

# BRIEF SENIOR MANAGEMENT: Robust EHS Program Will Protect Company from Liability



A worker poured several thousand litres of what he believed to be tap water into an outdoor storm sewer catch basin at the loading dock of a company's water treatment facility. Later that day, the Ontario Ministry of the Environment (MOE) was notified that a creek near the facility had turned milky white. An MOE investigation traced the discoloration back to the catch basin and determined that the material discharged contained aluminum chloride hydroxide sulphate, which posed a risk to the fish in the creek. As a result, the worker and the company were each charged with five environmental violations. But the court dismissed all charges against the company, ruling that it had exercised due diligence. Specifically, the court found that the company's environmental management system was 'broad, thorough, detailed, well-documented, understood by employees and subject to frequent internal and external compliance review' [*Control Chem*].

## THE PROBLEM

When a company is charged with an OHS or environmental violation, it can avoid liability by proving that it exercised 'due diligence' that is, that it took all reasonable steps to comply with the law and prevent violations. Although the required reasonable steps will vary, at a minimum, a company should have a formal environmental health and safety (EHS) management program in place to ensure compliance with environmental and OHS laws and to prevent environmental and safety incidents from occurring. The *Control Chem* case is a good example of how having an effective EHS program can shield a company from liability if an incident happens despite its best efforts.

## THE EXPLANATION

What constitutes 'reasonable steps' will depend on the specific circumstances of the case. But when you read court decisions analyzing due diligence defences in OHS and environmental prosecutions, you see that courts expect companies to take certain basic steps. One such step is the implementation of an effective EHS program. In fact, the *R. v. Sault Ste. Marie (City)* case, in which the Supreme Court of Canada established the due diligence defence, specifically stated that

one of the most important factors is whether the defendant developed 'a proper system to prevent commission of the offence.'

In the *Control Chem* case, the court said the company had a 'farsighted, thoughtful, methodical and well documented philosophy and standards' to address environmental protection generally and specifically address the issue of spills avoidance/mitigation. The environmental risks guarded against were serious in nature, and the steps taken were proportionate to this level of risk to the safety of the public and the natural environment, it added. The specific elements of the company's EHS program that the court noted included the following:

- The premises were purposely built to incorporate spill containment features;
- The company's EHS program was certified under the ISO 9001 and ISO 14001 standards;
- The company conducted compliance audits twice a year;
- The program included Standard Operating Procedures on which all staff were trained;
- Individual written training records were maintained;
- Periodic spill training was conducted, including simulated spill and clean-up exercises, and the results documented;
- The company had a 'succinct and unambiguous' mantra 'Nothing leaves the building' which refers to a general policy to ensure that any potential for spillage would be contained to within the facility's building; and
- The company had documented labelling procedures and policies.

So the court concluded that the company had exercised due diligence and the worker's decision to dump the hazardous substance into the drain wasn't reasonably foreseeable. The worker had been an employee for approximately 20 years and held a position of significant authority and responsibility. He'd gotten 'thorough and detailed training' and worked in an environment that was subject to 'comprehensive and documented policies and procedures of environmental standards.' And there was no evidence that he'd engaged in any prior misconduct. Based on the company's practices and procedures with respect to environmental protection, the worker's training and his prior performance, no reasonable person would've foreseen such a departure from procedure by this worker.

## THE LESSON

The court in *Control Chem* described the company as an enterprise with 'a culture of strong commitment to proper environmental standards.' It also noted that management recognized the high risk of severe harm that could follow from a spill or discharge of any materials and took 'robust steps' to minimize this risk and harm. Our company and management should aspire to that standard. We must have a formal EHS program that contains specific procedures and policies designed to meet environmental requirements. And the duty to ensure that the company has such a program falls on the shoulders of senior management. *Bottom line:* Even the most diligent company with the most comprehensive and effective EHS program is vulnerable to an environmental incident. But this decision is a reminder that having such an EHS program and demonstrating a commitment to protecting the environment will support a due diligence defence if the company's faced with environmental offences as a result of a spill or other incident.

## **INSIDER SOURCE**

R. v. Control Chem Canada Ltd., Court file No. Burlington 139537-01, March 15, 2016 (unreported decision)