Civil Injunction Powers Tried Under Environmental Statute

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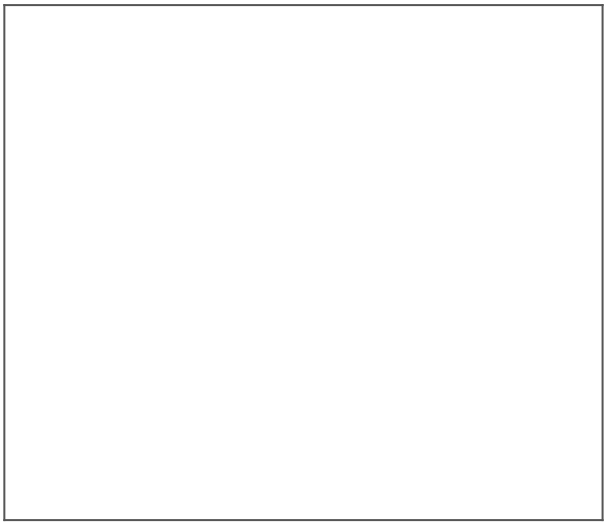
In Canada v. IPSCO Recycling Inc., a first attempt by Environment Canada to make use of the civil injunction powers under s.311(1) of the Canadian Environmental Protection Act, 1999 (CEPA), Justice Eleanor Dawson of the Federal Court dismissed an application to compel corporate and individual respondents to take action to correct alleged non-compliance with the Storage and Handling of PCBs Regulations.



The corporate respondents operated recycling businesses: a metal scrap shredder; and a manufacturing plant that recycled the remaining nonmetallic 'automobile shredder residue'.

In 1997, Environment Canada carried out an inspection and sampling exercise at their business premises. The respondents attempted to provide evidence that there was no breach of regulatory standards to Environment Canada, and disputed Environment Canada's continued directives.

This culminated in December 2000 with the filing of an injunction application under s.311(1) of CEPA against the corporate respondents and two officers.

The remedy of civil injunction to enforce the public law has long been available to the Attorney General as an exceptional power. Cases have typically restricted the remedy to circumstances where there has been a repeated flouting of the law or where there is

a serious and established risk to public health and safety, where the court has been satisfied that a breach of the law is clear, and where the enforcement provisions of the statute have proved to be ineffective.

Specific legislation has extended the ability to make injunction applications to other government departments and agencies. Even so, the cases in which government has resorted to the use of injunctions have been few and far between.

Justice Dawson held that the considerations that govern the exercise of the court's discretion where a statute provides for a remedy by way of injunction are different than those that apply when the Attorney General sues at common law to enforce public rights:

The court's discretion is more fettered and the factors to be considered by the court when considering granting equitable relief will have a more limited application.

The applicant need not prove that damages are an inadequate remedy or that irreparable harm will result if an injunction is refused. Other remedies need not have been pursued.

Although the court retains its ultimate discretion, the public interest in having the law obeyed will generally outweigh any hardship arising out of the imposition and enforcement of the injunction unless the injunction would be of questionable utility or inequitable.

It remains more difficult to obtain a mandatory injunction.

Justice Dawson held that all that the Crown needs do to succeed under 311(1) is to

provide evidence that would enable the court to come to a bona fide belief, on a balance of probabilities that a serious possibility exists that an offence has been committed, or is likely to committed, or that conduct directed toward the commission of an offense has occurred or will likely occur unless an injunction is issued.

That conclusion must be based on credible evidence and such inferences as are properly supported by that evidence. If proved, the court could then issue a prohibitory injunction restraining the respondent from doing the act or thing that may constitute or be directed toward the commission of an offence; or issue a mandatory injunction requiring the respondent to do any act or thing that may prevent the commission of an offence.

On the evidence, however, she held that Environment Canada had fallen short of proving that the respondents were in breach of or were likely to breach the Regulations.

She accepted the extensive sampling and analysis that had been performed by the respondents' environmental engineering consultants and the detailed statistical analysis and hypothesis testing applied to the range of individual analytical results.

With this decision in hand, it appears that Environment Canada will continue to use subsection 311(1) of CEPA as an enforcement tool. Provisions virtually identical to s.311(1) of CEPA are found at s.222(1) of Alberta's Environmental Protection and Enhancement Act and an injunction power is contained in section 183 of the Ontario Environmental Protection Act.

Counsel should advise their clients of the risk of potential civil action as well as the risk of prosecution under environmental and other regulatory legislation.

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