SUPREME COURT OF YUKON

Citation: *R. v. Cobalt Construction Inc.*, 2018 YKSC 36

Date: 20180730
S.C. No. 17-AP008
Registry: Whitehorse

BETWEEN

REGINA

APPELLANT

AND

COBALT CONSTRUCTION INC.
and
SHAUN RUDOLPH

RESPONDENTS

Before Mr. Justice R.S. Veale

Appearances:
Julie DesBrisay — Counsel for the appellant
Meagan Hannam — Counsel for the respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal by the Government of Yukon from a decision of the Territorial Court of Yukon acquitting Cobalt Construction Inc. and Shaun Rudolph (collectively called "Cobalt") of an offence under the *Environment Act*, R.S.Y. 2002, c. 76 (the "*Act*"). The trial judge found that winter conditions made it impossible for Cobalt to comply with an Environmental Protection Order ("EPO") issued by the Department of Environment ("Environment") in the time provided for compliance.

[2] This case deals with a strict liability offence, which means that the Crown must prove the *actus reus* of the offence beyond a reasonable doubt. There is no

disagreement that those facts have been so proved, but the question to be determined is whether the defence of impossibility applies and has been established or alternatively, whether the trial judge erred in finding that Cobalt was not duly diligent.

THE FACTS

[3] As the trial judge indicated, the facts are largely undisputed and are taken from the Reasons for Judgment cited as *R. v. Cobalt Construction Inc.,* 2017 YKTC 41.

[4] Shaun Rudolph is the single director and shareholder of Cobalt, which operates a road construction business.

[5] As a result of a fuel spill during the 2013 road construction season, Cobalt sought and was granted a Land Treatment Facility permit 24-014 (the "LTF permit") to operate what was known as the Nines Creek Land Treatment Facility near Destruction Bay, Yukon (the "LTF"). The LTF was operated by Cobalt without issue until the permit expiry on December 31, 2015, following Cobalt's decision not to renew the permit. By letter dated November 4, 2015, Environment advised Cobalt that its LTF permit would expire on December 31, 2015. The letter set out the steps to renew the permit and added:

> Please note that failure to maintain a current, valid permit that accurately reflects your permitted activities is a contravention of the *Environment Act* and will be subject to enforcement action.

[6] The permit expiry triggered the requirement to decommission the site pursuant to the terms of the LTF permit and Protocol 11 under the *Contaminated Sites Regulation,* O.I.C. 2002/171, entitled "Sampling Procedures for Land Treatment Facilities."

[7] Part 12 of the LTF permit includes the following requirements for the decommissioning plan:

1. At least two months prior to the intended closure of the facility or any individual cells, the permittee shall submit a detailed decommissioning plan to an environmental protection analyst for approval which includes:

a) a schedule for decommissioning the facility or cell(s);

b) the results of sampling demonstrating the levels of contaminants in all soil in the facility or cell(s);

c) details of intended use and receiving location of all soil in the facility or cell(s);

d) a description of the methods to be used to restore the site, or portion thereof, or to prepare the site or portion thereof for its future uses; and

e) any other information required by the Branch.

[8] These same requirements were included in Section 5.0 of Protocol 11 as follows:

> A decommissioning plan must be submitted to the Standards & Approvals section for approval at least three months prior to the planned decommissioning of the facility. The plan must include a schedule for decommissioning, the results of sampling demonstrating the contaminant levels in all soil being treated in the LTF, details of the proposed disposition of remaining soil, a description of the intended future use of the site, and a description of how the site will be restored for future uses.

[9] While the two documents include different requirements in terms of timing of the decommissioning plan, this conflict is of little import as it is agreed that the deadline for submitting the decommissioning plan in this case was governed by the EPO.

[10] No steps were taken by Cobalt to decommission the LTF between permit expiry and February 2, 2016, when the Deputy Minister of Environment wrote a letter advising Cobalt that the Minister of Environment would be issuing an EPO on February 19, 2016

with respect to decommissioning the LTF. The letter set out the proposed terms of the EPO, including the requirement to submit a decommissioning plan in accordance with Part 12 of the LTF permit and Protocol 11 within 30 days of the issuance of the order. The letter went on to indicate that Cobalt may make representations prior to the issuance of the EPO, and set out the procedure and deadline for so doing. Cobalt made no such representations.

[11] The EPO was issued by the Minister of Environment on February 18, 2016. The EPO required the submission of a detailed decommissioning plan, in compliance with Parts 6, 8, and 12 of the LTF permit and Protocol 11, to Heather Mills, Contaminated Sites Coordinator, within 30 days. The EPO, at para. 2, required a scheduled timetable "for submitting any analytical sampling results" and further that:

> … If this schedule of work does not provide adequate flexibility to account for sampling results, relocation of any contaminated material to a permitted facility, and exchange of information to conform to the completion date contained in this order, an adjusted work schedule may be provided as directed by Kevin Johnstone, Senior Conservation Officer Enforcement and Compliance.

[12] On March 10, 2016, Cobalt sent a letter addressed to Ms. Mills confirming receipt of the EPO, indicating an intention to "clean up the site towards the end of the summer", and promising to "update you on schedules later in the 2016 work season". This prompted a reply letter from Ryan Hennings, Manager of Enforcement and Compliance, Conservation Officer Services Branch on March 14, 2016, reminding Cobalt of the requirement to submit a decommissioning plan for approval by March 21, 2016 (as March 19, the 30-day deadline, fell on a Saturday). The March 14, 2016 letter specifically informed Cobalt that its March 10, 2016 letter did not satisfy the requirements of the EPO:

> You stated in your letter, "**we will update you on schedules later in the 2016 work season".** Please note that a decommissioning plan must be submitted and approved prior to initiation of decommissioning activities, and decommissioning must be completed by November 1, 2016 which includes submission of all analytical and reporting requirements as outlined in the order. The provision of an update later in the 2016 work season will not satisfy the requirements of the order and Cobalt Construction will be in violation of this order. (emphasis already added)

[13] On March 17, 2016, Cobalt sent a letter to Ryan Hennings entitled "Initial Decommission Plan for Land Treatment Facility." This initial plan indicated an intention to till the soil and sample in June 2016 and to develop an "accurate Decommission Plan" in the summer of 2016.

[14] Ms. Mills advised Officer Hennings by email dated March 21, 2016, that Cobalt's initial decommissioning plan contained insufficient detail to be considered the required decommissioning plan. This conclusion was not communicated to Cobalt. Officer Hennings waited until April 18, 2016, to see if further information would be forthcoming from Cobalt. When no further information was received, Officer Hennings consulted the Department of Justice, who recommended that charges be laid against Cobalt.

[15] In June 2016, Cobalt retained Toos Omtzigt to conduct the sampling required for the decommissioning plan. Ms. Omtzigt advised Ms. Mills of her retainer by email dated June 24, 2016. Officer Hennings was also made aware of the retainer.

[16] On July 11, 2016, Officer Hennings swore an Information charging Cobalt with contravening the terms of the EPO for failing to provide a compliant decommissioning plan by the required deadline of March 21, 2016.

[17] A detailed, and apparently compliant, decommissioning plan, prepared by Ms. Omtzigt, was provided on August 5, 2016. This plan is referenced in correspondence, although the plan itself was not filed as an exhibit.

[18] The only factual issue in dispute at the trial related to whether the sampling required for a compliant decommissioning plan could be completed by Cobalt within the time frame required by the Minister. Not only is the decommissioning plan required to contain sample results, but many of the elements of the plan itself are dependent on those results, including identification of an appropriate receiving facility.

[19] The evidence is clear that sampling requires that the piles within the LTF be tilled to mix the soil two weeks before samples are taken for analysis. It is also clear that tilling of the soil cannot disturb the configuration of the piles in the LTF.

[20] Mr. Rudolph testified at trial that it would have been impossible to till the soil as required within the time frame for two reasons: the snow on the ground would have prevented use of the excavator, and the ground would have been frozen such that a ripper would have to be used to break it up, which, in turn, would have destroyed the configuration of the piles. Mr. Rudolph's evidence was based on his experience of working for 17 seasons of road construction in the area, noting that the ground is still frozen into June.

[21] The only contradictory evidence on this point was provided by Ms. Mills who indicated that other operators have been able to till the soil in such circumstances. The trial judge was not provided with any specific examples in this regard.

[22] The trial judge found the evidence of Mr. Rudolph to be entirely credible on this point and found as a fact that the required sampling could not have been conducted

within the time frame set out in the EPO due to the winter conditions. This finding was not challenged on appeal.

THE TRIAL JUDGMENT

[23] The trial judge identified four issues in her reasons at para. 18:

> 1. Does the initial plan provided by Cobalt and filed as exhibit 9 comply with the requirements of the EPO?
>
> 2. If not, was there any obligation on the Department of Environment ("Department") to advise Cobalt that the initial plan was insufficient to meet the requirements of the EPO?
>
> 3. Do the actions of Cobalt in response to the EPO amount to due diligence?
>
> 4. In the alternative, is the defence of impossibility available to Cobalt on the basis the required sampling upon which the decommissioning plan is based could not be completed within the time frame required by the EPO due to weather conditions?

[24] She addressed them as follows.

Was the initial plan sufficient?

[25] The first finding was that Cobalt did not comply with the requirement of the EPO that he submit a decommissioning plan. The trial judge found that the initial plan provided by Cobalt fell well short of the requirements of the LTF permit and Protocol 11. This finding is not in dispute.

Did Environment have an obligation to advise Cobalt of the insufficiency?

[26] Counsel for Cobalt submitted that Environment should have advised Cobalt that the initial plan was not compliant with the EPO and offered an opportunity to correct any deficiencies. Applying *R. v. Bleta,* [2003] O.J. No. 1672 (C.J.), the trial judge concluded, at para. 30:

> … the initial plan provided is so clearly and objectively deficient on its face that I am not satisfied that it was in any way incumbent on the Department to notify Cobalt that the [initial] plan did not comply with the EPO and to give them an opportunity to rectify the deficiencies prior to laying charges.

Was Cobalt duly diligent?

[27] The trial judge considered *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 ("*Sault Ste. Marie*") and *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63 ("*La Souveraine*"), to determine if, the Crown having established the *actus reus* beyond a reasonable doubt, Cobalt exercised due diligence by taking all reasonable steps to avoid the act or omission which constitutes the offence.

[28] After considering *R. v. Twin Mountain Construction Ltd.*, 2001 NSPC 10 ("*Twin Mountain*") and *R. v. Starcan Corp.*, 2005 ONCJ 446 ("*Starcan*"), both cases in which the defence of due diligence was established, the trial judge concluded that the circumstances that became barriers to compliance in those cases were not reasonably foreseeable, the defendants had been proactive in their communication with the government, and efforts were made to seek time extensions. She found that similar circumstances did not exist here.

[29] The trial judge wrote the following:

> [36] The same cannot be said in this case. The evidence with respect to the impossibility of sampling due to the time of year comes from Mr. Rudolph's lengthy experience in the road construction industry in the Kluane area. It was known to him at the time he received the letter advising him that an EPO would be issued and inviting him to make representations; it was known to him after the EPO was issued; it was known to him when he wrote the March 10 letter advising of his intention "to clean up the site towards the end of summer"; it was known to him when he received the letter from Officer Hennings advising him of his obligation

> to provide a detailed decommissioning plan by March 21, and it was known to him when he provided his initial plan on March 17.
>
> [37] Notwithstanding the fact that the inability to do the required sampling was known to Cobalt and therefore clearly foreseeable, at no time did Cobalt convey this fact to the Department. His counsel argues that the initial plan can be said to have put the Department on notice that the sampling could not be performed, but, in my view, the initial plan simply states when Cobalt intends to do the sampling. Nowhere does it offer an explanation as to why the sampling is not being done within the imposed time frame, and at no time did Cobalt seek an extension of time.

[30] The trial judge concluded that she was hard-pressed to conclude that a reasonable person would not have taken the obvious step of advising Environment of the problem and seeking an extension.

[31] The trial judge concluded with the following:

> [40] The tone and content of Cobalt's correspondence suggest that they did not expect to be held to the timelines or required content set out in the EPO. Overall, Cobalt responded to the EPO with a casualness that suggests that they did not appreciate the nature and consequences of non-compliance, even though the EPO itself references the potential for prosecution upon failure to comply. In such circumstances, I cannot conclude that Cobalt was duly diligent in taking all reasonable steps to comply with the condition to provide a detailed decommissioning plan within 30 days of the EPO.

Is the defence of impossibility available?

[32] The trial judge addressed the defence of impossibility as a separate and distinct issue from due diligence. Citing *R. v. Perka*, [1984] 2 S.C.R. 232, and applying it in a regulatory context, the trial judge determined that the defence generally requires the defendant to establish that there was no legal alternative to the action taken.

[33] The trial judge acknowledged the Crown submission that the defence of impossibility only applies in a strict liability context as part of the due diligence defence. However, ultimately she relied on *R. v. 605884 Saskatchewan Ltd.,* 2004 SKPC 16 (the "Saskatchewan hide case"), a hunting case where only one tag was provided for possession of unprocessed hides where more tags were required. The defence had been successfully applied to the tag issue without reference to due diligence. At para. 55, the trial judge stated:

> [55] In the case at bar, while I am not satisfied that Cobalt was duly diligent, I am satisfied that it was factually impossible for Cobalt to comply with the EPO within the time frame specified, regardless of the steps taken. In such circumstances, a conviction would result in a legal absurdity that would, adopting the words of Nightingale J., be repugnant to the rule of law. This is particularly so where, as in this case, no harm was occasioned to the environment that the *Act* and the EPO were designed to protect. The evidence suggests that the EPO was ultimately complied with, including the provision of a detailed decommissioning plan. Compliance was simply delayed; a delay that can be said to have been caused by the conditions of a Yukon winter, conditions well beyond the control of Cobalt. (my emphasis)

THE ISSUES

[34] Counsel are in agreement that, under the *Summary Convictions Act,* R.S.Y. 2002, c. 210 and ss. 813 and 822(1) of the *Criminal Code,* I have equivalent jurisdiction to the Court of Appeal under ss. 683-689 of the *Criminal Code.* Accordingly, this Court may dismiss the appeal or allow the appeal, and, if allowed, the Court can set aside the verdict and either order a new trial, or enter a verdict of guilty and pass sentence or remit the matter to the Territorial Court to impose a sentence (s. 686(4)).

[35] Counsel agree that the standard of review to be applied by this Court to the issues raised is correctness. The issues are questions of law, and to the extent that any

raise questions of mixed fact and law, they involve an extricable error in principle and also attract a standard of correctness. See *Housen v. Nikolaisen*, 2002 SCC 33.

[36] Counsel for the Government of Yukon essentially submits that the trial judge erred in law in finding that a defence to the charge was available on the facts. Counsel for Cobalt submits that the defence of impossibility or involuntariness arises on the facts, or alternatively, that Cobalt should be acquitted because it was duly diligent.

[37] The issues that were argued on appeal are as follows:

1. Does the defence of impossibility apply to strict liability offences?
2. Is the defence of impossibility made out on the facts found by the trial judge?
3. Alternatively, did the judge err in finding Cobalt was not reasonably diligent?

ANALYSIS

[38] I am in agreement with the trial judge's analysis up to her findings on the defence of impossibility.

[39] In that regard, I am respectfully of the view that the trial judge erred in concluding that, at least in these circumstances, the defence of impossibility is a defence separate and apart from due diligence and that it was established. Having found that a reasonable person, with knowledge that soil sampling could not be done within the dictated timeline, would have taken the obvious step of informing Environment and seeking an extension, she erred in finding that Cobalt had no reasonable legal alternative to non-compliance with the EPO.

[40] Put differently, it was an error to find that Cobalt was not duly diligent because it failed to inform Environment that sampling could not be done in the winter time frame,

but then decide it could avail itself of a defence of impossibility. It is inconsistent to find that Cobalt knew of the impossibility and was not reasonably diligent because it failed to communicate it to Environment, and then conclude that the defence of impossibility relieves Cobalt from its lack of due diligence.

[41] The leading case in strict liability offences is *Sault Ste. Marie,* where the Supreme Court of Canada described the difference between a true criminal offence, which requires proof of a mental element of intention or recklessness, and a public welfare or strict liability offence, for which there is no necessity to prove intent. For a strict liability offence, the Crown must prove the *actus reus* of the offence beyond a reasonable doubt. The burden then shifts to the defendant to establish on the balance of probabilities that all due care has been taken "as he is the only one who will generally have the means of proof" (my emphasis). In other words, it is not up to the prosecution to prove a mental element. Regulatory offences fall into this category.

[42] Dickson J. expressed the offence of strict liability concisely in *Sault Ste. Marie*, at p. 1326, where he described them as:

> 2. 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. … (my emphasis)

[43] The relatively recent decision of *R. v. Klem*, 2014 BCCA 272, adds clarification to the defence of due diligence relevant to the case at bar. In that case, Klem was charged

with, among other things, 1) hunting or wounding wildlife other than in open season, 2) hunting without reasonable consideration for the lives, safety or property of others, and 3) discharging a firearm in a no shooting area being within 100 metres of a dwelling house. Klem had shot and wounded a black bear in a residential area where he lived.

[44] Lowry J.A. did not consider that the defence of due diligence applied in Klem's circumstances which he explained at para. 28:

> This is because, as the Crown contends, to constitute a defence, the person charged must establish the due diligence exercised was exercised to prevent the breach of the statute that gives rise to the offence. It is not a matter of establishing that the offence has been committed in a manner whereby the accused person acted with diligence or acted reasonably in the course of the offending event as both the trial and appellate judges appear to have considered. Rather, it must be proven that due diligence was employed to insure the statute in question was not breached. (my emphasis)

[45] In this regard, Lowry J.A. stated at para. 30:

> … Further, Klem made no effort, reasonable or otherwise, to avoid pursuing the bear in breach of the prohibition, and, for the purposes of the defence, it matters not then whether in pursuing the bear he took appropriate precautions and was not negligent. Pursuing the bear (and shooting it within 100 metres of a dwelling) is, once proven, a deliberate act that constitutes a breach of the statutory prohibitions. Due diligence is not a defence that was open to consideration in the circumstances.

[46] Lowry J.A. went on to recognize, in a passage that the respondent relies on at para. 31, that due diligence is only one of several defences that may arise in a regulatory offence context, referencing necessity, impossibility, mistake of fact, self-defence, lack of requisite mental element, officially induced error and *res judicata*. This leads to the first issue.

Issue 1: Does the defence of impossibility apply to strict liability offences?

[47] In addition to *Klem*, law professors have commented on the availability of defences, including the defence of impossibility, in the context of strict liability offences.

[48] In *Manning, Mewett & Sankoff: Criminal Law,* 4th ed. (Markham: LexisNexis Canada Inc., 2009), the authors observe that an accused must have acted with some voluntariness for the Crown to establish the *actus reus* or the act of doing the prohibited thing. This raises a defence of impossibility in the context of strict liability offences, as pointed out by Professor Don Stuart, in his book, *Canadian Criminal Law: A Treatise*, 5th ed. (Scarborough: Thomson Carswell, 2007).

[49] Professor Stuart is of the view that the case for a separate justification of impossibility has not been made out (p. 552). He states:

> A major reason why a separate defence of impossibility is unnecessary lies in the *actus reus* requirement, and in particular the notion that the act be voluntary in the sense of beyond the capacity to control. Surely we do not need a special rubric of a defence of impossibility to explain acquittals in cases where an accused did not fulfil his duty to maintain a highway because it had been washed away by the sea, where an accused failed to give way to a pedestrian due to a failure of brakes which could not have been anticipated, or where pollution occurred through an "Act of God"?

[50] As is illustrated by his examples, where circumstances render it impossible to avoid committing an offence, an individual cannot be found to have acted voluntarily in its commission.

[51] In *Criminal Law*, 5th ed. (Toronto: Irwin Law Inc., 2012), Kent Roach states this concept as follows at p. 119:

> Courts seem increasingly willing to consider a lack of voluntary or conscious conduct as something that prevents the commission of the criminal act, or *actus reus*. This

> means a lack of voluntariness may be a defence to all criminal and regulatory offences, regardless of the fault element required. In practice, this will be most important in cases with no fault element or one based on negligence because involuntary conduct should usually be inconsistent with subjective forms of fault.

[52] In *Manning, Mewett & Sankoff,* the way in which the authors frame voluntariness suggests that the defence of impossibility is subsumed in the defence of due diligence, at pp. 225 - 226:

> … [T]he due diligence test normally concentrates upon the reasonableness of the precautions taken to avoid the unlawful occurrence, including any steps taken to ensure that the precautionary system operates properly. This includes consideration of how foreseeable the event in question was, as the law does not hold an accused responsible for failure to take reasonable steps against a risk that cannot be anticipated. … (my emphasis)

[53] In my view, due diligence can be seen as placing an obligation on an individual to act reasonably to respond to circumstances that can foreseeably lead to the commission of an offence. To reference back to the faulty brake example discussed by Professor Stuart, where the failure of the vehicle's brakes could have been anticipated, the accused cannot say that the offence was beyond his control and involuntary. Rather, there would have been a positive obligation on him to act with due diligence and either repair the brakes or refrain from driving.

[54] This understanding of the relationship between due diligence and impossibility is picked up in the caselaw provided to the trial judge, see e.g. *Toronto (City) v. Belman,* 2001 CarswellOnt 6038 (C.J.). and *R. v. Canchem Inc.,* [1989] N.S.J. No. 499 (P.C.).

[55] I conclude that the defence of impossibility is available to Cobalt, but only as part of the consideration of whether it was duly diligent in taking steps to not breach the EPO.

[56] I also find that, generally, where a defendant has not established that they have conducted themselves with due diligence, they cannot rely on the existing circumstances to say that their only course of action was to commit an offence. There is a positive obligation on an individual to take reasonable steps to avoid committing an offence. Where those reasonable steps are not taken, offending conduct cannot be justified on the basis of impossibility.

Issue 2: Is the defence of impossibility made out on the facts found by the trial judge?

[57] In the Saskatchewan hide case, the company was charged with having an unprocessed hide of a big game animal without a tag attached.

[58] The hunter was supplied with only one hide seal despite the fact that when a hunter typically separates the hide into two pieces, a tag is required for each piece of the hide. The trial judge in the Saskatchewan hide case found that it was impossible for an outfitter to comply with a legislative scheme that required a hide tag to be attached to each part of a hide given the practice of separating the hide into pieces.

[59] Citing Glanville William*,* Nightingale PCJ accepted the general proposition that "… where the law imposes a duty to act, non-compliance with the duty will be excused where compliance is physically impossible." He found that it would be repugnant to the rule of law to convict in a situation where the accused cannot comply.

[60] I am not bound by the Saskatchewan hide case. To the extent that the government created the impossibility faced by the hunter, I find it can be distinguished from this case.

[61] Cobalt is charged under s. 172 of the *Act*: That section states:

> A person who
>
> …
>
> (c) contravenes an environmental protection order;
> …
>
> is guilty of an offence ….

[62] The Information dated July 11, 2016, charged that Cobalt:

> On or upon the expiry of the 21st day of March, 2016, near Whitehorse, YT, did unlawfully commit an offence by contravening an environment protection order, to wit, failing to submit a detailed decommissioning plan for approval that complies with parts 6, 8 and 12 of the land treatment facility permit issued to Cobalt Construction and with Protocol 11 under the *Contaminated Sites Regulations,* contrary to section 172(c) of the *Environment Act.*

[63] In Cobalt's situation, the impossibility was not known by the government, according to the evidence provided by its employee. Indeed, Environment disputed that sampling in winter conditions was impossible. The impossibility was, however, known to Cobalt when it received the EPO. Cobalt did not bring that to the attention of Environment. A reasonable person would have advised about the barrier imposed by the winter conditions to seek an extension for the decommissioning plan or another resolution. This reasonable step may have allowed Cobalt to avoid committing an offence under the *Act*. .

[64] This is unlike the *Twin Mountain* case, in which the defendant had taken steps to communicate the impossibility of complying with a clean-up order to the government regulator and sought an extension. It is also unlike the *Starcan* case where the defendant had taken all reasonable steps to comply with a government order, but was faced with unforeseen and unexpected issues.

[65] As did the trial judge, I conclude that to establish a defence of due diligence, Cobalt was required to advise about the factual circumstances that posed a barrier to its ability to provide a decommissioning plan. This would have permitted Environment to consider granting an extension or some other appropriate response, and potentially allowed Cobalt to avoid the commission of the offence with which it is charged. The defence of impossibility does not arise as Cobalt was in circumstances in which the commission of the offence was reasonably foreseeable and Cobalt was not reasonably diligent in taking steps to avoid its commission.

Issue 3: Alternatively, did the judge err in finding Cobalt was not reasonably diligent?

[66] My answer to this question is previewed above. Counsel for Cobalt submits that there was no evidence at trial of any steps that Cobalt could have taken to comply with the EPO. The evidence of Mr. Rudolph, found credible by the trial judge, was that Cobalt could not prepare the requested plan because it could not conduct the required tilling and sampling during winter.

[67] However, the defence of due diligence here is not limited to a consideration of whether Cobalt took all reasonable steps to comply with the EPO. In my view, the defence of due diligence involves a consideration of what a reasonable person would do more broadly to avoid committing an offence. A reasonable person would have raised the winter conditions before the EPO was issued. It should be noted that the Minister is obligated by s. 160(4) of the *Act* to give prior notice of the intention to issue an EPO and allow a reasonable opportunity to the permit holder to make representations, and this offer was expressly made by Environment in its letter of February 2, 2016.

[68] A reasonable person would also have raised the problems posed by the frozen ground after the EPO was issued and sought an extension or some other appropriate response. This possibility of an "adjusted work schedule" was included within the EPO itself, if the provided schedule did not provide adequate flexibility.

[69] The *Act* also provides the Minister with discretion to amend or change EPOs as follows:

> 166(1) The Minister may,
>
> > (a) after giving reasonable notice, amend or suspend a term or condition in an environmental protection order, or add a term or condition to, or delete a term or condition from an environmental protection order; or
> >
> > (b) cancel an environmental protection order.

[70] It is clear that the legislative scheme invites input from persons who are subject to an EPO. Cobalt failed to avail himself of them. He did not inform Environment that he could not conduct sampling within the time frame he had been given and did not seek an extension on the EPO to allow the work to be conducted within a mutually agreeable time frame. This type of notice and back-and-forth communication features prominently in the due diligence cases relied on by the trial judge.

[71] I agree with the trial judge that Cobalt was not duly diligent.

CONCLUSION

[72] I conclude that Cobalt was not duly diligent. In the circumstances of this case, I find that the defence of impossibility does not arise.

[73] I therefore set aside the acquittal of the trial judge and remit the matter to the Territorial Court to impose a sentence.

_____
VEALE J.