SUPREME COURT OF NOVA SCOTIA

Citation: Wilson Fuel Co. Limited v. Canada (Attorney General), 2009 NSSC 215

Date: 20090707
Docket: Hfx No. 179673
Registry: Halifax

Between:

Wilson Fuel Co. Limited, a body corporate, with its principal place of business at Truro, in the County of Colchester, and Province of Nova Scotia

Plaintiff

v.

The Attorney General of Canada, representing the Crown in Right of Canada; Roland Bourdage and Alan Johnston

Defendants

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	September 30, 2008, to November 19, 2008, in Halifax, Nova Scotia
Counsel:	W. Dale Dunlop and Donald J. Peverill, for the plaintiff Lori Rasmussen and Scott McCrossin, for the defendants

By the Court:

Introduction:

[1] Wilson Fuel Co. Limited ("Wilson Fuel") has sued the Attorney General of Canada ("Measurement Canada") and Roland Bourdage ("Mr. Bourdage") and Alan Johnston ("Mr. Johnston"), (collectively "the Defendants") alleging negligent investigation and malicious prosecution on the part of Measurement Canada, Mr. Bourdage and Mr. Johnston. The incidents giving rise to the present action occurred during the period November, 1998, through to September, 2001. In November of 1998, Measurement Canada conducted an inspection sweep of some 28 of Wilson Fuel's gas stations in Nova Scotia and New Brunswick and checked the calibration of the fuel dispensing pumps at those stations. The results of the Measurement Canada inspections led to the laying of some 194 counts for three different alleged violations of the *Weights and Measures Act* (the "*Act*") and the Regulations made pursuant to the *Act* (the "Regulations"). The alleged violations were the following: 1) was an allegation that Wilson Fuel was perpetrating fraud on its customers by not maintaining its fuel dispensing pumps such that they measured accurately; 2) was an allegation that Wilson Fuel possessed and used fuel dispensing pumps which delivered product outside of the limit of error or

tolerances permitted by the Regulations; and, 3) was an allegation that Wilson Fuel did not adjust (calibrate) its fuel dispensing pumps as close to zero error as possible, as required by the Regulations. The trial of those charges proceeded during January and February of 2001. The trial resulted in a significant number of charges being stayed by the Crown and Wilson Fuel was acquitted on the remaining charges on a motion by the defence for a directed verdict at the close of the Crown's case.

[2] The Crown appealed the acquittals of Wilson Fuel, and, in September, 2001, the Crown abandoned the appeal on the eve of the hearing.

[3] Wilson Fuel has alleged that Measurement Canada was negligent in its investigation during its inspections in November, 1998, and subsequently when it reviewed the evidence, especially the expert reports submitted by Wilson Fuel, before the trial of the 194 counts in January of 2001.

[4] Wilson Fuel has also alleged that it was improperly targeted by Measurement Canada, especially by the lead investigator, Mr. Bourdage, and that it

was improperly pressured by Mr. Johnston, the President of Measurement Canada, during the appeal process.

[5] As a result, Wilson Fuel has sued the defendants, claiming loss of business and profits of some two to three million dollars. Wilson Fuel has contended that the alleged negligent investigations and malicious prosecution by the defendants, and the resulting negative publicity, were the causes of the alleged losses.

[6] There is no allegation of improper actions or motives on the part of the crown prosecutors involved in the case, such that it would attract liability.

Background:

[7] Wilson Fuel is a family owned business which has been in operation in Nova Scotia for several generations. At the beginning of the incidents which give rise to these proceedings, the president of the company was Peter Wilson. He was also a full-time professor at the Technical University of Nova Scotia. Until 1989, the business of the company had been confined to the sale of home heating fuel oil and propane. David Collins was a graduate engineer working for Imperial Oil and he

was a former student of Peter Wilson. Mr. Collins believed there was an opportunity for independent gasoline retailers in Nova Scotia and the Maritimes and, in 1989, he went to work for Wilson Fuel with a view to commencing and building a retail gasoline business for the company. Mr. Collins has been with Wilson Fuel ever since. By 1997, Wilson Fuel's retail gasoline business had grown to 54 retail stations in Nova Scotia and New Brunswick. Needless to say, the Wilson family was proud of its accomplishments and it believed itself to be a respected member of the fuel oil business and of the community in general. In all its years in business, Wilson Fuel had never run afoul of Measurement Canada. This all changed in 1998 and 1999.

[8] On August 11, 1998, Measurement Canada received a complaint from a consumer regarding Rod's One Stop gasoline station in Whycocomagh, Nova Scotia. The station was one using Wilson Fuel's logo, dispensing equipment and product. The complaint was to the effect that the consumer had been charged for 87 litres of fuel pumped into his vehicle's tank but that the tank only had a capacity of 75 litres. Apparently such complaints are not uncommon and they are usually unfounded. Nevertheless, Measurement Canada follows them up with an inspection of the station's fuel dispensing equipment. In this case, Measurement

Canada did not have any inspectors in the Whycocomagh area of Cape Breton, and the inspection did not take place until September 10, 1998.

[9] Measurement Canada inspector, Michel Belliveau, performed the inspection of Rod's One Stop fuel dispensing equipment and the results of that inspection can be found in tab 6 of ex. D-1. The results reveal that, of the 12 dispensing equipment tests performed, 5 pumps were outside of the tolerances permitted by the Regulations by between 10 and 30 millilitres (mL) per 20 litres (L) of fuel. The Regulations permit pumps to be either side zero, by negative 100 mL to positive 100 mL per 20 L of fuel. All pumps tested were in the negative, that is delivering less fuel than the dispenser displays. These readings ranged from negative 50 mL to negative 130 mL per 20 L of fuel. When pumps are out of tolerance by what is considered a minor non-compliance, the standard procedure is that Measurement Canada sends a notice of non-compliance to the gasoline station operator and the operator has 21 days in which to rectify the problem. The operator then has the pumps adjusted (calibrated) by a person employed or contracted by the operator. In this case, the results of the September 11th inspection apparently did not raise any immediate concerns for Measurement

Canada. The standard procedure was followed and the results of the inspection were simply placed in a file to be put away in due course.

[10] The next important event occurred a couple of weeks after the September 11, 1998 inspection of the Whycocomagh gas station. A senior inspector with Measurement Canada, Gerry MacEachern, by coincidence, found himself in the presence of an individual who had previously been a fuel pump calibrator for one of the local companies performing that service for retail gasoline companies. Mr. MacEachern testified that this individual, the alleged informant who has remained undisclosed throughout, told him that a retail gasoline company had made an unusual request of his employer. The informant is alleged to have told Mr. MacEachern that a gasoline retailer, who was not selling gasoline under the "Automatic Temperature Compensation" ("ATC") regime, had requested his employer to set (calibrate) its fuel dispensers at the maximum negative tolerance.

[11] Mr. MacEachern, upon returning to the Measurement Canada office, relayed this information to Roland Bourdage. Mr. Bourdage was then a volumetric and gravimetric specialist for Measurement Canada, working out of the Dartmouth, Nova Scotia, office. Mr. Bourdage had performed the duties of Acting District

Manager at times during 1998 and 1999, but he was not in that position during the times relevant to these proceedings. However, Mr. Bourdage appears to have been acting in an *ad hoc* supervisory capacity. Mr. Bourdage testified that, upon hearing this information from Mr. MacEachern, it was not difficult to deduce that the reference to a non-ATC gasoline retailer may be Wilson Fuel, because it was the most prominent non-ATC retailer at the time.

[12] Mr. Bourdage testified that he then recalled that he had the results of the September 11, 1998 inspection of Wilson Fuel's Whycocomagh gasoline station in his desk drawer and he pulled them out to have a look at them. He testified he could not recall if he had looked at those results before, but, that when he looked at them on this occasion it looked odd because the readings were all in the negative. Mr. Bourdage testified that this information was conveyed to Jim Kavanaugh, the then District and Regional Manager of Measurement Canada. He said he asked Mr. Kavanaugh for permission to perform an inspection sweep of a significant number of Wilson Fuel's retail gasoline outlets. He said he wanted to confirm if the results of the September 10, 1998 test at the Whycocomagh site were common.

[13] Inspector MacEachern testified that he thought the Whycocomagh inspection results “might be worth some follow up”. He said that he and Mr. Bourdage decided to go see Jim Kavanaugh. Mr. MacEachern testified that it was he who proposed an inspection of Wilson Fuel retail gasoline sites to Mr. Kavanaugh and that he had Mr. Bourdage “present with him for backup”. In any event, it appears that it was Mr. Bourdage who directed what has been referred to as the inspection sweep (“the sweep”) of 29 of Wilson Fuel’s gasoline stations in November of 1998. Mr. MacEachern appears to have had a significant role in organizing or arranging for the number of inspectors required to conduct the sweep.

[14] Measurement Canada was not cognizant of how many retail gasoline outlets Wilson Fuel did in fact operate, nor of their locations. This had to be first ascertained and the sweep had to be planned. Mr. Bourdage testified that he had to schedule the sweep for a time when a sufficient number of inspectors would be available. Mr. Bourdage gave the inspectors their assignments for the sweep which took place during the period November 16 to 24, 1998. These inspections were carried out by six different Measurement Canada inspectors. Mr. Bourdage said the inspectors were given their assignments, but that they were not told of the

reason or the objective of the inspections. He said they were to conduct routine type inspections according to standard procedures, as they had been trained to perform. Both Mr. Bourdage and Mr. MacEachern took part in the inspections. The inspection reports were to be provided to Mr. Bourdage. Mr. Bourdage undertook the work of compiling the results of the inspections on a spread sheet, which can be found at tab 10 of ex. D-1, attachment #2. He then also undertook the task of analyzing the results of the sweep.

[15] Mr. Bourdage testified that he was surprised at the results of the sweep. He said he was surprised to find so many pumps out of tolerance; that is, in this case, more than negative 100 mL per 20 L of fuel. Two hundred and sixty pumps were inspected and one hundred and fifty-two pumps failed as being out of tolerance. All pumps tested were on the negative side of zero; that is against the consumer. He emphasized that all the pumps that the inspectors passed as being within tolerance, were on the negative side of zero. Mr. Bourdage testified that it amounted to a compliance rate of about 42 percent. He said that in all his time with Measurement Canada, he had never seen a compliance rate so low and with all the readings in the negative.

[16] During the sweep, Inspector MacEachern obtained copies of calibration forms showing calibrations performed for Wilson Fuel by Dan MacAskill on March 1 and July 26, 1998 at the Wilson Fuel retail gasoline outlet in Upper Tantallon, Nova Scotia. These can be found at pp. 11-13 and 55-57 of ex. D-6. Mr. Bourdage was provided with these March and July 1998 calibration results of Mr. MacAskill a few days after the sweep. Mr. Bourdage stated that these March and July 1998 calibration results of Mr. MacAskill show that pumps were left significantly in the negative and some were left outside of the tolerance or limit of error. Mr. Bourdage testified that the sheer number of negative and out of compliance results of the sweep was out of the "norm" and not what one would have expected.

[17] On December 8, 1998, Mr. MacAskill, the pump calibrator who performed the majority of this work for Wilson Fuel, was in Measurement Canada's Dartmouth office having his "test can" calibrated. Mr. Bourdage questioned Mr. MacAskill about his testing methods, and Mr. Bourdage stated that the procedures and methodology used by Mr. MacAskill "seemed the same" as those employed by Measurement Canada inspectors. Mr. Bourdage further questioned Mr. MacAskill and explained to him that it was on "offence" not to try to calibrate the gasoline

pumps as close to zero as possible or to set them outside the tolerance limitations. Mr. Bourdage was by this time investigating what he considered to be activity in violation of the Regulations, at least on the part of Mr. MacAskill, because he read him the standard “police/peace officer” caution that anything Mr. MacAskill said could be used against him.

[18] Mr. Bourdage testified that Mr. MacAskill denied he had been requested or instructed by Wilson Fuel to set the pumps to the maximum negative tolerance. He stated that Mr. MacAskill said if the pumps were delivering in the positive range; that is, more fuel to the customer than the pump readings were indicating, that he was told to set them in the negative and that, if they were already in the negative, “to leave it there”. Mr. Bourdage testified that Mr. MacAskill finally stated that he was told to set the pumps between 60 and 80 mL in the negative. Mr. Bourdage said that Mr. MacAskill’s explanation did not seem to be consistent with the July 1998 calibration records of the Upper Tantallon site. Mr. Bourdage said he showed those sheets to Mr. MacAskill who had no explanation and said “that should not have happened”. Mr. Bourdage testified that Mr. MacAskill said “he would not want Wilson’s or any one there to get in trouble for anything he did”.

[19] Some time after this interview with Mr. MacAskill, Mr. Bourdage obtained a copy of Mr. MacAskill's calibration results dated December 6, 1998, for the Alma, Nova Scotia, site. These were obtained from a Mr. Chapman of the Provincial Tax Auditing Department and can be found at p. 114 of ex. D-6. Mr. Bourdage testified these show a continuing pattern of Mr. MacAskill still not targeting zero after the November 1998 sweep.

[20] Mr. Bourdage testified that, by the middle of December, 1998, after analyzing the data obtained in the November sweep, "there seemed to be more to the negative readings than met the eye". He decided that Measurement Canada would need to look at additional Wilson Fuel records "to determine if Wilson Fuel was up to something". Mr. Bourdage said he then went to Mr. Kavanaugh, the Regional Director and Manager for the Atlantic Region, and asked for permission to conduct a search of Wilson Fuel's business office. Mr. Bourdage testified he understood that Mr. Kavanaugh went "higher up" with the request. Mr. Johnston, the president of Measurement Canada, testified that any prosecution had to be approved by the president of Measurement Canada; in this case, by himself. However, he testified that he had no role in initiating the investigation. He said he only became aware of the investigation after the sweep. He testified that he had no

prior knowledge about Wilson Fuel and that he had no further involvement in the matter until the charges were laid. Mr. Johnston said that he considered lesser procedures, but that when he looked at the test results, he did not see what one would expect; that is, some results "above", or on the positive side of zero, and some results "below", or on the negative side of zero.

[21] When asked on direct examination, "why not just ask Wilson's for the information?", Mr. Bourdage replied that "because after all the inspections and the results, he expected Wilson's would be contacting Measurement Canada to see what is going wrong". Mr. Bourdage testified that the Measurement Canada "search warrant policy" was that, once an inspection turns into an investigation, a search warrant is required to obtain the records of the subject under investigation. He said he requested a meeting with crown prosecutors to go over the requirements for the drafting of the "Information to Obtain" a search warrant. Mr. Bourdage said his first draft was rejected and his second draft was reviewed by Prosecutor James Martin who suggested more changes and then approved the document which is found at tab 10 of ex. D-1. The accuracy of the contents of this document is a significant issue as far as Wilson Fuel is concerned. Wilson Fuel is in effect

alleging intentional misrepresentation on the part of Mr. Bourdage in drafting the Information to Obtain the search warrant.

[22] By the time of drafting the Information to Obtain the search warrant, Mr. Bourdage had formed the opinion and was of the strong belief that Wilson Fuel was involved in intentional activity in contravention of the Regulations which govern the calibration of fuel pump dispensers at retail gasoline and diesel fuel stations. The offences which Mr. Bourdage was of the belief were being committed are outlined in the Information to Obtain:

> OFFENCES INFRACTIONS
>
> 1) Wilson Fuel Co. Limited, maintained and used in trade, devices, to wit, retail fuel dispensers for the purpose of measuring and selling gasoline and diesel fuels, located at dealers and outlets listed in **Appendix A**, and other locations, from on or about January 01, 1998 to on or about December 31, 1998, in such a manner as to not permit accurate measurement thereby perpetrating fraud when in use, contrary to Section 68(1) of the Weights and Measures Regulations and did thereby commit and (sic) offence under Section 35(2) of the Weights and Measures Act, R.S.C. 1985, C. W6.
>
> [Emphasis added]
>
> And furthermore that;

2) Wilson Fuel Co. Limited did have in their possession for use in trade, devices, to wit, retail fuel dispensers for the purpose of measuring and selling gasoline and diesel fuels, located at dealers and outlets listed in **Appendix A**, and other locations, from on or about January 01, 1998 to on or about November 24, 1998, that did not measure units of measurement within the limits of error prescribed by Sections 262 and 265 of the Weights and Measures Regulations, contrary to Section 24(b) of the Weights and Measures Act, R.S.C. 1985, c. W6.

And furthermore that;

3) Wilson Fuel Co. Limited and Allan Dan MacAskill did not adjust the measurement error of devices, to wit, retail fuel dispensers for the purpose of measuring and selling gasoline and diesel fuel, located at dealers and outlets listed in **Appendix A**, and other locations, from on or about January 01, 1998 to on or about December 6, 1998, as close to zero error as possible within the normal operating range of the devices after making an accuracy adjustment, contrary to section 35.1 of the Weights and Measures Regulations and did thereby commit and (sic) offence under Section 35(2) of the Weights and Measures Act, R.S.C. 1985, C. W6.

And furthermore that;

4) Allan Dan MacAskill, altered a device, to wit, motor fuel dispensers for the purpose of measuring and selling gasoline and diesel fuels, that are to be used in trade, located at dealers and outlets listed in **Appendix A**, and other locations, on or about January 01, 1998 to on or about November 24, 1998 in such a manner that they ceased to meet the requirements of Sections 262 and 265 of the Weights and Measures Regulations, contrary to section 29(c) of the Weights and Measures Act and did thereby commit and (sic) offence under Section 35(1)(a) of the Weights and Measures Act, R.S.C. 1985, C. W6.

[23] The effect of count 1) above is that Mr. Bourdage was of the belief that Wilson Fuel was defrauding its customers by intentionally violating Section 68(1) of the Regulations. This was the main or primary belief of Mr. Bourdage, and counts 2), 3) and 4) are basically the means of perpetrating the alleged fraud. Count 2) is an allegation of having fuel dispensing pumps outside of the permitted tolerances. Count 3) is an allegation that Wilson Fuel, through its calibrator, Mr. MacAskill, did not target as close to zero as possible when calibrating its fuel dispensers, as required by the Regulations. Count 4) is an allegation against Mr. MacAskill directly, alleging that he intentionally calibrated fuel dispensers outside of the permitted tolerances; this is in addition to the allegation in count 3) that he did not target as close to zero as possible.

[24] The wording of count 1) was the subject of much debate at this trial and had been raised by Wilson Fuel prior to the formal arraignment before the Provincial Court. Wilson Fuel points out that Section 68(1) of the Regulations does not use the words “thereby perpetrating fraud when in use”, as was used in the Information to Obtain and the subsequent charges laid before the Provincial Court; but that the words used in Section 68(1) are “and eliminate means of perpetrating fraud when in use”. Mr. Bourdage was questioned at length at trial as to why he used the

wording which he did in formulating count 1). Mr. Bourdage had no explanation as to the reason for using the wording which he did, but it is clear that the wording which he used accorded with his belief of the alleged violations of the Regulations by Wilson Fuel. He said the wording was not objected to by the crown prosecutors. He said the crown prosecutors were of the view that a fraud charge under the *Criminal Code of Canada* may be appropriate; however, Mr. Bourdage testified that he was against such a move and he wanted to keep any alleged offences within the ambit of regulatory proceedings. He said he was not comfortable with proceeding under the *Criminal Code of Canada*. Wilson Fuel contends that the words "thereby perpetrating fraud" had a much more devastating effect on its short term reputation than had the words, "and eliminate means of perpetrating fraud" been used. It is clear that both phrases employ the word "fraud" and it would be speculation what, if any, different implications would follow had the correct phrase been used. This was an error made by Mr. Bourdage, which was eventually corrected at trial, albeit with opposition from Wilson Fuel. There is no evidence that the wording of this charge had any more negative impact on the perception of the allegations against Wilson Fuel than had the correct wording been initially used in describing the alleged offence.

[25] There are also inaccuracies in the Information to Obtain the search warrant which Wilson Fuel contends go to establishing intentional misrepresentations by Mr. Bourdage and which it contends support an allegation of malicious intent on his part. There can be no question that Mr. Bourdage was of the firm belief that a scheme on the part of Wilson Fuel was being perpetrated on its customers, as can be seen from paras. (2)(a), (b) and (c) [and 2(a) and (b) in particular] of the Information to Obtain:

> (2) It is set out below, that the informant has reasonable grounds to believe and does believe that the "THINGS TO BE SEARCHED FOR" referred to above, related to an alleged scheme whereby
>
> (a) Wilson Fuel Co. Limited contracted with Alan Dan MacAskill, to set the accuracy of the retail fuel dispensers that they use for the measuring and sale of gasoline and diesel fuels to consumers, so that these dispensers would under deliver the volume of product sold by an amount equivalent to the maximum permitted by the Weights and Measures Regulations. It is believed at this time that Wilson Fuel Co. Limited has contracted with other persons or service agencies to do the same in a number of locations in Nova Scotia and New Brunswick.
>
> (b) That Wilson Fuel Co. Limited, as a result of the above scheme, has resulted in them using in trade or having in their possession for use in trade, retail fuel dispensers for the measuring and sale of gasoline and diesel fuels that were under delivering the volume of product sold in an amount that exceeds the limit of error prescribed by the Weights and Measures Regulations.

(c) Wilson Fuel Co. Limited and Allan Dan MacAskill failed to adjust the measurement error of retail fuel dispensers for measuring and selling gasoline and diesel fuels, as close to zero error as possible.

(d) Allan Dan MacAskill adjusted the measurement error of retail fuel dispenser for measuring and selling gasoline and diesel fuels, so that these would no longer meet the accuracy requirements of the Weights and Measures Regulations.

[Emphasis Added]

[26] In para. (4) of the Information to Obtain, Mr. Bourdage makes assertions regarding the alleged informant which are somewhat exaggerations of the evidence known at the time. Similarly, in para. (12), he makes assertions regarding an interview with Bob Smith. Allegations which were contested facts and which turned out to be questionable. Allegations which Mr. Smith later denied. There can be no question that there are inaccuracies in the assertions made by Mr. Bourdage in the Information to Obtain. These assertions are undoubtedly the result of Mr. Bourdage's firm belief that he was correct in his assessment of what Wilson Fuel may have been doing. The question is whether those erroneous or exaggerated assertions are the product of a zealous investigation and honestly held belief or the result of a malicious intent.

[27] In the end, Judge Digby of the Provincial Court approved and issued the search warrant. The validity of the search warrant was contested at the regulatory trial because of the alleged incorrect assertions by Mr. Bourdage, and, in the end, the trial judge upheld the search warrant. However, that is not determinative of the issue as far as this trial is concerned. The assertions made in the Information to Obtain can be considered by this court in assessing the issue of liability on the part of the defendants.

[28] The search warrant was executed by Measurement Canada at the Barrington Street office of Wilson Fuel on March 4, 1999, with the assistance of the RCMP. The execution of the search warrant effectively shut down the activities of Wilson Fuel's head office for approximately two days; but, all the evidence establishes that Measurement Canada officials were as considerate and accommodating to the ongoing business needs of Wilson Fuel as was possible in the circumstances. Where possible, copies of business records were made so as not to disrupt ongoing business activities. While many documents and business records were obtained, the only information found which was of any significance to the investigation were copies of the calibration records or reports of Mr. MacAskill. These were found in Wilson Fuel's office and in the desks of Mr. Wilson and/or Mr. Collins and are

contained in ex. D-6. There can be no question that ex. D-6 shows an overwhelming majority of calibrations performed by Mr. MacAskill which left or set fuel dispensers in the negative, some within tolerances, some outside of tolerances. The search did not reveal or produce any other documentary evidence to the effect that Wilson Fuel had contracted with anyone to violate the Regulations.

[29] Nevertheless, the results found in ex. D-6 only confirmed Mr. Bourdage's belief that there was an intentional scheme on the part of Wilson Fuel to thwart the Regulations. It was after the execution of the search warrant that Wilson Fuel became very concerned about the allegations made against it. Wilson Fuel then embarked on a campaign, through its legal counsel and various experts, to convince Mr. Bourdage and Measurement Canada that their hypothesis was wrong. The first such attempt was a letter dated March 15, 1999 from Wilson Fuel's legal counsel to Crown Prosecutor James Martin.

[30] In the March 15, 1999 letter, legal counsel for Wilson Fuel addressed the seriousness with which the company was taking the situation. The letter emphasized Wilson Fuel's commitment to follow industry standards and practices,

"including the manner in which pump metres are adjusted and regulated". The letter also outlined Wilson Fuel's concerns with regard to "any reference to fraud, whether successfully prosecuted or resulting in acquittal, could be financially disastrous for Wilson Fuel". In order to convince Measurement Canada that Wilson Fuel was not profiting at the consumer's expense, it invited Mr. Bourdage to examine the records seized from the company which it contended showed that it was consistently "purchasing more petroleum product than it sells. That is to say that in the overall picture the motoring public is receiving more product than is recorded by the meters at the pumps. The difference is not minuscule". The letter went on to explain why Wilson Fuel considered the loss of product an important issue to monitor; the first one being environmental (leaking tanks); the second one being federal and provincial tax liability on product that had not in fact been sold.

[31] In the March 15, 1999 letter, Wilson Fuel's legal counsel also briefly explained why it was opposed to the ATC method of adjusting gasoline volume at the pumps. He stated, "For every day our climatic temperature does not reach 15 degrees Celsius, purchasers of petroleum products adjusted to that temperature will receive less than shows on the meters". Wilson Fuel had been promoting and advertising itself as a non-ATC retailer. At this trial, Mr. Wilson and Mr. Collins

alleged that Wilson Fuel was probably targeted by Measurement Canada because of its widely publicized stance against the use of ATC.

[32] The March 15, 1999 letter, at the fourth paragraph on pg. 2, also went on to explain the rationale for the procedure Wilson Fuel was following regarding the adjustment of fuel dispensing pumps, as follows:

> Wilson's policy has been to maintain adjustment of the pumps so that they deliver fuel amounts within the tolerances prescribed by Weights and Measures. Because of stringent requirements for reporting to the Nova Scotia Department of Environment, shortages in the gasoline volume, Wilsons, like other suppliers, tried to maintain calibration of the pumps in the negative area in order to eliminate pump calibration as a source of error which might lead one to a mistaken belief that an underground storage tank was leaking.

[33] The defendants cite this paragraph as a clear indication that Wilson Fuel was not following the proper procedures, as required by the Regulations, when adjusting its fuel dispensing pumps.

[34] In a letter dated March 30, 1999, Mr. Collins of Wilson Fuel sent Mr. Bourdage a "raft" of "Over-Short" reports in a further attempt to convince Measurement Canada that Wilson Fuel's procedures did not "short-change" the consumers. By letter dated August 11, 1999, Peter Wilson, the then president of

Wilson Fuel, wrote directly to Mr. Johnston, the president of Measurement Canada, in an effort to convince him that the Measurement Canada hypothesis could not be right and to use his good offices to set the matter right. When these efforts did not have the desired effect, Wilson Fuel then retained experts to provide reports which it aspired would convince Measurement Canada that its suspicions were wrong, in the hopes that the regulatory charges would be abandoned.

[35] The first such report was requested from Saybolt Canada ("Saybolt"). Saybolt is a world class player in the petroleum testing and measurement field. It is a division of Core Laboratories of Houston, Texas. Locally it performs services for Imperial Oil, Irving Oil, Nova Scotia Power Corporation, New Brunswick Power Corporation, Wilson Fuel, etc. The Saybolt reports were prepared by Brian Tofflemire, whose C.V. can be found at tab 2 of ex. P-1. Mr. Tofflemire has been the Operations Manager for Saybolt in Canada since 1993. Saybolt's expertise is in the field of measuring large (bulk) loads of petroleum products and not in the calibration of retail fuel dispensing equipment. Mr. Tofflemire clarified Saybolt's area of expertise in his September 25, 2000 letter to Dale Dunlop, legal counsel for Wilson Fuel (Letter is at tab 26 of ex. D-2).

[36] Mr. Tofflemire prepared two reports on behalf of Wilson Fuel, the first one dated July 26, 2000 (tab 2 of ex. P-1), and a second report dated December 1, 2000 (tab 5 of ex. P-1). The effect of these reports is that temperature variations play an important role in the measurement of petroleum products and that, unless the temperature of the samples is closely monitored, the accuracy of the tolerance readings can vary by as much as 33 percent if the performance of the tests take place over a period of some 30 minutes. Mr. Tofflemire was not aware of the length of time Measurement Canada Inspectors took to complete a sample test in the field; thus, the Saybolt tests were performed over a period of 30 minutes to arrive at a 33 percent change in tolerance readings. The evidence at trial revealed that the Measurement Canada Inspectors take approximately two minutes to perform a test in the field.

[37] I should point out that this Court was not asked to decide which expert evidence presented by both the plaintiff and the defence was the most acceptable or the most probable. That was not the function of the Court at this trial. This evidence was presented for the primary purpose of supporting the reasonableness, or lack thereof, of the continuation of the regulatory prosecution after the plaintiff's expert reports were made known to the Crown.

[38] Another report, dated December 11, 2000, was obtained from Eldon Gunn, Ph.D., a professor of industrial engineering with Dalhousie University since 1980. The main tenet of Dr. Gunn's report is that "a measure of volume of a liquid such as gasoline is meaningless without stating the temperature at which that volume is recorded". He hypothesizes that a 5 degree Celsius change in temperature would affect a volume of 20 L by approximately 95 mL. However, it is important to note that Dr. Gunn did not have detailed information of the methodology used by Measurement Canada Inspectors in the field, or how much, if any, the temperature of the petroleum fuel being measured varied during the sweep testing procedures.

[39] Another report, dated December 11, 2000 (tab 6 of ex. P-1), was obtained from Environmental Solutions of Shelburne, Nova Scotia. The report was authored by Louise Lindsay, Senior Contaminant Hydrogeologist with Environmental Solutions. The main purpose of this report was to attempt to show to Measurement Canada that the Company records of Wilson Fuel which showed that it was consistently purchasing more product than it sold was not attributable to "leakage in storage tanks", "product delivery errors including the comparison of volume at different temperatures", or "theft of product". Wilson Fuel hoped that

the information contained in this report would help to show Measurement Canada that the company was not profiting by under delivering fuel products to consumers.

[40] The crown prosecutors received copies of Wilson Fuel's expert reports in December, 2000 and they met to discuss whether they may need to retain experts to counter the defence experts. The Crown consulted with Measurement Canada's own experts in Ottawa, Patrick Hardock, P.Eng., and Christian Lachance, P.Eng. The Hardock and Lachance final report is dated February 6, 2001 and is in evidence as ex. D-24. They had been asked to assess the expert reports provided by Wilson Fuel. The crown prosecutors had been receiving "bits of information from Messrs. Hardock and Lachance prior to February 6, 2001, but the final report, Ex. D-24, was prepared in the event that the crown prosecutor viewed it necessary to call evidence at the regulatory trial in rebuttal of any defence expert evidence. It was not available when the regulatory trial commenced in January, 2001.

[41] In the result, Measurement Canada officials, primarily Mr. Bourdage, were not convinced that the defence's expert reports meant that the prosecution should not go forward, even though both the defence and the prosecution experts were of the opinion that test results in the field may not be established without a 33 percent,

or plus or minus 33 mL per 20 L, margin of error. The prosecutors were also of the view that the prosecution should go forward because the primary allegation against Wilson Fuel was that it leaving or setting pumps on the negative side of zero and not targeting as close to zero as possible. The focus of the prosecution was not the outside of tolerance charges alleged in count 2) on the Information to Obtain the search warrant, even though these allegations ultimately formed the majority of the infractions alleged in the Information laid before the Provincial Court (See tab 18 of ex. D-1). It is apparent that any counts alleging possession of a fuel dispenser "that did not measure units of measurement within the limits of error" prescribed by the Regulations would be difficult to prove if the allegation was that the equipment was outside of the 100 mL tolerance by 30 mL or less per 20 L test. That is, any charge alleging a negative test reading of negative 130 mL or less per 20 L test would have been difficult to prove at the regulatory trial. This would have affected a significant number of charges; but, as I have said, these alleged offences were not the main focus of the allegations against Wilson Fuel. Mr. Bourdage and other Measurement Canada officials, and the crown prosecutors handling the case, believed that Wilson Fuel had in place a scheme to intentionally set its fuel dispensers in the negative range; thereby, delivering less fuel to consumers than what was indicated on the meters and was paid for by the

consumers. The prosecutors were of the view that any margins of error alleged by the defence was a matter to be decided by the trial judge after hearing all the evidence.

[42] In view of the above noted, after the prosecutors had considered the circumstances of the case, they decided to continue with the prosecution. Tim McLaughlin, the then lead prosecutor on the case, testified that he and Monica McQueen, his assistant on the file, had reviewed the expert reports submitted on behalf of Wilson Fuel and that they did not alter his view of the case. He testified that the charges related to "a point in time" and that the expert reports "did not answer the charges". Mr. McLaughlin stated that he was always of the view that there was a "reasonable prospect of conviction". Mr. McLaughlin testified that he had no doubt about the "propriety of the prosecution". Mr. Johnston testified that shortly before the trial, he received a copy of a letter (tab 29 of Ex. D-2) threatening legal action if the prosecution proceeded. He said he was concerned about the repercussions of going to trial and he arranged for a conference call to discuss the matter. Mr. Johnston testified that he requested the weekend to consider if the trial should proceed. He said that, one hour or so later, he received a call from one of the prosecutors, he could not recall which one, and that he was

told there was no point in Mr. Johnston taking the weekend to consider the matter, and that there was no need for a conference call. He said he was told the decision of whether to proceed or not to proceed with the trial was the Department of Justice's alone. Mr. Johnston said he had thought that Measurement Canada had the authority to decide to withdraw charges if it felt the prosecution was not in the public interest. He said only then did he realize that the Department of Justice, not he, was the decision maker.

[43] The regulatory trial commenced on all counts in January of 2001.

[44] At the regulatory trial, the Crown brought forward a witness who had experience in the adjusting (calibrating) of petroleum fuel dispensers in Prince Edward Island. It was intended that this person be qualified to give opinion evidence as an expert in the field of fuel pump calibration. The witness testified that it was relatively a routine matter to calibrate fuel pumps close to zero. It was later discovered by the prosecution that this witness had overstated his qualifications and that he had misrepresented the results of his own calibrations and he could in fact not target and achieve zero error as readily or easily as he had

testified. He could only achieve a zero margin of error approximately 40 percent of the time.

[45] The prosecution disclosed this information to the defence and then stayed all charges or counts which alleged, pursuant to s. 35.1 of the Regulations, that Wilson Fuel was not targeting as close to zero as possible when it had its fuel dispensers adjusted. The prosecution also stayed all charges or counts which alleged, pursuant to s. 68(1) of the Regulations, that Wilson Fuel maintained its fuel dispensers in a manner that did not permit accurate measurement and eliminate means of perpetrating fraud when in use. This resulted in a large number of counts, approximately 45, being in effect "dropped" by the Crown. That left 149 violations of ss. 262 and 265.(1) of the Regulations; that is, having possession of fuel dispensers "that did not measure units of measurement within the limits of error (tolerance) permitted by those sections. The remaining charges were the ones which required the prosecution to prove the accuracy and the results of its measuring techniques and procedures when inspecting retailers' fuel dispensers.

[46] By this time all parties should have been aware that there was a possible margin of error of approximately, 30 percent; or 30 mL per 20 L test performed in

the field. This would mean that any charges alleging negative readings of between 110 mL and 130 mL per 20 L test may have been difficult to prove to the degree of proof required in the regulatory prosecution. This would have been a significant number of the remaining charges. Be that as it may, the regulatory trial never did reach that stage. The defence made a motion for a directed verdict at the close of the Crown's case in chief on the basis that the Crown had failed to prove an essential element of the remaining offences, being the effect that temperature would have had on the alleged measurement results of the November, 1998 inspection sweep. However, the motion was decided on a somewhat different criteria.

[47] One of the conditions on Measurement Canada's certificates of calibration regarding the measure used in the field, (the 20 L test can), reads as follows:

> "This measure will deliver or receive the certified volume if used with liquids having a viscosity not greater than No. 2 fuel oil at a temperature of 15 degrees celsius."

[48] The regulatory trial judge ruled that there was no evidence that the fuel measured by the inspectors during the November, 1998 sweep had the required viscosity. He said:

> ...There really is no evidence at all before me that the fuel which was measured in the various test cans had at the time it was measured, the viscosity of not greater than the viscosity of No. 2 fuel at 15 degrees celsius. There simply is no evidence at all before me about the viscosity of the fuel that was in fact measured in the test cans ...

[49] In the result, the regulatory trial judge granted the motion for a directed verdict and he dismissed all the remaining charges. The crown prosecutors were firmly of the view that the regulatory trial judge had erred and that there was sufficient evidence of the viscosity of the fuel measured during the November, 1998 sweep, at least sufficient to put the defence to its election as to whether or not to present any evidence. In the alternative, the Crown requested to re-open its case, but this motion was denied.

[50] After reviewing the evidence presented at trial and the regulatory trial judge's decision on the directed verdict, the Crown filed an appeal of the judge's decision.

[51] It should be said at this time that it is not the function of this Court to review the regulatory trial judge's decision and decide on the merits of the appeal.

[52] The motives or decision of the crown prosecutors to file an appeal, or the merits of the appeal itself, have not been seriously challenged in the present trial. It is primarily the handling of the appeal by Measurement Canada, principally Mr. Johnston, which has been criticized and challenged by Wilson Fuel. Wilson Fuel has claimed that it was improperly pressured by Measurement Canada, Mr. Johnston in particular, to give up any civil remedies in exchange for Measurement Canada abandoning the appeal.

[53] Mr. McLaughlin, the lead prosecutor at the regulatory trial, testified that it was his decision, in consultation with his local director, to file the appeal. He also testified that it was the prosecutions decision to make, not Measurement Canada, whether or not to continue with the appeal at every stage of the appeal process. Nevertheless, there were ongoing discussions between the parties which, at times involved the prosecutors, and at other times did not involve the prosecutors. Wilson Fuel was anxious to avoid the appeal, as was Mr. Johnston. There was at least one meeting held between Wilson Fuel and Measurement Canada officials, with Mr. Johnston representing Measurement Canada. At that meeting at which the crown prosecutor, Mr. McLaughlin, was present, it was proposed that a re-inspection of a significant number of Wilson Fuel retail outlets be conducted to see

if Wilson Fuel was then in “substantial compliance”. There is a divergence of views as to what exactly was agreed to at that meeting. Wilson Fuel contends that it was agreed that if it was in substantial compliance, the appeal would be dropped. Mr. McLaughlin said that he only agreed that substantial compliance was only one factor, albeit an important one, which he would consider in deciding whether to continue with the appeal. The proposed re-inspection took place and Wilson Fuel was found to be in “substantial compliance”. By this time, the threat of a possible civil action by Wilson Fuel was looming in the background.

[54] Mr. Johnston testified that he did not want to go forward with the appeal. He said he thought that, if Wilson Fuel was found in “substantial compliance” after the recent re-inspections, he could use that to convince the Justice Department not to go forward with the appeal.

[55] There were some further telephone discussions between Ian Wilson, the then president of Wilson Fuel, and Mr. Johnston in attempts to arrange a further meeting in the hopes of resolving the issues between the parties and convincing the Department of Justice to abandon the appeal. Mr. Johnston testified he was concerned that if the appeal went forward, it would undo the small steps achieved

thus far to restore relations. In the end, a further meeting did not materialize and the issues between the parties remained unresolved.

[56] During this time, the president of Measurement Canada, Mr. Johnston, was receiving legal advice from government lawyers in Ottawa. He had obviously discussed the possibility of a civil action by Wilson Fuel with these lawyers. One such lawyer took the position that it may be an opportune time to propose an agreement whereby, if Measurement Canada would abandon the appeal, Wilson Fuel would agree to settle all legal issues, including any potential civil suit by Wilson Fuel.

[57] This proposed settlement agreement was presented to Wilson Fuel's legal counsel by the prosecutor, Mr. McLaughlin. Mr. McLaughlin testified that he was aware such an agreement would not be enforceable, as being against public policy. Mr. Johnston testified that he simply followed his legal advice and that he only learned later that such an agreement was not enforceable. Mr. Johnston said he would not have wanted to forward something that was legally wrong.

[58] The proposed settlement did not go any further because Wilson Fuel was not in agreement. Wilson Fuel was of the view that it had met all of the conditions agreed to at the earlier "substantial compliance" meeting and it would not agree to any further conditions.

[59] Mr. McLaughlin testified that he regretted having passed the proposed minutes of settlement on to Wilson Fuel's legal counsel because it was at the prosecutor's sole discretion to decide whether to go ahead or not go ahead with the appeal. Mr. McLaughlin said that he agonized over the decision of whether to proceed with the appeal the weekend prior to the scheduled hearing. He said he then discussed it with his director at the local Federal Justice Department. The decision was made that it was not in the public interest to continue with the appeal and that it should be abondoned.

[60] Mr. McLaughlin testified that he was still of the view that the regulatory trial judge had erred in allowing the motion for a directed verdict; but that, in view of all the circumstances, he became of the view that it was not in the public interest to continue with the appeal and another possible prosecution. Thus, the appeal was formally abandoned on the eve of the hearing.

[61] The end result of the failed prosecution is the present civil action by Wilson Fuel.

The Issues:

(A) Negligent Investigation:

(1) Did the defendants owe a duty of care to the plaintiff?

(2) If the defendants owed a duty of care to the plaintiff, what is the standard of care?

(3) If the defendants owed a duty of care to the plaintiff, did they breach the standard of care?

(4) If the defendants owed a duty of care to the plaintiff and breached the standard of care, has the plaintiff proven that the breach caused the alleged damages?

(B) Malicious Prosecution:

(1) Did the defendants have reasonable and probable cause to investigate the plaintiff?

(2) Did the defendants have reasonable and probable cause to prosecute the plaintiff?

(3) Did the defendants investigate and prosecute the plaintiff out of malice, or improper purpose or motive?

[62] It should be noted that Wilson Fuel advised the Court, prior to closing arguments, that it was no longer pursuing the abuse of power or misfeasance in office ground for liability.

Authorities:

NEGLIGENT INVESTIGATION

A. The Law of Negligent investigation

[63] The law of negligent investigation begins with the so-called *Anns* test for establishing a duty of care, as recently restated in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, and *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18. In *Childs*, McLachlin C.J.C. said, for the court at paras. 11-12:

> In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Lord Wilberforce proposed a two-part test for determining whether a duty of care arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or "proximate" enough to give rise to a duty of care.... The second stage asks whether there are countervailing policy considerations that negative the duty of care. The two-stage approach of *Anns* was adopted by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 10-11, and recast as follows:
>
> > (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
> >
> > (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?
>
> In *Odhavji Estate* ... the Court affirmed the *Anns* test and spoke, *per* Iacobucci J., of three requirements: reasonable foreseeability; sufficient proximity; and the absence of overriding policy considerations which negate a *prima facie* duty established by foreseeability and proximity...

[64] The Supreme Court of Canada recognized the tort of negligent investigation in *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, 2007 SCC 41. In that case, the majority held, per McLachlin C.J.C. at para. 3:

> [P]olice are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent investigation exists in Canada.... The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect.

[65] The defendants submit that the facts and reasoning in *Hill* do not support finding a duty of care in the present case. The majority made the following comments in *Hill* at para. 27:

> Before moving on to the analysis of proximity in depth, it is worth pausing to state explicitly that this judgment is concerned only with a very particular relationship — the relationship between a police officer and a particularized suspect that he is investigating. There are particular considerations relevant to proximity and policy applicable to this relationship, including: the reasonable expectations of a party being investigated by the police, the seriousness of the interests at stake for the suspect, the legal duties owed by police to suspects under their governing statutes and the Charter and the importance of balancing the need for police to be able to investigate effectively with the protection of the fundamental rights of a suspect or accused person. It might well be that both the considerations informing the analysis of both proximity and policy would be different in the context of other relationships involving the police, for example, the relationship between the police and a victim, or the relationship between a police chief and the family of a victim. This decision deals only with the

> relationship between the police and a suspect being investigated. If a new relationship is alleged to attract liability of the police in negligence in a future case, it will be necessary to engage in a fresh *Anns* analysis, sensitive to the different considerations which might obtain when police interact with persons other than suspects that they are investigating. Such an approach will also ensure that the law of tort is developed in a manner that is sensitive to the benefits of recognizing liability in novel situations where appropriate, but at the same time, sufficiently incremental and gradual to maintain a reasonable degree of certainty in the law...

[66] There is clearly an analogy between a police criminal investigation and an investigation under the *Weights and Measures Act* with a view to pursuing a regulatory offence. There is a significant divergence of interests and there are serious interests at stake. It should be noted as well that the *Weights and Measures Act* contemplates imprisonment as a penalty. Section 35 provides:

> 35. (1) Every person who is guilty of an offence under any of the provisions of sections 23 to 34 is liable
>
> (a) on summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both; and
>
> (b) on conviction on indictment, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both.
>
> Punishment for general offence
>
> (2) Every person who contravenes any provision of this Act or the regulations, for the contravention of which no punishment is elsewhere provided in this Act, is

> guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars.
>
> Officers, etc., of corporations
>
> (3) Where a corporation commits an offence under this Act, 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 prosecuted or convicted.

B. The *Anns* test applied to the present case

[67] On the first stage of the *Anns* test – proximity – the defendants submit that (1) the relationship between the parties in this case does not give rise to the proximity required to found a duty of care, and that (2) the circumstances do not offer the conditions necessary to create a new category of recoverable economic loss.

1. Duty of Care

Proximity

[68] The defendants concede that it was reasonably foreseeable that a negligent inspection or investigation on their part could result in "some form of harm to the plaintiff." For various reasons, however, they maintain that they did not owe the plaintiff a duty of care.

[69] Where a governing statute exists, proximity must be grounded in that statute. In *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80, the court said at para. 9, "[f]actors giving rise to proximity must be grounded in the governing statute when there is one..." In *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, the court said at para. 43:

> the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar [of Mortgage Brokers] is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.

[70] The defendants submit that the governing statutes – the *Department of Industry Act* and the *Weights and Measures Act* – are concerned with consumer protection and do not create a duty to those being regulated. The *Department of Industry Act* sets out the objectives to be pursued in the exercise of the Minister's duties and functions, which include promoting "the interests and protection of

Canadian consumers." The *Weights and Measures Act*, by contrast, includes no purpose or objectives section. The Act's scheme is to provide authority for the Minister of Industry to approve weighing and measuring devices and to establish and regulate units of weight and measurement. The Act provides for the inspection of devices, and for the making of necessary adjustment with the consent of the owner. Inspectors have the power to inspect, and the owner is required to "give the inspector all reasonable assistance to enable the inspector to carry out his duties and functions" and to "furnish the inspector with such information with respect to the administration of this Act and the regulations as he may require."

[71] In addition, the defendants submit that imposing a private law duty on them would conflict with the purposes of the governing statute. They cite several cases that suggest that there is insufficient proximity between an investigating authority and the subjects of its investigation, due to the opposing interests at play, to found a duty of care. In effect, the concern is with the possibility that an investigator required to observe a duty of care to the subject of the investigation may be inhibited in conducting an effective investigation.

[72] In addition to the absence of a basis for proximity in the governing statute, the defendants submit that other factors that might support a finding of proximity are absent, arguing specifically that the plaintiff did not act in reliance on the defendants, and that "the causal connection between the parties is tenuous."

Residual Policy Considerations

[73] The second stage of the *Anns* test – to be addressed if the court concludes that proximity has been established – requires a consideration of whether there are "residual policy concerns" that negate or limit the scope of the duty of care. The onus is on the defendant. McLachlin C.J.C. said, in *Hill* at para. 31:

> ... [T]he final stage of *Anns* is concerned with "residual policy considerations" which "are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Cooper*, at para. 37. In practice, there may be overlap between stage one and stage two considerations. We should not forget that stage one and stage two of the *Anns* test are merely a means to facilitate considering what is at stake. The important thing is that in deciding whether a duty of care lies, all relevant concerns should be considered.

[74] The defendants submit that residual policy concerns militate against expanding tort recovery for pure economic loss in the present case, and support the application of the general rule against the creation of new categories of economic

loss. The basis for this position is that establishing a new category of recovery in the circumstances would lead to "indeterminate liability." In *Martel Building* the court said at para. 57, "[t]he scope of indeterminate liability remains a significant concern underlying any analysis of whether to extend the sphere of recovery for economic loss." Indeterminate liability may be a particular concern in cases of pure economic loss due to the potential "chain" of potential plaintiffs. In *Design Services* the court, at paras. 59-66, made this point in the construction context, noting the potential chain of claims by subcontractors. In this case, the defendants speculate that the potential scope of loss could include owners of stations that operated under the plaintiff's business name (due to lost sales of fuel and incidentals), as well as suppliers, employees and shareholders. At its widest extent, the defendants raise the possibility of losses in the industry generally arising from price-matching by other fuels sellers. As such, the defendants submit, the risk of indeterminate liability and an indeterminate class of plaintiffs requires that a new duty of care not be recognized.

[75] The defendants also submit that allowing recovery in tort for pure economic loss in these circumstances could cause a "chill" on regulatory enforcement,

deterring government investigations out of a fear of the magnitude of financial risk that could arise from regulated businesses.

Pure Economic Loss

[76] Finally, the defendants argue that the circumstances do not support a conclusion that damages for pure economic loss are available in this case. *Hill*, they argue, did not establish an entitlement to damages for pure economic loss arising from negligent investigation. It dealt only with personal injury. The majority in *Hill* said at para. 90:

> To establish a cause of action in negligence, the plaintiff must show that he or she suffered compensable damage. Not all damage will justify recovery in negligence. Recovery is generally available for damage to person and property. On the other hand, debates have arisen, for example, about when an action in negligence may be brought for purely economic loss and psychological harm.

[77] *Hill*, it must be emphasized, did not establish an entitlement to damages for economic loss arising from negligent investigation because the issue was not dealt with. The damages in *Hill* were attributable to personal injuries. As such, *Hill* does not appear to say anything – one way or another – about the relationship of economic loss and proximity in a claim for negligent investigation. The relevant

case on this point remains *Design Services Ltd. v. Canada*, 2008 SCC 22, where the court set out the analysis to be applied in finding a duty of care in cases of claims of pure economic loss. Rothstein J., for the court, said at paras. 26-27:

> Proximity has generally been understood in the context of an overt act that directly causes physical loss to a plaintiff.... However, the notion of proximity has been extended to cover certain limited circumstances in which a defendant, without causing a plaintiff to suffer personal injury or property damage, did cause financial loss to the plaintiff. Further, Canadian law recognizes that new categories where a duty of care is recognized may be established by application of the analysis set out in *Anns*...
>
> However, as stated in *Childs*, at para. 15, before determining if a new duty of care should be recognized, it must first be determined whether the present situation fits within, or is analogous to, a relationship previously recognized as having a duty of care between the parties. If it does, a duty of care will be established. By first determining whether the situation fits within or is analogous to a previously recognized category, the analysis otherwise required by *Anns* is avoided.
>
> [Emphasis Added]

[78] It has been said that claims for pure economic loss are subject to special scrutiny. In *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, the court said at para. 18:

> Over time, the traditional rule was reconsidered. In [*Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189] and subsequent cases it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such

> damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits...

[79] There are several defined categories where recovery is available in tort for pure economic loss. Rothstein J. wrote, in *Design Services* at paras. 30-31:

> The appellants' costs and lost opportunity for profit were solely financial in nature. They were not causally connected to physical injury to their persons or physical damage to their property. As such, they qualify as pure economic losses...
>
> In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1049, La Forest J. recognized five different categories of negligence claims for which a duty of care has been found with respect to pure economic losses:
>
> 1. The Independent Liability of Statutory Public Authorities;
> 2. Negligent Misrepresentation;
> 3. Negligent Performance of a Service;
> 4. Negligent Supply of Shoddy Goods or Structures;

5. Relational Economic Loss.

> ... As explained in *Martel*, at para. 45: "The reason for the broader five categories is merely to provide greater structure to a diverse range of factual situations by grouping together cases that raise similar policy concerns. These categories are merely analytical tools."
>
> [Emphasis Added]

[80] The defendants note that the "Independent Liability of Statutory Public Authorities" has been interpreted as relating to cases where the authority in question has failed to confer an economic benefit, rather than cases where economic loss arises from regulatory inspection and investigation. As such, they argue, this category would not capture the circumstances in the present case.

2. Standard of Care

[81] The defendants submit that, should a duty of care be found to exist, the standard of care is that of a reasonable investigation. In *Hill* McLachlin C.J.C. said at para. 3:

> [T]he police owe a duty of care in negligence to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have

> acted.... The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect.

[82] The defendants suggest that, in setting limits on the potential liability of the police for negligent investigation, the majority in *Hill* signalled that "the police ought not to be judged too harshly in the conduct of their investigations", noting that, despite "numerous flaws" in the investigation, the standard of care was held not to have been breached in *Hill*.

[83] McLachlin, C.J.C., in discussing the existence of a duty of care, also commented on the standard of care at para. 44:

> ...[T]he standard of care is based on what a reasonable police officer would do in similar circumstances. The fact that funds are not unlimited is one of the circumstances that must be considered. Another circumstance that must be considered, however, is that the effective and responsible investigation of crime is one of the basic duties of the state, which cannot be abdicated. A standard of care that takes these two considerations into account will recognize what can reasonably be accomplished within a responsible and realistic financial framework.

[84] And at para. 50:

> The possibility of holding police civilly liable for negligent investigation does not require them to make judgments as to legal guilt or innocence before proceeding

> against a suspect. Police are required to weigh evidence to some extent in the course of an investigation.... But they are not required to evaluate evidence according to legal standards or to make legal judgments. That is the task of prosecutors, defence attorneys and judges. This distinction is properly reflected in the standard of care imposed, once a duty is recognized. The standard of care required to meet the duty is not that of a reasonable lawyer or judge, but that of a reasonable police officer. Where the police investigate a suspect reasonably, but lawyers, judges or prosecutors act unreasonably in the course of determining his legal guilt or innocence, then the police officer will have met the standard of care and cannot be held liable either for failing to perform the job of a lawyer, judge or prosecutor, or for the unreasonable conduct of other actors in the criminal justice system.

[85] And at para. 55:

> Recognizing a duty of care in negligence by police to suspects does not raise the standard required of the police from reasonable and probable grounds to some higher standard, as alleged. The requirement of reasonable and probable grounds for arrest and prosecution informs the standard of care applicable to some aspects of police work, such as arrest and prosecution, search and seizure, and the stopping of a motor vehicle. A flexible standard of care appropriate to the circumstances ... answers this concern.

[86] These comments give some indication as to how a standard of care for negligent investigation might be established. However, as the defendants themselves have argued in relation to the duty of care, the facts in *Hill* are very different from the facts in the present case. That said, the defendants are probably correct in submitting that the standard would be that of a reasonable inspector in the circumstances, which standard, they submit, was met. It is also necessary to consider the distinction between the actions of inspectors and those of prosecutors,

as the court in *Hill* distinguished between the actions of police officers and those of prosecutors. That said, it seems unreasonable to cut off any potential liability on the part of inspectors at the point where a prosecution commences in circumstances where the investigator remains closely involved with the prosecution. The facts of the case will establish the boundary between the potential negligence of the various figures involved.

Causation

[87] The defendants submit that the plaintiff must establish that any shortcomings in the defendants' investigation actually changed the outcome of the investigation, that is, "that it is more likely than not that the charges in question would never have been laid but for these flaws." Thus, "[i]f it can be shown that on the evidence before them, the Measurement Canada inspectors would still have had reasonable and probable grounds to lay charges and in fact would have done so, then the claim in negligent investigation would fail for lack of causation." The defendants submit that if the inspection was flawed, there were nevertheless reasonable and probable grounds to prosecute the plaintiff, and there is no causation.

[88] This appears to be a basic argument respecting causation. The authority cited is the dissent by Charron J. on the cross-appeal in *Hill* (described by the defendants as an opinion of the "minority," which in fact rejected the majority's view that a tort of negligent investigation exists in Canada). Charron J. said at para. 175:

> [I]f the civil standard for liability is to be "carefully tailored" so as to complement and not conflict with governing criminal standards, the presence of reasonable and probable grounds for laying the charge must constitute a bar to any civil liability. It cannot be sufficient for the plaintiff to show that identification techniques used by the police were substandard. Rather, it must be established that the identification process was so flawed that it destroyed the reasonable and probable grounds for laying the charge. It is only when this standard is met that the plaintiff can be said to have suffered, as McLachlin C.J. puts it "compensable damage that would not have occurred but for the police's negligent conduct" (para. 92).

MALICIOUS PROSECUTION

[89] The elements of the tort of malicious prosecution were set out in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, [1989] S.C.J. No. 86, where Lamer J. said at para. 42:

> There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:

> a) the proceedings must have been initiated by the defendant;
>
> b) the proceedings must have terminated in favour of the plaintiff;
>
> c) the absence of reasonable and probable cause;
>
> d) malice, or a primary purpose other than that of carrying the law into effect.

[90] The defendants concede that the proceedings were "initiated by the defendant" and that they "terminated in favour of the plaintiff," thus accepting that the first two elements of the tort are made out. The defendants dispute the last two elements of the tort.

Absence of Reasonable and Probable Cause

[91] With respect to the "absence of reasonable and probable cause," Lamer J. said in *Nelles* at paras. 43-44:

> ... Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably

> guilty of the crime imputed" (*Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.)
>
> This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.

[92] In *Proulx v. Quebec (A.G.)*, [2001] 3 S.C.R. 9, 2001 SCC 66, the majority commented on the requirement for reasonable and probable cause in the following terms at para. 31:

> To say that a prosecutor must be convinced beyond a reasonable doubt of an accused person's guilt before bringing charges is obviously incorrect. That is the ultimate question for the trier of fact, and not the prosecutor, to decide. However, in our opinion, the Crown must have sufficient evidence to believe that guilt *could* properly be proved beyond a reasonable doubt before reasonable and probable cause exists, and criminal proceedings can be initiated. A lower threshold for initiating prosecutions would be incompatible with the prosecutor's role as a public officer charged with ensuring justice is respected and pursued.... [Emphasis in original.]

[93] The defendant says the actions of Mr. Johnston and Mr. Bourdage should be considered in the same terms as a police officer, that is, with respect to actions they took up to the point charges were laid; after that, responsibility rests on the prosecutors. The defendants submit that the information gathered in the inspection gave rise to a "reasonably-held and honest belief that the Plaintiff was deliberately

under-calibrating its fuel dispensers, so as to under-deliver gasoline to the consumer."

Malice, or a Primary Purpose other than that of Carrying the Law into Effect

[94] Lamer J. stated in *Nelles* at para. 45 that "[t]he required element of malice is for all intents, the equivalent of 'improper purpose'. It has according to Fleming, a 'wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage.'..." The majority in *Proulx* stated at para. 35:

> ... [A] suit for malicious prosecution must be based on more than recklessness or gross negligence. Rather, it requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. In the civil law of Quebec, this is captured by the notion of "intentional fault". The key to a malicious prosecution is malice, but the concept of malice in this context includes prosecutorial conduct that is fueled by an "improper purpose" or, in the words of Lamer J. in *Nelles*, *supra*, a purpose "inconsistent with the status of 'minister of justice'" (pp. 193-94).

[95] The majority in *Proulx*, at paras. 37-45 went on to note various *indicia* of malice, including absence of reasonable and probable cause, ignoring the probable inadmissibility and lack of probative value of recorded communications, relying on tenuous identification evidence, manipulated testimony and conflict of interest.

The determination of whether malice existed will be based on "the totality of the circumstances."

Analysis:

A. Negligent Investigation:

(1) Did the defendants owe a duty of care to the plaintiff?

(a) Proximity:

[96] Obviously, the *Hill* case dealt with the duty of a police investigator and a particular suspect, and not with an inspector in a regulatory process, such as we have in the present case. However, as I stated earlier, there is clearly an analogy between a criminal investigation and an investigation under the Act. There is potentially a great deal at stake for the entity being investigated, in this case, Wilson Fuel. Not only are there stiff fines and imprisonment possibilities for its managing directors; but there are the business implications, depending on the nature of the charges. To argue that the Act is only a measure to protect consumers

is not entirely correct. The other side of the Act is to prosecute and provide for penalties, including imprisonment, for offenders. The Act, in this case, does not include a purpose or objectives section. It is in fact a double edged sword. The defendants concede that it was reasonably foreseeable that a negligent investigation, followed by the laying of charges, could result in some form of harm to Wilson Fuel.

[97] I find that there is "a sufficiently close relationship between the parties" or "proximity" to justify the imposition of a duty of care on the Defendants. I see no reason for distinguishing the *Hill* case from the present situation. In the present case, as in *Hill*, we are dealing with an investigator and particularized suspect, and not with any other relationships. The relationship, in the circumstances of this case, is one of investigator and suspect only. There would be a clear causal connection between a proven negligent investigation and certain types of losses or harm suffered by the subject of the investigation. I find that the first stage of the *Anns* test or analysis is satisfied in the present case.

(b) Residential Policy Considerations:

[98] The primary reasons advanced by the Defendants, on whom the burden rests, for denying a duty of care in the present are; first, that allowing the damages claimed would "open the flood gates" for new categories of indeterminate pure economic losses; and, second, that it would inhibit or put a "chill" on the work of investigators pursuing alleged offences under the Act. I am not satisfied that the Defendants have proven either of those reasons. In this case, as in *Hill*, we are only dealing with investigator and suspect, and no other parties. Claims by parties in other relationships would be subject to a "fresh *Anns* analysis, sensitive to the different considerations which might obtain". I reject the flood gates argument of the Defendants.

[99] I am not satisfied that imposing a duty of care in the present circumstances would inhibit or place a "chill" on regulatory investigations. The threat of civil action was looming large during the investigation and throughout the subsequent prosecution and it clearly had no such effect. All that investigators have to do is act reasonably and in good faith and they are immune or protected from negative consequences. Surely subjects have a right to expect reasonableness on the part of regulators and their investigators. I find no other policy considerations which

would dictate against the imposition of a duty of care toward the Plaintiff in the circumstances.

[100] I therefore find that the Defendants owed a duty of care to Plaintiff in this case.

(2) What is the standard of care?

The *Hill* case and other cases state the duty of care of an investigator quite simply as "measured against the standard of how a reasonable officer in like circumstances would have acted", that "the law . . . does not demand a perfect investigation". As far as the present case is concerned, the standard would be that of a reasonable inspector in the circumstances. *Hill* went on to say "the requirement of reasonable and probable grounds for arrest and prosecutions informs the standard". *Hill* also stated, "liable for negligent investigation does not require them (investigators) to make judgments as to legal guilt or innocence before proceeding against a suspect. Police (investigators)) are required to weigh evidence to some extent . . . But they are not required to evaluate evidence according to legal standards or to make legal judgments. That is the task of prosecutors, defence attorney's and judges".

(3) Did the Defendants breach the standard of care?

[101] Wilson Fuel contends that Measurement Canada inspectors made errors during the November 1998 sweep. It argues that, in certain instances, inspectors failed to accurately and faithfully follow the inspection procedures of Measurement Canada. There is no question that errors occurred; for example, some inspectors failed to do a "wet down" before performing the first in a series of tests, as stipulated in the guideline requirements. However, the evidence at trial revealed that such an error only affected the first in a series of tests and only by about 10 mL per 20 L test.

[102] Mr. Bourdage, who was the lead investigator, was particularly criticized by Wilson Fuel. He is accused of not having properly organized the sweep, in particular by not making sure the inspectors would carefully follow the test procedures stipulated in the guidelines. Mr. Bourdage has also been criticized for not taking more steps to ascertain the trust worthiness of the alleged informant, in particular, failing to contact this individual's employer to attempt to verify the allegation.

[103] Mr. Bourdage has been most severely criticized for his failure or refusal to "back off" on the charges in view of the extensive export reports and other information presented by Wilson Fuel prior to the January 2001 regulatory trial. Wilson Fuel argues that Mr. Bourdage ought to have known that it would be difficult to prove some of the out of tolerance (exceeding limit of error) charges because all experts appeared to be of the opinion that there was an uncertainty of at least 30 mL per 20 L test performed in the field. Wilson contends, that in view of all this information, it was negligent for Mr. Bourdage to want to proceed with the prosecution.

[104] As I stated earlier, there is little doubt that some of the out of tolerance charges would have been in some difficulty. Nevertheless, it must be remembered that those charges were not the core of what Mr. Bourdage and Measurement Canada were of the opinion that Wilson Fuel was doing in contravention of the Regulations. They held the belief that Wilson Fuel was intentionally setting its pumps to deliver in the negative and not targeting zero, thereby delivering less fuel that what was paid for by the customer. Although Measurement Canada never found any evidence that there was a deliberate scheme between Wilson Fuel and its calibrators to under deliver to customers, Measurement Canada remained of the

opinion that the negative settings were intentional and in violation of the Regulations. This was the main thrust of the investigation and of the prosecution's case. The fact some of the tests revealed that, in Measurement Canada's opinion, many pumps were out of tolerance, was viewed as but a by-product of what Measurement Canada believed were Wilson Fuel's violations of the Regulations; ie., intentionally setting pumps in the negative. Mr. Bourdage and the prosecutors were willing to face the challenges of proving their out of tolerance charges in court; however, their main thrust remained the alleged setting of pumps in the negative resulting in intentional under delivery to customers. Mr. Bourdage has remained of that opinion and belief throughout, including this trial. The question to be decided is, were there reasonable and probable grounds for Mr. Bourdage and other officials of Measurement Canada to hold that belief?

[105] When one looks at all the evidence and circumstances of this case it would be difficult to conclude that Mr. Bourdage, Mr. Johnston and Measurement Canada's belief was not and could not be reasonably held. We start off with the information provided by the alleged informant and compare that with the results of the Whycocomagh inspection in September of 1998. Then we have the inspection results of the sweep in November 1998. That is followed by the information

obtained during the search in March 1998, namely the copies of Mr. MacAskill's calibration records (See Ex. D-6) spanning a period of almost one year, showing readings consistently set in the negative, some outside of tolerance.

[106] The expert reports and other information provided by Wilson Fuel prior to the trial in January of 2001 were not only reviewed by Mr. Bourdage and Mr. Johnston, but they were also reviewed by Measurement Canada expert staff in Ottawa. Moreover, all this was reviewed by prosecutors, who remained of the opinion that the prosecution was well founded and that it should go ahead.

[107] While there were undoubtedly some errors made and the investigation and the prosecution were not perfect, I am unable to say that Mr. Bourdage, Mr. Johnston and Measurement Canada were negligent in their roles in the investigation and the prosecution, such that it would attract civil liability. Perfection was not achieved, as it usually never is; however, I find that the Defendants did not breach the duty and the standard of care which they owed to Wilson Fuel. I am satisfied that the Defendants had an honest and reasonably held belief in the allegations made against Wilsons Fuel.

B. Malicious Prosecution:

(1) and (2) Did the Defendants have reasonable and probable cause to investigate and prosecute the Plalintiff?

[108] I will not repeat the analysis performed with regard to Negligent Investigation. It is obvious and apparent from that analysis that I am satisfied the Defendants had reasonable and probable grounds to investigate the Plaintiff. The question that remains to be decided is whether Wilson Fuel has proven that it was investigated and prosecuted out of malice, or improper purpose or motive, other than that of carrying the law into effect.

(3) Did the Defendants investigate and prosecute the Plaintiff out of malice, or improper purpose or motive?

[109] I will start off by saying that one can understand Wilson Fuel's frustration in this whole drawn out affair. Wilson Fuel has remained steadfast in its assertion and belief that it was not intentionally doing anything wrong. It believed it could convince Measurement Canada that its hypothesis was wrong. When that did not happen, it concluded that there must be another reason it had been investigated so extensively, and ultimately prosecuted by Measurement Canada.

[110] Wilson Fuel has contended throughout that Mr. Bourdage's actions were unreasonable in view of "the total lack of evidence" of its guilt, and, "more importantly, the great amount of exculpatory evidence that was provided to him before the case went to trial". This position is addressing itself directly at element c) as quoted earlier from para. 42 of Lamer J.'s judgment in *Nelles*. As stated earlier, the Defendants take no issue with elements a) and b) of the above quoted para. 42 of the *Nelles* decision; and I have found, in my analysis on Negligent Investigation, that the Defendants had "reasonable and probable cause" to investigate and prosecute Wilson Fuel. Therefore the only question that remains is whether this was instigated and pursued by the Defendants out of malice, or for a primary purpose other than that of carrying the law into effect.

[111] Wilson Fuel's theory appears to be that the Defendants investigated and prosecuted it because of its criticisms of Industry Canada and Measurement Canada because Automatic Temperature Compensation (ATC), for use in the retail sale of gasoline and diesel fuel, was being sanctioned in Canada. Wilson Fuel, Mr. Collins in particular, was very vocal in the criticism of the use of ATC in the retail fuel business. Wilson Fuel was of the view that, because of the average

ambient temperature in Canada, the consumer would get less for his money and that the use of ATC amounted to a price increase for the oil companies. Mr. Collins' opposition to the use of ATC received widespread publicity in the media, including coverage on the national television show, "Market Place". A great number of the media reports were placed in evidence at this trial (se Ex. P-5). Wilson fuel surmised that it may have been targeted by Measurement Canada because of its stand on the use of ATC and that the investigation and the prosecution were initiated maliciously, or for an improper purpose other than that of carrying the law into effect.

[112] Mr. Bourdage and Mr. Johnston both testified that they were not aware of Wilson Fuel's stand on the use of ATC or the publicity which it was creating. Mr. Johnston had no knowledge of Mr. Collins' involvement with Wilson Fuel, although he was aware of Mr. Collins' involvement with the Independent Retail Gasoline Dealers Association. Mr. Bourdage testified that he was not aware of Wilson Fuel's involvement in the ATC controversy, or in fact the location and number of retail gasoline outlets owned or operated by Wilson Fuel prior to the November 1998 sweep.

[113] Wilson Fuel suspected that someone from Measurement Canada had “tipped off” the media to be present at the court house on the day it was arraigned on the charges. In order to avoid media attention, Wilson Fuel had taken steps to have its lawyers arrange for the arraignment when court was not otherwise sitting. Nevertheless, some members of the media did view the court docket for that day, and although none were present at the arraignment, the allegations were reported on the suppertime T.V. news that same day. Wilson Fuel would have the court draw an inference that this is evidence of malice on the part of Measurement Canada. However, the evidence did not support such an inference and it appears that the media became aware of the charges through its routine regular view of court dockets.

[114] Wilson Fuel also contends the large number of charges and counts in the Information laid before the Provincial Court is evidence the Measurement Canada was “throwing the book” at it in order “to bring it to its knees”. However, it must be remembered that Mr. Bourdage testified he decided to group the counts by retail site rather than individual pumping equipment in order to reduce the number of counts. It should also be noted that it was Mr. Bourdage who objected to the

possibility of proceeding with fraud under the **Criminal Code**, when this was suggested by prosecutors.

[115] Likewise, I am not satisfied that the inaccuracies contained in the Information to Obtain the search warrant were the result of a malicious intent as opposed to a zealous investigation fuelled by an honestly and reasonably held belief of wrongdoing.

[116] As I stated earlier, the investigators, supported by the opinions of the prosecutors, had reasonable and probable cause to launch the investigation and to follow the theory which they honestly believed could be made out in a court of law. The fact that the prosecution failed, primarily on what the prosecutors viewed as a “technicality”, does little to bolster Wilson Fuel’s claim of malicious prosecution. Likewise, Mr. Johnston’s actions during the appeal process, some of which he has admitted were ill advised, do not convince me that Measurement was operating out of malicious intent. In fact, Mr. Johnston’s primary goal was to restore relations between Wilsons Fuel and Measurement Canada and abandon the appeal.

[117] In the final analysis, on "the totality of the circumstances, Wilson Fuel has failed to satisfy me, on a balance of probabilities, that it was targeted by the Defendants out of malicious intent or for an improper purpose.

Damages:

[118] In view of my findings and rulings on liability and the claims for Negligent Investigation and Malicious Prosecution, it is not necessary for me to decide the issue of damages or the questions of Causation and Pure Economic Loss. However, a great deal of evidence was presented on these issues.

Conclusion:

[119] In the result, I dismiss Wilson Fuel's claims for Negligent Investigation and Malicious Prosecution.

[120] The issue of costs was not argued before me, and, if the parties cannot agree, I will hear them on this question at a mutually convenient time.

[121] An order will follow, prepared accordingly by the Defendants, and consented as to form to by the parties.

Boudreau J.