

**ENVIRONMENTAL LAW AND ITS ENFORCEMENT
A PRACTITIONER'S POINT OF VIEW**

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INTRODUCTION

I have been asked to follow Mr. Piette's presentation by focusing on the practitioner's view of environmental law. Mr. Piette discussed the different legal problems which can be encountered when dealing with an environmental spill in a river such as the St-Lawrence. I will try to give you an idea of the scope of recourses that a practitioner in environmental law is called upon to deal with, not only in cases of spill, but also in dealing with the problem of disposal of dangerous substances or with other environmental issues. If at times my remarks seem ambivalent, it is probably a reflection of the fact that over the years, I have had the good fortune of being called upon to plead environmental cases from both sides of the fence, that is both as the defending attorney of large or not so large corporations facing the threat of penal sanctions or civil suits claiming damages, and as the attorney for the plaintiff.

I. CRIMINAL ACTIONS

Penal sanctions are provided for in a multiplicity of sources: federal, provincial or municipal laws, regulations or by-laws. From the point of view of the accused, they often present one troublesome characteristic: a lack of clarity and precision.

Although it is growing rapidly, environmental law is still a fairly recent specialization and legislation is relatively sparse. At present, much of the present legislation tends to be vague, lagging behind scientific developments and social awareness of environmental problems. Penal sanctions often suffer from the same characteristics as the laws which contain them—they may be vague, and they are not by any means all-encompassing. Such relatively new pieces of environmental legislation have not as yet always identified and described correctly and completely the different infractions they were meant to deal with. In order to provide adequate environmental protection in the future, lawmakers at the federal, provincial and municipal levels must define a violation clearly and provide precise guidelines to recognize when violations have occurred.

When challenging a prosecution under an environmental statute, a lawyer acting for the defence should whenever possible make the argument of "void for vagueness". If an offense is vaguely defined, it becomes overwhelmingly difficult to tell whether or not the offense has been committed. In such instances, the law or regulation is thus unenforceable and will be set aside.

In addition, unclear provisions give rise to interpretations which may or may not have been foreseen by the legislator. For example, Sections 20 and 21 of the *Quebec Environmental Quality Act* provide that:

20. *No one may emit, deposit, issue or discharge or allow the emission, deposit, issuance or discharge into the environment of a contaminant in a greater quantity or*

concentration than that provided for by regulation of the Government.

The same prohibition applies to the emission, deposit, issuance or discharge of any contaminant the presence of which in the environment is prohibited by regulation of the Government or is likely to affect the life, health, safety, welfare or comfort of human beings, or to cause damage to or otherwise impair the quality of the soil, vegetation, wildlife or property.

21. *Whoever is responsible for the accidental presence in the environment of a contaminant contemplated in section 20 must advise the Deputy Minister without delay.*

In a recent case involving a Montreal refinery, the Court faced the problem of interpreting the meaning of the words: “or is likely to affect the life, health, safety, welfare or comfort of human beings, or to cause damage to or otherwise impair the quality of the soil, vegetation, wildlife or property.”

A spill of some 1,500 gallons of Bunker “C” oil had occurred in January. At the ambient temperatures that prevail in Montreal in January, the product solidified within seconds. The tank is surrounded by a safety moat which exists precisely to contain that sort of mishap. The idea is that the diameter and height of the moat should enable it to hold the entire contents of a ruptured tank.

In the freezing weather, the Company cleaned up the oil by pick and shovel, and gave no notice of the spill to the Deputy Minister. There was no possibility of seepage into the ground, evaporation into the air, nor contamination of the ground water.

The government argued that Section 21 provides for an infraction of strict liability, to which no defense is possible. The company argued that it had no reasonable ground to think that this was a case where a contaminant might harm the environment, since the contaminant had been totally contained in a space specifically provided for such a purpose and removed without any possibility of escape into the environment.

The judge accepted the company’s argument. The wording of the section was such that there was room to argue that it did not, indeed, create a strict liability violation whenever a contaminant was spilled but rather, that the circumstances had to be such as to present a possibility that there would be a harmful effect on the environment. If the legislation required notice to be given of any spill occurring in a refinery (or elsewhere), it should have stated so clearly.

As in all penal and criminal matters, with a few dubious exceptions, the burden of proof imposed upon the Crown is to prove its case beyond a reasonable doubt. The lack of precise guidelines in environmental legislation may well increase this burden. The attorney for the defendant will often have a chance to put into doubt whether the Crown has discharged its burden.

Again, an example might help to focus on the relevant considerations. A good case in point

is one where a large oil company was charged for having operated a tank truck that emitted smoke a shade darker than the one allowed by the Montreal Urban Community by-laws. The inspectors had posted themselves across the entrances of many Montreal refineries for a few days and issued a string of summons. The method used by the M.U.C. investigators to determine the thickness of the smoke from the exhaust pipes of the defendant's truck is referred to as the Ringelmann Smoke Chart. The defendants focussed their defense on the well-documented deficiencies and weaknesses in the use of the Ringelmann Smoke Chart. In point of fact, scientific articles are an extraordinary source of inspiration to attorneys in this field, and certainly to defense attorneys, since no scientific method is perfect. By reading up on the deficiencies of a particular scientific method, an attorney can sometimes gather enough information to conduct a devastating cross-examination. In this particular instance, it was demonstrated that in order to obtain an objective reading, the testing had to be carried out under very specific conditions. Otherwise, the results could be meaningless. It so happened that the investigators in the case had not met the required scientific conditions. The cross-examination therefore centered on the methodology used by the investigators in assessing the smoke, and on comparing that methodology to that of the Ringelmann Smoke Chart. The Court concluded the method employed was not reliable for two reasons:

- (1) The scale used by the investigator was not the actual Ringelmann Smoke Chart, but a miniaturized version, which is less cumbersome but even less precise;
- (2) In that particular instance, in the investigator's own testimony, (which served more or less as a test case for all the others), the inspector had admitted that when he made his measurement, he was standing in front of the vehicle, which was coming toward him. Movement obviously forces the smoke to bend in the opposite direction. From the standpoint of the observer, one then sees a much deeper column of smoke. That factor accounted for the investigator's impression of the smoke being much darker than it actually was. What he saw was not the depth meant to be observed by the method, which calls for looking at the smoke sideways.

This was of course a major weakness in the prosecutor's case and explains the acquittal. I point out that wind factors were not significant in the case at hand.

Viewed from the public's point of view, penal sanctions represent the only evident sign of some control over the environmental abuse that each and everyone of us is increasingly coming to consider as a violation of our right to a certain quality of life. After all, if governments or municipalities do not take action and do not themselves enforce the regulations and by-laws that they enact, how can the ordinary citizen do so? The citizen feels, and often is, powerless in the face of a dangerous or potentially dangerous situation or of a violation of a by-law or regulation. It is rather shocking to note that before the catastrophe at the warehouse in St-Basile-le-Grand, a number of complaints had been lodged. One must conclude that no one investigated or took action as a result of the complaints. As serious as the situation was, the residents of the region were immensely fortunate that the part of the warehouse which was set on fire contained mostly barrels of contaminated oil, not the purer PCBs stored in another section of the warehouse. That would have led to another Seveso, Italy, where a chemical explosion and fire led to the long term contamination

of a densely populated area.

The public has reason to question whether governments are serious in their efforts to protect citizens from the effects of pervasive and relentless attacks on the environment. Our governments, after all, are not only our protectors. They are also themselves direct or indirect polluters. In point of fact, there is a growing perception, certainly among industry, that municipalities and Crown corporations are the worst offenders. The perception is that the law enforcers spend relatively more of their time trying to bring private industry before the Courts than they do municipalities and Crown corporations. Consider Hydro-Quebec and PCBs, Hydro-Quebec and mercury, and Hydro-Quebec and spray defoliants (which it now asserts it *no longer* uses). Consider our governments' involvement in many other industries. Can the public really trust government officials to protect their environmental interests if the government must at the same time consider the business interests of certain Crown corporations or government agencies? Still worse, can we be sure that the decision to prosecute one case and not another will be purely objective and without any internal influence when governments themselves, or some government agency, or Crown corporation, may very well be the party to be prosecuted? How can we be sure that public relations considerations or other political objectives do not impact on the purely legal ones?

In the case of UFFI, a report was published by a federally appointed body that recommended that criminal charges should be laid. They never were.

In all fairness, it must also be said that in the case of UFFI, the Quebec provincial government is paying the cost of a civil case where it is a defendant. But that may have been due to the particular political circumstances of the day. Is the citizen to be protected or to be able to afford environmental litigation only when politics so dictate?

I am also reasonably certain that the Department of the Environment can probably point to a string of summons recently issued against Crown corporations. But the public, I would venture to say, is not made sufficiently aware of such actions. It is the old saying again: "Justice must not only be done. It must be seen to be done".

II. CIVIL RECOURSES

In Quebec, article 1053 of our Civil Code, (which is more or less the equivalent of tort actions in common law provinces) provides a recourse in damages. In order to get compensation for an environmental problem, the plaintiff must prove an act of negligence, that damages were suffered and, most importantly, that there exists a link of causality between the two.

Most environmental threats are not directed specifically to specific individuals or groups but to the entire population. People exposed to asbestos included not only the worker directly involved but school children, hospital patients, homeowners and their family. In many instances, it is beyond the grasp of individuals to institute an action against the polluter. They might be only dimly

conscious of a threat to the health of their families or their environment. They might not know who is responsible. They might not even know that a recourse exists. And certainly, they are almost always unable to finance the huge costs of the expertise and legal skills necessary for the conduct of such a case.

When the public becomes aware of an environmental threat, there is a normal and beneficial tendency to group together, as the people involved in the St-Basile-le-Grand problem did recently. What can they do as a group? What are the recourses open to them? Is a class action the solution to their problem? In an environmental case, the exposure as well as the extent of the damages suffered by each and every person will differ. That may unfortunately preclude the use of the class action, which requires that members of the class be linked by similar questions of facts and law. In a recent case involving *Le Comité d'environnement de la Baie c. Société d'électrolyse et de chimie Alcan Limitée*, a Quebec Superior Court Justice dismissed the class action of a group of people in respect of their claims for damages to their health and property from the smoke of the Alcan stack. The judge ruled that as damages were different for each and every person in the group, the questions of fact to be assessed were not identical and a class action was not an appropriate recourse. What is then the appropriate recourse? Does a recourse truly exist that realistically allows people to pool their resources and band together before our courts? What made the UFFI test cases possible is the Quebec Government's undertaking to finance them. It is not a class action. This brings us back to an earlier question. The costs involved in such proceedings being what they are, will cases only proceed when some political context allows them to?

Then there is the question of how to evaluate damages. Are they to be evaluated only in terms of rotting houses, pock-marked cars eaten by acid fallout from a nearby plant or can damages encompass the mere fact that the quality of one's environment is being more subtly eroded? Precious few cases have awarded monetary compensation for environmentally caused decreases in the quality of life.

Another problem posed by environmental mishaps is that no one really knows *now* what will happen in the future to those who have been exposed to substances such as PCBs. If a risk is created by exposure to a substance, something *might* befall those exposed. With latency periods running from 15, to 20, to 30 years, what are the courts to do? Ignore the cancer risk? Wait until a cancer occurs? What about the anguish that the possibility of such a risk creates? Very few cancers are specifically caused. One can think of mesothelioma (which is a type of cancer associated *only* with asbestos exposure), but few others. When cancer of the lung occurs, how will the court decide that it was caused by secondary cigarette smoke, rather than some other pollutant to which practically anyone is exposed just by working in an office? At this point in time, should not our courts expand on recognition of the constitution of risk as a separate and distinct source of damage?

The judicial system is centered around the individual. Civil recourses are mostly meant to be exercised individually for damages caused to one's belongings or one's physical integrity. But environmental problems are for the most part a collective problem which concerns all of us. That there is a cumulative effect of the many environmental hazards that besiege us is a dictum accepted

by most of the medical and scientific community. A collective solution must be found, and that calls for removing any obstacles which persist today. Suppose the St-Basile-le-Grand fire had occurred in Hull and contaminated Ottawa. Who would have had jurisdiction? Quebec or Ontario? Or Canada? In the environmental field, jurisdictions become intimately intertwined. Some would say they are meaningless. Pollutants know no boundaries. Consider acid rain. Could Quebec maple sugar producers sue the Quebec government for failure to abate emissions of sulphur dioxide? Could they sue the Canadian government for failure to convince the Reagan administration that such measures are required? Our governments are right in the middle of every situation. As our understanding grows, many environmental issue becomes more and more complex.

Let us take again the case of St-Basile-le-Grand as an example, since it is of more recent vintage, to see what can be made of it. Quite possibly, those who were evicted could sue the government for having been aware of violations to its laws and regulations and having done nothing to enforce them, or having done nothing to compel PCB users to dispose of them. It is conceivable. On the other hand, the government could also conceivably argue that it is not the insurer of every imaginable risk, that there were mechanisms in place to protect people and that the government is not per se responsible for the presence of PCBs or of other possible sources of dioxins and furans in the environment. After all, PCB, DDT, chlorophenols, their derivatives and related compounds are world-wide contaminants, whether they come from electrical transformers, or from fighting unwanted vegetation along railway tracks, or sage brush in pastures.

Today's lawyer is regularly asked by his or her corporate client how to dispose of its hazardous waste, and that includes PCBs. Such has been our governments' clairvoyance that at present, the answer is to ship them overseas. Or fly them overseas, with the result that international airports now look at Canadian airplanes with an increasingly suspicious eye. Our governments want the jobs that private industry creates, but they don't want to deal with the production wastes that private industry often cannot afford or will not volunteer to manage on its own. At the same time, *more and more*, government agencies are increasingly involved as prospective defendants, if not as principal defendants, not only because of their lack of action in enforcing by-laws and regulations, but because of their own actions as a polluter or as the controlling influence on a variety of Crown corporations.

In the case of UFFI, two levels of governments (or government agency) are defendants because they enticed people to make use of a product by subsidizing its purchase and installation. Yet those same governments were at the time the only parties in a position to enact appropriate regulations or initiate the proper action to protect the public at large. All of us are faced with the problem. No individual can take action for the protection of the ozone layer, other than refraining from buying eggs not packaged in plain cartons, or drinking from foam coffee cups!

Others have commented on how peculiar it is to observe our governments' preoccupation about our own voluntary intoxications, while appearing at times so blissfully unaware of the ravages of involuntary intoxications. The government dictates, for example, that even should you wish to, you can't eat cheese that the French love and regularly consume because it supposedly contains too

much bacteria. One would like to see the same level of preoccupation for the involuntary environmental hazards posed by high tension wires, pesticides, and industrial wastes.

In today's complex world, I believe the legal world has an essential contribution to make, if only by showing awareness. We are in a position to influence events. We have a duty to remain well informed of both sides of every environmental issue. Only then can we be in a position, as lawyers, to best serve our clients and to guide them in an enlightened way. Only then can our judges be in a position to maintain a strong jurisprudential basis which deals aptly with this most pressing concern of our day, environmental legislation and its enforcement.

ENDNOTES

- *R.S.Q. c. Q-2.*
- *Texaco Canada Ltée v. Communauté Urbaine de Montréal (Ville de Montréal Est)* (27 février 1978) Montreal, (C.S. juridiction criminelle) M. le juge Jacques Dugas in Y. Duplessis, J. Héту & J. Piette, *La protection juridique de l'environnement au Québec* (Montreal: Themis, 1982) 643 .
- *Comité d'environnement de La Baie Inc. v. Société d'électrolyse et de chimie Alcan Ltée* C.S. Chicoutimi, No. 150-06-000002-865 - J. E. 88-541, J. Philippon.