



*Making Out the Environmental Due Diligence Defence  
at Trial*



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Willms & Shier

SMART Remediation  
January 26, 2017 | Toronto, Ontario  
February 16, 2017 | Ottawa, Ontario  
March 2, 2017 | Vancouver, British Columbia

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# Making Out The Environmental Due Diligence Defence At Trial

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**“Law Firm of the Year” for Environmental Law in  
The Best Lawyers in Canada, 2017 Edition**

SMART Remediation Seminar Series 2017



## Roadmap

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- 1. Environmental Prosecutions**
- 2. Defending Environmental Prosecutions**
- 3. *R v ControlChem***
- 4. Helping Clients Stay Out of Environmental Trouble!**



# ENVIRONMENTAL PROSECUTIONS

## Regulatory Prosecutions

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- **Environmental prosecutions in jurisdictions across Canada can result where the Crown alleges a violation of an environmental law**
- **Upon conviction, charges lead to fines and/or jail terms**
- **These are known as ‘quasi-criminal offences’**

## Regulatory Prosecutions

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- **By Whom?**

- federal, provincial or municipal governments, or individuals

- **Against Whom?**

- individuals
- partnerships and corporations
- corporate directors and officers have a duty to take all reasonable care to prevent environmental contraventions (*EPA*, s. 194; *OWRA*, s. 116)
- regulators have been known to prosecute corporate directors and officers and their companies to extract a conviction against the company

## Regulatory Prosecutions

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- **Why?**

- for contravening
  - statutes
  - regulations
  - municipal by-laws
  - permits, licences, approvals and orders

- **Sanctions?**

- fines, court orders, imprisonment, profit-stripping, victim surcharge (add 25% to all fines in Ontario)

# DEFENDING ENVIRONMENTAL PROSECUTIONS

## Regulatory Prosecutions

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- **Defences**

- *Failure of the Crown to Prove the Constituent Elements of the Offence* – each element must be proved beyond a reasonable doubt
- *Officially Induced Error* – reliance on seemingly reasonable but erroneous legal advice obtained from a government official
- *Abuse of Process* – abuse may justify a stay where there is oppression, prejudice, harassment or manifest hardship on the accused to a significant degree
- *Act of God* – an extraordinary event of nature that could not be foreseen and could not be guarded against by taking reasonable steps
- *Sabotage* – deliberate failure of employees to follow a system
- *Necessity* – to respond to an emergency to the extent necessary for the response
- *Due Diligence*

## Due Diligence Defence - All Reasonable Care

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- **Corporate due diligence in *R v Bata Industries Ltd.*, [1992] O.J. No. 236**

- “They must establish that they exercised **all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.** The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore, in law, the acts of the corporation itself.”

## Due Diligence Defence – Very High Standard

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- **Due diligence in *R v Courtaulds Fibres*, (1992) 9 C.E.L.R. (N.S.) 304**

- “**Reasonable care and due diligence do not mean superhuman efforts.** They mean a high standard of awareness and decisive, prompt and continuing action. To demand more, would, in my view, move a strict liability offence dangerously close to one of absolute liability.”

## Due Diligence Defence – Systems Approach

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- **Due diligence in the oil sands as described in *R v Syncrude*, (2010) ABPC 229**
  - “To meet the onus, Syncrude is not required to show that it took all possible or imaginable steps to avoid liability. It was not required to achieve a standard of perfection or show superhuman efforts. **It is the existence of a ‘proper system’ and ‘reasonable steps to ensure the effective operation of the system’ that must be proved.** The conduct of the accused is assessed against that of a reasonable person in similar circumstances.”

## Due Diligence Defence – The Legal Test

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- **What does the accused need to prove for the Court to exonerate?**
  - due diligence defence will be made out if
    - the accused demonstrates, on a balance of probabilities, that the accused
      - took all reasonable care to avoid the particular event,  
or
      - reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent

*R v Sault Ste. Marie (City)*, [1978] 2 SCR 1299

## Due Diligence Defence - Key Elements

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- **Adequate system properly implemented**
- **Compliance with reasonable industry standards**
- **No feasible alternative to prevent the contravention**
- **The contravention was not reasonably foreseeable**
- **The activity was conducted by competent personnel (skill and knowledge)**

## Due Diligence Defence - Key Elements

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- **Employees, agents, contractors were properly supervised**
- **There must be coincidence in time between the exercise due diligence and the alleged unlawful act**
- **Court will weigh and balance these factors in determining whether the defence of due diligence is made out**
- **Making out the due diligence defence results in exoneration of the charge (i.e., not guilty)**



# R v CONTROLCHEM

## Due Diligence Defence – R v ControlChem

**SUMMONS  
ASSIGNATION**

ONTARIO COURT OF JUSTICE  
COURT DE JUSTICE DE L'ONTARIO  
PROVINCE OF ONTARIO  
PROVINCE DE L'ONTARIO  
Central West / Centre-Ouest  
(Region / Région)

Form / Formulaire 108  
Courts of Justice Act  
Loi sur les tribunaux judiciaires  
R.S.O. / R.R.O. 1990  
O. Reg. / Règl. de l'Ont. 200

Under Section 24 of the Provincial Offences Act  
Aux termes de l'article 24 de la Loi sur les infractions provinciales

To  
A  
of  
de(su)

Control Chem Canada Ltd.  
4450 Harvester Road Burlington, Ontario Canada L7L 4X2

Whereas you have been charged before me that you,  
Attendu que vous avez été accusé(e) devant moi d'avoir  
On or about the 11<sup>th</sup> day of March yr. / en 2012 at / à near 5275 John Lucas Dr, City of Burlington,  
Regional Municipality of Halton  
did commit the offence of / commise l'infraction suivante  
discharging or causing or permitting the discharge of a material, namely Aluminum Chloride Hydroxide Sulphate into Sheldon  
Creek, which said discharge may impair the quality of the water of any waters  
Sec.30 (1) of the Ontario Water Resources Act, R.S.O.  
contrary to 1990, c. O.40, as amended, section 107 (1) of the said Act.  
contrevenant à l'article 107 (1) de la Loi sur les ressources de l'eau de l'Ontario  
AND WHEREAS you have been charged with a further 4 offences as set out in the information, a copy of which is attached hereto.

THEREFORE YOU ARE COMMANDED IN HER MAJESTY'S NAME TO APPEAR BEFORE THE ONTARIO COURT OF JUSTICE  
À CES CAUSES, VOUS ÊTES SOMMÉS, AU NOM DE SA MAJESTÉ, DE COMPARAÎTRE DEVANT LA COUR DE JUSTICE DE L'ONTARIO  
at  
à (au)

on the 17<sup>th</sup> day of DECEMBER, 2013 at 09:00 am  
le jour de DECEMBRE, 2013 à 9 heures

at 1  
à (au) (salle / salle d'audience)

and to appear hereafter as required by the court to be dealt with according to law.  
de comparaître par la suite selon les exigences du tribunal, afin d'être traité(e) selon la loi.

Issued at: Milton  
Delivered / délivré le 15<sup>th</sup> day of OCTOBER, 2013  
co. jour de OCTOBRE, 2013

Judge of Justice of the Peace in and for the Province of Ontario  
Juge ou juge de paix dans et pour la province de l'Ontario

Willms & Shier  
Environment  
Aboriginal  
Energy Law  
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## Due Diligence Defence – *R v ControlChem*

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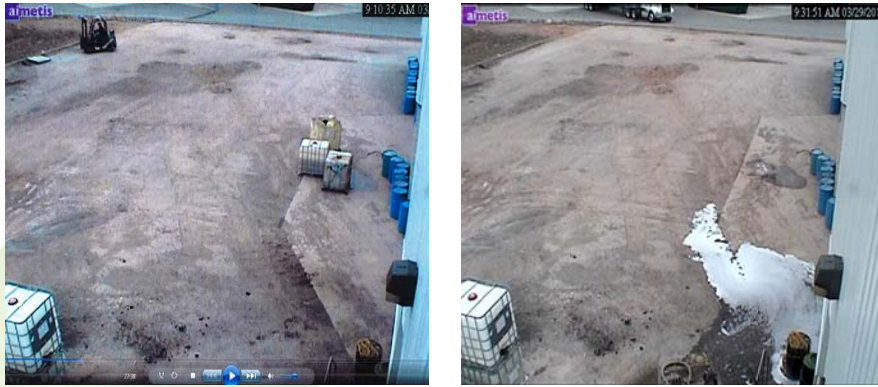
- **At ControlChem's chemical mixing and batching facility, 4,000 litres of chemical water was discharged to a storm sewer leading to Sheldon Creek in Burlington, Ontario (Decision: March 15, 2016)**
  - on March 29, 2012, an employee deliberately discharged liquids from four large totes into a storm drain which turned the creek white
  - the MOECC and the City traced the flow upstream through the sewer system to a catch basin in the rear of the ControlChem property
  - 5 EPA and OWRA charges were brought against both the company and employee
  - 20 year employee pled guilty and was convicted on one OWRA charge (\$5,000 fine plus Victim Fine Surcharge)

## Due Diligence Defence – *R v ControlChem*

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- **Did the Court find that**
  - the company met the environmental due diligence defence and should be exonerated, or
  - did the Court convict?

## Due Diligence Defence – *R v ControlChem*



## Due Diligence Defence – *R v ControlChem*

**CityNews**

Officials investigating chemical spill in Burlington creek  
Posted Mar 30, 2012 6:09 am EST



## Due Diligence Defence – *R v ControlChem*

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- **Systems and Procedures Described at Trial**

- described various management and environmental control initiatives
  - ISO 9001 and ISO 14001 (early adopter)
  - written environmental policies
  - standard operating procedures (SOPs)
  - documented training
  - identification and remediation of deficiencies in adherence
  - periodic external audits of practices and procedures
  - company mantra – “*nothing leaves the building*”

## Due Diligence Defence – *R v ControlChem*

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- **Systems and Procedures Described at Trial**

- company mantra – “*nothing leaves the building*”
  - no sewer drains in the chemical mixing/batching production area
  - 3” high containment in the plant production area capable of holding 20,000L
  - secondary containment around all mixing stations and pumps
  - raised barriers at every door
  - spill kits throughout the production area
  - regular spills drills
  - written training records and sign off on each protocol and procedure
  - wastewater treatment system located in the production area at ControlChem for its own use

## Due Diligence Defence – *R v ControlChem*

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- **You be the Judge! How would you decide this case? Would you convict or acquit the company?**
  - Did the Court find that
    - the company met the environmental due diligence defence and should be exonerated, or
    - did the Court convict?

## Due Diligence Defence – *R v ControlChem*

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- The first prong of the due diligence test (took all reasonable care) was made out during the company's trial in Fall 2015
- ControlChem was **acquitted** of all 5 charges (no conviction and no fine)
- The Crown did not appeal

## Due Diligence Defence – *R v ControlChem*

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- **ControlChem Makes Out the Due Diligence Defence and the Court held**

- “I am satisfied that the defendant has proven on the balance of probabilities that it took all reasonable care in the circumstances leading up to the March 29, 2012 discharge of the offending liquids.”
- “The evidence reveals the Defendant to have had farsighted, thoughtful, methodical and well documented philosophy and standards to address environmental protection generally and specifically addressing the issue of spills avoidance/mitigation.”
- “Management recognized the high risk of severe harm that could follow from a spill or discharge of any materials and employed robust steps were taken to minimize this risk and harm.”

**HELPING CLIENTS STAY  
OUT OF  
ENVIRONMENTAL  
TROUBLE!**

## Staying Out of Environmental Trouble

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- Environmental due diligence cases highlight the need for corporations, their directors and officers, senior management and employees to implement an integral **environmental systems** approach to ensure that **foreseeable** and **preventable** environmental events and harm do **not** occur
- Many corporations rely on their **environmental advisors** to provide incisive and practical advice to keep the company, its management and employees out of environmental trouble



## Contact Information

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Called to the Bar in British Columbia and Ontario

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**Willms & Shier Environmental Lawyers LLP**

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