Are Consultants Liable for Environmental Violations They Cause?



Hiring an environmental consultant to furnish technical advice can be a good way to keep a project in compliance with anti-pollution laws. But consultants may slip up and recommend solutions that are legally unsound. Implementing those recommendations may result in environmental violations for which you'd be liable. But what about the consultants who gave you that bad advice to begin with? Are they also liable? Or do they get a free ride? **Answer:** It depends on how much control the consultant had over the activity that caused the pollution. Here's a look at 2 cases showing how different courts have resolved this issue.

Environmental Consultant Is Liable

Here's a case where a consultant had enough control over a project to be held liable for an environmental violation.

Situation

The City of Moncton hires a consulting firm to design a plan for closing a landfill that's been leaking leachate into a nearby waterway. The firm recommends depositing leachate into the river, assuring the City that the substance will be diluted and remain within acceptable levels. The City relies on the recommendation. But the consultant turns out to be

wrong and leachate deposits exceed *Water Quality* guidelines. The Crown charges the consulting firm with depositing a "deleterious substance" into fish-infested waters under the *Fisheries Act*. The firm denies liability. We didn't dump anything, we just consulted, it claims.

Ruling

The New Brunswick court finds the consulting firm guilty of an illegal deposit.

Reasoning

Although the consulting firm didn't do the actual depositing, it "exercised a large measure of influence and control over" the City's decision to deposit leachate into the river. Moreover, even though local government officials approved the plan, the consultants had been warned that leachate deposits might exceed *Fisheries Act* limits. But they still lobbied for and oversaw a plan "predicated on deposit of massive quantities of leachate into the Petitcodiac River system." That was enough to make the firm and its principal guilty and subject to a $28,000 fine.

R.c. Gemtec Limited, 2006 NBBR 439 (CanLII).

Environmental Consultant Is Not Liable

Control was also the key factor in this case from Ontario. But this time the outcome was different.

Situation

A landowner hires a consultant to come up with a plan to keep groundwater contaminated with vinyl chloride from migrating onto a neighboring property. The consultant, who's in charge

of securing all necessary permits, recommends a “pump and treat” plan requiring no permit. Later, the landowner hires another firm to create a system to collect the groundwater in a 500-gallon tank and filter it through carbon drums. The design is faulty. Contaminants escape from the tank and get into the environment. Ontario charges the consultant with operating equipment that discharges contamination without a permit under the *Environmental Protection Act*. The consultant denies responsibility.

Ruling

The consultant is convicted but the Ontario Court of Justice throws out the conviction.

Reasoning

The consultant denied that it “operated” the faulty system. “We keep our hands in our pocket,” the consultant argued. “We don’t operate anything.” If the consultant was right, it shouldn’t have been convicted. But the court noted that the lower court didn’t even consider the argument. “There’s no way of knowing if the trial judge required the Crown to prove” that the consultant “operated” the equipment, the court explained. So, it threw out the conviction and ordered a new trial.

R.v. Brown, 2004 ONCJ 124 (CanLII).