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The Case of the 1600 dead ducks: The verdict is in - Syncrude guilty under the Migratory Birds Convention Act

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Cases Considered:

R. v. Syncrude Canada Ltd., 2010 ABPC 229, http://www2.albertacourts.ab.ca/jdb/2003-/pc/criminal/2010/2010ABPC0229.pdf

On June 25, 2010 Justice Ken Tjosvold of the Provincial Court of Alberta issued his guilty verdict against Syncrude Canada after a lengthy trial heard over approximately 8 weeks during this past March and April. The message is a powerful one: Syncrude is held to account by the criminal justice system for the death of 1600 migratory birds that landed in one of its tailings ponds.

ABlawg has followed these proceedings since their inception in January 2009 as a private prosecution (See Environmental Private Prosecution Update: John Custer v. Syncrude Canada; R. v. Syncrude Canada: The Case of The 500 Dead Ducks; Lame duck constitutional arguments: a new twist on Syncrude's Tailings Pond Debacle; R. v. Syncrude Canada: The Case of The 500 (or was that 1600) Dead Ducks). In a somewhat surprising move the private prosecution led to charges against Syncrude laid by Alberta Environment and Environment Canada under section 155 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and section 5.1 of the *Migratory Birds Convention Act*, S.C. 1994, c. 22. The relevant statutory provisions are as follows:

> 5.1 (1) No person or vessel shall deposit a substance that is harmful to migratory birds, or permit such a substance to be deposited, in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area.
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> 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.

Justice Tjosvold ruled the Crown (federal and provincial) established that Syncrude committed the *actus reus* elements in each of these offences beyond a reasonable doubt, and that Syncrude did not have a defence (due diligence or otherwise) on the evidence. As a result, he found Syncrude guilty on both counts. Sentencing will follow.

There are a number of interesting storylines from which to assess this case, some of which I have previously canvassed and others which have only come to light with the onset of the trial: (1) the fact that this case started as a private prosecution; (2) the prospect of a constitutional challenge to the *Migratory Birds Convention Act* that never came to be; (3) the prosecution of conduct that has regulatory approval from the Energy Resources Conservation Board, Alberta Environment

and Environment Canada; (4) the evidentiary reliance by the Crown on written statements by Syncrude employees to establish elements of the offence and counter a due diligence defence; (5) the application of section 5.1 of the *Migratory Birds Convention Act*; (6) the implications of a conviction for the oil sands industry. My focus in this comment is on the application of section 5.1 of the *Migratory Birds Convention Act*, however I will necessarily touch on other aspects in this discussion.

From the start, I've thought the Crown's case under section 5.1 of the *Migratory Birds Convention Act* to be somewhat of a formality. Syncrude obviously disagreed with this view. Nevertheless, it is of little surprise to me that Justice Tjosvold handles the elements of the federal offence in somewhat short order (at paras. 87 to 94). Is there a deposit of a substance harmful to migratory birds? Yes, the evidence established that not only is bitumen continuously deposited (as defined in section 2 of the *Migratory Birds Convention Act*) into the Aurora pond as a necessary component of processing oil from the sands, but that the cost required to completely eliminate the deposit of the bitumen toxins into the pond would make the entire process uneconomic (and perhaps not attainable at all with current technology). Once deposited into the pond, the bitumen froth initially sits on the surface – exposing it to birds that land in the pond - and eventually sinks. Is the Aurora pond an area frequented by migratory birds? Yes. It is located under two major migration flyways; being the size of 640 football fields the pond is an inviting landing point (particularly early in the season when the warm bitumen results in an earlier thaw than the surrounding water bodies); and Syncrude's ongoing efforts to deter birds from landing on the pond confirms it as an area frequented by them (at para. 92).

Once the Crown established the *actus reus* of the section 5.1 strict liability offence, the onus shifted to Syncrude to escape culpability with a defence such as due diligence (for a discussion of strict liability and due diligence in the context of this case see R. v. Syncrude Canada: The Case of The 500 (or was that 1600) Dead Ducks). Much of the evidence tendered in this case focused on whether Syncrude took reasonable steps to prevent the deaths to the birds in April 2008, and likewise the majority of Justice Tjosvold's analysis is focused on this point (at paras. 95-129). Justice Tjosvold canvasses the lengthy list of relevant factors in a due diligence defence, including: (1) efforts taken by Syncrude to prevent birds from landing on the pond; (2) industry standards in these deterrence efforts; (3) the complexity of the matter; (4) alternatives available to Syncrude in its deterrence initiatives; (4) economic considerations; (5) foreseeability of the circumstances that led to the deaths; (6) the gravity of the offence. Convincing evidence for Justice Tjosvold included expert testimony from Dr. Cassady St. Clair on what a minimum reasonable deterrent system would look like (at paras. 20-21) and statements from Syncrude employees documenting a decline in the company's resources dedicated to deterrence measures in recent years and whether or not sound cannons were operational on the Aurora tailings pond on the day of the incident (at paras. 22-34). Justice Tjosvold affirmatively states his conclusion that the evidence here established that Syncrude did not have its sound cannon bird deterrent system operational on the day of the incident in late April of 2008 (at paras. 110-115). Justice Tjosvold concludes that Syncrude did not have a proper system to prevent birds from landing on the Aurora pond or take reasonable measures to ensure the effectiveness of such a system (at para 128).

By and large this deliberation over due diligence was in relation to the provincial offence in section 155 of the *Environmental Protection and Enhancement Act*. The federal Crown confirmed at trial that a due diligence defence to section 5.1 in this case was factually unattainable given the purpose of the Aurora pond as storage for bitumen toxins. It is illogical to suggest that Syncrude make an effort to prevent the deposit of bitumen into a basin designed

specifically for that purpose. Moreover, efforts to deter birds from landing on the Aurora pond are not relevant to a violation of section 5.1 which only speaks to depositing toxic substances in an area frequented by the birds. But surprisingly the federal Crown indicated to the Court that should Syncrude establish a due diligence defence to the provincial charge by demonstrating reasonable efforts to deter the birds from landing on the Aurora pond, the federal Crown would not seek a conviction under the *Migratory Birds Convention Act*. This concession arguably subverts the language in section 5.1, but does offer a possible explanation for why Syncrude did not proceed with its constitutional challenge to the *Migratory Birds Convention Act*.

Syncrude had to know a successful due diligence defence to section 5.1 would be elusive on the facts here, and that accordingly a successful defence would come from elsewhere. Syncrude in fact attempted to defend itself on several grounds besides due diligence including abuse of process, impossibility, act of god, and *de minimus*. In my observation, Syncrude's primary argument here was abuse of process and the allegation of injustice in being prosecuted by the State for conducting an activity which had been approved by the State. As Justice Tjsovold summarizes (at paras. 4 to 6), the Aurora tailings pond operates under various administrative licenses and approvals issued pursuant to the *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7, and the *Environmental Protection and Enhancement Act*. As well, Syncrude and other oil sands producers purportedly rely on an Environment Canada policy position that due diligence to prevent migratory birds from landing on the tailings ponds serves as an exemption from the habitat protection for migratory birds offered in section 5.1 of the *Migratory Birds Convention Act*. Syncrude's position here was that any legal sanction for the death of the birds should rest on a failure by the company to comply with conditions in its regulatory permits to operate the Aurora tailings pond – for which no violations were alleged or admitted. This aspect of Syncrude's case is of most interest to me since it calls into direct question the conflict between the regulatory apparatus of the State in approving oil sands production and legislated habitat protection.

That Justice Tjsovold was not convinced by this abuse of process argument (see paras. 143-155) and convicted Syncrude under section 5.1 suggests a victory for migratory bird habitat protection and sends the important message mentioned above in the first paragraph. However his passing remarks and the position of the federal Crown in relation to section 5.1 suggests otherwise. Justice Tjsovold comments on the possibility that abuse of process might be found had the federal Crown not offered the concession of no conviction if Syncrude established reasonable efforts to deter birds from landing on the Aurora pond (at para. 154). Or likewise that Syncrude might have relied on the defence of officially induced error had the federal Crown not offered this concession in light of existing Environment Canada policy that meaningful efforts to prevent birds from landing in a tailings pond would ensure no prosecution under section 5.1 (at paras. 156-158). All of this is difficult to reconcile with a literal or purposive interpretation of section 5.1 as absolute habitat protection for migratory birds. Yet this executive and judicial reading down of section 5.1 also seems attributable to the underlying conflict at play in this case between habitat protection and energy development, and is consistent with a utilitarian interpretation of the law and the sense that habitat protection must ultimately give way to energy development to maximize economic welfare. This was arguably at the heart of Syncrude's position – that is, oil sands companies contravene section 5.1 every day and so applying section 5.1 as the Crown purports here places all oil sands operators with tailings ponds liable to criminal charges with widespread economic consequences.

Perhaps this wrinkle is attributable to the irony here that the area frequented by migratory birds is in fact not really bird habitat at all, such that if this were some other water body section 5.1

would not have been read down as such. But I doubt this alleviates the true issue here. At some point we cannot have both habitat protection and energy development – there are choices to be made. The enactment of section 5.1 of the *Migratory Birds Convention Act* would seemingly demonstrate a choice in favour of habitat protection. Reading down this provision in an attempt to accommodate both oil sands development and habitat protection arguably makes a mockery of the law, and misleads all of us into thinking environmental protection is a priority in our society.

I chose to mention only the *Migratory Birds Convention Act* in the title of this post for a reason. I question the extent to which the section 5.1 conviction will survive this proceeding going forward (arguments are yet to be made over whether Syncrude should be convicted under both counts), and I also question whether subsequent to this case section 5.1 will remain in its current form given the sense that decision-makers believe habitat protection must give way to energy development at some point. The current language in section 5.1 just doesn't allow for this.