

NEWS

June 29th, 2010

Judgment - Syncrude found guilty of federal and provincial environmental offences[Français](#)

Overlapping legislation and the possibility of duplicated environment-related charges remains a concern. Tar sands operator Syncrude has been found guilty of environmental offences brought under Alberta's general environmental legislation, as well as under the Federal Migratory Birds Convention Act.

[In a detailed judgement issued June 25, 2010](#), Judge Tjosvold of Alberta Provincial Court rejected Syncrude's due diligence defence. The judgement contains some interesting points and which are of general application in environmental offence cases.

Syncrude's tar sands operation includes tailings ponds, notably the Aurora pond in the Fort McMurray area. The 1300-acre pond contained strands and clumps of tar, as well as a tar "mat". On April 28, 2008, a large number of ducks landed on the tailings pond and came into contact with the tar. Roughly 1600 birds died.

Under the Alberta legislation, Syncrude was charged with failure to keep or store a hazardous substance in a manner so as to ensure it did not come into contact with birds.

Under the federal legislation, the charge was that of having deposited a substance harmful to migratory birds in an area frequented by them.

The Court decided that the essential elements of the offences had been made out. Of particular interest as regards the federal legislation, the Court considered the question of what constitutes an area frequented by migratory birds. According to the Court, the "area" for the purposes of the charge included the space over, on or adjacent to the deposit of the harmful substance and close enough to the deposit for the migratory birds to be attracted to the specific location. As to "frequented", this imported the dictionary notion of associating with, being in or resorting to a place often or

habitually, or visiting often. In this case:

- The basin of the tailings pond was located in way of two major migration flyways;
- A body of water, even if less appealing than others, is going to attract waterfowl;
- The evidence established a regular presence of waterfowl;
- Syncrude's Waterfowl Protection Plan demonstrated that waterfowl tended to visit the location.

On the defence of due diligence, the Court decided that Syncrude had not taken reasonable precautions to prevent the commission of the offence:

- There was a bird deterrence team, but there was no formal training in bird behaviour and other aspects;
- While there were no norms in the industry for bird deterrence, it was clear that having adequate personnel ready to deploy deterrents at the latest in early April was good practice; here, the deployment was both late and slow;
- The absence of documented procedures for deterrence, as well as personnel reductions, contributed;
- The previous years' experience of lower bird mortality could not serve as a basis for predicting such would continue to be the case.

The case is continuing. In addition to a distinct possibility of an appeal, the sentencing stage (determination of fine) will take place later this summer. The maximum fine under the provincial legislation is \$500,000; under the federal legislation \$300,000 (slated to increase). According to the prosecution, there is a possibility of a discrete fine for each bird, although Syncrude naturally disputes this. Also up for argument: Can there be more than one conviction for what is essentially the same offence?

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