

In the Provincial Court of Alberta

Citation: R v Land Petroleum International Inc., 2021 ABPC 76

Date: 20210303
Docket: 200216596P1
Registry: Wetaskiwin

Between:

Her Majesty the Queen

Crown

- and -

Land Petroleum International Inc.

Corporate Defendant

Decision of the Honourable Judge G.G. Yake

Introduction

[1] Land Petroleum International Inc. (the “corporate defendant”) is charged with committing the following offence:

That on or between the 14th day of August, 2018 and the 22nd day of August, 2018, both dates inclusive, at or near Ponoka in the Province of Alberta did prevent, hinder or obstruct or fail to permit or assist any person authorized by the Regulator pursuant to section 96(1) of the *Oil and Gas Conservation Act* in the exercise of the powers conferred by section 96(1) of the *Oil and Gas Conservation Act* contrary to section 96(4) of the *Oil and Gas Conservation Act*.

[2] At trial the Crown called four witnesses and entered as exhibits documents which will be described later in these Reasons. The corporate defendant did not call any witnesses or enter any exhibits.

[3] The following main issues arise:

- (a) has the Crown proven beyond a reasonable doubt the identity of the corporate defendant as the perpetrator of this offence?
- (b) has the Crown proven beyond a reasonable doubt that any person acting on behalf of the corporate defendant committed the *actus reus* required for this offence?

[4] Section 96(1) of the *Oil and Gas Conservation Act*, RSA 2000, c. O-6 (the “Act”) says:

96(1) At any reasonable time, each person authorized by the Regulator

- (a) shall have access to all wells, equipment, plant and records;
- (b) is entitled to enter on and inspect any well or any place at which oil or gas is refined, produced, handled, processed or treated or any place used or occupied in connection with a well or with a place at which oil or gas is refined, produced, handled, processed or treated;
- (b.1) is entitled to enter on and inspect any well, or any place used or occupied in connection with a well, that is used for the storage or disposal of any substance to an underground formation;
- (c) is entitled to inspect all books, documents, records, plant and equipment pertaining to any such well or place; and
- (d) is entitled to take samples or particulars or to carry out any tests or examinations desired

[5] Section 96(4) of the *Act* says:

96(4) A person who prevents, hinders or obstructs or who fails to permit or assist any person authorized by the Regulator pursuant to subsection (1) in the exercise of the powers conferred by subsection (1) is guilty of an offence.

[6] This case arises from efforts made pursuant to section 96 of the *Act* by authorized Alberta Energy Regulator (“AER”) inspectors to inspect a gas plant facility that was being operated near Ponoka, Alberta (the “gas plant facility”).

[7] Bill Fung is one of the persons alleged to have been acting on behalf of the corporate defendant in the commission of this offence. It is alleged that through a series of interactions that he had with AER personnel he “...did bar AER from inspecting the gas plant facility ...” (Crown’s Written Submissions at para 54)

[8] Lyle Nichols is another person who is alleged to have been acting on behalf of the corporate defendant in the commission of this offence. It is alleged that he was either an employee or a contactor of the corporate defendant, and that he was therefore acting as an agent for the corporate defendant when he told someone from the AER that no inspection of the gas plant facility would be allowed.

[9] The Crown alleges that the actions of Bill Fung and Lyle Nichols, standing alone or taken together, constitute the *actus reus* of the offence charged under section 96(4) of the *Act*.

ISSUES

[10] In addition to the issues described above, the corporate defendant has raised the following issues that the Court must determine:

- (a) is the Crown required to prove that the corporate defendant was a Licensee of the gas plant facility, or had an interest in that facility, and if so, has that been proven?
- (b) has the Crown proven that Lyle Nichols was acting on behalf of the corporate defendant?
- (c) has the Crown proven that Bill Fung was acting on behalf of the corporate defendant? and
- (d) has the Crown proven the corporate defendant's conduct falls within the description of conduct described in section 96(4) of the *Act* constituting the *actus reus* of the offence?

FACTS

[11] Unless otherwise stated, all of the events described occurred in 2018.

The Corporate Defendant and Bill Fung

[12] Three documents titled "Historical Corporation/Non-Profit Search Registry" issued by the Alberta Registrar of Corporations dated August 14, 2018, August 22, 2018 and November 26, 2020, entered collectively as Exhibit 2, prove that:

- (a) on August 14, 2018 and August 22, 2018 and on November 26, 2020 the corporate defendant was a company that existed and was registered in Alberta, and had a registered office in Calgary, Alberta;
- (b) on August 14 and on August 22, 2018 "Bill Y.P. Fung" was the corporate defendant's sole director and "Bill Fung" was its majority shareholder, each with the same address as the corporate defendant's registered address;
- (c) on November 26, 2020 neither "Bill Fung" nor "Bill Y.P. Fung" was a director of the defendant corporation, but "Bill Fung" was its majority shareholder; and
- (d) on August 14, 2018 and August 22, 2018 and November 26, 2020 the corporate defendant held shares in a separate company named Land Petroleum Ltd.

The Corporate Defendant and Lyle Nichols

[13] There is no evidence that Lyle Nichols has ever been a director, officer or shareholder of the corporate defendant.

[14] There is no evidence that Lyle Nichols was ever an employee or contractor of the corporate defendant. There is some evidence that he may have been an employee or contractor of a different company (i.e. Land Petroleum Ltd.) in which the defendant corporation held shares.

The Actions of Lyle Nichols

[15] Sometime in the middle of August, as Lyle Nichols was operating the gas plant facility, he received a telephone call from a person that he believed worked for the AER. Mr. Nichols did not provide the name of that person when he testified.

[16] That unidentified person told Mr. Nichols that the AER was going to inspect the gas plant facility the next day.

[17] Mr. Nichols notified a person named Gable Bruners of this call and shortly thereafter Mr. Nichols received a telephone call from either Bill Fung or Gable Bruners instructing him to keep

the facility locked and to not allow the AER inspectors onto the gas plant facility site "...unless they showed up with the police and a search warrant..." (Transcript at page 12, line 15-16)

[18] At this point, it is important to note that there is no evidence that Gable Bruners had any authority to act or speak on behalf of the corporate defendant or to instruct Lyle Nichols to do so. Gable Bruners did not testify and Mr. Nichols could not say whether or not he was an employee of the corporate defendant or whether or not he was an independent contractor hired by the corporate defendant.

[19] It is also important to note that there is no evidence that Lyle Nichols was generally authorized by the corporate defendant to speak on its behalf with AER personnel for any reason.

[20] Based on his past work experience, Mr. Nichols believed that the AER was entitled to inspect the gas plant facility, and that its effort to do so should not be hindered. However, he was caught in a difficult situation because he was told to not allow the AER to conduct an inspection.

[21] In an effort to address this conundrum, Mr. Nichols told his employees to "... in no way hinder the AER, but to follow the instructions to keep the facility locked..." (Transcript at page 12, lines 19-21)

[22] Mr. Nichols then called someone at the AER and explained the instructions that he had received and the difficult situation in which he found himself. He provided that person with the telephone number for the corporate defendant's head office and asked that person to call that number.

[23] Shortly after that Mr. Nichols received another telephone call from either Bill Fung or Gable Bruners, and he was again told that he was not to allow the AER inspectors onto the gas plant facility site.

[24] After he received those instructions, Mr. Nichols kept the gate to the gas plant facility locked but instructed his employees to "...in no way obstruct ..." the AER.

[25] Mr. Nichols testified that AER inspectors attended at the gas plant facility on August 20. He remembers telling an employee at that facility not to hinder the AER inspection. He believes that he was not present at the gas plant facility when it was inspected, and if that is correct he must have spoken with that employee by telephone.

[26] Mr. Nichols is clearly mistaken in his belief that the AER inspectors were given access to the gas plant facility on August 20. The evidence of the AER inspectors, which I accept, clearly proves that they did not gain access to that site to inspect it until August 22, at which time Mr. Nichols was present.

Initial Efforts to Inspect

[27] Initially the AER scheduled an inspection of the gas plant facility to occur on August 9. However, at the request of the corporate defendant the AER agreed to re-schedule the inspection for September 18, contingent upon the corporate defendant providing the AER with certain readily available information by August 9. At the request of the corporate defendant that deadline date was extended to August 14.

[28] Because the corporate defendant failed to provide that information by August 14 the AER notified the corporate defendant that the inspection would be expedited, unless the requested information was provided to the AER by the corporate defendant by August 16 at 4:30 p.m.

The Actions of AER Employees Neil Berry, Dawna-Lisa Trautman and Kevin Tetz

[29] The corporate defendant failed to meet the August 16 deadline, so authorized AER inspectors Dawna-Lisa Trautman and Kevin Tetz attended at the site of the gas plant facility on August 20. They travelled to that site together in one vehicle that was driven by Ms. Trautman. AER employee and field support worker Trish Taylor accompanied them.

[30] *En route* to that site Kevin Tetz called Gable Bruners and got his voice mail. He left a message stating that he was traveling to the gas plant facility site and needed an operator to open up the gates to that facility so that an AER inspection could be conducted.

[31] Kevin Tetz then called Lyle Nichols and told him the same thing. Mr. Nichols' response was that he could not do that without the approval of Gable Bruners or Bill Fung.

[32] Gable Bruners then called Kevin Tetz. Mr. Tetz testified that Gable Bruners told him that the AER would not be able to access the site without Bill Fung's approval. It must be noted that, because Gable Bruners did not testify this portion of Mr. Tetz's testimony is hearsay and cannot be admitted to prove that Bill Fung gave that direction to Gable Bruners.

[33] Mr. Tetz advised Gable Bruners of the provisions of the *Act* that allow the AER to inspect the site of the gas plant facility. Although Mr. Tetz referred to section 69(1) of the *Act* when he testified, it is apparent that was merely a slip, and I am satisfied that he advised Gable Bruners of the provisions of section 96(1) of the *Act*.

[34] After the conversation between Mr. Gables and Mr. Tetz ended Bill Fung called Mr. Tetz. Ms. Trautman listened to this brief conversation as it was broadcast in the vehicle over a speaker phone. Ms. Trautman recognized Bill Fung's voice from a previous telephone conversation that she had heard on August 14 between him and another person.

[35] Mr. Tetz attempted to provide Bill Fung with information describing the legislative provisions of the *Act* that authorized the inspectors to inspect the gas plant facility.

[36] Bill Fung initially spoke in a normal tone but soon became irritated and verbally aggressive and yelled, screamed and swore at Mr. Tetz. He said that he was going to sue the Province, Rachel Notley, the AER and Mr. Tetz personally if they entered the gas plant facility site that day without a search warrant and without the RCMP being present.

[37] Ms. Trautman and Mr. Tetz arrived at the gas plant facility site at approximately 8:50 a.m. on August 20. The gates allowing access to that site were locked, so they walked around the perimeter of the site in order to try to determine if they could see anything on the site that posed a risk to the environment or to public safety. They took some photographs that were not entered into evidence. There is no evidence that they saw anything that presented a risk to the environment or a risk to public safety. There is no evidence that they saw anyone on that site on that day.

[38] At about 9:20 a.m. on August 20, as Ms. Trautman and Mr. Tetz were outside the gas plant facility site, Bill Fung called and spoke by telephone with Neil Berry, AER Acting Manager and Regional Coordinator for Field Operations West. Mr. Berry was at an AER office in Red Deer, Alberta.

[39] Mr. Berry told Bill Fung that the AER had authority under the *Act* to enter the gas plant facility site. In response Bill Fung told Mr. Berry that:

- (a) he did not recognize that authority;
- (b) the AER would have to "...go to a Judge, get a search warrant and then come back..."; and
- (c) if the AER inspectors had attempted to enter the gas plant facility site he would consider that to be a "...breaking and entering..." and he would notify the RCMP.

[40] Mr. Berry then called Mr. Nichols and asked him if he was willing to cooperate with the AER by opening the gates on the site. Mr. Nichols said he was hesitant to do so because, as an employee of Land Petroleum, he faced "potential repercussions", so access to the site was denied.

[41] Shortly thereafter, at 9:44 a.m. on August 20, Neil Berry received an email message from Bill Fung. Exhibit 1 is a copy of that email message. It originated from the email account address landpete@hotmail.com and it is endorsed with the corporate defendant's logo and the full legal name of the corporate defendant (i.e. Land Petroleum International Inc.). The signor of that message is identified as "Bill Fung, P.Eng."

[42] Exhibit 1 includes the following script:

"Both Gable and I have made it clear to you on the phone this morning that we do not agree to such unannounced visit."

And:

"If you believe you have a legal right to visit the plant other than the scheduled September 18 date without our permission, please go to a judge and obtain a search warrant. If you enter our gas plant without our prior permission, we will consider that breaking and entering."

[43] Ms. Trautman and Mr. Tetz left the site at about 1:00 p.m. on August 20. Together they returned to it on August 21 at about 7:30 a.m. Again, they walked around the perimeter and then parked about 500 metres away from the site and watched to see if anyone entered.

[44] They stayed at that location until sometime in the afternoon. There is no evidence that they saw anyone at that site on that day or that they saw anything that caused them to be concerned about the environment or the safety of the public.

[45] They returned to that site on August 22. At approximately 11:11 a.m. they saw Lyle Nichols open a gate and enter the site without closing the gate.

[46] Ms. Trautman and Mr. Tetz then put on their personal protective equipment, entered the site through that open gate and inspected the gas plant facility. Mr. Nichols was on the site, and they gave him a copy of section 96 of the *Act* and showed him their government-issued Inspector Identification cards.

[47] They conducted an inspection that started at about 11:30 a.m. It took about 90 minutes to complete. Ms. Trautman testified that they found "22 non-compliances". No description of the inspection process or the "non-compliances" was given in evidence.

Discussion and Analysis

Nature of the Offence

[48] The charge against the corporate defendant is a public welfare offence and a strict liability offence as described in *R v Sault Ste. Marie (City)*, [1978] 2 SCR 1299. There is no necessity for the Crown to prove *mens rea*. The Crown need only prove that the corporate defendant committed the prohibited act, leaving it open to the corporate defendant to avoid liability by proving that it took all reasonable care.

[49] This defence will be available if the corporate defendant took all reasonable steps to avoid the particular event that is the *actus reus* of the offence. This defence was not advanced at trial, and in any event the evidence does not show any basis for it.

Elements of the Offence

[50] The elements of this offence that the Crown must prove beyond a reasonable doubt are that on or between August 14, 2018 and August 22, 2018, at or near Ponoka, Alberta:

- (a) the corporate defendant existed and was a “person” within the meaning of section 96(4) of the *Act*;
- (b) the corporate defendant prevented, hindered or obstructed or failed to permit or assist;
- (c) any person authorized by the Regulator pursuant to section 96(1) of the *Oil and Gas Conservation Act*;
- (d) in the exercise of powers conferred by section 96(1) of the *Oil and Gas Conservation Act*.

Necessity of Proving the Corporate Defendant Was a Licensee or Held an Interest

[51] The corporate defendant submits that charge must be dismissed because the Crown has not proven that the corporate defendant was a licensee of the gas plant facility, or that the corporate defendant had an interest in that facility.

[52] Section 96(3) of the *Act* is relevant to this issue. It says that any person who is the licensee, contractor or operator of or who is in charge of any of the wells, places, equipment, plant or records mentioned in subsection 96(1) of the *Act* shall permit or assist any person authorized by the Regulator in the exercise of the powers conferred by section 96(1) of the *Act*. As noted above, section 96(1) of the *Act* includes the power to inspect and have access to all gas plant facilities.

[53] I interpret this provision to impose a particular duty to permit or assist AER inspectors, and other persons authorized by the Regulator, upon persons who fall within the category of persons described as “licensee, contractor or operator of or in charge of” any the places or records described in section 96(4) of the *Act*.

[54] I do not interpret it to mean that that it must be proven that every person charged under section 96(4) of the *Act* must be a licensee of or hold an interest in the well, place, equipment, plant, records or facility subject to inspection. That is not an element of the offence described by section 96(4) of the *Act*.

Proof of the Elements of the Offence

Jurisdictional Elements

[55] The evidence proves beyond a reasonable doubt that the events relevant to this matter occurred at or near Ponoka, Alberta within the offence date set out in the Information and the corporate defendant does not contend otherwise.

Persons Authorized by the Regulator

[56] Likewise, the corporate defendant does not contend that the Crown has failed to prove that Ms. Trautman and Mr. Tetz were persons who were authorized by the Regulator pursuant to section 96(1) of the *Act* to exercise the powers conferred by section 96(1) of the *Act*, and the evidence proves beyond a reasonable doubt that they were persons who were so authorized.

Has the Crown Proven Beyond a Reasonable Doubt the Identity of Land Petroleum International Inc. as Perpetrator of This Offence?

The Corporate Defendant as a “Person” Existing on the Alleged Offence Date

[57] As noted above Section 96(4) of the *Act* requires proof beyond a reasonable that the defendant corporation was the “person” who committed the offence described therein.

[58] The term “person” is not defined in the *Act*.

[59] However, the concept of “corporate personality” has long been recognized in common law. Since at least 1897 England’s High Courts have described corporations as “artificial persons” separate from a “natural persons”: *Saloman v Saloman & Co.*, [1897] AC 22, HL.

[60] This concept is statutorily established in Alberta by section 28(1)(nn) of the *Interpretation Act*, RSA 2000, c. I-8, which defines “person” to include, *inter alia*, a corporation and section 1(x) of the *Business Corporations Act*, RSA 2000, c. B-9 (the “*Business Corporations Act*”) which includes a “body corporate” in its definition of “person”.

[61] The corporate defendant was therefore a “person” within the meaning of section 96(4) of the *Act*.

Proof that the Corporation Committed the *Actus Reus*

[62] The Crown must prove beyond a reasonable doubt that someone acting within the scope of his or her authority on behalf of the corporate defendant committed the *actus reus* by committing one or more of the following acts, described at section 96(4) of the *Act*:

- (a) preventing the inspection of the gas plant facility;
- (b) hindering the inspection of the gas plant facility;
- (c) obstructing the inspection of the gas plant facility;
- (d) failing to permit the inspection of the gas plant facility; or
- (e) failing to assist the inspection of the gas plant facility

[63] The Crown alleges that the actions of both Lyle Nichols and Bill Fung constituted the *actus reus*.

Bill Fung

[64] The Historical Corporation Search documents dated August 14, 2018 and August 22, 2018 entered collectively as Exhibit 2 prove that as of those dates the corporate defendant existed and was registered as an Alberta corporation, and that Bill Fung was on those dates its sole director and its majority shareholder.

[65] There is nothing in those documents, and there is no other evidence, to indicate that the status of the corporation changed between those dates, or that Bill Fung ceased to be its sole director and majority shareholder.

[66] The corporate defendant submits that because there is no Historical Corporation Search document dated August 20, 2018 in evidence, a reasonable inference may be drawn that Bill Fung was not a director of the corporate defendant on that date, and therefore the court cannot find that he was speaking and acting on behalf of the corporate defendant on that date.

[67] This is important because August 20 is the date that Bill Fung directed foul language at Mr. Tetz over the telephone, and told Mr. Tetz that no inspection of the gas plant facility would be allowed on August 20 absent a search warrant. August 20 is also the date that Bill Fung spoke by telephone with Neil Berry and then sent him an email message bearing the corporate defendant's name and logo and identifying himself as President of the defendant corporation. That email message purported to deny AER Inspectors entry to the gas plant facility site on August 20 unless the AER obtained a Search Warrant.

[68] Presumably the corporate defendant intends this submission to apply to the events of August 15, 2018 as well, because on that date Bill Fung contacted Kevin Tetz by email and told him that, if the inspection of the gas plant facility was expedited and occurred before September 18, he would take "unilateral actions" against Kevin Tetz, and would sue him personally as well as the Province of Alberta.

[69] With respect, I disagree with the corporate defendant's submissions on this issue. I find that the documents entered as Exhibit 2, and the other evidence described below, constitute strong circumstantial evidence proving that the corporate defendant existed and that Bill Fung was its sole director and majority shareholder over the time period encompassed by the alleged offence date, including but not limited to August 15 and August 20.

[70] In coming to this conclusion, I note that circumstantial evidence does not have to totally exclude all other conceivable inferences. Alternative inferences must be reasonable and rational, not just possible: *R v Dipnarine*, 2014 ABCA 328 at paras 22 and 23; *R v Radita*, 2019 ABCA 77.

[71] In light of the very short period of time encompassed by the documents found in Exhibit 2, and the fact that August 15, 2018 and August 20, 2018 fall within that time period, the only reasonable and rational inferences to be drawn are that for the entire period from August 14, 2018 to August 22, 2018, both dates inclusive:

- (a) the corporate defendant existed and was registered as an Alberta corporation; and
- (b) Bill Fung was the sole director and majority shareholder of the corporate defendant.

[72] These inferences are supported by evidence that on August 20 Bill Fung sent the AER an email message embossed with the corporate defendant's name and its logo, and in that email message he described himself as the President of the corporate defendant (Exhibit 1) and he purported to be able to exercise control over the AER's entry onto the gas plant facility site.

[73] As there is no evidence that the status of the corporation changed or that Bill Fung's directorship or shareholding changed between August 14, 2018 and August 22, 2018, on the whole of the evidence there is no alternative inference that is reasonable and rational.

Bill Fung Speaking and Acting on Behalf of the Corporate Defendant

[74] As the sole director and major shareholder of the corporate defendant, Bill Fung was its operating mind. This is illustrated by the contents and form of the email dated August 20 (Exhibit 1) which bears his name, his description of himself as the "President" of the corporate defendant and the corporate defendant's logo. It is also illustrated by the comments that he made during his telephone conversations with Mr. Tetz and Mr. Berry on August 20.

[75] As the operating mind of the corporate defendant, his statements were made within the scope of his authority and were made by him as the corporate defendant's agent. His statements were, in effect, the corporate defendant's statements: *R v Syncrude Canada Ltd.*, 2010 ABPC 123.

Lyle Nichols Speaking and Acting on Behalf of the Corporate Defendant

[76] On the other hand, the actions and statements of Lyle Nichols cannot be described as actions and statements of the corporate defendant. He was not an employee, officer, director or shareholder of the corporate defendant. There is no evidence that generally he had authority to speak with AER employees or to deal with AER inspectors on behalf of the corporate defendant.

[77] Further, he identified himself to Neil Berry as an employee of Land Petroleum, a different corporation in which, according to Exhibit 2, the corporate defendant held shares on the offence date.

[78] It is also important to note that Lyle Nichols testified that he may have acted on instructions he received from Gable Bruners. Gable Bruners did not testify, and there is no evidence that he had any authority to instruct Lyle Nichols or anyone else to say anything or to take any action on behalf of the corporate defendant.

Has the Crown Proven Beyond a Reasonable Doubt that Bill Fung Committed the *Actus Reus* While Acting on Behalf of the Corporate Defendant?

[79] Section 96(4) of the *Act* uses broad and flexible language to describe the various ways that the *actus reus* may be committed.

[80] In order to determine whether Bill Fung committed the *actus reus* the Court must consider his words and acts in the context of the purposes of the *Act*, taking into consideration the principles of statutory interpretation applicable to remedial environmental legislation.

[81] Part 1 of the *Act*, titled Object and Application of Act, states:

4 The purposes of this Act are

- (a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;

(b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, constructing, completing, reworking, testing, operating, maintenance, repair, suspension and abandonment of wells and facilities and in the operations for the production of oil and gas or the storage or disposal of substances;

(c) to provide for the economic, orderly, efficient and responsible development in the public interest of the oil and gas resources of Alberta;

(c.1) to provide for the responsible management of a well, facility, well site or facility site throughout its life cycle;

(d) to afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool;

(e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta; and

(f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas in other operations over which the Regulator has jurisdiction.

[82] I agree with Crown counsel's submission that *Castonguay Blasting Ltd. v Ontario (Environment)*, [2013] 3 SCR 323 and *R v Canadian Pacific Ltd.*, [1995] 2 SCR 1031 are authorities for the proposition that environmental legislation is entitled to a generous interpretation, because environmental protection is a legitimate concern of government and is a very broad subject matter that does not lend itself to precise codification. As was stated in *Castonguay* at paragraph 87, "...The objective of environmental protection is itself broad, and the legislature is justified in choosing broad, flexible language to give effect to this objective."

[83] In Alberta section 10 of the *Interpretation Act* requires remedial legislation to be given fair, large and liberal construction that best ensures the attainment of its objects.

[84] It is with these principles in mind that I evaluate Bill Fung's words and acts in order to determine whether the Crown has proven beyond a reasonable doubt the commission of the *actus reus*.

[85] The corporate defendant submits that Bill Fung's words and actions only "...at best, amount to a "stated intention" to prevent the inspection, but do not on their own amount to the commission of the offence: in other words, an "...*inchoate* commission of the offence." (Corporate defendant's written submissions at para 9, emphasis in the original).

[86] Crown counsel contends that "...the words that...Fung ...spoke to various AER people denying the inspection form the *actus reus* of the offences (sic) ..." and that "...Bill Fung had a series of interactions starting on August 14, 2018"...that "...culminated with his email of August 20, 2018..." and that Bill Fung, acting on behalf of the corporate defendant "...did bar AER from inspecting the gas plant facility..."(Trial Argument Brief at paras 51, 53 and 54)

Did the Corporate Defendant Acting Through Bill Fung “Prevent or Hinder” the Inspection?

[87] The AER inspection of the site was not prevented, but it was delayed. The question is whether that delay was a hindrance within the meaning of the *Act*, and if so, whether it has been proven that the corporate defendant is liable for that delay.

[88] “Hinder” is not defined in the *Act*. I have not been provided with any case authorities that judicially consider this term generally, and I have not been able to find any cases that specifically judicially consider this word in the context of the *Act*.

[89] The online *Merriam Webster Dictionary* defines the transitive verb “hinder” as follows:

1. “to make slow or difficult the progress of: HAMPER”
2. “to hold back: PREVENT, CHECK”
3. “to delay, impede or prevent action”

[90] Applying this definition, it is clear that the efforts made by Mr. Tetz and Ms. Trautman to inspect the gas plant facility were hindered on August 20, August 21 and initially on August 22 by the locked gates on the site.

[91] It is also clear that those gates were locked at the direction of Lyle Nichols. However, as it has not been proven that Mr. Nichols was directed by Bill Fung or anyone else authorized by the corporate defendant to lock those gates, or to instruct anyone else to do so, liability for this hindrance cannot be attached to the corporate defendant.

[92] In short, the Crown has failed to prove that the corporate defendant prevented or hindered the AER inspection, or barred the AER from the gas plant facility site, by locking the gates to that site.

[93] The Crown contends that the email sent to the AER on August 20 by Bill Fung, and his telephone conversations to Neil Berry and to Kevin Tetz on August 20 constitute hindrances within the meaning of section 96(4).

[94] I disagree. Although Bill Fung was aggressive and rude when he spoke with Neil Berry and Kevin Tetz, neither of those conversations, nor his email sent August 20, caused the AER to change its course of action or delayed, impeded or prevented the inspection.

[95] For these reasons I find that the corporate defendant did not prevent or hinder the inspection of the gas plant site.

Did the Corporate Defendant “Obstruct” the Inspection of the Gas Plant Facility?

[96] “Obstruct” is not defined in the *Act*. This term has been the subject of much judicial interpretation in the context of the criminal law, and section 129(a) of the *Criminal Code of Canada* in particular.

[97] Criminal cases are of limited value because criminal obstruction requires proof of an intentional act or an intentional omission constituting a failure to comply with a legal duty. (*R v Chanyi*, 2016 ABPC 7 at para 112). In contrast, proof of intention is not required to prove strict liability offences.

[98] One element of criminal obstruction described in *Chanyi* that can be imported to this case is the requirement that, to prove obstruction, the Crown must prove that the impugned act or omission made it more difficult to exercise a power or carry out a duty.

[99] This accords with the definition of “obstruct” found in the online *Merriam Webster* Dictionary as follows:

1. “to block or close up by an obstacle”
2. “to hinder from passage, action or operation”: IMPEDE

[100] In this case, pursuant to section 96(1) of the *Act* the AER had both the duty and the power to inspect the gas plant facility, and Mr. Tetz and Ms. Trautman were authorized to carry out that duty and exercise that power on behalf of the AER.

[101] While Neil Berry, Kevin Tetz and Ms. Trautman were understandably offended by Bill Fung’s rude and aggressive words, none of those witnesses testified that anything Bill Fung said or did impeded or made more difficult the inspection of the gas plant facility, and there is no other evidence to that effect. The only impediments to the inspection were the locked gates at the site, and as noted above the Crown has not proven that those gates were locked at the direction of any person authorized by the corporate defendant to give that direction.

[102] For these reasons I find the Crown has not proven beyond a reasonable doubt that the corporate defendant obstructed the inspection of the gas plant facility.

Did the Corporate Defendant “Fail to Permit or Assist” the Inspection?

[103] Even though it has not been proven that the corporate defendant was a licensee, contractor or operator of the gas plant facility, it is proven that the corporate defendant was in charge of the gas plant facility.

[104] This is well-illustrated by the telephone conversations that Bill Fung had with Neil Berry and Kevin Tetz, and by Bill Fung’s email sent August 20 to Neil Berry which show that Bill Fung, acting on behalf of the corporate defendant, purported to exercise control over the gas plant facility by prohibiting its inspection before September 18 unless the AER obtained a Search Warrant.

[105] The corporate defendant had reasonable notice of the inspection scheduled for August 20, and pursuant to section 96(3) of the *Act* the corporate defendant, as the person in charge of the gas plant facility, had a statutory duty to permit or assist that inspection.

[106] The corporate defendant breached that duty on August 15 when Bill Fung contacted Mr. Tetz by email and told him that he would take unilateral actions against Mr. Tetz and would sue him and the Province of Alberta if the inspection of the gas plant facility was expedited and occurred before September 18.

[107] The corporate defendant again breached that statutory duty on August 20 when Bill Fung sent the email message entered as Exhibit 1 to Neil Berry and when, on the same date, by telephone he told Neil Berry and Kevin Tetz that no inspection would be allowed before September 18 unless the AER obtained a Search Warrant.

[108] By breaching its statutory duty to permit or assist the inspection, the corporate defendant committed the *actus reus* described under section 96(4) of the *Act* of failing to permit or assist

the AER Inspectors to have access to, enter on and inspect the gas plant facility pursuant to the authority conferred upon the AER pursuant to section 96(1) of the *Act*.

Conclusion

[109] For the Reasons set out above I find that all of the elements of the offence under section 96(4) of the *Act* have been proven beyond a reasonable doubt, and I therefore find the corporate defendant guilty as charged.

Deliver orally on the 26th day of February, 2021.

Dated at the Town of Ponoka, Alberta this 3rd day of March, 2021.



G.G. Yake
A Judge of the Provincial Court of Alberta

Appearances:

C. Kallal
for the Crown

G. Hatch
for the Defence