

R. v. Syncrude Canada: The Case of The 500 Dead Ducks

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Cases Considered:

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Alberta Environment and Environment Canada have laid charges against Syncrude Canada in relation to the toxic substances in its Aurora Mines tailing pond that resulted in the death of 500 migratory birds in 2008.

Environment Canada has charged Syncrude for violating section 5.1 of the *Migratory Birds Convention Act*, S.C. 1994, c. 22 by depositing substances harmful to migratory birds in its tailing pond. This is the same information as sworn by John Custer in his private prosecution that commenced in January (See my earlier post [Environmental Private Prosecution Update: John Custer v. Syncrude Canada](#)).

Alberta Environment has charged Syncrude for violated section 155 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E - 12 (*EPEA*). The hazardous substances prohibition in section 155 reads as follows:

155 A person who keeps, stores or transports a hazardous substance or pesticide shall do so in a manner that ensures that the hazardous substance or pesticide does not directly or indirectly come into contact with or contaminate any animals, plants, food or drink.

Section 227(j) of *EPEA* makes it an offence to contravene section 155.

As a result, one would expect the Alberta Attorney General will intervene at the February 19 process hearing and stay the Custer prosecution. And unlike the Attorney General intervention to stay the Martha Kostuch prosecution over the Oldman River Dam in the late 1980s (as noted in my earlier post), this time the private prosecutor will seemingly have no reason to object. Better to have the investigatory apparatus of the State support a prosecution, rather than have the onus rest on an individual citizen. Nonetheless in my view, the Custer prosecution was not commenced in vain as it has almost certainly greased the wheels of Alberta Environment and Environment Canada to proceed with charges.

Syncrude will appear in Provincial Court to answer the federal (and presumably provincial) charges on March 25, 2009. This matter is far from over, and it will remain of interest to see how Syncrude pleads and, if convicted, what punishment results. Syncrude might, for example, answer by asserting a due diligence defence to the effect that it has taken all reasonable measures to prevent the deaths and thus should not be convicted. And if ultimately convicted by the Court what purpose will the punishment serve: remedial, desert, deterrence, or all of the foregoing?