Citation: *R. v. Cobalt Construction Inc.,* 2017 YKTC 41 Date: 20170914
Docket: 16-04869
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

COBALT CONSTRUCTION INC.
and
SHAUN RUDOLPH

Appearances:
Julie DesBrisay Counsel for the Territorial Crown
Meagan Hannam Counsel for the Defence

REASONS FOR JUDGMENT

[1] Shaun Rudolph is the sole shareholder and director of Cobalt Construction Inc., a road construction company. Both Mr. Rudolph and his company are charged with contravening an Environmental Protection Order ("EPO") by failing to provide a detailed decommissioning plan in relation to a Land Treatment Facility ("LTF"). An LTF is a location designed to accept, store and treat dirt contaminated with petroleum hydrocarbons, pursuant to the conditions of a permit.

[2] There is no issue that both Mr. Rudolph and Cobalt Construction Inc. can be separately charged notwithstanding the fact that, as a single director/shareholder

company, Cobalt Construction Inc. is essentially Mr. Rudolph. For ease of reference in this decision, I will refer to Mr. Rudolph and his company collectively as "Cobalt".

Facts

[3] The facts giving rise to the charges are largely undisputed.

[4] As a result of a fuel spill during the 2013 road construction season, Cobalt sought and was granted LTF permit 24-014 to operate the LTF commonly known as the Nines Creek LTF located near Destruction Bay in the Yukon. This LTF was operated by Cobalt without issue until permit expiry on December 31, 2015, following Cobalt's decision not to seek renewal. Permit expiry triggered the requirement to decommission the site pursuant to the terms of the authorizing permit and Protocol 11, entitled "Sampling Procedures for Land Treatment Facilities".

[5] No steps were taken by Cobalt to decommission the LTF between permit expiry and February 2, 2016 when the Deputy Minister of Environment authored a letter, filed as exhibit 4, advising Cobalt that the Minister of Environment would be issuing an EPO on February 19, 2016 with respect to decommissioning the LTF. The letter sets 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 goes on to indicate that Cobalt may make representations prior to the issuance of the EPO, and sets out the procedure and deadline for so doing. Cobalt made no such representations.

[6] The EPO, filed as exhibit 5, was issued by the Minister of Environment on February 18, 2016. The EPO requires 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.

[7] On March 10, 2016, Cobalt sent exhibit 7, a letter addressed to Ms. Mills confirming receipt of the EPO and indicating an intention to "clean up the site towards the end of the summer" and promises "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, filed as exhibit 8, 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).

[8] On March 17, 2016, Cobalt sent a letter to Ryan Hennings entitled "Initial Decommission Plan for Land Treatment Facility", filed as exhibit 9. This initial plan indicates an intention to till the soil and sample in June 2016 and to develop an "accurate decommission plan" in the summer of 2016.

[9] Ms. Mills advised Officer Hennings by email dated March 21, 2016 and filed as exhibit 10, 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.

[10] 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, filed as exhibit 12. Officer Hennings was also made aware of the retainer.

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

[12] A detailed, and apparently compliant, decommissioning plan, prepared by Ms. Omtzigt, was provided on August 5, 2016. This plan is referenced in correspondence filed as exhibit 13, although the plan itself was not filed as an exhibit.

[13] The only factual issue in dispute relates 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.

[14] 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.

[15] Mr. Rudolph testified 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 up the ground, 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.

[16] 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. I was not provided with any specific examples in this regard, including where and when they may have occurred.

[17] I find the evidence of Mr. Rudolph to be entirely credible on this point and find 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.

Issues

[18] There are a number of issues to be decided in determining whether the case has been made out against Cobalt:

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?

Is the initial plan sufficient?

[19] 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.

[20] These same requirements are 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.

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

[22] The question to be answered is whether the initial plan provided by Cobalt and filed as exhibit 9 is compliant with the content requirements set out in the LTF permit and Protocol 11 as required by the EPO.

1. **Schedule:** while the initial plan refers to dates as "somewhat of a moving target", it does include reference to when certain things are expected to take place with respect to decommissioning the LTF such that one could conclude that a schedule of sorts has been provided;

2. **Sampling results:** it is clear that the required sampling was not and could not be completed such that no sampling results are included in the initial plan;

3. **Receiving location:** the initial plan does not reference any receiving location. Again, as the receiving location is dependent on the level of contaminants in the soil as shown by the sampling, at issue is whether, absent sampling results, a receiving location could be identified;

4. **Site restoration:** the initial plan does not reference the methods that will be used to restore the site.

[23] Considering all of these factors, I find that the initial plan falls well short of the decommissioning plan requirements set out in the LTF permit and in Protocol 11. By extension, the initial plan is not in compliance with the EPO.

Did the Department have an obligation to advise Cobalt?

[24] Counsel for Cobalt asserts that Cobalt should have been advised that the initial plan was not compliant with the EPO and been given an opportunity to correct any

deficiencies. The Crown takes the position that no notice was required as Cobalt had taken no steps with respect to the identification of receiving locations. Both rely on the case of *R. v. Bleta,* [2003] O.J. No. 1672, out of the Ontario Court of Justice in support of their respective positions.

[25] The *Bleta* case involved an order for a landlord to correct a number of specified defects in relation to a rental property. The landlord corrected some of the defects but not others and was charged with failing to comply with the order. The defendant's counsel advanced the argument that there was an obligation on the City to inform the defendant why the repairs were insufficient and allow time to correct the deficiencies before laying a charge. Quon J.P. concluded:

> In certain situations, it would be unfair if the City of Toronto had failed to inform someone, who made reasonable repairs to all items on a list of defects in a Property Standards Order, of why the repairs were insufficient. It is unfair since the decision on whether a defect has been corrected to a prescribed standard is a subjective decision made by the same person who also decides if a charge for non-compliance should be laid. Hence, because of the subjective nature of the decision on the acceptability of the repairs, it is sometimes necessary to inform the owner of the reasons why the work is substandard to allow him or her the opportunity to rectify the insufficient repairs. In that scenario, charging someone, before the obligation of the municipality is reasonably carried out, would be unjust. This act of unfairness could then form part of an owner's due diligence defence. … (para. 87)

[26] However, on the facts in *Bleta*, Quon J.P. went on to conclude that no such notice was required, noting:

> The failure of the City of Toronto to provide both an explanation on the adequacy of the repairs and additional time to rectify, would have been persuasive in this particular case as part of the due diligence, if the defendant had actually tried to repair all the items in the order. However, the argument loses steam when there had been no work done on several

> of the itemized defects. That is, the defendant would not need an explanation of why a repair was not sufficient when no repair had been done at all. … (para. 88)

[27] Common sense suggests that had Cobalt been notified that the initial plan provided was insufficient and been given time to address the deficiencies in the plan, the need for charges may have been avoided. However, the question is not whether notification would have been helpful, but whether such notification can be said to be obligatory.

[28] In applying the reasoning in *Bleta*, I do not think it is so simple as to adopt the Crown's analysis that the failure to address a required element in the decommissioning plan, such as the proposed receiving facility, in and of itself should result in the conclusion that there was no obligation to advise Cobalt that the plan was insufficient to meet the requirements of the EPO.

[29] At its root, a requirement to notify that something is deficient and to give an opportunity to rectify the deficiency is a question of what is fair in all of the circumstances. Adopting the reasoning in *Bleta*, this turns, in my view, on the question of the extent of the deficiency and the degree to which the determination of sufficiency requires a subjective rather than an objective assessment. In other words, the more detailed the decommissioning plan provided, the more subjective the assessment of sufficiency, and the more likely fairness would demand notification of the deficiency and an opportunity to rectify it. Conversely, the less detailed the plan, the more it can be said that the plan does not objectively meet the requirements, the less likely fairness would demand notification. To decide otherwise would mean that a defendant could

evade responsibility and delay consequences simply by making a cursory attempt at compliance.

[30] In this case, had Cobalt made more of an attempt to flesh out the plan, such as including options for receiving facilities and restoration that would be contingent on the sampling results, one could perhaps conclude that fairness would dictate the need to notify them that the plan was insufficient. However, 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 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?

[31] The offence before the court is properly characterized as a strict liability offence. The law is clear that the onus is on the Crown to establish the *actus reus* beyond a reasonable doubt. The burden then shifts to the defendant to establish, on a balance of probabilities, that he or she was duly diligent in efforts to avoid the commission of the offence (see *R. v. Sault Ste. Marie,* [1978] 2 S.C.R. 1299). Due diligence is established if the accused satisfies the court either that he or she reasonably believed in a mistaken set of facts, which, if true, would have rendered the act or omission innocent, or if the accused can satisfy the court that he or she took all reasonable steps to avoid the act or omission which constitutes the offence (see *La Souveraine, Compagnie d'assurance générale v. Autorité des marches financiers,* 2013 SCC 63). In this case, the applicable branch of the test is whether all reasonable steps had been taken.

[32] Counsel have filed a number of cases in support of their respective positions. While all have been reviewed and considered, I am not of the view that it is necessary to reference each case specifically in explaining the reasons for my decision. Two decisions, however, merit mention with respect to the issue of due diligence given their factual similarities to the case at bar.

[33] In *R. v. Twin Mountain Construction Ltd.,* 2001 NSPC 10*,* the defendants operated a sewage sludge composting facility. Local complaints gave rise to a notice ordering the defendants not to accept further material and to remove the material from the site as soon as possible. Efforts were made with respect to a proposal for handling the material that was not acceptable to the Department. A consultant was retained by the defendants to prepare a report to which the Department failed to respond. A Ministerial Order was issued giving the defendants 30 days to remove all material from the site and dispose of it to an approved facility. The three facilities suggested by the Department were unable or unwilling to accept the material. An extension of the order was sought but denied. Despite ongoing discussions and attempts to resolve the issues, charges were laid. The Crown argued that the defendants should have made more efforts to find a suitable facility to accept the material, but Crawford J. found that the defendants had done all that could reasonably have been expected of them, and concluded that the defence of due diligence had been made out.

[34] In *R. v. Starcan Corp*., 2005 ONCJ 446, the defendants owned a dated industrial manufacturing plant. To ensure compliance with new legislative requirements with respect to sound and vibration ‘contaminants’, the defendants were required to seek a Certificate of Approval, which, when granted, included a number of conditions.

Compliance required major modifications to the existing plant at significant cost to the defendants, along with an acoustic report to be filed by a specified date. Unforeseen circumstances delayed provision of the required report. An amendment was sought and granted. The report was ultimately provided but some months after the deadline, as weather prevented the required testing within the amended time frame. Noting that the defendant was prompt in responding to every unexpected challenge and spared no expense in retaining the required experts and completing the necessary modifications, Debacker J.P. found that the defendants had exercised a high degree of due diligence.

[35] Cobalt asserts that it too took all reasonable steps to comply with the EPO. However, when I compare the actions of Cobalt in this case against those described in *Twin Mountain* and *Starcan*, there are notable differences. For example, the circumstances that became barriers to compliance in *Twin Mountain* and *Starcan* were not reasonably foreseeable; the defendants were very proactive in their communication with their government counterparts; and efforts were made to seek time extensions when it became apparent that they could not be met.

[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.

[38] Defence counsel argues that due diligence does not require Cobalt to inform the Department of problems with the EPO, and that to require this of them would be to shift the onus of ensuring the EPO is enforceable to the defendant. However, as noted by Dickson J. in *Sault Ste. Marie*, due diligence "involves a consideration of what a reasonable man would have done in the circumstances". I am hard-pressed to conclude that a reasonable person would not take the obvious step of advising the Department of the problem and seek an extension.

[39] As argued by the Crown, Cobalt could have made efforts to contact potential receiving facilities and included those as options in the decommissioning plan. I would also note Cobalt's failure to include any information with respect to planned restoration of the site. Mr. Rudolph testified that he did not reference restoration as he felt that he would just be flattening the site and turning it back into a gravel pit. Clearly, he could have written that in his initial plan. Had Cobalt done either of these in the initial plan,

the plan would still have fallen short of the requirements, but inclusion may well have influenced the decision with respect to charges, and would certainly have bolstered the due diligence defence.

[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?

[41] As previously noted, I have found as a fact that Cobalt could not have performed the required sampling necessary for the decommissioning plan. The logical extension of this finding is that Cobalt could not have provided a compliant decommissioning plan by the deadline set out in the EPO. This raises the question of whether the defence of impossibility is available to the defendant.

[42] Impossibility is often referred to as the opposite of necessity, a defence the Supreme Court of Canada in *R. v. Perka*, [1984] 2 S.C.R. 232, noted must:

> …be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale. That rationale, as I have indicated, is the recognition that it is inappropriate to punish actions which are normatively "involuntary". …

[43] While necessity has three requirements: an urgent situation of imminent peril; no reasonable legal alternative to disobeying the law; and proportionality between the harm inflicted and the harm avoided (see *R. v. Latimer,* 2001 SCC 1), the test with respect to impossibility generally involves the second requirement only, whether there was no reasonable legal alternative (see *R. v. Syncrude Canada Ltd*., 2010 ABPC 229).

[44] It is clear that impossibility is available as a defence to a criminal charge of non-compliance (see *R. v. Gauthier*, 2002 YKTC 75). The availability of the defence of impossibility in the context of a strict liability offence is less clear.

[45] Crown argues that impossibility is only available in a strict liability context as part of a greater due diligence defence, citing *Regulatory Offences in Canada, Liability & Defences*, (Scarborough Ontario: Carswell Thomson Professional Publishing, 1992), in which Swaigen writes that “In most circumstances, some of these defences, such as Act of God, necessity, and impossibility, will be subsumed in the defence of reasonable care.”

[46] Crown suggests this proposition is further supported by the case law out of the Supreme Court of Canada in relation to strict liability offences which suggest that the **only** defence available to a strict liability offence once the *actus reus* has been established is that of due diligence (see *Sault Ste. Marie*).

[47] A number of the cases provided by counsel which reference impossibility do appear to conflate the defences of impossibility and due diligence rather than speaking of them as separate and distinct entities.

[48] In *Toronto (City) v. Belman*, 2001 CarswellOnt 6038 (C.J.), the defendant was charged with failing to display a parking receipt as required. The defendant argued that it was impossible for him to do so on his motorcycle. Quon J.P. referenced the 1973 decision in *Regina v. Ford Motor Company of Canada Ltd.* (1973), 12 C.C.C. (2d) 8 (Ont. P.C.), as support for the proposition that the defence of impossibility could not be applied to strict liability offences, but noting that the judge in that case offered a personal opinion of when impossibility should be available, before concluding:

> …the defendant would have the defence of impossibility if he **took all reasonable steps** to purchasing a parking receipt and in displaying the receipt. And that if the defendant chose another reasonable alternative to parking at that location that would result in some public harm equal to or greater to the harm of parking at that location without purchasing and displaying a receipt. … (para. 43, emphasis added)

[49] The reference in the decision to the requirement of taking all reasonable steps certainly appears to import the defence of due diligence as a necessary element of establishing the defence of impossibility.

[50] In *R. v. Canchem Inc*., [1989] N.S.J. No. 499 (P.C.), the defendants were involved in the collection and storage of hazardous waste. An order was issued requiring the removal of all waste from their site within 30 days. Curran J. of the Nova Scotia Provincial Court noted the time it actually took the government to remove the waste and concluded that it would have been impossible for the defendant to remove the waste within the 30-day time frame. In so concluding, he stated, “A person cannot be said to have failed to act with due diligence if he fails to do in thirty days something that could only be done in several months”.

[51] None of the cases before me clearly support the availability of the defence of impossibility separate and apart from the exercise of due diligence. Having already concluded that Cobalt has not established that they were duly diligent, were I to adopt the argument advanced by the Crown, the defence of impossibility considered as part of a due diligence defence would not be enough in and of itself to alter the conclusion that Cobalt has not made out a due diligence defence in this case.

[52] Defence counsel argues that there is an element of voluntariness required in determining whether the *actus reus* has been proven beyond a reasonable doubt. Where, as here, no steps could have been taken to comply with an order as written, she argues, the failure to comply is not voluntary. This position posits that impossibility is available as a defence separate and apart from due diligence.

[53] While the *Perka* decision cited above does reference the inappropriateness of punishing involuntary actions, there is no clear authority to support the proposition that the *actus reus* of a strict liability offence alleging non-compliance with a law or an order cannot be proven where compliance would have been factually impossible. However, there is something inherently unfair and illogical in the notion that someone could be convicted of an offence for failing to comply with an order when compliance was impossible.

[54] This conundrum was addressed in *R. v. 605884 Saskatchewan Ltd.,* 2004 SKPC 16, in which the defendant Outfitters were charged with a number of offences including possession of unprocessed hides without a seal attached as required. In considering that particular charge, Nightingale J. noted that only one seal was provided making it

impossible to comply once the hide was separated for trophy purposes. In exploring the availability of physical impossibility as a defence to the charge, Nightingale J. notes that the defence of impossibility "has often been found inapplicable in a regulatory context because it is simply too much trouble to apply where the only consequence of conviction is a small fine and the regulation exists for the greater good", and goes on to conclude "It would be repugnant to the rule of law to convict in a situation where the accused could not have complied with the law, and I decline to do so."

[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.

[56] Accordingly, I find Cobalt Construction Inc. and Shaun Rudolph not guilty. The charges are hereby dismissed.

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RUDDY T.C.J.