Citation: *R. v. Palma*, 2022 YKTC 16

Date: 20220406
Docket: 19-04005
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

MICHELE PALMA AND
DAWSON GROUP OF COMPANIES LTD.

Appearances:
Kelly McGill — Counsel for the Territorial Crown
Michele Palma — Appearing on his own behalf and on behalf of Dawson Group of Companies Ltd.

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Michele Palma is facing two counts of failing to comply with Dangerous Wildlife Protection Orders contrary to s. 93(8) of the *Wildlife Act*, RSY 2002, c. 229 (the *"Act")*. The charges involve two orders issued to Mr. Palma, firstly, in relation to an industrial property located at 23 Boulder Rd. in the Macrae Subdivision (the "Boulder Property") and, secondly, in relation to a residential property situated at 118 Esker Drive in the Whitehorse Copper Subdivision (the "Esker Property"). Both properties fall within the Whitehorse City limits. The corporate defendant, Dawson Group of Companies Ltd. ("DGC") stands co-accused in relation to both properties, but Crown has proceeded against DGC in relation to the Boulder

Property only. Not guilty pleas have been entered to all counts. At trial, Mr. Palma represented both himself and DGC.

[2] Trial evidence for the Crown consisted of various documents, photographs, and *viva voce* testimony from three witnesses, Conservation Officer ("CO") Matthew Hall, CO Aaron Koss-Young, and Natural Resource Officer ("NRO") Corey Mackie. Mr. Palma filed four copies of an aerial photograph of the Boulder Property that he asked each of the witnesses to highlight, including the one witness called by the defence, Joszef Suska.

Facts

[3] The facts are relatively straightforward.

Boulder Property

[4] On July 5, 2018, CO Hall and CO Koss-Young attended at the Macrae Subdivision in response to a public complaint of bears acting aggressively in the area. Investigation led them to the Boulder Property. The officers entered onto the property to make an inspection pursuant to their authority under s. 93(5) of the *Act*.

[5] The officers noted that the large property was akin to a scrapyard, housing a large number of damaged vehicles. In addition, the officers observed a significant number of plastic jugs full of a brownish liquid consistent with cooking oil. Some of the jugs were stored in vehicles with open windows. There were patches of contaminated soil apparently saturated with the oil. The officers also observed some buckets containing food waste.

[6] Most importantly, for these proceedings, there was evidence of significant bear activity in the area, specifically containers torn open with visible puncture and bite marks. A distinct trail of oily bear tracks was observed from the property into the woods on the right-of-way adjacent to the western boundary of the Boulder Property. In the woods, at the end of the trail, the officers discovered at least 100 of the jugs and buckets of rancid food waste, with evidence that bears had been feeding on the contents.

[7] While in the Macrae area, the officers spoke to City of Whitehorse Bylaw Officer White who came to the Boulder Property. Officer White advised them that he believed the property to be owned by Mr. Palma.

[8] The officers believed that bears accessing the attractants on the Boulder Property created a public safety issue. They set up a trap in the center of the property. At 9:00 p.m. on the evening of July 5, 2018, the officers returned to the Boulder Property to check on the bear trap. They observed a black bear walking down the right-of-way and onto the property. The bear walked past the bear trap and went to a pick-up truck, where the bear climbed into the truck bed and grabbed a jug of oil that it carried back into the woods on the right-of-way. The officers followed the bear, where they observed it to be feeding on the oil. As the bear was unbothered by the presence of humans, the officers determined the bear to be food conditioned and habituated to people, requiring it to be put down.

[9] CO Hall shot the bear, and the officers carried the bear to their vehicle. In so doing, they noted it to be difficult to get a grip on the bear as the fur was saturated with oil, indicating that the bear had clearly been visiting the site for some time.

[10] On the morning of July 6, 2018, CO Koss-Young returned to the Boulder Property and found another black bear in the trap. He contacted CO Hall who met him at the Conservation Services Office on Burns Road, where CO Koss-Young had transported the bear in the trap. The officers took the bear out of town where CO Hall shot it.

[11] Later on July 6, CO Koss-Young had a meeting with three Natural Resource Officers, including NRO Mackie. They advised CO Koss-Young that the Boulder Property was under an agreement for sale between DGC and the Yukon Lands Branch. They further advised CO Koss-Young that Mr. Palma was a Director of DGC, and that NRO Mackie had issued an Environmental Protection Order to DGC regarding environmental deficiencies on the Boulder Property. CO Koss-Young obtained a copy of the agreement for sale and documents showing that Mr. Palma was a Director of DGC.

[12] CO Koss-Young contacted Mr. Palma by telephone, using a number obtained from Bylaw Services, and arranged to meet with him at the Conservation Services Office on July 6, 2018. CO Koss-Young and CO Hall met with Mr. Palma to discuss the bear attractant issue. CO Hall issued Mr. Palma a Dangerous Wildlife Protection Order requiring removal of the “containers of used cooking oil and any food waste, as well as any oil contaminated soil” from the Boulder Property by 3:00 p.m. on July 16, 2018.

[13] On July 9, 2018, CO Koss-Young went to the Boulder Property to inspect progress on the Order. He noted work had been initiated, but empty containers with residue had been thrown into old vehicles and oil was leaking into upholstery, creating another attractant issue. CO Koss-Young relayed this information to CO Hall who called Mr. Palma and advised him that the containers had to be removed from the property because of residue.

[14] CO Koss-Young returned to the Boulder Property on July 10, 2018. He found workers on site to be noticeably afraid, as there had been two bears on the property. CO Koss-Young was able to shoot one brown coloured black bear, but could not safely shoot the second.

[15] On July 16, 2018, CO Hall went to the Boulder Property to check on progress given the 3:00 p.m. deadline. He observed that the empty jugs were still there, though he confirmed the information received from CO Koss-Young that they had been picked up and put into vehicles. Metal drums were on site in an apparent effort to burn the oil, and the contaminated soil was still present.

[16] On July 17, 2018, CO Hall returned to the Boulder Property to see if the Order had been complied with. He noted attractants were still present on the property including jugs with trace amounts of the oil, metal drums seeping oil, and contaminated soil.

[17] On July 24, 2018, CO Hall called Mr. Palma and informed him that the Order had not been complied with, and the attractants still needed to be removed.

[18] On July 27, 2018, CO Hall returned to the Boulder Property, and noted that all of the attractants were still on site.

[19] On September 6, 2018, CO Koss-Young and CO Hall returned to the Boulder Property in response to a report of a grizzly sow and cub in the area. They located the bears on the Boulder Property feeding on grease dripping from the barrels. The officers determined that the bears were not yet food conditioned. They were able to capture both mother and cub safely, and translocate them to another area 100 kms away.

Esker Property

[20] On August 8, 2018, CO Koss-Young responded to a call through the Turn in Poachers or TIPPS Hotline reporting an aggressive black bear in the residential area of Whitehorse Copper Subdivision, which is located on the opposite side of the Alaska Highway from the Macrae Subdivision.

[21] CO Koss-Young went door to door in the area to get information. He came across the Esker Property where he observed a thin-walled rickety trailer that had been torn open. He observed the same plastic jugs of cooking oil as had been found on the Boulder Property strewn across the back yard of the Esker Property. There was evidence that bears had fed on the jugs, including bite marks. Oil had soaked into the soil around the trailer. A 1000-litre container of amber fluid believed to be cooking oil was located in the back of a pick-up truck on the property.

[22] CO Koss-Young went to the Land Title Office and determined that Mr. Palma was on title as owner of the Esker Property. On August 14, 2018, CO Koss-Young

issued a Dangerous Wildlife Protection Order to Mr. Palma requiring removal of the "empty and full containers of used cooking oil as well as soil contaminated with cooking oil to a licenced solid waste facility" by 10:00 a.m. on August 21, 2018.

[23] CO Koss-Young returned to the Esker Property on August 21 to check on compliance. He found that all of the containers had been removed as required, but there had been no attempt to remove the contaminated soil, which remained exactly the same with no indication that the vegetation had been disturbed.

Issues

[24] The regulatory offences before the Court fall within the category of strict liability offences. Per the Supreme Court of Canada decision in *R. v. Sault St. Marie*, [1978] 2 S.C.R. 1299, for strict liability offences the Crown need only prove that the act was committed by the defendants. They need not prove the mental element of *mens rea* or wrongful intent. Once the act is proven, the burden shifts to the defendants to establish the defence of due diligence, meaning that all due care was taken to avoid the commission of the offence.

[25] In this case, while the evidence indicates some steps taken towards compliance on both properties, particularly the Esker Property, Mr. Palma has not advanced a due diligence defence, either on his own behalf or that of DGC. Accordingly, the ultimate issue to be determined is whether the Crown has met its burden of proving the commission of the offences beyond a reasonable doubt.

The Law

[26] In terms of the applicable legal framework, s. 93(7) of the *Act* provides for the issuance of dangerous wildlife protection orders as follows:

> If a conservation officer believes on reasonable grounds that the existence or location of an attractant in, on or about any building or other place, poses a risk to the safety of any person because the attractant is attracting or could attract dangerous wildlife to the building or place, the conservation officer may issue a dangerous wildlife protection order directing an owner, occupier or person in charge of that building or place to contain, move or remove the attractant within a reasonable period of time specified in the order.

[27] Subsection 93(8) of the *Act* requires "A person to whom an order under subsection (7) is expressed to apply shall comply with an order within the period of time specified in the order".

[28] Section 157(1) of the *Act* provides that "A person who contravenes any provision of this Act is guilty of an offence". Accordingly, failure to comply with an order issued under s. 93(7), within the time frame required per s. 93(8), constitutes an offence.

[29] Based on this legal framework, the Crown must prove the following essential elements to prove the commission of the offence:

1. The existence of an attractant on or about the two properties;

2. Whether the officers had reasonable grounds to believe that the attractant posed a risk to public safety because it was attracting or could attract dangerous wildlife;

3. That the defendants were owners, occupiers, or persons in charge of the properties in question;

4. That Dangerous Wildlife Protection Orders were issued to the defendants; and

5. That the defendants failed to comply with the Orders within the time specified in the Orders.

Existence of Attractants

[30] Dealing with the first essential element, the existence of attractants, the starting point is the definition of what constitutes an attractant. Section 93(1) of the *Act* defines an attractant as “food, food waste, compost, garbage or other substances that could attract dangerous wildlife”.

[31] In this case, there is absolutely no doubt regarding the existence of attractants.

[32] With respect to the Boulder Property, both CO Hall and CO Koss-Young testified to observing buckets of rancid food waste and jugs of what they believed to be used cooking oil. Both the jugs and buckets are readily visible in the photographs filed as Exhibit 1. The rancid food waste clearly meets the definition of attractant set out in the *Act*.

[33] In terms of identifying the liquid substance contained in the jugs, CO Hall testified that he believed it to be used cooking oil based on the colour, viscosity, and, most importantly the smell, which he described as smelling like a greasy fast-food restaurant. NRO Mackie was on site numerous times between July 2017 and into November 2018.

While his observations were not specific to the time period at issue, it is notable that he, too, observed hundreds of jugs of oil, and was able to testify that some of the jugs were labelled as “kitchen bio grease”.

[34] Mr. Palma’s sole witness, Mr. Suska, admitted to storing the jugs on or about both properties, and identified the substance as vegetable oil that he was storing with a view to converting it to bio diesel to use as fuel. While there were obvious concerns identified with Mr. Suska’s credibility, there is no reason to disbelieve him on this particular point, as his evidence regarding the nature of the liquid substance is entirely consistent with the observations of the officers.

[35] Based on this evidence, I am satisfied that the oil contained in the jugs and soaked into the soil would also meet the definition of attractant in the *Act*.

[36] The sole issue in dispute regarding the existence of attractants and the Boulder Property is Mr. Palma’s assertion that the Crown has failed to prove that the attractants were located within the boundaries of the Boulder Property.

[37] There is contradictory evidence on this point. Mr. Palma asked each of the four witnesses to mark where the attractants were located on the aerial photos he provided. Exhibits 12 through 14 show the locations as marked by the Crown’s three witnesses. Exhibit 15 shows the locations as marked by Mr. Suska.

[38] All four witnesses marked a wooded area directly adjacent to the Boulder Property. This is the area where CO Hall shot the first black bear. It is seen in photograph 8, in Exhibit 1, and the first photograph in Exhibit 2, depicting the black bear

after it was killed. This was referred to by several witnesses as the right-of-way and by Mr. Suska as the laneway. The evidence was clear that this area did not fall within the boundaries of the Boulder Property.

[39] All three of the Crown's witnesses marked other areas clearly falling within the boundaries of the Boulder Property. Mr. Suska marked only areas outside of the property boundaries. He testified that he stored all of the oil on the laneway so that it was close to the road for transport to the facility where it would be converted to bio diesel.

[40] In resolving this conflict on the evidence, as noted, there were significant concerns raised with respect to Mr. Suska's credibility. Specifically, the Crown ask Mr. Suska about his involvement in litigation in British Columbia in 2009 when he was the ringleader of a group sued by Insurance Corporation of British Columbia (ICBC) for fraud and conspiracy. Mr. Suska agreed that in the course of that litigation he admitted to lying under oath in a discovery and that he would do so again. He further admitted that he would lie to save himself, as everyone lies. Given that Mr. Suska not only sees nothing wrong with lying under oath, but that he admits to actually having done so in the past, his evidence must be seen as suspect and treated with extreme caution save and except where it is corroborated by other evidence.

[41] With respect to the location of the jugs of oil, I simply do not believe Mr. Suska's evidence that it was stored only on the laneway adjacent to the property outside of the Boulder Property boundaries. Not only is this evidence contradicted by all three enforcement officers, but it is inconsistent with the photographic evidence.

[42] Even if I did believe Mr. Suska's evidence on this point, however, it would not in my view amount to a defence. Section 93(7) of the *Act* refers to attractants located "in, on, or about any building or place" [emphasis added]. I am satisfied that attractants stored directly adjacent to a property but outside property boundaries would fall within the definition of "about a place".

[43] With respect to the Esker Property, CO Koss-Young testified to observing jugs scattered about the Esker Property along with a large container of what appeared to be oil. Photographs depicting same were filed as Exhibit 8. As the jugs observed in the photographs are identical to those observed on and about the Boulder Property, it is logical that they and the large tank would contain the same substance. Furthermore, Mr. Suska did testify that they were indeed the same substance that an employee had left on the Esker Property in error. Although Mr. Suska's credibility is of concern, the supporting evidence is enough to persuade me that his evidence can be accepted on this point.

[44] Thus, I am satisfied that the liquid substance observed on the Esker Property also meets the definition of attractant as set out in the *Act*.

Reasonable Grounds to Believe

[45] Turning next to the essential element of whether there were reasonable grounds to believe the location of the attractant posed a safety risk to any person because it was attracting or would attract dangerous wildlife, it must be remembered that this element requires proof of reasonable grounds to believe not proof beyond a reasonable doubt.

[46] In my view there is more than enough evidence in this case to establish reasonable grounds to believe that the location of the attractant posed a safety risk by attracting dangerous wildlife to the two properties.

[47] Section 93(1) of the *Act* defines dangerous wildlife as a “grizzly bear, black bear, polar bear, cougar, coyote, fox or wolf”.

[48] With respect to the Boulder Property, the evidence indicated that the Macrae Subdivision included residential properties as well as industrial or commercial properties. CO Hall and CO Koss-Young were advised that there were children living in the area. They were further advised that bears were seen in the area acting aggressively, including “bluff charging” at people, meaning charging without actual contact. While hearsay, this evidence can properly be considered as part of the officers’ reasonable grounds.

[49] In addition to what the officers learned from others in the area, the officers observed evidence of bears feeding on the cooking oil including bite marks on several of the jugs. They were also able to observe a number of bears accessing the Boulder Property, both through trail cameras CO Koss-Young installed and directly when attending to inspect the Boulder Property.

[50] With respect to the trail cameras, CO Koss-Young testified that he observed footage taken on July 5 and July 6, 2018, showing five separate black bears accessing the Boulder Property.

[51] In terms of direct experience, both conservation officers observed the first black bear shot by CO Hall. They observed the bear to go directly to a pick-up truck on the property where the bear grabbed one of the jugs of cooking oil and took it to the area on the right-of-way for feeding. The bear exhibited no concern with respect to the presence of the officers. Once killed, the officers noted the bear's fur to be saturated with oil. All of this makes it clear that the bear was not only attracted to the cooking oil, but that he had been accessing the property to feed on the cooking oil for some time.

[52] Photograph 9, in Exhibit 1, shows a well-defined trail between the Boulder Property and the right-of-way, on which the officers observed greasy bear paw prints.

[53] The evidence establishes that two additional black bears were located on the Boulder Property and ultimately put down in July 2018. A grizzly sow and cub were found feeding on the property in September 2018. Fortunately, the lack of evidence that the grizzlies were food conditioned as a result of the oil on the property meant that mother and cub could be successfully relocated rather than put down.

[54] There is overwhelming evidence to support a finding that bears were being attracted to the Boulder Property because of the cooking oil. Given the hearsay evidence that bears were acting aggressively in the Macrae Subdivision, an area that included residential properties and children, I am satisfied the officer's belief that the location of the attractants posed a safety risk was objectively reasonable in all the circumstances.

[55] With respect to the Esker Property, the evidence, while not as overwhelming, nonetheless, supports a finding that CO Koss-Young did have reasonable grounds to

believe that the location of the attractants on the Esker Property posed a safety risk to people residing in the Whitehorse Copper Subdivision. CO Koss-Young received a complaint of a black bear acting aggressively in the area. He observed evidence that bears had been feeding on the oil in the form of bite marks on the jugs located on the Esker Property. This evidence certainly supports a finding that there were reasonable grounds to believe that bears were attracted to the oil, and the report of a bear acting aggressively in a residential subdivision supports a finding that there were reasonable grounds to believe that the presence of the attractant posed a public safety risk.

Orders Issued to the Defendants

[56] Though somewhat out of order, I will turn next to the issue of whether the Crown has proven that the dangerous wildlife protection orders were issued to the defendants.

[57] With respect to the Boulder Property, both CO Hall and CO Koss-Young testified that a dangerous wildlife protection order was issued to Mr. Palma on July 6, 2018. A copy of the Order was filed as Exhibit 3 in these proceedings.

[58] Similarly, with respect to the Esker Property, CO Koss-Young testified that a dangerous wildlife protection order was issued to Mr. Palma on August 14, 2018. A copy of the Order was filed as Exhibit 9 in these proceedings.

[59] Both Orders indicate that they were issued to Mr. Palma. Thus, the evidence is clear that dangerous wildlife protection orders were issued to Mr. Palma in relation to both the Boulder Property and the Esker Property.

[60] Mr. Palma argues, however, that the Crown has not proven that these Orders were served on him.

[61] With respect to the Boulder Property, CO Hall and CO Koss-Young both testified that they met with Mr. Palma at Conservation Services Office on July 6, 2018, to discuss the attractants on the property. Both officers testified that the Dangerous Wildlife Protection Order was issued to Mr. Palma at that time, and that CO Hall provided Mr. Palma with a copy of the Order. Both officers identified Mr. Palma in the courtroom at trial.

[62] In terms of the Esker Property, CO Koss-Young testified that he again met with Mr. Palma at the Conservation Services Office to discuss the attractants on the property. He further testified that he issued the Dangerous Wildlife Protection Order at that time and provided Mr. Palma with a copy of the Order.

[63] I observed nothing to suggest the evidence of either CO Hall or CO Koss-Young was incredible or unreliable on this or any other point. Furthermore, there is no evidence before me to contradict their assertion that Mr. Palma was served with both Dangerous Wildlife Protection Orders. While Mr. Palma did state more than once that he had not received the Orders, he declined to testify and offered no evidence to rebut the credible evidence of the two officers.

[64] I am satisfied that the Crown has proven that Mr. Palma was issued both Dangerous Wildlife Protection Orders and that he was personally provided with copies of each.

Failure to Comply with the Orders

[65] Turning to the question of whether Crown has proven that the defendants failed to comply with the two Dangerous Wildlife Protection Orders.

[66] With respect to the Boulder Property, the Dangerous Wildlife Protection Order filed as Exhibit 3 required compliance in the form of removal of the containers of used cooking oil, food waste, and contaminated soil no later than 15:00 hours on July 16, 2018.

[67] CO Hall and CO Koss-Young both testified that they attended on the Boulder Property after the issuance of the Dangerous Wildlife Protection Order to monitor compliance. CO Koss-Young visited the site on July 9 and 10, 2018. He observed some steps taken towards compliance in the form of barrels on site in an effort to burn the cooking oil and pick up of the various jugs that had been strewn about the property and adjacent right-of-way. However, the barrels were noted to be seeping oil into the soil and the jugs had been put into vehicles, with oil residue leaking into the upholstery, rather than removed from the property. CO Koss-Young advised CO Hall of his findings, and CO Hall contacted Mr. Palma by telephone to advise that the containers needed to be removed from the property and disposed of appropriately.

[68] CO Hall visited the property on the final date for compliance on July 16, 2018. He visited again after the deadline for compliance on July 17, 24, and 27, 2018. His evidence indicated essentially no change from what CO Koss-Young had observed on July 9 and 10, 2018. Attractants remained on the property. Photographs filed as Exhibit 4 were taken of the Boulder Property by CO Hall during his visit on

July 17, 2018. They depict the barrels seeping oil, the presence of contaminated soil, and the jugs previously holding oil stored inside a wrecked van on the property.

[69] Based on the evidence of CO Hall and the photographs in Exhibit 4, I am satisfied that while some efforts had been made towards compliance, the Crown has proven that the defendants failed to ensure full compliance with the Dangerous Wildlife Protection Order by the deadline date.

[70] With respect to the Esker Property, CO Koss-Young testified that he returned to the property on August 21, 2018, the deadline date for compliance. He observed some efforts towards compliance, including removal of all of the containers of cooking oil from the property; however, he testified that there had been no attempt to remove any of the contaminated soil.

[71] Based on the evidence of CO Koss-Young, I am satisfied that while some considerable effort had been made towards compliance on the Esker Property, the Crown has proven that Mr. Palma failed to ensure full compliance with the Dangerous Wildlife Protection Order by the deadline date.

Owners, Occupiers, or Persons in Charge

[72] The final essential element is whether the Crown has proven that Mr. Palma and DGC were owners, occupiers, or persons in charge of the properties such that they could be issued a dangerous wildlife protection order under s. 93(7) of the *Act*. I have chosen to deal with this essential element last as it, in my view, is the most contentious issue, and the area where I had the most concern.

[73] At the outset, I would note the reason this issue is important is it speaks to the underlying validity of the order. If the order itself is not valid, it raises a question of whether the defendants can be held liable for failing to comply with the order. For the order to be valid per s. 93(7) of the *Act*, it must be issued to an owner, occupier, or person in charge.

[74] As the Esker Property is the more straightforward of the two with respect to this issue, I will address it first.

[75] Mr. Palma argues that there is no evidence he was even aware of the attractants located on the Esker Property in August 2018, and as a result, he feels he ought not to be held responsible. I would agree that there is no evidence, prior to the issuance of the Dangerous Wildlife Protection Order, that Mr. Palma was aware of the attractants on the Esker Property. Nor is there any evidence to suggest that Mr. Palma was personally responsible for the attractants being stored on the Esker Property.

[76] The only evidence regarding how the attractants came to be on the Esker Property in August 2018 was from Mr. Suska who testified that one of his employees mistakenly moved the attractants to the Esker Property instead of the Boulder Property. He further testified that he had no agreement with Mr. Palma allowing Mr. Suska to use the Esker Property. As previously noted, there are serious concerns with Mr. Suska's credibility; however, Mr. Suska did enter guilty pleas and was convicted of five offences. These included one count of encouraging dangerous wildlife contrary to the *Act* in relation to the Esker Property. In light of his admission and the ensuing criminal

conviction, there is no reason to disbelieve Mr. Suska's evidence regarding how the attractants came to be on the Esker Property.

[77] However, while I accept as a fact that the Mr. Palma was not personally responsible for the attractants being placed on the Esker Property, and that he had no knowledge of them having been placed there, it must be remembered that Mr. Palma is not charged with improper storage of oil, failing to mitigate a spill, or encouraging dangerous wildlife as Mr. Suska was. Rather, Mr. Palma is charged with failing to comply with a dangerous wildlife protection order. Accordingly, the issue is not whether he was responsible for the attractants, but whether he could, nonetheless, be issued a dangerous wildlife protection order under s. 93(7) of the *Act*. The subsection provides that anyone who is an owner, occupier, or person in charge of a property can be issued a dangerous wildlife protection order. It does not require them to have foreknowledge of the attractant or to have been the person who placed the attractant on the property.

[78] In this case, Crown has filed a certified true copy of a Certificate of Title as Exhibit 5. The document indicates that Michele Palma was the registered owner of 118 Esker Drive, as of June 17, 2013, through to the date the document was certified on February 14, 2020. As the Certificate of Title conclusively establishes that Mr. Palma was the owner of the Esker Property during August 2018, he clearly meets the definition of owner under s. 93(7) of the *Act*.

[79] Turning to the Boulder Property, Mr. Palma again argued that there was no evidence to suggest that either he or DGC were responsible for the attractants on the property, and they should therefore not be held liable. With respect to this argument, I

would reiterate that the *Act* does not limit issuance of dangerous wildlife protection orders to persons who are responsible for the placement of attractants on a particular property. Again, the issue is whether the Crown has proven that the defendants meet the definition of owner, occupier, or person in charge such that they could be issued a dangerous wildlife protection order.

[80] The issue of whether the Crown has proven Mr. Palma and/or DGC to be owners, occupiers, or persons in charge is the most problematic issue to be determined in this case. Crown does not argue, nor is there any evidence to support a finding, that Mr. Palma or DGC were occupiers of the property.

[81] Assessing whether Mr. Palma and/or DGC meet the definition of owner, CO Koss-Young was asked the basis for his belief that Mr. Palma was the owner of the Boulder Property. He replied that he came to this conclusion following his discussion on July 6, 2018, with Natural Resource Officers, including NRO Mackie, in which CO Koss-Young was advised that the Boulder Property was the subject of an agreement for sale between DGC and the Yukon Lands Branch. CO Koss-Young then obtained a copy of the agreement for sale. CO Koss-Young was further informed by NRO Mackie and Bylaw Services that Mr. Palma was a director of DGC.

[82] The Crown has filed Articles of Incorporation for DGC as Exhibit 6. These documents clearly establish Mr. Palma to be a Director and the President of DGC. Thus the relationship between Mr. Palma and DGC has been proven beyond a reasonable doubt. However, the question of ownership of the Boulder Property, in my view, has not been proven beyond a reasonable doubt. The agreement for sale

referenced as the basis for CO Koss-Young's belief that DGC was the owner of the Boulder Property was not similarly provided in evidence. This case would have been significantly more straightforward had it been filed, as it would, presumably, have offered conclusive evidence on the question of ownership.

[83] During supplementary submissions, Crown agreed that the evidence with respect to ownership of the Boulder Property was hearsay not offered for the truth of its contents. As such, Crown noted that it was admissible for the limited purpose of explaining how CO Koss-Young arrived at his conclusion that the dangerous wildlife protection order should be issued to Mr. Palma, but the Crown properly conceded that the hearsay evidence was insufficient to establish either DGC or Mr. Palma as owners of the Boulder Property.

[84] Instead, Crown argues that the evidence establishes Mr. Palma to be a person in charge of the Boulder Property. Crown points to the following evidence in support of this contention: Mr. Palma had dealings with both Conservation Officers and Natural Resource Officers in relation to issues on the Boulder Property. DGC and Mr. Palma were served with an Environmental Protection Order in relation to the Boulder Property, filed as Exhibit 7. NRO Mackie testified that during his monitoring for Order compliance throughout 2017 and 2018 he frequently dealt with Mr. Palma. He described Mr. Palma as easy to get in touch with and very approachable, and noted they had numerous discussions regarding the cleanup and requirements such as necessary permits to remove the contaminants.

[85] In deciding whether the evidence is sufficient to establish Mr. Palma as a person in charge, it is first important to consider what is meant by the term person in charge from a legal perspective. While I do not have any cases before me that expressly define the term, the starting point, in my view, is consideration of the concept of control within the context of regulatory offences.

[86] In *Sault St. Marie*, at para. 50, Dickson J. spoke of control in a regulatory context as follows:

> The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control"…

[87] In the text, John Swaigen and Susan McRory, *Regulatory Offences in Canada: Liability and Defences, 2nd Edition* (Thomson Reuters Canada, 2018), the authors address this concept of control in a regulatory context by distinguishing it from the concept of control in a criminal context:

> The *Sault St. Marie* concept of control, which includes the ability to influence the conduct of others, represents a major departure from the criminal notion of control. The concept of control has been widely discussed in the criminal jurisprudence, especially in connection with the definition of "possession" which requires proof of knowledge, consent and a measure of control. Even in the context of constructive possession of narcotics, "control" is not to be equated with mere opportunity or access. "Control" in the context of care or control of a motor vehicle with respect to impaired driving under section 253 of the *Criminal Code* requires some physical act involving the use of a motor vehicle by which it may intentionally or unintentionally be set in motion.
>
> Yet for public welfare offences, control is a much broader concept based on either the ability to control or the opportunity to prevent, thereby

> extending the duty of care to a duty to control or influence the conduct of others. … (p. 210)

[88] In *R. v. Placer Developments Ltd.,* 1983 CarswellYukon 14, Stuart J. of this Court made the following comments about responsibility for regulatory offences at para. 22:

> Several important concepts distinguish the approach in *R. v. Sault Ste. Marie (City)*, supra, to responsibility in strict liability prosecution, from the approach in *R. v. Pacific Logging Co.,* supra:
>
> 1. The legal classification of a contractual relationship between the parties while relevant is less important than determining if the accused had an ability to influence or control the offending conduct of the other contractual party.
>
> 2. If the accused had an ability to influence or control the offending conduct, the accused must do so and cannot escape this responsibility by contracting out to an independent contractor. " ... [A] corporation cannot escape conviction merely by saying its mind and will was delegated to another, an independent contractor." (*Aurora Quarrying Ltd. v. Catherwood*, [1982] 6 W.W.R. 517 (Man. Co. Ct.), at 522)
>
> 3. The ability to influence the conduct of an independent contractor or any other party is measured by the powers the accused may employ to affect the conduct in question. These powers may derive from legislation, financial control, executive control, expertise, ownership, or contractual or legal rights, and from any other factor creating an influential bargaining power, position of authority, or ability to control offending activities.

[89] Recognizing the underlying importance of the question of control in a regulatory context as established in *Sault St. Marie*, it is only logical to interpret the phrase “person in charge” as meaning a person who is in a position either to directly prevent or remediate an identified contravention of regulatory legislation or to control or influence others to do so.

[90] In determining whether Mr. Palma was in a position to control or influence what happened on the Boulder Property, I would note the following: The evidence clearly established that Mr. Palma met with both CO Hall and CO Koss-Young to discuss the need to address the attractants on the Boulder Property. As already found, Mr. Palma was served the Dangerous Wildlife Protection Order at the same time. The evidence also satisfies me that Mr. Palma participated in a telephone call with CO Hall on July 9, 2018, with respect to concerns about clean-up efforts and what was required to comply with the order. Similarly, the evidence establishes that Mr. Palma dealt frequently with NRO Mackie in relation to the Environmental Protection Order and efforts towards compliance. There is no evidence before me to suggest that Mr. Palma, at any time, advised any of the officers that he was not the person they should be dealing with, in other words, that he had no control over the property.

[91] The combined effect of this evidence, in the absence of any contradictory evidence, is sufficient to support a finding that Mr. Palma was, factually, acting as a person in charge in relation to the Boulder Property. Mr. Palma called no evidence to rebut the evidence that he was functioning as a person in charge. The only evidence he did call was from Mr. Suska who testified, in cross-examination, that he was renting the Boulder Property from Mr. Palma, and that he believed it to be Mr. Palma's property. While this evidence is certainly insufficient to conclusively establish either a contractual relationship or ownership of the property, particularly given concerns with respect to Mr. Suska's credibility, I am, nonetheless, left in a position where the only evidence called by the defence would appear to support rather than rebut a finding that Mr. Palma was a person in charge.

[92] Accordingly, I am satisfied that Mr. Palma was acting as a person in charge, which, in turn, satisfies me that the Dangerous Wildlife Protection Order was valid in relation to Mr. Palma.

[93] This leaves the question of whether liability for the failure to comply with the Dangerous Wildlife Protection Order in relation to the Boulder Property extends to the corporate defendant. In this case, DGC was not named in the Dangerous Wildlife Protection Order issued to Mr. Palma. Crown argues that liability of the corporate defendant is established through operation of s. 159 of the *Act*, which reads:

> A defendant may be convicted of an offence under this Act if it is established that the offence was committed by an employee or agent of the defendant, whether or not the employee or agent is identified or has been prosecuted for the offence.

[94] As Director and President of DGC, Mr. Palma could certainly meet the definition of agent under s. 159 of the *Act*. However, the question for me is whether Mr. Palma holding himself out as a person in charge necessarily means that he was, in so doing, acting on behalf of the corporate defendant.

[95] If the evidence conclusively established DGC to be the owner of the Boulder Property, it is not a huge leap to conclude that Mr. Palma, acting as a person in charge, would be doing so on behalf of DGC. I do not have that proof of ownership connecting DGC to the property in this case.

[96] The Crown argues that under s. 159 of the *Act*, the only issue is Mr. Palma's relationship to DGC. Evidence of the nature of DGC's relationship to the property is not required. With respect, I would disagree. Mr. Palma and DGC are two separate entities

in law. Even though Mr. Palma is a Director and President of DGC, not every action of Mr. Palma is necessarily an action on behalf of DGC.

[97] The evidence before me connecting DGC to the Boulder Property is, firstly, the hearsay evidence about the agreement for sale between DGC and the Yukon Lands Branch, and, secondly, the fact that the Environmental Protection Order, filed as Exhibit 7, was issued to DGC on the basis DGC had exclusive occupation of the Boulder Property under the agreement for sale, which was not filed in evidence. With respect to the Environmental Protection Order, as the order was issued to DGC, and, the evidence establishes that Mr. Palma was acting as a person in charge in relation to that order, it is clear that he would have been doing so as agent of the company to whom the order was issued.

[98] The combined impact of this evidence is enough to persuade me that there is sufficient circumstantial evidence connecting DGC to the property that, in the absence of evidence to the contrary, is sufficient to satisfy me that Mr. Palma was acting as agent on behalf of DGC in relation to the Dangerous Wildlife Protection Order for the Boulder Property.

Conclusion

[99] In conclusion, based on the foregoing findings, I am satisfied that the Crown has proven all of the essential elements of the offences as they relate to Mr. Palma.

Accordingly, I find Mr. Palma to be guilty on both counts 7 and 8. I am further satisfied that Crown has proven liability with respect to the corporate defendant, through operation of s. 159 of the *Act*. Accordingly, I find DGC guilty on count 7.

_____

RUDDY T.C.J.