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Alberta Court Finds Syncrude Guilty in Duck Deaths

On June 25, 2010, Syncrude Canada Ltd. was found guilty of two charges stemming from the April 2008 death of approximately 1,600 ducks in its Aurora Settling Basin, a tailings pond serving part of the company's Fort McMurray–area oil sands operations. The Alberta Court is waiting for the parties next appearance, in August, to hear other submissions relating to whether convictions should be entered on one or both of the charges. If both convictions are entered, the maximum potential fine would be \$800,000.

Environmental groups are applauding the guilty verdict as a victory. Ecojustice for example, which launched the private prosecution prompting the Crown to charge Syncrude over the incident, has indicated that the Court's decision "confirms the need to eliminate toxic tailings ponds and the risks they pose." Yet the Alberta Court took a more nuanced view of the issue, establishing a precedent that indicates tailings pond operators may avoid certain regulatory liability if they implement effective bird-deterrent systems.

Facts

Syncrude began depositing tailings – mostly residual bitumen, sand and metals from its oil sands mining operation – in the Aurora Settling Basin in July 2000. Alberta Environment permitted the construction and maintenance of the tailings pond and, given the pond's location beneath significant flyways for migratory waterfowl, required Syncrude to submit and implement a Waterfowl Protection Plan. In the years prior to 2008, Syncrude, like its local oil sands competitors, had implemented a system of sound cannons, effigies and other deterrents designed to prevent birds from landing on its tailings ponds. However, the Court concluded that Syncrude had been too slow in getting the system up and running in the spring of 2008, finding, for example, that none of the sound cannons had been deployed by late April 2008, when the deaths occurred.

Ultimately, on April 28, 2008, about 500 waterfowl were found trapped in the viscous bitumen material that had yet to settle in the tailings pond. Later, some 1,600 birds were found to have died.

Charges

In September 2009, after Ecojustice initiated a private prosecution, the federal and provincial governments charged Syncrude on two counts:

- first, for failing to store a hazardous substance in a manner that ensured that it did not come into contact with or contaminate any animals, contrary to section 155 of Alberta's *Environmental Protection and Enhancement Act* (the "provincial offence"); and

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- second, for depositing a substance harmful to migratory birds in an area frequented by migratory birds, contrary to section 5.1(1) of the federal *Migratory Birds Convention Act* (the “federal offence”).

Syncrude pleaded not guilty on both counts.

Decision

Regarding the provincial offence, the Court found that Syncrude had failed to store the bitumen tailings in a way that ensured that they did not contaminate any waterfowl. Notably, the Court concluded that an animal may be contaminated regardless of whether it moved into contact with a hazardous substance or whether the substance moved into contact with the animal. In addition, the Court rejected Syncrude’s argument that it would be impossible to avoid liability because it could not prevent every bird from coming into contact with the tailings pond, even if the most costly deterrents were used. The Court indicated that Syncrude was only required to take all reasonable steps to prevent the commission of the offence.

For the federal offence, the Court concluded that Syncrude had committed an offence by depositing bitumen in the tailings pond, which was an “area frequented by migratory birds.” According to the Court, such areas include “the space over, on or adjacent to the deposit of a harmful substance, close enough to the deposit for migratory birds in that space to be attracted to the specific location of the harmful substance.” In the Court’s view, this definition captured the Aurora Settling Basin, which was situated under two well-known major migratory flyways, and had been a landing area for migratory birds for years.

However, the Court did not conclude, in effect, that every tailings pond located under or near a migratory flyway was automatically in violation of the federal law. Instead, the Court added that “not every space under a flyway should be labelled an ‘area frequented by migratory birds,’” and went on to suggest that tailings pond owners and operators located under flyways may be able to avoid conviction by having a system of operating deterrents in place to prevent attracting migratory birds. Even though the violations were established, both the provincial and federal offences allow a defence of due diligence if the accused (i) reasonably believed in a mistaken set of facts that, if true, would render the impugned conduct innocent; or (ii) took all reasonable steps to avoid committing the offence. The Court found no evidence that Syncrude believed in a mistaken set of facts, but did consider at length whether Syncrude took all reasonable steps to avoid each of the offences in question.

For the provincial offence (failing to store a substance in a manner that it doesn’t come into contact with animals), the due diligence defence was that Syncrude did take reasonable steps to render its storage area safe by having a deterrent system in place. But for the federal offence (depositing a harmful substance in an area frequented by migratory birds), Syncrude could not (as the federal Crown noted) have established that it attempted to avoid that act because the deposit of tailings was intentional. Nevertheless, the federal Crown was prepared to drop the federal charge if the due diligence defence to the provincial charge was successful. Perhaps underlying the federal Crown’s position was the evidence before the Court that federal officials had advised Syncrude in previous years that a system to deter birds from landing in the tailings pond was necessary to avoid prosecution under the *Migratory Birds Convention Act*. As noted above, however, the Court found that Syncrude, by failing to have sound cannons operational by April 28, 2008, had failed to take all reasonable steps to avoid commission of the provincial offence. According to the Court, Syncrude did not deploy these deterrents early enough, largely because effective procedures were absent and because of inadequate staff, training and expertise, and equipment delays.

Conclusion

Contrary to the aspirations of some, the Syncrude decision does not render every tailings pond operation near a migratory flyway illegal under federal law, regardless of the avoidance measures implemented. It provides instead continued incentive for operators to be responsible by confirming that such efforts will be taken into account, though not always as part of the assessment of the due diligence defence, whether the prosecution is brought under provincial or federal law. 