September 16th, 2009

R. v. Syncrude Canada: The Case of The 500 (or was that 1600) Dead Ducks

By Shaun Fluker

In a Provincial Court appearance on September 14, 2009, Syncrude Canada pled not guilty to charges laid by Alberta Environment and Environment Canada in relation to the toxic substances in its Aurora Mines tailing pond that resulted in the death of 1600 migratory birds in 2008 (the number of birds was initially thought to be 500, but was revised upwards to 1600 after further investigation). ABlawg has followed this regulatory saga from its inception in January 2009 (see previous posts by myself (R. v. Syncrude Canada: The Case of The 500 Dead Ducks and Environmental Private Prosecution Update: John Custer v. Syncrude Canada) and Jocelyn Stacey (Lame duck constitutional arguments: a new twist on Syncrude's Tailings Pond Debacle).

To summarize legal proceedings thus far, in early January 2009 John Custer swore an information in Edmonton alleging violation by Syncrude of section 5.1 of the *Migratory Birds Convention Act*, S.C. 1994, c. 22. Environment Canada subsequently charged Syncrude for violating section 5.1 by depositing substances harmful to migratory birds in its tailing pond. The prohibition in section 5.1 reads 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.

Alberta Environment has also charged Syncrude for violating section 155 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E – 12. 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.

The Custer private prosecution has given way to Alberta Justice, which expects a lengthy trial and has accordingly moved the proceedings from Fort McMurray to St. Albert and reserved two months of trial time starting in March 2010. In June, Syncrude gave notice of a possible constitutional challenge to section 5.1 of the *Migratory Birds Convention Act*, and in her earlier ABlawg post Jocelyn Stacey speculates on the substance of that challenge and possible legal results.

With respect to those hoping for a constitutional clash in this matter I believe the constitutionality of section 5.1 is of little concern to Syncrude, but rather the crux here rests on the concept of due diligence and its availability to Syncrude as a defence to these charges. Both the *Migratory Birds Convention Act* and the *Environmental Protection and Enhancement Act* provide Syncrude with the possibility of a due diligence defence in sections 13(1.8) and 229 respectively. In effect, these sections enable Syncrude to avoid culpability for the death of the migratory birds by establishing on the balance of probabilities that the company took reasonable steps to avoid the act(s) leading to the regulatory offence(s). The Supreme Court of Canada first established the availability of due diligence as a defence against regulatory offences in *R v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299. These so-called strict liability offences fall in between traditional criminal offences where the Crown must establish beyond reasonable doubt both the *mens rea* (guilty mind*)* and *actus reus* (guilty act*)* and absolute liability offences where liability flows from mere proof by the Crown of the *actus reus.* In strict liability cases, such as this one, the Crown has the onus of establishing the *actus reus* from which the offence flows, but the defendant is able to exculpate themselves by demonstrating they took reasonable steps to avoid the act(s) in question (For more discussion see Strantz, "Beyond *R. v. Sault Ste. Marie*: The Creation and Expansion of Strict Liability and the Due Diligence Defence" (1992) 30 Alta. L. Rev. 1233).

A quick comparison of section 5.1 in the *Migratory Birds Convention Act* and section 155 of the *Environmental Protection and Enhancement Act*, and it is obvious why Syncrude is considering a constitutional challenge to the *Migratory Birds Convention Act*: Syncrude has no due diligence defence under this legislation. It is nonsensical to argue Syncrude took reasonable care to avoid depositing toxic substances into a designated *tailings pond* whose very purpose is the storage of toxins. With the *actus reus* seemingly easy to prove for the Crown (the deposit of tailings in waters frequented by migratory birds), a conviction under section 5.1 seems like a slam dunk. Hence, the possibility of a constitutional argument that section 5.1 is *ultra vires* Parliament. With section 5.1 swept out the way, Syncrude would get on with the more straightforward business of constructing a due diligence defence against section 155 of the *Environmental Protection and Enhancement Act* by arguing its use of noise-makers and other devices to keep the birds from landing on the tailings pond satisfy the reasonable person test.

And if this is truly what is at play here, then the Crown should elevate the consequences of a successful conviction under the federal legislation (and unsuccessful constitutional challenge) by indicating that, if successful in its prosecution, the Crown intends to ask the Court to impose cumulative fines for each and every bird that perished in 2008 (section 13(4) of the *Migratory Birds Convention Act* allows for such cumulative fines). On summary conviction, the maximum fine allowed by the legislation would be $300,000 times 1600 birds: $480,000,000. Now that's incentive to deter future violations of section 5.1!

One wonders why Syncrude does not simply plead guilty to the charges under section 5.1 of the *Migratory Birds Convention Act* in exchange for the Crown dropping the provincial charges, negotiate for some type of creative sentence that provides funding for research into managing conflict between oil sands development and migratory bird habitat, and then push for legislative

reform to remedy what is an obvious conflict between federal habitat protection legislation and provincial energy regulation that condones the contamination of such habitat. Ultimately, this course of action would place the onus on government to resolve the human-bird conflict directly by legislating an exception to the section 5.1 prohibition and be accountable to the electorate and the international community for the decision, rather than hide behind the constitutional division of powers as an excuse for why migratory bird habitat is sacrificed in the interests of energy development.