The Due Diligence Defence: Your Bridge Over Troubled Water

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Toronto based construction company 2280577 Ontario Inc. (228) was one of four separate companies involved in the construction of a large solar farm in the Hamilton Township area. Sub-contracting arrangements between the four companies made 228 responsible for implementing specific stormwater management and erosion/sediment control plans (Management Plans).

While all four companies were charged with environmental offences related to stormwater discharge, the MOECC dropped the charges against the three other companies on the basis that each had a potential due diligence defence. 228 was fined a hefty $600,000.

228 plead guilty to three of fourteen charges laid against it by the Ministry of Environment and Climate Change (MOECC) under the *Ontario Water Resources Act* and the *Environmental Protection Act*:

1 discharging contaminated stormwater into Baltimore and Brook Creeks

2 failing to notify the MOECC of the discharge, and

3 failing to implement the Management Plans as required by the facility's renewable energy approval

There are several lessons to be learned from 228's conviction:

1 When deciding who to charge the MOECC may read the small print

Companies involved in joint-venture projects must be aware of contractual allocations of responsibility for ensuring regulatory compliance.

The MOECC's renewable energy approval (REA) for the Hamilton Township solar facility required the implementation of the Management Plans.

Through the sub-contracting arrangement between the construction companies, 228 had undertaken to implement the Management Plans and act as the project site manager. The MOECC did not shy from closely following this chain of contractual relationships to identify who had assumed responsibility for implementing the REA conditions.

2 Failure to "forthwith notify" – large fines forthcoming

The MOECC conducted four site visits. The samples collected across these visits showed that the levels of silt in the water were 13-500 times greater than the Canadian Water Quality Guidelines established to protect aquatic life.

On one particular visit, the MOECC observed that "snow melt water was discharging silt-laden water the colour of chocolate milk directly into" the creeks. Despite the visible impairment caused by the sediment run-off, 228 did not notify the MOECC of any of discharges.

After warnings and orders failed to prevent further discharges, and no notice of these discharges was provided by 228 to the MOECC, the MOECC laid the fourteen charges. 228's failure to notify the MOECC was one of the three charges laid, and cost them $125,000.

3 Contractual responsibility and the due diligence defence

The MOECC withdrew the charges against the other three companies on the basis that each had a potential due diligence defence:

- each of the companies had supervised, monitored and provided technical information to 228.
- when problems arose, the other companies pressed 228 to take the necessary actions and hired consultants to assist 228, and
- the companies spent over $11 million trying to help implement the Management Plans. As a result, the project was no longer profitable.

In contrast, the MOECC concluded from its site visits that 228 had:

- failed to commit sufficient staff and resources to implementing stormwater management and sediment and erosion control plans, and
- only spent funds (about 2.4 million dollars) to control and address the impacts caused by the sediment discharges *after* the second MOECC site visit and MOECC orders.

4 The larger the contract, the higher the stakes

228's construction contract was in the range of 7 to 8 million dollars. The $600,000 fine represents less than 10% of this contract. The Crown commented that this amount is consistent with how fines have been calculated for similar corporate offences.

The take away is that abrogation of approvals can result in fines. And abrogation of the law can result in fines. A gross abrogation of both, can result in big fines.

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