



Enforcement and Prosecution Issues: The Defence Perspective

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Outline

- Mitigate Risks
- Investigations
- Enforcement / Prosecutions
- Sentencing



Indemnities

- Regulatory liability
- Civil liability



Due Diligence Defence

- Available to an accused who is charged with a “strict liability” offence
- In establishing due diligence, the accused generally must prove that all reasonable steps were taken or that reasonably believed in mistaken set of facts
- Depends on the facts of each case



Prepare for the Inevitable – “Incident Response Plan”

- Respond to emergency first
- Initiate plan – establish privilege
- Key personnel familiar with it in advance
- Early response to investigation



Incident Response Plan

- A. Identify site coordinator
- B. Make employees aware of plan
- C. When the investigator is at the site
- D. Seizure of documents / records / materials
- E. Questioning and interviewing employees
- F. After the investigation – “reduce uncertainty”



Offences

- Generally separate offence to:
 - (1) commit the act; and
 - (2) fail to report to appropriate authority
- If in doubt, report
- Some provisions – separate offence for each day act continues
- Possible to have provincial and federal charges for same event



Investigator's practices

- Different investigators use different processes
 - a) Alberta Environment and Sustainable Resource Development (different between regions)
 - b) Environment Canada
 - c) Department of Fisheries and Oceans



“New Era” of Enforcement – Defence Perspective

- Last 5 years unprecedented coverage
- Sophisticated lobby → media → public opinion
- Recent high profile events or made high profile
- Issues on national and international stages
- Oilsands – in news on daily basis
- Increased penalties



Trends in Environmental Enforcement in Alberta

Increased enforcement

- Significant penalties
- Costs to organizations

Broader application

- Personal liability
- Contractors' liability



Trends in Environmental Enforcement in Alberta

Summary of AB Environmental Prosecutions

| Calendar Year | Number of Prosecutions Completed | Total Penalties | Range of Court Penalties |
|---------------|----------------------------------|-----------------|--------------------------|
| 2012 (YTD) | 4 | \$395,500 | \$16,500 - \$180,000 |
| 2011 | 8 | \$880,000 | \$100,000 - \$275,000 |
| 2010 | 9 | \$861,270 | \$6,000 - \$500,000 |
| 2009 | 4 | \$1,481,000.00 | \$6,000 - \$675,000 |
| 2008 | 4 | \$12,000.00 | \$2,000 - \$4,000 |
| 2007 | 4 | \$582,000.00 | \$7,000 - \$280,000 |
| 2006 | 8 | \$546,902.00 | \$7,500 - \$249,402 |
| 2005 | 18 | \$930,735.00 | \$1,000 - \$100,000 |
| 2004 | 4 | \$56,073.00 | \$1,000 - \$50,000 |
| 2003 | 7 | \$443,900.00 | \$1,000 - \$125,000 |
| 2002 | 7 | \$130,500.00 | \$1,000 - \$75,000 |



Recent propensity to charge all who can “control” the activity

- Owners may be liable for actions of subcontractors
- Liability for subcontractors can be managed:
 - a) Stringent selection process
 - b) Contract provisions – addressing compliance, reporting, indemnity
 - c) Provide them with all information
 - d) Oversight – audit, inspection



Personal Liability

- Employees, Officers, Directors, etc. – could all potentially face personal liability
- Independent legal counsel



Western Biodiesel Inc. (August 2011)

- Release of wastewater containing methanol into environment resulting in fire
- Manager provided false/misleading information to investigators
- Company fined \$160,000
- Manager sentenced to 4 months house arrest



R&D McCabe Ltd. (May 2009)

- Hired by Suncor's contractor, Compass Group, to operate wastewater facility
- Investigation revealed that false information had knowingly been provided to regulators
- Mr. McCabe sentenced to 11 months house arrest
- Suncor fined \$175,000
- Compass Group fined \$225,000



Sentencing

- Sentencing options
 - creative sentencing
 - value to the Crown that directs money to the problem
 - joint submissions may remove risk of trial or sentencing uncertainties



Creative sentencing examples (Provincial)

- **Canadian National Railway Company**
 - fined \$100,000.00
 - Creative sentencing order
 - \$280,000.00 allocated to NAIT to develop a course for volunteer firefighters; and
 - \$20,000.00 to the AB Firefighters Association for mentorship and qualification maintenance
- **Syncrude Canada Ltd.**
 - fined \$250,000.00
 - Creative sentencing order of \$250,000.00 towards 3 projects:
 - University of Alberta research into avian migration and deterrence;
 - conservation organizations to preserve waterfowl habitat; and
 - Wildlife Management Program at Keyano College in Fort McMurray.



QUESTIONS?