



Robust Environmental Management System Serves to Fully Absolve Defendant: *R v Control Chem Canada Ltd.*

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Abstract

On March 15, 2016, the Ontario Court of Justice (“OCJ”) released its decision in R v Control Chem Canada Ltd.¹ The company was charged with five offences pursuant to Ontario’s Environmental Protection Act (“EPA”) and the Ontario Water Resources Act (OWRA). The charges arose from the independent actions of the company’s employee at the time.

Contrary to the company’s environmental management system, the employee drained the liquid contents of four large totes to an outdoor storm sewer catch basin at the company’s facility. The Court found that the discharged liquid caused the nearby creek to turn milky white and acidic, and posed a risk to fish in the creek.

Control Chem Canada Ltd. (“ControlChem”) demonstrated that environmental management was inherent to its corporate culture. The company implemented policies, standard operating procedures and systems, and rigorous staff training to clearly discourage employees from disposing wastewater outside of the facility. ControlChem also engineered containment features to minimize the risk of environmental harm and eliminate the risk of spills. The company also had its own wastewater treatment system on site with a fully trained operator.

The OCJ found that the company took all reasonable care and was duly diligent. The Court dismissed all charges against the company, and held that the company’s environmental management system was “broad, thorough, detailed, well-documented, understood by employees and subject to frequent internal and external compliance review.”²

The case reaffirms the importance of a thorough environmental management system that incorporates measures to ensure continuous improvement of policies, procedures systems and training.

¹ Unreported case. Court file No. Burlington 139537-01.

² *Ibid* at page 36.

The Spill

On March 29, 2012, unbeknownst to and without the authority of ControlChem management, a ControlChem employee, Mr. Silva, discharged the liquid contents of four large totes (approximately 4,000 litres) to an outdoor storm sewer catch basin. The spill occurred in the loading dock of ControlChem's water treatment facility in Burlington, Ontario. At the time, the company president was out of the country on business.

Later that day, the Ministry of the Environment and Climate Change's ("MOECC") Spills Action Centre was notified about the discoloration of nearby Sheldon Creek. Investigations by MOECC, the City of Burlington and the local Conservation Authority traced the discoloration from the creek to the municipal storm sewer system and a catch basin at the rear of ControlChem's facility. The material discharged included aluminum chloride hydroxide sulphate ("ACHS") which reduced pH levels in the creek to lethal levels, and posed a risk of burning or damaging the gills of fish in the creek.

The Charges

ControlChem and Mr. Silva were each charged with five offences arising from the spill.³ Two of the charges were under the OWRA and the remaining three charges were under the EPA. The charges were for discharging or causing or permitting the discharge⁴, and for failing to report a spill forthwith.⁵

ControlChem's Due Diligence Defence

During the course of a ten day trial in Fall 2015, ControlChem presented extensive evidence about its environmental management system including ControlChem's:

- ♦ International Standards Organization ("ISO") 9001 certification and early adoption of ISO 14001
- ♦ continual participation in the ISO 14001 audit process
- ♦ participation in biannual environmental compliance audits conducted by an external environmental consultant
- ♦ creation of its comprehensive ISO 14001 environmental manual
- ♦ establishment of detailed standard operating procedures, including instructions for the disposal of waste, truck maintenance inspections and cleaning of reusable totes and drums
- ♦ organization of regular production team meetings
- ♦ dissemination of the company mantra that "*nothing leaves the building*", and
- ♦ well documented and thorough staff training, including annual spills simulations.

Notably, ControlChem's standards and systems included mechanisms to identify and continuously improve any deficiencies.

In addition to policies, procedures, systems and training, ControlChem presented evidence that it had gone to great lengths to engineer and implement spill containment features at its production facility to ensure the containment of chemicals within ControlChem's production area. These included:

³ Mr. Silva took a plea bargain and was fined \$5,000 for discharging hazardous waste into Sheldon Creek, contrary to s. 30(1) of the OWRA.

⁴ Counts 1, 3 and 5 were pursuant to s. 14(1) and s. 40 of the EPA and s. 30(1) of the OWRA.

⁵ Counts 2 and 4 were pursuant to s. 30(2) of the OWRA and s. 92(1) of the EPA.

- ◆ no sewer drains within the production area floor to eliminate the risk of spilled liquids entering the sewer system
- ◆ a three inch lip around the walls and elevated doors with the capacity to contain up to 20,000 litres of liquid spilled on the chemical mixing and batching floor
- ◆ securely constructed bulk inventory storage tanks with double walls
- ◆ containment of all mixing stations and pumps
- ◆ a closed heating system to eliminate the risk of open flame
- ◆ installation and use of an ultra-filtration system to treat chemical water and ensure that no liquid waste was disposed outside the facility, and
- ◆ installation of spill kits throughout the production facility containing equipment and materials to be used in the prevention and cleanup of spills.

ControlChem's Corporate Culture and Mr. Silva's Deliberate Spill

ControlChem demonstrated that environmental management was integral to its corporate culture. The company expressly prohibited all employees from disposing wastewater outside the facility. ControlChem submitted evidence that its employees were trained to understand specific risks relating to spills through emergency spills simulation training. Notably, Mr. Silva regularly organized and participated in spills simulations, including a simulation of an ACHS spill just months prior to the March 29, 2012 discharge.

ControlChem's president, Douglas Fast, testified that Mr. Silva was a production co-ordinator at ControlChem who had supervisory responsibility for the other production staff members. Mr. Silva had been a ControlChem employee for approximately twenty years with no prior misconduct. He participated in the creation and review of chemical formula sheets, operated and cleaned the ultra-filtration wastewater treatment system and understood that nothing was to leave the building. As recited by the Court from Mr. Fast's evidence, Mr. Silva had "*...twenty years of outstanding performance and one day of horrible performance...*"

The Court found that Mr. Silva had competent skills and knowledge, and that he adequately comprehended the company policies and procedures. During trial, Mr. Silva himself acknowledged that he understood the duty to report any environmental spill and that he was required to do so.

The Decision

The OCJ found that the Crown proved all elements of each of the five charges beyond a reasonable doubt. But, the Court acquitted ControlChem of all charges in finding that the company proved, on a balance of probabilities, that ControlChem exercised due diligence and took all reasonable care to prevent the March 29, 2012 discharge.

The Court found that Mr. Silva's aberrant action was not reasonably foreseeable:

The evidence reveals the Defendant (ControlChem) to have farsighted, thoughtful, methodical and well documented philosophy and standards to address environmental protection generally and specifically addressing the issue of spills avoidance/mitigation. ControlChem generally presents as an enterprise with a culture of strong commitment to proper environmental standards. Management recognized the high risk of severe harm that could follow from a spill or discharge of any materials employed and robust steps were taken to minimize this risk and harm.⁶

The Court recognized that ControlChem's steps to guard against environmental risks were proportionate to the serious risk to public safety and the natural environment. In addition, the Court noted the company's compliance with reasonable industry standards.

While no amount of due diligence can guarantee the prevention of an environmental incident, this decision highlights the importance for companies to implement and document meaningful prevention practices in support of an environmental due diligence defence. The bar is high to satisfy the Court that an accused should be absolved. *R v ControlChem* illustrates that the shift in the burden of proof to the defendant can lead to acquittal on the right set of facts.

This case shows that a successful, grand slam, due diligence defence requires not only the development of environmental policies, but a genuine commitment to environmental protection. This includes ensuring environmental policies are known and implemented at all levels of a company's operations. It also includes continuous improvements to company policies, procedures, systems and training to reflect or exceed current environmental standards. Anything less may negate the opportunity to successfully defend an environmental prosecution.

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⁶ *Supra* note 1 at page 34.