Brief Your CEO: Why Formal EHS Programs Are Necessary for Due Diligence

A licensed outfitter in Saskatchewan hired high school students to clean birds killed during a spring bird hunt. Conservation officers found 135 whole birds disposed of and wasted at the location where the students were cleaning the birds. The court convicted the outfitter of violating *The Wildlife Regulations*, ruling that he didn't "exercise 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" [*R. v. Mitchell*].

THE PROBLEM

Companies need an EHS program that's formal and structured and includes monitoring and oversight to ensure effectiveness and compliance with the environmental laws. Casual, informal programs are unlikely to adequately protect the environment

and ensure compliance. And they're unlikely to convince a court that the company's exercising due diligence. The *Mitchell* case is a good example of what can happen when a company lacks a formal EHS program.

THE EXPLANATION

Some OHS laws require companies to have formal OHS programs to ensure compliance with workplace safety laws. In contrast, the environmental laws generally don't require companies to have formal EHS programs. But this omission doesn't mean that the company can get away without a formal environmental compliance program. That's because having a formal EHS program is the key to exercising and proving due diligence.

Explanation: In 1978, the Supreme Court of Canada decided the *Sault Ste. Marie* case, an environmental case best known for establishing the due diligence defence. The Court ruled that a company can avoid liability for a regulatory offence, such as an environmental or safety violation, if it can show that it exercised "due diligence"—that is,

that it took all reasonable steps to comply with the law and prevent the violation. The Court went on to say that one of the most important factors a court will consider in evaluating a company's due diligence defence is whether it had a "proper system to prevent commission of the offence."

Cases decided since *Sault Ste. Marie* have made it clear that a "proper system" is a formal EHS program that contains the appropriate policies and procedures needed to identify environmental hazards and take adequate steps to address and protect the environment from them. The problem for the outfitter in *Mitchell* was that, at best, he had an informal EHS program. For example, he didn't have a recordkeeping system that tracked the number of birds cleaned and compared it to the number shot. And he didn't have any procedures to ensure that edible flesh wasn't wasted, such as by sorting

damaged birds from good birds as soon as the hunters returned or requiring a senior staff member go through the birds the largely unsupervised students were discarding.

THE LESSON

The key lesson from the *Mitchell* case is that if a company has to comply with requirements in the environmental laws, it needs to have a formal, structured EHS program that covers environmental hazard identification, rules and procedures, training, inspections, discipline for infractions, etc. Naturally, a small operation such as the outfitter's in *Mitchell* may need a less complicated EHS program than a large corporation doing hazardous work involving lots of dangerous chemicals. But even a small company needs a *formal* EHS program.

The structure of a formal EHS program will vary from company to company. But many government guidelines, voluntary standards such as those from the Canadian Standards Association and best practices recommend implementing an EHS management system with four key components:

- **Plan**—Identify your environmental compliance obligations, assess environmental hazards and rate their severity;
- **Do**—Control the hazards identified via the use of engineering, training, work procedures, etc.;
- **Check**—Regularly monitor the EHS management system's effectiveness through scheduled inspections, investigations of spills and other environmental incidents and periodic audits; and
- **Act**—Implement corrective actions and get you and your fellow officers directly involved in reviewing and improving the system.

SHOW YOUR LAWYER

R. v. Mitchell, [2011] SKPC 042 (CanLII), March 3, 2011

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, May 1, 1978