

Environmental Prosecutions – Defence Strategies & Latest Cases

Jacquelyn Stevens

Partner, Certified Specialist in Environmental Law by the Law Society of Ontario

Remediation Technologies Symposium (RemTech)
Banff, Alberta
October 16, 2019

Overview

- **Environmental Liabilities**
- **Inspections vs Investigations**
- **Potential Legal Defences**
- **Sentencing & Implications of Conviction**
- **Environmental Prosecutions – Case Law Updates**

ENVIRONMENTAL LIABILITIES

Environmental Liabilities

- **Regulatory Liability**

- regulator can issue orders
- regulator can prosecute under environmental statutes
- “person responsible”, “contaminant”, “adverse effect”

- **Civil Liability**

- contamination on-site (soil, groundwater, indoor air)
- contaminant migration and impact off-site (groundwater, air emissions)
- concept of “flow through” property
- causes of action and damages

Personal Environmental Liabilities

- **Personal Environmental Regulatory Liability**
 - individuals may be ordered and/or prosecuted
 - statutory liability for Directors, Officers and agents
- **Personal Environmental Civil Liability**
 - individuals may be sued
 - precedent from the Ontario Court of Appeal (*Midwest*) for piercing corporate veil in an environmental lawsuit

INSPECTIONS VS INVESTIGATIONS

Inspections

- **Inspections occur**
 - to verify compliance with the Act
 - where inspector has “reasonable grounds to believe” or “reasonably believes” that substance or documents related to Act can be found in the place
- **Inspectors can require persons on site to**
 - give “all reasonable assistance”
 - furnish all information that the inspector may reasonably require to carry out his/her duties

Inspections – Obstruction

- **It is an offence to**
 - knowingly make false or misleading statements
 - obstruct or hinder the Inspector (such as physically preventing the inspection)
 - provide false or misleading samples, results, or documents

Investigations

- **Investigations occur**
 - when reasonable and probable grounds formed of contravention that constitutes an offence
 - for the purpose of seeking evidence for prosecution of an offence
 - to seek evidence of due diligence

Investigations – With Consent

- **Voluntary investigation can take place where**
 - agree to interviews
 - agree to disclose documents
 - allow investigator on premises

Investigations – Without Consent

- **Exigent circumstances**
 - impractical to obtain a search warrant
 - reasonable grounds to believe entry necessary to prevent imminent loss or destruction of evidence
 - a pollution offence has been committed and likely loss or destruction of evidence may take place
 - can involve police assistance

Investigations – Without Consent

- **Judicial Authorization**
 - search warrant (becoming more frequent)
 - judicial order
 - can involve police assistance

Search Warrants & Orders – What to do?

- **Investigator should provide a copy when executing**
 - immediately review with lawyer to
 - determine scope of authorization
 - consider challenge of basis for authorization
- **Cooperate, with caution – non-compliance is contempt of court (criminal consequences)**
- **Ask for a list of items seized**
- **Segregate documents and assert claim of legal privilege (where appropriate)**
- **Conduct training, organize files in advance!**

Investigations – Obstruction

- **It is an offence to**
 - hinder an investigator carrying out legitimate purposes of legislation (i.e., execution of search warrant)
 - refuse to furnish information required to be maintained
 - provide false/misleading information
- **It is not an offence to**
 - exercise personal *Charter* rights
 - assert claim of legal privilege over documents
 - refuse to consent to the investigation

POTENTIAL LEGAL DEFENCES

Potential Legal Defences

Charter Applications: R v Jarvis and R v Ling (SCC) considerations

- Timing of formation of reasonable and probable grounds of offence(s) by inspectors
- Timing and context of inspector's collection and sharing of information with investigators
- If successful in *Charter* application, two possible remedies
 - exclusion of evidence
 - stay of proceedings

Potential Legal Defences

De Minimus Principle (R v Beets)

- Law does not attach penal consequences for trivial or minimal impairments to the natural environment (*R v CP*)
- Two Uses:
 - to attack Crown's case (i.e. "adverse effect" in Ontario's *EPA*, s. 14(1))
 - as a defence
- Is offence at issue minimal or trivial ("mere trifle")?

Potential Legal Defences

Defence of Officially Induced Error (*Lévis (Ville) v Tétreault*)

Defendant must establish that:

- defendant made an error of law/mixed law and fact
- defendant considered the legal consequences of its actions
- an appropriate official gave the advice
- the advice was reasonable
- the advice was erroneous, and
- the defendant relied on the official's advice in committing the offence

Potential Legal Defences

Defence of Necessity (*R v Perka*, *R v Latimer*)

Defendant must establish that:

- defendant faced imminent danger or peril
- defendant had no reasonable legal alternative to its chosen outcome, and
- defendant only inflicted harm proportionate to the harm the defendant sought to avoid

Potential Legal Defences

Defence of Due Diligence (*R v Sault Ste Marie (City)*)

- Took all reasonable care to avoid the offence
 - “reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt and continuing action” – *R v Courtaulds Fibres*
- Reasonable belief in a mistaken set of facts
 - “the defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent” – *R v Sault Ste Marie (City)*

Potential Legal Defences

Defence of Due Diligence

- Environmental Management Systems (EMS)
 - develop and implement EMS
 - reasonable and realistic corporate policy
 - identify environmental impacts and legal requirements
 - implement SOPs and training
 - adequate commitment of resources
 - continuous improvement (management review, audits)

Case Law – Due Diligence Defence

R v Zellstoff Celgar Limited Partnership (BCPC 2012)

- Defendant found guilty of discharging effluent into the Columbia River
- Defendant had ISO procedures to prevent the discharge
 - “...had the defendant followed the ISO procedures, it should have prevented the spill...”
- Defence of due diligence rejected

Case Law – Due Diligence Defence

R v ControlChem (OCJ 2016)

- Employee deliberately discharged liquids from four large totes into a storm drain which turned the creek white
- 5 *EPA* and *OWRA* charges were brought against both the company and employee
- Employee pled guilty and convicted on 1 *OWRA* charge
- Due diligence (took all reasonable care) was made out during the company's trial in Fall 2015
- Company mantra – “nothing leaves the building”
- ControlChem acquitted of all charges

Case Law – Due Diligence Defence

R v MV Marathassa (BCPC 2019)

- Ship leaked fuel oil into English Bay in Vancouver
- Charged under *Canada Shipping Act* for discharging pollutant, failing to implement pollution emergency plan
- Due diligence defence made out at trial
 - defendant reasonably believed ship was designed, built, and certified to internationally recognized environmental and safety standards (ECO standard) (belief in mistaken set of facts)
 - pollution prevention systems included comprehensive crew selection and training program aimed at pollution prevention
 - met and exceeded regulatory requirements and industry standards
- MV Marathassa acquitted of all charges

SENTENCING & IMPLICATIONS OF CONVICTION

Sentencing & Implications of Conviction

- **Court weighs several sentencing factors when assessing a fine amount**
 - statutory sentencing factors
 - adverse effect, intentional or reckless. prior warning, prior convictions, actions after offence
 - common law sentencing factors – *R v Bata Industries Ltd*
 - nature of environment affected, extent of damage, deliberateness, attitude, size, wealth and power of corporation, duration of non-compliance, profits. prior offences, evidence of character

Sentencing & Implications of Conviction

- **Defendant may have more of a “target on its back”**
 - more day-to-day scrutiny of operations
 - higher frequency of inspections by environmental officers
- **Increased fines if subsequent conviction under same/similar environmental statute(s)**

Sentencing & Implications of Conviction

- **Defendant's conviction(s) will be publicly accessible and published**
 - “Court Bulletins” published – defendant names, offence(s), and penalty
 - Prosecution Disposition Reports published and available in government and legal databases
 - Local news reporting, social media
- **Defendant's business, contracts and customer relations may be at risk or negatively affected**

ENVIRONMENTAL PROSECUTIONS – CASE LAW UPDATE

Case Law Update – Tailings Waste

Syncrude Canada Ltd (ABPC 2019)

- Syncrude abandoned tailings pond containing bitumen without completing remediation
- Contractor for Syncrude found 30 decomposing Great Blue Herons in pond and one live heron covered in oil
- Syncrude convicted under Alberta's *EPEA* and federal *Migratory Birds Act*
- Syncrude fined \$2.75 million
 - \$25,000 fine inclusive of VFS to court for *EPEA* charges
 - \$950,000 held in trust by AER to fund wildlife, biodiversity projects (RFP process)
 - \$1.775 million directed to EDF

Case Law Update – Wastewater

Obed Mountain Mine (ABPC 2017)

- Defendant company operated a dike that held back wastewater at Obed Mountain Mine in Alberta
- When dike failed, contaminated water and sediment spilled into creeks and impacted Athabasca River
- Defendant convicted under the *Fisheries Act* and Alberta's *EPEA*
- Defendant fined \$4,425,000, of which \$1,150,000 was directed to be held in trust by the University of Alberta and \$2,150,000 directed towards the EDF

Case Law Update – Fuel Oil

Canadian National Railway Corporation (ABPC 2017)

- Defendant railway company operated fueling station
- ECCO officers traced oil sheen from North SK River >8km through Edmonton's storm drain system to fueling station
- Joint federal-provincial investigation - oil and water separator did not comply with *Storage Tank Systems for Petroleum and Allied Petroleum Products Regulations*
- Convicted under *CEPA*, *Fisheries Act* and Alberta's *EPEA*
- Defendant fined \$2.5M federally & \$125,00 provincially

Case Law Update – PCBs

Collingwood Prime (OCJ 2018)

- Electrical equipment exceeded regulated PCB levels and was not sent for destruction to authorized facility
- Company and its director charged with
 - 10 counts of contravening *PCB Regulations* under *CEPA*
 - 1 count of failing to comply with an EPCO
- Defendants pleaded guilty
 - company and director fined \$420,000, and
 - 45-day jail term for director (to be served on weekends)

Case Law Update – Effluent

Irving Pulp and Paper Limited (NBPC 2018)

- Defendant company discharged improperly treated effluent into St. John River between June 2014 and August 2016
- In 2018, defendant convicted under *Fisheries Act*
- Defendant fined \$3,500,000, of which \$2,340,000 was directed to EDF and \$1,160,000 directed towards UNB Canadian Rivers Institute
- Company also directed to commission new effluent treatment system

Case Law Update – Diesel Fuel

Kirby Offshore Marine Operating (BCPC 2019)

- Defendant company owned tug boat that ran aground and spilled 107,552 litres of diesel fuel and 2,240 litres of lubricants into Pacific Ocean
- Defendant company fined total of \$2.9 million
 - \$2.7 million under the *Fisheries Act*
 - \$200,000 under the *Migratory Birds Convention Act, 1994*
 - \$5,000 under the *Pilotage Act*
 - Fine to be used towards conservation of fish and fish habitat

Case Law Update – Effluent

University of British Columbia and CIMCO Refrigeration (BCPC 2019)

- Defendant company and university convicted for depositing ammonia-laden water into an area that may enter water frequented by fish
- Defendant university also convicted for depositing ammonia-laden water into water frequented by fish and failing to report incident in a timely manner
- Defendant company fined \$800,000
- Defendant university fined \$1.2 million and ordered to conduct 5 years of electronic storm-water quality monitoring
 - Defendant university filed an appeal

Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **20 lawyers**
 - seven are certified by the Law Society of Ontario as Environmental Law Specialists
 - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut, and Yukon
 - offices in Toronto, Ottawa, Calgary and Yellowknife

Contact Information

Jacquelyn E. Stevens

(403) 444-6887

jstevens@willmsshier.com

Environmental Law Specialist
Certified by the Law Society of Ontario

Called to the Bars of Ontario and Alberta



Willms & Shier Environmental Lawyers LLP

www.willmsshier.com

ENVIRONMENTAL PROSECUTIONS – ADDITIONAL CASE LAW UPDATE

Case Law Update – Chlorinated Water

Clark Builders (ABPC 2012)

- Defendant was construction manager for the project
- Subcontractor hit a water main when excavating for foundation pilings
- Defendant failed to obtain locates for water main prior to construction
- Approx. 12 million litres of chlorinated water entered the North Saskatchewan River
- Defendant pleaded guilty to offence under the *Fisheries Act* and fined \$285,000

Case Law Update – Effluent

Mackenzie Pulp Mill Corporation (BCPC 2018)

- Defendant company discharged improperly treated effluent to a lake frequented by fish
- Contravention of *Fisheries Act*
- Defendant fined \$900,000 and ordered to complete audit of operations to prevent future incidents

Case Law Update – Logging

Gwaii Wood Products Ltd (BCPC 2017)

- Defendants' logging and road construction caused extensive damage to over 2.5 km of streams, stream banks, riparian vegetation, and wetlands
- Defendants convicted under *Fisheries Act*
- Defendants ordered to collectively pay \$2,200,000, of which \$400,000 was directed to Fisheries and Oceans Canada to promote fisheries management activities
- 2 defendants also prohibited from conducting logging operations

Case Law Update – PCBs

Tidan Inc. (QCCP 2016)

- Defendant company and seven associated companies did not follow Environmental Protection Compliance Orders (EPCOs) relating to the use, storage, and disposal of electrical equipment containing PCBs
- In 2016, defendants convicted under *CEPA* and *PCB Regulations* (52 charges)
- Defendants fined \$975,000 directed towards the EDF
- Defendants also required to publish an article and develop procedures to manage electrical equipment and provide training to management

Case Law Update – Crude Oil

Montreal, Maine and Atlantic Canada Co (QCCP 2018)

- Train carrying 7.7 million litres of crude oil derailed in Lac-Mégantic in July 2013
- Resulting fire destroyed town's downtown, 47 people died, 2,000 people forced out of homes
- 6 million litres of crude oil spilled, including into Lac-Mégantic and the Chaudière River
- Defendant company fined \$1,000,000 under *Fisheries Act*, of which \$400,000 is to be directed to EDF

Case Law Update – Waste

1449817 Ontario Inc and Alfred Tenny (OCJ 2016)

- Refinery, formerly approved waste disposal facility
- Defendant company and president ordered by MOECC to process, remove and dispose of metals and waste
- In 2015, convicted of failing to comply with MOECC Order, Court Order to process, remove & dispose of waste
- Defendants convicted of failing to comply with Court Order
- President fined \$320,000 plus 25% VFS, company fined \$1,200,000 plus 25% VFS