SUPREME COURT OF YUKON

Citation: *R v 16142 Yukon Inc*, 2025 YKSC 13

Date: 20250228
S.C. No. 23-AP011
Registry: Whitehorse

REX

APPELLANT

16142 YUKON INC. o/a NORTHERN ENVIRO SERVICES
and KERRY PETERS

RESPONDENTS

Before Justice K. Wenckebach

Counsel for the Crown — Ludovic Gouaillier

No one appearing for the respondents

REASONS FOR DECISION

INTRODUCTION

[1] Kerry Peters is the owner of a property at 1006 Centennial Avenue (the "Centennial Property" or the "Property"), located in Watson Lake, Yukon. He is also director of a company, 16142 Yukon Inc., known as Northern Enviro Services ("NES"). In October 2020, NES had a special waste permit issued under the *Environment Act,* RSY 2002, c 76 (the "*Act*"). No permits were associated with the Centennial Property.

[2] On October 16, 2020, two Environmental Protection Officers ("EPO") from the Government of Yukon, Emily Sessford and Aaron Koss-Young, along with a Conservation Officer, Logan Donovan, conducted an inspection of the Centennial Property.

[3] Damien Warren, an employee of NES, was present during the inspection. The trial judge found that Mr. Warren did not consent to the inspection.

[4] Based on the information obtained from the inspection, Mr. Koss-Young sought judicial authorization to search the Centennial Property. In addition, he sought judicial authorization to search another property owned by Mr. Peters: 113 10th Avenue (the "10th Avenue Property"), also in Watson Lake. The search warrant was granted for both properties; and searches of the two properties were carried out.

[5] Three charges arose out of the results of the searches. Mr. Peters was charged with the offence of handling special waste without a permit between October 16-December 8, 2020, contrary to s. 8 of the *Special Waste Regulations*, OIC 1995/047 (the "*Regulations*"), of the *Act*; and NES was charged with generating and handling special waste without a permit, contrary to s. 83 of the *Act*, and disposing of special waste not in accordance with the regulations, contrary to s. 95 of the *Act*, all between the dates of October 16-December 8, 2020.

[6] At trial, defence counsel challenged the admissibility of the evidence derived from the search warrants. The trial judge concluded that the inspection of October 16, 2020, violated Mr. Peters' and NES' rights against unreasonable search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (the "*Charter*"). He then determined that the warrant should not have been issued. Finally, he excluded the evidence obtained through the search warrant pursuant to s. 24(2) of the *Charter*.

[7] Without this evidence, the Territorial Crown did not have sufficient evidence to proceed and asked the judge to acquit Mr. Peters and NES.

[8] The Crown has now appealed the trial judge's ruling that the evidence be excluded and seeks a new trial.

DECISION

[9] For the reasons below, subject to the trial judge's decision about the 10th Street Property, I allow the appeal and order a new trial.

RESPONDENTS' PARTICIPATION IN THE APPEAL

[10] Mr. Peters, who represented himself and NES, did not appear for the hearing of the appeal. I decided to proceed with the hearing even though Mr. Peters was not present. I did so because a delay was not warranted; and Mr. Peters had adequate notice of the appeal.

[11] The first appearance for the appeal was on November 7, 2023. At that time Mr. Peters attended and sought an adjournment to seek legal advice. The matter was thus adjourned. Mr. Peters was told that he could attend by phone. Mr. Peters did not attend some of the appearances that followed. The appeal was then set down for June 24, 2024.

[12] Mr. Peters attended on June 24, 2024, but claimed that he had not received the Territorial Crown's materials and was not ready to proceed. He asked for a further adjournment. The Territorial Crown submitted that he had delivered the materials to Mr. Peters. I directed the Crown to provide Mr. Peters the materials again. He gave Mr. Peters some of the materials in court and committed to providing the rest electronically. Mr. Peters confirmed his email address. I then granted the adjournment, set the date of the appeal hearing to October 3, 2024, and set another interim appearance before then. Mr. Peters did not attend the interim appearance.

[13] Thus, on October 3, 2024, although Mr. Peters did not attend, I was satisfied that Mr. Peters had notice of the appeal and the requisite materials. I concluded that there had been delays already because of Mr. Peters. Moreover, given he did not consistently attend court, I was not confident he would attend if the matter was further adjourned. I therefore decided to hear the appeal, even without Mr. Peters' presence.

THE TRIAL

[14] A *voir dire* was conducted to determine the admissibility of the evidence the EPOs obtained pursuant to the search warrant. The primary issue was whether the EPOs' inspection of October 16, 2020, was lawful. Defence counsel submitted that the inspection breached the respondents' s. 8 rights. The evidence gathered during the inspection was then used to apply for the warrant. However, because Mr. Peters' and NES' rights were breached during the inspection, the evidence obtained from the inspection could not be used to justify issuing the warrant. Without this evidence, the warrant would not have been issued and was invalid. Thus, the evidence was obtained illegally and should be excluded pursuant to ss. 24(2) of the *Charter*.

[15] The issues were heard in three separate hearings. The trial judge thus issued three decisions. In the first decision[1], he determined that the inspection of October 16, 2020, breached Mr. Peters' and NES' rights under s. 8 of the *Charter*. In coming to this conclusion, he determined that a policy, the *Enforcement and Compliance Policy for the Environment Act* (January 2007) (the "Policy"), which was issued by the Department of the Environment, was legislative in nature, and therefore, was binding on the EPOs. He

[1] *R v 16142 Yukon Inc.,* 2023 YKTC 4

then concluded that the EPOs did not conduct themselves in accordance with the Policy and the *Act*. The EPOs' inspection was therefore unlawful.

[16] In the second decision[2], the trial judge decided that the search warrant should not have been issued. He concluded the search warrant was invalid; and the searches conducted pursuant to them were unlawful.

[17] In the third decision[3], the trial judge concluded that admitting the evidence obtained through the search warrant would bring the administration of justice into disrepute and should be excluded pursuant to ss. 24(2) of the *Charter.*

ISSUES

[18] The issues in this appeal are:

The Inspection

A. Did the trial judge err in concluding that the Policy is legislative in nature, and therefore, binding?

B. If the Policy is legislative in nature, as interpreted by the judge, is it valid?

C. Did the EPOs conduct the inspection reasonably?

The Warrant

D. Did the trial judge err in ruling that the warrant should not have been issued?

The Evidence

E. Did the trial judge err in concluding that the evidence should be excluded pursuant to ss. 24(2) of the *Charter*?

[2] *R v 16142 Yukon Inc.*, 2023 YKTC 13
[3] *R v 16142 Yukon Inc.*, 2023 YKTC 34

STANDARD OF REVIEW

[19] The standard of review in summary conviction appeals is correctness on questions of law, and palpable and overriding error on questions of fact (*R v Smith*, 2022 YKSC 37 at para 14; *R v Pottie*, 2013 NSCA 68 at para. 14). I will determine the standard of review for each issue as required.

ANALYSIS

The Inspection

A. Did the trial judge err in concluding that the Policy is legislative in nature, and therefore, binding?

[20] At trial, the Crown submitted that the EPOs properly conducted their inspections under ss. 151(1) and (2) of the *Act*, which permits warrantless inspections.

[21] A part of defence counsel's submissions was that the EPOs should have conducted their inspection not only in accordance with the *Act*, but also in accordance with the Policy.

[22] The trial judge determined that the Policy is binding and legislative in nature. As the Policy was binding, the Policy, in conjunction with the *Act*, set out the parameters of the EPOs' authority to inspect. In my opinion, that the trial judge erred in coming to this conclusion.

Standard of Review

[23] This is a question of law, with a standard of review of correctness.

Analysis

[24] Governmental policies and guidelines may be legislative in nature and therefore binding; or they may be administrative in nature and therefore non-binding. Policies are binding if they meet three criteria: (a) the policy must be authorized by statute; (b) it is

meant to be binding; and (c) it must enact "rules of general application which establish the rights and obligations of the individuals to whom they apply" (*Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, 2009 SCC 31 at paras. 63-65).

[25] In this case, the Policy is authorized by statute. Under s. 150 of the *Act*, the Minister of Environment is required to establish a policy about enforcement of the *Act*, including how discretionary powers are to be exercised under the legislation. Thus, not only may a policy be established, but, pursuant to the legislation, a policy must be established. The first criterion is met.

[26] I find, however, that the Policy does not meet the second or third criteria required to make the Policy binding. In this case, the Policy explicitly states that it is not intended to be binding. It states: "[t]he Policy does not have the force of law. Rather, it is a guide to the application of the law. For information on the law, the reader should consult the *Act*." (at 1).

[27] Moreover, its structure and content do not, in general, provide for rules of general application that establish rights and obligations. Instead, the Policy uses broad language to discuss such things as the government's guiding principles in applying the legislation, various stakeholders that may have a role in administering the legislation, and the tools government has for promoting and ensuring compliance.

[28] Some of the Policy does provide more detail on the way the legislation is applied, including Part VI, "Determining Compliance", which the trial judge reviewed[4]. It describes, amongst other things, the authority of the EPOs when conducting

[4] The trial judge's decision refers to it as Part VII (2023 YKTC 4 at para. 45)

inspections. The language used here is more specific than in other areas of the Policy. For the most part, however, it simply paraphrases provisions of the legislation, thus providing nothing additional to that contained in the *Act*. Moreover, in its paraphrasing, Part VI also omits important phrases and parts of some provisions. The effect is to create confusion.

[29] Viewing the Policy as a whole, I conclude that it is not binding, because it is neither meant to be law, nor does it provide sufficiently clear rules that establish rights and obligations.

B. If the Policy is legislative in nature, as interpreted by the judge, is it valid?

[30] Even if I am wrong, and the Policy is law, as interpreted by the judge, it is invalid.

[31] Statutes are supreme over the regulations and binding policies that are enacted under them. Thus, unless expressly permitted by the statute, regulations and binding polices cannot conflict with the statute, go beyond the scope of authority granted to them by the statute, or "enlarge or abridge any statutory provision" (*McMeekin v Northwest Territories (Department of Education, Culture and Employment*, 2010 NWTSC 27 at para 41, quoting *R v Wold* (1956), 19 WWR 75 (MBCA) at 79).

[32] Here, the trial judge's interpretation of the Policy had the effect of narrowing the EPOs' scope of authority of inspection from the authority provided under the *Act*. To see how the judge's interpretation narrowed the EPOs' authority of inspection, however, it is first necessary to understand the extent of the authority granted to EPOs by the *Act*.

EPOs' Authority under the Act

[33] As noted, ss. 151(1) and (2) are the provisions that set out the EPOs' authority to inspect without a warrant. Subsections 151(1)(a)-(f) and 151(2) are pertinent here. These parts of the provisions state:

> (1) Subject to section 152, for the administration of this Act or the regulations, an environmental protection officer may, at any reasonable time, inspect a development, activity, or any other thing, which is the subject of a permit, order, or direction, and for that purpose may
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> (a) with the consent of the occupant in charge of a place, enter any place;
>
> (b) enter any place to which the public is ordinarily admitted;
>
> (c) enter any part of the environment to determine the extent, if any, to which a development, activity, or contaminant has caused an adverse effect, the cause of the adverse effect and how any adverse effect may be prevented, remedied, or mitigated and the natural environment restored or rehabilitated;
>
> (d) enter any place which the environmental protection officer reasonably believes may contain or hold waste or which may be governed by regulations regarding hazardous substances or pesticides;
>
> (e) enter any place in or from which the environmental protection officer reasonably believes a contaminant is being, has been, or may be released into the natural environment;
>
> (f) enter any place that the environmental protection officer reasonably believes is likely to contain documents related to the development, activity or thing, or to the release of a contaminant into the natural environment;
>
> …
>
> (2) An environmental protection officer may exercise the powers of inspection granted under subsection (1) in relation to a development, activity, or any other thing, which is not the subject of a permit, order, or direction, if they have reasonable grounds to believe that the development, activity, or thing is required or ought to be the subject of a permit, order, or direction.

[34] Breaking these provisions down, first, under ss. 151(1) and (2), an EPO may inspect any activity, development or other thing that is subject to a permit, order, or

direction (ss. 151(1)); or which the EPO has reasonable grounds to believe should be subject to a permit, order, or direction (ss. 151(2)).

[35] Additionally, almost all the subsections state that, to conduct an inspection, an EPO may enter "any place". The exception is ss. 151(1)(c), which allows the EPO to enter "any part of the environment".

[36] What varies in s. 151 are the pre-conditions needed to effect an inspection. Thus, for instance, under ss. 151(1)(a), the pre-condition for entry is that the occupant in charge (the "Occupant") has provided consent; and under ss. 151(1)(d), the pre-condition for entry is that the EPO "reasonably believes [the place] may contain or hold waste …" Subsections 151(1)(e) and (f) similarly set out specific pre-conditions that must exist for the EPO to enter the place.

[37] In analyzing the pre-conditions, there is also a question of how many pre-conditions must apply before the EPOs may use their powers of inspection. On a plain reading of the subsections, it is non-sensical to conclude that all the pre-conditions, from ss. 151(1)(a)-(f), must exist before an EPO can conduct an inspection. There is also nothing in the legislation that would suggest that a combination of pre-conditions is required for an EPO to inspect a place. The wording does not support an interpretation that, for example, an Occupant's consent is required, as well as another pre-condition, before the EPO can conduct an inspection. The most logical interpretation of the *Act* is also the simplest: an EPO can conduct an inspection when any of the pre-conditions listed in ss. 151(1)(a)-(f) apply.

[38] Under the legislation, then, the EPO has broad powers of entry to a place or part of the environment so long as: (a) it is subject to a permit, order, or directive; or the EPO

has reasonable grounds to believe it should be subject to a permit, order, or directive; and (b) one of the pre-conditions under ss. 151(1)(a)-(f) exist.

[39] While the powers granted to the EPO are, in certain aspects, extensive, this aligns with the purpose of the legislation. The legislation is aimed at ensuring that there is a "healthful environment" for all (s. 5). It does so by regulating human activities and interactions with the environment. Under the *Act* authorities are empowered not only to respond when damage is done to the environment, but also to prevent the environment from being damaged. Authorities are also given the power to review whether activities are being conducted in accordance with the legislation. Subsections 150(1)(a)-(f) and (2) form part of the authorities' arsenal in both protecting the environment from being harmed, and responding when it may have been harmed.

The Trial Judge's Interpretation of the Policy

[40] The trial judge concluded that the Policy restricts the EPOs' authority to conduct warrantless inspections. In his interpretation of the policy, he concluded that it does not permit EPOs to conduct a warrantless inspection in circumstances where they reasonably believe that a place may contain or hold waste or which may be governed by regulations regarding hazardous substances or pesticides (i.e. where ss. 151(1)(d) applies) but the place is not subject to a permit, order, or direction. He then further interpreted the Policy, taking into consideration the *Act*. In the end, he concluded that, for an EPO to inspect a place in the circumstances where ss. 151(1)(d) applies, they would need the Occupant's consent, judicial authorization, or if there were exigent circumstances.

[41] The trial judge's interpretation significantly restricts the EPOs' authority from that which is granted by the *Act*. If the trial judge's analysis is correct, then the Policy would

change the powers granted to EPOs under the legislation. To the extent that the Policy changes the *Act*, however, it would be invalid. The Policy should therefore not be used in determining whether the EPOs conducted a reasonable search of the Centennial Property.

C. Did the EPOs conduct the inspection reasonably?

[42] In the case at bar, the EPOs proceeded under ss. 151(1)(d) and ss. 151(2) of the *Act*: the Centennial Property was not subject to a permit, order, or direction; and the EPOs testified they reasonably believed that waste was being held at the Property. The trial judge's conclusions that the Policy restricts the EPOs' authority to inspect pursuant to s. 150(1)(d), therefore, affects the entirety of his analysis about whether the EPOs conducted their inspection reasonably. Rather than review his decision, I will consider anew whether the inspection was reasonable.

Facts

[43] Ms. Sessford and Mr. Koss-Young originally went to Watson Lake to conduct an inspection related to NES' special waste permit, not the Centennial Property. When they got to Watson Lake, the EPOs went first to the Government of Yukon Environment Office. While there, they noticed the yard of the Centennial Property, which is next door to the Environment Office and is separated by a chain link fence. At that time, they did not know Mr. Peters owned the Property. They saw numerous totes and drums, both of which are containers often used to store special waste, in the yard. The totes and drums were partially covered by tarps, but they could still see that some of the totes held a dark substance. Mr. Donovan, who worked in Watson Lake, also told them that during the spring and summer he had smelled used motor oil coming from the Centennial Property.

[44] Additionally, the EPOs could see a large mechanical shop and numerous vehicles parked on the Property, including commercial trucks and heavy equipment. Some of the vehicles had NES insignia on them. Based on these observations, the EPOs concluded that the Centennial Property may deal with special waste regularly and should therefore have a permit. They decided to conduct an inspection of the Property. Mr. Donovan accompanied Ms. Sessford and Mr. Koss-Young to the inspection. The EPOs inspected both the mechanical shop and the yard.

Parties' Arguments

[45] As noted, s. 151(2) grants EPOs the authority to inspect a place that is not subject to a permit, if they have "reasonable grounds to believe" that the place should be subject to a permit. Further, under ss. 151(1)(d), they may inspect a place if the EPO "reasonably believes" that it holds waste. At trial, the parties accepted that the EPOs had "reasonable grounds to believe" that the Centennial Property should be subject to a permit; and they had the "reasonable belief" requisite to inspect the yard.

[46] The real issues, as argued at trial, were the proper test for determining whether the search was reasonable and applying the test to the facts.

[47] Defence counsel argued that s. 151 of the *Act* is to be used by EPOs for compliance and preventative purposes. She stated that, where EPOs have reasonable grounds to believe there is a violation of the *Act*, they are no longer dealing with compliance and prevention but are investigating an offence. At that point, they are required to get a search warrant. Here, the EPOs knew that there was no permit attached to the Centennial Property and reasonably believed the Property was "holding waste". Holding waste without a permit, in turn, is an offence. Thus, the EPOs reasonably believed that the Property was linked to an offence. The EPOs were

conducting an investigation into an offence, not an inspection related to compliance and prevention. They were therefore required to apply for a warrant, rather than proceeding on their powers of inspection. Defence counsel relied on *R v Jarvis*, 2002 SCC 73 ("*Jarvis*"), and the *Act* in support of her submission.

[48] The Territorial Crown submitted that whether the EPOs' purpose was to inspect for prevention and compliance or to investigate an offence is a factor the court may consider in determining whether a search was reasonable, but it is not the only factor. Instead, the court must assess the reasonableness of the search by taking into account the totality of the circumstances. In the case at bar, the EPOs' actions were reasonable.

Analysis of the Law

[49] Contrary to defence counsel's argument, neither the case law nor the legislation supports her position. *Jarvis*, as counsel stated, did differentiate between inspections and investigations in determining whether actions of government regulators were reasonable. In *R v Nolet*, 2010 SCC 24 ("*Nolet*"), however, the Supreme Court of Canada revisited its decision in *Jarvis*. It determined that the principle enunciated in *Jarvis* was not applicable in all regulatory contexts. In *Jarvis*, the facts involved a taxpayer undergoing a civil audit which then changed to an investigation of an offence. In that case, it was appropriate to consider when the purpose changed from an audit to an investigation into penal liability (at para. 45). In other regulatory contexts, determining the authorities' purpose is not conclusive. Instead, the court should decide whether the authorities had a continuing regulatory purpose. If so, the court should ask whether their actions infringed the accused's, or, in this case, the respondents' reasonable expectations of privacy (at para. 41).

[50] In *Workers' Compensation Board of British Columbia v Seattle Environmental Consulting Ltd.,* 2020 BCCA 365, the Court of Appeal for British Columbia, adopting *Nolet*, rejected the submission that the reasonableness of regulators' conduct can be determined solely by drawing a line between the inspection phase and the investigatory phase. The Court of Appeal noted the potential difficulties in distinguishing between inspection for prevention and compliance and investigation of an offence, stating:

> [31] … regulatory inspections always take place, broadly speaking, in a 'penal' or 'adversarial' context because the powers of entrance and inspection to ensure compliance with an *Act* or regulations always raise the spectre of charges under the *Act*.

[51] As in *Nolet,* the Court concluded that whether the actions taken are pursuant to an inspection or investigation is just one of a constellation of factors that may be applied in determining whether a regulator's actions infringed the accused's reasonable expectations of privacy. It stated:

> [32] … the issue in relation to s. 8 of the *Charter* is whether the exercise of that [regulatory] power infringed the reasonable expectation of privacy of the accused 'having regard to the totality of the circumstances'. *Nolet* at paras. 41 and 45.

[52] Section 151 also explicitly permits EPOs to conduct an inspection even when they reasonably believe there may have been a contravention of the *Act*. As defence counsel herself noted, holding waste without a permit is an offence. Subsections 151(1)(d) and 151(1)(2), when put together, provides the EPO with the authority to inspect a place they believe holds waste without a permit. That s. 151 permits inspections in circumstances where the EPO believes that an offence may have been committed indicates that the legislation does not draw a clear line between inspection for compliance and prevention and the investigation of an offence.

Application of the Law to the Facts

[53] The questions a court considers, then, is: (a) whether there was a continuing regulatory purpose for the search; and (b) whether, after considering different factors, and applying the facts, in the totality of circumstances, the search was reasonable.

[54] Here, it was accepted by the parties that there was a continuing regulatory purpose to the search. The issue in dispute is about the reasonableness of the EPOs' actions.

[55] To determine whether the EPOs' actions are reasonable, I will take the following factors into account: the regulatory setting; the extent of privacy the respondents could reasonably expect; the statutory scheme; and the EPOs' purpose in attending the Centennial Property.

[56] In the regulatory context, the expectation of privacy may be reduced. The Supreme Court of Canada has stated "[t]he greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness" (*British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 at para. 52). In activities that are highly regulated, and in which the individuals willingly take part in the activities, there can be little expectation of privacy (*R v Gomboc*, 2010 SCC 55 at paras. 113-114).

[57] In this case, the EPOs were investigating the use, and storage of waste and hazardous materials. This is highly regulated through the *Act*. While the Centennial Property did not have a permit, the EPOs had reasonable grounds to believe it should have a permit. There was, therefore, a limited expectation of privacy.

[58] Another factor in the determination of expectation of privacy is the type of location inspected. There is an expectation of privacy in a place of business, but it is

less significant than other places, such as a home. Additionally, the EPOs conducted some of their inspection outside, in a yard, which could be clearly viewed when the EPOs were not on the Property. The expectation of privacy was therefore less in the yard than inside (*R v Tessling*, 2004 SCC 67 at para. 22).

[59] In considering whether the actions were reasonable, it is also necessary to take into account the legislation. The EPOs' powers of inspection under ss. 151(1) are more than minimally intrusive. So long as the statutory pre-conditions are met, an EPO can enter "any place". The only restriction is that they may not enter a private dwelling (s. 152). EPOs thus have a broad power of entry.

[60] They also have the authority to take a number of actions. EPOs are not restricted to a visual check of the place they are inspecting. They may take more intrusive steps, such as excavating, taking samples and measurements, and conducting tests (ss. 151(1)(g),(i)). They may require some cooperation from the occupants and others, including by compelling the production of documents, asking reasonable questions from any person, and requiring a driver of a vehicle to produce any document required by the regulations to be carried in the vehicle (ss. 151(1)(k)-(n)). They may control the use of a place or thing by requiring that the place or thing not be disturbed or used, or that it be used only in a manner as directed by the EPO (ss. 151(1)(h)). They may copy information "by any method" (ss. 151(1)(j)). And they can "take any other action necessary to effect the inspection" (ss. 151(1)(o)). An EPO may also seize anything produced to them or, under certain circumstances, that is in plain view (s. 155).

[61] The legislation also limits the EPOs' inspection authority. Where, under s. 154, an EPO has obtained a search warrant, they may search a place, seize anything referred to in the warrant, or that is in plain view that may be evidence of the

commission of an offence. This means that under the EPOs' inspection authorities, which are less than that granted under a search warrant, they may not seize items, except as permitted in s. 155, and may not search a place.

[62] The distinction between an inspection and a search is not clearly defined in the legislation. Given the legal principles developed through the case law, what can be stated is that the criminal law principles about what constitutes a search and seizure will have, at best, limited applicability; and the distinction drawn between an inspection and search will be determined, to an extent, by the context.

[63] Turning to the purpose of the search, the factors used to determine whether a search is for compliance and prevention or investigation of an offence include: whether the conduct of the authorities was consistent with an inspection or an investigation of an offence; whether an investigatory unit was involved; and if so, whether the investigators appeared to be using the person inspecting as an agent in the collection of evidence; and whether there was already a sufficient basis to proceed to an investigation of an offence (*Jarvis* at para. 94).

[64] Here, the EPOs stated purpose for attending the Centennial Property was to conduct an inspection. Ms. Sessford testified that when she and the others went to the Centennial Property she had not thought of enforcement. She stated: "I wasn't assuming [enforcement] was going to be the next step. It was simply an inspection to determine if a permit would be needed … ."

[65] Ms. Sessford's testimony is supported by other facts. Ms. Sessford is an Environmental Compliance Officer. Her role is to conduct inspections for compliance and prevention. She may assist investigators but does not conduct investigations herself. Ms. Sessford was also responsible for the NES "file". While Mr. Koss-Young,

who was with Ms. Sessford, does investigate offences, he was with Ms. Sessford because her manager had advised her to have assistance for the inspection. Mr. Koss-Young went “as an extra set of eyes”. The specific decision to inspect the Centennial Property occurred when Ms. Sessford and Mr. Koss-Young were in Watson Lake. It seems to have been a collective decision.

[66] The trial judge found that Mr. Koss-Young was the lead while the EPOs were inspecting the Centennial Property. Ms. Sessford testified, however, that this was because Mr. Koss-Young had more familiarity with inspections under ss. 151(2). His position as the lead was not, therefore, because he had the role of investigator.

[67] The nature of the evidence the EPOs had was also preliminary. The containers, the NES trucks and machinery, and the smell of oil earlier in the year possibly formed a sufficient basis upon which to start an investigation into offences. It also, however, supports the decision to embark on an inspection. I conclude that the EPOs’ purpose in attending the Centennial Property was to conduct an inspection.

[68] Even with proper intentions, a limited expectation of privacy, and a legislative framework that permits some degree of intrusion, the EPOs’ actions could have overstepped the bounds of what was reasonable for an inspection. Thus, it is necessary to determine whether the EPOs’ actions, given this context, were reasonable.

[69] The EPOs had clear authority to enter the yard and take pictures of it. Other actions, however, do require further examination. These are: entering the workshop and then taking photos; and in the yard, removing tarps and taking a soil sample from a location that could only be seen once the tarp was removed.

[70] I begin by considering whether it was reasonable to enter the workshop. Recalling the language of ss. 151(1)(d), the EPOs would have authority to enter the

workshop if they reasonably believed it may hold hazardous waste or may be governed by regulations regarding hazardous substances. Reasonable belief, in this context, is a low threshold, meaning that there was an objective and reasonable basis for the EPOs' subjective belief (*Ontario (Ministry of the Environment and Climate Change) v Geil*, 2018 ONCA 1030 at paras. 75-77).

[71] The EPOs did not testify about why they went into the workshop. While it would have been better to provide evidence about the basis for their belief that they could enter the workshop as well as the yard, it is reasonable to infer they believed the same facts giving them a reasonable belief that waste was being held in the yard applied to the workshop as well.

[72] The workshop is in the same location as the yard. Being a workshop, it is conceivable that it would also be used in handling the waste that was then placed in the yard or apart from that found in the yard. I conclude that the EPOs had a reasonable basis to enter the workshop. As they had authority to enter the workshop, they also had the authority to take pictures of it.

[73] In terms of the EPOs' entry into the yard, the questionable actions were that they lifted tarps; and they took a sample from a location that was not in plain view. In lifting the tarps, were the EPOs conducting a search that necessitated a warrant rather than an inspection? And in taking the sample, were they conducting a seizure?

[74] The answer is driven by the facts. The respondents had only a limited expectation of privacy, given the regulatory context and that the inspection was of a place of business. The expectation of privacy was further decreased because the inspection was outside in the yard; and it could be viewed from the Environment Office.

[75] In examining the actions of removing the tarps, it could be argued that I should infer that the respondents sought to maintain some privacy by covering the drums and totes with the tarps. I do not accept that, however, as the drums and totes were still visible under the tarps; and they were sufficiently visible that, from the Environment Office next door, the EPOs could see barrels and totes and that some contained dark fluid. I infer that, had Mr. Peters wanted to maintain privacy rather than, say, protecting the containers from the elements, he would have done more to cover them. Given all the circumstances, I conclude that lifting the tarps was reasonable.

[76] This conclusion alleviates to some extent the concerns about taking the soil sample. Additionally, under the legislation, taking a soil sample is not considered a seizure. Rather, it is one of the enumerated actions an EPO may take when conducting an inspection. Thus, I also conclude that taking a soil sample was reasonable.

[77] The result is that the EPOs conducted the inspection reasonably. They did not violate the respondents' rights against unreasonable search and seizure.

The Warrant

D. Did the trial judge err in ruling that the warrant should not have been issued?

[78] I conclude that the warrant should have been issued with regards to the Centennial Property.

[79] As noted above, the warrant concerned the 10th Street property as well as the Centennial Property. The focus of this appeal has been on the inspection and subsequent warrant issued in relation to the Centennial Property. Little, if anything, was discussed about the 10th Street property. I will therefore not consider the trial judge's

conclusion that the warrant in relation to the 10th Street property was invalid. His decision on this point remains in place.

[80] With regard to the Centennial Property, the Information to Obtain (the "ITO") Mr. Koss-Young filed contained a significant amount of evidence obtained through the October 16, 2020 inspection. (An ITO contains the evidence used to determine if there is a sufficient basis to issue a search warrant.) Because the trial judge decided that the inspection was unlawful, all the information obtained through the inspection was excised from the ITO.

[81] The trial judge also made amendments to the ITO because he concluded that the ITO was missing information, was incorrect, and was also misleading. After analyzing the edited and amended ITO, he determined it did not provide sufficient information to meet the statutory preconditions for the warrant.

[82] On appeal, because I concluded the EPOs' inspection on October 16, 2020 was reasonable, the portions excised from the ITO when it was before the trial judge are added back in. I accept the amendments he made to the warrant.

[83] The ITO contains information about what the EPOs saw and the evidence they collected at the Centennial Property. It states, amongst other things: that the EPOs saw a large volume of unknown substances consistent with the appearance of a special waste, in this case, oil, stored on the property, as well as details about the EPOs' observations of the substances; that some of the containers had labels with NES' permit number on them, indicating that the containers had oil and waste oil from NES in them; and that a soil sample that had been tested contained light and heavy extractible petroleum hydrocarbon levels three times the standard of the land uses under the legislation. Even with the trial judge's criticisms of the ITO, the information contained in

it provides more than sufficient information to meet the legislative requirements for a search warrant. The search warrant was therefore valid.

The Evidence

E. Did the trial judge err in concluding that the evidence should be excluded pursuant to s. 24(2) of the *Charter*?

[84] Because I have determined that the search warrant was valid, I do not need to consider s. 24(2) of the *Charter.*

CONCLUSION

[85] I allow the appeal, in part, set aside the verdict, and order a new trial.

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WENCKEBACH J.