Citation: *R.* v. *Beets,* 2017 YKTC 17

Date: 20170517
Docket: 16-11329
Registry: Dawson City
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

ANTON BEETS AND
TAMARACK, INC.

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

REASONS FOR JUDGMENT

[1] 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.

[2] On March 10, 2015, as the result of the airing of an episode of Gold Rush, the office of the Chief Mining inspector for the Yukon received a complaint with respect to the activities of Tamarack, Inc. as depicted in the episode, namely the pouring of gasoline into a dredge pond, followed by it being lit on fire.

[3] Tamarack, Inc. and Mr. Beets face 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 paragraphs 7(1)(a) and 7(3)(a), respectively, of the *Waters Act,* SY 2003, c. 19 (the "*Act*").

[4] Tamarack, Inc. is also charged that it failed to comply 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 paragraph 38(3)(a) of the *Act*.

Facts

[5] In early October 2014, Mr. Marc Favron was employed as a contract welder on a Tamarack, Inc. job site near the Indian River. He testified that at the end of the day, he came up with the idea to pour gasoline on the dredge pond so that it might be lit. When Mr. Favron asked Mr. Beets if he could do so, Mr. Beets responded that he did not care. Mr. Favron took a gas can and poured what he estimates to be a gallon to a gallon and a half of gasoline in the dredge pond. Another employee lit it on fire.

[6] These events were captured by the film crew for the television show.

[7] The Crown called four witnesses and entered as an exhibit a video of the portion of the television show depicting the pouring and lighting of the fuel. The defence called no evidence.

Analysis

[8] There is no dispute that the contraventions alleged fall within the realm of strict liability offences.

Is gasoline waste in the circumstances of this matter?

[9] As indicated, Count 1 alleges the deposit of waste in a water management area and Count 2, the failure to report this deposit of waste. The defence contends that the Crown has not proved that the deposit of gasoline which is subsequently combusted meets the definition of 'waste' in the legislation.

[10] Section 1 of the *Act* defines 'waste' as:

> (a) any substance that, if added to water, would degrade or alter, or form part of a process of degradation or alteration of, the quality of the water to an extent that is detrimental to its use by people or by animal, fish, or plant…

[11] Mr. Brendan Mulligan is Environment Yukon's senior scientist for water quality. He was qualified to provide expert opinion evidence, *inter alia*, on the chemical properties of hydrocarbons.

[12] Mr. Mulligan testified that gasoline is a complex mixture of hundreds of hydrocarbons, many of which have toxic or carcinogenic qualities. For example, it contains benzene, a confirmed human carcinogen, and ethanol, a confirmed animal carcinogen. Two of its components, benzene and naphthalene, are listed as toxic substances under the *Canadian Environmental Protection Act, 1999*, S.C. 1999 c. 33. In that legislation a substance is deemed to be toxic:

> … if it is entering or may enter the environment in a quantity or concentration or under conditions that
>
> (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
>
> (b) constitute or many constitute a danger to the environment on which life depends; or
>
> (c) constitute or many constitute a danger in Canada to human life or health.

[13] When introduced to water, gasoline tends to pool on the surface, forming a light nonaqueous phase liquid. This liquid may affect aquatic life by inhibiting the exchange of gases and nutrients between the body of water and the atmosphere.

[14] Gasoline is not readily soluble, although some quantity will dissolve in water. Some particles may be absorbed in soil, or by solid particles suspended in water.

[15] If gasoline that is introduced into water is combusted, there may be remnants in the water and dangerous by-products of the combustion may be re-deposited into the water.

[16] Pursuant to the Yukon *Environment Act*, RSY 2002, c. 76, the *Contaminated Sites Regulation* OIC 2002/177 regulates contaminants found in gasoline due to their toxicity to "potential human and ecological receptors" (expert report of Brendan Mulligan).

[17] The defence argues that gasoline is not a 'waste' as defined in the *Waters Act*, as the definition of this word in the legislation focuses on the extent to which the substance complained of is detrimental to humans, animals, fish or plants, as opposed to focusing on the dangerous aspects of a substance's chemical composition. In other

words, the defence submits that the Crown must prove in this case that the amount of gasoline discharged is detrimental to humans, animals, fish or plant.

[18] The definition of 'waste' in the Yukon legislation is very similar to the definition of 'deleterious substance' which was considered in *R. v. MacMillan Bloedel Ltd.* (1979), 12 B.C.L.R. No. 29 (C.A.) in the context of the *Fisheries Act,* R.S.C. 1970, c. F-14, as amended by R.S.C. 1970, c. 17 (1st Supp.), s. 3(1).

[19] The definition of 'deleterious substance' read:

> (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish or to the use by man of fish that frequent that water,

[20] In considering this definition, the Court stated:

> What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To re-phrase the definition section in terms of this case, oil is a deleterious substance if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that that water is rendered deleterious to fish or to the use by man of fish that frequent that water. … (para. 8)

[21] And later:

> …The thrust of the section is to prohibit certain things, called deleterious substances, being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply. (para. 10)

[22] This reasoning was followed in the Yukon decision of *R. v. Placer Developments Ltd.,* [1984] Y.J. No. 19 (T.C.), which dealt with an allegation pursuant to the *Fisheries Act*.

[23] In *R. v. Canadian Forest Products Ltd.,* 1978 CarswellBC 656 (P.C.), a slightly altered version of the definition of 'deleterious substance' in the *Fisheries Act* was considered. The words 'likely to be deleterious' and 'fish habitat' had been added to the definition outlined above.

[24] The Court concluded:

> I find that it is not necessary for the Crown to prove that the substance deposited was of such a concentration or attained such a concentration in the water, in this particular case, that it was deleterious to fish, but only that it is known to be a substance which is deleterious to fish.
>
> All pollution legislation is concerned not only with the immediate damage of a pollutant but also by the cumulative effect of any substance, as expressed by the words 'form part of degradation'… (paras 26 and 27)

[25] In addition to employing common sense, there is ample expert evidence for me to hold that gasoline meets the definition of 'waste' in the legislation. The scientific evidence demonstrates that gasoline is, at the very least, a substance which when combined with water forms part of a process of degradation or alteration of water quality that is detrimental to humans, fish and animals.

Did Anton Beets and Tamarack, Inc. allow waste to be deposited into the water?

[26] Mr. Favron testified he was a contractor doing welding work for Tamarack, Inc. and Mr. Beets. In fact, evidence reveals that Mr. Beets paid Mr. Favron for his work. Mr. Favron described Mr. Beets as the boss at the work site, which explains why he approached him to ask whether he could pour gasoline into the pond. Mr. Beets did not object.

[27] As such, there is no question that Anton Beets allowed waste to be deposited into the water of the dredge pond. He is guilty of Count 1.

[28] The defence argues that Tamarack, Inc. should not be held liable in these circumstances, based on the fact that there is no evidence that Mr. Beets was the directing mind of the corporation and secondly because Tamarack, Inc. did not employ Mr. Favron.

[29] In my view, the defence's first argument is without merit. In order for a corporation to be liable, it must first be proved that a directing mind of the company participated or was complicit in the alleged contravention (*Canadian Dredge & Dock Co. v. The Queen,* [1985] 1 S.C.R. 662).

[30] Mr. Beets is a director of Tamarack, Inc. and was present at the time of Mr. Favron's actions.

[31] In *Dredge & Dock*, the Court referred to Granville Williams' text on Criminal Law, where he stated:

> ….the director or other controlling officer will almost always be a co-perpetrator of or accessory in the offence…

[32] Mr. Beets was the face of Tamarack, Inc. at this mining operation. Not only was he the site boss, he represented the company in his role as director. Mr. Beets' apparent tacit agreement with Mr. Favron's proposed course of conduct, places Mr. Beets in the accessory to the offence category.

[33] As stated in *R. v. Rivtow Straits Ltd.,* [1992] B.C.J. No. 63 (S.C.), in discussing the *Sault Ste. Marie* case:

> I think this decision sets down the rule that the *actus reus* of discharging, causing, or permitting pollution can be committed only by those who undertake the activity in question or who are in a position to exercise control over the activity and prevent the pollution from occurring, but fail to do so. (emphasis added)

[34] Based on the evidence before me, there is no question that Mr. Beets is a directing mind of the corporation.

[35] In terms of the second argument, namely who employed Mr. Favron, it is important to note that Mr. Favron was clearly of the view that he was working as a contract welder for Tamarack, Inc. and Mr. Beets, despite the fact the cheque he received as payment for his work was drawn on Mr. Beets' bank account. Based on this and considering Mr. Beets' role in the company, it seems disingenuous to suggest that Mr. Favron was not associated to Tamarack, Inc. in the course of his work.

[36] Additionally, even if Mr. Favron was not technically an employee of Tamarack, Inc., Mr. Beets, as already described, was in a dual role at the work site. His decision to refrain from preventing Mr. Favron's pouring of gasoline in the pond was equally the decision of Tamarack, Inc.

[37] It also should be pointed out that in this fact situation, Mr. Beets' relationship with Mr. Favron extended beyond his control over Mr. Favron in the scope of the latter's employment, and extended to Mr. Favron's conduct generally at the work site, including his action of pouring gasoline into the dredge pond on the day in question.

[38] I find that both Mr. Beets and Tamarack, Inc. allowed waste to be deposited in the water of this water management area. Neither reported the deposit.

Did Tamarack Inc. fail to comply with conditions of its water licence?

[39] The defence takes the position that the offences Tamarack, Inc. faces with respect to its water licence should be dismissed due to vagueness, in that the specific conditions of the licence alleged to have been breached are not set out.

[40] As earlier noted, Count 3 alleges that Tamarack, Inc. failed to abide by the licence condition that it not use fuel in a way which allows it to be deposited in water. The defence submits that paragraph 7 of the licence, which speaks to depositing waste into water, does not capture the incident in question. I need not consider this argument further, as paragraph 10 of the licence clearly contemplates the deposit of gas into water.

[41] It states:

> Fuels, lubricants, cleansers, solvents and similar chemicals or substances shall be used, transported, stored and disposed of in such a way that said substances are not deposited in, or allowed to be deposited in, waters.

[42] Gasoline falls into the ‘fuels’ category.

[43] As such, I find that Count 3 is drafted in a manner which is not vague and which does not prejudice Tamarack, Inc. in any manner.

[44] Similarly, with respect to Count 4, paragraph 41 of the licence clearly specifies that any unauthorized discharge or spill must be reported.

[45] Therefore, the defence argument regarding vagueness of these Counts fails.

Due diligence or reasonable care

[46] Once the *actus reus* of a strict liability offence has been proved, the defendants may lead evidence to establish on the balance of probabilities, or in rare instances it may be implied by the Crown's case, that reasonable care was taken (*R. v. Gonder,* [1981] Y.J. No. 16 (T.C.) at para 9).

[47] In this case, there is no evidence that the defendants used reasonable care to avoid an incident of this nature. In fact, it appears from the evidence of Mr. Favron that the defendants had not established a training program for employees or contractors with respect to the handling of waste on site or the proper response to a waste spill.

[48] As well, Mr. Beets' acceptance of Mr. Favron's actions with the gasoline demonstrate that dumping waste into the water was in this situation, at least, not a priority for him or Tamarack, Inc.

[49] In the result, the Crown has proved beyond a reasonable doubt all the charges alleged.

De Minimis

[50] The defence further submits that if the offences are made out, the legal maxim *de minimis non curat lex* is applicable in the circumstances of this incident.

[51] The question to be answered boils down to whether placing one to one and a half gallons of gasoline in a dredge pond is so trifling or trivial that it does not merit prosecution.

[52] As discussed in *R. v. Superior Custom Trailers Ltd.*, 2009 ONCJ 740:

> Academics have defined the defence of *de minimis non curat lex* in the following terms:
>
> > The legal maxim *de minimis non curat lex* means that the court may properly overlook the breaking of the law by irregularities of very slight consequence or by trifling deviation which, if continued in practice, would weigh little or nothing on the public interest. The law does not concern itself with trifles. (para 35, quoting P.J. Knoll, Criminal Law Defences, 2nd ed.)

[53] Although the spill in *R. v. Placer Developments Inc.* involved a greater amount of deleterious substance, the words of Stuart, C.J. are still relevant:

> Despite the circumstances and amount of the spill, coupled with the absence of any proof of damage, the principles of *de minimis* do not apply (*R. v. McBurney*, (1974), 26 C.R.N.S. 114 (B.C.S.C.)). The extent of environmental damage within the context of a prosecution under the statutory scheme of sections 33(2) and 33(8) of the *Fisheries Act* is only relevant in sentencing. (para. 11)

[54] In my view, the defence argument must fail. The pouring of this amount of gasoline into a water system that makes its way back to the Indian River is not insignificant. The expert evidence established that gas hydrocarbons would not have settled in the system of settling areas between the dredge pond and the Indian River.

[55] The fact that the gasoline was combusted soon after it was introduced into the water does not assist the defendants, as the act of combustion itself may lead to other

dangerous by-products entering the water system. This is one of the reasons why the burning of such a spill is not recommended.

The rule against multiple convictions

[56] The defence submits that Counts 1 and 3, as well as Counts 2 and 4, respectively, offend the rule against multiple convictions, and that in each case one of the two should be stayed based on the principles enunciated in *R. v. Kienapple,* [1975] 1 S.C.R. 729.

[57] The caselaw establishes that in order for this principle, which prohibits multiple convictions for the same delict, to be applicable, a legal and factual nexus must exist between the charges in question.

[58] There is no doubt that the factual nexus exists in this case. The actions of Mr. Favron in placing gasoline in the dredge pond comprise the foundation of Counts 1 and 3. Similarly, both Counts 2 and 4 stem from a failure to report this action.

[59] The next step is the consideration of the legal nexus.

[60] The decision in *R. v. Andrew* (1990), 46 B.C.L.R. (2d) 325 (C.A.) considered four situations in which an additional, distinct element will lead to the application of the *Kienapple* principle, namely:

> 1) Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. (*Prince* p. 499)

2) Where an element of one offence is a particularization of essentially the same element in the other offence. (*Prince* p. 500)

3) Where there is more than one method, embodied in more than one offence, to prove a single criminal act. (*Prince*, p. 501. But I have used "criminal act" instead of "delict")

4) Where Parliament has deemed a particular element to be satisfied on proof of another element. (*Prince* p. 501)

[61] In *R. v. Heaney*, 2013 BCCA 177, Justice Bennett noted:

> In determining whether the *Kienapple* principle applies, the focus is not on common elements between the offences, but whether there are any additional or distinguishing elements. … (para. 23)

[62] In *R. v. R.K.* (2005), 198 C.C.C. (3d) 232 (Ont. C.A.), Doherty, J. found the application of the *Kienapple* principle to be appropriate in cases:

> … in which the offences charged do not describe different criminal wrongs, but instead describe different ways of committing the same criminal wrong. (para. 37)

[63] In the matter before me, Counts 1 and 2 are the more serious offences as the maximum penalty in each case is a $100,000 fine or imprisonment of one year, or both, whereas the maximum penalty for each of Count 3 and 4 is a $15,000 fine or imprisonment of six months, or both.

[64] The ultimate question in the matter before me is whether the lesser licencing offences include any distinct, additional elements to those which make up the deposit of waste charges.

[65] I find this to be the case. The licensee receives special privileges when granted a water licence. At the same time, the licensee also has certain responsibilities that flow from the licence.

[66] A somewhat analogous situation, in a criminal law setting, is an individual on a probation order with a condition to keep the peace and be of good behaviour, who subsequently commits an assault. It is the commission of the assault which constitutes the failure to keep the peace and be of good behaviour.

[67] However, as reiterated by Cozens, J. in *R. v. Krizan*, 2016 YKTC 33:

> It is well-established that, despite the factual nexus between these offences, they are not subject to the ***Kienapple*** principle, given the additional aspect of the non-compliance with a court order with respect to the breach charge. There is no doubt in law that Mr. Krizan is guilty of two separate offences and subject to two distinct sentences. … (para. 30)

[68] The licence to which Tamarack, Inc. is subject obliges it to follow each and every condition, and its failure to do so may result in a prosecution. In my view, the lack of compliance by Tamarack, Inc. with the terms of this licence is an additional and distinct element which renders the *Kienapple* principle inapplicable in the circumstances of this case.

[69] In summary, Mr. Beets is guilty of Counts 1 and 2. Tamarack, Inc. is guilty of Counts 1, 2, 3 and 4.

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CHISHOLM T.C.J.