

IS YOUR COMPANY PREPARED FOR NEW ENVIRONMENTAL ENFORCEMENT?

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On March 4, 2009, the federal Minister of Environment tabled *an Act to amend certain Acts that relate to the environment and to enact provisions respecting the enforcement of certain Acts that relate to the environment*. The Act, known as Bill C-16, will amend nine other federal Acts including, the:

- *Canadian Environmental Protection, 1999;*
- *Canada Wildlife Act;*
- *Migratory Birds Convention Act, 1994*
- *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*
- *International River Improvements Act;*
- *Antarctic Environmental Protection Act;*
- *International River Improvements Act;*
- *Canada National Parks Act;*
- *Canada National Marine Conservation Areas Act;* and
- *Saguenay-St. Lawrence Marine Park Act.*

Bill C-16 was debated at second reading on March 23rd and 25th, 2009 and is currently before the Standing Committee on Environment and Sustainable Development having been referred to that committee on March 25, 2009. This article will outline some of the key aspects of the new legislation and spotlight the recent decision in the *Her Majesty the Queen v. Suncor Energy Inc.* in the Provincial Court of Alberta Criminal Division.

Given the Federal Government's recent announcement of its intention to increase the number of enforcement officers and to better its laboratory equipment and technical expertise, coupled with the introduction of Bill C-16, companies are increasingly interested in how the new enforcement legislation might impact their operations and whether they can establish that their company has acted with the requisite due diligence. Recent enforcement activity by the Alberta Government against Suncor under Alberta's *Environmental Protection and Enhancement Act* has resulted in fines and other remedial measures against Suncor and its contractor and subcontractor in the amount of \$850,000 making the Suncor decision an expensive example to learn from.

Key features of the new Bill C-16 include:

1. Increasing minimum fines for large corporations who commit serious offences generally, especially for repeat offences – fines range between a minimum of \$15,000 to a maximum of \$12,000,000;
2. Differentiating between penalties for individuals (including officers and directors of corporations), small resource corporations and large corporations;

3. Establishing a positive duty of care on directors and officers to ensure compliance with the *Act*;
4. Directing that fines be paid to an Environmental Damages Fund unless otherwise ordered by the court;
5. Creating a public registry for corporate offenders; and
6. Identifying factors that the Court needs to consider in sentencing.

So what defence does a corporation have in the face of environmental enforcement? The answer is “due diligence” and understanding what is required to prove your due diligence means keeping abreast of legal developments and recent enforcement activity.

While there is no written decision from the Provincial Court in the Suncor decision, the following information is based upon a review of the Agreed Statement of Facts, the Crown’s Submissions and the final Orders granted in the case.

The enforcement action started with Alberta filing two separate charges against Suncor and its contractor for failing to install pollution control equipment at its facility near Fort McMurray and failing to tell Alberta Environment about it and for dumping under-treated wastewater from a company-owned work camp near Fort McMurray into the Athabasca River. Joint submissions were made by the Crown and defence counsel as part of a creative sentencing effort. Pursuant to s. 235(1) of the Alberta *Environmental Protection and Enhancement Act*, fines were levied in addition to other creative sentencing measures including a mandatory requirement to update the Alberta Water and Wastewater Operators Association training course to increase emphasis on professional responsibility, funding of a scholarship program and training, and other creative measures.

According to the Agreed Statement of Facts, the Suncor Millennium Wastewater Treatment Plant is owned by Suncor, but during the period of the offence it was operated by Suncor’s contractor who in turn contracted part of the running of the plant to a subcontractor. Albert Environment discovered that the subcontractor had falsified lab results and the alteration of those lab results, in all cases but one, hid the fact that there had been violations of the TSS limits. The contractor had no knowledge of the falsification and culpability was based on failure to investigate and properly supervise the subcontractor. Similarly, Suncor had no knowledge of falsification and again, culpability was based on failure to investigate the competency of its contractor and thereafter in failing to properly supervise that contractor.

In the Crown’s submissions to the Judge, she relied on the case of *R. v. Sault St. Marie (City)* [1978] 2 S.C.R. 1299 and *Canadian Dredge & Dock Co. v. The Queen* [1985] 1 S.C.R. 662 arguing that certain aggravating factors were relevant to the sentence including the contractor’s negligence in the supervision and oversight of its subcontractor and Suncor’s previous convictions in 1983, 1990 and 1994 and its limited supervision or oversight of its contractor.

In summary, what can you do to prepare your company for new environmental enforcement?

- Keep abreast of legal developments and recent enforcement activity

- Review your compliance assurance systems
- Conduct litigation risk assessments
- Have a plan in place for immediate legal assistance during investigations and enforcement proceedings
- Review and obtain assistance with compliance relating to emissions monitoring

If you have any questions about this article or wish to obtain additional information or materials, please contact Sarah D. Hansen at shansen@millerthomson.com, Daniel Kiselbach at dkiselbach@millerthomson.com, or Tony Crossman at tcrossman@millerthomson.com or by phone at (604)687-2242