

1989

C.AR. No. 02301

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

ALEXANDER JOHN WILSON

RESPONDENT

HEARD: At Annapolis Royal, Nova Scotia, on the 28th day of
November, A.D. 1989

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

DECISION: The 8th day of February, A.D. 1990

CHARGE: Section 4 of the Forest Fire Regulations

COUNSEL: David Acker, Esq., for the Appellant
W. Bruce Gillis, Esq., Q.C., for the Respondent

DECISION ON APPEAL

HALIBURTON, J.C.C.

This is an appeal by the Crown against the acquittal of the Accused entered by John R. Nichols, Judge of the Provincial Court, on June 20th, 1989. The charge was dismissed on the preliminary motion of Defence. The Appellant raises the following issues:

1. Did the Information (Summary Offence Ticket) establish an offence known in law?
2. Is the Information defective in that it did not refer to the statute pursuant to which the regulation was made?
3. Is the Information defective in that it did not set out with some particularity the offence which the defendant had to meet?

Those questions encompass the issues on the appeal according to the factum submitted by the Crown. To these issues, the Respondent would add the further issue:

Does the Statute permit the creation of this offence by regulation?

The Respondent was charged

that at or near West Paradise, Annapolis County, Nova Scotia, on 6 May 1989 at 4:40 p.m. he did unlawfully contravene the terms of a burning permit contrary to Section 4 of the Forest Fire Regulations.

Judge Nichols, after hearing argument by Counsel representing the Respondent and the Crown, and after considering the preliminary motion for dismissal, made the following comments:

I'm prepared to dismiss it on the face, it...doesn't disclose the particular statute under which the matter is related, nor does it set out with some particularity the offence which the defendant must meet...the Information should set out that it's contrary to Section 4 of the Forest Regulations under Section whatever it is of whatever Act that's involved...it doesn't refer to the Act which I take it was...the Forest Act should be referred to with the , as they do in the Motor Vehicle Act in any offence under the Regulations on your SOT tickets.

Reviewing the words used by Judge Nichols in dismissing the charge, I conclude that he did so for two reasons: One, that the offence alleged was not described with sufficient particularity so as to "reasonably inform the Accused of the nature of the offence, and to permit him an opportunity to adduce a full defence upon a fair trial"; and, secondly, that the SOT ticket utilized as the form of Information in this case failed to recite the particular statute alleged to create the offence and therefore failed to comply with the requirements of Section 581 of the Criminal Code.

An Information to commence a proceeding against an accused person must, as a general rule, conform to the requirements of the Criminal Code. Those requirements were considered by the Supreme Court of Canada in R. v. Cote (1977); 33 C.C.C. (2d) 353. The Court's position was, perhaps, put most succinctly in the dissenting judgment of Spence, J., who said at page 354:

the particular form of the information in the present appeal complied with the provisions of s. 510 of the Criminal Code in that it referred to a section and subsection of the Criminal Code and also outlined all the facts...the accused had been reasonably informed of

the transaction alleged against him and had the opportunity to adduce a full defence upon a fair trial.

De Grandpré, J., in delivering the majority decision, referred to what is now s. 581(5):

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

And went on to say:

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, as in the present case, the information recites 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. To hold otherwise would be to revert to the extreme technicality of the old procedure.

In Nova Scotia, the Legislature has provided a simplified and streamlined method of laying an information and getting that information before the Court for adjudication. Under the provisions of the Summary Proceedings Act, the investigating officer may, with respect to certain offences, issue a Summary Offence Ticket. The S.O.T. serves as both Information and Summons, while at the same time, obviating the necessity of serving a more formal summons upon the accused to require his attendance at Court, and also the preparation of a standard form of Information to place before the Court.

Among the provisions of the Summary Proceedings Act, S.N.S., 1972, c. 18, is Section 5A:

5A (1) In addition to the procedure set out in the Criminal Code (Canada) for laying an information and for issuing a summons, an information may be laid and a summons issued by means of a ticket in accordance with this Section for an offence under any provision of an Act or regulation or municipal by-law designated by the regulations.

5A (3) The Governor in Council may make regulations:
(b) designating offences under provisions of Acts or regulations or municipal by-laws for the purposes of this Section;

5A (7) The use on a ticket of any word or expression authorized by the regulations to designate an offence under any provision of an Act or regulation or municipal by-law designated by the regulations is sufficient for all purposes to describe the offence designated by such word or expression.

The Forests Act, S.N.S. 1986, c. 10, is a relatively new statute. It replaced certain provisions of the former Lands and Forests Act. The intent and purpose of the Act as outlined in Section 2 is the promotion of effective forest management of both Crown and private lands as an economic resource. Among the provisions of the Act, the following sections deal with forest fire control and the setting of a fire in a wooded area. Of particular relevance in this case are the following sections:

23 (3) During the fire season no person shall ignite a fire or cause a fire to be ignited in the woods or within one thousand feet of the woods without a valid permit to burn.

23 (5) A permit to burn shall be in the form prescribed by the Minister and may be issued by a conservation officer or other person authorized by the Minister.

23 (6) A person authorized to issue permits to burn may impose such additional terms and conditions or may refuse to issue permits to burn as that person deems necessary.

40 The Governor in Council may make regulations
(b) governing the terms and conditions of issue,
refusal and cancellation of permits;
(h) respecting the establishment of fire seasons;
(i) respecting procedures regarding fire proclamations
and restrictions during such periods;
(j) respecting any matter necessary or advisable to
effectively carry out the intent and purpose of this
Act.

The predecessor legislation, the Lands and Forests Act, R.S.N.S., 1967, c. 163, like the new Act, contained provisions respecting fire protection. These provisions began at s. 85 in that Act. I find s. 96 to be relevant to a consideration of the issues before the Court here.

96 (1) No person shall make, kindle or start a fire on land within a wood, forest or forest area or within one thousand feet of woods, a forest or forest area during the fire season unless he has the leave of the chief ranger or sub-ranger.

96 (2) It shall be the duty of such chief ranger or sub-ranger...to examine the place at which it is intended to start the fire...and to refuse the request and decline to grant leave, or to grant it only on conditions to be performed by the persons...

116 (1) The Governor in Council may from time to time, by Order or Orders in Council, make, amend, vary or repeal rules and regulations for carrying out the purpose and provisions of this Part, including matters in respect whereof no express or only partial or imperfect provisions have been made.

116 (2) Any person contravening or committing any breach of or committing any offence against any of the provisions of any rule or regulations made under this Part, shall be guilty of an offence against this Part.

Regulation No. 1380/84 was made under the authority of s. 5A (3) of the Summary Proceedings Act and published in the Royal Gazette on February 23rd, 1984, Volume 8, No. 3. The

following provisions contained in that regulation are relevant to this discussion:

3 A summary offence ticket may be used for any offence contained in a statute or regulation of the Province;

5 In a summary offence ticket an offence may be described

(a) using the words set out in Schedule 2 to Schedule 16, inclusive, opposite the number of the Section, subsection or regulation providing for the offence;

(b) using the words of the enactment; or

(c) in any concise expression which sufficiently describes the offence to the accused.

Schedule 6 attached to this regulation provides the wording to be used under paragraph 5(a) above where an offence against the Lands and Forests Act was alleged. No charge fully equivalent to that in the case presently before the Court was contemplated in that schedule, however, there are two forms of wording provided under the S.O.T. regulations for a charge under s.96 (1) of the former Lands and Forests Act which was quoted above. The operative words are set out as follows:

making, kindling or starting a fire within a wood, forest or forest area during fire season without a permit; and making, kindling or starting a fire within one thousand feet of woods, forest or forest area during fire season without a permit.

No regulation has been made relative to the subject matter of this charge since the Forests Act has been promulgated. Accordingly, it is apparent that the section charged is not "any provision of an Act or regulation designated by the regulations" [Summary Proceedings Act, s. 5A(7)].

ISSUES

From the foregoing discussion, it will be evident that in my view, the decision of the Trial Judge flowed from his conclusions with respect to those questions raised in Issues numbered 2 and 3 in the appeal. I find it appropriate to deal with those issues as two aspects of the basic question agreed upon by Counsel as being: **whether or not the information reasonably disclosed the offence charged.**

In his decision, the Trial Judge observed that the alleged offence was not related to a specific statute and a section thereof and therefore failed to give required notice to the Accused. The Appellant argues it is well established that such a reference is not essential to a valid Information. The Appellant is clearly correct in that assertion. Whether or not the Trial Judge relied on that proposition in dismissing the charge is less clear. As noted above, R. v. Cote 33 C.C.C. (2d) 353 establishes that

the golden rule is for the accused to be reasonably informed of the transaction alleged against him.

The Appellant has further cited R. v. Canadian International Paper Co. 20 C.C.C. (2d) 26, a case decided by Chartrand, Co. Ct. J., and cites the following quotation:

The respondent contended at the outset that the first information is a nullity because it does not refer to the enactment which creates the offence alleged therein. There is considerable jurisprudence establishing the fact that any such reference is mere surplusage **provided there is a general allegation that the facts alleged are contrary to law.**

(My emphasis)

The law is surely that the Accused be reasonably informed of the allegation which constitutes an offence. The sufficiency of that Information may be assisted by a reference to the statute and section number which is alleged to have been offended. The wording used need not be technical and, indeed, would preferably be simple and clear to the layman. The provisions of the Summary Proceedings Act are, in my view, intended to promote the use of such wording in the laying of informations. That, however, does not in any way diminish the obligation of the Crown and the right of the Accused to have a succinct allegation of the facts incorporated in the charge with the further allegation that those facts are **unlawful or contrary to law**. If these allegations are imperfectly stated, then a correct reference to the statute and section contravened will aid the prosecution in persuading that the Accused has been sufficiently informed of the charge against him, so that he may make a full answer and defence. Without the appropriate reference to statute, the Information and the allegations contained in it must be full and complete within themselves.

In this case, the charge does not allege the actions of the Accused were contrary to law. Nor does it refer to the statute under which an offence was said to have been committed and, indeed, it does not use the correct name of the regulations. The statutory reference is therefore not of any assistance in establishing what offence is alleged against the Accused. The offence alleged is unlawfully "contravening terms of burning permit". This wording is clearly inadequate to

convey any appreciation to a bystander as to what action was taken by the Accused which is alleged to be an offence. Was he burning after dark? Was he using a flammable substance? Was the fire in a locality from which he was restricted? Whatever may be the case, after reading the Information, the reader is clearly not informed as to the nature of the offending action.

In an unreported decision, R. v. Mark Louis Thibault C.D. #2318, where a Charter argument was raised with respect to the sufficiency of the Information, I said the following:

It is clear that the "charge" is not required to be in technical language, and may preferably be in simple language, whether or not in accordance with the wording set forth in the schedule to the Summary Proceedings Act regulations, but that in any event, it is required: "that every material fact and essential element of the offence be charged with precision and certainty in the indictment or information. He has a substantive right to be informed by the indictment" of that with which he is charged.

For further authority, see R. v. Lucas 57 N.S.C.A. (2d) 159.

Accordingly, I conclude that the Trial Judge committed no error in law in dismissing the charge upon a finding that the Information was defective in that the information in the form of a SOT ticket failed to recite the particular statute and that its failure to do so, coupled with its failure to disclose particulars sufficient to give the Accused notice of the offence with which he was charged, resulted in a circumstance whereby the prosecution had failed to comply with the requirements of s. 581 of the Criminal Code. Alternatively, it might simply be said that the averments contained in the Information do not comply with the "golden rule" that "the accused be reasonably

informed of the transaction alleged against him". I would, therefore, dismiss the appeal.

While it is obviously unnecessary to deal with the remaining issues to dispose of this matter, Counsel have raised interesting points with respect to the Forests Act and the Summary Convictions Act. I consider a further discussion of those issues useful.

ISSUE NO. 1

The first issue raised by the Appellant relates to the conclusion of the Trial Judge that the Information did not establish an offence known in law. The Appellant/Crown argues that the Forests Act, s. 40(b) authorizes the Governor in Council to make regulations governing the terms and conditions of issue, refusal and cancellation of permits; and s. 40(3) and 40(j) authorize the making of regulations "respecting any matter necessary or advisable to effectively carry out the intent and purpose of this Act". He argues this section is authority for the creation of an offence by way of the Forest Fire Protection Regulations. It is s. 4 of these regulations which makes it an offence to "fail to comply with the terms and conditions contained in a permit". Finally, he argues that the penalty is ascertainable by reference to s. 36 of the Act which imports the general penalty section from the Summary Proceedings Act.

The Respondent, on the other hand, argues on the basis of the general law relating to the interpretation of statutes that the authority of the Governor in Council to make

regulations under s. 40 does not include any authority for creating an offence. Rather, it lists a number of areas in which the Governor in Council is specifically authorized to make regulations and thereby restricts such regulations to those in the same class or category "expressio unius exclusio alterius".

It is a curious facet of the Forests Act that it does not include a general provision making it an offence to contravene any section of the Act. There is no provision similar to that contained in s. 116 (2) of the former Lands and Forests Act. (See text above.)

The granting of a permit to burn with conditions attached is specifically provided in the statute and not in the regulations. One would naturally expect to find the creation of any related offence in the statute as well. No such offence is created.

Indeed, it is unclear in my view whether the Governor in Council would, in fact, have authority under the provisions of s. 40 (b) to establish a set of conditions for the issue of a burning permit when the statute itself gives that authority to a conservation officer. The nature of the regulations contemplated in the main, as described in the subsections to section 40, are very broad and are obviously intended to regulate such things as spraying practices, forest management agreements, and the operation of the Timber Loan Board.

I agree with Counsel for the Respondent that the creation of offences does not appear to be in keeping with the general intent of that regulation making authority. I find the

offence alleged, or the creation of it, is **ultra vires** the powers of the Governor in Council and therefore is not an offence known in law.

ISSUE NO. 4

It is not my intention to respond to the question raised by the fourth issue, that is, "Does the statute permit the creation of this offence by regulation?" I would only observe that the drafting of the statute very obviously makes this an open question. The predecessor statute under s. 116(2) left no doubt that the contravention of **any rule or regulation** would be an offence. There appears to be no similar provision in the new Forests Act and, while there are certain offences created by the statute itself in relation to various matters, there is no specific authority whereby it is made an offence to contravene the conditions of a burning permit.

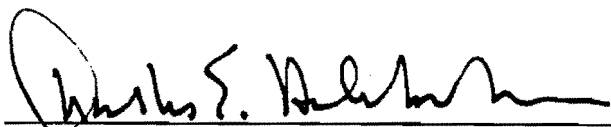
CONCLUSION

I cannot conclude without making a general comment on the use of Summary Offence Tickets. As noted earlier, the use of Summary Offence Tickets, their abbreviated style and convenient process, constitute an exception to the general rule. Whether or not the procedure may properly be used on any summary conviction is not a matter which needs to be adjudicated to dispose of this case. The considerations I have, however, in determining this appeal have caused me to have serious reservations about the efficacy of s. 3 of regulation 1380/84

made under the provisions of the Summary Proceedings Act in as much as it purports to provide that a S.O.T. may be used for any offence. That provision appears to be in direct contradiction of s. 5A(1) of the statute which restricts their use to acts designated by the regulations. Had the Legislature intended that Informations in relation to offences against any statute or regulation of the Province might be proceeded with by way of a S.O.T., the Legislature would surely have included such a provision in the Act. This is particularly so where the regulation appears to be anticipatory in nature, embracing not only existing statutes and regulations, but those to be passed or promulgated in future.

The appeal herein will be dismissed and the Respondent will have his costs in the amount of Four Hundred (\$400.00) Dollars.

DATED at Digby, Nova Scotia, this 8th day of February, A.D. 1990.



CHARLES E. HALIBURTON
JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER THREE

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CASES AND STATUTES CITED:

R. v. Cote (1977), 33 C.C.C. (2d) 353

Summary Proceedings Act, S.N.S., 1972, c. 18

Forests Act, S.N.S. 1986, c. 10

Lands and Forests Act, R.S.N.S., 1967, c.163

R. v. Canadian International Paper Co. 20 C.C.C. (2d) 26

R. v. Mark Louis Thibault C.D. #2318 (unreported)
1989 C.AR. No. 02301

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF ANNAPOLIS

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

ON APPEAL FROM

THE PROVINCIAL COURT

BETWEEN:

HER MAJESTY THE QUEEN

-and-

ALEXANDER JOHN WILSON

HEARD BEFORE: His Honour Judge John R. Nichols, J.P.C.

PLACE HEARD: Middleton, Nova Scotia

DATE HEARD: June 20, 1989

CHARGE: That he on or about the 6th day of May, 1989,
at West Paradise, Annapolis County, Nova
Scotia, did unlawfully commit the offence of
contravening terms of burning permit, contrary
to Section 4 of the Forest Fire Regulations.

COUNSEL: C. Lloyd Tancock, Esq., for the Prosecution
W. Bruce Gillis, Esq., Q.C., for the Defence

C A S E O N A P P E A L