When Fines are Just the Beginning

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On February 29, 2016 a judge of the British Columbia Provincial Court ordered Teck Metals Ltd. to pay a $3 Million penalty. Teck had pleaded guilty to three offences under the *Fisheries Act*. The offences related to multiple incidents that had resulted in the discharge of approximately 125,000,000 litres of deleterious effluent into the Columbia River. At various times the effluent contained potentially harmful levels of copper, cadmium, chlorine or ammonia or were acidic. The discharges took place between November 28, 2013 and February 5, 2015.

Under the plea arrangement, the $3 Million penalty was directed to the federal government's Environmental Damages Fund to be used for fish habitat and fisheries restoration projects in the area watersheds. Priority is given to restoration projects that address the damages caused by the discharges.

"Wow", one might say, "$3 Million is serious coin." The fine was just the tip of the iceberg for Teck. As part of the plea arrangement, Teck also agreed to undertake a series of on-site improvement projects in part designed to prevent future releases of deleterious substances into the area watersheds. According to the media release from Environment and Climate Change Canada, implementation of these upgrades will set Teck back another $50 Million, making the fine look like a rounding error.

The point to be learned is that when it comes to environmental protection (and workplace safety and health) legislation, the initial fine is only the starting place when assessing the cost of noncompliance. There are a whole raft of other considerations in designing compliance measures and responding to charges if laid. Most federal and provincial environmental and safety legislation provide for most, if not all, of the following judicial remedies.

Restoration/Clean-up

Everyone knows that when there is a spill on land it has to be cleaned-up. This is not an inexpensive proposition. What if the release has entered waterways? What if it has gone on

for decades? What if the spill arises out of a catastrophic event, like the Mount Polley tailings impoundment failure? The cost of rectifying the consequences associated with the commission of an offence will often greatly exceed the amount of any penalty that might be imposed.

Disgorgement of Profits

If the Crown proves that noncompliance with the law saved the offender money, then it is open to the Crown to argue that those savings should be paid over in addition to the fine. Judges and the public are very fond of the old saying, “Cheaters never prosper”.

Prohibitions Against Indemnification

Corporations provide their officers with indemnity agreements. Legislation in Canada also allows corporations to indemnify officers against penalties and claims when the officers take actions in good faith and for the best interests of the corporation. Some courts have attempted to circumvent these arrangements by writing judgments and orders that specifically prohibit the corporation from indemnifying an officer who has been found guilty of the commission of an offence. Those orders might not stand up on appeal, but who wants to take the chance.

Facility Shut-down

Some legislation allows the courts to order the convicted business (in addition to any fine or other penalty) to “take such action as may be necessary to refrain from committing any further offence . . . or from causing further environmental damage.” These types of prevention orders can specify the actions that must be taken in order to stop or prevent further pollution. They can require modifications to processes, installation of pollution prevention equipment, implementation of environmental management systems, etc. In a cost-competitive world of mobile capital, this kind of order could force a shut-down.

Publication

The federal government and most provinces and territories maintain some form of environmental registry. Conviction may result in the addition of your company name to the “naughty list”, for all the world to see. Publicly traded entities will also typically include descriptions of significant fines or enforcement proceedings as part of continuous disclosure and in any corporate environmental reports. All of this is great ammunition for objectors when it is time to start that next development.

Escalation of Remedies

It is becoming more and more common to see minimum statutory fines escalate dramatically for second and subsequent offences. Couple that with the fact that most environmental legislation specifies that every day that a continuing offence continues (one in which the subject matter of the offence lasts for more than twenty-four hours) constitutes a separate offence, and the fines can stack up quickly. Ever wonder why someone would spend $20,000 in legal and expert fees to fight a $500 ticket? Preventing the fine escalator from kicking in the next time around is a significant consideration in deciding how to deal with a charge.

Alternative Measures

It is not all doom and gloom. Some federal legislation specifically allows for diversion of charges to an alternative measures program. This usually involves a negotiated arrangement under which money (sometimes more than what the fine would have been) is paid into an environmental protection fund or to local organizations for environmental protection, education or enhancement projects. What turns some corporations away from this option is that they usually require the corporation to admit the facts that gave rise to the charge.

Conclusion

There are plenty of reasons to ensure that your organization complies with environmental and safety laws. The best reason is that it is the right thing to do. If you or your board or your management need more tangible reasons, just remember all of the possible outcomes that can come with noncompliance.

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