

# TRAPS TO AVOID: Ignoring Advice of Environmental Consultants



When engaging in activities that could impact the environment or violate environmental laws, such as performing construction near watercourses, many companies chose to hire environmental consultants to advise them on how to proceed with those activities while still complying with the law. Consulting such experts is a smart decision but only if you actually follow the consultant's advice. Ignoring this advice could result in the very violations you hired the consultant to avoid. Just look at what happened to a company and its director in BC.

## BC Court Says Ignoring Expert Advice ' Due Diligence

A DFO biologist and inspector collected evidence at a construction site near a creek. As a result, the company that owned the site and its director were charged with violating the *Fisheries Act*. But at trial, the court ruled that the evidence from the biologist and inspector were the result of an illegal search. The defendants were acquitted, so the Crown appealed. The appeals court ordered a new trial at which the evidence from the DFO employees would be admissible.

At the new trial, the defendants were convicted. The court found that the drastic alterations to the site had harmfully disrupted a fish habitat in the

creek. In addition, the defendants didn't exercise due diligence. The court noted that the defendants had retained an environmental consultant to get advice about how to comply with environmental laws. The environmental consultant provided a plan and confirmed that the DFO wouldn't object if they followed that plan. But the defendants chose not to proceed with the consultant's plan. Specifically:

- The consultant told them not to cut down trees and to remove only those limbs that presented a hazard. Instead, the defendants elected to remove a considerable number of trees, in some cases uprooting them.
- The consultant advised the defendants to have an environmental monitor present when work was being performed but they chose not to do so.
- The consultant asked to be notified when work was being performed. However, the defendants went ahead with the work without notifying the consultant.

So the court found that the evidence established that the defendants chose to reject the consultant's plan, which, if followed, wouldn't have met with any complaints from the DFO. Under these circumstances, the defendants 'are clearly not entitled to a defence of due diligence,' concluded the court [*R. v. Larsen and Mission Western Developments Ltd.*].

## **SOLUTION: Heed Expert Advice**

Hiring an environmental consultant makes sense if you don't have the knowledge needed to address an environmental issue. For example, your company may want to retain an environmental consultant to:

- Conduct an environmental assessment of the development of new facilities or expansion of existing ones;
- Help it address permit issues, such as compliance with emissions limits;
- Develop an EHS system or update and improve an existing one;
- Assess property it may want to purchase or lease;
- Advocate on the company's behalf with regulators in connection with proposed regulations and other general environmental issues; and
- Testify as an expert witness on its behalf at trial.

But there's no point in wasting money hiring an environmental consultant if you're only going to ignore his advice. So if your company retains such a consultant, you should be prepared to do what he tells you to do. And if you have any doubts about the consultant's advice, you should ask questions or get another opinion. If you ultimately decide *not* to follow the consultant's advice, such as because you don't trust his opinion or can't afford the measures he recommends, document in detail the reasons for this decision in case the issue is ever raised in court.

**Insider Says:** Of course, not all environmental consultants are competent. And if a consultant gives you bad advice and you follow it, you could be held liable for any resulting violations. To protect your company from liability when retaining environmental consultants, you should take certain steps, such as carefully screening them and including certain protections in your contracts with them. For more information, see 'Environmental Consultants: How to Prevent Liability Risks to Your Company,' which includes a Model Clause.

## **SHOW YOUR LAWYER**

*R. v. Larsen and Mission Western Developments Ltd.*, [2013] BCPC 92 (CanLII),  
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