Citation: *R. v. Tamarack, Inc.,* 2017 YKTC 40

Date: 20170825
Docket: 16-11329
Registry: Dawson City
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

TAMARACK, INC.
and
ANTON BEETS

Appearances:
Megan Seiling — Counsel for the Territorial Crown
André Roothman — Counsel for the Defence

REASONS FOR SENTENCE

[1] CHISHOLM J. (Oral): Tamarack, Inc. and Mr. Anton Beets were found guilty, after a trial, of charges that they permitted the deposit of waste into water in a water management area; and that they failed to report the said deposit, contrary to paras. 7(1)(a) and 7(3)(a), respectively, of the *Waters Act*, S.Y. 2003, c. 19 (the "*Act*").

[2] I also found Tamarack, Inc. guilty for failing to have complied with the conditions of its water licence, namely to not use fuel in a way that allows it to be deposited in waters; and to report an unauthorized discharge, contrary to para. 38(3)(a) of the *Act*.

[3] Tamarack, Inc. is a Yukon company which is engaged in placer mining in the Dawson district. Mr. Anton Beets is one of the directors of the company. The company and Mr. Beets participate in a television program named "Gold Rush" which depicts placer miner operations.

Facts

[4] The facts regarding these matters are straightforward. Mr. Marc Favron worked as a contract welder for Tamarack, Inc. at the time of the offences. In early October 2014, at the end of the work day, Mr. Favron decided on the spur of the moment to pour gasoline in the dredge pond in order that it might be lit. Although Mr. Favron provided Mr. Beets, his boss, with advance knowledge of what he planned to do, Mr. Beets did not prevent him from doing so. Mr. Favron poured approximately a gallon to a gallon and a half of gasoline in the dredge pond. Another employee lit it on fire.

[5] These events were captured by the film crew for the television show. The 2015 episode of Gold Rush entitled "Hundreds of Ounces" depicts Mr. Beets standing in front of the burning dredge pond, fully participating in this spectacle for the benefit of the cameras.

Position of the Parties

[6] The Crown seeks fines for Mr. Beets totalling $10,000 and for Tamarack, Inc. totalling $40,000. The Crown emphasizes the need for specific and general deterrence for these environmental offences, especially in light of the use of the footage of these events to promote the television episode.

[7] Mr. Roothman, on behalf of Mr. Beets and Tamarack, Inc., submits that much lower fines are appropriate in all the circumstances of this matter, namely, a total of $1,500 for Mr. Beets and $12,500 for Tamarack, Inc. The defence notes that the event was a momentary lack of judgment which led to little to no environmental impact.

Principles of Sentencing for Environmental Offences

[8] The Yukon Territorial Court decision of *R. v. United Keno Hill Mines Limited* (1980),10 C.E.L.R. 43 (Terr. Ct.), sets out various factors to be considered in determining the appropriate penalty for offences of environmental abuse. These are summarized as follows:

1. the nature of the environmental damage;
2. the criminality of the conduct;
3. the extent of attempts to comply;
4. remorse;
5. the size of the corporate offender;
6. the profits or gain realized by the offence; and
7. the criminal history of the corporation.

[9] More recently, in *R. v. Terroco Industries Limited*, 2005 ABCA 141, the Court details general principles at play in environmental offences, namely:

1. culpability;

2. prior records and past involvement with the authorities;

3. acceptance of responsibility;

4. damage/harm; and

5. deterrence.

[10] As is evident, there is much overlap between the approaches taken in the *United Keno Hill Mines* and *Terroco* decisions, respectively.

Relevant Sentencing Principles

Culpability

[11] The culpability of Mr. Beets and Tamarack, Inc. is, in my view, in the mid-range on the spectrum. Tamarack, Inc. had not established any training program for employees dealing with fuels, or those who might have access to fuels, nor any defined method to combat fuel spills. In terms of this incident in particular, although Mr. Favron devised the plan to dump the fuel on the spur of the moment, Mr. Beets had the opportunity to prevent him from doing so. In not prohibiting Mr. Favron's stated course of action when he had the opportunity, Mr. Beets abdicated both his managerial responsibility and his corporate responsibility as a principal of Tamarack, Inc.

[12] The incident was clearly neither inadvertent nor accidental.

Environmental damage

[13] The damage to the environment caused by the actions of Mr. Beets and Tamarack, Inc. is on the lower end of the spectrum. Although the harm was not ascertainable, the evidence established that the combustion of gasoline in water may lead to dangerous by-products entering the water system.

[14] In any event, as stated in the *Terroco* decision at para. 47:

> In many environmental offences, harm is not easily identified. However, the absence of ascertainable harm is not a mitigating but merely a neutral factor …

[15] It is also important to consider the cumulative harm that offences of this nature may occasion. As stated in *R. v. Northwest Territories Power Corp.*, 2011 NWTTC 3:

> [20] Often, the harm resulting from an environmental offence is not immediately ascertainable. For example, the deposit of a few litres of hydrocarbons in a river system may not kill any fish; however, if the act is repeated, there will be a cumulative effect that will be harmful. Yet, the first offender who deposits the hydrocarbons even where the harm is not ascertainable should be treated in the same way as the last offender whose incremental deposit results in ascertainable harm.

Remorse

[16] A defendant is never punished for taking a matter to trial. It is the defendant's right to do so. However, a guilty plea is a mitigating factor, as the offender acknowledges culpability. An expression of remorse is also a sign that the offender is contrite and open to the concept of rehabilitation.

[17] At para. 26 in the *United Keno Hill Mines* decision, the trial judge articulated this concept in an environmental offence context in the following manner.

> The personal appearance of corporate executives in Court and their personal statement outlining the company's genuine regret and stating future plans to avoid repetitions of such offences is another indication of genuine corporate contrition …

[18] Such contrition appears absent in the matter before me. Counsel for Mr. Beets and Tamarack, Inc. described the situation as a "storm in a teacup". I respectfully disagree with this submission. In my view, Mr. Beets' active participation in the filming of this environmental offence by going in front of the cameras while the dredge pond fire burned, demonstrated his view with respect to the contraventions. I have no indication that his state of mind in this regard has changed.

Deterrence

[19] In *R. v. Garry Johnson*, 2010 NWTTC 17, Malakoe J. discusses the factor of deterrence in the following terms:

> [31] ... Many cases have stated that the primary purpose in sentencing for environmental offences is deterrence, both general and specific - *R. v. Schulzke*, [2008] S.J. No. 790. In *R. v. BYG Natural Resources Inc.*, [1999] Y.J. No. 35, the Court expressed the deterrent effect of prosecution in the following manner:
>
> > **13** In prosecutions involving individuals, the process of arrest, prosecution and trial are often considered to be as important for deterrence as is the penalty imposed. This principle also applies to some corporations.

> **14** K.A. Manastet, Perspective: Early Thoughts on Prosecuting Polluters (1972), 2 Ecology Law Quarterly 471 at p. 479, notes:
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> > The deterrent effect of pollution prosecutions does seem to be considerable. That is, it is highly likely that vigorous prosecution of a certain type of polluter will be noticed by other polluters of the same type. The polluter on the sideline quickly begins to envision and assess his posture in similar litigation. Often the result is either a quiet but prompt clean-up or an inquiry to the prosecuting authorities as to just what he must do to avoid being next.
>
> [Quoted from Law Reform Commission of Canada, Crimes Against the Environment, Working Paper #44(1985)]

[32] The combined effect of prosecution and a fine in providing both general and specific deterrence is stated in the following quote from pages 14 and 16 of the 1985 the Law Reform Commission of Canada study paper entitled *Sentencing In Environmental Cases*:

> The basic rule in environmental cases, as in other cases, is that "without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere licence fee for illegal activity." . . . [O]ffenders often respond to prosecution by making substantial improvements even when faced with small fines. Thus, prosecution does provide "specific" deterrence. Whether it also results in general deterrence is questionable, and potential exposure to higher fines may be important in this respect. Regardless of the accuracy of this perception of undue leniency,

> it must be dealt with or it will result in erosion of respect for environmental laws and their enforcement

[20] A fine should not be perceived either by the offender or the general public as a cost of doing business. In other words, while the penalty must be fair, it must also have some impact on the offenders. Where, as here, the environmental infractions under scrutiny were broadcast widely to a large viewership, the need for both specific and general deterrence is an important factor.

Size of the corporation

[21] Tamarack, Inc. is one of the largest privately held placer mining companies in the Yukon. It possesses 337 placer claims, each of which requires a work expenditure, or payment in lieu, of at least $200 a year to keep the claims in good standing. I infer from the fact that Tamarack, Inc. spends over $67,000 a year to maintain these claims, and the fact that it makes use of heavy equipment at sites such as the one in question, that it is a company of some means. The defence led no evidence to dissuade me of this notion.

Criminal history

[22] Neither Mr. Beets nor Tamarack, Inc. has a prior record for environmental offences.

Benefit of this activity

[23] There is no way to accurately quantify the benefit of this activity to Mr. Beets and Tamarack, Inc. Although this is not a situation where the offenders contravened the law

in an effort to lower costs at the worksite, as noted, the dumping and lighting of the gasoline in the dredge pond was captured by the film crew for the television show "Gold Rush". Indeed, the complaint that led to the investigation of this matter resulted from the airing of the episode which contained this footage.

[24] Although it is argued that neither Mr. Beets nor Tamarack, Inc. had any control over the production of the television episode, including what footage was used, there also was no evidence presented that either attempted to dissuade the production personnel from airing this footage. As a result, the Gold Rush episode sensationalized the illegal dumping and lighting of fuel in the dredge pond.

[25] Based on the dramatic fashion in which this incident was presented in the television episode, it may be inferred that the sensationalized footage was employed in order to make for "good television".

[26] I am of the view that for Mr. Beets, one of the stars of the show, this type of exposure would only be beneficial in the role that he portrays.

Case Law

[27] I have consulted a number of sentencing decisions involving environmental offences in which discharges into water occurred. As stated in *R. v. Weldwood Canada Ltd.*, [1999] B.C.J. No. 2242 at para. 33:

> In environmental pollution cases, the circumstances are often quite unique and each case must be considered on its own merits.

[28] In *R. v. Fellhawk Enterprises Ltd.*, 2001 YKTC 20, the offender pleaded guilty to having permitted the deposit of sediment into a creek; failing to maintain the settling pond dam in good order; and failing to file the required annual report, all offences contrary to the *Act*.

[29] The mining inspector investigating the matter noted that the settling ponds had been breached, resulting in the discharge of some sediment into the creek.

[30] The sentencing judge agreed with the joint submission and imposed fines of $5,000 for the deposit of sediment; $2,000 for the failure to properly maintain the settling pond dam according to the licence; and $500 for failing to file the required annual report.

[31] In *R. v. Radford,* 2001 YKTC 52, Mr. Radford pleaded guilty to an offence contrary to the *Act* for having allowed the deposit of effluent into water, and for not having created a diversion ditch. In the first instance, the settling ponds became saturated and, as a result, were ineffective; in the second instance, another miner working under the same water licence did not create a diversion ditch as required. Mr. Radford received a fine of $2,000.

[32] In the same case, Britannia Pacific Mining pleaded guilty to an offence contrary to the *Fisheries Act,* R.S.C., 1985, c. F-14, for having deposited a deleterious substance, namely, sediment, into water. The sediment exceeded the allowable limit by five millitres per litre. In accepting a joint submission, the sentencing judge fined the placer mining company $8,000.

[33] The case of *R. v. Legend of the Seas (The)*, 2000 BCPC 24, involved a violation of s. 28 of the *Oil Pollution Prevention Regulations*. A few gallons of diesel fuel were spilled into Burrard Inlet, Vancouver, during the fuelling of a passenger liner berthed at a dock. The offender company, that pleaded guilty, immediately contacted the authorities and made efforts to clean up the small spill. No observable harm to the environment occurred. The Crown and defence jointly submitted a $2,000 fine, which the Court accepted.

[34] The defendant company in *R. v. Weldwood Canada Ltd.* pleaded guilty to depositing a deleterious substance in a river, contrary to the federal *Fisheries Act*. The company operated a new lumber mill beside an important river in British Columbia. Very toxic wood resins accumulated in the storm drain system of the mill and, ultimately, were transported to a partially frozen sandbar of the river. This toxic waste did not enter the flowing river water. When discovered, the company took immediate action to remediate the area.

[35] The *Weldwood* decision considered the general sentencing principles as enunciated in *R. v. United Keno Hill Mines*. Aside from the volume of liquid that ended up on the sandbar of an ecologically important river, the other aggravating factor was that the company had previous environmental convictions. On the other hand, the company had built the mill to operate in an environmentally friendly manner and it was a mistake that led to the toxic discharge. The company pleaded guilty.

[36] The Court fined the company $5,000 and ordered it to pay another $50,000 for conservation purposes.

[37] In the case of *R. v. Teck Cominco Metals Ltd.,* 2003 NUCJ 5, the defendant company pleaded guilty to having permitted the deposit of diesel fuel, a deleterious substance to fish, in a place where it might enter waters frequented by fish, contrary to the *Fisheries Act*. The incident leading to the prosecution consisted of a fuel leak which occurred when diesel was being transferred between two tanks. The leak resulted in a significant amount of diesel mixing with rainwater. Some of the diesel water mixture subsequently entered the waters of Crozier Strait, however, there was minimal damage to the environment. Teck Cominco had a solid environmental and safety operating record and no previous convictions.

[38] The sentencing Court imposed a $5,000 fine and ordered the company to pay $25,000 to the Crown to promote fish and fish habitat in Nunavut.

[39] Returning to the matters before me, Mr. Favron, who poured the gasoline into the dredge pond, entered guilty pleas to having deposited waste into water in a water management area; and for having failed to report the deposit of such waste. In accepting a joint submission, the Court sentenced him to pay fines of $1,000 and $500, respectively, regarding the two charges to which he had pleaded guilty.

Discussion

[40] As this is a somewhat unique fact situation, the case law to which I have referred, although important for the principles which emerge, is not a complete answer to the issue of the appropriate penalties in this matter.

[41] On the one hand, the amount of fuel deposited into the pond was relatively small; on the other hand, with Mr. Beets figuring prominently, this illegal behaviour was broadcast widely via a popular television program.

[42] While Tamarack, Inc. and Mr. Beets do not have a history of this type of behaviour, they appear to possess little insight into the seriousness of these offences.

[43] Although there appears to have been little thought or preparation leading to the offences, Mr. Beets failed to scuttle the ill-conceived plan, despite having the opportunity to do so.

[44] On balance, I find that this is a serious incident.

[45] Due to its large and remote nature, enforcement of environmental legislation in the Yukon is challenging. The overseeing body undoubtedly relies on self-reporting as part of its efforts to enforce the *Act*. In the matter before me, the contraventions would likely have gone unnoticed but for the airing of the television episode.

[46] This incident displayed a lack of common sense and good judgment by those involved. It taints the reputation of the Yukon Territory and does a disservice to the many individuals in the mining community who diligently follow the rules.

[47] The bottom line is that polluters or those who are contemplating such activity must be aware that violations of environmental legislation in this jurisdiction will be treated seriously by the courts.

[48] I am cognizant of the maximum penalties for the offences in question. The two offences for which both Mr. Beets and Tamarack, Inc. have been found guilty, namely permitting the deposit of waste into water in a water management area and failing to report the deposit of such waste, may attract, in each case, a maximum penalty of $100,000, or imprisonment of one year, or both.

[49] The maximum penalty which Tamarack, Inc. faces for failing to comply with the conditions of its water licence to not use fuel in a way that allows it to be deposited in waters; and for failing to comply with its licence conditions to report unauthorized discharge is, in each case a $15,000 fine, or imprisonment of six months, or both.

[50] I am also mindful of the principle of totality, meaning that when a court imposes two or more sentences, the sentencing judge should not make the combined sentence unduly harsh.

[51] In the result, Mr. Beets is ordered to pay a fine of $4,000 for Count 1 and $2,000 for Count 2.

[52] Tamarack, Inc. is ordered to pay a fine of $10,000 for Count 1 and $5,000 for Count 2.

[53] Additionally, Tamarack, Inc. is ordered to pay a fine of $5,000 for Count 3 and $5,000 for Count 4.

[54] I will allow both Mr. Beets and Tamarack, Inc. three months to pay the respective fines.

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CHISHOLM T.C.J.