

MANAGING PROSECUTION RISK WHEN REGULATORS ISSUE PERMITS OR ORDERS

By Stanley D. Berger

A recent decision from the Yukon Territorial Court is a reminder of how important communication between the regulator and the regulated can be. At the same time, perhaps as an illustration of the power of fate, at least in a narrow set of circumstances, communication may make no difference at all. In *R. v. Cobalt Construction Inc.*, released September 14, 2017 the sole shareholder/director and his road construction company were charged with failing to provide a detailed decommissioning plan in accordance with the conditions of a permit for a facility designed to accept, store and treat dirt contaminated with petroleum hydrocarbons. The defendants failed to establish a due diligence defence to the charges because of poor communication with the authorities, but were acquitted anyways because it was impossible for them to comply given the weather conditions during the time frame for compliance.

The regulator's plan required sampling results be obtained after contaminated piles of dirt were tilled as configured. The soil was to be mixed two weeks before the samples were taken for analysis. The sample results would then inform further elements of the plan including identification of an appropriate receiving facility. The defendant director testified that it would have been impossible to till the soil as required within the time frame set out by the regulator because snow on the ground would have prevented use of the excavator and the ground would have been frozen requiring a ripper to be used to break up the ground, thereby destroying the configuration of the piles. The defendants had in the initial plan set out dates for sampling beyond the time frame required by the regulator, but failed to offer any explanation as to why the sampling could not be done within the imposed time frame. Further, the defendants at no time sought an extension of time for performing the sampling. The Crown prosecutor argued that the authorities were under no obligation to notify the defendants that their initial plan was insufficient to satisfy the regulatory requirements. The Court observed that the more detailed the decommissioning plan provided, the more likely fairness would demand notification by the authorities of the deficiency and an opportunity to correct it. Conversely, the less detailed the plan, the less likely fairness would demand notification. "To decide otherwise would mean that a defendant could evade responsibility and delay consequences simply by making a cursory attempt at compliance." The Court suggested that if the defendants had fleshed out the plan and included options for receiving facilities and restoration that would be contingent on the sampling results, this would trigger notification by the regulator that the plan was deficient. However, the initial plan provided was so clearly and objectively deficient on its face that the regulator had no obligation



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to notify the defendants that the plan did not comply and did not further require the authorities to give the defendants an opportunity to rectify the deficiencies prior to laying charges. The Court consequently rejected the defence of due diligence. Nevertheless, the Court acquitted the defendants, accepting the defence of impossibility, notwithstanding the absence of due diligence.