Citation: *R. v. 16142 Yukon Inc.,* 2023 YKTC 4

Date: 20230117
Docket: 21-10406
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

16142 YUKON INC. o/a NORTHERN ENVIRO SERVICES and KERRY PETERS

Appearances:
Megan Seiling — Counsel for the Territorial Crown
Sarah Hansen and Christina McLeod (By Video Conference) — Counsel for the Defence

RULING ON *VOIR DIRE*

[1] PHELPS T.C.J. (Oral): The matter before me involves alleged violations of the *Environment Act,* RSY 2002, c. 76 (the "*Act*"), and of the *Special Waste Regulations*, O.I.C. 1995/047 (the "*Regulations*"). The defendants are 16142 Yukon Inc., which carries on business using the name Northern Enviro Services ("NES"), and Kerry Peters. NES and Kerry Peters are jointly charged with an offence contrary to s. 8(1) of the *Regulations* for handling special waste without a permit between October 16, 2020, and December 8, 2020. NES is further charged with offences contrary to s. 83 of the

Act, for generating and handling special waste without a permit, and s. 95 of the *Act,* for disposing of special waste without a permit.

[2] The parties filed an Agreed Statement of Facts which provide that Kerry Peters is the sole director of NES and owns the following properties that are relevant to the charges before the Court:

1. Lot 1083, Quad 15A/02, Plan 97-33 located at Mile 636 of the Alaska Highway in Watson Lake, Yukon (the "Land Treatment Facility Property");

2. The parcel adjoining the Land Treatment Facility Property to the west (the "Adjacent Property");

3. Lot 12, Block 14, Adela Trail, Watson Lake, Yukon (the "Adela Property");

4. Lot 3, Block 46, Watson Lake, Yukon (the "10th Street Property"); and

5. Lot 4, Block 46, Watson Lake, Yukon (the "Centennial Property").

Charter Challenges

[3] NES and Kerry Peters seek the exclusion of certain evidence pursuant to s. 24(2) of the *Charter of Rights and Freedoms* (the "*Charter*") for alleged violations contrary to s. 8 of the *Charter*. There are two searches being challenged:

1. A search on or about October 16, 2020, of the Centennial Property conducted without a warrant; and

2. A search of the Centennial Property and of the 10th Street Property on December 9, 2020, pursuant to a search warrant issued under s. 154(1) of the *Act*.

[4] At the outset of trial, a *voir dire* was declared to address the October 16, 2020 warrantless search of the Centennial Property. The evidence gathered on October 16, 2020, was analysed and the results formed part of the reasonable grounds adduced in the Information to Obtain sworn in relation to the subsequent search warrant. As the outcome of the challenge to the October 16, 2020 warrantless search will impact the challenge to the search warrant, this matter proceeded first.

[5] These are my reasons on the *voir dire* in relation to the October 16, 2020 search of the Centennial Property without a warrant.

Reliability and Credibility of Witnesses

[6] The Crown called as witnesses Conservation Officer ("CO") Aron Koss-Young, CO Logan Donovan, and Environmental Protection Officer ("EPO") Emily Sessford. The defence called no evidence. The three Crown witnesses conducted the search together on October 16, 2020. Before summarizing the facts, I have applied the following observations with respect to the credibility and reliability of the Crown witnesses.

[7] CO Koss-Young has been a Conservation Officer with the Yukon Government for the past 14 years in Whitehorse, Yukon. For the past three years he has held the position of Detective Sergeant. He has been a designated EPO pursuant to s. 63 of the *Act since* June 13, 2008. CO Koss-Young's primary responsibility as a Conservation

Officer is to conduct inspections and investigations in relation to several pieces of legislation. As an EPO he testified that his current role is to "assist with conducting inspections but more so to conduct investigations into alleged illegal activity or non-compliance with the *Environment Act* or *Regulations*".

[8] Despite his extensive experience with the Department of Environment and conducting investigations, I found that CO Koss-Young was a very poor historian on points important to the search at issue, significantly impacting his reliability. The following are examples, but not an exhaustive list, to highlight this observation:

- CO Koss-Young denied being in charge of the warrantless search despite being the senior officer involved and the clear understanding from his colleagues that he was in charge;

- CO Koss-Young denied any resistance to the search from the property owner despite EPO Sessford clearly articulating that there was a verbal objection by the NES representative, and that the representative made a call to legal counsel whom CO Koss-Young spoke with;

- CO Koss-Young minimized what he was able to observe of the Centennial Property from the neighbouring Department of Environment Property notwithstanding that the photographs in evidence show that significant observations could be made without entering the property;

- CO Koss-Young testified that the decision to conduct the first warrantless search of the Adjacent Property was based on

observations made during their inspection of the Land Treatment Facility Property, while CO Donovan testified that CO Koss-Young briefed the group on the plans for the day prior to departing for the first inspection, which included conducting the warrantless searches of the Adjacent Property and the Centennial Property; and

- CO Koss-Young spoke to legal counsel, representing NES and Kerry Peters, regarding the objection to the warrantless searches of the Adjacent Property and the Centennial Property. Despite his extensive experience as an investigator, it is concerning that he could not recall the position of legal counsel in relation to the search and did not take any notes of the conversation.

[9] I accept the evidence of CO Koss-Young where it is supported by the evidence of his colleagues. However, where his evidence contradicts that of his colleagues, I prefer the evidence of his colleagues.

[10] EPO Sessford has been a designated EPO pursuant to s. 63 of the *Act* since July 20, 2017. EPO Sessford was the Environmental Compliance Officer responsible for the planned inspections in Watson Lake on October 16, 2020. She was not responsible for the warrantless searches which were led by CO Koss-Young.

[11] I found EPO Sessford to be both credible and reliable.

[12] CO Donovan has been a Conservation Officer with the Department of Environment since April 2019, and has been stationed in Watson Lake since December

21, 2019. He has been a designated EPO pursuant to s. 63 of the *Act* since October 2022.

[13] I found CO Donovan to be both credible and reliable.

Facts

[14] On September 4, 2019, NES was issued a Land Treatment Facility Permit under the *Act*, permit #24-037, to operate a Commercial Land Treatment Facility at the Land Treatment Facility Property.

[15] On January 31, 2020, NES was issued an amended Special Waste Permit under the *Act*, permit #42-105, for the Land Treatment Facility Property and the Adela Property.

[16] Prior to early 2017, permit #42-105 also included the Centennial Property.

[17] On October 16, 2020, EPO Sessford and CO Koss-Young drove from their place of work in Whitehorse, Yukon, to Watson Lake, Yukon, to conduct inspections, under the authority of s. 151 of the *Act,* of the properties subject to permits #24 037 and #42-15. EPO Sessford planned the inspections and invited CO Koss-Young for support due to previous non-compliance issues she experienced relating to the permits. Although EPO Sessford planned the inspections, CO Koss-Young was the lead officer responsible for the warrantless searches.

[18] On arrival in Watson Lake, EPO Sessford and CO Koss-Young attended at the Department of Environment office and met with CO Donovan. EPO Sessford had not planned for CO Donovan to join them on the inspections, but CO Koss-Young invited

him. According to CO Donovan, CO Koss-Young was the lead on the activities for the day and CO Donovan's role was to take notes, observe, and learn.

[19] EPO Sessford, CO Koss-Young, and CO Donovan attended at the Land Treatment Facility Property in the early afternoon to start the inspections in relation to permits #24-037 and #42-105. They were met on arrival at the Land Treatment Facility Property by Damon Warren, a representative of NES, who accompanied them during the inspections. The inspection of the Land Treatment Facility Property lasted for about one and one-half hours, which includes the search of the Adjacent Property discussed below. They then proceeded to the Adela Property and inspected that property for approximately 40 minutes. There were no concerns noted during the inspection of either the Land Treatment Facility Property or the Adela Property.

[20] In addition to the inspections of the Land Treatment Facility Property and the Adela Property, there were two warrantless searches conducted by the officers. The first warrantless search was of the Adjacent Property at the time they were inspecting the Land Treatment Facility Property. The second warrantless search was conducted at the Centennial Property after the inspection of the Adela Property.

Search of the Adjacent Property

[21] During the inspection of the Land Treatment Facility Property, the officers notified Mr. Warren of their intention to inspect the Adjacent Property. There were fuel drums and totes visible, and CO Koss-Young stated the intention to check for special waste on the property. When informed of this intent, Mr. Warren objected to the inspection. While CO Koss-Young testified that he could not recall there being any objection to the

officers proceeding to inspect the Adjacent Property or the Centennial Property, EPO Sessford was clear in her testimony that “we were told not to” by Mr. Warren and that she recalled him stating “lets stick to the permit”. According to EPO Sessford, the intention to conduct the additional inspections “created some tension”. At that point, Mr. Warren proceeded to call legal counsel and provided the phone to CO Koss-Young to discuss the intended inspection.

[22] According to CO Koss-Young, he advised legal counsel that they were proceeding under the authority of s. 151(2) of the *Act* and that the officers intended to inspect both the Adjacent Property and the Centennial Property. He could not recall the response from counsel, other than her questioning the authority for the search. Further, he did not take any notes in relation to the conversation with legal counsel. It is clear from the evidence that Mr. Warren was not consenting to the additional inspections on behalf of either NES or Kerry Peters. The officers proceeded with the additional warrantless searches without consent.

[23] The search of the Adjacent Property resulted in some halogen lights being discovered, which do constitute special waste. This was considered to be a minor matter and was dealt with administratively by a direction to remove the waste from the property.

Search of the Centennial Property

[24] In the fall of 2020, CO Koss-Young, CO Donovan, and CO Donovan’s supervisor in Watson Lake, District Conservation Officer (“DCO”) Mark Brodhagen, observed 1000 litre plastic totes and 200 litre metal drums, both typically used to store and transport

special waste, on the Centennial Property. CO Koss-Young attended Watson Lake throughout the summer and fall of 2020 for purposes that included support for the COVID-19 border control measures being conducted at the south end of Watson Lake, providing the opportunity for observations of the Centennial Property. They observed a large volume of the containers which were partially covered by tarps. From the Department of Environment property, which is next to the Centennial Property, they could see a dark substance, and staining from the storage of dark substances, in some totes that they believed to be special waste under the *Act*. The properties are separated by a chain-link fence which does not obstruct the view, and the containers were located near the boundary between the two properties.

[25] In addition to the observations of the totes and drums, there is a large mechanical shop on the Centennial Property and numerous vehicles were parked on the property, including commercial trucks and heavy equipment. Some of the vehicles were clearly marked as NES property. CO Koss-Young suspected, from his observations, that NES was generating special waste in the form of used motor oil at the location and possibly disposing of it.

[26] During the meeting between EPO Sessford, CO Koss-Young, and CO Donovan at the Department of Environment building prior to starting the inspections on October 16, 2020, CO Donovan informed his colleagues that through the spring and summer months of that year, in hot weather, he could detect the smell of used motor oil coming from the Centennial Property. CO Donovan testified that these observations started in March or April of that year, his first spring residing in Watson Lake, and that he was familiar with the smell of used motor oil because of his exposure to it in a

previous occupation as a shop hand in a mechanical shop where oil changes on motor vehicles were regularly conducted. He further testified that he relayed his observations to DCO Brodhagen at the time. He is not aware of what DCO Brodhagen did with the information after he reported it.

[27] Based on these observations regarding the Centennial Property, it was decided that the officers would inspect the Centennial Property to determine whether there was activity in relation to special waste that should be subject to a permit under the *Act*. CO Koss-Young, as the senior officer in charge, advised his colleagues that that they were not going there to collect evidence and that, if there was any evidence of a violation, they would cease operations and leave the property.

[28] Mr. Warren joined the officers at the Centennial Property for the inspection. While the officers testified that they did not note any objection to their entry on the Centennial Property at that time from Mr. Warren, it is clear from the previous interaction, including the call to legal counsel, that there was an objection to them entering the property.

[29] During the search, the officers pulled back the tarps on the totes and the barrels and took pictures of the uncovered items. They discovered what they believed were barrels that had been sitting in place for a considerable time based on appearance and condition, and numerous barrels were laying on their side and appeared to be leaking a substance into the ground causing staining of the earth. A sample of the stained earth was taken by EPO Sessford. Of note is that the stained earth, and the location of the sample taken, were in an area where the barrels were covered by a tarp and were not visible without removing the tarp.

[30] Efforts were not made to determine the contents of the totes, either through smell or sampling. However, several totes had NES stickers indicating they were subject to permit #42-105 and contained special waste in the form of motor oil.

[31] Contrary to the plan articulated by CO Koss-Young earlier in the day, the officers did not stop the search once they had located evidence of special waste, which would have been obvious when they uncovered the totes and saw the NES stickers. They instead continued to uncover items, take photographs, and collect samples of the stained earth. They also proceeded to search the building on the premises. The rationale provided by CO Koss-Young for continuing the search was that he believed that NES was using the property to either generate, handle, or dispose of special waste and those activities require a permit. He wanted to make sure he was not missing any of their activities that should fall under the permits.

Issues

[32] The warrantless search analysis will address the following topics:

1. Expectation of privacy in the Centennial Property;
2. Section 8 warrantless search test;
3. Application of policy to the warrantless search test;
4. Authority of an EPO to inspect;
5. Availability of search warrants; and
6. Findings in relation to the warrantless search.

Expectation of Privacy in the Centennial Property

[33] As a preliminary issue, the Crown argues that the defendants had no reasonable expectation of privacy in the Centennial Property as it was being operated as a commercial property. While the basis for the Crown's argument in this regard was not fully clear to me, I consider the law in this area to be firmly established. As stated by the Ontario Superior Court of Justice in *R. v. Canada Brick Ltd*., [2005] O.J. No. 2978 (ONSC):

> 157 Before turning to what I believe to be the legitimate complaints of Canada Brick respecting the s. 8 Charter issue, a summary overview of relevant principles is warranted:
>
> **...**
>
> (7) As a general rule, in highly regulated sectors of society, there is a diminished expectation of privacy in commercial premises and in respect of records and documents produced in the ordinary course of business: R. v. Jarvis, at p. 34; Thomson Newspapers Ltd. v. Canada, at p. 507; Comité Paritaire v. Potash, at p. 424. That said, there is a reasonable expectation of privacy more or less, in business premises: R. v. McKinlay Transport Ltd., at p. 546; R. v. Grant, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173 (S.C.C.), at p. 188; R. v. Rao (1984), 12 C.C.C. (3d) 97 (Ont. C.A.), at pp. 121-2.

[34] The evidence before the Court regarding the Centennial Property was that the premises, while used by NES, were not a public facing business. The property was not, at that time, subject to any permits or authorizations that would trigger inspections by Department of Environment officials, which would reduce the expectation of privacy. While the activity on the property appeared to be the operation of a mechanical shop for the company vehicles which may somewhat diminish the expectation of privacy, I find

that NES and Kerry Peters did have a reasonable expectation of privacy with respect to the Centennial Property.

Section 8 Warrantless Search Test

[35] The Crown conceded that the burden of establishing that there was a warrantless search has been met in this matter. This shifts the burden to the Crown, as set out in *R. v. Collins*, [1987] 1 S.C.R. 265, at paras. 22 and 23:

> 22 …This shifts the burden of persuasion from the appellant to the Crown. As a result, once the appellant has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable.
>
> 23 A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. …

Application of Policy to the Warrantless Search Test

[36] In the *Act*, enforcement falls under Part 13 and begins with s. 150 which requires the Minister to establish an enforcement policy:

> 150 Enforcement and compliance policy
>
> The Minister shall establish and make public a policy respecting the enforcement of this Act and the regulations, including procedures and guidelines governing the exercise of discretionary powers under this Act.

[37] The Crown provided the Court with the *Enforcement & Compliance Policy For The Environment Act*, January 2007, issued by the Department of Environment, Government of Yukon (the ”Policy”), which was the policy created pursuant to s. 150 and was in place at the time of the warrantless search. It is significant that the *Act* itself

requires the establishment of a public facing policy respecting enforcement which includes "procedures and guidelines governing the exercise of discretionary powers" by officers under the *Act*. The Policy represents the government's interpretation of the authorities in the *Act* and sets the expectation for the public on how it will be enforced. As the Policy is required by the *Act,* it must be included in the analysis either as an interpretive aid or as law, as summarized by the Supreme Court of Canada in *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, at paras. 63 to 65:

> 63 What *Committee for the Commonwealth of Canada* and *Little Sisters* demonstrate is a concern about the administrative nature of the policies and guidelines of the government entities in question. Administrative rules relate to the implementation of laws contained in a statutory scheme and are created for the purpose of administrative efficiency. The key question is thus whether the policies are focussed on "indoor" management. In such a case, they are meant for internal use and are often informal in nature; express statutory authority is not required to make them. Such rules or policies act as interpretive aids in the application of a statute or regulation. …
>
> 64 Where a policy is not administrative in nature, it may be "law" provided that it meets certain requirements. In order to be legislative in nature, the policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority. A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply . . .
>
> 65 Thus, <u>where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".</u> [emphasis added]

[38] In this case, the Policy was not only authorized by statute, it was prescribed by statute and intended to govern "the exercise of discretionary powers under" the *Act*. In

the circumstances, I am satisfied that it is legislative in nature and constitutes a limit prescribed by law.

[39] The statutorily mandated Policy, published and intended to be relied on by the public, provides an interpretation of the legislation that places reasonable restrictions on the ability to enter a place without consent and to seize evidence without a warrant. These restrictions must be read along with the additional enforcement provisions in the *Act.*

Authority of an EPO to Inspect

[40] According to the Crown, the warrantless search of the Centennial Property was conducted pursuant to s. 151 of the *Act*. The relevant provisions of the section are as follows:

> 151 Inspections of regulated activities
>
> (1) Subject to section 152, for the administration of this Act or the regulations, an environmental protection officer may, at any reasonable time, inspect a development, activity, or any other thing, which is the subject of a permit, order, or direction, and for that purpose may
>
> (a) with the consent of the occupant in charge of a place, enter any place;
>
> (b) enter any place to which the public is ordinarily admitted;
>
> …
>
> (d) enter any place which the environmental protection officer reasonably believes may contain or hold waste or which may be governed by regulations regarding hazardous substances or pesticides;

> (e) enter any place in or from which the environmental protection officer reasonably believes a contaminant is being, has been, or may be released into the natural environment;
>
> (f) enter any place that the environmental protection officer reasonably believes is likely to contain documents related to the development, activity or thing, or to the release of a contaminant into the natural environment;

[41] As the Centennial Property was not the subject of a permit, order, or direction at the time of the warrantless search, the authority relied on by the Crown is found in s. 151(2) whereby the officers could exercise the powers found in s. 151(1) if they had "…reasonable grounds to believe that the development, activity, or thing is required or ought to be the subject of a permit, order, or direction".

[42] The officers did not have the "consent of the occupant in charge of a place" as required under s. 151(1)(a) but relied on s. 151(1)(d) which permits the entry to any place that the EPO "reasonably believes may contain or hold waste or which may be governed by regulations regarding hazardous substances or pesticides". Accordingly, s. 151(2), combined with s. 151(1)(d), was relied on as the authority to enter onto the property without consent and conduct an inspection under the *Act*.

[43] In order to determine whether the search of the Centennial Property was authorized by law, it is necessary to look at the surrounding enforcement provisions to assist in the interpretation of s. 151. In doing so, I rely on the following quote from the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 to 23:

> 21 Although much has been written about the interpretation of legislation…Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > …
>
> 22 I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".
>
> 23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. …

[44] In applying this approach, it is also important to note the nature of the legislation being analysed, which was addressed by the Supreme Court of Canada in *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52, at para. 9, as follows:

> The *EPA* is Ontario's principal environmental protection statute. Its status as remedial legislation entitles it to a generous interpretation (*Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64; *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031, at para. 84). Moreover, as this Court recognized in *Canadian Pacific*, environmental protection is a complex subject matter — the environment itself and the wide range of activities which might harm it are not easily conducive to precise codification (para. 43). As a result, environmental legislation embraces an expansive approach to ensure that it can adequately respond "to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation" (para. 43). Because the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep (para. 84).

[45] In assessing the impact of the Policy on the interpretation of s. 151, the relevant provisions, as found in Part VII, Enforcement Responses to Violations of the Act, are:

> Inspections
>
> The purpose of inspections is to monitor activities and developments to ensure that they are in compliance with the *Act*, a permit, order or direction. Environmental Protection Officers are responsible for conducting inspections.
>
> …
>
> Environmental Protection Officers have authority under the *Act* to enter and inspect the following places without a search warrant:
>
> * any place, with the consent of the owner,
>
> * any public place, or
>
> * a development, activity or any other thing which is not the subject of a permit, order or direction, if he/she has reasonable grounds to believe that the development, activity or thing requires a permit, order or direction.

[46] The third bullet in this provision applies the authority to enter and inspect, without a warrant, pursuant to s. 151(2) of the *Act*. However, the Policy goes on to cover ss. 151(d) through (f) as follows:

> Environmental Protection Officers may enter and inspect a place which is subject to a permit, order, or direction, where the Environmental Protection Officer has reasonable grounds to believe that:
>
> * the place contains hazardous substances or pesticides governed by the *Act*,
>
> * a contaminant has been or may be released from the place, or
>
> * the place contains documents related to a development, an activity or to the release of a contaminant.

[47] This provision of the Policy is significant for three reasons. First, the authority to enter and inspect a place without consent in s. 151(d) though (f) is restricted to “a place which is subject to a permit, order, or direction”. The Policy does not extend this authority to circumstances under which s. 151(2) is being relied on, where there is not a “permit, order, or direction”. Second, the Policy increases the legal test for the application of these sections from that of “reasonable belief” to ”reasonable grounds to believe”. This appears to restrict the use of the provisions to circumstances of increased knowledge in situations where there is an urgency. Third, regarding s. 151(1)(d), the Policy restricts the application to circumstances where the EPO has reasonable grounds to believe that “the place contains hazardous substances or pesticides”. The Policy removes the application to circumstances where the belief is that the place “may contain or hold waste”, which is the part of the section relied on by the officers in this case. The significant restrictions to the exercise of discretion in the Policy suggests that the exercise of discretionary power under s. 151(1)(d) should be limited to circumstances where there is some urgency, and where a delay to seek judicial authorization may have a detrimental impact on the environment.

[48] The Policy also applies the plain view doctrine for the seizure of evidence during an inspection as follows:

> An Environmental Protection Officer may seize evidence of a violation without a search warrant, if the Officer observes the evidence in plain view during an inspection.

[49] The evidence discovered and seized at the Centennial Property was not in plain view. The officers went beyond their authority as set out in the Policy by seizing items that were not in plain view.

Availability of Search Warrants

[50] There are two search warrant provisions in the *Act* that also require consideration when interpreting the authorities under s. 151, the first being s. 151.01:

> 151.01 Warrant for entry and inspection
>
> (1) A justice may issue a warrant authorizing an environmental protection officer or any other person named in it to enter and inspect an area, except a private dwelling, if the justice is satisfied by information on oath or affirmation that there are reasonable grounds to believe that
>
> (a) entry into the area is necessary for the purposes of administering or determining compliance with this Act or the regulations; and
>
> (b) either
>
> (i) entry has been refused or will be refused, or
>
> (ii) the occupant is temporarily absent.
>
> …
>
> (4) An environmental protection officer who is issued a warrant under this section may, subject to any conditions in the warrant, exercise any of the powers of inspection set out under subsection 151(1).

[51] This section provides for judicial authorization to “enter and inspect an area” where there are “reasonable grounds to believe“ that “entry into the area is necessary for the purposes of administering or determining compliance with this Act”. This is

exactly the same test as is required for the application of s. 151(2) and is available where an officer is faced with a situation where entry to a place has been denied. Where the warrant is granted, s. 151.01(4) gives the officer the "powers of inspection set out under ss. 151(1)".

[52] When Mr. Warren declined to consent to the officers entering and inspecting the Centennial Property, the officers were required to seek judicial authorization under s. 151.01 to enter and inspect without a search. However, their actions were not consistent with the authority to inspect.

[53] In *Ontario (Ministry of the Environment and Climate Change) v. Geil*, 2018 ONCA 1030, at para. 51, the Ontario Court of Appeal analysed the inspection powers under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19, and interpreted them in the context of the broader search powers in the legislation. In doing so, the Court conducted a comparison of the inspection powers with other powers, including the availability of judicial authorizations, concluding as follows on the inspection authority:

> Viewing s. 156(1) in the context of the range of powers enumerated in the Act indicates that this provision authorizes activities intended to support the provincial officer's preventative and compliance powers. It is not directed at the investigation of offences, the seizure of evidence, or the issuance of binding orders or directions. It is at the least intrusive end of the provincial officer's authority. As outlined above, more intrusive powers require a higher level of belief or knowledge, or require prior judicial authorization.

[54] In the Yukon, s. 151 of the *Act* provides for the powers to inspect which, as stated in *Geil*, support the officer's preventative and compliance powers. The section authorities are not directed at investigation, search, or seizure activities. The permitted

activities, including the taking of samples, are limited to the intended purpose of prevention and compliance. To conclude otherwise would result in the warrant provisions of the *Act* being entirely superfluous.

[55] In my view, s. 151 and s. 151.01 do not provide authority to conduct a search. These provisions apply to the authority to inspect. The authorization to search is governed by s. 154, which provides for judicially authorized search authority as well as warrantless search authority:

> 154 Search warrants
>
> (1) If, on *ex parte* application, a justice is satisfied by information on oath that there are reasonable grounds to believe that there is in a place
>
> (a) a thing by or in relation to which a provision of this Act or the regulations has been contravened; or
>
> (b) a thing that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence under this Act,
>
> the justice may issue a warrant authorizing an environmental protection officer, or authorizing any other person named in the warrant, to enter and search the place and to seize any thing referred to in paragraph (a) or (b) subject to any conditions specified in the warrant.
>
> (2) Subject to any conditions specified in the warrant, a person authorized by a warrant issued under subsection (1) may
>
> (a) at any reasonable time enter and search a place referred to in the warrant;
>
> (b) seize and detain anything referred to in the warrant or anything in plain view that may provide evidence of the commission of an

> offence under this Act or a schedule 1 enactment; and
>
> (c) exercise the inspection powers described in subsection 151(1).
>
> (3) Subject to section 152, an environmental protection officer may exercise the powers described in subsection (2) without a warrant, if the delay necessary to obtain a warrant under subsection (1) would result in a risk of serious harm to human life or the environment or the loss or destruction of evidence of the commission of an offence under this Act or a schedule 1 enactment.

[56] Section 154(1) again applies the reasonable grounds to believe standard to obtain the authority to search and seize. Section 154(3) provides that a search may be conducted without a warrant where there are exigent circumstances, and it would be impractical to obtain judicial authorization.

[57] The Policy addresses s. 154 as follows:

> Search and Seizure
>
> Environmental Protection Officers may enter and search a premise and seize evidence of a violation with the aid of a search warrant unless immediate action is required to ensure that the evidence does not disappear. Where evidence is observed in plain view, an Officer may seize and detain evidence without a warrant.

[58] It is noteworthy that the Policy adds the requirement to comply with the plain view doctrine to circumstances that justify a warrantless search. The Policy provides for warrantless search authority where “immediate action is required” and explicitly disallows the seizure of evidence unless it is located in plain view. This additional restriction represents an added safeguard against the misuse of the provision, requiring judicial authorization for both the search and the seizure of items not in plain view.

[59] The Court in *Geil*, at paras. 83 and 84, goes on to analyse the standard of proof applicable in the various sections of the legislation:

> 83 Given the harm caused by release of contaminants and the potential damage caused by a failure to remediate, MOE inspectors must be able to act swiftly and effectively. A standard of "reasonable belief", rather than the more onerous standard of "reasonable and probable grounds" engaged in other provisions of the Act, allows for less time-consuming and intrusive fact-finding, given the need for prompt and effective action.
>
> 84 This lower standard applicable to inspection powers is subject to appropriate statutory limits and safeguards. Section 156(5) provides that a provincial officer may not enter a room actually used as a dwelling without the consent of the occupier, except under the authority of an order under s. 158. Further balance is provided by s. 158(1), which provides that where a person (such as the respondent) has prevented the provincial officer from exercising the inspection powers in ss. 156(1) or (2), or s. 156.1, the provincial officer must obtain a judicial order for entry or inspection. Thus, it is open to an individual who believes that inspection powers are being engaged in an unreasonable or abusive manner to refuse inspection of their property in the absence of judicial authorization. These provisions provide an appropriate balance between the public interest in ensuring regulatory compliance and individual privacy rights.

[60] In the Yukon, ss. 150(1)(d) through (f), as stated in *Geil,* provide an avenue for officers under the *Act* "for less time-consuming and intrusive fact-finding, given the need for prompt and effective action". The "appropriate statutory limits" are found in s. 151.01 whereby judicial authorization is required when entry has been refused, and under s.154 whereby either judicial authorization or exigent circumstances are required to enter and search a property.

[61] The officers cannot rely on urgent circumstances to explain their actions relating to the warrantless search of the Centennial Property. The Department of Environment was aware of the smell of used motor oil coming from the Centennial Property and the existence of the totes and barrels on the property since the spring of 2020. The

observations of CO Donovan were made in the spring of 2020 which was his first spring in Watson Lake, and he shared his observations with DCO Brodhagen, his immediate supervisor. Further observations of the property, including the vehicles, totes, and barrels were made by CO Koss-Young throughout the fall of 2020, and he discussed his observations of the property at the time with DCO Brodhagen. It is also clear from the evidence that the items, particularly the barrels, were there for a considerable amount of time. An argument cannot be made in these circumstances that there was any urgency to accessing the property without consent or without a warrant.

Findings in Relation to the Warrantless Search

[62] As previously noted, the officers did not have the necessary consent to enter the Centennial Property under s. 151(1)(a). The application of the Policy raises significant questions about whether the officers had the requisite grounds to enter the Centennial Property for the purpose of conducting an inspection, but even if they did, their actions in this case went well beyond the scope of inspection authority conferred by s. 151(d). Their immediate action upon entry to the Centennial Property was to conduct a thorough search of the property and building, and to seize evidence not found in plain view. This activity, being the exercise of more intrusive powers than inspection, required the officers to pursue judicial authorization under s. 154.

[63] I find that the officers failed to follow the Policy and misunderstood the extent of their authority under s. 151 of the *Act* when they entered the Centennial Property without consent and conducted the warrantless search. The search was therefore not authorized by law and required judicial authorization pursuant to s. 154. The warrantless

search was conducted in the absence of any concern that the delay necessary to obtain judicial authorization "would result in a risk of serious harm to human life or the environment or the loss or destruction of evidence of the commission of an offence" and therefore cannot be justified under s. 154(3). Further, the failure of the officers to follow the Policy and to take the necessary steps to obtain judicial authorization to search the Centennial Property was not reasonable.

[64] I find that the October 16, 2020 warrantless search of the Centennial Property was unreasonable and violated s. 8 of the *Charter*.

[65] The Crown, in her submissions, stated that a s. 24(2) analysis was not required as it relates to the evidence flowing from the warrantless search being excised from the Information to Obtain sworn for the search warrant. I took her position to be based on the doctrine of automatic excision, which has been addressed by the Supreme Court of Canada, as stated by the Alberta Court of Appeal in *R. v. Love*, 2022 ABCA 269, to be that "…the excision of unconstitutionally obtained information is automatic…". However, in the interest of time during submissions, counsel were advised that submissions could be made at the next appearance should the Crown wish to reconsider whether or not the doctrine of automatic excision applies in this case, or whether a s. 24(2) analysis is otherwise required.

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PHELPS T.C.J.