Officer And Director Liability For Environmental Offences May Not Require Proof Of Knowledge Of The Underlying Infraction: R. v. Mossman, 2024 BCSC 443

The lengthy and storied judicial history of the environmental prosecutions arising from Banks Island Gold Ltd.'s ("**BIG**") mining operations in Northwestern British Columbia (BC) is not over[1] and its full impact is not yet clear.

In the latest chapter, the BC Supreme Court, on March 15, 2024, issued reasons in *R v. Mossman*, 2024 BCSC 443 in which the Court:

1. upheld convictions against Mr. Benjamin Mossman, a director, president, chief operating officer of BIG, and Mine Manager under the BC*Mines Act*[2], on 14 charges arising from BIG's exceedances of permitted limits for the discharge of Zinc and Total Suspended Solids (the "**Exceedance Offences**"); and
2. allowed the Crown's appeals from the trial judge's acquittals of Mr. Mossman in relation to four charges of failing to report various discharges from the mine (the "**Reporting Offences**") and two charges of having

discharged waste/deleterious substances (the "**Discharge Offences**"), and remitted these two sets of charges back for a new trial (which, if it proceeds, will be the third trial in this saga).

The decision turns on the Court's interpretation of what is, and what is not, required to secure a conviction for secondary liability under statutes that contain provisions like s. 121(1) of the *Environmental Management Act ("**EMA**")*[3]:

121(1) if a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is convicted. (emphasis added)

The Court held that liability under s. 121(1) did not require proof of an intention (*mens rea*) on Mr. Mossman's part to allow the company to commit the offence, or even any proof that Mr. Mossman had knowledge that the company was committing such an offence.

The Court has in effect ensured that the strict liability nature of offences under public welfare statutes extends to the secondary liability provisions governing the liability of employees, directors, officers, and agents of corporations that commit offences, leaving due diligence as the primary defence where the corporation has committed an offence.

Given that the language at issue in this case of "authorized, permitted or acquiesced" is ubiquitous in regulations in many jurisdictions across Canada, if this decision is upheld on appeal or followed in other jurisdictions, this case could have broad implications for directors' and officers' liability across Canada in a range of regulatory contexts.

Background

BIG was engaged in the business of acquiring, developing and operating mineral properties, including the Yellow Giant Mine on Banks Island, BC (the "**Mine**"). At the time of the alleged offences, Mr. Mossman was the designated Mine Manager for the Mine under the *Mines Act.*Mr. Meckert, Mr. Mossman's co-defendant, was employed by BIG and was the Mine's chief geologist. The Court found that Mr. Mossman was the key operating mind of BIG. However, it was unable to come to the same conclusion with respect to Mr. Meckert.

Mr. Mossman and Mr. Meckert were charged with three broad categories of offences under the *EMA* and the federal *Fisheries Act*[4]:

1. the Exceedance Offences (*e.*, discharging substances in concentrations exceeding permitted levels);
2. the Reporting Offences (*e.*,failing to report environmental spills and discharges); and
3. the Discharge Offences (*e.*, discharging mine waste into the environment).

At the second trial of this matter, the Provincial Court acquitted Mr. Mossman on the Reporting Offences and Discharge Offences and convicted him on the Exceedance Offences. Mr. Meckert was acquitted on all counts.

Notably, neither BIG nor Mr. Mossman presented any evidence of due diligence.

Mr. Mossman appealed the Exceedance Offense convictions, and the Crown appealed the Reporting Offence and Discharge Offence acquittals.

Secondary Liability Offences

Secondary liability provisions provide that directors, officers, and agents who direct, permit, authorize or

acquiesce in the commission of an offence by a corporation are liable on conviction regardless of whether the corporation has been prosecuted (*Fisheries Act*) or convicted (*EMA*). The provisions target responsible individuals within a corporation when the corporation itself commits an offense.

The Court commented that the purpose underlying the extension of liability for corporate regulatory offences to directors and officers is to "bring pressure to bear on those persons who are a corporation's directing or operating mind or its delegated agent." Such persons have the power and authority to ensure that reasonable steps are taken by the corporation, such as incorporating effective systems to prevent the commission of an offence.

The appeal centered on how to interpret the terms "authorized, permitted or acquiesced" and whether the Crown was obligated to prove an intention or knowledge by the corporate actor respecting the offences committed by the corporation. Mr. Mossman's position in the appeal was that to establish secondary liability, the Crown must prove:

1. The corporation committed the offence;
2. The accused held a specified role in relation to the corporation (*e.*, an officer, director, employee, etc.);
3. The accused "authorized, permitted, or acquiesced in the offense"; and
4. That proof of the latter required proof that the accused had knowledge of the circumstances of the breach.

The Court disagreed and found that the secondary liability provisions before it did not require proof that the accused had any knowledge of the circumstances of the breach.

Effectively, the Court refused to import into the liability regimes in question any element of knowledge or intention required to secure a conviction. These statutes are regulatory statutes designed to safeguard the public and the environment,

and since the seminal decision in*R. v. Sault St. Marie*[1978] 2 S.C.R 1299, offences under such statutes are strict liability offences for which no proof of intention or knowledge (*mens rea*) is required and the only defence available once the act is proven is if the accused can establish that they were duly diligent in endeavouring to avoid the prohibited act. In this regard, the Court held in the Mossman case that, absent express language importing a knowledge requirement, the Crown was only required to prove the prohibited act occurred. Language here that the accused had "authorized, permitted, or acquiesced" was not express language importing a knowledge requirement. Language such as "knowingly" is required to expressly import a knowledge element into any such charge.[5]

The Court further confirmed that "acquiescence" does not require the Crown to prove that the accused knew of the specific details of the violation. That is, the accused's knowledge of the violation or intent is not a requirement that the prosecution must satisfy. Secondary liability can arise if the accused directed, authorized, agreed to, or participated in the commission of the offense, or failed to take action to prevent a foreseeable offense.

These circumstances most often arise when a director or officer has significant (often total) control over the corporation that commits the offence. Here, Mr. Mossman's conviction was premised on just that: he had a significant role in leading BIG, was the key operating mind, and was the final decision maker in most matters respecting the Mine.

Once liability is established on a strict liability basis by the prosecution (*i.e.*, the actus reus is established), the defendant can only escape liability by demonstrating that they exercised due diligence or reasonable care. There was no evidence advanced by Mr. Mossman that he had been duly diligent in relation to the issues giving rise to the charges.

The Court allowed the Crown's appeal of the acquittals of the

Reporting Offences and Discharge Offences, remitting those matters for a new trial.

Key Takeaways

This latest decision in the *Mossman* saga confirms that the secondary liability provisions with "acquiesce" language, which import personal liability to directors and officers for environmental violations, remain strict liability offences. Specifically, the Crown is not required to establish that the accused had knowledge of the circumstances of the breach or had to commit the offence unless the statute expressly provides otherwise.

In our view, whether secondary liability will be imposed continues to involve an assessment of whether the director or officer was in a position of influence and control, and would thereby have been able to prevent the commission of the offence, but failed to set up and maintain systems designed to avoid the commission of the offences in question. How much control is required for liability is a highly fact-sensitive inquiry. Directors exercising significant operational control should be proactive and diligent in environmental management and ensure proper systems and policies are in place.

Footnotes

1. The current appeal arises from the second trial in this matter where Mr. Mossman was found guilty of various environmental offences. The decision in the original trial was entered in 2018. Following appeals by the Crown and the defendants, a retrial was ordered in 2020 (*R. v. Banks Island Gold Inc.*, 2020 BCSC 167). Subsequent applications for leave to appeal, primarily on issues relating to the admissibility of evidence and alleged Charter breaches, to the British Columbia Court of Appeal (*R. v. Mossman,* 2020 BCCA 299) and Supreme Court of Canada (*R. v. Mossman and Meckert,* 2021 CanLII 37631) were denied.

2. RSBC 1996, c. 293.

3. SBC 2003, c.53 s. 121(1).

4. RSC 1985, c. F-14.

5. For example, Yukon's *Environment Act*, R.S.Y. 2002, c. 76, s. 179.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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