Citation: ☼

Date: ☼
File No: 24399-1
Registry: Nelson

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN: **Marilyn Burgoon**

AND: Executive Flight Centre Fuel Services Ltd.
and
Her Majesty the Queen in Right of the Province of British Columbia

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE D.M. McKIMM

Appearing for Marilyn Burgoon:	Lilina Lysenko
Public Prosecution Service of Canada counsel:	Todd Gerhart
Place of Hearing:	Nelson, B.C.
Date of Hearing:	November 27, 2014
Date of Judgment:	December 12, 2014

Summary

[1] This is an application under section 507.1(2) of the *Criminal Code* in which the informant Marilyn Burgoon seeks an order that process should issue against the two named defendants for alleged violations of the *Fisheries Act*, RSC, 1985, c. F-14.

[2] For the reasons that follow, the court agrees with the application and a summons will issue to each of the named parties.

Facts

[3] On July 26, 2013 a large tanker truck hauling Jet A1 fuel turned over while driving on a small forest service road adjacent to Lemon Creek in the Slocan Valley. As a result of that accident over 30,000 litres of fuel was discharged directly into Lemon Creek. That discharge caused enormous environmental destruction to the Creek and the adjacent aquifer.

[4] The tanker truck in question was operated by Executive Flight Centre Fuel Services Ltd. (hereinafter Executive Flight Centre), a corporate entity that provides fuel services for various flight operations. In July 2013 they had been hired by the Province of British Columbia to supply fuel to helicopters working in the Slocan Valley fighting several forest fires. As part of the forest firefighting effort the Province set up a staging area in the woods where helicopters could land and be refuelled. The intention was that Executive Flight Centre would deliver fuel to that staging area.

[5] The day before the accident a different fuel truck being driven by a different driver had also gone up the Lemon Creek forest service road in an attempt to find the helicopter staging area. He was able to turn his truck around and withdraw from the

Lemon Creek service road without incident. There is evidence that when that driver finally arrived at the staging area he advised those in charge that he was given incorrect directions to the staging area as a result of which he had driven up the Lemon Creek forest service road.

[6] It is alleged that the Province was responsible for directing traffic to the staging area and that they were responsible for the signage that was used for that purpose. The allegation is that the signage was incorrect and that error was compounded by a failure to correct the signage prior to the accident on July 26. Essentially, it is alleged that the Province knew or ought to have known that tanker trucks containing enormous quantities of jet fuel were being misdirected.

[7] It is conceded that the depositing of tens of thousands of litres of jet fuel into a pristine creek, which is inhabited by fish is a violation of the *Fisheries Act.* R.S.C. 1985, c. F-14. Section 36(3) of that *Act* reads:

> 36.(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

[8] Prior to September 29, 2014, no charges had been laid under the *Fisheries Act* against any person. On that date, the informant, Marilyn Burgoon, appeared before a justice of the peace and swore a private information containing three counts alleging in count one that Executive Flight Centre did deposit a deleterious substance into water frequented by fish, in count 2 that Her Majesty the Queen in Right of the Province of British Columbia, did deposit a deleterious substance into water frequented by fish and

count 3: Executive Flight Centre and Her Majesty the Queen did deposit a deleterious substance into water frequented by fish all contrary to section 36(1) of the *Fisheries Act*.

The Process

[9] The Information having been taken by a justice of the peace, the issue now arises as to whether or not process should issue compelling the attendance of the accused. Because the informant is not a peace officer, but rather a private citizen, the provisions of section 507.1 of the *Criminal Code* apply. That section provides that prior to issuance of a summons this court must hold a hearing to determine whether or not a case has been made out to issue either a summons or a warrant for the arrest of the accused persons. This hearing is referred to as a *pre-enquete*.

[10] It was agreed and I am satisfied that the preconditions for the issuance of the summons under section 507.1 (3) (b), (c) and (d) have all been satisfied. On November 27, 2014 the informant appeared before the court and provided evidence under oath with respect to these allegations and provided a book of documentary material substantiating her allegations. An agent for the Minister of Justice through the Department of Justice attended and cross examined the informant.

[11] At this hearing it is appropriate for the court to consider any evidence that it finds to be credible and trustworthy. This is so because section 507.1 of the *Criminal Code* incorporates by reference the rules of admissibility found in sections 540 of *Code* regarding preliminary inquiries. I accept Mr. Justice Watt's analysis in *R. v. Vasarhelyi*, 2011 ONCA 397 where he writes:

> "The *admissibility* of evidence at a preliminary inquiry is the focus of sections 540 (7)-(9). In other words, these provisions have to do with *what* the justice may receive as evidence at the inquiry. Sections 540 (7)-(9) expand the scope of what may be received as evidence beyond what the traditional rules of admissibility would permit. Provided the information tendered for reception is credible and trustworthy, and the opposite party has received reasonable notice of the intention to introduce it, together with disclosure, the justice may admit the information as evidence even though the traditional rules of evidence would exclude it.
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> *Vasarhelyi* at para. 46

[12] In this case, I have considered all of the evidence given *viva voce* at the pre-enquete, as well as the documents filed. In those materials are the pleadings of a civil action in the Supreme Court of British Columbia out of the Vancouver Registry, *Kirk v. Executive Flight Center Developments Ltd., Executive Flight Center Fuel Services Ltd. and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure and the Minister of Forest Lands and Natural Resource Operations,* Vancouver Registry No. S135927. These pleadings are from an action commenced by a citizen of the Slocan Valley on behalf of himself and other citizens in the Slocan Valley against Executive Flight Centre and the Province of British Columbia. The action is for damages caused as a result of the July 26, 2013 spill.

[13] In my view, these pleadings fall under the rubric of trustworthy and reliable information only as they relate to the party who has pled the document. I do not accept as trustworthy and reliable the pleadings of one of the parties to that civil litigation against the other. As an example, in a third-party notice filed by Executive Flight Centre, a number of allegations were made by Executive Flight Centre, both factual and legal, against the Province of British Columbia. I am prepared to accept as trustworthy

and reliable the statements made by Executive Flight Centre only as against Executive Flight Centre, but I do not consider them trustworthy and reliable as information against the Province.

[14] I leave for another day the important question of whether the pleadings would ever be admissible in a trial of this matter. See *R. v. Soni*, 2014 ABQB 649.

Analysis of the Evidence

[15] Under section 507.1 of the *Criminal Code* process should issue only if the court considers that a "case for doing so is made out". This phrase has been considered a number of times in the authorities. Mr. Justice Then of the Ontario Superior Court of Justice, adopts the analysis of MacDonnell J. when that court writes of the test:

> It is well-established that for the purposes of this procedure, the case is "made out" where the evidence establishes a *prima facie* case, that is, where there is evidence of each essential element of the offense charged in the information, and where the judge or designated justice does not conclude that the proceedings are vexatious, frivolous or an abuse of the process of the court.
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> *R. v. Nenchev*, 2014 ONSC 5159

[16] This test, drawn from *R. v. McHale* (2010) 256 CCC 3rd 26 (Ont.C.A.), is cited with approval by our Court of Appeal in *Ambrosi v. British Columbia (Attorney General)* 2014 B.C.C.A. 123, where the court writes:

> Section 507.1 requires that the referral be heard by a judge or a designated justice; that the informant lead evidence of his or her allegations on each essential element of the offence…; and that notice be given to the Attorney General, and that the Attorney General be permitted to participate, cross examine and call witnesses, and present evidence.
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> These additional safeguards ensure that "spurious allegations, vexatious claims, and frivolous complaints barren of evidentiary support or legal validity will not carry forward into a prosecution". [*McHale* at para. 74]

[17] It was conceded by counsel for the Minister of Justice that there was evidence of a *prima facie* case against Executive Flight Centre. They clearly had control over the operation of the tanker truck which deposited deleterious substances into a waterway populated with fish. Summons will issue with respect to Executive Flight Centre Fuel Services Ltd.

[18] On the other hand, counsel for the Minister of Justice submitted that process should not issue against the Province of British Columbia, because there was no direct evidence that the Province deposited the deleterious substance into the waterway. I disagree.

[19] The offence in question under the *Fisheries Act* is a strict liability offence. The evidence establishes that the Province retained Executive Flight Centre to provide the deleterious substance, the jet fuel, to its operations in the Slocan Valley. The evidence also shows that it was the Province who chose the areas which were to be the staging area to which the fuel was to be delivered. It was the Province who was responsible for having the deleterious substance brought to the wilderness.

[20] An offense of strict liability was first articulated by the Supreme Court of Canada in *Regina v. Sault Ste. Marie*, (1978) 2 S.C.R. 1299 at1329. In that case, the City of Sault Ste. Marie retained an independent contractor to remove garbage on behalf of its citizens. The independent contractor in that case removed and dumped the garbage in a place and in a manner that caused effluent to enter into a waterway and pollute the waterway. The only act of the City of Sault Ste. Marie was to retain the contractor and to instruct that contractor to dispose of the garbage. Of importance is that the City of

Sault Ste. Marie was not responsible for directing where the garbage was to be deposited nor the manner in which it was to be deposited; they simply retained the contractor for those details.

[21] When assessing the liability of the City, the court writes:

> As I am of the view that a new trial is necessary, it would be inappropriate to discuss at this time the facts of the present case. It may be helpful, however, to consider in a general way the principles to be applied in determining whether a person or municipality has committed the *actus reus* of discharging, causing, or permitting pollution within the terms of section 32(1)[of the Water Act], in particular in connection with pollution from garbage disposal. The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so. The "discharging" aspect of the offence centers on direct acts of pollution. The "causing" aspect centers on the defendant's active undertaking of something which it is in a position to control which results in pollution. The "permitting" aspect of the offence centers on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen. The close interweaving of the meanings of these terms emphasizes again that section 32(1) deals with only one generic offence.
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> ...
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> Nor does liability rest solely on the terms of any agreement by which a defendant arranges for eventual disposal. The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution if it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution.... *Prima facie*, liability will be incurred where the defendant could have prevented the impairment by intervening pursuant to its right to do so under the contract, but failed to do so. Where there is no such express provision in the contract, other factors will come into greater prominence.
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> *R. v. Sault Ste. Marie* (1978) 2 S.C.R. 1299 at 1329

[22] Section 36(3) of the *Fisheries Act* also delineates different ways in which the offence in question may be committed. While the information, as drafted, now refers

only to the Province as being responsible for "depositing" the deleterious substance, it would be equally liable if the information provided that they "permitted" the deposit of the deleterious substance. In my view, the information can be easily amended to capture either one of the two different ways in which the offence might be committed and the court ought not to stand on niceties of pleadings at the stage of the pre-enquete. A *prima facie* case is clearly made out with respect to the Province of British Columbia, permitting the deposit into Lemon Creek of the deleterious substance in exactly the same way in which the City of Sault Ste.. Marie was responsible for permitting the pollution of the waterway in that case. There is clearly evidence of all of the other elements of the offence under section 36 (3) and, as such, a summons will also issue to Her Majesty the Queen in Right of the Province of British Columbia.

The Honourable Judge D.M. McKimm