



*The New Reliance on Criminal Prosecutions to Enforce
Environmental Compliance*



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THE NEW RELIANCE ON CRIMINAL PROSECUTIONS TO ENFORCE ENVIRONMENTAL COMPLIANCE

SMART REMEDIATION CONFERENCE – MARCH 2020



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INTRODUCTION

- **Over the past 5-10 years, Federal regulators have demonstrated an increased reliance on criminal prosecutions to enforce environmental compliance.**
- **This shift has several impacts, including:**
 1. Different range of penalties for polluting activities;
 2. Increased risk in the early stages of Government contact;
 3. New defences available to accused; and
 4. Impacts on securities and commercial transactions.
- **This presentation will focus on the practical implications of criminal environmental enforcement for companies (and their consultants) doing business in Canada.**

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CRIMINAL PROSECUTIONS – A LEGISLATIVE BACKGROUND

- **Federal and provincial governments have significantly increased the quantum of fines for environmental offences.**
- **For example:**
 - In 2009, the Federal *Environmental Enforcement Act* imposed mandatory minimum fines, a \$6M maximum fine for corporations, and fine doubling for subsequent offences.
 - In 2014, the Federal *Fisheries Act* increased the maximum fine for pollution offences from \$300,000 to **\$6M**.
- **Similar increases have taken place in Ontario and Quebec’s environmental legislation.**

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FINES BY THE NUMBERS

- **1991-2009: “Large fines” (over \$75,000) issued by the Federal government totalled an average of \$1.4M per year.**
 - **2018: a total quantum of \$15.7M in large fines was issued.**
 - **2019: courts issued 4 individual fines over \$1.4M.**
- **Adjusting for outliers, the number and quantum of fines steadily increased between 2014 - 2018.**
 - Despite a drop in overall fines in 2019, the average quantum of fine continued to rise.
- **The largest fine to date - \$196.5M – was issued to Volkswagen Aktiengesellschaft on January 22, 2020, after pleading guilty to 60 counts under the *Canadian Environmental Protection Act, 1999*.**

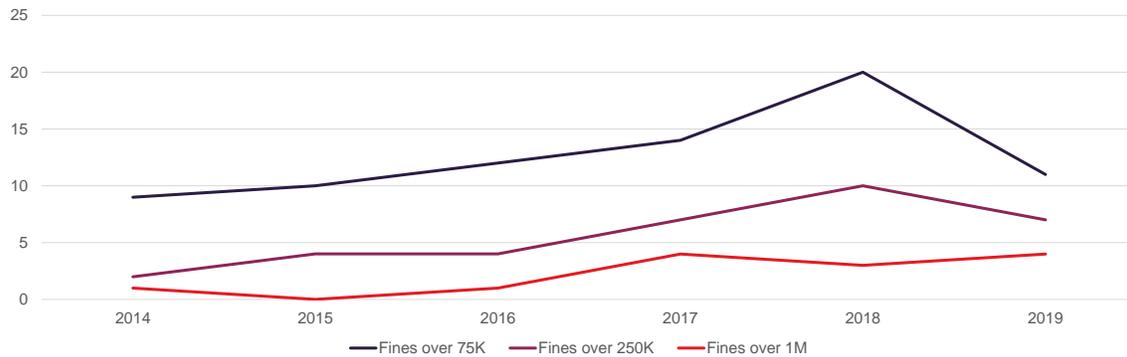
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FINES BY THE NUMBERS (CONT.)

Large Federal Fines for Environmental Offences



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ADMINISTRATIVE ORDERS VS CRIMINAL PROSECUTIONS

| Topic | Administrative Orders | Criminal Prosecutions |
|-------------------------------------------|-------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|
| Burden of Proof | Balance of Probabilities | Beyond a Reasonable Doubt |
| Procedural Safeguards | Depends on the administrative regime, but less than a standard court procedure. | Full criminal procedural rights, including certain Constitutional protections. |
| Defences | Limited; often absolute liability. | Due diligence, common law criminal defences, procedural and Constitutional defences. |
| Compliance and Enforcement Options | Orders to comply/refrain, AMPs, suspension or cancellation of permits. | Significant fines, monitoring obligations, potential jail time. |
| Investigative Techniques | <i>Inspections</i> – Can make recordings and inquiries. No right of silence or search warrants. | <i>Investigations</i> – Search warrants, arrest and subpoena powers, <i>Charter</i> rights engaged. |
| Environmental Offenders' Registry | Not listed. | Listed. |

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INVESTIGATIONS VS. INSPECTIONS

| Investigation | Inspection |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none">• A systematic process conducted by regulatory officials.• The main purpose of an investigation is to collect evidence that may be used in prosecuting statutory violations.• An investigation is triggered when information regarding possible offences under the law arises from an inspection, a monitoring program, an emergency, informants or other sources.• During an investigation, <i>Charter</i> rights are engaged. | <ul style="list-style-type: none">• A routine visit made by regulatory officials.• The main purpose of an inspection is gathering information to verify compliance with statutes, regulations, and orders.• Under an inspection, regulatory officials can take photographs, audio or visual recordings and samples, they can inspect and operate machinery, and they can make reasonable inquiries, including reasonable requests for statements and documents.• They do not need a search warrant. There is no “right to silence” during an inspection, but the purpose of the regulatory officials’ questions must be restricted to verifying compliance. |

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INVESTIGATIONS – SOURCES OF INVESTIGATION INFORMATION (PROSECUTIONS)

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

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DEFENDING CRIMINAL PROSECUTIONS

- **Most environmental offences are strict liability.**
 - As a result, the main defence available to accused corporations is due diligence.
- **Corporations may also claim the benefit of Constitutional and procedural protections.**
 - The application of the *Charter* to corporations is an evolving area of law.

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CRIMINAL LIABILITY OVERVIEW

| The Requirement of <i>Mens Rea</i> According to Type of Offence | | |
|-------------------------------------------------------------------------------|------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------|
| Full <i>Mens Rea</i> | Strict Liability | Absolute Liability |
| proof of a guilty act committed with full intention beyond a reasonable doubt | - <i>prima facie</i> proof of commission of the offence - due diligence defence | - commission of offence proved - <i>mens rea</i> assumed; no defence on basis of lack of intention |
| CRIMINAL CODE CRIMES | WIDE RANGE OF REGULATORY OFFENCES | |

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DUE DILIGENCE - OVERVIEW

- 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 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.

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DUE DILIGENCE – THE ‘GOLD STANDARD’

***R v Control Chem Canada Ltd.*, File No. Burlington 139537-01**

- Praised as “farsighted, thoughtful, and methodical” and indicative of a “culture of strong commitment to proper environmental standards”

R v Pacifica Papers Inc. (2002) 46 CELR (NS) 93

R v Chilliwack Cattle Sales Ltd., 2013 BCSC 1059

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DUE DILIGENCE AND CONTRACTING WITH THIRD PARTIES

- You cannot contract out of due diligence obligations, however contracts can help evidence that a company was duly diligent.
- From the regulatory perspective:
 1. Document clear communication of expectations at the point of procurement
 2. “Boiler plate” contracts are usually not enough
 3. Meeting of the minds: referring to a contract is usually not enough
 4. The case law indicates that contracts/agreements need another layer of specificity in order to be relied upon in a due diligence defence
- **Key take away:** For regulatory offences, contracts are only part of the “system of prevention”

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KEY TAKEAWAYS ON DUE DILIGENCE AND INVESTIGATIONS

| DO | DON'T |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Establish a due diligence system and remediation plan. Comprehensive training, clear communication, a focus on foreseeability and forethought into remediation are essential. | Merely establish a due diligence system 'on paper'. A due diligence system must be strictly followed to limit liability. |
| Approach investigations with caution. Think strategically about whether to be cooperative with investigators. | Let your guard down. Investigations will start immediately following the incident and can continue to the eve of trial. |
| Seek legal advice early. Information gathered in the first 48 hours after an incident will have a significant impact on the course of the prosecution. | Leave your employees unprepared. A spur of the moment comment by an employee can have serious consequences. |
| Be responsive to your probability of success at trial. Factors such as admission of responsibility and remorse are instrumental in setting a fine for an offence. | View spills as a 'cost of doing business'. A larger fine is more likely when the court views the conduct of the corporation as a mere 'cost of doing business'. Attendance during sentencing and demonstrations of remorse are critical. |

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COMMON LAW INTERPRETATION OF THE *CHARTER*

| Applies to Corporations | Does not apply to Corporations |
|------------------------------------------------|-------------------------------------------|
| Freedom of expression. | Life, liberty and security of the person. |
| Right to a fair trial. | Equal treatment before and under the law. |
| Right to a trial within a reasonable time. | Freedom of religion. |
| Secure against unreasonable search or seizure. | Live free from discrimination. |

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RIGHT TO A TRIAL IN A REASONABLE TIME (“DELAY”)

- **S.11(b) of the *Charter* protects individuals and corporations from unreasonably long criminal proceedings.**
- **In 2016, the Supreme Court of Canada set the following “ceilings” over which a delay is presumed to be unreasonable (the “*Jordan Framework*”):**
 - Provincial Court = 18 months
 - Superior Court = 30 months
- **If a delay exceeds the ceiling, an accused is acquitted unless the Crown can demonstrate “exceptional circumstances”.**
- **If a delay falls below the ceiling, the burden of showing the trial was unreasonably long falls on the accused.**
- **Delay attributable to or waived by the accused does not count towards the total delay time.**

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THE *JORDAN* FRAMEWORK AND CORPORATIONS

- In *Jordan*, the Court did not specify whether the framework applies to corporations.
 - If the *Jordan* framework does not apply to corporations, corporations will need to establish that they suffered prejudice before they can claim s.11(b) *Charter* rights.
- There is a persuasive argument in favour of applying *Jordan* to corporations.
- Lower courts in Alberta, Ontario, Quebec, Nova Scotia, and Nunavut have all applied *Jordan* to corporations.
 - A superior court has taken this issue under reserve in British Columbia.
- The recent Supreme Court of Canada application of the *Jordan* framework to Youth Offenders is instructive, but not determinative.

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IMPLICATIONS FOR SECURITIES AND COMMERCIAL TRANSACTIONS

- Environmental due diligence has never been more important.
- ***Remember* – While contracts may be reviewed for due diligence purposes, a corporation cannot contract out of its due diligence obligations.**
- Be wary of ongoing liabilities from past pollution activities.
- A key tool in transactional settings are *environmental indemnities*:
 - Indemnities must capture the scope of environmental enforcement mechanisms.
 - Indemnities must straddle a fine line: narrow enough to be enforceable, but broad enough to take into account future technologies and environmental laws / policy.
 - Seeking assistance from counsel when drafting / reviewing an indemnity is essential.

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QUESTIONS?

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