



A PRIMER ON ENVIRONMENTAL PROSECUTIONS

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INTRODUCTION

- **Administrative enforcement mechanisms**
- **Quasi-criminal environmental prosecutions**
 1. Different process than contaminated sites regimes
 2. Quasi-criminal in nature
 3. Many procedural rules, we won't cover here

1. ADMINISTRATIVE ENFORCEMENT – *GENERAL PRINCIPLES*

- **Includes various options:**
 - Inspections
 - Inquiries to obtain information
 - Orders to comply, or to restrain certain activities or operations
 - Suspension and cancellation of rights and permissions
 - Administrative monetary penalties
 - Recovery of amounts owing for work performed by the Crown
- **Burden of proof is lower than in environmental prosecutions**
 - e.g., administrative penalties can be issued under BC *Environmental Management Act* if a director is satisfied on a balance of probabilities that a contravention or failure to comply has occurred
- **Alternative to quasi-criminal offences**

2. ENVIRONMENTAL PROSECUTIONS – *CRIMINAL ELEMENTS*

- **Crown disclosure**
- **Presumption of innocence**
- **Burden of proof**
- **Defences**
- **High fines and even prison time**

2. ENVIRONMENTAL PROSECUTIONS – *CROWN BRIEF*

- The investigator's brief is submitted to Crown prosecutors
- Prosecutors, not investigators, make the call as to whether there is enough evidence to warrant charges and stand a reasonable likelihood of success
- Prosecutors tend not to participate in investigations; the first they usually see of a potential prosecution is when they receive the brief

2. ENVIRONMENTAL PROSECUTIONS – *SOURCES OF INVESTIGATION INFORMATION*

- **Enforcement Officers will primarily look to three sources of potential information respecting the incident:**
 - Sampling and other environmental studies
 - “Voluntary” interviews
 - Photographs, maps and other media

2. ENVIRONMENTAL PROSECUTIONS – *EXTRAORDINARY POWERS*

- **Arrest Powers**
- **Search Warrants**
- **Subpoenas**

2. ENVIRONMENTAL PROSECUTIONS – *LESSONS FROM CURRENT CASES*

- **The first 48 hours**
 - Investigators try to get as much as they can immediately after spill (no lawyers + anxious employees = good evidence)
- **Investigators have friendly ‘Columbo’ type demeanors**
 - E.g. investigators are *fish cops*
- **Investigators often adopt a case early**

2. ENVIRONMENTAL PROSECUTIONS – *LESSONS FROM CURRENT CASES*

- **Investigators have lots of time – 5 year limitation period following incident to bring charges**
 - Don't read too much into silence
- **The investigators don't necessarily stop after the charges are filed by Crown**
 - The Crown will use investigators in a "PI" way to chase down further evidence until the eve of the hearing

2. ENVIRONMENTAL PROSECUTIONS – *LESSONS FROM CURRENT CASES*

- **Statements made by employees can go in as evidence for the “truth of its contents”**
 - Meaning, what an employee says on the spur of the moment could easily find its way into a hearing
- **Company will need to assess very early whether to be proactive and cooperative or ask employees not to comment**
 - Proactive information might incriminate

2. ENVIRONMENTAL PROSECUTIONS – *LESSONS FROM CURRENT CASES*

- **Beware of “interviews”**
 - Under oath, with warnings that they will be taped and could be used as evidence in court
 - There is no obligation to participate
 - Strongly urge legal counsel to attend to prepare witness and attend to limit damaging evidence
- **Employees can be subpoenaed to be witnesses for the Crown**

2. ENVIRONMENTAL PROSECUTIONS – *DUE DILIGENCE DEFENCE*

- In responding to charges, establishing a defence of due diligence is about demonstrating the steps taken to prevent the environmental offence from occurring
- What is the standard?
 1. Not required to take *all possible* steps
 2. Must have taken *all reasonable* steps were taken that a reasonable person would have taken in similar circumstances
- Court takes a practical and evidence-based approach to assessing due diligence
- Relevant factors may include:

Gravity of potential harm	Foreseeability	Industry standards
Likelihood of harm	Control	Alternatives available
- Relying upon industry standards alone may not be sufficient

2. ENVIRONMENTAL PROSECUTIONS – *PROCEDURAL RIGHTS*

R v Jordan, 2016 SCC 27

- **Supreme Court of Canada dramatically altered the framework applicable to the right to a criminal trial within a reasonable time**
- **The Presumptive Ceiling**
 - 18 months on the length of a criminal case in provincial courts, from the charge to the end of trial
 - 30 months on criminal cases in superior courts, or cases tried in provincial courts after a preliminary inquiry
- **Delay that is attributable to, or waived by, the defence does not count toward the presumptive ceiling**
- **Institutional delay that is not the fault of the Crown does count toward the presumptive ceiling**

2. ENVIRONMENTAL PROSECUTIONS – *SENTENCING PRINCIPLES*

- Degree of culpability
- Deterrence
- Environmental damage
- Prior record
- Admitting remorse
- Not challenging the charges *per se*
- Proactive steps taken after the incident

2. ENVIRONMENTAL PROSECUTIONS – *SENTENCING PRINCIPLES*

R v Terroco Industries Ltd., 2005 ABCA 141

- Leading case on common law sentencing principles in environmental context:
“Post conduct changes to practices and procedures can show that an offender is remorseful and has learned from his experience. However, offenders are expected to have in place safe practices before the offence occurs. Again, the degree of foreseeability of spills or releases will influence this factor. Changes that should have been obvious before a spill or release will not be a significant factor if put into place after the spill or release. Changes regarding less obvious eventualities which result in spills or releases will constitute a more significant mitigating factor.”

2. ENVIRONMENTAL PROSECUTIONS – *SUBSTANTIAL PENALTIES*

R v Mackenzie Pulp Mill Corp. (2018, unreported)

- **Incidents in July 2014 and Sept 2016 – effluent discharging from mill was found to be deleterious to fish**
- **Environment and Climate Change Canada investigated the incidents**
 - Concluded that mill's treatment system had not properly treated wastewater, due in part to improper management
- **Pled guilty to depositing a deleterious substance into water frequented by fish, an offence under the federal *Fisheries Act***
- **Sentence included:**
 - Fine of \$900K
 - Company's name to be added to the Environmental Offenders Registry

2. ENVIRONMENTAL PROSECUTIONS – *ADDITIONAL STATUTORY PENALTIES*

R. v. Thompson, 2017 BCPC 351

- **Accused pled guilty to:**
 - Fishing in a Rockfish Conservation Area
 - Failing to hail in within a prescribed time
- **Court considered:**
 - Gravity of offences
 - Moral culpability
 - Prior record
 - Need for deterrence
 - Aggravating factors
 - Mitigating factors
- **Sentence included:**
 - Fines for each offence (total \$6,000)
 - An “additional fine” (\$19,000) based on monetary benefit received by Accused
 - \$4,000 of the “additional fine” to paid for benefit of two PhD students for projects related to Rockfish and similar species

2. ENVIRONMENTAL PROSECUTIONS – *CREATIVE SENTENCING*

R v Raymond (2018, unreported)

- Owner of a dry cleaning business in NB was recently charged with 2 counts of contravening the *Tetrachloroethylene (Use in Dry Cleaning and Reporting Requirements) Regulations* under *CEPA, 1999*
- Accused pled guilty
- Sentence included:
 - Monetary penalty (\$7,000) to be directed to Government of Canada Environmental Damages Fund
 - Required to publish an article in an industry publication, with content subject to Environment and Climate Change Canada's approval

2. ENVIRONMENTAL PROSECUTIONS – *CREATIVE SENTENCING*

R v Distributions Limotrique Inc. (2018, unreported)

- **Environment and Climate Change Canada investigation found number of violations, including”**
 - Releasing PCBs into the environment in a concentration greater than 50 mg/kg
 - Processing PCBs or a product containing PCBs in a concentration greater than 50 mg/kg
 - Failing to store PCBs at a PCB storage site and to send the PCBs or products containing PCBs for destruction
- **Accused pled guilty to 3 charges for violating the PCB Regulations under *CEPA, 1999***
- **Sentence included:**
 - Fine (\$52,500)
 - Ordered to develop policies and procedures (within 1 year) related to management of PCBs and other toxic regulated substances
 - Ordered to develop and implement an employee training program (within 1 year)
 - Refrain from importing or exporting electrical equipment (new or used) if they fail to comply with legal & regulatory requirements

QUESTIONS?


THANK YOU



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