You Make the Call: Can Developer Make Subcontractor Responsible for Environmental Violations?



SITUATION

A large corporate real estate developer hires an experienced subcontractor to clear land for a new shopping center. A creek flows through the land. Environmental consultants report that the creek has little potential as a fish habitat but warn of the potential for erosion. The contract requires the subcontractor to minimize silt deposits and erosion and makes the subcontractor responsible for doing the job in compliance with environmental laws. The contract doesn't appoint an environmental monitor to oversee the work. Instead of clearing the property in phases as required by environmental guidelines, the subcontractor strips everything at once, leaving the land vulnerable to erosion. Moreover, the subcontractor does the work at the worst possible time of year —when rains and snowmelt are at their heaviest. As a result, a large amount of silt is deposited into the creek and eventually a major river. There's no evidence of serious injury to water or fish. But the subcontractor is charged and pleads guilty to a *Fisheries Act* violation and is fined $15,000. The Crown wants to fine the developer $100,000 for the same offence.

YOU MAKE THE CALL

How much, if anything, do you think the developer was fined'

1. Less than $15,000'since the subcontractor actually caused the discharge, it deserved a higher fine than the developer
2. Nothing since no violation occurred because the siltation didn't do significant harm to water or fish
3. More than $15,000 because the developer tried to pass off the risk to the subcontractor rather than take steps to control it
4. Nothing because the contract made the subcontractor responsible for compliance with the environmental laws

ANSWER

1. **The court found the developer liable for a *Fisheries Act* violation and fined it more than $15,000.**

EXPLANATION

This scenario is based on an actual case in BC. The developer pleaded guilty to one count of violating the *Fisheries Act* but claimed it should be fined no more than the subcontractor—$15,000. The Crown asked for a $100,000 fine. The BC provincial court settled on $40,000. Explanation: The developer, who was obviously aware of the environmental risks, could have but didn't use its economic leverage to insist on having an environmental monitor oversee the work. It generally takes a bigger fine to deter a large corporation from violating environmental laws, the court explained. Still, $100,000 was too much, the court said, given the developer's immediate response, expression of remorse and the fact that this was its first violation [*R v. First Prince George Developments Ltd.*, [2006] B.C.P.C. 231 (CanLII)].

WHY WRONG ANSWERS ARE WRONG

A is wrong because, even though (Section 718.2(b) of) the Canadian *Criminal Code* says that a sentence should be 'similar to sentences imposed on similar offenders for similar offences committed in similar circumstances,' the word 'similar' doesn't mean exactly the same. Courts have 'flexibility' to assess the circumstances of each offender and impose different sentences, if warranted, according to the court.

B is wrong because a person who makes an illegal deposit can be guilty of a *Fisheries Act* violation even if there's no proof that the deposit actually harmed water or fish. At most, the degree of harm is a factor to be considered in determining the size of the penalty for an illegal deposit.

D is wrong because the *Fisheries Act* makes it illegal to commit or 'permit' a discharge. In failing to use its considerable economic leverage to monitor the subcontractor's work and ensure that it minimized erosion and siltation, the developer had 'permitted' the violation to occur.