

NORTHWEST TERRITORIES MAGISTRATE'S COURT

Smith Mag.

Regina v. Giant Yellowknife Mines Limited

Environmental law -- Water pollution -- Sentence -- Deposit of deleterious substance in water frequented by fish -- Breach of tailings dam resulting in spill of highly toxic wastes onto ice covering nearby watercourse -- Accused taking adequate remedial measures -- Two thousand dollar fine -- Fisheries Act, R.S.C. 1970, c. F-14, ss. 33(2), 33(5).

The corporation was found guilty of violating s. 33(2) of the Fisheries Act after a breach in the dyke surrounding its tailings disposal area caused the release of a large quantity of highly toxic effluent onto the ice covering Yellowknife Bay.

Held, the appropriate fine was two thousand dollars. The company was taking adequate remedial measures involving the expenditure of large sums of money, and accordingly, the objective of deterrence could be achieved by imposition of less than the maximum penalty.

O.J.T. Troy, Q.C., for the Crown.

D.H. Searle, Q.C., for the accused.

February 24, 1975.



191/75 (S)

IN THE MAGISTRATE'S COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GIANT YELLOWKNIFE MINES LIMITED

HEARD BEFORE:

His Worship, Magistrate F. G. Smith, Q.C.
sitting in the Court House, in the City
of Yellowknife, N.W.T. on Monday,
February 24, 1975.

PORTION OF TRIAL PROCEEDINGS

APPEARANCES:

O. J. T. Troy, Esq., Q.C.

For the Crown

D. H. Searle, Esq., Q.C.

For the Defence.

C. Adams,
Court Clerk.



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THE COURT: Well, Mr. Troy, have you any comments as to sentence?

MR. TROY: Sir, I'd like to point out to you the punishment section which is found on page 2 of Chapter 17, First Supplement --

"Any person who violates any provision of this Section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for each offence."

THE COURT: And the offence is one day --

MR. TROY: One day here, Sir. I this was a matter of several days, the next Section allows for --

THE COURT: An offence for each day?

MR. TROY: Deemed to be an offence for each day, up to five thousand dollars for each day. I would like to point out to the Court, but I am not seriously asking the Court to consider putting it into operation - but this legislation was considered so serious that power has been given to the Court under Subsection 7 --

"Where a person is convicted of an offence under this Section the Court may, in addition to any punishment, it may order that person to refrain from committing any further such offences, or to cause 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."



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1 I just point that out to show how serious this
2 matter is, and I am not asking that the Court invoke that
3 Section on a first offence. This is the first offence for
4 this Company, and I do wish to point out the principles that
5 have been established in respect to penalties that have been
6 imposed for what I suppose we call Environmental Pollution
7 Control Legislation by the Government.

8 I would like, Sir, to point out that in the
9 original Revised Statutes text, although it was a different
10 offence, under Chapter F.14, Revised Statutes of Canada, I'd
11 like to refer you to Section 33 (2), and this was 1970, printed
12 by the Queen's Printer, but Section 33 (2) -- if you look at
13 Section 33 on page 11 - 12 of Chapter F. 14, and look at the
14 bottom of Subsection 5, you will notice that Section 33 has
15 been in existence since 1960-61, Chapter 23, Section 4, and
16 at that time when the Revised Statutes came out - Section
17 33 (2) at that time was an analogous section to the one that
18 is now in effect, and that one states --

19 "No person shall cause or knowingly permit
20 to pass into, or knowingly permit to be put any lime, chem-
21 ical substance, or drugs, poisonous matters, dead or decayed
22 fish or remnants thereof, mill rubbish or sawdust, or any
23 other deleterious substance or thing, whether the same is of
24 a like character to the substance named in this section or
25 not, in any water frequented by fish, or the closing of such
26 water, or on ice over either of such waters."
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1 Now, that is a little different offence than
2 the present one, but at that time the offence section said --

3 "Every person who violates any provision of this
4 Section is guilty of an offence and is liable upon summary
5 conviction for the first offence to a fine of not less than
6 a hundred dollars and not more than a thousand dollars, or
7 imprisonment for a term of not less than one month and not
8 more than six months, or both such fine and imprisonment;
9 and for a second and each subsequent offence to a fine of not
10 less than three hundred dollars and not more than two thous-
11 and dollars, or a term of imprisonment for a term of not
12 less than two months or not more than twelve months, or both
13 such fine and imprisonment."

14 And that was amended, Sir, in Chapter 17,
15 First Supplement, and the present Section which I read out
16 earlier in these proceedings, Section 33, Subsection 2,
17 which was found on page 661, Chapter 17, First Supplement --
18 it's the very first page in the book --but the punishment
19 section now since these amendments to this Act, to amend
20 the Fisheries Act, 1969-70, Chapter 63 - the punishment
21 section there, Sir, now is changed. The Crown is taking a
22 much severer look at this type of penalties. The penalty
23 is somewhat different than the one before the amendment.
24 Now it reads --

25 "No person shall deposit or permit the deposit
26 of deleterious substances under any conditions where such
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1 deleterious substance may enter waters frequented by fish."

2 Now, the penalty section now is - any person
3 who violates any provision of this section is guilty of an
4 offence and liable on summary conviction, as Mr. Searle
5 pointed out, to a fine of five thousand dollars.

6 Now, the first type of case we had in the
7 North with ice involved in and which the Supreme Court of
8 the Northwest Territories became involved in, was not quite
9 an environmental or protection legislation, in that it in-
10 volved the industrial storage of dynamite and explosives
11 which a company had stored on an island in the Mackenzie
12 Delta, and in that particular case - which was appealed by
13 the Crown - and that was the case of the Queen vs Pat
14 McNulty Limited, and they were charged under the Explosives
15 Act of unlawfully failing to comply with the directions
16 made in pursuance to the provisions of the Explosives Act
17 in regard to storage; and then there was a second count
18 in regards to unlawfully storing explosives, that is -
19 twenty-six hundred cases of dynamo-hydro mix --it's an
20 explosive, in an unlicensed magazine, contrary to the reg-
21 ulations.

22 Now, Mr. Justice Morrow -- that case was
23 appealed, because in the lower Court the Court saw fit at
24 Fort Good Hope - and the Court at that time was Chief
25 Magistrate Parker as he then was, I believe - that was in
26 1971, March 1971 - on a plea of guilty Magistrate Parker
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1 saw fit to fine twenty-five dollars and Count number one
2 and fifty dollars on Count number two.

3 Now, the Crown appealed, and Mr. Justice Morrow
4 increased the penalty. I am not too sure what the maximum
5 penalty was, but it was certainly more than twenty-five or
6 fifty dollars, and Mr. Justice Morrow pointed out in that
7 case --

8 "It is quite true the accused respondent here,
9 which was an admitted expert in explosives and the handling
10 of explosives, took immediate remedial action after they were
11 given the order by the inspector when some time had elapsed,
12 by putting a full time watchman on the site. It was suggested
13 by the Counsel, and I accept the suggestion, that it was
14 better than the regulation itself. However, if that is so,
15 I would have expected such an experienced company to put a
16 watchman there at the very beginning. So, if anything, it
17 probably emphasizes the danger that was inherent in the expl-
18 osives being left the way they were, and is a clear breach
19 of the regulation under this Act.

20 It seems to me we hear a lot from the press
21 and in the newspapers and television and so on about the
22 ecology of the North, and all that type of thing, and how it
23 must be protected; and yet, despite that, it seems to me
24 as I travel around the Country, the corporations from East-
25 ern Canada and the United States show almost total disregard
26 of this situation. They almost show contempt for the Country,
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as if they think we are wild aborigines wandering around from camp to camp, with the way they handle it.

The area where this explosive was located was a very active area. Right now there ships going by; there are barges going by. This summer, and I am sure if we were to examine last year, you would take it as quite common to see barges going up and down that area. I would find it difficult to understand that such an experienced corporation would be in such contempt of the regulations.

Accordingly, with reluctance, I have reached the conclusion that the penalties as charged are inadequate. I am allowing the Crown's appeal in respect of each of the charges. On number one, the fine will be increased to three hundred dollars, and on number two it will be increased to one hundred dollars.

There will be a direction that the explosives that have been impounded will be available to the respondent Company for immediate disposal, and if the Company fails within a reasonable time to take the proper steps, there will be a direction that the police will take it in hand and dispose of it, and any expenses incurred will be charged as an additional fine on Count number one against the Corporation. There will be no costs added."

Now, in that particular case the reason for the appeal by the Crown was that the fines were inadequate and were too lenient and out of proportion to the severity



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of the penalty provided by the law, and that the learned Chief Magistrate failed to give adequate consideration to the deterrent effect of the imposition of punishment to these offences, having regard to the circumstances existing in the Northwest Territories.

Now, the next case was R. vs Kenniston Drilling and this was a case that was heard before a Justice of the Peace in Inuvik, and Kenniston Drilling was charged under the Territorial Land Use Act for unlawfully conducting a land use operation in a land management zone without a land use permit. In other words, they moved equipment across the Tundra contrary -- without a permit, and of course, there's laws that say this can't be done without a proper permit and without obeying the regulations of the Territorial Land Use Act, and the Territorial Land Use Act itself, and in that particular case in the original instance the Justice of the Peace, Mr. Barney McNeil, fined this Company one hundred dollars and costs of four dollars, and that was on a guilty plea.

It had been pointed out to him at that time that the maximum penalty for that offence would be five thousand dollars for each day that the offence was committed. This offence only occurred on the one day.

Now, Mr. Justice Morrow, on appeal, laid down some principles in respect to these types of environmental precautions and the principles regarding sentencing, and



1 in his judgment which was brought down at Inuvik on May 9,
2 1973, Mr. Malcolm McConnell was acting for the appellant,
3 and the Crown - I was acting on behalf of the Crown --
4 Mr. Justice Morrow pointed out in the Inuvik appeal the
5 main concern expressed by the Crown is to bear in mind the
6 existing circumstances in the Northwest Territories, and
7 the sentence of the Court did not give sufficient consider-
8 ation to the deterrent effect.

9 And then I should point out to you -- I pointed
10 out, Sir, what were the facts in respect of the violation.
11 I am not going to go into those facts in detail, but there
12 was a violation of the Territorial Lands Act, Section 3.3,
13 Subsection 1, which provides for a penalty of five thousand
14 dollars; and then again, the same is in the Fisheries Act,
15 for each day, and it's similar environmental protection leg-
16 islation.

17 He points out that it would be readily seen --
18 after reviewing the legislation Mr. Justice Morrow pointed
19 out --

20 "It can be readily seen from the above that,
21 except in the case of an emergency that threatens life and
22 property, in Regulation 17, Subsection 2, there is a full
23 prohibition against land use operators.

24 There is no suggestion that the present appeal
25 came within the Section. The problem posed by the appeal is
26 as to whether in this type of case a marginal fine should
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1 be allowed to stand when the Parliament of Canada has
2 by Section 3.3 (2) made each day the offence continued a
3 separate offence.

4 It is correct to say that in the present appeal
5 one day only is involved, but Crown Counsel argues that to,
6 in effect, place a possible fine of five thousand dollars
7 per day shows a serious view taken by Parliament.

8 Counsel has been unable to cite any reported
9 cases that can be said to bear directly on the subject.
10 I am not unaware of the general principles that should be
11 considered in sentencing for the commission of the crime.
12 It is my opinion the offence is such as is provided for in
13 the present legislation and requires, perhaps, a special
14 approach. I would be remiss as a Judge in this Territory
15 if I did not take notice of the need and purpose of the
16 present legislation to protect and control the use of the
17 surface of the land -- the land which, although tundra of
18 nature and frozen over for many months each year, is none-
19 theless a delicate land, easily damaged, but once damaged
20 impossible to repair. This is without any mention of poss-
21 ible use that our original inhabitants - in this case
22 Eskimo, may still be making of it, and how their way of life
23 may be still dependant on its being preserved in its natural
24 state.

25 It may very well be that in the present case
26 no actual damage took place, but surely the test to apply
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1 in approaching the question of sentence should be less a
2 concern of what the damage was, but more a concern of what
3 the damage might have been.

4 In cases of this kind, to fine a Corporation
5 such as the present one a mere one hundred dollars is to,
6 in effect, invite breaches, to invite the gamble. Where in-
7 coming rewards are big enough the persons or corporations
8 will only be encouraged to take what might be termed a
9 calculated risk.

10 It seems to me that the Court should deal with
11 this type of offence with resolution -- should stress the
12 deterrent with a high cost, in the hope a chance will not
13 be taken because it is too costly.

14 Keeping in mind the good record of the present
15 respondent, but applying the above principles, I allow the
16 Crown's appeal and fine the Kenniston Drilling the sum of
17 two thousand dollars. The Company will have thirty days in
18 which to pay."

19 Now, that was driving an automobile without a
20 permit across the Tundra after the closing season.

21 Now, Sir, Mr. Searle mentioned Pan Arctic is a
22 Company that is 45 per cent owned by the Government, but it
23 is a private Corporation, and many large Corporations in
24 Canada hold an interest and shares in that Company, so it's
25 not only a Government Corporation, but the whole mining ind-
26 ustry is involved in many aspects of that operation and
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1 have many representatives on the Board of Directors.

2 Now, in the Pan Arctic case they were charged
3 with failing to comply with a condition of one of their land
4 use permits, and that was in respect to the retention of
5 drilling effluent from a drilling site and it spilled over
6 from a sump and went down over a hill into a gully and
7 into water.

8 Now, that case took place on November 16,
9 1973, and there was a guilty plea in respect to one day,
10 and that was the day when the Land Use Inspectors arrived
11 there and saw the spill. The whole operation was almost
12 completely over at that time and they were fined three thous-
13 and dollars. It was very high up in the Arctic, that part-
14 icular spill.

15 That one was done before Chief Magistrate
16 Parker.

17 Then there was another -- there's one in resp-
18 ect to Gulf Oil, and that was in respect to failing to comply
19 with an operating condition in respect to not maintaining --
20 well, it says - "Sumps and pits constructed in such a manner
21 that fluids contained therein cannot spread to surrounding
22 land."

23 Now, that is similar to this situation, but
24 it's a violation of the permit, rather than having the
25 material reach the waters frequented by fish.

26 Now, on March 22, 1974, there was a plea of
27



1 guilty and this Company was find twenty-five hundred
2 dollars.

3 On that matter I don't know whether that was
4 before a Magistrate or before -- I think it was before Mr.
5 Justice Morrow sitting as a Magistrate, wasn't it?

6 MR. SEARLE: Yes.

7 MR. TROY: There was a big legal argument
8 involved in this matter, as the one charge was a nullity,
9 but that is irrelevant to my argument here today.

10 But then the last one, Sir, was a charge
11 against Elf Oil, and that one was before Magistrate Parker,
12 and that was on April 29, 1974, and this was in relation --
13 this was under the Fisheries Act, the same Section we are
14 dealing with here, and this was unlawfully permitting the
15 deposit of deleterious substance in a place where it did
16 enter water frequented by fish.

17 This was in the MacKenzie Delta, and Elf had
18 taken over a fuel site, and had brought in their storage
19 tanks, and unfortunately one of these big tanks burst or
20 leaked, and there was quite a leakage that went down into
21 water that was frequented by fish, and there was a tremend-
22 ous effort made by Elf to correct the situation, and the due
23 diligence exception was raised in this case as a defence, and
24 Magistrate Parker, after hearing the facts, saw fit in his
25 judgment of the facts that he couldn't find the Company
26 exercised due diligence to prevent the pollution, and his
27



1 opinion on the facts of this case was that the diligence
2 was after the event, rather than before.

3 MR. SEARLE: Mind you, I disagree with his
4 view. I represented the Company at the time.

5 MR. TROY: In any case, Counsel didn't see
6 fit to appeal, so there was no question by either Counsel
7 for the Crown or the enforcement officers, the Defence or
8 by anyone that Elf Oil wasn't a good corporate citizen.
9 In fact there was no question in relation to Gulf Oil or
10 the Kenniston Drilling one, and there's no question that
11 Giant isn't trying to be a good corporate citizen, but I
12 submit that is not the issue. The legislation has nothing
13 to do with whether you are a good corporate citizen or not,
14 or whether you are taking or making amends after the fact.

15 The important thing is that this type of
16 thing cannot be allowed, and Parliament saw fit to make
17 appropriate legislation.

18 Now, Magistrate Parker in the Elf Oil case
19 made some comments in connection with the penalty, and said
20 the penalty as mentioned of five thousand dollars did not
21 actually -- "in infractions of this type I believe the
22 maximum penalty is really too low"; and there was no ques-
23 tion in that case that Elf Oil had spent a considerable amount
24 of money cleaning up.

25 MR. SEARLE: Forty thousand dollars as I
26 recall.
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1 MR. TROY: It was a lot of money, but it
2 wasn't as big a leak, a seepage. It was only a fuel tank --
3 old fuel tanks stored there, and they had taken over that
4 site from some other Company, but then he goes on to say --

5 "It is only the one case. Certainly these
6 people - although in my view they made a poor decision by
7 getting in there, that is in regards to storing in there -
8 they cooperated, and I was impressed by the way they gave
9 their evidence, and I felt that the witnesses for the Company
10 were very fair."

11 So in that case he imposed a fine of two thous-
12 and dollars, but that was in a place, Sir, that was out in the
13 Delta where drilling operations were going on. It was not
14 in a heavily populated area, and these particular laws were
15 in force for five years; and you have here both sides of
16 the story today, and I think it has been quite fairly pres-
17 ented by both sides; and the Crown takes the position in
18 this case that, because of the serious toxicity of the
19 deleterious substance that did get into Yellowknife Bay,
20 that the Court should consider in the circumstances of this
21 case to impose the maximum penalty of five thousand dollars.

22 MR. SEARLE: Your Worship, just two seconds --
23 two seconds --

24 I am not so sure -- my memory doesn't serve
25 me very well, but I am not so sure the Crown didn't take
26 that view in some of the other cases as well, in that it is
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1 up to the Court to decide what the appropriate punishment
2 might be.

3 The only thing that we have to say is that the
4 Kenniston case showed a fine of two thousand dollars, Pan
5 Arctic - three; Gulf twenty-five hundred and Elf - two thous-
6 and. They were all under either the same or similar legis-
7 lation, with the identical maximum of five thousand dollars
8 per day, so they're all, we submit, very good and recent
9 guidelines for the Court.

10 The reason the Elf fine of two thousand dollars
11 was lower than the others was because of the time and trouble
12 and effort they obviously spent in cleaning up the oil spill
13 and the expenditure, as I recall it, having been Counsel in
14 that case for Elf, was something, I believe, in the nature
15 of forty-five thousand dollars. Now, I am using my memory,
16 but I am relatively sure that that's what it was.

17 MR. TROY: It was something like that,
18 Your Worship.

19 MR. SEARLE: In this case, I submit that you
20 have virtually the same situation. Admittedly the spill
21 on the ice may here have been larger, but so, too, of course,
22 was the expenditure by an additional twenty thousand dollars
23 just in clean-up, followed immediately, of course, by the
24 one hundred and eighty-five thousand dollars in improving dikes
25 and what you have heard; and this year a further sum ear-
26 marked in the neighbourhood of five hundred and fifty --
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1 six fifty. With those sums of money, surely the Court is
2 satisfied that this Company not only was, but intends to be
3 responsible, and as a result what's important is the prin-
4 ciple and not the maximum fine, which surely is imposed
5 where you have got a real "bad cat" who walks away from the
6 mess; and surely that's what the maximum is intended for,
7 and this is definitely not the case here.

8 THE COURT: I will adjourn for five minutes.

9 MR.TROY: Sir, just before we adjourn --

10 The money spent on clean-up, Sir, was a necessary expenditure
11 to be expected. I think what the Crown is interested in is
12 that there be no future occurrences, and if this money and
13 proposed plan of expenditure is going to be made, perhaps
14 the Court should consider that the Court is given some
15 assurance that this plan will be carried through to its
16 fulfilment.

17 MR. SEARLE: Well, we don't indicate plans
18 without the intention of fulfilling it, and indeed, it will
19 be imposed by the water licence.

20 THE CLERK: This Court is adjourned for
21 five minutes.

22
23 ---Adjournment at 4:32 p.m.

24
25 ---Upon resuming at 5:05 p.m.
26
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1 THE COURT:

2 In considering the sentence that ought to be imposed
3 on Giant Yellowknife Mines, the defendant, I only have one
4 of the sentencing principles to consider, and that is the
5 principle of deterrence.

6 The defendant, in my opinion, is a concerned and resp-
7 onable corporate citizen. It was aware before the spill
8 that measures to control the mill tailings and effluent was
9 indicated, and was carrying through with a control program,
10 when events caught up and passed them by the serious spill-
11 age of deleterious substances into the Yellowknife Bay.

12 After that event occurred, a more ambitious program
13 involving the expenditure of close to a million dollars was
14 instituted.

15 At present no spillage is occurring, if I understand
16 the evidence, and will not occur again.

17 Parliament has indicated its concern with offences of
18 this kind by fixing the maximum penalty of five thousand
19 dollars a day, which is a considerable increase over its
20 previous penalty.

21 This charge is for one day, and the Crown has asked for
22 the maximum penalty to be imposed as a deterrent.

23 Comparing the maximum penalty with the cost of the
24 control program now being instituted, I am driven to the
25 conclusion that the defendant is not particularly concerned
26 with the size of the penalty that I am empowered to impose,
27



1 but much more with its corporate image, which, if it is
2 seriously damaged, renders it difficult to operate in a clim-
3 ate of hostile public opinion.

4 This is the real deterrent. It knows that it simply
5 cannot carry on by shaving nickels from this aspect of its
6 operations. In this regard the Corporation has in the past
7 demonstrated its concern by spending large sums of money
8 on environmental control, particularly dust control.

9 I have listened to the Crown cite the various penalties
10 imposed on other corporations for similar offences. These
11 corporations were equally concerned to comply with the envir-
12 onmental control regulations under which they operated.

13 I can do no better than by imposing a penalty similar
14 in size. I therefore fine Giant Yellowknife Mines the sum
15 of two thousand dollars.

16 MR. SEARLE: Naturally, Giant doesn't
17 need time to pay, except for it now being after five. It
18 will do so tomorrow, with your leave, Sir.

19 THE COURT: Yes. Well, that will be all.

20 THE CLERK: This Court is adjourned.

21
22
23 I hereby certify that the foregoing is a
24 true and accurate transcript of the
portion of the said proceedings requested.

25 *R. Hobbs*

26 R. Hobbs, Reporter.
27