Citation: *R. v. Smith*, 2021 YKTC 26

Date: 20210318
Docket: 19-06041
Registry: Whitehorse
Heard: Haines Junction

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

MOREY SMITH

Appearances:
Megan Seiling — Counsel for the Territorial Crown
Morey Smith — Appearing on his own behalf

REASONS FOR JUDGMENT AND REASONS FOR SENTENCE

[1] CHISHOLM C.J.T.C. (Oral): Mr. Morey Smith is charged under s. 39(a) of the *Forest Resources Act*, S.Y. 2008, c. 15 (the *"Act")*. The section reads that:

> 39 A person must not
>
> (a) knowingly make a false or misleading statement to a forest officer who is acting under this Act…

[2] The Territorial Crown called two witnesses and Mr. Smith testified in his own defence.

[3] The first Crown witness was Bryan Levia, now retired, who was a senior Natural Resources officer at the time that this allegation arose. Pursuant to his position, he was

also designated as a Forest Resources officer. He testified that he has known Mr. Smith professionally for approximately six years. He was aware in 2018 and 2019, that Mr. Smith was a logger and that he held a permit under the *Act* authorizing the harvesting of forest resources. The cutting permit was under the name of, as I understand it, Luckey-Rose Wood Development, run by Mr. Smith.

[4] Mr. Levia testified that he is familiar with the area east of Marshall Creek, for which Mr. Smith holds his cutting permit, as he has attended there many times over the previous years. He indicated that the minimum amount of annual harvesting was 5 cubic metres. The reporting period is once per year. There is evidence before me that 5 cubic metres is approximately 2.2 cords of wood.

[5] Mr. Levia recounted that on August 13, 2019, he met Mr. Smith in person and received his Annual Harvest Summary form (the "Summary"). The Summary indicated that Mr. Smith had completed no harvesting during the year.

[6] Mr. Levia spoke to his colleagues and to management and on October 9, 2019, he sent Mr. Smith a notice of non-compliance. The notice requested Mr. Smith to complete the required 5 cubic metres of harvesting of wood by December 16, 2019. Ultimately, Mr. Smith submitted a revised Summary.

[7] On October 24, 2019, Mr. Levia received the revised Summary indicating that Mr. Smith cut 2.265 cubic metres in October 2018, and 2.735 cubic metres in December 2018.

[8] The revised document raised concerns, according to Mr. Levia, and, as a result, he conducted an inspection on October 31, 2019. He testified to performing a grid pattern examination of the property to determine if there was any sign of recent cutting and found none. He looked for stumps, treetops, and trails. He indicated there was no snow on the ground and his view of the property was not obscured in any way. He spent between two and one-half to three hours on the property.

[9] Mr. Levia also testified that 5 cubic metres of wood is a fairly substantial volume to cut and harvest. Since he did not find an area with signs of cutting, he gave Mr. Smith the opportunity to show him where the cutting took place. He made this offer by letter, but Mr. Smith did not take him up on the offer.

[10] Mr. Levia again attended the property of Mr. Smith on December 17, 2019, for another viewing. Again, there were no signs of any wood harvesting. He spent approximately one hour on the property. He indicated that there was some snow on the ground at that time.

[11] Mr. Levia issued a ticket to Mr. Smith in January 2020.

[12] He did say that it was possible that Mr. Smith might have removed 5 cubic metres of non-merchantable wood but it was unlikely. Mr. Levia also indicated he believed that he would have seen evidence of that movement of wood.

[13] The second witness to testify for the Crown was Owen MacKinnon, who is also a Forest Resources officer. Mr. Levia testified that he accompanied Mr. Levia on his second visit to Mr. Smith's property in December 2019. There were no signs of recent

cutting and no markings of equipment, no indication of burnt brush, no clearings, and no signs of cutting of merchantable or non-merchantable wood. He agreed in cross-examination that it was possible that he would have seen no signs of cutting of wood that had been cut the previous year, although he thought that it was unlikely, and that there would be still some signs of such activity.

[14] Mr. Smith testified. He gave a history in terms of how he applied for and ultimately received a cutting permit. He talked about his projects involving the Jackson Lake Healing Camp.

[15] With respect to the matter before the Court, Mr. Smith indicated that when he submitted the Summary on August 13, 2019, he made a clerical error because it was the first time that he had completed the Summary in this fashion. As I understood his evidence, annual harvest summaries had previously been done on a quarterly basis and, at that point in time, he did not have an obligation to cut a certain amount of wood in each quarter or annually. This was the first time that he was so obliged. Mr. Smith indicated that he made a mistake in filling in the months with zeros and, as a result of that, he submitted a revised Summary on October 22, 2019, that I have already spoken about.

[16] Mr. Smith indicated that in the lead up to the matter before the Court, over the years, there had been a lot of cutting that took place on the woodlot and he talked about that cutting happening as early as 1998 and into the early 2000s, and that wood was cut by others, some of it was taken, some of it was left, and he said that it was easy to actually harvest two cords in a fairly short period of time.

[17] Mr. Smith also indicated that in October and December 2018, as he indicated in his revised Summary, he did, in fact, harvest non-merchantable wood, wood that had been, as I understood his evidence, on the ground for years and some of which, as he pointed out, on the bottom would have been mossy and rotten to a certain extent, but it was still worth harvesting, not for sale, but to give away, and for personal use.

[18] Mr. Smith said that he kept some of the wood. As I understood his evidence, he kept two cords, and he gave two cords to the Mountain View Restaurant. This occurred when the ground was frozen in October and December 2018. He said that there may be 20 cords of wood strewn about on his property.

[19] And, again, Mr. Smith indicated that the initial Summary that he completed was an administrative error.

[20] Mr. Smith did agree in cross-examination that he was aware that he had to harvest wood according to his permit, but he did have a desire to preserve wood for the job training program that he is trying to put together. He agreed that he had made two requests for amendments to his permit, as I understood it, both being in 2018, and he had been denied those amendment requests. The amendments would have allowed, if they had been granted, for him not to have to harvest wood. Yet, despite knowing this prior to filling out and completing his Summary on August 13, 2019, despite knowing that he had been denied these amendment requests, he still indicated that he had harvested no wood in the annual period.

[21] That is the summary of the evidence.

[22] The question before me is a factual one. I have to look at the issue of whether or not I accept the evidence of Mr. Smith and whether it raises a doubt in this case.

[23] The Crown pointed out that this is a strict liability offence and that it really is an *actus reus* offence but there is the mental component, the *mens rea*, "of knowingly", as set out in the section with which Mr. Smith is charged, and as interpreted by *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

[24] I have considered the evidence that has been presented by Mr. Smith and his explanation for what occurred. I do have a couple of concerns.

[25] One of the concerns, as has been argued by the Crown, is that it seems strange to me that in the situation that Mr. Smith was in at the time — considering that he had been denied requests to amend his permit so that he would not have to harvest wood, and that he had been denied on two occasions prior to filling out the Summary on August 13, 2019 — that he would have made a clerical or administrative error, especially on a form where he had to indicate, in a number of areas, that he had harvested no wood over the period of the reporting year.

[26] The other thing that he did indicate was that the ground was frozen at the time that he did the harvesting in October and December 2018. It would seem to me to be a difficult process to be harvesting wood that had been felled and was lying on the ground for, in some cases, between 15 and 20 years; to try to remove it at that time of the year, and to be able to easily transport it, to move it by hand, and accumulate the amount of wood that was required.

[27] I have some difficulty with his evidence in both those regards.

[28] The question for me, at the end of the day, is whether or not the Crown has proved its case beyond a reasonable doubt. In this case, based on the issues that I have raised, and based on the consistent testimony that was received by the two officers, in my view, the Crown has proved that the Summary in question was, at the very least — I do not question that Mr. Smith may have harvested some wood during the year allowed period — I find that he did not harvest the requisite amount of wood as required by his permit.

[29] In my view, the Crown has proved that Mr. Smith made, at least, a misleading statement to a forest officer under the *Act*, and, as a result of that, I find him guilty.

[30] I have not dealt with the *Charter* argument that has been put before the Court. I think it was fairly raised by Ms. Seiling. Mr. Smith, I think that you should thank her for that. This was a situation — in brief, we have talked about it today already so I am not going to go over too much detail — but, as I understand it, when Mr. Smith received his ticket — because I am assuming, based on the evidence, that because relations between him and the Forest Resources officers were not the best, they decided to bring along RCMP officers — both Mr. Levia and one of the RCMP officers believed that they had the right to detain Mr. Smith. The Crown concedes that that was a breach of his *Charter* rights and I understand the Crown is referring specifically to s. 9, that he was arbitrarily detained.

[31] Mr. Smith was not detained in the sense that he was handcuffed, or that he was taken from the area where they met, but it did result in them asking for his identification,

and engaging him in what was likely a conversation that was not very pleasant for any of the parties for a period of 20 to 30 minutes.

[32] At the end of the day, although there is a breach, nothing truly flows from the breach. Usually, Mr. Smith, what happens when there is a *Charter* breach is that under another section of the *Charter*, s. 24(2), the evidence can be excluded or the Court can decide not to exclude it. The Court looks at things such as the seriousness of the *Charter*-infringing state conduct, the impact on the *Charter*-protected interests of the accused, and society's interest in an adjudication of the matter on its merits.

[33] In this case, nothing flowed from the breach — but there was a breach — and I think that it does not rise to the level of issuing a stay of proceedings because I do not find that it was the most serious in nature because of the reasons that I have touched upon: that there was no arrest; that you were not touched in any way; and that, ultimately, the ticket was left on your windshield and the officers left. What it amounted to was you staying there for a period of time with them and having a conversation, even though, as I pointed out, it might not have been the most comfortable of conversations.

[34] In the final analysis, I think that the breach, you should benefit from that in terms of the fine you receive for this offence.

[35] In terms of the fine, my recollection is that is in the amount of $200; is that right?

[36] MS. SEILING: Yes, the ticket amount is $200, with a $30 fine surcharge, so $230 in total.

[DISCUSSIONS]

[37] THE COURT: I am not going to go there. I understand your point. You do not think that there should be any fine and that it should be zero dollars.

[38] What I am going to do, in all the circumstances, based on the facts and based on the *Charter* breach, I am going to impose a fine of $100 and a $15 surcharge, and allow you six months' time to pay.

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CHISHOLM C.J.T.C.