

## THE LIABILITY OF THE AGENT FOR THE OFFENCES OF THE PRINCIPAL

### ISSUE

In several cases, counsel for the accused has suggested that his client cannot be convicted of offences committed by the principal because the legal obligations whether to provide information to Alberta Environment or to conduct an activity under the auspices of an approval are obligations that are unique to the principal.

The position of the Crown is that the agent is culpable as a party to the offence whether statutorily (by virtue of section 146 of the *Water Act* or section 232 of the *Environmental Protection and Enhancement Act*) or under the criminal rules relating to parties of the offence.

### **STATUTORY BASIS FOR LIABILITY UNDER PROVINCIAL LAW**

Section 146 of the *Water Act* provides as follows:

If a corporation commits an offence under this Act, any officer, director or **agent** of the corporation who directed, authorized, assented to, acquiesced in **or participated** in the commission of the offence is guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted for or convicted of the offence. [Emphasis added]

Section 232 of the *Environmental Protection and Enhancement Act* contains an almost identical provision.

Regardless of whether the principal has been convicted or even charged, if the Crown can prove that the principal has committed an offence, that the subcontractor was an agent of the principal and that the agent was acting within the scope of that agency, there will be a conviction.

### **STATUTORY BASIS FOR LIABILITY UNDER THE CRIMINAL CODE**

Section 21(1) of the *Criminal Code* defines parties in these terms:

Every one is a party to an offence who

- (a) actually commits it;
- (b) does or **omits to do anything** for the purpose of aiding any person to commit it; or
- (c) **abets** any person in committing it. [Emphasis added]

When a charge is laid, the Crown is not obliged to identify whether the person is the principal or the party. R v. Harder (1956) 114 C.C.C. 129 (S.C.C.) In years past this meant that a female person could be convicted of rape, even though that was an offence that was impossible for a female to commit. The Criminal Code was amended in 1985 to specifically allow for convictions of the party even in situations where the principal could not be convicted. (Section 23.1)

By section 3 of the *Provincial Offences Procedure Act*, the provisions of the *Criminal Code* apply to all provincial legislation unless expressly indicated otherwise.

The question of amounts to abetting in the regulatory context was considered by the Ontario Provincial Court in *R v. Continental Cablevision Inc.* (1974) 19 C.C.C. (2d) 540 in which the decision of the Manitoba Court of Appeal in *R. v. Kulbacki* [1966] 1 C.C.C. 167 was quoted with approbation:

...the failure of the accused to make any effort to stop or prevent the commission of the offence, when he was in a position to do so and when he had the authority to do so, was equivalent to encouragement on his part.

The notion that a person could be held responsible in the absence of a duty to act is not unique. In *R v. Sault Ste. Marie* (1978) 40 C.C.C. (2d) 353, the City argued that it had no “duty” to act and therefore should not be held liable for the actions of its contractor. The Supreme Court of Canada disagreed stating at page 376 that... “[t]he law is replete with instances where a person has no duty to act but where he is subject to certain duties if he does act”.

### ***ACADEMIC COMMENTARY***

In his definitive text *Regulatory Offences in Canada, Liability & Defences* John Swaigen wrote:

Agents of a corporation or other business, whether they are employees or independent contractors, can generally be held liable for offences as well as the principal. They will have failed to exercise reasonable care if they were negligent in carrying out their duties...An independent contractor may have a higher standard of care than an employee, since such contractors are usually retained on the basis of their expertise and experience. (Page 164)

However, as Mr. Swaigen points out this is a question of evidence as to scope of the duty of the agent.

### ***EXAMPLES FROM ALBERTA***

There are numerous examples where the principal has been held accountable for the misfeasance of its employees but dealing specifically with subcontractors, the approval holder and its immediate subcontractor where convicted for failure to comply with an approval in a situation where a lower level sub-contractor had falsified records. Although the principal and its immediate sub-contractor knew nothing of the falsification they were convicted for their failure to properly supervise.

More recently, an independent contractor was successfully prosecuted as a party to the offence for making an error which contributed to the offence that committed by its principal.

### ***EXAMPLE FROM ONTARIO***

In R. v. Domtar (unreported, October 15, 1992) the Ontario Provincial Court dealt with an approval violation. According to the synopsis in The Prosecution and Defense of Environmental Offences at pages 2-79 and 2-80 by Stanley Berger, while the accused was not the approval holder, he was an agent of the corporation who was. Counsel for the individual challenged the information as alleging no offence known to law because his client was not the named approval holder. The trial judge disagreed:

The fact that the certificates of approval were issued to the corporate defendant does not preclude the ability of the individual defendants aiding and abetting the corporation in committing the offence. Whether or not their involvement in the commission of these offences is mere acquiescence which would not result in a conviction or more direct involvement which might, is a matter for evidence at trial.

### **WHAT ARE THE FACTS THAT WOULD SUGGEST THAT THE SUBCONTRACTOR IS A PARTY TO THE OFFENCES COMMITTED BY THE PRINCIPAL?**

It is always a question of the evidence but relevant evidence would include proof that the subcontractor was hired to perform the very activity that was the subject matter of the prosecution, that the sub-contractor had actual knowledge, participated activity in the project and had the opportunity to prevent the offence.

### **CONCLUSION**

Depending upon the evidence, the subcontractor may be successfully prosecuted where the principal has failed to comply with a duty that belongs to the principal alone. It matters not from the viewpoint of the prosecution whether that liability is framed in terms of the actions of a principal or of a party. In the prosecution of the former premier of Saskatchewan Colin Thatcher, the Crown could not prove whether Mr. Thatcher had committed the murder himself or whether he had hired a contract killer but the Supreme Court held that manner in which the crime was committed whether as a party or a principal was irrelevant. (R v. Thatcher [1987] 1 S.C.R. 652.)

**All of which is respectfully submitted.**

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