

Citation: *R. v. Pauch*, 2023 YKTC 23

Date: 20230620
Docket: 21-13007
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

JOHN FRANCIS PAUCH

Appearances:
Kelly McGill
André W. L. Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] PHELPS T.C.J. (Oral): John Francis Pauch is before the Court on a single count Information alleging an offence contrary to s. 66(1)(a) of the *Cannabis Control and Regulation Act*, SY 2018, c.4 (“CCRA”). It is alleged that John Pauch sold or distributed cannabis in Whitehorse, Yukon, between October 1, 2020 and December 29, 2020, without having a license to do so contrary to s. 53(1) of the *CCRA*.

[2] Counsel have agreed that the *CCRA* constitutes public welfare legislation and that the offence before the court is one of strict liability. The *actus reus* of the offence is set out in an agreed statement of facts, filed at the commencement of trial, setting out

the essential elements of the offence. The onus on the Crown is met and the trial proceeded on Mr. Pauch's defence of due diligence.

Agreed Statement of Facts

[3] The agreed statement of facts was marked as Exhibit 1 and the following extracts summarize the key evidence relating to the offence before the Court:

1. At the time of the offence before the Court Mr. Pauch used the business name of "Off the Hook Meat Works" ("Off the Hook") which had been registered to him under the *Partnership and Business Names Act* in 2012.
2. Mr. Pauch operated Off the Hook as a butcher shop in Whitehorse, Yukon, pursuant to a permit issued to him by the Government of Yukon, Environment Health Services ("EHS"). Off the Hook butchered meat and sold meat to the public, along with some products processed on site including beef jerky.
3. Mr. Pauch regularly sold packaged Off the Hook beef jerky to numerous grocery stores and convenience stores in Whitehorse.
4. Between December 25 and 29, 2020, four people attended at the Whitehorse General Hospital displaying symptoms consistent with severe intoxication by cannabis despite not having knowingly consumed any. Tests confirmed the presence of THC, the primary

psychoactive component in cannabis, as being present in all four people.

5. An investigation ensued by both the Whitehorse RCMP and EHS which confirmed that the cause of the cannabis intoxication was the consumption of beef jerky from Off the Hook.
6. EHS officers attended at Off the Hook on December 30, 2020 and seized 671 bags of jerky, packaged them in boxes, and left them on the premises with clear direction to Mr. Pauch not to interfere with them.
7. EHS officers attended at Off the Hook at 2:00 p.m. on December 31, 2020, to retrieve the seized items but the business was closed. Multiple attempts to reach Mr. Pauch by phone and by e-mail were unsuccessful.
8. EHS heard from Mr. Pauch on January 1, 2021 and advised him that they would attend on January 4, 2021, to collect the boxes. When EHS attended at Off the Hook on January 4 the boxes were no longer present.
9. On January 5, 2021, RCMP attended at Off the Hook with the intention of seizing the video recording system for the security cameras and were advised by Mr. Pauch that he had thrown the hard drive away five or six months earlier as it no longer worked.

10. Regarding the missing seized jerky, Mr. Pauch advised the RCMP on January 5, 2021:

- a) He left work early on December 31, 2020 and the seized items were still on the premises;
- b) He left a note informing staff that EHS would attend and pick up the boxes;
- c) His staff later told him that the boxes were moved outside at the end of the day. He would not identify which staff member he was referring to; and
- d) His son, Joel, said that when he was leaving at 5:30 p.m. on December 31 he saw a van attend and the occupants wave, leading him to believe they were from EHS.

11. In total, the investigation identified thirty-three people in Yukon, Alberta and Nova Scotia who experienced symptoms of cannabis intoxication after consuming beef jerky from Off the Hook, including seven children and two infants. The severity of their symptoms varied from mild to severe and nine, including one child, had attended at hospital emergency departments.

12. RCMP seized approximately three hundred unopened bags of Off the Hook beef jerky from seven businesses in Whitehorse. They took one

random sample of jerky from six of the stores and had them tested, and all six contained cannabis.

13. RCMP seized twenty-two bags of jerky from individuals and sent twenty for testing. Fourteen of the samples contained cannabis.

14. The positive samples were taken from a total of four flavours of jerky.

Viva Voce Crown Evidence at Trial

[4] In addition to the agreed Statement of Facts, the Crown presented Joel Pauch and Terry Badcock at trial. While reviewing the evidence of the witnesses, I will also review their credibility. The BC Supreme Court addressed the assessment of witness credibility and reliability in the decision of *R. v. Dionne*, 2022 BCSC 959, at paras. 37- 39:

37 Reliability has to do with the accuracy of a witness's evidence, such as whether they have a good memory, if they are able to recount the details of the event, and whether the witness is an accurate historian: *R. v. Nyznik*, 2017 ONSC 4392 at para. 15.

38 Credibility relates to the witness's veracity. A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case. Sometimes, an honest witness will be trying their best to tell the truth and will believe the truth of what they are relating, but nevertheless be proven to be mistaken in their recollection. Although honest, their evidence is not reliable: *Nyznik* at para. 15.

39 Determining the credibility of a witness requires the court to consider a number of factors. These include the internal and external consistency of the witness's evidence, motive to fabricate, the inherent plausibility of the evidence in the context of the case as a whole, and demeanour: *R. v. Swain*, 2019 BCSC 1300 at para. 48.

Evidence of Joel Pauch

[5] Joel Pauch is Mr. Pauch's adult son and in 2020 he was working at Off the Hook. He explained that his responsibilities included to filling in and doing what was requested by his father, which included overseeing the shop from time-to-time when his father was not there.

[6] Mr. Pauch would provide him direction day-to-day and supervised the daily business. When Mr. Pauch was absent, Joel Pauch would sign for deliveries, order products, etc., but was not involved in the finances of the company.

[7] He testified that his familiarity with the Food Retail and Food Services Code (the "Code"), which applied to Off the Hook, was "not very much". He did not receive any specific training in relation to the Code. All of his training was provided by Mr. Pauch on packaging items for resale and making jerky.

[8] Joel Pauch would make jerky from time to time during his day shift if they were behind on production. He testified that he did not make jerky at Off the Hook in over six months prior to the time of the investigation into the matter before the Court.

[9] There were two other employees that worked during the daytime doing odd jobs, cleaning, and packaging products. One additional employee, Terry Badcock, was employed making jerky in the evenings when the shop was closed. The two daytime employees were not involved in the jerky making process unless they were packaging jerky left over from the night before.

[10] Joel Pauch testified that Mr. Badcock was not the cleanest person and that they would have to clean up after him in the morning. It was common to find dry seasoning on the table and pieces of jerky and debris on the floor from the jerky making process. The cleanliness concerns were raised multiple times with Mr. Badcock, by both Joel Pauch and Mr. Pauch, without improvement.

[11] Jerky was made with 25 pounds of fresh meat per batch, and three batches could be produced from start to completion of packaging in an eight hour shift. According to Joel Pauch, there were no quality control measures in place for the jerky. He added that jerky not packaged the night before would be left in a grey tub or in large turkey bags and tied off, then placed in the cooler.

[12] There were several security cameras in Off the Hook that he understood could be viewed through a phone app by Mr. Pauch. This included one that showed the face of the smoker so that Mr. Pauch could monitor the smoker after hours.

[13] In 2020, Joel Pauch researched the process online and made two batches of jerky infused with cannabis oil ("cannabis jerky") at home. He shared news of the successful production with his father and shared some samples with him and with others. They, together with Mr. Pauch's brother Rick Pauch, who resides in Edmonton, pursued the idea of making cannabis jerky commercially under the incoming legal cannabis edible regime. Joel Pauch conducted research online and connected with a cannabis licensing expert to assist them in the process. He, Mr. Pauch and Rick Pauch communicated with the company over the phone and by e-mail.

[14] It was decided that a batch of cannabis jerky would be prepared at Off the Hook to see how it would work on a commercial scale. The company they were using to help with the licensing process required them to do some product testing. Mr. Pauch, Rick Pauch, and Joel Pauch were involved in the decision to produce a batch in Off the Hook. The plan was to use it for testing for water activity, cannabis strength and how it compared to the regular jerky. The decision was to have Mr. Badcock make one 25lb batch in the evening. Mr. Pauch advised him that Mr. Badcock made the jerky two or three weeks prior to the RCMP attending Off the Hook to investigate the matter before the Court.

[15] Joel Pauch was not personally involved in making the cannabis jerky at Off the Hook, but was responsible for sending samples of the cannabis jerky to BC for the testing. He did not believe the cannabis jerky would be kept on the premises because of frequent unannounced inspections by EHS.

[16] Joel Pauch believed the cannabis contamination of the jerky that was sold was caused by cross contamination. He suggested that moisture, including the cannabis oil, that came out of jerky during the drying process would be on the drying racks. It would be difficult to mix up jerky because the process was generally done from start to finish, one large batch at a time, and his belief is that cross contamination is the only explanation.

[17] Regarding the seized jerky from Off the Hook, he did see it in the shop the next day. He does not know what happened to it. He never saw it outside, never told Mr. Pauch that it was moved outside and did not see what happened to it.

[18] They ultimately discontinued the pursuit of a legal edible cannabis jerky operation, considering that the process was costly and a high risk to be denied due to this charge. At that time, he believed that Mr. Pauch had sent an initial payment of \$20,000 as a down payment on a new smoker.

[19] Exhibits 3, 4 and 5 were entered through Joel Pauch. They are e-mails depicting exchanges with a representative from Cannabis License Experts (“CLE”), the company Joel Pauch engaged to assist with the legal cannabis licensing process. The first e-mail is from January 7, 2021, and the final one is from March 19, 2021.

[20] An e-mail from January 10, 2021, from Joel Pauch to a CLE representative includes:

1. Joel Pauch had just finished speaking with his father about the cost, ballparked at forty thousand dollars;
2. His father asked if payment was required up front, or if there was a deposit required with full payment after the license was received;
3. That they are retooling the existing business for the cannabis edible business which will be closed pending approval; and
4. His father wanted to know if they could operate the current business pending the licensing approval which was six to eight months, and that public access to the business would be locked upon licensing approval.

[21] Another e-mail from February 12, 2021, is from a CLE representative to Mr. Pauch thanking him for a recent telephone conversation and confirming that new paperwork was being sent to put everything in the name of Mr. Pauch.

[22] I found Joel Pauch to be genuine and forthright in his testimony regarding his passion for the cannabis industry and his pursuit of cannabis jerky as a business option. He was candid about his research and experimentation with making cannabis jerky, as well as his pursuit of the business with his father and his uncle.

[23] However, I find his assertion that he personally had no involvement in making cannabis jerky at Off the Hook to be problematic. He clearly has a motive to fabricate in this regard given the significant harm caused by the cannabis jerky, and it is not plausible that the one person, with the specific knowledge about making cannabis jerky, would not be involved in the test batch to be used for testing in support of the business pursuit.

Evidence of Terry Badcock

[24] Mr. Badcock is 65 years old and retired. In 2020, he was working at Off the Hook, and had been working there for several years making jerky in the evenings. He has been legally blind for about eight years since suffering from a stroke and is unable to drive a motor vehicle. He can read with glasses, but it takes significant effort because he lost peripheral vision to the left out of both eyes.

[25] Mr. Badcock worked shifts on Monday to Wednesday, as needed, during the evening making jerky. He was paid in cash for the work. According to him, Mr. Pauch

knew about his vision issues when he was hired. He was trained on how to make jerky, by Mr. Pauch, and did not receive any training on food safety.

[26] According to Mr. Badcock there were no quality control measures in place for the jerky he produced in the evenings. He would complete the jerky making process and package the jerky during his shift.

[27] Mr. Badcock explained the jerky making process step by step, and how he would clean certain items after use. The jerky was placed on drying racks once ready for the smoker. There were two drying racks on wheels and each rack was large enough to hold one 25lb batch of jerky. The rack could be wheeled directly into the smoker, which could hold one rack at a time.

[28] He indicated that he did not regularly clean the drying racks, but if the racks were really dirty he would spray them off. He advised that he, generally, could not taste the flavours of a previous batch on the jerky freshly made due to cross contamination from the drying racks. Mr. Pauch was responsible for cleaning the smoker and the drying racks.

[29] He was not supervised or checked up on during the evening. He stopped working at Off the Hook after Joel Pauch attended at his home and told him about the investigation into contaminated jerky.

[30] About a week before the investigation, he said that he attended at Off the Hook, at the invitation of Joel Pauch, and made two batches of cannabis infused jerky for \$250.

Joel Pauch was the one that prepared the cannabis oil, and Mr. Badcock proceeded to make jerky in the standard way. This was a week before his last shift making jerky. After preparing the cannabis oil, Joel Pauch left and Mr. Badcock proceeded to finish the two batches.

[31] He advised that he was directed to put the cannabis infused jerky into large bags, tie them off and place them on the floor in the cooler. He was not told that he could not speak with Mr. Pauch about the jerky, and Mr. Pauch never asked him about how jerky could have been contaminated by cannabis.

[32] He only made it the one time and was aware that it was made with cannabis oil that contained THC.

[33] I found Mr. Badcock to be honest and forthright when providing his testimony. I note that he did not advise investigators about making the cannabis jerky, disclosing it for the first time at trial. While his memory regarding the details, including the date, were not specific, this is expected with the passage of time. I did not find reliability concerns to the extent that it impacted his credibility and accept that he made cannabis jerky at Off the Hook.

Strict Liability and the Defence of Due Diligence

[34] The legal test for strict liability offences such as the one before the Court was addressed by the SCC in the decision *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299. The Court stated at p. 1325:

The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to *Pierce Fisheries* and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. . .

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof . . . While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

[35] In *Sault Ste. Marie*, the Court adds the following regarding the category of strict liability offences at p. 1326:

Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability...

[36] In this case, the burden is on Mr. Pauch to establish on a balance of probabilities that he took all reasonable care that a reasonable person would have taken in the circumstances. The burden is not on the Crown to disprove due diligence.

Standard of Care Required

[37] While the test for due diligence is on a balance of probabilities, the level of care required to establish reasonableness on the part of the accused can be high, depending on the industry involved. It is the consideration of a reasonable person in

the industry that Mr. Pauch was operating in, and not a review of what the average reasonable person in society would have done.

[38] The approach for the Court to take in determining the reasonable person standard for due diligence was addressed in *Regina v. Centre Datson Ltd.*, (1975) 29 C.C.C (2d)78 (Ont. Prov. Ct. (Crim. Div)) at para. 16:

. . . I think by now that it is trite law that due diligence is synonymous with reasonable diligence, and as well, that the test for reasonableness is a question of fact. It is argued that the test is that of a reasonable man; I think the test is somewhat more than this -- it is the degree of reasonableness within a specialty where a special skill or knowledge or ability is involved, as in the case for example of surgical malpractice; the test is not that of a reasonable man, but that of a reasonable surgeon.

[39] Stuart, J. of this Court addressed the question of what constitutes reasonable care at length in *R. v. Placer Developments Ltd.*, [1985] B.C.W.L.D.581 (Y.T. Terr. Ct.) paras. 25-26:

25 To constitute a defence pursuant to this section, all due diligence must be exercised. While not tantamount to absolute liability, more than the care expected of an ordinary citizen is demanded. In the very least, the care must reflect the diligence of a reasonable professional possessing the expertise suitable to the activity in issue. (*Giftwares Wholesale Co. v. Rodger* (1977), [36 C.C.C. \(2d\) 330](#) (Man. Co. Ct.))

26 No one can hide behind commonly accepted standards of care if, in the circumstances, due diligence warrants a higher level of care. Reasonable care implies a scale of caring. A variable standard of care ensures the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each case. The care warranted in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required, and the extent the accused could control the causal elements of the offence. (*R. v. Gonder* (1981), [62 C.C.C. \(2d\) 326](#) (Y.T. Terr. Ct.), at 332 -3)

[40] Mr. Pauch was processing and packaging food products for consumption by the general public. He had a considerable network of distribution and his products, particularly the jerky, were consumed by a broad segment of the population in Whitehorse and beyond. The standard of care required was high, and the likelihood of harm was great should the food distributed by him be contaminated by the various forms of foodborne bacteria. It is a highly regulated industry for good reason.

Regulatory Context – Permit and Code Requirements

[41] Mr. Pauch was granted a Permit to Operate for Off the Hook by EHS on March 21, 2019. The Permit sets out four terms and conditions, with number two stating:

2. Operation of a food premises shall be in accordance with the guidelines outlined in the Food Retail and Food Services Code (current edition) where not described in the Regulations.

[42] The applicable version of the Code is the current version amended February 24, 2016, by the Federal/Provincial/Territorial Food Safety Committee. The Code is comprehensive and covers the control of food hazards, identifying risks, sanitation, and education. I note for the purpose of this case, that the Code specifically addresses both the requirement for a food safety management system and a written sanitation program. The Code has helpful explanatory notes after each section explaining the rationale for the requirement.

[43] The requirement for a food safety management system is contained in s. 3.1.2(a) which states:

An operator of a food premises shall ensure that a food safety management system is in place and practiced so that the potential for contamination of foods (whether by chemical, physical or biological agents, or by allergens) during critical phases of food processing operations is effectively controlled and minimized.

[44] The rationale for requiring a food safety management system to be in place includes:

In food premises, it is necessary to outline specific procedures for food safety. Each food product has its own specific risk factors that are based upon scientific data.

The potential for biological, chemical and physical hazards may vary considerably from one food product to another. Specific hazards, as well as allergens (see Appendix C), having the potential to cause an adverse health effect, need to be identified, as do the preventative measures for their control.

[45] Similarly, the Code requires the premises to have a written sanitation program, as set out in s. 4.2.1:

Food premises shall have a written sanitation program in place to monitor and control all elements in Section 4.0 of this Code, which generally must:

- a) outline the parameters to be controlled in the food premises to ensure safety of the food product.
- b) include sanitation procedures for equipment, utensils or refrigeration units that have an impact on food safety. Procedures must specify:
 - i) areas, equipment and utensils to be cleaned;
 - ii) the designated food handler(s) responsible for the cleaning and sanitizing;
 - iii) the chemicals and/or cleaning products (including concentrations and contact times) and process to be used;
 - iv) the processes to be used;

- v) the frequency of cleaning and sanitizing; and
- vi) inspection and monitoring records.

c) document that the sanitation program is monitored and its effectiveness verified.

d) reflect the level of risk of the food products as determined by the management plan required in Section 3.0 of this Code.

[46] The rationale for requiring a premises to have a written sanitation program includes:

The requirement for a written sanitation program is very similar to the requirement, in Section 3.1.3 of this Code, for management principles to control food hazards. The objective of the sanitation program is to provide reasonable assurance that the food premises is being cleaned and sanitized effectively and consistently.

[47] This part of the Code also addresses the cleaning and sanitizing of food contact surfaces, stressing the importance of these activities in a timely manner and setting out some specific requirements.

[48] Section 6 of the code addresses education, and includes the following at s. 6.1:

Employees engaged in food operations who come directly in contact with food should be trained in or at least have knowledge of food hygiene to a level appropriate to the operations they are to perform.

[49] The rationale for the requirement of education for employees includes:

Food safety is dependent on many factors, including the environment and the ways in which food is handled by employees. Training helps assure an operator that the food prepared in the food premises is safe.

[50] Given the industry that Mr. Pauch was operating in, and that his business was specifically required to operate in accordance with the Code, the reasonable person, when analysing the defence of due diligence, would be the reasonable person operating a business in the food service industry and subject to the Code.

Evidence of John Pauch

[51] Mr. Pauch testified as the only witness called for the defence. He was a truck driver, by trade, before he opened the Off the Hook butcher shop in Whitehorse. The business sold a variety of meats, including processed meat such as sausage and jerky. He typically operated the business with three employees, in addition to himself.

[52] He confirmed that jerky was made primarily by Mr. Badcock in the evenings, with Joel Pauch making it periodically in the daytime. He would clean the smoker and the racks thoroughly approximately once every two months. According to him, the racks were supposed to be washed down every night, but not cleaned to the extent that he would do every two months.

[53] Mr. Pauch testified that he was “not too familiar” with the Code. He appeared resistant to the notion that cooked jerky could become contaminated but agreed that it could carry contaminants such as e-coli and salmonella. He was asked a series of questions regarding the Code, confirming:

1. He never conducted a risk assessment at Off the Hook and never assigned a risk rating to the premises. I note that the Code sets out

- that the requirements for the application of a food safety management system in a food premises should be identified by a risk assessment.
2. He was not aware that he was supposed to have a written sanitation program. He indicated that he knew the requirements regarding cleanliness and according to him, everyone knew what they were doing and were responsible for cleaning up after themselves. There were no cleaning checklists and there was no schedule for cleaning.
 3. He did not take any food handling courses himself or require his employees, including Mr. Badcock, to take any courses.
 4. He did not know what a water activity rating was or that it refers to the moisture content in food. He never had the jerky from Off the Hook tested for the water activity rating but did suggest that it wouldn't have much moisture content.

[54] Mr. Pauch was cross examined on the EHS inspection reports from 2014 through 2020. Two areas of concern were consistently raised. One was that food was being stored on the floor of the cooler, and the second was that there was wooden shelving in the walk-in freezer. Mr. Pauch appeared to object to the concern over the wooden shelving, but eventually put in acceptable shelving, while the concern over storing food on the floor continued to be included up to the last report. I highlight these two issues as they are both clearly addressed in the Code and had Mr. Pauch followed the Code, he would have known he was in violation, and why.

[55] Mr. Pauch was aware of Mr. Badcock's vision issues but appeared to minimize it on several occasions in his testimony, indicating that when Mr. Badcock did not want to wrap meat because of his vision "that was the excuse he used, yeah", and stating that he was not blind to the point he needed glasses, rather it was just his "peripheral vision was not that great". When asked in direct examination if there were any concerns with Mr. Badcock's cleanliness he said "not really", yet in cross examination he conceded that staff would have to clean up after Mr. Badcock in the morning as there would be pieces of jerky and seasoning on the floor, on edges of tables, etc., but that it "wouldn't bother me".

[56] In December 2020, the security cameras were not functioning and had not been working for quite some time. Mr. Pauch did not provide an explanation as to why the system was not replaced immediately to record the activities in the shop and to continue to give him the ability to monitor activities remotely through an app on his phone. He did advise that after the investigation on December 30, 2020, he had the server replaced immediately, which just involved a phone call to the local vendor.

[57] He had a conversation about a cannabis jerky business with Joel Pauch in 2020. He claims that Joel Pauch never told him that he had researched a recipe and made cannabis jerky successfully at home, and that Joel Pauch never shared the recipe or process with him on how to make it. Despite this apparent lack of knowledge, he decided to pursue the business of making cannabis jerky, and Joel Pauch was the lead on the project.

[58] When questioned about his knowledge of the business pursuit, Mr. Pauch testified that:

1. Joel Pauch was the one dealing with the process of obtaining a license to produce the cannabis jerky;
2. Mr. Pauch was not familiar with “that line of work” and was not too involved in it;
3. Joel Pauch pursued it on a different level and would report back to Mr. Pauch from time to time on his research;
4. Mr. Pauch “didn’t pay much attention to it”; and
5. Mr. Pauch and his brother, Rick Pauch, had agreed to finance the new business.

[59] According to Mr. Pauch, a decision was made that production in Edmonton was the most viable option for commercial production based on freight costs. It was never his intention to produce cannabis jerky at Off the Hook.

[60] Mr. Pauch insisted that he never discussed any plans to make a batch of cannabis jerky at Off the Hook. Additionally, he never suspected Joel Pauch of producing cannabis infused jerky at Off the Hook or at his home.

[61] On December 30, 2020, when EHS arrived at Off the Hook, he was surprised when they advised him about the contaminated jerky and proceeded to seize products. He cooperated with authorities and assisted in packing up the seized items. The next

day he worked until noon and was away from the shop for a day or two. When leaving, he left a note to staff to cooperate with EHS and give them the boxes. He spoke with Joel Pauch and left him in charge of the boxes.

[62] Mr. Pauch claims that he never spoke with Mr. Badcock about the cannabis jerky after the authorities arrived at Off the Hook on December 30, 2020, and did not speak with Joel Pauch about it either. He testified that at the time he had no idea how the Off the Hook jerky could have become contaminated with cannabis.

[63] Off the Hook was shut down due to the contamination of the jerky with cannabis, but he continued to pursue the edible business until it was determined that the venture was not viable due to the charge before the Court which was sworn in late 2021.

[64] There were aspects of Mr. Pauch's testimony that were problematic in that they were implausible, defied common sense, or otherwise lacked credibility. Problematic aspects of his testimony include:

1. His explanation for the missing jerky that had been seized by EHS is contradicted by Joel Pauch. The agreed statement of facts states that Mr. Pauch refused to provide the name of the employee who he suggests either witnessed the boxes being moved or moved them. The refusal to share the name significantly impacts his credibility on this issue.
2. His statement to the RCMP, as set out in the agreed statement of facts, from January 5, 2021, that Joel Pauch left work on

December 31, 2021 at 5:30 p.m., directly contradicts the evidence of Joel Pauch that they closed early as it was New Year's Eve. It also directly contradicts the evidence of EHS, from the agreed statement of facts, that when they attended at Off the Hook on December 31, 2020 at 2:00 p.m. the business was closed.

3. His statement that he had no idea how the Off the Hook jerky was contaminated with cannabis, along with his assertion that he did not speak with either Mr. Badcock or Joel Pauch about it on or after December 30, 2020, defies common sense. He was trying to start a business making cannabis jerky and a discussion with his son and the primary jerky maker would be expected.
4. His assertion that he was willing to invest into a new cannabis jerky business without any knowledge of whether or not such a product could be made, or the process involved, defies common sense.
5. His statement that the plan was to produce the cannabis jerky in Edmonton, Alberta, contradicts the evidence of Joel Pauch and the instructions by Joel Pauch to the CLE representative by e-mail confirming the plan to produce the cannabis jerky at Off the Hook.

[65] I find that Mr. Pauch lacked credibility on the issues relating to his knowledge about the cannabis jerky recipe and the intention to make a test sample at Off the Hook.

Analysis

[66] Mr. Pauch argued that there was no way that he could have anticipated cannabis jerky being produced at Off the Hook, and thus no way to take precautions against the activity. Despite my findings regarding Mr. Pauch's credibility, I note that his knowledge of the actions of his employees is not the issue being addressed in his due diligence defence.

[67] The issue of an employee committing an offence without the knowledge of the owner was addressed by the Court in *Centre Datson Ltd.* At para 30:

30 Taking all this into consideration, I can come to no other rational conclusion but that the corporate accused is guilty of the offence. It would appear to me, as I have previously made the finding of fact, that the offence was committed by the employee Fitzpatrick, without the knowledge and consent of the company and its principle officer Mr. James Patterson, but liability stems entirely from the corporate accused's failure to exercise all due diligence to prevent the commission of the offence . . .

[68] The Supreme Court of Canada addressed the issue of knowledge in *Sault Ste. Marie* at p. 1331:

The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

[69] The lack of specific knowledge asserted by Mr. Pauch does not assist him with the defence of due diligence, nor does his passive approach to the possibility that

cannabis jerky would be made at Off the Hook, as addressed in *Lévis (City) v.*

Tétreault; Lévis (City) v. 2629-4470 Québec inc., 2006 SCC 12 at paras. 29 – 30:

. . . A strict liability scheme responds adequately to the concern to ensure that vehicle operators are aware of their legal obligations and, in particular, of their duty to do what is necessary to ensure that their licences remain valid and to drive only while they are valid. The only issue in dispute thus consists in determining whether the defence of the accused is consistent with the concept of due diligence.

30 In Mr. T treault's case, the judgments of the courts below confused passivity with diligence. The accused did no more than state that he expected to receive a renewal notice for his licence and that he had confused the licence expiry date with the due date for paying the fees required to keep the licence valid. He proved no action or attempt to obtain information. The concept of diligence is based on the acceptance of a citizen's civic duty to take action to find out what his or her obligations are. Passive ignorance is not a valid defence in criminal law.

[70] There is no evidence before the Court that Mr. Pauch took any steps to make sure that his employees understood that despite his interest in the cannabis jerky business venture, Off the Hook would not be used for testing cannabis jerky recipes. It is reasonable to expect that he would have made this clear, if that was in fact his position. His decision not to take any precautions does not assist him in his defence.

[71] The defense of due diligence requires Mr. Pauch to establish that he met the standard of a reasonable person in the food industry that is subject to the Code. The evidence before the Court suggests that the cannabis jerky was contaminated through cross contamination. It is clear on the evidence that Mr. Pauch had a very limited understanding of the Code, and that he did not implement the procedures for a risk assessment or sanitation program to address the concern of cross contamination. The

lack of a meaningful education program for his employees addressing issues such as cross contamination also fails to meet the expected standard.

[72] I note that strict compliance with the Code is not necessary to show that the practices followed at Off the Hook met the required standard. That is, a detailed description of the sanitation practices and training provided to employees at the time would be considered by the Court when assessing the defence of due diligence. In this case, Mr. Pauch provided very little detail regarding what, if any, measures he did have in place that may be considered reasonable based on the reasonable person test. The evidence before the Court is in relation to what he did not know, and did not implement, from the Code. The burden to establish the defence was his.

[73] Had Mr. Pauch applied the expected industry standard, then this Court would consider the defence of due diligence in the face of the cross contamination. The fact of the cross contamination would be weighed against the reasonableness of the business standards practiced. As his business practices fell far short of the industry standard, he cannot claim to have met the burden of establishing due diligence on the balance of probabilities in this case.

[74] I find John Pauch guilty of the single count before the Court for the offence contrary to s. 66(1)(a) of the *Cannabis Control and Regulation Act*.

PHELPS T.C.J.