Citation: *R. v. Palma*, 2022 YKTC 36

Date: 20220812
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 SENTENCE

[1] RUDDY, T.C.J. (Oral): On April 6, 2022, Michele Palma and Dawson Group of Companies Ltd, which I will refer to as "DGC", were both convicted at trial of failing to comply with Dangerous Wildlife Protection Orders pursuant to s. 93(8) of the *Wildlife Act*, RSY 2002, c. 229 (the "*Act*"). Mr. Palma was convicted of two counts, one in relation to a property on Boulder Road in the Macrae Subdivision (the "Boulder Property"), and the other in relation to a residential property on Esker Drive in the Copper Subdivision (the "Esker Property"). DGC was convicted only in relation to the Boulder Property.

[2] The matter is now before me to determine the appropriate sentence.

[3] The facts are set out in greater detail in the trial decision that was released on April 6, 2022. In summary, in July 2018, jugs of used cooking oil and food waste stored on the Boulder Property came to the attention of Conservation Officers investigating reports of bears in the area acting aggressively. Two black bears located on the Boulder Property were determined to be food habituated and had to be put down by the Conservation Officers, one on July 5, 2018, and the other on July 6, 2018.

[4] The Boulder Property appears to have been the subject of an agreement for sale between the Government of Yukon and DGC, although that was not made fully clear.

[5] At trial, Mr. Palma, a Director of DGC, was found to be the person in charge of the property. He allowed Joszef Suska and his company, Budget Towing and Auto Services ("Budget"), to use the property. It was clear that the attractants on the Boulder Property had been stored there by Mr. Suska and Budget rather than Mr. Palma and DGC.

[6] Later, on July 6, 2018, a Dangerous Wildlife Protection Order was issued to Mr. Palma as a person in charge of the Boulder Property, requiring removal of the cooking oil, food waste, and contaminated soil by July 16, 2018. While some efforts were made, they ultimately fell well short of full compliance within the allotted time frame. Prior to the deadline, Mr. Palma was advised by telephone that ongoing efforts were insufficient to meet the terms of the Order.

[7] On September 9, 2018, a female grizzly and cub were found in the area. It was determined that they were fortunately not yet food habituated; thus, they could be and were translocated.

[8] On August 8, 2018, cooking oil and contaminated soil were located on the Esker Property, which is personally owned by Mr. Palma. There was no evidence indicating that Mr. Palma was aware of the attractants on this property. Again, they had been placed on the property by employees working for Mr. Suska. However, as owner, Mr. Palma was served with an Order on August 14, 2018, requiring removal of the cooking oil and contaminated soil by August 21, 2018.

[9] All the cooking oil in containers was removed from the Esker Property before the deadline date, but the contaminated soil was not, although Mr. Palma has indicated in his written submissions that the Order was ultimately fully complied with some time after the deadline date and that soil was removed.

[10] In terms of positions on appropriate sentence, with respect to the Boulder Property, the Crown seeks imposition of a fine of $35,000 for DGC and a fine of $15,000 for Mr. Palma. With respect to the Esker Property, Crown seeks a fine of $10,000 for Mr. Palma. Crown also seeks an order that 50 percent of any fines imposed be made payable as a contribution to the Turn In Poachers and Polluters, or TIPPs, line fund pursuant to s. 169(1)(h) and (2).

[11] Mr. Palma takes the position that with respect to the Esker Property, his efforts had resulted in substantial compliance and that any fine, if there is one, should be nominal. He suggests something in the range of $100 to $200. With respect to the

Boulder Property, it is Mr. Palma's position, on his own behalf and on behalf of DGC, that the real problem in this case, the real danger was created by Mr. Suska and Budget, who have ultimately been sanctioned for the situation that they created and that Mr. Palma's only failure was in not ensuring that Mr. Suska cleaned up the property in sufficient time. Mr. Palma has indicated that he spends much of his time out of town in the Dawson area, so he was not in a position to monitor closely and, essentially, he relied on Mr. Suska to do what needed to be done, and Mr. Suska failed to do so. Again, Mr. Palma takes the position that any fine should be nominal, in the range of $100 to $200.

[12] Pursuant to s. 161(1), the maximum fine that can be imposed is $50,000 on each count. There is no prescribed minimum.

[13] With respect to the law in this area, the Crown has filed several cases highlighting the principles and factors to be considered in sentencing on offences that are contrary to what is often referred to as public welfare legislation. *R. v. Terroco Industries Limited*, 2005 ABCA 141, a decision of the Alberta Court of Appeal, is instructive on factors to be considered in sentencing for offences impacting the environment.

[14] While the case, which involves offences relating to the transport of dangerous goods, is factually distinct, the identified principles have, nonetheless, been adopted in a multitude of sentencing cases involving a broad range of public welfare legislation, including wildlife offences. *R. v. Clemett,* 2016 ABPC 137, and *R. v. Stevikova,* 2021

BCPC 235, are two cases in which those principles have been adopted in a wildlife context.

[15] The five sentencing principles that are articulated in *Terroco* are as follows:

1. Culpability is considered one of the dominant sentencing principles and is to be assessed on a sliding scale with consideration of where the behaviour of the offender falls between the two extremes of near due diligence on the one end of the spectrum and near full intent or recklessness on the other;

2. A prior related record is considered to be an aggravating factor;

3. Conversely, acceptance of responsibility and expressions of remorse are mitigating factors;

4. The degree of both actual and potential harm are aggravating factors, particularly where the harm is readily foreseeable; and

5. Noting that the purpose of environmental legislation is to ensure that damage to the environment does not occur, deterrence, both specific and general, are primary objectives of any sentence imposed.

[16] For your benefit, Mr. Palma, when we are talking about deterrence, specific deterrence means a sentence that would deter you from committing another offence. General deterrence is a sentence that would deter others from committing the same

type of offence. So that is what we mean when we talk about specific deterrence and general deterrence.

[17] Other cases provided by the Crown confirm the importance of deterrence and consideration about actual and potential harm, but also urge consideration of harm to the common good and the cost to the public in determining the appropriate sentence (see *R. v. Chalupiak*, 2018 BCPC 82).

[18] In applying the identified sentencing principles in this case, I note that two of the five principles or factors can be addressed in a relatively summary fashion. With respect to the second of the five sentencing principles identified in *Terroco*, there is no prior record being alleged for either Mr. Palma or DGC. With respect to the third factor, there has been no acceptance of responsibility in the form of a guilty plea or otherwise, and there had been no expressions of remorse, although in Mr. Palma's written submissions he has now expressed some degree of remorse for not being diligent enough in ensuring Mr. Suska cleaned up the property and also has expressed the concern that he does have for wildlife in the Yukon, and the impact of these types of offences on wildlife.

[19] Turning next to the question of deterrence, per *Terroco*, the sentence imposed must be greater than the cost of doing business and must send a clear message to both the offender and to others that the failure to take reasonable care to protect the environment will result in significant sanctions. Given that failure to ensure full compliance with the two Dangerous Wildlife Protection Orders ("the Orders"), in this case, enabled a situation that placed both wildlife and the public at risk to persist, any

fine imposed must, in my view, be significant enough to reinforce the necessity of complying with orders that are intended to protect both precious wildlife and the public from harm.

[20] In terms of actual and potential harm, the facts of this case include three black bears that had to be put down by Conservation Officers. It must be remembered, however, that Mr. Palma and DGC have been convicted of failing to comply with the Dangerous Wildlife Protection Orders rather than with placing the attractants on the properties that led to the three bears becoming food habituated and, therefore, a public safety risk. As the Orders were not served on Mr. Palma, nor was he or DGC in breach of the Orders until after the destruction of the bears, in fairness, their loss cannot be properly considered as actual harm in sentencing Mr. Palma and DGC.

[21] That being said, the need to euthanize the three bears is certainly instructive in assessing the question of potential harm. The clear evidence of increased bear activity in the area, which continued after the deadline for compliance with the Orders had passed, and evidence of the bears feeding on the attractants and acting aggressively makes it clear that allowing the situation to continue by failing to ensure full compliance with the Orders meant there was very real potential for future harm, including the potential for other food habituated bears being euthanized.

[22] Potential harm also includes the risk to public safety presented by food habituated bears. This potential harm is heightened by the fact that the Esker Property is located in a residential subdivision and the Boulder Property, while in a largely industrial area, was, nonetheless, also in close proximity to residential properties.

[23] In addition to these potential harms, there was also actual harm following the failure to comply with the Orders which must be considered as an aggravating factor, specifically the grizzly sow and cub who had to be translocated as a result of the ongoing presence of attractants on the Boulder Property, although fortunately, they did not need to be put down.

[24] It must be remembered that potential and actual harm to wildlife in the Yukon is a significant aggravating factor given the importance of protecting wildlife and the gravity of wildlife offences in the Yukon, as noted by Faulkner, J. in *R. v. Candow*, 2006 YKTC 45, at para. 10:

> The cases make it clear that there are a number of special considerations in sentencing for wildlife offences in the Yukon. Firstly, it is clear that wildlife in the Yukon have not only an intrinsic value in and of themselves but form a particularly valuable resource within the Territory. Secondly, the Yukon is very large and much of it is very remote, rendering overseeing of wildlife laws very difficult and, coincidentally, making the temptation to cheat all the greater. Thirdly, as previously indicated, the legislature has recently increased some five-fold the range of fines that may be imposed. This is an indication of the seriousness with which wildlife offences are viewed within this Territory.

[25] While consideration of deterrence and harm, both actual and potential, call for significant fines to be imposed, assessing the exact fine amounts is a much more difficult question, firstly because of a lack of factually similar precedents, and secondly because the somewhat unique circumstances of this case raise questions about the appropriate characterization of culpability and its consequent impact on determining a fit sentence.

[26] As highlighted by the Crown, the limited volume of reported cases on regulatory offences, including wildlife offences, make it difficult to find sufficient precedents upon which to discern a clear sentencing range for particular offences. Indeed, as noted by the Crown, there are no reported Yukon decisions with respect to appropriate sentences for offences contrary to s. 93(8) of the *Act*, let alone cases that are factually similar.

[27] However, the Crown provided *Stevikova*, a case involving a similar offence under the British Columbia *Wildlife Act*, [RSBC 1996] Chapter 488, for leaving attractants where there are likely to be people and which could attract dangerous wildlife. The accused pleaded guilty to the offence and an additional count for feeding bears. The accused, a part-time resident of Whistler, purchased bulk produce which she left around her property on a weekly basis for the express purpose of attracting and feeding bears. In addition, she fed or attempted to feed bears directly on three or four occasions. The offences led to a sow and two cubs being euthanized.

[28] The sentencing judge rejected a joint submission for a global financial penalty of $10,500, noting the flagrant disregard for clear messaging and the established wildlife management scheme and the considerable danger presented to the Whistler community. Instead, the sentencing judge imposed a financial penalty of $35,000 for leaving attractants and $25,000 for feeding bears.

[29] In reaching this determination, the sentencing judge referenced the decision of *R. v. Wiens*, B.C. Prov. Ct. (unreported), in which the accused left attractants on three occasions with the intention of attracting bears in the context of a hunting business,

resulting in the death of one bear. In *Wiens*, the Crown sought fines in the range of $25,000 to $35,000. A penalty of $18,500 was imposed.

[30] The only other case before me involving related offences is that of the co-accused in this particular case, namely, Mr. Suska and Budget, which must be considered, in my view, from a parity perspective. Parity, Mr. Palma, means we look at sentencing people who have committed similar offences in similar ways, and it often comes up when we have co-accused. How we sentence one does affect how we sentence the other.

[31] As noted, the evidence clearly established that it was Mr. Suska and his employees who were responsible for the attractants being placed on both the Boulder and Esker Properties. Mr. Suska and Budget entered guilty pleas to encouraging wildlife, contrary to s. 93(2) of the *Act*, in relation to both properties and the sentencing judge imposed a global financial penalty of $30,000 for both Mr. Suska and Budget in relation to both properties.

[32] Additional fines were imposed for charges of failing to mitigate a spill contrary to *Special Waste Regulations,* O.I.C 1995/047. In my mind, those are more tangentially related, while leaving the attractants on the property is what led to the Orders that Mr. Palma and DGC have been convicted of failing to comply with, so those are the counts that, in my view, are most applicable in deciding what I ought to be doing in this particular case.

[33] On the one hand, it must be recognized that, in each of these three cases that I have referenced, guilty pleas were entered, which is a significant mitigating factor that is

absent in relation to Mr. Palma and DGC. I want to be clear in saying that it is not an aggravating factor to go to trial. A person is entitled to have their trial, to plead not guilty and to hold the Crown to proving the case against them, but if an individual comes before the court, accepts responsibility and says, “Yes, I did it, I plead guilty”, that person is entitled to some mitigation in sentence, so we move the sentence down the sentencing range because of that mitigating factor of the guilty plea. In this case, we do not have that mitigating factor.

[34] On the other hand, it is notable that the behaviour admitted to in each of these three cases is qualitatively different than that of Mr. Palma and DGC. We have spent a lot of time on this particular point, and it is the point that I struggled with the most in assessing what the appropriate sentence ought to be in this case.

[35] This is relevant, in my view, to the assessment of where Mr. Palma and DGC fall on the spectrum of culpability. Each of these three cases involve active behaviour with an element of either deliberation or recklessness which, in turn, created highly dangerous situations. In *Stevikova*, it is notable that one of the major drivers of the financial penalties imposed was the planned and deliberate nature of the behaviour. In assessing culpability, the sentencing judge juxtaposed the behaviour with the fact the section does allow for the offence to be committed in a much more passive or negligent manner. He said:

> 81 Ms. Stevikova’s conduct lies past the gravest end of the continuum measuring from “virtual due diligence” to “virtual intent.” Her actions in leaving or placing an attractant on or about her land, where there were likely to be people, in a manner which the attractant could attract dangerous wildlife to the premises, was entirely deliberate.

> 82 As set out in subsection 33.1(7), a person commits the offence in Count 2 if they *fail to remove* an attractant from their premises, *or allow it to remain*. For example, if apples were to blow down from a tree and an occupant of the property failed to pick them up and remove them or failed to exercise due diligence to ensure that that was done on their behalf.
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> 83 The situation here is at the other end of the spectrum.

[36] The *Wiens* case involved similarly intentional behaviour, though it seems to lack the significant aggravating factor of the offence being committed in a populated area.

[37] With respect to Mr. Suska and Budget, continuing to place the attractants on the property, even in the face of clear evidence that they were attracting bears, perhaps lacks the same intent of placing attractants for the express purpose of attracting bears to the property, but otherwise falls at the higher end of the spectrum as highly reckless behaviour.

[38] In the case of Mr. Palma and DGC, there is no evidence to suggest any active involvement in creating the dangerous situation. Rather, liability flows from a failure to ensure that the attractants were removed as required by the Orders. While there was a clear lack of any degree of due diligence, I would characterize the behaviour as more passively negligent than deliberate or reckless. As indicated by Mr. Palma, he essentially relied on Mr. Suska to clean it up, and Mr. Suska failed to do so.

[39] This characterization is important in determining where the defendant falls on the spectrum in comparison to the related sentencing precedents. In so saying, I am not suggesting that this passivity excuses the very real danger that the defendants allowed to continue. As owners or persons in charge, the defendants had a responsibility to ensure that the situation was addressed and any potential for future harm was mitigated

or eliminated, but in sentencing the defendants, I am of the view that I must recognize that there is a qualitative difference in the behaviour that is being sanctioned from that of Mr. Suska and Budget.

[40] The impact of this distinction is more difficult to measure. In the majority of cases that either the Crown or I were able to locate, there is an inter-relationship between the creation of the dangerous situation and failure to comply with any orders to remedy the situation. Crown was able to provide some more cases where they show significant sanctions for failing to comply with orders, but still in situations in which the offenders were still the people that had created the situation in the first place. This is factually distinct, in my mind.

[41] The only case I was able to find with any similarity is the case of *R. v. Baker*, 2008 ABPC 308. Again, it is not directly on point, but it at least touches on the issue that I have been struggling with in this particular case.

[42] This is a case in which homeowners left their property in the care of a Mr. Baker, someone that they trusted, while they travelled to the U.S. in relation to the husband's health issues. The individual caring for the property, Mr. Baker, in turn, sublet to another individual, who persuaded Mr. Baker to become complicit in a scheme to convert the single-family dwelling into a rooming house for multiple tenants. The scheme involved modifications to the house, many of which were clearly potentially dangerous, and contrary to the *Public Health and Safety Act*, RSY 2002, c. 176.

[43] When modifications came to light as a result of a small fire, all parties were mandated to rectify them. While the female homeowner did come back to Canada,

rather than taking steps to address the deficiencies herself, she left the property in the care of Mr. Baker, trusting that he would resolve the problems, but he failed to do so.

[44] It is not factually the same situation, but there is a similarity to Mr. Palma in that he essentially left the matter to Mr. Suska to address, which, again, is contrary to what his obligations were as an owner or person in charge and that is what resulted in the convictions.

[45] In assessing relative culpability in the *Baker* case, the sentencing judge made the following comments about the position of the owners:

> 46 Second, particularly in the case of the Schneiders, their liability flows from their ownership and their culpability flows not from their actions but from their failure to show diligence in the face of problems that were created in their absence without their knowledge. Their moral blame worthiness is low.

[46] In light of this finding, the sentencing judge did not accede to the Crown's submission that a financial penalty of $11,900 be imposed on Ms. Schneider; rather, the sentencing judge imposed a fine of $500.

[47] While, in my view, Mr. Palma and DGC are not as sympathetic as the Schneiders, as Mr. Palma was aware that there were problems on the property as early as when the Environmental Protection Order was issued, the *Baker* case, nonetheless, offers some support for the proposition that the degree of culpability for a property owner or person in charge who fails to diligently ensure compliance with a Dangerous Wildlife Protection Order is qualitatively different from the culpability of those who

deliberately or recklessly create situations that are dangerous to both wildlife and the public.

[48] Accordingly, I do find that Mr. Palma and DGC fall lower on the spectrum of culpability than the three identified cases, including Mr. Suska and Budget. That being said, the scale of the danger allowed to continue by virtue of the failure to comply with the Orders, particularly the continuing presence of attractants on the Boulder Property, is such that deterrence and harm both mandate the need for a considerable fine.

[49] As noted, it must be a fine that amounts to more than the cost of doing business. This does require some consideration of the financial circumstances of Mr. Palma and DGC, although financial position, per *Terroco*, is only one of many factors to consider and is not, in and of itself, determinative. That means that ability to pay is not the determining factor in terms of the fine to be imposed.

[50] I will note for the record I do have some additional information provided with respect to Mr. Palma and DGC's financial circumstances, specifically, two financial statements from 2016-2017 and 2017-2018 suggesting the company is operating at a small loss and Mr. Palma has, on more than one occasion, indicated that he lives primarily on a disability pension. I accept that there are somewhat limited financial means although, on the other hand, the Crown has provided Certificates of Title and, indeed, one was provided at the trial itself, so I am aware that both the company and Mr. Palma do at least own some land. There are also vehicles which Mr. Palma and DGC own, though Mr. Palma does dispute ownership of some of the vehicles registered in DGC's name.

[51] At the end of the day, this is everything that I have to throw into the mix of deciding what I think is appropriate. I have to say, Mr. Palma, I was persuaded that there is a difference between what Mr. Suska did and what you did, but, at the same time, this is not the type of offence that could or should result in a nominal fine in the amounts that you suggested. That would be completely inconsistent with any law in the area of these types of offences. What you did was different because Mr. Suska created the problem, but you had an obligation to make sure it got fixed. Because the presence of those attractants on the property created such a dangerous situation, in my view, the fines do need to be significant. I am not of the view that they need to be as high as the Crown is suggesting, though, when I consider the differences between you and Mr. Suska.

[52] Weighing all the circumstances before me, I am satisfied that Mr. Palma and DGC fall lower on the spectrum of culpability than Mr. Suska and Budget, though this is offset, to some extent, by the fact that Mr. Palma and DGC do not have the mitigating benefit of that acceptance of responsibility that Mr. Suska and Budget would have had as a result of entering guilty pleas.

[53] What I believe is the appropriate outcome, offsetting the slightly lower degree of culpability as against the lack of the mitigating guilty plea, is for there to be a comparable sentence imposed on DGC and Mr. Palma, as was imposed on Mr. Suska and Budget for putting the attractants on the property.

[54] With respect to Count 7, DGC is ordered to pay a fine in the amount of $15,000 in relation to the Boulder Property. Mr. Palma is ordered to pay a fine of $10,000 in relation to the Boulder Property.

[55] I recognize in many ways, Mr. Palma, you are DGC, but in terms of the fines, I am mindful of the danger created, even though you did not create it, your failure to make sure that Ms. Suska got it cleaned up in time resulted in the continuation of an extremely dangerous situation at the Boulder Property, so that is the offence I view as most serious.

[56] With the Esker Property, a fair amount was done towards compliance. It was not full compliance and the evidence was clear that the contaminated soil could still continue to attract bears, but it is much less serious than the combined fines of $25,000 that I see as appropriate for the Boulder property. For the Esker Property, I am going to impose a fine of $5,000 so the total amount of fines is $30,000.

[57] I also am making the order that 50 percent of all fines imposed are to be made payable as a contribution to the Turn In Poachers and Polluters, or TIPPs, fund pursuant to s. 169(1)(h) and (2). Essentially, half of the money is going to fund TIPPs, which is intended to address others who may not be as responsible in the way they interact with the environment as they should be.

[58] In these circumstances, the cumulative fines are considerable, and given what I do know of Mr. Palma's financial situation, I will waive the victim surcharges.

[59] [DISCUSSIONS]

[60] Mr. Palma, you and DGC have 18 months' time to pay all fines.

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RUDDY T.C.J.