R v Syncrude Canada: A Clash of Bitumen and Birds

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On 28 April 2008, approximately 1,600 migratory birds died when they landed on a tailings pond located on Syncrude Canada's Aurora North tar sands mine along the Athabasca river north of Fort McMurray. The Aurora mine, along with others in this region, fall under the pathway for migratory birds flying to and from breeding grounds in the Peace Athabasca freshwater delta in Wood Buffalo National Park. Weather or fatigue will influence migratory birds to rest along their route and a tailings pond located under the flyway is an attractive resting spot, particularly in early spring as the warm bitumen froth in the pond keeps its surface free of ice and snow. Unsuspecting birds who land on the pond risk being trapped in the sticky mat of toxic bitumen that floats on the surface before it sinks. The migratory birds who landed on the Aurora tailings pond that day were sentenced to certain death.

Bird deterrence programs have been a part of tar sands mining operations since their beginnings in the 1970s, and as one of the pioneer operators Syncrude Canada has decades of experience working to prevent tired birds from landing on its tailings ponds using techniques such as sound cannons. The bird deterrence systems used by Syncrude and other operators do not completely prevent birds from landing on tailings ponds, and in April 2008 an unusually large spring snowfall in the region elevated the appeal of the warm tailings pond and thereby attracted an unusually large number of migratory birds. Syncrude's bird deterrence system was not effective in these conditions.

None of this was likely to attract the attention of the Alberta justice system, but for the fact that Jeh Custer, a member of the Sierra Club of Canada, commenced a private prosecution in January 2009 alleging Syncrude had contravened the *Migratory Birds Convention Act, 1994*[1] for depositing substances harmful to migratory birds in its Aurora tailings pond. The Crown subsequently took control of this prosecution when Environment Canada and Alberta Environment laid their own charges against Syncrude under the *MBCA* and the *Environmental Protection and Enhancement Act*[2] in relation to the death of the 1,600 migratory birds. In September 2009, Syncrude pled not guilty to the charges, and an eight-week trial ensued from March to May of 2010 at the Provincial Court in St. Albert with Justice Ken Tjosvold presiding. On 25 June 2010, Justice Tjosvold convicted Syncrude of both the federal and provincial charges.[3] In late October 2010, Justice Tjosvold sentenced Syncrude to pay $3 million in fines.

There are a number of interesting storylines from which to assess this legal proceeding and Justice Tjosvold's decision to convict Syncrude. The aspects that this comment does not address include the fact that Alberta Justice took over the prosecution rather than intervening

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1 SC 1994, c 22 [*MBCA*].

2 RSA 2000, c E-12 [*EPEA*].

3 *R v Syncrude Canada Ltd*, 2010 ABPC 229.

and requesting a stay of proceedings,[4] and the prospect of a constitutional challenge by Syncrude to section 5.1 of the *MBCA* that never came to be.[5] This comment is primarily focused on the argument that Syncrude was prosecuted for activity that has the regulatory approval of the Alberta government, and the implications of this conviction for the Alberta tar sands industry and migratory bird habitat in northern Alberta.

I. THE AURORA MINE

Syncrude is the corporate front of a consortium of multinational energy companies. Although Suncor had established a small tar sands mine in 1967, Alberta officially entered the tar sands era in the early 1970s when the Peter Lougheed government came to terms with Syncrude on the development of the Mildred Lake mine.[6] The Alberta government subsequently issued many more tar sands mining leases to various companies. Syncrude acquired several of these leases to acquire the right to develop the Aurora mine and replace the diminishing bitumen production from its original Mildred Lake mine. In June 1996, Syncrude applied to the Energy Resources Conservation Board (ERCB) under section 10 of the *Oil Sands Conservation Act*[7] for approval to construct and operate the Aurora mine along the Athabasca river about 70 kilometres north of Fort McMurray.[8]

Syncrude provided Alberta Environment with its environmental impact assessment on the Aurora mine in compliance with terms of reference set by Alberta Environment pursuant to the *EPEA* in November 1995.[9] The terms of reference called for an assessment of how wildlife use the proposed location for the Aurora mine. The Syncrude environmental impact assessment (EIA) report indicates that 81 species of waterfowl frequent the region, and notes that existing lakes are important stopover zones for migratory birds.[10] However, there is no discussion of any impact the Aurora mine tailings pond would have on migratory birds.[11]

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4 I believe the Custer prosecution greased the wheels of Alberta Environment and Environment Canada to proceed with charges against Syncrude. My understanding is that Alberta Justice intervenes in all private prosecutions and will request that the court stay the proceedings. Alberta Justice is of the view that it is best situated to decide whether a prosecution is in the public interest, and that no prosecution will take place unless Alberta Justice believes it is in the public interest. And, in such cases, the prosecution will be conducted by Alberta Justice. For a discussion of Alberta Justice and its view on private prosecutions, see Shaun Fluker, "Remembering Martha Kostuch: The Private Prosecution and the Oldman River Dam" (29 September 2008), online: ABlawg <http://ablawg.ca/2008/09/29/remembering-martha-kostuch-the-private-prosecution-and-the-oldman-river-dam/>.

5 See Jocelyn Stacey, "Lame Duck Constitutional Arguments: A New Twist on Syncrude's Tailings Pond Debacle" (30 June 2009), online: ABlawg <http://ablawg.ca/2009/06/30/lame-duck-constitutional-arguments-a-new-twist-on-syncrude%e2%80%99s-tailings-pond-debacle/>.

6 See Larry Pratt, *The Tar Sands: Syncrude and the Politics of Oil* (Edmonton: Hurtig, 1976) for a detailed review of the politics behind the Syncrude project in the early 1970s. Pratt offers a scathing critique of concessions provided to Syncrude by the Lougheed government. His primary thesis is that the Alberta government essentially agreed to the terms of development set by Syncrude on issues such as taxation, environmental impacts, and labour standards.

7 RSA 2000, c O-7 [*OSCA*].

8 The Alberta Energy and Utilities Board approved Syncrude's application in *Application by Syncrude for the Aurora Mine*, EUB Decision 97-13 (24 October 1997), online: ERCB <http://www.ercb.ca/docs/Documents/decisions/1997/D97-13.pdf>.

9 Syncrude Canada, *Environmental Impact Assessment for the Syncrude Canada Limited Aurora Mine* (BOVAR Environmental, June 1996). The terms of reference issued by Alberta Environment indicate the terms were prepared in accordance with both the *EPEA* and the *Canadian Environmental Assessment Act*, SC 1992, c 37 [*CEAA*]. It is not uncommon for the federal government work with provincial authorities to ensure a "one window approach" to environmental assessment.

10 *Ibid* at 4-125.

11 The Aurora mine EIA covers impact on wildlife, but makes no mention of migratory birds, *ibid* at 5-232 to 5-298.

In response to the Syncrude environmental impact assessment report, Environment Canada recommended certain practices be implemented by Syncrude to address the potential for migratory birds to land on the Aurora tailings pond:

> To minimize the potential use of the tailings by migratory birds, Environment Canada recommends: Gradual filling of tailings ponds should be minimized to avoid the artificial creation of shoreline habitat and shallow edges suitable to shorebirds and waterfowl. Should the present bird deterrent procedures become ineffective, Environment Canada recommends that restraining booms and skimming devices be activated to minimize floating bitumen material.… Environment Canada recommends that the proponent plan to implement a comprehensive deterrent program throughout any new tailings ponds during the peak spring and fall migrations. The proponent is encouraged to investigate and use the best available technology for deterring devices.[12]

In response to Environment Canada, Syncrude indicated the Aurora mine would implement the same bird deterrent program as employed at its Mildred Lake mine and furthermore that Syncrude recognizes "the need for particular diligence in operation of the bird deterrent program during peak migratory periods."[13]

Nobody knows the full extent of social and environmental impacts of the Alberta tar sands. Nevertheless, both the Alberta and federal government approve tar sands projects on a case-by-case basis with faith in the industry assertions that project-specific and cumulative adverse socio-ecological impacts on the water, air, land, and the species that rely on each of these (humans or otherwise), are understood and will be mitigated. The evidence is not convincing, and continued government faith in these assurances is questionable at best.[14]

The tailings ponds are perhaps the most significant problem facing development in the tar sands. The ponds contain a toxic mixture of water, sand, chemical, and bitumen, and are a byproduct of the extraction process to separate bitumen from sand.[15] The extraction process collectively diverts approximately 650 million cubic metres of water annually to wash sand out of the bitumen.[16] To industry, the bitumen that flows into a tailings pond represents lost profits. Evidence tendered at the Syncrude trial suggests anywhere from 3 to 10 percent of bitumen is not captured in the extraction process.[17] For others, the tailings ponds are an environmental liability.

Nearly all of the massive quantity of water diverted from the Athabasca river for tar sands production ends up sitting in the tailings ponds mixed with toxins from the extraction process and the bitumen itself. The ponds are known to leak into the Athabasca river and the

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12 Syncrude Canada, "Response to Environment Canada" in *Environmental Information on developments proposed by Syncrude Canada Limited and Shell Canada Limited* (BOVAR Environmental, March 1997) at 9-10.

13 *Ibid*.

14 See generally Andrew Nikiforuk, *Tar Sands: Dirty Oil and the Future of a Continent* (Vancouver: Greystone Books, 2010).

15 Royal Society of Canada, *Environmental and Health Impacts of Canada's Oil Sands Industry* (Ottawa: Royal Society of Canada) at 121-35, online: Royal Society of Canada <http://www.rsc-src.ca/creports.php>.

16 Pembina Institute, *Duty Calls: Federal Responsibility in Canada's Oilsands* (Ottawa: Pembina Institute, 2010) at 10, online: Pembina Institute <http://www.pembina.org/oil-sands>.

17 *Supra* note 3 at para 12.

surrounding lands, thereby endangering nearby life and communities downstream.[18] Even before commercial tar sands production really began in the 1970s, the tailings ponds were labeled as the "worst single ecological problem in the operation."[19] In 1974 Environment Canada raised doubts on the extent to which Syncrude or the Alberta government had seriously addressed the environmental impact of the proposed tailings ponds.[20] These doubts have been realized in the last decade as tar sands operations escalate to meet global demand for oil.

II. THE OFFENCES

Environment Canada charged Syncrude with contravening section 5.1 of the *MBCA* for depositing substances harmful to migratory birds in its Aurora tailings pond. Alberta Environment charged Syncrude with contravening section 155 of the *EPEA* by failing to keep or store a hazardous substance in a manner that ensures it does not come into contact with birds. The relevant federal and provincial statutory provisions read as follows:

> *Migratory Birds Convention Act*
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> 5.1 (1) No person or vessel shall deposit a substance that is harmful to migratory birds, or permit such a substance to be deposited, in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area.
>
> *Environmental Protection and Enhancement Act*
>
> 155 A person who keeps, stores or transports a hazardous substance or pesticide shall do so in a manner that ensures that the hazardous substance or pesticide does not directly or indirectly come into contact with or contaminate any animals, plants, food or drink.

Both statutes declare the contravention of these provisions to be an offence,[21] and provide the accused with a due diligence defence.[22]

Justice Tjosvold deals with the elements of the provincial and federal offences in somewhat short order. In relation to the offence in section 155 of the *EPEA*, he rules the Crown proved beyond a reasonable doubt that Syncrude contravened the provision on the following evidence: (1) Syncrude stored bitumen in its Aurora tailings pond on 28 April; (2) bitumen is toxic to birds and thus falls under the legislated definition of a hazardous substance in section 1 of the legislation; and (3) bitumen came into contact with birds when they landed on the pond.[23] Syncrude argued that the phrase "come into contact" in section 155 requires that the bitumen come to the birds, and therefore the section does not apply where the birds fly to the bitumen. Justice Tjosvold rejects this argument, ruling that the ordinary meaning of the phrase includes situations where birds come into contact with

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18 Nikiforuk, *supra* note 14, ch 6. See also the Royal Society of Canada, *supra* note 15.
19 Pratt, *supra* note 6 at 106.
20 Pratt reproduces the 1974 response of Environment Canada to Syncrude's environmental impact assessment on its proposed Mildred Lake mine. *Ibid* at 107-108.
21 *MBCA*, *supra* note 1, s 13; *EPEA*, *supra* note 2, s 227(j).
22 *MBCA*, *ibid*, s 13(1.8); *EPEA*, *ibid*, s 229.
23 *Supra* note 3 at paras 84-86.

bitumen and that to rule otherwise would defeat the stated purposes of the *EPEA* to protect the environment, ensure environmentally responsible growth, and mitigate environmental impacts.[24]

Justice Tjosvold rules the Crown also proved the elements of the offence in section 5.1 of the *MBCA* beyond a reasonable doubt on the following evidence: (1) Syncrude continuously deposits bitumen into its Aurora tailings pond as a necessary component of extracting bitumen from sand and thus deposited bitumen into the Aurora pond on 28 April; (2) bitumen is harmful to migratory birds; (3) bitumen initially sits on the surface of the pond; (4) the Aurora pond is located under two migration flyways and is approximately the size of 640 football fields making it an inviting landing spot, and (5) the pond is an area frequented by migratory birds.[25]

Once the Crown established the *actus reus* of these two offences, the onus shifted to Syncrude to escape culpability with a defence. Syncrude raised a number of defences to the charges including due diligence, impossibility, Act of God, abuse of process, and de minimus.[26] In my opinion, the due diligence and abuse of process arguments were Syncrude's primary grounds for a not guilty plea.

III. Due Diligence

Due diligence was Syncrude's most likely defence. The due diligence defence would allow Syncrude to avoid culpability for the death of the migratory birds by establishing on a balance of probabilities that the company took reasonable steps to avoid the action leading to the offence. The Supreme Court of Canada first established the availability of due diligence as a defence against a regulatory offence in *R v Sault Ste Marie*.[27] This so-called strict liability offence falls between a traditional criminal offence where the Crown must establish beyond reasonable doubt both the *mens rea* (guilty mind) and *actus reus* (guilty act) and an absolute liability offence where liability flows from mere proof by the Crown of the *actus reus*. In strict liability cases, such as this one, the Crown has the onus of establishing the *actus reus* from which the offence flows, but the defendant is able to exculpate themselves by demonstrating they took reasonable steps to avoid the act(s) in question.[28]

Much of the evidence tendered at trial focused on whether Syncrude took reasonable steps to prevent the death of the birds in April 2008, and likewise the majority of Justice Tjosvold's analysis focuses on this point.[29] Justice Tjosvold canvasses the lengthy list of relevant factors in a due diligence defence, including: (1) efforts taken by Syncrude to

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24 *EPEA*, *supra* note 2, s 1. Justice Tjosvold dealt with this argument in his dismissal of a non-suit application by Syncrude, in *R v Syncrude*, 2010 ABPC 154.

25 Syncrude in particular argued that the Crown failed to adduce evidence that migratory birds frequent the area (see the non-suit application in *R v Syncrude*, *ibid*), but Justice Tjosvold rules evidence of birds landing on the pond together with Syncrude's bird deterrence program establishes the pond as an area frequented by birds. *Supra* note 3 at paras 87-94.

26 *Supra* note 3 at para 50.

27 [1978] 2 SCR 1299.

28 For an overview of strict liability offences and due diligence see NJ Strantz, "Beyond *R. v. Sault Ste. Marie*: The Creation and Expansion of Strict Liability and the 'Due Diligence' Defence" (1992) 30:4 Alta L Rev 1233.

29 *Supra* note 3 at para 95-128.

prevent birds from landing on the pond; (2) industry standards in these deterrence efforts; (3) the complexity of the matter; (4) alternatives available to Syncrude in its deterrence initiatives; (4) economic considerations; (5) foreseeability of the circumstances that led to the deaths; and (6) the gravity of the offence. Convincing evidence for Justice Tjosvold here included expert testimony on what a minimum reasonable deterrent system would look like, statements from Syncrude employees documenting a decline in the company's resources dedicated to bird deterrence measures in recent years, and testimony that Syncrude's sound cannons were not operational on the Aurora tailings pond on the day of the incident.[30]

Justice Tjosvold concludes that Syncrude did not have a proper system to prevent birds from landing on the Aurora pond or take reasonable measures to ensure the effectiveness of such a system.[31] All of this evidence is particularly damning to Syncrude in light of its response to Environment Canada back in 1997 that the company recognized the need for extra care in bird deterrence during the spring migration period.

By and large this evidence was in relation to the provincial offence in section 155 of the *EPEA*. The federal Crown confirmed at trial that a due diligence defence to section 5.1 of the *MBCA* was not available to Syncrude on these facts because the purpose of the Aurora tailings pond is to store bitumen toxins. The offence occurs with the deposit of the toxins — an act contemplated by the very purpose of the tailings pond. It is nonsensical to argue Syncrude took reasonable care to avoid depositing toxic substances into a designated tailings pond whose very purpose is the storage of toxins. Efforts by Syncrude to deter birds from landing on the Aurora pond are not relevant evidence in relation to an offence under section 5.1 of the *MBCA*. Or at least they should not be relevant.

Surprisingly, the federal Crown indicated to the Court that should Syncrude establish a due diligence defence to the provincial charge by demonstrating reasonable efforts to deter the birds from landing on the Aurora pond, the federal Crown would not seek a conviction under the *MBCA*. This federal concession was important to Justice Tjosvold in his dismissal of Syncrude's argument that this prosecution constituted an abuse of process.

IV. ABUSE OF PROCESS

The Aurora tailings pond operates under licences and approvals issued pursuant to the *OSCA*, the *EPEA*, and joint federal-provincial environmental impact assessments that comply with the *CEAA*.[32] As well, Syncrude and other tar sands producers purportedly rely on an Environment Canada policy that tar sands operators will not be liable under section 5.1 of the *MBCA* so long as they exercise due diligence to prevent migratory birds from landing on the tailings ponds. Syncrude argued at trial that any legal sanction for the death of the birds must rest on evidence that the company failed to comply with conditions in its regulatory license to operate the Aurora tailings pond. To hold otherwise amounts to an abuse of process because either (1) it is impossible for Syncrude to operate its Aurora mine and comply with

30 *Ibid* at paras 20-34, 110-15.
31 *Ibid* at para 128.
32 *Supra* note 9.

the *EPEA* and the *MBCA*, or (2) Syncrude is being prosecuted by the Crown for conducting an activity authorized by the Alberta government under the *OSCA*.

The abuse of process doctrine is available to any court as a means to stay legal proceedings that would otherwise offend notions of justice or fairness towards an accused person.[33] A common example where abuse of process might be invoked is unreasonable delay by the Crown in bringing proceedings forward. A closer example to the facts here would be the prosecution of an accused for an act that is induced by the representation from a government official.[34] The doctrine is used sparingly by courts out of respect for the separation of powers between the judiciary and the executive.

Justice Tjosvold canvasses the applicable law and refuses to apply the abuse of process doctrine largely on the evidence that Syncrude failed to implement its bird deterrence system on the Aurora pond on 28 April.[35] The evidence told a story of neglect on the part of Syncrude towards ensuring adequate resources and attention directed to bird deterrence. Moreover, bird deterrence was not substantively addressed in the 1996 regulatory approval process. In short, there was no evidence of government representations that regulatory approval of the tailings pond would preclude a subsequent prosecution, and in any event, Syncrude did not come to the court with clean hands.

V. Energy Development Versus Habitat Protection

This decision will have significant implications for the Alberta tar sands and its inevitable conflict with legislated habitat protection. The message to Syncrude and other tar sands operators is simply this: there are adverse environmental effects from bitumen recovery and the law does not expect you to completely eliminate them, however the law does require that you take reasonable measures to prevent them. Specifically in relation to migratory birds, this decision stands for the proposition that while birds will die in the tailings ponds, tar sands operators must pay special attention to bird deterrence. Empty promises, such as what Syncrude offered in its Aurora mines regulatory application, will not suffice to avoid legal liability. I suspect tar sands operators currently pay more attention to the effectiveness of their bird deterrence system, and that the ERCB and environmental impact assessments in forthcoming project applications will scrutinize migratory bird impacts more closely than in the past.

Environmentalists will, however, come to lament this decision in their battle against the Alberta tar sands, because it is precedent for a significant reading down from the literal or purposive interpretation of section 5.1 in the *MBCA*. Parliament added section 5.1 to the legislation in 2005 to comply with Canada's commitment under 1995 revisions to the *Migratory Birds Convention* that call for legal protection of migratory bird habitats.[36] The

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33 *R v Rourke*, [1978] 1 SCR 1021, Laskin CJ.

34 *Lévis (City of) v Tétreault*, 2006 SCC 12, [2006] 1 SCR 420 at para 22.

35 *Supra* note 3 at paras 129-32, 143-59.

36 *An Act to amend the Migratory Birds Convention Act*, SC 2005, c 23, s 4. The original and revised version of the *Migratory Birds Convention* between Canada and the United States is attached as a Schedule to the *MBCA*, *supra* note 1. In 1995, the contracting parties revised article IV of the *Migratory Birds Convention* to require each nation to take appropriate measures to preserve the environment of migratory birds, including protection from pollution.

very existence of a tailings pond contravenes the *MBCA* where the pond is frequented by migratory birds. A literal reading of section 5.1 provides no due diligence defence where the area frequented by migratory birds happens to be a tailings pond. This defence has nonetheless been read into the section by Environment Canada policy and was accepted as a necessary element by Justice Tjosvold when he rules that without this policy a prosecution under section 5.1 would likely have been an abuse of process:

> Dealing specifically with the federal count, had the federal Crown taken the position that a conviction should be entered regardless of due diligence to deter birds from the tailings pond, that might well have amounted to an abuse of process.[37]

If there is a victory here for Syncrude and other tar sands operators it is this: Justice Tjosvold's decision is precedent for a significant reading down of what is otherwise absolute legislated habitat protection. Despite the literal reading of section 5.1 and its purpose as habitat protection, the section offers no legal protection for migratory birds in the Alberta tar sands where an operator employs a bird deterrence system that meets with industry standards.

There is one significant wrinkle in this case. The area frequented by migratory birds here is ironically not really bird habitat at all; it is rather a toxic soup. Perhaps if this case had involved some other body of water that truly was bird habitat, section 5.1 would not have been read down as such. Indeed, it is unlikely section 5.1 offences involving real bird habitats ever get to trial because the accused pleads guilty in the face of overwhelming evidence supporting a conviction.

But the irony in this case fails to alleviate the true issue here. At some point we cannot have both habitat protection and unabated energy development — there are choices to be made. The enactment of section 5.1 of the *MBCA* demonstrates a choice made by Canadians (including those who reside in Alberta) in favour of habitat protection. Reading down this provision in an attempt to accommodate both tar sands development and habitat protection makes a mockery of the law and misleads all of us into thinking sustainable development is a priority in our society.

POSTSCRIPT

Just days after Justice Tjosvold sentenced Syncrude to a $3 million fine in late October 2010, another 230 birds died in Syncrude's Mildred Lake tailings pond.[38]

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37 *Supra* note 3 at para 154.

38 Patrick White, "Toxic Syncrude tailings pond kills hundreds more ducks," *Globe and Mail* (26 October 2010) online: Globe and Mail <http://www.globeandmail.com>.