Citation: ☼ R. v. Larsen and Mission Western Developments Ltd. Date: ☼20131106
2013 BCPC 0309
File No: 70318-1
Registry: Abbotsford

2013 BCPC 309 (CanLII)

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

BLAKE LARSEN and MISSION WESTERN DEVELOPMENTS LTD.

REASONS FOR SENTENCE
OF THE
HONOURABLE JUDGE K. D. SKILNICK

Counsel for the Crown:	R. Roberts and J. R. Lawn
Counsel for the Defendant:	P. D. Le Dressay
Place of Hearing:	Abbotsford, B.C.
Date of Hearing:	September 30, October 21, 2013
Date of Judgment:	November 6, 2013

2013 BCPC 309 (CanLII)

Background

[1] The Defendants Blake Larson and Mission Western Developments Ltd. have each been convicted of two offences under the *Fisheries Act (Canada).* They have been found guilty of carrying on a work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat at a site known as Windebank Creek in Mission, BC, between January 23rd and February 18th of 2008, contrary to section 35(1) of the *Fisheries Act.* In doing so, they are subject to the penalties set out in section 40(1) of the Act.

[2] Written reasons for judgement summarizing the evidence heard at trial and the basis for these convictions have been published and reported at 2013 BCPC 0092. The evidence at trial established that, in the course of cleaning up a piece of commercial property that they had purchased, the Defendants had retained an environmental consultant in order to get advice about how to comply with environmental laws. An opinion was provided by the consultant on how to accomplish this and confirmation was obtained from the Federal Department of Fisheries and Oceans (the "DFO") that the DFO would not object if that plan was followed. The Defendants elected not to proceed with that plan and embarked on a course of action contrary to much of what their environmental consultant had recommended. The environmental consultant told the Defendants not to cut down trees and only to remove those limbs that presented a hazard. The Defendants did not follow this advice, choosing instead to remove a considerable number of trees, in some cases uprooting them. The environmental consultant told the Defendants to have an environmental monitor present when work was being performed. The Defendants chose not to do so. The environmental

consultant asked to be notified when work was being performed. The Defendants chose to go ahead with the work without notifying the environmental consultant.

2013 BCPC 309 (CanLII)

[3] At trial, the Crown proved, beyond a reasonable doubt, that the work performed at the direction of the Defendants interfered with the fish habitat in a way that has impaired the value or the usefulness of the habitat for one or more of the purposes described in the definition of "fish habitat" in s. 34(1) of the *Fisheries Act*. The cutting down of a great number of trees, the removal of the shade from the creek, and the clearing of adjacent vegetation amount to an alteration of the fish habitat to a degree that was more than trivial or minimal. According to biologist Lisa McDonald in her written report:

> “[T]he unauthorized works have resulted in negative impacts to Windebank Creek. Potential and likely results of the unauthorized works include alterations in the natural stream temperature regime, reduced large woody debris and food and nutrient contributions and decreased soil and bank stability, all of which have a negative impact on fish and fish habitat.”

[4] Specifically, according to the evidence accepted at trial, this particular fish habitat was adversely affected in a number of ways, including:

(a) Alteration of stream temperature;

(b) Reduced large woody debris output, (which provides secure cover for fish and provides food and nutrients for algae, insects and ultimately for fish);

(c) Decreased food and nutrient sources;

(d) Decreased soil and bank stability.

2013 BCPC 309 (CanLII)

Relevant Legislation

[5] The Defendants have been found guilty of two counts of committing offences under section 35(1) of the *Fisheries Act (Canada),* which reads as follows:

> **35.** (1) No person shall carry on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction, of fish habitat.

[6] Persons convicted of offences under section 35(1) face the penalties set out in section 40 and section 79.2 of the *Fisheries Act.* Section 40 provides a specific penalty for persons who commit an offence under section 35(1) and permits the Crown to prosecute the offence as an indictable offence or on summary conviction. In this case, the Crown has elected to proceed summarily. The penalty on summary conviction is set out as follows:

> **40.** (1) Every person who contravenes subsection 35(1) is guilty of
>
> (*a*) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both;

[7] Section 79.2 of the *Fisheries Act* also provides for the imposition of a number of additional sanctions against persons convicted of offences under the Act. The Crown is seeking two specific orders under this section, those being an order requiring the Defendants to pay for prevention of future harm to the fish and fish habitat at Windebank Creek, and for an order requiring the Defendants to publish the facts relating to the commission of these offences. The relevant portions of section 79.2 read as follows:

> **79.2** Where a person is convicted of an offence under this Act, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:...
>
> (*b*) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;
>
> (*c*) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;

2013 BCPC 309 (CanLII)

Kienapple Principle

[8] At the conclusion of delivering reasons for conviction of the Defendants on both counts on the information, I invited submissions from counsel as to whether or not the principle set out by the Supreme Court of Canada in *R. v. Kienapple* (1974) 15 C.C.C. (2d) 524 applied on these facts. This is a rule which prevents an accused person from being convicted multiple times for the same subject matter. In *R. v. Wigman* (1987) 33 C.C.C. (3d) 97, also a decision of the Supreme Court of Canada, the court explained this principle as follows at paragraph 17:

> ...[A] two-part test must be met for the *Kienapple* rule to apply: there must be both a factual and legal nexus between the charges. Multiple convictions are only precluded under the *Kienapple* principle if they arise from the same "cause", "matter", or "delict", and if there is sufficient proximity between the offences charged. This requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.

[9] In this case the Defendants were convicted of two offences under section 35(1) of the *Fisheries Act,* by carrying on a work or undertaking that resulted in the harmful alteration, disruption or destruction of fish habitat at Windebank Creek. In both counts,

the work or undertaking was charged as “land clearing and grubbing.” In count 1, the fish habitat was Windebank Creek itself, and in count 2, the fish habitat was “riparian vegetation located along the banks of Windebank Creek.” This is a very fine distinction in this case because the evidence accepted at trial was that fish habitat harmed in this case included not only the creek itself, but the adjacent vegetation, and that by harming the vegetation, the creek was also harmed in its function as a fish habitat. Accordingly I conclude that there is sufficient proximity between both of the offences charged and that the principle applies in this case. Each counsel has expressed concurrence in this result. Prior to my directing a conditional stay of proceedings on one of the counts, Crown Counsel entered a stay of proceedings on count 1 of the information.

2013 BCPC 309 (CanLII)

Gardner Hearing

[10] At the sentencing of this matter, an issue arose regarding the cost of restoration of Windebank Creek and over what the appropriate restoration plan was. Counsel requested that I direct the calling of evidence on this issue, pursuant to section 724(3) of the *Criminal Code.* In *R. v. Gardner* [1982] 2 S.C.R. 368, the Supreme Court of Canada held that where there is conflicting evidence concerning the gravity of the offence, the onus is on the Crown to prove the aggravating factors beyond a reasonable doubt. This principle does not apply to evidence accepted as proven at trial so as to enable an accused to make the Crown prove the same facts twice. On sentencing, Crown and Defence disagree on what is required to restore Windebank Creek, an issue which was not fully addressed at trial.

[11] By October of 2011, the Corporate Defendant had subdivided the property that Windebank Creek runs through into two parcels. One parcel contained the commercially viable area on which a commercial mall has been constructed and that parcel was kept by the Corporate Defendant. A second parcel contained Windebank Creek and the area comprising the fish habitat. That portion was "gifted" to the Fraser Valley Conservancy, a non-profit society whose objects include environmental protection. In addition to transfer of this parcel of land, the Corporate Defendant also paid the Fraser Valley Conservancy the sum of $32,200. In a letter from the Corporate Defendant to the Conservancy's lawyers, this sum is described as being "the full amount identified by Envirowest Consultants for replanting and maintenance" of the transferred land. Envirowest was a consultant which the Corporate Defendant retained after commission of these offences. The estimate of $32,200 is based on an estimate given by Envirowest on July 18, 2011.

[12] On October 18, 2011, the Corporate Defendant wrote to the Fraser Valley Conservancy requesting that the Conservancy "on an immediate basis" confirm to the District of Mission that this agreement was acceptable. The Defendants take the position that no complaint was made by the Conservancy when the sum of $32,200 was paid to them, and they are surprised that the Crown now asks for a further payment of $26,540 to pay for the restoration of the site.

[13] Two expert witnesses testified on what the appropriate restoration plan is for Windebank Creek. Dr. Mike Pearson was qualified to give opinion evidence in the field of fish biology and fish habitat. He has a Ph. D. In resource management, a Master of Science degree in zoology and a Bachelor of Science degree in fisheries science. He is

2013 BCPC 309 (CanLII)

the principal of Pearson Ecological and is also a member of the board of directors of the Fraser Valley Conservancy. He is also someone who is very familiar with Windebank Creek.

2013 BCPC 309 (CanLII)

[14] It is Dr. Pearson's opinion that proper restoration of the fish habitat at Windebank Creek will take between five to seven years. It will require the planting of trees and shrubbery native to the area as well as ongoing control of the infestation of Himalayan blackberry bushes. He gave evidence that this would require a cost of approximately $58,740. He addressed the breakdown of this estimate in his evidence.

[15] Dr. Pearson also described an event held on Earth Day (April 20) in 2012 when approximately 30 volunteers participated in a clean up of Windebank Creek and in the planting of about 675 trees and shrubs. The plants cost $5,240. Blackberry removal was done by a paid crew because the nature of the work is difficult and likely to deter volunteers from returning.

[16] On behalf of the Defendants, Mr. Ian Whyte, the Senior Project Manager of Envirowest Consultants Inc., was called to give evidence, and was also qualified to give opinion evidence in the field of fish habitat restoration and enhancement and watershed management. According to a report prepared by Mr. Whyte, the transfer of management of the riparian area of Windebank Creek from the Corporate Defendant to the Conservancy was not done entirely for charitable reasons, but as a condition of the issuance of a development permit for the commercial site.

[17] Mr. Whyte provided an opinion on the restoration plan put forward by the Conservancy. Part of the difficulty with Mr. Whyte's opinion is that he maintains that the

Defendants did not harmfully alter, disrupt or destroy the fish habitat at Windebank Creek, a conclusion that is contrary to the findings of this court. Much of his opinion is a repetition of the evidence that he gave at trial which was rejected. One area of his evidence which was not discussed at trial concerns the notion of restoration. As he points out in his report, the term “restoration” suggests a return to some previous condition. It is his position that the site restoration plan proposed by his company which formed the basis of the payment of $32,200 to the Conservancy was one which met the approval of the District of Mission. Specifically, it provided for the planting of vegetation which would control erosion and protect Windebank Creek’s water quality. The trees proposed in that plan were selected so as to control the growth of Himalayan blackberries and other invasive plant growth. Mr. Whyte is also of the opinion that a three year maintenance period is required because that is what comports with the District of Mission’s requirements.

[18] In his report, Dr. Pearson was critical of the Envirowest plan for a number of reasons. Dr. Pearson is of the opinion that the Envirowest plan will not control the growth of the harmful blackberry species. He is also of the opinion that the plant density proposed by the Envirowest plan is too low, that the species of trees it proposes be planted is not diverse enough to promote proper insect and fish food sources or to resist invasive plant species, and that the maintenance period of three years is too short to allow native plants to establish.

[19] Where the evidence of Dr. Pearson is in conflict with the evidence of Mr. Whyte, the evidence of the former should be preferred. Much of Mr. Whyte’s recommendations are concerned with meeting the approval of the District of Mission for commercial

2013 BCPC 309 (CanLII)

development, as opposed to any concern over the long term viability of the fish habitat at Windebank Creek. Conversely, each of Dr. Pearson's recommendations is based on environmental concerns that directly relate to the health of the fish habitat which was found to be harmfully altered by the Defendants. Mr. Whyte's position that no harmful alteration of the fish habitat has occurred adversely colours his opinions on what proper site restoration should look like and accordingly, I find the opinion of Dr. Pearson to be the more objective of the two.

2013 BCPC 309 (CanLII)

Position of the Parties

[20] The Crown asks this court to impose a fine of $100,000 against the Corporate Defendant and a fine of $30,000 against the Defendant Larsen. The Crown also seeks an order under section 79.2 (b) of the *Fisheries Act* that the Corporate Defendant pay to the Fraser Valley Conservancy the sum of $26,540 to be used for the cost of site restoration. Lastly, the Crown asks for an order requiring the Defendants to publish the facts of this case, in order to deter other environmental offenders from committing similar offences.

[21] The Crown argues that the culpability of the Defendants is high. They deliberately chose to ignore advice given by their own expert and were reckless as to what environmental damage would result from their actions. The Crown points out that the actions of the Defendants have caused the health of this fish habitat to be set back twenty years and takes the position that a significant monetary penalty must be imposed in order that environmental harm is not simply seen as part of the cost of doing business for commercial developers.

[22] On behalf of the Defendants, their counsel asks that a fine of $1000 be levied against each Defendant with no ancillary orders being made. He argues that the Defendants have been deterred by the costs which had followed their actions, which include the cost of the donated land, the costs of subdivision, surveying and legal fees associated with the transfer, and the payment of $32,200 to the Fraser Valley Conservancy. Counsel also argues that the Defendants' culpability is at the lower end of the scale. In support of this contention, he points out that the Defendants have satisfied the District of Mission with how they have handled the site, and that they purchased the site after it had been abandoned by a previous owner, in effect acquiring someone else's mess. He argues that the expenses which the Defendants have incurred are punishment enough.

2013 BCPC 309 (CanLII)

Applicable Law on Sentencing

[23] Under section 83 of the *Fisheries Act,* the summary conviction provisions of the *Criminal Code* apply to offences under the *Fisheries Act*. This means that the sentencing objectives set out in section 718 of the *Criminal Code* apply here, and the sentence imposed must consider such factors as denunciation of unlawful conduct, general and specific deterrence, and reparation of harm done to the community.

[24] When sentencing on environmental offences, the British Columbia Court of Appeal, in *R. v. Brown* 2010 BCCA 225 (at paragraph [13]) has approved of the Alberta Court of Appeal's decision in *R. v. Terroco Industries Limited* 2005 ABCA 141, which in turn has identified the following five factors which are to be considered in sentencing environmental offences:

1. Culpability: At paragraphs [35] to [37], the court said that culpability should be a dominant factor in sentencing environmental offenders. Offences involving recklessness call for more severe penalties than those which the court called "near due diligence misses." The more diligent the offender, the lower the sentence, and conversely, the less diligent the offender, the higher the sentence.
2. Prior Record: A prior record for environmental offences indicates that an offender is more concerned about profit than compliance. Even where the offender has no prior record, persisting in the unlawful conduct in the face or prior warnings is an aggravating factor.
3. Acceptance of Responsibility/remorse: An early guilty plea to an environmental offence is a mitigating factor. The maintenance of a right to trial is not an aggravating factor, it is a neutral factor.
4. Damage/Harm: The existence, potential, duration and degree of harm are all factors to be fully considered on sentencing. Actual harm is an aggravating factor, especially where the harm is readily foreseeable. Damage to property may be ameliorated, provided by compensation, provided that such compensation results in the restoration of the environment.
5. Deterrence: Specific and general deterrence are key components of sentencing environmental offences. Sentencing judges should use the entire arsenal of sentencing options under the applicable legislation to accomplish the goals of sentencing, including deterrence. The size and profitability of the enterprise which resulted in the breach should be taken into account. Penalties imposed for environmental offences must serve to deter others in the industry who may risk offending. A fine must not be such as to be considered "the cost of doing business. Where the offence results from the taking of a shortcut, this should be considered as an aggravating factor so as not to discourage those in the industry who are law-abiding.

[25] In *R. v. Brown*, supra, the British Columbia Court of Appeal applied the sentencing considerations set out in *R. v. Terroco Industries* to offences under section 35 (1) of the *Fisheries Act.* I would also note that the sentencing considerations set out in these cases do not purport to substitute for the sentencing considerations set out in section 718 of the *Criminal Code*, they incorporate the principles of denunciation of unlawful conduct, general and specific deterrence, rehabilitation and reparation of harm

2013 BCPC 309 (CanLII)

done to the community, and give sentencing courts guidance as to which of these principles deserve greater weight when environmental offenders.

Application of Sentencing Considerations

[26] The Defendants continue to maintain that their actions did not result in any harm to the fish habitat at Windebank Creek. They base this position in part on an opinion which they have obtained after they chose to reject the advice of the environmental consultant that they had retained when initially dealing with the DFO. The notion that their actions did not result in any harm to the fish habitat at Windebank Creek has been rejected by this court as well as by a number of other environmental experts.

[27] In determining a fit sentence for the Defendants, the first consideration is culpability. As set out in the law summarized earlier, culpability should be a dominant factor in sentencing environmental offenders. Offences involving recklessness call for more severe penalties than those sometimes called “near due diligence misses.” In the case at bar I find that the Defendants demonstrated a significant degree of culpability. They chose to ignore the opinion of their own environmental expert as to what was required to comply with applicable environmental laws. They did not provide environmental monitors when the critical work was being performed despite being advised to do so, and they went ahead with the work without contacting their consultant after indicating that they would do. The Defendants demonstrated a high degree of recklessness when they commenced the work altering the fish habitat at Windebank Creek, without any guidance as to what they could and couldn’t do to comply with the

2013 BCPC 309 (CanLII)

law. In deciding that they knew best, the proceeded at their peril, and will now be called upon to account for that recklessness.

[28] The Defendants do not have any prior record for environmental offences.

[29] The Defendants continue to deny that they have harmfully altered the fish habitat at Windebank Creek. I agree with the submission of their counsel that this is not an aggravating factor, it is a neutral factor. They have the right to be wrong in their opinion. The effect of this is simply that they can not be given the same credit as an offender who accepted responsibility for his or her actions.

[30] The harm which the Defendants have caused to Windebank Creek is not insignificant. It will take years to remedy. It has already utilized a significant amount of volunteer resources of the Fraser Valley Conservancy, and will require ongoing monitoring and expense. The Defendants argue that the property was a mess when they bought it, and they have helped to remedy what was already an environmental liability due to the actions of squatters who littered the property with garbage, mattresses and used needles. While they initially solved one problem in the manner that the land was cleared, they created another one. They could have addressed both the problem of cleanup of the land and compliance with environmental laws if they had followed the advice of their initial consultant. Addressing one problem while creating another is not a justification for the harmful alteration of this fish habitat.

[31] The final consideration on sentencing is specific and general deterrence, which are described as key components of sentences for environmental offenders. Sentencing courts are directed to use the entire arsenal of sentencing options under the applicable

2013 BCPC 309 (CanLII)

legislation to accomplish the goals of sentencing, and to deter environmental offenders. Penalties imposed for environmental offences must serve to deter others in the industry who may consider offending. Commission of environmental offences must never be seen to be profitable either in the short run or in the long run. Fines for these offences must not be such as to be considered "the cost of doing business." Where, as in this case, the offence results from the taking of a shortcut, the law directs that this should be considered as an aggravating factor so as not to discourage those in the industry who are law-abiding.

[32] Here the Defendants chose to ignore the recommendations of their initial environmental consultant. Costs for compliance were estimated by Scott Resources Inc to be $77,285.32, according to the evidence presented at trial. The Defendant presented murky and incomplete financial information about its commercial venture adjacent to Windebank Creek. For example, Mr. Weiss, an officer of the Corporate Defendant, claimed that this development contributed $165,000 to the tax rolls of the City of Mission, while at the same time providing a financial statement into evidence which only accounted for annual property taxes of just over $6,000, without offering any understandable explanation about this discrepancy or of what the financial statement actually represented. At the end of the day however, their counsel concedes that the Defendants are not pleading poverty.

[33] Counsel for the Defendants argues that the Defendants' donation of that portion of the property containing Windebank Creek should be seen as a major mitigating factor on sentencing. An appraisal of that portion of the land values it at $105,000 and the Defendants incurred additional costs in connection with the donation that totalled almost

2013 BCPC 309 (CanLII)

another $50,000. These included appraisal costs, legal fees, surveyor's fees, fees paid to Envirowest Consultants, and the sum of $32,200 paid to the Conservancy for site restoration costs. On the one hand, it must be kept in mind that there would have been a cost to the Defendants associated with retention of the property. The opinion of the appraiser is also a curious one, given that the appraisal declares that the highest and best use of this property is as "environmentally sensitive parkland." This portion of the land has no commercial value and was never going to be developed for any income earning purpose. The person who prepared the appraisal did not testify. It is difficult to imagine what buyer would pay $105,000 for a piece of land that would have no commercial or residential use, no income earning capacity, but an almost certain upkeep cost. Nevertheless, while the divestiture of this land also removed an ongoing headache for the Defendants, the costs associated with the donation of this property should be considered in the Defendants' favour in arriving at a fair sentence.

<u>Sentence</u>

[34] Taking into account all of these considerations, the sentence imposed must be one which recognizes the recklessness of the Defendants actions in choosing to ignore the advice of their initial environmental consultants, which takes into account the harm done to the fish habitat at Windebank Creek, which does not make the offence a profitable business decision, and which makes the Defendants responsible for the cost of restoration of the fish habitat at Windebank Creek, insofar as money can achieve this. The Defendants are not to be punished for their lack of acceptance of responsibility for the commission of these offences, nor will they be given the credit afforded to an offender who had taken responsibility for any unlawful and harmful actions. The fine

2013 BCPC 309 (CanLII)

imposed will be a significant one, but will be lower than that requested by the Crown in recognition of those steps taken by the Defendants thus far to remedy the damage which they have caused.

2013 BCPC 309 (CanLII)

[35] The Defendant Blake Larson will be ordered to pay a fine of $20,000. The Defendant Mission Western Developments Ltd. will be ordered to pay a fine of $60,000. They will have until May 31, 2014 to pay these fines.

[36] In addition, pursuant to section 79.2 (b) of the *Fisheries Act*, the Defendant Mission Western Developments Ltd. shall pay to the Fraser Valley Conservancy the sum of $26,540 to be used for the cost of site restoration. This sum shall be paid no later than March 31, 2014.

[37] I decline the Crown’s request for an order under section 79.2 (c) of the *Fisheries Act*, directing the Defendants to publish the facts relating to the commission of the offence. The reasons for judgement in this matter have been published on the Provincial Court’s judgement database and on other websites, and these reasons for sentence will be similarly published. The Crown has the option of publicizing the matter further by way of a press release. I don’t believe that ordering the Defendants to publish the facts of this case would have any greater deterrent effect on them.

[38] Environmental consultants may wish to use the story of Windebank Creek as a parable for clients who are thinking of ignoring their advice.

Dated at the City of Abbotsford, in the Province of British Columbia this 6th day of November, 2013.

____

The Honourable Judge K. D. Skilnick

2013 BCPC 309 (CanLII)