

Building Owners Accused of Environmental Offences for Birds Hitting Windows



When a company or individual is charged with violating an environmental law, it's usually for acts such as spilling a hazardous substance into a water source, discharging a toxic chemical into the air or failing to comply with the requirements of a permit or C of A. But in a recent case from Ontario, the owners and managers of an office complex in Toronto were charged with environmental violations because birds kept flying into the buildings' shiny windows. Here's a look at the court's decision in this novel case.

THE CASE

What Happened: The environmental advocacy group EcoJustice accused the owners and managers of the Yonge Corporate Centre, a group of office buildings in northern Toronto, of violating the federal *Species at Risk Act* as well as the provincial *Environmental Protection Act* based on a large number of incidents in which migratory birds struck the buildings' highly reflective windows and facades and were injured or killed. Some of the birds injured or killed in this manner were Canada Warblers, a threatened species. EcoJustice argued that the owners and managers knew that the buildings posed a threat to migratory birds and didn't do enough to address the environmental hazard.

What the Court Decided: The Ontario Court of Justice ruled that the environmental laws applied in these circumstances but found that the defendants had exercised due diligence.

The Court's Reasoning: The court had two key questions to answer:

Did the environmental laws apply in this situation? The court explained that this case illustrates the 'wisdom of observing flexibility in the drafting of regulatory statutes, particularly in the field of environmental protection.' Although the environmental harm presented in this fact pattern wasn't likely contemplated when the EPA was drafted, the law was broad enough to apply to

emissions and reflections of light from windows. The court also concluded that the *Species at Risk Act* applied to the bird strikes involving threatened species. And it ruled that the prosecution had proven the violations of these laws beyond a reasonable doubt.

Did the defendants exercise due diligence' Due diligence is a defence to violations of these environmental laws. The court noted that although the owners and managers didn't hire an outside consultant to address the bird strikes, they were in touch with and did consult experts in this area. And they did invest in a bird deterrent application at the complex. There were delays in the installation of this application because of technical and logistical challenges. The building complex apparently complied with municipal building and industry standards and only a handful, at most, of other buildings had adopted a more aggressive strategy to deter bird strikes at that time. The complex implemented and maintained a policy to respond to nocturnal light pollution; cooperated with a local environmental group's bird retrieval, rescue and documentation efforts for more than a decade; and tried to find solutions to the problem of daytime collisions since the late 1990s. It also conducted test installations of window treatments that proved ineffective, unappealing to its tenants or both. *Bottom line:* The problems were complex and the necessarily site-specific solutions were constantly evolving, said the court. Thus, it concluded that the owners and managers had exercised due diligence to prevent the bird strikes [*Podolsky v. Cadillac Fairview Corp.*, [2013] ONCJ 65 (CanLII), Feb. 11, 2013].

ANALYSIS

According to the Fatal Light Awareness Program, an environmental group that works to protect migratory birds in the urban environment and consulted with the defendants in *Cadillac Fairview*, an estimated one million birds die each year in collisions with Toronto's buildings alone. The group notes that in addition to providing beauty and diversity, these birds provide an invaluable resource by consuming crop-destroying insects. So protecting birds from these deaths seems appropriate. But prosecuting building owners for environmental offences because of light reflections from their windows is very unusual. Perhaps that's why this case was a private prosecution initiated by the environmental group EcoJustice and not the government. (*Cadillac Fairview* is, in fact, the second such case this group brought. The charges in the first case were dismissed in Nov. 2012.) So although this decision does clearly establish that the environmental laws can be used in circumstances such as these, it's unlikely that we'll start to see many prosecutions like this one.