COLLECTING ESSENTIAL EVIDENCE FOR ENVIRONMENTAL INVESTIGATIONS AND PROSECUTIONS: APPROACHES TO LEGAL STRATEGY AND ASSOCIATED ISSUES

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I. INTRODUCTION

Environmental investigations and prosecutions can be daunting, even for the most experienced environmental practitioner. The variety of fact situations, offences, expert evidence and law that may be brought to bear in any particular case can be expansive and challenging. At every stage of the process, the effective management, control, collection, evaluation and presentation of evidence is critical to a positive outcome. This paper provides an overview of one practitioner's recommended "best practices" with respect to many of these evidentiary activities.

We begin in Part II by providing a legal context for environmental offences and the evidentiary implications of the laddered enforcement approach common to most public welfare regimes. In Part III we examine the key evidence which is required by one's client in order to "stop a prosecution before it starts" – in a nutshell, how clients can avoid the commission of environmental offences by achieving due diligence. In Part IV, we review, in some detail, strategic legal approaches for responding to the many evidentiary issues raised by an environmental investigation. In Part V, we move out of the investigatory phase and into the pre-trial and trial phase that follows the laying of charges. Here, we examine the strategic legal issues which arise, from an evidentiary perspective, as one deals with the Crown prosecutor pre-trial, or otherwise prepares for trial.

We hope that by the time you reach the conclusion of this paper in Part VI, your thinking will have been stimulated, you will be asking lots of new questions, and you will feel even more prepared for your next case.

II. BACKGROUND ON ENVIRONMENTAL OFFENCES – EVIDENTIARY IMPLICATIONS?

A. The Ladder of Enforcement – Its Evidentiary Implications

All environmental regulators adopt a stepped or laddered approach to enforcing compliance.[1] For practical purposes, this means:

Step 1 – Voluntary Abatement. As a first step, regulators will almost always attempt to achieve compliance through "voluntary abatement". The regulator (abatement officers, inspectors) uses "suggestions" to persuade companies to voluntarily comply with statutory prohibitions, regulatory limits and approval requirements. The value of this approach is that it saves both the regulated party and the regulator enforcement costs.

Step 2 – Approvals. As a second step, legislation sometimes requires regulated parties to

[1] See, for example, the Ontario Ministry of Environment and Climate Change policy, *Compliance Policy Applying Abatement and Enforcement Tools* (May 2007), online: <https://dr6j45jk9xcmk.cloudfront.net/documents/1098/60-applying-abatement-and-enforcement-tools-en.pdf>.

obtain approvals or permits for a wide variety of activities (air emissions, water emissions, handling of waste). These approvals and permits often have detailed, legally binding terms and conditions.

Step 3 – Administrative Orders. As a third step, discretionary decision-makers (director or minister) may exercise their broad statutory powers to require mandatory compliance through orders. Usually, such orders can be appealed to an expert tribunal or court. If they are not appealed, they remain legally binding and impose absolute liability.

Step 4 – Environmental Penalties. As a fourth step, discretionary decision-makers can impose "environmental penalties" or "administrative monetary penalties" upon parties out of compliance with the law. Such penalties impose absolute liability fines for violations of environmental legislation. On their appeal, often a reverse onus is imposed (appellant must disprove that offence occurred).

Step 5 – Quasi-Criminal Investigation & Prosecution. As a fifth and final step, where voluntary abatement, approvals, orders and environmental penalties have failed to secure the required behaviour of the regulated party, the regulator may resort to investigation and prosecution. The investigation is one in which the predominant purpose is to collect evidence for the purpose of acquiring reasonable and probable grounds sufficient to lay charges, and to create a "Crown Brief" of evidence which may be used by the Crown prosecutor to prove those charges beyond a reasonable doubt. These are generally "strict liability" offences, in which Crown needs only prove the "actus reus" of an offence beyond a reasonable doubt, namely, that a statutory prohibition (e.g. causing an "adverse effect"), regulatory limit, order or approval has been violated. In such a prosecution, the accused can negate offence by proving "due diligence", i.e. non-negligence, on balance of probabilities. If convicted, the Court may impose substantial penalties on an accused, including multi-million dollar fines and/or imprisonment and disgorgement of profit.

The focus of this paper is preferred strategies around the collection of evidence when one's client is involved in this fifth and last step – an investigation and prosecution. However, one must remember that a good legal strategy requires consistent approach throughout all aspects of regulation (from Step 1 through to and including Step 5).

The significance of being at Step 5, is that your client is already in a situation where the regulator has concluded that Steps 1 to 4 are inadequate because of the gravity or persistence of your client's non-compliance. The regulator perceives your client as a serious offender who needs a heavy stick to achieve compliance.

The consequence is that it may be an uphill battle to persuade Ministry to return to Steps 1-4. However, you may be able to do so by:

- Demonstrating and documenting your client's environmental management system (EMS) and due diligence;

- Establishing with evidence your client's *bona fides* with the ministry;
- Responding carefully and diligently to inspections and investigations, in a manner that provides evidence which has been demanded, but controls its flow;
- Demonstrating with evidence that your client has fixed the problem so that it will never occur again.

Note, the above actions can also be taken proactively – prior to any prosecution – to completely avoid: a) non-compliance, b) investigation and c) prosecution.

B. Evidentiary Implications of Public Welfare Law

The defence of due diligence has been defined by the Supreme Court in *Sault Ste. Marie* as follows:

> The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.[2]

For our purposes, the significance of this definition is that:

1. The Crown assumes that an accused was negligent (not duly diligent) and failed to take all reasonable steps, i.e. that there will be evidence in the Crown Brief confirming same;
2. The Investigator will seek evidence to prove an accused's negligence, for inclusion in the Crown Brief;
3. You must independently assess whether there is evidence proving, on balance of probabilities, that the accused was duly diligent, i.e. not negligent. Applying the test in *Sault Ste. Marie*, and the long list of cases in which the defence basic test has been adumbrated,[3] you must determine whether your client took all reasonable steps to avoid the particular *actus reus* in question; and
4. An accused must put in place systems to prove it will be duly diligent going forward, and provide you with evidence that it has done so.

[2] *R v Sault Ste Marie (City)* (1978), 40 CCC (2d) 353 (SCC) at 373-374.

[3] See, for example: *R v Wholesale Travel Group Inc* (1991), 67 CCC (3d) 193 (SCC); *Lévis (City) v Tétreault*, [2006] 1 SCR 420; *R v Commander Business Furniture Inc* (1992), 9 CELR (NS) 185 (Ont Ct (Prov Div)), aff'd 22 WCB (2d) 526 (Gen Div); and *R v Courtaulds Fibres Canada* (1992), 9 CELR (NS) 304 (Ont Ct (Prov Div)), to name but a few.

III. LEGAL STRATEGY FOR STOPPING A PROSECUTION BEFORE IT STARTS

A. Most Important Step – Client Must Achieve (and Create Evidence of) Due Diligence.

The number one strategy for avoiding investigation and prosecution, is to assist your client in avoiding the commission an offence by achieving due diligence. I often do this by providing to my clients the following list of factors that a court will weigh and balance when assessing due diligence. These are taken from the *Commander Business* decision:[4]

1. the nature and gravity of the adverse effect;
2. the foreseeability of the effect, including abnormal sensitivities;
3. the alternative solutions available;
4. legislative or regulatory compliance;
5. industry standards;
6. the character of the neighbourhood;
7. what efforts have been made to address the problem;
8. over what period of time, and promptness of response;
9. matters beyond the control of the accused, including technological limitations;
10. skill level expected of the accused;
11. the complexities involved;
12. preventive systems;
13. economic considerations; and
14. actions of officials.

The difficulty is that there are literally hundreds of court decisions discussing how these factors should be interpreted and applied. So at most, discussing these factors with a client will only provide them with a general idea of what they need to do.

B. Due diligence through an Environmental Management System

Probably the most constructive advice that one can give to a client is to focus the discussion on factor number 12 – preventive systems. This turns the client's mind to whether they can actually prevent all future non-compliance – i.e. offences – by having a proper EMS in place, one which is vigorously and fully implemented. In my experience, this advice provides clients with the biggest "bang for the buck", since the cases are fairly clear that the essence of due diligence is being able to prove that one has a "system" in place to avoid committing offences.

[4] *Commander Business Furniture*, *ibid* at para 87.

So, for example, in *Bata*,[5] the court observed that for an accused to establish due diligence it:

> … 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.

According to *Bata*, a proper EMS must include:

- a reasonable and realistic corporate policy;
- an adequate commitment of resources;
- no omissions in identifying environmental impacts within the organization's control; and
- up-to-date legal requirements.

So do not be afraid to ask your client whether it has evidence that it has an EMS in place which meets these minimum requirements.

Similarly in *Courtaulds Fibres*,[6] the court observed:

> 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.

The court in *Syncrude*[7] put it in these terms:

> 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.

More generally, the key elements of due diligence will require evidentiary proof that:

- An adequate system was properly implemented;
- There has been compliance with reasonable industry standard;
- There was no feasible alternative;
- The contraventions were not reasonably foreseeable; and
- The activities in question were conducted by competent personnel within scope of employment.

Occasionally, clients will ask whether implementing ISO 14001 is it the solution? ISO 14001 is often viewed as the Cadillac of EMS. However, in *Zelstoff*,[8] the defendant was

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[5] *R v Bata Industries Ltd* (1992), 7 CELR (NS) 245 (Ont Ct (Prov Div).
[6] *Courtaulds Fibres Canada*, *supra* note 3.
[7] *R v Syncrude Canada Ltd*, 2010 ABPC 229 at para 99.
[8] *R v Zellstoff Celgar Limited Partnership*, 2012 BCPC 38.

convicted of discharging effluent into the Columbia River despite the fact that it had ISO procedures in place to prevent the discharge. Why? Because the defendant failed to follow those ISO procedures. This underscores the fact that no matter how sophisticated a client's EMS, one must "use it or lose it" – an EMS system must be diligently followed to afford evidence of a defence.

To conclude, an EMS alone does not equal due diligence. To achieve due diligence, your client must vigorously implement the EMS. This includes: ensuring the EMS is documented and followed; regular training; and conducting spot checks, keeping records and acting promptly to rectify deficiencies.

Also, it must also be remembered that an EMS system is a double-edged sword. EMS documentation can also provide evidence to regulator of non-compliances, declining environmental performance, and third party complaints/claims.

C. Due Diligence of Directors and Officers

It has become quite common in recent years that whenever charges are laid against a corporation, similar charges will also be laid against its directors and officers. In the past, this was based upon aiding and abetting provisions, or situations in which corporations were closely held such that by definition the actions of the corporation were also the actions of its "controlling mind".

More recently, even the directors and officers of large, publicly held corporations will be subjected to charges. This may be a function of the fact that specific D&O liability provisions have become pretty much ubiquitous to all environmental legislation.

For example, under the *Canadian Environmental Protection Act, 1999*:

> If a corporation commits an offence under this Act or the regulations, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.[9]

Similarly, under Quebec's *Environmental Quality Act*, directors and officers of a corporation are deemed to have committed a corporation's offence unless they can establish that due diligence was exercised and all necessary precautions taken to prevent offence.[10]

Under Ontario's *Ontario Water Resources Act* and *Environmental Protection Act*, directors and officers have a duty to take all reasonable care to prevent corporation from discharging

[9] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, s 280 [CEPA].
[10] *Environmental Quality Act*, RSQ, c Q-2, s 115.40.

a contaminant.[11] There is also a reverse onus which shifts to directors or officers an obligation to demonstrate that they discharged this duty.[12] Moreover, directors and officers may be found guilty of an offence whether or not the corporation is prosecuted or convicted.[13]

Generally, directors and officers can only avoid prosecution by establishing that they have, each of them, personally exercised due diligence. That is, they need to be able to answer each of the following questions (taken from *Bata*[14] with a "yes":

- Did the board of directors establish a pollution prevention "system" for the company – an EMS?
- Does the EMS ensure proper supervision? Inspection? Improvement in business methods? Compliance with industry standards? Compliance with environmental laws?
- Did the directors exhort those they controlled or influenced to implement EMS?
- Did directors ensure officers report back periodically to the board on the operation of the system, and to ensure that the officers are instructed to report any substantial non- compliance to the board in a timely manner?
- Did the directors review environmental compliance reports provided by the officers or consultants? Place reasonable reliance on those reports?
- Did the directors substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders?
- Are the directors aware of the standards of their industry and other industries which deal with similar environmental pollutants or risks?
- Did the directors immediately and personally react when they noticed the system had failed?

Most important, as legal counsel to an accused director or officer, what evidence does your client have with which to prove the desired "yes" answers to the satisfaction of the investigator, Crown Counsel, or the court?

IV. LEGAL STRATEGY FOR RESPONDING EFFECTIVELY TO AN INVESTIGATION – HOW TO MANAGE THE EVIDENCE?

A. What is an Investigation?

Prosecutions begin with investigation by Ministry investigator (IEB). Clients need to

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[11] *Ontario Water Resources Act*, RSO 1990, c O.40, s 116(1) [OWRA]; *Environmental Protection Act*, RSO 1990, c E.19, s 194 [EPA].
[12] OWRA, s 116(2.1); EPA, s 194(2.1).
[13] OWRA, s 116(3); EPA, s 194(3).
[14] *Supra* note 5.

understand that an investigator is not there to assist the client in abating a compliance problem. The presence of an investigator means the client is already at "Step 5", so the investigator's predominant purpose is typically to collect evidence in order to lay charges and prosecute.[15]

The evidence sought by an investigator includes witness statements, documents in the client's possession, actual samples taken, and the personal observations and photographs of investigator. This evidence goes into a "prosecution brief" that is given to Ministry prosecutor (Crown counsel) and with form the basis of the Crown's proof of charges. If this evidence is not provided by the client "voluntarily", the investigator cannot rely on statutory inspection powers, but rather must obtain and execute a search warrant in order to compel disclosure.[16]

The primary difficulty facing most clients is that abatement "inspections" (that can properly rely upon statutory inspection powers) may occasionally transform into investigations that lead to the laying of quasi-criminal charges when, during an inspection, the inspector acquires evidence which affords him/her "reasonable and probable grounds" (RPG) to believe an offence has been committed, begins collecting evidence for the purpose of prosecution, and effectively becomes an agent of quasi-criminal investigation.[17] For practical purposes, this means that clients cannot let their defences down just because the government employee initially enters the premises as an "inspector".

B. What Can an Investigator Do?

Matters are complicated by the fact that an investigator can access and make use of any incriminating information collected by an inspector prior to the inception of the quasi-criminal investigation.[18] Again, this reinforces that clients should be advised that they cannot let their defences down just because they are responding to an "inspection".

Once an investigation is underway, the inspection can continue in parallel, but the inspector can no longer share fruits of her inspection with "investigative side".

Moreover, in the context of an investigation, an accused's rights under section 7 (liberty) and section 8 (privacy) of the *Charter* are engaged. As a consequence, the investigator cannot compel disclosure of evidence through the use of an inspector's statutory "inspection" powers, even when demanding information or documents from third parties.[19] The investigator needs either consent or a search warrant.

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[15] *R v Jarvis* (2002), 169 CCC (3d) 1 (SCC), and *R v Ling* (2002), 169 CCC (3d) 46 (SCC).
[16] *Ibid*.
[17] *Ibid* at para 94.
[18] *Supra* note 15.
[19] *Jarvis* and *Ling*, *supra* note 15.

As a result, an investigator cannot use the following statutory inspection powers during an investigation:

- Enter a building
- Excavate (with duty to restore property to previous condition
- Require the operation of any machinery/require
- Examine, record, or copy documents or data, in any form and by any method
- Photograph/videotape the condition of operations
- Remove documents/data from the premises
- Make reasonable inquiries of any person, orally or in writing (includes an interview).[20]

However, she can do many of these things with a search warrant.

Moreover, an investigator may have the power to seize (without warrant or court order) anything produced or in "plain view" if he reasonably believes it is evidence of an offence.[21] Clients should be cautioned against leaving sensitive or incriminating documents in plain view.

Both an inspector and investigator may have the power to issue an order prohibiting entry to prevent the destruction of evidence of an offence or discharge causing an adverse effect.[22] Clients should be cautioned to take steps to preserve evidence so such an order is unnecessary.

C. Questions for the Investigator

So when an agent of the regulator comes knocking, without a search warrant, the client's first task is to determine if they come in the capacity of an inspector, entitled to rely on statutory inspection powers, or as an investigator. A good starting point is to ask the officer:

a) Does she have RPG to believe that an offence has been committed?
b) Is she doing an investigation or inspection?
c) Is the client is compelled to answer her questions and provide evidence, or is its cooperation entirely voluntary?

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[20] See, for example, s 156 of the EPA.

[21] Although in *Safety Kleen Canada Inc v Canada* (1991), 7 CRR (2d) 299 (Ont Ct (Gen Div)) at 307, the court held that there is no 'plain view' principle for provincial offences where a search is conducted under warrant, this decision may be in doubt based on the Supreme Court of Canada ruling in *R v Macooh*, [1993] 2 SCR 802. See also: *R v Busat* (2006), 274 Sask R 1 (QB). Statutes may expressly empower an inspector to seize evidence of an offence in plain view: see s 160 of the EPA.

[22] For example, see: s 156.4 of the EPA and s 57(6) of the Ontario *Occupational Health and Safety Act*, RSO 1990, c O.1 [OHSA].

The agent will likely give one of three possible answers:

- She may admit that she has RPG, is conducting an investigation, exercises no statutory powers, and is completely reliant on voluntary cooperation.
- She may say she has no RPG (or is "not yet sure" about RPG), is inspecting, is relying on statutory inspection powers, and compliance is mandatory.

If the first answer is given, the client can ask the investigator for more time in which to obtain legal advice before making a decision on whether to cooperate. If the second answer is given, the client is typically under a statutory duty to answer questions and not obstruct the inspection.[23]

D. What is Obstruction?

Generally, it is a statutory offence to obstruct a provincial officer (e.g. inspector or abatement officer) in the performance of his/her statutory duties.[24]

Under Ontario's EPA, for example, one cannot:

- "Hinder or obstruct" the officer in the performance of his/her duties;
- Submit "false or misleading information in any statement, document or data"; or
- "Refuse to furnish" the officer with information required for purposes of the Act or its regulations.[25]

"Obstruction" means making it more difficult for the PO to carry out his/her statutory duties.[26] Obstruction need not be a positive action. It can simply amount to failing to do something that the officer requests.[27] So clients need to know that they are obligated to cooperate and provide information reasonably required by an inspector, but not a warrantless investigator.

Specifically, with respect to requests for an interview, clients need to know that it is not obstruction to:

- Refuse to give a voluntary interview during an investigation;
- Ask to have lawyer present during interview (however, the inspector may exclude company lawyer during the interview of an employee);

[23] See, for example, s 184 of the EPA.
[24] EPA, s 184. OHSA, s 62(1).
[25] EPA, *ibid*.
[26] *R v Tortolano*, (1975) 28 CCC (3d) 562; *R v Yussuf*, 2014 ONCJ 143; and *R v Clare* (2014), 115 WCB (2d) 383 (Ont CJ), affirmed 2015 ONCJ 341 (Ont CJ).
[27] *R v O'Hara* (1993), 10 CELR (NS) 112 (NS Prov Ct).

- Ask to have your management point person (e.g. Accident Coordinator) present during an interview.

Moreover, under most environmental statutes, the officer may not exclude the lawyer of the person being interviewed. Individuals have a right to have their own lawyer present even during an inspection interview.[28]

Clients also need to be aware that there is no such thing as confidential, "off the record" discussion with inspector/investigator. All information provided is with prejudice.

Regarding warrantless or warranted requests for documents and information, it is not obstruction to:

- Provide only the documents requested; and
- Answer only questions asked.

E. How to Handle Confidential Information

It is also not obstruction to protect privileged and confidential information. Clients need to know that, presumptively, "privileged and confidential" documents include:

- Those marked "privileged and confidential";
- Communications between a company and its lawyers for purpose of obtaining legal advice or for purpose of pending/contemplated litigation. Note that lawyers include in-house counsel and external counsel; and
- Consultant reports prepared for your lawyers at your request.

If the inspector demands that you produce privileged and confidential communications, clients need to know that they should:

- Provide them in a sealed envelope marked privileged and confidential;
- Keep the originals or at least copies of the documents provided; and
- A court will then decide (on motion) if the regulator can look at them.[29]

F. How to Handle a Search Warrant or Inspection Order

In Ontario, a search warrant for investigation and seizure must be obtained from Justice of the Peace (JP) under section 158 *Provincial Offences Act*. To obtain such a warrant, the investigator must have RPG that offence has been committed. In addition, a search warrant: can only be used at the location expressly authorized; expires within 15 days of issue; and must be executed between 6 a.m. and 9 p.m. Before challenging a search warrant on any

[28] EPA, s 156(4).

[29] *Provincial Offences Act*, RSO 1990, c P.33, s 160.

of these grounds, clients would do well to obtain legal advice.

Under section 163.1 of the EPA, an investigator can obtain an order from JP authorizing use of tracking or other device, if she has RPG that an offence has been committed.

However, an investigator does not need a search warrant or inspection order in "exigent circumstances" – i.e. where it is impractical to obtain a search warrant. A statutory precondition to such a search and seizure is that the investigator have RPG that one of two kinds of offences are being committed:

- Discharge of a contaminant causing an adverse effect, or
- An offence relating to hazardous waste or hauled liquid industrial waste.[30]

In carrying out warrant/order, the officer may "use such force as is reasonably necessary"[31] and may call for assistance from the police.[32]

G. Avoiding the Disruption of Search Warrant Execution

Investigators often content to receive documents voluntarily, so they can avoid time and cost associated with obtaining and executing search warrant. Clients should work with their environmental lawyer to:

- communicate with the investigator;
- narrow down the documents requested to a specific list;
- provide only the listed documents; and
- avoid providing unnecessarily incriminating documents.

In the result, your clients may be able to avoid the disruption associated with the execution of search warrant, including the wholesale seizure of all files, seizure of confidential information, and seizure of computers required by the client for ongoing operations.

H. The Value of an Investigation Protocol and Checklist

Clients may be able to avoid business disruption, self-incrimination, and loss of important evidence, through the early adoption and implementation of an investigation "Protocol/Checklist". If obtained from your lawyer and implemented *well in advance of any inspection or investigation*, such a Protocol and Checklist can offer valuable guidance on how employees and management should respond to an investigation.

Typically, the Protocol and Checklist will cover:

[30] EPA, s 161.
[31] EPA, s 163.
[32] EPA, s 166.

- What the company's receptionist/security should do upon an investigator's arrival;
- Who will be the point person to coordinate the company response (escort the investigator throughout the premises, answer questions, obtain documents;
- What information should be obtained from the investigator, for example: name, I.D., purpose (routine audit vs. whether RPG), person the investigator wishes to meet, whether the visit is supported by search warrant, copy search warrant, supporting Information

It should also cover the role of management before, during and after visit, including advice to management on:

- How and when to involve the company lawyer;
- How to evaluate the search warrant and determine if there is compliance;
- How to observe and guide the investigator's search without obstructing it;
- How to make a complete documentary record of the search (admissions of investigator, notes, duplicate samples and photos) which can used in your defence;[33] and
- How to control documentary disclosure and defuse a potentially disruptive search by voluntarily providing documents to the regulator.

On the subject of interviews, the Protocol and Checklist will address:

- How to defer potentially incriminating interviews until employees are properly represented by independent legal counsel, and given an informed choice on whether they want to be interviewed;
- How employees and management should answer questions;
- How to handle and safeguard documentary disclosure;
- How to conduct an exit interview of the investigator; and
- What commitments you should and should not make to the investigator.

I. Employee Interviews?

Employee interviews can expose a company and its directors and officers to serious liability, especially if the employee is without a lawyer and unprepared. Employee statements may be adopted by the court as admissions of the company, and may be admitted into evidence without even calling the employees as witnesses at trial.[34]

In addition, there is a real risk that a scared employee may be more inclined to point fingers

[33] It is critical that sampling evidence be collected by qualified consultants, who take "legal samples" under seal, so that an unbroken chain a custody/continuity can be proven at trial establishing that the laboratory results tendered pursuant to the relevant statutory provisions, in fact relate to the material sampled. See, for example: *R v Metalore Resources Ltd*, 2012 ONCJ 518 (Ont CJ); and *R v Unitec Disposals Inc* (1994), 14 CELR (NS) 78 (Ont Ct (Prov Div)), to name only a few cases.

[34] *R v Syncrude Canada Ltd*, [12 April 2010] AJ No 421 (Alta Prov Ct).

at management or other employees. This is not a desirable outcome from the company's perspective.

The employee's fear may be well-founded if an employee is suspected of committing an offence, and could be charged personally. Even if the employee is not a suspect, she or he may become one as a result of the interview.

As a result, an employee has a right to remain silent and should be advised of that right by the investigator. Unfortunately, not all investigators are forthcoming with this warning, so that responsibility may fall upon your corporate client or you.

Since all interviews during an investigation must be given voluntarily, employees should be given the right to seek legal advice before agreeing to an interview, and an opportunity to have their own lawyer present at the interview.

If an employee is not part of the company's management, I will often recommend that the company facilitate (i.e. pay for) the retainer of independent legal counsel for the employee. This avoids many of the above problems, mitigating employee fears, ensuring the employee receives independent legal advice, and ensuring the employees do not automatically volunteer to give interviews. It also avoids the conflict of interest problem which can arise where a company lawyer represents both the company and the employee, and the employee ultimately testifies against the company.[35]

The independent legal counsel can act for all employees, if they agree to a joint retainer. She can also communicate closely with the company lawyer, and take the advice of the company lawyer, should she agree with it. However, she will give her advice to any employees in complete confidence.

In instances where an employee is a part of company management, and their interests are aligned, the company lawyer can usually represent both the company and the employee, and attend the employee interview on the company's behalf.

V. LEGAL STRATEGY FOR RESPONDING EFFECTIVELY TO A PROSECUTION – HOW TO MANAGE THE EVIDENCE?

If you are retained after charges are laid, the effective defence of an environmental prosecution will generally reflect a number of "best practices" relating to the collection and disclosure of evidence. These best practices have, as their object not only the favourable settlement of the matter (withdrawal of some or all charges; plea to some charges; agreed

[35] Remember that it is generally a bad idea for the company lawyer to represent employees in an investigative interview. If the employee is subsequently called as a Crown witness to testify against the company, you may be disqualified from acting for the company – i.e. acting against your former client. See: *R v Laidlaw Environmental Services (Sarnia) Ltd* (1996), 19 CELR (NS) 42, aff'd 23 CELR (NS) 1.

fine), but also effective representation at trial.

The "best practices" include:

A. Witnesses

If an investigation is ongoing after charges have been laid, continue to control the number of witnesses made available to an investigator, and prepare the witnesses. Do not personally attend witness interviews by the Crown if you plan to be the trial lawyer. Never offer up your employees to an investigator on Company time or as a representative of the Company. Never arrange employee interviews. Always clarify the employee does not speak for the Company.[36]

B. Employees

As noted earlier, ensure that employees are onside and feeling protected with independent legal representation.[37] Circle the wagons with them, and their legal counsel, in terms of their right to refuse an interview where the investigator has no statutory power to compel an interview. Conduct your own interview of employees in the presence of their legal counsel.

C. Crown Disclosure

Always demand full Crown disclosure. Include not only a generic request, but also a specific request which highlights the weaknesses in the Crown's case, and the evidence which you anticipate may be exculpatory of your client. Not only is Crown disclosure essential to proper case preparation and constitutionally required,[38] it can also force Crown counsel to confront evidence which he or she may not have noticed during charge screening, which can result in the withdrawal of charges or a favourable plea.

D. Limitation Periods

One can occasionally get all charges withdrawn based on a limitations defence. If any of the charges cover offence dates which are outside the Crown's limitation period for laying charges,[39] demand disclosure of documentation you either know or suspect may be in the

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[36] For a classic example of defence counsel violating most of these best practices, see: *R v Syncrude Canada Ltd*, 2010 ABPC 123 (CanLII).

[37] *Supra* note 35.

[38] It is constitutionally required under s 7 of the Charter to enable an accused to make "full answer and defence", See: *R v Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45 (SCC).

[39] The limitation period for prosecutions under most of Ontario's environmental laws, is two years from the date of the offence, or from when the provincial officers first knew about it, whichever is later. See: s 195 of the EPA, and 94 of the OWRA.

Crown's possession that would prove the Ministry knew about the offence so long ago that the limitation period expired before charges were laid.

E. Client Disclosure

As defence counsel, you must obtain full documentary disclosure from your own client and analyze it carefully to prepare a tentative "theory of the case". It is not possible to assess whether your client has a due diligence defence, without undertaking this important step.

F. Missing Client Disclosure

If your client's disclosure is obviously missing critical pieces of evidence which should be in your client's possession (and this is frequently the case), you need to ask your client to find the missing evidence for you. You do not want evidentiary surprises during discussions with the Crown, or when your client is on the witness stand, in court.

G. Co-Defendants

In most prosecutions, you will want to "circle the wagons" with co-defendants and their legal counsel. Invoke common interest privilege. Agree not to give interviews or provide additional evidence to the investigator/Crown in which co-defendants point fingers at each other. Agree on defects in the Crown's case. Agree on a strategy that presents a united front to the Crown.

H. Crown Immunity Agreement

On occasion there will be cases in which it does not make sense to "circle the wagons" with co-accused persons. These are cases in which your client was a genuine victim of illegal conduct by a co-accused, despite taking all reasonable steps to avoid the commission of an offence. In such a case, which is admittedly rare, it may be preferable to enter into a Crown immunity agreement with Crown counsel. Under such an agreement, your client agrees to provide evidence to the Crown in exchange for complete or partial immunity from prosecution.[40]

I. Analysis of Crown's Case

A critical step in the defence of environmental charges is to review the Crown disclosure you have received to determine:

a) Whether the Crown can prove *actus reus* beyond reasonable doubt (and whether there is a reasonable prospect of conviction).

[40] See, for example, online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch03.html>.

b) Whether your client can establish a defence of due diligence on balance of probabilities.
c) Whether the Crown has been misled by co-defendants, and this requires correction.
d) Whether the Crown is missing exculpating evidence that is in your client's possession, which may lead the Crown to drop a charge, or reduce a requested fine.

J. Obtain New Evidence Where Necessary

Where both your client and the Crown are missing critical pieces of evidence, good defence counsel will consider whether it is important to go out and find, or generate, new evidence by:

a) Tasking the client to make inquiries and collect new documentation and evidence;
b) Directly seeking out and interviewing new witnesses yourself; and
c) Retaining a trial expert(s) to provide new opinion evidence that tests or challenges the Crown's expert evidence.

K. Educate Client on Due Diligence

We have discussed the elements of due diligence earlier in this paper. In my experience, and depending upon the level of sophistication of your client, it is often a necessary precondition to the successful collection of available and new evidence under steps E, F and G, above, to educate your client about the meaning of "due diligence". Without undertaking this important educational step, many clients will not be able to self-assess whether they have such evidence in their possession, will not be able to provide you with this evidence, and will not know that they need to take active steps to generate new evidence on the subject.

L. Due Diligence "After the Fact"

If it should turn out that your client has no arguable due diligence evidence (because, for example, there were certain reasonable steps it could have taken, but did not take, to avoid the commission of the offence), it is extremely important to the effective defence of a case to determine whether your client has rectified the problem by undertaking these reasonable steps. Your key question for the client will be: "What steps have you taken since the alleged offence occurred to ensure that similar offences do not happen again in the future?"

If inadequate steps have been taken, you should counsel your client to take immediate steps in this regard. You may need to provide your client with access to expert resources to accomplish this objective. If your client has not obtained an environmental compliance report in some time, complete with recommendations on what steps that should be taken to rectify non-compliance (covering all steps, whether immediate, systemic, policy manual, procedural, monitoring, reporting, training, and management), now is the time to do so. I

will often recommend that the client commission such a report through legal counsel, so it can be protected by solicitor-client privilege until such time as a decision is made to disclose it to the Crown.

In the case of a particular offence which the client believes may evidence larger, systemic problems, I will often recommend that more than one report be commissioned: one, which is responsive to the particular offence in question, suitable for disclosure to the Crown; another often larger report, which looks at non-compliance throughout the client's facility, which is kept confidential and not disclosed to the Crown. The latter sort of report is used by the client internally to correct existing problems without bringing them to the Crown's attention.

In the case of compliance reports suitable for disclosure to the Crown, while such evidence is "after the fact" and therefore does not support a due diligence defence, it will be critical to satisfying the Crown that there is no need for deterrence through a high fine.[41]

M. Reasonable Prospect of Conviction

Complete your own analysis of whether, in light of all the available evidence, there is a reasonable prospect of conviction. This requires finalizing your analysis of the Crown's case, per item I above. What is required here is an honest and unvarnished assessment of these critical issues, which can be shared with the client, and can form the basis for obtaining instructions from your client and holding settlement discussions with the Crown (or trial preparation). Jettison unrealistic and unprovable defences which will only clutter your case, cost your client, irritate the Crown and bemuse the court.[42]

N. Communication with Crown

Open the lines of communication with Crown counsel. Meet with Crown counsel. Find out what plea and penalty Crown counsel wants and why. Provide additional evidence and argument to Crown counsel in support of your client's position on plea and penalty. This requires your judgment of whether it will be more effective and in your client's best interest to disclose additional evidence and arguments upfront, or to "keep your powder dry" for

[41] The leading case on sentencing in Ontario is *R v Cotton Felts Ltd* (1982), 2 CCC (3d) 287 (Ont CA), which ruled that the primary purpose of sentencing in all regulatory offences is "deterrence". Of course, there are many other factors which a court is mandated to consider – see, e.g. s 188.1 of the EPA for a list of such factors.

[42] See, e.g. *R v Syncrude Canada Ltd*, 2010 ABPC 229 (CanLII), the newsworthy "oil ducks" prosecution in Alberta. Here, the defendant advanced a multitude of defences, arguing not only due diligence, but also impossibility of compliance, act of God, abuse of the approvals process, officially induced error and that the infraction was de minimis. The court rejected all six defences, and convicted.

trial.[43]

O. Settlement

Most environmental prosecutions settle. This is true for a number a reasons. First, it is true because the likelihood of conviction is high. Generally, charges are only laid after the Crown brief of evidence is subjected to charge screening by Crown counsel, that is, is carefully reviewed and a conclusion reached that there is "reasonable prospect of conviction", and that it is "in the public interest" to prosecute.[44]

Second, it is often more costly to defend than to settle. Clients are first and foremost businesses, and with your help they will carefully evaluate whether it makes monetary sense to fight a case at trial to avoid a fine or obtain a reduced fine. In addition to the immediate cost of settling, a client will need to weigh the cost of agreeing to a conviction, thereby exposing itself to the risk of an increased minimum fine for a second or subsequent offence.

Third, the Crown will occasionally lay charges that are duplicative,[45] or more commonly will lay multiple counts of the same charge in relation to different time periods in which the same offence was committed.[46] Crowns may advise that they did so out of an abundance of caution, but it cannot be ignored that these practices tends to strengthen the Crown's hand during settlement discussions. As a result of these practices, the Crown may be willing to withdraw some charges if an accused pleads to a more limited number of "representative charges". The Crown may also show some flexibility on quantum of fine, especially where defence counsel can establish an arguable defence of due diligence, or

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[43] In civil litigation, there is an obligation upon every party to disclosure to the party opposite all relevant documentary evidence in their "power, possession and control", as well as obligation to make full oral disclosure during examinations-for-discovery. By contrast, in a quasi-criminal prosecution, only the Crown is obliged to disclose. An accused is under no disclosure obligation, and is free to "keep its powder dry" and to surprise Crown witnesses with undisclosed evidence at trial. In practice, however, "keeping your powder dry" generally only promotes one thing – its ensures that a matter will proceed to trial. As a result, this practice is usually not in your client's best interests. If your client has cogent evidence of due diligence, give it to the Crown. Most Crowns will be reasonable and (with the advice of the investigator) will try to evaluate it objectively and do what is right and fair. Give them a chance to exercise prosecutorial discretion in your client's favour.

[44] See, for example, Province of Ontario, Ministry of Attorney General, *Crown Policy Manual* (21 March 2005), Charge Screening, online: <https://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/ChargeScreening.pdf>.

[45] For example, the Crown may lay duplicative charges for polluting under s 14 of the EPA and s 30 OWRA, or for failing to notify the Ministry of a discharge/spill under ss 13 and 92 of the EPA. These extra charges may not withstand a motion to strike based upon the rule against multiple convictions set out in *R v Kienapple*, [1975] 1 SCR 729, but they still serve the Crown as fodder for negotiation.

[46] For example, when charging an accused with operating a waste transportation system without a required approval, it is common for the Crown to lay multiple counts of the same charge for every period of days within a given year in which the illegal system was allegedly operated.

due diligence “after the fact”.

Counsel must carefully document in writing any settlement reached with the Crown. Documentation may include one or more of the following, depending on the case: a) Minutes of Settlement, b) Exchange of letters or emails, c) Agreed Statement of Facts, d) Agreed Submissions as to Penalty, e) Crown Agreement Granting Immunity from Prosecution. Agree on as much as possible, and leave rest for submissions to the court.

P. Trial

Where no settlement can be reached, prepare for trial. Evidentiary considerations and issues arise at every step of trial preparation.

For example, it is common to prepare a trail brief that contains all relevant legal documents, including the Information, court orders, legal memos, and case law. However, the trial brief also needs to include all of the Crown’s evidence which has been disclosed to an accused, including (but not limited to) the Crown Brief which gave rise to the laying of charges. The Crown’s evidence will include all investigation materials, police notes, witness statements, expert reports, demonstrative evidence, official documents (e.g. approvals, searches of records), demonstrative evidence, and relevant government correspondence.

Defence counsel must also prepare, either as part of the trial brief or as a separate “trial book”, his or her work-product in preparation for trial. A typical trial book would include a list of all key “to do” action items by defence counsel, an opening statement, the elements of each offence accompanied by defence counsel’s “theory of the case” with respect to each element, an exhibit list, notes for any motions, notes on key evidence which the defence intends to present, a closing statement, and so on.

It is also critical to trial preparation that defence counsel prepare any motions which he or she contemplates as likely at trial, whether for the commencement of trial or during its course, whether brought by an accused or by the Crown. These typically would include motions to:

- obtain an order for further and better Crown disclosure;
- strike an Information for delay (“*Askov*”);
- obtain a change of venue;
- quash an Information due to invalidity or irregularity;
- strike out charges on account of duplicity or multiplicity;
- amend charges;
- order the joinder of charges;
- order the severance of co-accuseds;
- exclude witnesses;
- exclude evidence;
- adjourn;

- obtain a directed verdict; and
- obtain a court order declaring a mistrial.

You will need to support most of these motions[47] with affidavit or *viva voce* evidence that is prepared well in advance of the motion.

Finally, a key to effective trial preparation is the preparation of your own witnesses. In the case of factual lay witnesses, the most important goal will be to refresh the witness's memory of the relevant facts. Usually, one would prepare a witness statement or "will say" with the assistance of the witness, to ensure there is a clear and common understanding of the witness's intended testimony. Counsel should speak with the witnesses and review the facts of the case and have them review their prior statement before testifying.

In the case of expert witnesses, one would normally obtain an expert report from the witness, for the same reason. Defence counsel may provide appropriate input into such a report, in accordance with acceptance judicial guidance.[48]

VI. CONCLUSION

In this paper, we have attempted to outline some effective legal strategies for the management, control, collection, evaluation and presentation of evidence at every stage of an environmental prosecution – its investigation, pre-trial process, and trial. We hope that our review has cemented in the reader's mind the critical importance of carefully formulating an evidentiary strategy for the defence of such cases. We also hope that it stimulates the reader to reconsider their own "best practices", and to dig deeper into the rich case law and practice associated with regulatory litigation generally, and environmental defence work in particular. Ideally, you will be asking lots of new questions, and you will feel even more prepared for your next case.

[47] Obviously not all motions require evidence from the accused – e.g. a motion for a directed verdict is based entirely upon the evidence submitted by the Crown in its case.

[48] *Moore v Getahun*, 2015 ONCA 55 (CanLII); see also, *White Burgess Langille Inman v Abbott and Haliburton Co*, [2015] 2 SCR 182.