

CONTINUITY OF EVIDENCE AND REMEDATION ADVICE FOR INVESTIGATORS: SOME BRIEF COMMENTS

John D. Cliffe, Q.C. and John S.G. Clark*

A Symposium on
Environment in the Courtroom:
Evidentiary Issues in Environmental Prosecutions and Hearings
March 6-7, 2015
University of Calgary

This project was undertaken with the financial support of:



Environment Canada Environnement Canada

Ce projet a été réalisé avec l'appui financier de :



Environnement Canada Environment Canada



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.



Canadian Institute of Resources Law
Institut canadien du droit des ressources



UNIVERSITY OF CALGARY
FACULTY OF LAW

*Respectively counsel at Cliffe Tobias, Barristers & Solicitors of Vancouver, British Columbia, and the Federal Department of Justice, Business & Regulatory Group, British Columbia Regional Office at Vancouver. Mr. Cliffe will address “Continuity of Evidence” and Mr. Clark will address “Remediation Advice for Investigators”. The statements, opinions and views of the writers herein are solely those of the writers and are not those of or reflective of either Cliffe Tobias, Barristers & Solicitors, the Federal Department of Justice and/or the Government of Canada.

The Canadian Institute of Resources Law encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following considerations:

- (1) You must acknowledge the source of this work
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of the Institute.

Copyright © 2015

Of the many things that an investigator or a first responder to an environmental incident and legal counsel advising both must be mindful of, continuity of the evidence gathered and timely remediation of the impacted environment are two such things notwithstanding that they are unrelated.

CONTINUITY OF EVIDENCE

My comments are from an enforcement and prosecutorial perspective.

1. “Continuity” Ordinarily Defined

The plain and ordinary definition of the word “continuity” is a “connection uninterrupted; cohesion; close union of parts ...”.¹ “Continuity” is also defined as “the state of being continuous; uninterrupted succession ...”.²

2. “Continuity” in the Legal Context: Generally

The issue of continuity or what is sometimes referred to as “continuity of possession” or what some American jurisdictions have termed “chain of custody” arises when real evidence including articles of physical evidence is tendered in legal proceedings such as a trial.

Watt’s Manual of Criminal Evidence, 2013, defines real evidence to include:

“... any evidence that conveys a relevant *first-hand sense impression* to the trier of fact. In other words it appeals to the trier of fact to use their own senses to make observations and draw conclusions, rather than being told about the object by a witness ... is unlimited in its variety. It includes, but is not limited to production of articles, observations of demeanor or appearance of witnesses, taking a view, and audio or videorecordings. It may be direct or circumstantial in nature.”³

The introduction of real evidence including physical evidence (articles of all kind) as exhibits at trial requires a foundation of admissibility laid by the testimony of witnesses or admissions at trial made by the accused. A proper foundation rests on three points.⁴

One, the proposed exhibit must have relevance to the proceedings. In other words it has probative value in proving a fact in issue. Two, it is what it purports to be and accordingly

¹ Virginia S Thatcher & Alexander MacQueen, *The New Webster Encyclopedic Dictionary of the English Language* (New York: Avenel Books, 1984) at 185.

² *Webster’s Dictionary For Everyday Use* (Florida: PSI Associates, 1988) at 85.

³ *Ibid* at 82-83.

⁴ Lee Stuesser, *An Advocacy Primer*, 3d ed (Toronto: Thomson Carswell, 2005) at 228.

is authentic and/or identifiable. Three, a witness or witnesses must verify the authenticity or otherwise identify the proposed exhibit.

Continuity is relevant to the above second point. In this regard, it must be shown for example that the proposed exhibit is the same one that was seized⁵ or received during the investigation; if its source is relevant, that it came from the particular source;⁶ it has not been tampered with;⁷ or its chemical composition if relevant has not been altered, contaminated or modified in any manner prior to its forensic analysis.⁸ Accordingly evidence being *viva voce* evidence is required to prove continuity unless, as stated above, an admission of proof of continuity is made by the accused.

It is trite to say that the evidentiary onus of proof of continuity is on the party tendering the proposed exhibit. In the case of an exhibit tendered by the prosecution it is upon the Crown, who has the overarching onus of proving its case against the accused beyond a reasonable doubt, to establish continuity of the proposed exhibit.

A failure to prove continuity can have adverse and drastic consequences. The most serious of which is the proposed exhibit is found by the Court to be inadmissible. If found admissible however the Court may rule that the exhibit and any collateral evidence such as analytical results pertaining to the exhibit may have little evidentiary value or what is termed “little weight”.

For example in the context of a drug prosecution the failure to prove continuity of a sample of the seized drug has been commented upon as follows:

“Where the continuity of possession has been broken, and where the evidence gives rise to a reasonable apprehension the exhibit may have become contaminated, the courts have generally resolved any doubt on the issue in favour of the accused ... None the less, such doubts must be based on reasonable grounds and not a mere ‘fantasy of the mind’”⁹

That said the Courts have on occasion relaxed the requirements for strict proof of continuity. For example in the case of continuity of a proposed exhibit whose chemical composition is relevant the Courts have held that continuity need only be established with respect to the period from the time of seizure or receipt to the completion of analyses.

It has also been long recognized that depending on the facts of the case (including evidence of various precautionary measures) that gaps in continuity are permissible where it is highly unlikely that any alteration, contamination or modification occurred.¹⁰ For example, such a gap where precautionary measures have been taken and the means by which proposed

⁵ Bruce A MacFarlane, *Drug Offences in Canada* (Toronto: Canada Law Book Limited, 1979) at 305.

⁶ *R v Andrade* (1985), 18 CCC (3d) 41 (Ont CA) at 61.

⁷ Stuesser, *supra* note 4 at 228.

⁸ MacFarlane, *supra* note 5 at 305-306.

⁹ *Ibid* at 306.

¹⁰ *Ibid* at 307-308.

exhibits are transported are viewed as trustworthy such as by mail and/or commercial delivery by bus, truck, and aircraft, has not been problematic.

3. Continuity in the Environmental Context: Generally

Given that most environmental investigations involve collection of samples of pollutants and/or impacted environment including waters, fish and wildlife and that prosecutions of same involve tendering evidence of such samples and the results of their forensic analyses (chemical composition; fish bioassay testing, etc.), the issue of continuity is a live one at trial unless there is an admission by the accused. Of course and as stated above other items of physical evidence gathered during the investigation and to be tendered at a trial will attract the requirement to prove continuity with respect to those items.

An environmental prosecution should never be lost on the basis of failure to prove continuity!

It has been my experience that most Government environmental protection agencies have internal procedures governing continuity of collected evidence and that such procedures are followed such that continuity is frequently admitted by the accused. However there are exceptions which will be addressed in oral presentation.

As the collection of samples such as those mentioned above is such an integral part of an environmental investigation I will focus my comments regarding continuity to that form of real evidence.

4. When Continuity is Engaged in the Environmental Context

In Government environmental protection agencies the question commonly asked is “are we taking legal samples or non-legal samples”. The answer dictates whether continuity has to be established by the investigator.

The difference is based on whether the sample and its results are to further a criminal investigation of the environmental incident and subsequently be used in legal proceedings, hence the word “legals”. The reference to “non-legals” is to what is sometimes termed “routine sampling” by the agency for compliance purposes which does not require the rigours of continuity.

This difference and what is entailed by it, including continuity, are aptly described in the *Interpol Environmental Security Sub-Directorate Pollution Crime Forensic Investigation Manual, 2014*, (the *Interpol Manual*), and as follows:

“The distinction between legal sampling and routine sampling is the ability to prove in court the chain-of-custody of a sample. This is the practice of ensuring security of the sample so that no one

has an opportunity to tamper with or otherwise alter the sample or the results. The prevention of tampering involves the placement of seals on the sample container and locking the sample in storage, shipping containers and/or vehicles in such a manner so that no one other than the documented sample handlers has direct access to the samples ... Legal sampling involves approximately 30% more effort to carefully handle and document the samples and evidence. Laboratories require additional security procedures and may charge up to 50% more for handling legal samples and providing special legal reports.”¹¹ (Emphasis added)

When specifically should legal sampling be undertaken may be dictated by an agency’s internal sampling policies and procedures or by decision in the moment by management staff or individual investigators. The *Interpol Manual* recommends that legal sampling should be conducted in the following circumstances:

“When you strongly suspect a violation may have or is occurring for which an enforcement action and/or a penalty is likely to apply;

Spills or environmental accidents;

When you have no previous knowledge about compliance history;

There is unlikely to be a subsequent chance to collect a sample or the cost/logistics of collecting a subsequent sample are prohibitively high.”

5. Establishing and Proving Continuity of Legal Samples

It is trite to say that the investigator who conducts legal sampling will have control at least in part over continuity of those samples. Other agency staff may be involved in subsequent handling of the sample containers and as a result be in control of continuity.

Leaving aside sampling procedure and its conduct, continuity may comprise of requirements for sample containers appropriate and specific to the type of samples being taken including appropriate lids and lid liners for the containers; sufficient detailed and lasting labels affixed, marked and/or scratched on the sample container to later permit in Court authentication and identification; seals sufficiently affixed to the sample container such that the seal must be destroyed to open the container thereby confirming whether someone has had access to the container; interim storage before being transported to the forensic laboratory; use of a lockable shipping container to store the sample containers for transport; transport to or arranging transportation to the forensic laboratory for analyses and testing; taking photographs or video to record the continuity process; completed detailed documentation usually on a specific agency continuity form recording all dealings with the sample containers (and/or shipping container storing the sample containers); making detailed notes of the sampling and continuity thereafter.¹²

¹¹ *Ibid* at 105.

¹² *Ibid* at 106-111.

In addition there is the continuity process followed at the forensic laboratory which includes receipt of the sample containers, interim storage prior to and during analyses.

Unless there is an admission made by the accused of proof of continuity counsel tendering legal samples and their analytical results as exhibits at trial must prove it. As a result counsel must know and understand the continuity process followed by the investigator, other agency staff and the forensic laboratory so counsel can gather and present the evidence of it in an organized and cohesive manner.

REMEDICATION ADVICE FOR INVESTIGATORS

My interest in this subject arose from a series of courses John Cliffe and I worked on. We spoke at several dozen multi-day environmental enforcement workshops across the country. Early on we realized we needed to address this, as investigators consistently brought up a variety of fascinating real life scenarios on this subject.

Besides addressing the queries of the investigators we found there were several reasons for providing legal advice on this subject, including:

- Clean up is always a good idea. Our assumption, which seemed to be shared by many, was that it is always in the Crown's interest, the public interest, and the interest of the accused to restore, remediate and/or protect the environment as well and as quickly as is feasible.
- The Crown should not get in the way. It would be detrimental to the Crown's case to have any suggestion an investigation in any way hampered remediation efforts; or greater harm to the environment resulted because an investigation complicated remediation works of the accused.
- Uncertainty due to investigation. Some accused have stated in Court, or otherwise, that they would have quickly cleaned up a site, or significantly lessened the environmental impact of works, but no one in authority ask them to do so; and in the circumstances of uniformed officers attending their premises they did not want to take any steps without specific direction. One can easily imagine circumstances where the Crown would look (and be) unreasonable if it did not take immediate steps to remediate harm.
- Timing. Many types of environmental impacts benefit significantly from prompt cleanup efforts. If the harm is left to be dealt with by way of Court order, adverse environmental effects may be greater or last longer.
- All goes to sentencing. Any efforts, successes, or lack thereof by the accused will be relevant to any sentences or orders imposed upon conviction. In some cases

complete and timely restoration may be a factor in the Crown not proceeding with charges.

1. What Should Investigators and Their Legal Counsel Bear in Mind Regarding Remediation?

Who is the accused and what is the accused doing? The first matter an investigator should confirm is if the accused has already undertaken all reasonable remediation efforts. Many larger companies or public utilities will have the mandate and resources to undertake remediation efforts at the earliest reasonable time. Investigators can often quickly determine if a corporate accused is taking all such steps. If this is the case remediation issues will likely not be relevant to investigative efforts.

How complex is the problem? Often devising measures to protect or remediate the environment is more complicated than lay people will appreciate. There are many sites and many environmental problems that cannot be feasibly remediated; and will only be made worse by human efforts. Providing advice to an accused that makes a site worse will be detrimental to both the environment and a potential prosecution.

How sophisticated is the accused? Sometimes the offence at issue is at least in part due to the lack of expertise or care of the accused. Investigators should consider whether it makes sense to have this particular accused, corporate or otherwise, undertake delicate remedial efforts.

Use of experts? If the circumstances are beyond the capabilities of the investigators and/or the regulators, they may be able to use experts within their Ministry, or who are known to their Ministry. Conversely, investigators can suggest, encourage or in some cases direct an accused to obtain appropriate expertise to provide a remediation or cleanup plan.

2. Investigators And Their Legal Counsel Need To Be Clear As To The Crown's Position.

The following is noted:

- Investigators should leave no doubt that their actions will not hamper remediation efforts. If this is an issue investigators must secure the most important and time sensitive physical evidence (e.g.samples; photographs; taking measurements; identifying individuals) and leave witness interviews until they would not impact remediation efforts.
- Investigators should document their remediation advice. For example, this can be done by using emails to confirm on site recommendations and suggestions.

- Provide complete clean up advice. In my experience DFO officers have a practice of sending cleanup advice letters soon after attending an impacted site. The letters explicitly confirm that the advice does not entail a promise of avoiding prosecution, nor are the clean up or remediation recommendations and suggestions to be considered a threat of prosecution. The letters can provide and document the best advice of the regulator as to how to remediate the impacted environment.
- Issue a Direction. Various environmental legislation allow regulators to issue directions to remediate. Where applicable this practice can have environmental and legal benefits.

Where potential accused comply with such directions and mitigate environmental harm, this action will at least go to sentencing; and place an accused in a more sympathetic light in a prosecution. In some cases significant remedial efforts may influence the Crown not to proceed with a prosecution.

Conversely, if a statutory direction is not complied with, this may result in further charges brought by the Crown. A prosecution for failure to comply with such a direction are typically easier to prove in Court, as due diligence will rarely be an issue.

3. Did the Regulator Make a Deal?

What are the legal consequences if a regulator, or government expert or an investigator implies that charges will go away if everything is cleaned up? To my knowledge, the Crown does not have a position as to whether this is appropriate practice. However, if such comments are made, and an accused does undertake the requested cleanup efforts, it would appear to be problematic for the Crown to continue to prosecute as the accused would likely raise a good argument that to do so would be an abuse of process for which a judicial stay of proceedings is warranted.

4. How Long Will the Clean Up Take?

Sometimes remediation planning, discussions and works can take place over several years. Investigators and their legal counsel should remain aware of the applicable statutory limitation periods under which the Crown can bring charges. The regulator may find itself statute barred if remediation works never eventually take place or continue for an unreasonable period of time.

We hope that the above comments are helpful.

JDC / JSGC