In the Provincial Court of Alberta

Citation: R. v. Bautista, 2011 ABPC 59

Date: 20110218
Docket: 091261495P1
Registry: Edmonton

Between:

Her Majesty The Queen

- and -

Alvin Vargas Bautista

Sentencing Decision of The Honourable Judge P.G. Sully

Background

[1] After a trial on June 10, 2010, I found Alvin Vargas Bautista ("Offender") guilty of the following charge:

> Count 2: on or about the 19th day of August, at or near Edmonton, Alberta, did project a directed bright light source into navigable airspace in such a manner as to create a hazard to aviation safety contrary to section 601.20 of the *Canadian Aviation Regulations,* thereby committing an offence, contrary to section 7.3(3) of the *Aeronautics Act*.

[2] The trial commenced on January 28, 2010. Further evidence was heard on April 1, 2010. After the evidence was completed and after hearing oral submissions from Mr. Bernard on behalf of the Crown, I rendered an oral decision dismissing the charge contained in Count 1.

[3] On April 1, 2010, I heard oral submissions with respect to the charge contained in Count 2 from both Mr. Bernard and Mr. Nelson on behalf of the Offender. Both counsel agreed that the charge contained in Count 2 constituted a strict liability offence and that, therefore, the Crown was not required to prove *mens rea*. They agreed that the Crown had proven the *actus rea* of the offence. Both counsel agreed that the Offender could avoid liability by establishing the defence of due diligence. The burden was on the Offender to prove the defence of due diligence on a balance of probabilities.

[4] After hearing the oral submissions on April 1, 2010, I advised both counsel that I would require written submissions. After receiving and considering the written submissions, I rendered a written decision on June 23, 2010. I convicted the Offender of the charge contained in Count 2. The proceedings were adjourned to September 27, 2010 for submissions on sentence.

Circumstances of the Offence

[5] The circumstances of the offence involved an Edmonton Police Service helicopter piloted by Cst. Chaulk ("pilot"). Cst. Bohochyk ("flight officer") was the tactical flight officer. His duties involved communicating with the dispatcher and ground units and operating the camera system on board to locate, track, observe and monitor either a vehicle or a suspect. The offence occurred at about 10:30 p.m. on August 19, 2009 when the helicopter was in flight at approximately 109 Street and Whitemud Drive in Edmonton, Alberta.

[6] While in orbit, the pilot was struck by a green light which took him by surprise. As a result, the pilot tried to focus on his instruments and on the horizon to ensure that the aircraft stayed in control. The pilot continued his orbit and visually regained sight of his instruments and the horizon. He began to look out and saw the source of the light which he recognized as a laser source.

[7] The pilot was familiar with the dangers of a laser to the eyes. He immediately averted his eyes from looking at the source of the light. The pilot advised the flight officer of the problem and began to fly in the direction of the light source using his peripheral vision.

[8] The light was coming from the Millwoods area of Edmonton which was approximately two to two and half miles away from the helicopter. It took the pilot approximately one minute to travel to the light source. During the first 45 seconds of the flight , the helicopter was struck on and off with the light from the laser. Upon arrival at the source of the light, the flight officer located the subject on the camera system.

[9] I have detailed the actions of the Offender in this incident in my Reasons for Decision found at 2010 ABPC 216.

Position of the Parties

Crown's Position on Sentence

[10] During his submissions on sentence, Mr. Bernard advised that, under s. 7.3(4) of the *Aeronautics Act* ("*Act*"), the Crown was seeking a sentence by way of a fine of $2500.00 and forfeiture of the laser.

[11] Mr. Bernard referred to the decision of *R. v. Cotton Felts Ltd.* (1983), 2 C.C.C. (3d) 287 (Ont. C.A.) ("*Cotton Felts*"). Mr. Bernard submitted this decision is authority for the proposition

that for a regulatory offence, a fine should be substantial enough to warn others that the offence will not be tolerated and not constitute a mere licencing fee for illegal activity.

[12] Mr. Bernard referred to the decision of the Alberta Court of Appeal in *R. v. Terroco Industries Ltd.* (2005), 196 C.C.C. (3d) 293 ("*Terroco*"). In *Terroco*, the Court stated that sentencing principles for environmental offences require a special approach to ensure that the illegal activity is deterred. Mr. Bernard submitted that the court adopted the following five factors to be considered in determining an appropriate sentence:

1. Level of culpability
2. Record
3. Acceptance of Responsibility
4. Damage or Harm (actual and potential)
5. Deterrence

[13] Mr. Bernard proceeded with the application of the five factors to the present case.

1. Level of Culpability

Mr. Bernard distinguished between advertent and inadvertent negligence. Mr. Bernard submitted that the Offender's culpability is at the higher end because he was aware of the dangers posed by lasers.

2. Record

Mr. Bernard acknowledged that the Offender did not have a criminal record.

3. Acceptance of Responsibility

Mr. Bernard submitted that the Offender is deprived of significant mitigative factors due to his failure to provide a guilty plea.

4. Damage or Harm (actual or potential)

Mr. Bernard submitted that the potential harm in this case was significant.

5. Deterrence

Mr. Bernard submitted that there is a significant need for deterrence because of the increasing prevalence of incidents involving the interference of aircrafts through the use of lasers.

[14] Mr. Bernard referred to *R. v. Mackow*, 2008 ABPC 204 ("*Mackow*"), a decision of Judge Fradsham of the Alberta Provincial Court. This case involved the intentional use of a laser to

strike a commercial aircraft and a helicopter. Judge Fradsham refused to give the offender a discharge. Instead, he imposed a fine of $1,000. Mr. Bernard described this decision as an "effective starting point".

[15] Mr. Bernard referred to two unreported decisions in Ontario. In the case of *R. v. Juan Carlos Orozco Pelaez,* Pelaez pled guilty to an offence involving the projection of a directed bright light source at an aircraft by a laser, in contravention of s. 601.2 of the *Canadian Aviation Regulations*, the same offence as in Count 2 in the present case. Pelaez received a fine of $1,000.00. In the other unreported decision, which is *R. v. Cote*, the offence appears to involve behavior which endangered the safety/security of an aircraft by the intentional use of a laser. Cote received a suspended sentence and probation for three years.

[16] Mr. Bernard referred to the serious treatment by other jurisdictions such as the United States and Australia for offences involving the interference of aircraft by the use of lasers. Mr. Bernard also referred to the report of Dr. Macuda, which indicates the potential dangers of the light from a laser on the human eye.

Offender's Position on Sentence

[17] Mr. Nelson began his submissions by suggesting that the law in other jurisdictions is not relevant to the present case and the outcome of present case must be based on the law as it exists.

[18] Mr. Nelson reviewed the decisions referred to by Mr. Bernard. In the decision of *Cotton Felts*, Mr. Nelson pointed out that the Court considered the following factors:

(1) the size of the company;
(2) the scope of the economic activity;
(3) the extent of the actual harm;
(4) the extent of the potential harm;
(5) the maximum sentence prescribed by law;
(6) the amount needed for deterrence to enforce the regulatory standards.

[19] Mr. Nelson referred to the *Terroco* decision. Mr Nelson agreed with Mr. Bernard that the Court adopted the five factors listed in paragraph 12 herein. Mr. Nelson indicated that when the Court dealt with the level of culpability factor, it stated the following at paragraph 35:

> ... that offences which involve recklessness will call for more severe penalties than those which are near due diligence misses.

[20] Mr. Nelson submitted that this Court's decision that the Offender was not entitled to the defence of due diligence constituted a "near due diligence miss". Mr. Nelson's reasons for this position is the conclusion reached by this Court that it was not reasonable for the Offender to assume that the leaves on the tree in question would constitute an opaque surface sufficient to prevent the beam of light of the laser from passing through those leaves.

[21] Mr. Nelson submitted that the present case involved the Offender "unknowingly" firing a laser at a helicopter. Mr. Nelson repeated this submission a number of times during his submissions.

[22] Mr. Nelson quoted a passage from paragraph 37 of *Terroco* where the Court stated the following:

> Sentencing judges should critically examine the facts and attempt to place the offender at an appropriate point on the sliding scale of culpability ranging from offences where due diligence was a near miss to those where the Crown's ability to establish intent to release is a near miss.

[23] Mr. Nelson submitted again that the present case was a "near due diligence miss". He further submitted that the foreseeability of interference with an aircraft was so low that the Offender could not know that he committed an offence. Mr. Nelson indicated that the Offender thought he was stopped for a driving offence.

[24] Mr. Nelson pointed out that the Offender did not have a criminal record. With respect to the third factor, acceptance of responsibility, Mr. Nelson indicated that when the Offender learned what happened, he apologized to the police officer and showed remorse. The Offender cooperated with the police, provided them with the laser and did not deny the incident.

[25] With respect to the forth factor, damage or harm, Mr. Nelson submitted that there was no actual harm either to the eyes of the crew members or the aircraft as a result of the offence. Mr. Nelson conceded that the potential injury to the eyes or loss of life and severe damage to the aircraft were well known.

[26] With respect to the fifth factor, deterrence, Mr. Nelson submitted that the Offender was aware of the dangers of lasers interfering with aircraft and he was attempting to avoid those dangers. Consequently, there is no need for specific deterrence because the Offender is not going to use a tree again. Mr. Nelson submitted that the Offender's involvement in these proceedings is sufficient deterrence.

[27] Later in his submissions, Mr. Nelson argued that because the Offender "unknowingly" committed the offence, there is no need for general deterrence. His reasoning is that where other persons face similar circumstances, they will be unaware that they are committing an offence. Consequently, the penalty in the present case will not act as a deterrence to those other persons because they will be unaware that they are in the process of committing an offence.

[28] Mr. Nelson proceeded to compare the penalties for an offence under s. 7.41(1)(b) of the *Act* with an offence under s.7.3(3) of the *Act*. Mr. Nelson pointed out that an offence under s. 7.41(1)(b) provides for a maximum penalty of $25,000 or 18 months imprisonment or both while an offence under s. 7.3(3) provides a penalty of only $5,000.

[29] Mr. Nelson referred to the decision of *R. v. Van Waters & Rogers Ltd.*, 1998 ABPC 55 ("*Van Waters & Rogers*"), another decision of Judge Fradsham of the Alberta Provincial Court, which was contained in the written material supplied by Mr. Bernard but not referred to in his submissions. *Van Waters & Rogers* is an environmental case that is cited in *Terroco*.

[30] In his submissions, Mr. Nelson referred to the following passage in *Van Waters & Rogers* found at page 10:

> ... Pollution usually arises out of business activities, either through carelessness or in an attempt to save or make money. In either case, it is unlikely that any rehabilitation is possible in the sense of treatment, psychological insight, or changing motivation. Deterrence, not rehabilitation, is the goal ...

This passage was a quotation from a study paper entitled *Sentencing in Environmental Cases* authored by John Swaigen and Gail Bunt and published in 1985 by the Law Reform Commission of Canada.

[31] Accordingly, Mr. Nelson submits that in environment cases, when you are dealing with a corporation, a fine must be substantial enough to deter others and not appear to be a simple licence fee. Mr. Nelson referred to the following statement of Judge Fradsham at para. 40 of *Van Waters & Rogers*:

> ... most environmental offences are a product of errors. The "accidental" nature of the offence does not reduce the penalty, though an offence deliberately, or recklessly committed will call for an increased penalty.

[32] Mr. Nelson submitted that in cases involving individuals, the sentencing factors are different than when dealing with corporations in environmental cases. With individuals, willfulness, recklessness and willful blindness are aggravating factors as apposed to conduct of an accidental nature.

[33] Mr. Nelson argued that one of the circumstances to be considered by a sentencing court is what the offender did to prevent the occurrence. He reviewed the steps which he alleged the Offender took in the present case.

[34] In dealing with potential and actual damage, Mr. Nelson submitted the decision in *Van Waters & Rogers* is authority for a distinction to be made between dealing with corporations and individuals.

[35] Mr. Nelson referred briefly to the decision *R. v. Canadian MDF Products Company*, 2002 ABPC 82, a decision of Judge Lefever dealing with work safety. Mr. Nelson indicated the factors considered in determining a penalty were as follows:

1. The size of the company.
2. The scope of the economic activity.
3. The actual and potential harm to the public.
4. The maximum penalties prescribed.

[36] Mr. Nelson referred to the *Mackow* decision. He submitted that in *Mackow*, the Court was dealing with a more serious offence. Nevertheless, Mr. Nelson indicated the decision was a "good guide". Mr. Nelson indicated that in *Mackow*, the offender intentionally aimed a laser at an aircraft while landing and, later, he aimed the laser at a helicopter sent to find him. Mr. Nelson proceeded to compare the offender in *Mackow* with the Offender in the present case.

[37] Mr. Nelson referred to the statement of Judge Fradsham found at paragraph 24 of *Mackow*, as follows:

> I agree with the Crown that the sentencing objectives in this case are general deterrence, denunciation, and the promotion of a sense of responsibility in offenders.

[38] At this point in his submissions, Mr. Nelson began to review that portion of the *Mackow* decision dealing with the offender's application for a discharge. Judge Fradsham reviewed the factors for a discharge set out by the Alberta Court of Appeal in *R. v. MacFarlane* (1977) 3 Alta. L.R. (2d) 341 ("*MacFarlane*"). Mr. Nelson reviewed the applicability of each of these factors to the Offender in the present case.

[39] Beginning with the nature of the case and its prevalence, Mr. Nelson submitted that not one of the authorities produced by Mr. Bernard involved an offender who "unknowingly" committed the offence. Mr. Nelson indicated that all of Mr. Bernard's cases involved the deliberate use of lasers in some fashion or other. Mr. Nelson stated he expected that the circumstances of the present case would not repeat themselves for another 100 years or so. Accordingly, Mr. Nelson submitted that the peculiar circumstances were not a prevalent situation. Mr. Nelson stated that there might be a lot of laser attacks on aircraft, but we do not know if any of them were "unknowingly" done or whether they were all deliberately done.

[40] Mr. Nelson submitted that there were no personal gains in the present case. Mr. Nelson also submitted that there was no actual damage but he conceded there was the potential for damage. Mr. Nelson submitted that the offence was not the result of an impulsive or calculated act. The offence was not an intentional act like in *Mackow*. In the present case, the Offender "unknowingly" committed the offence. Finally, Mr. Nelson submitted that, unlike in *Mackow*, there was no need for the offence to be made a matter of record because there was no need for specific deterrence. Mr. Nelson argued that the Offender was already aware of the dangers of lasers to the human eye and aircraft.

[41] Mr. Nelson quoted a comment of Judge Fradsham from para. 39 on page 11 of *Mackow* as follows:

> It is to the potential consequences of the prohibited conduct that the regulatory legislation is directed. Making the general public aware of those potential consequences is one of the primary aims of the regulatory offence sentencing process.

Mr. Nelson submitted that in *Mackow*, Judge Fradsham held that a discharge would be contrary to the public interest because it would undermine the objective of the regulatory legislation, specifically, to make the general public aware of the potential consequences which flow from the prohibited conduct. In *Mackow*, the offender was "having some fun" because he did not understand the very serious consequences of his conduct.

[42] Mr. Nelson submitted that what distinguishes the present case from that of *Mackow* is that in the present case, the Offender knew the seriousness of the prohibited conduct but he "unknowingly" committed the offence.

[43] Mr. Nelson submitted that in *Mackow*, Judge Fradsham held that the offender was not likely to re-offend because of what he now knows. Accordingly, Judge Fradsham settled on a fine of $1,000. Mr. Nelson referred to the decision in *R. v. Aiden Walsh* ("*Walsh*") which is contained in Mr. Bernard's material. Mr. Nelson acknowledged that a full report was not available and, accordingly, full details of the circumstances are not known. The details that are known are that the offender in that case was charged with an offence under s. 7.3(3), the same offence as in the present case. The offender pled guilty and received an absolute discharge.

[44] With respect to discharges, Mr. Nelson referred to the decision of the Alberta Court of Appeal in *MacFarlane*. In addition, Mr. Nelson referred to *R. v. Bram* (1983) 30 C.R. (3d) 398 ("*Bram*") where the Alberta Court of Appeal inferred that *MacFarlane* was the leading case on discharges in Alberta. Mr. Nelson submitted that the criteria for the granting of a discharge were that it must be in the best interests of the Offender and not contrary to the public interest. Mr. Nelson indicated the various factors the Court in *MacFarlane* suggested should be considered and, then, he proceeded to review each of those factors with respect to the circumstances of the Offender in the present case. Accordingly, Mr. Nelson submitted that the Offender qualifies for an absolute discharge.

Crown's Reply

[45] Mr. Bernard began his reply to Mr. Nelson's submissions by indicating that the maximum penalty of $5,000 in s. 7.3(3) covers a wide range of activity. In the present case consideration must be given to the particular offence in the present case of creating a hazard for aviation safety.

[46] Mr. Bernard took issue with Mr. Nelson's submission that the Offender "unknowingly" committed the offence. Mr. Bernard submitted that this is no different than accidently committing the offence. Mr. Bernard submitted that the Offender should be found to have a higher mental culpability.

[47] Mr. Bernard took issue with Mr. Nelson's submission that there was no actual damage. He submitted that the actual damage was that the aircraft was distracted from its regular duties. Mr. Bernard submitted that the pilot momentarily lost control of the aircraft.

[48] Mr. Bernard submitted that since the *Mackow* decision, there has been a sharp increase in the number of reported incidents. However, I pointed out that we do not know anything about the circumstances of those reported incidents as to whether they are intentional interference or not. Mr. Bernard agreed but he submitted that this particular offence would cover both intentional or unintentional conduct.

[49] In dealing with Mr. Nelson's submissions regarding the issue of a discharge, Mr. Bernard referred to the following quote from the decision in *Bram* at p. 400:

> *R. v. MacFarlane* states that the jurisdiction to grant an absolute discharge should be used sparingly in the interests of preserving the general deterrence principle of criminal sentencing.

[50] Mr. Bernard submitted that the principle of deterrence plays a special role in regulatory offences. Again, Mr. Bernard referred to the fact that the number of reported incidents has increased dramatically. Again, I reminded him of the lack information as to the nature of these incidents. Mr. Bernard submitted that the penalty for unintentional conduct still has a deterrent value.

[51] Mr. Bernard submitted that potential harm was significant in terms of the value of the aircraft and the injury to the pilot.

[52] With respect to the public record, Mr. Bernard submitted that it comes back to general deterrence. He indicated that the public needs to be aware that this offence carries a reasonable sentence.

[53] At this point in the proceedings, I asked both counsel to provide me with written submissions of the issue of a discharge.

Granting of a Discharge

Crown's Position on the Granting of a Discharge

[54] In his written submissions, Mr. Bernard provided a list of circumstances that he submitted were relevant to the appropriateness of the granting of a discharge.

[55] Mr. Bernard submitted that deterrence plays a special role in regulatory offences.

[56] In his written submissions, Mr. Bernard referred to aviation safety, the Offender's prior awareness of the dangers of lasers to the human eye and aircraft, the Offender's alleged higher level of culpability, the increase in the reported incidents of interference of aircraft with lasers, and the maximum penalty for the offence.

[57] Mr. Bernard referred to s. 730 of the *Criminal Code of Canada* and the decision in *MacFarlane*. Mr. Bernard indicated that the granting of a discharge must be in the interests of the Offender and not contrary to the public interest. Dealing with the public interest, Mr. Bernard referred to the six factors the Alberta Court of Appeal stated should be considered. Mr. Bernard examined the applicability of each of these factor to the circumstances in the present case.

[58] Dealing with the seriousness of the offences, Mr. Bernard submitted that the pilot momentarily lost control of the aircraft.

[59] Dealing with prevalence of the offence, Mr. Bernard submitted that the prevalence of the offence has increased since the decision in *Mackow* based on his information.

[60] In dealing with the motive of the Offender, Mr. Bernard referred to paragraph 34 of *Mackow* and submitted that this Court must consider the potential consequences of violating the regulatory legislation.

[61] Dealing with value of property, Mr. Bernard submitted that the value of the aircraft was "great".

[62] In dealing with whether the offence was committed by impulse, an unexpected opportunity, Mr. Bernard resorted to his argument that the Offender should be found in a higher level of culpability.

[63] In dealing with the need for a public record, Mr. Bernard submitted that a public record is needed in the interests of general deterrence.

[64] Finally, at the end of his submissions, Mr. Bernard argued that the granting of a discharge was not in the public interest.

Offender's Position on the Granting of a Discharge

[65] At the outset of his written submissions, Mr. Nelson referred to the decision in *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53 (Ont. C.A.) ("*Sanchez-Pino*") and submitted that there was a wide discretion vested in a trial court when considering whether to grant a discharge.

[66] Mr. Nelson referred to the decision in *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.) and submitted that the granting of a discharge is available for any offence other than

an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or life.

[67] In dealing with the best interests of the Offender, Mr Nelson made reference to the following passage of the Ontario Court of Appeal in their decision in *Sanchez-Pino* found at pp. 58-59:

> The granting of some form of discharge must be "in the best interests of the accused." I take this to mean that deterrence of the offender himself is not a relevant consideration, in the circumstances, except to the extent required by conditions in a probation order. Nor is his rehabilitation through correctional or treatment centres, except to the same extent. Normally he will be a person of good character, or at least of such character that the entry of a conviction against him may have significant repercussions.

Mr. Nelson submitted that the Court must consider all of the circumstances.

[68] Mr. Nelson proceeded to present various situations where discharges have been granted by the courts. Then he proceeded to outline the reason why a grant of a discharge to the Offender would be in his best interests. Furthermore, Mr. Nelson submitted that the repercussions to the Offender of a conviction would be disproportionate to the culpability of the Offender for the offence committed. Mr. Nelson reiterated that a fine and conviction would not deter anyone from "unknowingly" committing the same offence.

[69] In dealing with the premise that the granting of a discharge must not be contrary to the public interest, Mr. Nelson resorted back to the factors provided by the Alberta Court of Appeal in the decision of *MacFarlane*.

[70] With respect to the first factor, the nature of the offence, Mr. Nelson described the actions of the Offender and submitted that the culpability of the Offender was "virtually nil."

[71] When addressing the second factor, the prevalence of the offence, Mr. Nelson discussed the lack of information surrounding the records submitted by the Crown. In addition, Mr. Nelson submitted that it was extremely fortuitous that the actions of the Offender had resulted in the commission of the offence.

[72] In dealing with the third factor, personal gain, Mr. Nelson submitted that it was clear that the Offender did not stand to gain from the commission of the offence.

[73] In dealing with the value of the property, Mr. Nelson pointed out that this was not a property offence and no property damage occurred.

[74] In dealing with the issue of whether the offence "was committed as a matter of impulse, and in the face of unexpected opportunity, or whether it was calculated", Mr. Nelson submitted

that the use of the tree was on impulse. Mr. Nelson submitted that the culpability of the Offender was "basically non-existent."

[75] In dealing with the need for the Offender to have a record of his conviction, Mr. Nelson submitted that the present case is not one which requires a public record for the protection of society.

[76] On the issue of deterrence, Mr. Nelson referred to the following passage of the Court of Appeal in the decision of *Terroco* at para. 37:

> Sentencing judges should critically examine the facts and attempt to place the offender at an appropriate point on the sliding scale of culpability ranging from offences where due diligence was a near miss to those where the Crown's ability to establish intent to release is a near miss. Once that point is determined it becomes an important factor in the determination of a fit sentence.

Mr. Nelson submitted that the case against the Offender was a case of where due diligence was a near miss and the foreseeability of committing the offence was extremely low.

[77] Mr. Nelson referred to a passage in the *Mackow* decision and submitted that the Court made it clear that discharges can act as a deterrent in regulatory offences. Mr. Nelson referred to the *Walsh* decision as an example of this principle. Mr. Nelson submitted that in the circumstances of the present case, a grant of discharge by the Court in favor of the Offender would provide sufficient deterrence

Decision

Application for a Grant of a Discharge

[78] The application for a grant of a discharge is refused because, in my view, it would be contrary to the public interest. In determining my reasons for this conclusion, I have adopted the factors set out in the *MacFarlane* decision.

Nature of the Offence

[79] The offence in the present case was serious, although not as serious as made out by Mr. Bernard. At no time did the pilot lose control of the aircraft. He was momentarily blinded from viewing his instruments. Utilizing his instruments and the horizon, he was able to complete his orbit. The pilot recognized the light as being from a laser and he was familiar with the dangers of lights from lasers. Utilizing his peripheral vision, the pilot immediately pursued the source of the laser.

Prevalence of the Offence

[80] I am satisfied that the Offender did not intend to interfere with an aircraft while testing his son's laser. I am not satisfied with the records submitted by Mr. Bernard as an indication of the prevalence of unintended interference of aircrafts by the use of lasers.

Personal Gain

[81] There is no evidence of personal gain for the Offender.

Value of Property Destroyed or Stolen

[82] No property was destroyed but there was the potential for considerable harm when one considers possible injuries to the eyes to the occupants of the aircraft, their lives at stake and the value of the aircraft.

Commission of Offence – Impulse or Calculated

[83] The offence was unintended and it was extremely fortuitous that the actions of the Offender actually interfered with an aircraft.

Need for a Record

[84] In my view, the granting of a discharge would be contrary to public interest for the same reasons in the *Mackow* decision, namely that it would be contrary to the objective of deterrence. Lasers are dangerous instruments both, to the human eye and to aircraft. Like weapons, when one handles a laser, a high standard of care is required. I do not accept Mr. Nelson's distinction that the Offender committed the offence "unknowingly". In my view, the Offender failed to recognize the dangerous nature of his son's laser and he did not proceed with a high degree of caution. I am confident that the Offender will not re-offend. However, as in *Mackow*, it is important to make the public aware of the potential consequences of a laser on aircrafts.

Sentence

[85] In determining a just and fit sentence, I have adopted the factors set out by the Alberta Court of Appeal in the *Terroco* decision.

Level of Culpability

[86] I disagree with the rationalization of Mr. Bernard that because the Offender was aware of the dangers of lasers, he should have a culpability at the higher end. I am satisfied that the Offender did not intend to interfere with an aircraft. Furthermore, I am satisfied that had the Offender become aware of that possibility, he would not have proceeded as he did. In his decision to test the laser using the leaves of the tree, the Offender had a momentary loss of common sense which resulted from his failure to recognize the high standard of care needed when handling a laser. At the same time, I am satisfied that it was extremely fortuitous that the

actions of the Offender actually interfered with an aircraft. In my view, the actions of the Offender constituted a "near due diligence miss".

Record

[87] The Offender is without a record.

Acceptance of Responsibility

[88] The Offender has accepted responsibility for his conduct. On learning of what occurred, he immediately apologized and showed remorse. He gave the laser to the officer and did not deny the incident. Given all the circumstances, it was reasonable for the Offender to not enter a guilty plea. As stated above, his actions were a "near due diligence miss".

Damage of Harm (actual or potential)

[89] In the present case, there was no actual damage or harm. However, there was the potential for serious damage or harm.

Deterrence

[90] I am satisfied that the Offender will not re-offend. Consequently, there is no need for specific deterrence. There is some need for general deterrence which is largely covered by the refusal of a grant of a discharge.

Disposition

[91] The Offender is fined $500 inclusive of a victim surcharge. The laser is forfeited.

Dated at the City of Edmonton, Alberta this 18th day of February, 2011.

P.G. Sully
A Judge of the Provincial Court of Alberta

Appearances:

A. Bernard
for the Crown

T. Nelson
for the Offender