

## Environmental Law

December 1, 2016

### Protection for Corporations, Officers and Directors – Advanced Environmental Management Systems May Absolve Corporations, Directors & Officers of Guilt for Environmental Damage

Corporations, officers and directors can be subject to large fines for environmental damage caused by the corporation under environmental protection legislation in Canada. However, the defence of “due diligence” is available as a shield against such prosecutions. That is, even if the corporation, the directors and officers are found to have committed the prohibited actions, courts will examine the level of diligence applied to the prevention of environmental mishaps when determining guilt. The Ontario Court of Justice decision in *R v. Control Chem Canada Ltd.*,<sup>1</sup> indicates that a comprehensive “environmental management system” can offer significant protection as part of the due diligence defence.

While this defence has been available for decades, it has been many years since the court has offered guidance on the necessary components. In the *R v. Control Chem Canada Ltd.* decision, the Court held that as a result of a rigorous environmental management system, the defendant corporation was found not guilty of offences, even though an employee willfully poured litres of toxic material down a storm drain thereby contaminating a nearby watercourse. The Court reviewed the defendant

corporation’s environmental management system which included building design features, regular employee training and internal and external audits and found the corporation to be not guilty. This case demonstrates that it is extremely important to develop and maintain an environmental management system as a key tool, not only for good environmental stewardship, but for the protection of the corporation and its directors and officers.

#### The Offences

The Ministry of Environment and Climate Change was notified in February 2012 that Sheldon Creek in Burlington, Ontario had turned milky white. Tests found that the water was very acidic, with a pH level sufficient to burn the gills of fish. The flow of the storm drain system was traced upstream to Control Chem Canada Ltd. (“Control Chem”). It was subsequently discovered that an employee of Control Chem had earlier emptied the liquid contents of several large totes (chemical containers) into an outdoor storm sewer.

Control Chem was charged with five offences under the *Environmental Protection Act* and the *Ontario Water Resources Act*. The charges related to discharging material into the water and failing to notify the Ministry forthwith of the discharge.

#### Liability of the Corporation

The Court held that although the employee had acted contrary to the company’s policies and training, the corporation was responsible for the employee’s actions. Control Chem relied on the due diligence defence, arguing their environmental management system was of such an advanced nature that the due diligence defence should be satisfied.

---

<sup>1</sup> (15 March, 2016), Burlington 139537-01 (Ont. Ct. J.).

# Goodmans<sup>LLP</sup> Update

---

## The Environmental Management Systems

The Court found that the concept of due diligence and the framework for this defence was established in *R. v. Sault Ste. Marie (City)*:<sup>2</sup>

The defendant must establish on the balance of probabilities that **they are duly diligent, that is, they must establish that they exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking all reasonable steps to ensure the effective operation of the system.** The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself (Emphasis added).

The Court in *R. v. Control Chem Canada Ltd.* reviewed the measures taken by Control Chem which included:

- The factory was purpose-built to maximize environmental protection;
- The factory floor had no sewer drains to eliminate the risk of spilled material entering the sewer system;
- Surrounding the fluid compounding area with a 3-inch high containment barrier, capable of containing 20,000 litres of spilled material;
- Surrounding all factory passage and loading doors with a raised barrier to ensure no spilled materials left the building;
- All mixing stations and pumps were contained;
- Storage tanks with double-walled construction were used;
- There was a closed heating system to ensure no open flame risk;
- Employees had annual spills training;
- Internal and external audits were conducted two times per year;

- Training was provided from in-house *and* third-party resources;
- The washing of equipment, such as trucks and forklifts, was completed outside where the liquid could carry materials into the environment;
- It was continually emphasized to employees that they must “document what you do and do what you document” (such as signing and dating to confirm that they received training).

The Court held:

The evidence reveals the Defendant to have had farsighted, thoughtful, methodical and well documented philosophy and standards to address environmental protection generally and specifically addressing the issue of spills avoidance/mitigation. Control Chem generally presents as an enterprise with a culture of strong commitment to proper environmental standards. Management recognized the high risk of severe harm that could follow from a spill or discharge of any materials employed and robust steps were taken to minimize this risk and harm.

Despite the fact that the Crown had proven that the defendant corporation was responsible for the employee’s actions beyond a reasonable doubt - notwithstanding that the employee had violated express company policy and training - the corporation was found not guilty of the offence.

This case provides useful guidance for corporations, directors and officers as to the necessary components of an effective environmental management plan which demonstrates a diligent approach to managing environmental liability.

For further information, contact any member of our Environmental Law group.

---

<sup>2</sup> [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353