act might be a defence. But the difficulty I have with these decisions is that both refer to regulations which clearly come within the definition of such in the appropriate statutes, and Halsbury's quotation refers to a statutory instrument, whereas in point of fact I have already concluded that the determination which is at the root of this prosecution does not fall within the definition of a regulation or a statutory instrument. Whatever the merits of the defence argument respecting the law relating to notice, I am quite satisfied that the defendant had ample and sufficient notice of his position vis-a-vis the Federal Department of Fisheries and consequently the Fisheries Act. It is a fact that the defendant himself first made inquiries of the Provincial authorities respecting the construction of the dam as he was anxious to obtain whatever Government assistance or grants might be available to him in the circumstances. This application was routinely referred to the Provincial Department of Fisheries and also the Federal Department of Fisheries and Oceans. As a result of the request for financial assistance, a number of employees of these three departments visited the construction site from time to time. The first was by Mrs. Pat Simpson on July 16, 1979 in company with several other members of the Federal Department of Fisheries. On that date, following an examination of the work in progress being done by the defendant Ducharme had a conversation with the defendant, both at the site and later in the residence of the defendant. At p. 191 of the transcript of evidence the following occurs:

> "Q. ... as a senior biologist with the Department and as the head of the stream alteration and fish habitat protection branch and as a fish habitat protection officer, is there anything in those photographs that concerned you at that point on July 16?
>
> A. Very much so and I think I said so at the time in a very clear way. Vehemently, perhaps. It's a, as shown by the photograph, it's a very bad erosion site, much silt has already entered the stream and it can certainly can be assumed that much more will enter the stream and therefore the areas lying downstream from that site will be effected (sic) severely."

On November 16, 1979, Ducharme returned to the site with another departmental employee, Andrew Cullen, and Ducharme went there specifically for the purpose of meeting the defendant. He and Cullen had a discussion with the defendant on that date. A final visit was made by Ducharme on April 11, 1980. At p. 183, the following questions and answers appear:

"Q. Did you give any indication to Mr. Webster at that time (July 16, 1979) of your view with respect to fish passage?

A. Yes.

Q. And what was that view, what was your view at that time?

A. I told him that there would definitely be a fish passage problem and that we would probably need either some sort of a scheme of operation of stop logs, stop logs which at that time by the way did not exist yet, that we would either need the stop logs opened for a period of a year and we were to name that period down to the, accurately or alternatively we would need a fishway. Now, whether we needed a fishway or not depended on whether or not Mr. Webster wanted to maintain full impoundment the year round. At that time he did not think that he wanted the impoundment the year round and at that time I did not know, I could not possibly know, that the sill of the stop log section would be placed above the natural bed of the stream."

As a result of the investigations made by the members of the Federal Department of Fisheries and Oceans, there was some intra-Departmental correspondence relating to the problems anticipated at the site of the defendant's dam. On August 2, 1979, the acting Director General of the Department, one D.A. MacLean, wrote a letter to Mr. L.R. Lewis of the Provincial Department of the Environment. This letter contained the conditions under which permission to build the dam under s.20 of the Fisheries Act, without a conventional fishway, would be granted by the Federal Department. A copy of that letter was forwarded to the defendant by covering letter dated August 7, 1979. Exhibit 10 is a letter prepared by Andre Ducharme addressed to L.R. Lewis of the Department of the Environment for the Province of Nova Scotia. In that letter Ducharme recommended that Webster "should also be told that it is an illegal dam for as long as he doesn't comply to the conditions set in the fisher permit (letter from Director General) regarding the maintenance flow schedule and the drawings of the "as built structure.". However, it is not clear that a copy of this letter or the information contained therein was given to the defendant although the exhibit was introduced in evidence without objection from the defence. Based upon the foregoing evidence then I am satisfied that the defendant was adequately informed of his position and of what he was required to do under s.20 of the Fisheries Act.

During oral argument on the appeal counsel with the Crown spent some time on the liability of the Minister's actions under s.20 of the Act to attack in judicial proceedings. He referred to the distinction between administrative and quasi-judicial functions of an official such as the Minister of Fisheries and the law applicable thereto. This was in response to the arguments of the appellant in the written brief filed on his behalf. It is admitted on page 29 of that brief that if the function under consideration is properly classified as an administrative function, then there can be no successful challenge to it save on the ground that it was done in bad faith. I accept Mr. Lenethen's contention on behalf of the Crown that the determination and the opinion of the Minister which are dealt with in s.20 of the Act demonstrate policy of the Department and hence should be classified as administrative functions of the Minister. It is nothing that penal sanctions follow a failure to comply. Turning to the other side of this question, could it be said that the Minister was acting in a quasi-judicial capacity when he made a determination or expressed an opinion, without holding any hearing, on a question which affected but one

individual in the whole of the country? I think not. There is no suggestion in the evidence of bad faith on the part of the Minister or the persons upon whom his duties devolved. I point out here that a substantial part of the appellant's brief is directed against the bureaucratic and bungling and, to a limited extent, misleading statements of the almost myriad of officials who attended at the site of the dam following the defendant's application for funds. I am inclined to agree with the general thrust of this complaint. There is no doubt that had each of these persons taken the time to discuss his or her duties and responsibilities with the defendant and, more importantly, the import of the conclusions reached upon the defendant, the latter would have been better informed, and conceivably, his actions might have been more in consonance with the wishes of the officials of the Department of Fisheries and Oceans, with the result that proceedings against the defendant might have been avoided. In a sense some of the officials seem to have been afflicted with a kind of "tunnel outlook", in the sense that they confined their actions and, more importantly, the statements and opinions which they gave to the defendant, to their own particular responsibilities. No doubt the multiplicity of investigators and departments involved would confuse the defendant so that he could not properly assess the weight to be accorded to each piece of information imparted to him. Be that as it may, however, nothing which occurred in this situation went to the extent of providing the defendant with a defence to the charges. The single instance of what might be classified as a misleading statement occurred when, according to the defendant, the witness Vernon Conrad, Fish Passage Engineer with the Federal Department of Fisheries and Oceans, expressed the opinion that if he, the defendant, refused to comply with instructions, the Department would probably 'back off'. Conrad in cross-examination categorically denied making any such statement. Based upon the findings of credibility at trial, I must consider that the defendant failed to prove the statement he attributed to Conrad. In the result, then, I am of the view that the Minister's determination under s.20, relevant to count one, and his opinion, relevant to count two, are not subject to attack in these proceedings in the manner suggested by the appellant. No similar question arises under the third count which is laid under s.31 of the Act. That section is framed in straight forward language and no action by the Minister is required before there can be a breach of the section.

In the result, then, I am not pursuaded that the appellant has demonstrated any defence to the three charges against him either on the facts or on the law applicable. The appeal against conviction is dismissed.

The defendant has also appealed the sentence. Under s.755, sub-section 6 of the Criminal Code, and, if I think it fit to do so, I may vary the sentence within the limits prescribed by law for the offences of which the defendant was convicted. In the foregoing, I am taking these offences as ones for which the sentence is not fixed by law (s.755 (6)). The penalties applicable to the first two counts are found in the general penalty section while the penalty under the third count is set forth in the section itself. Both penalty sections have been amended so that each provides for a maximum penalty of $5000.00 for a first offence under summary conviction proceedings (cf Statutes of Canada 1976-1977 c.35 ss.5 and 18). At this point I note that the learned trial judge has imposed penalties in the range of one-seventh of the maximum in the case of the first and second charges and one-fifth in the case of the penalty under the third count. Considering the maximum provided in the section, clearly these are in the lower range of penalties which the learned trial judge could have imposed.

I refer to the remarks of the trial judge on sentencing. In my opinion, his remarks constitute an eminently clear, concise, and, save as hereinafter set forth, complete summary of the principles of sentencing in such a case as this. I would be loathe to disturb his conclusions but for the fact that, as urged by the appellant, the trial judge did not consider the fact that the three charges arose out of what was essentially one undertaking. It is not suggested that the evidence does not support a conviction on each of the three charges to the point where the *Kienapple* principle ought to be applied. Technically, the three offences are separate and distinct; the first count alleges a failure to provide an efficient fishway, the second count alleges a failure to comply with the directions of the Minister to provide an efficient fishway and the third count relates to harmful disruption of a fish habitat contrary to s.31 (3) (a) of the Act. Both the first and second counts relate to the same period of time and same section of the Act albeit one hinged upon a determination of the Minister and the other is based upon an opinion of the Minister. Taking an overall view of the evidence I repeat that it would seem that the delicts of the defendant did in fact arise out of one single undertaking although it is acknowledged that not only are the acts distinct, they are related to two different periods of time. However, if one were compelled to impose a sentence of incarceration, I think that the period of imprisonment imposed under the second count would run concurrently with that imposed under the first count, in accordance with the well recognized principles of sentencing that the sentences ought to run concurrently when the offences arise substantially out of the same conduct of the accused. In my view, the same principles ought to apply when the penalty is a monetary one, although I do not suggest that the principle ought to be extended to the point where no penalty is imposed under the second count. For the foregoing reason I propose to reduce the penalty under the second count from $750.00 to $50.00 which I would consider to be a nominal penalty under the circumstances here existing. I point out that there is no minimum penalty provided in s.61 (supra). To this extent then I would allow the appeal against sentence but in other respects I confirm the sentences imposed by the learned trial judge.

I propose that there be no costs on this appeal.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER (Leachate From landfill site)

LAYTON Prov. CT. J. North Vancouver, February 11, 1982

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Accused entered pleas of guilty to four charges of violating s. 33(2) - Fines totalling $20,500.00 imposed.

Sentencing - Accused entered pleas of guilty to four charges of violating s. 33(2) of Fisheries Act, R.S.C. 1970, c. F-14, as amended - Fines totalling $20,500.00 imposed.

The accused Corporation entered pleas of guilty to four charges of violating s. 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended. With respect to the first offence, which occurred in March 1980, the Corporation knew that the operation of its landfill site would generate dangerous water-borne substances, but it failed to properly guard against the possibility that such substances might escape into water frequented by fish. It is therefore fined $10,000.00 with respect to this offence. With respect to the remaining three offences, which occurred in June and July 1981, mitigating circumstances exist and therefore a fine of $3,500.00 for each is in order.

D.R. Kier, Q.C., for the Crown.
J.M. MacKenzie, and *L.G. Schaffer*, for the accused.

LAYTON Prov. Ct. J. (orally): - Now, in the matter of The Corporation of the District of North Vancouver.

1. These charges concern the escape of deleterious substances from lands operated by the defendant Corporation as a refuse disposal area. In each case the offending substances were carried by water flowing over and through this landfill into the waters of Lynn Creek.

2. The first offence, of March 11, 1980, arose because of a sludge-like substance highly toxic to fish, which was found to be entering into Lynn Creek through an abandoned wooden culvert.

3. Counts 3, 6 and 8 occurred the following year, on June 10, 1981, June 16, 1981 and July 13, 1981, respectively. They each involved soil and silt bearing water, less toxic to fish, but capable of damaging the river, as an environment suitable for fish. These offences took place while the defendant was carrying out construction work designed to prevent the escape of water borne substances.

4. The prosecutor, Mr. Kier, contends that these are offences of grave public concern. He suggests that heavy fines are required to emphasize that public concern and to deter other offenders. He rightly pointed to the unusually high maximum fine provided by the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, for this specific offence. He also cited some recent decisions in which substantial fines were levied. He particularly mentioned *R. v. Canadian Forest Products Ltd.* and *R. v. Jack Cewe Ltd.* Overall I am not persuaded by the prosecutor that these latter three counts or any one of them deserve an unusually large fine as exemplified by these two cases.

5. Defence counsel, Mr. MacKenzie, has given me a history of the landfill, details of the present operation and particulars of engineering and construction work in progress. These are contained in Exhibit F and in other supporting material. He has also detailed those factors which might weigh in mitigation of sentence. As examples of fines in a lower range he has cited:

> *R. v. Canadian Pacific Transport Company and Canadian Pacific Limited; 2 Fisheries Pollution Reports 209*
> *R. v. United Keno Hill Mines Limited (1980), 10 C.E.L.R. 43;*
> *R. v. Texaco Canada Limited; 2 Fisheries Pollution Reports 215*
> *R. v. Canadian Cellulose Company, Limited; 2 Fisheries Pollution Reports 111, 256, and*
> *R. v. Cyanamid Canada Inc. (1981), 11 C.E.L.R. 31, 3 Fisheries Pollution Reports.*

Some of these cases also dealt with factors which might be considered in mitigation of sentence.

6. I find that the Corporation, at least since the date of the first offence, has begun construction of works which should prevent any further damage to Lynn Creek. This I see as the most significant mitigating circumstance. However, I am satisfied that the outflows specified in counts 3, 6 and 8 could reasonably have been prevented.

On each of counts 3, 6 and 8, I sentence the defendant to pay a fine of $3,500.00

7. On count No. 2, I sentence the defendant to pay a fine of $10,000.00.

Here a significantly larger fine is appropriate. I find that the defendant knew that its operation would generate dangerous water-borne substances which might escape into Lynn Creek. It failed to properly guard against such leakage. Mr. MacKenzie, in his submission for the defendant, has emphasized that the District has carried on a refuse operation on these lands for many years. I find it pertinent to take notice that the *Fisheries Act*, since at least 1950, has included this offence. And, of course, as Mr. Kier points out, the common law principle illustrated by the decision in *Rylands v. Fletcher* (1868), L.R.3 H.L.330 has throughout applied to the municipality's operation on these lands.

Finally, I should add that I considered the recently reported decision in which MacMillan Bloedel Ltd. at Nanaimo was sentenced to a fine of $22,500.00 for two counts of pollution at its Harmac Pulp Mill site. I only saw the report of this decision published in the Vancouver Province but I anticipated it dealt with the same section.

BRITISH COLUMBIA COUNTY COURT

R. v. THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER

COWAN Co. Ct. J. Vancouver, October 14, 1982

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Corporation entered pleas of guilty to four charges of violating s. 33(2) - Provincial Court Judge imposed fines totalling $20,500.00 - Appeal by Corporation on basis that fines excessive - Appeal dismissed - No error in principle by Trial Judge when imposing sentence - Also, fines not excessive.

Sentencing - Corporation entered pleas of guilty to four charges of violating s. 33(2) of Fisheries Act, R.S.C. 1970, c. F-14, as amended - Provincial Court Judge imposed fines totalling $20,500.00 - Appeal by Corporation on basis that fines excessive - Appeal dismissed - No error in principle by Trial Judge when imposing sentence - Also, fines not excessive.

J.M. MacKenzie, and *H. Hollinrake*, for the appellant.
D.R. Kier, Q.C., for the respondent, Crown.

COWAN Co. Ct. J.: - The appellant plead guilty in Provincial Court to four counts under section 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, *viz*, that it did on the four dates mentioned in the counts unlawfully deposit or permit the deposit of a deleterious substance in water frequented by fish in Lynn Creek.

Fines totalling $20,500.00 were imposed, $3,500.00 each on three of the counts and $10,000.00 on the other count. The appellant appeals on the grounds that in all the circumstances the fines are excessive.

The charges arose out of the appellant's operation of a sanitary landfill site adjacent to Lynn Creek.

Counsel for the appellant fully reviewed the history of the appellant's operations at the site and the steps which it had taken to prevent and alleviate problems arising from the operation of the site in so far as those problems concerned the deposit of deleterious materials in Lynn Creek.

In fact three of the counts involved spills or deposits which occurred while the contractor hired by the appellant was carrying out remedial work.

All of the information and material placed before this court on the appeal was before the learned Trial Judge. I have reviewed his reasons for judgment and his reasons for differentiating between the respective counts in so far as the amounts of the fines involved.

In my opinion it cannot be said that the learned Trial Judge erred in principle in imposing sentence, nor do I think it can be said in all the circumstances that the fines were excessive having regard to the seriousness with which Parliament has treated offences of this nature as evidenced by the fact that an unusually high maximum fine of $50,000.00 is provided for a first offence.

The appeal is dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. COULSON PRESCOTT LOGGING LTD.

MACLEOD Prov. Ct. J. Port Alberni, B.C., May 27, 1982

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Six charges under s. 33(2) and s. 31(1) relating to accused's logging activities - Accused convicted on one charge and fined $1,500.00.

The accused company was charged with three offences under s. 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, and with three offences under s. 31(1). All offences related to three unnamed streams which were referred to as streams 1, 2 and 3. It was established that streams 1 and 2 were covered with brush and logging debris as a result of the accused's activities, but on the evidence it could not be said that the streams were waters frequented by fish or that they constituted fish habitats. Thus the charges with respect to these streams were dismissed. The third stream however was a water frequented by fish and also a fish habitat, and there was no doubt that logging debris and silt had entered the steam, partly as a result of the accused's activities. Logging debris and silt are not deleterious by themselves but become deleterious after a period of time if not removed. A conviction with respect to this stream was entered and a fine of $1,500.00 imposed. Because of the principle in *Kienapple*, the accused could not be convicted under both s. 33(2) and s. 31(1).

D.R. Kier, Q.C., for the Crown.
C.S. Bird, for the accused.

MACLEOD Prov. Ct. J. (orally): The defendant company Coulson Prescott Logging Limited stands charged with an Information containing six count, three under sections 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, and three under section 31(1) of the *Fisheries Act*. All offences therein covering three unnamed tributaries in an area where the accused held a cutting permit. The tributaries alleged are unnamed, but for the purpose of this trial are named 1, 2, and 3 and marked accordingly.

Witnesses testified that there are a number of streams in the area in question, but the charges relate only to these particular streams.

The accused is a logging contractor, having engaged in the logging industry for some forty years. The area which we're talking about was where the accused was the holder of a number cutting permits, in what is known as a portion of the Toquart watershed. The alleged incidents occurred in cutting permit number twelve and that permit included a number of stipulations setting out cutting specifications, slash disposal, culverts, roads, et cetera and in addition, restrictions as to deposit of logs or debris into water. All the restrictions and specifications therein are under the jurisdiction of a forestry official. The type and method of the logging are totally under the jurisdiction of the provincial Ministry of Forest. However, in the past few years, there has been an arrangement that the federal Department of Fisheries and Fish and Wildlife to have input into the cutting permits in the sense, that meeting of all bodies are held and the problems thereto

discussed. The federal Fisheries have this input, but it appears from the evidence in this particular case, that the only input by Fisheries was regarding the road and bridge construction and not that of describing, if any, of any of the fish streams in the area. For some reason the input by the federal Fisheries is directly to the Forestry (provincial) and not directly to the individual responsible for the carrying out of the permit in question.

The accused company as per the cutting permit did construct a road and bridges or culverts as requested. Some evidence was led regarding over runs on construction, but the required work was completed. All bridges or culverts in the area were gravel covered not decked. See volume III, 3 (134-135).

"From my experience if there were fish concerns in that creek, they would have required a decked bridge as they did on Tributary 4. There's more chance of pollution from a gravel decked bridge than there is from a wooden decked bridge and normally anywhere there are any concerns for fish habitat, they require a decked creek as they did on Scott Creek, as they did on Trib. 4, as they did on Cub Creek and the Little Toquart Crossing."

The logging continued until shut down through the Fisheries Officer Girodat, who at the time, namely July 23rd, 1980, took numerous photographs of the streams in question and calling in Mr. Langer for an assessment of the area and the type of clean up that may be required. It appears to me from the evidence, that with his expertise in the fishing and logging industry, he felt not competent to assess the situation at that particular time and relied there on Mr. Langer to advise of the solution.

There's no doubt on the evidence that streams 1 and 2 were covered with logging debris, while stream number 3 was covered to a much smaller extent. The debris consisted of twigs, needles and the usual debris one would find in a typical west coast logging operation. Mr. Langer attended on August the 1st, 1980 for a period of some three hours, inspecting the streams in question. On stream number 1, he walked down it one hundred metres and inspected upstream. Number 2, he inspected it from a bridge. Stream number 3, he walked down-stream some two hundred yards into the virgin cut and noticed a large number of fry and he walked upstream to the virgin forest of the cutting permit.

As a result, advice of his findings were communicated to Fisheries Officer Girodat and clean up was commenced and completed to the satisfaction of all concerned.

This is a very brief resume of the facts elicited by the Crown as to the actual events up to and including the closure date. I have not gone into the testimony of the Crown as to the effects of the logging debris and the silt at this stage.

The defence called a number of witnesses including the President of the accused, his foreman, expert witnesses in the field of forestry, toxicology and water quality ecologists, logging practises and hydrology.

I do not want to go into detail of the evidence to an extent that may obscure the salient points of this matter. On re-reading the transcripts a great deal of the evidence is repetitious and to pick out bits and pieces of evidence may be somewhat misleading.

Firstly, I am satisfied that the accused company is a proper party to these charges. It is the licensee of the cutting permit with obligations thereto, it had a foreman overseeing the logging on a daily basis. It did hire independent fallers and this to me does not avoid their liability under the *Fisheries Act*.

Count number one states that between March 1st, 1980 and August 2nd, 1980, did unlawfully deposit a deleterious substance, to wit; logging debris in water frequented by fish, an unnamed tributary of the Little Toquart River in contravention of section 33(2) of the *Fisheries Act*. This charge relates to tributary number 1.

Count two reads the same as count number one and covers the stream identified as number 2.

There's no doubt both these streams were covered with brush and logging debris. According to Mr. Langer stream number 3, the third count was 2.3 times larger than number 1 and 2 and that number 3 was two to three metres wide. In other words, streams 1 and 2 were from three-quarters of a metre wide to maybe one metre wide and their bed -one described as torrential - different than 3. In stream number 1, he found one fry downstream, no mention of fry in number 2.

Evidence produced by the defence appears to show that these two streams are not of a viable nature; not spawning streams, agreed to by Mr. Langer. The presence of two fry as seen by Mr. Girodat and Mr. Langer on their viewing can be explained by the odd fish being trapped or possibly coming from other waterways.

Mr. Olmsted, in his evidence, saw no fish at all in 1 and 2. His description as he saw it on the occasions were somewhat different than that of the Crown. At high flow, tributary 1 and 2 were torrential. At low flow, very small.

I can come to no other conclusion from the evidence produced to me by all witnesses that these two streams are, like hundreds of others, not viable for the production of fish and although two fish were spotted were not such watercourses as were not frequented by fish (sic).

I'm also satisfied beyond any reasonable doubt that these two streams do not come anywhere near the definition of fish habitat. The evidence is quite conclusive as to that fact. Having found that these are not streams frequented by fish or that these streams are fish habitat counts one and two and counts four and five fail and will be dismissed.

Counts three and six of the Information deal with the stream identified as number 3. Count number three states, in essence, that the defendant did deposit a deleterious substance, logging debris and silt in water frequented by fish contrary to section 33(2) of the *Fisheries Act*.

Count six, did unlawfully carry on an undertaking, logging, that resulted in the harmful alteration of fish habitat another unnamed tributorty of the Little Toquart River, contrary to section 31(1) of the *Fisheries Act*.

The evidence shows quite clearly that this stream number 3 is frequented by fish and is fish habitat within the definition described. The majority of the evidence of the experts called by both sides left no doubt in my mind as to the viability of this stream in regards to fish.

In view of my findings pertaining to streams 1 and 2, I am now only interested in the evidence pertaining to stream number 3.

Evidence has been heard that this operation was not out of the ordinary, in that the type of wood cut is of such a nature that wood debris will enter watercourses. The fallers ae instructed to clear all merchantable timber up to a watercourses even though the falling of such timber may be hazardous to a stream or to a faller. There is no doubt that in stream number 3, logging debris and silt has entered this stream. And the only conclusion is that logging of this particular area was partially responsible.

Photographs tendered in evidence by the Crown show some damage done to the banks of this stream. Mr. Langer states that this resulted in the silt found in the pool area. Mr. Eller says that as a result of natural erosion upstream of the permit great quantities of silt were deposited naturally and always will be. There would be flushing out occasionally due to the rains, but his opinion in essence, was that it was natural siltation as well as logging induced.

Mr. Langer comments regarding the deleterious effect of the debris and siltation were more of the long term effect of clogging and possible scouring, forming dams, et cetera, which may obliterate the stream channel.

It appears to be the practise in logging operations that following cessation of logging arrangements are made with Fisheries as to the type of clean up required. Only then is the clean up proceeded with. In this particular case, the operation was closed by the Forestry Branch co-operating with the Fisheries Branch. Clean up was ordered by the Fisheries department and was completed.

I am satisfied on the evidence presented to me is such that the debris and siltation effect was induced into the stream by logging and that the debris in question was deleterious as set out in the very embracing definition of section 33(11).

In essence, I am saying that the debris in this stream was at the time at first inspection by Officer Girodat deleterious. There is really no evidence as to when this deposit occurred except for Mr. Langer whose opinion was at least a few months prior to shutdown. The evidence does show and I accept that logging operators are well aware of the effects of logging near viable streams and appear to do their utmost to abide by the guidelines.

If there is evidence that the debris as outlined was of a very short term effect than I would find that this debris and siltation were not deleterious.

To my mind, logging debris and silt are not deleterious by themselves but become of a deleterious nature over a period of time. This time would be difficult to ascertain, but I suppose would have to be based on actual fact cases.

The accused is afforded the defence of due diligence. The accused is an experienced operator with competent staff and very well aware of his obligations under the *Fisheries Act*.

As pointed out in evidence the input by the Department of Fisheries to the contractor or licensee is routed through a rather convoluted process. I am satisfied

that the accused company was aware of stream number 3 and number 4 and did the best he could in the circumstances. Being aware of the *Fisheries Act* and the responsibilities thereto normal practise of clean up following completion of logging may not be sufficient and that an operator has an obligation to clean up situations as they arise. The streams in question in this particular case was not that difficult to remedy during the course of yarding which appears to have been the contributor. The Fisheries Department, except for road construction does not, as the evidence shows, appear that co-operative in the outlining of problems that may be encountered.

There will be a finding of guilty in count number four (sic). Count number six to my mind comes within *Regina v. Kienapple* and will be dismissed.

(Editor: At this point, counsel made submissions with respect to sentence.)

Mr. Kier: Your Honour, Fisheries Officers Mr. Langer and Mr. Hartman were back on this site on January the 29th, 1982. I hoped to have Mr. Langer here. He took a number of photographs. I only have photostatic copies of the photographs. He has the other ones with him and he unfortunately is in another trial in Burnaby. ... Mr. Langer took the pictures and I would like him here to be able to tell Your Honour what stream number 3 is like in the long range. From my observations of what I heard and he told me last May, ... it was in his words "very serious": Talking about fifty and a hundred years to have this stream rehabilitated.

The Court: Well, you're going to run into Mr. Bird though, going to call Mr. Eller and show that it's not going to.

Mr. Kier: Yes.

The Court: So?

Mr. Kier: And I would like to have Mr. Langer here to be able to give that evidence. I make that submission that it takes fifty to a hundred years to have the stream rehabilitated. That may not have as much weight, of course, when I say it as when they say it. That is what I like to have Mr. Langer here, to say that, to give some indication to Your Honour of how serious the Fisheries people view this matter. It's not a one or a two or a ten year thing; it's fifty to a hundred years to rehabilitate this stream and accordingly, my submission the penalty that Your Honour must impose then, of course, must be that much --

The Court: Well, of course, in my judgment, I said it was partially to blame --

Mr. Kier: Yes.

The Court: I've made that a finding of fact.

Mr. Kier: Yes.

The Court: I'm quite satisfied there's a lot of natural --

Mr. Kier: Well, in any event, Your Honour, that's my request. If Your Honour, feels you don't want to hear from Mr. Langer, I'm sorry he's not here --

The Court: Yes.

Mr. Kier: That is a submission of the Crown, that this is a very serious matter and also that Your Honour can make an order to have the matter cleaned up. I've seen the pictures, the photographs, Your Honour, I only have photocopies here today, and they were taken on January 29th, 1982, which of course, is the worse time of the year for photographs, but it looks like an absolute wasteland --

Mr. Bird: Your Honour --

Mr. Kier: -- it looks like a --

Mr. Bird: Your Honour, I object to my friend even beginning to get into this area, right at this point in time. In fact, I also propose to object vigorously to his submission that Mr. Langer could be recalled at this point in time.

Mr. Kier: Now, if I continue, Your Honour, these pictures indicate that it's a wasteland and this may have something to do with, of course, the time of the year. There's no vegetation around. It looks like, almost like moonscape, there's stumps, logging debris and a lot of water (this is stream number 3). It's fairly flat there if Your Honour will recall, there's a lot of water and if Your Honour would harken back to the original tissues that were put in streams 1 and 2 -- stream 1, I believe, Mr. Girodat took them before the bridge went in and try and visualize a nice mountain stream that way and then, of course, you have the total denuding of the forest cover and is consequent, as Your Honour has found, some bank erosion and so on that as far as liability of the stream goes, in my submission, what Doctor Hartman and Mr. Langer tell me, fifty to a hundred years to rehabilitate the stream, of course, is not out of line.

Consequently, Your Honour, the Crown submits that a very heavy fine should be imposed on the defendant Corporation to impress upon them and any other person whom would see fit to cause such devastation of a fishery resource, Your Honour, and that a heavy fine should deter them and anybody else.

Now, the penalty section is for first offence, summary conviction to a fine not exceeding fifty thousand dollars and in addition, Your Honour, under subsection 33(7), in addition,

> *"order that person to refrain from committing any further such offence or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the court, will or is likely to result in the committing of any further such offence or to take such action specified in the order as, in the*

opinion of the court, will or is likely to prevent the commission of any further such offence."

Now, the Crown submits that that would encompass, Your Honour, an order by Your Honour to have the matter cleaned up to the satisfaction of the fisheries. My submission is that on the totality of the case here, Your Honour, the fisheries have not been out of line in asking for the stop work order when it was done and ask for a hand in cleaning it. According to Mr. Langer, this requires further clean up and to be done by way of hand cleaning as well, and I would ask for that, Your Honour, in addition to a very severe monetary penalty.

The Court: Mr. Bird?

Mr. Bird: Your Honour, firstly, I object to the Crown's request that it be allowed at this point in time to recall Mr. Langer. The Crown has had every opportunity to put this evidence in during previous hearings on this case and it also had ample time to arrange for Mr. Langer to be here today, if that was its intention. I submit that anything that the Crown could do now, would be merely rehashing evidence already before the Court. I submit that the best evidence which the Court can consider with respect to this present state of tributary 3 is contained in the slides which the defence put in. Your Honour will recall the slide show, which I submit, shows the state of that tributary in January of 1981 and whatever happened between January '81 and '82 is a different matter. I submit that that the evidence my friend seeks to put in now, in any event, is not the best evidence. The best evidence has already been put in. I submit that that the accused should not be required to come back another time; there should not be another adjournment on this trial to allow for Mr. Langer to put in more photographs of this tributary number 3.

With respect to sentence, Your Honour, I urge the Court to impose a fine of no more than the smallest amount available to Your Honour. I submit that the fine should be of a nominal amount. I say that, Your Honour, for the following reasons: I submit that the whole of the evidence presented in this case indicates clearly that the offence was one essentially, Your Honour, of a trifling nature, the extent of any disturbance was small. Your Honour has said in his judgment that the siltation was only partially caused by the logging. I urge Your Honour to recall that fact. I also submit, Your Honour, that this offence, this occurrence was virtually inevitable during logging of this area. I submit that the occurrence was essentially unavoidable. In addition, I submit, Your Honour, that any disturbance which occurred was for a very short period of time. The evidence, I submit, is clear that there were in fact no long term effects of the logging. In any event, certainly by January of 1981, which I just referred to, the period when Richard Olmsted took the slides of tributary 3, the streams were clean and healthy at that point in time, I submit, Your Honour, and that is easily seen from the slides. The Court can see the clean gravel and the natural state of the banks at that time and I submit that that indicates that by January of

1981 those streams essentially had no longer were suffering any effects which they may have suffered earlier. And by that point in time, they were completely rehabilitated.

I submit that, in addition, the defence, if Your Honour sees fit to allow the Crown to introduce evidence of the length of time for rehabilitation of this stream, I submit that the defence could produce evidence that, in every likelihood the stream could be naturally rehabilitated in a period of much less than what the Crown submits. In other words, if the stream is not already naturally rehabilitated, which I submit it is Your Honour, than the defence I submit could obtain evidence that the stream would reach a point of natural rehabilitation in a much shorter period than my friend is alleging. I have a note from Mr. Eller here that such rehabilitation could take place in less than five years. My submission, however, is that the evidence which is before the Court and the testimony of Rick Olmsted supports this, that the stream is already rehabilitated.

With respect to the accused, Your Honour, I submit that there is no evidence, whatsoever, before the Court of the presence of an uncaring attitude or sloppy approach to the logging, so as to save time and money by ignoring the environment. I submit, there is no evidence whatosever of that before the Court. On the contrary, Your Honour, I submit, that the evidence showed an intention to try to prevent environmental damage. I submit, also, there was in the Company, a willingness and an eagerness even, to prevent infractions such as this. In addition, I submit, that the officers of the defendant company showed a willingness to co-operate with the various regulatory authorities. The testimony of Mr. Coulson and Mr. Rai and also the evidence from the time cards which were submitted as exhibits indicates the presence of this attitude, Your Honour.

If there is some kind of failure in this case, Your Honour, I submit that it is the failure by the Department of Fisheries to indicate its concern to the loggers; it's a breakdown communication between the regulatory authorities and the people who do the logging. I submit its their duties to give the knowledge to the company which would allow the company to prevent the occurrences of such things as has occurred here. In reality, Your Honour, it is the responsibility of the fisheries officers and I submit that what has resulted here, resulted from their failure to communicate and from a breakdown of the referral system, about which Your Honour heard so much evidence.

On that point, Your Honour, I ask Your Honour to remember the evidence regarding C.P. 16; how the fisheries officer is now communicating by the use of letters and maps, to set out his concerns, his requirements and his expectations concerning the logging and how the company is now (being in possession of the necessary knowledge) complying with those requirements and the system apparently now, Your Honour, is working. I submit that it was not working before.

In addition, Your Honour, I urge Your Honour in considering the sentence to consider the very large expense incurred by the company in defending this action. I submit the company did most certainly did not expect the trial to last as long as it did, Your Honour. I don't think anyone expected the trial to be as long as it was and to be so expensive; requiring eleven day of trial and numerous expert witnesses. And this defence, Your Honour, I submit was undertaken because of the principle involved; that my client believed he was right and that's why he defended the action. He was not prepared to lie down without a fight and become a victim of, what I submit, is a faulty system of regulations, Your Honour.

I also ask Your Honour to look at the company, itself, to consider its position in the community; as a log employer, a tax payer for many years, a company with unblemished record of performance in a difficult industry, Your Honour. I submit the company is an important and contributing element in society. That it is, in addition, a good corporate citizen and has been so for many years, Your Honour. This was all shown, I submit, in the evidence.

I submit, in addition, Your Honour, that this company is entitled to leniency under the circumstances, in view of its past record and in view of the size of the expense it has already incurred and in view of the fact I submit Your Honour, that such an occurrence has happened here, is most unlikely in the circumstances ever to happen again.

Accordingly, I urge Your Honour to make a fine a nominal one. In support of that submission Your Honour, I refer Your Honour to the Court of Appeal decision handed out by my friend during arguments, its *Regina and Blackmans Construction* (3 Fisheries Pollution Reports 2). It's a decision of the B.C. Court of Appeal dated December the 16th, 1980. This was a case, Your Honour, involving four counts under section 31 of the Federal Fisheries Act. There were four counts. Court of Appeal discusses various constitutional matters. Your Honour, the case involved the removal of gravel, it was a question of gravel in the streams. The Court considers, as I've said, various constitutional matters which we discussed during argument and the Court of Appeal iln December of 1980, Your Honour, says, at the bottom of page eleven (page _ of 3 Fisheries Pollution Reports);

> *"I would therefore grant leave and allow this appeal and order conviction of the respondent to be entered on counts one and seven".*

They conclude;

> *"The appeal is allowed and conviction is entered accordingly".*

And then Mr. Justice McFarlane says, finally in his reasons for judgment;

> *"It is the judgment of the Court that the sentence to be imposed here is that of a fine of one hundred dollars in respect of each of the two counts".*

And I submit, Your Honour, that that recent Court of Appeal decision should be the decision upon which Your Honour bases sentence. I would submit that sentence in this case should be one hundred dollars, Your Honour, in view of the circumstances that I related and in consideration of the fact that the occurrence, Your Honour, I submit was of a very minor nature in reality.

Accordingly, Your Honour, I submit that the fine should be no more than one hundred dollars as set out in the *Regina v. Blackmans Construction* case.

Those are my submissions, Your Honour.

The Court: Thank you.

Mr. Kier: Your Honour, I might say something about the *Blackmans Construction* case. I was counsel on that case at the Court of Appeal level. There had been two previous acquittals; Provincial Court and County Court and it was on a constitutional matter, it was sort of a test case.

Now, on that basis, under the Gravel Removal Order of British Columbia, the federal regulations, it wasn't the same section as here, Your Honour. On the basis of a test case, a nominal fine was imposed. The Crown was finally successful after the third hearing. As far as the case --

The Court: Of course, this may be the same facts or type of situation; the test case, might it not be Mr. Kier?

Mr. Kier: Well --

The Court: The situation regarding the judgment today?

Mr. Kier: No, Your Honour, because this is 33(2). There's been many cases under 33(2). The constitutional question there dealt with an owner of land at which the Fraser River had encroached upon and he was taking away his own land so he though - Blackmans Construction - he felt that he could presumably take away gravel on his own land even though it was contrary to the Gravel Removal Order of the fisheries regulations, Federal Department of Fisheries.

And that's the background of that, so it's totally far different than here, Your Honour. There, in my submission, he would have some justification for feeling he could do with his own land as he saw fit. In this case, contrary to what my friend says, Your Honour, the evidence, I understood was that the fisheries officers, according to Mr. Girodat were out there on a number of occasions dealing with Coulson Prescott officials on the bridges and there was a meeting of ten or eleven people, forestry and fisheries. So that's far from the case here when they know the fisheries are concerned. That is not like having something on your own land digging it up, without fisheries being on the site.

MACLEOD Prov. Ct. J. (orally):- Well, I'm prepared to sentence now, in view of the matter been going on since September the 10th, 1980.

Penalties imposed under criminal law, which of course, this is, in a sense, imposed to deter individuals from committing a similar type of offence again, or deter other individuals from doing that type of thing, or rehabilitation. Rehabilitation, of course, was the so called main thrust of sentencing in the past years. Now, it's in terms of more of a matter of retribution than (I don't want to use the word) revenge, but it's more of a punishment to the individual charged with any criminal offence, in some cases.

It's interesting to note that the section regarding logging companies it has been held *ultra vires* to the company, talking about debris and substances in the water only a maximum penalty of $5,000.00. It seems to me, at that particular time, I guess, when this section was put in for the - solely directed against logging companies and others, they feel that this type of thing is too serious of an offence, although the deleterious substance covers such a majority of things that can happen on occasion.

As pointed out that my only concern was number 3, it was found in the evidence, as a matter of fact, that the Fisheries officers in question, in essence, totally wrong regarding 1 and 2; that it only carried water and that's all it did, there was nothing else viable or fish undertaking or fish stream whatsoever. Number 3 is a little different proposition, hence the guilty finding. I don't think the penalty involved - the accused is a reputable company, is in business and has to remain in business, is well aware of these types of things that can happen. These aren't deliberate which the Fisheries people seem to want this Court to accept; they deliberately do these things just for a matter of chopping down trees and then drag them through creeks. I can really make no finding that there's any logs dragged through, except on one occasion. As a matter of fact, looking at the whole of the evidence of the Crown regarding the Fisheries people involved, it seems to me that between the two of them, a bit of exaggeration of some of their evidence, compared to the other -

A penalty should be imposed. This thing cannot be condoned. The operator Coulson Prescott, the accused, should at least realize the penalties involved. The finding of this type of thing later on, would be far more expensive, in a sense, than the penalty.

In the circumstances, there will be a fine of $1,500.00.

(Editor: Proceedings Reconvened).

Mr. Bird, this is a matter for the record. I've been advised by my Court Clerk that during the final reading of my judgment that where I had dismissed counts one, two, four and five, I inadvertently convicted your client of count number four rather than count number three which is the conviction that is held. I'm sure both of you gentlemen were aware I was talking about tributary 3.

BRITISH COLUMBIA COUNTY COURT

R. v. COULSON PRESCOTT LOGGING LTD

CASHMAN Co.Ct.J. Nanaimo, May 3 and 12, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Appeal by Crown from acquittal on charges of violating ss.31 (1) and 33 (2) - Appeal dismissed - Decision of trial judge that streams not waters frequented by fish and not fish habitat was not unreasonable and could be supported by evidence.

Sentencing - Appeal by Crown from fine imposed by trial judge for violation of s.33 (2) of Fisheries Act, R.S.C. 1970, c.F-14, as amended - Appeal allowed - Fine increased from $1,500 to $4,000.

On appeal by the Crown from acquittal on four counts of violating ss.31 (1) and 33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, *held*, the appeal is dismissed. The County Court should not substitute its view of the evidence unless the verdict is unreasonable or cannot be supported by the evidence. Although two fish were seen in the streams in question, the trial judge found that the streams were not waters frequented by fish, fish habitat or viable to the production of fish. He carefully considered the evidence and all arguments advanced and found that that evidence satisfied him beyond a reasonable doubt that the streams did not come within the definitions.

On an appeal by the Crown from the sentence imposed for a violation of s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, *held*, the appeal is allowed. The fine imposed by the trial judge ($1,500) is not appropriate. It does not take into account the seriousness of the offence, given that the maximum possible fine is $50,000. The fine is increased to $4,000.

D.R. Kier, Q.C., for the Crown, appellant.
C.S. Bird, for the respondent.

CASHMAN Co.Ct.J.: - (written judgment May 12, 1983) The appellant (Crown) appeal the acquittal of the respondent (accused) on four counts of a six count Information alleging offences in contravention of the *Fisheries Act* R.S.B.C. 1970 c.F-14, as amended.

The trial in Provincial Court consumed some eleven days. The acquittal was entered on May 27th, 1982, by a Judge of the Provincial Court of British Columbia at Port Alberni. Counts 1 to 3 alleged offences under the provisions of s.33 (2) of the *Fisheries Act* and Counts 4 to 6 offences in contravention of s.31 (1) of the *Fisheries Act*.

Counts 1, 2 and 3 concern three unnamed tributaries of the Little Toquart River, where the respondent carried on logging operations, referred to in the evidence and on this appeal, as stream 1, stream 2 and stream 3, and similarly with respect to Counts 4, 5, and 6. The learned Provincial Court Judge found that the respondent had

contravened s.33 (2) of the *Fisheries Act* in respect of stream 3 and held that Count 6 also in respect to stream 3 came within the *R.* v. *Kineapple* concept and dismissed that charge against the respondent. No objection has been taken to that.

S.33 (2) of the *Fisheries Act* makes it unlawful to deposit a deleterious substance, in this case said to be logging debris, in water frequented by fish. S.31 (1) of the *Fisheries Act* creates the offence of unlawfully carrying on an undertaking, in this case logging, that results in the harmful alteration, disruption or destruction of fish habitat.

The essence of the findings of the learned Provincial Court Judge was that streams 1 and 2 were not "waters frequented by fish", nor did they constitute a fish habitat and he further went on to find that streams 1 and 2 were not viable to the production of fish.

The Crown listed six grounds of appeal but argued this appeal only on the first three grounds, which are stated on the Notice of Appeal as follows:

> *"1. THAT the learned trial Judge erred in holding that streams 1 and 2 were not waters frequented by fish;*
>
> *2. THAT the learned trial Judge erred in holding that streams 1 and 2 were not fish habitat;*
>
> *3. THAT the learned trial Judge erred in holding that streams 1 and 2 were not viable for the production of fish."*

The term "water frequented by fish" means Canadian fisheries waters as defined in s.2 and that includes all internal waters of Canada.

In 1977, s.33.4 (3) was added to the Statute and deals with matters of proof. Only subsection (b) is applicable and the section reads in part as follows:

> *"(3) For the purpose of any proceedings for an offence under subsection (1) or s.33,*
>
> *(b) no water is "water frequented by fish" as defined in subsection 33(11) where proof is made that at all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish."*

It is my respectful view, and both counsel agree, that that is a reverse onus section and falls to be dealt with as provided by *R.* v. *Appleby* (1972) SCR 303 that is the civil standard of proof on the balance of probabilities or the preponderance of evidence.

As I have already noted this trial consumed many days of the Court's time and numerous witnesses, both fisheries officers, employees of the respondent, and scientists were called by both parties.

It is contended by the Crown that there was overwhelming evidence to support a finding of guilt with respect to the three streams and contends that the learned trial Judge disregarded the evidence as well as the law when he acquitted the respondent.

I think it proper for me to take note that the trial Judge appealed from is an experienced trial Judge and I am aware that he has tried many cases under the *Fisheries Act* and while his Reasons for Judgment do not refer specifically to the *Fisheries Act* or

any sections contained in that Act, my reading of his Reasons for Judgment satisfies me that the learned trial Judge was alive to the law and that he properly considered the law in coming to the decision he did. He would have had to do so to find the respondent guilty with respect to stream 3.

This is not a case of law alone. At best this is a case of mixed fact and law.

The learned trial Judge very carefully considered the evidence in what I consider to be an admirably concise judgment. I am satisfied that he considered all of the arguments advanced to this Court in that judgment.

I have had the benefit of reviewing much of the evidence as it pertains to the question of whether these were waters frequented by fish, or fish habitat, or viable streams, and particularly the evidence of the experts, and I am unable to conclude that the learned trial Judge came to the wrong conclusion. I point out that an expert witness, while entitled to careful attention because of that witness's expertise, is like any other witness whose evidence may be accepted in whole or in part, and that appears to be what the learned trial Judge did in this case.

The learned trial Judge said that he could come to no other conclusion from the evidence adduced to him by all of the witnesses, that these two streams, like hundreds of others, were not viable for the production of fish, and even though two fish were seen, were not such water courses as were frequented by fish. He also said he was satisfied beyond any reasonable doubt that these two streams did not come anywhere near the definition of fish habitat, and held that the evidence was quite conclusive and accordingly, dismissed the four counts appealed from, being Counts 1, 2, 4 and 5.

Fish habitat is defined in s.31 (5) of the *Fisheries Act* as follows:

> *"(5) For the purposes of this section and ss.33, 33.1 and 33.2 "fish habitat" means spawning grounds and nursery, rearing food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."*

While it is true that the actual physical presence of fish may not be required to prove that the waters in question are those frequented by fish, that does not mean that from the whole of the evidence the trial Judge wrongly concluded that it is unlikely that the waters could be said to have been frequented by fish.

In saying that I bear in mind what was said by Seaton J.A. in *R.* v. *MacMillan Bloedel (Alberni) Limited* (1979) 47 C.C.C. (2d) 118 at 120.

It appears that that case was decided before s.33.4 (3) of the *Fisheries Act* was enacted.

In my respectful view this case comes squarely within what was said by Craig J.A. speaking for the Court of Appeal in *R.* v. *Janzen* 9 B.C.L.R. 208 at 209-10, where that learned Judge noted that where a person appeals from a summary conviction to a County Court Judge his appeal is governed by s.755 (1) of the Criminal Code, which in turn incorporates the provisions of ss.610 to 616 of the Criminal code, and in particular s.613 (1) (a) (i) which provides in part that the Court may allow an appeal where it is of the opinion that the verdict should be set aside on the ground it is unreasonable or cannot be supported by the evidence.

While a County Court Judge sitting on an appeal from a summary conviction court has certain powers with regard to findings of fact (*R.* v. *Antonelli* (1977) 5 B.C.L.R. 154) that does not mean that a County Court Judge has an unlimited discretion, and does not, in my respectful view, mean that this Court should substitute its view of the evidence for that of the trial Judge, unless the findings of fact or the evidence cause the appeal Court to conclude that the verdict was unreasonable or cannot be supported by the evidence.

In my respectful view, bearing in mind the burden of proof on the Crown, on a charge under the *Fisheries Act*, which is proof beyond a reasonable doubt, and having considered the Reasons for Judgment of the learned trial Judge, I am unable to conclude that the verdict is either unreasonable or cannot be supported by the evidence, and accordingly, the appeal is dismissed.

CASHMAN Co.Ct.J.: - (orally May 3, 1983) This is an appeal by the Crown. There are two appeals. Firstly there was a Notice of Appeal from Acquittal. I dismissed that appeal earlier today and said that I would give written Reasons. The second appeal is the sentence appeal.

The background of this matter is that the respondent is in the logging business and was charged on a six-count Information that relates to three streams, each described in the Information as being "an unnamed tributary of the Little Toquart River." The matter proceeded by referring to them as Count 1 as Stream 1, Count 2 as Stream 2, and Count 3 as Stream 3.

The learned trial judge held that with respect to Streams 1 and 2 they were not "waters frequented by fish," nor could he find that they came within the category of "fish habitat." He did, however, with respect to the third stream find that that stream was a stream that contained waters frequented by fish and he found that the respondent had unlawfully deposited a deleterious substance, logging debris and silt. He heard a considerable body of evidence over a period of some ten or eleven days and when he came to consider the matter of conviction or acquittal he gave what appears to me to be a well-thought-out and considered judgment and he differentiated between Streams 1 and 2 and Stream 3 and he said with respect to Stream 3:

> *"There is no doubt that in Stream Number 3 logging debris and silt has entered this stream and the only conclusion is that logging of this particular area was partially responsible."*

He then went on to consider photographs tendered in evidence by the Crown, the evidence of Mr. Langer and the evidence of Mr. Eller with respect to the silt. By the time Mr. Olmsted, an expert called by the defence, saw the stream the respondent had cleaned up the area but the evidence as read to me by Mr. Kier of Mr. Girodat and that of Mr. Langer and my perusal of the photographs that were entered in evidence, and particularly Photograph 13 RR, part of an exhibit showing Mr. Langer and the stream, would indicate that there was more silt than the learned Provincial Court judge was prepared to recognize in his Reasons for Judgment.

The learned Provincial Court judge dealt with sentencing immediately after submissions and unfortunately, and with great respect, I must say that I find some of his Reasons somewhat disjointed. The fact of the matter is that the Provincial Court judges do not have the luxury of correcting their judgments, as do those of us who are appointed

by the Federal Government, and I try as best I can to bear that in mind in looking at a judgment of a Provincial Court judge and bear in mind also what the learned judge of our Court of Appeal recently said, that "One ought not to read the Reasons of a trial judge as though they were a debenture." However, after considering that the respondent is a reputable company, is in business and has to remain in business and is well aware of the types of things that can happen and that what he did was not deliberate, he then went on to simply say as follows:

> *"A penalty should be imposed. This thing cannot be condoned. The operator, Coulson Prescott, the accused, should at least realize the penalties involved. The finding of this type of thing later on would be far more expensive than a sentence and a penalty. In the circumstances there will be a fine of $1500."*

Those Reasons are not very helpful to this Court sitting on appeal because they do not disclose whether the trial judge considered that the maximum fine is $50 000 and on the scale of things, in my respectful view, a fine of $1500 in the circumstances of this case, as contained in the evidence of Mr. Girodat and Mr. Langer, and even taking into account the evidence of Mr. Olmsted, is not an appropriate fine. The Crown has produced to me the judgment of His Honour Judge Layton in the Provincial Court in the case of *R.* v. *The Corporation of the District of North Vancouver*, decided on February 11th, 1982, and the Reasons for Judgment of His Honour Judge Cowan, sitting on appeal from the fines imposed there, where silt was distinguished from other deleterious substance, and on the facts of that case His Honour Judge Layton distinguished between one type of deleterious substance and another because on the more serious substance he imposed a fine of $10 000 but with respect to the silt, imposed fines on each of the three counts, $3500 on each count.

In my respectful view the Crown is right, this is not a proper fine. It does not take into account the seriousness of the offence. I allow the appeal and substitute a fine of $4000.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. WESTERN STEVEDORING COMPANY LIMITED

LAYTON Prov. Ct. J. North Vancouver, June 15, 1982

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Deposit of deleterious substance into water frequented by fish contrary to s. 33(2) - Deliberate dumping of substance known to be dangerously toxic - Deterrence to take precedence over other considerations when sentencing - $35,000.00 fine.

Sentencing - Deliberate dumping of deleterious substance known to be dangerously toxic into water frequented by fish contrary to s. 33(2) of Fisheries Act - Deterrence to take precedence over other considerations when sentencing - $35,000.00 fine.

D.R. Kier, Q.C., for the Crown.
G.K. MacIntosh, for the accused.

(Editor: The $35,000.00 fine is the largest fine levied to date for a single violation of the *Fisheries Act*. An appeal to County Court quashed the conviction (see page 484). However, the Crown appealed to the Court of Appeal, and the conviction was restored (see page 487). Leave to appeal to the Supreme Court of Canada was refused.

LAYTON Prov. Ct. J. (orally): Now, the defendant, Western Stevedoring Company Limited, is charged that on the 6th day of August, 1981, it did unlawfully deposit or permit the deposit of deleterious substances in water frequented by fish or in a place under conditions where such deleterious substance or any other deleterious substance that resulted from the deposit of such deleterious substances may enter any such water in violation of section 33(2) of the *Fisheries Act* R.S.C. 1970, c. F-14, as amended.

I find the defendant guilty of this offence and my reasons for so doing are as follows.

1. The defendant corporation carries on the business of Stevedoring at the Lynn Terminals Dock. This dock, which faces on to Burrard Inlet, has a large asphalt tarmac as partially shown on Exhibit two. The tarmac area is drained by a number of catch basins let into the surface of the tarmac and draining away through sewers into Burrard Inlet. Some of these are also shown on Exhibit two.

2. During the morning of August 6th, 1981, the defendant's workmen were draining a chemical dip-tank which is shown on Exhibit two. The tank was filled with a water and chlorophenate mixture. The chemical liquid was being transported from one dip-tank to another, a somewhat smaller tank located elsewhere on the dock.

3. Daniel Dobslaff, an employee of the defendant, drove a forklift which carried a two thousand gallon metal tank shown in Exhibits seven and ten. The tank was filled through a hatch on top and emptied through a valve on the bottom on one end of the tank. Mr. Dobslaff estimated, in his testimony, that the tank contained seventeen to eighteen hundred gallons on each trip including the last trip.

4. He went on to testify that the smaller dip-tank, apparently, would not hold all of the chemical liquid being drained from the larger tank. He was instructed by his foreman to empty the last tankful by dumping it on the tarmac. He then opened the valve on the bottom end of the tank and drove for about fifteen minutes around the tarmac in the area shown by arrows on Exhibit two discharging the liquid. He testified that the liquid, "Just ran into the holes in the tarmac which drained into the water".

5. At about 11:40 a.m., as Daniel Dobslaff was finishing, an official of Environment Canada arrived. The tank valve was shut off and samples were taken of the liquid, "From the tank, from the tarmac and from the catch basins".

I'm satisfied and find that the tank contained some seventeen to eighteen hundred gallons of the offending fluid and that, substantially, all of this fluid was emptied on to the tarmac. Futher, I find that, substantially, all of this fluid ran into the tarmac drainage system as observed by Mr. Dobslaff.

6. I find that the chemical mixture was a deleterious substance and that Burrard Inlet is a water frequented by fish and that all these events took place in and near North Vancouver.

7. I am satisfied, upon considering all of the evidence, that the offence was then complete. The defendant and its servants had deliberately emptied some seventeen to eighteen hundred gallons of a liquid substance known to them to be toxic and damaging to fish into an area of the dock which they well knew was drained directly through storm sewers into the Burrard Inlet. Thus, I find that all the elements of this offence are proven on these facts, both *actus reus* and *mens rea*.

8. The offending fluid was emptied by Mr. Dobslaff on a small area of the tarmac shown in Exhibit two which would drain, as I understand the evidence, into the four catch basins also shown on Exhibit two. There was evidence that the sumps in each of these four catch basins were inspected and later that day pumped out by the defendant. Mr. Chapman, an executive of the defendant, testified that each of three of the catch basins sumps held about sixty gallons each and one held about a hundred gallons; thus, the retaining capacity of the four catch basins into which most or all of the liquid would have drained, was about two hundred and eighty gallons. The balance of the offending liquid is not, in my view, accounted for and I conclude that it drained away into Burrard Inlet.

9. The defendant cited a number of decisions. I considered these and found that they did not apply to the facts and circumstances that I have found to have occurred that day. Specifically, the cases I considered are as follows: *Northwest Falling Contractors Ltd. v. R.* 2 F.P.R. 296, (1980), 9 C.E.L.R. 145 (S.C.C.), *R. v. MacMillan Bloedel (Alberni) Ltd.* 2 F.P.R. 182, (1979), 47 C.C.C. (2d) 118, *R. v. Crestbrook Forest Industries Ltd.* 2 F.P.R. 198, (1978), 9 C.E.L.R. 110, *R. v. Chew Excavating Ltd. and The Corporation of the District of Saanich* 2 F.P.R. 163, *North Arm Transportation Co. Ltd. v. R.* 2 F.P.R. 71, *R.v. Stearns - Roger Engineering Co. Ltd.* 1974 3 W.W.R. 285 rev'g 1973 2 W.W.R. 669, *R. v. Barabash, R. v. Provincial Court Judges, Ex parte McGowan*, and *R. v. Clark.*

Arguments on sentence:

The Court: Yes, counsel, did you wish to deal with the issue of sentence?

Mr. Kier: Yes, I'm prepared to do that, Your Honour.

Mr. MacIntosh: Yes, Your Honour, I am too.

Mr. Kier: The Crown wishes to call one Douglas Wilson as an expert on the toxicity of this substance, if I may, Your Honour. Mr. Wilson, please. And before I begin with Mr. Wilson, Your Honour, the bioassays were done (on) the sample number one taken by Floyd McKee (from) a pool of liquid (going) into the storm sewer. (The sample at) 1300 hours, came from NCB 7D ... Your Honour, ... ten fish were put into that sample and it was aerated, as I recall (from) the notes ... of the scientist who did this, Your Honour. (There was) immediate stress upon the fish's introduction to the sample: speed swimming, jumping at the surface, (most dead) more done within two minutes, all dead at five minutes. The conclusion was the LT 50 is greater than two minutes but less than five minutes at a hundred percent concentration. ..., Your Honour, these various samples analyzed as high as 693 mg/l and some were down to 65 mg/l of tetrachlorophenol and they also contained pentachlorophenol. I might say that three out of four were in the range of 300 to 500.

The Court: I'm sorry, is it two different things there?

Mr. Kier: Well, of these various samples that were analyzed for tetrachlorophenol and pentachlorophenol.

The Court: Are (they) the same thing?

Mr. Kier: Well, they are ... wood preservatives composed of tetrachlorophenol and pentachlorophenol.

The Court: I see.

Mr. Kier: Two different but similar chemicals I'm told, Your Honour.

The Court: Yes.

Mr. Kier: So may the witness be sworn, if it please, Your Honour?

The Court: Yes.

DOUGLAS MCKENZIE WILSON, a witness called on behalf of the Crown being duly sworn, testifies as follows:

The Clerk: Your full name, please?

A Douglas McKenzie Wilson

The Court: You could sit down, Mr. Wilson, if you wish.

Examination in Chief by Mr. Kier:

Q And, sir, you obtained your Bachelor of Science, majoring in chemistry and biology from the Unversity of British Columbia in 1969, sir?

A Yes, that's correct.

Q And you received a Master of Science in pesticide chemistry and toxicology in 1973 from Simon Fraser University, sir?

A Yes, that's correct.

Q And what have you done since that time, sir?

A I'm presently working with the Federal Government and my duties include the control of toxic industrial chemicals that contaminate the environment.

Q Well what -- have you done that since 1973?

A I worked for the Department of Agriculture at that time and since 1974, I've been working with Environment Canada on ...

Q In the environment?

A That's right, yes.

Q How familiar are you with the substance that's referred to as this wood preservative, sir, and -- at Lynn Terminals, Western Stevedoring's operation?

A Well, during my university training and my government employment, I have had the opportunity to review all of the published literature on this material and I've also been involved with studies to monitor this material in the environment.

Q All right. And that's been ongoing, sir?

A Yes.

Q And are you able to tell His Honour, if you were asked, sir, how -- how toxic this substance is as far as fish go, sir?

A Yes.

Mr. Kier: I have no further questions on his qualifications on this point, Your Honour.

The Court: Did you wish to question --

Mr. MacIntosh: No, I have no cross-examination with regard to his qualifications, Your Honour.

The Court: Yes, I'll find that he's an expert in that field.

Mr. Kier:

Q Sir, you're familiar with these pentachlorophenols and tetrachlorophenols?

A Yes.

Q These are the common elements for wood preservatives on the west coast of Canada in the lumber manufacturing industry, sir?

A That's right, yes.

Q Tell us what you can say, sir, as to how toxic they are to the environment, and particularly the fish environment, please?

A Okay, they are -- all the chemicals that we are dealing with in British Columbia, they certainly are one of the most accutely toxic. When I mean accutely toxic, this refers to very rapid lethality. The fish will die in this material at very low concentrations. We generally measure fish toxicity by a measurement that's known as a median lethal concentration or an LC 50. Now, the LC 50 is the concentration of a chemical in water that will kill fifty percent of the test fish in a given time, usually ninety-six hours. Now, the LC 50, for example, (for) sodium pentachlorophenate and the tetrachlorophenate varies from 0.05 to 0.1 parts per million. Now, that is ... the LC 50 for salmon species of fish.

Q 0.05 to what?

A To 0.1 parts per million.

Q Yes, for fish?

A For fish, yes. Now, if you compare those -- that concentration to the concentrations that we found in the tanker truck and in the catch basins, those concentrations were many hundreds to thousands of times greater than the LC 50 for fish -- the bioassay which was --- the time required for fifty percent mortality of the fish. This also demonstrates the very high toxicity of this material to fish. ... The LT 50 varied between two and five minutes which shows very rapid lethality to fish.

Q As far as you're concerned, sir, is there any safe amount of this in the environment?

A I would say not, because even at small concentrations these chlorophenols have been demonstrated to show effects on fish, growth, and reproduction. Now, this is what we call a chronic effect or a long

term effect. Now, these chlorophenols can be taken up into fish once they (are) in the environment and they can effect fish growth and reproduction. Effects on fish growth have been shown at only one thirty-fifth of the value of the actual LC 50 value and on reproduction it has been shown that fish eggs and alevins (these are newly hatched fish), yoke sacs, are very sensitive to very small concentrations of the chlorophenol.

Mr. Kier: Nothing further, Your Honour.

Cross-Examination by Mr. MacIntosh:

Q Mr. Wilson, are you familiar with a chemical named polychlorinated biphenol?

A Yes, I am.

Q Are you able to compare the toxicity of that chemical with the chemical in question in this trial?

A No, you cannot compare the two. They are quite different chemicals and their mode of action is quite different on fish.

Q Right. Are you saying that the way in which they effect fish differs?

A Yes, that's correct.

Q But would you say that each of the two chemicals was a very hazardous chemical with regard to the health of fish?

A Yes, we would consider both polychlorinated biphenols and the chlorinated phenols as hazardous to fish.

Q Right. And are you able to rank which is more hazardous or are they both simply extremely hazardous or what would you say?

A In terms of their accute toxicity which I referred to early as rapid lethality, the chlorinated phenols are much more accutely toxic than are the polychlorinated biphenols.

Q And in other respects?

A In terms of chronic toxicity, I would think the PCB's, ... have a more long term effect because they're more persistent in the environment.

Q Right. So the polychlorinated biphenol may well be more harmful in the long run but the chemical we're dealing with here may well be more harmful in the short run?

A Possibly, yes.

Q You can't say conclusively on that point?

A No.

Q All right. And now, with regard to Western Stevedoring Company Limited, your Agency, I understand, has had dealings with that Company with regard to attempting to deal with this environment problem?

A Yes, that's correct.

Q Would you describe the attitude of the Company generally as being a cooperative one?

A Yes.

Q And would you say that the Company, generally, has demonstrated a true willingness to attempt to deal with the problem?

A Yes.

Q Would you agree with me that the Company is carrying on to the present day with different modes of attempting to alleviate the problem?

A Yes, I believe that's true, yes.

Q Are you aware of the importance of this chemical in treating lumber in the lumber industry of this Province?

A Yes, we're very aware of its importance.

Q All right.

Mr. MacIntosh: Thank you, Your Honour.

Mr. Kier: Nothing further, Your Honour.

The Court: Fine, thank you, witness.

WITNESS EXCUSED

Mr. Kier: Excuse me, Your Honour. That's all the evidence I purpose to call on sentence, Your Honour.

Mr. MacIntosh: Calling no evidence on sentencing, Your Honour.

Mr. Kier: Your Honour, I'll be very brief on sentence. Your Honour has heard how deadly, and I say the word deadly, the substance is. The maximum fine for a first offence is fifty thousand dollars under this section, Your Honour. In my submission, I don't know of any more a callous disregard for the Fisheries Act that could have been done by this Corporation than to handle this deadly substance in this way, and they have not ... tried to

justify this in any way, Your Honour it's clearly negligence on (their) part. ... And in my submission, Your Honour should impose a penalty to deter, not only this Corporation but any other person, individual or corporation to conduct their activities ... in a much more suitable fashion than this Corporation at this time. Your Honour has heard me speak to sentence before. The range of fines, ... have gone as high, ... $20,000 per count. (At) Sechelt, B.C., there were six counts, each of $20,000 imposed by His Honour Judge Johnson against Canadian Forest Products (3 F.P.R. 63), ... (A) liquid effluent from the pulp mill, instead of going through the pulp mill diffuser and then out into the ocean, ... was going down ... a ditch and into a river and then into the ocean. This went on for a period of four or five months and that is why a number of charges were laid by the Fishery Officers. In my submission, ... Judge Johnson felt it was a very callous disregard. The Fishery Officers brought it to the attention of the corporation, (but) they didn't lay charges right away. They kept bringing it to their attention over the summer and nothing was done and finally it was done in October and that was the reason for the substantial fine of twenty thousand dollars per count. In my submission, Your Honour, I find that that neighbourhood is in line here because of ... the callous disregard of this corporation in its activities so close to the water (such that) spills that could enter that water in such a free manner. ... The tarmac is sloped toward the catch basins and the catch basins run right into the water. There's no final gate, as it were, that would prevent these substances getting into the water if, in fact, an accident did occur and, of course, this wasn't an accident. This was not an accident, this was something far more serious than that. So that bearing that in mind, if they're dealing with a very toxic substance on their property, then in my submission, a very high standard is called for. I submit to Your Honour, that Your Honour should view it in that way when you impose a sentence, that a serious fine by Your Honour would indicate to this Corporation and others that a very very high standard is called for and they would have to act accordingly.

The Court: Thank you, Mr. Kier. Yes, counsel.

Mr. MacIntosh: Thank you, Your Honour. Your Honour, as my friend has urged a large fine I'm urging a small one and I say that for five reasons.

Firstly, Your Honour, the act of spreading the chemical found in the dock was not a deliberate plan of the management of the Company. It was done at the direction of a dock foreman without direction from management and without even any knowledge of management. The foreman was not educated in the subject and he honestly, though mistakenly, believed that spreading it on the dock and allowing it to evaporate was safe and it was an error in judgment and that is all. And that, in my submission, Your Honour, is very different from wantingly --wantonly disregarding the environment by a deliberate plan of management, for example, to authorize the draining of the tank. And the real attitude of management here is better shown by the way that it has managed the chemical throughout. It has a dip-

tank and a surrounding moat and a surrounding collection area which it is authorized by a federal agency to operate. And all the steps that management has ever taken with regard to this site, have been in accordance with the federal directive. And so I would submit it would be wrong to visit the Company with a large fine for what appears to be an isolated act authorized at the foreman level only.

The second point, Your Honour, is that while the chemical is highly toxic, it was greatly diluted and that was something which was --resulted from the way in which it was used. As the evidence indicated, the ratio of water to chemical in this solution was fifty to one, fifty gallons of water to one gallon of chemical. And then beyond that, Your Honour, the chemical in question had a trade name of Woodbrite twenty-two and that chemical contained only 24%. Only 24% of that chemical was the toxic part -- was this toxic chemical. What that means, of course, is that only -- if I can round the 24% to 25%, only one-quarter of that one gallon is toxic, if you see. So that the dilution that was there was 200 to 1 rather than having the pure chemical go into the water on its own.

For the third point, Your Honour, is that this Company has no record of environmental carelessness apart from this incident. It has never been prosecuted before let alone been convicted and, indeed, as the evidence of this witness that you've just heard indicates, the Company, on the contrary, has demonstrated an ongoing cooperative attitude with the Environmental Agency with regard to the question of attempting to deal with the problem. So, it's not a case of a company that is just carelessly carrying on a practice, that it carries on oblivious to environmental concerns. And the evidence that we do have from Mr. Chapman with regard to the ordinary containment program, the part that's authorized by management, like the part that management runs on a day-to-day basis, that is a model containment program. That is a program approved by the Federal Agency and I am instructed that that is a program which has been used as a demonstrator by the Federal Agency for other parties for other companies to come and inspect it to see how environmental matters should be dealt with.

Fourthly, Your Honour, the quantity of this diluted chemical that was shown to have entered the water is unknown. In view of Your Honour's reasons, it's -- I would have to leave it at that. I would submit that there is no evidence to indicate that any sizeable quantity of this chemical did go in because the evidence was, and if I can stop on this for a moment, Your Honour, the evidence was that the catch basins are entirely leak proof - waterproof and that the level of the liquid in each of the catch basins was ... was not flowing out into the harbour and that indicates, in my submission, Your Honour, that the bulk of the chemical had to have been evaporating from the tarmac because what was left to flow down into the catch basins had to be limited to the quantity that the catch basins could hold because --

The Court: On that point, counsel --

Mr. MacIntosh: Yes.

The Court: I see that as speculation. That is, that two thousand, or perhaps fifteen hundred gallons of liquid would evaporate in an hour is speculation.

Mr. MacIntosh: Well --

The Court: I can't really --

Mr. MacIntosh: It's speculation, Your Honour, except that it is impossible for it to have ... flowed into the harbour if the catch basins are leak proof, as the uncontradicted evidence indicates they are, and if the level of the liquid observed in the catch basins was below the level that it would have to get to ... flow out into the harbour. Because what that means, Your Honour, with respect, is that the liquid never could have gotten as high in the drainage basins as it had to before it could start flowing into the harbour.

The Court: Well, I want to make it clear that ... on that issue or the issue involving the dynamics of water in the sewer system, like the issue of evaporation, I have no evidence upon which I can do more than speculate.

Mr. MacIntosh: I see, Your Honour. I won't pursue the point further because I would ... be limited on the evidence on that regard then.

The fifth point I wanted to make with regard to this sentencing, Your Honour, was the attitude of the Company in terms of cooperation when the matter was brought to their attention. Now, this was a case where management responded the moment it found out about what had been done. It was, of course, ... absolutely contrary to everything management has attempted to do in the past because its had this containment area and this draining area and it was taking steps to take the substance over to another part of the dock. All steps (are) entirely inconsistent with polluting and all steps that are taken to avoid polluting and that's why it's reasonable to assume that management's going to act quickly when the matter is brought to its attention. And on that point, to show management's attitude about it, there were management's voluntary steps which I mentioned prior, and those were the steps of sweeping the tarmac which wasn't done at the direction of the Federal Government or the request of the Federal Government. So rather than anything in the nature of cavalier management, what we're seeing is responsible management trying to make the best of an error in judgment that was made by an employee in the Company. Now I refer to only one case, Your Honour, and in that decision, (*R. v. Canadian Cellulose Co. Ltd.*, 2 F.P.R. 256) the Court was dealing with an appeal both as to conviction and as to sentence. The chemical that was ... involved in that case is referred to at line eighteen in the first page, (page 256 in 2 F.P.R.) polychlorinated biphenol. You'll recall the witness today indicated that in the long run that chemical likely was

more harmful to fish and in the short run the chemical that's before you may likely be more harmful, so I would submit that the nature of the chemical is rather similar in both cases for our purposes. Down at the bottom of page one (page 256 in 2 F.P.R.) -- an explosion that (put an estimated) 210 gallons of this PCB from the transformer into a position where it was free to flow into the water. And if I can take Your Honour to page two at line twenty, (page 257 in 2 F.P.R.), His Honour found that he would go farther and say that the evidence was almost overwhelming to support the conclusion that the PCB went into the interceptors of the drainage system from whence it made its way into Porpoise Harbour. That situation was permitted by the company to prevail for several days during which time its employees knew or should have known what the likely result would be. And then on page three (page 258 in 2 F.P.R.) at line twelve, his review on the judgment below, he says, referring to the trial judge, he also concluded that after the explosion, the company did not act reasonably and with the obviously necessary care to prevent the PCB from entering and remaining within the drainage system. I'm not sure that it was necessary to make the first finding, but both findings are certainly supported by the evidence. Once the explosion took place and the dangerous substance was released, the company's duty to contain it was clear and it was not until January 24th that the clean up of the oil on the ground started and the interceptors in the drainage system were not cleaned out until January 27th. The conclusion that PCB got into the interceptors from the 22nd to the 27th and was permitted by the company to remain there is well-founded by the evidence. It was not until the latter date that the company did anything to remedy the continuance of the problem insofar as the interceptors are concerned. The company's permissiveness, therefore, started on the 22nd when it should have acted more diligently and continued to the 27th when it did do what was needed to be done. They permitted the deposit on each of those six days. And, of course, here they say, Your Honour, quite apart from what the Federal Government asks us to do on the very day of the event, it was also on that very day that we voluntarily, of our own initiative, swept it up. We didn't like that job so we brought in another sweeper, again, forthwith. The other sweeper came in the very next day to do the job better. And at page four (page 258 in 2 F.P.R.) of this case that I've handed up, His Honour says, the company has no previous convictions. The spillage of the PCB was accidental and the gravement of the offence is the failure of the company to react properly to it. The explosion of the transformer, no doubt, caused many operational difficulties -- and I can skip through some of that part. The clean up has cost $200,000 for landfill, dredging was considered. The company acted as good corporate citizens in accepting the more expensive solution. The sentence is appealed and a sentence of $1,000 per day is substituted for each of those days from January 22nd to January 27th inclusive. Now, in my submission, Your Honour, that case contains a number of points that are very similar to the circumstances before you and, indeed, if anything, in my submission, the Company before you has acted more responsibly than did that company. And it is for those reasons that I would submit that a small fine is appropriate and that's why I would urge that a fine of $500 be pronounced.

The Court: Yes?

Mr. Kier: If I could just comment on this case, Your Honour? There, (there) was an accident of the explosion, of course, that was not any forethought ... and secondly, the $200,000 landfill reclamation. That is a very very heavy penalty the Corporation would have to pay, not in the way of penalty but by way of cleaning up the mess. So that in my submission is why the low fine was imposed, Your Honour.

LAYTON Prov. Ct. J. (orally sentencing): - Well, I have considered the cases cited by counsel, that is, the County Court decision in the Canadian Cellulose Company Limited (2 F.P.R. 256) given in March, I believe, of 1979 and the Canadian Forest Products Limited decision (3 F.P.R.) of Judge Johnson in 1978 (sic, 1980). These cases, in my view, are a class of cases dealing with accidental or careless use of a polluting substance or slowness in cleaning it up after an accident rather than deliberate pollution with a substance known to be dangerously toxic. On the facts before me, I don't see that I can do otherwise than comment that the Company knew that this was a dangerously toxic substance. In fact, it had been dealing, as I recall, with the Department Environment Canada on the very issue. Yet, on this morning, the Company or its servants, when it found that it had an extra two thousand gallon tank of the liquid for which it didn't have adequate storage, told a workman, in effect, to dump it in the storm sewers. There is simply no other reasonable interpretation of these facts than that the Company, or at least a servant with authority, deliberately dumped this tankful of liquid down the tarmac storm sewers knowing that the storm sewers ran out into Burrard Inlet. I also recognize that this happened in a community which for a number of years now has been very sensitive to the problem of chemical wastes and their proper disposal. I agree with the Crown, this is a case where deterrence, both to the defendant and to the public at large, must take precedence over other considerations of sentencing. I note that the maximum fine is $50,000. In my view, this fine should be a substantial portion of that sum and I levy a fine of $35,000. The recovery would be by distress if is is not paid within a reasonable time.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. ALLARD CONTRACTORS LTD.

GROBERMAN Prov. Ct. J. Burnaby, June 17, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under ss.31 (1) and 33 (2) resulting from deposit of silt from gravel pit operation into water frequented by fish - Accused acquitted - All reasonable care taken, and deposit of silt resulted from unforeseen flooding and erosion - Accused acquitted.

The accused operated a gravel pit adjacent to the Coquitlam River. A series of settling ponds and drainage channels were constructed to give suspended solid material time to settle before water entered the River. The system was designed by the accused's civil engineer. On July 14, 1981 a conservation officer inspected the site and found that an erosion channel had developed which short-circuited the system and resulted in silt-laden water entering the River and silt being deposited in the River. On July 14, 1981 he observed the same thing getting worse in spite of efforts by the accused to correct the situation. On July 20 and 24 he observed the same situation. The company was attempting to dyke the erosion channel and uncover a culvert but the situation was getting worse not better. The situation continued until August 7, 1981. The Court was satisfied on the evidence that the River was "water frequented by fish", that the area was "fish habitat" and that the sediment was harmful to fish and habitat. The accused however took all reasonable steps in the circumstances. A proper drainage system was in place. The heavy erosion was a result of unusually excessive rainfalls and was not reasonably forseeable. The accused acted promptly in engaging experts to advise it and followed the advice it was given. It also sought the advice of the Inspector of Mines and followed it. In any event, under the circumstances the accused did not "permit" the prohibited acts but did everything it could to try to prevent the unforseeable erosion from continuing. Further, there is no evidence that its gravel pit operation was the cause of the harmful alteration of the fish habitat. It resulted from the unforeseen flooding and erosion. The accused was therefore acquitted of charges under ss.31 (1) and 33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended.

S. Antifaev, and *W. Young*, for the Crown.
M.F. Welsh, for the accused.

GROBERMAN Prov.Ct.J.: - (Orally) The accused's company, Allard Contractors Ltd., a Provincially Incorporated Company, stands charged as follows: Count 1. Allard Contractors Ltd., on or about the 14th day of July, 1981, at or near the District of Coquitlam, in the County of Westminster, Province of British Columbia, unlawfully did permit the deposit of a deleterious substance, to wit, sediment, in a place where such deleterious substance may enter water frequented by fish, namely, the Coquitlam River, contrary to s.33 (2) of the Fisheries Act. Count 2. That Allard Contractors Ltd., on or about the 24th day of July, A.D. 1981, at or near the district of Coquitlam, in the County of Westminster, Province of British Columbia, unlawfully did permit the deposit of a deleterious substance, to wit, sediment, in a place where such deleterious substance may enter water frequented by fish, namely, the Coquitlam River, contrary to s.33 (2) of the Fisheries Act. Count 3. That Allard Contractors Ltd., between the 21st day of June,

A.D. 1981, and the 19th day of August, A.D. 1981, at or near the District of Coquitlam, in the County of Westminster, Province of British Columbia, unlawfully did carry on a work or undertaking, namely, the operation of a gravel pit, that resulted in the harmful alteration of fish habitat in the Coquitlam River, contrary to s.31 (1) of the Fisheries Act.

The evidence establishes that during all material times the accused carried on the act of operation of a gravel pit on approximately twenty acres of land located in Coquitlam, British Columbia, adjacent to and abutting the Coquitlam River. The vast majority of the land is owned by the accused. The lands are at the foot of a mountain; they are sloped downward from west to east, and terminate at the Coquitlam River.

Exhibit 7 is a rather rough plan of the area that was prepared by Richard Hahn. It was referred to constantly throughout the trial and was of considerable help. I will frequently refer to it and therefore a copy of Exhibit 7 will form part of this judgment. Cewe Creek runs from west to east on the south side of the lands. It flows through a culvert under Pipeline Road and empties into the Coquitlam River which in turn flows into the Fraser River and then out to the Pacific Ocean.

The mining of gravel was taking place on the north side of the lands. The south side of the lands had been mined out and formed part of the drainage system that was installed to drain water from the forest area to the west. A diversion channel is shown running north and south across the top of Exhibit 7. A diversion culvert cuts through the centre of the lands from west to east and empties into the Coquitlam River. These are also part of the drainage system. In addition, and as part of a reclamation plan for the mined out area, a series of catch basins and settling ponds were installed by the defendant company on the southerly portion of the lands running from west to east.

The plan of operation is for the water, containing sediment, to run off the west and northwest portions of the land and into the diversion channel and diversion culvert. Any waters that are not picked up by the diversion channel and diversion culvert, flow into the upper catch basin. The idea is to slow the flow of sandy, silty water so the sediment will settle and remain in the catch basins and settling ponds and only clear water will eventually flow into the Coquitlam River. It gives the suspended solid material in the water time to settle.

The upper two catch basins are about one acre each in area; the series of settling ponds east of Pipeline Road total approximately one-half acre. When the water in the upper catch basin reaches a certain height, it passes through a culvert to the lower catch basin. It then flows through a culvert out of the lower catch basin along a ditch to a culvert under Pipeline Road to the settling ponds on the east side of the road.

The same process takes place in the series of settling ponds. That is; the remaining sediment in the water settles and remains in the ponds so that only clear water empties into the Coquitlam River. A brief study of Exhibit 7 will clarify what I have struggled to describe.

Approximately fifty feet to the south of the culvert to the settling ponds is another culvert through which Cewe Creek flows to the river. Both culverts run under Pipeline Road. The drainage system on the defendant's lands was designed by their civil engineer. It was not intended to drain into Cewe Creek but rather through the series of catch basins and settling ponds and finally into the river.

Richard Hahn is a Conservation Officer with the Ministry of the Environment and a Fisheries Officer for the purpose of enforcement of the Federal Fisheries Act. His evidence is summarized as follows: He is familiar with the defendant's gravel pit operation on Pipeline Road in Coquitlam. He prepared the diagram, Exhibit 7. The gravel pit had been in operation during the six years he has been in the area. He attended at the site on July 14, 1981, and for the first time noticed the area marked on his plan as "erosion channel". He described it as an area where the soil was eroding away in a channel. His first view was shown as a dotted line on the plan, estimated at ten metres long and ten metres wide. He was asked the following questions and gave the following answers:

> Question. "Now you have indicated it appeared to be an erosion channel. What led you to call it that?"
>
> Answer. "The material was, the soil was dropped off the sides. There was water coming out of side of this channel and material was falling away and was being carried by the water that was flowing out of the channel and generally eroding away. The material was being carried away leaving this large gap, if you want to call it that."
>
> Question. "Where was the material that was falling away going to?"
>
> Answer. "It was flowing in a downhill direction out of this area alongside this where I have indicated "shovel" here, and over these catch basins and out to this lower catch basin into the creek that is named Cewe Creek, which is on the west side of Pipeline Road and then hence it flowed through the creek and into the creek under Pipeline Road through this channel here and into the Coquitlam River."

When he saw the erosion channel on July the 24th, 1981, it had expanded to twenty to thirty metres deep. During July he observed sediment in the catch basins; that is, fine sands and clay like material. It had been carried into the catch basin by water coming from the erosion channel.

He could not identify any other source. He also observed water and a build up of sediment in the first settling pond east of Pipeline Road. The culvert under Pipeline Road was plugged with sediment. There was water in the settling ponds, and in his opinion there was room for more.

On July 14 he observed the flow of silt laden water entering Cewe Creek. He walked down to the river and observed the creek discharging into the river. The creek was clear above the point where the sediment was entering. He traced the sources of the sediment. He walked to an area just west of the upper catch basins and observed water carrying sediment flowing from the erosion channel into the upper catch basin. The upper catch basin was full; the water flowed across it, through a culvert, and into the lower catch basin which was also full. The material flowed out of the lower catch basin into a ditch on the west side of Pipeline Road and into the creek just west of the culvert under Pipeline Road. The culvert to the settling ponds was plugged so the material flowed pass it and into the Cewe Creek culvert and so on down into the river.

Hahn observed a large amount of sediment in the area where the creek discharged into the river. The river upstream of this point was clear. About five metres downstream

the sediment stretched almost all the way across and downstream for at least a hundred feet. The sediment discharging from Cewe Creek into the river formed a mat on the bottom of the river. This is clearly depicted in the booklet of photographs marked Exhibit 8. There was no discharge from the lower settling ponds to the river. The culvert to the settling ponds under Pipeline Road was buried in sediment. No water was flowing into the settling ponds; the first settling pond was full.

He attended the site on July 24 and observed the same thing taking place. That is; water flowing out of the lower catch basin, along the ditch, and into Cewe Creek and then to the river.

On July the 14th he took a series of water and bottom samples for analysis. He took water samples first from the Coquitlam River, 10 metres upstream of the Cewe Creek discharge, marked Exhibit 9A. Then a sample from Cewe Creek three metres from the Coquitlam River, marked Exhibit 9B. Then a sample from the Coquitlam River twelve metres downstream of the Cewe Creek discharge, marked Exhibit 9C. Then a sample from the Coquitlam River a hundred and twenty metres downstream of the Cewe Creek discharge, marked Exhibit 9D. And finally he took a sample of a discharge from the lower catch basin two metres before it entered the Cewe Creek culvert under Pipeline Road, marked Exhibit 9E. He also took a sample of river bottom material from the Coquitlam River ten metres upstream of the Cewe Creek discharge, marked Exhibit 10. This was from the same place as Exhibit 9A. And another from the Coquitlam River twelve metres downstream of the Cewe Creek discharge, marked Exhibit 11. From the same place from which Exhibit 9C was taken.

He returned to the gravel pit on July the 15th. He observed the same situation that he had seen the day before. A discharge of sediment was leaving the lower catch basin that entered Cewe Creek and flowed into the Coquitlam River. The water appeared silty at the point where Cewe Creek met the river. The culvert to the settling ponds was still buried. A back hoe was working at the upper catch basin. It was removing material from the catch basin and placing it on the dyke around the catch basin.

Hahn returned to the site on July the 20th. There was no discharge from the catch basins into Cewe Creek. However, the creek was picking up material from the ditch on the west side of Pipeline Road. The creek was dirty down to the river into which it was discharging. He went up to the erosion channel which was double the size it had been on July 14th. Water was emerging from it and flowing into the upper catch basin; it was not discharging from the catch basins. The culvert to the settling ponds was still buried. A rock dyke was being constructed across the front of the erosion channel.

He returned to the site on July 24th. Water was flowing from the lower catch basin into the ditch on the west side of Pipeline Road. The ditch was filled with sediment. The water flowed into the creek and down to the Coquitlam River. The creek water above, or to the west of the culvert, was clear. When the flow met the river, it appeared as a silty grey colour and flowed downstream. The upstream water was clear. He also observed the erosion channel. It was similar to July 20th. Water was flowing from it and into the catch basins. The dyke was higher and extended across the front of the erosion channel. It held water back, but water was flowing overtop of the dyke. The area behing the dyke was filled with material that had sluffed down from the erosion channel. The culvert to the settling ponds was still buried.

He took four further water samples. First from the Coquitlam River ten metres upstream from Cewe Creek, marked Exhibit 12A. This was taken from the same location as Exhibit 9A. Then a sample was taken from Cewe Creek five metres up from the river, marked Exhibit 12B. From approximately the same place as Exhibit 9B. Then a sample was taken from the Coquitlam River fifteen metres downstream of the Cewe Creek discharge, marked Exhibit 12C. From approximately the same place as Exhibit 9C. Then finally a sample was taken from the Coquitlam River one hundred and twenty metres downstream of Cewe Creek, marked Exhibit 12D. From the same place approximately as Exhibit 9D.

He returned to the site on July the 30th. Equipment was building the dyke at the erosion channel. The culvert to the settling ponds had been dug out on the east side, but it was still plugged. A large area of the first settling pond had been dug out. He returned to the site next on August the 18th. The culvert to the settling ponds had been cleaned out on the east side. No water was running through the culvert to the settling ponds. The settling ponds had been cleaned out; there was no flow to the river.

He observed the erosion channel. It was larger and a new erosion channel was starting to the north. Water was flowing from the erosion channel carrying silt and sediment over the dyke and into the catch basin. The upper catch basin had been dug out around the perimeter. The dyke was significantly higher. The water discharging to the lower catch basin was not as silty as it had been before. He said the water flowed from the lower catch basin into Cewe Creek. There was no discharge from the settling ponds. He went down to the river and said, "Well the river was clear".

The water samples were analyzed for non filterable residue by laboratory scientists employed by the Ministry of the Environment at the Environmental Laboratory at U.B.C. No filterable residue is that portion of residue suspended in water that will not pass through a filter of a certain size.

Various samples were analyzed for non filterable residue. The results were as follows: Exhibit 9A contained two milligrams per litre. Exhibit 9B contained four hundred and ninety-seven grams per litre. Exhibit 9C contained eight thousand, five hundred and thirteen milligrams per litre. Exhibit 9D contained two thousand, four hundred and nine milligrams per litre. Exhibit 9E contained seven hundred and thirty-one grams per litre. Exhibit 12A contained less than one milligram per litre. Exhibit 12B contained thirty-five point three grams per litre. Exhibit 12C contained nineteen hundred and seventy milligrams per litre. And Exhibit 12D contained one thousand and twenty milligrams per litre.

Otto Langer is an expert in the field of Fishery Biology. He interpreted the non filterable residue readings in the terms of the effect upon fish and fish habitat. His evidence established beyond a reasonable doubt that water samples identified as Exhibits 9B, C, D and E, and 12B, C, and D constituted a "Deleterious substance" pursuant to the definition of that term in S.33 (11) (a) of the Fisheries Act as being deleterious to fish or fish habitat.

Defence Counsel raised five specific issues. One issue was that the Crown did not prove beyond a rasonable doubt that at the material times the Coquitlam River, at the Cewe Creek confluence, was water "frequented by fish". S.33 (11) of the Fisheries Act states:

"Water frequented by fish means Canadian Fisheries waters."

S.2 states in part:

"Canadian Fisheries waters means all internal waters of Canada."

This would include the Coquitlam River. S.33.4(b) states:

"No water is "water frequented by fish" as defined in subsection 33(11) where proof is made that at all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish."

Once it is established that the river in question falls within the internal waters of Canada, that river will constitute water frequented by fish, unless there is proof that the water "is not, has not been and is not likely to be frequented by fish". No such proof exists in this case. In fact evidence to the opposite effect has been adduced.

On July 24, 1981, in the Coquitlam River about ten metres upstream of the Cewe Creek junction, Richard Hahn observed nine fish described as the salmonid fry. This was corroborated by Patrick Field who was with him at the time.

Otto Langer has visited the Coquitlam River about fifty times. He saw fish in early 1970 up to 1974 and 1975. He observed chum, coho salmon and trout. He observed that coho fry tend to remain in the river for one full year and would be rearing in the stream during July. And while declining to do so, this could well be an appropriate situation for the application of the presumption of continuity. The authorities cited by Defence Counsel do not discuss s.33.4 (3) (b). It has been proven beyond a reasonable doubt that the Coquitlam River at the material times at the Cewe Creek junction constituted "water frequented by fish" as defined in the Act.

I should perhaps just pause here for a moment. If I should make an error as to an Exhibit number or a section of the Act, or anything like that, I invite Counsel to interrupt me. My reasons are written and therefore you would not be distracting me at all. So if I have made any mistakes, as to numbers or exhibits and things of that particular nature, please interrupt me. All right.

... Thank you. Another issue raised by the Defence is that it was not proven beyond a reasonable doubt that the Coquitlam River at the Cewe Creek junction was a "fish habitat" as defined in s.31(5) which states:

"For the purposes of this s. and ss. 33, 33.1 and 33.2, "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."

Otto Langer was shown photograph twenty-one in Exhibit 8. This is a photograph of the Coquitlam River about ten metres upstream of the Cewe Creek confluence and where the salmonid fry were observed by Richard Hahn on July the 24th, 1981. Langer was asked:

Question. "Turning now, Sir, to photographs twenty-one to twenty-four in the booklet of photographs, Exhibit 8, I want you to look please firstly at photograph

number twenty-one. Assuming that the water in photograph twenty-one has been analyzed for non filterable residue, and that the analysis has indicated that the level of non filterable residue in that water is less than one milligram per litre, can you comment on the suitability of that area as a fish habitat?"

Answer. "It would be one milligram per litre, that is a very good number if you are trying to raise fish. It indicates to me almost no sediment in the stream and if I relate that number to the photograph, photo twenty-one, that area of the stream would mainly be a rearing and food producing area. The boulders and cobblestones are quite large in the stream and this would not be a spawning area so we would have excellent water quality conditions for rearing and food production in that portion of the stream."

He also observed fish in the Coquitlam River from 1970 to 1975.

The Crown has proven beyond a reasonable doubt that the Coquitlam River at the confluence of Cewe Creek was at all material times a rearing and food supply area and thus a fish habitat within the definition in the Act. This finding taken in conjunction with the evidence of Otto Langer, and my previous ruling that the water samples were deleterious to fish or fish habitat, establishes that a harmful alteration of fish habitat occurred as set out in Count 3 of the Information.

Douglas Sinclair is a Civil Engineer with Dover Engineering Services. The defendant is a client. Sinclair is familiar with Allard's gavel pit operation in Coquitlam and was instrumental in the design of the drainage system. His evidence is summarized as follows: He explained the drainage system on the lands and said that if the system is working properly, no water would flow into the creek. It would slowly go through the series of catch basins and settling ponds and clear water would flow into the river. A berm between the two culverts on Pipeline Road was supposed to prevent water from entering the creek. He did not recall visiting the gravel pit between January and July, 1981, but recalls being telephoned by Barry Allard on July 14th, 1981. Allard advised of an erosion problem and asked Sinclair to take a look at it. Sinclair suggested a geotechnical engineer be consulted and that both attend the site.

Sinclair and James Madsen, a Geotechnical Engineer, attended at the site the next morning, being July the 15th. He observed the erosion problem marked as "erosion channel" on Exhibit 7. He observed the flow of silt laden water emerging from a face of the channel. The face was continually sluffing in. He said, "It was flowing quite rapidly at the time that we observed it. I could liken it perhaps to a babbling brook. It was generally flowing down the middle; as each piece of face would sluff off, it would send out a gush of water." The water flowed into the first catch basin.

He also observed water flowing from the lower catch basin into the ditch west of Pipeline Road and then into Cewe Creek. They walked to the major water courses north and west of the site to establish the source of the water causing the erosion. They were unable to establish the source of the water. They flew over the area in a helicopter and again could not determine where the water was coming from.

After the lands were examined, recommendations were made to the Allards. It was suggested that they plug the gravel seam in the upper diversion channel and reinstate the water course shown on Exhibit 7 as diversion and direct the water down through the

diversion culvert. It was then suggested that they monitor the situation to see what took place.

On July the 21st, 1981, Sinclair attended at the gravel pit as part of the monitoring program. He observed that substantially more erosion had occurred at the erosion channel and more water was flowing from the face than before. The Allards had started to construct a shoulder berm across the mouth of the erosion channel that was five to eight feet high. Water flowed over the berm and into the upper catch basin. He contacted Madsen, explained the situation to him that their previous suggestions had not been fruitful and discussed the next steps. He spoke to Barry Allard and suggested other possible solutions for the erosion problem. One alternative suggested was to place a filter blanket at the toe of the erosion embankment and remove the top of the embankment so it sloped back.

A filter blanket is composed of graded gravel that would support the embankment and allow water to flow through. They also discussed drilling holes or dewatering the area west of the erosion channel to intercept water before it could get to the erosion channel. It was decided that a filter blanket could not be applied at that time, and it was decided to build up the dyke in front of the erosion channel.

Sinclair next returned to the site on August the 7th. He observed that a reasonably substantial dyke had been constructed. The gradient behind the dyke had flattened out and was filled with eroded material that had settled. The flow from the face of the erosion channel had dimished considerably. The catch basins were holding the water. He felt that the problem was under control.

Sinclair did not examine the culverts on Pipeline Road or the lower settling ponds on July the 15th or July the 21st. He was asked the following questions and gave the following answers:

Question. "During your involvement with the erosion problem, did you concern yourself with the water flowing from the lower of the two catch basins?"

Answer. "We concerned ourselves to the degree that we felt that the proper approach to a solution to Allard's problem was to try and stop the flow or control the flow of the water before it became dirty."

Question. "Did you at any point, during your dealings with the Allards, concern yourself with the Coquitlam River?"

Answer. "I guess that our -- the entire thrust of our design work for Allards over the last number of years has been concerned with meeting the requirements of various regulatory bodies that any discharge from their pit and their working to the Coquitlam River be in accordance with the requirements of those regulatory bodies."

Question. "And during the time of this problem in July and August?"

Answer. "Again, we felt that the -- that our investigation and our recommendations were focusing on finding a solution to the problem as a whole and we chose to go in a certain direction because we felt that would be most fruitful."

Question. "And the direction you went in related to the water as it flowed out of the erosion channel?"

Answer. "To be gaining some control over that water, yes."

Sinclair had discussed the drainage system with Bela Dudas, the Inspector of Mines, who approved the drainage system for the most part. The system that had been approved was for a period from the end of May, 1981, until approximately October of that year. Sinclair was asked in cross examination:

Question. "All right, and am I correct in saying as well that the system as approved by Mr. Dudas was in your opinion reasonably adequate to accommodate the reasonably foreseeable water control over the period of time that we suggest, May to October, and during that time to ensure reasonably clear water flow into the Coquitlam River given reasonably foreseeable events? Is that a fair statement of your opinion?"

Answer. "That is fair."

The form of that question dimished the weight to be attributed to the answer. It should be noted that Sinclair, the defendant's engineer, was called as a Crown witness, and the defendant's counsel was able to cross examine him. The following question and answer was given.

Question. "And am I accurate to say that given your knowledge of that particular pit operation and that water system as it was in May of 1981, that the spring of water or the outflow of water from the erosion area was not something that you would reasonably foresee or expect to occur between May and October of 1981 given the circumstances as you know them as of May, 1981?"

Answer. "That is correct."

Sinclair could not establish the source of the outflow from the erosion channel and did not feel that the drilling option would have brought the situation under control any sooner. When told that the rainfall for June, in the area, was three times the normal rainfall, he agreed that such could have contributed to the overflow of the system, but it was not the prime or sole cause of the erosion. He did not know for sure what triggered it. Sinclair agreed that it would have been imprudent to divert the water into the pit working area because of the risk of an uncontrolled flow going from the pit area through the diversion culvert and into the Coquitlam River.

James Madsen was the Geotechnical Engineer consulted by Douglas Sinclair to assist with the erosion problem at the Allard's gravel pit. His evidence is summarized as follows: He accompanied Sinclair to the site on July the 15th, 1981, and observed a "surging stream" flowing from the mouth of the erosion channel to the upper catch basin. He toured the entire area as previously described by Sinclair. He did not inspect the culverts or settling ponds on the east side of Pipeline Road because he was not asked to do so, and he did not see Cewe Creek or walk to the Coquitlam River.

Madsen recommended that the diversion west of the erosion channel be regraded to drain away from the crest and plugged to prevent water from going to the edge of the

slope. Also that the diversion channel, paralling the access road, be diverted to the east to the diversion culvert. The plan was to do these and then see what happened. They also discussed rock dykes, granular filter blankets, dewatering holes and diversions. It was concluded that a filter blanket was not possible due to the difficulty of access at that time. Madsen felt it would be difficult to construct a rock dyke because of access problems and soft sediments located at the mouth of the erosion channel.

On July 21st he had conversation with Sinclair regarding the status of the erosion and wanted to know if the diversions had worked. After being told that the flow had increased, he suggested the dewatering measure. He was asked to visit the site and examine the dyke. On July the 22nd he visited the site and observed the dyke across the mouth of the erosion channel. It was about ten feet high, and contained a large volume of eroded sediment and provided some support for the erosion channel. He recommended that the dyke be reshaped to confine the water to the centre portion of the channel. Water was flowing over the dyke and to the east; it appeared stable. The erosion channel had deepened but had not widened. He did not inspect the catch basins, settling ponds, Cewe Creek, Coquitlam River or the Pipeline Road culverts. Madsen noticed that his recommendations for diverting water to the diversion culvert had been completed. He was asked to resolve the problem of erosion only and to stop the flow of silty material to the catch basins. He described the erosion as a natural phenomenon, which it was. He was unable to determine the source of the flow of water from the erosion channel and could not say whether dewatering would have brought the situation under control faster than the construction of the dyke.

Bela Dudas is employed by the Government of British Columbia as a mining inspector. He qualified as an expert in the field of mining engineering. His jurisdiction included the Allard's gravel pit. His evidence is summarized as follows: His responsibility is to enforce the Mining Regulation Act, the orderly development of mines and the reclamation of disturbed land. This includes the protection of water courses.

He explained that operators require mining and reclamation plans. The reclamation plan covers area that has been mined out. He said, "One cannot work and leave. They are required to stabilize the slopes and leave it in the condition which in general is compatible with the surrounding area." The Allards obtained a reclamation permit in 1979. Dudas inspected the Allard's gravel pit on several occasions. The company was required to reslope and stabilize the area on the south side of the lands that had been mined out.

On May 27, 1981, he visited the site. He described the slopes as reasonably stable. The erosion channel did not exist at that time. The two catch basins were in place; also work was going on in the pit working area. He took photographs of the area in March of 1981. Exhibit 22, photograph number two, depicts the area of the eventual erosion channel. He said it would be hard to speculate that the area would be completely unstable, however, it required stabilization. He was asked if the preparation of the slope in the area of the erosion area required special expertise. He said, "Most likely it would require a person with special expertise, but often you get away with a general rule of thumb. It would not be beyond the scope of a general civil mining engineer." In his opinion in March, 1981, there was not sufficient evidence to signify a major erosion problem.

He attended at the pit twice in the month of July, 1981. On July the 8th, he observed a lot of mud on the west side of Pipeline Road near Cewe Creek. This was the result of the flow from the lower catch basin. It was flowing heavy mud or slurry that was heading for and eventually into the creek. He wanted to locate the source of the mud flow. He walked up to the area of the erosion channel. The shovel was buried in approximately one foot of mud. The erosion channel was receding back into the face. He had not noticed it previously. The slurry, being a mixture of water and solid particles, flowed from the erosion channel and into the upper and then lower catch basins, and from there into Cewe Creek.

On July the 16th he returned to the site. The erosion channel was now fifty percent larger than it had been on July the 8th. It appeared that the sides were caving in. The pit working area was in operation. Work was being done by a back hoe at the catch basins. Material was being removed from the catch basins and placed on the surrounding dykes. He observed a gravel buffer between the two culverts on Pipeline Road and did not believe there was any flow into the creek. The culvert to the settling ponds was plugged; there was no flow. The culvert for Cewe Creek was flowing normally.

He described how the culvert to the settling ponds could be cleaned out by means of a back hoe and a pump, also a slurry pump could pump the material across the road. The settling pond east of the culvert was full. In his opinion the settling ponds would have been capable of handling some of the slurry that was flowing from the catch basins.

Having observed the condition of the catch basins, he thought that a back hoe could have been used "around the clock" on a daily basis to clean them out and to continue until the erosion stopped. Also the culvert to the settling ponds would have to be cleaned three to four times per day and the settling ponds would require daily cleaning. He said, "There was no easy solution".

He was asked if the pit working area could have been used as a settling pond. He gave a qualified 'yes'. He said:

> "This area would have been available as a last resort, but not a very prudent way to do it. As an emergency, I suppose, you may have to do certain things like that."

Having observed his demeanor and facial expressions as he commented on the subject, it was clear to me that the idea did not appeal to him at all. He went on to explain what he meant by 'prudent'.

> "The prudent means since there are no other alternatives available, this really would have been a last resort. Prudent action would be to look for another solution then to try to lower the grade of the existing gravel. The solutions exist, we can examine a number of them, and up to now we were talking about the catch basin and settling pond. In fact we are looking at the effects of the erosion, not the cause of the erosion, and perhaps as an engineer I would be looking at the cause instead of doing the housekeeping and sweeping up the yard. I would say who is throwing the dirt there, and where is the dirt coming into the yard. Maybe there is a big windstorm and I have to wait until the windstorm is over. This is what I say prudent was to examine the alternatives and see which one is a most feasible with the greatest assurance that the erosion can be controlled."

Question. "In terms of what you have described as housekeeping measures, Mr. Dudas, aside from establishing a settling pond in the pit working area, what other alternatives are there for dealing with this slurry other than what you have already mentioned?"

Answer. "The housekeeping method we talked about, and now we are coming to the engineer and the engineer expects us to take a proper assessment of the situation, and if I am not qualified as an engineer, I would say another engineer takes a second look, and has a second look, and perhaps a third look in because the erosion has to be stopped one way or the other. Perhaps 'stopped' is the wrong word; it has to be controlled. With controlled erosion we can live; with uncontrolled erosion you are at the mercy of the elements and as a mining engineer I would be looking at how to control the erosion. You can't stop the erosion; it is going on steadily. I was meaning referring to the degree of erosion. A certain degree of erosion is part of our life. It is how steep mountains become flatter. However, in a case like this one, it is more or less an emergency situation, one has to reduce the rate of erosion and control the associated sediment transport. This is a term which they use to describe this slurry muddy water. And when you look at it, to try using the alternatives, which are as many again as engineers exist, I suppose, or what a person experienced would dictate."

As an inspector of mines, it was part of his responsibility to make recommendations to control the erosion. He talked to Barry Allard about it. His evidence was vague and uncertain as to whether the conversation with Barry Allard took place on the 8th or 16th of July; he just was not sure. Barry Allard was positive that the conversation with Dudas took place on July the 8th. Having weighed and considered the evidence, I find as a fact that the conversation did take place on July the 8th. They talked about how to control the flow of slurry. Allard had already asked his engineers to take a look at it. Dudas believes he mentioned dewatering pipes and placing large boulders. He believed, which to me means he was not sure, that he advised Allard to consult his design engineer, and if he could not handle it then a geotechnical engineer.

Mrs. Antifaev, for the Crown, did not want to leave her settling pond in the pit working area suggestion alone and she returned to it. Mr. Dudas said, "It would be very temporary, you still have to attend to the cause." He said that Madsen, as a member of the Canadian Geotechnical Society, would be qualified to give advice on the erosion problem.

He went on to explain how to clean out the settling ponds and the associated problems. He said the major problem is the disposal of the sludge. He recalled Allard telling him that the culvert to the settling ponds had plugged on June the 22nd, and that the water ran all over the road, blocking it to traffic, and that he had cleaned it up. It was suggested to Dudas that he had told Allard not to let the water flow onto Pipeline Road and not to allow the water to run into the Creek unless there was risk of a public hazard. He answered that a similar conversation with Allard took place to the following effect. "If it would be a real hazard to the safety of the public, then people have to come first."

He agreed having advised Allard to build up the berm between the two culverts on Pipeline Road, but not above the road elevation. The reason being so that the water

would not flow onto the highway. Allard told him that apart from the culvert plugging incident of June the 22nd, the drainage seemed to be working all right and the problem was under control.

Dudas recalls having advised Allard to beef up the berm and clean out the intake to the culvert. On June the 13th he had a telephone conversation with Allard where Allard told him that he was having problems with the drainage and had contacted a geotechnical person.

It should be noted that Mr. Dudas was "on the spot" during this trial. In my opinion, the problem of erosion and pollution was that of the Allards and not that of Mr. Dudas. It was not his obligation to solve that problem for them and no fault or criticism should be attributed to Mr. Dudas.

Barry Allard gave evidence for the defence. His evidence is summarized as follows: He has been the general manager of the defendant company since 1968. His father has been in the gravel pit business since 1946 and Barry Allard grew up in and around gravel pits. The company has operated two to four gravel pits in the lower mainland; the gravel pit in question was started in late 1969 or early 1970. Obviously through personal experience, he has considerable knowledge as to the operations of a gravel pit.

He testified that the control of water is an important consideration in the operation of gravel pits. "We spent a lot of time and money developing the drainage systems at each pit." The company retains the services of a civil engineer, Doug Sinclair, for advice on water control. Sinclair designed the defendant's drainage system.

The company was required to control the water in the "forest area" and "erosion channel" as described on Exhibit 7. The drainage system shown on Exhibit 7 was approved on May the 28th up to the fall of 1981. Barry Allard said, "Because we are at the toe of a mountain you have to control the surface water from a very large area and any seepage that is coming out of the gravel." The drainage system on Exhibit 7 was designed to handle "the seepage of water and surface runoff". The drainage system was approved by the inspector of mines and all necessary approvals had been obtained before it was installed. The reclamation work on the mined out southern portion of the site commenced on May the 8th, 1981. The plan was to construct a two to one slope. He explained that work is done on catch basins and settling ponds when it is not raining because the equipment cannot work on saturated material. There was no unusual seepage in May, 1981.

During the month of May, and prior to June the 22nd, the system was operating normally. On June the 22nd, he observed a flow of liquid about ten feet above the shovel as shown on Exhibit 7. He gave the following evidence during the trial:

> Question. "Now referring to June the 22nd, Mr. Allard, could you please tell the Court what you saw at or about the erosion site on that data and if you could refer to Exhibit 7, if it will assist?"
>
> Answer. "There was a flow of liquid from the area just west of the shovel about ten feet above the level of the shovel where it was sitting coming out of the face. It was a mixture of sand and water."

Question. "What, if anything, did you do at that date?"

Answer. "I was slightly alarmed because we never had had that happen before and I assumed that because of the heavy rains that we had had, that is what caused this sudden gush of water and it was -- it seemed to be surging."

Question. "When you say 'surging', what do you mean by that?"

Answer. "You would get a fairly large amount of water, then it would slow down and then another large amount of water and then it would slow down."

Question. "When you looked at this discharge on June 22nd, did you form any conclusions with respect to its prognosis?"

Answer. "The volume was not that great at the time I looked at it. With the catch basins the way they were, I was not overly concerned about the catch basins not being able to handle it, and I was under the impression that the rain, the heavy rains that we had then possibly had come through the ground and was --"

Question. "Do you remember what the weather was like on June the 22nd?"

Answer. "It had rained substantially in June; it was the worst three weeks of June I can remember I think."

Question. "Did you have any anticipation as to what would happen in the future with respect to this discharge, did you form any conclusions?"

Answer. "Well after June 22nd, the rain had stopped and I assumed that the water would stop as well."

On June 23rd, at 6:30 a.m., he inspected the site and noted that the catch basins were discharging a liquid of sand and water and had plugged the culvert under Pipeline Road leading to the settling ponds; water was discharging into Cewe Creek. The water in that area was about one and a half feet deep on Pipeline Road. The road access was blocked to the north. They cleaned up the road and cleaned out the culvert with front end loaders. The discharge pipes to the catch basins were raised to increase capacity. When he left work at 4:00 p.m., "Everything was functioning perfectly; there was no problem." A berm was built between the two culverts on Pipeline Road for the purpose of directing water through the culvert to the settling ponds rather than into the creek. But if the settling pond culvert became plugged, the water would flow into the creek rather than onto the road because water on the road would create a public hazard. So one of two evils was selected in the event of further problems.

On June the 25th the rain had stopped. There was no discharge from the catch basins. On June the 26th everything was fine and Barry Allard went on holiday until July the 4th. Between July the 4th July the 7th,

"The weather had turned warm again. The water was still coming from the erosion channel, but the catch basins were handling it effectively. We had raised the pipes once more and everything was running as designed."

The channel was starting to form at the erosion area; water was surging out and slabs were breaking off into the channel. It was suspected that the water was coming from the area marked "Diversion channel" on Exhibit 7 running across the forest area. On July the 6th the diversion channel was plugged and diverted to the east through the diversion culvert.

On July the 8th at 5:00 p.m. he met Mr. Dudas on the site. Allard explained what had occurred on July the 22nd. Dudas said that "Under no circumstances were we to discharge water into the creek except in the case of a public hazard. If you have to, if it has to discharge there rather than run across Pipeline Road, you can't let it go across Pipeline Road." Dudas suggested that the berm between the culverts should be "beefed up and built so that it was in the form of a dyke rather than a berm". Dudas made no further suggestions on that date. The drainage system was under control and functioning as designed; there was no discharge from the catch basins.

On July the 9th the berm was built up but to an elevation lower than Pipeline Road. On July the 10th, there was no discharge from the catch basins and the settling ponds. On July the 11th everything appeared to be under control and Allard expected the water to stop. During a two day period between July the 7th and July the 11th, no water flowed from the erosion channel.

On July 13th it started to rain. The erosion channel reactivated and started to flow. The erosion continued; the channel became larger. The drainage system was functioning normally. At 4:00 p.m. he called Dudas to discuss the erosion problem. In the past, had offered his expertise if requested. Mr. Dudas suggested that a geotechnical engineer investigate the problem.

On July the 14th, he contacted Doug Sinclair, explained the situation and was advised to consult a geotechnical engineer. There was trouble on the site. Both catch basins were full; silt plugged the culvert to the settling ponds and all settling ponds were filled with a sandy liquid. The sediment "ran over the berm, over the road, everywhere", obviously into Cewe Creek and down into the river.

On July the 15th, Sinclair and the geotechnical engineer, James Madsen, did a complete inspection of the site. Water was flowing from the erosion channel in a surging, continuous stream; the erosion was continuing. Madsen recommended plugging the diversion channel to the forest area above the erosion channel and redirecting the water to the diversion culvert.

After that was done, the flow from the erosion channel was to be checked to observe the effect. On July the 15th they discussed other options which included a rock dyke across the face of the erosion channel, a filter blanket at the toe of the erosion channel, and dewatering. The next morning, that is July the 16th, the company plugged the diversion channel and redirected the water to flow to the diversion culvert as suggested. After the flooding had been seen, the company cleaned up Pipeline Road and worked on the upper catch basins. They were not able to unplug the culvert to the settling ponds which were full. According to Allard, there was no place to store the material from the plugged culvert as all their storage room was used up. The material was semi liquid and could not be stacked, and being close to the river it would run everywhere.

He also said that there was no room to build smaller settling ponds. The plugging of the diversion channel and redirecting water to the diversion culvert, had not solved the problem by July the 17th. Allard came to the conclusion.

> "Our only solution was to stop the source of the water and sand mixture. And we felt at that time that a rock dyke would be the quickest solution. Once it left the source we just had no way to handle the material any longer, no place to store it, and it was not feasible to challenge the effect when the cause was the problem."

The water had not slowed by July the 17th, so construction of rock dyke, at the erosion channel, was commenced on July the 18th. By July 21st a ten foot dyke had been completed. The company's engineer suggested the dyke be built in ten foot stages as each section had to stabilize before the next one was started. By August the 5th the dyke was thirty to thirty-five feet high; the completed dyke is sixty feet high. That is, by no means, a small effort in the circumstances.

In January, 1982, when the land was frozen, a gravel filter blanket was installed. The ground was too soft previously to bring in the necessary equipment.

On August the 5th, 1981, the flow of water was slowing down and there was no discharge from the catch basins. By August the 7th the situation was under control and I so find as a fact. The catch basins were not discharging; the river was clean.

During his testimony alternative solutions were suggested to Barry Allard. He said bringing in an electric pump to unplug the culvert would not solve the storage problem. No one recommended a pump to him and he never thought about it. As for the twenty-four hour cleanup of the catch basins and settling ponds, he said you can only excavate what the dyke can hold because that is where the material is placed and that was being done. You are dealing with a semi-liquid material that takes time to dry and solidify. There was more material coming from the erosion channel than could be handled, and it was decided to stop it at the source by means of a rock dyke.

The company was working Saturdays, Sundays, and whenever weather permitted. As for installing a temporary settling pond in the pit working area, he said if that had been done it would have been filled in a day or a day and a half due to the depth of the excavation and from there it would have flowed into the river. In his opinion, that would not have solved the problem as there was just not enough room.

In cross examination several alternatives were suggested. The storage problem was dealt with at some length. Crown Counsel suggested the material be trucked away. Mr. Allard explained that it would be impossible to deal with semi-liquid material. A drag-line was suggested. He said that drag-lines had been outdated by hydraulic back hoes. He had considered this but he eliminated it quickly as it was slow and inefficient. He said it would take a drag-line three days to do what a back hoe could do in three hours.

His engineers were instructed to solve the erosion problem, and it was decided to handle it at the source. He said as follows:

> Question. "Did you ask any suggestions from Mr. Sinclair and Mr. Madsen as to how you could deal with the material from the erosion channel?"

Answer. "That was the reason we had them come out was to solve the erosion problem and deal with this material. And they said the best way to deal with this, the problem was to deal with it at its source because there is physically no way of handling the material once it has come out of the source and is washing the system."

As for the June 22nd episode, he thought the spring of water was due to excessive rain. He thought there was lots of room for the water in the catch basins and was hoping that if the rains stopped, the water would stop.

On July 24th, material was flowing from the lower catch basin into Cewe Creek. He said there was no other place to direct it, and he was permitting it to run into the creek. He said it was possible to unplug the culvert to the settling ponds, but the settling ponds were full and there was no place to put the silt. So cleaning the settling ponds at that time would not have done any good. The culvert to the settling ponds was plugged between July 15th, and July the 24th, and the material flowed into Cewe Creek during that time.

Defence Counsel raises three further issues. With reference to Counts 1 and 2, he submits the Crown has not proven beyond a reasonable doubt that the defendant permitted the occurrence of the prohibited incidents. Secondly, with reference to Count 3, he submits that the Crown has not proven beyond a reasonable doubt that the prohibited incident occurred as a result of the defendant's operation of a gravel pit. And thirdly, with reference to all three counts, he submits that the defendant has established the defence of due diligence pursuant to s.33 (8) of the Fisheries Act, and the decision of the Supreme Court of Canada in *R.* v. *City of Sault Saint Marie*, 1978 40 CCC 2nd 353.

The offences charged are:

"Strict liability offences in which there is no necessity for the prosecution to prove the existance 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 that he took all reasonable care. This involves consideration of what a reasonable man could have done in the circumstances."

See *R.* v. *City of Sault Saint Marie* - headnote:

"It is not up to the Prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken."

See *R.* v. *Sault Saint Marie*, page 373.

Pursuant to s. 33(8) of the Fisheries Act, the defendant must establish that "he exercised all due diligence to prevent" the prohibited incidents.

The Defence makes a great deal of the heavy rainfall on the site during June, 1981. Exhibit 25 shows that the normal rainfall for June is 130.9. While the rainfall during June, 1981, was 347.4. It rained a lot in June, 1981, almost triple the normal, but it rained more in February, March and April. Undoubtedly the rainfall contributed to the erosion problem, but no one could say that it caused it.

I do however agree with Defence Counsel, and find as a fact that a proper drainage system existed on the lands. I also find on the evidence that the erosion problem was an

unexpected occurrence and was not reasonably foreseeable by the defendant in the circumstances.

The defendant company had worked that pit for over ten years. The Allards were not strangers to the area. There is no evidence that there had been an erosion problem before. It happened suddenly with immediate severe results. Barry Allard had never seen anything like it before, and his civil engineer, Sinclair, agreed that the outflow from the erosion channel was not reasonably foreseeable.

The pollution in this case was due to sudden erosion of the lands accompanied by an extremely heavy outflow of water that proved too much for the drainage system on the lands. The overburdened drainage system simply could not accommodate the overflow and the mixture of sediment and water flowed into the Coquitlam River.

There is no evidence whatsoever that the defendant contributed in any manner to the erosion and resulting outflow of water and sediment. According to Barry Allard, he observed a heavy flow from the area on June the 22nd. However, no erosion channel was forming and he was able to resolve the problem by the end of the following day. Barry Allard is not to be faulted for having taken no further steps following his resolution of the June 22nd problem. He could not possibly anticipate the severity of the events of early July. Surely the worst he could be reasonably expected to foresee would be a repeat of the events of June 22nd. He was hoping that the problem had abated. That was not unreasonable in the circumstances.

So what was he to do? What could he do? The erosion problem had not started. It was not unreasonable in the circumstances for the defendant to take no addition preventive steps following the episode of June 22nd. The real trouble started on July the 13th, and I have reviewed Barry Allard's evidence. He acted quickly and effectively. The entire matter, which was of some considerable magnitude, was resolved by August the 7th.

He immediately sought and received the advice of experts. On July the 15th there were two engineers on the site. The company constructed a formidable rock dyke across the front of the erosion channel that eventually resolved the problem. The company followed the advice it was given. Crown Counsel submitted that the defendant only concentrated on one-half of the problem. That was the cause and not the effect. Barry Allard explained why he attacked the cause of the problem rather than the effect. The cause was the erosion and flowing water. The effect was the pollution of the Coquitlam River.

Mr. Dudas, the Inspector of Mines, was of the opinion that the cause of the problem should be examined. He said:

> "I would be looking at the cause instead of doing the housekeeping and sweeping up the yard. As a mining engineer, I'd be looking at how to control the erosion."

That is what the company did. When Sinclair was asked about his concern over water flowing from the catch basins, he said the proper approach was to try to control the flow of water and its source before it became dirty. Meaning, of course, concentrate on the cause.

Many alternatives were suggested to Barry Allard in his examination in chief and cross examination as to what he could have or should have done to prevent the pollution once the sediment was flowing into the Coquitlam River. Suggestions were put to him such as; electric pumps, storage, twenty-four hour cleanup, a temporary settling pond in the pit working area, drag lines, trucking, etcetera. Barry Allard gave his explanations to each suggestion which will be found in my summary of his evidence. He followed the advice of his engineers promptly. He followed the advice of Mr. Dudas, the Inspector of Mines, promptly.

The question is not whether he did everything that has been suggested months after the incident. Undoubtedly, he could have tried everything suggested to him in his examination in chief and cross-examination, and perhaps more. The question is, did Barry Allard act reasonably in the circumstances? Did he do what a reasonable man could have done in the circumstances? I find that he did. His actions are, of course, the actions of the defendant company.

The defendant did not cause or contribute to causing the pollution. It was caused by the sudden and unforeseen erosion with the resulting heavy outflow of water. Applying the previously cited quotation from the City of Sault Saint Marie decision, I find that the defendant had satisfied the onus of establishing on a balance of probabilities, that is exercised all due diligence in the circumstances. The due diligence defence succeeds. That is sufficient to dismiss all three charges, and they are hereby dismissed. But for practical purposes, I think I should rule on the other two issues raised by the Defence.

Regarding counts 1 and 2. Has the Crown proven that the defendant permitted the prohibited acts? See *R.* v. *City of Sault Saint Marie*, 376.

> "The permitting aspects of the offence centres on the defendant's passive lack of interference or, in otherwords, its failure to prevent an occurrence which it ought to have foreseen."

Applying that definition of "permitting" to the circumstances of this case, the defendant was hardly passive and the event was not foreseeable.

Defence Counsel submits that the defendant cannot be said to have permitted an event that was caused by an unusual and unexpected occurrence which could not have been reasonably foreseen and could not have been guarded against. I agree.

To support this proposition, he cited *R.* v. *North Canadian Enterprises Ltd.*, 20 CCC 2nd, 242, *R.* v. *Pioneer Timber Co. Ltd.*, a decision of the British Columbia County Court, delivered March the 7th, 1979, *R.* v. *Jack Cewe Ltd.*, 23 CCC 2nd, 237, and *R.* v. *Byron Creek Collieries Ltd.*, 1979, 8 CELR 31. The Crown has not proven beyond a reasonable doubt that the defendant permitted the acts described in Counts 1 and 2.

Regarding Count 3. Has the Crown proven beyond a reasonable doubt that the defendant's gravel pit operation, which included its drainage system, resulted in the harmful alteration of fish habitat? The answer is 'no'. No evidence points to the defendant's operation resulting in the pollution. It resulted from the sudden and unforeseen erosion on the lands with an accompanying heavy flow of water and sediment. As I said earlier, *all three charges are dismissed.*

BRITISH COLUMBIA PROVINCIAL COURT

R. v. The Corporation of the DISTRICT OF NORTH VANCOUVER

PARADIS Prov. Ct. J. North Vancouver, July 9, 1982

Due diligence - Sewage system designed to discharge, in time of emergency, raw sewage into water frequented by fish, contrary to s. 33(2) of Fisheries Act, R.S.C. 1970, c. F-14, as amended - Notwithstanding that system operated in good faith and according to accepted engineering practices, due diligence not a defence to charge under s. 33(2).

Fisheries Act, R.S.C. 1970, c. F-14, as amended - Discharge of raw sewage, a deleterious substance, from sewage system into water frequented by fish - System designed to discharge sewage in time of emergency - Due diligence not a defence to a charge under s. 33(2) notwithstanding that system operated in good faith and according to accepted engineering practices.

Sentencing - Sewage system designed to discharge, in time of emergency, raw sewage into water frequented by fish, contrary to s. 33(2) of Fisheries Act, R.S.C. 1970, c. F-14, as amended - Three options to be considered when sentencing if offence results from planned operation of elaborate and costly system - Fines of $7000 on two counts.

The accused Corporation operates a sewage pumping station having an emergency overflow drain leading into Hastings Creek, a water frequented by fish. The purpose of the overflow drain is to provide an outlet for sewage when the station pumps fail to operate. An alarm system in the station is connected directly to the Fire Department, but during holiday periods the Department waits one hour before reacting to an emergency signal. The station is inspected twice a week. On 9 August 1981 sewage flowed into Hastings Creek through the overflow drain. The Fire Department sent two different engineers to repair the station that day, but a similar flow of sewage through the drain ocurred the following day, when final repairs were made.

On a prosecution for violations of section 33(2) of the *Fisheries Act*, *held*, the accused Corporation is guilty.

The raw sewage deposited by the accused Corporation into Hastings Creek is a deleterious substance. It can be deleterious to fish when added to water or it can form part of a process of degradation which renders the water deleterious to fish, primarily because urea is a main component of raw sewage and it inevitably changes to ammonia which is toxic to fish.

Furthermore, the accused has not exercised due diligence. The sewage system is designed to do precisely that which is prohibited by the *Fisheries Act*; namely, to deposit, in the event of an emergency, a deleterious substance into water frequented by fish. The accused not only has not taken steps to prevent the deposit of a deleterious substance, but has planned for it to happen.

The accused operates the system, which is bound to violate the provisions of the *Fisheries Act*, in good faith and according to accepted engineering practices carried on

throughout the province. However, the practice of waiting one hour during a holiday period before responding to an alarm is unreasonable. The accused has not callously disregarded its responsibilities regarding the environment, and whether other discharges to the Creek will occur will depend on whether any reasonable alternatives to the present system exist, whether or not any penalty is imposed.

When sentencing for environmental offences, the aim should be to curb the potential for such offences in the future, whether by the accused or by others. Where the occurrence of pollution is due to the planned operation of an elaborate and costly system already in place, three options apply, depending 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 is absurd to impose any fine at all;

2. if there exists the possibility for a change to the system, but one which is not in general use and is, as yet, generally unproven at least in the jurisdiction, a penalty which will, in effect, force further investigation into that alternative or others should be considered; or

3. if there exists known technology which is in widespread use elsewhere, which is within the financial capabilities of the accused, and which has been avoided in the past on the grounds of budgetary priorities, the penalty should be substantial enough to express the court's disapproval and to force a change in the accused's priorities.

This case falls within the second option. Necessity is often deemed the mother of new technology and that may well be the case. The accused is therefore fined $5,000.00 on one count and $2,000.00 on a second count.

(Editor: For an interesting comment on this decision, written by counsel for the Corporation, see (1982), *7 West Coast Environmental Law Research Foundation Newsletter* (No. 4), 12-14. The comment briefly discusses, among other things, the defence of due diligence in the context of engineering design.)

E.M. Reid, for the Crown.
J.M. Mackenzie, for the accused.

PARADIS Prov. Ct. J.:- The Corporation of North Vancouver stands charged that on the 9th and 10th of August, 1981 it deposited, or permitted the deposit of, a deleterious substance in water frequented by fish. In the alternative, it is alleged that the Corporation deposited, or permitted the deposit of, a deleterious substance in a place under conditions where that substance may have entered water frequented by fish.

Because the circumstances surrounding these allegations are somewhat unusual, it is necessary to outline the facts rather extensively.

I FACTS

A. Background

Hastings Creek is one of several small watercourses which drain the mountain located on the North Shore of Burrard Inlet. It flows through the higher elevations of the District of North Vancouver into Lynn Creek, which in turn empties into the inlet.

Adult spring and coho salmon, seagoing rainbow trout ("steel-head") and cut-throat trout migrate from the Pacific Ocean waters of Burrard Inlet into Lynn Creek and, to a lesser extent, into Hastings Creek. Juveniles of those species live in the Creek throughout the year. At the confluence of what I will refer to as the "west" and the "north" arms of the Creek there is located what was referred to in evidence as a "sewage emergency overflow drain". The drain outlet consists of a concrete culvert covered by an iron grate and is a permanent structure embedded in the north-east bank of the Creek. A short distance away, at the intersection of Ross and Allan Roads, is located a sewage pump or "lift" station. The station was installed by the defendant Corporation in 1965 as part of an overall development designed to bring sewage disposal services to homes in the area, which, up to that time, had met their needs through septic tanks.

The lift station consists of a "dry well" in which are located three pumps, which are in turn connected to a "wet well" which receives raw sewage from approximately 800 homes in the area at the rate of approximately 1100 Imperial gallons per minute. The purpose of the lift station is to accept sewage flowing by gravity from the surrounding homes and to pump it to the main sewage drainage system at a higher elevation. From there the sewage flows, again by gravity, to a treatment plant. As the sewage accumulates in the wet well it eventually affects a "bubbler" or "sensing" tube which automatically activates the pumps.

The emergency overflow drain on the bank of Hastings Creek is connected directly to the lift station and was designed to perform and does perform the very function which its name suggests: to provide an outlet for sewage when, for some reason, the pumps fail to operate and sewage accumulates beyond the capacity of the wet well. It would appear that the most common, though by no means frequent, cause of such an emergency is a general electrical power failure, since the pumps operate electrically. However, as with any machinery and equipment, wear and tear will take its toll and breakdowns will occur.

Accepting the possibility of such breakdowns, the defendant Corporation has installed an alarm system which is connected directly to the North Vancouver Fire Department. When an overflow is imminent, a light automatically flashes on the alarm board and the Fire Department alarm operator is instructed to take certain appropriate actions which will be dealt with in more detail below.

The Corporation also conducts a maintenance programme which requires the inspection of each of the twenty-eight lift stations in the District of North Vancouver approximately twice per week, the one at Ross and Allan Roads being inspected every Monday and Friday. Where problems are discovered during these routine maintenance checks they are dealt with as required. When it is deemed necessary, the wet well is washed down.

B. The incidents

The month of August, 1981 was extremely warm in all parts of British Columbia and North Vancouver was no exception. The maximum temperature recorded for August 9th was 33°C and for August 10th, 32°C. The temperature for August 9th was a record for the month of August for North Vancouver since such records have been kept and was only slightly under the record for high temperatures for any summer day since such records have been kept.

Also during the month of August, 1981, residential construction was being carried on approximately 150 yards downstream from the confluence of the north and west arms of Hastings Creek. To assist the contractors in conveying materials, the federal Department of Fisheries had allowed the construction of a gravel "bridge" over the Creek. The bridge consisted of loose gravel and some earth surrounding two culverts which continued to allow the somewhat restricted flow of Hastings Creek. It had been agreed by the contractors that the culvert bridge would be removed in time for the anticipated salmon migration which begins in September. Nevertheless, the existence of the bridge caused a slowing of the flow of the river and the formation of a pool immediately upstream of the bridge.

On Sunday, August 9th, 1981, at approximately 11 a.m. Mr. and Mrs. W.R. Paches, owners of property adjacent to the mainstream of Hastings Creek at the point where the emergency outflow is located, noted liquid and solid material coming from the emergency drain and flowing into Hastings Creek. The flow contained excrement, prophylactics, tampon applicators and other debris. The smell was described as "terrible" and continued throughout the day.

Mr. Paches took photos which were entered as exhibit 2 in these proceedings, and telephoned a Mr. Macdonald, the head of an *ad hoc* association which had been formed to maintain the Creek as a fish habitat. Mr. Paches testified that, under normal conditions, the Creek bed is rocky and sandy and contains no deposit or "sludge". Mrs. Paches testified that she made an attempt to clean the Creek but was unsuccessful. At approximately 2 p.m. the same day, the flow was continuing and Mr. Paches telephoned the North Vancouver Fire Department. Between 2:15 p.m. and 2:25 p.m. the flow appeared to stop and then begin again. At 4 p.m. Mr. Paches telephoned the North Vancouver Fire Department again; and at 4:30 p.m. he once more contacted Mr. Macdonald.

The records of the North Vancouver Fire Department show that at 12:04 p.m. on August 9th an alarm light signalled trouble with the Ross and Allan Roads lift station. However, the alarm operator testified that, when the automatic alarm lights up on weekends her instructions are to wait for one hour and then refer the problem to the party from the defendant's Engineering Department, who is designated as being "on call". Filed as exhibit 30 are the relevant pages of the operations manual from which she received her instructions and at page G-1 is contained the notation "pump stations - (lights 1-11 - (wait one hour)", followed by the name of the personnel to be called and their phone numbers.

Therefore, upon seeing the automatic alarm at 12:04, the operator waited. However, she then received a direct complaint from Mr. Macdonald at 12:37 p.m. and acting upon that complaint she called the person noted as being on call, Mr. Clay White, at 12:39 p.m.

Mr. White went directly to the Ross and Allan Roads pump station, arriving at approximately 1 p.m. Upon investigating he discovered that all three pumps were running on "air lock", meaning that they had been activated normally, had pumped the sewage from the wet well, but then had failed to stop. They had consequently pumped air into the impellors and needed to be bled before they could operate properly again. As a result, the wet well had filled again in the normal course of events and eventually had begun to flow out of the emergency outflow drain into Hastings Creek.

Mr. White shut down the pumps, manually pumped the wet well contents to the point where the sewage was again below the overflow level, bled the air from the pumps and switched the system back onto automatic. He observed the operation of the pumps through two cycles and was satisfied that everything was once again in working order. He then went home. He testified that he did not check the bubbler tube.

At 7:19 p.m. on the same day another call was received by the North Vancouver Fire Department alarm operator, complaining of an overflow into Hastings Creek. She was unable to reach Mr. White and called the next person on the list, Mr. Rurka, the Water and Sewage Superintendent for the defendant Corporation.

Mr. Rurka went to the lift station at approximately 7:45 p.m. and found that the pumps were on "air lock" once again. He proceeded to deal with the problem in the same way as had Mr. White. However, he also checked the bubbler tube and found it to be, as he described it, "sluggish", meaning that it did not respond readily to sewage accumulation in the wet well. With some difficulty he purged the tube and satisfied himself that, although it would need repair or replacement, it was at that time operating properly.

On Monday, August 10th, at approximately 7:50 a.m., Mr. Paches noted that the flow was still coming from the emergency drain. He left for work and upon his return at 5:45 p.m. he noted that it had stopped. Mrs. Paches also testified that she saw a flow on the morning of August 10th similar to what she had seen on August 9th. However, in an interview on January 26th, 1982 with a member of the law firm acting for the defendant Corporation, she stated that she had seen no flow whatsoever on August 10th.

That same morning, on instructions from Mr. Rurka, Mr. White went to the station at approximately 8:20 a.m. and, with the assistance of a crew, switched the pumps to manual operation and replaced the bubbler tube which then appeared to be clogged with grease. The job was completed and was checked by Mr. Rurka at about 10 a.m. on the 10th.

Mr. White testified that when he arrived that morning the station appeared to be operating properly and he assumed that it had been doing so overnight. Also testifying for the defence, Mr. H.K. Lear, an expert in the construction and operation of such stations stated that, if Mr. White's observations on Monday morning were correct, the station had to have been operating correctly overnight, particularly in view of the absence of any alarms occuring overnight.

Nevertheless, Mr. White and Mr. Lear were forced to base their conclusions on certain assumptions, whereas Mr. Paches testified directly as to what he actually saw on the morning of August 10th. In spite of the earlier conflicting statement by Mr. sic

Paches, I am unable to disregard the direct evidence of an eyewitness and I am satisfied that there was some flow into Hastings Creek in the early morning of August 10th.

C. Reaction of the Federal Department of Fisheries and Oceans

On August 10th, 1981 at 11:30 a.m., Fisheries Officer Floyd McKee inspected Hastings Creek both above and below the emergency outflow drain. Upstream, the bed was clear. Downstream, the bottom was covered with approximately 1/2 to 1 inch of a brownish sludge, a sample of which was taken by Officer McKee and entered as exhibit 17. He also noted dead fish in two pools approximately 100 to 125 yards downstream.

On August 11th, he returned and found conditions very similar to those he had seen on August 10th. He then took samples of sludge covering the bottom approximately 125 yards downstream and took a scraping from the bottom approximately 125 yards downstream and took a scraping from the bottom of the north arm of Hastings Creek approximately 30 yards upstream from the emergency outflow drain. Both samples were taken to the Department of Fisheries and Oceans Laboratory in West Vancouver and analysis of the components was done immediately by Mr. Yashioka. His report was entered in the proceedings as exhibit 21.

Approximately one week later, at the request of the Department of Fisheries and Oceans, the defendant Corporation made available a vacuum truck to clean the creek bed, but upon attendance at Hastings Creek it was discovered that water flow since August 9th and 10th had cleared away material in the bed and the cleanup was no longer necessary.

II ISSUES

Section 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14 and amendments thereto, reads:

> *(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.*

Subsection (4) has no bearings on these proceedings.

There is no issue arising from two of the essential elements of the offence to be proved by the Crown: it is not disputed that the defendant deposited, or permitted the deposit, of fresh sewage into Hastings Creek; and it is common ground that Hastings Creek is water frequented by fish.

The issues which do arise and which have been ably and strenuously argued are the following:

i. Was the sewage which entered into Hastings Creek a "deleterious substance"?

ii. If so, did the defendant exercise due diligence in preventing the deposit?

III "DELETERIOUS SUBSTANCE"

Section 33(11)(a) defines "deleterious substance" as,

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

A. General Observations

Before proceeding to deal with the evidence of experts called by both the Crown and defence, it is important to note two aspects of the evidence generally dealing with the deleterious nature of the sewage outflow. The first is that the analysis done by Mr. Yashioka on August 11th was not done under anything approaching ideal circumstances. All expert witnesses agreed that analysis for dissolved oxygen should be conducted at the site and the result in this case is not one upon which the Court can rely except as being marginally supportive of other evidence, independent of it. The second is that no "bio-assay" was conducted, whereby live fish are subjected to the environment of the water which is suspected of containing a deleterious substance and their reactions are observed. Similarly, no coliform count was conducted, that being the most common test for the presence and concentration of human excrement in water.

However, it must be pointed out that the defence emphasized in cross examination the unreliability or irrelevance of the results contained in Mr. Yashioka's report, while devoting a considerable amount of time in the course of defence evidence to countering that report with other figures. If the report is unreliable as an indication of the extent to which the substance in Hastings Creek was "deleterious", in my view it is of no value to the defence to attempt, for example, to show that an analysis conducted ten months later showed no significant difference in the heavy metal composition of the water, or that there was, in the Yashioka report itself, no significant difference in concentrations of ammonia upstream and downstream from the emergency overflow drain.

B. Crown Evidence

Two experts testified for the Crown. Mr. S.C. Samis is a water quality biologist in the Habitat Management Division of the federal Department of Fisheries and Oceans. He has worked on various projects to assess the impact on fish and fish habitat of the discharge of sewage and industrial wastes. As with other witnesses called either for the Crown or the defence, he agreed that there is little or not existing literature on the effect of raw or untreated sewage on fish habitat. Virtually all such studies deal with the effects on fish and fish-frequented waters of sewage which has undergone at least primary treatment. Nevertheless, from his general knowledge and existing studies, he felt able to express the opinion that untreated sewage could have a deleterious impact on water frequented by fish in three ways.

1. It could be directly toxic in that ammonia, a competent of all sewage, is damaging and can be lethal.

2. The settling of organic material in the creek bed could destroy the ecology of the creek generally by destroying plant and insect life on which the food chain, culminating in fish, depends.

3. The nutrients in raw sewage could result in overfeeding the basic life in the creek, resulting in an overabundance of algae and the destruction of the water's ecological balance.

Dr. J.A. Servizi, Chief of Environment Conservation with the International Pacific Salmon Fisheries Commission, testified that he has conducted studies of the effects of sewage on fish in circumstances where raw or fresh sewage was the principal, although not the only, component.

Based on the description of the spill and the smell it generated, as well as the photographs which provided some indication of the concentration and degree of putrification of the sewage, he expressed the opinion that the discharge would have been fatal to fish.

C. Defence Evidence

Mr. A.E. Birkbeck, a research officers involved in waste treatment research in the Bio-engineering Divison of B.C. Research, an arm of the British Columbia Research Council, conducted tests on Hastings Creek on May 4th, 1982. His object was to compare his analysis with that of Mr. Yashioka and I have viewed this evidence in light of my comments above regarding the probative value of such a comparison.

Mr. Birkbeck's report, which was entered as exhibit 40, shows that samples were taken as close as possible to those taken by Mr. McKee, and contains an analysis of the mix of the creek water with what is referred to as "construction soil", i.e. soil taken from the site of the residential construction which was being carried on on August of 1981 some one hundred and fifty yards downstream of the sewage emergency outflow drain. The composition of heavy metals in this sample reveals that there is no essential difference from the composition set out in Mr. Yashioka's report. However, I note that Dr. Servizi in cross examination testified that there is still no sound evidence to demonstrate that the presence of heavy metals in water is, or is not, deleterious to fish.

Mr. Birkbeck's report in general contains a critical analysis of the tests done August 11th, 1981 and in particular he points to the absence of any test for urea nitrogen which would have indicated the extent to which urea, a widespread component of fresh sewage, had changed into ammonia. In his opinion considering the toxicity of ammonia, such a test would have been invaluable in determining whether the outflow into Hastings Creek was indeed of a deleterious nature.

On the stand, he testified that from the evidence he heard, the photographs taken and the technical information provided, the overflow on August 9th and 10th, 1981 was, in his opinion "weak" sewage consisting mainly of laundry, shower and food processing waste generally known as "grey" water.

In short, his evidence was not to the effect that the flow was harmless, only that the information on which the opinions of Crown witnesses was based was too unreliable and sketchy to allow the Court to conclude on the strength of those opinions, that what did flow into Hastings Creek was a deleterious substance.

D. Law

The question of what amounts to a "deleterious substance" has been canvassed in several cases but the most concise and helpful review of the meaning of those words is that of Seaton J.A. in *R. v. MacMillan Bloedel (Alberni) Limited* (1979), 47 C.C.C. (2d) 118, at pages 120 and 121. Having reviewed the analysis of the phrase in two Courts below, he concludes with these comments (page 121):

> *Section 33(2) prohibits the deposit of a deleterious substance, not the deposit of a substance that causes the water to become deleterious.*
> ...
>
> *What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To rephrase the definition section in terms of this case, oil is a deleterious substance if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that that water is rendered deleterious to fish or to the use by man of fish that frequent that water.*

That fish were killed in Hastings Creek some time immediately prior to August 11th, 1981, is not in doubt. The defence went to considerable lengths to posit several possible explanations for that occurrence. In direct and cross-examination of expert witnesses, the evidence showed that the composition of raw sewage varies geatly according to location and even time of day; that excessive heat will have some effect on fish; that the pooling effect caused by the culvert bridge and, indeed, the materials accidentally dumped into the pool by construction activity itself would have had some effect on fish; that there are many storm sewer outlets into Hastings Creek upstream of the sewage emergency outflow drain and that, even in dry weather, flows from those sewers will contain surfactants and other substances from the watering of lawns, the washing of automobiles, the draining of swimming pools, and so on. There was also a considerable amount of evidence tendered to show that fresh sewage, in itself, may not be deleterious at the time it is deposited into water frequented by fish.

Nevertheless, it is not necessary to prove that the substance was, at the time of its deposit, deleterious; nor is it necessary to go so far as to show that it was the cause of the fish kill which occurred. The question which must be answered is whether fresh sewage can be deleterious to fish when added to any water or whether it can form part of a process of degradation which renders that water deleterious to fish.

I am satisfied beyond a reasonable doubt that it can, principally because urea is a prevalent component of raw sewage and inevitably will change to ammonia which is toxic to fish. I also take into account that the inescapable increased bacterial oxygen demand from organic waste must deplete the oxygen supply of the water and that raw sewage carries with it potential destruction of the ecological balance of a stream through the overproduction of nutrients and through the settling of wastes on the creek bottom.

In the case of the deposit at issue here, each of those factors formed part of a process of degradation which rendered the waters of Hastings Creek harmful.

IV "DUE DILIGENCE"

A. Evidence

The facts detailed above, with some notably exceptions, show that the defendant Corporation has established reasonable systems to maintain lift stations and to respond to emergencies when they arise.

Mr. H.K. Lear, a mechanical engineer, presently employed by Associated Engineering Services in Vancouver, coincidentally the firm which installed the lift station in 1965 (prior to Mr. Lear's employment there) testified that, in his opinion, the defendant has established a "housekeeping" programme for its sewage lift stations which is appropriate in the circumstances. In particular, he was satisfied that the maintenance procedure and the alarm system are well in keeping with prudent engineering practice throughout British Columbia.

In his report, filed as exhibit 39, he states that emergencies are unavoidable. Sooner or later a power outage or an equipment breakdown will occur and when it does, if there is no overflow drain, sewage will simply back up through the collection system into homes or onto the streets and eventually into ditches and storm sewer systems. In the latter event, the likely result would be the eventual deposit, by gravity, into adjacent streams such as Hastings Creek.

On the stand, he testified that he could find nothing objectionable in the manner in which the defendant responded to the emergency in this case nor in the steps it took to avoid the emergency in the first instance.

I would tend to agree except for two aspects of the matter. In view of the fact that an overflow will occur within minutes of an alarm, the practice of waiting one hour before initiating a response, when the alarm occurs on a holiday, is unreasonable. It is also my opinion that a system of logging maintenance activity should have been instituted so that Mr. Rurka would have known, at the time of his repairs on the evening of August 9th, that an identical problem had arisen that same morning. That knowledge may have left him somewhat more concerned about dealing immediately with the deficient bubbler tube. In any event, I find it unnecessary to deal at any length with the system as constructed or the responses to the emergency by the defendant. In my view, the resolution of the issue of "due diligence" lies elsewhere.

B. Law

In *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 7 C.E.L.R. 53, Dickson J. described the defence of *"due diligence"*, as it has now become known, in the following way (pp. 70-71 C.E.L.R.):

> *I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:*
> ...
> 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 that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be 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.*

I have been unable to fine any case, nor was any cited to me, in which the facts, in relation to that definition, parallel the facts of the case at bar. All the decisions which deal with the defence of due diligence are cases in which an established procedure, essentially lawful and safe in its own right, has somehow gone awry. It has then become necessary to determine whether or not the defendant took reasonable steps to prevent the occurrence of the offence or to ascertain the true facts which rendered the activity illegal.

The difficulty here, of course, is that the system which was installed at Ross and Allan Roads in 1965 was designed to do precisely what was then and is now prohibited by the *Fisheries Act*: to deposit, in the case of an emergency, a deleterious substance into Hastings Creek, water frequented by fish. I am unable to see how it can be said that the defendant took all reasonable steps to avoid the particular event. The evidence establishes clearly that emergency overflows will occur. At some point, either through factors entirely beyond the defendant's control (such as an electrical failure) or through factors which it might be unable to control but which it took reasonable steps to prevent (the breakdown of machinery), sewage will accumulate beyond the capacity of the wet well. In order to deal with that inevitable occurrence, the Corporation made a conscious decision in 1965 to install an overflow outlet which by its very design would deposit sewage into Hastings Creek. It is that deposit which is prohibited by the *Fisheries Act*, not the emergency which may lead to the deposit.

The defence argues that the defendant's maintenance programme and alarm systems demonstrate that, when an emergency does occur, its response is such that it amounts to taking "all reasonable steps to avoid the particular event". However, the "particular event", the act which led to the charges being laid in this case, was not the breakdown of the machinery in the lift station, and the issue is not whether the defendant Corporation took steps to prevent such a breakdown and then responded promptly and adequately when it did happen. The event is the deposit of a deleterious substance into Hastings Creek and the defendant not only did not take steps to avoid that occurrence, it planned for it to happen.

Testifyng for the Crown, Mr. J.S. Wishart, a civil engineer with extensive experience in municipal sewage systems, maintained that a solution to the problem would be the establishment of a separate wet well connected to the same lift station, containing its separate set of pumps. The result would be that, even if there were a breakdown of the pumping capacity of the existing wet well, sewage could accumulate in the separate well and the separate pumping system could provide adequate "back-up" for the main system. However, he conceded that he knew of no such arrangement in existence in British Columbia today.

Mr. Lear, to some extent in response to Mr. Wishart's evidence, agreed that there was no such system in existence to his knowledge in British Columbia today; but he added that the cost of establishing such a system could be quite accurately estimated to

be $460,000 per lift station. As he put it, if the cost becomes prohibitive, the emergency outflow into existing watercourses is a reasonable alternative, particularly if it is desirable to avoid backup of sewage into homes and onto streets. In essence, therefore, the matter appears to be one of choosing the comfort of people over the propagation of a fishery.

Apart from pointing out that the separate wet well system loses some of its appeal when one considers that most failures of these lift stations occurs through general power outages (and therefore *all* pump systems would fail and eventually the separate wet well would overflow as well), I find it not only unnecessary but unwise to comment on the issue of priorities.

The conflict is between reasonable policies established by two levels of government, each for their own very good reasons. The federal Department of Fisheries and Oceans is justifiably concerned about the depleting salmon fishery on the west coast and, while Hastings Creek is a minor element in that fishery, its degradation exemplifies the damage urbanization can cause. The defendant Corporation, on the other hand, is legitimately concerned with providing essential services to citizens living within its boundaries and with doing so in a manner that is neither dangerous to public health nor unreasonably costly. How that conflict can or should be resolved is not for the Courts to decide. The only issue before me is whether or not the defendant Corporation did deposit a deleterious substance into Hastings Creek on August 9th and 10th, 1981 and whether or not, in spite of doing so, it can be excused on the ground that it took all reasonable care to prevent that occurrence.

The first question is answered in the affirmative and the second question in the negative. I find the defendant guilty on counts 1 and 5. Counts 2, 3, 4, 6, 7 and 8 are dismissed.

(Remarks on sentencing, July 22, 1982)

PARADIS Prov. Ct. J. (orally): - The considerations on sentence in cases of this kind have been very well outlined and in fact detailed in a decision of His Honour Judge Stuart of the Territorial Court of the Yukon in the case of *Regina* v. *United Keno Hill Mines Limited*, unreported, October 31, 1980 (reported at (1980), 10 C.E.L.R. 43). I'll be referring to those considerations because I consider them appropriate in virtually all cases of this type.

In the *United Keno Hill Mines* case, Judge Stuart felt that the four major factors to be considered are, first of all, the nature of the environment and its fragility; secondly, the extent of the injury caused to that environment; thirdly, the offender; and fourthly, several general considerations which I will deal with in more detail.

Going back to the three first considerations, in this case the environment, in the sense of water frequented by fish and in particular spawning fish of either the salmon or steelhead variety, is fragile but not to the extent that, for example, in the case I've referred to the northern tundra was and was seen to be by Judge Stuart. The extent of the injury in this case is such that I am persuaded on balance, even though I was not persuaded beyond a reasonable doubt on the case itself, that the spill which occurred was the causant - the final cause - of the fish kill which occurred. However, in the broader sense, the damage to the creek-bed was relatively minimal.

Thirdly, as to the offender, in this case the offender is the district municipality. Now, I think it is important to refer immediately to the argument made that imposing a fine on a municipality for an offence of this kind results in money simply going from one government pocket to another. However, in my view, municipalities budget according to priorities and even though a fine is tax-payers money going from one level of government to another it may have the effect of forcing a change in the municipal budgeting priorities. In other words, it may still act as a deterrent on the municipality and certainly on others. I will deal at considerably greater length with the question of deterrence further on.

Turning then to the general considerations in the *United Keno Hill Mines* case, the first of those was the criminality of the conduct and the extent of the efforts to comply with the law on the part of the accused. I think it is in that regard that the particular facts of this case create a dilemma. As Judge Stuart said in that case at page 8 (p. 49 C.E.L.R.), and I quote,

> *Accidents, innocent mistakes, and not reasonably foreseen events are less damnable than wilful surreptitious violations.*

On the other hand, while I have found that the defendant operated a system that was bound to violate the provisions of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, I am also satisfied that it did so in good faith and according to accepted engineering practices carried on throughout the province. Indeed, I am advised that a number of municipalities in British Columbia, large and small, have sewage systems with emergency overflow drains which flow into waters frequented by fish.

The second general consideration is that of remorse, and it is, I think, a strange word to apply to a district municipality, but essentially it refers to a genuine regret that the events took place and a sincere effort to rectify the problem. I have no doubt on the evidence I have heard and the submissions that have been made that the defendant Corporation has not callously disregarded its responsibilities regarding the environment and does not wish to see these events repeated. However, again, the problem is that the fact that they will inevitably be repeated whether or not any penalty imposed in this case can alter that fact depends entirely on whether any reasonable alternatives to the present system exist.

Some other considerations in that case I have found not really appropriate here and they are, the size and wealth of the corporation; the profits which might be realized by the commission of the offence; and any previous criminal convictions of this type.

Reduced to the fundamentals, the aim of the courts in sentencing for environmental offences is, and should be, to curb the potential for such offences in the future, whether by the defendant or by others. Where the occurrence was singular and due to negligence either in procedures and systems generally, on the part of one or more individuals, a substantial fine may well provide the impetus for a realistic re-assessing of corporate consciousness about environmental responsibility. To avoid fines in the future, procedures would be revised, managers and employees, hopefully, would be re-educated and concern for the environment would take its rightful place alongside concern for customers and shareholders, or in the case of the municipality, for the welfare of the community. But where, as here, the occurrence is due to the planned

and operation of an elaborate and costly system already in place, different considerations must apply. 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 has 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. 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 where the charge arises out of a normal, long-standing, and continuing exercise of one of its duties and responsibilities.

In reviewing that aspect of the matter, I was reminded of the fact that Willie Sutton, an infamous bank robber, once said, and I quote, "You can get a great deal from people with a kind word but you can get more with a kind word and a gun." I am not sure that that is the best approach for the Fisheries Department to take in cases of this kind.

Now, subject, of course, to the outcome of any appeals, other municipalities throughout British Columbia will now be on notice that the sewage systems they have had in place for perhaps many years leave them open to criminal liability under the *Fisheries Act* and they should be guided accordingly. However, they cannot be guided toward solutions that do not exist and that brings us back to the question of alternatives.

Mr. Wishart, for the Crown, has testified that separate wet-well systems with standby emergency power are in general use in Johannesburg, South Africa. He has also testified that Ontario requires the installation of separate wet-well systems although he was unable to confirm whether that was a matter of law, regulation or policy.

Dealing first with the Johannesburg system, I tend to agree with what I think is a reasonable submission by counsel for the defence. I am not surprised that that system is in place. Without it, emergency overflows would contaminate that city's entire water supply. The policy choice there was dictated by the need to preserve clean water at whatever cost for the city's population. It is another question entirely whether the public would be as prepared to foot the bill for a considerably more expensive sewage system in order to ensure the preservation of all or part of the fishery.

As for Ontario, my brief research has revealed only that by section 24 of the *Ontario Water Resources Act*, R.S.O. 1980, c. 361, as amended, municipalities planning to install a new or change an old sewage system must submit plans for approval to that province's Ministry of the Environment. Presumably, measures for emergency overflows are then looked at in terms of potential damage to the environment and, if felt necessary, approval is withheld until the plans include measures acceptable to the ministry. Also, presumably, such measures may include separate wet-wells, but I can find no requirement as such for their installation.

Mr. Lear, for the defence, has provided a detailed report regarding cost of installing a wet-well system at Ross and Allan Roads, as well as an estimate of the cost of by-passing the lift station entirely with a gravity sewage line thereby rendering the lift station redundant, but guaranteeing no further spills of raw sewage into Hastings Creek.

In cross-examination, Mr. Lear conceded that alternative, albeit difficult, methods would probably reduce his estimates by an amount that I am still not too clear on. (If I thought about it, I am sure I could come to some specific figure.) In any event, the costs are high indeed. But whether or not they are "prohibitive" depends on the value society as a whole is prepared to place, in the long view, on the preservation of a resource.

Now, having considered the evidence presented regarding alternative measures, I am satisfied that this case falls into the second category of the three that I have 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. The system was constructed in 1965 when awareness of environmental problems would be much less than it is now. And even today there is no legislation or regulatory requirement in this province as there is in Ontario for governmental approval of sewage installations or renovations on environmental grounds.

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. However, the penalty cannot amount to acceptance of the status quo because, in my view, deterrence of others is a significant factor.

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 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. In default distress.

BRITISH COLUMBIA COUNTY COURT

R. v. THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER

FISHER Co. Ct. J. Vancouver, January 20, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Appeal by accused from conviction under s.33(2) of discharging raw sewage, a deleterious substance, into water frequented by fish - Appeal dismissed - Accused did not take all reasonable care since it was within its power to dictate a design that would not automatically discharge sewage to stream in an emergency.

Sentencing - Cross-appeal by Crown from sentence imposed upon conviction under s.33(2) of Fisheries Act, R.S.C. 1970, c.F-14, as amended, of discharging deleterious substance into water frequented by fish - Appeal dismissed - no error on part of trial judge - fine imposed was low, but was not inordinately low.

E.M. Reid, for the Crown, respondent.
J.M. Mackenzie, for the appellant.

FISHER Co.Ct.J. (orally): - This is an appeal by The Corporation of the District of North Vancouver against a conviction on two counts under s.33(2) of the Fisheries Act, R.S.C. 1970, c.F-14, as amended, on the 9th day of July, 1982, before Provincial Court Judge Paradis.

The facts need not be outlined by me as they are well set forth in the very full and detailed judgment of the learned trial judge.

The offence s.33(2) sanctions against, deposit or permit a deposit of any deleterious substance of any type in water frequented by fish (sic).

The appellant concedes that a deleterious substance entered Hastings Creek on the two days set forth in the two counts; that it so entered from the appellant's sewage overflow drain and that the creek contained water frequented by fish.

The issue advanced by the appellant is that the trial judge erred in not finding that reasonable care, otherwise referred to as due diligence, was taken by the appellant so as to avoid the offending act. The appellant submits that it did all that could reasonably be expected of it and, in addition, showed due diligence in the maintenance and care of the system.

The Crown submits that the trial judge did not err on the basis that the "permitting" aspect centers on the accused's active undertaking of something, here, the construction of the system which it was and continues to be in a position to control and that it was that very system that resulted in the pollution.

The undertaking here is the construction of the sewage system designed for and accepted by the appellant with, as the trial judge found, as one of the purposes, the

flow of a deleterious substance into the Hastings Creek bed, in the event of the overflow mechanism coming into effect. It was, as he found, designed to allow effluent under certain circumstances to flow into the creek.

As s.33(2) is a strict liability offence, and while on this point I would note that the appellant has disclaimed subsection 8 of the Act, and state that he did not rely on that subsection. I therefore refer to the case of *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 7 C.E.L.R. 53 on the interpretation given of a strict liability offence and the headnote, which is accurately extracted from the judgment of Dickson, J. states as follows at page 354:

> *"Strict liability offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act, prime facie, imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man could have done in the circumstances. The defence will be available if the accused reasonably but mistakenly believed in a 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".*

Although, as Provenzano, Co.Ct.J. in *R. v. Byron Creek Collieries Limited*, an unreported decision of September 13th, 1978 (reported at (1978), 8 C.E.L.R. 31) at page 13 (page 38 C.E.L.R.) stated, following a review of the above case:

> *"Therefore it would be open to the appellant to exculpate itself from liability by showing on a balance of probabilities that it had used all reasonable care in the circumstances".*

Conversely, reasonable care does not apply as an answer to a strict liability offence, by way of the care of operation of the plant before an occurrence or steps taken after the occurrence, when the requirement of reasonable care to prohibit a violation of s.33(2) existed, as it does here, at the commencement of the implementation of a sewage system, as I say, as in the instant case.

I find the appellant, therefore, cannot rely on such relief when it was within its power to dictate a design plan that would not have as part of its design the automatic acceptance on a possible overflow of the funnelling of effluent into the stream. This possibility clearly existed, not only by design but by the warning and repair system set up by the appellant.

Clearly the design was that in order to prevent a back-up a flow-out was designed, it being classified as the "sewage emergency outflow drain". The appellant accepted that risk of choice. The trial judge's findings are at page two of his Reasons for Judgment of July 9th, 1982 and are as follows (page 160 C.E.L.R.):

> *"The emergency overflow drain on the bank of Hastings Creek is connected directly to the lift station and was designed to perform and does perform the very function which its name suggests: to provide an outlet for sewage when, for some reason, the pumps fail to operate and sewage accumulates beyond the capacity of the wet well. It would appear that the most common, though by no means frequent, cause of such an emergency is a general electrical power failure, since the pumps operate electrically. However, as with any machinery and equipment, wear and tear will take its toll and breakdowns will occur.*

Accepting the possibility of such breakdowns, the defendant Corporation has installed an alarm system which is connected directly to the North Vancouver Fire Department. When an overflow is imminent, a light automatically flashes on the alarm board and the Fire Department alarm operator is instructed to take certain appropriate actions which will be dealt with in more detail below".

Then continuing on at page 14 (page 166 C.E.L.R.):

"The facts detailed above, with some notable exceptions, show that the defendant Corporation has established reasonable systems to maintian lift stations and to respond to emergencies when they arise.

Mr. H.K. Lear, a mechanical engineer, presently employed by Associated Engineering Services in Vancouver, coincidentally the firm which installed the lift station in 1965 (prior to Mr. Lear's employment there) testified that, in his opinion, the defendant has established a "housekeeping" programme for its sewage lift stations which is appropriate in the circumstances. In particular, he was satisfied that the maintenance procedure and the alarm system are well in keeping with prudent engineering practice throughout British Columbia.

In his report, filed as Exhibit 39, he states that emergencies are unavoidable. Sooner or later a power outage or an equipment breakdown will occur and when it does, if there is no overflow drain, sewage will simply back up through the collection system into homes or onto the streets and eventually into ditches and storm sewer systems. In the latter event, the likely result would be the eventual deposit, by gravity, into adjacent streams such as Hastings Creek.

On the stand, he testified that he could find nothing objectionable in the manner in which the defendant responded to the emergency in this case nor in the steps it took to avoid the emergency in the first instance".

After considering the safety steps taken and referred to by the trial judge, he said at page 15 (page 167 C.E.L.R.):

"In any event, I find it unnecessary to deal at any length with the system as constructed or the responses to the emergency by the defendant. In my view, the resolution of the issue of "due diligence" lies elsewhere".

And at page 16 (page 167 C.E.L.R.):

"The evidence establishes clearly that emergency overflows will occur. At some point, either through factors entirely beyond the defendant's control (such as an electrical failure) or through factors which it might be unable to control but which it took reasonable steps to prevent (the breakdown of machinery), sewage will accumulate beyond the capacity of the wet well.

He then proceeded on to his finding at page 16 as follows (page 168 C.E.L.R.):

The defence argues that the defendant's maintenance programme and alarm systems demonstrate that, when an emergency does occur, its response is such that it amounts to taking "all reasonable steps to avoid the particular event".

However, the "particular event", the act which led to the charges being laid in this case, was not the breakdown of the machinery in the lift station, and the issue is not whether the defendant Corporation took steps to prevent such a breakdown and then responded promptly and adequately when it did happen. The event is the deposit of a deleterious substance into Hastings Creek and the defendant not only did not take steps to avoid that occurrence, it planned for it to happen".

In addition to the due diligence submission, Mr. Mackenzie, in his very well-prepared submissions, advanced a further proposition, that of "alternatives available." I referred counsel to *R. v. Gonder*, (1981), 62 C.C.C. (2d) 326, a judgment of Stuart C.J. Yukon Territorial Court dated July 15th, 1981, and appellant's counsel pointed to and relied upon that portion of the judgment dealing with this issue at page 333. I have considered that judgment, in light of the evidence before the trial judge, and I am not persuaded in these circumstances that the learned trial judge was in error for on the evidence I find it was open to him to make the finding he did in that regard.

Therefore, on the appeal against conviction, I do not find the learned trial judge to have erred and I therefore dismiss the appeal.

The Crown has appealed against the sentence imposed on July 22nd, 1982, as follows: count 1, $5000.00; count 2, $2000.00 and in default, distress.

At the opening of this appeal the Crown abandoned its appeal on count 2. On count 1, I have reviewed the judgment of Judge Paradis, and find that he has given consideration to all the matters required of him on sentence. He has provided reasons for his conclusions. I do not find them to be such as to be in error and that in the circumstances of this particular case it was open to him to deal with the matter as he did. I might well have imposed a higher fine but I cannot come to the conclusion that in this instance such fine as was imposed was so inordinately low as to require me to increase it.

Therefore, the appeal against sentence is dismissed.

I wish to thank both counsel for their assistance throughout this appeal.

(Editor: The B.C. Court of Appeal upheld this decision. See page 491.)

NOVA SCOTIA PROVINCIAL COURT

R. v. CROSSLEY KARASTAN CARPET MILLS LTD.

Archibald Prov. Ct. J. Truro, August 20, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charged under s.33 (2) - Oil spill from mills-s.33 (8) due diligence - Cause of spill not determined - Accused acquitted on defence of due diligence.

The accused company was charged under s.33 (2) of Fisheries Act with depositing or permitting a deleterious substance, oil to enter McClure's Brook which flows into the Salmon River in April 30, 1980. The oil in McClure's Brook was established to have come from the accused's mill through a storm sewer. The spill was investigated by provincial federal, and company officials, but the cause of the spill could *not* be established.

The accused called various witnesses including the contractor who built much of the mill to show that it was properly designed and that they had suitable procedures for handling oil. The court decided that the company exercised all due diligence and therefore dismissed the charge.

J. Akerman, J. Crawford, Gruchy, for the Crown.
MacLeod, Caldwell, for the accused.

ARCHIBALD Prov. Ct. J.: - (orally, extracts from transcript)

...

Well, there's been a great deal of argument and law cited in this matter, and there's been a great deal of evidence adduced for the Crown and the Defence. Despite all this, the question eventually comes down to a relatively simple proposition

...

Now, the facts of the matter ..... there is no question in my assessment that the Crown has proved that the oil came from the premises of the defendant corporation, through the drainage system, and entered the waters of McClure's Brook, and thus the waters of the Salmon River and the Bay of Fundy, and these waters were frequented by fish. Now,

...

there's certainly no question that it was intentional. That is ruled out. Now, its obviously a case in the second category under the *Sault Ste. Marie* case, of strict liability, where it is not incumbent upon the Crown to prove mens rea, that is, intention to do it. Now, whether or not they still have to prove some degree of negligence is not quite so apparent, to me at least. Or whether the mere fact that it does come out of the place is sufficient, whether the source of it has to be ascertained and proved is not quite so apparent; that is, the law on that score.

The case is cited by the Prosecution, and it seems to me that the source of the oil ... substance ... has been ascertained in those cases. Here there is no question that it came from the property of the defendant company, but it hasn't been proved exactly from where it emanated. There are several intriguing possibilities and theories, one of which is that it may have been underground for a considerable length of time, in fact from 1974, and it had become heated when certain heating arrangements were made on the Bunker C system, and therefore this may have activated the oil and caused a spill. Of course this is not proved, and if that were proved, whether or not that would constitute a spill or deposit is again not quite as clear as it might be, but I would be inclined to think that it would be a spill, or seepage. Of course there is no evidence that they were aware that this oil was still there, that is prior to the second spill, the one of the 30th of April, 1980, occurring. *But it would seem to me as though the law is that any oil emanating from a place has to be explained by the owners, unless they show evidence of due diligence to meet the burden of proof on the balance of probabilities* ..... the burden of proof that is required under the second category, the strict liability, due diligence provisions of the law under the *Sault Ste. Marie* case.

It has been urged that this fact of unknown escape of oil from the premises of a company that uses oil is per se, contravention of the section. It is urged by the defence that after the 1974 spill the company took steps to store the Bunker C oil and all the supplying pipes and what-not above ground, and they exercised diligence, and had a system whereby this was constantly under surveillance. The crown of course alleged that there was oil around the floor, around the sump hole and what-not, where the oil was seen, and that this obviously came from the valve which is depicted in the ... the photographic exhibit ... and that they were negligent, per se, in having this system so close to a potential source of spill, that that very fact that they had this drainage system there .... if a break in a pipe had occurred,it would obviously go into this hole, and therefore go into the brook, that that fact is enough to negative any evidence of due diligence on the part of the company.

That of course is disputed by the defence. The company had the means ... wire and peat moss; etc. there to use in the event of any rupture of any pipe, and that the surveillance was carried out on a regular basis, and in fact I find as a fact that the Crown has not proved exactly where the oil came from, (that is, within the premises). It came definitely from the premises. *But I find* that the onus is on the company to show that they used due diligence because the oil did in fact escape from their property

...

and

... the law is a strict liability offence, and in fact Section 8 of Section 33 of the Fisheries Act invokes the due diligence concept by the statute itself.

If there were some carelessness on the part of an employee or negligence on the part of an employee, if it did dump some oil down that hole when the thing was being cleaned up, if a rupture did occur, unknown to the authorities, it would still be open to the defendant, the company, to establish that the offence was committed without their knowledge or consent, and they they exercised all due diligence to prevent its commission. On the whole of it, I find it is incumbent, as I said, upon the defendant to prove by preponderance of evidence that it exercised due diligence to prevent this type of thing.

What happened after the spill is, of course, irrelevant, and that they did to clean it up with all dispatch is commendable, and perhaps relevant upon sentence of a conviction were entered, it is actually irrelevant to the concept of due diligence to prevent its commission in the first place.

Now there's a great deal of evidence on this, and I can't help but be impressed the way in which the company reacted to the spill in 1974. I think this is relevant to this extent

....

their intention and the way they operate negatives carelessness at least. The witnesses for the Defence impressed me as people who were very concerned about the possibility of this occurring and seemed to be extremely intent upon doing their best to prevent it. Now, they don't have to prove that they did this beyond a reasonable doubt. They only have to prove it on the balance of probabilities or preponderance of evidence.

I find as a fact that the company exercised all due diligence, and therefore have a defence, and therefore I dismiss the charge.

NEW BRUNSWICK PROVINCIAL COURT

R. v. SANCHEZ

CROCCO Prov. Ct. J. Woodstock, November 9, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Destruction of fish habitat contrary to s.31(1) - Sentence suspended in circumstances.

(Editor: The Information in this case charged that the accused on July 27, 1982 altered the bed of a small brook thereby causing the destruction of a fish habitat, contrary to s.31(1) of the Fisheries Act, R.S.C. 1970, c.F-14, as amended).

P.B. Maddox, Q.C. for the Crown.
H. Depow, for the accused.

CROCCO Prov.Ct.J. (orally): - I have listened with interest to this case this afternoon and it is unique in that it has to do with one of our newer citizens coming to this country who is not aware of our ways. But under the circumstances, this is the strict interpretation that I must give to this section, it is strict liability, and I find that M. Sanchez did cause destruction of fish habitat granted, but I can't get over the feeling that Mr. Sanchez was totally ignorant of the law, that this is not beyond complete remedy, that nature itself will in due time restore this brook, and possibly in some ways it can be helped along by Mr. Sanchez doing certain works there under the direction of the Department. The range of penalties is from nothing to $5000.00 and in my opinion, if there ever was a case where no penalty was deserved, this is the case. So I suspend the imposition of any sentence upon you for a period of six months. In that time, I hope that you will, with the advice of the Department, do such work as can be done to restore the stream to its former pattern and condition.

BRITISH COLUMBIA COUNTY COURT

R.v. MACMILLIAN BLOEDEL LIMITED
(Logging in Tsitika Watershed)

STEWART Co. Ct. J. Nanaimo, December 17, 1982

Fisheries Act, R.S.C. 1970, c. F-14, as amended - While Act intended to protect fisheries, not every species of fish in every geographical location is a fishery - Stream in question neither a fishery nor part of one - Act therefore inapplicable and appeal from conviction under s. 31(1) allowed.

On an appeal by MacMillan Bloedel Limited from its conviction of violating s. 31(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, as amended, *held*, the appeal is allowed. While the *Act* is intended to protect fisheries, a fishery does not include every species of fish in every geographical location. The Supreme Court of Canada in *R.v. Northwest Falling Contractors Ltd.* 2 Fisheries Pollution Reports 296; (1980), 9 C.E.L.R. 145 in fact suggested that there is a limitation on the scope of the *Act*. In the present case, the stream in question was neither a fishery nor part of one, and therefore the *Act* does not apply. To be identified as a fishery the stream would have to contain fish having a commercial, or perhaps sporting value.

D.W. Shaw, for the appellant.
P.M. Thompson, for the respondent, Crown.

(Editor: This decision was upheld by Court of Appeal. See page 459. Application by the Crown for leave to appeal to the Supreme Court of Canada was refused.)

STEWART Co. Ct.J.: - The issue on this appeal can be expressed in very general form as a question whether the *Fisheries Act* applies to all waters containing fish, or can there be a limitation on its scope. I will deal with the specific issue later.

The appellant carries on extensive logging operations in the Province of British Columbia. In 1979 it was carrying on such an operation in the furthermost limits of the Tsitika River Watershed on Vancouver Island. The appellant was charged that during its operation it committed a breach of Section 33(2) of the *Fisheries Act* in depositing a deleterious substance in water frequented by fish. It was acquitted of that charge but convicted on another arising out of the same operation at the same time under Section 31 of the Act, subsection (1) of which provides:

> *No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.*

There was a stream in the area being logged. The learned trial Judge described it as more than a trickle, a fair-sized stream. The learned Judge may well be justified in his choice of words, but on the evidence which included photographs I would refer to it as a very small stream. Nevertheless it contained fish and it was a tributary of the Tsitika River which, with many of its tributaries, contains anadromous fish and could be described with most such tributaries as a fishery. However, the stream referred to in the charge, before reaching the Tsitika River, passes over at least two waterfalls, which form impassable barriers to anadromous fish attempting to reach the area above. The fish above the waterfalls are of species which have, according to the experts, filled

their place in nature for perhaps 2,000 years entirely above these waterfalls. It is only by accident and contrary to the nature of the species that any fish find their way downstream. These fish are small, about 4 to 5 inches, seldom, if ever, reaching 6 inches. They have no commercial value and no sporting value, although undoubtedly forming a pleasant part of the natural environment which the learned trial Judge seems to have considered of some importance.

It cannot be disputed that the appellant in its logging operation in the vicinity of this stream ignored the same. The result was, so far as the stream was concerned, in the not inappropriate words of the learned trial Judge, "an ungodly mess". The appellants later cleaned up the stream without being able, of course, to restore the forest through which it previously flowed. "Fish habitat" is defined in the Statute and this stream formed part of the habitat of this species of small fish. Such habitat was altered and disrupted by the logging. That such alteration and disruption was harmful can hardly be denied. As I read the judgment of the learned trial Judge he appears to consider the harmful effects significant, and even perhaps disastrous to the fish above the waterfalls and further, he seems to have concluded that the acts of the appellant in relation to this small stream, high above the waterfalls, in some way seriously affected the habitat of the anadromous fish below the waterfall. If I am correct in assessing the conclusions of the learned trial Judge, in my respectful opinion, they are not supported by the evidence, which goes no further than to indicate some short term negative impact on the fish above the waterfalls and none on the fish below.

Introduced in evidence (Exhibit 13) was a logging plan entitled "Tsitika River Watershed Fisheries". The plan is helpful in demonstrating the remoteness of the area involved in this appeal, that is, its proximity to the outer limit of the Tsitika River Watershed and also to indicate the almost countless similar tributaries to the Tsitika River. The plan was prepared over a period of two years by a study group consisting of a number of interests including the Department of Fisheries and the appellant. For its part the objective of the Department of Fisheries was to maintain and enhance the fisheries resources of the Tsitika Watershed and to that purpose the plan is endorsed with numerous prescriptions and constraints intended to be observed by loggers. There is no doubt that the appellant failed to observe many of these on the unnamed stream above mentioned, and the trial Judge attached considerable significance to that. If *mens rea* was a factor considered by the learned trial Judge with respect to either of the charges before him these prescriptions and constraints may well have been relevant, but with respect, they appear to me to be irrelevant to the real issue.

That issue can perhaps best be stated by reference to the Notice of Appeal, which states as a ground of appeal that the learned trial Judge erred "by failing to find that the scope of Section 31(1) of the *Fisheries Act* does not extend to the subject habitat in the unnamed tributary of the Tsitika River, there being no fishery directly or indirectly affected". The appellant's argument is that the Tsitika River fishery extends no further than the waterfalls and that the unnamed stream was not in itself part of a fishery.

Bearing in mind that the learned trial Judge was dealing with two counts, it is a little difficult to ascertain with reasonable precision his reasons for convicting on Count 1. He does appear to me, with respect, to have been in error on some matters of fact. He appears to have concluded that the fish upstream of the waterfalls were an important part of the entire Tsitika system, even providing food, albeit in a minimal degree, to the fish below the waterfalls, and that if they did not have the protection of the *Fisheries Act*

they would soon cease to exist to the inevitable deterioration of the entire system. The evidence cannot support that position. Counsel for the appellant chose to present the appellant's case before me in written form, elaborating thereon as he considered appropriate. It is a carefully prepared submission and I respectfully agree with his assessment of the facts in relation to the findings of the learned Provincial Court Judge. However, even if the trial Judge had seen the facts as perceived by counsel for the appellant, he may well have reached the same verdict. He could easily have accepted the position taken by counsel for the respondent on this appeal in opposition to the appellant's argument that there is no fishery in the area with which we are concerned. Counsel for the respondent points to the admittedly very broad definition of "fish" in the Statute. He finds support in a case in the Provincial Court of Ontario, *Regina v. Cyanamid* (1981) 11 C.E.L.R. 31 and the authorities therein reviewed, including *Regina v. Northwest Falling Contractors Ltd.* (1980) 32 N.R. 541. The Provincial Court Judge in that case was concerned with a species of fish in the Welland River of no commercial or sporting value which were entirely isolated by the Welland Canal. He held that in identifying a fishery it is not material or relevant whether there is any commercial value. In effect he held, as I interpret the judgment in this regard, that any fish constitute a natural resource and hence become a fishery. With respect, I am persuaded that the contrary position taken by the appellant is sound, that the *Fisheries Act* is for the protection of fisheries, and that fishery does not include every species of fish in every geographical location. I agree with counsel for the appellant that the Supreme Court of Canada has indeed suggested some limitation on the reach of the Statute. In *Regina v. Northwest Falling Contractors Ltd., (supra)* at p. 550 Martland J. for the court said:

> *The charges laid in this case do not, however, effectively bring into question the validity of the extension of the reach of the subsection to waters that would not, in fact, be fisheries waters.*

The charges involved waters frequented by fish, and hence I infer that Martland J. contemplated the existence of waters with fish in them which did not constitute fisheries. The issue in this case is one which, with respect, I think will have to be settled by the Supreme Court of Canada. I regard the words of Martland J. as encouraging to the appellant.

In reaching my decision in this matter, which is to allow the appeal, I was much influenced by a case relied on by counsel for the appellant which, although dealing with another Statute, is by analogy helpful and I refer to *Regina v. Sommerville* (1972) 32 D.L.R. (3d) 207. In that case a section of the *Canadian Wheat 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.

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. None of these conditions has been established. The appeal is allowed and the conviction quashed.

NEW BRUNSWICK PROVINCIAL COURT

R. v. G.E. BARBOUR COMPANY, LIMITED

LYNCH Prov. Ct. J. Fredericton, February 7, 1983

Constitutional Law - Fisheries Act, R.S.C. 1970, c.F-14, as amended, s.31(1) -s.31(1) intra vires federal Parliament.

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Carrying on work or undertaking that resulted in harmful alteration, disruption or destruction of fish habitat contrary to s.31(1) - s.31(1) intra vires federal Parliament - Accused acquitted.

The accused company, pursuant to a permit issued under the provincial Clean Environment Act, excavated material from the Miramichi River. On a charge of unlawfully carrying on a work that resulted in the harmful alteration, disruption or destruction of a fish habitat contrary to s.31(1) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, held, the accused is not guilty.

S.31(1) is intra vires the federal Parliament as it prohibits only those works and undertakings that are in conflict with the effective protection or preservation of a fish habitat. It does not matter if one has a permit under a provincial statute such as the *Clean Environment Act*, as one may still be in contravention of the *Fisheries Act*. However, for both Acts to be compatible, s.31(1) must be interpreted narrowly. In this case, the work did not damage spawning grounds, or injure or alter the habitats of the fish population in a harmful way. Thus the accused is acquitted.

L. Jackson, for the Crown.
J. Turnbull, for the accused.

LYNCH Prov.Ct.J.: - The defendant G.E. Barbour Company, Limited was charged that:

> "On the 28th day of September, A.D., 1982, at or near Rocky Bend, South West, Miramichi River, in the Province of New Brunswick, did unlawfully carry on work resulting in the harmful alteration, disruption or destruction of fish habitat, contrary to and in violation of s.31(1) of the Fisheries Act, c.F-14, R.S.C., 1970, and amendments thereto".

Since the early 1950's a number of artificial salmon pools were created in the area in question by removing material from the river bed. The Miramichi River at this location is fast moving and lacking in very many natural pools. The Rocky Bend Camps were originally build (sic) to accommodate canoeist(s) from the upper reaches of the river system. The camp owners in the immediate area would periodically clean out their pools and in time were required to obtain provincial permits. These permits were issued with a degree of regularity until 1980.

In 1977, the federal government amended the Fisheries Act, R.S.C. 1970, c.F-14, and made it a summary conviction offence for any person to carry out work which harmed

the fish habitat. Pursuant to s.15 of the Clean Environment Act the provincial and federal government set up a joint board to advise the New Brunswick Minister of Environment on whether or not permits should be issued for the maintenance of salmon pools. Since the early part of 1980 all applications for the restoration of salmon pools in the Miramichi region had been turned down. At a meeting dated September 9, 1982, of the joint board, a further two year prohibition was agreed upon. Prior to this, that being during the month of 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. The federal officials explained why no permits would be granted and specifically mentioned two possible downstream effects. These were possible unravelling of the river bed and possible siltation of downstream spawning beds.

Mr. Brenan took his case directly to the then provincial Minister of Environment, Eric Kipping. Mr. Kipping met with Mr. Brenan on August 29, 1982, and unilaterally issued a permit for water course alteration on September 24, 1982, authorizing the defendant to restore local pools during the period between September 23 and September 28, 1982. This date was extended. On September 28, 1982, the defendant had a bulldozer put into the river to excavate material. The work done by the bulldozer is the subject matter of these proceedings.

The defendant contends that Her Majesty the Queen in Right of the Province of New Brunswick gave the defendant permission to bulldoze so as to maintain several salmon pools on the Company's private property on the South-West Miramichi River pursuant to appropriate legislative authority. This is a matter that is completely within provincial property rights and the fact that bulldozing may have harmed fish habitat is irrelevant.

S.31(1) of the Fisheries Act, R.S.C. 1970, c.F-14, as amended states:

"No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor-in-Council under this Act.

(3) Every person who contravenes subsection (1) is guilty of an offence and liable

(a) on summary conviction, to a fine not exceeding five thousand dollars for a first offence, and not exceeding ten thousand dollars for each subsequent offence; or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years.

(4) Subsections 33(6) to (9) apply in respect of an offence under this section as if it were an offence under s.33.

(5) For the purposes of this section and sections 33, 33.1 and 33.2 'fish habitat' means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."

The question to be answered is whether that section is *ultra vires* the federal Parliament. Ritchie, C.J., in *The Queen v. Robertson* (1882), 6 S.C.R. 52, at page 120 states:

> *... I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' contemplated by the British North America Act was not in reference to 'property and civil rights' - that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but the subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection...*

Thus does this go beyond the federal authority. Ritchie, C.J., states earlier in his judgment in *The Queen v. Robertson* at page 110:

> *The nearest approach to a rule of general application that has occurred to me for reconciling the apparently conflicting legislative powers under the British North America Act, is what I suggested in the cases of Valin v. Langlois 3 Can. S.C.R. 15 and The Citizens' Insurance Co. v. Parsons 4 Can. S.C.R. 242, with respect to property and civil rights, over which exclusive legislative authority is given to the local legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative powers of the Dominion Parliament. But while the legislative rights of the local legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think such latter rights must be exercised so far as may be consistent with the rights of the total local legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights insofar as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.*

And further at page 123:

> *To all general laws passed by the Dominion of Canada regulating 'sea coast and inland fisheries' all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large.*

More recent jurisprudence has evolved from s.33 of the Fisheries Act, R.S.C. 1970, c.F-14, as amended, when dealing with what was thought to be an absolute prohibition in the discharge of slash stump of the debris in the carrying out of a logging operation. In *R. v. Fowler* (1980), 32 N.R. 230, 9 C.E.L.R. 115, Martland, J. in adopting the

description of the particular section by the trial judge at page 243 states (page 122 C.E.L.R.):

> *"The scope of this legislation covers the handling of any wood material by loggers and land clearers in respect to almost any water in Canada. This section would affect every log, piece of lumber of tree that is so placed or dumped into any river, lake, stream or ocean in Canada from which there is detached therefrom any slash, stump or debris. I cannot conceive that the booming operations, the log drives and similar type of logging enterprises could be carried out without depositing some debris into the waters used for that purpose. If s.33(3) does not require the additional proof that the deposit of the debris affects the preservation of fish then every such booming operation and log drive would be committing an offence against s.33(3).*

Martland, J. then concludes (page 123 C.E.L.R.):

> *"Subsection 33(3) makes no attempt to link the proscribed 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 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 sea coast and inland fisheries and is ultra vires of the federal Parliament".*

This Court finds little difficulty in finding that s.31(1) of the Fisheries Act is intra vires the federal Parliament. It appears reasonable that s.31(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 s.31(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 s.31(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 some juvenile salmon. It appears that these fish could return after a month or 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 his lack of scientific knowledge of these habits is the main reason that the Crown must fail, for the Court cannot convict on speculation.

I find the defendant company not guilty and dismiss this Information.

ALBERTA PROVINCIAL COURT

R. v. SUNCOR INC.
(Alberta Clean Water Act)

HORROCKS Prov.Ct.J. Fort McMurray, October 20, 1982

***Clean Water Act*, R.S.A. 1980, c.C-13, as amended - Charges of discharging contaminant in excess of that permitted in license, and of failing to report uncontrolled release of contaminant - Finding of guilty on latter charge and not guilty on former - Due diligence established.**

The accused was charged with two offences under the provincial *Clean Water Act*, R.S.A. 1980, c.C-13, as amended. On the first charge, of contravening its licence by discharging into the Athabasca River oil and grease in an amount in excess of that permitted, it was found not guilty. There was no negligence on the part of the accused; it had used all of its resources to combat the problem which resulted in the discharge of the oil and grease. Thus the defence of due diligence was established.

On the second charge, of failing to report the uncontrolled release of a contaminant within 24 hours of the release, the accused was found guilty. It had not, on the facts, fully and properly reported to the Alberta Environment representative.

M.E. Braun, for the Crown.
D.R. Thomas, *B. Zalmanowitz*, and *A. Moen*, for the accused.

HORROCKS Prov.Ct.J.: - I apologize for the amount of time I took.

The charges before the Court that I'm dealing with are two, and perhaps the easiest thing is just to read them. They are that:

"Count No. 1 -

between the 20th day of February and the 24th day of February, A.D. 1982, at or near Fort McMurray, in the Province of Alberta, contravene a term of the said license, namely s.3.1, which required that the release of water contaminants in the liquid effluent discharged to the Athabasca River from the waste water storage pond shall be controlled so that the concentration of oil and grease shall not exceed a mass discharge of 420 kilograms net per 24 hours, contrary to paragraph 4(8)(b) of The Clean Water Act, c.C-13 of the Revised Statutes of Alberta 1980 and amendments thereto.

Count No. 2 -

on or about the 21st day of February, A.D. 1982, at or near Fort McMurray in the Province of Alberta, fail to report to the Director of Pollution Control within 24 hours of the release of a contaminant or contaminants which occurred on the 19th day of February, A.D. 1982, contrary to sub-section 9(1) of The Clean Water (General) Regulations AR35/73 and amendments thereto and did thereby commit an

offence under s.10 of the said regulations, which regulations are authorized by the Clean Water Act c.C-13 of the Revised Statutes of Alberta, 1980 and amendments thereto."

There were raised in defence of Suncor with respect to these charges, constitutional arguments whether part of the Clean Water Act was good and valid legislation as far as the sections on which Count 1 of the Information was based. It was suggested that the regulation was inconsistent with the Fisheries Act, the legislation of the Parliament of Canada and in constitutional law, paramountcy of federal enactment is said to happen when federal legislation is inconsistent with provincial legislation even though both may be validly enacted under their powers. It must be remembered that it is the statutes themselves which must show this inconsistency which in the Clean Water Act s.17 (1) reads as follows:

> *"Subject to subsection (2), no person shall deposit or permit the deposit of a deleterious substance of any type in a watercourse or in surface water or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any watercourse or any surface water."*

Subsection (2) goes on the say:

> *"Subsection (1) does not apply to the deposit of a deleterious substance of a type, in a quantity and under terms and conditions stated...(c) in a license issued by the Director of Standards and Approvals pursuant to this Act or regulations under it."*

The Fisheries Act of the Parliament of Canada in s.33 (2) says:

> *"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."*

It then goes on in subsection (4) to permit exceptions under the regulations. Subsection (11) defines "deleterious substance" and "deposit" and subsection 13 also allows exceptions by regulation.

In my view this is a situation where the two provisions overlap but are not inconsistent with each other. They both forbid the deposit of deleterious substances except either by license or by regulation. Now, nobody has shown this Court that the license and the regulations are necessarily inconsistent and I would have to be shown that to hold that part of the Clean Water Act to be unconstitutional. In my opinion the constitutional argument fails in this case.

Now, turning to consideration of Count 1 on the Information, Exhibit 5 as filed in the case gives readings for the days between the 20th and the 24th of February, 1982. I've extrapolated them from the report and on the 20th Suncor reported to Alberta Environment that nineteen hundred and fifty-one point eight kilograms of oil and grease went into the river, on the 21st five thousand and ninety-seven kilograms, on the 22nd twenty-one thousand eight hundred and thirteen point one kilograms, on the 23rd six

thousand three hundred and fifty-one, and on the 24th eight thousand eight hundred and twenty-five. Some rough calculations would indicate that these were respectively on the 20th four and a half times the permissible maximum limit, that's on the 20th; on the 21st twelve times the maximum permissible limit; on the 22nd, fifty times; on the 23rd fifteen times; on the 24th twenty-one times. Now, the calculation of those amounts as has been shown to the Court in evidence involves two factors. The first is the calculation of the parts per million of the sample that the oil and grease forms and that's a sample that is taken over the course of a twenty-four hour period. This is multiplied by the flow as calculated by the readings at the weir, which is the second factor. The evidence in Exhibit 5 is criticized by the Defendant in two ways. They attack the calculation of the amount in the sample through their expert who takes issue with the method of pouring a subsample from their original. They take issue with the use of an improper solvent and the failure to recalibrate the basic calculations on which this is measured by the instrument, the infra red spectraphotometer that was used by Suncor to obtain these figures.

The Crown felt that it could be said that the criticism of the subsampling technique could be offset by other factors, but the difficulty about that is everybody is being very imprecise about the factors involved and I frankly am unable to make those sort of judgments, not having either the technical knowledge nor having sufficient evidence on the point since nobody has produced any experimentation to tell me one way or another; however, looking at it one way even if one assumed that in the subsample of five hundred millilitres out of a one gallon sample was taken and that every speck of oil and grease that was contained in the one gallon sample originally went into the subsample, which I think even the expert called by the Defence would think inherently unlikely, the factor of error could be no more than nine times. It was not suggested that in the evidence that either the failure to use the proper solvent or the recalibration would lead to any gross errors. They would clearly in the opinion of Mr. LaBerge lead to error, but I certainly didn't get any impression that gross errors could result from either of these factors; however, there is a conceivable error of some magnitude as set out above. The other part of this is that of the flow and there I have Mr. Timpany's evidence as to the difficulties of calculating correctly the flow of the weir at Suncor as opposed to an ideal weir. His evidence was extremely cogent and, thank heavens, clear and it is evidence that the actual rate of flow was not, nor could it be calculated with any precision; however, I am loath to believe that that could be of any great magnitude because it must clearly have been obvious to anybody at the Plant if they were reporting flows that were in multiples of the actual flow, it's inconceivable that a large operation could think that they were using twice as much water for instance as they were, so that I'm not satisfied that the errors arising out of the incorrect calibration of the flow could in my opinion conceivably be wrong by a factor of two, and I think that's putting it at a very, very high figure indeed given the nature of the operation. The sort of net result of this is that however much one may attack the methods used by Suncor I am satisfied that at least on the 22nd of February, 1982 there is no reasonable, rational, conceivable thought in my mind that they did not pump well over four hundred and twenty kilograms of oil and grease into the Athabasca River.

The other and next defence raised by Suncor to this first Count rests itself on the principles set out by the Supreme Court of Canada in the case of the Queen against the City of Sault Ste. Marie and I also took the National Reporter citation which is (1978) 21 National Reporter at page 295. In argument there was quoted the second test or the second category of offence by Mr. Justice Dickson and he described that type of offence as:

> "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 that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be 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. These offences may properly be called offences of strict liability."

The Defendant here says that he did indeed or sets out to prove on a balance of probabilities that he did indeed do what any reasonable man would have done in the circumstances and that he was not negligent. There was a lot of evidence concerning what might have happened at the point in which this leakage of oil and grease went into the Athabasca River. There was evidence that in their attempts to stop or trace what was happening that Suncor dug down and discovered three culverts which on the evidence before me was clearly an error in construction that they had not been removed when the dike was completed. We must remember that the Suncor Plant was constructed at least fifteen years before these events took place and this fault or error if that's what it was had given no trouble during these fifteen years and therefore unless one can import negligence in this type of situation fifteen years back, even if it's not saved by the mistaken fact part of Mr. Justice Dickson's rule would I'm not, as I say, I don't think I'm prepared to hold that that is negligence of the sort that would prevent the Defendant from attempting to espouse this particular defence.

Having heard all the evidence I am frankly not satisfied that the culverts had very much to do with this at all. I think they're a red herring. All the evidence I have suggests that they only came into play in an attempt to solve the problem and that other than removing control from Suncor of the transfer of fluids between the waste water pond and the duck pond, even if they had left them I don't suppose it would have made any difference to this at all. It doesn't seem very reasonable on all the other evidence I've heard that it was anything but something that was discovered in the course of trying to solve the problem. Whether it was due to weather or not it seems that a very large amount of oil had accumulated in the waste water pond at this period of time. The continuing operation of the Plant which although impaired by the disasters that are in evidence meant that the water was being continuously pumped into the waste water pond. If water was continuously fed into the waste water pond its level must necessarily rise, and with it the level of the duck pond and with that equally necessarily the flow over the weir. It is clear to me and unavoidable that just this natural progression, water goes in, the level in the waste water pond comes up, the level in the duck pond comes up, the water goes out, necessarily resulting in the contaminants going into the river. What is the Defendant then to do? There is no suggestion that the disasters of December and January were caused by their negligence. There is evidence that it was the worst winter in twenty-five years -- though I'm not sure where Mr. Johnson was during the 1968-1969 winter. The Defendant was faced with a mass of oil with no place to go but out. It's just going to go through the system. There is nothing anybody that I can see can do about it. The Defendant used all its resources to combat the problem. Looking at it in hindsight now other methods might have indeed been better. They might have done something else, but though I must admit no other methods have been suggested to this Court that would have improved on the performance they had. In all the circumstances I'm satisfied that they did everything that they could and so the Defence of due diligence is made out and I'm therefore going to dismiss the first Count on this Information.

Coming to the reporting, the failure to report Count under s.9 of the regulation the first thing I want to observe is the charge fails to specify whether it is under s.9(a) or 9(b) and in my opinion the Count is defective because of that; however, Defence has not taken issue with this and the Trial has certainly proceeded and all the evidence has been led as if it was under 9(a) and I'm going to therefore amend the Information by adding the word "uncontrolled" before the word "release", pursuant to the provisions of the Criminal Code as brought into effect by the Summary Conviction Act.

It is clear from the evidence that there was an ongoing problem at the Plant and that it had been giving rise to concern between the Department of Environment and the Plant and that there had been regular consultations between the appointee of the Plant, Suncor the Defendant, Mr. Martin to deal with this by reporting to Mr. Kostler, representative of Alberta Environment, but this was an ongoing thing. I come to the Defence offered is that on the 19th on the day of the spill that gives rise to this charge, Mr. Martin talked to Mr. Kostler. There was nothing in that report in my opinion by Mr. Martin to Mr. Kostler that the situation had suddenly gone critical. Mr. Martin may not indeed have perhaps realized that the situation had gone critical, but in my opinion he should have. In the circumstances the laboratory staff, it is in evidence, is available on a daily basis. They're there every day. It's not a question that they were closing down on the weekend. The laboratory staff is in two sections and operates four days, replaced by another section that operates the next four days. The laboratory staff was available and in my opinion monitoring should have been strict in those circumstances. I don't think that referring it to an aesthetic problem shows any emergency. The fact that the use of vacuum trucks was discussed, but that does not per se indicate any large scale escape of contaminants to the river. It is not consistent one way or the other. It appears to me that Mr. Kostler would only get the opinion that there had been some escape, that it was aesthetic and not critical; and that was not the situation. As a result no further reporting was made until the 21st even though the levels were up and I do find that there has under those circumstances been a failure to report under s.9 of the regulations and I find the company guilty of that Count.

ALBERTA PROVINCIAL COURT

R. v. SUNCOR INC.
(Ruling on Defence Application)

HORRICKS Prov.Ct.J. Fort McMurray, January 31, 1983

Defences - Prosecution under Fisheries Act, R.S.C. 1970, c.F-14, as amended - Previous prosecution under provincial Clean Water Act - Consideration of defence of issue estoppel.

L. Wenden, S. Rutwind, and *D. Estrin,* for the Crown.
D. Thomas, and *A. Moen,* for the accused

HORRICKS Prov.Ct.J.: - I'm sorry to have taken so long. It's not anything very long-winded on my part, but I wanted to be sure in my own mind how I felt on the subject. Clearly as far as I'm concerned the principle of issue estoppel in this case involves that of inconsistent verdicts to state the obvious. I'm quite satisfied that with respect to oil and grease on those days I made a verdict that any conviction on the charge under The Fisheries Act would be inconsistent with my decision under the Clean Water Act. Taking it a step beyond that I find it ridiculous that I could try and split these, my consideration of these charges so that I could find that the company had not been duly diligent with regard to phenols and chemical oxygen demanding substances on the same days when my earlier verdict really dealt with matters going into the Athabasca River in general and it would result in a logically indefensible position and in my opinion quite inconsistent to be able to do so, so I've come to the conclusion that the four first Counts on that Information indeed are barred by issue estoppel, and the fifth Count only will stand.

MR. THOMAS: And would be dismissed, Sir, then?

THE COURT: On the four, yes. Sorry, if you will give me the Information so I can be quite precise about it. The Counts referring to the 21st, 22nd, 23rd and 24th days of February are dismissed.

ALBERTA PROVINCIAL COURT

R. v. SUNCOR
(Fisheries Act)

HORRICKS Prov.Ct.J. Fort McMurray, June 3, 1983

Defences - Issue estoppel - Charges dismissed on four of five counts.

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under s.33 (2) - Accused guilty on one count - Defence of due diligence not established - Comments on "deleterious substance" - Charges dismissed on remaining four counts - Defence of issue estoppel.

Sentencing - accused convicted of violating s.33 (2) of Fisheries Act, R.S.C. 1970, c.F-14, as amended - Factors to be considered - $8,000.00 fine imposed.

Suncor has a provincial licence to obtain water from the Athabasca River for its oil sands plant in Fort McMurray. The licence also sets maximum limits for contaminants which are in waste water returned to the River (with which the company has continually had trouble complying). Waste water from the plant is not treated but flows to one of several ponds and from there into a large waste water pond. A dyke with control lines separates this pond from a pond which spills into the River.

Fires at the plant over the winter of 1981-1982 knocked out certain processes with the result that much unprocessed oil escaped into the waste water system and then into the River. A fault in the dyke was discovered several days after oil began escaping.

On five counts of violating s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, *held*, four counts are dismissed, and the accused is guilty on one count.

The Accused was tried on four counts of exceeding the limits on its licence contrary to the provincial *Clean Water Act* and acquitted because the evidence it led established due diligence (the Crown could have, but did not, lead evidence to rebut the evidence of the accused). Any finding on the *Fisheries Act* charges that the accused was not duly diligent would be inconsistent with the finding of the other case. Therefore issue estoppel applies and four counts are dismissed.

The trial was delayed three months due to the collapse of the Crown Attorney. The accused's argument that this delay violated s.11 (b) of the Canadian Charter of Rights and Freedoms (the right to be tried within a reasonable time) is rejected. Because the collapse of the Crown was unforeseeable and the case so complicated, the delay was not unreasonable in the circumstances. There was no prejudice to the accused; the only detriment was that the Crown had time to improve its case.

Under s.33 (2), all the Crown needs to prove is that a deleterious substance was deposited in water that is frequented by fish. The thrust of s.33 is to prohibit deleterious substances from being put into water. Thus, it is not a requirement that the Crown prove that the substance had a deleterious effect on the receiving waters. Both sides agreed

that the Athabasca River was water frequented by fish. The accused argued three factors in its defence; that measuring techniques were inaccurate and could not be relied on, that the Crown had failed to prove that the effluent was a deleterious substance, and that it had exercised due diligence.

Of the possible definitions of "deleterious substance" in s.33 (11) which could apply, the effluent from the waste water pond falls within ss.11 (b): "any water that contains a substance in such quantity...that it would, if added to any other water, degrade or alter...the quality of that water so that it is rendered or is likely to be rendered deleterious to fish...". The effluent contained numerous hydrocarbons. Both expert and experimental evidence established that concentrations of oil and grease in excess of 10 ppm are capable of giving rise to sublethal effects. The Crown established undiluted concentrations in excess of 10 ppm entering the River; this is sufficient to be likely to be deleterious to fish. The concept of a limited zone around the outfall to the River where no violation of the Act could occur is rejected.

The defence of due diligence fails. The fires and resulting escape of oil to the waste water pond could not have been foreseen, but the efforts to clean up the oil were inadequate. They did not have to have comprehensive disaster planning but Suncor could have done better than appointing a person with no experience in oil spill clean-ups to be in charge of this clean-up. The accused's Water Quality Manager did not become aware of oil escaping to the River until told by provincial officials. The clean-up director was not told for two days after that and no remedial measures were taken during this time. The failure of the dyke was foreseeable. It should have been clear from continuous high oil levels in the duck pond for several years that there was a fault in the dyke, but this implication was ignored by both the accused and the Environment Branch. The accused showed no awareness of the seriousness of the situation. Its lack of attempts to clean up the River or even to seek advice is a further indication of its attitude.

HORRICKS Prov.Ct.J.: - In these proceedings, Suncor Inc. was originally charged on five counts that on the 21st, 22nd, 23rd, 24th and 25th of February, 1982:

> "at or near Fort McMurray, in the Province of Alberta, did unlawfully deposit a deleterious substance in water frequented by fish, to wit: Athabasca River. Contrary to the provisions of s.33 subsection (2) of the Fisheries Act R.S.C. 1970, c.F14 and amendments thereto and did thereby commit an offence, contrary to s.33 subsection 5(b) of the said Statute and amendments thereto."

These charges were originally laid on five separate Informations by Chief Dorothy Mary McDonald of the Fort MacKay Indian Band on February 26th, 1982, but for administrative convenience were resworn by the Chief on one Information at the commencement of this Trial. There had been one previous Trial date set but the matter went over to October 21st at the request of the Defence. The Trial opened on October 21st and continued on the 22nd and 25th but during the noon break on the 25th, the Crown Prosecutor became emotionally and mentally prostrated and was unable to continue with the Trial. The complicated and technical nature of the proceedings made it impossible to find a replacement at short notice as a result of which the Trial was adjourned until January 24th, 1983. I have briefly set out the history of the proceedings because at the re-commencement of the Trial, Counsel for Suncor Inc. (hereinafter called "Suncor") made an application pursuant to the Canada Act for relief under s.24

on the grounds that the Defendant had been denied its right to be tried within a reasonable time pursuant to s.11(b) of the Act. The chief delay complained of by Suncor was that caused by the collapse of the Crown Attorney in October of 1982, as a result of which it was claimed Suncor's legal position was impaired and it was placed at a disadvantage. While it may be detrimental to the Defendant to have the case postponed it should be noted that the detriment on this occasion arose from the Crown having the opportunity to improve its case during the delay, rather than the Defence actually being impaired in any way. It should also be noted that there were and are fifteen further charges against the Defendant which were going to have to be adjourned in any event as the Defence had already indicated their inability to carry on for a third week of Trial. Although a considerable body of case law was quoted to the Court, I find it unnecessary to refer to it as I am of the opinion that the delay was not unreasonable given the circumstances. The complication of the case together with the unforeseeable collapse of the Crown Attorney have resulted in the delay, such as it is, and I am not prepared to characterize it as unreasonable.

Prior to the commencement of these proceedings, in October 1982, the Defendant had faced two charges under the Clean Water Act, the first of which alleged that:

> "between the 20th day of February and the 24th day of February, A.D. 1982, at or near Fort McMurray, in the Province of Alberta, contravene a term of the said license, namely s.3.1, which required the release of water contaminants in the liquid effluent discharged to the Athabasca River from the wastewater storage pond shall be controlled so that the concentration of oil and grease shall not exceed a mass discharge of 420 kilograms net per 24 hours, contrary to Paragraph 4(8)(b) of The Clean Water Act and did thereby commit an offence under s.19 of The Clean Water Act, c.C-13 of the Revised Statutes of Alberta 1980 and amendments thereto."

This charge together with a further charge under the Clean Water Act were tried together immediately before the commencement of the current proceedings. The Crown called four witnesses, the Defence five, and no evidence was led in reply. While convicting the company on the second charge, I acquitted it on the charge set out above on a finding that the company had exercised "due diligence", applying the test set out in *R. v. The City of Sault Ste. Marie* 1978 2 S.C.R. 1299 and I quote from my Judgment at Page 413 et seq:

> *"Whether it was due to weather or not it seems that a very large amount of oil had accumulated in the wastewater pond at this period of time. The continuing operation of the Plant which although impaired by the disasters that are in evidence meant that the water was being continuously pumped into the wastewater pond. If water was continuously fed into the wastewater pond its level must necessarily rise, and with it the level of the duck pond and with that equally 414 necessarily the flow over the weir. It is clear to me and unavoidable that just this natural progression, water goes in, the level in the wastewater pond comes up, the level in the duck pond comes up, the water goes out, necessarily resulting in the contaminants going into the river. What is the Defendant then to do? There is no suggestion that the disasters of December and January were caused by their negligence. There is evidence that it was the worst winter in twenty-five years--though I'm not sure where Mr. Johnson was during the 1968-1969 winter. The Defendant was faced with a mass of oil with no place to go but out. It's just going to go through the system. There is nothing anybody that I can see can do about it. The Defendant used all its resources to combat the problem. Looking at it in*

> *hindsight now other methods might have indeed been better. They might have done something else, but though I must admit no other methods have been suggested to this Court that would have improved on the performance they had. In all the circumstances I'm satisfied that they did everything that they could and so the defence of due diligence is made out and I'm therefore going to dismiss the first count on this Information."*

At the close of the Crown's case in the instant proceedings, the Defence applied to have the charges relating to the 21st, 22nd, 23rd and 24th February dismissed on the principle of "issue estoppel" on the basis of my findings on the charge under the Clean Water Act *supra*. The Defence relied on *R. v. Gordon* 1980 3 W.W.R. 655 a decision of Kerans J. (as he then was) where he directed the jury to acquit the Accused in a perjury Trial on a charge laid following the evidence of the Accused at his previous Trial for robbery, in which he had denied committing that offence. Kerans J. held that the new evidence that the Crown sought to lead was "available" at the Trial for the robbery. He said at 656:

> *"Issue estoppel arises when a fact in issue in one case is decided against the Crown and the Crown in a subsequent case against the same Accused seeks to put the same fact in issue. The rule is simply that the Crown shall not be permitted to do it."*

The existence of issue estoppel as a factor in criminal proceedings has been stated in the case of *Gushue* v. *the Queen* reported at (1979) 50 C.C.C. 2nd at 417 where Laskin C.J.C. said at 420,

> *"I think it desirable to say at the outset that issue estoppel is part of the criminal law of Canada and I would affirm the position of this Court in the matter as expressed in McDonald v. the Queen, (1959) 126 C.C.C. 1, 1960 S.C.R. 186, 32 C.R. 101 and Feeley, Wright and McDermott v. the Queen, 1963 3 C.C.C. 201, 40 D.L.R. 2nd 563, (1963) S.C.R. 539. The Court accepted the statement of law of the availability of issue estoppel in criminal proceedings made by the Privy Council in Sambasivan v. Public Prosecutor Federation of Malaya, 1950 A.C. 458, 11 C.R. 55."*

In both the *Gordon* and *Gushue* cases the situation was one in which the Accused had been acquitted of criminal charges and had subsequently given statements showing that the evidence given at those Trials was perjured and that the Crown had thereupon laid charges of perjury against these Accused. In each case the Court held that the jury's finding of innocence settled the issue.

In the present case there was no question of untrue evidence having been entered at the Trial under the *Clean Water Act*, merely that in the prosecution of that charge no evidence was led in rebuttal of the due diligence defence raised by Suncor. There can be no question that such evidence was available to the Crown, particularly in light of the subsequent proceedings on the final charge. In my opinion it was clear that any verdict that Suncor had not been duly diligent with respect to the 21st, 22nd, 23rd and 24th days of February, 1982 must necessarily be entirely inconsistent with the decision of a charge under the *Clean Water Act* against which no appeal had been entered by the Crown within the period provided by law. I accordingly held that issue estoppel had been established and dismissed the first four counts under the Information. The Trial

then proceeded with respect to the fifth count, however it was agreed between Counsel that evidence would be led with respect to all five dates as originally charged so that all the evidence might be placed before any Court reviewing these proceedings.

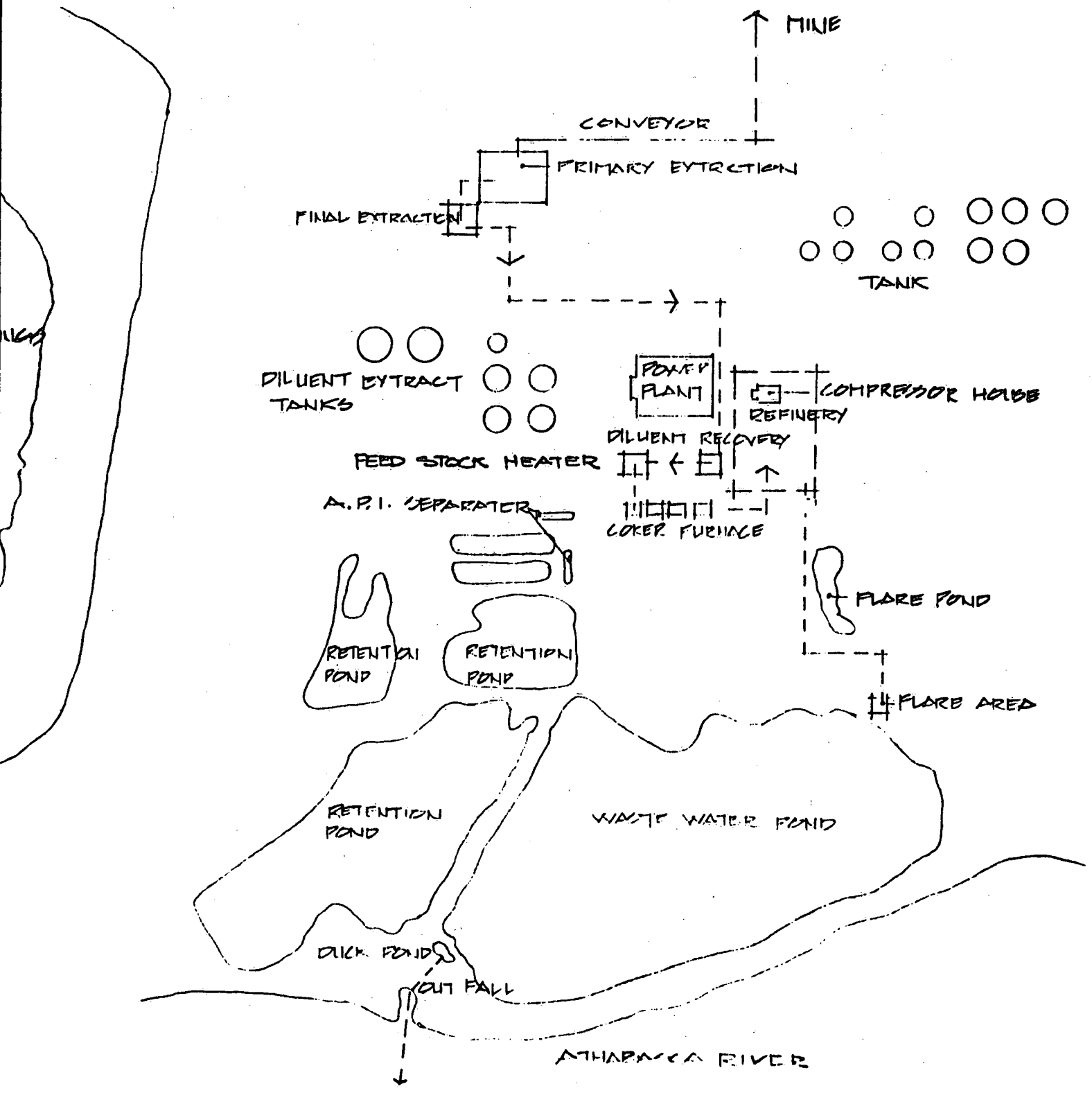
I intend therefore to describe the Suncor Plant and following that, the events leading up to the alleged breaches of the Act before considering the law, and in light of the law the defences offered by Suncor in the proceedings.

THE PLANT AND PROCESS:

The Defendant Suncor in its previous incarnation as Great Canadian Oil Sands Limited, a subsidiary of Sun Oil Company, proposed to the Alberta Government in the early '60's to construct and operate the first large-scale commercial Plant to recover oil from the Athabasca tar sands. On obtaining approval they proceeded through their main contractor Bechtel Corporation to construct an oil sands plant at Tar Island some thirty-five miles north of Fort McMurray downriver from the town as it then was. Construction started in early 1964 and operations commenced on the 30th of September, 1967. The design and original capacity of the Plant was to produce forty-five thousand barrels of oil a day. In 1978 permission was granted to expand the capacity of the Plant to fifty-eight thousand barrels per day and at the time of the alleged offences the Plant occupied an area of some seventy-five hundred acres employing a site work-force of just over seventeen hundred persons.

The Athabasca tar sands are a deposit of bitumen bonded to sand which lie in strata in various depths throughout the region. The Suncor operation was designed to recover strata that were adjacent to the surface by strip-mining the oil sand and extracting the bitumen by a hot water process developed by Dr. Karl A. Clark. The normal process requires draining of the muskeg surface and removal of this material together with any other overburden allowing the strata to be worked by bucketwheel excavators feeding by conveyor system to the Plant itself. The mining operation is a very large-scale venture but has no relationship to the charges presently before the Court. It should, however, be noted that it is a continuing process and that it is not possible to shut down the supply of oil sand to the Plant for any but a short period without bringing the entire process of the Plant to a halt. The oil sand on the conveyor belt is fed to the top of the extraction plant from which it drops and is fed into drums in which steam and various chemicals are added in what is referred to as the primary extraction plant. From there the mixture is pumped to the final extraction plant where the bitumen is diluted with naphtha which is one of the products of the Plant and is used as a diluent in order to allow the bitumen to be handled at relatively low temperatures. From the extraction plant the now diluted bitumen is fed to a tank farm and from there to a diluent recovery plant. This plant is a two-stage system that is apparently peculiar to oil sands recovery operations. Its function is to remove the naphtha, the diluent of the bitumen, from the mixture leaving a basic bitumen stock available for the next part of the process. To this is added a small part of recovered oils from other portions of the process which are re-introduced into the cycle. This mixture then goes to a coker feed drum heated to between five hundred and fifty and six hundred degrees Fahrenheit from whence it is fed to a coker furnace. There are four of these furnaces. They are direct fired heaters normal to any refinery that has cracking operations. The oil leaving the coker furnace is between nine hundred and ten and nine hundred and fifteen degrees Fahrenheit, which is then charged into the bottom of one of the eight coke drums. The coking process is a cyclic operation known as a delayed coking operation. The normal operation cycle for a coke drum is twenty-one hours producing

DIAGRAM FROM PAGE 7 OF JUDGMENT OF JUDGE HORROCKS



between one thousand and eleven hundred tons of coke in one drum for each cycle. When a full load of coke has been deposited in one drum the feed from that coker furnace is routed to another drum and the first drum is first quenched with steam and water following which the coke is removed from the drum by use of water at high pressure. This process has removed the free carbon from the mostly bitumen coker feed and the balance from the top of the coking drum is fed to the refinery.

This feed is directed into a large fractionator tower which separates naphtha, kerosene, gas-oil and the heavy recycle or slurry oils as liquid streams and one a wet gas stream that is gaseous. This stream of gas together with methane is used in the upgrading or unifining section of the Plant to produce hydrogen. The hydrogen is compressed and fed to the three unifining plants where the fractionated products are mixed with hydrogen and passed over a catalyst in which the sulphur and nitrogen compounds are converted to ammonias and hydrogen sulphide from which in further processes sulphur is produced in the form of elemental sulphur. There are four products from the unifiners, unifined naphtha which is low sulphur naphtha, unifined kerosene, also low sulphur, and low sulphur gas-oil and a fourth stream trade-named "cascade kerosene" being a railroad engine fuel. These four streams are blended and put into the pipeline for distribution.

It must be remembered that all these processes from the coker through the refinery are carried out using materials at very high temperatures and at considerable pressures and there is in parallel throughout all this area what is referred to as a "flare" system which is basically a system of escape valves and piping which allows the release of any of the materials being processed to the flare system where they can be burned off to avoid explosions or leaks. It is basically a safety valve system and works on automatic pressure relief valves where any pressures over and above those proper for the process result in the material escaping into the flare system for disposal. This occurs at the flare stacks where the system feeds into a drum called a knockout drum from which the liquids can be recycled and the gaseous material can be burned off in the flare stacks.

In its license to operate, Suncor was granted by the Provincial Government the right to obtain water from the Athabasca River for the necessary processes of extraction and hydraulic cleaning of the cokers. This water was to be returned to the Athabasca River under license which set levels of permissible contaminants. The water treatment system allowed for initial treatment of water pumped from the river for use in various areas of the Plant. After use the water from the extraction plant is directed through a system known as an API Separator in which the water is allowed to flow slowly down a long rectangular path at the end of which an open pipe or channel known as a skimmer would recover the surface oil and the main flow of water would be directed under a baffle and over a weir from where the flow would go into retention ponds and from there to the wastewater pond. The wastewater pond also received a flow from the ash pond through a settling pond which consists of water from the coke fired boilers in the power plant and further receives water from an additional pond known as the flare pond (due to its being adjacent to the flare stacks) which receives water from the coking operations previously referred to where the coke drums have been quenched and cut with water. At the time of the alleged offences the flare pond was also taking an emergency overflow from the knockout drum in the flare system, though that would normally be routed back to the API Separator.

At that time the wastewater pond was a very large body of water which was designed to allow all these streams of water to slowly flow towards the river. Although

there was some conflict of evidence on the point, it is my understanding that water introduced to the wastewater pond would be fifty per cent removed from it after thirty-six hours. The pond had apparently from construction contained a number of dead tree stumps still rooted in the bottom. There was no artificial means of aeration or movement of the water. At the river end of the wastewater pond there was a dyke which contained six decant lines controlled by valves which allowed the water to flow into a small pond known as the duck pond. These decant lines were not only below the water surface but on the wastewater pond side of the dyke were bent downwards so that their ends were considerably below the normal water levels of the wastewater pond. The duck pond itself is a relatively small pond measuring approximately forty feet by twenty feet and from there the water would pass under a concrete baffle and over a weir, from whence it was discharged by pipe onto an outflow in the Athabasca River. Sitting over the weir is a small steel building known as the metering shack in which flow measurement instruments are sited as well as water sampling instrumentation. From the readings and samples obtained, the reports required by the Clean Water License issued by the Alberta Government are measured and calculated following analysis in the laboratory. There was also provision for some cooling water to be introduced into the stream going to the outfall, however at the times material to these incidents there was no flow through this system.

The discharges that could be made to the Athabasca River were set out in a license issued by the Department of Environment of the Alberta Government which defined daily maximum limits and monthly average limits and these are reproduced as s.3.1 of License 78-WL-080, Exhibit 4 in these proceedings:

SECTION THREE: LIQUID EFFLUENT STANDARDS

3.1 The release of water contaminants in the liquid effluent discharged to the Athabasca River from the waste water storage pond shall be controlled so that the following levels of water contaminants are not exceeded.

Water Contaminant	Mass Discharge per day	Average Mass Discharge per day
Chemical Oxygen Demand	6330 kilograms	4220 kilograms
Phenols	12.7 kilograms	8.4 kilograms
Sulphide	11.3 kilograms	3.8 kilograms
Ammonia Nitrogen	215 kilograms	136 kilograms
Oil and Grease	420 kilograms net	210 kilograms net
Total Suspended Solids	1055 kilograms net (1) 1074 kilograms net (2)	420 kilograms net (1) 845 kilograms net (2)

Note:
(1) Permissible during the period October 1 to February 28 of each year.
(2) Permissible during the period March 1 to September 30 of each year.

It should be noted that the Defendant was also required to measure the background levels of oil and grease in the river on each day that it was required to report, normally every third day, and could deduct those levels from the amounts that their tests showed to be discharged into the river. The method of calculation of the contaminants was to take water samples based both on flow and time, measure the amount of the contaminant in the sample and multiply the result by the measured flow to obtain a mass discharge figure for the day. These results were reported to the Department of Environment on a monthly basis.

Because of the complexity of the technical descriptions both of the operation and the difficulties encountered by the defendant leading up to the alleged offences, the Court took a view of the Plant. The view was taken on a relatively cold, though not extremely cold day so that the Court was able to appreciate to some extent the difficulties of the operation of this enterprise. One cannot help but be struck both by the scale and the complexity of this marriage of mining technique and refinery technique. The amounts of materials to be handled coupled with the high temperatures and high pressures of those materials in relatively adverse outside weather conditions were very evident. One was left with an impression, particularly in the refinery area, of incredible complexity and considerable danger, a veritable maze of piping among which one walked among plumes of steam, which severely restricted visibility, through ice, snow and pools of oily material. In such a setting it was possible to conceptualize the difficulties faced by Suncor in pioneering a new technology of oil sand extraction.

FACTUAL SITUATION GIVING RISE TO PRESENT CHARGE:

The expansion of the Plant, licensed in 1978, was scheduled to come on stream in the summer of 1981 and during the whole of 1981 difficulties were encountered in this regard. The original license and the modified license both required reporting to Alberta Environment of the water quality each month, tests for which were taken every third day. Evidence was led that there had been some difficulties with compliance through a considerable period in the Plant's history. The 1981 Water Treatment Record shows that in only one month were the oil and grease emissions below the permitted level of two hundred and ten kilograms per day on average and in three of the months the average was greater than the daily maximum limit. Similarily, in only four months were the limits for phenols below those permitted on average and in four of those months the amounts emitted were greater on average than the maximum daily limit. These figures were all based on the testing procedures used by the Suncor laboratory at that time.

The winter of 1981-1982 was extremely severe and Suncor experienced a series of fires that had a cumulative effect on the Plant's ability to operate and undoubtedly led to the situation giving rise to the charges placed before the Court. On December the 21st, 1981 there was a fire in the flare area which did fairly extensive damage to the flare system and among other things damaged the main pump used for pumping material from the knockout drum in the flare system to the API Separator. In addition, a floating oil skimmer on the flare pond was damaged beyond repair. As a result of this, vacuum trucks were required to take material from the knockout drums and from the flare pond to the API Separator instead of being able to pump it there. On January the 20th, 1982 there was an explosion and major fire in the unifiner compressor complex which not only

destroyed the compressor complex but forced an immediate emergency shutdown of the unifiner plant. The result of the shutdown of the unifiner plant was that all material within that complex went into the flare system as an emergency release. It was later discovered that one of the pressure safety valves involved in this operation failed in an open position. This was the safety valve of the diluent recovery unit so that diluent continued to flow into the flare system for some time. Because of the previous fire which had damaged the flare area much of this material escaped into the wastewater system either directly into the flare pond as an overflow from the knockout drum or into the adjoining wastewater pond by discharge directly out of the flare stacks. Although there was a dyke between the flare pond and the wastewater pond, there was a channel allowing material in the flare pond to flow into the wastewater pond. On January the 21st in the early morning there was a major fire on the wastewater pond involving a large proportion of the surface in which one witness described the flames as being three hundred feet high. The fire was of such dimensions as to force the shutdown of the coking operation for fear that the entire Plant would be destroyed. It was evident at that time that a large amount of oil had escaped to the wastewater pond during the fire of the previous day and in the aftermath a considerable amount of oil was observed still on the pond. At this point the evidence is that approximately half the wastewater pond was still covered with ice. It must be remembered that although the ambient temperatures during the period were extremely low, often in the minus forty-degree Celsius range, the streams feeding into the wastewater pond were often of quite high temperatures with the result that the ice coverage was never complete during the winter and in mild weather would tend to disappear very quickly. During the following several weeks the staff at Suncor attempted to deal with the oil on the wastewater pond by using vacuum trucks to remove any pockets of oil that would be blown into areas close to the edge, but the size of the pond together with the presence of a large amount of ice of unknown stability and density prevented any clean-up of the ice affected areas or proper inspection of those areas. In the early part of February the ambient temperature in the area began to rise from the low levels previously recorded and the figures given to the Court indicated that on the 11th of February it was minus 19.5 C. moving up to zero by the 17th. This temperature increase was matched by a steady rise in the effluent temperature as measured at the weir and also resulted according to witnesses in the melting of the ice previously in the wastewater pond. At this time the concentrations of oil and grease measured from the effluent and the total emissions as calculated rose rapidly to levels above those permitted by the license, though a considerable fluctuation was observed. These figures are reproduced in the table below for the oil and grease and phenols emissions together with the chemical oxygen demand materials.

	Oil & Grease		Chemical Oxygen		Phenols Demand	
Feb. 1981	Con .	Kg/Day	Con.	Kg/Day	Con.	Kg/Day
17th	25.2	798.4	190	6 019.9	.43	13.6
18th	31.8	615	150	2 901.5	.095	1.84
19th	326.7	4 081.1	600	7 495.1	.082	1.0
20th	78.6	1 951.8	300	7 449.7	.24	6.0
21st	151.8	5 097	210	7 061	.191	6.41
22nd	446.7	21 813.1	660	32 228.9	.17	8.3

23rd	104.8	6 351.3	660	39 998.8	.8	48.5
24th	29.4	882.5	300	9 005.5	1.0	30.0
25th	15.3	538.6	120	4 224.5	.243	8.6

The concentrations of various substances are expressed in parts per million or milligrams per litre, and it is those concentrations multiplied by the flow over the weir for the twenty-four-hour period which give rise to the readings of kilograms per day. While there is no evidence that in the initial period these increasing rates of emissions into the Athabasca River gave any concern to the employees of Suncor, there was evidently some outside concerns that reached the Fish and Wildlife Department of the Provincial Government as Officer T.A. Wendland gave evidence that he was apprized of a problem as of February the 15th. On February the 16th he attended at the Suncor Plant in the morning and at that point observed a large quantity of oil in the duck pond. To quote his evidence (Page 260, Volume 2):

> "I saw sheens of oil passing through some straw bales that they had going over the dam or over the weir and disappearing. I went over to the river, Mr. Martin and myself. We saw a cloudy area and then we saw a sheen on the open water, an oil sheen on the open water."

On February the 17th Officer Wendland returned to the site and took various samples, one of which was a sample which proved to be largely oil, taken from the surface of the wastewater pond adjacent to the dyke by the duck pond. It was this sample that figured in many of the experiments that were brought into evidence in this case. On the 18th of February the Mr. Martin referred to by Officer Wendland who is the Water Environment Manager for Suncor received a call from a representative of the Energy Resources Conservation Board and a visit from that gentleman who was expressing concern at the reported situation at the Suncor Plant.

On the same date, February the 18th, Mr. Russell Fosberg who had been placed in charge of the clean-up on the wastewater pond became aware of the presence of oil on the duck pond. Mr. Fosberg caused the valves on the decant lines between the wastewater pond and the duck pond to be closed and set vacuum trucks to removing the oil. He observed at this time that there was a continuation of discharge into the duck pond despite the closure of the valves and came to the conclusion that the No. 6 valve was operating improperly. As a result of which, straw bales were placed on the wastewater pond side of the dyke in the area of the No. 6 valve which appeared to contain the flow. This was on Thursday, February the 18th. On February the 19th Mr. Fosberg saw further oil on the duck pond and sought advice as a result of which a truck deposited a load of tar sand where the straw bales had been placed the previous day which appeared to correct the problem. On Saturday, the 20th of February, there was again a problem of oil on the surface of the duck pond and the treatment of dumping tar sands into that was repeated. No problems were observed on Sunday the 21st, but on Monday the 22nd the problem was again noted and on the advice of his superiors an excavation was made of the area of the No. 6 valve. At this time an old culvert was discovered running in a downward direction commencing at a level just below the decant lines on the wastewater pond side of the dyke and approximately three to four feet from the edge of the dyke. The material between the end of the culvert on the dyke was described as muddy soil. From there the culvert sloped downwards to a point three to four feet below the duck pond end of the

decant lines and finished nine to ten inches from the edge of the dyke. This culvert was removed and the area was backfilled and compacted. The normal flow over the dyke continued on the 23rd, 24th, 25th, 26th into the 27th of February where once again oil was noticed on the surface of the duck pond and further excavation was done in this area and a quantity of old iron pipes and willows was discovered in the same area. These were removed following which the excavation was backfilled and compacted. No evidence was led as to how the culvert (which showed signs of an attempt to crush it) nor the pipes and willows had become embedded within the dyke, though varous witnesses indicated that there were no records showing them and that they must date back to the time of construction of the dyke when the Suncor Plant was being built. These briefly were the facts brought before the Court of the events occurring in the Suncor Plant preceding the dates on which the alleged offences occurred.

THE LEGAL POSITION:

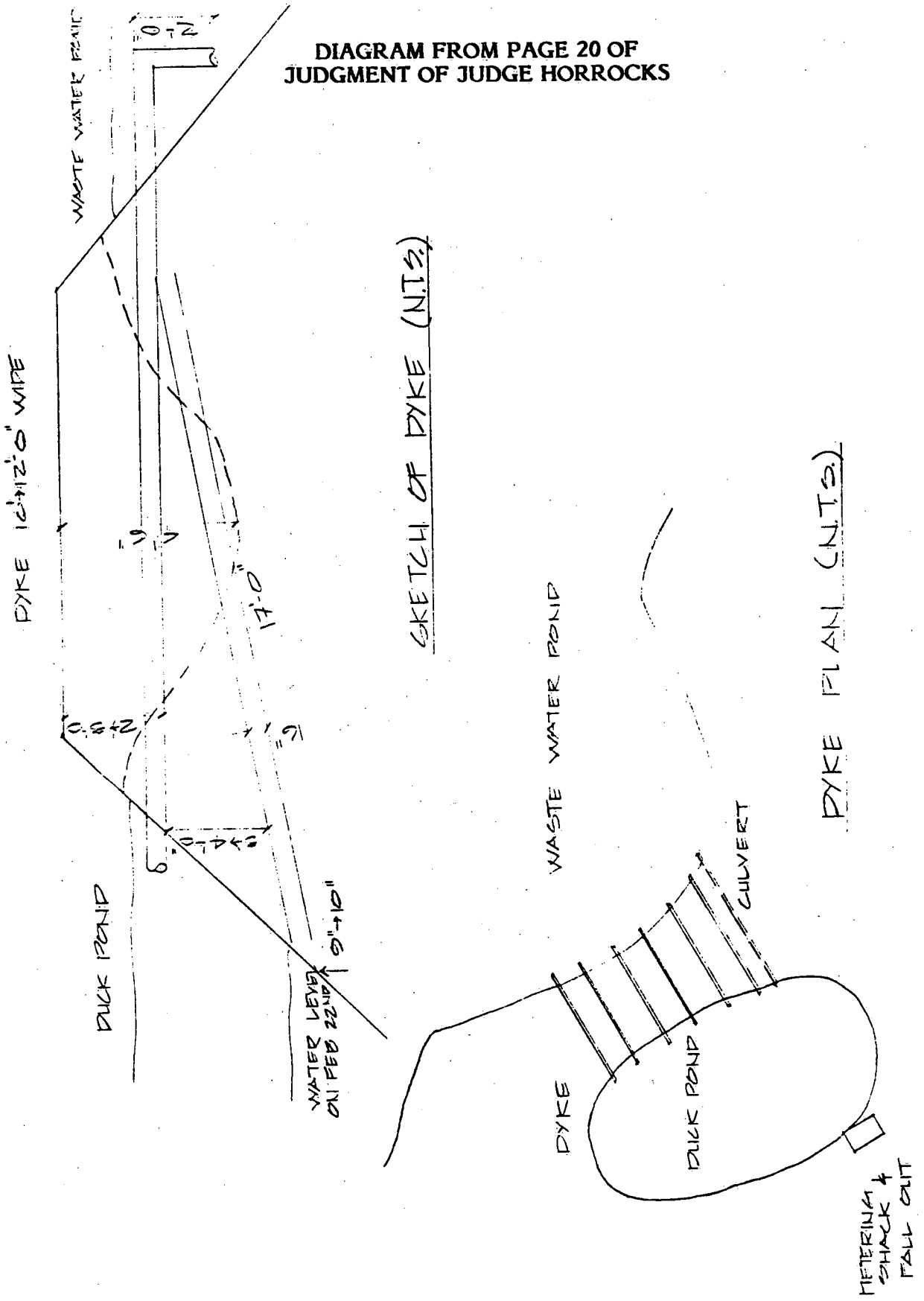
The charge before the Court was laid under s.33 subsection (2) of the Fisheries Act which reads as follows: s.33(2),

> *"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."*

It will be noted that subsection (2) is stated to be subject to subsection (4) which permits deposits authorized by regulation, and it is agreed that there are no regulations governing oil sands recovery plants although there are regulations under the Fisheries Act for other operations among which are "Regulations respecting deleterious substances in liquid effluents from petroleum refineries". I further reproduce the definition subsection (11) as well as subsection (12) which read as follows:

> *"(11) For the purposes of this section and ss.33.1 and 33.2, "deleterious substance" means*
>
> *(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or*
>
> *(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, and without limiting the generality of the foregoing includes:*
>
> *(c) any substance or class of substances prescribed pursuant to Paragraph (12)(a),*

DIAGRAM FROM PAGE 20 OF JUDGMENT OF JUDGE HORROCKS



(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to Paragraph (12)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to Paragraph (12)(c); "deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

"water frequented by fish" means Canadian fisheries waters."

(12) The Governor in Council may make regulations prescribing

(a) substances and classes of substances,

(b) quantities or concentrations of substances and classes of substances in water, and

(c) treatments, processes and changes of water for the purpose of Paragraphs (c) to (e) of the definition "deleterious substance" in subsection (11)."

It might further be noted that subsection (11) in its definitions of "deleterious substance" was amended in 1977 by inserting between the words "rendered" and "deleterious" the words "or is likely to be rendered" which amendment was in force at the time of the present case.

There are two basic issues raised in this case, the first of which is what definition of "deleterious substance" applies in the instant situation, and the second is what the Crown is required to prove in order to secure a conviction under this section of *The Fisheries Act*. Dealing with the first issue, the definitions in subsections 11(a) and subsection 11(b) show three forms of deleterious substance. The first as contained in s.(a) is a substance which, if added to water, would make that water deleterious to fish; the second is a substance in "solution" which solution should prove deleterious to fish if added to water, and the third is water itself, if treated in some manner which makes it deleterious to fish if it should be added to other water. In using the term "solution" I do not use that in the chemical sense, but rather in an inclusive sense which would embrace suspensions and emulsions as well as true solutions of the substance.

The Crown suggests that the situation in the present case falls within subsection (a) and in support of this cites the Regulations with respect to effluents from petroleum refineries, on the basis that these in s.4 specify as "deleterious substances" various materials for the purpose of Paragraph (c) in s.33 (11). The Crown takes the position that subsection (c) can only refer back to subsection (a) and while I am sure that it does refer to subsection (a) I fail to see why it should be limited only to subsection (a) as it appears to me that it could equally well apply to those "substances" referred to in subsection (b). The Defendant points out that logically this division of "deleterious substances" takes into account the various situations which might be met. For instance, a spill of a substance deleterious when deposited in water falling into subsection (a), effluent from a refinery or oil sands plant falling into subsection (b) and also some forms of treated water also falling into subsection (b). The Defence did have some

difficulties with the requirements of it being added to water in both cases but I take it that the draftsman had in mind some substances which though deleterious to fish by themselves may be totally insoluble in water and therefore their addition to water would not have any adverse effect on fish as they would either float on the surface or sink to the bottom of the waters in which they were inserted. The division as suggested by the Defendant appear to be quite logical and to look at the deleterious substances in this way permits some reconciliation of the cases where they are in conflict and further would permit effluent from an oil sands recovery plant to have a proper chance for legality under *The Fisheries Act*, without at the same time placing an unreasonable burden of proof upon the Crown. I would conclude therefore on the first issue that from a grammatical and sensible point of view the effluent from Suncor would fall under the first arm of the definition of subsection 11(b).

The second issue raised is what the Crown might prove to secure a conviction in the case of a deposited deleterious substance as defined in subsection 11(b). In the case of *R. v. Great Canadian Oil Sands Limited* (an unreported decision of the District Court of Alberta in 1978) by McClung D.C.J. (as he then was), the Court held that evidence was required that the deleterious substance affected the receiving waters. This case although decided after the amendments to *The Fisheries Act* originated at a time before that amendment to the definition of "deleterious substance" was made, nor did it refer in its factual context to the effluent from the Plant but was rather concerned with drainage from the tailings pond. Although Great Canadian Oil Sands was the predecessor in title to the Plant which is the subject matter of these proceedings, the deposit alleged in that case was not the same as that alleged in the present case. In the *Great Canadian Oil Sands* case also, McClung D.C.J., found no proof that the waters of the Athabasca River were frequented by fish which is indisputably a necessary element for a conviction on this charge.

In *R. v. MacMillan Bloedel (Alberni) Limited* (1979) 4 W.W.R. 654, the British Columbia Court of Appeal was dealing with a case involving the spillage of Bunker C oil at a deep sea dock at Alberni Inlet. The Court refused to accept a narrow definition of the phrase "water frequented by fish" and indeed that subject is not in dispute in the present case as both parties agree that the Athabasca River is water frequented by fish (and further that the bioassays conducted are representative of the fish in the Athabasca River for the purposes of this case). In *MacMillan Bloedel* the Court made its finding on the definition of "deleterious substance" under subsection 11(a) and held at 658,

> *"Once it is determined that Bunker C oil is a deleterious substance and that it has been deposited the offence is complete without ascertaining whether the water itself was thereby rendered deleterious. I do not think that the words "that water" in the definition section mean the water into which it is alleged the Accused deposited the substance. Those words refer back to "any water", at the beginning of the definition: the hypothetical water which would degrade if the oil was added to it."*

Seaton J.A. continued on,

> *"Had it been the intention of Parliament to prohibit the deposit of a substance in water so as to render that water deleterious to fish that would have been easy to express. A different prohibition was decided upon. It is more straight. It seeks to exclude each part of the process of degradation. The thrust of the section is to*

prohibit certain things, called "deleterious substances", being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply."

Although the *MacMillan Bloedel* case was subsequent to the *Great Canadian Oil Sands* case the latter was not cited to the British Columbia Court of Appeal. Leave to appeal the decision of the British Columbia Court of Appeal was sought from the Supreme Court of Canada, but leave was refused.

In the case of *R. v. Cyanamid Canada Inc.* from the Ontario Provincial Court reported at (1981) 11 C.E.L.R. 31 the Court considered a case of effluent being discharged into the Welland River. These discharges were within a Control Order issued under the *Environmental Protection Act* 1971 S.O. 1971, c.86 as amended (now R.S.O. 1980, c.141, as amended). Wallace P.C.J. accepted the *MacMillan Bloedel* decision and held that the refusal of leave to appeal by the Supreme Court of Canada impliedly overruled the *Great Canadian Oil Sands Limited* decision. He found the Defendant guilty upon proof of deposit of a substance deleterious to fish into water frequented by fish. The form of deposit was ascribed to subsection 11(a) rather than 11(b) although the point does not appear to have been argued.

It therefore seems to me that if a deleterious substance is deposited and if the water is proved to be frequented by fish that this is all the Crown needs to prove, and this holds true whether the deleterious substance is the substance itself as under subsection (a) or whether it is an effluent under subsection (b) or indeed a treated water under subsection (b). The test is the *deleteriousness* of the *substance* or the *solution* or the *water* and if such a substance should be found to have been deposited in water frequented by fish then a conviction should follow.

THE DEFENCES:

The Defendant argued on three main lines. The first position taken was that the measuring techniques used by the Defendant in its laboratory which form the basis of the Crown's case as to the amounts of material deposited in the Athabasca River on the dates set out in the charges were inaccurate both as to their manner of measurement and also as to their calculation in total. The second argument raised by the Defendant was that the Crown failed to prove that the substance or substances deposited in the Athabasca River were "deleterious". And the third argument raised was that company had shown all "due diligence" both in preventing the escape of oil into the Athabasca and also in cleaning up the resulting spill.

The Crown at the commencement of the Trial had stipulated that the "deleterious substances" that they were alleging had been deposited in the Athabasca River were: oil and grease, chemical oxygen demand and phenols. It was clear on the evidence at the Trial that "chemical oxygen demand" is not a substance within the definition under *The Fisheries Act* but rather is a collection of materials that will oxidize naturally and thus take dissolved oxygen out of the water if they are to be fully oxidized within that medium. C.O.D. will therefore not be considered in the first argument as to the reliability of the measurement though some regard must be made in general terms with respect to the deleteriousness aspect in the second argument.

1. Reliability of Measurement: In the metering shack that stands above the weir, which conducts water from the duck pond to the outflow, are a number of measuring

devices. For the purposes of the Trial two of these are of interest. One is an automatic sampler and the other is the flow measurement recorder which traces on a graph the height of water going over the weir. The automatic sampler is used to produce samples both on a time and flow basis from the water going over the weir and these samples are analyzed in the Suncor laboratory for various substances that may be contained. The proportion of each of these substances is then multiplied by the flow over the weir for a given day to give the amounts of materials deposited into the Athabasca River for each twenty-four hour period. Under the terms of the license under the Clean Water Act Suncor are permitted in their reporting of the oil and grease level to deduct the base amount of oil and grease that is analyzed to occur in the river on that day and this concentration is subtracted from the day's figure before being multiplied by the flow figure. A sampling process upstream of the Plant provides samples for analysis in the laboratory in order to obtain this figure. Since water taken from the river for use in the Plant takes considerably more than twenty-four hours to be redeposited in the river this process must necessarily result in inaccuracies in the amounts deposited unless the base levels in the river are constant. Clearly they are not constant as examination of Exhibit 5 shows; for instance on the 21st of February there was no oil and grease in the river water while on the 23rd there were 8.7 parts per million and on February the 25th there were 6.13 parts per million. As a result the figure of concentration for oil and grease reported by the Suncor laboratory of 15.3 parts per million should in fact be 21.43 parts per million with a consequent increase in the daily amount released of some forty per cent.

Apart from this, only a portion of the sample gathered by the sampling device was used for the analysis of oil and grease, and the procedure by which this was poured off in the laboratory was criticized by witnesses on behalf of Suncor on the basis that any oil and grease floating on the surface of the sample would be poured off in total and thus give a high reading. Other witnesses suggested that floating oil and grease would adhere to the glass and not get poured off giving a low reading. Clearly, a procedure by which the whole sample in total was analyzed would give more satisfactory results. Evidence of comparative analyses done by the Suncor laboratory, by a private laboratory and by a government laboratory of one sample ranged from a high of 21.8 ppm from Suncor, 16.2 ppm from the private laboratory and 15.2 ppm from the Alberta Government. Another sample done by Suncor and the Alberta Government showed a variation of 15.6 ppm to 10.4 ppm respectively. These differences could not only be ascribed to the sampling technique but to a difference of the solvent used by Suncor as opposed to other testers. In order to dissolve the oil and grease out of their sample the Suncor laboratory were using carbon tetrachloride as opposed to the more commonly used freon by other testers. It should be noted that the freon method was that stipulated in the Clean Water License rather than the carbon tetrachloride method which had been used by the Suncor laboratory apparently from the commencement of operations at the Plant. The expert witnesses testifying all agreed that carbon tetrachloride is a more effective solvent than freon and therefore they would expect the reported levels to be higher under the Suncor method. They would also be expected to be more accurate. It is no doubt paradoxical that by using an unapproved method the Defendant was showing violations of its Clean Water License levels that might not have given rise to proceedings had they been using the approved method of testing, but this does not in my opinion cast any essential doubt on the basic accuracy of the levels of oil and grease as reported by the laboratory over the period in question.

With respect to the testing for phenols carried out by the laboratory once again the evidence showed that Suncor technicians were not following the procedures as required in

the Clean Water License. In the case of phenols it was not a question of using a different solvent but rather of failure to use the required method as set out in the *Standard Methods for the Examination of Water and Wastewater*, 14th Edition (1975) or the *Methods Manual for Chemical Analysis of Water and Wastes*, Alberta Environment (1977). The recommended method involved the bringing of the pH value to a stipulated range before making the photometric analysis whereas Suncor were adding a set amount of ammonium hydroxide which they felt would give the desired result instead of actually checking the pH level before the analysis. It should be noted that there is a subsequent edition of Standard methods in which this method is changed and a different pH value is required. In any event the evidence suggests that testing outside the recommended pH range would be less sensitive. It further appeared in the evidence that the Suncor laboratory were using a calibration curve to interpret the results of the spectrophotometer that was of a considerable age. Once again however, the evidence suggests that the potential error from this was very slight and on recalibration there appeared to be no significant variations from the curve being used. Further issue was taken with the use of a one centimeter cell rather than a five centimeter cell in the spectrophotometer for low levels of phenols. This point would appear to be valid and there is some question as to the reliability of low level readings of phenols although it is clear that as the readings approach the one milligram per litre level (1 ppm), the accuracy of Suncor's method would be greatly increased. At the reading obtained on the 25th of February it is my opinion that this is not the case. The Defence also took issue with the difficulties of reading the spectrophotometer scale at low concentrations. This was not, however, born out by the evidence, though in view of the previous finding it is of no consequence. In the end result I conclude that in the period between the 21st and 25th of February the concentrations for the 23rd and 24th are the only ones that I would find sufficiently accurate to be relied upon.

As has been pointed out earlier the laboratory measured concentrations and then multiplied the concentration by the water flow as observed at the weir. Suncor took issue with these flow rates on the basis that the flow over the weir could not be accurately determined. Providing that a weir is constructed in a certain way and with certain features the flow of water over it can be calculated by measuring the height of the water above the lip of the weir. Such a configuration is referred to as an "ideal weir". The Defence took issue with the ideality of the weir in question by calling an expert witness who pointed out numerous features that he said detracted from this ideality and prevented the accurate measurement of water over the weir and further said that it would be impossible to calibrate the weir correctly. While freely admitting that some of these errors would tend to cancel each other out, Mr. Timpany, the Defence expert, gave an opinion that the actual flow could be ten to fifty per cent less than that which was reported. Taking into account the Crown evidence in rebuttal and the cross-examination of the witnesses I do not accept that the inaccuracies suggested by Mr. Timpany could reach anything like the figure that he suggested as a high range. I'm satisfied that any inaccuracies were of a low order and that the basis flow measurements can be relied upon for the calculation of total amounts of materials deposited into the Athabasca River and that the ten per cent error suggested by Mr. Timpany as a low range would most likely be the high range of such error. I'm further satisfied that it would have been relatively easy to calibrate the weir should it have been required to do so. In any event, the question of deleteriousness was argued on the basis of concentrations not gross amounts.

2. The Question of Deleteriousness: As has been pointed out the Crown stipulated the "deleterious substances" to have been oil and grease, phenols and chemical oxygen

demand. Much of the testimony concerning potential deleteriousness of what was put into the river was based on the whole effluent rather than individual portions thereof, though some evidence did relate to phenols and oil and greases themselves. Witnesses on both sides testified with respect to the whole effluent in certain regards, and I am not prepared to attempt to restrict my consideration of the evidence to the items stipulated by the Crown, even if it were possible.

A very large part of the evidence of the Trial was taken up with technical matters governing this question and these must be looked at in order to make a determination of the issue of deleteriousness. The first question involves what actually went into the river and in what form it went in, and what analysis is available to determine its composition. The second question involves its toxicity and the tests showing toxicity. The third question involves the concentrations and dispersion of what was put into the river. And the fourth question involves the observed effect on the aquatic life in the Athabasca River.

Nature of the Emission: With one exception all of the experimental work, the results of which played a large part in the technical evidence of this Trial, was done on the sample taken from the wastewater pond by Officer Wendland on the 17th of February. It must be remembered that this was a floating sample that on analysis proved to be ninety-five per cent oil and grease. There can be no question that the presence of this material resulted from the Plant upset of the previous month which was clearly the only unusual source of additional contaminants going into the wastewater system. This as has been pointed out was a floating sample and there is certainly evidence that floating oil was escaping to the Athabasca River at various times throughout the period. Since no other source of floating oil has been suggested in the evidence it is clear that Officer Wendland's sample either as analyzed or in a degraded state was the source of this oil. The problem however is how much of the emission of oil and grease to the Athabasca was floating oil and how much was a dissolved fraction of that oil. In order to conduct a bioassay, the results of which will be dealt with later, Dr. Lyle Lockhart, a Crown expert on the dispersion of organic pollutants in the environment, found that the water soluble fraction of the Wendland sample was only one part per million. Subsequent experiments by Defence experts gave figures of an average order of twenty parts per million using the same Wendland sample. This is an extraordinary variation and the only explanation that the various experts could offer to account for such variation was that the subsequent Defence experiment resulted in a "dispersed" rather than a "dissolved" fraction. It was pointed out that it is possible to break up oils and greases into very fine and small globules that will remain suspended within the medium for considerable periods of time before finally rising to the surface as a slick. The possibility of such a dispersion or emulsification accounts in part for the very high oil and grease readings that occurred on some days during this period, as by either Crown or Defence evidence, the figures recorded greatly exceed the capacity of the receiving medium, in this case water, to hold these amounts either as a dissolved or dispersed fraction. Clearly some, or indeed a large part, of the oil and grease being discharged into the Athabasca River during the period from the 7th to the 25th of February was neither dissolved nor dispersed but must necessarily have been a floating component and this is born out by the evidence of various eye witnesses who saw slicks and sheens on the Athabasca River, as well as the evidence of Ian Faichney, who made a hole in the ice some thirty kilometers downstream from the Suncor Plant at the end of this period, and found an oil slick gathered there some hours later.

What proportion the floating slick bears to the water dissolved fraction was not put into evidence either by experiment or by hypothesis and while the question of further dispersion or dissolving of the oil and grease once it was introduced to a larger volume of water in the Athabasca River was commented on by one of the witnesses it was not possible to reach a firm conclusion on the point. In summary, while it is clear a large amount of oil and grease were released into the Athabasca River the evidence does not reveal what proportion of this was a water dissolved or dispersed fraction and what proportion of it was floating oil, though both elements were undoubtedly present.

The next point requiring consideration is the nature of the substances being discharged. Oils and greases, particularly in a semi-refined condition, are composed of a bewildering variety of organic compounds. These range from what are called the "lighter ends" made up of molecules with relatively few carbon atoms to the "heavy ends" of very complex molecules containing large numbers of carbon atoms. The relative volatility of these molecules declines with their complexity, that is the simpler lighter ends will be volatilized at a lower temperature whereas the more complex heavier ends require higher temperatures to volatilize. This property is used in the gas chromatograph, a measuring tool in which a quantity of the subject matter is subjected to increasing temperatures and the amounts of material and the temperatures at which it comes off are measured. The machine makes a graphic tracing referred to as a chromatogram. These chromatograms give a picture of the mixture of oils and greases contained in the sample, which show as peaks on a linear tracing. The height of the peaks gives the amount of the substance or substances that volatilized at the given temperature. From the evidentiary point of view there are two problems with this process. The first and more important one is that more than one substance can volatilize at a set temperature and while, for instance, a peak on the chromatogram may be typical of molecules containing ten carbon atoms, they might also include more complex molecules with only eight carbon atoms. As a result, none of the experts giving evidence was prepared to point to a particular peak on a chromatogram and say "that is the C_{10} peak". For this reason the picture painted by the chromatograms put into evidence was somewhat generalized.

The other concern in this area is that although various chromatograms were submitted in evidence each batch was the product of a different machine and a different make and model of machine so that it was impossible to compare one chromatogram with another due to the different characteristics of the final product. In addition the sensitivity of the chromatographs can be varied so that the picture may appear on a different vertical scale. The time frame of the experiment may also be varied so that differences may appear on the linear scale and different models have different sensitivities so that a more sensitive machine may show more peaks by being able to make finer differentiations as to temperatures of volatilization.

The problem raised by this inability to compare chromatograms was that while most of those submitted dealt with the Wendland sample and should therefore have given the same results, it would have been desirable to compare them with chromatograms made of Suncor effluent during experiments conducted by the Alberta Oil Sands Environmental research project in 1977 by Mel Strosher and published as a study in 1978. These were taken at the same time of the year and the chromatograms were not dissimilar in appearance to those made by Derek Murray from Dr. Lockhart's Winnipeg group with respect to the Wendland sample. While it is possible to analyze this material, it was not done, so that one cannot state with any certainty that the

Wendland sample and the Strosher samples were identical or even more than similar. In fairness it must be pointed out that analysis would serve no other useful purpose as due to the complexity of the material involved, it would be impossible from a practical point of view to do bioassays on every constituent of the material to establish individual deleteriousness by chemical substance.

Evidence given at the Trial shows that the materials escaping to the wastewater pond as a result of the January upsets included large quantities of diluent, in this case naphtha, which is one of the lighter ends of oils and greases. The presence of this is not inconsistent with the chromatograms of the Wendland sample.

In summary therefore, it can be said that the Wendland sample from the wastewater pond contained a wide range of oils and greases with a high proportion of light ends and that this appears to be similar to the normal Plant effluent as shown on the Strosher chromatograms but no exact concurrence can be established.

Toxicity: The potential toxicity of the Plant effluent or the Wendland sample can be established either through direct experimental evidence or through expert evidence. It must be remembered that the Wendland sample was taken on the 17th of February from the wastewater pond so that if it escaped it must necessarily have traversed the dyke either in a dissolved fraction or in an undissolved fraction by means of the decant lines or one of the faults that that were discovered in the dyke. It was common ground among the experts that the lighter ends are more aromatic and tend to volatilize naturally and the Defence pointed out that it would be impossible to say to what degree volatilization of this sort might have taken place between the 17th of February and the dates covered by any of the original charges, but more particularly with respect to the 25th of February. While some volatilization of the lighter ends of the surface oil may indeed have taken place, it is clear from the expert evidence that this would not have been total and it is equally clear that the lighter ends dissolved in the water (the water soluble fraction) would have less opportunity to volatilize particularly if there was a surface slick and that this opportunity would mainly take place in the journey over the weir where there would be some exposure to air. Experiments by Dr. Lockhart's group suggested that active aeration was needed for quick volatilization.

The experimental evidence of toxicity is conducted by means of a bioassay, an experiment done by exposing fish to the contaminant in different proportions until a dilution is found which will kill half of the exposed fish, usually over a ninety-six hour period; put in other words, that proportion which will kill the average fish. This dilution is referred to as an LC 50 and is a widely used and approved method of determining toxicity and obviously "deleteriousness". It was generally agreed between the experts on both sides that this was a valid tool despite the fact that the fish were suffering a much longer exposure to the contaminant than they would normally suffer in the receiving environment, and despite the fact that the experimental fish were very small and immature. The accepted opinion was that if it would kill those fish it would certainly affect larger fish. The actual fish experimented on were larval Whitefish and it was further agreed that while Whitefish form only a small proportion of the fish population in the Athabasca River, the evidential results were applicable to the general fish population of the region. Two bioassays were in evidence. That of Dr. Lockhart's group from the fresh water institute in Winnipeg showing an LC 50 for the Wendland sample of one hundred and eighty parts per billion of the water soluble fraction. In Dr. Lockhart's experiment only one part per million of the Wendland sample would dissolve into the water and his LC 50 would

indicate that even if this dissolved fraction was then diluted fivefold it would still kill the average fish. Related back to the addition of the sample as a whole to the water, it was calculated that the equivalent was twenty-five parts per million or milligrams per litre of the whole sample if it was added to otherwise pure water. It should be noted that the analysis of the Suncor effluent does not differentiate between dissolved and undissolved fractions. On the 25th of February, the total concentration was twenty-one point four three milligrams per litre so that even if the figures analyzed were for totally undissolved fractions they would still give rise to eighty per cent of the LC 50. On the evidence, it would appear impossible that the levels measured on the 25th were entirely undissolved fraction and if anything, those levels would include the dissolved fraction or at least dispersed fraction for that date. Clearly, on the days previous: the 21st, 22nd and 23rd the levels of oil and grease were such that they would have been lethal to fish at the outfall, if the LC 50 can be regarded as accurate for the whole effluent. The other LC 50 that was in evidence was that conducted on behalf of Suncor as part of their reporting requirement and which was submitted to the government under their Clean Water reporting requirements. This for the 17th of February showed an LC 50 of fifty-two per cent by volume of whole effluent. In other words, even where the effluent is diluted by as much again water it would still kill the average fish. It should be noted that on the 17th, analysis of the effluent indicates a concentration of twenty-five point two parts per million of oil and grease and the background levels for the days either side of that show minimal amounts in the river that would be added to that figure for a total. This correlates remarkably well with the Lockhart bioassay.

Expert Opinion: It must be remembered that the bioassays referred to above were done on larval fish which are not found in the Athabasca River during the month of February and thus, it serves only as an indication of the potential lethality or toxicity of the substances to adult fish. In addition to the bioassays a good deal of expert evidence from many eminent scientists in the field of marine biology and toxicology was heard. Chief among these were Dr. John Vandermeulin of the Bedford Institute, Dartmouth, Nova Scotia for the Crown and Dr. John Sprague of the University of Guelph for the Defence. While Dr. Vandermeulin's experience was mainly with respect to spills at sea, Dr. Sprague's expertise was chiefly with refinery effluent. It was suggested by the Defence that refinery effluent was similar to oil sands plant effluent but this contention was challenged by the Crown who pointed out among other factors that the Federal Department of Fisheries had established water quality regulations for refineries and pointedly refused to do so for oil sands plants.

Dr. Vandermeulin's evidence was extremely impressive. His considered careful responses and his obvious depth of knowledge were such that I accept his evidence in total subject only to the caveats which he himself expressed. He indicated that he would expect sublethal effect in fish with concentrations as low as one part per million of oil and grease in water and clearly at levels of ten parts per million or above. Dr. Vandermeulin had had no knowledge with respect to phenols.

Dr. Sprague in general, accepted Dr. Vandermeulin's figures as to sublethality. He had some question however, with respect to Dr. Vandermeulin's view that it was possible to have synergistic effects. "Synergistic effects" mean that the toxicity of various chemicals present in water is greater in total than the additive toxicity of each chemical or more simply that the sum is greater than the parts. Dr. Sprague felt that his experience in refinery effluent suggests that the toxicity was less than additive, not more than additive. This view was later criticized by Dr. Stephen Hrudey, a Crown

expert, on the basis that the refinery effluent used was one with an activated sludge cycle which would have the effect of substantially removing the aromatic and lighter ends which are the most toxic by the agreement of all the experts. With respect to the phenols, Dr. Sprague felt that the level for sublethal effect was three hundred and forty parts per billion in contrast to the Crown expert Dr. Hodson who had felt that fifty parts per billion was the sublethal limit and two hundred parts per billion was the lethal limit. As was pointed out by the Defence, Dr. Hodson gave no particular basis for his figures although he was not questioned as to how he arrived at them. Dr. Sprague's level for lethal effects was up in the one part per million range but the total evidence with regard to the toxicity of phenols was not of sufficient clarity to enable the Court to come to any conclusions beyond a reasonable doubt.

The same may be said of the synergistic question as the different opinions were not specific enough to allow factual conclusions, and they remain no more than a possibility.

Taking all the evidence with respect to toxicity into effect I'm satisfied that oil and grease concentrations that exceed ten parts per million are capable of giving rise to sublethal effects in fish and are therefore properly described as likely to be deleterious.

Concentration and Dispersion in the Athabasca River: The effluent discharged from the duck pond and over the weir was transferred by a 42-inch diameter sewer pipe to the outfall approximately thirteen meters from the bank and four meters below the surface of the river. This outfall discharges at right angles to the flow of the river and at the time relevant to these proceedings this effluent was undiluted in any way and therefore, the whole effluent was discharged into the river. Evidence was given by Dr. Robert Gerard, a hydraulic engineer and expert on mixing characteristics of rivers, dealing with the dispersion into the river of the oils and grease and phenols as shown by the Plant records during the relevant period. This evidence shows that the effluent will be diluted tenfold thirty meters from the outfall and fortyfold one hundred meters from the outfall. At the same time a mixing effect is going on which is finally completed some forty kilometers downriver at which point the dilution is one hundred and fortyfold. In view of my findings on toxicity it is clear that on some days there would still be a considerable area covered where sublethal effects could be expected on fish. Particularly on the 22nd of February, but it is equally clear that the emissions of the 25th would have a very restricted area in which they could cause sublethal effects on fish. Dr. Gerard's evidence was highly technical, but pursuasive, but if the question to be answered by the Court was one of actual damage to fish there would be considerable doubt of that with reference to the 25th of February.

The Defence argued for the concept of a "limited use zone" in which levels that would be clearly deleterious to fish could be achieved close to the discharge and that this would not involve a transgression of The Fisheries Act. I do not accept that such a concept could or should be approved by the Court. Although I accept that the area of sublethality on the 25th of February would be very small.

Effect on the Aquatic Life in the Athabasca River: A good deal of technical evidence was led by the Defence and rebutted in part by the Crown with respect to the effect of oil spills on the microbiological and benthic invertebrate life forms within the Athabasca River. As I understand it the proposition set up by the Defence was that the microbial population of the sediment contained a proportion of microbes that are able to absorb hydrocarbons if there should be a steady source of supply and that these microbes should

there be a large oversupply would multiply rapidly in order to absorb this additional food source. Dr. John Costerton, who described himself as microbial ecologist, described experiments that he had done to demonstrate the microbial efficiency in degrading hydrocarbons in the sediment and also with respect to the surface floating oils. His respect for the enthusiam and efficiency of these organisms was not shared by Dr. Donald Westlake, a fellow microbiologist from the University of Alberta, who disputed the speed and total efficiency ascribed to the organisms by Dr. Costerton. Even with the best will in the world, Dr. Costerton was unable to promise instant degradation to all hydrocarbons deposited into the Athabasca and the argument was therefore somewhat irrelevant.

The same comment might well be applied to the evidence of Dr. Roy Crowther, a specialist in benthic invertebrates, those species of life composed of larvae of insects that live within rivers and who dine on the microbes and other forms of aquatic life smaller than themselves while providing nutrition for fish and larger species. Dr. Crowther's research in experiments indicated that the Athabasca River appeared to have suffered no catastrophic damage from the effects of February, 1982 as he discovered a uniform number of mature benthic invertebrates throughout the area where he conducted experiments during the summer of 1982 to determine this question. This conclusion was attacked by Dr. John Ciborowski, a further expert on the habits of these creatures, who had done studies with respect to the drift of these creatures and who testified that adult populations would drift downriver and fill in a void created by damage to the original population. Once again this material was of considerable interest but essentially irrelevant to the question of deleteriousness to fish other than on a long-term basis.

Due Diligence: The third point of defence raised by Suncor was that the company had used due diligence to prevent the discharge of the alleged deleterious substances into the Athabasca River. It was suggested that the upsets of December, 1981 and January, 1982 could neither be foreseen nor guarded against and that even these were not sufficient without a failure of the dyke between the wastewater pond and the duck pond to result in the emissions complained of. The Defence pointed out the clean-up efforts embarked on by the company, the appointment of Mr. Fosberg to oversee the clean-up of the wastewater pond, the retaining of outside oil clean-up experts to complete this task and the continual concern of Suncor management with the problem and their inability to prevent the escape of this material to the Athabasca River. In rebuttal the Crown called Dr. Douglas Napier, an expert on disaster prevention with wide international experience, who testified as to the possibilities of preplanning for disasters and analysis of Plant operations to foresee possible problems. Dr. Napier pointed out that this was now common in Europe and indeed required by many European Government agencies and was being largely accepted in the United States. He did however, concede that such practice was new to Canada and certainly not widespread. In addition, cross-examination of Defence witnesses who described the history of the Plant's water treatment system and production problems over much of the life of the Plant, had indicated that difficulties with water quality were not new to the Suncor operation.

With respect to the clean-up operation there was much discussion concerning the availability of clean-up materials and the fact that the Suncor trailer primarily equipped for pipeline break oil spills which is normally stationed at Wandering River some two hundred and forty kilometers south of the Suncor Plant was left at that

location throughout the February crisis. Those on site claim that they had sufficient clean-up materials to handle the process without calling on this additional material. In addition much discussion and evidence was brought before the Court concerning remedial measures in the Athabasca River once the escape of oil was discovered. The evidence showed that no actual clean-up was attempted on the river although various experts suggested techniques that might have been employed.

The main clean-up operation on which the defence of due diligence must rest, was that of the wastewater pond and the appreciation of Suncor employees of the problems with the dyke between that body of water and the duck pond. While Mr. Fosberg who had been placed in charge of this operation had little experience with respect to clean-ups, he appears to have gone about his duties with enthusiam and reasonable thoroughness. The problem from January the 20th onward until the middle of February was that there remained a fair amount of ice on the wastewater pond and the evidence all suggests that much of the oil that caused the problem was trapped under this ice. Despite the generally cold temperatures at that time, the warm waterflows into the wastewater pond resulted in this ice being rotten and unstable and Suncor was not able to investigate the problem at first-hand because of the dangers involved. When the temperatures rose towards the middle of the month of February this ice rapidly melted leaving the large amounts of free oil upon the surface of the wastewater pond that escaped to the river despite the clean-up attempts.

I am of the opinion that the defence of due diligence must fail. While Dr. Napier's recipe for disaster analysis would indeed have been desirable and in retrospect it is clear should be used by all industries of this type, it is not current practice in Canada and it would not be right to impose a higher standard of foresight upon Suncor than is customary in this country. With respect however to the aftermath of the problems of December, '81 and January, '82 I do not find the appointment of Mr. Fosberg, a person without experience in the clean-up of oil spills, to be the best that the company could have done. More telling is the fact that Mr. Fosberg did not appreciate until the 19th of February that oil was escaping into the Athabasca River although officers of the Provincial Government Fish and Wildlife Branch were certainly aware of the problem on the 16th and probably aware at least a day earlier than that. These concerns were communicated to Mr. Robert Martin, the Water Quality Manager of Suncor, on the 17th and no proper remedial measures were taken at that time. Indeed the inspector of the Energy Resources Conservation Board, testified that he suggested remedial measures to Suncor or contract employees when he inspected the situation on the 18th of February. There does not appear to have been an awareness of the seriousness of the situation through this period.

With respect to the dyke failure the evidence was that there was no record of the culvert that was discovered embedded in the dyke having been placed there. Examination of the Plant records for 1981 and particularly for December, 1981 indicate elevated levels of oil and grease were constant throughout that period. In light of the accepted scientific figures for solubility of oils and grease in water it should have been clear that these levels could only be achieved by a fault in the dyke or by a failure in design of the decant lines from the wastewater pond to the duck pond. Some of the levels of concentrations recorded make it quite impossible for them to have been dissolved or even dispersed oil and these figures were reported to the Alberta Environment Branch by the company officials and the implications of these figures seem to have been ignored by both.

Therefore, I find that a combination of the inexperience of the director of the clean-up, the failure of the Water Environment Manager to notify the clean-up manager of the escape of oil to the Athabasca and the general lack of appreciation of the meaning of the elevated oil and grease levels all amount to a lack of due diligence. The lack of an attempt to clean up the Athabasca River or to seek advice on that aspect of the problem is a further symptom of lack of diligence though it would of course not have affected the essence of the offence as charged.

CONCLUSION

In the result I have held that the Crown must prove to the Court that a substance or a "solution" of a substance must be shown to be deleterious or likely to be deleterious to fish. They must further show the deposit of that substance or solution into water frequented by fish.

I am satisfied that the measurement techniques used by the Defendant were sufficiently accurate to estabish the levels of oil and grease and phenols deposited into the Athabasca River within narrow limits. I am also satisfied that oil and grease concentrations exceeding ten milligrams per litre (ppm) and phenol concentrations exceeding one milligram per litre are likely to be deleterious to fish. The receiving water was by admission, and indeed on the Defence evidence, frequented by fish.

Since the Defence of "due diligence" has been rejected I hold that with respect to the oil and grease deposit on February 25th, the Crown has made out a case and I therefore find the Defendant guilty as charged.

HORRICKS Prov.Ct.J. (Sentencing): - As I noted in the Judgment, the Plant was constructed in the 1960's, starting in 1964 and completed and put onto stream in September, 1967 and that is about fifteen years before the events complained of took place. Obviously it wasn't designed as state of the art because there wasn't an art. It was the first one of its type, and clearly it suffers from defects of design with respect to the treatment of wastewater that would not be permitted now in the light of experience and indeed as we are aware, because it appeared in the evidence, the only other oil sands recovery Plant, being Syncrude works on a closed water system, but then everybody by then perhaps have smartened up about what was necessary. But I note, why I bring this up partially is that in fifteen years the people responsible for producing regulations for Plants have not seen fit to produce regulations for Plants of this nature and it's a factor I take into account.

I further take into account that infractions by exceeding the permitted limits happened on numerous occasions and this was in the evidence and this seems to have taken place without causing any excitement in the authorities who were supposed to look after this and, you know, if the watchdogs aren't going to get worried, it is a little difficult to see why the company should get excessively worried in those circumstances.

The actual complained of spill-that's the subject matter of the conviction-happened as a result of a series of catastrophies in the Plant which are outlined in the Judgment. The actual spill itself has been pointed out at a low level and those again are factors that although I could not find due diligence for the reasons I pointed out, that there was perhaps insufficient senior input into the clean-up operation and there was certainly as far as I'm concerned a long period in which oil was escaping into the

Athabasca where nobody seemed to be aware of it except everybody outside the Plant. It makes one wonder if they were used to seeing oil on the Athabasca River and it didn't strike them as odd, but I'm not going to take that into account. All right, those are the plus side from the company point of view.

From the negative side there is of course the concern with Fisheries, the concern with water quality and the very real problems that are associated with large industry and its responsibilities.

I have heard the submissions of the Crown and I think I'm inclined to agree with Defence that the earlier cases although these are interesting, I'm not really prepared to translate the principle because obviously the penalty in that case was extremely insufficient. Now we have a more realistic penalty, though in comparison with the amounts of money involved in an operation of Suncor's size they're still extremely small.

I think on balance in some ways if the company had not argued so strenuously that they should not be a deleterious substance under 33(11)(a) but should be under 33(11)(b), an argument that I accepted it might have altered how I felt about it because obviously if any amount of oil and grease made them liable I think that that would affect the penalty, but they were too persuasive and I accept that it should be effluent more than the individual contents of the effluent, and that does alter it from that viewpoint.

In all the circumstances I'm going to impose a fine of eight thousand dollars, in default of payment distress.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. TAHSIS COMPANY LTD.
(Perry Lake Logging Road)

SARICH Prov.Ct.J. Campbell River, April 30, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under ss.31 (1) and 33 (2) -Accused convicted under s.33 (2) - On facts, accused's activities resulted in deposit of silt in watercourse.

The accused was charged with violating ss.31 (1) and 33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. It was established on the facts that the accused's road construction activities had resulted in silt entering a creek and a lake. It was therefore found guilty on the s.33 (2) charges; the s.31 (1) charges, which were based on the same set of facts, were dismissed.

P. Thompson, for the Crown.
R. hungerford, and *H. Giesbrecht*, for the accused.

SARICH Prov.Ct.J.: - (Oral) The Tahsis Company Limited is charged on an information alleging four counts. The first count reads that:

> "Count 1: On or about the 26th day of March, A.D. 1980 at or near Tahsis in the Province of British Columbia did unlawfully deposit a deleterious substance in water frequented by fish, Perry Lake, in violation of 33 (2) of the Fisheries Act.
>
> Count 2: On or about the 26th day of March, A.D. 1980 at or near Tahsis in the Province of British Coumbia did unlawfully carry on a work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat in violation of 33 (1) of the Fisheries Act.
>
> Count 3: On or about the 28th day of March, A.D. 1980 at or near Tahsis in the Province of British Columbia did unlawfully deposit a deleterious substance in water frequented by fish, Perry River, in violation of 33 (2) of the Fisheries Act.
>
> Count 4: On or about the 28th day of March, A.D. 1980 at or near Tahsis in the Province of British Columbia did unlawfully carry on a work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat in violation of 31 (1) of the Fisheries Act."

The facts I found at trial are as follows:

Near the west coast of Vancouver Island, some six or seven miles east of the Village of Tahsis, Perry Lake lies in a valley that serves as a passage through the mountainous backbone of Vancouver Island. The lake is a narrow one, a little more than a mile long and at its widest, less than a quarter of its length. It is a very shallow lake having within it several high sedimentary mounds of differing layers of deposited silt. The whole bottom appears to be composed of fine, deposited silt such that if one were

to step in it, one would simultaneously sink up to his ankles into the bottom and raise a cloud of fine silt into the immediately surrounding water. The lake lies generally north and south in its length, and at the north end, noisily empties over a series of small falls and boulder strewn rapids into the Perry River. The Perry River follows the valley downward in a generally northern direction for about three miles, where it joins the Leiner River and the conjoined waters of which flow westward and empty into Tahsis Inlet.

There are a variety of trout indigenous to Perry Lake and over the years fishermen have enjoyed this bounty. But the anadromous salmonid species of fish inhabit the Perry River below the lake because the falls and rapids over which the lake empties form an impassible barrier for this species.

A gravel highway runs through this valley connecting the village of Tahsis with the more developed communities on the east coast of Vancouver Island. This gravel highway runs along the east shore of Perry Lake for almost its whole length, and so close to this shore that, before a large rock formation was blasted out of the outlet of the lake, the highway was in jeopardy of being flooded during times of excessive rainfall or high run-off.

Up the side of the valley on the east side of the lake, the accused company has designated an area to be logged as block W.18. A contractor of the company was in the process of building a logging road up into and through block W.18 during the latter part of March, 1980. During that time there had been a considerable amount of rainfall in the area, but not an excessive amount for the west coast of Vancouver Island. There was some controversy on this point at trial, but I accept the evidence of Fisheries Officer Dragseth, who made notes of the weather at the time, and the evidence of his own recollections by the area logging engineer of the accused company.

On the 26th of March, 1980, two Fisheries Officers, Dragseth and Setter, drove up to Perry Lake from Tahsis and found a great deal of discolouration and silting in the lake. Following what they determined was the creek carrying the silt, they made their way up to where the contractor for the accused company was in the process of building the sub-grade for the logging road. They found a crawler tractor working and a rock drilling machine sitting idle. The surface of the sub-grade was very wet, soft and muddy. There was a small stream which began in the timber considerably higher than the road construction, flowing onto and along the constructed sub-grade, then across it and into a small creek that flowed down through block W.18, down the sidehill, through a culvert under the highway, and into Perry Lake. The water from this small stream ran not only in a recognizable stream channel along and across the sub-grade, but along the ditches of the sub-grade as well. The main stream was from three to one foot wide and varied in depth from six to twelve inches. In the course of this flow, the water in the stream and the ditches picked up a great deal of mud and silt and carried this along with it into a drainage gully which in turn carried the creek that drained into Perry Lake.

In addition to the stream that flowed along and across the sub-grade, there were a number of other streams and seepages of water that contributed to the flow of water in the creek. In further addition there were a number of contributing creeks from other areas of the valley flowing directly into the lake, but no specific number was established in evidence. There was yet in addition a ditch along-side the highway that fed into the culvert, through which the creek flowed that drained block W.18 and emptied into Perry Lake.

On his arrival at the road construction site, Officer Dragseth shut down the construction and set about gathering evidence. He took two photographs of the road 3 construction site he visited and then returned to the lake. He took one sample of lake water upstream from the confluence of the creek water and lake water as a control sample. He then took a sample from the creek below the highway and the highway ditch but before the creek water entered the lake water. The third sample he took from the point of the mixing of the creek water with the lake water, and a fourth sample about half mile downstream in the lake. He took a fifth sample from just before the point where the lake spills out into Perry River.

These samples were analyzed to contain nonfilterable residue as follows:-

No. 1 - (control sample) slightly more than 5.0 milligrams per litre.

No. 2 - (from the creek) 450 milligrams per litre.

No. 3 - (mixing of creek and lake water) 400 milligrams per litre.

No. 4 - (half mile downstream) 27 milligrams per litre.

No. 5 - (beginning of Perry River) slightly more than 5.0 milligrams per litre.

No samples were taken for analysis of the stream water above the road construction site or of the water of any other stream or seepage that flowed into the creek draining block W.18. Also, no samples were taken of the water out of the highway ditch before it emptied into the culvert. Likewise, no samples were taken of the water of any other creek whose waters flowed into the lake.

But in observations made by the Fisheries Officers at the time and as shown by photographs they took, the discolouration and silty appearing water in the lake stemmed from the point of entry of the creek draining block W.18 downstream in an apparent natural flow and only partway across the lake. There was no evidence of discolouration or silt from any other source.

Two days later, on the 28th of March, 1980, Officer Dragseth again drove to the lake and saw discolouration and silting in practically the whole of the lake, in Perry River, and in the water flowing out of Perry River into the Leiner River. He returned to Tahsis, picked up his sampling kit and together with Constable G.R. Straughan of the R.C.M.P., returned to the lake. They took samples and photographs from and of the lake and the river.

The first sample taken out of the lake was upstream from the entry of the creek sufficiently far enough so that the water of the lake was not influenced by the water of the creek. This was again a control sample, and the water appeared clear and clean to the naked eye. Four more samples were taken from the same places in the lake from which the samples two days earlier were taken.

When the samples and photographs of the lake had been taken, the two of them then took three samples out of the Perry River and one sample of the water of the Leiner River above the confluence of the two rivers. They also took photographs along the Perry River and of the mixing of the waters from that river with the waters from the Leiner River.

Again, in this group of samples, the first sample of lake water, above where the creek water had an influence, and the last sample out of the Leiner River above the confluence, had slightly more than 5.0 milligrams per litre of nonfilterable residue, and in each case, the water appeared clear and clean to the unaided eye. The samples between the first and the last held varying quantities of non-filterable residue, from a high of 84 milligrams per litre to a low of 8.1 milligrams per litre.

According to the quantity of non-filterable residue in the water of Perry Lake on the 26th of March, 1980, and in the waters of Perry Lake and Perry River on the 28th of March, 1980, there would have been considerable damage to the fish habitat in those waters and injury to the fish in all stages of their life cycle.

There are a number of small creeks and streams feeding into the Perry River drainage and on neither of the two days was there any evidence of siltation or discolouration in these creeks or streams. Indeed, there was no evidence of any such from any other source than the creek draining block W.18.

The logging engineer of the company went to the area a few days before the 26th of March, and on the 27th of March when he was informed that the road construction had been stopped by the Fisheries Officer, he noted the siltation and discolouration of Perry Lake on each of those visits. He admitted quite openly that the siltation and discolouration of the water of Perry Lake resulted from the road building operation in block W.18.

By cross-examination, counsel for the company established that every stream and flowing waterway on the west coast of Vancouver Island is likely to be carrying with it some suspended solids as non-filterable residue. And this would be more likely at times of heavy rain or fast run-off. Discolouration is also a naturally occurring phenomenon caused by the carrying by the water of decaying organic material. And this discolouration can often occur with very little non-filterable residue in the water. Also, witnesses have seen Perry Lake discoloured and apparently silted as a result of heavy rain and run-off without any apparent man-made contribution to the condition.

Further, no samples were taken from the stream above the road construction, no samples of water were taken of any other stream or water flow that contributed to the water in the creek draining block W.18, and no effort was made to check or sample any other creek or stream that flowed into the lake. Given the evidence established on cross-examination and the lack of sampling and checking by the Fisheries Officers, counsel for the company submits there is no proof of how much, if any, the work on the road construction caused or contributed to the siltation and discolouration of the lake and the river. His submission is that the silt came from many sources. As an example, the highway ditch was a likely source and the water in the ditch was not sampled and analysed.

But there is clear evidence that the lake water above and free from the water carried by the creek contained only five milligrams per litre of non-filterable residue on both the 26th and 28th of March. The water of the Leiner River carried the same amount. The water of each of these at the place of sampling appeared clear and clean to the unaided eye, as did the water of a number of other creeks and streams flowing into the same drainage basin.

There was no evidence on those two occasions of discolouration or silting from any other source then the creek draining block W.18. There was viva voce and photographic evidence of silt and mud being washed off the road construction site into this creek. There is the admission by the engineer for the company that the road construction caused the siltation and discolouration of the lake and the river. While this is opinion evidence on his part, it is nevertheless evidence to which considerable weight may be accorded. And there is evidence that once the road construction ceased, the lake and the river cleared up and remained that way.

What is of concern in this case is the excessive siltation; the non-filterable residue far in excess of the five milligrams per litre in the waters uncontaminated by the creek waters draining block W.18, and, as well, the discolouration of the water. And there is no reason to believe that since other creeks and streams in the general area ran clear water, the streams and seepages flowing into the creek draining block W.18 - other than the stream flowing over and across the sub-grade - would not also run clear water. Especially so if they were not disturbed by road construction or other works by man. And there is no reason to believe that if the watershed had not been disturbed by road construction, the non-filterable residue of any of the streams or creeks would have exceeded the five milligrams per litre of non-filterable residue otherwise contained in the lake and carried by the water of the Leiner River.

To hold that these creeks and streams might have contributed to the excess siltation and discolouration in the circumstances placed before the court would be no more than a conjectural possibility. Such a possibility does not give rise to any other rational conclusion than that the road work being carried out at that time in block W.18 caused the excessive siltation and discolouration of the lake and the river. In that regard, see *R.* v. *Bagshaw* (1971) 4 CCC (2 ed) 303 (S.C.C.) and *R.* v. *Dillman* (1979) 7 CR (3 ed) 378 at p. 383 (B.C.C.A.).

I find therefore, that all of the essential elements of the offences alleged in counts one and three of the information have been proven against the company. From the evidence and by admission of counsel for the Crown, the allegations in counts two and four are based upon the same facts upon which conviction is based in counts one and three. Accordingly, I find the company guilty of counts one and three, and counts two and four are dismissed.

BRITISH COLUMBIA COUNTY COURT

R. v. TAHSIS COMPANY LTD.
(Perry Lake Logging Road)

DRAKE Co.Ct.J. Nanaimo, October 12, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Appeal by accused from conviction under s.33 (2) - Appeal dismissed - Sufficient evidence to support findings of trial judge.

D.R. Kier, Q.C., for the Crown, respondent.
R.F. Hungerford, for the appellant.

DRAKE Co.Ct.J.: - (Orally) The issues raised in the Notice of Appeal are that the judge at first instance found as a fact that the Tahsis Company unlawfully deposited or permitted the deposit of a deleterious substance into waters frequented by fish, Perry Lake; and again erred in finding that there was sufficient evidence that this occurred; that he was in error in respect to Count 3 in finding that the same deposit was made in other waters, that is, the Perry River which flows out of Perry Lake; and the same for the fourth head, that was two days later.

They are narrow issues raised here and they are simply whether or not the trial judge based his findings upon sufficient or any evidence. Simply put, I think that he did. It may not have been a finding that somebody else would have made but he made it and there was evidence to support his findings.

As to the matter of definition of "depositing" here; which is an important point, the statute, s.33(11) I think it is, provides a definition of that term in this way, "discharging, releasing, filling, leaking, seeping, pouring, emitting, emptying," and so on, this would cover the situation where a person creates a good deal of loose mud in making a road in wet country and permitting it, he discharges it or releases it if it should happen to flow off his works and down the hill, as water will do, and thus into Perry Lake, in this case, which is water frequented by fish, according to the evidence.

The other point raised is that this substance was not necessarily deleterious to fish. That depends entirely on its concentration and where it is; and in sufficient quantities it can be deleterious. It could never be good for them, both to fish and to embryonic fish. On the 26th this got into Perry Lake, and I think that he was right in finding that a conviction should be had on that count. Two days later it got into the river which drains the lake and it was plainly, from the evidence, the same substance which had slowly drifted down in the course of nature and gone into the river. It is obvious from the photographs and, indeed, from the description in the evidence of what happened that the substance, silt, mud, whatever, was the mud that originated on the appellant's road.

I cannot see, in short, that the judge was wrong anywhere. There is evidence to support his conclusions, so the appeal must be dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CAMPBELL RIVER LODGE, LTD., et al

SARICH Prov.Ct.J. Campbell River, April 21, 1981

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under s.31 (1) - Liability of contractor discussed - Due diligence defence considered - Both accused convicted - Corporate accused fined $2,500.00 and individual accused $750.00.

The two accused were charged with carrying on a work or undertaking that resulted in the harmful alteration, disruption or destruction of a fish habitat, contrary to s.31 (1) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. The individual accused, Giese, was a contractor hired by the accused corporation to do certain work in a river. He was never told when being hired that the work was to be carried out in the river and, moreover, his employee was specifically told by an employee of the accused corporation that the corporation had permission to do the work. Both accused were convicted.

On the facts, the accused corporation did not establish that due diligence was taken to prevent the commission of the offence. It had never received governmental permission to do the work in question and its employee had not received proper instructions from the corporation's directing mind and will. the Corporation was exceedingly negligent. The individual accused, Giese, while operating under a mistaken belief that the corporation had permission to do the work, was negligent in failing to properly instruct his own employee as to what work could be done in a river and in failing to set up a proper system of control. The corporation was fined $2,500.00 and the individual $750.00.

S. Shook, for the Crown.
B. Saunderson, for the accused, Giese,
G. Sinnott, for the accused, Campbell River Lodge, Ltd.

SARICH Prov.Ct.J.: - (Orally) The two accused are charged that they, on or about the 17th day of October, 1979 at or near the District of Campbell River in the Province of British Columbia did unlawfully carry on a work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat. Such activity is contrary to the provisions of s.31(1) of the Fisheries Act, R.S.C. c.F-14, as amended.

The accused company operates a lodge on property the northern boundary of which forms the southern bank of the Campbell River. The company is managed in its day-to-day affairs by Edward E. Arbour, who is an officer and director of the company. The company also had as an employee one Kenneth M. Dyer who is a bricklayer by trade, but who fills the role of handyman.

Some considerable time prior to October 17, 1979, Arbour decided that the company would construct a retaining wall along the river bank to prevent erosion of the bank by the water of the river. At the same time, Arbour also proposed that the company would build and install a decorative water wheel.

With this purpose in mind, Arbour telephoned George Graham, a fisheries officer of the Department of Fisheries and Oceans of Canada. Graham discussed with Arbour a wall of the type proposed by Arbour that had been built by an up-stream property owner such that in the construction all excavation was on dry land and no silt or debris was permitted to fall into the water. Graham told Arbour that if the wall was completely on company owned land, the company did not need permission to build it. But if the wall was to be built within the "wetted perimeter" of the Campbell River, there is no way the Department of Fisheries would allow it, and anyway he had no authority to grant or withhold such permission. Graham recalls expressing some concern about the water wheel, in that it should be screened so as to protect salmon fry and other immature fish. But because he knew very little of water wheels, he directed Arbour to make an application for the construction and installation of the water wheel to the manager in the Courtenay office of the Department of Lands of British Columbia. With the application, Arbour was directed to file a plan of the proposed construction of the water wheel. This telephone conversation with Graham took place on the 4th day of October, 1979.

On the same day and after talking with Graham, Arbour telephoned J.P. Eagen, the manager in the Courtenay office of the Department of Lands of B.C. In this conversation he questioned Eagen on the matter of the construction of the water wheel. Eagen did not say yes or no to Arbour's verbal enquiry for permission, telling Arbour that if the construction called for any encroachment on Crown land, either permanent or temporary during construction, he, Arbour, must file an application together with detailed plans of the proposed construction.

I am satisfied on the evidence that Arbour left the clear impression firstly with Graham that the retaining wall was to be built entirely on dry land up from the river bank, and secondly with Eagen that the structure for the water wheel would be anchored and constructed entirely on company land and hung out over the wall so that only the paddles of the wheel would be in the river water.

Following the two telephone conversations and on the same day Arbour wrote a letter to each of the persons he spoke with. To Graham he wrote: "Dear Sir, As per telephone call of today, we are interested in putting in a decorative property water wheel on the Campbell River. I understand there should be no problem and that we may go ahead with the plan. Yours truly,..."

To Eagen he wrote: "Dear Sir, As per telephone call of today we are interested in putting in a decorative property water wheel on the Campbell River. I understand there should be no problem as per our discussion and that we may go ahead with the plan. Yours truly,...".

For one reason or another, neither Graham nor Eagen answered the letter to him before the events of October 17th, 1979. About 9:30 a.m. on that day, the Department of Fisheries office in Campbell River received a telephone call that machinery was working within the Campbell River directly out from the company's lodge.

The evidence discloses that some time prior to that date Arbour had called the accused Giese, who is a contractor utilizing backhoe equipment, requesting a machine and operator for some trenching work at the lodge to begin on the morning of the 17th of October. Arbour told Giese there would be an employee at the site to direct the work of the machine. Giese accordingly dispatched one of his machines, operated by Robert E.

Brunton, to the lodge with instructions that a company employee on the site would set out the work he was to do with the machine. I am satisfied on the evidence that Giese was never told the machine would be required to enter the Campbell River and that Brunton had no such knowledge until he arrived on the scene.

When the machine arrived to commence work, Arbour was off on a hunting trip and Dyer was left with the responsibility of completing the work. Although Brunton questioned the legality of so doing, Dyer instructed Brunton to take the machine into the river and commence work in accordance with a sketch shown by Dyer to Brunton. Dyer assured Brunton that his, Dyer's boss, had permission to do the work. With that assurance and without more, Brunton did.

Brunton took the machine down off the bank into the river, travelled in the water parallel to the bank for some 150 feet, then went out into the river some 40 to 50 feet to a gravel bar. From there he pushed 8 to 10 cubic yards of gravel toward shore into a hole about 3 feet deep so that he could take his machine out onto that fill. He then dug out some stumps and placed them on the bank of the river and proceeded to dig out a foundation hole 8 feet long, 6 feet wide and 2 feet deep in the riverbed. The end of the excavation was some 15 feet out into the river. The gravel and silt from this digging Brunton put into the river and spread it about so as to more fully fill in the hole in the river bottom into which he was backing the machine. According to instructions from Dyer, the purpose of the excavation was to accommodate two concrete pillars as a foundation for a water wheel.

After completing this excavation, on the instructions of Dyer, Brunton commenced digging a trench for footings for the wall along the property line. This trench was 2 feet wide, 2 feet deep into the river bottom and about 3 feet out into the water from the river bank. The material he dug from the trench, Brunton placed into the river so the water would disburse it. He had dug about 6 lineal feet of the trench when he was stopped by the fisheries officers. Photographs taken by one of the fisheries guardians show the machine, operated by Brunton, in the river surrounded by discoloured, silt-laden water. Brunton had up to then been operating the machine in the water of the river for some 2 hours.

In his testimony, Dyer denied he showed Brunton a sketch, but readily agreed that he showed Brunton exactly where to dig, directed him down into the river and agreed to the information contained in a sketch prepared by Brunton. On this issue, I accept the testimony of Brunton and find that Dyer did have a sketch that he showed to Brunton.

In defence of the company, Arbour testified that by virtue of his discussions with both Graham and Eagen, he considered the company had authority to go ahead with the work. He stated he knew the machinery was not to be allowed into the river. Further, he knew and intended that digging for the wall could not extend into the river and that in the digging, no excavated material was to be permitted to slough off or fall into the river water. Further, that all the footings and construction for the water wheel would be completely on company property. He also stated that the project had been considered over a long period of time and that he discussed it on a number of occasions with Dyer, and particularly that he walked over the line along which the wall was to be built with Dyer. Arbour also stated that he expressly told Dyer that no equipment was to go into the river, that the wall was not to extend into the wetted river bed, and that the footings for the water wheel were to be constructed entirely on company lands.

Dyer, however, states that while the wall and water wheel were discussed by Arbour and himself, there were no plans or specific instructions given to him. Dyer does not recall being said that the machinery was not to enter the river, that the wall was not to encroach into the river and particularly that the footings for the water wheel were not to be placed into the river. I found Arbour to be equivocal and evasive in his answers and in areas of conflict, I accept the evidence of Dyer. I also find from the evidence that at all material times Arbour was the directing mind and will of the accused company and controlled what the company did.

From a number of witnesses I accept the testimony that the general area of the Campbell River contiguous to the northern boundary of the company's lands contained salmon spawning at the time when the work was being done. I also find that that stretch of the river was a migration route for salmon spawning further upstream, and was at the time as well a nursery, rearing and food supply area for salmon fry. These conclusions follow from the the facts that salmon spawn in that area of the river and further upstream, and fry remain in fresh water for a considerable time before they reach the smolt stage and migrate downstream to the brackish and salt water of the estuary. Consequently I find the stretch of the river in which the backhoe machine had been working to be fish habitat as that term is defined in s.31(5) of the Fisheries Act.

The applicable sections of the Fisheries Act are as follows:

31(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

And s.33(8) (made applicable here by s.31(4)):

In a prosecution for an offence under this section or s.33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

On the facts, I find that what the accused did in that river on the day in question was a work or undertaking. Based on the expert evidence of Michael B. Flynn, which I accept, I find that the work or undertaking resulted in the harmful alteration, disruption and destruction of fish habitat. Harmful alteration of this habitat would result from the silt deposited downstream into the gravel, limiting or preventing percolation of water through the gravel and thus limiting the supply of oxygen to and elimination of the wastes from the incubating eggs. It also inhibits emergence of the fry from the gravel.

The harmful disruption of the fish habitat would be caused by the presence of the machine working in the river which disrupts and delays upstream adult fish migration and drives fry into the lower reaches of the river. This delay in the upward migration of adult fish would inhibit the spawning fish from defending its spawning territory, would delay the spawning, and would cause delay in emergence from the spawn and thus would inhibit the

chances of survival of the fry. The fry that is driven out of the area by the activities of the machine must compete more fiercely for food with fish already in the newer area of the river, and in this case, because of the closeness of the estuary, would be more susceptible to extermination by larger predatory fish.

The harmful destruction caused by the work would obviously be digging up the spawn with the gravel moved by the machine. And mid-October is the peak spawning time for salmon. Also, the digging and resulting silt would cause abrasion and covering of the algae, the covering up or driving off of the invertebrate population that feeds on the algae, and upon which the fry feed, all of which would destroy the area as a nursery for immature fish.

Turning first to the accused company, the evidence clearly discloses that Dyer was an employee of the company. The work that he had undertaken was for the benefit of his employer, the company. He was explicitly charged by his employer with the responsibility of having dug a trench for a retaining wall and an excavation for footings to support a water wheel. Neither of these works were of any personal benefit to him. Because he did not follow lawful procedure does not imply that he was not acting in the course and scope of his employment. To suggest he was on a gambit of his own is to defy common sense.

Counsel for the accused company raises the issue of an employer's liability for the acts of his employee. He referred to a number of authorities, all of which -- and more -- I have examined. But here we are dealing with a specific statutory enactment, s.33(8) of the Fisheries Act. But the common law is not markedly different from this statutory provision. See *R.* v. *City of Sault Ste. Marie*, 40 C.C.C., 2nd 353, at page 377, where Dickson J in discussing offences of strict liability, said:

> "*. . . . The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and 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. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.*"

See also *R.* v. *Gulf of Georgia Towing Company, Ltd.*, 1979 3 W.W.R. 84, a decision of the B.C. Court of Appeal, in this regard.

I find here then, that the directing of the taking of the machine into the river was done by an employee of the accused company. To escape conviction the accused company must establish on a balance of probabilities two things:

(a) That the acts were committed without its knowledge and consent, and

(b) That it exercised all due diligence to prevent its commission.

It should be noted that, other than the conversations by Arbour with Graham and Eagen, and the letters written by Arbour to them, the accused company makes no pretence to having obtained authorization from the Minister of Fisheries to take the machine into the river in the manner that it did. And the work was not done pursuant to any regulation made under the Fisheries Act by the Governor in Council. In regard to the conversations and letters, considering the evidence and Arbour's own admissions, no such unilateral conduct could be remotely considered as implying consent to the work by any person duly authorized to give such consent.

It is not necessary for me to deal with the knowledge and consent issues of the statutory burden placed on the accused company, even though these issues raise some unanswered questions. But the matter of the exercise of due diligence, however, is something else. Arbour states he walked over the proposed route of the wall with Dyer and that this route was on company land, not in the river. He states he told Dyer that the machine was not to go into the river, no debris was to be put into the river, the foundation for the water wheel was to be on company land, not in the river. In his testimony he says of Dyer, "Ken has been a very good employee, and he's followed instructions quite closely in the past." Yet Dyer states he does not recall any of these specific instructions allegedly given by Arbour. Dyer appeared a reasonably intelligent witness. He did not appear to be perverse and I sensed he exhibited a feeling of loyalty to the accused company. How could he possibly have forgotten such critical instructions concerning the work?

The water wheel was described by Arbour variously as "extremely large -- a good size -- and about 15 feet." According to him, this wheel was to be cantilevered out over the wall from a foundation dug into the company's land such that only the paddles entered the water of the river. Yet even a cursory consideration of the weight of the wheel, the projected length of the supporting beams, and some form of bracing against the thrust of the moving water, would suggest a rather complicated structure requiring considerable precision in design and assembly. Yet the evidence clearly indicates the company had no plans drawn for this structure. The general location of the excavation for the footings was not even chosen, let alone being staked out in some precise fashion, so that Dyer and the machine operator would know where to dig it. And there were no stakes or lines run to establish the precise location of the wall.

I am satisfied that Arbour gave no proper instructions to Dyer at all, that Dyer was left to his own concepts and understandings, and that Arbour showed little concern about the manner in which Dyer performed the work. I find accordingly that the accused company did not exercise any diligence in prevention of the forbidden acts and I find the company guilty as charged.

Considering now the position of the accused Giese, the evidence clearly reveals that Brunton was his employee. He paid Brunton's wages, he presumably could discharge or discipline Brunton and assign him to different machines or work. When the machine was driven down to the lodge for the anticipated work, the direction to do so was given by Giese. He attended at the scene, not because he learned that the machine was being used in illegal work, but in a supervisory function to check as to how long the machine was likely to be tied up. Counsel for Giese urges that upon arrival at the lodge with the machine, Brunton became an employee of the accused company. He bases this submission on the acknowledged facts that Dyer, the company employee, directed Brunton where to dig, how far to dig and when to stop. But I see no merit in this submission. The company

contracted with Giese for the use of a machine and operator to excavate in the manner and to the specifications required by the company. The company had no right to discharge or discipline Brunton, it could not of its own choice replace him, it did not pay his wages, and all it could have done is terminate the contract, as could have Giese by withdrawing Brunton and the machine from the job. I find that at all material times, Brunton was the employee of Giese.

On the facts as I have found them, that Dyer told Brunton that Dyer's boss had permission to have the machine go into the river and that Giese had no knowledge or expectation that the machine would be so used, counsel advances a further argument. He states that both Brunton and Giese, being misled, committed the forbidden acts by reason of an honest and reasonable mistake of facts which, had they been true, would have made their acts innocent. There is indeed such a defence in law, but the manner of its applicability depends on the nature of the offence alleged and the grounds upon which the belief of facts is founded.

The offence alleged against the accused was what is termed at common law a "Public Welfare Offence". It is categorized by Dickson J. in *R. v. City of Sault Ste. Marie*, supra, as a "strict liability" offence. Once the prosecution has proven the commission of the acts constituting the offence, it is open to the accused to avoid conviction by proving that he was not negligent. In this type of offence, the defence based on a reasonable belief in a mistaken set of facts is simply another way of setting out the same defence. But even though the offence alleged against Giese is a "public welfare or strict liability" offence, it falls to be determined under the statutory provisions of s.33(8) of the Fisheries Act, and not the common law.

I am satisfied that the machine went into the river without the knowledge and consent of Giese. But I am not satisfied that Giese had exercised all due diligence to prevent such an occurrence. As a contractor with excavating equipment, it is surprising he has made no apparent effort to ascertain what work, if any, such equipment can perform in relation to streams, rivers and foreshore without permit; what jobs require authorization, and to determine what form this authorization takes. He did not alert Brunton to the dangers of any such work and did not set up any system or form of checking to ascertain whether or not a particular work was authorized. When Brunton, because of lack of better instruction, accepted the statement of a person not known to him, and whose relationship to the accused company he was unsure of, that the company had been authorized to take the machine into the river, without any effort on his part to confirm such authorization or even to contact Giese about the matter, he acted on a very dangerous assumption. But the facts clearly reveal the negligence of Giese in failing to properly instruct such an employee and in failing to set up a proper system of control. Accordingly I find that the mistaken fact or belief was not reasonably held by Giese. He did not exercise such effort to ascertain the true facts as would have been exercised by a prudent man, bearing in mind the seriousness of the offence and the extent of damage that can result by not doing so.

Accordingly I find Giese guilty as well.

SARICH Prov.Ct.J.: - (Sentencing) The courts of this country have set out, I think, a pattern of concern, if I can use that term, over disposition of cases of this kind. This is, as I stated earlier, an offence commonly called a public welfare offence, in that in many of these cases there is very little moral culpability attached to the act of the

accused person. The whole thrust of these legislative prohibitions is the protection of the realm, protection of the natural resources of the country, protection of the general public welfare. The nature of the offence is akin to those perceived by the Canada Shipping Act and the protection of the shipping waters or waters of the oceans contiguous to the boundaries of the country. It is the kind of offence generally referred to as provincial pollution control offenses. And there had been a great deal of soul-searching by the Courts for over a number of years to determine a method of procedure, a standard of proof that is required, and the placing of burdens on an accused in determination of guilt or innocence. And one of the criteria by which the Courts consider the gravity of the offense and the penalties to be imposed is the possibility or likelihood of the immense harm done by a very thoughtless or a stupid or a foolish act or negligent act on the part of a convicted person.

It doesn't need, I think, a great deal of imagination to determine how great a destruction could occur from an oil spill or the workings of a machine of this kind in a propagating river, or of any other kind for that matter. Adverting for a moment specifically to salmon on the west coast, this resource is beseiged on every hand. The progress -- if I can use that term in the context of expansion of the society that we live in -- is daily encroaching on the habitat of that salmon resource. Everywhere there is pressure. The rivers are being dammed, mine spillings and tailings are being put into the waters, more boats in the ocean spilling and polluting oil, digging, changes, construction of bridges, foundations for buildings, particularly logging and the cutting and the destroying of the habitat. And it may well be true to say that on any one occasion the particular activity of one person or two people is minimal. It reflects very little damage. But when compounded by all of the matters that are constantly pressing in on this resource, it's one that is going to, that activity, cause a disaster and a catastrophe unless it is checked. That resource, I submit with some concern, will in ten to fifteen years from now be either artificially propagated or it will disappear completely, if present trends are to continue. That's reflected, I think, in the actions of the Department of Fisheries in Ottawa, in the closure of fishing seasons, closure of areas, an attempt to control spawning and regulation, the agitation of the fishermen, both sports and commercial, all of which is reflected and reflecting directly upon the life that we lead every day, and particularly in this community.

This is the kind of an offense for which a penalty is not fixed in accordance with the standard, if you like -- the routine criminal conviction. There is no or very little attempt here to rehabilitate an accused person, or to in some way re-educate him -- suppose that's possible. But here there is, I think, a primary thrust in making the public aware that this is a very serious matter. The deterrence of the public at large and those people who may contemplate or be engaged in this kind of work, I think is the foremost criteria upon which sentencing must be based. And that is reflected in the penalties set out by Parliament, in this particular statute, in the Canada Shipping Act, and in other like legislative enactments.

It is quite true here that Mr. Giese was not morally blameworthy beyond a certain extent. But that is limited, that conception, to moral blameworthiness that involves a lack of care. It really makes no difference whether a person intends to commit an act, or whether he commits an act through negligence or carelessness, if in the end result the damage is the same from both, whether it be intentional or negligent. And it is the end damage and the end result that the law attempts to curb.

In this case I find, and have found and still hold, and am convinced without any question that Campbell River Lodge was exceedingly negligent in the way it proceeded about this work. I find here that Mr. Arbour, whatever he may have done, did not do the kind of things I would expect, or that anyone would expect in a reasonably efficient manner in going to work on a river where, it seems to me, he might well earn some of his living. I don't know whether he does. But certainly it is an attraction. It may well be one of the reasons why he has guests in his hotel. But more importantly, it's in an area where everyone who is cognizant of this community, that which stirs it and causes interest in it abroad, is that river and the fish that are in that river. And for him to proceed in that fashion is either disregard or sublime stupidity of what it is that makes this attraction.

I find that there is here, in his case, or in the case of that company as I stated earlier, gross negligence in that particular work. And that accused, the company, I fine the sum of two thousand five hundred dollars ($2500.00), in default of payment to distress.

Mr. Giese -- it is quite correct that he in this to some degree was probably a pawn, of his employee and of that man Dyer, and the workings at the lodge. He has suffered considerably because of the seizure of his machine, but again, he is not free from blame in his lack of control over his employees. Bearing in mind the loss he has already suffered, I order that he pay a fine of seven hundred and fifty dollars ($750.00). Had it not been for that, the fine would have been considerably higher. In default of payment, to 45 days.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. FORDE

HUBBARD Prov Ct. J. Campbell River, January 21, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charge under s.31 (1) - Man-made drainage ditch subsequently frequented by fish is fish habitat within meaning set out in s.31 (5) - Accused convicted - Accused did not exercise due diligence - $100.00 fine imposed.

The accused purchased a house bordered by a man-made drainage ditch which had become frequented by salmon. The banks of the ditch were damaged when he had trees cut down. As a result, the fish habitat was damaged, albeit unintentionally. On a charge under s.31 (1) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, *held*, the accused is found guilty. A man-made drainage ditch which subsequently becomes frequented by salmon is a "fish habitat" as defined in s.31 (5).

An offence under s.31 (1) is a strict liability offence and the defence of due diligence is therefore available. However, the accused failed to make reasonable inquiries concerning the fish habitat, notwithstanding that he knew salmon were using a different portion of the drainage ditch. Consequently the accused did not exercise due diligence. A fine of $100.00 is imposed.

P. Thompson, for the Crown
L.P. Forde, in person.

HUBBARD Prov.Ct.J.: - Lawrence Patrick Forde is charged that he did on or about the 6th of June, 1981, at or near Campbell River in the Province of British Columbia, unlawfully carry on work or undertakings that resulted in the harmful alteration, disruption or destruction of fish habitat. Mr. Thompson, I note at this stage that there is a spelling mistake in the information. I would entertain an application to amend it.

...

It's d-i-s-t-r-u-p-t-i-o-n. I order that it be amended by striking out the T.

...

THE COURT: The section which this charge is brought under is s.31(1) of the Federal Fisheries Act. It says -

> *"No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."*

A fish habitat is itself further defined in the Act in sub-section 5 of s.31, it says for the purposes of this section and ss.33, 33(1) and 33(2) -

> *"Fish habitat means spawning grounds and nursery rearing food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes."*

Now with regard to the evidence that I've heard today, I am satisfied firstly that although the work in fact was performed by Mr. Alexander, that is the cutting down of the trees in question and the damage to the banks of the stream, it was in fact on the instructions of Lawrence Patrick Forde. I note specifically that there were no special instructions given to Mr. Alexander as to where the trees were to be felled, so I am therefore satisfied that the acts in question were committed, albeit indirectly, by Lawrence Patrick Forde.

Secondly I am satisfied that there was disruption or destruction of the water course, and it is clear from the evidence of Mr. Brownley, who is an expert called by the Crown in the field of fish habitat, that the trees felled were an important part of the habitat as were the banks which were damaged in this water course.

I am also satisfied from the evidence of K.R.W. Martin that salmon have in fact over the past few years been using this water course. Accordingly I have no problem in finding that it was fish habitat within the meaning of s.31(5) of the Fisheries Act.

I am aware of the evidence given by Mr. Forde, Senior, which was of great interest to the court, in setting out the historical background of this particular water-course, and this evidence seems to be undisputed that it did in fact originate as a drainage ditch constructed to drain fields. However in the course of time it has become a fish habitat in my opinion, in my ruling pursuant to the terms of the Fisheries Act.

Mr. Forde acting on his own behalf, has raised two defences. The first is, was it fish habitat and subject to the Act. He has denied that, as I have already indicated I have no problem in finding that in fact it was fish habitat within the meaning of the Act, and it was damaged by the works performed by him.

The second defence which he has raised is that he didn't have any intent to damage the fish habitat. With regard to this the Crown has referred me to the case of *R. v. The City of Sault Ste. Marie*, which is reported 40 Canadian Criminal Cases, Second Edition, page 353. This case which is in the Supreme Court of Canada states that there are three different types of mens rea, which is the legal word used for intent in cases such as this. There are cases of absolute liability, and cases - I am sorry, I'll read directly from the headnote to avoid confusion.

"Firstly there are offences in which mens rea consisting of some positive state of mind such as intent, knowledge or recklessness must be proved. Secondly there are strict liability 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 that he took all reasonable care. This involves consideration of what a reasonable man could have done in the circumstances. The defence will be available if the accused reasonably but mistakenly believed in a 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.

Three, offences of strict, of absolute liability, where it is not open to the accused to exculpate himself by showing that he was free of fault."

Having regard to the wording of the section I hold that this offence under s.31(1) of the Fisheries Act is within the second category, that is a category where it is open to the accused to avoid liability by proving that he took all reasonable care.

So the sole question left for me to decide in this case is whether on all the evidence, Lawrence Patrick Forde took reasonable care in all the circumstances. It is my conclusion, having considered the evidence, that in fact he did not. His evidence was that he bought this house and decided to move it onto the property some time in February of 1981. That he was told when he bought the house that he had to have it moved by the end of the month. His evidence was that he cut down a number of trees of a small nature in the immediate location where he was going to place the house, and proceeded to move the house. Subsequently he had Mr. Alexander cut down the trees which resulted in the damage to the water-course.

In my judgment he did not in fact, take reasonable care to protect this water-course. He says that he didn't know that it was in fact used by salmon. I find that in fact he should have made reasonable inquiries to find out whether or not it was in fact used. He has admitted on oath that he knew that lower down below the culvert salmon were in fact using this same water-course. So I hold in fact, that he did not use the reasonable care that is required and accordingly find him guilty as charged.

THE COURT: (Speaking to Sentence) - Mr. Thompson, do you have any submission as to sentence?

MR. THOMPSON: Well I think Your Honour, there has been a fair number of cases of this type before in the local courts that I have found that the penalties seem to range between three hundred to fifteen hundred dollars. The Crown would take the position that in all of the circumstances, that a fine on the lower end of that scale would be appropriate.

THE COURT: Mr. Forde what's - do you have any position with regard to sentence?

THE ACCUSED: How do you mean, Your Honour?

THE COURT: Do you have anything you wish to say to me as to what you feel the punishment should be?

THE ACCUSED: No, Your Honour.

THE COURT: You don't?

THE ACCUSED: No.

THE COURT: I have considered the matter of sentence with some seriousness in this case. I have also considered the possibility of granting a conditional or absolute discharge. However, having regard to the importance of salmon spawning grounds in British Columbia and particularly in the Campbell River area, and having regard also to the fact that fish habitat is going to become more and more important as the world's food resources dwindle, it is necessary in fact to impose a punishment other than a conditional or absolute discharge as a means of deterring others from this type of conduct.

However, having regard to all the circumstance I am imposing only a fine of one hundred dollars, in default seven days.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. DOWNIE STREET SAWMILL LTD.
(Road Slid into Eagle River)

LUNDEEN Prov. Ct. J. Salmon Arm, May 7, 1979

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under ss.31 (1) and 33 (2) -S. 31 (1) creates absolute liability offence while s.33 (2) creates strict liability offence -Accused convicted under s.31 (1) but acquitted under s.33 (2) - $2,000.00 fine imposed -s.31 (4) not applied - s.31 (4) makes s.33 (8) applicable to s.31 (1).

A mountain slide created by road construction entered and seriously damaged a fish habitat in the Eagle River. The accused had exercised due care in the construction and could not reasonably have anticipated the landslide. On one charge under each of ss.31 (1) and 33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, *held*, the accused is convicted under s.31 (1) and not found guilty under s.33 (2). S.31 (1) creates an absolute liablity offence. Because it was proven that the accused's construction resulted in the harmful landslide, the accused is guilty of this offence notwithstanding its due care and diligence. On the other hand, s.33 (2) is a strict liability offence for which the defence of due diligence may be invoked. In this case the accused could not reasonably have anticipated the landslide, and it carried out the construction with due care and diligence. Accordingly, the accused is not guilty of the second count.

E.R. Brecknell, for the Crown.
Humphreys, and *Wilson*, for the accused.

(Editor: Consideration of s.31 (4) appears to have been overlooked in this case. S.31 (4) says

> *"Subsections 33 (6) to (9) apply in respect of an offence under this section as if it were an offence under section 33".*

Thus, s.33 (8), the due diligence provision, is incorporated into s.31. Subsequent judgements have considered s.31 as a strict liability offence rather than an absolute liability offence.)

LUNDEEN Prov.Ct.J.: The Defendant Company is charged that it, on or about the 20th day of April, A.D. 1978, near Revelstoke, County of Yale and Province of British Columbia did carry on a work or undertaking, to wit: road building that resulted in the harmful alteration of fish habitat in the Eagle River, near Three Valley Lake, British Columbia.

> CONTRARY TO S.31(1) OF THE FISHERIES ACT REVISED STATUTES OF CANADA

and in Count 2, that it on or about the 20th day of April, A.D. 1978 near Revelstoke, County of Yale and Province of British Columbia did permit the deposit of a deleterious substance, to wit: silt, in a place under conditions where the said deleterious substance or any other deleterious substance that resulted from the said deposit of such

deleterious substance may enter water frequented by fish, to wit: Eagle River near Three Valley Lake, British Columbia

CONTRARY TO S.33(2) OF THE FISHERIES ACT REVISED STATUTES OF CANADA

There is in my view, no doubt whatsoever that the Defendant Company undertook construction of a so called logging road and that as a result of the construction of that road, there was a slide and part at least, of the material involved in that slide continued down the mountain side into the Eagle River.

It is further abundantly clear that the Eagle River near Three Valley Lake, British Columbia, is a stream as described and is one wherein fish go to spawn. It is also abundantly clear that as a result of the material getting into the Eagle River, the fish habitat was very seriously affected.

With respect to Count 1, it seems to me that the matters raised and considered by the Supreme Court of Canada in the *Sault Ste. Marie* case is applicable. I must determine whether on the wording of s.31, Sub-section (1), Parliament has established an Absolute Liability, so that where it is proven that the Defendant did carry on work and as a result of carrying on that work, there was a harmful alteration to the fish habitat - then the Defendant shall be found guilty.

It seems to me in reading the two Sections with which I am concerned, that Parliament did intend from the very careful wording that was chosen to establish an Absolute Liability under the provisions of s.31, sub-section (1) - "No person shall carry on any work or undertaking that results in the harmful alteration to fish habitat."

There is, in my understanding of the words used in that Section, no possibility that Parliament intended that there be an element of mens rea or alternatively that there is open to the Defendant a Defence if he exercises due care or caution or alternatively if he had no prior opportunity to know that the work that he was undertaking would result in this adverse effect.

I hold that the evidence establishes beyond any reasonable doubt that the Defendant Corporation did carry on the work and that the results of that work has been a harmful alteration to the fish habitat in the Eagle River. I find the Defendant guilty on Count 1.

With respect to Count 2, I appreciate the comments of Mr. Brecknell that this is an alternative charge, but because the matter may proceed further, I feel that I ought to comment upon it. My view, after carefully reading s.33, sub-section (2), is that this is a section which establishes not Absolute Liability but Strict Liability.

In this case, it is open to the Defendant Company to establish that they did exercise all due care and diligence, that they had no prior warning or knowledge that as a result of the work or undertaking, that deleterious substance would be deposited in the Eagle River. I am satisfied on the evidence before me that they had no prior knowledge and that they did exercise due care and diligence to prevent the circumstances which developed here - that they have established on the whole of the case that they could not reasonably anticipate this event.

There has been no attempt by either the Prosecutor or the Defence to explain through any expert testimony what the causes of this may have been. I do not view it as a responsibility of the Defendant Corporation to establish positively by expert testimony or otherwise, exactly why there was a slide. To prevent it, they would have had to anticipate it and they did not anticipate it. I find the Defendant not guilty on Count 2.

The penalty that ought in any circumstance to be imposed will be dependent on other factors. One consideration which I must have is that Parliament has fixed a maximum of $5000.00 for a first offence and $10 000.00 for a second or subsequent offence.

In establishing an offence under s.31, sub-section (2), Parliament has seen fit to create an Absolute Liability offence. They clearly intend, in my view, to place a heavy burden upon persons involved in the extraction of wood products, to undertake their work with the greatest amount of caution available to them - to the extent that it is doing to involve the use of experts in areas where this has not been done in the past.

I appreciate the fact that resource Companies are moving in this direction and will continue in the employment and use of experts to guide them in their work in order to avoid a situation such as has occurred here. It becomes extremely expensive, I suppose, to use soil specialists to guide Companies in the location of their roads but something of this nature may be the answer to avoid these Strict Liability matters.

It is not the concern of Parliament to impose a specific penalty and it certainly is not the concern of the Courts to simply impose penalties for the raising of revenue. What is of concern here is the destruction of a spawning stream. Many people are dependent upon fishing for their livelihood and we all depend to some extent on the fishing industry for food. The cost and inconvenience of operating in one of the natural resource areas has to be balanced against the effect, the cost and inconvenience to other industries in the natural resources field.

I feel that the penalty imposed must be such that everyone involved in the Forestry industry will know the degree of concern that Parliament has for the preservation of fishing and spawning areas, and the degree of seriousness that the Courts will attach to it as well. I impose a fine of $2000.00.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. DOWNIE STREET SAWMILLS LTD.
(Impact on Habitat of Eagle River)

BEHNCKE Prov. Ct. J. Salmon Arm, May 13, 1981

Sentencing - Plea of guilty to charge under s.31 (1) of Fisheries Act, R.S.C. 1970, c.F-14, as amended - Fine of $7,500.00 imposed - Order made under ss.31 (4) and 33 (7) requiring implementation of training programme and supervision of accused's work.

L.P. Jensen, for the Crown.
D.W. Shaw, for the accused.

BEHNCKE Prov.Ct.J.: - The Defendant, Downie Street Sawmills Ltd. on or about the 18th day of November, A.D. 1980, did carry on an undertaking to wit: Logging, that resulted in the harmful alteration of fish habitat, at or near the Eagle River, in the County of Yale, in the Province of British Columbia

CONTRARY TO S.31 OF THE FISHERIES ACT, AS AMENDED

I will refrain from repeating the circumstances as outlined before me - they were summarized by Mr. Jensen and replied to by Mr. Shaw and I would like to thank both of these gentlemen for their assistance.

I think it is, in review, notable that somewhere there was a breakdown of communications in the Defendant Company and as in most environmental cases which I have had come before me under the Pollution Control Act, minimal actions were required to correct the mistakes which led to the charges - which means to say that in itself, the causes are normally minimal. The results are impressive and the more expert a person becomes, the more disastrous they seem to be.

It is furthermore noticeable that the same Corporate Defendant appeared two years less two days in this courtroom when the Corporate Defendant was convicted and sentenced for an offence contrary to s.31 (1) of the Fisheries Act, as it was then.

I agree with the Crown that the fact of this previous conviction has to affect my thinking, particularly in view of the fact which I have already stressed - that there was a breakdown of communications and lack of knowledge with an employee as to what should and what should not be done. I think that in dealing with this offence and this goes without saying, I put the main emphasis on that - and this excuse is not agreeable in any future infraction. Infractions will occur but as Mr. Shaw has pointed out, if the proper steps are taken then a Company can rely on the Ontario case, Sault Ste. Marie.

I would normally have adjourned this case for better and probably more complete reasons, however, for circumstances which are beyond my control, as everybody claims, I have to do it today.

I am finding the Company guilty on Count 1 and I impose a fine of $7500.00.

I also make an Order under s.31 (4) and s.33 (7) of the Fisheries Act, R.S.C. that - however, I have modified and I would like to point out why. I think it is one of the problems of the day that the citizens say, "More and more Government, you do. You tell me and then it is fine." I think that is disastrous.

The Order I am making is that:

1. Downie Street Sawmills will develop and implement a Training Programme for employees, Contractors working for the Company and Supervisors who are engaged in road construction and timber extraction activities in areas where there is a potential for water quality or fish habitat to be adversely affected.

   The said Programme is to be implemented on or before August 1, 1981.

   The Training Programme will emphasize the importance of protecting water quality and will outline the requirements of the Fisheries Act. In addition, the Company will ensure that all employees, contractors and supervisors engaged in road construction and timber extraction activities are made aware of existing procedures and guidelines relating to the protection and maintenance of water quality.

2. All work carried out by Downie Street Sawmills Ltd. in the Eagle River watershed shall be properly supervised.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CIPA INDUSTRIES LTD.

GRAHAM Prov. Ct. J. Masset, November 16, 1981

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Prosecution under s.33 (2) - Accused acquitted - On facts, accused had taken all reasonable care to avoid spill of diesel oil.

Diesel oil from the accused's fuel truck spilled and entered a harbour. On charges of violating s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended *held*, the accused is not guilty. The accused has established on a preponderance of evidence that it exercised reasonable care. There was no defect in the truck or in the method of handling the oil. The accused's camp superintendant gave express instructions regarding procedures for handling oil which were understood and followed as a matter of practice. The superintendent was responsive to a suggestion to move the truck when warned of the possibility of a spill. The accused's employees took prompt action to investigate the actual spill and, although not necessary, were prepared to take remedial action. Leaving the keys in the truck was not unreasonable in a remote camp.

D. Warner, for the Crown.
D. Clark, for the accused.

GRAHAM Prov.Ct.J.: - The accused Corporation is charged in an information with two counts of depositing, or permitting the deposit of, a deleterious substance, oil, in waters frequented by fish (count no. 1) and in a place under conditions where such deleterious substance entered water frequented by fish (count no. 2) in contravention of s.33(2) of the Fisheries Act.

Both counts relate to the same incident and are in the alternative.

The evidence has proven that on the morning of March 27th, 1980 diesel oil emanating from a fuel truck owned and under the control of the accused entered the waters of Naden Harbour, off the Northern Coast of Graham Island, one of the Queen Charlotte Islands. It has also been proven that the diesel oil is a deleterious substance and the waters of Naden Harbour are waters frequented by fish.

I find on the evidence that the diesel oil which entered the waters of Naden Harbour came from the defendant's fuel truck. That is I think the only rational conclusion which can be reached from the evidence. It is not so clear why or how the spill took place. It has been said by Defence Counsel that there must have been an intervention by a third party without the consent of the Defendant. While that may or may not be the case, I am satisfied on the evidence that the commission of the offence i.e. the prohibited act has been proven which *prima facie* imports the offence but that the Defendant may avoid liability by establishing that it took all reasonable care.

It was not in issue before me that these offences as alleged are offences of strict liability to which there may be a defence of due diligence or reasonable care *R.* v. *City of Sault Ste. Marie* 40 CCC(2d) 353 (SCC).

Turning to the facts, the evidence establishes that the Defendant Corporation operates a logging camp at Davidson Creek near Naden Harbour. The location of the camp is in a remote area which is only accessible by boat or chartered aircraft. The only roads in the area are those associated with logging operations, developed for that purpose. They are not available nor accessible to the general public.

The Defendant as part of its operations has a tank truck for hauling diesel oil used as fuel for logging trucks and other vehicles and heating. A main fuel tank depot is located some distance from the camp at tidewater where fuel supplies are brought in by tanker from time to time. From this depot the fuel truck is filled and it in turn is used to deliver fuel to the woods operations and about the logging camp. Other logging vehicles are fueled directly from the fuel truck including those of a contractor "Husby Trucking". The fuel truck has a tank capacity of 2000 - 2500 gallons.

About 8:30 a.m. on March 27, 1980 Michael Brown a fisheries Guardian who lived near the Defendant's camp discovered the spill and within an hour traced the source of the oil to the Defendant's fuel truck parked in a gravel pit. An oil slick could be seen on the waters of Naden Harbour. He reported his observations and finding to a Fisheries office. He took samples of water and oil at different points from Naden Harbour to the location of the truck. He took photographs of the area and of the slick on the water.

Acting on instructions Mr. Brown notified the Defendant by speaking to the timekeeper at the camp and requested someone in a supervisory capacity to meet him at the site. He does not recall meeting anyone later at the site in response to that request.

The following day Mr. Hebron Sr. Protection Officer with Environment Canada arrived from Vancouver. More photographs were taken and more samples were taken. He did not see more than minimal evidence of the spill. He took delivery of the samples taken by Brown and later took them away for analysis.

Neither Brown nor Hebron inspected the fuel truck, nor did they see any evidence of leaks from the truck. Hebron said he assumed the truck was empty.

It is common ground that no direct efforts were taken to clean up the evidence of the spill probably for the reason expressed by Mr. Hebron that only a minimal amount of oil could have been recovered and when he arrived it was not worthwhile cleaning up at that time.

The Crown called Mr. Joseph LaFarge the Defendant's camp superintendent who gave evidence he was in a vehicle 8 to 10 miles from camp with a fellow employee John Jefferd, Quality Control Supervisor from another of the Defendant's logging operations, when he first learned of the spill by radio communication from the camp about 10:00 a.m. He gave instructions to the Master Mechanic, Mr. Peterson to go and look at the situation as soon as he could and that he (LaFarge) was on his way into camp. Both LaFarge and Jefferd gave evidence that they returned to camp at once but when they arrived they could see little evidence of a spill and no sign of oil in the ocean. Nor could they find on inspection any leaks from the fuel truck tank. Peterson, the Master Mechanic said when he received the radio communication from LaFarge he went to the site of the spill and met Brown. According to his evidence Brown and he discussed the

spill but that Brown said there was not enough spill to warrant a cleanup. I accept Peterson's evidence in this regard.

Several witnesses described the fuel truck and how oil was pumped from the tank of the truck. Unless the truck ignition was used to start the truck and the power take off engaged, fuel could not be pumped from the delivery hose.

Peterson said that the ignition key was always left in the truck but that only he and two mechanics under him had anything to do with fueling from the truck apart from Mr. Tattrie who was with "Husby Trucking" and also took fuel from the truck. Those persons all gave evidence on behalf of the Defendant. Each explained their own actions regarding the fuel truck the previous day. Each denied any knowledge of any leak from the tank or any involvement in the spill.

LaFarge gave evidence that he had given instructions to the Master Mechanic and Tattrie of "Husby Trucking" that they were not to put any fuel on the ground and to avoid spilling fuel on the ground and that any fuel taken from the truck which was not for use was to be drained into containers and then the contents burned at the shop. The last procedure was followed when water or other contaminants were suspected to be in the fuel in which case all contaminated fuel taken from the tank was to be drained into containers.

Each of the persons who took fuel from the truck that were called gave evidence confirming LaFarge's instructions concerning the handling of fuel from the tank.

LaFarge also gave evidence that about two days prior to the discovery of the spill that he had a conversation with Brown initiated by Brown about the risk of a spill of fuel from the truck because of the proximity of the truck to Naden Harbour. As a result of this discussion the fuel truck was then parked in the gravel pit instead of its former location.

LaFarge said this was a decision which was mutually agreed to by himself and Brown. Brown agrees that he discussed the matter of where the fuel truck was to be parked but that he did not agree that the gravel pit was necessarily a better parking place to avoid the risk of pollution in the event of a spill. In this regard I accept the evidence of LaFarge as to the discussion and the result. I found Brown's evidence somewhat evasive on the point, he was not wanting to be thought of as having been in agreement with the decision to move the truck's parking spot to the gravel pit. The truck was in fact parked thereafter in the gravel pit on instructions given by LaFarge to which Peterson was privy.

Having regard to all the evidence most of which is not in dispute I find that the Defendant has established on a preponderance of evidence that it did exercise reasonable care and due diligence for the following reasons:

(1) The evidence does not disclose any defect in the fuel truck such as leaks or faulty valves nor in the method of handling of the oil.

(2) The Defendant's employee LaFarge as camp Superintendent gave express instructions regarding procedures to be followed when handling oil and those instructions were understood and apparently followed as a matter of practice.

(3) LaFarge was conscious of the possibility of a spill of oil from the truck and the evidence discloses he was responsive to the suggestion by Brown that the truck be moved to another parking spot which was agreed between them as being more suitable and he saw to it that that was carried out.

(4) Upon learning of the spill LaFarge and other employees of the Defendant took prompt action to investigate the circumstances and were prepared to undertake any remedial action had that been indicated which it was not.

I have not overlooked the fact that the ignition key was at all times left in the truck which would have enabled anyone to start the truck, engage the powertake off and pump oil from the tank. In some circumstances that might be a fact which would weigh heavily against the Defendant who is responsible to ensure that a safe system is established to handle the fuel oil deliveries from the truck. In this case though it must be remembered that the location of the camp and its operations is in a remote area and not accessible to or by the public. Only employees of the Defendant and other persons such as Government Fisheries or Forestry personnel would likely be expected to be in the area or about the Defendant's logging operation. I therefore have concluded that the fact that the key was left in the truck in the circumstances should not be decisive of the issue of reasonable care and that on the facts in this case it was not unreasonable.

In the result I find the Defendant not guilty and accordingly dismiss both counts in the information.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. WHONNOCK INDUSTRIES LIMITED

SCHMIDT Prov. Ct. J. Port Hardy, January 28, 1982

Sentencing - Deterrence - Inadequate communication between on-site operations and head office - Inadequate supervision by head office - Responsibility for on-site operations - Long history in business and knowledge of potential impact on fisheries - $3,500.00 fine.

The accused was convicted on a charge of removing gravel without a permit as required under the British Columbia Gravel Removal Order. The maximum penalty for the offence was $5,000.00. In assessing a fine of $3,500.00, the Court stressed two factors in passing a sentence that would deter such occurrences in the future. The first factor was the failure of the accused's site superintendent to notify head office of the denial of an application for the requisite permit and subsequent disregard for the permit refusal. The second factor was the accused's experience in a business it knew or ought to have known could impact the fishing industry if carried out without regard to the permits and controls of fisheries and other public authorities. Companies in this business must ensure that their on-site employees forward fisheries and other communications from public authorities to their head office.

J.D. Cliffe, for the Crown.
G.R. Switzer, for the accused.

SCHMIDT Prov.Ct.J.: - The proper principles to apply in sentencing are the protection of the public, the punishment of the offender, the deterrence of the offender and others, and the reformation and rehabilitation of the offender. It's possible that the reformation and rehabilitation of the offender is not a concern in this case and that really it's the deterrence of the offender and others that is the major consideration in cases of this sort. The paramount consideration of course is the protection of the public and the specific public that is being protected in this case is first of all the consumers insofar as a food product is concerned and secondly the fishing industry.

Dealing with deterrence I'm considering two particular aspects of this case. One aspect of the case is in respect to pit nine and in that case a permit was applied for and was in fact denied. That was communicated not to the head office of the accused corporation but it was communicated to the on site superintendent. That communication should have been passed on to the head office and more importantly should have been acted upon by the on site superintendent. Dealing with the aspect of deterrence I think it's important to assess a penalty which will be significant enough that companies will make their people on the site very aware of the penalties and aware of the importance of all communications which emanate from fisheries offices or other persons who are given the - any authority under these acts which are protecting the fishing industry and the public at large.

The second aspect that I think is an aggravating circumstance is that the company had been working in this area for a long period of time and was obviously aware of the process which is involved with respect to these permits and the great deal of concern that

is shown by fisheries officers and other persons and the government in general as the permit involves on site inspections. Regardless of that knowledge by the company that permits did not - had not been issued for the time that they were digging or excavating they went ahead and did further excavations for which they no doubt benefited by being able to carry on their logging operations after a flood. I think that it is important for the deterrence of them and others that this factor be a part of the sentencing in this particular case. It is not any longer sufficient for companies to say that they have done this in the past and it will be okay to do it in the future. The nature of the fishing industry at this particular time is crucial and it's common knowledge at least in this area and possibly the other areas that are fishing communities that the fisheries change from day to day. In the past the fishermen have been able to go out for several months of the year and catch fish and that no longer applies. I think that it's common knowledge in this area that it's very, very closely monitored and fisheries are sometimes only open for a few hours of a week rather than for a few months of the year as they used to be.

It has been urged upon me that the particular excavation was done by the employees on site and not authorized by the company wherever their head office is, but I must in my view not consider that. The people on site are the people that can do the greatest amount of damage and I think it's important that the company disabuse all their employees of the idea that whatever is necessary on a logging or other type of site can be done. The employees on site must be aware of the ramifications of their actions just as the people in the head office must be aware of the ramifications of the actions of the people on site.

I have a view to the maximum penalty in this case which is five thousand dollars. I have considered the amount of property and economic harm that can be caused by this type of activity and in this case I assess a fine of thirty-five hundred dollars, in default distress.

BRITISH COLUMBIA COUNTY COURT

R. v. DOMAN FOREST PRODUCTS LIMITED

MELVIN Co. Ct. J. Nanaimo, October 21, 1982

***Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Appeal from acquittal on two charges under s.33 (2) - Evidence to support decision of trial judge - Appeal dismissed.**

On an appeal by the Crown from the acquittal of the accused on two charges under s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, *held*, the appeal is dismissed. The trial judge did not err in accepting the alternative explanation offered by the accused of the discharge in question. The alternative explanation was not just a mere conjectural possibility but rather was a rational explanation supported by the evidence. The trial judge did fail to draw the obvious conclusion that a chemical concentration lethal or toxic to fish was at a level deleterious to fish. However, the absence of evidence on this point at trial, and in light of the alternative explanation, the trial judge had a reasonable doubt which he resolved properly in the accused's favour. Where the evidence or lack thereof supports the decision of the trial judge, the appeal court should not lightly interfere.

D.R. Kier, Q.C., for the Crown, appellant.
T.M. Singh, for the respondent.

MELVIN Co.Ct.J.: - The Crown appeals from the acquittal by the learned Provincial Court Judge of the respondent on two counts contained in the Information sworn the 17 day of February, 1981. The counts are as follows:

> Count 1: On or about the 6th day of January, 1981, near Nanaimo, Province of British Columbia did unlawfully deposit or permit the deposit of a deleterious substance, wood preservative, in water frequented by fish, to wit, Northumberland Channel, in violation of s.33(2) of the Fisheries Act;
>
> Count 2: On or about the 7th day of January, 1981, near Nanaimo, Province of British Columbia did unlawfully deposit or permit the deposit of a deleterious substance, wood preservative, in water frequented by fish, to wit, Northumberland Channel, in violation of s.33(2) of the Fisheries Act.

In support of the appeal, the Crown alleges certain errors by the trial judge which are set out in the Notice of Appeal. At the hearing of the appeal a statement of facts was prepared for the purposes of the appeal, and the extensive Reasons of the learned Provincial Court Judge contain a full outline of the facts. Consequently I do not propose to reproduce the facts in these Reasons.

The Crown alleges that on January 6, 1981 the respondent discharged 900 gallons of fluid from its premises, which fluid may have contained a chemical (T.C.P.) which at certain levels is toxic to fish. The pumping out of the sump by the respondent's employees was admitted, as they were of the opinion that it was safe to do so by reason of their examination (touch, sight and smell) of the sump contents. They were experienced men

who could recognize the presence of the chemical, and were aware of its danger. They were satisfied that the fluid did not contain the chemical.

Two reasons or theories are advanced for the presence of the chemical in the catch basins as shown by Exhibit 18 which gives levels of the chemical and pH levels at various stages throughout the discharge system as it leads to Northumberland Channel. There is an abundance of evidence of pumping out of the contents of the sump of the respondent on January 6, 1981. In addition, there is evidence of a subsequent discharge of fluid from an exhaust fan which caused complaints of strong odours of the chemical in question. The fan operated for ten hours on January 6 and six to seven hours on January 7, 1981. Samples from the catch basins were obtained at approximately 9:00 p.m. on January 7, 1981. An expert called on behalf of the defence expressed an opinion that the chemical found in the catch basin may be related to the discharge of fluid from the exhaust fan. In expressing this opinion, he used language such as the following: the liquid "might be emitted", whether it was probable that it could be discharged from the fan"; "a likely possibility".

There is no doubt that some fluid was discharged from the fan and was lying on the asphalt surface outside the building where the spraying operations were conducted. Equally it is clear on the evidence that the wet area went from the fan to the first catch basin (although there was no streaming of fluid). This evidence leads to the rational conclusion that some of this fluid made its way to the catch basin in question.

The Crown submits that the learned Provincial Court Judge erred in considering this alternate explanation for the chemical being found in the catch basins (no evidence of chemical was found at the discharge end of the pipe leading to Northumberland Channel) and refers to *R.* v. *Bagshaw*, reported in 4 C.C.C. (2d) 303, S.C.C.

In *Bagshaw* there was no evidence to support the alternate theory. In the course of the decision the Court quoted with approval the following from *Wild* v. *The Queen*, (1971) 4 C.C.C.40:

> *In the present case the learned trial Judge, in considering the facts to which he referred, failed to appreciate their proper effect, in law, in that he did not distinguish between a conjectural possibility, arising from those facts, and a rational conclusion arising from the whole of the evidence.*

In my opinion, the language in *Bagshaw* and in *Wild* does not apply to the case at bar. The presence of the discharge from the fan and it leading to the catch basin is not a conjectural possibility.

This court sits in review and in carrying out its function it should not arbitrarily embark on a re-hearing. If the evidence or lack thereof supports the decision of the court below, this court should not lightly interfere.

In the course of his Reasons the learned trial judge commented on the levels of the chemical (between 492 and 530) being lethal to trout, and that it was extremely toxic to salmon in parts as low as 63 micrograms per litre, but that no witness said at what level the liquid became deleterious. In my opinion the obvious conclusion on the evidence is that levels which are toxic to fish may be equated with levels that are deleterious to fish. However, in my view, this does not affect the overall result. The

learned Provincial Court Judge had a reasonable doubt as to whether or not the concentration of the chemical in the liquid pumped out of the sump was deleterious to fish, and whether or not any of the liquid found to be in the catch basins as a result of the samples taken on January 7, 1981 found its way into the Northumberland Channel. Those doubts he resolved in favour of the respondent, and in my view rightly so.

As a result, the appeal is dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. MACPHERSON

BARNETT Prov.Ct.J. Quesnel, February 29, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under ss.31 (1) and 33 (2) -S.31 (1) charge dismissed for lack of evidence - Accused found not guilty of offence under s.33 (2) as he had made a real and significant attempt to comply with instructions of government inspector.

A settling pond constructed by the accused was determined by government inspectors to be inadequate. The accused was told to shut down his placer mining operation and he did so. He was told to make changes which he made. A further inspection revealed that problems still existed. Further changes were recommended and the accused did more. An inspection two weeks later resulted in charges under ss.31 (1) and 33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. The accused had apparently misunderstood the inspector's instructions and although he thought he was doing the right thing, the inspector did not consider it an improvement. The charge under s.31 (1) was dismissed for lack of evidence, and the accused was found not guilty under the s.33 (2) charge because he made real and significant attempts to comply with the instructions given to him.

G. Barrow, for the Crown.
P. Fletcher, for the accused.

BARNETT Prov.Ct.J.: - (Orally) ..... Mr. MacPherson is charged under the provisions of the Fisheries Act. There are two counts. The second of the two counts says that the work that he was carrying on, a placer mining operation, resulted in harmful alteration of fish habitat. There is, I think, essentially no evidence to support that count and it will be dismissed.

The first count is the one that this case is really all about. And, it can't be dealt with quite so summarily. Mr. MacPherson had this placer mining operation on Sugar Creek. It may well be that at the very place where Mr. MacPherson had his operation and because an old dam downstream or because of the canyon that he has referred to or for some other reason -- it may well be that there aren't any fish right in that immediate area. But, I am satisfied that only a short distance downstream, there are fish - there are trout down there.

And, if what he was doing, at his operation was wrong, I certainly would not be prepared to dismiss this charge simply because there aren't any fish swimming around up at the placer mine as seems to be evidence by the fact that his wife couldn't catch any. I don't regard that as an issue of any real importance.

There was a complaint made by the Forestry people. I was pleased to hear that piece of evidence because in other cases of this general nature that I have had to deal with - not in Quesnel - it seems to me that there was absolutely no cooperation at all between Forestry and other government departments. And, here, it seems that their attitude is different.

In any event, Mr. Lorenz went out to see Mr. MacPherson operation and it seems quite clear to me that that day he first went out, there was a pretty substantial problem with that settling pond. A lot of water was flowing out of it. And, although the water wasn't tested that day, you can look at the photographs and -- taken either that first visit or on the September 1st visit and you can see that it was not a good situation.

But, Mr. Lorenz felt that cooperation between the Federal Fisheries people and the Provincial Mining people was a reasonable way to deal with situations of this kind and he wasn't exactly certain what would be the best way to correct the problem. The problem in his mind was obvious. He told Mr. MacPherson to shut down his operation and not to start it up again until the placer mining technician, Mr. Guinet had been out. And, as I understand it there really isn't any controversy on this. Mr. MacPherson did shut down his operation. Mr. Guinet did come out. Mr. MacPherson did some things that Mr. Lorenz told him and he followed Mr. Guinet's suggestions.

When Mr. Lorenz returned on the 1st of September of -- although there had been some changes, Mr. Guinet didn't think the changes were very substantial or successful. And, -- so, Mr. MacPherson did more. Now, on the 16th of September when Mr. Guinet -- when Mr. Lorenz came out again, he was dismayed because in his opinion what Mr. MacPherson had done concerning the settling pond was ridiculous. He had put in these pipes and Mr. Guinet, I believe -- Mr. Lorenz I'm sorry, thought that wasn't an improvement at all. Mr. MacPherson thought that he was doing what he had been told to do by Mr. Guinet.

We haven't heard from Mr. Guinet. And, the evidence seems to indicate that Mr. MacPherson may not have precisely understood what Mr. Guinet was suggesting. The evidence, I think, is clear that he thought that he was doing the right thing and that the situation in Mr. MacPherson's eyes had substantially improved. He realized that there was still some murkiness in the creek caused by his operations but not nearly so much, he thought.

Mr. Lorenz did some sampling on the 16th of September which was when he decided that he would charge Mr. MacPherson. And, the charges relate to that day. They don't relate to the visit in August or the earlier visit in September.

I know there are limitations on the type of sampling and the amount of sampling that somebody such as Mr. Lorenz is able to carry out in a location such as this. Nevertheless it does seem to me that in hindsight - and hindsight is always -- you can be very wise in hindsight. In hindsight, it does seem to me that more sampling would have been significantly helpful in dealing with this case. There was some sampling done by Mr. Lorenz upstream of where the water from the settling pond was going into the creek. There was not any sampling done at any point right alongside the bank or out in midstream or at the other side. There was no downstream sampling at all. That seems to me to have been a bit of a shortcoming.

There was a sample of water taken from the water that had originated from the outlet pipe of Mr. MacPherson's settling pond but it was not taken at the -- in the immediate vicinity of where that water was seeping or flowing or whatever it was doing - into the creek. I think that those shortcomings meant that Mr. Delaney was not able to give his evidence nearly as precisely as he might have been able to give it. Of course, he would have been able to give much more precise evidence if he had actually been to the

place. But, again perfection is not always possible and shouldn't be expected on the part of persons such as Mr. Lorenz or -- in doing his work and Mr. Delaney, I'm sure, if he had gone out to Sugar Creek would have known more about it but I suppose his superiors thought that was a luxury that the Crown couldn't afford. I don't know. In any event I know that he didn't go out there.

These cases as Mr. Fletcher points out fall to be decided on the principles set forth in the *R.* v. *Sault Ste. Marie* (1978), 40 C.C.C. (2d) 309 case. It's not an absolute liability offence.

My understanding of the evidence is that Mr. MacPherson was told to shut down his operations and not resume them until he had corrected things in manners that were left to be suggested to him by the mines people. He did make honest efforts, as I understand the situation, to correct the problems. And, I don't know really how bad the problems were -that would not be a ground for dismissing a charge under this section of the Fisheries Act because depositing a deleterious substance in the water in an unlawful manner is an offence. But, on a quantitative basis, the evidence does not disclose to me in any way at all just how bad a problem this was. The evidence does disclose to me in my belief Mr. MacPherson made real and significant attempts to comply with the instructions given to him and I do not feel that this is a case where it would be warranted to convict Mr. MacPherson on count 1. And, I said that count 2 is dismissed so I think that deals with the matter.

Mr. MacPherson, I rather expect that today's experience may be successful in a result but undoubtedly not to your financial advantage - will impress upon you the necessity of perhaps -- or the wisdom perhaps of taking more care next year. And, you did indeed, tell me that you made arrangements to get that other area where you can --

Thank you.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. MACMILLAN BLOEDEL LIMITED
(Log Dump at Steamer Cove)

MACLEOD Prov.Ct.J. Port Alberni, November 24, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under s.33 (2) relating to deposit of logs and bark in water frequented by fish - Accused acquitted - In circumstances of case, bark and logs not deleterious substances - Also, defence of due diligence made out.

The accused had logging rights in an area known as Steamer Cove, a water frequented by fish. Logs were slid into the water and boomed. Some of the bark from the logs would break off and subsequently sink. On the facts presented, the Court was unable to find that the bark and logs were, in this particular case, deleterious substances. Furthermore, it was quite clear that the accused had taken all reasonable care and was entitled to the defence of due diligence. The accused was therefore acquitted of charges under s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended.

J. Woodward, for the Crown.
D.W. Shaw, Q.C., for the accused.

MACLEOD Prov.Ct.J.: - The accused MacMillan Bloedel is charged with some four counts under s.33(2) of the Fisheries Act, in that it did on various dates during 1981 and 1982 did deposit or permit the deposit of a deleterious substance to wit; logs and bark in water frequented by fish.

The facts in this matter are not that much in dispute and I feel a lengthy recitation of the facts and the evidence of the witnesses involved in detailed form is unnecessary.

The accused had logging rights in an area situated on Flores Island and in January, 1981, made an application to the Ministry of Lands for renewal of foreshore rights in an area known as Steamer Cove. At that time biological reports were submitted together with documentation as to the proposed site, the application forms exhibit 5. Subsequently by exhibit 12, the application was submitted to the Fisheries and Oceans of Port Alberni for their comments on the application. This application was in May, 1981, approved by Fisheries and Oceans, subject to some conditions as set out in exhibit 14. One being; no storage of logs during February 20th to March 20th of any year and no activity in the bay west of the proposed area.

Although the Land Lease agreement (exhibit 4) is dated for reference June the 15th, 1982, and the term of the lease begins June the 15th, 1982, I must assume that the lease was approved in principal for it does contain the Ocean and Fisheries concerns and the evidence quite clearly shows log dumping began in June of 1981. Log dumping continued as set out in the information, namely June the 10th, '81 to June 19th, '81, September 27th, 1981, to December 17th, 1981, January 5th, 1981, to February 24, '82 and April the 20th, '82 to June 23 '82 when logging ceased.

The logging operation in question appears to be a typical one in that logs are brought to the dump, bundled and then by a slide, then slid into the water and subsequently boomed. From the log dump to the boom takes up to an hour and a half. A self loading barge is then instrumental in the removal of the boom. As stated this is a typical operation and although the information uses the words "log" and "bark", the main thrust of the complainants evidence is to the deposit of bark and its deleterious effect. There is no evidence that logs per se are deleterious to fish.

The evidence of the complainant and the accused leaves no doubt that the area in question is one frequented by fish. The area does not contain any spawning streams and has been closed to herring fishing since 1974. There are areas in the cove which do support herring spawning, which areas appear not to be in the area of the log dumping or the booming ground.

The logs once sorted on land and then bundled and placed on the log slide, which in this case consisted of steel rails, and slid into the water. The weight of the bundle does create a splash and the sliding effect does cause some of the bark to be broken off and float on the surfaces, subsequently sinking.

The depth of the water where the bundle strikes is about sixty feet at zero tide and approximately ninety feet at high tide (prosecution witness: Alto Frey).

The Prosecution called Dr. Royce whose opinion in the main was based on the finds of Miss Rosenberg in her report together with Dr. Sloan's report of 1980, previous to the application for foreshore rights. Dr. Royce's report, to my mind, was of a general nature in that his experience in this type of situation was of others and included suppositions that appeared not to exist in Dr. Sloan's report. There was no evidence of grounding of logs or compaction or scouring of the bottom. As he finally stated, "he would appreciate more information and it would be helpful to see it."

Miss Rosenberg's report of her dive of the area of the log slide was criticized by Dr. Sloan for a number of reasons, mainly the map field was not of the area in question, the lack of professionalism. However, it does confirm at least bark debris at the base of the slide.

There is no doubt that as a result of the deposit in the water of logs debris in the form of bark was deposited and some sank to the bottom covering an area as set out in Dr. Sloan's report.

Has the Prosecution shown that the bark is deleterious to fish or to fish habitat as defined in s.33(11), I guess it is, which states:

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

The evidence in this case shows that finny fish in the area complained of, were not affected in any manner.

There is no doubt in my mind that the area of the dump site, as pointed out by Dr. Sloan, is suboptimal fish habitat, being steep poorly vegetated, sedimentary slope compared to the more level seagrass and kelp beds in the north and western cove areas. However, I doubt if it matters whether the above is so when the area is a fish habitat per se. *R.* v. *MacMillan Bloedel Limited* by its definition of deleterious, leaving a complainant need only to prove waters frequented by fish, which of course must mean and probably does mean any coastal waters.

The defence argued the following: that the bark was not deleterious and that evidence shows the fishery was not affected. They presented the defence of due diligence in that the operation was commenced and with some restrictions approved by Ocean and Fisheries and De Minimis doctrine in that if any effect by such a deposit it was nominal and had no effect on fish, but possibly some effect on fauna, which did not interfere with the habitat.

Of the evidence I heard during the four days, or five days of the trial in question regarding the effect of the deposit of logs and bark in this particular area and bearing in mind the various cases that have been heard over the past regarding the definition of deleterious and the type of deposits that do apparently form that definition, I am unable to find that the deposit was a deleterious substance in this particular case.

Further the evidence appears quite clear that the accused through its applications, environmental reports et cetera, the Ministries involved, including Oceans and Fisheries took all reasonable care and is entitled to the defence of due diligence.

Having found that, of course, all charges will be dismissed against the accused.

BRITISH COLUMBIA COUNTY COURT

R. v. MACMILLAN BLOEDEL LIMITED
(Spill of Rosin Size at Port Alberni)

CASHMAN Prov.Ct.J. Nanaimo, January 20, 1983

Sentencing - Appeal by Crown from sentence imposed after plea of guilty to charge under s.33 (2) of Fisheries Act, R.S.C. 1970, c.F-14, as amended - Appeal dismissed -Although fine on low side, trial judge did not err in imposing sentence - Fine of $4,000.

On an appeal by the Crown from a sentence imposed after a plea of guilty to a charge under s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, *held*, the appeal is dismissed. It can not be said that the fine imposed ($4,000.00), which was for a second offence, was not a fit sentence. While the fine appears to be on the low side, the trial judge did not err in principle in imposing sentence.

D.R. Kier, Q.C., for the Crown, Appellant.
D.W. Shaw, Q.C., for the respondent.

CASHMAN Prov.Ct.J.: - The appellant (Crown) appeals a sentence imposed on the respondent (M & B) on October 7th, 1981, by a Judge of the Provincial Court on a charge that:

> "On or about the 22nd day of May, A.D. 1981, at the City of Port Alberni, County of Nanaimo, Province of British Columbia, did unlawfully deposit a deleterious substance in water frequented by fish, to wit: Owatchet Creek. Contrary to s.33, Subsection 2 of the Fisheries Act."

M & B plead guilty to this offence. After hearing lengthy submissions and some evidence, and it being conceded that this was a second offence, the learned Judge imposed a fine of $4000.00.

The Crown contends that the sentence was firstly inappropriate and inadequate for a second offence, and secondly, that the sentencing Judge failed to give due consideration to the deterrent element in such a serious offence.

S.33(5) of the *Fisheries Act* R.S.B. 1970 c.F14 amended 1976-77 C35 Sec. 7 provides a range of penalties for a first offence up to $50 000.00 and not exceeding $100 000.00 for a second offence.

The first offence occurred in February, 1977 and at that time M & B was fined the sum of $1000.00. This offence occurred in May, 1981, and as noted resulted in a fine of $4000.00.

The deleterious substance here was a substance known as rosin size which is used to waterproof paper products. It appears from some tests conducted by the fisheries offices that this is a highly toxic substance.

Many of the facts do not appear to be in dispute. The major question in the sentencing concerns the question of whether M & B failed to take proper precautions to prevent such a spill or whether this can be said to be an accident, which the Company did its best to prevent. That question would not be relevant on an issue of liability, but it is relevant to the matter of sentence.

This Court's concern on a sentence appeal is whether the sentence is fit, not whether the Court would have imposed the same sentence. There is a range within which a sentence may be regarded as fit. Here the statutory range provides no minimum, only a maximum of $100 000.00 for a second offence.

Unfortunately some of the photographic exhibits relied upon at the trial and referred to by Counsel at the trial, failed to find their way to this Court.

The spill was first noted by the R.C.M.P. Just after 7:00 p.m. the fisheries officers went to investigate. Owatchet Creek is a small stream that flows through the mill. The officers noted a frothy white substance in the stream which had escaped from a drainage ditch, designed to catch the escape of such substances from the mill.

The fisheries officers arrived at the mill at about 7:45 in the evening where they noticed the spill occurring. They then embarked upon their investigation, took numerous photographs and two samples. The first sample was photographed at 8:05 p.m. They went downstream some 50 meters and took another sample. They carried on with their investigation until some time between 8:15 and 8:25, when they met a mill security officer, who then alerted the officials of M & B, who arrived at the mill approximately 10 minutes later, and at 9:10 p.m. found a partially opened valve. They placed a large bale of pulp on the top of the sewage gate near the source to help reduce the flow and absorb some of the substance. Shortly before 11:00 p.m. they managed to get a vacuum truck at the mill and used that to assist in the cleanup.

The Crown contends that the spill commenced prior to the high tide at 4:00 p.m., however, the evidence appears to indicate that the problem occurred sometime after 5:00 p.m.

The rosin size was stored in a tank and passed through an emulsifier. It was an old piece of machinery which was scheduled for replacement and was in fact replaced on February 2nd, 1982. In the normal course of events if a spill occurred at the emulsifier it could go through the plant, be treated, and put out through an outfall into the Alberni canal. It appears that in this instance not only did the emulsifier breakdown but as well the drainage system became blocked at approximately the same time. This allowed the substance to escape into the stream.

The Crown contends that this shows a culpable lack of maintenance. M & B says that this was an accident and no amount of foresight would necessarily have prevented it.

The learned trial Judge considered the submissions of counsel and the evidence. He as well had before him a judgment of the Provincial Court of Ontario, in *R.* v. *Cyanamid Canada Inc.* (1981) 11 CELR 31, to which I have been referred.

I have also considered the judgment of Cowan C.C.J. of the County Court of Vancouver in *R.* v. *The Corporation of the District of North Vancouver*, October 14th, 1982.

The learned trial Judge, in his reasons for judgment, said in part as follows:

> *"...I'm quite well aware that most industrial companies are well aware of the pollution standards and have taken all of what they can do. In this particular case, it appears MacMillan Bloedel has abided by all the rules and regulations that it can. ...that they were aware that their emulsion (sic) system wasn't of the best, in the sense that it deteriorated and required repairs and replacement... That should have put them on guard that their system should be watched a little more. This is deleterious substance, no doubt about it. In the end... it does enter into the Alberni Canal. Whether it kills fish or not, ...is immaterial. They are facing their second conviction in a period of three years. I can't find that they should be assessed such a penalty to deter others. This is not a malicious or an intentional thing in a sense."*

Having reviewed the evidence, submissions of counsel and the cases cited, and the Reasons for Judgment of the learned trial Judge, I cannot say that the learned trial Judge erred in principle in imposing sentence, nor do I think it can be said in all of the circumstances that the fine here did not reflect the seriousness of this offence in the circumstances of this case.

Clearly, the trial Judge did consider the element of deterrence and while the fine might be on the low side, I am unable to say that in the circumstances here it was not a fit sentence.

Accordingly, I dismiss the Crown's appeal.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. B & B CONTRACTING LIMITED

MACALPINE Prov.Ct.J. Clearbrook, January 14, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charge under s.31(1) - Accused acquitted - Although partly responsible for damage to fish habitat, accused had exercised due diligence in carrying out its construction project.

The accused was undertaking a construction project on the banks of a creek. There were also construction activities by others in the vicinity, upstream from a fish habitat. On February 15 or 16, the accused commenced clearing vegetation and installing concrete storm drains for a subdivision. On February 16, it was contacted by government officials and on February 23, a letter was sent to it setting out the requirements for constructing sediment control works. On February 25, a sediment catchment basin was dug and straw bales put in place. Installation of drains continued. On March 8, the accused enlarged the sediment basin on the advice of the Fisheries Department. On March 12, a Fisheries Officer and assistant noted considerable deposits of silt in the creek and a charge under s.31 (1) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, was laid. They also noted on that date that water was flowing past, not through, the sediment catchment basin and into the creek. There had been heavy rains just previously. The Court concluded that the siltation of the creek was at least in part due to the run-off from the area disturbed by the accused. It was also demonstrated to the Court's satisfaction that the siltation was harmful to the fish habitat. However, the actions of the accused in complying with the directions to construct the sediment basin were reasonable. The accused was mindful of its responsibility and to the sensitivity of the area. Its engineers helped develop the plans for sediment control and the plans were carried out with care. No expert appeared to indicate that its actions were unreasonable or that alternative mitigative measures should have been taken. The accused was therefore found not guilty.

D. Leedham, for the Crown.
D. Simm, for the accused.

MACALPINE Prov.Ct.J.: - (Orally) I might say at the outset that I feel I've had sufficient time to come to a decision in this matter, but I frankly admit that I haven't had sufficient time to perhaps appropriately verbalize the decision that I've come to, but I have made some notes, which I'll allude to, to get the matter under way and thereafter, I'll make some reference to my notes of the evidence and a decision will follow.

I don't have all of the exhibits in front of me, nor do I need them, but if I do I'll ask the Court Clerk for them.

The case, I might say at the outset, presents a classic situation of an encounter between a developing area and the preservation of a natural resource.

The site of the alleged violation is, as can be seen from the aerial photographs tendered in evidence, at the edge of a burgeoning residential development in Matsqui Municipality.

There seems to be some irony in the situation that brings the parties to Court in that the charge faced by the Corporate Defendant arises from its apparent action to protect the environment, but in my view this perversity, if I properly called it that, does not affect the legitimacy of the proceedings brought by the Federal Crown pursuant to s.31 of the Fisheries Act.

Now, the company, B & B Contracting Limited, is charged that between the 16th of February, 1982 and the 12th of March, 1982, at the District of Matsqui, in the Province of British Columbia, the company did unlawfully carry on work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat in violation of s.31, subsection (1) of the Fisheries Act, thereby committing an offence in contravention of s.31, subsection (3) of that Act.

Now I've made certain findings of fact on the evidence that I've heard and they are these. There is no doubt whatsoever that Downes Creek and its tributaries south of Downes Road, including what we here have called B & B Creek, constitute fish habitat as defined in s.31, subsection (5) of the Fisheries Act, R.S.C. 1970 and amendments thereto.

There is ample evidence upon which it can properly be found, that this is fish habitat. Not necessarily by the presence of fish, both adult and juvenile, but also by the evidence which I accept of the biologist, that this is insect producing, plant producing ground which are fundamentals of the food chain in fish life and I suppose other life as well.

Also, it cannot be said with any certainty that the muddy water in Downes Creek seen by Fisheries Officer Germscheid on March the 4th, 1982, as he drove along Downes Road, or the substantial alteration of the stream flow marked E on Exhibit 1, seen on an undetermined date by Mr. Fast, were caused by acts of the accused Corporation. These observations have not been tied to the Defendant Corporation in any way and could as easily be the result of activities on, above, or adjacent to tributaries one, two or three.

It seems unlikely, from the evidence that I have heard, that it's the result of any activity or occurrence on tributary two. It is more likely the result of activity on tributary one and very much more likely the result of activity on or about tributary three.

As I considered this evidence, I wondered what Fisheries Officer Germscheid might have done, and this is strictly speculation, which I'm not entitled to delve into, but nonetheless, I wondered what he might have done had he gone the other way on Downes Road and come first upon the gravel pit operation. Whether that might have produced some sort of inquiries that might lead to similar proceedings as these, but in any event, his evidence was that he went east on Downes Road and then on Gladwin Road and to this residential development area and saw things that quite properly, in my opinion, prompted him to commence an inquiry thereto.

Now, another finding of fact is this, that the major deposit of gravel and other soil material at the confluence of tributary three and B & B Creek marked C on Exhibit 1, is not the result of acts done by B & B Contracting Limited. And further, that tributary number one sometimes carries sediment in suspension, as seen by Mr. Powell on April 6th, although silt had not collected on the bottom of that tributary at the time of his inspections of that tributary on April 6th and again on April 30th, 1982.

Further, that industrial operations are carried out, or were, at or about the time in question here, carried out on bared land areas above both tributary one and tributary three, being the Matsqui Landfill Fair Grounds area and the Matsqui gravel pits respectively.

And further, that water drainage from the said industrial operations, is into the Downes Creek catchment area in which the B & B Contracting Limited sediment catchments are located.

And further, that a sizable land acreage is being developed for residential purposes, easterly and adjacent to the Matsqui Landfill site and these also are on the perimeter of the Downes Creek catchment area and that drainage from one of the developments at least, also is into the Downes Creek catchment area. And that development area that I refer to is the one in which B & B Contracting Limited was responsible for the installation of drainage controls with respect to that subdivision.

Now I would hope that that's a sufficient finding of fact for me to proceed further. There may be some areas where findings might have been made, but I don't really consider them to be relevent for my determination of the case charged here. And I feel those findings of fact bring me to this point, that what I must be concerned with is evidence and only evidence relating to events on the tributary marked A on Exhibit 1, which we have been calling here B & B Creek, and to the catchment construction at, near and above the commencement of that tributary. So we're dealing here with the area where the catchment construction took place and pipes were laid and the stream which flows from about that area, B & B Creek, a distance of probably no more than a few hundred feet. And I say that, because it seems to me that there are other influences which could have an effect on the quality of the water course below that point, other than B & B's works and undertakings.

Also, that's the geographical or physical area I will be concerned with and further, I'm really only concerned with the events, with the evidence of events that occurred in that area between February 16th, 1982 and March 12th, 1982, with respect to works undertaken there and with evidence from February the 16th onward, with respect to results of such works.

It's my understanding of the Law and the role that I'm required to perform, that any works done before or after the dates charged have no relevance here and that would include any work that might have been done to the hundred year storm catchment after the 12th of March, if any. The only evidence I have is that it apparently was still being constructed, but that I'm not limited to the later date of March the 12th with respect to the results of work done between the offence dates.

Now as Mr. Leedham did in his submissions, he presented a chronology of events, I've tried to do that too, because there are a number of dates here that are relevant and I have made a sequential list of events concerning the work done between the relevant dates of February 16th and March 12th of last year.

They are these. That about February 15th - 16th, the Defendant Company did some clearing in the catchment area and cleared some trees and made, or started to make a road down into the area so equipment could be brought down.

On February the 18th and 19th, a concrete storm pipe was laid to the edge of the basin on the upper half of the development site. That is the rim of this basin that can be seen in the aerial photographs. And also on those two days, and I think particularly on the 19th of February, some work was done on the forty-nine percent slope above the catchment basin areas.

On February 22nd, storm pipe from the sedimentation catchment to the top of the hill was completed and on February 23rd, this doesn't relate to work specifically, but should be mentioned here, a letter dated February 23rd, '82 was sent to the Defendant Company, or a copy of the letter sent to the Defendant Company, setting forth certain requirements concerning the requirement of a sediment catchment structure and indicated the use of hay bales or washed gravel filters at the downstream end of the work site and it also indicated that approval of the Provincial Water Management Branch and the Federal Department of Fisheries and Oceans would be required. That was the result of contact between the Company and government officials on the 16th of February, 1982.

On February 25th, the original sediment catchment was dug and a haystack or straw bales were put in place, some thirty in number. Logs were laid to in effect dam the flow of sediment mud. Equipment was moved in for this -- to do this work and in the removal of material from the sediment catchment, the equipment was moved back with its load some distance and the load was side-cast to prevent its being carried downsteam by water.

On February 26th, the Defendant Company laid pipe to a man hole half way between a sediment catchment and the hundred year storm catchment and the Company also dug a man hole at that time and two sump holes. The two sump holes being dug to protect the man hole from fill up due to heavy rain.

On March the 1st, indeed there had been some fill up of the man hole area with mud and water and that was dug out and three or four pipes were laid out of that man hole.

On March the 2nd, the Company laid pipe to the one hundred year catchment and on March the 8th, the Company enlarged the sediment catchment on the advice of the Fisheries Department and with a plan provided by its Engineers, McElhanney & Associates, or some such name. And to carry out this work, the backhoe or the equipment used, dug out the basin, backed up some thirty meters and again side-cast the material to an area of logs that the Company had put along its road down into the area to preserve, I suppose, the stability of that road.

Now thereafter, as after March the 8th, 1982 and up to April the 6th at least, according to Mr. Clark, the hundred year storm catchment was still being built. I really don't know why he said that, except that he said it wasn't on line and we know it wasn't on line because Mr. Wood said that he plugged the pipe. I guess it wasn't ready to receive the storm drainage and that's my opinion from what was said. But in any event, I gather that it wasn't completed and it may be that work was done on that storm catchment after March 8th and indeed after April the 6th. I don't know and I don't really know how much relevance that has except that there's a possibility that some work was done after March the 8th and that would mean that it's possible that work was done after March the 12th, which is the outer limit of the offence date. And it might

be that some of the observations made by Mr. Powell and his associate, when they visited on April the 6th, could have been the result of work done after March 12th.

Now for the purpose of the charge that the Company faces, the observations that are important in this whole scheme of things are those of March the 12th made by Fisheries officer Burnip and Habitat Protection Technician Giles. They walked B & B Creek on that day and they noted considerable deposits of silt immediately below the sediment catchment outfall and also further downstream. And I gather from their evidence and from photographs tendered in evidence, that this sediment appeared at various spots all the way along B & B Creek, that portion of it marked A on Exhibit 1, which I'm concerned with here.

Also on March the 12th, water was flowing past the sediment catchment, not going into the catchment and it was travelling through an area of deposited silt as it made its way around the sediment catchment and into the water course marked A.

Now, Fisheries Officer Germscheid thought that he was there the same day, but he wasn't sure. He said that he wasn't sure, but he was there with Clark and Powell. I think from looking at my notes, that it may very well have been that they were in fact there on a date in April, not on March the 12th. I say that, because Clark and Powell say they were there in April, on the 6th and I think the 30th and also for the reason that neither Burnip nor Giles mentioned Fisheries Officer Germscheid being there on the day they walked the creek. So I think the observations that are relevant here are those made on March 12th by Burnip and Giles.

It seems to me reasonable to assume that the siltation that they found there came, in part at least and probably in large part, from the disturbed area of this catchment development, due to the construction in the catchment area and to an abundance of rainfall that, obviously from the Exhibits filed, indicate there was a very large amount of rainfall in a very short period of time. And it may be and I'm certainly of this view, that that was a combination of bad timing. The fact (is) that the rainfall came at or about the time of the disturbance of the ground area there. So those are two causes that I see for the siltation and a third cause is the presence of a stream flow from the swamp area adjacent to the catchment development, which was not connected with the B & B project.

I think from what I have heard and seen in the photographs, that the result complained of was caused by a combination of all three of those factors. And I should say as well, that the evidence indicates without a doubt to me, that this is a very sensitive area so far as construction is concerned, because it's a wetted area, swampy in many areas and indeed the witnesses who testified indicated that they sunk down somewhat in swampy areas and also in silty gravel deposit areas.

In coming to the conclusion that those factors were causes of the siltation, I'm satisfied too, that the siltation had a harmful effect on the fish habitat by its alteration, its disruption and its destruction. And in coming to that conclusion, I rely on the evidence of biologists that this siltation covered forest duff and the creek bottom where vegetation would grow and provide the basis of food for higher forms of life. But the evidence indicates as well, and I'm referring specifically (to) the evidence of Miss Giles and her observations on December 20th, that this has not resulted in the total obliteration of the habitat and it may be fair to say there's some evidence of regeneration and that's my conclusion only because of the presence of an adult Coho Salmon that she saw on that portion of the creek marked A in Exhibit 1, approximately one month ago.

Now with those findings on the evidence, I have to consider whether or not the defences raised by the Defendant Corporation, have merit.

The first of these arguments was that there was not proof that the Defendant did any act as causing the problems, that is the deposit of silt. And I have found that in fact, B & B Contracting Limited did do certain acts which were responsible, at least in part, for the deposits of the silt that were referred to in evidence.

I'm asked secondly to consider that the Defendant Company exercised due diligence. This being a defence as recognized in the *Sault Ste. Marie Case*, a decision of the Supreme Court of Canada. Now, in that regard, the evidence indicates to me that the Company was mindful of its responsibility with respect to safeguarding the fishery there, or the food habitat -- fishery habitat, in that on the 16th of February it invited certain representatives of the Environmental Agencies to meet with them at the site and to look over their plans and to gain some appreciation of what they intended to do. And that resulted in this letter that Miss Giles sent to the engineering firm and with copies to the Company.

In that letter she recommended the construction of a sediment pond, settling pond, with the use of hay bales and or clean gravel fill and it's evident that this was done by the Company.

Now it seems odd to me, that with the presence of the Environmental people and in that description I include all of these people who come from a variety of agencies, mostly the Environment and the Fisheries and Oceans Department and so on, that it seems odd that the Company would proceed to do work that would have any devastation on the fishery after having invited the Fisheries and Environmental people to see what they were doing to give them an opportunity to make inspections. But, I suppose that through carelessness or negligence, lack of care, notwithstanding the appreciation of the responsibility that disastrous results could flow.

What I have to consider I think, is the evidence of Mr. Wood particularly, because he was on the scene while this was being done and maintained a daily diary as well as the evidence of other crown witnesses too. But the evidence of Mr. Wood suggests to me that he took a number of steps to prevent siltation sediment deposits in the creek. These have been alluded to before. They include the laying of the logs, the thirty bales of straw, the care which was taken to back this material away from the drainage area and to deposit it at the side on both occasions, when the original sediment pond was created and later when it was enlarged. There's no doubt that Mr. Wood appreciated the sensitivity of the area and the problems that might be encountered. He may have been more concerned about the heavy rainfall filling his man hole than he was about silt getting into the creek. I suppose he didn't want to have to dig a hole twice and he attended there on the Saturday when he was supposed to have been elsewhere, out of concern I think, for his construction problem, but I thought that Mr. Wood had a keen appreciation of the need to protect that area.

And I think that probably I need not say any more about that point because I'm content to find that the Company did exercise due diligence.

Now, no one has said in the evidence here, that what he did was unreasonable. One exception to that would be the evidence of Fisheries Officer Germscheid, that he

found the original sediment catchment to be wholly inadequate for the size of the cleared area. And I suppose that I can safely construe from that, that what had been done was unreasonable, but I don't have any evidence that at that time, there was any sedimentation in the creek, the B & B Creek. The evidence of that followed later and appeared to be at a time after which the pond was enlarged and Mr. Wood had made mention of the possibility of sedimentation or siltation occurring, to enlarge the pond. So I qualify my remarks in that regard by saying that there is some evidence of unreasonableness there, but in my view, in the whole scheme of this undertaking, the Company I think did exercise due diligence. No one had indicated to me that what they did was wrong. No one in a professional capacity with the ability to give expert evidence has come forth and indicated what ought to have been done, if indeed what was done was not reasonable.

And for that reason, without going on to the third and fourth areas of argument, I'm prepared at this time to dismiss the charge.

FEDERAL COURT OF CANADA
TRIAL DIVISION

R. v. THE SHIP "ERAWAN" et al.

WALSH J. Vancouver, April 15, 1983

Civil Action for Damages - Liability of owners of ship for damages resulting from oil spill -National Harbours Board Act, R.S.C. 1970, c.N-8, as amended - Fisheries Act, R.S.C. 1970, c.F-14, as amended - Common Law.

The ship Erawan negligently came into collision with a second ship as it neared the outer approaches to the Port of Vancouver. A quantity of fuel oil spilled as a direct result of the collision. The Court was presented with an agreed statement of facts and asked to answer four questions dealing with the liability of the owners of the Erawan to pay certain damages.

The Court concluded that the proceedings were properly brought in the name of Her Majesty the Queen in Right of Canada and that the owners of the Erawan are liable for damages under the provisions of the *National Harbours Board Act*, R.S.C. 1970, c.N-8, as amended, and its regulations and by-laws. It concluded that the owners might also be liable for damages under the provisions of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, as among the terms and conditions with respect to the admission of British Columbia into the Dominion of Canada it was agreed that Canada would assume and defray the charges for the protection and encouragement of fisheries. As well, the owners of the Erawan are liable in common law for public nuisance and, to the extent that Her Majesty or a crown agency on whose behalf She is suing is the owner of private property damaged by the oil spill, for private nuisance.

With respect to the actual damages for which the owners are liable, the Court allowed the entire cost of the water clean up, whether within or outside the harbour limits, the costs of the beach and foreshore clean up on all property belonging to the Crown, but not on private property, equipment damage and the costs and expenses involved in its cleaning, and payments made to various claimants although such payments were voluntary in nature.

G. Carruthers, for the plaintiff.
P. Bernard, for the defendants.

WALSH J.: - This matter was set down for hearing as a special case for adjudication in lieu of trial by determination of the questions of law set out in an Agreed Statement of Facts on the basis of the facts set out in said Statement which reads as follows:

The Plaintiff and the Defendants John Swire & Sons (Shipping) Ltd., owner of the Defendant ship "ERAWAN", the Defendant John Swire & Sons Ltd., the Defendant C.G. Cocksedge, in this case, and for the purpose of this case only, agree that for the determination of the issues herein the following facts are hereby admitted, subject to the qualifications or limitations (if any) hereunder specified:

Provided that this Agreement is made for the purpose of this action only and is not an admission to be used against the Plaintiff or the Defendants in any other case or by anyone other than the Plaintiff or the Defendants.

Provided that additional evidence, either of fact or opinion may be put into evidence at the request of the Court which does not vary or contradict the admissions made herein but no evidence which varies or contradicts the admissions of fact made herein are to be admitted into evidence.

1. The Attorney General of Canada brings this action on behalf of Her Majesty the Queen in right of Canada (hereinafter referred to as "Her Majesty") to recover the cost of cleaning up fuel oil which was discharged from the Defendant "ERAWAN" (hereinafter referred to as "ERAWAN") as hereinafter described.

2. The Defendant John Swire & Sons (Shipping) Ltd. is a United Kingdom Corporation having its head office and chief place of business of 66 Cannon Street, London, England, and on the 25th day of September 1973 and all times material to this action was the owner of the British vessel "ERAWAN" registered at the port of London of gross tonnage 9229.

3. At all times material to this action and in particular on September 25, 1973, the Defendant vessel was under the command of the Defendant C.G. Cocksedge employed by the Defendant John Swire & Sons (Shipping) Ltd. and was being piloted by Canadian pilot Captain W.H. Hurford, who was licensed under the *Pilotage Act* S.C. 1970-71-72, C.52, and amendments thereto.

4. (a) The National Harbours Board (hereinafter referred to as the "Board") is a body corporate incorporated pursuant to the *National Harbours Board Act*, R.S.C. 1970, C.N-8, as amended, and pursuant to s.3(2) of the said Act is thereby deemed to be an agent of Her Majesty for the purposes of the said Act.

   (b) For the purpose of and as provided for in the said *National Harbours Board Act* the National Harbours Board has jurisdiction over those areas set forth in the Schedule to the said Act including Burrard Inlet, Indian Arm (formerly known as the north Arm), and Port Moody, False Creek and English Bay, Sturgeon Bank and Roberts Bank.

5. By SOR/67-417 (P.C. 1967-1581) the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to s.6 and 8 of the *National Harbours Board Act*, *inter alia*, transferred to the Board for administration, management and control, all works and property vested in Her Majesty and situate within the area of the Harbour of Vancouver (sometimes referred to as Vancouver Harbour and the Port of Vancouver and hereinafter collectively referred to as the port of Vancouver).

6. Real Property of Her Majesty at the Port of Vancouver under administration, management and control of the Board is subject to the *Government Property Traffic Act* R.S.C. 1970 C.G-10.

7. Real Property of Her Majesty at the Port of Vancouver, under the administration, management and control of the Board is subject to the *Municipal Grants Act* R.S.C. 1970 C.M-15.

8. In 1973 and at all times material to this action the Port of Vancouver was a public and navigable harbour administered by the Board.

9. In 1973 and at all times material to this action the Port of Vancouver:

(a) ranked first in Canada, first on the Pacific Coast of North America, and second only to New York on the entire continent in its tonnage of international trade;

(b) had 49 square miles of deep draft inner harbour with approximately 100 miles of shoreline;

(c) was ice-free and navigable year round and capable of handling a vessel up to 125 000 D.W.T. with a 50 foot draft;

(d) consisted of an Inner and Outer Harbour. The Inner Harbour (Burrard Inlet) is the central core of the Port of Vancouver. However, the total port incorporates a water area of 214 square miles, stretching from Vancouver to the United States Border (excluding the lower reaches of the Fraser River). The major facility of the Outer Harbour is Roberts Bank, a sophisticated bulk handling terminal located some 20 miles south of the city;

(e) was among the top international ports in terms of volume of cargo handled. Exports include grain, coal and coke, sulphur, lumber and logs, pulp, potash, copper ores, fodder and feed, propane gas and general cargo containers. Imports include raw sugar, phosphate rock, common salt, fuel oil, iron, steel, metals and general cargo containers;

(f) was visited by 2222 foreign going deep sea vessels with a gross registered tonnage of 31 640 000 importing into Canada a cargo of 2 289 000 metric tons and exporting from Canada 27 164 000 metric tons of cargo;

(g) was visited 20 960 times by coastal vessels including B.C. Ferries at Tsawwassen with a tonnage of 39 211 bringing into the port 4 238 000 metric tons of cargo and taking out of the Port 4 493 000 metric tons of cargo;

10. That in connection with the importation and exportation of cargo referred to in paragraph 9 herein charges are levied, *inter alia*, pursuant to the following regulations passed by the Governor in Council on the recommendation of the Minister of Transport: *Crane Tariff*, *Vancouver Heavy-Life Crane Tariff*, *Vancouver False Creek Fishermen's Terminal Dockage Tariff*, *Tariff of Electric Service Charges*, *Harbour of Vancouver*, *Vancouver Tariff of Wharf Charges*, *Vancouver Tariff of Dockage*, *Buoyage and Booming Ground Charges*, *Vancouver Water Service Tariff*, *Tariff of Elevator Charges*, *Pacific Harbours Dues Tariff By-Law*.

11. That in addition to charges levied as set forth in paragraph 10 herein the Board derives revenue from the lease of lands and premises as illustrated on the chart attached hereto, marked 1 and named Vancouver Harbour (Inner port) which with the exception of the Lynnterm and Vanterm facilities shown thereon were substantially the same in September 1973.

12. That at all material times to this action in 1973 the Board had 439 outstanding leases respecting properties owned by Her Majesty in approximately seven municipalities surrounding the Port of Vancouver. The leases included land, reclaimed land, waterlots, warehouses and other structures from which the Board derived revenue. Most of the properties are shown on the chart marked 1. In 1973 the Board paid the said municipalities some $627 500 as grants in lieu of municipal taxes pursuant to the provisions of the aforementioned *Municipal Grants Act*.

13. That for the year ended December 31, 1973, the Board had a net income of $1 003 955 from the Port of Vancouver made up as follows:

(a)	Harbour Operations and Control (including harbours dues tolls, dockage, customer services, miscellaneous and sales)	$ 906 431
(b)	Open Storage Terminals (rentals)	$ 122 254
(c)	Container Terminals (wharfage, rentals, demurrage)	$ 469 177
(d)	Passenger Terminals (small tools)	$ 1 546
(e)	Real estate (leases, customer services, miscellaneous)	$1 897 189
(f)	Real estate (Roberts Bank) (rentals)	$ 334 022
(g)	Terminal operations (wharfage deficiencies, rentals demurrage, customer services miscellaneous)	$1 884 131
(h)	Grain Elevators (wharfage, rental)	$ 355 326
(i)	Ice manufacturing Plant (rental, sales)	$ 14 850
(j)	Small Craft Facilities (dockage, wharfage, rentals, customer services, miscellaneous)	$ 66 116
	INCOME FROM TOTAL CUSTOMER SERVICES	$5 915 718
	NET INCOME FOR 1973	$1 003 955

14. On September 25, 1973, the "ERAWAN" was on a voyage from Tacoma, Washington, U.S.A. to the Port of Vancouver, British Columbia, carrying, *inter alia*, potash and chemicals. At about 0318 the "ERAWAN", under the conduct of a Canadian licensed pilot Captain William Hurford, was proceeding at the outer approaches to the Port of Vancouver.

15. On the aforementioned date and at a place south west of the Point Grey Bellbuoy outside the limits of the Port of Vancouver the "ERAWAN" came into collision with the motor vessel "SUN DIAMOND", of 8176 gross tons registered at the Port of Osaka, Japan, owned by the Defendant Nichia Kaiun K.K., with an address at 123-1, Higashi-Machi, Ikuta-Ku Kobe, Japan. At the time of the collision the "SUN DIAMOND" was outbound from the Port of Vancouver on a voyage to Seattle, Washington, U.S.A. under the conduct of a Canadian licensed pilot, Captain Colin Darnell.

16. The aforementioned collision occurred when the bow of the "SUN DIAMOND" struck the "ERAWAN" amidships puncturing certain tanks containing a quantity of fuel oil which subsequently escaped into the water at or near the place of collision as a direct result of the collision. Following the collision the two vessels were moved to a position east of the line between Point Grey and Point Atkinson which designates the outer limits of the Port of Vancouver. The tide was flooding, and this would bring the oil within the boundaries of the Port of Vancouver.

17. At about 0319 on September 25, 1973 the 1st Narrows Signal Station operated by the Board was notified by the "ERAWAN" of the collision and the Board's Harbour Master, and the Pollution Control officer, Department of Transport, Government of Canada shortly arrived on the scene of the collision. At 03:40 the Harbour Master requested that Clean Seas Canada Ltd. dispatch its equipment and men to the area of the collision as soon as possible to contain the oil. In accordance with an understanding between the Board and the Canadian Coast Guard, Department of Transport based on an Interim National Contingency Plan designed for dealing with oil spills the Board called upon the Canadian Coast Guard, Department of Transport and its resources for assistance. The Department of Transport took over command of clean up operations at the request of the Board and although the Board continued to provide assistance throughout the clean up operation all clean up costs claimed herein were paid for by the Department of Transport.

18. Clean Seas Canada Ltd., which had an oral agreement with the Board to contain oil spills, used its own resources and also obtained clean up assistance from a number of subcontractors who provided resources used in the clean up of the aforementioned oil spill which lasted until approximately October 23, 1973. During this period some work was done in all areas designated on the chart attached hereto and marked 2 in red, green or blue representing oil which escaped from the "ERAWAN". Some water surface clean up work was done at Gambier and Bowen Island, as depicted, to prevent oil from entering those areas. The Department of Transport maintains the Government Wharf, Snug Cove, Bowen Island.

19. On September 28th, 1973, the "ERAWAN" was towed from English Bay to Burrard Dry Dock in North Vancouver. In the course of this tow the First Narrows as shown on chart marked 1 was closed to marine traffic for approximately one hour and oil booms and other equipment were used to avoid the further spread of oil from the vessel. When the "ERAWAN" was alongside the Dry Dock spokesmen for the Department of Transport advised Clean Seas that the Department would no longer pay for services relative to the continuing escape of oil from the vessel. Clean Seas then made arrangements to bill Burrard Dry Dock for charges for work done in the area of the Dry Dock as a result of any further oil escape. The Clean Seas account for such services has been paid.

20. The aforementioned collision was caused solely by the negligence of either those in charge of the "ERAWAN", servants of the Defendant owner of the "ERAWAN" John Swire & Sons (Shipping) Ltd. or other persons for whose negligence the said owner John Swire & Sons (Shipping) Ltd. is responsible at law as was found in the judgment of Mr. Justice Collier referred to in paragraph 21 herein.

21. The parties to this agreement admit the findings of fact contained in the Judgment of Mr. Justice Collier pronounced on January 6, 1975 in cause No. T-3841-73 and T-3842-73 between:

The Owners of the Ship *Sun Diamond* Nichia Kaiun K.K.,

Plaintiffs

and

The Ship *ERAWAN*, The Owners of The Ship *ERAWAN*, John Swire & Sons Ltd., John Swire & Sons (Shipping) Ltd.,

Defendants

AND BETWEEN: T-3842-73

John Swire & Sons (Shipping) Ltd. Owners of the Ship *ERAWAN*,

Plaintiffs

and

The Ship *Sun Diamond* and Captain Darnell

Defendants

Attached and marked 3 is a copy of the Order ...

22. At the time of the collision the tide was flooding and the Port of Vancouver and some surrounding beaches and foreshore within the limits of the Port of Vancouver were seriously threatened.

23. As a direct result of the collision referred to in paragraphs 15, 16 and 17 herein and as described in the aforementioned judgment approximately 211 tons of fuel oil escaped from the fuel tanks of the "ERAWAN" into waters both adjacent to and in the Port of Vancouver and was deposited on foreshore in those areas depicted on the chart marked 2 to this Agreed Statement of Facts. Some of the oil was contained or pumped off the ship following the collision, some went onto beaches below the high water line and some to the water surface. It was reasonable to conclude that as oil was on the surface of the waters of Burrard Inlet for up to four days some of the oil depicted in blue on the chart marked 2 may have sunk to the seabed in the said areas depicted in blue.

24. The escape of fuel oil from the "ERAWAN" into the Port of Vancouver and surrounding waters and on foreshore as stated herein and as depicted on the chart marked 2 was a direct result of the collision. Complaints were made by approximately 40 commercial fishermen who alleged that oil from the "ERAWAN" had fouled hulls and commercial fishing gear. Approximately $12 600 was paid by Her Majesty to these forty fishermen respecting their complaints.

25. Following the removal of the "ERAWAN" from English Bay to Burrard Dry Dock on September 28, 1973 at approximately 1600 hours the clean up of oil on the surface of the water was discontinued (or became unnecessary) and all the effort was directed towards the foreshore.

26. A complete summary of costs for clean up of oil, which was prepared by the Department of Transport is attached hereto and marked 4. For the purpose of this Agreed Statement John Swire & Sons (Shipping) Ltd. and John Swire & Sons Ltd. do not question the reasonableness of the costs marked 4 hereto which can be broken down as follows:

Water clean-up	$270 568.03
Beach clean-up	297 598.25
Equipment clean-up and sundry	35 548.07
Total	$603 714.35

The parties agree that the question of quantum of damages shall be the subject of a Reference if necessary.

27. The Board did not make payment of any of the above-mentioned charges or expenses. Payment was made by the Department of Transport.

28. Following the escape of oil from the "ERAWAN" the Minister responsible for the administration of the *Fisheries Act* for Canada who was M.P. for West Vancouver Howe Sound attended personally at the scene of the oil cleanup and observed and generally supervised the work that was being done under the direction of the Ministries of Transport and Environment (Fisheries) and Clean Seas Canada Ltd. The Minister did not make any specific direction that action be taken in accordance with S.33(10) of the Fisheries Act but believed that he had the power or authority as Minister of Fisheries to direct that clean up action be taken.

29. That in the event the Court finds the provisions of s.33 of the *Fisheries Act*, as it then was, relevant to the determination of the issues between the parties, it is admitted that the owners of the "ERAWAN" exercised all due diligence to prevent the discharge of oil from the vessel.

30. The following lands hereinafter described are owned by Her Majesty:

(a) All the foreshore and bed of the Public Harbour of Burrard Inlet and the area adjacent to the entrance thereto lying east of a line drawn south astronomically from the south-west corner of the Capilano Indian Reserve Number 5 to high water mark of Stanley Park.

(b) The Capilano Indian Reserve No. 5 shown on charts 1 and 2 except certain small portions which have been alienated and which are not material.

(c) Stanley Park shown on charts 1 and 2. The lease of Stanley Park has been granted for 99 years by His Majesty Edward VII to the City of Vancouver with right of renewal as therein provided but subject to rights of His Majesty as therein provided. Legal title to Stanley Park consists of all that portion of the City of Vancouver (and the foreshore adjacent thereto) bounded by the Western limit of District Lot 185, Group One New Westminster District (as shown on the official plan thereof filed in the Land

Registry Office at Vancouver) and the low water mark of the waters of Burrard Inlet, the First Narrows and English Bay and being all that peninsula lying to the West and North of the Said District Lot 185 known as "Stanley Park".

(d) Deadman's Island, occupied by the Department of National Defence and the Ministry of Transport.

31. No attempt was made by any of the Defendants to abate the nuisance caused by the discharge of oil from the "ERAWAN".

32. Following its escape from the "ERAWAN" oil in varying amounts reached the foreshore at points along approximately 25 miles of coastline, and there was a likelihood that if the oil was not cleaned up from beaches further high tides could refloat and redistribute the oil onto previously clean areas. Attached hereto as 5 and 6 are diagrams published in Canadian Hydrographic Service Publication No. 22 showing *inter alia* the currents at Maximum Flood and Currents at Maximum Ebb on September 25, 1973.

33. (a) The aesthetic quality and the potential for recreation was impaired in varying degrees in those places where oil reached the foreshore as described in paragraph 30 herein.

(b) The waters and shorelines in the area of the spill depicted on charts 1 and 2 are used as follows:

(1) Public beaches at Stanley Park, Ambleside to Point Atkinson, Caulfied Cove and Snug Cove on Bowen Island;

(2) Three parks near Point Atkinson: Lighthouse, Whytecliff and Parc Verdun;

(3) Thirteen marinas that harbour many commercial fishing vessels and some 3770 pleasure boats worth an estimated 16 million dollars. It is estimated that pleasure boats moored in Burrard Inlet spent an equivalent 9400 days during September, 1973, 5000 of these in Burrard Inlet itself;

(4) Scuba diving near Whytecliff Park and Point Atkinson where the underwater region surrounding Whytecliff Park was declared a reserve area on August 7, 1973. It is estimated that between 2000 to 5000 divers may have visited Whytecliff Park in 1973.

(5) It is estimated that water contact activities valued at $8 million took place during September 1973 on Burrard Inlet beaches.

34. Annexed hereto and marked 7, 8, 9 and 10 are sketches indicating the spread of oil or oily film from the "ERAWAN" over the periods of September 25, 26, 27 and 28.

35. The Department of Transport, on behalf of Her Majesty, administers within the boundaries of the Port of Vancouver, the Government Floats, Caulfied, Lynwood

Marina, North Vancouver Government Wharf, which are owned by Her Majesty and were subject to being fouled by oil if the oil from the "ERAWAN" had not been cleaned up.

36. The Department of Transport, on behalf of Her Majesty, maintains approximately 35 Aids to Navigation owned by Her Majesty within the boundary of the Port of Vancouver including radio beacons, light bellbuoys and foghorns. None of these Aids to Navigation were damaged by the oil spill.

37. The aforementioned collision and oil spill occurred in an area populated by fish:

(a) Thousands of adult salmon were in the waters of the Port of Vancouver at the time of the spill; approximately 550 were in the port en route to spawn at the Capilano River Hatchery owned by Her Majesty and situated on the bank of the Capilano River some three miles upstream of its mouth as depicted on the map marked 1 and 2. Hundreds of other fish would spawn naturally in the other spawning streams on the map marked 11 attached hereto. The Capilano River Hatchery is an artificial spawning facility and is part of Her Majesty's salmon enhancement program.

(b) In June 1973 approximately 600 000 juvenile salmon fish and 41 000 steelhead juvenile fish were released from the said Hatchery after being reared at the Hatchery for 2 years; many of these fish would be expected to migrate to the waters at the approaches to the Port of Vancouver and subsequently return in the fall and subsequent years to spawn at the rivers and streams depicted on the map marked 11 as well as up the aforementioned Capilano River Hatchery.

(c) In 1973 a total of approximately 500 000 adult salmon returned from the sea, including the waters in and around the port of Vancouver, to the Salmon spawning streams depicted on map 11 attached hereto, including the Capilano River Hatchery.

(d) In 1973 the estimated commercial wholesale value of fish (principally salmon) associated with the following six streams and rivers which empty into Burrard Inlet: Capilano River, McKay Creek, Mosquito Creek, Lynn Creek, Seymour River and Indian River, was approximately $500 000. Of that approximately $181 000 represented 145 000 pounds of fish that were harvested in September 1973 from the Point Grey-Burrard Inlet area marked Area 29-C on the Department of the Environment, Fisheries Operations, Statistical Map attached hereto and marked 12.

(e) In September 1973 there was an estimated three to four hundred tons of herring and three hundred tons of anchovy fish present in the waters in and around the Port of Vancouver. The wholesale value of the commercial herring has been estimated at $168 000 to $224 000 for 1973.

(f) In September 1973 the Point Grey-Burrard Inlet area depicted as 29-C on the Department on the Environment Fisheries Operations Statistical Map attached hereto and marked 12 was a nursery ground for several species of flatfish, some of which are commercially important.

(g) In September 1973 and throughout the year ten to twelve boats were estimated to be fishing for crabs and shrimps in the approaches to the Port of Vancouver. Approximately 23 000 pounds of crabs and shrimp with a commercial wholesale value of approximately $14 000 were harvested in September 1973 from the waters in and around the port of Vancouver depicted as 29-C on the aforementioned map.

(h) The Port of Vancouver supports a sizeable resident population of Dungeness Crabs (*Cancer Magister*). The area between the First and Second Narrows bridges, False Creek and English Bay, are closed to crab fishing. However, crabs from these areas migrate to other areas in Burrard Inlet and Indian Arm and crab larvae will be dispersed throughout the region and enhance the sport and commercial catches.

(i) Crab traps are set along Spanish Banks and Ambleside by sportsfishermen.

(j) The Waters and tidal foreshore of Burrard Inlet, Indian Arm and Vancouver Harbour are closed to the taking of shellfish because of bacterial contamination.

(k) Due to congestion due in part to navigation fishing is prohibited in the Port of Vancouver, however the Port serves as a reserve for many varieties of fish including: salmon, crabs, shrimp, flatfish.

(l) The fishing industry in British Columbia is one of the top three industries in the Province.

38. (a) The oil that escaped from the "ERAWAN" is deleterious to fish and is disruptive to their life processes. As a result of the aforementioned spill, the flesh of the fish, if it came into contact with the oil, was subject to being tainted, and the accumulative toxins would likely render fish inedible.

(b) Some of the oil that escaped from the "ERAWAN" would sink and possibly create damage to the sea bed including smothering shellfish beds and interfering with fish feeding or breeding grounds.

39. The effects of oil on salmon fish may be indirect as well as direct. Indirectly food organisms and habitat were affected. It is probable that intertidal organisms in several areas including food organisms of juvenile salmon such as amphipods were killed by suffocation after being coated with oil. There was no evidence of damage to or destruction of salmon resulting from the oil discharge.

40. Access by Her Majesty's subjects to recreational areas for sailing, swimming, sportsfishing and the commercial fishery was affected by the said oil spill and would have been even greater if the said oil spill had not been cleaned up.

41. That among the terms and conditions with respect to the admission of British Columbia into the Union of the Dominion of Canada on May 16, 1871 it was agreed that Canada would assume and defray the charges for the protection and encouragement of fisheries. Now produced and marked 13 is a copy of a document relating to the entry of British Columbia into the Union.

42. Now produced and marked 14 are copies of documents relating to the agreement between the province of British Columbia and the federal Government declaring the Harbour of Burrard Inlet to be a public harbour and the property of Canada.

43. Now produced and marked 15 is a copy of lease of Stanley Park from the late King Edward VII to the City of Vancouver dated November 1, 1908.

44. Now produced and marked 16 is a copy of the National Harbours Board Act and By-Law A-1 (Operating Regulations).

45. Now produced and marked 17 is a copy of a map and accompanying index of location and sighting times respecting oil deposited on the foreshore as described in the above-mentioned paragraphs 32 and 33 including Bowen Island and Passage Island.

46. Now produced and marked 18 is a series of photographs depicting some of the oil deposited on the foreshore as described in the above-mentioned paragraphs 32 and 33.

The questions for the determination of this Honourable Court are as follows:

1. Whether the owners of the "ERAWAN" are liable to Her Majesty for damages under the provisions of the *National Harbours Board Act*, regulations and by-laws made pursuant thereto.

2. Whether the owners of the "ERAWAN" are liable to Her Majesty for damages under the *Fisheries Act*.

3. Whether the owners of the "ERAWAN" are liable to Her Majesty for damages in common law through negligence, trespass, public or private nuisance.

4. If the owners of the "ERAWAN" are found to be liable to Her Majesty for any of the said clean-up charges, in what area of damage does liability for clean up attach:

   i) water clean-up (in all or some locations);

   ii) beach-foreshore clean-up (in all or some locations);

   iii) both areas (in all or some locations);

   iv) equipment damage and costs and expenses of cleaning;

   v) payments made to various claimants including fishermen.

It is agreed by the parties that the amount of the invoices are recited herein for identification purposes and are not admitted or agreed as damages as a result of their inclusion in this Agreed Statement of Facts. The inclusion of any particular fact on this Agreed Statement is not deemed to be an admission or concession that such fact is relevant to the issues in the within action or to the questions for the determination of the Court as set out above.

At the opening of the hearing some amendments were made to the statement of claim so as to add following subparagraph 17(e), an additional subparagraph (f) reading "Interest", subparagraph (f) in the original statement of claim now becoming (g). A further amendment was made so as to strike the first five named defendants and last two named defendants from the Style of Cause, which is therefore now amended accordingly. This results from the findings of fact in the judgments of Justice Collier pronounced on January 6, 1975 in cause No. T-3841-73 and T-3842-73, between the owners of the Ship ERAWAN and the Ship SUN DIAMOND referred to in paragraph 21 of the Agreed Statement of Facts and his finding of law that the collision was caused solely by the negligence of either those in charge of the ERAWAN, servants of the defendants owner of the ERAWAN John Swire & Sons (Shipping) Ltd. or other persons for whose negligence the said owner John Swire & Sons (Shipping) Ltd. is responsible at law as set out in paragraph 20 of the Agreed Statement of Facts.

During argument it was not disputed that the incident took place within the 12-mile limit. Ownership of water rights within the Georgia Straits belongs to British Columbia as a result of a 3 to 2 decision of the British Columbia Court of Appeal in a Reference re Ownership of the Bed of the Strait of Georgia and Related Areas[1]. The Supreme Court had previously decided in Reference re Offshore Mineral Rights (B.C.)[2] that the mineral rights belonged to the Federal Crown provinces only being able to claim land above low water without express legislation to the contrary. This judgment was distinguished in the British Columbia judgment and Crown counsel in the present proceedings stated it was not claimed that the Federal Crown owns the water rights.

It appears from an order issued by Collier, J. in December of 1979 that limitation of liability has been made, and that the owners of the Ship SUN DIAMOND and others have been paid the portion due to them so that only the balance of fund, amounting to $377 733.15, remains to satisfy any judgment rendered as a result of the present proceedings. While defendants do not admit any liability, it is agreed that should liability be found there will be a reference as to damages relating to the quantum only. The present proceedings will decide what, if any, elements of damages can properly be included in the claim.

Defendants contend that the proceedings were not properly brought in the name of Her Majesty the Queen but it is plaintiff's contention that it would not have been appropriate for the National Harbours Board to have commenced an action in the circumstances since not only did it not have the resources to contain the oil but the cleanup was in fact directed by and paid for by the Department of Transport on behalf of Her Majesty. If the action had been brought by the National Harbours Board it is, plaintiff contends, an agent of the Crown, and that the principal must have the same rights as the agent.

In support of its contention that the action was properly brought plaintiff relies on the provisions of the *National Harbours Board Act*[3] and what is referred to as the Six Harbours Agreement entered into in June, 1924 between the two governments that the harbour of Burrard Inlet, *inter alia*, is a public harbour within the meaning of Schedule III of the *British North America Act*[4], having become the property of Canada as of July 20th,

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1 (1976) 1 B.C.L.R. 97
2 1967 S.C.R. 792

1871 by virtue of s.108 of the said Act and of Order-in-Council dated May 16th, 1871, which agreement was confirmed by Order-in-Council P.C. 941, June 7th, 1924.

By SOR/67-417 the Governor in Council transferred to the National Harbours Board the management, administration and control of all works and property vested in Her Majesty and situate within the area of the Harbour of Vancouver.

Plaintiff contends that Her Majesty is not precluded from bringing an action in Her own name for damages for negligence and nuisance for pollution to the waters which are the subject of Her jurisdiction. The waters of the harbour may not constitute a "work or property" but Her Majesty's jurisdiction over the harbours is for purposes of litigation and the recovery of damages in the nature of a proprietary right. Her Majesty does not own the sea bed of English Bay but she does own the sea bed and foreshore of Burrard Inlet by virtue of the Six Harbours Agreement. In support of this reference was made to the case of the *Attorney General of Canada and Western Higbie and Albion Investments Limited and the Attorney General of British Columbia, Intervenor*[5], in which it will be noted that the plaintiff was the Attorney General of Canada suing on behalf of His Majesty the King to get possession of the land covered by water in the bed of Coal Harbour and the Harbour of Vancouver. The judgment of Rinfret C.J. points out at page 404:

> *When the Crown in right of the Province transfers land to the Crown in Right of the Dominion, it parts with no right. What takes place is merely a change of administrative control.*

On the same page the learned Chief Justice points out:

> *It is admitted by the Province of British Columbia that the Dominion held the foreshore of Coal Harbour as owners since 1871.*

At page 408 reference is made to the case of *Attorney General for Canada v Attorney General of Ontario*[6] where at page 469 Strong, C.J. said:

> *That the Crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them, seems to be a well recognized constitution canon.*

At the time this action was brought the National Harbours Board could sue and be sued in its own name[7] and this same provision still remains in the present *National Harbours Board Act (supra).*

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3 R.S.C. 1970 C. N-8
4 30-31 Victoria C-3 (U.K.) found in R.S.C. 1970 Appendix
5 1945 S.C.R. 385
6 1894 23 S.C.R. 458
7 *National Harbours Board Act*, 1936, S. of C. 1936, c.42 s.3(3)

By virtue of the *Department of Justice Act*[8] the Attorney General for Canada shall

> *5(d) have the regulation and conduct of all litigation for or against the Crown or any public department, in respect of any subject within the authority or jurisdiction of Canada.*

The National Harbours Board is defined as an agency corporation pursuant to s.66(1) of the *Financial Administration Act*[9] being a Crown Corporation named in Schedule C.

Plaintiff refers to a number of sections of the *National Harbours Board Act* as a result of which it may be said that the National Harbours Board is Her Majesty's "alter-ego". *Inter alia*, subsection 3(2) of the Act provides that the Board is an agent of Her Majesty, the members of the Board are appointed by the Governor in Council and the *Government Employee's Compensation Act* applies to all employees who receive their benefits, except salaries, as employees in the Public Service. S.7(1) gives the Board jurisdiction *inter alia*, over Vancouver Harbour, the boundaries of which are set by the Governor in Council. All property acquired or held by the Board is vested in Her Majesty in Right of Canada (s.11(2)). Contracts awarded by the Board above a certain amount must be approved by the Governor in Council (s.13(3)) which makes by-laws for the direction, conduct and government of the Board and its employees and the administration, management and control of the several harbours works and property under its jurisdiction. All monies received by the Board are paid to the Receiver General of Canada and advances are made out of the Consolidated Revenue Fund to the Board by the Minister of Finance for working capital purposes (s.28). Monies received by the Board are paid to the credit of the Receiver General and credited to a special account designated the National Harbours Board Special Account (s.24). The land under the jurisdiction of the Board is subject to the *Government Property Traffic Act*[10] and the Board does not pay taxes but makes grants under the *Municipal Grants Act*[11].

Reference is made by the plaintiff to the case of *Rex v Southern Canada Power Company Limited*[12]. That action was commenced in the Exchequer Court by the Crown concerning damage to a railway train on an embankment operated by the CNR. The railway was the property of the Dominion of Canada and ownership had never been conveyed to the CNR although the company had been entrusted with its management and operation by statute and given the right to bring an action of this kind. Both the Supreme Court of Canada and the Privy Council held that the Crown was the proper party to bring the action. At page 927 Lord Maugham referred to the "admirably clear" statement of Mr. Justice Davis found in 1936 S.C.R. 8-9 as follows:

> *A preliminary objection was raised by the appellant at the trial and renewed before us that the Crown had no right to take these proceedings in the Exchequer Court of Canada, the contention being that the right of action was by statute vested in the Canadian National Railways Company and that that company could only sue in the ordinary courts and not in the Exchequer Court of Canada. The learned trial judge carefully reviewed the statutory law upon the subject and concluded, I think rightly,*

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8 R.S.C. 1970, c.J-2
9 R.S.C. 1970, c.F-10
10 R.S.C. 1970, c.G-10
11 R.S.C. 1970, c.M-15
12 1937 3 All E.R. 923

that the Crown was the owner of the railway and had never given up its right to sue for any claim it had in connection with the operation of the railway.

Again on the same page:

While a right of action was given to the railway company by s.33 of the Canadian National Railway Act, R.S.C. 1927, c.172, and this action might have been taken in the name of the Canadian National Railways Company, His Majesty in right of the Dominion of Canada did not relinquish his right as owner to sue.

The Minister of Transport administers the *National Harbours Board Act* and under s.7(3) of the *Department of Transport Act*[13] the duties, powers and functions of the Minister extend to the National Harbours Board over which he has the control, regulation, management and supervision. In the present case when the collision occurred the National Harbours Board initially asked for the assistance of the Ministry of Transport in cleaning up the oil but soon realized that the Board itself did not have the resources to do the job and turned the handling of the clean up over to the Ministry of Transport. Its actions in cleaning up the nuisance could, it is contended, be considered in connection with the control of the National Harbours Board by the Minister of Transport acting through his local officials. Defendants in their argument refer to subsection (6)(2) of By-law A-1 being the operating regulations of the National Harbours Board[14] which reads as follows:

The Board may remove any encumbrance, obstruction, nuisance or possible cause of danger or damage at the risk and expense of the person who is responsible therefor.

They contend that there was no transfer by the National Harbours Board to the Department of Transport nor to the Crown of the right to sue for the expense incurred in having the nuisance removed by Clean Seas, the party engaged by the Department of Transport to undertake the work.

Reference was made to the British Columbia case of *National Harbours Board v Hildon Hotel (1963) Limited et al*[15] where leaking oil from the hotel was accidentally pumped into the harbour. The Board took steps to get rid of the oil and charged the hotel company under the provisions of the by-law which contained somewhat similar provisions of those of the present by-law. The Court discussed the difference between private nuisance and public nuisance stating that plaintiff had no claim insofar as its right was vested in private nuisance. At page 644 the judgment refers to the words of Denning, L.J. in *Southport Corporation v Esso Petroleum Co. Ltd.*[16] where he states:

The term "public nuisance" covers a multitude of sins, great and small.

The *Hildon Hotel* judgment goes on to say:

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13 R.S.C. 1970, c.T-15
14 P.C. 1970-1135, June 23, 1970
15 64 D.L.R. (2d) 639
16 1954 2 Q.B. 182 at 196

> *The plaintiff here suffered no personal damage unless it can be said that the defendant's action invoked a statutory obligation on the plaintiff to expend monies to clean up the pollution. It is unnecessary however to speculate on the extent to which public nuisance may cover the present case, for it clearly comes under the heading of nuisance in art. 4(2) and (3) of the by-law supra and may properly be termed a "statutory nuisance".*

It was the Harbours Board which brought the action, however. The defendant also refers to the Supreme Court of Canada case of *Marcel Langlois* v *Canadian Commercial Corporation*[17] in which the judgment of Kerwin, C.J. stated at page 956:

> *If the obligation in this case had been incurred on its own behalf, the decision of the Judicial Committee in International Railway Company* v *Niagara Parks Commission (1941 A.C. 328, 1941 2 All E.R. 456, 1941 3 D.L.R. 385, 1941 W.W.R. 338, 53 C.R.T.C. 1) would apply. It was there held that there was nothing to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as his principal and that the Commissioners, having entered into a certain agreement "on their own behalf" as well as on behalf of the Crown, had done so on the express terms that they were to be liable for its fulfilment. By the latter part of s.10 of the respondent's Act, the obligation here in question is to be taken to have been incurred on its own behalf. It is, therefore, in the same position as if it were not an agent for the Crown and it is subject to the general law of the province of Quebec, as the case was fought on the basis that it was the law of that province that was applicable.*

In the case of *Grant* v *St Lawrence Seaway Authority et al*[18] it was held that civil proceedings for an injunction or a declaration in respect of an alleged public nuisance are open only to the Attorney General suing either alone or on the relation of another. In either case the Attorney General has an unfettered discretion in deciding whether to sue whereas a private person, unless he has sustained some special damage over and above that affecting the public at large or unless he is asserting some special statutory benefit, cannot bring an action to enjoin a public nuisance. This would appear to support plaintiff's contention that action is properly brought by Her Majesty the Queen rather than by the National Harbours Board.

Defendants refer to s.13 of the *National Harbours Board Act*, which, in subsection 1, provides that the Board shall call tenders by public advertisement for the execution of works unless *inter alia* the cost will not exceed $15 000 or there is a pressing emergency in which delay would be injurious to the public interest, which is certainly the case here. Subsection 3 provides, however, that no contract for the execution of any such work shall be awarded without the approval of the Governor in Council in any event for an amount in excess of $15 000 unless, *inter alia*, the amount of the contract as indicated by the tender of the person to whom the contract is to be awarded does not exceed $50 000. There were, of course, no tenders in the present case and the cost greatly exceeded $50 000. As stated in paragraph 17 of the Agreed Statement of Facts the Harbour Board was notified of the collision and the Board's harbour master and the pollution control officer of the Department of Transport arrived at the scene of the collision, whereupon the harbour master requested that Clean Seas Canada Limited dispatch its equipment and men to the area of the collision as soon as possible to contain the oil. In accordance with an

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17 1956 S.C.R. 954

18 Ontario Court of Appeal, 23 D.L.R. (2d) 252

understanding between the Board and the Canadian Coast Guard, Department of Transport, based on an Interim National Contingency Plan designed for dealing with oil spills, the Board called upon the Canadian Coast Guard, Department of Transport and its resources for assistance whereupon the Department of Transport took over command of the clean up operations at the request of the Board, although the Board continued to provide assistance while all clean up costs were paid by the Department of Transport. While the Interim National Contingency Plan does not have the force of law, defendants do not contend that the Board and Department of Transport did not act prudently in the matter and I do not think it is incumbent upon defendants to raise the absence of approval by Order-in-Council as an issue preventing the National Harbours Board from claiming the costs incurred in this clean up nor the Department of Transport acting on its behalf by engaging and paying for the services of Clean Seas, nor that the Crown cannot claim in the event that the National Harbours Board, its agent, could not as a result of the lack of such Order-in-Council. If anything, it appears to me that this is another reason why it was preferable to bring proceedings in the name of Her Majesty.

Plaintiff also relies on subsection 10 of s.33 of the *Fisheries Act*[19] which read at the time of institution of proceedings as follows:

> *10. No civil remedy for any act or omission is suspended or affected by reason that the act or omission is an offence under this section, and where, by reason of the occurrence or existence in, upon or adjacent to any water frequented by fish of any condition resulting from an act or omission by a person that is an offence under this section, the Minister directs any action to be taken by or on behalf of the Crown to repair or remedy the condition or reduce or mitigate any damage to or destruction of life or property that has resulted or may reasonably be expected to result from its occurrence or existence, the costs and expenses of and incidental to the taking of such action, to the extent that such costs and expenses can be established to have been reasonably incurred in the circumstances, are recoverable by the Crown from that person with costs in proceedings brought or taken there for in the name of Her Majesty in any court of competent jurisdiction.*

While there was no formal direction by the Minister to clear up the oil spill, the Minister of Fisheries, who happened to be the Member of Parliament for West Vancouver-Howe Sound at the time, attended personally at the scene of the oil clean up and observed and generally supervised the work that was being done under the direction of the Ministries of Transport and Environment (Fisheries) and Clean Seas Canada Limited. It is admitted in paragraph 28 of the Agreed Statement of Facts that he believed he had the power or authority as Minister of Fisheries to direct that clean up action be taken. Under the circumstances, it would appear there was no need for written direction, his presence at the scene constituting at least approval of what was being done. Defendants further argue s.10 is not operative unless the violators are guilty of an offence which was not the case in the present circumstances.

Subsection 8 of s.33 reads as follows:

> *8. In a prosecution for an offence under this section or s.33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been*

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19 R.S.C. 1970, c.F-14, as amended by c.17, (1st Supp)

> *prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.*

It may introduce the doctrine of *respondeat superior* but it was the pilot who was found responsible by the judgment of Collier, J. for the collision which resulted in the oil spill. He has not been prosecuted for the offence and, in any event, it was committed without the knowledge or consent of the defendant vessel or owners nor was there any lack of diligence on their part in preventing the collision. The defendants argue that subsection 10 merely gives a right of recovery from the person responsible for the offence - that is to say, the compulsory pilot, licenced by the Canadian government itself, so that an estoppel would operate against the present claim.

There is considerable force in the defendants' argument that in the absence of proof of commission of an offence which is not in issue before the Court in these proceedings, or in any event an offence for which defendants can be held liable, s.33 of the *Fisheries Act* cannot be invoked to justify plaintiff's claim. It is true that the *Fisheries Act* as a whole did not appear to give authority for the cleaning up of oil spills despite the fact that they are undoubtedly severely damaging to fisheries. Nevertheless, the Minister was present and assisted in directing the clean up and undoubtedly acted properly in doing so and might perhaps be said to have been acting on behalf of the Crown in so doing. In any event, plaintiff's right to claim does not rely solely on the provisions of the *Fisheries Act*.

In further support of proceedings being brought in the name of the Crown plaintiff also invokes the doctrine of *parens patriae* contending that the Attorney General not only represents Her Majesty's interests but is the guardian of the public interest generally. This involves the institution of proceedings in cases of public nuisance. In the text by G.S. Robertson, Civil Proceedings By And Against The Crown, I find the statement at page 2:

> *...The right of the Crown, however, to proceed by prerogative process is often specifically preserved, and still exists, unless specifically forbidden; and it is not seldom exercised, in spite of a special provision for suits by or against a particular Government department.*

The general principle has been recognized in the American Courts in the case of the *State of California by and through the Department of Fish and Game*, Plaintiff, v *S.S. Bournemouth*[20] in which at page 929 the general observation appears:

> *Oil pollution of the nation's navigable waters by seagoing vessels both foreign and domestic is a serious and growing problem. The cost to the public, both directly and indirectly of abatement is considerable. In cases where it can be proven that such damage to property does in fact occur, the governmental agencies charged with protecting the public interest have a right of recourse in rem against the offending vessel for damages to compensate for the loss.*

There appears to me to be little doubt that an oil spill constitutes a public nuisance and that it is important that it should be cleared up as rapidly as possible to

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20 (1969) 307 Fed. Supp. 922 (U.S.D.C.)

mitigate the damages caused by it. Whether this is done by the National Harbours Board or the Department of Transport it would not be going too far to say that the Crown is under at least a moral, if not a legal, obligation to see that this is undertaken. In the case of *The Attorney General v PYA Quarries Limited*[21], Denning, L.J. as he then was, stated at page 190 in distinguishing between a public nuisance and a private nuisance:

> *The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals.*

He goes on to state:

> *...So here I decline to answer the question how many people are necessary to make up Her Majesty's subject generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.*

The question of whether plaintiff can recover for expenses incurred cleaning up the oil spill from private property will be dealt with later when I come to consider the question of damages but I have little doubt that a serious oil spill, even if it originated outside the limits of the Port of Vancouver (see paragraph 15 of Agreed Statement of Facts), which drifted into the harbour and on to the foreshore, constituted a public nuisance. In the case of the *Attorney General for the Dominion of Canada v Ewen and the Attorney General for the Dominion of Canada v Munn*[22], the cause of action dealt with a claim for injunctions restraining the defendants, their servants agents or workmen from permitting offal or remnants of fish or other deleterious matter to pass into the Fraser River. At page 470 the judgment states:

> *The defendant's first ground is that, as the Dominion Legislature has expressly legislated with respect to offal, and imposed fines and imprisonment for any infraction of the law to be recovered before Justices of the Peace, therefore this Court has not power to impose an additional penalty by way of injunction and he relies on the Institute of Patent Agents v Lockwood, (1849) App. Cas. 347.*
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> *If this was an action to recover damages for allowing the offal to escape into the river, there would be great force in the contention, but what the plaintiff seeks to restrain is the nuisance which arises from the defendant's neglecting to comply with the law; the nuisance affects the public, and whether or not there was any law prohibiting the placing of the offal in the river, the defendant would be liable for a nuisance, even if it arose from doing a lawful act.*

An Australian case in the Supreme Court of New South Wales, that of the *Wagon Mound No. 2*[23] is of interest. A spillage of oil occurred from the vessel into the harbour while bunkering. It was held that although the result of the spillage was not reasonably foreseeable the defendant was not liable in negligence but the court found that the spillage created a public nuisance. The headnote reads in part:

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21 1957 2 Q.B. 169
22 1895 B.C. Reports, 468
23 1963 1 Lloyd's List Law Reports 402

...(i) that plaintiffs could not maintain claim based on private nuisance because there was no interference with use and enjoyment by plaintiffs of their land, but liability for public nuisance was not restricted to cases of injury to plaintiffs' interest in their land, nor was it essential that the nuisance should emanate from defendant's land; that, if defendant created a nuisance and there was then a public nuisance on navigable waters open to the public defendant was prima facie liable, although it was not negligent; (ii) that presence of large quantity of oil on harbour waters constituted a public nuisance; (iii) that plaintiffs suffered "particular injury" in that they suffered serious losses which other members of the public did not suffer.

(The oil took fire in the harbour and damaged plaintiff's vessel).

Defendants contend that the Crown cannot recover on the basis of a public nuisance having been caused, as it has not suffered special damage to property or chattels. The admitted facts disclose, however, that approximately 211 tons of fuel oil escaped into waters both adjacent to and in the Port of Vancouver being deposited in part on the foreshore and onto beaches below the high water line. Forty commercial fishermen had fouled hulls and commercial fishing gear and approximately $12 600 was paid by Her Majesty to them respecting these complaints. Her Majesty owns lands described in paragraph 30 of the Agreed Statement of Facts including the foreshore and bed of the public harbour of Burrard Inlet and Stanley Park. Oil reached the foreshore at points along approximately 25 miles of coastline (paragraph 32) and there was a likelihood that if it was not cleaned up from the beaches further high tides would refloat and redistribute it onto previously clean area. There are a number of public beaches, parks and thirteen marinas in the area and scuba diving takes place at a place where the underwater region has been declared a reserve. The Department of Transport, on behalf of Her Majesty, administers within the boundaries of the Port of Vancouver various government floats and wharves owned by Her Majesty which were in danger of being fouled if the oil had not been cleaned up. There were 439 leases respecting properties owned by Her Majesty in areas surrounding the Port of Vancouver. (paragraph 12). It is difficult to see how defendants can contend that the Crown has not suffered any special damage to property or chattels.

Defendants contend, however, that since the Crown has statutory remedies in the form of fines for oil pollution and civil liability in certain circumstances, it should be limited to those remedies. Reference was made to Part XX of the *Canada Shipping Act* inserted by c.26 of the Second Supplement of the 1970 Revised Statutes dealing with pollution and specifically to s.734 which creates civil liability and specifically authorizes proceedings to be instituted by Her Majesty against the owners of the ships of the pollutant to recover the reasonable costs of reducing or mitigating the damage which may reasonably be expected to result from the discharge.

The existence of such a statutory remedy does not, I believe, deprive Her Majesty of the right to exercise common law rights available to Her, nor does the jurisprudence referred to by defendants in support of this justify such a general conclusion. I have dealt with the *Attorney General v Ewen case (supra)* and the case of *Barraclough v Brown*[24] merely dealt with Court jurisdiction and did not involve the Crown. The case of *Attorney General of Canada v Brister*[25] in the Nova Scotia Supreme Court led to a divided opinion, the learned judges dividing 2 to 2 on this issue although agreeing in the Appeal for other reasons. I find of particular interest the statement of Smiley J. at page 72-3:

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24 1897 A.C. 615
25 1943 3 D.L.R. 50

In 1 Hals. (2nd ed.), p. 11 para. 11, appears the following statement taken from the decision of Willes J. in Wolverhampton New Waterworks Co. v. Hawkesford, 6 C.B. (N.S.) 336 at p. 356, 141 E.R. 486:

'There are three classes of cases in which a liability may be established founded upon a statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute, which gives a special and peculiar form of remedy different from the remedy which existed at common law. There, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is where the statute gives the right to sue merely, but provides no particular form of remedy. There the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which, at the same time, gives a special and particular remedy for enforcing it...The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class.'

Paragraph 11 proceeds as follows: "In each case, however, in deciding whether a statutory remedy is, or is not, intended to be the only remedy for breach of the statutory duty, the particular statute must be examined. And even where the ordinary remedy by action for damages is excluded, there may also be a concurrent remedy by injunction."

In my opinion the Navigable Waters Protection Act does not exclude any remedy which existed under the common law previous to its enactment.

Defendants further contend that the Crown, having elected the remedy of abatement is unable to proceed with any other remedy, relying on the very ancient *Baten's* case[26] which held that a nuisance may be redressed by action, or by the party aggrieved entering and abating the nuisance, but in the latter case he shall not have an action or recover damages, and on the cases of *Ewen* and *Brister (supra)* and on the case of *Lagan Navigation Company v Lambeg Bleaching, Dyeing and Finishing Company, Limited*[27] in which the headnote states "the abatement of a nuisance by a private individual is a remedy which the law does not favour". Here we are dealing with the Crown which, through agents, took steps to abate the nuisance, and under contemporary conditions of increasing danger of serious ecological damage from oil spills, it is indisputable that this should be done immediately and is not an alternative remedy to claiming compensation for the damages caused by the spill.

To decide otherwise would constitute an unjust enrichment for defendants who were admittedly incapable of cleaning up the spill themselves, but whose vessel created the nuisance, whether the action can be based on negligence for which they are responsible or not.

Defendants made one further argument namely, that even if the Crown has jurisdiction with respect to navigable waterways, this is restricted to areas of Federal jurisdiction. It has already been stated (*supra*) that as a result of the Reference re

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26 9 Co. Rep. 53 B 77 E.R. 810
27 1927 A.C. 226

Ownership of the Bed of the Strait of Georgia and Related Areas, Her Majesty, in the present case, does not claim ownership of the water rights within the Georgia Straits. I do not believe that it follows, however, that Her Majesty in Right of Canada cannot take any responsibility for abatement of a public nuisance occurring therein and more specifically the area in question, including Burrard Inlet under the jurisdiction of the National Harbours Board, which by the Six Harbours Agreement was declared to be a public harbour, the property of Canada.

The case of *Dominion of Canada and Province of Ontario*[28] adds little to this contention, merely confirming that there is a distinction between the Crown in Right of Canada and the Crown in right of a Province, as in the *Ewen* case (*supra*).

Before concluding this part of the reasons reference might also be made to s.16 of the *Interpretation Act*[29] which reads:

> *16. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.*

In conclusions, therefore, I find that the present proceedings are properly brought in the name of Her Majesty the Queen in Right of Canada whether they have been brought on behalf of and in place of the National Harbours Board which might perhaps have brought them, or as owners of the works and property in the Harbour of Vancouver transferred to the Board for administration, management and control, and other real property within Burrard Inlet *inter alia*, or whether as a result of a general right to take action with respect to a public nuisance and mitigate damages which might foreseeably result therefrom. There is also an arguable case that action might perhaps have been taken by plaintiff under the provisions of the *Fisheries Act*, as among the terms and conditions with respect to the admission of British Columbia into the Union of the Dominion of Canada on May 16, 1971, it was agreed that Canada would assume and defray the charges for the protection and encouragement of fisheries (paragraph 41 of Agreed Statement of Facts). It is not necessary to rely on the *Fisheries Act*, however, to justify Her Majesty in bringing the present proceedings.

The jurisprudence does not establish that because a statutory right is given to the Crown or to some agent or quasi-agent of the Crown, which has been given certain rights for administrative purposes as a matter of convenience, the Crown is thereby deprived of Her right to institute proceedings. See in this connection *R. v Southern Canada Power Company Limited* and *Attorney General for Canada v Attorney General of Ontario* (both supra).

I now turn to the question of damages. The Crown in cleaning up the oil spill was not acting on behalf of defendants by virtue of any express or implied authority. Private owners of lands on the foreshore which might have been damaged by the oil spill would have had an action available to them against defendants for private nuisance and possibly for negligence although I make no finding on this since the issue is not before me. Nevertheless by taking or authorizing the taking by appropriate agents of proper

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28 1910 A.C. 637
29 R.S.C. 1970 c.1-23

measures to contain and abate the consequences of the oil spill and thus abate the public nuisance, some benefit was undoubtedly conferred on such proprietors and a multiplicity of actions thereby avoided which inured to the benefit of defendants. While the Crown has no authority to act on behalf of private individuals who might have had claims, nor would it most probably have any legal responsibility towards them had it failed to do so since their action would be against defendants, what was done was reasonable and appears to be a good example of the *parens patriae* principle with the Crown, through its agents, acting as what is referred to in civil law as "bon père de famille" or "prudent administrator" as this phrase is usually translated.

It is nevertheless a serious matter to take steps, however reasonable, to abate claims which but for this intervention might have been made against another, and then to claim compensation for the costs of the work so undertaken, so that the extent to which plaintiff can be compensated for such work is a difficult one.

In paragraph 26 of the Agreed Statement of Facts a summary of costs prepared by the Department of Transport indicated water cleanup $270 568.03; beach cleanup $297 598.25; equipment cleanup and sundries $35 548.07: Total $603 714.35. No breakdown of figures was given, this being left to the reference on the quantum of damages.

Paragraph 24 states that payments totalling $12 600 were made to approximately 40 commercial fishermen who had claimed that the oil had fouled hulls and commercial fishing gear. These payments would appear to have been made on a voluntary basis but as indicated, by the making of same defendants were relieved of the possibility of actions by these fishermen.

In the as yet unreported case in the Supreme Court of British Columbia No. C-773353 *National Harbours Board v Imperial Oil Limited et al*, judgment dated April 28th, 1981, oil had been pumped into a wrong fill pipe leading into an abandoned underground tank where it spilled out onto the furnace room floor in the bus depot and eventually entered a storm sewer being carried into the harbour. It was found that the employee was negligent but on page 10 the judgment states:

> *Despite my findings, the plaintiff's action founded in negligence must fail. The plaintiff did not show any damage to itself or to its property by the acts of the defendants. The expense of cleaning the oil from the water in the harbour arose from the statutory undertaking placed upon it by the Act and the by-law.*

The judgment goes on to state on the same page that the plaintiff's action in nuisance against the employee and Imperial Oil Limited based on his acts in the course of employment must succeed. Reference was also made to the case of *Bethlehem Steel Corporation v St. Lawrence Seaway Authority*[30], judgment by brother Addy, J. This dealt with economic loss. However, there had been no damage to the person of the claimant or to property in which the claimant might have some actual or potential proprietary interest. It was found that the general rule is that damage is not recoverable even where it might have been foreseeable and where the proper cause of relationship between the tortious act and the damage exist. Neither of these cases is of much help in deciding the elements of damage that should be allowed in the present case.

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30 79 D.L.R. (3d), 522

There was, as of December 4th, 1979, the date of the limitation of liability order, an amount of $377 733.15 remaining as principal in the limitation fund. Since both the payments out of it resulting from the said order provided for payment of interest from 1973 and presumably the final judgment to be rendered herein after the reference would make similar provision, it may well be that there will not be sufficient money in the fund to settle any very large portion of plaintiff's claim herein. Nevertheless, a finding has to be made so that the referee and the parties may be guided as to what elements of damages may be considered. In this connection I would allow the entire cost of the water clean up, whether within or outside the harbour limits, the costs of the beach and foreshore clean up on all property belonging to the Crown, but not on private property, equipment damage and costs and expenses of cleaning, and payments made to various claimants, including fishermen, to the exoneration of defendants although such payments were voluntary in nature.

ORDER

Questions for determination of this Honourable Court are answered as follows:

1. Whether the owners of the ERAWAN are liable to Her Majesty for damages under the provision of the *National Harbours Board Act*, regulations and by-laws made pursuant thereto.

   A. Yes.

2. Whether the owners of the ERAWAN are liable to Her Majesty for damages under the *Fisheries Act*.

   A. Possibly not and not essential for purposes of this claim.

3. Whether the owners of the ERAWAN are liable to Her Majesty for damages in common law through negligence, trespass, public or private nuisance.

   A. Defendants are liable to Her Majesty in common law for public nuisance and, to the extent that She or a Crown Agency on whose behalf She is suing is the owner of private property damaged by the oil spill, for private nuisance.

4. If the owners of the ERAWAN are found to be liable to Her Majesty for any of the said clean up charges, in what area of damage does liability for clean up attach:

   i) water clean up (in all or some locations);

   A. liability attaches for this in all locations affected by the oil spill.

   ii) beach foreshore clean up (in all or some locations);

   A. in all beach and foreshore owned by Her Majesty or by an agency on whose behalf She is suing.

   iii) both areas (in all or some locations);

A. see answer above.

iv) equipment damage and costs and expenses of cleaning;

A. all such damage.

v) payments made to various claimants including fishermen.

A. such payments, although made voluntarily, to the exoneration of defendants.

There shall be a reference as to damages. Costs of this motion are in favour of plaintiffs.

NEWFOUNDLAND PROVINCIAL COURT

R. v. FISHERY PRODUCTS LIMITED

ANSTEY Prov. Ct. J. Grand Bank, September 4, 1981

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charge under s.33 (2) resulting from spill of fuel oil into harbour - Accused found not guilty - Crown has not proven beyond reasonable doubt that accused permitted spill of fuel oil.

On November 8, 1979 about 10,000 gallons of fuel oil were spilled from the facilities operated by Fishery Products Ltd. at Marystown into marine waters during a fuel off loading operation from a tanker of Irving Oil Ltd. The Court found that Irving was neither an employer nor an agent of the defendent. The Court had a reasonable doubt as to who was responsible for permitting the oil to enter the water.

ANSTEY Prov. Ct. J.: - the onus is on the Crown to prove, beyond a reasonable doubt, that on the date and place set out in the information,

(1) there was a deposit of a substance in Marystown Harbour, Mooring Cove, Nfld.

(2) that the substance was fuel oil - a deleterious substance.

(3) that the waters of Marystown Harbour are frequented by fish.

(4) that the deposit was permitted, or released into the water by the defendant company, Fishery Products Limited, through its employees or agents.

From the evidence I find:

(1) on the date and at the place set out in the information, there was a deposit or release of a substance, namely fuel oil, which I find further to be a deleterious substance.

(2) the deposit or release was in waters frequented by fish.

I keep in mind this is not a civil action and the court is not called upon to determine who is responsible for the deposit or release and the extent of liability, but, the Crown must satisfy the Court beyond a reasonable doubt that Fishery Products Limited, through its employees or agents, is indeed the party responsible. (Section 33 (8) Fisheries Act as amended).

The question then for my determination is: Has the Crown proven beyond a reasonable doubt Fishery Products Ltd., by its employees or agents, permitted the deposit or release of the deleterious substance referred to?

In considering the whole of the evidence, I find the defendant Company has raised a reasonable doubt as to permitting, by its employees or agents, the oil to enter the water. In making this finding, I am influenced by the evidence of both Crown and

defence witnesses as it relates to the responsibility of Irving Oil Ltd., which company is neither an employee nor agent of the defendant company.

The Crown in my opinion therefore has not proven beyond a reasonable doubt the defendant company permitted the deposit of the deleterious substance referred to on the information and for this reason the charge is dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. EQUITY SILVER MINES LTD.

SMYTH, Prov.Ct.J. Smithers, June 20, 1983

Sentencing - Pleas of guilty to three charges under s.33 (2) of Fisheries Act, R.S.C. 1970, c.F-14, as amended - Accused knew there was risk that pollution would occur - Deterrence is major consideration - $4,000.00 fine on each count - total fine $12,000.00.

The accused corporation entered pleas of guilty to three charges under s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. Acidic surface drainage from waste rock dumps at its open pit mining operation had entered a creek which contained fish. The accused knew, from conflicting scientific opinions which it had received, that there was a risk that this could happen. In a case of this type, deterrence is a major consideration and, notwithstanding the amount of money now being spent by the accused to solve the problem, a fine of $4,000.00 on each of three counts (total $12,000) is imposed.

D.J. Cliffe, for the Crown.
G.A. Letcher, for the accused.

SMYTH Prov.Ct.J.: - Now, this case concerns offences against s.33 (5 b) of the Fisheries Act, which were committed by the defendant Equity Silver Mines Limited on the 7th, 20th and 28th days of April 1982. The company pleaded guilty to these three charges on the 8th of June 1983.

The submissions and evidence that I heard that day, on the 9th of June and today, were directed to the question of sentencing. There is no minimum penalty for offences of this type. The maximum for first offences is a fine not exceeding fifty thousand dollars. These are to be treated as first offences.

The company carries on an open pit mining operation near Houston, British Columbia. It began production in October 1980. The deleterious substance involved has been referred to as acid mine water or acid mine drainage. It results from the reaction of sulphur contained in rock with naturally occurring oxygen and water. The result is sulphuric acid, although I infer from the evidence, it is very dilute. The process may be hastened by soil bacteria so, it can occur naturally but there is no doubt that open pit mining is calculated to facilitate the production of acidic water, provided natural conditions are favourable.

Ultimately then, this acid mine drainage is not a direct by-product of mining, so much as a by-product at one remove.

The acid mine drainage here resulted from naturally occurring water making its way through the mine site. It travelled through two elementary dams designed to deal with silt, not acidic water, and from there into two small creeks. Neither contains fish, both empty into the Buck Creek System, which has some recreational fishing value, although it is not exceptional.

Prior to the start up of its operations, the company had received conflicting scientific opinions about whether acid mine drainage would occur at its Houston site. Accordingly, they monitored the situation after the beginning of their operations. The potential existed and indications of it appeared as early as the fall of 1980. That it was a serious problem became evident in the fall of 1981 -- sorry, in December of 1981.

Much of the evidence in this case has concerned the steps taken by the company to solve this problem, and I am quite satisfied that they are working diligently and successfully at it. In 1982, they spent between one point three and one point four million dollars to come to terms with acid mine drainage. They are working closely with environmental authorities. They have set no dollar limit on what they will spend to prevent acid mine drainage. They think it could cost ten to twenty million dollars. What is more, the evidence is that there has been no environmental damage as a result of the release of acid mine water to date.

In sentencing the defendant I have been much assisted by submissions of both counsel, and I approach the question on the basis that the company has made a major commitment to environmental responsibility and particularly to this problem. Senior mine management have been present throughout this sentencing hearing. The company has a strong sense of community in which it takes some pride.

There is unquestionably much that mitigates the severity of these offences. I am also of the opinion however, that deterrence is a major sentencing consideration in cases of this type. I take into account that the possibility of acid mine drainage at this site had not been foreclosed before operations began. That no doubt, is why water quality was monitored; and although in so doing the company is seen to have wanted to be made aware of this environmental hazard should it occur at the earliest moment, I think there is no other inference to be drawn than that the company chose to have the risk of this occurrence fall on the environment, though the risk was not thought to have been great, and that assumption was made on a reasonable scientific footing, but to that extent, it seems to me, the defendant preferred its private as opposed to the public interest.

Now, defence counsel has suggested that the penalty as to counts three and four ought to be substantially less than that for count two on the basis that there was nothing the company could have done to prevent the occurrences on April 20 and 28, given the conditions that existed on April 7. To the extent that this submission implies reduced culpability I reject it. However, the totality of the sentence be taken account of.

Having regard to all of the factors in this case then I sentence the defendant to pay a fine of four thousand dollars on each of counts two, three and four.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. WILBY AND SMITHANIUK

COLLINGWOOD Prov.Ct.J. White Rock, June 3, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charge under s.31 (1) - Accused convicted - However, in view of mitigating circumstances, fine of $10.00 appropriate.

The accused were charged with an offence under s.31 (1) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, after carrying out certain activities to improve the foreshore of their properties. They were convicted but in view of mitigating circumstances were each fined only $10.00. Their activities were not particularly devastating to the fish habitat, and the activities of the Department of Fisheries and Oceans in leaving one of the accused with the impression that verbal permission for the project was adequate bordered on negligence.

D.R. Kier, Q.C., for the Crown.
J.D. Spears, for the accused.

COLLINGWOOD Prov.Ct.J.: - Thank you, gentlemen. The last occasion when this matter was before me, I adjourned it to this date so that I would have an opportunity to consider the submissions made by Counsel and the various cases which you have put before me for my review. It has been a matter which has been before this Court for some considerable period of time and indeed, although there were delays between the various days, I believe we heard evidence for some three days in total. Therefore, a brief review of that evidence might serve useful, in light of the length of time involved.

The accused Wilby purchased property on Crescent Road in Surrey in 1980 and shortly thereafter concerned himself with the improvement of its foreshore on the Nicomekl River. The foreshore was in a disastrous condition, being littered with an accumulation of rubble, old tires, crab traps, bales of newspaper and abandoned structures. The contemplated improvement involved the neighbour's property, belonging to Mr. Smithaniuk and Mr. Smithaniuk actually assisted with the physical labour on occasion and made monetary contributions towards the work. Clearly what was done was to his benefit. The works consisted of the filling of low areas, the placement of rip rap and a prefabricated concrete wall along the foreshore, the driving of necessary pilings, dredging in the river itself and the creation of a boat ramp and a filled dock or quay area extending out into the river. Interestingly, these works are still, despite the improvements, subject to inundation at certain high tides.

Wilby was apparently sufficiently concerned about the works in the area in question to initiate contact with the Ministry of Fisheries and Oceans and eventually spoke to a Mr. Elliason. Wilby advised Elliason of the nature of the works, and told him of the location and at one stage anticipated that Elliason might visit the site itself. However, Elliason adopted a role best described, or perhaps I should say politely described as passive and did not pursue the matter, leaving Wilby with the decided impression that verbal permission for the project was adequate. Smithaniuk in turn relied largely upon his neighbour's enquiries and upon a 1972 letter from the B.C. Lands Branch which he felt allowed there placement of his existing dock.

The works in question were completed in the fall of 1980 and surprisingly did not come to the attention of the Federal Fisheries personnel until they were viewed from a helicopter in November 1981, that followed by a site visit in December of 1981.

Certain findings of fact are warranted.

Firstly, the area in question is an estuary which, by its nature, would normally provide feeding habitat for juvenile salmon.

Two, juvenile salmon feed on the substrate of such stream beds, which food consists of benthic invertebrates.

Three, significant numbers of these benthic invertebrate were present in the immediate area and therefore make it a productive habitat for juvenile salmon.

Four, substantial disturbance of or placement of foreign material upon the substrate will alienate the fish habitat to varying degrees and for varying periods of time.

Five, while permanent alienation of the fish habitat is not out of the question, clearly that did not occur here. In that regard, the Court accepts the evidence of Dr. Gary Vigers that these works created a stable environment which may be colonized by fish food organisms or utilized by fish. This condition was verified by his observations of extremely abundant number of juvenile salmon in the embayment at the Wilby foreshore as well as the samplings and laboratory tests carried out by the Fisheries personnel.

Six, The area covered by the works, while of significant size, is something less than the decimal one seven acres suggested by the surveyor and without question, a portion thereof was fish habitat within the meaning of the Fisheries Act.

I feel obliged to comment briefly upon Mr. Wilby himself, since he was indeed the central figure in this trial. I am impressed with Mr. Wilby as a witness. I am satisfied that for the most part his intentions and actions were those of an intelligent, prudent man. His contact with the elusive and apparently forgetful Mr. Elliason affirm that opinion. It is unfortunate that he did not see fit to confirm his dealings with Mr. Elliason in writing.

Regretfully, I cannot be as complimentary to the Federal Ministry of Fisheries and Oceans. That comment is not directed to the various Ministry personnel who gave evidence before this Court, but rather is intended to bear upon the administration and their dealings with the information-seeking public. I am frankly astounded by the apparent lack of system or procedure to effectively accommodate incoming enquiries, such as those made by Wilby. Their failure to pursue even the remote possibility of such potentially damaging undertakings is inexcusable and in my opinion borders on negligence.

In argument, certain cases were put to the Court for consideration. In my view, the case at bar is distinguishable from the circumstances set out in *R.* v. *Richmond Plywood Corporation Limited*, a decision of His Honour, Bruce Macdonald, in the Vancouver County Court bearing Registry number CC810556, handed down in

September of 1981. The land area in the case at bar is by comparison considerably larger, thus eliminating the application of the de minimis non curat lex rule, and further, by its very nature, should have left no doubt as to whether it constituted a fish habitat.

I must also reject the 1979 Supreme Court of Canada decision of *R.* v. *Chapin* found in volume 95 of the Dominion Law Reports, third series, page 13, as being of assistance to Messrs Wilby and Smithaniuk. It is distinguishable from the matter before me on its facts. Here, the evidence clearly indicates that Wilby had reason to suspect that the land use that he had in mind might constitute a violation of some regulation, that is borne out by his contact with Fisheries.

This offence, created by s.31 of the Fisheries Act, is one of strict liability. Offences of this nature were considered by the Supreme Court of Canada in *R.* v. *Sault Ste. Marie*, 1978 decision found in, amongst other publications, in the third volume of the Criminal Reports, third series, at page 30. In offences of this sort, there is no necessity for the Crown to prove mens rea since the doing of the act imports the offence, leaving it open, however, for an accused to avoid liability by proving that he 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 that particular event.

While I have inferred that Mr. Wilby's actions were not unreasonable, the proper test for both he and Mr. Smithaniuk must, in this Court's opinion, be the degree of reasonableness and care to be expected of them in their dealings with the project. The evidence here clearly discloses a significant undertaking on the foreshore, bordering upon a major natural habitat. Considering their respective backgrounds, education and accumulated knowledge, they should have anticipated the need for better study, planning and approval of the works. In that regard, their precautions were not reasonable. They were naive to assume that Fisheries's consent could be obtained so simply.

Before the present condition of natural ambience was achieved, there occurred on that foreshore, at the very least, a harmful alteration, disruption and destruction, albeit temporarily, of fish habitat. This came about directly by the construction of the works which, by the nature and scope of these works, was inevitable. It was that inevitable aspect which should have been anticipated by Messrs Wilby and Smithaniuk.

Accordingly, I must find them both guilty as charged.

Now, at this point I probably should ask Counsel for guidance with respect to sentencing, but there are certain cases where Courts would deem that unnecessary and that this case is in that category. Messrs Wilby and Smithaniuk are obviously not the type of persons who would normally be found in the Court system. Nor has the result of their action that brought them here proved to be particularly devastating or permanent in nature. Properly permitted, the same work might well have been carried forward within the law. Further, the role played by the Ministry of Fisheries and Oceans already referred to cannot be ignored. All of these factors, in my opinion, lead to mitigation.

In sentencing, therefore, I would defer to Messrs Gilbert and Sullivan, for indeed if there was ever a case where the punishment must fit the crime, this is it. Mr. Wilby, Mr. Smithaniuk, would you both stand, please. I'm satisfied, gentlemen, as to your guilt, I have already expressed that. I am not satisfied that great things will be accomplished if you are dealt with severely and I do not intend to deal with you severely. I am assessing a fine in both instances, that fine will be low. Both of you will be fined ten dollars, in default of payment of that fine, one day in jail.

BRITISH COLUMBIA COUNTY COURT

R. v. JACKSON BROTHERS LOGGING CO. LTD.

HUDDART Ct.Ct.J. Vancouver, June 30, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charge under s.31 - Fish habitat destroyed by road - Building operations - Due diligence not made out - Original plan should have been changed as construction proceeded.

The accused was charged with carrying on a work or undertaking that resulted in the harmful alteration, disruption or destruction of a fish habitat contrary to s.31 (1) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. While constructing a road, the accused allowed granitic material to enter a creek. The material was carried during fall and spring freshets to the mouth of the creek where it eventually destroyed a fish habitat.

On the facts, the Crown established beyond a reasonable doubt that the accused's road-building operations had caused the destruction of the fish habitat. The defence of due diligence was not made out since the accused's cost-efficient approach, its overriding concern for speed and its reliance on the British Columbia Forest Service had blinded it to its duty to exercise care when constructing the road. It should have changed its original plan, which may have initially seemed reasonable, as construction proceeded. The accused was therefore convicted.

D.R. Kier, Q.C., for the Crown.
D. Martin, for the accused.

(Editor: a fine of $6,000 and a clean up order were imposed.)

HUDDART Co.Ct.J.: - (Orally) The accused is charged with carrying on a work or undertaking that resulted in the harmful alteration, disruption or destruction of a fish habitat contrary to s.31(1) of the Fisheries Act during the period commencing April 12th, 1978 and ending August 28th, 1980. The fish habitat is a spawning channel for chum and coho at the mouth of Angus Creek in the Sechelt Peninsula. The work or undertaking was the road building activities of the accused about one mile up Angus Creek at the 1140 foot elevation. It is clear on the evidence that the fish habitat was disrupted as early as October 1978, that there was a marginal fish habitat by December 26th, 1978, and that the habitat continued to be disrupted during 1979 until it was destroyed completely by January, 1980. Nor is there any doubt that the accused constructed a cross-over road from the Chapman Creek area to the Grey Creek area between the months of March and July during 1978 with the approval of the British Columbia Forest Service under its active regular supervision.

The Crown alleges that the angular pinkish granitic material that filled the spawning channel between October, 1978 and January, 1980, and that was not native to the delta area of Angus Creek, was deposited in the creek by the road building activities of the accused, and found its way during the fall and spring freshets from 1978 to January, 1980 to the spawning channel.

Counsel for the accused argues firstly that the Crown has failed to prove beyond a reasonable doubt that the road building operations caused the disruption and ultimately the destruction of the fish habitat. It argues secondly that if it did, the accused took all reasonable steps to avoid the particular event so that a defence of due diligence within the meaning of s.33(8) of the Fisheries Act has been made out.

In my view the first defence must fail. Insignificant amounts of mineral material not native to the delta had arrived at the mouth of Angus Creek by October, 1978. On November 9th, 1978, fines were moving downstream covering the reeds granitic material not native to the delta. By December 21st, 1978, the pinkish granitic material was three and-a-half to four feet deep in the spawning channel. It was uncontroverted that no similar event had occurred in the years after 1970 when the channel had been cleared and riprapped.

On July 17th, 1979, the stream bottom below the East Porpoise Bay highway was covered with quite angular pink granitic material not natural to it to a depth of about one and one-half feet. This was not eroded into the gravel as one would expect of the normal processes of the stream. A new spit had been formed 60 to 75 metres long with six inches of this material covering marine life of recent origin.

Between August 28th and September 4th, 1980, Fisheries Canada removed an average of 3 to 4 feet of a granitic type of material with a minimum of silt in it for a distance of about 175 feet. The top two feet were composed of small pinkish white material mixed with round boulders, 8 to 9 inches in diameter. The next layer which was very distinctive was made up of 90 percent pinkish white material, not mixed with the large boulders. Below those fines was the usual spawning gravel. Since the spawning channel was re-opened, the fish habitat has returned to normal.

Towards the end of March, 1980, Jackson Brothers had reached the north side of Angus Creek. It was building a finished logging road as it went, first falling timber on the right-of-way and then pulling the logs off. When it reached rock about 200 feet north of the creek, it started blasting round for round down into the creek bed and up the south side of the canyon. Ultimately the road was built half on solid ground and half on material from side-casting. It continued for about 300 feet south of the creek to within a short distance (evidence varied from 10 to 30 feet) of a chute area they had identified during the layout of the road as a problem area. The cutting through of the road created a landslide. The slide which occurred about 2 hours after a blow, buried that cat that was being used to clear rock. The material that had slid went over the machine, down the bank, and back down to the road about 100 feet. The day after the slide the accused dug out the material behind the cat, back-hauled it 200 feet down the road where it put it over a bank onto an apron. Another machine was used to pull the cat out. When they did that, the rest of the slide went down and took the place of the cat. The excess went over the bank, and over-burdened the apron and went into the creek. The road construction stopped and the loose material was cleared up and the accused started building the road from the south side.

Late in May or early in June, Jackson Brothers returned to the canyon where they hit rock about 400 feet from the slide area to the south. They blasted round for round to build a road to the edge of the chute. Then as planned, they built a steep, terraced road to the top part of the chute, pushing the side-cast material over onto the road built to the south side of the chute, digging it out and back-hauling it to a dumping area 500 feet to

the south. They used the material in road building and particularly to build the road 10 feet higher than planned, to avoid access material. Mr. Jackson claimed they did everything they could to keep the material from going into the creek but they could only do so much on an almost vertical face with a 30 to 35 percent grade. Undoubtedly, more material entered the creek during this stage of construction.

Mr. Burton, a consulting geologist visited the site in October, 1981 just prior to the first days of the trial and again in September, 1982 prior to the continuation of the trial. He estimated that 3600 cubic yards of material had entered the creek as a result of the slide. In examination in chief, it was his opinion that the percentage of this that had reached the delta was insignificant. He considered that mother nature in the form of the natural stream processes, altered the spawning channel during 1978, 1979 and 1980. He rested this opinion on his not finding any similar material during his walk of the bottom half mile of the stream and on his comparison of the material dug out of the spawning channel with the material at the construction site. He said the material was similar but that the material from the spawning channel included glacial erratic material and sand not present in the material at the construction site. The natural load of the stream contained the reddish granitic country rock, a harder, rounder, tougher rock, and the glacial erratic material. At the construction site there was only country rock. At the delta the natural material was glacial boulder, country rock, and sand, with a grey colour predominating because of sand bank erosion in the lower regions of Angus Creek. Because Mr. Burton did not have the advantage of examining the creek during 1978, 1979, and 1980, his observation that the new fresh material stopped one half mile downstream from the culvert is not, in my view, as persuasive as the evidence of Mr. Langer, supported as it is by the evidence of other crown witnesses who visited the site at earlier dates and in particular, Mr. Eliasen, to the effect that the material found in the spawning channel and not native to it was the same as the material at the construction site. The presence in 1981 of glacial erratic material in the material dug out of the spawning channel is consistent with the mix of pink granitic angular rock and the natural load of the stream observed in 1979 by Mr. Langer and in 1980 by Mr. Eliasen and Mr. Chambers. His evidence that between 1200 and 1800 cubic yards of the material from the slide is probably somewhere in the creek bed, and his grudging admission that from zero to 50 percent could have gone to the delta, is consistent with the amount dug out of the spawning channel.

In these circumstances, I cannot give weight to Mr. Burton's opinion. Moreover, in cross-examination, Mr. Burton's opinion became less certain and seemed to be that the material from the spawning channel could have come from the slide, but did not necessarily come from it. He said no one could be absolutely certain the material in the spawning channel came from the slide. He also agreed that the material from the slide was incorporated into the natural stream load, which would be washed down by sudden freshets, all of a sudden. I have no doubt that no scientific opinion is ever certain. However, having considered all the evidence, only some of which I have reviewed, the only rational explanation of the blockage of the spawning channel of Angus Creek is that material was washed down during the fall of 1978, and spring and fall of 1979, and during the particularly heavy rains of January, 1980 from the upper regions of Angus Creek where it had been contributed to the stream load by the slide, the side casting, the blasting and the continuing sloughing caused by the road building operations of the accused. The addition of that material to the stream load was the cause of the disruption and eventual destruction of the coho and chum habitat at the mouth of Angus Creek. In my view the crown has proved the actus reus beyond a reasonable doubt.

I turn now to the second argument for the defence that Jackson Brothers took all reasonable steps to avoid the events that occurred. Here, I am satisfied that the evidentiary burden on the accused is to prove on a balance of probabilities that the accused exercised due diligence. Due diligence was considered by the Court of Appeal in the *Queen vs. Gulf of Georgia Towing Co. Ltd.*, (1979) 10 B.C.L.R. 134. The similar common law defence was discussed by the Supreme Court of Canada in *R.* v. *The City of Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161.

I glean from these cases that the standard of care required to make out this defence will vary with the gravity of the potential harm, the likelihood of such harm, the knowledge and skill that can reasonably be expected of the accused, alternatives available to it, and the extent to which the underlying causes of the harm were beyond the control of the accused.

The crown alleges that in cutting the road through to within 10 to 30 feet of a vertical chute area which it had planned to terrace to avoid just such problems as those as occurred, the accused in its rush to complete a road that was important to it, took an unjustifiable risk of creating harm that should have been foreseen, giving the knowledge that was possessed by the accused or that should have been possessed by it.

To establish that the accused was in no way negligent, counsel for the accused relied on the extensive efforts Jackson Brothers had taken in laying out the road and building it under the supervision of and to the standards of the British Columbia Forest Service. I am satisfied that there was no negligence in the laying out of the road. The accused did all that could reasonably be expected of it in that regard. But, the crown does not suggest otherwise. Rather it says that Mr. Jackson should have stopped building the road from the north further from the chute. It should also have exercised more care as it entered a dangerous area and it should have then end-hauled when necessary to avoid side-casting into the creek in the canyon area. I am driven irresistibly to the same conclusion.

Peter Jackson was entirely responsible for the construction of the road. He is an experienced logger who has constructed about 350 miles of road in the area. He was on the site every day. He considered that if he built the road "as narrow as possible" the apron would be adequate to hold the blasted materials. Like Mr. Trickett, his only concern was the chute area. The rest was "standard". He decided to build the road to the edge of the chute area from both directions, then terrace the chute area, remove the overhanging rock and end-haul the blasted material away. Terracing was the only method available. Then they would hook up the two ends of the road and install the culvert. As construction progressed, he consulted daily with Mr. Trickett whom he had hired to supervise the layout of the road and who advised on its construction. He made no major change without discussing it with Mr. Trickett or with Mr. Davis who supervised the construction for the British Columbia Forest Service. The slide came as a shock to all of them. Mr. Jackson further said that there was nothing he could do to prevent all sloughage at the terraced area.

I accept the opinion of the soil scientist, Mr. Utzig, who specializes in the effect of logging and road building activities on slope stability, after the careful examination he made on October 2nd, 1981, with the additional assistance of the 1978 aerial photographs of the British Columbia Forest Service that the slope in its natural condition was unstable. I also accept his opinion that "it was clear that side-cast material would end up in the creek". It is consistent with Mr. Trickett's evidence that end-hauling could be used south

of Angus Creek if the apron could not hold all the material. This was clearly an area that presented problems for road builders. Potential harm to the creek was not confined to the 75 foot chute area.

Despite or perhaps because of their experience, Mr. Trickett, Mr. Davis and Mr. Jackson did not seek the advice of a geologist or geological engineer. They did not depart from the normal construction practice of side-casting because that is done only where there is no apron. Mr. Trickett considered the same factors as Mr. Utzig, the 1967 aerial photographs of British Columbia Forest Service, and the cost of construction and arrived at a different conclusion. I can accept that as due diligence in the planning stage, people can make different observations and reach different conclusions from them and still be acting reasonably. However, the contractor must also keep a careful watch as construction proceeds and be prepared to consider and make changes if and when they become desirable.

Indicative of a failure to do that is the evidence of Mr. Trickett in cross-examination when he said that when they reached the area, they did not call in a geological engineer or a geologist although that was not an unreasonable suggestion. He said that Jackson Brothers had reached the stage where they had to proceed and they had to take the risk, that a slide is not an absolutely predictable thing and can happen with the best of advice. Calling in such experts is not practicable for logging road development if the risk is not significantly high, he said. He considered that the resource agencies had approved the location and that his firm, Charnall & Associates and the accused had confined the area of risk to a minimum by their choice of road location. He considered that it was the best the accused could do under the circumstances and in fact all that anyone could do. Mr. Davis agreed. I do not give any weight to the opinion of Mr. Davis. His bias on the side of Jackson Brothers was palpable throughout his testimony. Indeed, he referred to Jackson Brothers and himself as an agent of the British Columbia Forest Service throughout his testimony as "we". I am satisfied that his primary concern was the mandate which he says he received from the Minister of Forests to keep industry working and to meet quotas. His concern was entirely with getting roads built as economically as possible and logs out. His second mandate, protection of the environment, including fish, was for Mr. Davis and by implication, the British Columbia Forest Service, a clearly minor consideration. Consultation with resource agencies was limited to sending the application including the road plans and profiles to the Fish and Wildlife Branch whose responsibility it was to forward it to the Federal Fisheries with a note that if no comments were received within 30 days, it would be considered approved. Fish and Wildlife replied asking to be notified when the bridge at Angus Creek was being installed.

Moreover, Mr. Trickett and Mr. Jackson conceded that some side-cast material entered the creek and that a blasting slough occurred in June or July, 1978, contributing additional material to the creek. Both maintained that terracing and some end-hauling kept such material to a minimum. As a witness, Mr. Trickett was self-assured and self-righteous, convinced that he had done the most practical thing. In my view, like Mr. Davis, he was concerned with cost efficiency above all, leaving it to the resource agencies and the British Columbia Forest Service to worry about competing environmental values.

Also indicative of that failure is the evidence of Assistant Ranger Tymchuk, whose straightforward impartial evidence I accept without any reservation. While Mr.

Utzig had the advantage of hindsight, Mr. Tymchuk did not. He visited the site during heavy rain in March, 1978, and reported to Ranger Wilson that "things looked pretty critical" as far as the stability of the bank was concerned. He saw side-cast material rolling down the slope, and material sloughing on the up-slope to the new grade. He believed that the ranger should stop the construction. Relatively inexperienced as he was, he anticipated the slide. The ranger did not stop construction as he had the power to do. A forester, Mr. Johnston, visited the site on April 12th, 1978, after the slide had occurred. He saw that material had sloughed into the creek. He made a report to the district office on April 14th, 1978. Nothing resulted from his reported concern, among others, about silt from the slide seriously threatening spawning downstream. He also told the accused's forester of his concern about side-casting.

On April 13th, 1978, Ranger Wilson, Mr. Stephen and Peter Jackson visited the site. On April 17th, 1978, Mr. Kraft and Mr. Stephen visited and photographs were taken. Continuing visits were made by Mr. Kraft until July. He continued to observe more debris and fines in the creek. Observations in December, 1978 showed that slumpage was continuing. While none of this evidence is strictly relevant to the negligence alleged, it does indicate the attitude of the accused and of the representatives of the British Columbia Forest Service. If the young and inexperienced Mr. Tymchuk could visit the site for 30 minutes, look at it from a distance and anticipate what could happen, then the very experienced Mr. Jackson should have been able to foresee the possibility, if not the probability, of the particular event that occurred. Moreover, he should have taken more care to ensure that side-cast and blasting material did not enter the creek both before and after the slide occurred.

While I accept Mr. Jackson's honesty and sincerity, I can only conclude that his cost-efficient approach and overriding concern for speed and his reliance on the British Columbia Forest Service and the approval process to protect the environmental values blinded him to his duty and caused him to adhere to the original plan without due regard for the harm to the creek that could ensue. Slumpage and sloughing were occurring and materials were getting into the creek. He was blasting through a very steep slope and it was rainy weather. Mr. Jackson never considered an alternative, perhaps terracing further north and waiting for drier weather and at the very least, consulting a geologist. Given its knowledge of the potential harm to the creek from a contribution of materials to it and its professed concern for the fisheries' values, not to say the statutory obligation it owed to the fishery, I have concluded that the accused was negligent when its operating mind, Peter Jackson, continued to build the road toward the chute without exercising that duty of care one would expect of a reasonable person in the best position to ensure that such harm was prevented. I therefore find the accused guilty as charged.

BRITISH COLUMBIA COUNTY COURT

R. v. TAHSIS COMPANY LTD
(Hemlock Mill Oil Spill Case)

DRAKE Co. Ct. J. Nanaimo, October 12, 1982

Defences - Due diligence - No requirement to set up system to guard against vandalism - not guilty verdict upheld.

D.R. Kier, Q.C., for the Crown.
R.F. Hungerford, for the respondent.

DRAKE Co.Ct.J.: - (Orally) The issue in this case is short and simple, and it is whether or not the respondent, the Tahsis Company here exercised due diligence in the situation which arose when oil escaped from a barker machine at the mill and that oil got into the sea there, which is water frequented by fish. The oil is a deleterious substance, there is no doubt about that.

The judge found that what happened, the reason for the oil spilling was an act of, as he called it, "vandalism"; I think "sabotage" perhaps would be a better word. Of course, although there was no direct evidence on that point, that was in accord with the views of responsible officials of the company who were there at the time, and it was the only way in which they could account for this most unusual state of affairs with the valves on the barker and its hydraulic system.

Whether or not diligence is due in any given case is a matter, I suppose, of drawing a line and as far as facts are concerned no one case can be considered to be a precedent for another. It is a matter of circumstances in every case. The company here, the respondent, later took measures which in my opinion were extreme measures to catch any oil which might come out from any further incident of this kind, and installed what they hoped would be an unbeatable system for preventing these valves being opened. I do not think that that really affects the situation here. In my view on all the evidence the arrangements they had were perfectly adequate for ordinary operation of the barker and were such as to prevent in the ordinary course of events any oil leaking out. I do not think due diligence extends to being obliged to set up such a system as would guard against vandalism of the sort which must have occurred.

In short, I think they exercised due diligence with regard to the operation of this machine and, consequently, they have an excuse for what occurred -- see the *Sault Ste. Marie* case -- so the appeal should be dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. F.T. CONTRACTING LTD. et al.

BARNET Prov.Ct.J. October 13, 1981

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under ss.31 and 33 - Charges dismissed - Work in question had been authorized by government official.

The accused were acquitted of various offences under ss.31 and 33 of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended. A government official had authorized the completion of the work in question and the charges dealt with events that took place after the authorization had been given. If the charges had dealt with what the accused had done before they received the authorization, they would have been found guilty.

M. Barbour, for the Crown.
M. D'Arcy, for the accused.

BARNETT Prov.Ct.J.: - (Orally) This matter is a decision in a case where F.T. Contracting Mr. Todd and Mr. Flett were all charged with various offences under the Fisheries Act. Basically the charges involved putting a great deal of dirt into a fishing stream. The case, if I recall correctly, occupied nearly three and one half days of court time, it started in June and continued and the evidence was completed last Friday.

At the conclusion of the case, that is after three and a half days, the Crown apparently recognized that -- or it took the position that Mr. Flett should not be convicted -- I'm sorry, actually the evidence was first heard on the twenty-first of May, I believe, not -- not a date in June.

What happened is that Forestry had some beetle killed pine out at a place called Big Stick Lake which they wished logged and they wished that logged in quite a hurry. Big Stick Lake is in the bush a little bit in the area of Clearwater Lake fairly far out in the Chilcotin. It was in the fall of 1979 that Forestry apparently decided that this timber had to be removed and removed in quite a big hurry. Mr. Todd and Mr. Flett between them had a logging company, F.T. Contracting, and they or perhaps Mr. Todd only for the two of them went out and look this area over and decided that although it would be a marginal thing, they could log this timber. Now, Mr. Todd was a stranger to the area, that is to the Chilcotin, as I understand it, never been out there before. And, he goes out in the fall, I get the impression he went out with him from Forestry it was a very cursory appearance that they put in. And, nobody told Mr. Todd anything about the country that he was proposing to go out and log in. He sees this little swamp, or gully, or whatever you might call it, I'm not sure exactly what he thought it was at the time but he didn't think it was important, he recognized that if he was going to get a logging truck over it he would have to put in some fill. And, there was a little trickle of water there that he could see in the snow so he thought he'd have to put in a culvert, and that's what he did. This was work that was conducted late in the fall, in November Mr. Todd said, he didn't want to do the work at that time of year particularly but if they were going to go in and do this bit of logging it had to be done on a hurry up basis and they had to get started work and started

logging that winter. He doesn't think this is environmentally important at all and perhaps he can be forgiven for that, he's a stranger to the area and nobody tells him anything and he doesn't see very much water there, just a little trickle. So, what he proceeds to do is put in a small culvert and a great deal of dirt on top of the culvert and makes a crossing suitable for the use of logging trucks, and they get in there and they start to work right away that winter.

Well, come spring or the start of spring all of a sudden the situation changes. There is now a good deal of water and it's recognizable as a creek. Also, there are a lot of beaver around. Forestry in their hurry to get this work done did not bother to consult with the conservation people at all, the Fish and Wildlife people or the habitat protection people at all, they just ignored those persons working for other government ministries. It wasn't until Mr. Wolfe from habitat protection was out there in April of 1980 that conservation persons recognized or knew of any work that had been done out there at all, and by now, of course, the situation is very different, there's a lot of water, and there are a lot of beavers. The habitat protection people, the conservation people knew from years of experience that this is a very important fish spawning creek for Clearwater Lake, they've done a lot of habitat protection work out there over the years and they well know as do local people that beaver are a big problem in that creek or can be a big problem in that creek. Well, the beaver started plugging up the culvert as soon as the water started flowing and the culvert washed out in April. That must have put a lot of dirt into that creek and this is, as I say, an important fish spawning creek, the important fish spawning creek for Clearwater Lake. Clearwater Lake, I'm told, is an important recreational fishing lake in the Chilcotin, there's a tourist lodge on it of some description, and it's used for fishing by people who don't come from so far away that they stay in those lodges either, local residents and undoubtedly by many people from Williams Lake. It's an important fishing lake out in the Chilcotin, it produces rainbow trout. Rainbow trout start spawning in that creek I believe in May it is, they continue into June, the eggs start to hatch perhaps in June, peak some time in June, but the stream, creek, whatever, is an important fish rearing creek right through to mid July. And, there will be eggs spawn and young fry in that creek to replenish the Clearwater Lake stock right from June -- May, June and July, right through those three months, that's an important creek.

Well, in the early spring of 1980 that culvert that Mr. Todd had put in in his ignorance washed out. It was put back in and it was put in in the same inadequate manner. Nobody in Forestry cared a hoot it seems about what their logging operation might be doing to the fishing stock in Clearwater Lake. Forestry just appeared not to have cared. Mr. Wolfe from Habitat Protection wrote to Forestry out in Alexis Creek on the second of May explaining what they should have recognized or asked about earlier that this is an important area and that this still little culvert is totally inadequate and what that creek needs is a bridge across it. So, on the eighth of May Forestry write to Mr. Todd and tell him that his company must put a bridge across this creek. But, of course, it's now too late to do any work in that creek for that year because the spawn and the fish are already in the creek and so as Mr. Wolfe from Habitat Protection had suggested to Forestry Forestry told Mr. Todd that there could be no work done to build the bridge before the fifteenth of August and that the ridge would have to be finished by the thirtieth of September.

One of the problems with this little operation was that Mr. Todd and his loggers would leave the area for a long weekend every so often, perhaps, get into the big city of

Williams Lake I don't know, but while they were away for the weekend the beavers would be busy and when they got back, of course, there would be problems. That's what happened in April when there was a washout, and again in July, the July first long weekend. Mr. Todd and his crew left for the weekend, it rained a great deal at that period of time, it was unseasonable rain, it's not what you would expect but you would expect the beavers. The combination of the beavers and the rain caused another washout of that culvert at a critical time. Of course any washout would carry with it a great deal of this dirt that Todd had put into the creek as a crossing would now get washed into the creek. And, there is the evidence of Mr. Leggett, the wildlife biologist, who explains what that type of activity does to a fishing stream. The silt, the dirt, the gravel, all combined to smother the spawn, in other words, to ruin the hatch, it kills the fish or the spawn. And, that's what was happening because nobody cared really about what was going on in this creek except Mr. Wolfe and Mr. Tony Karup would have been contacted by Mr. Wolfe to go out and see what the situation was all about. And, Mr. Karup is a conservation officer out in Bella Coola. He has a place of his own fairly near this location and he did go out and check. He wasn't happy with what he saw but when he first went there there was really nothing that could be done about the situation. He went coincidentally on the first of July. Mr. Todd had come back from his weekend in town on that same day, of course, it was a holiday the long weekend, dominion day or Canada Day. Mr. Todd had arrived back at the crossing before Mr. Karup got there and he found, and he shouldn't have been surprised to find, that while he was away there had been another washout. They had ten logging trucks apparently coming the next morning, so without asking anybody and without really stopping to think carefully about it, in my opinion, Mr. Todd just got to work. He began to construct what to him was perhaps a bridge. Instead of just a silly little metal culvert Mr. Todd was putting in something that he thought was going to be more adequate, it was a wooden box, it was a little bigger than that metal culvert that had been there, but in my opinion it was still a totally inadequate response to the needs of that creek. And, Mr. Todd was going at it without any consideration to the letter which he had been sent and admitted he had received saying that there was not to be any work done out there until the fifteenth of August. In Mr. Todd's view, however, his operation was going to go broke if they didn't get that crossing put back in place. And, I expect the operation would have gone broke, it was a marginal operation to begin with, way out in the Chilcotin and working with beetle killed timber. And, Mr. Todd looked at the thing strictly from his own selfish, if I can call him that and I think one can call him that viewpoints, his selfish viewpoint and Mr. Flett's selfish view point too, and the company's. They weren't concerned really about whether this was an important fish rearing creek or not, he was just concerned about ten logging trucks that would be there the next morning and wouldn't be able to get across the creek unless he got it fixed. He went to work with another man and a chainsaw, I expect, to cut up some timbers and a bulldozer to put a lot more dirt in the creek. And, when Mr. Karup showed up, coincidentally, because he was spending the weekend at his cabin nearby, Mr. Karup arrives to see all this work going on and a great deal of time was spent on the trial at trying to make Mr. Karup out to be some kind of villian in this and in my opinion all of that time was wasted and misconceived. In my opinion Mr. Karup acted properly and sensibly throughout, and I'm not so sure that I can make that comment about anybody else that was involved in this matter. But, about Mr. Karup I wish to make it perfectly clear that I do not share in any criticism of anything that Mr. Karup did and quite the opposite. He took some pictures of the work that was going on and then he shut the work down and that's exactly the right thing. These people were busy wrecking the creek and there's no other fair description of it. Now, I do not lay all the blame for that on Mr. Todd or on Mr. Flett or their company because it's clear that these people were not

entirely experienced, one does not expect loggers, even in 1981, to be the most environmentally sensitive people and one would think that government agencies who have the responsibilities of supervising logging operations would do so in a responsible and sensible manner. And, with all due respect to Forestry's wish to get this timber out of there in a hurry they were failing to meet responsibilities that, in my opinion at least, rested upon them, at least to advise Fish and Wildlife, conservative people, habitat protection people of what they were up to, and they did not do that. It wasn't until Mr. Wolfe went out there on his own months afterwards that they were even aware of this activity going on because Forestry had never told anybody or never told anybody outside its own ministry. Mr. Karup comes out there on the first of July and finds that this creek is being wrecked even more and he shuts the work down. Well, Mr. Todd is understandably upset and anxious, he's got these ten logging trucks coming the next day, so he asks Mr. Karup, "Well, what can I do?", Mr. Karup tells him that he will get in touch with people in Williams Lake the next day and somebody will come out and look at the site and make a decision about the work proceeding just as soon as possible. But, Mr. Karup suggest that that will take a few days and that's understandable. Mr. Todd asks Mr. Karup, "Who can I get in touch with to get this thing speeded up?", and Mr. Karup very fairly gives him the name of Mr. Withler. Mr. Withler is the man in charge of Habitat Protection of this area, an employee of the Government of British Columbia. Mr. Todd phones his partner Mr. Flett in Williams Lake and tells him what the situation is, that the work has been shut down. And, Mr. Todd has honoured Mr. Karup's shut down orders but he wants Mr. Flett to see what can be done about getting the work under way again that same evening or night so that the logging trucks can roll the next morning. And, Mr. Flett phones Mr. Withler and in my opinion Mr. Flett conveyed fairly to Mr. Withler his understanding of things as he had been told by his partner Mr. Todd. Mr. Todd told Mr. Flett he had the job about ninety percent done and just a little more dirt had to be pushed around before the logging trucks could start rolling again. Mr. Flett, I believe, conveyed fairly to Mr. Withler what he understood to be the situation. Mr. Withler telephones Mr. Wolfe and Mr. Wolfe knew the scene out there well, he had been out there in April and he knew the damage that had been done. I don't know what Mr. Wolfe and Mr. Withler really talked about but in any event without checking further Mr. Witler phoned Mr. Flett and told Mr. Flett that the work could proceed again with the one condition that no instream work was to be done. They could go ahead and finish the crossing. Everybody knows that Mr. Karup's out there right at the scene, they know that he's out at his cabin which is no more than two or three miles from where the work was going on. Mr. Karup, and they know this, has got a radio telephone in his truck, it's a government truck. They must know that. The evidence is that it was there. Does anybody think of trying to contact Mr. Karup in any way, by radio telephone, or otherwise or by saying to Mr. Flett, "You go and get Todd and tell Mr. Todd to go and contact Karup and have him phone me, Withler, so that I can find out from our man on the scene just why he thought it necessary to shut the work down.", no. Everybody, in my opinion, fails miserably there. Mr. Karup was the man on the scene, he made the decision to shut the job down, to tell Todd that he couldn't go ahead because he was wrecking the creek. But, Mr. Withler told Mr. Flett that the work could proceed again without making any attempt to contact Mr. Karup to find out why he had thought it necessary to shut the work down.

Mr. Withler did tell Mr. Flett that Todd should go and contact Karup and tell him that the go ahead had been given the next day. Well, of course, Mr. Karup was a little excited about that. But, in any event Mr. Todd as he was authorized to do, I should put

that in quotes, did go ahead and finish the work. And, in a sense he didn't do any more instream work, he just pushed around enough dirt to get the crossing complete. That meant putting more dirt in the creek, there's no way you could avoid it, no way in the world that you could avoid it, but Mr. Todd didn't put his cat in the creek again, in the main bed of the creek.

Now, these charges the Crown concedes are based soley upon what Mr. Todd did out there the night of July first after this so-called authorization had been given by Mr. Withler to go ahead and complete the work. The Crown does not base its case upon the work that Todd did earlier that same day, there was an offence there without doubt, but that is not the offence that I am dealing with. There were offences committed on previous occasions in April when there was the first washout and in the late fall when Mr. Todd went ahead and built that thing in the first instance. Each of those occasions may well have been, and I think was, an offence of one nature or another or perhaps numerous offences, but this case does not involve those occasions, the activities conducted on those previous occasions are just not involved or not the subject of charges. The only acitivity that is the subject of a charge here is the activity that occured on the evening of July first when Todd went ahead to complete this crossing after having been given some so-called authority by Mr. Withler. And, in my opinion the Crown has not succeeded by any means in establishing that Todd abused the authority given to him by Withler. I feel, and I'm convinced, that he did that work within the scope of the authority that he had been given. How Mr. Withler could give Mr. Todd permission to go ahead and pollute the creek is beyond me. He's giving the man permission to go ahead and break the law. And, he acted, in my opinion, incorrectly in doing so, incorrectly is a much less strong word than I used during counsel's submissions the other day, incorrectly is the lowest level that one can possibly put this act. But, while I have no praise for Mr. Todd or for F. and T. Contracting for the manner in which the work out there was conducted in all the circumstances it is, in my opinion, simply not possible for a Court to register a conviction against any of the accused persons or the company for any of the offences here.

This case is a small but very clear example of the unfortunate results that have happened previously in this province and obviously continue to happen when government bureaucracies cannot get their act together and co-operate. We all read in the paper a couple of years ago about the disastrous things that happened up in the Queen Charlotte Islands when Forestry wanted to log off some very steep hillsides and Fisheries didn't wish that to be done because the creeks below were important salmon spawning creeks. The logging proceeded, the rain started as it's bound to do in the Queen Charlotte Islands and important fish salmon spawning water was totally destroyed. That was a conflict between Forestry and Federal Fisheries and it got a lot of newspaper publicity. This matter is smaller in scale and hasn't had any publicity that I know of. But this case involves a lack of co-operation between Forestry Habitat Protection, and conservation. All of those personnel and offices are under ministries of the British Columbia Government, they cannot co-operate and the result is that right hand doesn't see what the left is doing and to get some beetle killed pine logged it's done at an unnecessary sacrifice of important fishing streams. Perhaps the stream creek can be cleaned up at public expense, I suppose. And, incidentally Mr. Todd, who never pretended to be a skilled construction person, and his partner Mr. Flett and their company got dragged through three and a half days of court proceedings all, in my opinion, because some bureaucrat has made a mistake which I should never have made in the first place.

The charges will be dismissed.

MR. D'ARCY: Your Honour, I was just wondering if I could make one comment. The Court has indicated that there was -- I don't know if the word offences were used, in November and April --

THE COURT: I'm sorry, I said it seemed likely to me that there were offences then.

MR. D'ARCY: All right. I don't question that there was what you might call dirt into streams, polution, etc., whether again there's the question of intent and do diligence and permission and authority and it's a --

THE COURT: Well, Mr. D'Arcy, I made the comment the other day during argument that it is no longer acceptable and it hasn't been for a good many years for a logger to rape the environment the way they used to be able to do a good fifty years ago. And, if your clients had paid a little bit more attention they would have recognized that what they were doing was unwise.

But, the charges are dismissed and that's the bottom line.

MR. D'ARCY: All right.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. THE CORPORATION OF THE TOWNSHIP OF RICHMOND, FRASER RIVER HARBOUR COMMISSION, AND RICHMOND LANDFILL LTD.
(Leachate from Richmond Landfill)

DRYSDALE Prov.Ct.J. Richmond, April 13, 1983

Constitutional law - Charges under s.33 (2) of Fisheries Act, R.S.C. 1970, c.F-14, as amended, against municipal corporation - S.33 (2) not applicable to municipal corporations and charges therefore dismissed - Field fully occupied by provincial government.

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under s.33 (2) against municipal corporation - S.33 (2) not applicable to municipal corporation - S.33 (2) not applicable to municipal corporations and charges therefore dismissed - Constitutional law -Field fully occupied by provincial government.

Charges under s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, were brought against three accused. The charges against one of the accused, a municipal corporation, were dismissed because the Court concluded that s.33 (2) is directed towards individuals and limited companies, not municipal corporations. To hold otherwise would be to allow the federal government to invade an area of provincial jurisdiction. The provincial government has fully occupied the field; provincial legislation allows the province to exericse adequate control and supervision over municipalities.

D.R. Kier, Q.C., for the Crown.
R.S. Anderson, for the accused.

(Editor: This decision was reversed by the B.C. Court of Appeal and the case against the Township of Richmond was referred back to the trial judge. The other two defendants, Fraser River Harbour Commission and Richmond Landfill Ltd., pleaded guilty. The Court of Appeal decision is at page 467.)

DRYSDALE Prov.Ct.J.: - The information before me reads,

This is information of Wilmar Paulik, Recreation Instructor of 7500 Heather Street, Richmond, B.C. hereinafter called the "informant"

The informant says that he has reasonable and probable grounds to believe and does believe that

Fraser River Harbour Commission
Richmond Landfill Ltd.
The Corporation of the Township of Richmond

Count #1 On or about the 22nd day of February, A.D. 1981, in the Municipality of Richmond, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit landfill leachate, in water frequented by fish, to wit: The Fraser River, in violation of Section 33 (2) of the Fisheries Act;

Count #2 On or about the 24th day of February, A.D. 1981, in the Municipality of Richmond, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit landfill leachate, in water frequented by fish, to wit: The Fraser River, in violation of Section 33(2) of the Fisheries Act;

Count #3 On or about the 15th day of March A.D. 1981, in the Municipality of Richmond, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit landfill leachate, in water frequented by fish, to wit: The Fraser River, in violation of Section 33 (2) of the Fisheries Act.

Count #4 On or about the 22nd day of March, A.D. 1981, in the Municipality of Richmond, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit landfill leachate, in water frequented by fish, to wit: The Fraser River, in violation of Section 33 (2) of the Fisheries Act;

Count #5 On or about the 23rd day of March, A.D. 1981, in the Municipality of Richmond, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit landfill leachate, in water frequented by fish, to wit: The Fraser River, in violation of Section 33 (2) of the Fisheries Act;

Count #6 Between the 10th day of April, 1979 and the 9th day of April, 1981, in the Municipality of Richmond, Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: industrial and domestic refuse, in a place under conditions where such deleterious substance or any other deleterious substance that resulted from the deposit of such deleterious substance may enter water frequented by fish, to wit: The Fraser River, in violation of Section 33(2) of the Fisheries Act;

And Section 33(2) of the Fisheries Act reads,

"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."

And subsection (4) of Section 33 provides,

"No person contravenes subsection (2) by depositing or permitting the deposit in any water or place

(a) of waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or

(b) of a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (13)."

And it provides under subsection (5),

"Any person who contravenes any provision of (b) subsection (2) is guilty of an offence and liable on summary conviction to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence."

And subsection (6) provides,

"Where an offence under subsection (5) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued."

And when the proceedings opened on April the 11th I had, prior to the start of the proceedings, had an opportunity to read the Information and I had raised the question of counsel as to whether or not I had jurisdiction in the charge against The Corporation of the Township of Richmond and in essence as to whether or not a municipality could be proceeded against under the summary conviction provisions of the Criminal Code again pursuant to Section 28(2) of the Interpretation Act in connection with the charge laid pursuant to this particular section of the Fisheries Act.

The Crown had tendered as Exhibit A an extract from the British Columbia Gazette of March the 31st, 1892 at page 447 and it provides in essence that after the 25th day of March, A.D. 1892, that,

"The said Municipality shall be called and known by the name and style of "The Corporation of the Township of Richmond"."

And the particular incorporation, what I presume at that particular time, be subject to the Municipal Clauses Act, which I believe the consolidation was in the 1897, R.S.B.C. I took the opportunity to peruse the Act but there didn't appear to be anything under the Land Clauses Act that would be particularly relevant to the matter before us, however, turning to the Interpretation Act the Act provides under Section 2,

"2. (1) In this Act
"Act" means an Act of the Parliament of Canada;

"enactment" means an Act or regulation or any portion of an Act or regulation;

3. (2) The provisions of this Act apply to the interpretation of this Act."

Under Section 28, which is the definition section, it states,

"28. In every enactment "person" or any word or expression descriptive of a person, includes a corporation;"

And the powers vested in a corporation are provided under Section 20, and they appear to relate mainly to civil matters, however, perhaps it might be helpful just to refer to Section 20(1),

> "20. (1) Words establishing a corporation shall be construed
>
> *(a) to vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is established and to alienate the same at pleasure;*
>
> *(b) in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, to vest in the corporation power to use either the English or the French form of its name or both forms and show on its seal both the English and French forms of its name or have two seals, one showing the English and the other showing the French form of its name;*
>
> *(c) to vest in a majority of the members of the corporation the power to bind the others by their acts; and*
>
> *(d) to exempt from personal liability for its debts, obligations or acts such individual members of the corporation as do not contravene the provisions of the enactment establishing the corporation.*
>
> *(2) Where an enactment establishes a corporation and in each of the English and French versions of the enactment the name of the corporation is in the form only of the language of that version, the name of the corporation shall consist of the form of its name in each of the versions of the enactment.*
>
> *(3) No corporation shall be deemed to be authorized to carry on the business of banking unless such power is expressly conferred upon it by the enactment establishing the corporation."*

Section 16 provides,

> *"16. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to."*

In contradistinction, under the Province of British Columbia Interpretation Act, which is found in R.S.B.C., 1979, Ch. 206, and again in the interpretation section,

> *"1. In this Act, or in an enactment, "Act" means an Act of the Legislature, whether referred to as a statute, code or by any other name, and, when referring to past legislation, includes an ordinance or proclamation made prior to 1871, and having the force of law;*
>
> *"enactment" means an Act or a regulation or a portion of an Act or regulation;"*

The definitions of expressions are found in Section 29 and in Section 29,

> *"29. In an enactment*
> *"corporation" means an incorporated association, company, society, municipality or other incorporated body where and however incorporated, and includes a corporation sole other than Her Majesty or the Lieutenant Governor;*
>
> *"municipality" includes a city, town, village, district or township incorporated by or under an Act, but does not include a regional district or an improvement district defined in the Municipal Act, and does not include a village where the Lieutenant Governor in Council had, by regulation applicable to villages generally or to one or more villages, declared that a village shall not be deemed to be a municipality within the meaning of any Act, other than the Municipal Act;*
>
> *"person" includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law;"*

The provincial legislation dealing with the matter of pollution is under the Pollution Control Act which has now been repealed and replaced by the Waste Management Act which came into effect on September the 16th, 1982 and it's found in the 1982 S.B.C., Ch. 41 and in the revised statutes as index chapter 428.5. This Act specifically defines municipality.

> *"1. In this Act*
> *"municipality" means a city, town or village incorporated by or under an Act, and includes a district municipality, a regional district, an improvement district that has as an object the disposal of sewage or refuse, or the provision of a system for the disposal of sewage or refuse or both, and the Greater Vancouver Sewerage Drainage District;*
>
> *"environment" means the air, land, water and all other external conditions or influences under which man, animals and plants live or are developed;*
>
> *"pollution" means the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment;"*

And this Act provides explicitly in Section 2,

> *"2. (1) Where there is a conflict between*
> *(a) this Act, its regulations or an approval, licence, order, permit or waste management plan, and*
>
> *(b) the Geothermal Resources Act, the regulations under that Act or a permit, licence, lease, authorization, order or agreement entered into under that Act,*
> *this act, its regulations and an approval, licence, order, permit or waste management plan issued or subsisting under this Act apply.*

(2) Nothing in the Soil Conservation Act shall be taken to prevent the establishment within a municipality of any facility for the disposal of waste in accordance with this Act."

The Waste Management Act appears to be a result of an inquiry which I believe was conducted in 1974 and certain recommendations were dealt with concerning the disposal of waste and in particular, Part 3 of this Act deals with municipal waste management and the requirements to dispose of and treat municipal waste. Under the enforcement sections in Part 4 dealing with the section on pollution abatement orders which may be of some interest and interpretation which provides,

"22. (1) Where a manager is satisfied on reasonable grounds that a substance is causing pollution, he may order the person who had possession, charge or control of the substance at the time it escaped or was emitted, spilled, dumped, discharged, abandoned or introduced into the environment, or any other person who caused or authorized the pollution to do any of the things referred to in subsection (2).

(2) An order under subsection (1) shall be served on the person to whom it applies and may require that person, at his own expense, to

(a) provide to the manager information that the manager requests relating to the pollution,

(b) undertake investigations, tests, surveys, and any other action the manager considers necessary to determine the extent and effects of the pollution and to report the results to the manager,

(c) acquire, construct or carry out any works or measures that are reasonably necessary to control, abate or stop the pollution,

(d) adjust, repair or alter any works to the extent reasonably necessary to control, abate or stop the pollution, and

(e) abate the pollution

(3) A manager may amend or cancel an order made under this section.

(4) The powers given by this section are exercisable notwithstanding

(a) the terms of any permit or approval, and

(b) the abandonment of any permit or approval, under section 14.

(5) For the purposes of this section "person" does not include a municipality."

The Act appears to provide that under this provision that the Minister is the person that will take the necessary action to establish what is required other than the manager as outlined in the particular section.

Under the offences and penalties section, which is Section 34, under subsection (9) it's provided,

"(9) A municipality that contravenes a waste management plan approved by the minister commits an offence and is liable to a fine not exceeding $50,000."

And subsection (10) provides, which may be of some interest,

"(10) Where a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who authorized, permitted or acquiesed in the offence commits the offence notwithstanding that the corporation is convicted."

Mr. Kier has indicated that he is appearing on behalf of the Attorney General of British Columbia in this particular matter although he is a member of the Federal Department of Justice and usually engaged in prosecutions concerning the Attorney General of Canada, but has indicated that he is proceeding in this capacity because although the matter is under a federal statute, the Fisheries Act, he is proceeding pursuant to the incorporation of the Criminal Code pursuant to Section 28 (2) of the Interpretation Act which brings the summary conviction part of the Criminal Code, Part 24 and other related sections which are included by definition.

He has referred to the Criminal Code as his authority for proceeding under the prosecution and the Criminal Code in Section 2 defines,

"Where, pursuant to this Act, any summons, notice or other process is required to be or may be served upon a corporation, and no other method of service is provided, such service may be effected by delivering the process
(a) in the case of a municipal corporation, to the mayor, warden, reeve, or other chief officer of the corporation, or to the secretary, treasurer or clerk of the corporation, and

(b) in the case of any other corporation, to the manager, secretary or other executive officer of the corporation or of a branch thereof."

I had indicated to him that this appeared to be primarily directed to the matter of service of the documents, whatever the documents were, and as to how service was to be effected under the Criminal Code but I indicated in my opinion that this did not provide jurisdiction but only provided the method of service.

I have outlined in some length the various sections of the Federal and Provincial Interpretation Act and I have done so to indicate primarily perhaps by way of exclusion the matters that I have looked at in trying to reach my decision and the considerations that I have given effect to.

We are of course under the provisions of the British North America Act and the federal division under which matters of fisheries comes under Section 91(12) which deals with seacoast and inland fisheries and of course 92(8) which deals with municipal institutions in the province and as I indicated earlier that I had ruled on the Information as being a proper Information in the form in which it was in, the five counts charging violations of Section 33(2) on the specific dates, and count six is a general charge which dealt with between the 10th day of April, 1979 and the 9th day of April, 1981, again dealing with Section 33(2) of the Fisheries Act.

I indicated that under this general section and the deeming provisions of Section/33(6) where if there was a conviction pursuant to count number six that the maximum fine indicated on a fifty thousand dollar per day basis would be somewhat in excess of approximately thirty-six million dollars so the matter of course is of some seriousness.

The fishery regulations also provide the Informant is entitled to one-half of whatever fine is levied by the Court and I mention this matter only that the legislation in referring to a person that the Fisheries Act has sought the assistance of concerned and dedicated individuals who wish to maintain the fisheries resource which is an important resource and accordingly, by laying Informations against persons, will provide the incentive for people not to pollute the fishing water but the import of Section 33(2) appears to be in the direction of persons; that it's limited primarily to individuals and to limited companies and I'm fortified in this assumption through the division of powers under the B.N.A. Act because otherwise the Federal Attorney General would be placed in the invidious position, if municipalities were included, of invading that which is under the provincial jurisdiction and it appears clear that the provincial government, in dealing with the matter of pollution through the Pollution Control Act and the Waste Management Act, has fully occupied the field dealing with these pollution matters and has dealt with the control of pollution by the municipality as I indicated in the Waste Management Act which provides control over the municipality and permits the Minister, if there is violations of these provisions which is the overall pollution aspect, to fine the municipality and in my opinion the provincial legislation provides adequate supervision over the municipalities and that the matter could properly have been dealt with either under the Pollution Control Act or under the Waste Management Act and the federal legislation under the Fisheries Act, by not referring to municipalities either specifically under the Act or through the Interpretation Act, in my opinion meant specifically to exclude municipalities who of course are under the control of the provincial government and where the legislation is such that they have occupied the specific field in my opinion that there is no justification for concluding that the Fisheries Act meant to deal with municipalities.

The pollutant in the water is the end product apparently as a result of pollution by the air or land initially through either landfill or municipal garbage dumps and these matters of course are controlled under the Pollution Control Act and the Waste Management Act and that the proper area for enforcement is pursuant to these provincial Acts and the Acts specifically include the municipal corporation and they are explicitly included in the interpretation section so that I'm fortified by these matters to conclude that I do not have any jurisdiction over this particular matter because the Fisheries Act does not refer or include a municipal corporation which is The Corporation of the Township of Richmond and accordingly not having any jurisdiction to deal with the matter I would dismiss the charge against The Corporation of the Township of Richmond.

For clarification, because I presume the matter will be taken further, then I would be, I suppose, quashing it on the basis that I have no jurisdiction on the basis that the Fisheries Act makes no provision for a charge being laid against a municipality, specifically The Corporation of the Township of Richmond.

BRITISH COLUMBIA COUNTY COURT

R. v. FRASER RIVER HARBOUR COMMISSION (Soil Fill at Richmond Impacting on Habitat)

VAN DER HOOP Co.Ct.J. Vancouver, October 25, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charge under s.31(1) - Interpretation of "fish habitat" - Charge dismissed as property on which sand placed was not fish habitat.

The definition of fish habitat in s.31 of the *Fisheries Act*, R.S.C. 1970, c.F-14 as amended, includes food supply areas on which fish depend directly or indirectly in order to carry out their life processes. The food supply areas are ones which under normal conditions are wetted or washed by water. Normal conditions include freshet and high tides and storms, but not extraordinary or unusual tides or storms. In the present case, a charge under s.31(1) was dismissed because the property on which sand was placed was not wetted or washed by water under normal conditions.

D.R. Kier, Q.C., for the Crown.
B.J. Pettenuzzo, and A.C. McQuarrie, for the accused.

(Editor: The Crown is appealing this decision)

VAN DER HOOP Co.Ct.J.: - (Orally) The Fraser River Harbour Commission, which I will hereafter refer to as the Commission, is charged under Section 31 of the Fisheries Act that it did unlawfully carry on a work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat, and the area in question has been particularized as Lot 28, Section 19, Block 4 North, Range 4 West, Plan 35834 and the foreshore fronting thereon. Lot 28 consists of a small portion of land to the north of a dyke that runs parallel to the Fraser River but the major portion of it and the part which is in issue in this charge is that of the south of the dyke between the dyke and the river (and when I refer to Lot 28 I'm referring to that portion south of the dyke).

Lot 28 together with a fairly large parcel of land to the north of the dyke was acquired by the Commission in about 1966. The land prior to that had been used as a fill or, eschewing euphemism, a garbage dump, by the Municipality of Richmond, and one of the terms under which the Commission acquired the property was that it must allow the continued use of the land for that purpose by the Municipality. Due to certain unusual features of the area the Commission decided at an early date that this land would be ideal for a port facility and as early as the Commission's annual report of 1968 an outline of the proposed development of this land as a port facility was set out.

Throughout the history of the Commission's operations in the Fraser River a frequent and close contact was maintained between the Commission and the Department of Fisheries. For the major portion of the period, at least since 1970, the officials concerned with environmental protection operated under that department (there is some confusion in the evidence as to when and for what periods the environmental protection officials were not specifically operating under the department) but for the purposes of my judgment any reference to the Department is intended to mean the Department of Fisheries and the environmental protection officials.

In the 1970's there was a growing interest in and concern about environmental and ecological factors. It was discovered that due to the nature of the soil under the fill, under the dyke and under Lot 28 some effluent or leachate was escaping from the fill into the river. A fairly extensive investigation into this problem led to the Soper & McAlpine report of 1977 in which it is recommended that the solution to this problem lay in placing fill -- sorry -- placing soil on top of the land fill to compress the peaty soil underneath and then to seal the perimeter of the property with plastic and rearrange the drainage in order that a controlled flow away from the river could be arranged.

The Commission with the expert assistance of representatives from the Department of Public Works and from the soil expert consultants, Golder & Associates proceeded with this plan as recommended. Soil was dredged from the river by Sceptre & Associates under contract with the Commission and this soil was placed on the landfill in accordance with the specifications supplied by the experts which included a requirement that the soil be deposited in lifts not exceeding one and-a-half meters.

Work was carried out at intervals in 1979 and into 1980. On January the 21st, 1980 the night shift of the dredging crew was placing the final load of soil in an area adjacent to and immediately north of the dyke. On the morning of January the 22nd, 1980 a failure occurred which resulted in a south-ward movement of a part of the dyke, the escape of water in a geyser from the top of the dyke, cracks along the dyke and bubbling of soil and cracks in Lot 28 to the south of the dyke. It was clearly an emergency situation and fear was entertained about the stability of the dyke. Arrangements were made by those on site, which included the dredging company and Golder & Associates, to move sand from the north of the dyke to the south of the dyke and to continue dredging with the dredged material being placed south of the dyke on Lot/28.

Captain Grozier of the Commission states that the first word he received of this emergency was in the afternoon of January the 22nd, 1980, and I accept his evidence and I accept the fact that he was the first official of the Commission to hear of the failure.

In March, July and September of 1980 additional sand was placed on Lot 28 by moving it from the area north of the dyke. The plans of the Commission for development of this area as a port facility included the placing of soil on Lot 28, and Captain Grozier explained that this emergency had simply moved up the date in time when this fill was placed.

The first issue in this case is whether the placement of the sand on Lot 28 was a work or undertaking that resulted in the harmful alteration and disruption and destruction of fish habitat. Fish habitat is defined in s.33 ss.5 of the *Fisheries Act* as *meaning, "spawning grounds and nursery rearing food supply and migration areas on* which fish depend directly or indirectly in order to carry out their life processes."

On the evidence in this case we are concerned primarily with a food supply area. Taken at its broadest the area of food supply for fish could include trees adjacent to but many feet above water on the basis that the decaying vegetation constituted food for organisms which in turn were food for fish. It could include farm lands washed by unusual floods and industrial sites along the Fraser River. Lot 28 is an area that is

affected by the rate of flow of the Fraser River which includes the freshet in the spring. It is affected by the tides including the high tide of the winter period, and it is affected by storms. It seems to me that some limitation is necessary in using this definition and I note that food supply is used in conjunction with spawning grounds, nursery and migration areas. For the purposes of this case and the property in question I conclude that fish habitat constitutes the area which is normally under normal conditions wetted or washed by water. Those normal conditions will include freshet and high tide and storms but would exclude unusual or extraordinary flood tides or storms. Some suggestion was presented that assistance in defining the area concerned could be obtained from Provincial Statutes regarding land boundaries, but I do not consider that Provincial Statutes are properly applicable to this case.

The Crown presented four -- or really three broad areas of evidence to establish that Lot 28 was fish habitat, and the defence supplied a fourth area of evidence in opposition. The first area is evidence from eye-witnesses, Mr. Pawlick and Mr. Langer for the Crown, who stated they were on or adjacent to Lot 28 before and after the period covered by the charge, as did Captain Grozier for the Commission. In my assessment both Mr. Pawlik and Mr. Langer displayed bias in their evidence. They made contradictory statements and in part the evidence of both conflicted with other evidence, and in such case I accept such other evidence. Specifically, Captain Grozier described the area of Lot 28 from his personal observation and I have no hesitation accepting his evidence. Mr. Kampmeinert was a surveyor called by the Crown (and I will refer later to the results of his work) who stated that he and his crew conducted a survey in December of 1978 of the area from the dyke to the river from which he plotted elevation points. He stated that his access to the area was by walking from the dyke to the river and that they encountered bush and trees through most of Lot 28. He was not questioned further with regard to his observations of this property.

The second area of evidence comes from photographs, both aerial and taken on the ground. With respect to the aerial photographs it requires an expert to determine those details necessary to reach a conclusion as to whether or not a specific area is or is not fish habitat, and I would anticipate that even an expert would have difficulty. One of the several problems involved in assessing aerial photographs is the difficulty in comparing one photograph with another taken from a different height at a different time and with the water at a different level. With regard to the photographs taken on the ground it is of interest to note that the majority of the photographs are of areas adjacent to Lot 28. Mr. Pawlik and Mr. Langer stated that these areas were similar to Lot 28, but that evidence was disputed and I have already indicated I do not accept the evidence of Mr. Pawlik and Mr. Langer. The few photographs of Lot 28 taken prior to the period in question and prior to the deposit of soil on Lot 28 do not satisfy me in any way that this area was fish habitat. Even one of the experts called by the Crown indicated that he would have difficulty determining from a photograph whether a given area was or was not fish habitat.

I should perhaps mention here that the Crown also called Dr. Levings who did not observe Lot 28 before the relevant date. I did not consider Dr. Leving's evidence sufficiently reliable to enable me to reach any conclusions based upon such evidence.

The third area of the evidence concerning fish habitat was the survey of elevations made by Mr. Kampmeinert and filed in exhibit 32B with a super-imposition of Lot 28 upon the results made by another surveyor, Mr. Jones. On behalf of the Crown it is submitted

that the elevation shown when taken in conjunction with an average tide of nine or ten feet must necessarily lead to the conclusion that the major portion of Lot 28 was washed by water at regular intervals. In this regard I note that Mr. Kampmeinert in his evidence stated that it was not his work to establish the water line boundary, that the dotted line on the survey indicating the geodetic zero has nothing to do with where the water meets the lands and that the conclusion suggested by the Crown is not supported by the evidence of Mr. Kampmeinert with regard to his work on the land. It is also not supported and in fact contradicted by the evidence of such as Captain Grozier. The conclusion suggested by the Crown is not a rational conclusion based upon proven evidence and I cannot accept it as proof that Lot 28 consisted of fish habitat.

The fourth area of the evidence is relied upon by counsel for the Commission. In 1976 a survey plan was obtained by the Port Manager of the Commission at that time and he marked it with a colour code indicating in red area which the Commission considered were completely unsuited for development. Unsuitability was based upon environmental and ecological considerations. He marked further areas in green which the Commission concluded could only be developed if at all after consultation with the Department. He marked further areas of the foreshore in blue to indicate areas which in the opinion of the Commission could be developed without reference to the Department. That plan was then given to the Department and from the latter part of 1976 to early 1977 the officials of the Department reviewed all their information about the area, all of the Fraser River estuary together with any additional information they collected in that period of time and early in 1977 returned the plan, which is marked as exhibit 54 in these proceedings to the Commission with additional areas designated in black indicating areas which in the opinion of the Department representatives could be developed only after consultation with the Department or represented already existing problems. Each of these areas outlined in black was numbered and a commentary was supplied setting out the concern of the Department with regard to each area marked in black. The area of the foreshore of Lot 28 remained marked in blue, untouched by black. That led the Commission to conclude, and I think properly so, that the Department did not consider the foreshore of Lot 28 as constituting fish habitat or an area of environmental concern.

In October of 1978 the plans prepared by the Commission or at the Commission's request by the Department of Public Works and Golder & Associates with respect to the deposit of soil upon the area to the north of the dyke were requested by a representative of the Department. That representative was referred to the Department of Public Works and that representative later confirmed with the Commission that he had received those plans. No objection was raised by the Department with regard to those plans, although those plans did not of course contemplate at that time the deposit of soil fill upon Lot 28.

The only conclusion that I can reach upon the evidence which I have outlined in brief is that the Crown has failed to meet the onus upon it of proving beyond a reasonable doubt that Lot 28 or any part thereof consisted of fish habitat.

I should perhaps add that Captain Grozier stated in his evidence that when sand was placed upon Lot 28 it covered the area from the dyke to the end of the shrubs and trees and was not placed upon the marshy intertidal area beyond that line to the edge of the river. I accept that evidence of Captain Grozier.

The conclusion I have reached is not only that the Crown has failed to satisfy the onus upon it, but that the evidence goes further and leads to the conclusion that the part of Lot 28 which has been covered by sand was not fish habitat. The charge is therefore dismissed.

BRITISH COLUMBIA PROVINCIAL COURT

R. v. K.O. MILASTER

FRIESEN Prov.Ct.J. Langley, December 16, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under ss.31 and 38 - Accused acquitted on first charge - Although fish habitat damaged, accused's actions were reasonable in that he was protecting parents - Accused convicted on second charge of obstructing Fishery Officer in the execution of his duty.

A. Adlem, for the Crown.
C.R. Van Duffelen, for the accused.

FRIESEN Prov.Ct.J.: - The accused was charged

Count #1 on or about the 8th day of March, A.D. 1982, at or near Langley, in the Province of British Columbia, did unlawfully carry on a work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat; Contrary to Section 31(3) (b) of the Fisheries Act Chapter F-14 R.S.C. as amended.

Count #2 on or about the 8th day of March, A.D. 1982, at or near Langley, in the Province of British Columbia, did unlawfully wilfully obstruct a Fishery Officer in the execution of his duty; Contrary to Section 38 of the Fisheries Act Chapter F-14 R.S.C. as amended.

Count #3 *on or about the 8th day of March, A.D. 1982, at or near Langley, in the Province of British Columbia, unlawfully did commit mischief by wilfully damaging private property, to wit, a car, the property of the Government of British Columbia, Contrary to the form of the Statute in such case made and provided.*

Count 3 was quashed as being defective on its face, as it is impossible to determine which of two separate and distinct offences are charged, namely s387(3) or 387(4) of the Criminal Code. Neither charge is included in the other: R. v. Flindall *(1978), 42 C.C.C. 2d 65.*

The accused was acquitted on count 1 and convicted and sentenced on count 2 on December 15, 1982. These are reasons with respect to counts 1 and 2.

The facts are that the accused, a middle-aged, single man, lives with his aged and ailing parents on a farm near Langley. Nathan Creek runs through the property and parallel to a long driveway leading to the house. The hydro poles are within this driveway. There is no other access to the residence.

The creek is subject to rapid changes in level. It is said to drain a large area. In recent years, due to increased development and clearing of trees throughout the watershed it drains, the creek can suddenly turn into a raging torrent, especially where it passes through the Milaster farm. It has frequently overflowed its banks during heavy rain periods, and has destroyed 7-8 acres of their farm. The creek was threatening to

destroy the road - the only access to the residence, when the accused used his bulldozer to take gravel from the middle of the stream to shore up the bank of the road being threatened with a washout. The accused's father was sick, in the residence, and it is clear that there would have been a real and substantial danger to his well-being if an ambulance could not reach the house.

It was established that Nathan Creek is still a very productive fishery resource, despite its turbulent history and the disruption of fish habitat during freshets.

There can be no doubt that the movement of gravel by the accused resulted in the harmful alteration, disruption or destruction of fish habitat, but the question remains if it was unlawful for the accused to have done the work in the circumstances that prevailed on March 8, 1982. This is a strict liability offence, *R. v. City of Sault Ste. Marie* (1978) 40 C.C.C. 2d 353, leaving it open to the accused to avoid liability by showing he took all reasonable care. This involves consideration of what a reasonable man could have done in the circumstances.

The creek was about to endanger the safety and life of an elderly parent who might be isolated by a flood. The damage being done by nature to the fish habitat was enormous in comparison to what the accused did to protect his parents. What he did was eminently reasonable in the circumstances. He had to take immediate action. There was no reasonable alternative. Count 1 is therefore dismissed.

As to Count 2, the Fishery Officer appeared upon the scene in a uniform with shoulder flashing showing him as a "Conservation Officer". In fact he was also acting in his capacity as a Fishery Officer. The accused testified the officer refused to identify himself or state his business. The officer had been taking pictures while the accused was working in the creek. The accused knocked the camera from the officer's hands. A scuffle ensued. The accused lost his glasses and suffered a broken finger. The officer testified the accused said nothing when he approached and obstructed him. Whatever happened, it is clear the accused must have known he was dealing with a public official, and either attacked the officer without any provocation, or used a degree of force unreasonable in the circumstances which interfered with the Fishery officer's legitimate presence in the investigation of a complaint under the Fisheries Act. The accused is guilty of Count 2 beyond a reasonable doubt.

(Editor: A fine of $100 was imposed on Count 2)

BRITISH COLUMBIA PROVINCIAL COURT

R. v. CROWN ZELLERBACH CANADA LIMITED
(Ocean Dumping Control Act)

SCHMIDT Prov. Ct. J. Port Hardy, B.C., May 26, 1982

Constitutional law - Ocean Dumping Control Act, S.C. 1974-75-76, C.55 - S.4(1) of Act ultra vires - No attempt to link proscribed conduct to either actual or potential harm to fisheries or interference with navigation or shipping - Furthermore, no express declaration in Act that it is legislation implementing international obligations of Canada under Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter.

Section 4(1) of the *Ocean Dumping Control Act, S.C.* 1974-75-76, c. 55 which states

No person shall dump except in accordance with the terms and conditions of a permit.

is *ultra vires.* It is a blanket prohibition which makes no attempt to link the proscribed conduct to any of the powers enumerated in section 91 of *The British North America Act, 1867.* For example, the proscribed conduct is not linked either to actual or potential harm to fisheries or to interference with navigation or shipping. As well, the *Act* is not legislation implementing Canada's international obligations under the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter.* There is no express declaration in it that it was passed pursuant to the *Convention.* The fact that the *Convention* is referred to in some sections of the *Act,* and that the language used in some sections is similar to that used in the *Convention,* is not sufficient to uphold its validity.

(Editor: A comment on this case is found at (1982), *7 West Coast Environmental Law Research Foundation Newsletter* (No. 3), 4-6.)

D. Kier, Q.C., for the Crown
D. Shaw, for the accused

SCHMIDT Prov. Ct J.: - This is a case under section 4(1) of the *Ocean Dumping Control Act,* S.C. 1974-75-76, c. 55. This is a two count Information alleging offences on the 16th & 17th day(s) of August 1980. The Information reads as follows:

Count 1: On or about the 16th day of August, A.D. 1980, in the water of Johnstone Strait near Beaver Cove, Province of British Columbia did unlawfully dump except in accordance with the terms and conditions of a permit in contravention of Section 4 of the *Ocean Dumping Control Act,* thereby committing an offence under Section 13(1)(c) of the said Act.

Count 2: On or about the 17th day of August, A.D. 1980, in the waters of Johnstone Strait near Beaver Cove, Province of British Columbia did unlawfully dump except in accordance with the terms and conditions of a permit in

contravention of Section 4 of the *Ocean Dumping Control Act*, thereby committing an offence under Section 13(1)(c) of the said Act.

The admitted facts are as follows:

1) On or about the 12th, 16th and 17th days of August, 1980 the defendant dredged woodwaste from the ocean floor immediately adjacent to the shoreline at the site of its log dump in Beaver Cove, Vancouver Island, Province of British Columbia.

2) The woodwaste consisted of waterlogged logging debris such as bark, wood and slabs.

3) On August 16th and 17th, 1980 the defendant deposited the said woodwaste into deeper waters of Beaver Cove, approximately 60 to 80 feet seaward of where the wood waste had been dredged.

4) The approximate position of the defendant's log dump in Beaver Cove, being the place where the dredging took place, is marked with a letter "A" on charts 3561 and 3569 of the Canadian Hydrographic Service, Department of Fisheries and Oceans, which charts are entitled "HARBOURS IN BROUGHTON AND QUEEN CHARLOTTE STRAITS" and "BROUGHTON STRAIT", which charts are part of the facts agreed to herein by counsel.

5) The approximate place where the woodwaste was deposited in Beaver Cove is marked with the letter "B" on the said charts 3561 and 3569.

6) Canadian Hydrographic Service chart L/C-3001 entitled "VANCOUVER ISLAND" shows Vancouver Island, British Columbia, including Beaver Cove, which is marked with an ink circle. This chart is part of the facts agreed to by counsel.

7) The dredging was done for the purposes of allowing a new A-frame structure for log dumping to be floated on a barge to the shoreline for installation at the shoreline and to give clearance for the dumping of bundled logs from the A-frame structure into the waters of the log dump area.

8) The said dredging and depositing of woodwaste by the defendant was done with the use of an 80-foot loading crane situated on a scow that was moored in the area of the log dump. The crane reached in toward the shoreline to dredge the woodwaste from the bottom of the waters at the log dump site and then was swung around to the outshore position where the woodwaste was let go and allowed to sink in the deeper water. Also deposited was woodwaste which was situated on a scow, which woodwaste had been dredged from the log dump area on August 12, 1980 and stored on that scow. It was also offloaded with the use of the 80-foot crane.

9) The aforesaid activities of the defendant were part of the carrying out of its logging and forest product business in the Province of British Columbia. The logs dumped at the defendant's Beaver Cove log dump were and are logs emanating from the defendant's logging operations in British Columbia and were and are intended for use in the defendant's wood converting mills in the Province of British Columbia. The said scows and 80-foot loading crane were owned by the defendant and used only for the defendant's operations within British Columbia.

10) The area marked "A" on charts 3561 and 3569 has been used as a log dump for many years.

11) On or about July 28, 1980 the defendant was issued a permit under the *Ocean Dumping Control Act* which permit was numbered 4443-01005. The term of the licence was from July 26, 1980 to July 25, 1981. The dump site was in Johnstone Strait, British Columbia, 50° 33.5'N: 126° 48.0'W. This site was approximately 2.2 nautical miles from the place where the actual deposit took place in Beaver Cove. At the relevant time this was the only permit held by the defendant under the *Ocean Dumping Control Act*.

12) Beaver Cove is of such size that a person standing on the shoreline of either side of Beaver Cove can easily and reasonably discern between shore and shore of Beaver Cove.

13) The dredging and depositing took place within Block "A" leased from the Crown by the defendant for the purpose of log booming and storage.

14) The waters into which the deposit took place were navigable. Their use was for log dumping and sorting and booming. Scows also used these waters on occasion.

The defendant has questioned the constitutional validity of section 4(1) of the *Ocean Dumping Control Act* and has given notice to the Attorney-General of Canada and the Attorney-General of British Columbia pursuant to the *Constitutional Question Act*, R.S.B.C. 1979, c.63, as amended. The notice particularizes the constitutional points to be argued as follows:

1) Section 4(1) of the *Ocean Dumping Control Act* does not relate to any of the subjects of legislation expressly enumerated in section 91 of *The British North America Act, 1867*;

2) Section 4(1) of the *Ocean Dumping Control Act* does not provide for matters which are necessarily incidental to effective legislation by the Parliament of Canada upon a subject of legislation expressly enumerated in section 91 of *The British North America Act, 1867*;

3) Section 4(1) of the *Ocean Dumping Control Act* prima facie relates to certain of the subjects of legislation expressly enumerated in section 92 of *The British North America Act, 1867*. More particularly, section 4(1) of the *Ocean Dumping Control Act* relates to one or more of section 92(5), or section 92(10), or section 92(13) or section 92(16) of *The British North America Act, 1867*.

The impugned section of the *Ocean Dumping Control Act* reads as follows:

4(1) No person shall dump except in accordance with the terms and conditions of a permit.

This section must be read with the definition of "dumping" found in section 2(1) of the *Act* which reads as follows:

"dumping" means any deliberate disposal from ships, aircraft, platforms or other man-made structures at sea of any substance but does not include

(a) any disposal that is incidental to or derived from the normal operations of a ship or an aircraft or of any equipment thereof other than the disposal of substances from a ship or aircraft operated for the purpose of disposing of such substances at sea, and,

(b) any discharge that is incidental to or derived from the exploration for, exploitation of and associated off-shore processing of sea bed mineral resources;

The Crown contends that this section is not *ultra vires* the Government of Canada because it relates to or is necessarily incidental to the powers allocated in *The British North America Act, 1867*, 30 & 31 Victoria, c. 3(U.K.), sections 91(10) navigation and shipping and/or 91(12) seacoast and inland fisheries. In addition the Crown argues that the legislation falls within the scope of the federal government's power to legislate for the peace, order and good government of Canada by virtue of the fact that Canada was a signatory to the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter* signed by Canada on December 29, 1972 and therefore the legislation is necessary to permit the Government of Canada to implement its international *Convention* obligations.

The defendant argues that the section interferes with the power of the provinces under sections 92(5), 92(10), 92(13), or 92(16) and lacks any link between the proscribed conduct and any actual or potential harm or interference with shipping and navigation or sea coast and inland fisheries and is therefore *ultra vires* of the federal parliament. The defendant further contends that the federal parliament cannot take unto itself powers which it does not specifically have to implement its obligations under an international *Convention* and then justify that adoption of power by the peace, order and good government clause.

At the outset it is important to note that the material which was dredged and subsequently deposited was waterlogged logging debris such as bark, wood and slabs which resulted from the defendant's use of Beaver Cove for booming and sorting logs emanating from their logging operation. The booming and sorting of logs was an integral part of the logging operation and a usual method on the British Columbia coast for the transportation of logs to market. The dredging of the woodwaste was necessary for the installation of log dumping equipment and to give clearance for the dumping of logs. The dredging and dumping all took place within the area leased by the defendant from Her Majesty the Queen represented by the Minister of Lands, Parks and Housing of the Province of British Columbia.

The provinces clearly have the power to regulate logging operations. Section 92(5) *The British North America Act, 1867* reads as follows:

92(5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

I find that the area in which the operation took place, namely Beaver Cove, is within the Province of British Columbia. In *Reference re Ownership of the Bed of the Strait of*

Georgia and Related Areas (1976), 1 B.C.L.R. 97 (B.C.C.A.) the Court held that the internal waters and the subsoil of those waters, of which Beaver Cove is a part, are the property of the Queen in Right of the Province of British Columbia.

Counsel have referred the court to the four propositions of Lord Tomlin in *Attorney-General for Canada v. Attorney-General for British Columbia and others*, 1930 A.C. 111. The third proposition is important here. At p. 118 Lord Tomlin says:

> *(3.) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91*

The Crown says that section 4(1) of the *Ocean Dumping Control Act* is legislation necessarily incidental to navigation and shipping and to sea coast and inland fisheries.

In this case there is no allegation that the dumping impeded or interfered in any manner with navigation and shipping. Nor was there any allegation that the dumping was harmful to fish or fish habitat. For a successful prosecution under this section it is not required that the Crown prove that the dumping infringed on any area for which the federal legislature is empower(ed) to legislate. The Crown must only prove that a substance was dumped into the sea as "sea" is defined in the *Act*. The *Act* does not define "substance" but prohibits the dumping of "any substance". The broad scope of that term is not confined by the substances enumerated in Schedules I & II to the *Act* as section 13(1) (b) provides a penalty not exceeding fifty thousand dollars, where the offence involves any substance not specified in Schedule I or II.

Counsel for the defendant relies on the case of *R. v. Fowler* (1980), 32 N.R. 230, (also 9 C.E.L.R. 115 (S.C.C.), 2 *Fisheries Pollution Reports* 286). That case dealt with section 33(3) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, which read as follows:

> *33 (3) No person engaged 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 or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.*

In finding that the subsection was *ultra vires* of the federal parliament Martland J. said at p. 243:

> *The criteria for establishing liability under subsection 33(3) are indeed wide. Logging, lumbering, land clearing and other operations are covered. The substances which are proscribed are slash, stumps and other debris. The amount of the substance which is deposited is not relevant. The legislation extends to cover not only water frequented by fish but also water that flows into such water, ice over any such water and any place from which slash, stumps and other debris are likely to be carried into such water.*

Subsection 33(3) makes no attempt to link the proscribed 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 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 sea coast and inland fisheries and is ultra vires of the federal parliament.

In this case section 4(1) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries or to interference with navigation or shipping. It is a blanket prohibition of the broadest sort which makes no attempt to link the proscribed activity to any of the powers enumerated in section 91 of *The British North America Act, 1867*. It is legislation which does not purport to be incidental to any of the federal powers and is *ultra vires* of the federal parliament.

Having decided that section 4(1) is *ultra vires* of the federal parliament with respect to its specific section 91 powers it is now necessary to determine if the legislation was passed in implementation of an international obligation by Canada under a treaty or convention. If the answer is affirmative to that question then it must be asked whether it is open to Parliament to pass legislation in implementation of an international treaty obligation assuming that legislation would be otherwise beyond its competence.

The most recent authority cited to me in this regard is the case of *Vapor Canada Ltd. et al. v. MacDonald* (1976), 7 N.R. 477 (S.C.C.). In that case, Laskin, C.J.C., held that, although the decision in the *Labour Conventions* case 1937 A.C. 326, that the federal parliament cannot assume power for the implementation of treaty obligations, may be in need of reconsideration, the impugned section was not enacted for the implementation of a convention or treaty obligation and therefore the Crown could not rely on the obligation to give it a power which it did not specifically have under section 91(2) of *The British North America Act, 1867*. At p. 511 he says this:

There is nothing in the Trade Marks Act of 1953 to indicate that it was passed in implementation of the aforementioned Convention except that there is a reference to the Convention in the interpretation section and there is a definition of "country of origin" and "country of the Union", which bring in the Convention. These references are for a very narrow purpose of trade mark regulation, as is evident from ss. 5, 29 and 33 of the Trade Marks Act. They do not, in themselves, support the conclusion that the Act was passed in implementation of the Convention, and certainly not that s. 7 was so enacted.

In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference. The Courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation. Of course, even so, a question may arise whether the legislation does or does not go beyond the obligations of the treaty or convention.

Express reference existed in the various pieces of legislation which were the subject of the decision of this Court and of the Privy Council in the Labour Conventions case, supra. When that legislation was referred to this Court, being entitled, in brief, References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and The Limitation of Hours of Work Act. 1936 S.C.R. 416, the Order in Council under which the references were made recited what was the fact, namely, that the three Acts "were respectively passed, as appears from the recitals set out in the preambles of the said Acts, for the purpose of enacting the necessary legislation to enable Canada to discharge certain obligations declared to have been assumed by Canada...". In an earlier reference to this Court, Reference re Legislative Jurisdiction over Hours of Labour, 1925 S.C.R. 505, which concerned a draft convention on limitation of hours of work in industrial undertakings, adopted by the International Labour Conference of the League of Nations, the Order in Council directing the reference recited the opinion of the Minister of Justice that there was no enacting obligation upon the Parliament of Canada but only an obligation to bring any draft convention "before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action". The opinion of the Court on this Reference proceeded on this footing.

In the absence of an express declaration in the Trade Marks Act that the Act as a whole, including s. 7, or s. 7 itself was enacted in implementation of the obligations of the Convention, above referred to, I would not hold that there has been a valid exercise in this case of the federal treaty or convention implementing power, assuming such a power exists in the present case.

In this case there is no express declaration in the *Ocean Dumping Control Act* that the *Act* was legislation implementing the obligations of Canada under the *Convention of the Prevention of Marine Pollution by Dumping of Wastes and other Matter*. The *Convention* is referred to in the interpretation section and in some specific sections dealing with certain types of wastes and the disposal from Canadian ships of wastes outside the territorial waters of Canada. In addition some of the language tracks quite closely the language of the *Convention*. However, the difficulty is that the Court can only infer and speculate as to the purpose of the legislation and according to *Vapor Canada Ltd. et al. v. MacDonald* that is not sufficient. There must be an express intent to pass this legislation pursuant to the *Convention* to uphold this legislation as legislation to implement *Convention* or treaty obligations.

On the view I take on that question (it) is unnecessary for me to decide if such a power exists at all.

I find therefore that section 4(1) of the *Ocean Dumping Control Act* is *ultra vires* of the federal parliament and counts 1 and 2 of Information 2108 are dismissed.

BRITISH COLUMBIA COURT OF APPEAL

R. v. CROWN ZELLERBACH CANADA LIMITED
(Ocean Dumping Control Act)

CARROTHERS, AITKINS, MACDONALD J.J.A. Vancouver, January 26, 1984

On appeal from a decision of the British Columbia Provincial Court holding s.4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c.55, *ultra vires*, *held*, the appeal is dismissed.

The legislation is not valid under federal powers over "sea coast and inland fisheries" or "navigation and shipping" because no attempt was made to link the proscribed conduct to actual or potential harm to fisheries or to interference with navigation and shipping.

In addition, the legislation is not valid under the federal general power to make laws for the peace, order and good government of Canada. First it was found as a fact and not disputed that the waters in which the deposit was made are internal waters, whose property rights and thus legislative authority belong to the Province of British Columbia.

Second, it is not a valid attempt to implement an international obligation arising from a treaty. Assuming Parliament has the power to legislate to implement a treaty on a matter otherwise intended for provincial legislation, exercise of that power must be manifested in the legislation and not left to interfere as it is here.

Third, the argument that ocean pollution is a matter which was unknown at Confederation and should therefore fall within the residual power of the federal government also fails. A problem not contemplated in 1867 does not automatically come within the residual power. The nature of the new matter determines who will exercise legislative jurisdiction.

D.R. Kier, Q.C., for the Crown, appellant.
D.W. Shaw, Q.C., and *B.D. Gilfillan*, for the respondents.

The judgment of the Court was delivered by

MACDONALD J.A.: - the issues before us is whether s.4(1) of the Ocean Dumping Control Act, S.C. 1974-75-76, C-55 is ultra vires of the Parliament of Canada. It provides:

> *4(1) No person shall dump except in accordance with the terms and conditions of a permit.*

Section 2(1) contains this definition:

> *"dumping" means any deliberate disposal from ships, aircraft, platforms or other man-made structures at sea of any substance but does not include:*
>
> *(a) any disposal that is incidental to or derived from the normal operations of a ship or an aircraft or of any equipment thereof other than the disposal of substances from a ship or aircraft operated for the purpose of disposing of such substances at sea, and,*
>
> *(b) any discharge that is incidental to or derived from the exploration for, exploitation of and associated offshore processing of sea bed mineral resources.*

The respondent was charged under s.4(1) upon an information containing two counts. Both were dismissed by His Honour Judge E.D. Schmidt in Provincial Court upon the finding that s.4(1) is ultra vires. An appeal, by way of stated case, has been taken directly to this Court.

The trial proceeded upon the basis of the following admitted facts:

1) *On or about the 12th, 16th, and 17th days of August, 1980 the Defendant dredged woodwaste from the ocean floor immediately adjacent to the shoreline at the site of its log dump in Beaver Cove, Vancouver Island, Province of British Columbia.*

2) *The woodwaste consisted of waterlogged logging debris such as bark, wood and slabs.*

3) *On August 16th and 17th, 1980 the Defendant deposited the said woodwaste into deeper waters of Beaver Cove, approximately 60 to 80 feet seaward of where the wood waste had been dredged.*

4) *The approximate position of the Defendant's log dump in Beaver Cove, being the place where the dredging took place, is marked with a letter "A" on charts 3561 and 3569 of the Canadian Hydrographic Service, Department of Fisheries and Oceans, which charts are entitled "HARBOURS IN BROUGHTON AND QUEEN CHARLOTTE STRAITS" and "BROUGHTON STRAIT", which charts are part of the facts agreed to herein by counsel.*

5) *The approximate place where the woodwaste was deposited in Beaver Cove is marked with the letter "B" on the said charts 3561 and 3569.*

6) *Canadian Hydrographic service chart L/C-3001 entitled VANCOUVER ISLAND shows Vancouver Island, British Columbia, including Beaver Cove, which is marked with an ink circle. This chart is part of the facts agreed to by counsel.*

7) *The dredging was done for the purposes of allowing a new A-frame structure for log dumping to be floated on a barge to the shoreline for installation at the shoreline and to give clearance for the dumping of bundled logs from the A-frame structure into the waters of the log dump area.*

8) *The said dredging and depositing of woodwaste by the Defendant was done with the use of an 80-foot loading crane situate on a scow that was moored in the area of the log dump. The crane reached in toward the shoreline to dredge the woodwaste from the bottom of the waters at the log dump site and then was swung around to the outshore position where the woodwaste was let go and allowed to sink in the deeper water. Also deposited was woodwaste which was situate on a scow, which woodwaste had been dredged from the log dump area on August 12, 1980 and stored on that scow. It was also offloaded with the use of the 80-foot crane.*

9) *The aforesaid activities of the Defendant were part of the carrying out of its logging and forest product business in the Province of British Columbia. The logs dumped at the Defendant's Beaver Cove log dump were and are logs*

emanating from the Defendant's logging operations in British Columbia and were and are intended for use in the Defendant's wood converting mills in the Province of British Columbia. The said scows and 80-foot loading crane were owned by the Defendant and used only for the Defendant's operations within British Columbia.

10) The area marked "A" on charts 3561 and 3569 has been used as a log dump for many years.

11) On or about July 28, 1980 the Defendant was issued a permit under the Ocean Dumping Control Act which permit was numbered 4443-01005. The term of the licence was from July 26, 1980 to July 25, 1981. The dump site was in Johnstone Strait, British Columbia, 50 33.5'N: 126 48.0'W. This site was approximately 2.2 nautical miles from the place where the actual deposit took place in Beaver Cove. At the relevant time this was the only permit held by the Defendant under the Ocean Dumping Control Act.

12) Beaver Cove is of such size that a person standing on the shoreline of either side of Beaver Cove can easily and reasonably discern between shore and shore of Beaver Cove.

13) The dredging and depositing took place within Block "A" leased from the Crown by the Defendant for the purpose of log booming and storage.

14) The waters into which the deposit took place were navigable. Their use was for log dumping and sorting and booming. Scows also used these waters on occasion.

The trial judge made a significant finding which was not challenged before us. He said:

I found that the area in which the operation took place, namely Beaver Cove, was within the Province of British Columbia: Reference re Ownership of the Bed of the Strait of Georgia and Related Areas (1977) 1 B.C.L.R. 97 (B.C.C.A.); and that the internal waters and the subsoil of those waters, of which Beaver Cove is a part, are the property of the Queen in right of the Province of British Columbia.

The appellant submits that s.4(1) was validly enacted under the grant of legislative power to Parliament in s.91 of the Constitution Act, 1867. Firstly, the appellant says that the subject is within enumerated heads Navigation and Shipping (10) and Seacoast and Inland Fisheries (12). Secondly, Mr. Kier argued that the provision is valid under the general power given to Parliament "to make Laws for the Peace, Order, and Good Government of Canada".

Navigation and Shipping, Seacoast and Inland Fisheries

The respondent did not dispute the scope of the federal powers under these two heads and, specifically, conceded that those powers applied to the waters of Beaver Cove. Rather, its case is that the provision is ultra vires in that it is not legislation upon the subject of navigation and shipping or seacoast and inland fisheries nor necessarily incidental to effective legislation by Parliament upon those subjects.

Supporting the enactment, the appellant submits that the waters in question are navigable and fish may be expected in them. The public have the right to free usage of the ocean both for navigation and fishing. The woodwaste could hinder both. Its effect on fishing nets and food for bottom fish is obvious.

> In my opinion the tests of the validity of this legislation are those employed by the Supreme Court of Canada in two recent decisions *Fowler v. The Queen* 1980 2 S.C.R. 213 and *Northwest Falling Contractors Ltd. v. The Queen* 1980 2 S.C.R. 292. In both cases provisions of the Fisheries Act, R.S.C. 1970 c.F-14 were sought to be upheld under the federal legislative jurisdiction of s.91.12. In the first case. s.33(3) was held ultra vires; in the second s.33(2) was found to be intra vires.

S.33 of the Fisheries Act appears under the heading "Injury to Fishing Grounds and Pollution of Waters". Subsections 2 and 3 are as follows:

> *(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.*
>
> *(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 or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.*

Martland J. gave the judgment of the Court in both cases. After setting out definitions of "fishery" he went on to say this at p.224:

> *The legislation in question here does not deal directly with fisheries, as such, within the meaning of those definitions. Rather, it seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects. Prima facie, subs. 33(3) regulates property and civil rights within a province. Dealing, as it does, with such rights and not dealing specifically with "fisheries", in order to support the legislation it must be established that it provides for matters necessarily incidental to effective legislation on the subject matter of sea coast and inland fisheries.*

After pointing out that the respondent sought to support the provision on the ground that it was preventive legislation intended to protect and preserve fish, its validity not depending on showing that the operations to which it relates cause actual harm to a fishery, and observing how wide were the criteria for establishing liability under s.33(3), Mr. Justice Martland at p.226 gave these reasons for holding the provision ultra vires.

> *Subsection 33(3) makes no attempt to link the proscribed 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 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 sea coast and inland fisheries and is ultra vires of the federal Parliament.

In the *Northwest Falling Contractors* case Martland J. found that s.33(2), in essence, sought to protect fisheries by preventing substances deleterious to fish entering into waters frequented by fish. He explained the different situation presented from that in *Fowler* in this way at p.301:

The situation in this case is different from that which was considered in Dan Fowler v. Her Majesty The Queen, a judgment of this Court recently delivered. That case involved the constitutional validity of subs. 33(3) of the Fisheries Act and it was held to be ultra vires of Parliament to enact. Unlike subs. (2), subs. (3) contains no reference to deleterious substances. It is not restricted by its own terms to activities that are harmful to fish or fish habitat. The basis of the judgment in the Fowler case is set out in the following passage:

"Subsection 33(3) makes no attempt to link the proscribed 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."

In my opinion, subs. 33(2) was intra vires of the Parliament of Canada to enact. The definition of "deleterious substance" ensures that the scope of subs.33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.

In my judgment the statements in the key passage in *Fowler* are completely applicable to s.4(1) of the Ocean Dumping Control Act. In consequence it is not valid legislation under s.91.12. I think the appellant has a weaker case in attempting to bring the provision under s.91.10, Navigation and Shipping. It too must fail through no attempt to link the prohibited conduct to actual or potential harm to navigation or shipping.

Laws for the Peace, Order, and Good Government of Canada

The appellant submits that s.4(1) is valid legislation under this general power in three separate respects. The first is that as the waters, as distinct from the bottom, of Beaver Cove are not part of the province of British Columbia, there is no legislative competence in the province pursuant to s.92 of the Constitution Act 1867 and therefore legislative competence lies with Parliament under this general power. Re *Regulation and Control of Radio Communication and A.G. Quebec v. A.G. Canada* 1932, 2 D.L.R. 81 at pp.83-84; *Reference re The Debt Adjustment Act* 1937 (Alta.) *A.G. Alta. v. A.G. Canada* 1943, 2 D.L.R. 1 at p.9. Further, the appellant contends that the real subject matter of the legislation is such that it goes beyond local or provincial concern with the result that it falls within the legislative competence of Parliament as a matter affecting the peace, order, and good government of Canada, even though it may in another aspect touch upon matters specially reserved to the provincial legislatures. *A.G. Ontario et al v. Canada Temperance Federation* 1946, 2 D.L.R. 1. Mr. Kier relies also on the opinion of the Supreme Court *Reference re Offshore Mineral Rights (B.C.)* 1967, S.C.R. 792.

This argument cannot prevail. Firstly, it appears to over look what appears from the admitted facts, namely that the waters of Beaver Cove are *inter fauces terrae* and the finding of the Provincial Court Judge that they are internal waters the property of the Queen in Right of the Province of British Columbia. In support of his finding the judge cited *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* (1977) 1 B.C.L.R. 97. In that case the majority of three judges of this court held that the province had the property right in all the lands covered by certain waters, including Johnstone Strait and Queen Charlotte Strait upon which Beaver Cove abuts. And Seaton J.A., dissenting and holding in favour of the federal government, excluded from such a result waters which were inter fauces terrae. They were therefore within the legislative jurisdiction of the province as delineated by McFarlane J.A. giving the judgment of this Court *R. v. Bordignon Masonry Limited and Bordignon* 1978, 1 W.W.R. 374 at p.376:

> *The legislative power of the provincial legislature is to enact laws in relation to the classes of subjects enumerated in s.92 of the B.N.A. Act, 1867. Laws so enacted take effect within, and only within, the territorial boundaries of the province.*

I think the province has legislative jurisdiction in the area here in question under s.92.5 "the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon"; s.92.13 " Property and Civil Rights in the Province"; and s.92.16 "Generally all Matters of a merely local or private Nature in the Province".

Next, the appellant submitted that s.4(1) is supportable as legislation in the implementation of a Canadian international obligation arising out of a treaty or convention and thus falling within the ambit of the peace, order, and good government power of Parliament. The convention invoked is the "Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter" which was signed on behalf of Canada February 9, 1973 and came into force August 30, 1975.

The governing authority is *MacDonald et al v. Vapor Canada Ltd.* 1977, 2S.C.R. 134. The reasons of Laskin C.J.C. were, as well, those of four other judges. One of the issues was whether s.7 of the Trade Marks Act R.S.C. 1970, c.T-10 could be supported as federal legislation in implementation of an obligation assumed by Canada under an international convention. The Court held that it could not.

The Chief Justice commenced discussion of the point by reference to comment upon References re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act, and Limitation of Hours of Work Act (the *Labour Conventions* case) 1937 A.C. 326. Then he went on at p.169:

> *Although the foregoing references would support a reconsideration of the Labour Conventions case, I find it unnecessary to do that here because, assuming that it was open to Parliament to pass legislation in implementation of an international obligation by Canada under a treaty or Convention (being legislation which would be otherwise beyond its competence), I am of the opinion that it cannot be said that s.7 was enacted on that basis.*

Then, after setting out certain provisions of the statute and the convention, Laskin C.J.C. went on at pp.171-172 as follows:

There is nothing in the Trade Marks Act of 1953 to indicate that it was passed in implementation of the aforementioned Convention except that there is a reference to the Convention in the interpretation section and there is a definition of "country of origin" and "country of the Union", which bring in the Convention. These references are for a very narrow purpose of trade mark regulation, as is evident from ss.5, 29 and 33 of the Trade Marks Act. They do not, in themselves, support the conclusion that the Act was passed in implementation of the Convention, and certainly not that s.7 was so enacted.

In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to interference. The Courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation. Of course, even so, a question may arise whether the legislation does or does not go beyond the obligations of the treaty or convention.

Express reference existed in the various pieces of legislation which were the subject of the decision of this Court and of the Privy Council in the Labour Conventions case, supra. When that legislation was referred to this Court being entitled, in brief, Reference re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and The Limitation of Hours of Work Act, the Order in Council under which the references were made recited what was the fact, namely, that the three Acts "were respectively passed, as appears from the recitals set out in the preambles of the said Acts, for the purpose of enacting the necessary legislation to enable Canada to discharge certain obligations declared to have been assumed by Canada ...." In an earlier reference to this Court, Reference re Legislative Jurisdiction over Hours of Labour, which concerned a draft convention on limitation of hours of work in industrial undertakings, adopted by the International Labour Conference of the League of Nations, the Order in Council directing the reference recited the opinion of the Minister of Justice that there was no enacting obligation upon the Parliament of Canada but only an obligation to bring any draft convention "before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action". The opinion of the Court on this Reference proceeded on this footing.

In the absence of an express declaration in the Trade Marks Act that the Act as a whole, including s.7, or s.7 itself was enacted in implementation of the obligations of the Convention, above referred to, I would not hold that there has been a valid exercise in this case of the federal treaty or convention implementing power, assuming such a power exists in the present case.

Counsel for the appellant referred us to various sections of the statute as well as the schedules thereto and compared them with certain articles of the convention and the annexes to it. There are significant similarities in the effect of certain provisions. Further, the statute, in s.2(1) defines "Convention" as meaning the Convention here in question. And the Convention is referred to in a number of places throughout the statute. But, in my opinion, the appellant's case does no more than support an inference that the statute was passed in implementation of a convention obligation. There is no express statement to that effect. It is noteworthy that Parliament enacted the Ocean Dumping

Control Act without the benefit of the Supreme Court's decision in *MacDonald et al v. Vapor Canada Ltd.* That judgment was not delivered until January 30, 1976. But equally noteworthy, the statute in question does not contain recitals such as those in the preambles to the legislation considered in the *Labour Conventions* case and referred to by Laskin C.J.C. in the passages I have quoted. I conclude that this statute does not meet the test of legislation validly enacted in implementation of a treaty obligation of Canada.

The third argument for validity of s.4(1) under the federal peace, order and good government power is based upon the judgment of Pigeon, J., concurred in by Martland and Ritchie, JJ., *Regina v. Hauser et al* 1979, 1 S.C.R. 984. Citing the following passage at pp. 1000-1001, counsel submitted the pollution of the sea was a problem not contemplated at the time of Confederation.

> *In my view, the most important consideration for classifying the Narcotic Control Act as legislation enacted under the general residual federal power, is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of "Matters of a merely local or private nature". The subject-matter of this legislation is thus properly to be dealt with on the same footing as such other new developments as aviation: see Re Aerial Navigation, 1932, 1 D.L.R. 58, 1931, 3 W.W.R. 625, 1932, A.C.54, and radio communications Re Regulation & Control of Radio Communication, 1932, 2 D.L.R. 81, 1932, 1 W.W.R. 563, 1932, A.C.304.*

But it is not enough to find that pollution of the sea is a problem which was unrecognized in 1867. It must also be one which cannot be put in the class of "Matters of a merely local or private nature". In his work *Constitutional Law of Canada*, P.W. Hogg put it this way at p.246:

> *In most cases a "new" or hitherto unrecognized kind of law does not have any necessary or logical claim to come within p.o.g.g. It might come within property and civil rights in the province (s.92(13)) or matters of a merely local or private nature in the province (s.92(16)). Which head of power is appropriate depends on the nature of the "new" matter and the scope which is attributed to the various competing heads of power of which p.o.g.g. is only one.*

I have already expressed my opinion that the province of British Columbia has legislative jurisdiction over the dumping of substances in Beaver Cove.

I would dismiss the appeal.

NORTHWEST TERRITORIES TERRITORIAL COURT

R. v. PANARCTIC OILS LIMITED
(Ocean Dumping Control Act)

BOURASSA Terr. Ct. J. Yellowknife, December 20, 1982

Due diligence - Accused charged with an offence under s. 4(1) of Ocean Dumping Control Act, S.C. 1974-75-76, c. 55 - Person in charge of drilling operation knew of and consented to unlawful dumping by employees - Defence of due diligence considered.

Ocean Dumping Control Act, S.C. 1974-75-76, c. 55 - Accused convicted of an offence under s. 4(1) - Person in charge of drilling operation knew of and consented to unlawful dumping by employees - Not necessary therefore to deal with defence of due diligence - In any event defence not established on facts.

Pursuant to a drilling authority, the accused corporation established a drilling rig and well site in the Canadian Arctic. The drilling authority required that all non-combustible garbage be disposed of at a designated land base site. However, during "rig-out" in May 1981, employees of the accused drilled two holes in the ice into which they dumped, using assorted vehicles and equipment, garbage including, among other things, oil drums, cable, cement and a pick-up truck. Over a two week period of dumping, at least one-third of the total work force was involved, including some supervisory personnel who gave instructions with respect to the dumping.

On a charge of violating s. 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, *held*, the accused is guilty.

The facts are for the most part admitted by the accused who relies on the defence available in s. 17 of the *act* (that the offence was committed without its knowledge or consent and that all due diligence to prevent its commission was exercised).

With respect to the question of knowledge or consent, the period whose knowledge or consent is relevant is the person who in the circumstances represents the directing mind and will of the corporation. In this case that person is the Drilling foreman who was in full and actual control of rig operations. Although the Drilling Foreman denied all knowledge of the dumping, he must have known and must have seen what was going on because he was at the compact and isolate site at all times, and in daily consultation with the supervisors who were involved in and directed the dumping. Also, the events were overt, involving substantial manpower and equipment over a two week period. If the Drilling Foreman did not look or see, he was wilfully blind; if he did not consent, he was wilfully ignorant of what was going on.

With respect to the question of due diligence, because of the finding that the accused knew of and consented to the dumping, a consideration of this question is not necessary. However, what amounts to due diligence or reasonable care in any case depends on the circumstances. Certain factors should be considered in determining the appropriate standard of care, including the gravity of the potential harm, the degree of knowledge or skill required and whether the events are beyond the control of the accused.

In the present circumstances, a high standard of care is necessary. A greater potential for harm necessitates a higher standard of care. That damage will be caused by dumping is presupposed by the statutory prohibition. It is not visible or actual harm which must be considered (for example, the number of fish killed) but the harm to society (the destruction of a portion of the Arctic environment). The degree of knowledge or skill required in the present circumstances must be high and represent the latest state of the art in operating in the Arctic given the fragility of the environment. The events here were not beyond the control of the accused. The problems associated with rig-out were foreseeable and the possibility of employees resorting to dumping was manifestly so. The accused, despite asserted concern and awareness of environmental matters among its supervisory personnel, failed to instruct lower echelons as to the corporation's obligations regarding dumping and had no system at all to ensure compliance with the statutory prohibition against dumping. Thus, the accused failed to exercise due diligence.

G.M. Bickert, for the Crown
G. Lang, for the accused

BOURASSA Terr. Ct. J.: Panarctic Oils Limited, the defendant herein, is accused of dumping substances in the sea without a permit - an offence by virtue of section 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55.

> *No person shall dump except in accordance with the terms and conditions of a permit.*

'Dumping is defined in section 2(1) as

> *...any deliberate disposal from ships, aircraft, platforms or other man-made structures at sea of any substance....*

There is one matter which would be appropriate to address at this time, and as no issue was raised in these proceedings by Crown or defence, my comments are brief. I am satisfied that the jurisdiction of this Court to deal with an occurrence in the waters of the Canadian Arctic Archipelago springs from at least two sources: firstly, is from Canada's claim to those areas as territorial seas, using a straight baseline approach to encircle the Archipelago referred to in the *Anglo-Norwegian Fish* case 1951 ICJ Rep. 4; secondly, is the fact that Canada's jurisdiction over the waters is accepted as part of international law.

> *At the 1975 session of that Conference, held in Geneva, a form of Arctic clause was inserted in the first Negotiating Test and it provided that coastal States could adopt special protective measures in special areas within their exclusive economic zone, where exceptional hazards to navigation prevailed and marine pollution could cause irreversible disturbance of the ecological balance. In 1976, the provision was enlarged to enable coastal States themselves to enforce such protective measures, instead of leaving the enforcement to the flag State, and the provision has been kept without change in all the subsequent negotiating texts of 1977, 1979 and 1980. Considering the wide consensus which this provision has received, particularly on the part of other Arctic States, it may now be regarded as part of customary international law and completely validates Canada's Arctic legislation. (Donat Pharand, La contribution du Canada au developpement du droit international pour la protection du milieu marin: le cas special de l'arctique, Etudes Internationales, Vol. XI, Numero 3 (September 1980).*

Section 4(2) of the *Act* declares that section 4(1) applies to dumping "...in any area of the sea...". In an agreed statement of facts filed, it is conceded that the activity in question took place within the "sea" as defined in section 2(d) of the *Act*, and that the defendant was not in possession of a permit as required by section 4(1) of the *Act*.

There can be no question but that the Dominion Parliament regards the matter of illegal dumping as a highly important matter given the range of penalties that are provided for. Section 13(1) reads:

> *Every person who contravenes section 4, 5 or 6 is guilty of an offence and is liable on summary conviction to a fine not exceeding*
>
> *(a) one hundred thousand dollars, where the offence involves a substance specified in Schedule I;*
>
> *(b) seventy-five thousand dollars, where the offence involves a substance specified in Schedule II; or*
>
> *(c) fifty thousand dollars, where the offence involves any substance not specified in Schedule I or II.*

Further provision is made with respect to the imposition of penalty by virtue of section 14:

> *Where an offence under subsection 13(1) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.*

This offence of dumping can be termed or called a public welfare type of offence which, by law, requires the Crown to prove the prohibited act beyond a reasonable doubt, at which point the defendant can resist conviction by establishing on the balance of probabilities,

> *...that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission. (Section 17, Ocean Dumping Control Act. My emphasis.)*

With respect to the prohibited act, I find the following facts: pursuant to drilling authority No. 947, dated the 3rd of December, 1979, the defendant established a drilling rig and well site at Latitude 77° 12" and Longitude 106° 53" (a site in the Lougheed Island Basin approximately 25 kilometers west of Lougheed Island and 40 kilometers northeast of Vesy Hamilton Island at the northern tip of Melville Island) known as Panarctic A.I.E.G. Whitefish G-63. The drilling authority had attached to it a number of documents containing certain provisions with respect to environmental concerns and specifically paragraph II with respect to dumping.

> *The operator shall dispose of all combustible garbage and debris at least once daily by incineration in a fuel-fired incinerator. The residue and all other non-combustible garbage and debris shall be disposed of at a designated land base site.*

In this particular instance the designated land base site was Rae Point on the east side of Melville Island facing Byan Channel. The practice required by the conditions of the drilling authority, and in fact, the usual practice of the defendant was to have all garbage, junk, and refuse and the like flown out of the well site to Rae Point for final disposal.

The well site itself was made up of two camps. A (drilling) rig camp and a (air) strip camp, which were connected by a road approximately 1.6 kilometers long. In late April or early May of 1980, a hole was drilled through the ice approximately 50 to 100 feet behind a mechanic's shed located at the strip camp. Another hole was drilled a few feet from the road between the two camps. The hole behind the mechanic's shed was significantly enlarged from its original size of approximately 18 inches to a size of approximately 6 by 8 feet by the use of hot water jets. From and including May 6th to and including May 18th, 1980, at least, the hole behind the mechanic's shed was regularly and continuously used by the defendant's employees to dump various and sundry articles of garbage, refuse and junk. This garbage included the following: in excess of 300 45-gallon drums, each containing residues of the substances they originally contained (some as much as 2-3 gallons). These substances included diesel fuel, gasoline, lubricating oil and transmission fluid; numerous wooden pallets; hundreds of bags of caustic soda; hundreds of bags of weight material known as "Barite"; at least 400 feet of 3/8 inch cable; numerous 45-gallon drums containing burned refuse and ash; lengths of surplus drilling casing; several thousand pounds of cement; quantities of alcohol; scrap metal; paper; plastic; drilling mud; anti-freeze and a pickup truck.

The defendant's employees utilized assorted vehicles and equipment to effect this dumping, which included: a water truck for spraying hot water to enlarge the hole; a drilling vehicle; an 85 ton crane; a large wheeled front-end loader; a forklift and a number of trucks. At least 14 employees were identified as being involved or aware of the dumping (Van Stolk, Walburger, Williams, Bell, McNee, Winnatoy, McEachern, McBain, "Waldo", "Vic", Bolduc, Corby, McEachern, Cummins) plus at least 12 more unidentified by name. Most of these employees worked at the dumping site over the period of time that I have found the dumping to have occurred.

As part of the above, a number of supervisory personnel were involved with the dumping operation and identified as being at the dumping site while this dumping operation was in progress - The Drilling Foreman, the Construction Relief Foreman and two Construction Foremen. All but the Drilling Foreman have been identified as giving instructions or directions with respect to the dumping; the Construction Foremen, called as witnesses, are silent as to where their instructions came from.

At the material time the individuals involved in the dumping represented no less than 1/3 of the defendant's work force at the site.

Both holes were clearly visible to passersby and, in particular, the small hole by the road was clearly visible to anyone travelling the road, and workers were observed at both holes on many occasions working the equipment and dumping the items referred to.

I find that the dumping took place under the direction and supervision of the three full-time supervisors, that is to say, the Construction Relief Foreman as well as the two Construction Foremen, who are second only in authority at the well site to the Drilling Foreman. The Construction Foremen are answerable to the Drilling Foreman and

subject to his direction. The Drilling Foreman, being the most senior of the defendant's employees on the site had denied knowledge of the event.

The evidence is that the Drilling Foreman is in charge of the whole of the defendant's operation at Whitefish, and the most senior man on the well site, and that he was at the well site almost continuously at all material times.

These are the facts surrounding the dumping and these facts are not seriously questioned by the defendant, and in fact, for the most part, candidly admitted.

With the dumping having admittedly taken place, how then can the defendant avoid conviction? Section 17 of the *Ocean Dumping Control Act* provides:

> *In a prosecution of a person for an offence under subsection 13(1) or (2), it is sufficient proof of the offence to establish that it was committed by*
>
> *(a) an agent or employee of the accused, or*
>
> ...
>
> *whether or not any person referred to in paragraph (a) or*
>
> *(b) is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.*

The defence raised is that this dumping occurred without the knowledge or consent of the corporate defendant and that the corporate defendant exercised all due diligence to prevent this kind of prohibited act. As I have stated previously, the defendant must establish this defence on the balance of probabilities. I would refer to the landmark decision of *R. v. City of Sault Ste. Marie* (1978) 40 C.C.C. 353 at 377, 7 C.E.L.R. 53 at 74 (S.C.C.) wherein Mr. Justice Dickson stated as follows:

> *One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and 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. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.*

(My emphasis)

In dealing with the first part of the defence, knowledge or consent of the defendant: can it be said that the corporation's directing mind and will was not involved here?

Lord Denning stated in *H.L. Bolton (Engineering) Co., Ltd. v. T.J. Graham & Sons, Ltd.* 1956 3 All E.R. 624 at 630 (C.A.)

> *A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.*

These words were considered by Viscount Dilhorne in the House of Lords decision with respect to *Tesco Supermarkets Ltd. v. Nattrass* 1971 2 All E.R. 127 at 146 (H.L.) wherein he stated:

> *These passages, I think, clearly indicate that one has in relation to a company to determine who is or who are, for it may be more than one, in actual control of the operations of the company, and the answer to be given to that question may vary from company to company depending on its organization.*

In the instant case, responsibility for operating and conducting a significant aspect of the defendant's business was passed from the Vice-President of Operations to the Drilling Foreman. The defendant has put him forward as the "responsible agent" on the drilling authority and has placed him in full and actual control as to what the defendant does or does not do at the well site itself. After hearing the evidence I am satisfied that the Drilling Foreman, as the 'superior servant' on site, an individual who is charged with the responsibility of operating what must be a multi-million dollar well in the High Arctic, represented the mind and will of the defendant corporation and that his intent and actions were the defendant's intent and actions.

This superior servant, this Drilling Foreman, was on the evidence before me, at the well site virtually at all material times, travelling between the strip camp and the rig camp and in daily consultation and communication with the Construction Foremen, and in overall charge of all operations. He must have known, and in fact, must have seen what was going on with respect to this illegal dumping. If he did not look or see, I find he was wilfully blind; he must have consented to what was occurring, and if he did not consent, it was because he was wilfully ignorant of what was transpiring. The events described by the witnesses before me were unfolding in an absolutely overt manner, clearly visible to all those at both camps, involving substantial manpower, equipment, and other resources over a period of some two weeks. I find incredible the Drilling Foreman's evidence that all of this occurred without his knowledge and consent. This was not a surreptitious act of disobedience by a malcontent; this was a significant event that would be impossible to ignore at such a compact and isolated site. From the facts that I have found proven before me, I am satisfied, without any qualification, that the corporate defendant, through its superior servant, knew of and consented to the violation of the *Ocean Dumping Control Act* by its servants.

Having made that determination, it is not therefore strictly necessary to consider whether or not the corporation exercised all due diligence to prevent the commission of this offence. However, I believe it appropriate and relevant to address myself to this portion of the defence. In order to arrive at a conclusion with respect to that defence it is necessary again to refer to the facts that have been proven before me. The chain of command at the well site has already been described, but with respect to this aspect of the defence, I believe it useful to follow the chain of command to its ultimate source.

The person in overall command of all operations is the Vice-President in charge of Operations who is responsible for all field activities. Directly below him and answerable to him is the General Superintendent who is responsible for the direction of all site operations, which site operations are further subdivided by function. There is a Construction Superintendent and a Drilling Superintendent, both of whom instruct and direct the Construction Foremen and Drilling Foremen, respectively, at each particular well site. Both of these Superintendents are based off the well site. At the well site itself, as soon as the drilling rig is ready for "spud-in" the Drilling Foreman assumes direction over the entire site and direction over the Construction Foremen. Up until that time the Construction Foremen are responsible for preparing the site, maintaining the drilling rig, and removing it.

Evidence has been given that the corporate defendant is very concerned with environmental issues generally, that it has a strict environmental program, and in particular, dealing with the Whitefish site, that its operation's policies and directives with respect to compliance with all appropriate environmental legislation, including the *Ocean Dumping Control Act*, and the regulations were well known to all. It was stated by the Vice-President in charge of Operations, the Construction Superintendent, and the Drilling Foreman, that all personnel were well aware of the corporate policies with respect to dumping and that the personnel were all experienced and trusted. It has been given in evidence that when the drilling program at Whitefish was discussed in Calgary with the supervisory personnel involved present, environmental concerns, including company policy with respect to dumping "must have been discussed". Prior to spud-in there was a further meeting at the Whitefish site with all supervisory personnel and other personnel on site, at which meeting the drilling program was reviewed and discussed and environmental concerns and company regulations with respect to dumping would "most certainly be discussed". The evidence of the supervisory personnel that corporate environmental directives and anti-dumping directives "would have been discussed" at various and sundry meetings, is contradicted by the evidence of each of the roustabouts called by the Crown. These witnesses stated emphatically that they had received no briefing, no instructions, or any direction whatsoever with respect to dumping. In that regard I prefer their evidence over the evidence of the defence witnesses who stated at numerous points that these kinds of issues "must have been discussed" or "I assume they were discussed".

I find as a fact that no environmental concerns, or particularly, the obligations of the corporation with respect to dumping were raised at any time with the lower echelons of employee ranks. I note that each roustabout called to give evidence confirmed either in chief or on cross-examination that he felt that the dumping was wrong, but it was not clarified or stipulated whether that wrong was a wrong in light of company regulations or a legal wrong or a moral wrong. I am unable to assume that this "wrong" was of the former variety given the evidence of the complete lack of briefing or indoctrination by the defendant. Is this due diligence?

In assessing the conduct of the accused vis-a-vis its obligation of due diligence or reasonable care, I refer to the words of Chief Judge Stuart of the Yukon Territorial Court in *R. v. Gonder* 62 C.C.C. (2d) 326 at 332:

> *Reasonable care implies a scale of caring. The reasonableness of the care is inextricably related to the special circumstances of each case. A variable standard of care is necessary to ensure the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each factual*

setting. The degree of care warranted in each case is principally governed by the following circumstances:

(a) Gravity of potential harm.
(b) Alternatives available to the accused.
(c) Likelihood of harm.
(d) Degree of knowledge or skill expected of the accused.
(e) Extent underlying causes of the offence are beyond the control of the accused.

This is by no means an exhaustive list of the various factors involved, but a list that contains the factors referred to in a number of earlier decisions. Due diligence

...must be taken in a reasonable sense, and mean something substantial...as meaning not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so, as far as diligence can secure it.
(Grain Growers Export Co. v. Canada Steamship Lines Limited (1917), 43 O.L.R. 330 at 344 (Ont. App. Div.)

There is a substantial obligation on the defendant to exercise this due care of due diligence and see that its exercise is properly carried out.

...I think it quite insufficient to say, 'We hire and train carefully'.
(R. v. Georgia Towing Co. Ltd. 1979 3 W.W.R.84 at 88 (B.C.C.A.)

'Due diligence' ...requires successful communication of adequate information and instructions from the company right down to the man on the job.
(R. v. MacMillan Bloedel Industries Ltd. (1973), 13 C.C.C. (2d) 459 at 464 (B.C. Prov. Ct.)

...it is the degree of reasonableness within a speciality where a special skill or knowledge or ability is involved...
(R. v. Centre Datson Ltd. (1975), 29 C.C.C. (2d) 78 at 81 (Ont. Prov. Ct.)

First, considering the gravity of potential harm, it is obvious that the greater the potential for injury, the greater the degree of care is required. That there will be an adverse effect and damage caused by the dumping must be pre-supposed by virtue of the legislation prohibiting the dumping. In my judgment, there need not be actual visible damage or harm; damage or harm by virtue of an act of dumping can be assumed by the Court. The issue becomes "what is the injury to us as people or a society", rather than how many fish were killed or mammals inconvenienced. Arguments to the effect that a particular act was only of minimal or negligible impact on the total environment, 'a drop in the bucket' as it were, must be rejected. If I may paraphrase a controversial statesman, 'a journey of a thousand miles begins with the first step'; the effective destruction of an environment begins with the first load of garbage. In my view, therefore, the factor to be considered in this case is how serious would that harm, the destruction of a portion of the Arctic environment, be?

In considering the degree of knowledge or skill expected of the accused, I am of the view that it must generally be high and represent the latest state of the art in terms of knowledge and skill in operating in the Arctic, given the fragility of the environment.

In considering the events beyond the control of the accused, the factual situation in this case can be readily distinguished from a number of other decisions where the Courts determined that certain prohibited acts occurred as a result of an Act of God, rather than an act of omission or commission by the defendant. Here the defendant knew of the problems associated with rig out - the deterioration of air strips and ice surfaces; the frantic activity surrounding rig out; weather difficulties; the significant costs involved in cleaning up a site by the use of helicopters after the air strip is unusable. All of these problems, these events, were foreseeable for each well site and the possibility of employees resorting to dumping manifestly so.

An analysis of these factors brings me to the conclusion that a high standard of care is called for under these circumstances.

The answer to the question posed is an emphatic no.

The standard of care exercised by the accused was not reasonable in the light of the circumstances. It is clear on the facts before me that the defendant had no proper system -no system at all to ensure compliance with the prohibition against dumping; it had set up no program, no organization, no plan, no process, of any kind to see that its stated environmental concerns and willingness to comply with the obligations imposed by the *Ocean Dumping Control Act* were carried through or enforced. It took no steps whatsoever other than what amounted to mere formalities to discharge its obligation to prevent prohibited dumping.

The defendant has failed in its obligation under the law and must be convicted for the period indicated.

NORTHWEST TERRITORIES TERRITORIAL COURT

R. v. PANARCTIC OILS LIMITED
(Sentencing)

BOURASSA Terr. Ct. J. Yellowknife, January 14, 1983

***Ocean Dumping Control Act*, S.C. 1974-75-76, c.55 - Accused convicted of numerous offences under s.4(1) - Principles of sentencing corporate accused considered, including whether corporation can be placed on probation - Accused fined in total $150 000.00 and placed on probation for 2 years.**

Sentencing - Corporate accused convicted of numerous offences under s.4(1) of *Ocean Dumping Control Act*, S.C. 1974-75-76, c.55 - Principles of sentencing corporate accused considered, including whether corporation can be placed on probation - Accused fined in total $150 000.00 and placed on probation for 2 years.

Upon conviction for violating s.4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c.55, the following sentence is imposed pursuant to s.13 of the Act:

> for the offence of dumping Schedule I items (45-gallon barrels containing oil residues) on one day, a fine of $85 000 and an order directing the corporation to refrain from committing the act of dumping;
>
> for the offence of dumping a Schedule II item (pick up truck) on one day, a fine of $65 000; and
>
> for offences on all other days, sentence is suspended and the corporation placed on probation for two years (the terms of the probation are that the corporation be of good behaviour and not breach the peace and that the corporation file with the Court within three months a detailed written policy for correcting the situation that led to the offences, including a system for enforcement of the policy and an undertaking that the policy will be implemented).

Whatever sentence is imposed, the two goals of protection of society and rehabilitation of the accused should be achieved. The process used to achieve these aims vis-a-vis corporate accused is similar to that used with respect to flesh and blood accused in that the Court examines and weighs as it thinks appropriate a number of factors. In dealing with environmental legislation and corporate accused, the relevant factors which should be considered are: deterrence, environmental damage, size and wealth of the corporation, corporate attitude and criminality of conduct (which includes financial advantage, risk taking and the "worst case category").

Deterrence must be the paramount factor for consideration with respect to this Act as it has been with other environmental legislation. Application of the concept to a corporate accused for this kind of offence is most appropriate and most effective. Deterrence in this case means excising forever the concept of dumping from the accused's inventory of options. The accused and others must clearly understand that violating the law "will never be worth it". Two previous dumping convictions reflect

the same corporate attitude seen in this offence, that is, a willful flouting and ignoring of the laws and permit requirements for operating in the Northwest Territories. Efforts after the fact to correct the situation that led to the offences have been minimal and unsatisfactory.

Although there was evidence of no actual environmental damage, the prohibition here is of dumping, not of environmental damage. In enacting this Act, Parliament has recognized that to prevent dumping now will prevent gradual environmental destruction by cumulative acts. Thus environmental damage is not a factor to be taken into consideration unless there is concrete evidence of serious harm to the environment, which would be an aggravating circumstance.

There was limited evidence before the Court as to the wealth of the corporation. It is the operating arm for a number of other corporations and appears not designed to generate a profit now or in the immediate future. The determination of penalty is made without reference to the financial state of the corporation because if the accused is impecunious or under serious financial constraints, it is obliged to disclose those details and has not done so.

The accused is a significant corporation in the Territories; it is the only corporation actively engaged in off-shore drilling; it is an expert in its field; it provides environmental data to the federal government; and it is closely connected with the oil and gas industry.

Regarding criminality of conduct, it is concluded that there must have been an advantage to the corporation to commit the offence, even though what that advantage was was not established. Knowing their obligations, the corporation and the drilling foreman violated the law and ignored the specific provisions of the Drilling Authority. What occurred was a calculated risk by the personnel involved. On this isolated site, the corporation was in a position of total control and so was trusted to abide by the law, whether or not someone was watching.

Every element required for the "worst case category" is present. By calculatingly ignoring its obligations in such circumstances, the accused has appropriated unto itself the position reserved for the worst offenders on these offences.

There is little doubt that maximum fines for all offences serve the principles of deterrence and protection of society. The principle of totality in consecutive sentences (that the total not be excessive) has limited application where Parliament has provided that each day an offence occurs constitutes a separate offence. However, simply imposing a heavy fine and leaving the accused to its own devices is not the best and only answer here. Rehabilitation of the accused must be considered even when the accused is a corporation. A fine may deter but it is passed on to others leaving the corporation unaffected. This corporation is a candidate for rehabilitation because it is a corporation, that is, a rational being, and is desirous of correcting the problem which led to the offences. It has a large stake in the North and needs to regain public confidence.

S.663(1) of the Criminal Code is available as a sentencing tool for corporations. It allows the court to have regard to the "age and character of the accused, the nature of the offence and the circumstances surrounding its commission" and to direct that the accused be released on probation. The extension of s.663 to corporate accused is not foreclosed by the language of the section, the rules of statutory interpretation or

authority. "Age" is an indicia of maturity and a corporation's age can properly lead to basic assumptions about maturity, responsibility, stability and responsiveness to the community and society within which it operates. "Character" indicates goodwill and a commitment to the North. The whole object of the section is to authorize courts in appropriate circumstances to allow convicted accused to rehabilitate themselves under the supervision of the Court. S.663 should be used very sparingly and only in special cases when dealing with corporate accused. It is appropriate in these circumstances having regard to the accused's age and character because it is unsatisfactory to leave the resolution of the problem leading to the offence wholly in the accused's hands.

G.M. Bickert, for the Crown.
G. Lang, for the accused.

BOURASSA Terr. Ct. J. (orally): - The defendant, Panarctic Oils Limited, has had its actions weighed by the scales of justice, and they have been found wanting; today, justice takes off her blindfold and in a sense wields the sword.

The defendant is convicted in this Court of dumping substances contrary to the *Ocean Dumping Control Act*, S.C. 1974-75-76, c.55, s.4(1):

> *4.(1) No person shall dump except in accordance with the terms and conditions of a permit.*

and is exposed to the penalty set out in s.13 and Schedules I and II.

> *13.(1) Every person who contravenes s.4... is guilty of an offence and is liable on summary conviction to a fine not exceeding*
>
> *(a) one hundred thousand dollars, where the offence involves a substance specified in Schedule I;*
>
> *(b) seventy-five thousand dollars, where the offence involves a substance specified in Schedule II; or*
>
> *(c) fifty thousand dollars, where the offence involves any substance not specified in Schedule I or II.*

Schedule I specified, *inter alia*, persistent plastics, other persistent synthetic materials, crude oil, fuel oil, heavy diesel oil, lubricating oil, hydraulic fluids and any mixtures containing them.

Schedule II includes "containers and scrap metal".

I do not believe it is necessary for me to go through all of the facts again, they have already been amply canvassed, except by synopsis: late in the drilling season at the Whitefish drill site, rig-out was approaching; the airstrip, which was the only means of access to the well site, was deteriorating; additionally, there had been an extensive interruption of air flights because of the weather and the point was being reached where the use of wheeled aircraft, particularly Hercules or Twin Otters, would be impossible. This being rig-out, I observed that the priority for the corporation was to get its men and equipment out of the site. During this period when there were no

aircraft available, the corporation's employees and supervisory personnel were involved in the act of dumping.

The dumping involved far more than the odd employee. In my findings, it was a gross violation by the upper supervisory levels of the defendant corporation's employees. The dumping that was involved in these offences was foreseeable; the problems with the airstrip were foreseeable, and they were preventable. The Court is not in any way dealing with unknown factors. The actions of the defendant corporation were simply a matter of housekeeping. This situation is contrasted with many of the cases cited to me by counsel where there has been a mechanical or technological failure, a mixup in authorities or permits. The dumping, as I have stated, was strictly a housekeeping arrangement.

The *ex post facto* efforts to correct the situation that led up to the offences have, in my view, been minimal and unsatisfactory. At the time of trial, the only effort that had been made to correct the circumstances leading to the offences was the issuing of a letter which employees were requested to sign, and which forms Exhibit 6 in the trial. On today's date, I have heard evidence by Mr. Lindsay Franklin, Vice-President in charge of operations, that he had verbally impressed the supervisory personnel of the corporate defendant with the high degree of importance attached to obeying the *Ocean Dumping Control Act.*

The act of dumping was consciously willed, and I cannot concur with submissions by defence counsel that it was anything other than that. This was not something that occurred in uncontrollable circumstances; this was something that corporate employees simply went out and effected. In my view, I am satisfied as far as it goes that there was an advantage to the corporation to effect this dumping; although, I don't know what that advantage was. At trial, the evidence of Mr. Hugh Atcheson, the drilling foreman, was that he was 'really rushed to get the men and equipment out', the airstrip was going out -"I was rushing to get things done"; and Mr. L. Franklin in his evidence at trial indicated that under those conditions he could conceive of an employee dumping 'to save his neck', as it were. It has been established today that there was ample surplus cargo capacity available in the aircraft that were in and out over the total period that the drill site was in existence, available to fly out this garbage, but in fact it was not flown out. All that that evidence tells me is that the capacity was there, but the will was not. Mr. H. Atcheson appeared to suggest at trial that it was a financial advantage to the corporation in that it was very expensive to fly refuse out by helicopter. Today, the suggestion is that the financial advantage, if any, was minimal in that it would have only involved one flight of a Hercules aircraft at a cost of about $6 000.00. Whether the advantage was the drilling foreman's job, the prevention of a reprimand or exactly what is unknown to me, but I am satisfied that there must have been an advantage; whether an advantage of convenience or efficiency in terms of getting the rig out of the site, I can't speculate.

On these facts, and the ones proven at trial, the Court has to determine what sentence is appropriate. In the words of the Law Reform Commission (Law Reform Commission of Canada, Working Paper 16, Criminal Responsibility for Group Action, 1976) in dealing with corporate crime, the Court must answer the question, "How do we treat those that offend us?" Whatever sentence is imposed, it must be done with regard to certain aims and certain goals which have been simply and eloquently set out in *R.v. Morrissette et al.*, (1970), 1 C.C.C. (2d) 307 (Sask. C.A.) two of which are the protection of society and the rehabilitation of the accused. The process used to achieve these aims, vis-a-vis corporate defendants, is similar to that used with respect to flesh and blood

defendants in that the Court examines and weighs a number of factors, giving such weight as it determines is appropriate to each of those factors.

In dealing with environmental legislation and corporate defendants, numerous past cases have pointed to the relevant factors that this Court should consider, and these include deterrence; environmental damage; size and wealth of the corporation; the corporate attitude; the criminality of conduct, which can be broken down to include (a) financial advantage, (b) risk taking, and (c) what has been termed the worst case category.

Dealing with these factors individually, I make the following observations. First of all, with respect to deterrence, I believe without question that that factor is the single most important one in dealing with this kind of offence. Deterrence has been described by Allen, J.A., in *Regina v. Lehrmann* (1967), 61 W.W.R. 625, quoting MacKay, J.A., in *Regina v. Willaert* 1953 O.R. 282:

> *The governing principle of deterrence is, within reason and common sense, that the emotion of fear should be brought into play so that the offender may be made afraid to offend again and also so that others who may have contemplated offending will be restrained by the same controlling emotion. Society must be reasonably assured that the punishment meted out to one will not actually encourage others...*

Deterrence must be a paramount consideration with respect to the *Ocean Dumping Control Act* as it has been, in fact, with other pieces of environmental legislation. *Regina v. The Canada Metal Company Limited* (1980), II C.E.L.R. 28, Wren Co. Ct. J., pointed out (page 29):

> *In public welfare offences, the protection of the public and social interests is paramount to individual interests.*

Then, His Honour going on quoted from *Regina v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 7 C.E.L.R. 53:

> *Public welfare offences...lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement high standards of public safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration.*

Further, His Honour Judge Wren went on to state (page 30):

> *For this type of offence the need for emphasis upon deterrence has been recognized and stressed by all levels of our courts. It was well stated by the learned and experienced trial judge, Vannini, D.C.J., in Regina v. Sheridan (1973) 10 C.C.C. (2d) 545, at 560:*
>
> *The fight against pollution is not confined to this Province. It is national and international as well. It is probably one of mankind's greatest enemies and man has declared war against it by such a prohibitory and regulatory statute as the Ontario Water Resources Commission Act. Because of this the deterrent aspect must be taken into consideration in determining an appropriate penalty to impose*

upon one who offends against a prohibitory provision of that Act, not only to deter the particular offender from committing this offence against man again, but to deter others as well.

Finally, I would refer to *Regina v. Kenaston Drilling (Arctic) Ltd.*, (1973), 12 C.C.C. (2d) 383 (Northwest Territories Supreme Court) wherein Morrow, J., stated (page 386):

It seems to me that the Courts should deal with this type of offence with resolution, should stress the deterrent, viz., the high cost, in the hope that the chance will not be taken because it is too costly.

If there is to be any validity at all to the concept of deterrence, surely its application to a corporate defendant for this kind of offence is most appropriate and most effective. In this regard, I refer to *Corporate Crime in Canada* (Colin H. Goff and Charles E. Reasons):

Deterrence is often heralded as a major goal of the use of criminal law. Therefore, we should look at this aspect of social control. Students of crime generally agree that the threat or application of legal sanctions is potentially more effective as a deterrent for instrumental rather than expressive crimes. In the latter category a large proportion of such crimes as murder, sexual assault, and illicit drug use. Instrumental crimes, on the other hand, fit more readily into the 'rational man' model of human behaviour, which underlines the rationale for using the penal sanction. Since corporate crime fits into the instrumental model, theoretically the use of a sanction should have a deterrent effect. Assuming the criminal has relative certainty of detection, apprehension and conviction, and the penalty is sufficiently severe to counter the gains obtained by committing the act.

Deterrence has also been considered in a number of decisions in the Northwest Territories, and I refer to two in particular (see also "The Environment and the Law in Canada's North", David Searle, Q.C., *Alberta Law Review*, Volume 15, 1977), and that is the recent decision of De Weert, J., *Regina v. Placer Developments Limited* (unreported, Supreme Court of the Northwest Territories, March 19th, 1982) now reported at (1982), 12 C.E.L.R. 58 , and Ayotte, Terr.Ct.J., in *Regina v. Canada Tungston Mining Corporation Limited* (Northwest Territories Territorial Court). De Weerdt, J., states on page eight of his Reasons on Sentencing (page 61 C.E.L.R.):

The whole point of the requirements for licences and authorizations under the legislation is to ensure the public that the waters in the public domain in the two northern territories will not be interfered with in ways beyond public control. It is therefore essential that these requirements be enforced in such a way as to give meaning to them.

(My emphasis).

In my judgment, deterrence in this particular case means effecting forever a complete and utter excision of the concept of dumping from the corporate defendant's inventory of options. Within corporate ranks, it should become a banned word, an immoral concept. As well, with respect to this defendant and others, I believe it must be clearly understood that violating the law 'will never be worth it'.

With respect to corporate attitude, the defendant corporation has taken an active interest in defending the charge against it - that's to be expected, and no inference should be made from that. The fact that the defendant pleaded not guilty makes the situation no different than when dealing with a flesh and blood defendant. The corporate defendant is entitled to have a case proven against it; and in this instance, it has been done, and as I say, nothing can be made of that.

It must be noted, however, the corporation has been previously convicted for two offences (*R. v. Panarctic Oils Limited*, May 21st, 1976, Northwest Territories Magistrates Court, unreported; and *R. v. Panarctic Oils Limited*, November 16th, 1973, Northwest Territories Magistrates Court, unreported) that appear to reflect the same attitude as seen in this particular offence. That is to say, a willful flouting and ignoring of the laws and the permit requirements for operating in the Northwest Territories. The corporation's verbal assurances with respect to the environment do not appear to have worked in the past, they don't appear to have worked in this particular situation.

De Weerdt, J., in the *Placer Developments Limited* decision stated (page 61 C.E.L.R.):

> *The resulting fine, although substantial for a private citizen, can therefore be only a token amount and the real penalty must rest in the fact that the respondent now has a conviction on its record.*

In effect, expressing hope that at least a conviction would serve as a deterrent to that particular defendant. Unfortunately, previous convictions have not deterred this particular defendant.

From what is before me, there are some actions that are evident and are indicative of some remorse or contrition, but these appear to be few. At the time of trial, as I've already indicated, there was virtually nothing done to rectify the problem leading to the offences. At trial, the Court was told how any employee involved in this kind of activity would be fired, dismissed, even thrown off the well site. At trial, the Court was told this dumping was reprehensible and would never occur; and it was inconceivable that it did occur. But in fact, occur it did, and the only action taken to rectify whatever problem led to the dumping (once the corporation found out that it had occurred) was, as I've already indicated, to have a letter made available to new employees (Exhibit 6, Trial).

With respect to corporate attitude, I do note that the Vice-President of Operations is here today on this sentencing. He has given evidence and has subjected himself to cross-examination; and to a degree, I believe that this bodes well for the defendant. However, I believe it is only proper that the defendant have a human representative present at its sentencing; and this kind of conduct should be expected. But that it was done, I believe is commendable to a degree.

With respect to environmental damage, I have evidence today from Dr. Paul Leblond, Ph.D., an expert in oceanography and the physical aspects of oceanography that there was absolutely no damage to the environment as a result of this dumping. However, I note that the prohibition that the Court is dealing with is against dumping, not damaging the environment. The court can assume that the prohibition against dumping is there because it would lead to pollution and environmental damage. But in

any event, this Act is to be contrasted to, for example, the Fisheries Act, R.S.C. 1970, c.F-14, as amended, that prohibits dumping of substances 'deleterious to fish', where deleterious effects are critical. As noted in my judgment, and it is my judgment, that harm to the environment does not enter into consideration here. Harm to the environment can be assumed by the Court and I believe this is a concept that flows naturally from the legislation, as well as from the jurisprudence in this regard. Morrow, J., in *R. v. Kenaston Drilling (Arctic) Ltd.*, (1973), 12 C.C.C. (2d) 383 (Northwest Territories Supreme Court), stated (page 386):

> *It may very well be that in the present case no actual damage took place. But surely the test to apply in approaching the question of sentence should be less a concern of what the damage was but more a concern of what the damage might have been.*

The potential for permanent damage as a result of dumping in my view must be self-evident. Are there no lessons to be learned from the pollution and virtual destruction of Lake Erie as an ecosystem? The crippling of Lake Ontario? Is it not abundantly clear to all that to prevent dumping now will prevent the destruction of the environment and undoubtedly prevent the expenditure of multimillions of dollars in the future as new generations have to pay to clean up for today's mistakes? Surely, the answer is yes. In my view, Parliament has recognized that by enacting the Ocean Dumping Control Act - the Act applies to dumping and prohibits dumping substances, some of which I have on expert evidence today are not apparently harmful, such as plastic. Clearly, Parliament as an expression of the will of society generally has determined that the dumping of any kind of garbage, if I can loosely call it that, deleterious of (*sic*) not, in the waters of the Canadian Arctic is unacceptable. In my view, the destruction of any ecosystem or environment is a gradual process, effected by cumulative acts - a death by a thousand cuts, as it were. Each offender is as responsible for the total harm as the last one, who visibly triggers the end. The first offender can't be allowed to escape with only nominal consequences because his input is not as readily apparent. I have to concur with the Crown that damage to the environment here is not a factor that should be taken into consideration other than if there was concrete evidence before me of serious harm to the environment. Then, in my view, that would be an aggravating circumstance.

In dealing with the size and wealth of the corporation, in contrast to the *R. v. Placer Developments Limited* case, the evidence before me in this regard is extremely limited and not very helpful. I accept that the corporation has been actively and exclusively engaged in resource development on the front lines, as it were, drilling and exploring in the high Arctic for some fifteen years; and that it is the operating arm of a number of other corporations; that these corporations contribute money to Panarctic Oils Limited, which is expended in conducting Panarctic's operations. At this point in time, it would appear that Panarctic Oils Limited is not designed to generate a profit on its own and has no plans to do so in the immediate future. I have no financial statements before me, or operating statements; I have no indication other than the statement by the Vice-President in charge of operations, Mr. Franklin, that the capital contribution in 1981 from those corporate shareholders (including Petro-Canada) was twelve million dollars. All of this financial information is within the hands and control of the defendant, and they have not chosen to divulge it in any significant detail. If the defendant is impecunious or under such financial constraints or difficulties that justify taking those factors into consideration, then there is an obligation on the corporation to bring these details forward. There is nothing to that effect before me, so the determination of penalty is

made without reference thereto. In terms of size, Panarctic Oils is a significant corporation, employing four to six hundred people in the busy drilling season of each year. Importantly, Panarctic Oils Limited is the only corporation actively engaged in off-shore drilling here in the Northwest Territories. It is an expert in its field; active in the environmental sphere in terms of providing data to the federal government; closely connected with the oil and gas industry, and professes to be closely connected with the concern for environmental protection. I hasten to point out that as with any other offender because they have committed an offence does not mean that they are complete scoundrels or that there are no good or positive elements to them.

With respect to criminality of conduct, I conclude that there can be no question but that there must have been an advantage somewhere. I don't know what it was, it has not been established to me what the adantage was, but I cannot accept that this activity would have gone on for the period that I found (thirteen days, which was a minimal period) if it did not benefit someone somehow. The corporation knew its obligations, the drilling foreman knew his obligations under the law; and regardless of that the corporation is presumed to know the law. Apart from the law, the drilling foreman signed on behalf of the corporation the Drilling Authority that contained specified provisions with respect to waste disposal. Not only was the law broken, but that specific provision was ignored.

It would appear to me that what occurred was a calculated risk by the personnel involved. The defendant corporation found itself on an isolated sheet of ice, literally 450 kilometers from the nearest habitation, Resolute Bay; and psychologically, 450 000 kilometers away from normal societal controls. It was in a situation completely under its own control, populated with employees beholden to the corporation, in a situation where employees could hardly be in a position to complain to the supervisory personnel as to what was going on. In other words, the defendant was in a position of total control. Who would be around to see what was going on? Who would be around to tell? Who would ever know? In dealing with risk calculation, I would again refer to the words of Morrow, J., in *Regina v. Kenaston Drilling (Arctic) Ltd.*, (1973), 12 C.C.C. (2d) 383 (Northwest Territories Supreme Court) (at page 386):

> *Where the economic rewards are big enough persons or corporations will only be encouraged to take what might be termed a calculated risk. It seems to me that the Courts should deal with this type of offence with resolution, should stress the deterrent...*

In *Regina v. James Snow and Harold Gilbert*, (1981), 11 C.E.L.R. 13 (Ontario Provincial Offences Court), White, Prov.Off.Ct.J., stated in sentencing the Minister of Transportation and Communications and the Deputy Minister of Transportation and Communications at page 14 :

> *In this case it is clear that a minister of the Crown and his deputy took a calculated risk, a risk that no doubt appeared necessary to them, but a risk that amounted to a breach of the law, a defiance of the law, if not a flouting of the law. It is in this light that they must be sentenced.*

In this decision, the Provincial Offences Court was dealing with a Minister of the Crown, and the issue of trust was intimately involved. The case cannot be distinguished from the present one on that basis. If anything, the same element of trust is involved

here. Our whole society is based on the principle - indeed, it would not exist without the fundamental assumption - that by and large the majority of its citizens are law abiding. We trust each other to obey the law. The defendant has stated through its evidence, and it was implicit throughout all of the evidence of the defendant's witnesses at trial that trust was an important factor: "Trust us"; "We know what we're doing, we've done the job before"; "We trust our employees"; "Our employees trust us, we only hire experienced personnel we can trust". Be that as it may, the facts demonstrate that the trust the public might have had in the defendant has been breached. The defendant was induced to commit this offence in my view in a belief that "no one was watching". There was no one around to complain. The defendant breached the trust imposed upon it by the public, which is confirmed today by Mr. L. Franklin who testified that as a result of these convictions the trust reposed in Panarctic Oils Limited by other corporations has been eroded. I believe it must be clearly understood that the law has to be obeyed whether or not someone is watching. Society cannot have twelve million people in Canada watching the other twelve million people; society cannot afford to put a Royal Canadian Mounted Police detachment in the middle of the Arctic every time someone proposes to undertake a drilling expedition. The law has to be obeyed whether or not the defendant is carrying on business in downtown Toronto, Yellowknife, or in the middle of the Arctic away from everything.

In dealing with what has been termed by some authorities as the "worst case category", Madison, J.A., in *Cyprus Anvil Mining Corporation Limited v. The Queen*, (1976), 2 F.P.R. 32 (Yukon S.C.), stated in reducing a fine on appeal from the Yukon Magistrates Court that this case did not fall into what he termed "the worst case category", saying:

> *There are other matters which one can envisage which can make the situation worse, such as: deliberateness, recklessness, a cavalier disregard for the regulations and the instructions of various environmental authorities. The maximum penalty must be reserved for those cases.*

In *Regina v. United Keno Hill Mines Limited*, (1980), 10 C.E.L.R. 43, Stuart C.J. stated (page 49):

> *If a corporation surreptitiously dumps toxic waste in wilful disregard of regulations, a harsh sanction is required.*

An analysis of all these factors inexorably leads me to the conclusion that virtually every element required for the "worst case category" is present. The corporate defendant by calculatingly ignoring the obligations upon it in the circumstances that it found itself has appropriated unto itself the position reserved for worst offenders on each of these offences for which it is convicted.

Given the maximums provided for, I have little doubt that such fines would serve the principle of deterrence and protect society in that regard. That the maximum for the thirteen offences may exceed one million dollars must not intimidate the Court. The Dominion Parliament has as an expression of public will determined that this kind of offence is serious and significant, and the penalties that are provided for are a reflection of the gravity of harm that the law is designed to prevent. I point out that the penalties provided for in the *Ocean Dumping Control Act* apart from the financial penalty which I have already cited in s.13 (1), include: s.13(3):

13.(3) *Every person who fails to make a report as and when required under subsection 8(4) is guilty of an offence and is liable on summary conviction to a fine not exceeding seventy-five thousand dollars.*

s.14(1):

14.(1) *Where an offence under subsection 13(10) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.*

s.14(2):

14.(2) *Where a person is convicted of an offence under subsection 13(1), the court may, in addition to any punishment it may impose, order that person to refrain from committing any further such offence or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the court, will or is likely to result in the committing of any further such offence.*

s.16(2):

16.(2) *Where a corporation commits an offence under s.13, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been presecuted or convicted.*

All of these taken together with the significant fines that are provided for abundantly reflect the concern that Parliament and society generally has that there be no dumping.

In my judgment, this Court must not shy from its duty to tread where Parliament has provided, even if it involves imposing fines in amounts that are far beyond the range normally considered by way of penalty in this Court. In my view to do otherwise would be to defeat the express intention of Parliament and to defeat the express intention of the law.

There is a principle in sentencing that was succinctly expressed in *R. v. Bocskei*, (1970), 54 CR.App.R. 519 (at page 521):

> *... when consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive.*

This principle is regularly and consistently applied in our criminal courts in dealing with flesh and blood defendants. It is argued that it must apply to these facts, thereby limiting the penalty notwithstanding the number of offences for which the defendant is convicted. With respect, I disagree. Parliament must have had this concept in mind when it enacted section 14(1) of the *Ocean Dumping Control Act*. In my view the provision for deemed offences for each day of a continuing offence is the

legislative way of reflecting the gravity of the offence contemplated in terms of sanction. In the light of that specific sanction, it is my view that the principle of totality has a very limited if any application. To do otherwise would be to ignore the impact that the law is designed to make on offenders.

At this point then, is it enough to simply impose the heavy fines and leave the corporate defendant to its own devices? The Court has to ask itself if the goals of sentencing that I've indicated at the outset - protection of society and rehabilitation of the accused - are met thereby. While they may be, I have some reservations. In the words of the Law Reform Commission (Law Reform Commission of Canada, Working Paper 16, Criminal Responsibility for Group Action, 1976) in dealing with corporate crime:

> *A corporation must be viewed as something more than a person with money in terms of sentencing.*

And further:

> *We must attempt to develop and use innovative methods of sanctioning corporations, we share the concerns of many that heavy fines are not the answer.*

I don't believe that a heavy fine is the best and only answer here. In determining how best to achieve the aims of sentencing, the issue of an appropriate sentence for a corporate defender is raised; and I would with respect adopt the words of D. Stuart in *Canadian Criminal Law a Treatise* (Faculty of Law, Queen's University, 1982):

> *The crucial problem in the area of corporate responsibility lies not in substantive law, but in devising different and more appropriate forms of sanction.*

Reformation and rehabilitation of a defendant must remain an element for the Court's consideration, even where the defendant is a corporation. Indeed, I believe this may be an area where it is most fruitful and most fertile for the concept of rehabilitation to be explored because of the instrumental nature of the crime and because I believe it can be assumed that corporations, such as Panarctic Oils Limited, are rational beings. A fine may deter, but it can also be passed on to others and leave the corporation unaffected. If true rehabilitation can be effected, then I believe society has ultimate protection - society will benefit, and the corporation will benefit. It would appear to me quite evident that this corporate defendant is in a sense a candidate for rehabilitative measures because it is a corporation, it is a rational being, and reason will presumably work. It has a large stake in the North, and the North has a large stake in it. I have no doubt that Panarctic Oils Limited needs to some degree to regain the public confidence and public trust that it has enjoyed in the past and that it has now lost to a degree. It needs to re-establish itself and to wipe away the blemish, to use the words of defence counsel.

The defendant corporation has stated through Mr. L. Franklin that it is desirous of correcting the problem that led to the offences, and it is anxious to effect such correction. It is not something that the corporation wants to be involved with again. These are positive signs for the corporation. I have heard at trial and today evidence of arrangements, if I can call them that, that the corporation has endeavoured to make so that this offence never occurs again. At trial we were told that the offence occurred

notwithstanding numerous meetings and discussions of environmental concerns. I would hope it is clear to the defendant at this point that those meetings and those discussions were insufficient; they did not work as a process or plan for preventing this kind of offence. I am somewhat distressed in that the corporate defendant comes to Court today offering more of the same. The problem leading to the convictions, the problems involved in regulating dumping, I am told today have been brought up at every supervisory level, and it has been passed down by word of mouth. I have nothing before me today to indicate to what extent this has been done. I am disturbed because it was that very process, if we can call it that, that was unsatisfactory in the past, and the proof of that is in these convictions. I am doubtful that using the same plan will be satisfactory for the future. These kinds of plans and assurances are not enough. The Court would like, if there was some way, to assist the defendant in regaining the trust it has apparently lost by providing it with an avenue to do so; and at the same time ensure the corporate defendant's response to its obligations under the *Ocean Dumping Control Act* will go beyond mere platitudes, blandishments or verbal assurances. Some concrete steps have to be taken. There can be no doubt that the corporation can do more that it has done. Witness the corporate rules with respect to drinking and drugs on well sites: it is notoriously well known that there are no drugs or alcoholic beverages permitted on well sites. This policy has been effectively implemented to such a complete degree that every person on a well site down to the roustabout is abundantly aware that his job hangs on the balance. Surely the corporation can do the same with respect to its environmental obligations under the *Ocean Dumping Control Act*.

I am not satisfied on the evidence before me that meaningful steps have been taken to correct the deficiencies that led up to these offences, and I am disturbed with this. The corporation's actions to this date would appear to confirm the observations made by the Canadian Arctic Resources Committee in *Oil Under the Ice* wherein the authors observed (page 133):

> *In the course of our investigation we were told time and time again of the determination of oil companies to protect the environment... But our investigation of offshore drilling indicates that the industry concept of adequate environmental protection differs significantly from the one in which conservationists and native people believe....It seems apparent that the company has too much at stake economically to go...beyond cosmetic environmental programmes of its own volition.*

(My emphasis.) If that observation is correct, I would note that the banning of alcohol and drugs from well sites is in the corporation's best economic self-interest; and corporations, such as Panarctic Oils Limited, have not had difficulty in this regard.

The issue then simply put is whether or not a corporation can be put on probation. Regrettably, and notwithstanding an invitation by the Court, counsel for the Crown and the defence declined to make any submissions in this regard. In view of the expressed difficulties in sentencing corporations, I believe the issue merits some consideration. The *Criminal Code* provides in section 663:

> *663.(1) Where an accused is convicted of an offence the Court may, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,*

(a) *in the case of an offence other than one for which a minimum punishment is prescribed by law, suspend the passing of sentence and direct that the accused be released upon the conditions prescribed in a probation order;*

I take it as important that the section refers to an accused, not persons. It is noteworthy that other sections of the *Criminal Code* provide for explicit exemptions in dealing with corporate accused. S.647:

647. *Notwithstanding subsection 646(2), a corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence,*

(a) *to be fined in an amount that is in the discretion of the court, where the offence is an indictable offence, or*

(b) *to be fined in an amount not exceeding one thousand dollars, where the offence is a summary conviction offence.*

S.648:

648. *Where a fine that is imposed on a corporation is not paid forthwith the prosecutor may, by filing the conviction, enter as a judgment the amount of the fine and costs, if any, in the superior court of the province in which the trial was held, and that judgment is enforceable against the corporation in the same manner as if it were a judgment rendered against the corporation in that court in civil proceedings.*

S.662(1):

662.(1) *Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing sentence or in determining whether the accused should be discharged pursuant to s.662.1*

Interestingly, no such exemption had been provided for in s.663. It would appear to me that Parliament's attention has been directed to this issue, and their attention has been reflected in the various provisions that exclude or exempt corporations from the operation of a particular section. For example, corporations cannot be sentenced to jail, that is provided for in the *Criminal Code*. It would appear that Parliament has deliberately chosen to stipulate and highlight the provisions of the *Criminal Code* that do not apply to corporations, some of which have been specifically identified here. Therefore, is there anything in the wording of s.663 that would be incompatible with its application to corporations? I believe not. At first blush, "age" and "character" would appear to apply only to flesh and blood defendants. However, on close examination "age" is nothing more than a handy, readily available indicia of maturity, reflecting a length of time which a being or thing has been in existence. Decisions and assumptions are often made on age. We would take it that a twenty-five year old medical doctor is a "young" doctor; that a ten year old can't form the necessary intent to be convicted of a crime; that a business that has been operating for a hundred years is a stable, well-established

and responsible one. I believe those assumptions are abundantly evident here today when it is given by the defendant that it has been in business for fifteen years and that it is a stable corporation. A corporation's age I believe can properly lead to basic assumptions of maturity, responsibility, stability and responsiveness to the community and society in which it operates. In my view, "age" in s.663 does not preclude its application to corporate defendants.

In dealing with the word "character", does that apply only to flesh and blood defendants? Again, it is normally or usually applied to an individual to indicate a distinctive quality. I would refer to the definition of the word set out in *Webster's New International Dictionary:*

> *A mark or sign or distinctive quality...The complex or accustomed mental and moral characteristics and habitual ethical traits marking a person, group or nation, or serving to individualize it...Main or essential nature as strongly marked or serving to distinguish...Appearance, outward or visible quality or trait.*

I cannot see that the word "character" in s.663 can foreclose the application of that section to nothing else but flesh and blood defendants.

It may be suggested that the application of s.663 having been traditionally used for flesh and blood defendants exclusively, or virtually exclusively in the past, the Court should await an amendment of the *Criminal Code* by Parliament. However, our law is an organic concept, it is a living creature. It grows and changes and is by no means a "plastic tree". Significant changes are evident over the years without legislative action - some offences become more important and more significant in terms of sentencing and some become less. In *R. v. City of Sault Ste. Marie*, (1978), 40 C.C.C. (2d) 353, 7 C.E.L.R. 53, Dickson, J., stated (page 373 C.C.C. page 70 C.E.L.R.):

> *It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that the concept of absolute liability and the creation of a jural category of public welfare offences are both the product of the judiciary and not of the Legislature.*

In my judgment, the extension of s.663 to corporate defendants is not foreclosed by its language or by the rules of interpretation. In that regard, I refer to the *Interpretation Act* of Canada that indicates in s.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.*

Maxwell, on the *Interpretation of Statutes*, 11th Edition, although acknowledging that penal statutes must be interpreted strictly, goes on to state:

> *The tendency of modern decisions on the whole is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more rational regard to the aim and intention of the legislature than formerly.*

Further consideration in dealing with s.663 is, of course, that it is not strictly speaking penal in the sense that it is primarily directed and designed for the rehabilitation of accused persons. The spirit of s.663 is in my view liberal and remedial. Maxwell further states:

> *The rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it, which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment.*

The whole object in my view of the present provisions is to authorize the Court in appropriate circumstances and cases to allow convicted accused the opportunity to rehabilitate themselves under the supervision of the Court.

In *Regina v. The Canada Metal Company Limited* 3 F.P.R... Wren, Co.Ct.J., heard an appeal from the decision of Dnieper, Prov.Ct.J. His Honour Judge Dnieper had suspended the passing of sentence upon the corporate defendant and placed the corporation on probation. In hearing the appeal His Honour Judge Wren determined that the Provincial Court Judge erred in not emphasizing deterrence and held that a fine was most appropriate under all the circumstances, and thereby overturned the sentence. His Honour Judge Wren concluded in his reasoning that having overturned the sentence on the grounds that deterrence should have been the primary factor, it is not necessary to consider the point whether or not a corporation could be put on probation.

In *Regina v. Algoma Steel Corporation Ltd.* (January 10, 1977, 1 W.C.B. 118) a decision of Greco, Prov.Ct.J., the Court dealt with the issue of placing the corporate defendant on probation and concluded:

> *...that no accused, be it a flesh and blood person or an entity created by law such as a corporation, can have 'his' sentence suspended under the Criminal Code of Canada if 'he' has been charged with and convicted of an offence under a provincial statute.*

The dicta of this case does not therefore appear to preclude probation in certain circumstances. It is obvious that some of the probationary conditions under s.663(2) or some of the conditions commonly imposed by the Courts with respect to flesh and blood defendants are totally inappropriate to corporations. I believe that if I am correct, that corporations may be subject to probation, over a period of time appropriate conditions will be developed by the Courts. Stuart, C.J., in *R. v. United Keno Hill Mines Limited* (1980), 10 C.E.L.R. 43, and the Law Reform Commission have suggested a number of possibilities in terms of conditions or sanctions that could be imposed against corporations. I am of the view that s.663 should be used very sparingly and only in special cases in dealing with corporate defendants.

For these reasons it is my judgment that s.663 is available to this Court as a sentencing tool in dealing with this corporate defendant, and I believe it is appropriate under all the circumstances having regard to age, that is to say, the maturity and stability of the corporate defendant; the character, that is to say, its goodwill and commitment to the north; and the other elements of its activities which are admirable. I also believe it is appropriate because it is unsatisfactory to leave the question of resolving the problem that led to the offences wholly in the corporation's hands. In my view, and I believe it is clear from what has been stated earlier, what the corporation has done in the past and what it offers today in terms of correcting the circumstances that have led to the

commission of these offences is not enough. I also believe it is appropriate for this corporation because the corporation has given evidence that it is desirous of correcting the problem and that the public interest will be served if Panarctic Oils Limited takes such steps as are appropriate so that this problem never arises again. I am loath, and I do not propose to specify to this defendant, as experienced as it is, exactly what it should or should not do. I am going to leave that to their own judgment and to their own policies. I do not believe it is open for a Court to tell a corporation how to run its business, but I caution this corporation and any other corporation that if it persists and continues to disobey the law, then the kind of sanctions that are evident in some Scandinavian countries and in some jurisdictions in the United States, and the sanctions that have been described in the *United Keno Hills Mines Limited* case (for example, statutory imposition of an affirmative duty upon senior echelon corporate officials to know and control all corporate activities. Two, hierarchy of penalties dependent upon the degree of willfulness or recklessness attributable to actions of a corporate official. Three, strict liability offences utilized as lesser included offences posing a lesser degree of punishment upon corporate officials when the required degree of willfulness or recklessness cannot be established. Corporate officials should be required to fully apprise all shareholders of the details of any convictions of either the corporation or any corporate official. The Court should be empowered to levy restitution orders against corporations and corporate officials. The court should be empowered to suspend the privilege or participation in corporate activities for anyone who uses a corporate scheme in the commission of an offence, *inter alia*) may end up being imposed if not by a Court then by statute. It would seem to me to be abundantly clear that the situation is the same as drugs and alcohol on the well site; it is in the corporation's own best interest to get a handle on this problem and see that it never occurs again.

Regrettably, and notwithstanding invitation by the Court, counsel for the Crown and the defence declined to address the issue of appropriate penalty ranges reflecting their own respective interests.

Therefore, for the above reasons my judgment is that the following sentence is appropriate for this offender in that (a) the principle of deterrence shall be reinforced, and (b) the defendant will be given the opportunity that it requests to rehabilitate itself, both of which go to the protection of the public and the prevention of the reoccurrence of this kind of act.

With respect to the offence which occurred on the 11th of May, 1980, which I find to be dumping forty-five gallon barrels containing residues of oil and lubricating oils (Schedule I items), I impose a fine upon the corporation in the amount of $85 000.00; and in addition, pursuant to s.14(2), order and direct Panarctic Oils Limited to refrain from committing the act of dumping.

With respect to the offence which occurred on the 18th of May, 1980, which I find to be the cutting up and dumping of a one-half-ton pickup truck through the ice (a Schedule II item), I impose a fine of $65 000.00.

With respect to the offences which occurred on the 6th, 7th, 8th, 9th, 10th, 12th, 13th, 14th, 15th, 16th and 17th of May, 1980, I hereby suspend the passing of sentence and place the accused corporation, Panarctic Oils Limited on probation for a period of two years. The probation shall contain two terms: one, the statutory term that the corporation be of good behaviour and not breach the peace; and two, that the

corporation file with this Court, within three months of this date, a detailed written policy for the correcting of the situation that led up to these offences and which includes a system for its enforcement and an undertaking that the policy will be implemented.

For the record, I note that Mr. Lindsay Franklin, Vice-President of Panarctic Oils Limited is present in Court and is representing the corporate defendant, and I address to him that which I am obliged to do pursuant to s.663.

It is my duty to inform you that if you fail to comply with the terms of this probation order, that may constitute an offence pursuant to s.666 for which you may be charged, if on summary conviction found guilty, sentenced. In addition to that, pursuant to s.664 of the *Criminal Code*, where an accused is bound by a probation order and is convicted of an offence which includes an offence under section 666, breach of probation, in addition to any punishment that may be imposed for that offence the accused may be brought back to this Court, and this Court may impose any sentence it could have imposed if the passing of sentence had not been suspended. In other words, this Court may pass sentence for the other eleven offences that the corporate defendant is convicted of.

I direct that the probation order be signed by Panarctic Oils Limited, by a corporate officer or agent duly authorized to do so by a resolution by the Board of Directors filed with this Court. The corporation shall pay the fine forthwith; and given the amount of the fine and the difficulties in communications, forthwith shall mean, for the purposes of this order, three to four weeks from this date. I would like to thank both counsel for the authorities they canvassed and provided to the Court in their submissions in this matter.

MANITOBA PROVINCIAL JUDGES COURT

R. v. THE CANADA METAL COMPANY LIMITED
(Clean Air Act)

NORTON Prov. Ct. J. Winnipeg, April 28, 1982

Clean Air Act, S.C. 1970-71-72, c. 47, as amended - Attorney General of Canada has authority to prosecute under Act.

Constitutional law - Clean Air Act - Subject matter of Act falls within federal power to enact laws for peace, order and good government - Act does not collide with provincial Clean Environment Act, S.M. 1972, c. 76, as amended, but is complementary to it.

P. Kraemer, for the Crown
D. Abra, and *W. Ritchie*, for the accused

NORTON Prov. Ct. J. (orally): The Canada Metal Company Limited is charged summarily as follows:

> *THE CANADA METAL COMPANY LIMITED, the operator of a stationary source of a class in respect of which a national emission standard has been prescribed pursuant to Section 7 of the Clean Air Act, to wit: a secondary lead smelter located at 1221 St. James Street, in the City of Winnipeg, in the Province of Manitoba, on or about the 23rd and 24th days of June, 1980, both dates inclusive, at or near the City of Winnipeg aforesaid unlawfully did operate the said stationary source in a manner that resulted in an emission into the ambient air in contravention of the national emission standard therefore as contained in the Secondary Lead Smelter National Emissions Standards Regulations made under the Clean Air Act, contrary to Section 9(1) of the Clean Air Act, thereby committing an offence contrary to Section 33 of the said Act.*

Counsel for the accused company (hereafter referred to as the company), raised a constitutional challenge with respect to the *Clean Air Act*, S.C. 1970-71-72, c. 47, as amended, which basically falls into two categories as follows:

1) *the legislation, and particularly section 9 of the Act and therefore the Regulations passed pursuant to it, is ultra vires of the Parliament of Canada in that it:*

   (a) *infringes upon provincial legislative power over property and civil rights (section 92(13) of the B.N.A. Act), and legislation already passed by the Province of Manitoba; and*

   (b) *infringes upon provincial legislative power over "local works and undertakings" (section 92(10) of the B.N.A. Act).*

2) *the prosecution is being carried out by an agent of the Attorney General of Canada, who has no lawful authority to conduct the prosecution.*

The Attorney General of Manitoba has notified this court by a letter dated December 23rd, 1981 (Exhibit 1), that it will not take part in the prosecution.

> *The Attorney-General of Manitoba has been notified by the defendant that it wishes to challenge the constitutionality of the provisions of the Clean Air Act of Canada applicable to the prosecution.*
>
> *At this time the Attorney-General of Manitoba does not desire to make representation on that issue.*

The Attorney General of Canada disputes both contentions and has argued that not only is the legislation valid, but the Attorney General of Canada is the proper person to maintain the prosecution and enforcement of the *Clean Air Act*.

There is a plethora of legal decisions dealing with the constitutionality of several federal statutes in relation to the *British North America Act*. However, I consider an exhaustive review of these authorities is not necessary to decide the validity of the defence challenges.

To deal with the two issues here, I adopt the reasoning followed by the Supreme Court of Canada in *The Queen v. Hauser*, 1979 1 S.C.R. 984 at 992:

> *In Proprietary Articles Trade Association v. Attorney General for Canada 1931 A.C. 310, Lord Atkin said (at pp. 316-317):*
>
> > *The second principle to be observed judicially was expressed by the Board in 1881, "it will be a wise course . . . to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand": Citizens Insurance Co. of Canada v. Parsons (1881) 7 App. Cas. 96, 109. It was restated in 1914: "The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other question to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry": John Deere Plow Co. v. Wharton (1915) A.C. 330, 338 . . .*

Accordingly, I will endeavour to express an opinion on the constitutional questions raised by the company, without going any further than is necessary.

Upon consideration of the issues raised by the defence and the answers thereto by the Crown, my approach will be to determine whether or not the law and the Crown's submission, does or does not give a valid answer to the challenges raised by the defence.

Counsel for the Attorney General of Canada (the Crown) contends that the *Clean Air Act* is criminal law enacted with a view to some public purpose and for the protection from injury whether to public health, safety or morality, and therefore, falls within the field of criminal law, which is reserved to the Parliament of Canada under section 91 of the *B.N.A. Act*.

In *Labatt Breweries of Canada Limited v. The Attorney General of Canada et al.* 1980, 1 S.C.R. 914, Estey J. at page 933, speaking for the majority of the court, stated:

> *That there are limits to the extent of the criminal authority is obvious and these limits were pointed out by this Court in The Reference as to the Validity of Section 5(a) of the Dairy Industry Act, (Margarine Reference) 1949 S.C.R. 1, aff'd 1951 A.C. 179, where Rand J. looked to the object of the statute to find whether or not it related to the traditional field of criminal law, namely public peace, order, security, health and morality. In that case, the Court found that the object of the statute was economic:*
>
> > *. . . to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the province. To forbid manufacture and sale for such an end is prima facie to deal directly with the civil rights of individuals in relation to particular trade within the provinces. (per Rand J., at p. 50)*
>
> *The test is one of substance, not form and excludes from the criminal jurisdiction legislative activity not having the prescribed characteristics of criminal law.*
>
> > *A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened. (per Rand J., at p.. 49)*

In *Attorney-General of British Columbia v. Attorney-General of Canada et al.* (1937), 67 C.C.C. 193 at p. 195, 1937, 1 D.L.R. 88 at p. 90, 1937 A.C. 368 at pp. 375-376, Lord Atkin stated:

> *The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92 of the British North America Act . It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law, it might obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which, apart from the amendment, he could lawfully do.*

The was the test applied by the Court of Appeal in Manitoba in *Regina v. Cosman's Furniture (1972) Ltd. et al.* (1976), 32 C.C.C. (2d) 345. Put succinctly, is it "a genuine attempt to amend the field of criminal law"? The public purpose of the *Act* appears to be an effort to control the presence of one or more air contaminants.

Section 2(a) of the *Act* defines "air contaminant" -

> *means a solid, liquid, gas, or odour or combination of any of them that, if emitted into the ambient air, would create or contribute to the creation of air pollution;*

Section 2(b) of the *Act* defines "air pollution" -

means a condition of the ambient air, arising wholly or partly from the presence therein of one or more air contaminants, that endanger the health, safety or welfare of persons, that interferes with normal enjoyment of life or property, that endangers the health of animal life or that causes damage to plant life or to property".

(Editor: Clerical errors in reciting paragraph 2(a) and (b) have been corrected).

Paragraph 2(c), "ambient air" -

means the atmosphere surrounding the earth but does not include the atmosphere within a structure or within any underground space.

The preamble to the *Act* states:

"An Act relating to ambient air quality and to the control of air pollution".

Using the test set out in the foregoing authorities, I can find no basis that the *Act* is "a genuine attempt to amend the field of criminal law", and therefore, it does not fall within the jurisdictional field of criminal law (section 91(27)).

Air pollution has, and continues to be without demonstration, a concern of some consequence. It is not something that is confined to a single province, nor some of the provinces of Canada; it is a concern of all the provinces of Canada. Air pollution is not a matter that recognizes provincial boundaries, nor in fact, for that matter, international boundaries. Is it then a subject that depends on the federal residual power to enact laws for the peace, order and good government of Canada? The range of federal jurisdiction under this heading was referred to in *Labatt Breweries of Canada Limited v. The Attorney General of Canada, and the Attorney General of Quebec.* Estey J., speaking for the majority of the Court, at page 944, stated:

> *There remains to be examined the peace, order and good government clause in s. 91 as the basis for these federal regulations. This subject has already been adverted to above in connection with the health aspect of this statute. The principal authorities dealing with the range of the federal jurisdiction under this heading are illustrated by:*
>
> *(1) Fort Frances Pulp and Paper Co. v. Manitoba Free Press 1923 A.C. 695, basing the federal competence on the existence of a national emergency;*
>
> *(2) The Radio Reference 1932 A.C. 304 and the Aeronautics Reference 1932 A.C. 54, wherein the federal competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of merely local or private nature; and,*
>
> *(3) Where the subject matter "goes beyond local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole." Attorney General of Ontario v. Canada Temperance Federation 1946 A.C. 193 per Viscount Simon, at p. 205.*

In *The Queen v. Hauser* 1979 1 S.C.R. 984, Justice Pigeon, writing for the majority of the Court, put the case in its perspective when he stated at p. 1000, "In my view, the most important consideration for classifying the *Narcotic Control Act* as legislation enacted under the general residual federal power, is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of 'Matters of a merely local or private nature'."

It is difficult to imagine the subject of air pollution being a concern at the time of Confederation. If aeronautics and radio communications were problems which did not exist at the time of Confederation, as the courts have so held, *supra*, then I have no difficulty in finding air pollution to be a genuinely new problem which did not exist at the time of Confederation.

For the foregoing reasons, my answer to the question is that it is a subject matter falling under the general federal residual power to enact laws for the peace, order and good government and therefore, the *Clean Air Act*, and in particular, section 9 thereof, and the *Regulations* thereunder, is within the competence of the Parliament of Canada.

The Province of Manitoba by statute, enacted the *Clean Environment Act*, S.M. 1972, c. 76, as amended (originally passed in 1968). Essentially, this *Act* has the same purpose as the *Clean Air Act*, but it appears somewhat wider in scope in that it deals not only with air contamination, but in addition, contamination of soil and water. The *Clean Air Act* deals only with pollution or contamination of the atmosphere.

This does not mean, of course, the federal government cannot legislate in a field already occupied by the province, or for that matter, the reverse situation, as long as the legislation is complementary provided of course, the legislation is within its jurisdictional field, which I have so found.

As stated in *The Attorney General for Canada v. Dupond* 1978 2 S.C.R. 770, a decision of the Supreme Court of Canada, Beetz J. stated at page 794:

> *And, in the exercise of their own powers, the provinces may constitutionally complement federal legislation. The reports are replete with cases where provincial legislation complementary to federal legislation was upheld as long as it did not collide with the latter: Provincial Secretary of Prince Edward Island v. Egan 1941 S.C.R. 396, Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.) 1958 S.C.R. 608, Smith v. The Queen 1960 S.C.R. 776, O'Grady v. Sparling 1960 S.C.R. 804, Stephens v. The Queen 1960 S.C.R. 823, Lieberman v. The Queen 1963 S.C.R. 643, Fawcett v. Attorney General for Ontario 1964 S.C.R. 625, Mann v. The Queen 1966 S.C.R. 238.*

As the *Clean Air Act* does not appear in any way to collide with the provincial *Clean Environment Act*, and is in fact complementary to it, it is not in my opinion, an invasion of the provincial jurisdiction under section 92 of the *B.N.A. Act*.

Does the Attorney General of Canada have the right to prosecute under this *Act*?

The company contends that even if the legislation sought to be impugned is held to be *intra vires* of the Parliament of Canada, nevertheless, the Attorney General of Canada does not have the power to enforce the provisions of the *Clean Air Act*.

The latest binding decision on this Court was rendered in the Supreme Court of Canada in *The Queen v. Hauser*, 1979, 1 S.C.R. 984, 46 C.C.C. (2d) 481. The majority decision was written by Pigeon J. A dissenting opinion, concurred in by Pratt J. was written by Dickson J. In that case, an agent of the Attorney General of Canada preferred a direct indictment against the accused under the *Narcotic Control Act*, R.S.C. 1970, c.N-1, as amended. The accused contended that the indictment was preferred by a person without lawful authority to do so.

Pigeon J., at page 1003 of his judgment, stated:

> *I can see no bar to Parliament, in the discharge of its valid legislative power, providing that as to certain duties or procedures the provincial officials shall not be used exclusively but the power may also be exercised by a federal official who may be the Attorney General of Canada or any investigating or prosecuting agency designated by Parliament.*
>
> *Indeed it is difficult to understand how much of the federal legislative field could be dealt with efficiently by other methods. Much of the legislation in such fields is in essence regulatory and concerns such typically federal matters as trade and commerce, importation and exportation and other like matters.*

And continuing on page 1004:

> *If the legislative field is within the enumerated heads in s. 91, then the final decision as to administrative policy, investigation and prosecution must be in federal hands.*

Counsel for the company has cited the case of *R. v. Kripps Pharmacy Ltd. and Kripps* (1981), 19 C.R. (3d) 282. The authority of the Attorney General of Canada was challenged likewise, under the *Food and Drugs Act*, R.S.C. 1970, c. F-27, as amended, to enforce or prosecute; in addition, so was the validity of the legislation. Essentially, the trial judge followed the reasoning of Dickson J. in his dissent in *R. v. Hauser, supra*. This decision was upheld by the Court of Appeal for British Columbia, and I am informed leave has been granted to the Crown to appeal the decision to the Supreme Court of Canada. From a perusal of the decision so far reported, the Attorney General of Canada has argued that the *Food and Drugs Act* is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation. Flowing from that position would be the right to enforce or prosecute under that *Act*. So far, that argument has been rejected.

In *R. v. Hauser, supra*, the majority of the Court found that the *Narcotic Control Act* was legislation which did not depend for its constitutional validity on s. 27 of section 91 (Criminal Law) of the *B.N.A. Act*, and therefore, the Attorney General of Canada had the right to prosecute. Similarly, I have found the *Clean Air Act* does not depend for its constitutionality on s. 27 of section 91 of the *B.N.A. Act*, dealing with Criminal Law. I am bound by this decision and therefore, hold that the Attorney General of Canada has the authority to prosecute and enforce the regulations under the *Clean Air Act*.

I therefore dismiss the motion by the company, challenging the validity of the legislation.

MANITOBA COURT OF QUEEN'S BENCH

THE CANADA METAL COMPANY LIMITED v. REGINA (Clean Air Act)

SIMONSEN J. Winnipeg, December 6, 1982

Constitutional law - Clean Air Act, S.C. 1970-71-72, c. 47, as amended, is constitutional - Act deals with a matter of national dimension or concern and thus is properly enacted under peace, order and good government power - Act is in substance public health legislation and therefore also properly enacted under criminal law power.

The *Clean Air Act*, S.C. 1970-71-72, c. 47, as amended, is constitutional. The *Act* is specific and narrow in that it is concerned only with air quality, a subject which transcends the scope of provincial jurisdiction. A province cannot legislate to control the quality of air which it receives from an adjoining province. The matter is thus one of national dimension or concern, and the *Act* is properly enacted under the general power of peace, order and good government.

Furthermore, the *Clean Air Act* is a genuine attempt to amend the criminal law since it is in substance public health legislation. It specifically provides that emission standards are to be established with reference to significant danger to the health of persons, and the health risk arising from air pollution is national.

P.M. Kraemer, for Her Majesty the Queen *et al.*, respondents
W.L. Ritchie, Q.C., and *D. Abra*, for the appellant

SIMONSEN J.: The applicant is charged with an offence under section 9(1) of the *Clean Air Act*, S.C. 1970-71-72, c. 47, as amended, in failing to comply with the national emission standard as established pursuant to section 7 of the *Act* with particular reference to *Regulations* governing "secondary lead smelter national emissions standards".

The matter was to be heard by His Honour Judge Norton. The statutory validity of the *Clean Air Act* was challenged before the learned provincial judge and accordingly the hearing of the charge did not proceed. The Attorney-General for the Province of Manitoba was served with notice of the challenge but chose not to appear. No evidence was taken or material filed at the hearing before Judge Norton. The learned provincial judge delivered written reasons for judgment on April 28, 1982 (reported at (1982), 11 C.E.L.R. 130).

The applicant now applies to this court by way of *certiorari* to quash the decision of the learned provincial judge.

The applicant took the position that the validity of the *Clean Air Act*, in particular section 9(1)(a), could not be supported under the general power of "peace, order and good government". Environmental law, it was contended, falls squarely within "property and civil rights, 92(13)" or a subject of "local and private nature", under 92(16) of the *Constitution Act, 1982* (formerly *B.N.A. Act*) and was thereby exclusively a matter within provincial jurisdiction. The learned provincial judge had

justified the impugned statute as valid legislation under peace, order and good government.

In essence it was the applicant's submission that following the decision of the Supreme Court of Canada in *Reference Re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 a finding of a "national emergency" was necessary to permit the Parliament of Canada to encroach upon a subject matter which was clearly within provincial jurisdiction under section 92 of the *Constitution Act*, and in consequence the doctrine of national dimension or concern was no longer available as a basis for federal legislation under peace, order and good government. It was further contended that the Province of Manitoba by its *Clean Environment Act*, S.M. 1972, c. 76, as amended, had legislated in the environmental field and the constitutional validity of that statute, or its companion legislation in Ontario, was established by *Regina v. Lake Ontario Cement Ltd. et al.* (1973), 11 C.C.C. (2d) 1. Accordingly, since the field of environmental law was already the subject of valid provincial legislation, Parliament could not legislate in that area in the absence of a national emergency.

The *Clean Air Act* was defended as valid criminal law, and also supportable as legislation under the head peace, order and good government.

The *Clean Air Act* was adopted by Parliament in June 1971 while the provincial *Clean Environment Act* was passed in 1972. A brief examination of the two statutes is useful.

The *Clean Environment Act* is an omnibus statute covering virtually the entire spectrum of environmental concerns. The *Clean Air Act*, on the other hand, is narrow and specific. It is concerned with the quality of air in the atmosphere. In its definition section the *Clean Air Act* refers to "air contaminant", "air pollution" and "ambient air". The *Clean Environment Act* included a more general definition of "contaminant". It also legislated in respect of air quality. Clearly both statutes cover some common ground.

The *Clean Air Act*, by section 7(1), provides:

> *7.(1) Where the emission into the ambient air of an air contaminant in the quantities and concentrations in which it is consumed or produced in the operation of stationary sources of a particular class or classes specified by the Governor in Council would*
>
> *(a) constitute a significant danger to the health of persons, or*
>
> *(b) be likely to result in the violation of a term or terms of any international obligation entered into by the Government of Canada relating to the control or abatement of air pollution in regions adjacent to any international boundary or throughout the world,*
>
> *the Governor in Council may prescribe national emission standards establishing the maximum quantities, if any, and concentrations of such air contaminant that may be emitted into the ambient air by stationary sources of such class or classes.*

The offence provision of the *Clean Air Act* is found at section 9(1):

9.(1) No operator of

(a) any stationary source of a class in respect of which a national emission standard has been prescribed pursuant to section 7, or

(b) a federal work, undertaking or business in respect of which a specific emission standard has been prescribed pursuant to section 13 on the basis of a recommendation by the Minister pursuant to section 12, shall operate such stationary source or federal work, undertaking or business, as the case may be, in a manner that results in an emission into the ambient air in contravention of that national emission standard or specific emission standard.

The *Clean Air Act* further makes provision for co-operation and consultation with the provinces in respect of the establishment of emission standards and under section 19 makes provision for federal-provincial agreements relating to air quality.

The genesis of the doctrine of national dimension or concern as a foundation for federal legislation under peace, order and good government arose with what Viscount Simon (said) in *Attorney-General of Ontario et al. v. Canada Temperance Federation et al.* 1946 2 D.L.R. 1, 1946 A.C. 193. In my view the Supreme Court of Canada did not amend that doctrine in *Reference Re Anti-Inflation Act.* The anti-inflation legislation dealt with by the court in *Reference Re Anti-Inflation Act* was a clear and massive intervention into provincial legislation and distinguishable from the narrow and specific legislation as found in the *Clean Air Act.*

The continued existence of the doctrine of national dimension or concern cannot be doubted. It was not repudiated in decisions subsequent to the anti-inflation reference. The doctrine was confirmed by Estey, J. in *Labatt Breweries of Canada Limited v. The Attorney General of Canada et al.*, 1980, 1 S.C.R. 914 at page 944:

There remains to be examined the peace, order and good government clause in s. 91 as the basis for these federal regulations. This subject has already been adverted to above in connection with the health aspect of this statute. The principal authorities dealing with the range of the federal jurisdiction under this heading are illustrated by:

(1) Fort Frances Pulp and Paper Co. v. Manitoba Free Press 1923 A.C. 695, basing the federal competence on the existence of a national emergency;

(2) The Radio Reference 1932 A.C. 304 and the Aeronautics Reference 1932 A.C. 54, wherein the federal competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of merely local or private nature; and,

(3) Where the subject matter "goes beyond the local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole." Attorney General of Ontario v. Canada Temperance Federation 1946 A.C. 193 per Viscount Simon, at p. 205.

The position was further re-enforced by Dickson, J. in *Schneider v. Province of British Columbia*, (1982) 43 N.R. 91 at page 111:

> *There is no material before the court leading one to conclude that the problem of heroin dependency as distinguished from illegal trade in drugs is a matter of national interest and dimension transcending the power of each province to meet and solve its own way. It is not a problem which 'is beyond the power of the provinces to deal with' (Professor Gibson (1976-77), 6 Man. L.J. 15, at p. 33). Failure by one province to provide treatment facilities will not endanger the interests of another province. The subject is not one which 'has attained such dimensions as to affect the body politic of the Dominion' (Re Regulation and Control of Aeronautics in Canada, 1932 A.C. 54, at p. 77). It is not something that 'goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case)' per Viscount Simon in Attorney General for Ontario v. Canada Temperance Federation, 1946 A.C. 193, at p. 205. See also Johannesson v. Rural Municipality of West St. Paul, 1952 1 S.C.R. 292; Munro v. National Capital Commission, 1966 S.C.R. 663; Re C.F.R.B. and the Attorney General for Canada, 1973, 3 O.R. 819. Nor can it be said, on the record, that heroin addiction had reached a state of emergency as will ground federal competence under residual power.*

I the result the doctrine of national dimension or concern may be invoked to justify legislation under peace, order and good government.

The inquiry must now be directed to whether the *Clean Air Act* meets the test of national dimension or concern. The test, which I adopt, was stated by the learned author, P.W. Hogg, *Constitutional Law of Canada* (1977), at page 261 as follows:

> *. . . These cases suggest that the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces. A subject-matter of legislation which had this characteristic has the necessary national dimension or concern to justify invocation of the p.o.g.g. power.*

I now propose to examine that test criterion as it applies to the *Clean Air Act*.

The *Clean Air Act*, as earlier noted, is specific and narrow in the area of environmental concerns which it seeks to control. It is related to quality of air. It is a notorious fact that air is not impounded by provincial boundaries. Air moves with prevailing winds and other atmospheric conditions and its movement is not one which respects geographical limitations. Air is a free agent in the atmosphere and does not alter its quality or kind at provincial or national borders.

The control of air quality is not a subject of a purely private or local concern. It transcends the scope of provincial jurisdiction. A province cannot legislate to control the quality of air which it receives from an adjoining province or state. The quality of air certainly meets the geographical concern which has been expressed in the authorities.

It is accordingly my view that the impugned statute is within the scope of the Parliament of Canada to enact as legislation under the general power of peace, order and good government and I would accordingly uphold the decision of the learned provincial judge.

I need not, however, rest my decision upon this general power alone. The Attorney General of Canada in this proceeding contended that the *Clean Air Act* was valid criminal law. He contended that the pith and substance of the *Act*, being protection of public health, was thereby reserved to Parliament under section 91 of the *Constitution Act* as valid criminal law.

Health, as a constitutional issue, was dealt with by Estey, J. in *Schneider v. Province of British Columbia, (supra)*, at pages 120 and 121:

> *Health is not a subject specifically dealt with in the Constitution Act either in 1867 or by way of subsequent amendment. It is by the Constitution not assigned either to the federal or provincial legislative authority. Legislation dealing with health matters has been found within the provincial power where the approach in the legislation is to an aspect of health, local in nature. Vide: Fawcett v. Attorney-General for Ontario, 1964 S.C.R. 625; Re George Bowack (1892), 2 B.C.R. 216; Reference Re Intoxicated Persons Detention Act, 1981, 1 W.W.R. 333 (Man. C.A.); and Greene v. Livermore, 1940 O.R. 381. On the other hand, federal legislation in relation to 'health' can be supported where the dimension of the problem is national rather than local in nature (see: Attorney-General for Ontario v. Canada Temperance Federation, 1946 A.C. 193, at 205-6; Toronto Electric Commissioners v. Snider, 1925 A.C. 396, at 412), or where the health concern arises in the context of a public wrong and the response is a criminal prohibition. In Russell v. The Queen, Sir Montague Smith suggested the illustration of a law which prohibited or restricted the sale or exposure of cattle having a contagious disease; (1882), 7 A.C. 829, at 839. In Labatt Breweries v. Attorney General of Canada the case of adulteration provisions in a statute was cited; 1980 1 S.C.R. 914, at 934; 30 N.R. 496. Health concerns are directly raised by the jurisdiction attributed to Parliament by s. 91(11) of the Constitution Act and may also be raised by s. 91(7) and perhaps ss. (2) as well. In sum 'health' is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.*

One must then enquire as to whether the *Clean Air Act* is in substance public health legislation within the established principles.

The *Clean Air Act* specifically provides under section 7(1) emission standards are to be established with reference to "significant danger to the health of persons". There is no attempt to legislate outside that field.

The dimension of the health risk arising from air pollution is not prescribed by provincial boundaries. The harmful ingredients in air pose a national health risk. The inpugned legislation, in an effort to safeguard health, creates an offence section 9(1) with appropriate penalty for violation, section 33.

Valid criminal law adopted with this health object in mind has been supported in a number of authorities including *Standard Sausage Co. v. Lee* (1933), 60 C.C.C. 265 and (1934) 61 C.C.C. 95 (B.C.C.A.); *Berryland Canning Company Ltd. v. The Queen* 1974, 1 F.C. 91; *Regina v. Cosman's Furniture (1972) Ltd. et al.* (1976), 32 C.C.C. (2d) 345 (Man. C.A.).

This view of the law was clearly stated by Freedman, C.J.M. in *Cosman* at page 346:

> *There is ample jurisprudence to support this view of the law. The matter was put thus by Lord Atkin in A.-G. B.C. v. A.-G. Can. et al. (1937), 67 C.C.C. 193 at p. 195, 1937, 1 D.L.R. 688 at p. 690, 1937 A.C. 368:*
>
> > *The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subject enumerated in s. 92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which apart from the amendment he could lawfully do.*
>
> *Was the Hazardous Products Act 'a genuine attempt to amend the criminal law'? In our view it was. It fell within the scope of the test set forth by Rand, J., in Reference re Validity of s. 5(a) of Dairy Industry Act (Margarine Case), 1949, 1 D.L.R. 433, at pp. 472-3, 1949 S.C.R. 1 affirmed 1950 4 D.L.R. 689, 1951 A.C. 179 , where he said:*
>
> > *A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interests threatened.*
>
> *And at p. 473 Rand, J., continues:*
>
> > *Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law . . .*

I find the *Clean Air Act* was "a genuine attempt to amend the criminal law" and thus within the scope of parliament to enact.

This matter should accordingly be remitted to the learned provincial judge for disposition of the charge. The application for *certiorari* is dismissed.

BRITISH COLUMBIA COURT OF APPEAL

R. v. MACMILLAN BLOEDEL LIMITED

TAGGART, CRAIG, ESSON, J.J.A. Vancouver, January 20, 1984

Fisheries Act, R.S.C. 1970, c. F-14, as amended - While Act intended to protect fisheries, not every species of fish in every geographical location is a fishery - Stream in question neither a fishery nor part of one - Act therefore inapplicable and appeal by Crown against acquital under s. 31(1) dismissed by majority of Court.

D.R. Kier, Q.C., for the (Crown) Appellant.
D.W. Shaw, Q.C., for the Respondent.

(Editor: Leave to Appeal to the Supreme Court of Canada was refused)

TAGGART J.A. (ESSON J.A. CONCURRING): - An information was sworn by a conservation officer alleging:

> *The informant says that he has reasonable and probable grounds to believe and does believe that MacMILLAN BLOEDEL LIMITED, between the 1st day of July 1979 and the 31st day of December 1979 near Campbell River in the Province of British Columbia,*
>
> *Count 1: did carry on work that resulted in the harmful alteration, disruption or destruction of fish habitat in an unnamed tributary of the Tsitika River, contrary to Section 31 of the Fisheries Act, and*
>
> *Count 2: did deposit or permit the deposit of a deleterious substance in water frequented by fish in an unnamed tributary of the Tsitika River, contrary to Section 33(2) of the Fisheries Act.*

Following a trial before a Provincial Court judge the respondent was acquitted of Count 2 but convicted of Count 1. An appeal to the County Court resulted in the conviction on Count 1 being set aside and an acquittal entered. The Crown now appeals to this court.

I

FACTS

The work carried on by the respondent which was said to affect a fish habitat was logging near a small unnamed stream, sometimes called "Russell Creek". It is a tributary of Tsitika River which flows in an easterly direction into Robson's Bight on the east coast of Vancouver Island. The place where the logging occurred was within an area affected by the Tsitika Logging Plan. The Plan had been prepared with the

cooperation of the respondent and other interested parties, including the federal department of Fisheries. The object of the Plan was to govern logging practices in the area covered by it. Included in the Plan were requirements aimed at protecting streams, including "fish bearing streams".

Downstream from the place where the logging occurred is a waterfall which prevents any fish from proceeding up Russell Creek beyond it. In the creek above the waterfall are small fish which are a sub-species of cutthroat and char. This sub-species has evolved over hundreds of years. The fish, when mature, are rarely more than six inches in length. They have no commercial or sports fishing value.

II

THE JUDGMENTS

A. PROVINCIAL COURT

The Provincial Court judge found that the logging practices did not comply with the provisions of the Tsitika Logging Plan and were a harmful alteration, disruption or destruction of the habitat of the resident sub-species of cutthroat and char. He was not satisfied beyond a reasonable doubt that the logging debris was sufficient to constitute a deposit of a deleterious substance in Russell Creek.

The judge did not say whether the logging debris affected the creek below the waterfall, though I think the better view is that having acquitted the respondent on Count 2 his conclusion was that it did not.

B. THE APPEAL COURT JUDGE

The appeal court judge found that the logging had a short-term negative impact on the small fish above the waterfall but none on the fish below. He agreed with the trial judge's finding that the respondent's logging practices contravened the provisions of the Tsitika Logging Plan.

He stated the issue before him in this way:

> *That issue can perhaps best be stated by reference to the Notice of Appeal, which states as a ground of appeal that the learned trial Judge erred "by failing to find that the scope of Section 31(1) of the Fisheries Act does not extend to the subject habitat in the unnamed tributary of the Tsitika River, there being no fishery directly or indirectly affected". The appellant's argument is that the Tsitika River fishery extends no further than the waterfalls and that the unnamed stream was not in itself part of a fishery.*

After reviewing the arguments presented to him the judge said:

> *With respect, I am persuaded that the contrary position taken by the appellant is sound, that the Fisheries Act is for the protection of fisheries, and that fishery does not include every species of fish in every geographical location. I agree with*

counsel for the appellant that the Supreme Court of Canada has indeed suggested some limitation on the reach of the Statute. In Regina v. Northwest Falling Contractors Ltd., (supra) at p. 550 Martland J. for the court said:

> *"The charges laid in this case do not, however, effectively bring into question the validity of the extension of the reach of the subsection to waters that would not, in fact, be fisheries waters." The charges involved waters frequented by fish, and hence I infer that Martland J. contemplated the existence of waters with fish in them which did not constitute fisheries. The issue in this case is one which, with respect, I think will have to be settled by the Supreme Court of Canada. I regard the words of Martland J. as encouraging to the appellant.*
>
> *In reaching my decision in this matter, which is to allow the appeal, I was much influenced by a case relied on by counsel for the appellant which, although dealing with another Statute, is by analogy helpful and I refer to Regina v. Sommerville (1972) 32 D.L.R. (3d) 207. In that case a section of the Canadian Wheat 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.*
>
> *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. None of these conditions has been established. The appeal is allowed and the conviction quashed.*

III

CONCLUSION

I am in agreement with the opinion of the appeal court judge. Substantially the same arguments were advanced to us as those submitted to him.

Count 1 is based on s. 31(1) of the *Fisheries Act*, 1970 R.S.C., c.F-14. It provides:

> *31 (1) No person shall carry on any work or undertaking that result in the harmful alteration, disruption or destruction of fish habitat.*

"Fish habitat" is defined by s.31(5):

> *(5) For the purposes of this section and sections 33, 33.1 and 33.2, "fish habitat" means spawning grounds and nursery, rearing, food supply and*

migration areas on which fish depend directly or indirectly in order to carry out their life processes.

The constitutional basis for the Fisheries Act is s.91(12) of the Constitutional Act 1867 which confers on Parliament exclusive authority to legislate with respect to "12. Sea Coast and Inland Fisheries". The issue before us is whether the *Fisheries Act* extends to the place on Russell Creek affected by the logging done by the respondent.

Definitions of the word "fishery" were referred to by Martland J. who gave the judgment of the court in *Dan Fowler v. The Queen* 1980 2 S.C.R. 213. At p. 223 he said:

> *The meaning of the word "fishery" was considered by Newcombe J. in this Court in Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act, 1914, 1928 S.C.R. 457, at p. 472:*
>
> *In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:*
>
> > *A fishery is properly defined as the right of catching fish in the sea, or in particular stream of water; and it is also frequently used to denote the locality where such right is exercised.*
>
> *In Dr. Murray's New English Dictionary, the leading definition is:*
>
> > *The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.*
>
> *The above definitions were quoted and followed by Chief Justice Davey in Mark Fishing v. United Fisherman & Allied Workers Union (1972), 24 D.L.R. (3d) 585, at pp. 591 and 592. Chief Justice Davey at p. 592 added the words:*
>
> > *The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.*

The issue now before us was foreseen by Martland J. in *Northwest Falling Contractors Ltd. v. The Queen* 1980 2 S.C.R. 292. Again he gave the judgment of the court and at p. 300 said:

> *The charges laid in this case do not, however, effectively bring into question the validity of the extension of the reach of the subsection to waters that would not, in fact, be fisheries waters "or to substances other than those defined in paragraph (a) of subsection 33(11)". The charges relate to diesel fuel spilled into tidal waters. The task of the Court in determining the constitutional validity of subs. 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.*

A helpful analogy is the judgment of the Supreme Court of Canada in *The Queen v. Sommerville* 1974 S.C.R. 387. There the *Canadian Wheat Board Act* was construed in a way which confined the operation of the Act to its objectives and to the power conferred

on Parliament by the *Constitution Act 1867*. In that case Mr. Sommerville was charged with transporting wheat across a provincial border without a permit. He did this to take wheat grown on his farm in Saskatchewan to feed cattle on his farm in Alberta. The Act did not provide an exemption for such transportation but as a matter of interpretation the exception was made to keep the Act within its purposes and its underlying constitutional head of legislative power. Martland J., giving the judgment of the majority, said at p. 390:

> *The question for determination is whether, on these facts, the respondent was in breach of the provisions of s. 32 (b). Does s. 32(b) prohibit a grain producer, in Saskatchewan, from using his own grain to feed his own cattle in the Province of Alberta?*

At p. 391 Martland J. concluded that the Act was based upon the Regulation of Trade and Commerce which is made the exclusive legislative prerogative of Parliament by s. 91(2) of the *Constitution Act 1867*.

At pp. 392, 293 and 394 he said:

> *In my opinion it is proper, in determining the application of s. 32(b) to the facts of this case, to consider the intention of the Act and also the basis upon which this Court held that its enactment was intra vires of the Parliament of Canada.*
>
> * * *
>
> *To interpret s. 32(b) as applying to the circumstances of this case would be to apply it for an object outside the intention of the Act and would involve the conclusion that the Act applied to purposes other than the regulation of trade and commerce. The facts of the case involve no trading in grain by the respondent and no commercial transaction. The respondent dealt with his own grain for his own purposes and did not deal with anyone else.*
>
> *In McKay v. The Queen 1965 S.C.R. 798, 53 D.L.R. (2d) 532, Cartwright J., as he then was, who delivered the reasons of the majority of this Court, said, at p. 803:*
>
> > *The second applicable rule of construction is that if an enactment, whether of Parliament or of a legislature or of a subordinate body to which legislative power is delegated, 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.*
>
> *In interpreting s.32(b) (now s.33(b)) of the Act, I share the view expressed by Adamson C.J.M. in the Murphy case:*
>
> > *If there is no marketing or commerce in grain the provision should not apply.*
>
> *and by Johnson J.A. in the present case:*

> *This interpretation does no violence to the language of section 32(b) but merely restricts its operation to the movement of grain from one province to another that is made either in contemplation of or following upon a purchase or sale of that grain.*
>
> *For these reasons, as well as for those stated by Johnson J.A., with which I agree, I would dismiss the appeal.*

Applying that reasoning to the case at bar I am of the opinion that s.31 of the *Fisheries Act* should be restricted to fisheries. In this case a fishery was not affected by the logging practices of the defendant since the fish in Russell Creek did not constitute a fishery as that term has been defined by the Supreme Court of Canada in *Dan Fowler v. The Queen, supra.*

I would dismiss the appeal.

CRAIG J.A.: - (Dissenting) The Crown applies for leave to appeal from a decision of Stewart, C.C.J. allowing an appeal by the company from its conviction for an offence under the provisions of s.31(1) of the *Fisheries Act* ch. F-14 R.S.C. 1970 as amended.

A Provincial Court judge convicted the company 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 that there was no evidence to support this conclusion, but that there was evidence to support the conclusion 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 a part of one:

> *"To be identified as a fishery the area involved . . . 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(1) of the *Fisheries Act* provides:

> *"No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."*

Counsel for the respondent concedes that the portion of the stream in which the small fish are found is a "fish habitat" within the meaning of the Act but submits that it is not part of a fishery which is a condition precedent to the application of the *Fisheries Act*, contending that legislative authority of Parliament under s.92(2) of the *Constitution Act 1867* extends only to "seacoast and inland fisheries", not simply to inland "fish". He relies on the judgment of Martland J. in *Regina v. Fowler* (1980) 2 S.C.R. 213 at 223:

> *"The meaning of the word 'fishery' was considered by Newcombe, J., in this court in Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act, 1914, (1928) S.C.R. 457, at p. 472:*

In Patterson on the Fishery Laws (1863) p. 1, the definition a fishery is given as follows:

> *'A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.'*

> *In Dr. Murray's New English Dictionary, the leading definition is:*

> *'The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.'*

> *The above definitions were quoted and followed by Chief Justice Davey in Mark Fishing v. United Fishermen & Allied Workers Union (1972), 24 D.L.R. (3d) 585, at pages 591 and 592. Chief Justice Davey at page 592 added the words:*

> *'The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.'*

In *Northwest Falling Contractors Ltd. v. The Queen* (1980) 2 S.C.R. 292, Martland J. reiterated these comments and at p. 300 referred to the judgment of Laskin C.J.C. in *Interprovincial Co-operatives Ltd. et al. v. The Queen* (1976) 1 S.C.R. 477 at 495 who stated that the Federal legislative power under s.92(12) is "concerned with the protection and preservation of fisheries as a public resource".

Following the reference to this statement, Martland J. said at p. 300:

> *"Shellfish, crustaceans and marine animals, which are included in the definition of 'fish' by s.2 of the Act, are all part of the system which constitutes the fisheries resource. The power to control and regulate that resource must include the authority to protect all those creatures which form a part of that system."*
>
> (my underlining)

Crown counsel relies particularly on this passage submitting that there will be "thousands of creatures" in the ocean, lakes and streams of the country "that are an integral part of the ecosystem of fish in those respective waters" and that legislative power of Parliament must include the authority to protect them even though they may not have a commercial or sporting value.

Although there is much to be said for the submissions of both counsel, the submission of Crown counsel based on the statement of Martland J. in the *Northwest Falling Contractors* case commends itself to me because I do not think "public resource" or "fisheries resource" means simply fish having commercial or sporting value.

I would grant leave to appeal, allow the appeal and restore the conviction.

BRITISH COLUMBIA COURT OF APPEAL

R. v. THE CORPORATION OF THE TOWNSHIP OF RICHMOND

NEMETZ C.J. B.C.,
CRAIG, ANDERSON J.J.A.

Vancouver, November 15, 1983

Constitutional law - Charges under s.33 (2) of Fisheries Act, R.S.C. 1970, c.F-14, as amended, against municipal corporation - s.33 (2) applicable to municipal corporations and charges therefore remitted to the Provincial Court to determine issues on merits - Appeal by Crown allowed.

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charges under s.33 (2) against municipal corporation - s.33 (2) applicable to municipal corporations and charges therefore remitted to the Provincial Court to determine issues on merits.

Charges under s.33 (2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, were brought against three accused. The charges against one of the accused, a municipal corporation, were dismissed by the Provincial Court because the Court concluded that s.33 (2) is directed towards individuals and limited companies, not municipal corporations. The Crown appealed the decision of Drysdale Prov. Ct. J. by way of stated case to the Court of Appeal. The Court of Appeal allowed the appeal and remitted the case to the Provincial Court.

D.R. Kier, Q.C., for the (Crown) Appellant.
Robert Anderson, for the Respondent.

(Editor: The decision of Drysdale Prov. Ct. J. is at page 390.)

NEMETZ C.J.B.C., (CRAIG, ANDERSON, J.J.A. concurring): - The Corporation of the Township of Richmond was charged under Section 33(2) of the *Fisheries Act* which, in part, provides that no person shall deposit or permit to be deposited any deleterious substance or cause any such deleterious substance to enter any such water.

The matter came before His Honour Judge Drysdale, of the Provincial Court, and the matter was never decided because the judge held that he had no jurisdiction to deal with the charges because the *Fisheries Act* made no provision for the charge being laid against a municipality and spoke only of persons. The *Fisheries Act* does not define person, and the able submission made by Mr. Anderson was that it was then appropriate to look at the *Interpretation Act*, the *Federal Interpretation Act*, 1979 c. I-32. Section 28 of the *Interpretation Act* defines person as follows:

> *"(2) In an enactment words signifying a male person include a female person and words signifying a female person include a male person, and either word includes a corporation."*

The question then before us is very simply this: Is a municipal corporation a corporation within the meaning of that Act? In the first place, I look to the entire scheme of the Act. I think it is only common sense that parliament in providing for the protection of waters from pollution intended that that should apply to all persons in Canada and could not, unless there was some specific language, exclude a municipal corporation. Otherwise that would mean that a municipal corporation would be able to pollute at will any waters coming within the purview of this all embracing Act to protect the environment. In my view, a corporation includes a municipal corporation. Therefore, I would allow this appeal. The judge has jurisdiction to hear the issues on its merits.

The appeal is allowed and the matter is remitted to the Provincial Court to determine the issue on its merits.

BRITISH COLUMBIA COUNTY COURT

R. v. JACKSON BROTHERS LOGGING CO. LTD.

HUDDART CO. CT. J. Vancouver, September 6, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Charge by indictment under s.31 - Fish habitat destroyed by road - building operations - Due diligence not made out - Original plan should have been changed as construction proceeded.

Sentencing - After conviction by indictment there is no upper limit on the fine that may be imposed by court under s.31 of Fisheries Act - Company did not exhibit remorse but had lack of understanding of the close relationship between its activities and the fish habitat - Fine of $6,000 imposed - Court also imposed a remedial order under s.33(7) of Fisheries Act.

D.R. Kier, Q.C., for the Crown.
D. Martin, for the accused.
(Editor: See page 377 for Reason for Judgment)

HUDDART CO. CT. J.: - (Orally) Jackson Bros. Logging Co. was convicted of an offence contrary to section 31(1) of the *Fisheries Act*, in that it carried on a work that resulted in the harmful alteration, disruption or destruction of a fish habitat.

Paragraph 31(3) of the *Fisheries Act* provides as punishment a maximum of two years imprisonment and, thus, this corporate offender is liable to an unlimited fine. Had the charge been prosecuted by way of summary conviction, it would have been liable to a maximum fine of $5,000 for this its first offence. Counsel for the company asks me to take that provision into account in arriving at an appropriate penalty. The original information under section 33(3) was quashed. As a result, this indictment was laid because two years had passed.

By reason of subsections 31(4) and 33(7) the Court may also order the offender "to take such action specified in the order as, in the opinion of the Court, will or is likely to prevent the commission of any further such offence".

Although the English text suggests that such an order is additional to any "punishment" imposed, the French text makes it clear that it is also to be considered part of the punishment. Certainly the order sought by the Crown would result in considerable expense to the accused. For these reasons I propose to take into account any mandatory order I might make in determining the amount of the fine. However, I cannot accede to the submission on behalf of Jackson Bros. that such an order should replace a fine. The words of section 33(7) of the *Fisheries Act*, in both the English and French versions, make that impossible. A fine or a period of imprisonment must be the basic punishment.

The function of section 31 is to protect the fish habitat. Jackson Bros. harmed to coho and chum spawning grounds and rearing areas in the estuary of Angus Creek in the Sechelt peninsula by its road building operations. Remedial work by the federal and provincial government minimized the harm in ensuing years but the harm continues. Even with further remedial work the fish habitat will be at risk for another four to five years. The logging company continues to be active in the area.

Given these factors I consider that the primary concern of the Court in arriving at an appropriate punishment must be deterrence of this offender specifically, and of others active in the logging industry whose own concept of their own best interest may not take sufficient account of competing environmental and economic interests considered by Parliament to need the protection of the criminal law.

In *The Queen v. United Keno Hill Mines* reported at (1980) 10 C.E.L.R. 43, His Honour Judge Stewart of the Yukon Territory Court canvassed the factors to be considered in pollution cases. They apply to all environmental offences. As will become apparent I have drawn heavily on his analysis at arriving at the punishment I consider appropriate in this case.

The Angus Creek watershed is a fragile environment. He who enters the area for logging purposes is aware of the steep ground, the heavy waterfall, the nature of the soil and of the ground cover. Such a person knows that the clearing, blasting and side-casting inherent in road building on steep hills in such an environment can affect the streams that flow through it to the sea. Logging activity and the ancillary road building must continue. Although all such operations will affect the environment to some degree, persons undertaking them must be encouraged to take due care to minimize the risk of injury, particularly to the values protected by Parliament. In this case, the fish habitat was destroyed for one season and harmed for at least one other. Continuing harm is occurring and further harm is foreseen. Remedial work has not been and will not be sufficient to avoid that harm. However, with remedial work and in the long term, nature will come back into balance and the fish habitat will be restored. There is no evidence before me to suggest that the harm is irreparable and permanent.

Nor is there any evidence to suggest that Jackson Bros. deliberately or recklessly set out a course of action to harm the fish habitat. It did not exhibit a cavalier or wanton attitude. Rather, it followed its own economic best interests in constructing a road as efficiently as it could within the confines of the supervision provided by the British Columbia Forestry Service. In my view the priorities that it shared with the government agencies caused Jackson Bros. to be careless in its operation and to the consequences of them for the fish habitat.

Peter Jackson, the officer of the offending company responsible for the road building operations sat through the entire trial, at which he also testified. He seemed genuinely satisfied that his company had done all that could be expected of it in the circumstances. While there was no evidence that the company had helped in the remedial work undertaken by the governmental agencies or had volunteered to do so, I am satisfied that Mr. Jackson has found the trial and the preparation for it to be an educational experience. The company may not have exhibited remorse but any failure in that regard, I am persuaded, arises from an honest lack of understanding of the close relationship between its activities and the fish habitat, and the overriding concern for profit from logging operations it shares with the only government regulatory body with which it must deal. After the landslide caused by its blasting, the company did alter its plans somewhat. However, its failure to ditch the road and to hydro-seed the slide zone and the sidecast face, tell me that it still has much to learn.

In *The Queen v. The Corporation of the City of North Vancouver*, an unreported case (now reported at page 233) from the North Vancouver Provincial Court number 08999C, His Honour Judge Paradis on July the 9th, 1982 said:

"Where the occurrence was singular and due to negligence either in procedure and systems generally, on the part of one or more individuals, a substantial fine may well provide the impetus for a realistic re-assessing of corporate consciousness about environmental responsibility. To avoid fines in the future, procedure would be revised, managers and employees, hopefully, would be re-educated and concern for the environment will take its rightful place alongside concern for customers and shareholders, or in the case of the municipality, for the welfare of the community."

However, I have no evidence before me as to the size or profitability of the company. Thus I have no idea as to the ability of this company to pay a fine nor can I determine what fine might be sufficient to deter this company from further offences. There is no evidence as to the profits made or the logs drawn out over this road.

In undertaking the action I propose to order, this offender will, I trust, learn of the relationship between its activities and the fish habitats. This will provide the best assurance that it will not commit a second offence. It will also ensure that as much is done as is possible to prevent further materials from entering Angus Creek. It will involve considerable effort and expense. That should have the effect of deterring others from similar offences. It may also have the incidental effect of encouraging this offender and others to be more helpful in cleaning up messes they create.

Under the auspices of the Salmonoid Enhancement Programme $5,000 was spent to clear the fish habitat and rip rap the banks of Angus Creek during August and September 1980. The Provincial Parks Branch spent about $1,000 restoring the stream and physical improvements damaged by the materials deposited in the stream as they reached the Provincial Park at the estuary. Coho and chum salmon returned to the fish habitat. However, at least 50 percent of the material remains in the stream, caught behind log jams, likely to continue downstream during flash flooding over the next few years. The material is building up again in the estuary. Material continues to enter the stream at the site of the landslide and south of the intersection of the cross-over road in Angus Creek.

Therefore, I have concluded that I should impose a fine of $6,000. In addition to this fine, Jackson Bros. is to take the following action under the supervision of James Alexander Steven, Jr. or such successor as he may designate in writing:

1. To construct forthwith and maintain during such period as Jackson Bros. uses the road a ditch along the cross-over road on its inside face from the south side of the slough area to the south side of the culvert;
2. To hydro-seed forthwith with a legume-grass mixture the slide zone and the sidecast face along the cross-over road south of Angus Creek;
3. To remove forthwith all log jams in Angus Creek between the cross-over road and the estuary;
4. To remove forthwith the materials which have originated from the sidecast operations and the slide area from the estuary;
5. To construct forthwith and maintain for a period of five years a settlement pond 150 feet by 50 feet (armoured at the downstream side) to a depth of 8 feet at the site of the old highway bridge crossing Angus Creek; and, finally,
6. To rip rap forthwith the south side of Angus Creek for a distance of 100 feet upstream and downstream from the rip rapping constructed under the auspices of the Salmonoid Enhancement Programme during the summer of 1980.

BRITISH COLUMBIA COURT OF APPEAL

R. v. JACK CEWE LTD.

OPPAL CO. CT. J. Vancouver, October 6, 1983

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Appeal from convictions under s.33(2) and from sentence imposed - Appeal allowed in part - Five convictions set aside and fine accordingly reduced from $190,000.00 to $140,000.00.

Sentencing - Appeal from convictions under s.33(2) of *Fisheries Act*, R.S.C. 1970, c.F-14, as amended - Five convictions set aside - Fine reduced accordingly from $190,000.00 to $140,000.00

On an appeal by the accused from its conviction for seventeen offences under s.33(2) of the *Fisheries Act*, R.S.C. 1970, c.F-14, as amended, and from the sentence imposed, held, the appeal is allowed in part. The function of a court upon appeal is merely to consider "whether the weight of the evidence was so weak that the verdict of guilty was unreasonable". In this case, it cannot be said that the weight of the evidence was so weak that the findings of the trial judge were unreasonable and thus the appeals against conviction are dismissed.

However, the trial judge did offend the rule against multiple convictions for the same incident and therefore, where multiple convictions were registered for incidents taking place on a given day, the multiple convictions are set aside and a single conviction registered.

With respect to the appeal against sentence, it cannot be said that the trial judge erred in principle in imposing the sentences or that the fines imposed were excessive. However, the total fine is reduced from $190,000.00 to $140,000.00 since a number of the convictions have been set aside.

R.H. Wright, and *L. McFarlane*, for the Crown, respondent.
J.J. Reynolds, and *R.M. Young*, for the accused, appellant.

OPPAL CO. CT. J.:

- A. BACKGROUND

This is an appeal from convictions and sentences imposed upon the appellant corporation upon charges of polluting water frequented by fish contrary to s. 33(2) of the *Fisheries Act*, R.S.C. 1970, c. F-14. The appellant was convicted upon seventeen charges under the Act and was sentenced to fines totalling $190,000. Section 33(2) reads as follows:

> 33 (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.*

B. ISSUES

In the matter of conviction some twenty grounds of appeal have been advanced. The issues arising out of these grounds may be fairly summarized as follows:

1. Whether the Provincial Attorney General has the authority to conduct prosecutions under the *Fisheries Act*;
2. Whether the learned trial judge erred in concluding that the deposits of silt and sediment were of a deleterious substance;
3. Whether the learned trial judge erred in concluding that the appellant deposited or permitted the deposit of such substances in water frequented by fish;
4. Whether the learned trial judge erred in failing to conclude that the appellant exercised all due diligence or reasonable care in preventing the deposit of deleterious substances in water frequented by fish.
5. Whether the learned trial judge erred in registering multiple convictions for what was one occurrence.

C. EVIDENCE

Since 1951 the appellant corporation has carried on the business of a gravel pit operator. The area upon which it carries on its operations is in excess of forty acres. Its operations are situated on Pipeline Road in the Municipality of Coquitlam. Pipeline Road runs adjacent to the Coquitlam River. There is a ditch running adjacent to and a culvert running underneath Pipeline Road. The culvert and ditch both drain into the Coquitlam River. It is to be noted that a natural slide which occurred in this area some years ago has altered the natural topography.

In a trial which lasted some fifteen days over an eight-month period, evidence was led that conservation officers attended upon the appellant's property and obseved the removal of sand and gravel. This removal of sand and gravel resulted in silt, sand and sediment being deposited into the Coquitlam River. The Coquitlam River is a major spawning stream for salmon. It is a tributary of the Fraser River. Samples of the deposit were taken from the culvert, ditch and the river. They were scientifically analyzed and found to be deleterious by the learned trial judge.

Since much of this appeal concerned itself with the issue of reasonableness of the appellant's conduct and its apparent effects upon the environment it would be useful to view the evidence in some detail.

Evidence was led that conservation officers employed by the Fish and Wildlife Branch attended on numerous occasions on the appellant's property from November 1978 to November 1979. They gave detailed evidence of activity on the appellant's gravel operations. The activity included work being done with heavy machinery and equipment. Within the relevant time as many as 200 trucks per day frequented the appellant's operations. There was evidence of large amounts of gravel being removed from the pit area. Other gravel was being refined in a washer-sorter plant. An asphalt plant was in operation in the vicinity as well. Numerous photographs which were filed as exhibits revealed extensive digging of dirt and gravel in a large excavated area.

It was the evidence of the conservation officers that the extensive work done on the appellant's property resulted in a flow of dirty water from the property. The dirty water flowed from the Cewe property and discharged into three main areas of the Coquitlam River. The three areas which are designated on the photographs and plans are known as Creek "C", Pit "M" and 1641 Pipeline Road.

There are a number of settling ponds on the appellant Cewe's property. The purpose of the settling ponds is to slow the flow of water.

Numerous samples of water discharging into the ditch, culvert and river were taken by the officers. They were taken from various locations. The relevant samples in all instances were traced back to the appellant's gravel operations. Biological analyses were conducted upon the samples of discharge. The various counts in the information represent the occasions upon which the samples were taken and analyzed for the purposes of determining the proportion of suspended solids in the water. It should be noted that upstream samples which were unaffected by the gravel operations were taken as well for the purposes of a comparative analysis. In some instances these samples were found to contain levels of sediment which were not measurable.

A biologist, Otto Langer, testified as to the effect of the levels of solids which were found to exist. He also testified as to the effect of the levels of solids. His evidence with respect to these levels may be summarized as follows: 25 parts per one million was ideal; 25 to 80 parts per one million was an acceptable level; 80 to 400 parts per one million would have an adverse effect upon the productivity of a stream; over 400 parts per million results in poor fish production.

He also stated that there are four primary ways in which the introduction of sediment into water can have an adverse effect upon fish life. Firstly, the concentration of unacceptable levels of sediment will have an effect upon the gills, and upon the feeding ability of the fish. These factors affect the growth of fish. Secondly, the concentration of sediment directly affects the food chain of the fish that reside in that particular stream in that increased levels of suspended solids have a negative effect upon the food chain. Thirdly, the existence of certain levels of sediment have a direct bearing upon fish habitat because sediment fills in spaces and clogs areas in which fish live. This is particularly so during the winter season when fish tend to move into the substream and reside there during periods of cold weather. Fourthly, the increased amounts of sediment have an effect on egg survival or the spawning success of salmon and trout.

Another biologist, Patrick Slaney, gave detailed evidence of the levels of effect upon various species of fish. He specifically stated that sediment per se is a deleterious substance in a spawning stream. He also gave opinion evidence as to what type of substance in water consitutes deleterious substances. His evidence was that sediment has an adverse effect upon the food chain of fish that reside in a stream.

He testified that sand and clay are definitely harmful. Fine sand and coarse silt are the most deleterious because of their capacity to impact areas of the substrate. He also stated that, while clay would not likely settle in a fast-moving stream, it would nevertheless leave a lasting effect in that it would decrease light penetration to the gravel of a river bed. This would cause the pores in spawning areas to clog and therefore have a negative effect upon the reproduction of fish. The turbid or muddy condition of the river has this adverse effect upon fish growth.

Mr. Slaney gave evidence of the effect of the level of suspended solids existing in the river from November 1978 to November 1979. He stated that, where sediment is repeatedly entering a stream such as in this case, it would have the effect of causing a chronic loading condition, or increasing the level of sediment. He gave detailed evidence with respect to the levels of concentration and their effect upon fish growth and the environment. He stated that the net result of repetitive inputs of sediment such as was taking place as a result of the appellant's gravel operations would drastically impair the capability of the Coquitlam River to produce salmon and trout.

Mr. Slaney interpreted the levels of sediment as they pertained to the individual counts. Although in some cases the levels were not of a dangerous level he concluded that the over-all cumulative effect of even the lower levels would have a negative effect upon fish life.

It was the position of the appellant at trial that it in all respects acted reasonably. The evidence was the appellant, by the construction of the settling ponds, had attempted to slow the flow of water. Moreover, the evidence was that natural sediment will vary with the amount of rainfall in that, during periods of maximum rainfall, the level of sediment was high and during periods of minimum rainfall, the level of sediment was lower. The position of the appellant is that these matters were beyond its control. It was Langer's evidence that even during periods of dry weather there was considerable sediment released in the Coquitlam River resulting from the streams which flow through gravel pits.

Bela Dudus, a provincial inspector of mines and engineering, testified on behalf of the defendant. He stated that much of the discharge in question came from an area behind the Cewe property. He also testified that weather conditions were a contributing factor to the problem of run-off and pollution. His evidence was that an increase in rainfall increases the velocity of the water flow and thereby results in an increased volume of discharge of sediment. Moreover, the topography is such that it has an adverse effect upon the volume and velocity of discharge. He stated that there was an excessive amount of rainfall that took place in November and December of 1979. He stated that the problems were beyond the control of Cewe. His opinion was that, because of the number of programs implemented by the appellant and the appellant's co-operation with provincial authorities, the appellant acted reasonably.

His testimony was that there was no settling pond large enough to handle the existing rainfall. His evidence was that if Cewe shut down its operation the problem would be just as great but he qualified that by saying he could not say if natural erosion effects would be worse than the effects of Cewe's operation. He testified that there was not room for equiment to move safely and at the same time to protect the environment. He suggested that there should be some trade-off between the safety of man and safety of the environment.

D. ARGUMENT

The appellant first of all submits that these proceedings are a nullity because the Attorney General for the Province had no jurisdiction or right to conduct the prosecution of this case. The appellant relies on the case of *R. v. auser et al.* 46 C.C.C. (2d) 481, a decision of the Supreme Court of Canada. The right of a Provincial Attorney General to conduct prosecutions under the federal *Fisheries Act* was considered by the New Brunswick Court of Appeal in *The Queen v. Sacobie and Paul*,

Fisheries Pollution Reports 259. The latter court held that the *Hauser* case was concerned only with the right of the Attorney General of Canada to prefer indictments and to conduct prosecutions under the federal *Narcotic Control Act*. At p. 265 Dickson J. stated:

> *I would only add that if the proceedings are instituted by the Government of Canada, and the Attorney General of Canada or his agent appears to conduct that proceeding, the agent of the Attorney General of Canada would have exclusive authority. In all other cases, counsel for the Provincial Attorney General may appear and conduct the prosecution and if no counsel appears for the latter, the informant or his counsel may conduct the prosecution.*

The appellant attempts to distinguish the *Sacobie* case on the basis that a federal officer was involved in its investigation. If anyone may swear an information for an indictable offence it would follow that there is no valid reason for distinguishing between federal and provincial officers involved in investigating violations of statutes.

The next issue is whether the silt was a deleterious substance in the circumstance and, further, whether any deleterious substance had been deposited or permitted to be deposited.

Section 33(11) of the *Fisheries Act* reads as follows:

> *(11) For the purpose of this section and sections 33.1 and 33.2, "deleterious substance" means*
>
> *(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water....*

The term was judicially defined in the case of *R.v. MacMillan Bloedel (Alberni) Limited* 47 C.C.C. (2d) 118. Seaton J.A., at p. 121, stated as follows.

> *Section 33(2) prohibits the deposit of a deleterious substance, not the deposit of a substance that causes the water to become deleterious. The argument to the contrary is based on the definition of "deleterious substance". I must agree with the Provincial Court Judge that a definition section that uses the word being defined is awkward.*
>
> *What is being defined is the substance that is added to the water, rather than the water after the addition of the substance.*

There was clear evidence upon which the learned trial judge in this case made a finding that the deposits of silt, sands and clays constituted the deposit of deleterious substances in water frequented by fish. The testimony of the chemist David Brown and the biologist Langer was clearly supportive of these findings as they related to each of the counts. Both witnesses gave careful and detailed evidence of the measured levels of suspended solids that were found and their deleterious effects. Readings relating to the particular counts were considered by the court. While it may be stated that in some instances the levels were minimal to moderate it cannot be said that the learned trial judge erred in coming to the conclusions that he did. In fact, the only evidence that the

learned trial judge had before him was that the levels of deposits were deleterious. Moreover, there was evidence upon which the court quite properly concluded, and the defendant admitted, that the Coquitlam River constituted water frequented by fish.

The position of the appellant at trial was that it at all times acted reasonably and with due diligence. The evidence was that settling ponds were constructed. Moreover, the appellant retained the services of pollution experts and thereby expended large amounts of money. It also in all instances co-operated with environmental agencies.

The witness Dudus stated that the ponds were proper and workmanlike. The appellant states that at worst it failed to prevent the discharge and flow of water. It was subitted that the flow of water and the discharge of sediment was not at all caused by the appellant. It was stated that Cewe only failed to prevent what was already happening.

In considering this defence the learned trial judge stated at p. 7:

These deposits occurred as and when alleged to the knowledge of the defendant. I agree with Crown Counsel's submission that it has proved that the defendant has committed the acts and that contrary to showing a lack of knowledge in the accused, the evidence demonstrates long term knowledge in the defendant (through Jack Cewe, Tourand and Cunliffe) of the problem of silt entering the Coquitlam River, and emanating from the defendants' property.

The defendant has a program of control, but has it been adequate in the past, or was it simply a program that it hoped might at least satisfy the Fisheries Department and the Pollution Control Board that it was doing what it could? The Crown has not been able to tell the Court what, if the defendant were exercising due diligence, would permanently rectify this pollution problem. It appears from both Crown and defence witnesses, that the most satisfactory solution is the installation, and maintenance of large settling ponds. There are, and have been a number of settling ponds, but they do not appear to have been properly and systematically maintained by the defendant.

The defendant permitted these deposits of solids as alleged against it, the direct cause thereof arising from its operation in the excavating and removal of gravel. The defendant could have exercised more control than it did, thereby limiting to a great extent, the deposits complained of. The water from the pit face area picked up its solids between the pit face and the settling ponds and ditches through which it travelled. The settling ponds themselves do not appear to have been adequately monitored and maintained. While none of the experts called in this case could provide what they considered to be an ultimate solution for what is obviously a very major problem for the defendant in its operation, a number of respectable opinions were advanced as to the manner in which the deposits could be controlled to a greater extent than heretofore.

From the defendant's evidence, it appears that it is now, as opposed to at the material times, doing a great deal on a planned and researched basis to control these deposits into the Coquitlam River. The programs that they have

implemented, may or may not satisfy the "due diligence" burden that is described by Dickson J. in Regina v. City of Sault Ste. Marie (1978) 40 CCC (2nd) 353 @ 373 SCC.

The correct approach in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pearce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is opened to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on a balance of probabilities that he has a defence of reasonable care.

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. ....

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 that he took all reasonable care. This involves a consideration of what a reasonable man would have done in the circumstances. The defence will be 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 ....

3. ....

I am not required to decide the adequacy of their present program.

It is the Crown's position that, because of the wording of s. 33(8) of the *Act*, where there is evidence of knowledge due diligence is not a defence. Section 33(8) reads as follows:

In a prosecution for an offence under this section or section 33.4, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

For the purposes of this case I am not required to decide this issue for it is apparent from the reasons that the court considered the issues of reasonableness and due diligence notwithstanding the finding of knowledge.

E. CONCLUSION

The function of a court upon appeal was discussed in *Corbett v. The Queen* (1973), 14 C.C.C. (2d) 385, 25 C.R.N.S. 296 (S.C.C.). There it was held that the question was not whether the verdict was unjustified but whether the weight of the evidence was so weak that the verdict of guilty was unreasonable because no reasonable jury acting judicially could have reached it.

It cannot be said the weight of the evidence in this case was so weak that the findings were unreasonable. In this case the court quite properly found that the appellant owned and occupied real property and deposited or permitted the deposit of deleterious substances into water frequented by fish. There was most detailed evidence as to what constitutes a deleterious substance and how it affects fish. Moreover, there was both direct and circumstantial evidence of knowledge on the part of the company. There was also clear evidence that the appellant company was in a position to prevent these discharges. Whatever preventive measures were taken by the company were found to be wanting. The court considered the defences that were put forward by the company and quite properly rejected them. For these reasons the appeals against conviction are dismissed.

There remains to be determined whether the learned trial judge offended the rule against multiple convictions for the same incident or delict by convicting the appellant upon all seventeen counts. The incidents which give rise to counts 5, 6 and 7 took place on September 27, 1979. The incidents which give rise to counts 9 and 10 took place on October 5, 1979. The incidents which give rise to counts 11 and 12 took place on October 11, 1979 while the incidents which give rise to counts 15 and 16 took place on October 22, 1979. It is contended that the appellant was committing essentially one act. It is the same incident or cause which gives rise to all the charges. The appellant submits that the offence is one of polluting water and it is essentially one act or crime which is of a continuing nature. It is the crown's position on this issue that, where more than one count is laid for offences taking place on the same date, the discharge of sediment and silt was coming from different locations and was discharging into different areas of the river. It is contended on behalf of the crown that in some instances the samples of water were taken at different times and, therefore, that constitutes different acts.

In *Kienapple v. The Queen*, 1975, 1 S.C.R. 729 the Supreme Court of Canada held that better practice is to avoid multiple convictions for the same matter or delict. Merely because the discharge comes from different sources on the Cewe property does not justify the registering of separate and distinct convictions. The offences as they are embodied in the counts relate to the deposit of substances in water frequented by fish, namely, the Coquitlam River. The source of water is the Cewe property. That is one delict. Merely because there are different sources from which the river is being polluted does not mean that there are different crimes being committed. By the same token it cannot be said that the seventeen convictions encompass one single continuous act. These are charges which arise out of incidents which took place over a period of approximately one year. In some cases the counts relate to successive days. These surely are separate

and distinct acts. It was on a daily basis that the acts in respect to pollution were taking place. For these acts could have been prevented on any given day. Accordingly the appeal is allowed to the extent that, where there were multiple convictions registered for incidents taking place on a given day, the multiple convictions will be set aside and a single conviction will be registered instead. Therefore, the convictions on counts 6, 7, 10, 12 and 16 are set aside and there will be no finding made with respect to these counts.

F. SENTENCE

The appellant has advanced some eight grounds of appeal with respect to the sentences imposed. The issues arising from these grounds may be fairly summarized as follows.

1. Whether the sentences should be separate sentences for each count;
2. Whether the sentences imposed were inordinately severe in view of the evidence and circumstances relating to the commission of the offences and the background of the appellant.

Fines totalling $190,000 were imposed. These are now reduced by the convictions which have been set aside.

In the case of *Regina v. United Keno Hill Mines Limited* (1980) 10 CELR 43 the Territorial Court of the Yukon discussed sentencing principles as they pertained to corporations in cases of this nature. The headnote of that case in part reads as follows:

> *Pollution is a crime. Each offence must be sentenced in accord with its specific facts, but pollution offences must be approached as crimes, not as morally blameless technical breaches of a technical standard.*
>
> *The severity of punishment should vary with the nature of the environment affected and the extent of damage inflicted. Courts should take judicial notice to the seriousness of environmental damage, but appropriate sentencing distinctions cannot be made in the absence of Crown evidence depicting the specific damage in issue. Therefore, in this case, where the essentially uncontradicted corporate evidence indicated minimal environmental damage, a substantial penalty is inappropriate.*
>
> *A variety of civil, administrative, educational and criminal devices must be marshalled to regulate and control corporate activities in the public interest. In sentencing corporations for environmental offences the criminality of conduct, extent of attempts to comply, genuine contribution, the size and wealth of the corporation, and profits or savings realized as a consequence of the offence, and any prior criminal record must be considered.*

In this case the learned trial judge quite properly considered the daily effect of the appellant's conduct upon the environment. The court considered the heavy and irreversible damage that was done in this case. The learned trial judge carefully considered the ramifications of the deposits of deleterious substances upon water frequented by fish. The court quite properly held:

> *It seems that offences of this kind are getting to be rather common in today's social order of things, and we're beginning to appreciate that the effects are much more*

serious than they were thought to be in the past, and as such they are and should, of course, be a matter of great public concern. It seems to me in dealing with the 3 question of punishment that it should be, to some extent, commensurate with the gravity in all of the circumstances of the offences. The Act does provide what appears on the face of it to be a substantial penalty for second offences, but certainly in cases such as these the accused persons should not be persuaded that it's cheaper to face a prosecution occasionally than to put into place an adequate system of pollution control.

In considering the totality of the sentence, the fines now are $140,000.00. In my opinion it cannot be said that the learned trial judge erred in principle in imposing the sentences, nor do I find that in all the circumstances that the fines in question were excessive having regard to the seriousness with which parliament has treated offences of this nature. It must be remembered that an unusually high maximum fine of $50,000.00 is provided for a first offence under this *Act*. Since these were separate and distinct criminal acts it follows therefrom that the penalties should be separate and distinct. While the learned trial judge did not have before him evidence relating to the principles set forth in *United Keno Hill* it cannot be said that was any error in principle. The sentence appeals are dismissed.

BRITISH COLUMBIA COUNTY COURT

R.v. BRACKENDALE ESTATES LTD., DOWAD, AND CANDY

FISHER CO. CT. J. Vancouver, March 19, 1981

Sentencing - Fisheries Act, R.S.C. 1970, c. F-14 as amended - Case law on sentencing not provided to Provincial Court Judge - Fines reduced in view of cases cited - On Count 1 under S.31 (damage to fish habitat) Dowad's fine reduced from $1000 to 100 and Brackendale Estates Ltd's fine reduced from $1000 to $250. On Count 2 under S.33.1(1) (failing to provide plans to the Minister) Dowad's fine reduced from $250 to $50 and Brackendale Estates Ltd's fine reduced from $250 to $50. On Count 3 under S.31 Candy's fine reduced from $500 to $75.

M.J. Dodge, for the Crown, respondent
N. Dowad, for Wilfred Dowad *et al.*, appellants

(Editor: The appeal against conviction was dismissed by the County Court on March 19, 1981 and is reported at page 122.)

FISHER CO. CT. J.:- (orally) This is an appeal against sentence imposed following a very lengthy trial by His Honour Judge Walker on the 27th of February, 1980, for the conviction under Section 31 of the Fisheries Act.

The corporate Appellant was fined $1,000.00. (Editor: Count 1) Wilfred, $1,000.00, (Editor: Count 1) and Nicholas Candy, $500.00. (Editor: Count 3). The default in the case of Dowad, 14 days. And the case of Candy, 7 days. On the conviction pursuant to Section 33.4. (Editor: Count 2) I believe that is correct, Mr. Dowad?

MR. DOWAD: Yes, Your Honour. The corporate Defendant was fined $250.00. (Editor: Count 2)

FISHER CO. CT. J.: - Full and complete submissions would certainly appear to have been made before the trial Judge on the issue of sentence by Mr. Dowad, appearing as counsel at trial.

Crown counsel on Appeal has referred to those portions of the judgement confirming the extent of the particulars provided to the trial Judge on sentence. Mr. Dowad has submitted that as to the personally named Appellants that he made application to the trial Judge for (a) an absolute discharge or in the alternative (b) a conditional discharge.

Judge Walker considered this matter at page 46 of Volume 5 of transcripts filed in these proceedings and rejected either alternative.

Although I may have, in the circumstances, exercised my discretion differently than did the trial Judge, I cannot find from the transcript that he erred in considering this application. I therefore cannot accede to the submission of counsel for the Appellant that either an absolute or conditional discharge may be substituted for the penalties imposed.

The one salient issue that has emerged on this sentence Appeal and is as confirmed from the Judgement of the trial Judge, namely, that before him at the time of sentence there was no authority presented on the issue of sentence for a conviction similar to the convictions before me. I, however, have had presented to me the Judgement of my brother Grimmett of November 6th, 1979, an unreported decision, *Regina v. Blackham's Construction Ltd.*, a non-reported decision, Chilliwack Registry No. 22579 and the unreported decision of the Court of Appeal on the Appeal of that case No. CA800055 heard December 16th, 1980, and I refer particularly to the Judgement of the Court given by McFarlane, J.A. and as well the decision, the unreported decision of *Regina v. Canadian Cellulose Co.*, a Judgement of my brother Low, July 31st, '79, on Appeal from Provincial Court found in B.C. decisions, August, 1979. Although the *Blackham's* decision relates to gravel removal and is on an issue other than the issue before me and the Fisheries Act did not form the basis of the conviction in that case, the circumstances considered by the Court in imposing a sentence as well as the circumstances relating to the penalty imposed in *Canadian Cellulose*, lead me to the conclusion that had the trial Judge received the benefit of those authorities, he would have imposed a penalty of a substantially lesser amount than he did in this case. Being mindful of the protection of the public and of the extent, need, and purpose of the *Fisheries Act* and the public's requirement of the maintenance and perpetuation of the natural fishing habitat, I have in these circumstances come to the conclusion that a proper punishment reflecting deterrence to others and the circumstances of this particular breach limiting my punishment to those areas in view of the fact which I accept as I construed from his Judgement that deterrance has been effectively envoked as it relates to the two personally named Appellants.

I therefore allow the Appeal against sentence by varying the sentence accordingly. On count one on the Information, the sentence imposed against the Appellant Dowad is reduced from $1,000.00 to $100.00. In default, seven days. The sentence imposed against Brackendale Estates is reduced from $1,000.00 to $250.00. Count three, the sentence against Nicholas Candy is reduced from $500.00 to $75.00. In default, seven days. Count two, the sentence against Wilfred Dowad is reduced from $250.00 to $50.00. In default, three days. The sentence against Brackendale Estates is reduced from 250.00 to $50.00 and there will be an Order on request of the Registrar that the fish will be disposed of.

MS. DODGE: Does Your Honour normally include distress provisions for fines against corporations?

THE COURT: In default, distress against the corporate Appellant.

BRITISH COLUMBIA COUNTY COURT

R.v. WESTERN STEVEDORING COMPANY LIMITED

VAN DER HOOP CO. CT. J. Vancouver, December 2, 1982

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Appeal from conviction under s.33(2) -Appeal allowed and new trial ordered - Trial judge omitted to refer in decision to specific issue raised by accused which was crux of defence - Error of law.

D.R. Kier, Q.C., for the Crown, respondent
G.K. MacIntosh, for the accused, appellant

(Editor: Decision reversed by Court of Appeal, see page 487)

VAN DER HOOP CO. CT. J.:-(Orally) The appellant was convicted on a charge under the Section 33 (2) of the *Fisheries Act* that it, in effect, deposited a deleterious substance in a place under conditions where such substance may enter into water frequented by fish. I propose to confine myself to a very broad outline of some of the facts on the submissions raised, because I have concluded that a new trial must be ordered.

The appellant concedes that on August the 16th, 1980, an employee deposited a deleterious substance in liquid form on the tarmac at its premises in North Vancouver. The area involved was some two hundred yards by two hundred yards and was drained by a series of catch basins.

It is alleged, in the evidence, that the bottom of these catch basins are sealed and part way up each catch basin is a drain pipe which is the route by which any liquid would leave the catch basin to enter into an area that would lead it, the substance, to water frequented by fish. The thrust of the defence was that the substance so deposited could not have reached water frequented by fish and evidence was directed, firstly, at the amount of substance deposited; secondly, at the amount of substance which may have evaporated, considering particularly the size of the area, the topography and the heat of the day; and thirdly, and primarily, at the amount of substance in the catch basins after the event.

Evidence was adduced from one Crown witness, who checked two of the relevant catch basins and from defence witnesses who checked the levels in all four of the relevant catch basins after the deposit. It is submitted that from this evidence a conclusion can be reached that the water level in none of the catch basins was as high as the drain pipe. In other words, reasoning backwards, if the liquid did not reach the level of the drain pipes in the catch basins, there could not have been a sufficient amount reaching the catch basins to escape, no matter what amount was originally deposited. And if there was no escape this amounts to a defence to the charge.

The appellant submits that the learned trial judge erred in failing to consider this defence, but the learned trial judge said, in part:

> *"I'm satisfied and find that the tank some seventeen to eighteen hundred gallons of offending fluid and that, substantially, all of this fluid was emptied onto the tarmac. Further, I find that, substantially, all of this fluid ran into the tarmac drainage system as observed by Mr. Dobslaff."*

I interject here to say that it is not contended that the witness, Dobslaff, watched all of the fluid running into the drainage system, but the reference by the learned trial judge is to the fact that this witness did observe some of the fluid. Continuing a portion of the learned trial judge's Reasons:

> *"The defendant and its servants had deliberately emptied some seventeen to eighteen hundred gallons of a liquid substance known to them to be toxic and damaging to fish into an area of the dock which they well knew was drained directly through storm sewers into the Burrard Inlet. Thus, I find that all the elements of this offence are proven on these facts, both actus reus and mens rea.*
>
> *8. The offending fluid was emptied by Dobslaff on a small area of the tarmac."*

And again I must interject that this is a small area with reference to the whole of the area, but it is not in dispute that that area affected or covered by this substance was, as I have indicated, some two hundred yards by two hundred yards.

> *"Shown in Exhibit 2 which would drain, as I understand the evidence, into the four catch basins also shown on Exhibit 2. There was evidence that the sumps in each of these four catch basins were inspected and later that day pumped out by the defendant. Mr. Chapman, an executive of the defendant, testified that each of three of the catch basins sumps held about sixty gallons each and one held about a hundred gallons, thus, the retaining capacity of the four catch basins into which most or all of the liquid would have drained, was about two hundred and eighty gallons. The balance of the offending liquid is not, in my view, accounted for and I conclude that it drained away into Burrrard Inlet."*

The approach of an Appellate Court to a consideration of evidence where credibility is not specifically in issue has been referred to by the Chief Justice of the Supreme Court of Canada in the case of *Shieber Brothers Limited and Currie Products Limited* v. *Gulf Oil*, which is an unreported decision delivered March the 27th, 1980, which is referred to by a decision of the Court of Appeal of this province, in *Regina* v. *Arkell*, also unreported, dated May the 8th, 1980, as follows:

> *"It would, of course, be open to an Appellate Court where credibility of a witness was not in issue, to review findings of fact by a trial judge if they were based on a failure to consider relative evidence or on a misapprehension of evidence. An appeal, however, is not a complete rehearing."*

The learned trial judge does not refer, in his Reasons, to the specific issue raised by the evidence of the levels alleged in the catch basins or any conclusions which may or may not be drawn from that evidence. Since this was the crux of the defence, I have concluded that this omission constituted error in law on the part of the learned trial judge.

A secondary issue flowing from this is whether, in view of the wording of the section and of the charge, the evidence if accepted constitutes a defence to the charge and that issue has, of course, not been dealt with.

As a result of the original omission, the conviction therefore must be set aside and the matter is referred back to the trial court for a new trial.

BRITISH COLUMBIA COURT OF APPEAL

R. v. WESTERN STEVEDORING COMPANY LIMITED

CRAIG, LAMBERT AND MACDONALD JJ.A Vancouver, 9 February, 1984

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Accused convicted by provincial court judge of offence under s.33(2) - Conviction quashed by county court judge and new trial ordered - Appeal by Crown allowed and conviction restored - Provincial court judge did not err in finding that deleterious substance had been deposited in a place under conditions where it may enter water frequented by fish.

D.R. Kier, Q.C., for the Crown, appellant
G.K. Macintosh, for the respondent

MACDONALD J.A., (CRAIG and LAMBERT JJ.A CONCURRING):- The Crown applies for leave to appeal a decision of a judge of the County Court of Vancouver. By that decision the learned judge allowed an appeal from the conviction of the respondent by a provincial court judge, and ordered a new trial. The conviction was upon the charge that:

> *Western Stevedoring Company Limited at or near North Vancouver, in the Province of British Columbia, on or about the sixth day of August, 1981, did unlawfully deposit or permit the deposit of deleterious substance in water frequented by fish or in a place under conditions where such deleterious substance or any other deleterious substance that resulted from the deposit of such deleterious substance may enter any such water in violation of Section 33(2) of the Fisheries Act, thereby committing an offence contrary to Section 61 (1) of the Fisheries Act.*

The trial judge convicted upon the following findings which are taken from his reasons:

> *One; the defendant corporation carries on the business of stevedoring at the Lynn Terminals Dock. This dock, which faces on to Burrard Inlet, has a large asphalt tarmac as partially shown on Exhibit Two. The tarmac area is drained by a number of catch basins let into the surface of the tarmac and draining away through sewers into Burrard Inlet. Some of these are also shown on Exhibit Two.*
>
> *Two; during the morning of August 6th, 1981, the defendant's workmen were draining a chemical dip-tank which is shown on Exhibit Two. The tank was filled with a water and chlorophenate mixture. The chemical liquid was being transported from one dip-tank to another, a somewhat smaller tank located elsewhere on the dock.*
>
> *Three; Daniel Dobslaff, an employee of the defendant, drove a forklift which carried a two thousand gallon metal tank shown in Exhibits Seven and Ten. The tank was filled through a hatch on top and emptied through a valve on the bottom on one end of the tank. Mr. Dobslaff estimated, in his testimony, that the tank contained seventeen to eighteen hundred gallons on each trip including the last trip.*

Four; he went on to testify that the smaller dip-tank, apparently, would not hold all of the chemical liquid being drained from the larger tank. He was instructed by his foreman to empty the last tankful by dumping it on the tarmac. He then opened the valve on the bottom end of the tank and drove for about fifteen minutes around the tarmac in the area shown by arrows on Exhibit Two discharging the liquid. He testified that the liquid, "Just ran into the holes in the tarmac which drained into the water".

Five; at about 11.40 a.m., as Daniel Dobslaff was finishing, an official of Environment Canada arrived. The tank valve was shut off and samples were taken of the liquid, "From the tank, from the tarmac and from the catch basins".

I'm satisfied and find that the tank contained some seventeen to eighteen hundred gallons of the offending fluid and that, substantially, all of this fluid was emptied on to the tarmac. Further, I find that, substantially, all of this fuid ran into the tarmac drainage system as observed by Mr. Dobslaff.

Six; I find that the chemical mixture was a deleterious substance and that Burrard Inlet is a water frequented by fish and that all these events took place in and near North Vancouver.

Seven; I am satisfied, upon considering all of the evidence, that the offence was then complete. The defendant and its servants had deliberately emptied some seventeen to eighteen hundred gallons of a liquid substance known to them to be toxic and damaging to fish into an area of the dock which they well knew was drained directly through storm sewers into the Burrard Inlet. Thus, I find that all the elements of this offence are proven on these facts, both actus reus and mens rea.

Eight; the offending fluid was emptied by Mr. Dobslaff on a small area of the tarmac by Mr. Dobslaff on a small area of the tarmac shown in Exhibit Two which would drain, as I understand the evidence, into the four catch basins also shown on Exhibit Two. There was evidence that the sumps in each of these four catch basins were inspected and later that day pumped out by the defendant. Mr. Chapman, an executive of the defendant, testified that each of three of the catch basins sumps held about sixty gallons each and one held about a hundred gallons, thus, the retaining capacity of the four catch basins into which most of all of the liquid would have drained, was about two hundred and eighty gallons. The balance of the offending liquid is not, in my view, accounted for and I conclude that it drained away into Burrard Inlet.

The county court judge commenced his reasons by stating that he had concluded that a new trial must be ordered. He then went on to say:

The appellant concedes that on August the 16th, 1980 (sic), an employee deposited a deleterious substance in liquid form on the tarmac at its premises in North Vancouver. The area involved was some two hundred yards by two hundred yards and was drained by a series of catch basins.

It is alleged, in the evidence, that the bottom of these catch basins are sealed and part way up each catch basin is a drain pipe which is the route by

which any liquid would leave the catch basin to enter into an area that would lead it, the substance, to water frequented by fish. The thrust of the defence was that the substance so deposited could not have reached water frequented by fish and evidence was directed, firstly, at the amount of substance deposited; secondly, at the amount of substance which may have evaporated, considering particularly the size of the area, the topography and the heat of the day; and thirdly, and primarily, at the amount of substance in the catch basins after the event.

Evidence was adduced from one Crown witness, who checked two of the relevant catch basins and from defence witnesses who checked the levels in all four of the relevant catch basins after the deposit. It is submitted that from this evidence a conclusion can be reached that the water level in none of the catch basins was as high as the drain pipe. In other words, reasoning backwards, if the liquid did not reach the level of the drain pipes in the catch basins, there could not have been a sufficient amount reaching the catch basins to escape, no matter what amount was orginally deposited. And if there was no escape this amounts to a defence to the charge.

The appellant submits that the learned trial judge erred in failing to consider this defence....

The learned judge then, after quoting portions of the trial judge's reasons and commenting thereon, and citing two cases as to the approach an appellate court ought to take to the consideration of evidence where credibility is not specifically in issue, proceeded to this definitive finding:

The learned trial judge does not refer in his Reasons, to the specific issue raised by the evidence of the levels alleged in the catch basins or any conclusions which may or may not be drawn from that evidence. Since this was the crux of the defence, I have concluded that this omission constituted error in law on the part of the learned trial judge.

The words of s.33(2), relevant to this case, are as follows: "subject to subsection (4) no person shall deposit .... a deleterious substance .... in water frequented by fish or in any place under any conditions where such deleterious substance .... may enter any such water."

The effect of this provision is that there are two modes of committing the offence. The first is by the actual deposit of a deleterious substance in the water. The second is the deposit of it in a place under conditions where it may enter the water. In the seventh paragraph of his findings the learned trial judge found that it had been committed in the second mode. Then he went on to find that some of the deleterious substance actually drained into Burrard Inlet meaning that the offence had also been committed in the first mode.

The respondent's basic submission is expressed in this way in its statement:

20. In the opening by the Defendant at trial, throughout the evidence presented by the Defendant and in argument at trial, the main defence was that detailed and uncontradicted evidence about the levels of the liquid in the catchbasins plus detailed and uncontradicted evidence of extensive

evaporation and sweeping meant that a deleterious substance could not have entered the harbour.

21. In his reasons for judgment, the trial judge did not once deal with any of the uncontradicted evidence of the extensive evaporation on the tarmac or any of the uncontradicted evidence of extensive sweeping of the tarmac.

22. Nor in his reasons for judgment, did the trial judge once deal with any evidence about either the design of the system connecting the catchbasins or the level of the liquid being below the outflow pipes in the only two catchbasins in issue from where liquid could flow directly into the harbour.

In the course of oral argument Mr. Macintosh submitted, in effect, that upon consideration of all that happened one could only conclude that the deleterious substance did not, in fact, enter the water. And he said that "may" in the phrase "may enter any such water" applies where no one can tell whether the substance entered the water or not, but does not apply where it can be shown, as he says it can be shown here, that the substance did not enter the water.

The judge upon appeal clearly considered that the respondent's approach was correct in law. And he concluded that there had to be a new trial because the trial judge completely disregarded evidence which might have led him to the conclusion urged by the respondent, or at least have left him in reasonable doubt, that any of the substance got into the water. I think it is unnecessary to decide whether the learned county court judge was correct in finding that the trial judge erred in this manner in proceeding to his finding that the offence was committed in the first mode. That is because, in my opinion, with respect, the trial judge did not err in the ways alleged, in reaching his finding that the offence had been committed in the second mode. As stated, the subsection makes it an offence to deposit a deleterious substance in any place under any conditions where it may enter water frequented by fish. In this case the deposit occurred when the solution was dumped and spread on the tarmac. That left with the trial judge the question of whether it had been proved that the deposit was in a place and under conditions where the solution may enter the water. The trial judge held that this had been proved. It is not contended that his finding upon the issue framed in this way was incorrect. But the defence is that upon consideration of evidence of matters such as evaporation, the extensive sweeping of the tarmac undertaken by the respondent, and the level of the liquid in the catch basins, one must conclude that the solution was prevented from entering Burrard Inlet. The subsequent actions of the respondent are commendable. However, in my view all these matters are irrelevant.

I would grant leave to appeal, allow the appeal, and restore the conviction.

R. v. THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER

TAGGART, ANDERSON and MACFARLANE JJ.A. Vancouver, January 16, 1984

Fisheries Act, R.S.C. 1970, c.F-14, as amended - Appeal from decision of County Court judge affirming Provincial Court decision - appeal dismissed - Lower courts properly concluded that defence of due diligence not made out.

D.R. Kier, Q.C, for the Crown, respondent.
H.A. Hollinrake and *J.M. Mackenzie*, for the appellant.

Editor: Provincial and County Court decisions at pages 233 and 249.

TAGGART J.A., (ANDERSON and MACFARLANE JJ.A. CONCURRING):- The appellant appeals from an affirmation by a County Court judge of its conviction by a Provincial Court judge on two counts preferred against it under the provisions of the Fisheries Act of Canada.

The conviction was for unlawfully depositing deleterious material, to wit, sewage, in water frequented by fish. One count charged that offence on the 9th of August 1981; the other count on the 10th of August 1981.

The appellant had designed for it, or designed itself, what has been described as a municipal sewage lift station. It is designed to raise sewage from the gravity feed sewage system to another system utilizing pumps driven by electricity. The system was installed in 1965 and was intended to take the place of individual septic tanks utilized by residents in the area. The system is one which is commonly used in British Columbia and, according to the expert testimony meets the usual design requirements for such a system.

This system had an emergency escape tunnel made out of concrete which, if the main system failed, would cause any overflow of sewage to pass through the tunnel and into a creek called Hastings Creek. It is common ground that the creek is one in which there are fish, and it is now common ground that the sewage which in this case escaped was a deleterious substance. In fact, owing to a mechanical failure the sewage overflowed on the 9th and on the 10th of August, 1981.

The sole question before the County Court judge, and before us, is whether the appellant had satisfied the County Court judge on what has been called the defence of due diligence. That defence arose out of the judgment of Mr. Justice Dickson in *Regina v. City of Sault Ste. Marie* (1978) 40 C.C.C. (2d) at p. 353. In that case Mr. Justice Dickson described the defence in this way

> *I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:*
>
> ...

> *2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibitive act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believe in the 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 issue before us was put in this way, approximately, by counsel for the appellant: It was his submission that the judge erred in failing to hold that what the defendant did in designing and operating the sewage lift system constituted due diligence.

In support of that it was his submission that both the Provincial Court judge and the County Court judge had made of what is a strict liability offence an absolute liability offence. It was his submission, in effect, that the Provincial Court judge, after considering the way in which the appellant operated the system and the procedures which it had adopted to ensure that the system operated as effectively as possible, had really closed his mind entirely to the defence of due diligence. The County Court judge in effect adopted the reasoning of the Provincial Court judge and reached the same conclusion. In consequence, he dismissed the appeal taken by the appellant from the conviction by the Provincial Court judge. Counsel for the appellant conceded that if our view of the reasons for judgment of the Provincial Court judge and of the County Court judge was otherwise than counsel for the appellant has construed those reasons to be, than the appeal must fail.

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 that defence was not made out. With those conclusions I agree and would dismiss this appeal.

Date Due

APR AVR 26 1999			
DEC 27 2000			