***INSIDER* SPECIAL REPORT: DUE DILIGENCE SCORECARD**

Environmental Compliance INSIDER™

Your Plain Language Guide to Due Diligence and Managing Environmental Liability

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REGULARS

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Liability for the Costs of Environmental Emergencies

Understanding the 'Mistake of Fact' Defence

How to Prove that You Properly Trained Workers

Corporate Liability for False 'Green' Claims

THE *INSIDER*'S 3rd ANNUAL DUE DILIGENCE SCORECARD, PART 1

Court Cases & the Practical Meaning of Due Diligence

Ask a group of EHS coordinators if they know what due diligence is and they'll all probably say, "Yes." It wouldn't be surprising if many of them were also able to explain that the due diligence defence means making all reasonable efforts to comply with environmental laws and prevent violations. But ask those same EHS coordinators to explain what *measures* a company must take to prove that it showed due diligence and they probably won't be able to give you a specific answer. This reaction is completely understandable. After all, there's a huge difference between understanding the principles of due diligence and applying those principles to real-life situations. Unfortunately, as an environmental coordinator, it's your job to ensure that your EHS program is legally sufficient and can withstand due diligence scrutiny. And the best way to do so is to recognize what measures your company must implement to prove that it showed due diligence.

One strategy for meeting this challenge is to be aware of the cases where companies raised a due diligence defence, figure out why they won or lost and use the lessons from these cases to judge the adequacy of your company's EHS program. But few environmental coordinators have the time or legal training to find and analyze all of the due diligence cases from across Canada. The *Insider*'s annual Due Diligence Scorecard was created for just this reason. Like we've done every January since 2007, the *Insider* has organized all of the reported EHS cases in which a due diligence defence was raised and compiled the results into a Scorecard. This year's version picks up where last year's left off—in September 2007. As in previous years, we'll begin by briefly

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COMPLIANCE 101

Must Canadian Companies Comply with Foreign Environmental Laws?

Complying with Canadian environmental laws is complicated enough. But for many companies, compliance obligations don't stop at the border. Canadian companies may also have to comply with the environmental laws of other countries, particularly the U.S. For companies operating outside Canada, the risk of liability under foreign environmental laws is a recognized part of doing business. But companies doing business entirely within Canada may also face the risk of liability for pollution under foreign environmental law —and yet may be completely unaware of this risk.

The risk of liability under U.S. environmental laws for Canadian companies has become a matter of increasing concern in recent months as a result of the U.S. Supreme Court's refusal to overturn the decision in a case called *Teck Cominco* in which a U.S. appeals court had ruled that the Canadian company was liable for pollution in Washington State caused by slag waste it admitted dumping into the Columbia River in BC.

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Environmental Compliance INSIDER™
Your Plain Language Guide to Due Diligence and Managing Environmental Liability

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explaining the concept of due diligence. Then we'll break down the results of the cases. The actual Scorecard begins on page 3.

Note to Readers

If you're a regular reader of the *Insider*, then you've probably already read our review of the due diligence basics in a previous Scorecard. Or you may already be familiar with the principles of due diligence. In either case, feel free to skip the analysis and go directly to the actual Scorecard at the end. But if you're new to the *Insider*—or you simply want to review the due diligence basics—keep on reading.

DUE DILIGENCE 101

In simple terms, an EHS prosecution often consists of two phases:

Phase #1: prosecution proves violation. To convict a company of an environmental offence, the prosecutor must prove "beyond a reasonable doubt" that the company violated an environmental law. If the prosecution fails to satisfy this burden, the case ends there with the dismissal of the charges. But even if the prosecutor satisfies this burden, the case doesn't automatically end with the company's conviction.

Phase #2: company raises due diligence defence. Once the prosecutor has proven that the company committed an environmental violation, the company can still avoid being held liable if it successfully argues a "due diligence" defence. Individuals such as CEOs, corporate directors, supervisors and even workers accused of environmental offences can also argue due diligence.

There are two types of due diligence defences:

Reasonable efforts. The most commonly used type of due diligence defence—and the simplest to prove—requires a defendant to demonstrate that it made all reasonable efforts to protect the environment, ensure compliance with environmental laws and prevent the offence. Thus, most of the cases reported in this year's Scorecard involve the reasonable efforts form of due diligence.

Reasonable mistake of fact. The second type of due diligence defence requires a defendant to prove that it reasonably relied on a set of facts that turned out to be untrue but had they been true would have made what it did (or didn't do) legal. The so-called "reasonable mistake of fact" defence is harder to prove and gets raised less often than the reasonable efforts branch of due diligence.

Analyzing the Due Diligence Defence

When a court analyzes a company's due diligence defence, it considers the facts of the particular case and weighs a number of factors. Although these factors vary depending on the specific facts of each case, the following ones are key:

Foreseeability. The environmental laws require companies to protect the environment from foreseeable hazards, including both general hazards and hazards specific to the particular industry, equipment and materials involved. The court will consider whether a reasonable person in the company's position would have foreseen that something could go wrong or whether the incident was a freak occurrence that was so unlikely that the company couldn't have reasonably expected it to occur.

Degree of harm. The greater the potential harm of a particular risk, were it to occur, the more a company is expected to do to ensure that it doesn't occur. Thus, companies may have a duty to guard against even remote risks if they involve a risk of serious harm to the environment.

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Preventability. Courts will consider whether the company had an opportunity to prevent something from going wrong and, if so, whether it made all reasonable efforts to do so, such as identifying hazards to the environment, creating policies to address those hazards and training workers and supervisors to follow those policies.

Control. Courts look at who had control over the situation—that is, who was present and could have prevented what went wrong. For example, suppose a supervisor sees a worker spill a hazardous substance onto the ground. If the supervisor doesn't order the worker to immediately clean up the spill or discipline him for failing to properly dispose of the substance, it will be difficult for the company to prove due diligence because a supervisor was present, had control of the situation and yet didn't take reasonable steps to ensure that such spills didn't happen again. (And if the supervisor himself faces environmental charges, he'll have an even harder time proving due diligence.)

THIS STORY WILL HELP YOU:

Understand how courts evaluated due diligence defences in real cases from the past year

THE SCORECARD

This year, we found 10 reported cases decided since September 2007 in which a court had to decide if a company successfully made out a due diligence defence in an environmental prosecution. That number may not seem like a lot. But remember: Most environmental prosecutions are resolved with a plea bargain and never go to trial. And even if a case does go to trial, the decision typically gets reported only if one of the parties appeals the verdict. Thus, the number of reported cases doesn't accurately reflect the number of actual prosecutions taking place.

Continuing the pattern from previous years, the due diligence defence failed more often than it succeeded. The results:

Wins. The company "won" in three cases, which occurred in NL and ON.

Losses. The company "lost" in seven cases, which came out of NL, NS, ON, PEI and SK.

Conclusion

For the 10 cases mentioned above, the Scorecard tells you whether the company (or individual) won or lost, what happened and how the court analyzed the due diligence defence. Next month, we'll tell you what lessons you can learn from these cases and how to apply those lessons to ensure that your company's EHS program can withstand due diligence scrutiny. ✦

DUE DILIGENCE SCORECARD

Here's a synopsis of 10 cases decided since September 2007. In each case, a Canadian court had to decide if a company successfully made out a due diligence defence.

COMPANY WINS ✓

NL: *Ralph*

What Happened: The captain of a fishing vessel had a fishing licence requiring him to be monitored by an approved Vessel Monitoring System (VMS) while fishing. He was charged with and convicted of fishing without being monitored by a VMS. The trial court concluded that the captain hadn't exercised due diligence in complying with the conditions of his licence. The captain had a duty to ensure that the VMS was activated and fully operational while he was fishing. But he had no system in place to ensure that the VMS was functioning properly. He simply assumed that it was working fine and didn't actively check that it was working and that the Department of Fisheries and Oceans (DFO) was receiving information from his VMS. The captain appealed.

Ruling: A NL Supreme Court overturned the conviction, ruling that the captain exercised due diligence.

Analysis: The appeals court said the trial court put too high of a burden on the captain. He'd had the VMS professionally installed and faxed the necessary information on the VMS to the DFO. The light on the system when it was activated indicated that it was working. In fact, the evidence showed that the VMS *was* working properly and transmitting the required information to the DFO. The problem was on DFO's end. They never processed the faxed information on the captain's VMS and so were unable to interpret the VMS's transmissions. In short, the captain had taken all reasonable steps to ensure that he was complying with his licence's requirements, concluded the appeals court.

[*R. v. Ralph*, [2008] NLTD 10 (CanLII), Jan. 24, 2008]

NL: *Patey*

What Happened: Fishery guardians saw a man and his son fishing for salmon. They inspected the salmon that had been caught and saw that the tags hadn't been properly secured. The fisherman was charged with violating the *Wild Life Regulations*. The fisherman raised a mistake of fact defence, arguing that he'd thought that his son had properly tagged the salmon and didn't know that his son had tampered with the tags.

Ruling: A NL Provincial Court dismissed the charge, ruling that the fisherman's mistake of fact was reasonable.

Analysis: The court explained that the defence of mistake of fact requires "an honest belief, reasonably held." The court was satisfied

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that the fisherman honestly believed that his son had properly tagged the salmon. Given the nature of their relationship, that belief was reasonable. In addition, the fisherman had no reason to be suspicious of his son or to immediately check the tags after his son had attached them. In fact, he'd caught the salmon only a short time before the guardians asked to inspect them and so didn't even have a chance to check the tags.

[*R. v. Patey*, [2008] CanLII 2132 (NL P.C.), Jan. 28, 2008]

ON: *Williams Operating Corp.*

What Happened: A mine had an intake screen on a submerged pump well in a sedimentation pond. The screen got clogged with debris, which prevented water from accessing another pump well. So the water level in the pond rose and overflowed into a lake. Water samples taken from the pond after the spill showed a pH level over the legal limit. But by the next day, the pH level was within the government water quality requirements. However, the mine was charged with violating the *Fisheries Act* by discharging a "deleterious substance" into water frequented by fish. The trial court acquitted the mine, ruling that it had exercised due diligence. The prosecution appealed.

Ruling: An Ontario Superior Court ruled that the mine exercised due diligence.

Analysis: The appeals court said that the trial court's decision was reasonable. Due diligence involves two things: setting up an efficient system to prevent violations and properly operating that system. The mine had done both. It had two warning systems in place that were operating properly when the spill occurred. Neither indicated a problem because the plugging of the intake screen meant that the water level in the pump well didn't accurately reflect the water level in the pond. And the screen that got clogged was submerged and so couldn't be inspected. The screen had never clogged before and so it was appropriate for the trial court to conclude that such clogging couldn't have been reasonably foreseen.

[*R. v. Williams Operating Corp.*, [2008] O.J. No. 3736, Sept. 3, 2008]

COMPANY LOSES ✗

NL: *Moss*

What Happened: Two fishermen were allowed to catch 22,381 pounds of crab from the area in which they were fishing. But they landed 24,500 pounds, an overage of 2,169 pounds or 9.7%. They were charged with violating the *Fisheries* (*General*) *Regulations*. The trial court convicted the fishermen, so they appealed.

Ruling: A NL Supreme Court upheld the conviction, ruling that the fishermen didn't exercise due diligence.

Analysis: The fishermen argued that they'd exercised due diligence in estimating the weight of their catch. They said that a discrepancy of 5% to 10% was common in the crab fishing industry. They also claimed that the trial court was requiring "absolute precision." But the appeals court disagreed. The trial court didn't require an absolutely precise measure of the crabs' weight but a reasonable approximation. It noted that the Department of Fisheries and Oceans gave fishermen a 5% leeway. And there was evidence that most fishermen were able to come within 5%. But these fishermen were over by 9.7%. And given their years of experience, this discrepancy was significant. So the appeals court concluded that it was reasonable for the trial court to find that the fishermen hadn't exercised due diligence in coming to a reasonable approximation of the crabs' weight.

[*R. v. Moss*, [2007] NLTD 185 (CanLII), Oct. 23, 2007]

ON: *Vastis*

What Happened: A government engineer noticed long, narrow clearings in a designated Environmentally Sensitive Area. Trees had been removed and piled. Other standing trees were marked for removal. The government issued a stop-work order against the company that owned the land. But the company removed additional trees anyway. The company and an officer were charged with violating a local bylaw and the *Forestry Act*. The company and officer were convicted and so appealed.

Ruling: An Ontario Court of Justice upheld the convictions, ruling that the company and officer didn't exercise due diligence.

Analysis: The appeals court ruled that the trial court's findings were reasonable. The officer claimed that he removed the trees so he could farm the land. But the evidence showed that the clearings weren't consistent with good farming practices. They were, however, consistent with the early development of a nine-hole golf course. And the officer also owned a golf driving range. The trial court concluded that the officer had "proceeded without taking any due diligence in this matter. No reasonable person would destroy these trees without finding out if they can." It added that the officer hadn't consulted any experts or even his wife, who was the company's secretary and a lawyer.

[*Halton* (*Regional Municipality*) *v. Vastis*, [2008] O.J. No. 354, Jan. 30, 2008]

SK: *Thiel*

What Happened: Wildlife zone 49 was closed for moose hunting, while nearby zone 59 was open season for moose. Two hunters were driving back to their camp when they saw a moose. They got out of their vehicle and shot at the animal, which ran into the brush. One hunter flushed the moose out of the brush and toward the other, who killed it. Another hunter saw that the hunters had shot a moose in zone 49 and contacted officials. The hunters were charged with violating *The Wildlife Act*.

Ruling: A Saskatchewan Provincial Court convicted the hunters, ruling that they didn't exercise due diligence.

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Analysis: The hunters argued that they'd exercised due diligence by asking "some local gentlemen" where the boundaries of zone 59 were. They followed the directions they were given and so thought they were in the proper zone when they killed the moose. But the court found that merely talking to some locals wasn't due diligence. There was no evidence to suggest that these men had any particular knowledge of the zones' borders. In addition, the hunters could have checked the hunting guide, which has maps of the zones. Or they could have done what other hunters routinely do—contact the local wildlife office, noted the court.

[*R. v. Thiel*, [2008] S.J. No. 278, April 25, 2008]

NS: *Bennett*

What Happened: A land surveyor was hired to survey land and file an application for an on-site sewage disposal system. Using his sight level, he concluded that the slope was 20%+ and submitted that information on the application. But a government inspector determined that the slope was actually less than 5%. The surveyor was charged with knowingly providing false information on the application in violation of the *Environment Act*. He argued mistake of fact, claiming that he'd relied on the reading from his sight level, which was wrong.

Ruling: A Nova Scotia Provincial Court convicted the surveyor, rejecting his mistake of fact defence.

Analysis: Although the surveyor claimed that the sight level was the source of the mistake, there was no evidence to support his claim. He'd used it before without problems. And he let the level get so damaged that subsequent testing of it was impossible. Even if the surveyor's belief was honest, it wasn't reasonable, said the court. A reasonable person in his position would surely have been able to tell the large difference between a 20% slope (a steep hill) and a 5% slope (a relatively gentle slope), noted the court.

[*R. v. Bennett*, [2008] N.S.J. No. 286 (CanLII), July 2, 2008]

ON: *Inco Ltd.*

What Happened: A nickel mining company used water, which would get tainted with high levels of nickel. So it was stored in a pond until it could be treated with lime and released into a nearby creek. The company closed the mining complex, including the water treatment system. A worker detected water flowing from an area near the pond and into the creek. Tests revealed that the escaped water had high levels of nickel. As a result, the company was charged with discharging untreated mine effluent into the creek in violation of the *Ontario Water Resources Act*.

Ruling: An Ontario Court of Justice dismissed the charges because there was a reasonable doubt as to whether the untreated mine effluent discharged may have impaired the water quality. But the court noted that if it had ruled otherwise on the mine effluent, it would have rejected the company's due diligence defence.

Analysis: The workers had failed to follow reasonable precautions to monitor the pond levels and failed to follow the company's own shutdown procedures. The company had "poorly prepared" its workers to perform these tasks. The court concluded, "There was little in the defendant's conduct on this occasion that can be described as reasonable or due diligence. This is more in keeping with persons having been asleep at the switch or demonstrating a surprising insouciance about their obligations to monitor their operations."

[*R. v. Inco Ltd.*, [2008] O.J. No. 2963 (CanLII), July 23, 2008]

NL: *Miller*

What Happened: Four hunters onboard a boat had migratory bird hunting permits, which set a daily bag limit of 20 birds each. But when conservation officers inspected the boat, they found 89 murres (known locally as turrs). The hunters were charged with violating the daily bag limit and argued due diligence.

Ruling: A NL Provincial Court convicted the hunters, ruling that they didn't exercise due diligence.

Analysis: Essentially, one hunter drove the boat through a flock of the birds, while the other hunters shot at them. According to one hunter, it was "impossible" to keep count of the turrs killed during the hunt. He explained that to maximize the return on effort, they had to shoot as many birds as possible. The court said, "There is no air of reality to the proffered defence of due diligence." The hunters "displayed a gross ignorance of the duties of a responsible hunter, as well as an insouciance bordering on the bewildering towards conservation," criticized the court.

[*R. v. Miller*, [2008] N.J. No. 249, Sept. 16, 2008]

PE: *Dorgan*

What Happened: Lobster fishing areas (LFAs) 24 and 25 are contiguous. LFA 24 is open in the spring, while LFA 25 is open in the fall. In September, fisheries officers came upon lobster traps that were in LFA 24. One set of traps ranged from 49.1 to 73.3 metres inside LFA 24; the other set ranged from 16.3 to 73.5 metres inside that zone. The traps belonged to two fishermen who were licensed to fish in LFA 25. The fishermen were convicted of violating the *Atlantic Fishery Regulations*. They appealed.

Ruling: A PEI Supreme Court upheld the convictions, ruling that the fishermen didn't exercise due diligence.

Analysis: Although the fishermen didn't set their traps in LFA 24, they did set them close to the closed zone's border. One fisherman said that he doesn't intentionally go over the border, but "it's a chance I take." In fact, he admitted that his traps had drifted over the line earlier that same day and yet he reset his traps in the same general area. The appeals court concluded that the fishermen did *nothing* to show due diligence.

[*R. v. Dorgan.*, [2008] PESCTD 37 (CanLII), Oct. 1, 2008]

BRIEF YOUR CEO

A monthly safety briefing to educate management

C-45 Isn't the Only Ticket to Jail for Environmental Offences

The owner of a used tire business in Ontario was convicted of illegally storing used tires in violation of the province's *Environmental Protection Act*. The court fined him $7,500 and ordered him to remove all used tires from the property within 180 days. But seven months later, the owner had neither removed the used tires nor paid the fine. So the government charged him with failing to comply with a provincial court order. The owner pleaded guilty. The court fined him another $12,000. And to ensure that he learned his lesson, it sentenced him to three months in prison [*R. v. Piontek*].

THE PROBLEM

When C-45 took effect on March 31, 2004, it became possible for the Crown to prosecute companies and individuals for environmental offences resulting in serious bodily harm or death as crimes. Individuals convicted of criminal negligence under C-45 for such offences face the risk of not only criminal fines but also prison sentences. Individuals convicted of criminal negligence causing bodily harm could get up to 10 years in jail, while those convicted of criminal negligence causing death could get life sentences. C-45 hasn't produced as many prosecutions as expected. But officers and directors shouldn't be lulled into thinking that jail for environmental offences is *only* a possibility in criminal prosecutions. On the contrary, officers and directors can also be sentenced to jail time if they're convicted of environmental offences in regulatory prosecutions. In fact, getting a jail sentence for a regulatory offence is much more likely than getting a jail sentence for a C-45 violation. The *Piontek* case is a good example of a situation in which an individual was sent to jail for an environmental offence—and one that, in the grand scheme of things, wasn't terribly serious.

THE EXPLANATION

Like OHS offences, environmental offences are generally considered "regulatory" offences rather than crimes. So the typical penalty for such offences is a fine. But some environmental offences may be so serious that they carry the risk of imprisonment. Typically, individuals are only jailed for such offences if:

The offence resulted in serious bodily injury or death. Jail sentences are more common for OHS offences than environmental ones because, by their very nature, OHS offences are more likely to lead to a worker's injury or death. (Of course, jail sentences for OHS offences are still rare.) But that doesn't mean an environmental offence can't lead to injuries or deaths. For example, if a plant manager illegally disposes of a hazardous substance in a lake in which children swim, causing the kids to become seriously ill, the manager may get hit with a jail sentence.

The conduct was particularly egregious. If an individual's conduct is particularly egregious, the court may impose a jail sentence. For example, in BC, anyone who commits an environmental offence intentionally or with "wanton or reckless disregard for lives and safety" can be sentenced to up to three years in jail [*Env. Mgmt. Act*, Secs. 125 and 126]. And in YT, individuals who intentionally or recklessly cause "material impairment" of the environment can get up to five years in jail [*Env. Act*, Sec. 175].

The individual has prior convictions for similar conduct. Just like in criminal cases, individuals with prior convictions for environmental offences can expect to get harsher sentences for subsequent offences, especially if they engage in the same conduct. Courts may conclude that prior fines weren't enough to deter the commission of future crimes and thus be more inclined to sentence repeat offenders to jail. For example, a man was charged with illegal trout fishing. It turns out that he had two prior convictions for similar offences. So the court sentenced the fisherman to a month in prison [*R. v. Hobbs*].

So where does the *Piontek* case fit? The owner's illegal storage of used tires on his property certainly didn't hurt or kill anyone and he didn't have any prior convictions. But the court clearly felt that his flagrant disregard of the order to clean up his property and pay a fine warranted jail. And the *Piontek* case isn't an aberration.

Example: An Ontario waste disposal operator expanded his operation without a Certificate of Approval. He was fined $110,000 and ordered to clean up the site. But he didn't. So he was charged with violating the MOE's order. The operator pleaded guilty and was sentenced to 60 days in jail and 60 days probation [*R. v. Valleau*].

THE LESSON

Although it doesn't happen very often, individuals—including a company's owners, officers and directors—can go to jail for environmental offences. A jail sentence is a real possibility for egregious conduct that either harms people or causes substantial harm to the environment. It's also likely if you cavalierly disregard orders from the court or other government officials. So you and your fellow officers and directors can't assume only your wallets are at risk if convicted of an environmental offence. The owner in *Piontek* learned that lesson the hard way.

SHOW YOUR LAWYER

R. v. Hobbs, Federal Govt. News Release, Feb. 19, 2007

R. v. Piontek, ON MOL News Release, Feb. 23, 2007

R. v. Valleau, ON MOL News Release, Jan. 5, 2007

MONTH IN REVIEW

A roundup of important new legislation, regulations, government announcements, court cases and arbitration rulings.

REPORT OF THE MONTH

Status of the National Standard for PHC Contamination in Each Part of Canada

The large number of sites with petroleum hydrocarbon (PHC) soil and groundwater contamination has become a multi-billion dollar problem across Canada. When released into the environment, PHCs pose significant risks, including fire/explosion hazards, human and environmental toxicity, odour and impairment of soil processes, such as water retention and nutrient cycling. So in 2001, the Canadian Council of Ministers of the Environment (CCME), with the exception of Québec, endorsed the Canada-wide Standard for Petroleum Hydrocarbons in Soil (PHC CWS) to provide for a nationally consistent approach to PHC-impacted site assessment across Canada. Under the standard, which was revised in 2008, jurisdictions must report at specific intervals on their implementation of the PHC CWS. How is each jurisdiction doing in its implementation efforts? The CCME just released its 2008 report answering this question. Here's a rundown of what's happening in each jurisdiction.

THE REPORT

Federal: In 2005-6, the Federal Contaminated Sites Action Plan (FCSAP) was created to deal with contaminated sites subject to federal regulations. FCSAP guidance advocates the use of PHC CWS at federal contaminated sites. In addition, Environment Canada continues to provide training on use of the PHC CWS to federal custodians of contaminated sites.

Alberta: The province adopted the original PHC CWS in June 2001. It then incorporated the 2008 revision into its Tier 1 and Tier 2 soil and groundwater remediation guidelines.

Atlantic Provinces (NB, NL, NS and PEI): Under an earlier agreement, the Atlantic provinces use the Atlantic Partnership in RBCA Initiative (PIRI) PHC Guidelines, which differ in some respects from the PHC CWS. However, the Atlantic provinces are also considering whether to update the PIRI PHC Guidelines to incorporate the 2008 PHC CWS.

BC: BC hasn't yet adopted the PHC CWS under its *Contaminated Sites Regulation*. However, the province's Science Advisory Board has recommended that the province review its current soil standards protocol. Following this review, BC will reconsider adopting the PHC CWS.

Manitoba: Manitoba adopted the PHC CWS under Sec. 57(1) of *The Contaminated Sites Remediation Act*. It also amended several guidelines to reflect the application of the standard in the province.

Northwest Territories: The government revised its Environmental Guideline for Contaminated Site Remediation in November 2003 to incorporate the PHC CWS.

Nunavut: Nunavut intends to review and update its Environmental Guideline for Site Remediation to reflect the new PHC CWS. But this goal has taken a backseat to more pressing issues in the territory.

Ontario: Ontario passed the *Record of Site Condition Regulation* in June 2004, effectively incorporating the PHC CWS in the Soil Groundwater and Sediments Standards.

Québec: Although Québec didn't endorse the PHC CWS, it continues to review the science on which the standard is based and to participate in the standard's committee.

Saskatchewan: The province didn't enact any specific regulations to implement the PHC CWS. But it has applied the standard to all sites in Saskatchewan since the introduction of Environmental Protection Bulletin 344 in 2006.

Yukon: Yukon is in the process of amending its *Contaminated Sites Regulation*. One of the key amendments will be the adoption of the PHC CWS. ✦

SK

LAWS & ANNOUNCEMENTS

Environmental Technology
Oct. 16: A $160,250 grant from the Green Initiatives Fund will help a company bring its biomass briquetting technology to market. The process will turn waste agricultural and forestry biomass, such as oat hulls, into a carbon-neutral heat and energy source that can replace coal and firewood.

CASES

Anglers Fined $15,500 for Fisheries Violations
After getting calls to the Turn in Poachers (TIP) line, investigators found two men fishing in a lake designated for catch and release only due to reduced fish levels. A search of their boat revealed over-limits of fish and violations of maximum length limits. The two fishermen were each convicted of two violations of the *Fisheries Regulations*. The court fined them $7,750 apiece [*Paulsen and Wiberg*, Govt. News Release, Oct. 17, 2008].

Court Orders Pawn Shop Owner to Pay $25,000 for Trafficking in Wildlife Parts
A year-long investigation determined that the owner of a pawn shop was trafficking in illegal wildlife parts, such as bald and golden eagle parts. The owner was convicted of violating *The Wildlife Act*. The court ordered her to pay $25,000, including $1,200 to the Wild and Exotic Animal Medicine Society, a non-profit that rehabilitates raptors and returns them to the wild [*Linda Bomak*, Govt. News Release, Oct. 15, 2008].

FEDERAL

LAWS & ANNOUNCEMENTS

BPA
Oct. 17: The government announced plans to draft regulations barring the import, sale and advertising of polycarbonate baby bottles that contain bisphenol A (BPA), an organic compound used in plastic products that has been linked to cancer. It will also take action to limit the amount of BPA being released into the environment. Because BPA breaks down slowly and is widely used, the chemical could build up in waters and harm fish and other organisms over time.

Natural Gas
Oct. 23: According to a National Energy Board report, conventional natural gas production is expected to decline by approximately 7% by 2010. But further development of shale and tight gas prospects in northeast BC may offset this decline.

CASES

Lawsuit Against Government for Not Enforcing Kyoto Duties Dismissed
Friends of the Earth, a non-profit environmental organization, sued the federal government for failing to comply with Canada's duties under the Kyoto Protocol and to publish proposed regulations for reducing GHG emissions. The government asked the court to dismiss the lawsuit, arguing that the claims weren't suitable for a court to review. The court agreed and dismissed the case, ruling that the court has no role to play in reviewing the reasonableness of the government's response to Canada's Kyoto commitments and that the issues in the case were "policy-laden considerations" [*Friends of the Earth v. Canada* (*Governor in Council*), [2008] F.C.J. No. 1464, Oct. 20, 2008].

Canada Sued for Failing to Protect Killer Whale Habitat
Six environmental groups sued the Department of Fisheries and Oceans for failing to protect the critical habitat of killer whales on the BC coast. The two types of whales in question—the endangered southern resident killer whales and threatened northern resident killer whales—are both formally listed under the *Species at Risk Act*. According to the lawsuit, the southern resident killer whale population fell by about 20% between 1993 and 2003 and there are only about 220 northern resident whales [www.ens-newswire.com, Oct. 8, 2008].

Logging Company Fined $60,000 for Destroying Great Blue Heron Nests
A company's logging operations destroyed eight Great Blue Heron nests, a migratory bird protected by the *Migratory Birds Convention Act*. The company pleaded guilty to a violation of that act. The court fined it $60,000 and ordered it to create a buffer zone to prevent further forestry activity in the area where the nests were damaged [*J.D. Irving Ltd.*, Govt. News Release, Oct. 20, 2008].

Canadian Environmental Assessment Agency Actions
Assessment actions in Oct.:
- Awarded $175,000 to five applicants for their participation in the environmental assessment of the proposed Bruce Power New Nuclear Power Plant Project [07-05-25738, Oct. 22]
- Awarded $13,000 to the Métis Nation of Ontario for its participation in the environmental assessment of the proposed Lower Mattagami Hydroelectric Complex Redevelopment Project [07-03-26302, Oct. 16].

ONTARIO

LAWS & ANNOUNCEMENTS

Great Lakes
Oct. 16: The U.S. government signed the Great Lakes-St. Lawrence River Basin Water Resources Compact. This step enacts into U.S. law a cross-border partnership among Ontario, Québec and eight Great Lakes states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin) to:
- Place a virtual ban on removing or transferring water out of the basin
- Establish a common standard for managing this resource
- Set goals and objectives for conserving water
- Commit the parties to creating a science strategy for critical issues facing the Great Lakes.

Green Transportation
Oct. 30: Under the four-year, $15 million Green Commercial Vehicle Program, Ontario businesses can now apply for grants to:
- Purchase hybrid and alternative-fuel vehicles
- Retrofit heavy duty vehicles with anti-idling technology.

Clean Energy
Oct. 30: The Ontario government claimed that the province has become the national leader in wind power generation capacity thanks to the launch of the second phase of the Melancthon EcoPower Centre. The province now has a total wind capacity of 617.5 megawatts, placing it ahead of AB and QC. The first phase of the project has been in operation since March 2006.

Recycling
Oct. 16: The government released a discussion paper on the *Waste Diversion Act* to solicit feedback on the law, the programs associated with the law and new approaches to waste diversion in the province. Comments may be submitted through the Environmental Registry at www.ebr.gov.on.ca (Registry #010-4676) until Jan. 15, 2009.

CASES

Ottawa Fined $450,000 for Discharging Sewage into River
Due to extremely heavy rains, the regulator gate that directs municipal sewage got jammed, resulting in the illegal release of 764 million litres of sewage into the Ottawa River for 12 days. The city pleaded guilty to two violations of the *Ontario Water Resources Act* and was fined $450,000 [*City of Ottawa*, Govt. News Release, Oct. 10, 2008].

NB

LAWS & ANNOUNCEMENTS

Clean Energy
Sept. 12: The government released a possible model for a community wind energy program. A report on the model includes 29 recommendations and options on developing the program. The Department of Energy and other provincial departments are reviewing these recommendations.

Chromium Trioxide
Oct. 29: The Department of Health warned homeowners and businesses in the Evergreen Park area outside of Fredericton not to drink their well water or use it for cooking or bathing after a spill of chromium trioxide. Monitoring wells have been drilled to determine the extent of the contamination.

Greenhouse Gases
Oct. 31: The province's GHG emissions will be reduced by two new projects being supported by the New Brunswick Climate Action Fund. One project involves the installation of a landfill gas collection, recovery and utilization system that will produce electricity from the methane recovered. The other project involves the construction of a second powerhouse at a hydroelectric dam.

Wood Stoves
Oct. 30: The government encouraged residents using wood stoves or furnaces to heat their homes to take steps to reduce the adverse effects of wood smoke on health and air quality, such as using EPA-certified stoves and burning only small, dry pieces of wood that have been seasoned for at least six months. Wood smoke contains some potentially toxic substances, such as carbon monoxide, nitrogen oxide and organic gases.

CASES

Town Fined $1,000 for Clean Water Violation
A town pleaded guilty to failing to comply with a term or condition of its approval to operate the potable water distribution system in violation of the *Water Quality Regulations* of the *Clean Environment Act*. The court fined it $1,000 [*Town of Bouctouche*, Govt. News Release, Oct. 10, 2008].

BRITISH COLUMBIA

LAWS & ANNOUNCEMENTS

Environmental Enforcement
Oct. 17: The Ministry of Environment released the second Quarterly Compliance and Enforcement Summary for 2008. Government enforcement efforts yielded more than $147,900 in fines for the quarter. Highlights:
- Eight orders issued to prevent or stop impacts on the environment, human health or safety
- 42 administrative licensing sanctions taken against individual or commercial hunters or anglers
- 463 tickets issued
- 10 court convictions secured.

Invasive Plants
Oct. 28: The government is granting over $800,000 to help fight invasive plant species and protect the province's natural environment. Invasive plants push out native plants and pose an economic threat to the forestry and ranching sectors.

Climate Change
Oct. 24: More than 100 teachers and their classes in 13 post-secondary schools took part in goBEYOND's Teach-In to help examine the climate change crises and find ways that students and schools can take action to fight climate change. goBEYOND provided a short video to start the discussion as well as information on steps students can take to become climate-neutral.

Forestry
Oct. 15: The province is investing $12.5 million in the Forest Investment Account Forest Science Program for research into improving timber growth practices, responding to the impacts of climate change and maximizing the benefits of BC's forest resources. The program will use the money to fund 216 new and ongoing projects.

Clean Transportation
Oct. 20: The Quesnel school district now has a hybrid school bus in service. The environmentally friendly bus combines a diesel engine with a battery-powered electric motor. The batteries recharge whenever the brakes are applied. The hybrid bus will emit 90% less diesel particulate matter than standard diesel buses and use less fuel.

Schools
Oct. 8: To celebrate International Walk to School Day, the Education Minister challenged BC schools to go green by setting up a walking school bus or bicycle train to reduce their carbon footprints. If just nine families regularly walked or biked to school over a year, they could prevent almost 1,000 kg of CO_2 from being released into the atmosphere, the government claims.

CASES

Resident Slammed for Killing Bear Cub Near School
A man shot and killed a black bear cub on a school day near a secondary school. A witness saw the shooter drive away, called the police and provided the shooter's licence plate number. The shooter was arrested and convicted of violating the *Wildlife Act*. The court fined him $1,200, ordered him to pay $1,800 to the Habitat Conservation Trust Foundation, barred him from hunting for three years and required him to perform 30 hours of community service. He also has to write a letter of apology and publish it in two local papers at his own expense [*Andrew Robertson*, Govt. News Release, Oct. 24, 2008].

Environmental Assessments
The Environmental Assessment Office took the following actions in Oct.:
- Issued Section 11 orders for the environmental assessment (EA) process for the BC Hydro Mica 5 and Mica 6 Projects [Oct. 28]
- Invited public comment on the Prosperity Gold-Copper Project [Oct. 24]
- Issued a Section 11 order for the EA process for the Cache Creek Landfill Extension Project [Oct. 22]
- Invited public comment on the Morrison Copper-Gold Project [Oct. 21]
- Invited public comment on the Northern Rockies Secure Landfill Project [Oct. 15].

YUKON

LAWS & ANNOUNCEMENTS

Forestry
Oct. 27: The government tabled the Forest Resources Act, a law designed to build a viable forestry industry while preserving the Yukon's environment. The proposed law focuses on three pillars: planning, tenure and compliance/enforcement.

Climate Change
Oct. 10: The Yukon Geological Survey is working on four projects to address the effects of climate change on landslides to improve Yukon's ability to predict future terrain disturbances. The projects will study permafrost in particular, which is extremely sensitive to external influences.

Recycling
Oct. 20: The territory is giving an additional $273,200 a year to support recycling programs, doubling the current budget for such programs. Some of the new funds will go to recycling action and education in the schools.

Environmental Initiatives
Oct. 29: The One Million Acts of Green campaign was launched by CBC's *The Hour* and asks Canadians to commit "acts of green," such as recycling, walking to work and composting. And now Yukon's Environment Minister is encouraging Yukoners to join in this national challenge. Participants can register their acts of green on an interactive website, www.onemillionactsofgreen.com, which will calculate the environmental impact of these acts.

MB

LAWS & ANNOUNCEMENTS

Greenhouse Gases
Oct. 30: The government unveiled new tools to help residents understand and take action on climate change issues. The Green Registry is a website containing an expanding database of residential and business incentive programs, GHG protocols, calculators and climate-change service providers. See, www.greenregistry.org.

Recycling
Oct. 7: Through the Home Appliance Retirement Program, the government and the Kidney Foundation of Canada–Manitoba Branch will help Winnipeggers retire their unwanted, energy inefficient home appliances for free. The Kidney Foundation will pick up the appliances and safely recycle them. And the money it raises in the process will help residents with kidney disease and fund research.

PEI

LAWS & ANNOUNCEMENTS

Lobster Fishery
Oct. 31: Lobster landings in the 2008 fall fishery in Lobster Fishing Area 25 are similar to last year's landings. Preliminary figures for the year:
- Total landings: 21.9 million pounds
- Landed value: $100 million.

Clean Energy
Oct. 17: The government released a provincial wind development policy, the first step toward the goal of having 500 megawatts of wind energy produced on the Island by 2013. The 10-point plan will help provide energy security and price stability while benefitting consumers and communities and reducing the province's dependence on imported power.

QC

LAWS & ANNOUNCEMENTS

Mining
Oct. 20: Lawyers from the uOttawa-Ecojustice Environmental Law Clinic are defending three academic authors and a small Québec publisher in a lawsuit about a book on the controversial activities of several Canadian mining companies in Africa. Two of the mining companies have sued them for defamation.

CASES

Environmental Convictions
The following environmental convictions were secured in Oct:
- An abattoir pleaded guilty to an environmental offence and was fined $16,200 [*Abattoir Saint Germain Inc.*, Govt. News Release, Oct. 30]
- A pig farm pleaded guilty to an environmental offence and was fined $2,000 [*Pork SB Inc.*, Govt. News Release, Oct. 14].

NOVA SCOTIA

LAWS & ANNOUNCEMENTS

Clean Energy
Oct. 8: The Department of Energy has added a wind atlas to its website, www.gov.ns.ca/energy, to help individuals and small organizations determine whether wind power is a good option for them. The maps in the atlas show wind speeds, colour-coded based on velocity, at three different heights—30, 50 and 80 metres above ground—at specific locations.

Energy Efficiency
Oct. 1: Updates to the *Energy-Efficient Appliances Act* that will help residents be more energy efficient took effect. The updated Act now applies to the sale of:
- Wood burning appliances
- Household electric ranges, washers and dryers
- Refrigerators
- Room air conditioners
- Lighting products.

Green Buildings
Oct. 17: The government proposed changes to the building and plumbing codes to increase energy efficiency in homes and offices. The revisions, which will take effect April 1, 2009, will replace and surpass EnerGuide home efficiency goals identified in the *Environmental Goals and Sustainability Act*.

Natural Resources
Oct. 29: The government sought feedback on a working paper outlining residents' thoughts about the future of the province's natural resources. The information was gathered from 27 community meetings and about 600 written submissions on Nova Scotia's biodiversity, forests, minerals and parks.

Nature Reserves
Oct. 16: Five new nature reserves will protect old-growth forests, wetlands, rare species' habitats and ecosystems. The new reserves, located in four counties, will protect a total of 594 hectares and be designated under the *Special Places Protection Act*.

CASES

Five Hunters Fined for Exceeding Daily Bag Limit for Ducks
Conservation officers arrested five hunters on opening day of migratory bird season and charged them with exceeding the daily bag limit for ducks. Officers also seized 46 sea ducks, six shotguns, lead ammunition and a marine fuel can that was modified to smuggle extra ducks to shore. The hunters were fined a total of $2,500 [Govt. News Release, Oct. 27, 2008].

ALBERTA

LAWS & ANNOUNCEMENTS

Construction Waste
Oct. 23: Under a landmark agreement among the government, the Alberta Construction Association and the Canadian Home Builders' Association-Alberta, the province will begin to recycle construction and demolition waste. Such waste makes up 23% of the waste stream. The agreement sets out a timeline for the creation of a stewardship program to deal with this waste.

Carbon Capture
Oct. 16: The government is providing $6.6 million in funding for the drilling of three test wells as part of a long-term, large volume carbon capture project. Information from the field tests will be incorporated into Alberta's Climate Change Strategy. The field test phase of the project is expected to be completed by June 2010.

Recycling
Oct. 22: New regulations will make Alberta the first province to accept all milk cartons at bottle deposit locations. The deposit and option to return milk containers will take effect June 1, 2009. The regulations also increase deposit refunds on containers already in the program, such as pop, juice, beer, wine and spirit containers, as of Nov. 1, 2008.

CASES

Government Issues Enforcement Order to Power Company
The government issued an environmental enforcement order to a power company for failing to comply with several approval conditions, including air emissions monitoring and reporting requirements. Under the order, the company must verify that its EMS complies with IO 14001 requirements and provide all outstanding reports [*Valley Power Corp.*, Govt. News Release, Oct. 10, 2008].

Investigation of Pipeline Failure Complete
The ERCB finished its investigation of the failure of a sour gas pipeline near Beaver Mines. Its conclusion: Pipeline stress in areas where internal corrosion existed caused the failure. A suspension of the company's 23 pipelines in the area is still in effect until the company complies with all ERCB directives [*Shell Canada Ltd.*, Govt. News Release, Oct. 7, 2008].

ERCB Actions
Alberta Energy Resources and Conservation Board actions in Oct.:
- Reinstated well licence for Pembina Field for Highpine Energy Ltd. [2008-106, Oct. 28]
- Approved withdrawal of application to establish a holding for High River Field for Compton Petroleum Corp. [2008-104, Oct. 28]
- Approved well, facility and pipeline licences for Bentley Field for Canadian Natural Resources Ltd. [2008-102, Oct. 28]
- Approved withdrawal of application for special oil well spacing at Bonanza Field for NAL Resources Ltd. [2008-098, Oct. 28]
- Approved multi-well licence for Grande Prairie Field for Standard Energy Inc. [2008-093, Oct. 21]
- Approved pipeline licence for Sylvan Lake Field for Anderson Energy Ltd. [2008-096, Oct. 14]
- Denied pipeline licence for Royal Field for OMERS Energy Inc. [2008-092, Oct. 14].

NEWFOUNDLAND

LAWS & ANNOUNCEMENTS

Waste
Oct. 20: As part of Waste Reduction Week, the government reminded residents of the importance of protecting the environment through waste reduction. Every year in NL, approximately 480,000 tonnes of waste—about two kg per person per day—go into landfills. For information on how to reduce waste, see www.mmsb.nl.ca.

Caribou
Oct. 21: Wildlife officials will capture caribou in the Cape Shore area and transport them to the Salmonier Nature Park for educational display and research. Hopefully, the caribou will form the nucleus of a small, self-sustaining caribou herd in the park.

CASES

Environmental Assessments
EPA environmental assessment actions in Oct.:
- Preparation of draft guidelines for environmental impact statement for the Schefferville Area Iron Ore Mine [Reg. 1379, Oct. 29]
- Preparation of draft guidelines for environmental impact statement for the Elross Lake Area Iron Ore Mine [Reg. 1380, Oct. 29]
- Release of Dunville Healey's Pond Amusement/RV Park [Reg. 1394, Oct. 20]
- Release of the Grand Falls–Windsor Cranberry Farm [Reg. 1396, Oct. 20]
- Withdrawal of Big Cook's Pond (Corner Brook) Cottage Management Plan [Reg. 1235, Oct. 20]
- Issuance of the environmental preview report guidelines for the Portland Creek Agricultural Land Development [Reg. 1365, Oct. 9].

NT

LAWS & ANNOUNCEMENTS

Recycling
Oct. 21: The Minister of the Environment and Natural Resources announced plans to expand the current recycling program to include electronics, milk containers, paper and cardboard. Long-term expansion plans would also add tires, lead acid batteries and fuel drums to the program.

Clean Energy
Oct. 16: The government released a draft hydro strategy to advance the long-term development of the territory's hydroelectric potential. The strategy includes 13 actions focused in four strategic areas:
- Preparing for hydro development
- Protecting the environment
- Financing future hydro projects
- Developing the necessary policy framework.

FOREIGN ENVIRONMENTAL LAWS CONTINUED FROM FRONT

This Story Will Help You:

Protect your company from liability for violating foreign environmental laws

As EHS coordinator, you need to understand and manage your company's risks of liability under the environmental laws of the U.S. and other foreign countries. We'll explain how a Canadian company could be held liable under the environmental law of the U.S. or another foreign country for conduct that occurs in Canada. We'll also discuss the key cases that address this issue and draw practical lessons that affect your company's liability risks. And we'll give you four strategies you can use to help minimize your company's risk of liability under foreign environmental laws.

Defining Our Terms

If a Canadian company is held liable for pollution under a foreign environmental law, it's most likely going to be under a U.S. law for obvious geographic reasons. After all, the U.S. is the foreign country most likely to suffer air, water and land pollution as a result of emissions from Canada. So this article will primarily discuss liability under U.S. environmental laws. However, the theories under which a Canadian company could be liable under U.S. environmental law could apply equally to other foreign environmental laws. So we'll use the term "foreign law" instead of "U.S. law" throughout this article.

LIABILITY UNDER FOREIGN ENVIRONMENTAL LAW

There are two situations in which a Canadian company could be held liable for pollution under a foreign environmental law:

- Conduct in another country—for example, if a Canadian company owns property, does business or engages in other conduct in another country, it may be liable under that country's environmental laws for pollution in connection with those activities; and
- Conduct solely within Canada that affects another country.

While holding a Canadian company liable in the former situation isn't particularly controversial, the latter is. A company's business operations in one country can impact another country's environment. After all, air and water easily migrate over borders. But like any other sovereign country, Canada reserves the right to regulate the companies within its borders. When a foreign country exercises its authority over companies within Canada, it arguably infringes on Canadian sovereignty. So, to what extent, if any, should a Canadian company have to answer to a foreign government or private citizen for conduct that seemingly occurs solely within Canada—particularly if that conduct complies with Canadian environmental law?

The *Teck Cominco* case addresses this issue. But it isn't the first time the question of the liability of Canadian companies under foreign environmental laws has arisen. In fact, in the 1920s, the same facility involved in *Teck Cominco* was the subject of another U.S.-Canadian dispute over cross-border air pollution. Let's look at both cases:

***Trail Smelter* arbitration.** Air pollution from a zinc and lead smelter (the Trail Smelter) in BC traveled into the Columbia Valley, causing significant environmental damage in Washington State. Canada and the U.S. appointed members to a joint arbitration panel to resolve the dispute between the countries over liability for the pollution. *The panel's ruling*: Canada was liable for property damage in the U.S. caused by the Trail Smelter's release of sulphur dioxide from its smoke stacks. The decision is often cited in international environmental law for the principle that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." In other words, cross-border pollution that causes serious harm to people or property in another country violates the established norms of environmental law [*Trail Smelter Arbitration*]. Thus, a company in one country that causes pollution in another can be held liable under the latter country's environmental laws.

***Teck Cominco* case.** Many decades later, the same facility, which was operating under a Canadian permit, released slag waste into the Columbia River, which flowed into the U.S. The waste built up in the sediment of the river and Lake Roosevelt in Washington, causing heavy metal contamination. A U.S. government agency and Teck tried to negotiate an agreement regarding further studies of the contamination and remediation costs. But Teck wouldn't agree to the agency's terms. The agency then issued an order requiring Teck to conduct further investigations and pay the cost of cleaning up the contamination. Teck refused to comply. An American Indian Tribe, whose reservation was near Lake Roosevelt, got tired of waiting for something to be done about the pollution and sued Teck under a U.S. environmental law, seeking enforcement of the agency's order.

A U.S. appeals court ruled that a Canadian company could be liable under U.S. law for Canadian activities that result in pollution in the U.S. The U.S. law applied to discharges within the U.S. So how could Teck be liable for discharges that took place within BC? To apply the U.S. law to Teck, the court concluded there were two discharges involved: the first when Teck released the slag waste into the river in Canada and the second when the heavy metal contaminants were released in the U.S. as they leached from the slag waste that settled in the river and lake. Thus, because the second discharge was committed within the U.S., Teck could be held liable for it.

However, the decision was moot—Teck and the government agency had already settled the dispute. But in January 2008, the U.S. Supreme Court refused to hear Teck's appeal, essentially affirming the lower court's ruling and analysis. Thus, the *Teck Cominco* decision remains the law, at least in the 9th Circuit of the U.S., which covers the bordering states of Alaska, Washington, Idaho and Montana, as well as Arizona, California, Hawaii, Nevada, Oregon and the territories of Guam and the Northern Mariana Islands [*Pakootas v. Teck Cominco Metals Ltd.*].

Enforcement of Foreign Environmental Orders

Holding a Canadian company liable for violating U.S. environmental law is one thing; actually enforcing a U.S. environmental compliance order or judgment against a Canadian company is another. If the U.S. compliance order can't be enforced in Canada, then the liability determination is essentially meaningless.

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FOREIGN ENVIRONMENTAL LAWS CONTINUED FROM PAGE 11

The enforcement of a foreign court order against a Canadian company may be seen as impinging on Canadian sovereignty. Still, the Canadian courts have shown a willingness to enforce U.S. environmental orders against Canadian companies for reimbursement of remediation costs.

Example #1: An Ontario resident had a controlling interest in and oversaw the management and operations of a Michigan company that ran a waste disposal business near Detroit. The company's parent was an Ontario company that owned 80% of the Michigan company's shares. The Ontario resident was the president, general manager and a director of the Ontario company. When another Ontario corporation bought the parent company, the Ontario resident took over as president and CEO of that corporation. The waste disposal site was closed down and the Michigan company filed for bankruptcy.

The site was contaminated by various hazardous substances. But the Michigan company, Ontario parent and Ontario resident all denied responsibility for the remediation. A U.S. government agency remediated the site and then won an order under a U.S. environmental law requiring both Ontario companies and the Ontario resident to pay over $4.5 million (USD) in remediation costs. The U.S. asked an Ontario court to enforce this order.

The Ontario defendants argued that they shouldn't be liable for the costs of cleaning up a Michigan site under a U.S. environmental law. But the Ontario courts disagreed. The Court of Appeals upheld the lower court's ruling that the defendants were liable for the remediation costs. Given the Ontario resident's day-to-day control over the Michigan site's operations and the Ontario corporation's 80% share ownership in and financial ties to the Michigan company, there was ample evidence that the defendants engaged in the waste disposal business in Michigan. There was also sufficient evidence that they were aware of the environmental problems at the site and did nothing to address the situation. The court added, "It is no extension of U.S. sovereign jurisdiction to enforce its domestic judgments against those legally accountable for an environmental mess in the U.S. by reason of their ownership or operation of American waste disposal sites" [*U.S. v. Ivey*].

Example #2: An Ontario company operated a copper processing facility on land it leased in Utah. The company subleased the land to a U.S. company and later bought the land outright. Several years later, the Ontario company sold the land to another Ontario company. Both Ontario companies had the same president, an Ontario resident. Two U.S. government agencies, one state and one federal, determined that the land was contaminated. The agencies reported the contamination to the company president, who did nothing. The federal agency remediated the property and then sued the Ontario companies for the clean-up costs. The Ontario companies were notified of the lawsuit in the U.S. and hired a Utah lawyer to represent them. But they later stopped paying the lawyer and failed to participate in the lawsuit. A judgment was entered in the U.S. against the companies for $242,614 (USD). The U.S. government then asked an Ontario court to enforce this judgment on its behalf.

The Ontario court ruled that the Ontario companies were liable to the U.S. for the remediation costs. It rejected the argument that the legal proceedings in the U.S. violated "natural justice," which includes the right of defendants to notice of a claim against them and an opportunity to defend themselves against the charge. The Ontario companies had been notified of and had a chance to defend themselves against the claim for remediation costs. But they "made a choice to walk away from the proceedings," noted the court. It also rejected the argument that the Ontario companies hadn't caused the pollution. Causation isn't a precondition for enforcing a federal judgment in Canada. In this case, the U.S. went after the Ontario companies as the owners of the land in question [*U.S. v. The Shield Development Co. Ltd.*].

The *Teck Cominco* case was settled so the U.S. government didn't have to ask a Canadian court to enforce its order. Whether a Canadian court would have actually done so is an open question. For one thing, the order in *Teck Cominco* wasn't simply for reimbursement of remediation costs. The order also required Teck to further investigate the contamination in Utah. It's by no means clear that Canadian courts will enforce U.S. compliance orders that require Canadian companies to take certain actions, such as installing filters on smokestacks or conducting an assessment of the extent of contamination on a piece of land, as opposed to orders that simply require Canadian companies to pay for remediation.

The other reason to question whether a Canadian court would have enforced the *Teck Cominco* order is that the liability finding against Teck went much further than the rulings in previous cases holding Canadian companies liable under U.S. environmental law. In *Ivey* and *Shield*, the Canadian defendants engaged in conduct, either directly or indirectly, within the U.S. In *Teck Cominco*, by contrast, the polluting activity took place entirely within Canada and the U.S. court interpreted the U.S. law broadly so that it could find the company committed a discharge within the U.S. This distinction might have persuaded a Canadian court not to enforce the order against Teck.

4 RISK MANAGEMENT STRATEGIES

Liability under a foreign country's environmental laws may seem unreasonable at first glance, especially for companies that don't have business ties to the foreign country or engage in any conduct there. However, such liability is consistent with the "polluter pays" principle, which is accepted in Canada and internationally. The theory is that a company shouldn't be shielded from having to pay for pollution that it's responsible for simply because that pollution happened across a border.

Traditionally, issues of cross-border pollution have been handled through diplomatic means. In fact, Canada and the U.S. have a long history of cooperation in resolving such issues. But diplomatic measures often take too long. For example, the *Trail Smelter* arbitration took over 20 years to be resolved. So private citizens are taking matters into their own hands and demanding that the courts enforce their country's environmental laws—even against companies located in other countries. In fact, Canadian citizens have recently taken such steps against a U.S. company (see box on page 13). And this trend is likely to continue given the "success" in the *Teck Cominco* case. After all, the pressure from that private lawsuit led to a settlement of the dispute in less than two years.

So what can the EHS coordinator for a Canadian company do to protect his company from liability under foreign environmental laws? Here are four

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FOREIGN ENVIRONMENTAL LAWS CONTINUED FROM PAGE 12

strategies that will help you minimize your company's liability risk:

Strategy #1: Consider Environmental Impact of Domestic Operations in Foreign Countries

Considering the local environmental impact of your company's operations is no longer enough; you must also assess the possible environmental impact such operations may have in other countries. Such considerations are particularly important for companies located near the border or near water sources, such as rivers and streams, that flow across the border.

Strategy #2: Consider Liability Risks for Conduct in Other Countries

Knowing what your company is doing in Canada is also no longer enough. You also need to keep abreast of its conduct in other countries, no matter how remote. For example, you need to understand what activities subsidiaries are engaging in other countries, what property the company owns in other countries and what kinds of activities are occurring on that property. Such activities, even if the Canadian company isn't directly involved in them, may nonetheless expose the company to liability under the environmental laws of that country.

Strategy #3: Become Familiar with Key Foreign Environmental Laws

Knowing all you need to know about the Canadian laws that your company must comply with is a challenging enough task. Trying to also master any possibly relevant foreign environmental laws as well is probably asking too much. You don't need to know everything about all foreign environmental laws. But you should have some familiarity with key foreign environmental laws, such as the U.S. *Comprehensive Environmental Response, Compensation and Liability Act* (CERCLA).

Understanding the basics of U.S. environmental law won't be too difficult as many American laws are similar to Canadian laws. In fact, in the *Ivey* case, the court recognized the similarity between CERCLA and Ontario environmental law in rejecting the argument that the order shouldn't be enforced for public policy reasons. The court said, "International comity supports the mutual enforcement of such similar statutory regimes."

Strategy #4: Fully Participate in Legal Proceedings in Other Countries

The companies in the *Ivey* and *Shield* cases made a critical mistake: They had a chance to litigate their liability for remediation costs in the U.S. and to raise any relevant defences or challenges to the U.S. environmental law. Instead, they chose to essentially blow off the proceedings, perhaps believing that the Canadian courts wouldn't enforce any U.S. judgments or orders issued against them. That strategy certainly backfired. The Canadian courts were very critical of the decision not to litigate in the U.S. and demonstrated an unwillingness to litigate any substantive issues or defences that the companies could and should have raised in the U.S. proceeding. The Canadian courts suggested that they won't get into the substance of the U.S. rulings and will only evaluate the appropriateness of enforcing the order or judgment in Canada.

Thus, if your company is notified that another country is filing an environmental violation against it or is seeking reimbursement for remediation costs, don't bury your head in the sand and count on the Canadian courts to shield you from judgments under U.S. laws as a matter of course. Understand that these judgments may indeed be enforceable in Canada and that your company needs to fully participate in any proceedings in that country regarding pollution or remediation. If it doesn't, it may find itself precluded from later arguing in a Canadian court any defences it may have had in the U.S. proceeding.

Conclusion

What does the *Teck Cominco* decision mean for you? First, it shows that U.S. courts are willing to go to unusual lengths to read U.S. laws in a way that holds Canadian companies liable under U.S. environmental laws, even if the conduct that leads to the contamination occurred outside the U.S. This decision coupled with the fact that Canadian courts have demonstrated a willingness to enforce U.S. environmental orders against Canadian companies creates a potentially serious liability concern, especially for western companies located near the U.S. border. We don't know if a Canadian court would have actually enforced the U.S. order in *Teck Cominco*. But it might have. And so might a Canadian court when and if another U.S. government agency or civil litigant tries to hold a Canadian company liable for pollution in the U.S., which seems increasingly likely given what happened in *Teck Cominco*.

Bottom line: Canadian companies must prepare to be held responsible for the environmental impact of their business operations—regardless of where that impact is felt. The driving force behind compliance with environmental laws—both domestic and foreign—is more and more often environmental groups and private citizens. So even if governments are reluctant to go after a foreign company for violation of local environmental laws, they may be compelled to do so by public pressure. And if government moves too slowly or refuses to bow to public pressure, the public may take matters into its own hands. ✦

SHOW YOUR LAWYER

Pakootas v. Teck Cominco Metals Ltd., No. 05-355153, U.S. Ct. of App., 9th Cir., July 3, 2006

Trail Smelter Arbitration, 3 R.I.A.A. 1905 (1941)

U.S. v. Ivey, [1996], CanLII 991 (ON C.A.), Sept. 23, 1996

U.S. v. The Shield Development Co. Ltd., [2004] O.J. No. 5840, Dec. 1, 2004

Turnabout Is Fair Play

Liability under a foreign country's environmental law goes both ways. That is, while Canadian companies may face liability under U.S. environmental laws, the same is true for U.S. companies under Canadian environmental laws. *Case in point*: An Ontario resident filed a lawsuit against a Michigan company for violating Canada's *Fisheries Act* by discharging mercury into the St. Clair River, harming the fish habitat and rendering the fish unsafe for human consumption. In January 2008, an Ontario court issued an order directing a lower court to summon the U.S. company to Ontario to face these charges.

TRAPS TO AVOID

Letting Workers Rely on Shut-Off Technology When Refuelling Tanks

Picture this situation: A worker is refuelling his bulldozer with diesel fuel from an onsite storage tank. He locks the pump in the "on" position and goes to a nearby trailer to finish some paperwork. When the worker returns, he discovers that the pump's automatic shut-off switch hadn't worked. The storage tank is still pumping fuel, even though the bulldozer's tank is full. So fuel is spilling all over the ground.

Unfortunately, this situation actually happened in Ontario. Close to 150 litres of diesel fuel overflowed onto the ground and ran into a nearby ditch leading to a storm water retention pond. The company's staff worked quickly to contain the spill and clean it up. And, luckily, the property owner had installed oil absorbent booms that prevented the fuel from migrating into a local creek. So it could have been much worse. Still, there was substantial damage and the company ended up pleading guilty to two violations of the *Ontario Water Resources Act* (OWRA) and was fined $25,000 [*R. v. J.C.J. Contracting*].

The bad news is that despite automatic shut-off technology, spills during refuelling are all too common. The good news is that these types of spills are easy to prevent. This article will tell you how. Plus, we'll give you a Model Policy on page 15 that you can adapt and use to prevent such fuel spills by your workers.

Fuel Spills & Technology

Most people think that because nearly all fuel pumps have automatic shut-off technology, spills at refuelling facilities don't happen anymore—or that at least they're rare. But unfortunately refuelling spills are more common than you might think. It's true that most fuel nozzles are designed to stop once the tank being filled is full and to shut off automatically if they should fall out of a tank. But as the *J.C.J. Contracting* case shows, these devices don't always work. And even if a device is working, workers may fail to use it properly. As a result, a company could be faced with an environmental mess and a sizable fine.

Three Examples

To drive this point home, here are three more examples of actual refuelling spill incidents:

Example #1: A worker for an ON trucking company placed a fuel nozzle in a truck's tank, turned on the pump and walked away to perform some other tasks. But while he was gone, the nozzle fell out of the truck's tank. When the worker returned, the nozzle was lying on the ground with diesel fuel gushing out of it. The fuel made its way into a nearby river, impairing the water quality. The company and its owner pleaded guilty to a violation of the OWRA. The company was fined $20,000 and the owner $5,000 [*R. v. Ab Murray Transport Ltd.*].

Example #2: A worker for a groundskeeping company in Ontario was filling a tank mounted on the back of a company pick-up truck from an onsite fuel tank. He walked away from the pump, which was equipped with an automatic shut-off valve. Sometime later, a second worker found the fuel overflowing from the tank and onto the truck and the ground below. He turned the fuel pump off, but approximately 50 litres of diesel fuel had already been spilled. To make matters worse, the two workers failed to report the spill and tried to clean it up themselves, washing everything into a storm-water catch basin that flowed into a nearby creek. After city officials noticed a large number of dead fish floating in the creek, they investigated and found out about the incident. As a result, the company pleaded guilty to discharging diesel fuel into a watercourse and impairing water quality and was hit with a $40,000 fine. It also had to reimburse the city for the cost of cleaning up the spill [*R. v. Mal-Mal Enterprises Inc.*].

Example #3: A YT gold miner arranged for a fuel company to refill metal fuel drums on his barge. A company worker ran a hose from his tanker truck to the barge and started filling the drums with diesel fuel. He left the hose's nozzle running in one drum while trying to open another one. The nozzle fell out of the drum but didn't stop pumping fuel. The hose sprayed diesel fuel all over the barge's deck and into the river, which was inhabited by fish. The fuel company, its worker and the miner were convicted of violating the *Fisheries Act*. The court noted that refilling fuel drums on a barge is "an inherently hazardous undertaking" so steps should have been taken to prevent a spill. For example, the fuel company could have required the worker to keep his hand on the discharge valve while fuel was being pumped. The court ordered the worker and miner to pay $750 fines and ordered the fuel company to pay a $1,000 fine [*R. v. Stretch*].

Use Policy to End Fuel Spills at the Pump

To stop fuel spills during refuelling, set a policy barring workers from leaving an operating pump unattended. Such a policy not only protects the environment and minimizes the risk that your company will be fined for a spill, but also helps the company comply with environmental laws that prohibit workers from leaving pumps unsupervised.

CONTINUED ON PAGE 15

A number of provinces specifically require the implementation of such measures. For example, NL regulation prohibits a person from transferring "gasoline or associated products from a storage tank system to a vehicle or from a vehicle to a storage tank system without supervising the transfer at all times" so that the person can immediately shut off the flow of fuel during the transfer [*Storage and Handling of Gasoline and Associated Products Regulations*, Sec. 10(1)]. Other provinces—such as MB, NB and NS—have similar regulations.

Your policy, like our Model Policy below, should briefly explain the dangers of fuel spills and note that safe fuel handling is everyone's responsibility. It should also list the procedures that workers should follow when refuelling tanks. In particular, make sure your policy:

- Prohibits workers from walking away from operating fuel pumps;
- Tells workers to refuel tanks during daylight hours when possible;
- Bars workers from topping off tanks; and
- Requires workers to contact their supervisor immediately if a spill, leak or other emergency occurs.

Also, warn workers that they may be disciplined for violating the policy.

Conclusion

Relying on automatic shut-off technology to prevent spills during refuelling is a bad idea. If you don't believe us, just look at the cases described above. And those cases are just a sampling. To prevent refuelling spills and the risk of liability associated with them, you should make sure your company sets a policy that reminds workers to be diligent while filling their tanks. And make sure that you enforce that policy by disciplining workers who violate it. ✦

SHOW YOUR LAWYER

R. v. J.C.J. Contracting, Govt. News Release, Sept. 5, 2006

R. v. Ab Murray Transport Ltd., Govt. News Release, Jan. 6, 2006

R. v. Mal-Mal Enterprises Inc., Govt. News Release, July 25, 2006

R. v. Stretch, [2002] Y.J. No. 101, Sept. 15, 2002

MODEL POLICY

TANK REFUELLING POLICY

Safe handling of fuel is everyone's responsibility. Improper handling of fuel can result in death or serious injury. In addition, fuel released into the environment can contaminate soil, groundwater and surface water resulting in costly cleanups. Contaminated groundwater supplies may also sicken or even kill wildlife that drinks or lives in the polluted water.

The primary cause of most fuel spills is human error. Here are some very simple steps that can reduce the risk of a spill during tank refuelling. All workers must follow these steps to ensure safe fuel handling during the filling of all fuel tanks. Failure to do so may result in discipline up to, and including, termination.

- **Never leave a fuel hose unattended when refuelling your tank. Workers must remain near and in constant view of the transfer nozzle and fill pipe when filling a tank with fuel.**
- **Don't rely on automatic shut-off valves to regulate the flow of fuel to your tank. Know how much fuel your tank needs. If you're aware of the amount of fuel your tank requires, you can monitor and control the flow of fuel into your tank.**
- **To the extent possible, refill fuel tanks during daylight hours only.**
- **Always use an oil absorbent cloth or pad to catch small drips when refuelling, particularly when you remove the fuel nozzle from your tank. Even little drips can contaminate soil, groundwater or surface water.**
- **Don't top off your tank.**
- **If a spill, leak or other emergency occurs, stop refuelling immediately and advise your supervisor of the situation.**

WINNERS & LOSERS

How Do Courts Put a Monetary Value on Environmental Losses?

As a general principle, damages are designed to give victims money to compensate them for their losses. For example, if you win a lawsuit against a driver for causing a traffic accident that totals your car, calculating your damages would be fairly straightforward. You'd probably be entitled to the value of your car at the time of the accident or the cost to replace it. But putting a monetary value on environmental losses isn't so simple. After all, what's the value of the loss suffered if a tree is cut down or if a chemical is discharged into a lake that's used for public recreation? In 2004, the Supreme Court of Canada issued the leading decision on calculating the value of environmental losses in *BC v. Canadian Forest Products Ltd.* But Canadian Forest was a 4 to 3 decision. The Justices set out two approaches to calculating environmental losses, each of which is valid in Canada. So let's look at each approach.

WHAT HAPPENED

A fire swept through part of BC, damaging 1,491 hectares of forest in an area where licence holders could log. A forestry company was largely responsible for the blaze. The BC government sued the company for three types of damages: 1) the costs of suppressing the fire and restoring the burned areas; 2) loss of stumpage revenue for harvestable trees; and 3) loss of non-harvestable trees, which were environmentally protected. The parties agreed on an amount for the damages in category one. The trial court ruled that the government had failed to show that it suffered a compensable loss as to the other two categories. The government appealed and the appeals court awarded it limited damages for the loss of value of the non-harvestable trees. Both parties appealed.

MAJORITY VIEW

DECISION

The majority restored the trial court's judgment, ruling that the government wasn't entitled to damages for the loss of the harvestable and non-harvestable trees.

EXPLANATION

The majority explained that a claim for environmental loss must be based on a coherent theory of damages, a suitable method for assessing those damages and supporting evidence. Here, the BC government, which was like any other landowner, didn't meet this burden for either group of trees:

Harvestable trees. The majority said that BC's stumpage system was "revenue-neutral"—that is, if there was a loss in one area, the stumpage rates paid by licence holders in other areas were adjusted to compensate. Thus, the government didn't lose any revenue from the loss of the harvestable trees. In fact, the government's revenue increased because it benefited from the sale of the fire-damaged timber, which would otherwise have been spread out over up to 66 years.

Non-harvestable trees. The government didn't prove that the non-harvestable trees had any commercial value. Logging those trees on steep, environmentally sensitive slopes wasn't cost effective. And as to the non-harvestable trees in riparian areas, any loss of value from logging them was offset by the increased revenue the government collected from the sale of the timber salvaged from the fire.

DISSENTING VIEW

DECISION

The dissent found that the company was entitled to damages for the loss of the harvestable and non-harvestable trees.

EXPLANATION

The dissent noted that the government was suing not only in the capacity of a landowner but also as the protector of the environment and the public's interest in it and thus was entitled to damages for both types of trees:

Harvestable trees. Despite the stumpage system, the government did suffer a compensable loss as to the harvestable trees. Until the fire-damaged forest has grown back, this source of revenue for the government—the harvestable trees—is lost. Also, there was no guarantee that the system was, in fact, revenue-neutral. There was no evidence that maintaining the target stumpage rate by charging higher *rates* to some licence holders maintained the target *revenue* as a result.

Non-harvestable trees. The dissent said that the "non-harvestable trees have intrinsic value" *at least* equal to their commercial value, despite their non-commercial use. To say, as the appeals court did, that the value of the non-harvestable trees is only a portion of their commercial value "is to significantly and fundamentally devalue" the government's and society's loss, noted the dissent. It added, "This Court has repeatedly stated that environmental protection is a fundamental value of Canadian society." To imply that environmentally protected resources lose their value once they're protected contradicts this fundamental value.

BC v. Canadian Forest Products Ltd., [2004] S.C.J. No. 33, June 11, 2004