ONTARIO COURT OF JUSTICE

CITATION:

DATE: March 15, 2016·

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COURT FILE No. Burlington 139537 -01

B E T W E E N :

Ministry of the Environment

— AND —

Control Chem Canada Ltd.

Before Justice of the Peace P. Macphail
Heard on October 5, 26, 27, November 2, 3,9,16,17,23,30, 2015

Reasons for Judgment released on March 15, 2016

A.Huckins - counsel for the prosecution

M. McAree and M. Gardner - counsel for the defendant Control Chem Canada Ltd.

JUSTICE OF THE PEACE P. Macphail

Background

On the morning of February 29, 2012 a Control Chem Canada Ltd. ('Control Chem') employee poured several thousand litres of a liquid substance from three 1000 litre containers into a storm drain on the Defendant property. This action was in contravention of Control Chem policy and was recorded on the Defendant video surveillance system.

His apparent belief was that the three containers (or totes) were all filled with tap water. Subsequent analysis found the discolouring substance to be Aluminum Chloride Hydroxide Sulphate. This chemical is among the products sold in various strengths by the Defendant under the trade name ‘Delpac’.

Later that same day, representatives of both the City of Burlington and the Ontario Ministry of the Environment and Climate Change were notified that the water in the Burlington Sheldon Creek had turned a milky white at or near the so called storm water outfall at 5288 John Lucas Drive Burlington. Representatives of each entity attended and confirmed the discolouration. Craig Powell, the Supervisor of Drainage for the City of Burlington, took steps to contain the material. Michael Bywater, a Ministry of the Environment Field Officer took initial samples of the water. The water was found to be very acidic with a pH level of between 2-3, much lower than the usual pH level for such water.

The flow of the storm drain system was traced upstream to the Defendant premises at 5275 John Lucas Drive in Burlington. A similar white milky substance was observed in the bottom of several storm water catch basins immediately downstream of and upon the Defendant premises. Two separate water tests confirmed that water emptied into a storm water catch basin in the rear parking area of Control Chem property would flow downstream and enter into the outfall where the discolouration was observed.

Control Chem Canada Ltd. (‘Control Chem’) was charged with five offences as follows:

(1). Discharging or causing or permitting the discharge of a material which said discharge may impair the quality of the water of any waters contrary to s.30(1) of the Ontario Water Resources Act, R.S.O. 1990, c.40 as amended, thereby committing an offence under s.107 (1) of the said Act.

(2) Did, having discharged or caused or permitted the discharge of a material that may impair the quality of water of any waters, did commit the offence of failing to forthwith notify the Minister of the discharge, contrary to s.30(2) of the Ontario Water Resources Act R.S.O. 1990, c O.40, as amended, thereby committing an offence under s.107(1) of the said Act.

(3) Did commit the offence of discharging or causing or permitting the discharge of a contaminant into the natural environment, that caused or was likely to have caused an adverse effect, contrary to Sect. 14(1) of the Environmental Protection Act, R.S.O. 1990, c. E 19, as amended, thereby committing an offence under sec.186(1) of the said Act.

(4) Did having spilled or caused or permitted the spill of a pollutant, that caused or was likely to cause an adverse effect, commit an offence of failing to forthwith notify the Ministry of the Environment of the spill, of the circumstances thereof, and the action that the person has taken or intends to take with respect thereto, contrary to Sec. 92 (1)(a) of

the Environmental Protection Act, R.S.O. 1990, c. E 19, as amended, and thereby committing an offence under Sec.186(1) of the said Act.

(5) Did commit the offence of depositing, or causing, or permitting the deposit of waste on land that was not a waste disposal site for which an environmental compliance approval has been issued, contrary to Sec. 40 of the Environmental Protection Act, R.S.O. 1990, c. E 19, as amended, thereby committing an offence under Sec. 186(1) of the said Act.

The location of all of the alleged offences was particularized as '*at or near 5275 John Lucas Drive, Burlington, Regional Municipality of Halton'*. In all cases it is alleged that the discharge flowed into Sheldon Creek in the City of Burlington and that the contaminant, pollutant or waste as variously defined, was Aluminum Chloride Hydroxide Sulphate.

The Crown referred to the discharged/spilled material to be Aluminum Chloride Hydroxide Sulphate. Defence employed the description Polyaluminum Chloride. Both parties used the descriptor PAC or Delpac. It appears from the totality of the evidence that the parties were always referring to a material of the same chemical composition when these terms were employed and I have taken them to be interchangeable for the purposes of the evidence, submissions and my decision.

Evidence

Michael Bywater is a Field Officer with the Ministry of the Environment and Climate Change ('the Ministry'). He was called to Sheldon Creek on February 29, 2012 in response to a report that the creek water had been rendered milky white in colour. He took photographs of the creek and samples of the creek water. The photos where received as evidence in this proceeding. The discolouration commenced at a pool of water below a storm drain outlet and could be continuously observed from that pool to its outlet into the creek proper. Various witnesses referred to this location as the storm drain 'outfall'. While on site, he met with **Craig Powell**, the Supervisor of Drainage for the City of Burlington. Mr. Powell had already taken initial steps to control the discharge and had arranged for the placement of booms within the creek for that purpose. He had identified the Defendant premises at 5275 John Lucas Drive to be the possible source of the contaminant.

Bywater and Powell attended the Defendant premises, opening storm drain access covers as they approached and entered the Defendant property. The same white milky substance was observed within one of the catch basins within the Control Chem property. A white powdery substance was observed surrounding the surface of the catch basin of the storm drain located at the rear of the Defendant premises. This catch basin is in close proximity to the truck loading and passage doors of the Defendant building. Mr. Bywater stated that the substance was quite obvious in appearance, 'white to blue' in colour and looked to him to be 'out of place'.

Both attended the Defendant building reception area to speak with a Contro Chem representative. Frank Silva was summoned by the receptionist. Mr. Silva was the Produc-

tion Co-ordinator for the Defendant. Mr. Silva told Mr. Bywater that Silva had been washing storage containers or ‘totes’ with soapy water earlier that day. Bywater asked Silva to produce the Material Safety Data Sheet (‘ MSDS’) for the material used as well as the Control Chem Spills Procedures Documentation. Mr. Silva was unable to locate those documents but did later provide a sample of the soap used. Nermina Kotorich of Control Chem provided all Control Chem Material Safety Data Sheets to Karen Wassink, Mr. Bywater's colleague, by email on March 30.

Mr Silva attended the creek with Mr. Powell. Powell testified that, upon viewing the creek, Mr. Silva speculated that the cleaning material used by Silva that day may be the cause of the contaminant observed. Mr. Powell further testified that Mr. Silva initially committed Control Chem to take responsibility for the clean-up but later withdrew that offer.

Mr. Powell also conducted a so called ‘dye test’ by pouring water coloured by dye into the rear catch basin on the Defendant property and then observing the course of the dyed water as it passed through the storm water drain system and into Sheldon Creek at the outfall.

Karen Wassink is a Ministry inspector. She was called to the creek location in the early evening of February 29. She met with Craig Powell and issued an order directing that the City of Burlington clean up the spill. A private contractor was engaged to perform the clean-up. She also took water samples and conducted an initial pH test and obtained a reading of pH3.

She then attended the Control Chem premises, accompanied by Officer Bywater. She observed and photographed a number of tote containers. The totes had labelling affixed. The photos were filed as part of Exhibit 8. She returned the next day and met with Frank Silva.

She made no enquiry as to Mr. DaSilva’s job title or authority as she assumed that he had the authority to speak for Control Chem. She conducted what she referred to as a ‘water test’ where, under her direction, water was poured into the rear parking lot catch basin and the course of the water followed. Ms. Wassink observed that the water did drain into Sheldon Creek at the outfall location. She also observed that, during the test period, the storm drains upstream of the Control Chem facility remained dry. She observed the presence of video surveillance cameras at several locations on the outside of the Control Chem building and asked that Silva produce the surveillance information recorded. Mr. Silva did not have access to the information and the surveillance film was not provided that day.

She returned on Monday, April 2 and met with Mr. Silva and Doug Fast, the president of Control Chem. During the course of a meeting in the company boardroom Mr. Silva admitted that he had dumped three totes of water directly into the storm drain on March 29. Ms. Wassink again requested and was subsequently provided with a digital copy of the video camera record for March 29. She stated that she did not view any of the surveillance video while at the Control Chem premises. She first viewed the recording upon returning to her office on April 2.

Portions of this recording were viewed in this proceeding and the recording was filed in electronic form as Exhibit 7. In this recording, an individual acknowledged to be Frank Silva is seen positioning three tote containers directly adjacent to the rear storm water catch basin with the use of a tow motor or forklift machine, opening the drain of each container and emptying the content into the storm basin. Mr. Silva then is observed positioning and draining another tote at a separate location in the rear of the parking lot area not directly adjacent to the rear storm drain. It was generally accepted that this tote contained a smaller quantity of liquid, soapy water previously used by Mr. Silva for cleaning purposes. There was no evidence that this liquid entered the storm basin.

Neither Ms. Wassink, nor any other Ministry employee attempted to identify or inspect any remaining content any of the totes observed in the surveillance video.

Ms. Wassink testified that Mr. Fast called her at approximately 2:30 on April 2 to report a spill at the Control Chem property. She received a confirming e-mail from Mr. Fast on April 3.The e-mail was filed as Exhibit 11. The email reports the spill to have occurred at the company 5275 John Lucas Drive Burlington location between 9:00 and 10:00 am on Thursday March 29, 2012. He reported the spilling an estimated 2 gallons of Poly aluminum Chloride ('PAC') and one cup of soap, contained in approximately 750 gallons of water. He described PAC to be a coagulant for treating drinking water and the soap of a type similar to truck wash soap. Defence did not challenge the authenticity of the content of the email.

A Certificate of Search under date of April 16, 2012 was filed as Exhibit 12, wherein Daniel Izso – Spills Action Centre, Ministry of the Environment certifies that he had searched the Ministry records from March 29, 2012 and found no record of any notification of a 'spill by Control Chem Canada Ltd which occurred at or near 5275 John Lucas Drive Burlington Ontario. Defence did not challenge the content of this certificate.

Ms. Wassink prepared and issued a Provincial Officers Report and accompanying Order (Order #3461-8SZLUB) under date of April 5, 2012, both directed to Control Chem Canada Ltd. The Order directed Control Chem to '*Effective immediately, take all action necessary to prevent any further spills into a catch basin, or storm sewer, or sanitary sewer'.* The company was also ordered to provide to Ms. Wassink on or before April 13, 2012, copies of certain documents. A copy of the Report and Order were filed as Exhibit 13. Ms. Wassink stated that Control Chem complied with the directions in the Order.

Joe Killop was an employee of a business that was in close proximity to the Control Chem premises. He testified that he had previously observed totes being drained towards the same Control Chem storm sewer. He was unable to provide specific information as to the number of times he had seen this, when these observations were made or any specific details as to any pouring or draining observed. His evidence did not assist and I placed no reliance on it, as the vague and general nature of his testimony rendered it neither helpful nor reliable.

Tracy Boyd is employed by the Ministry as an Enforcement/Technical Specialist – Water. Her duties include assessing the environmental impact of water pollution incidents. She was qualified for this proceeding as an expert in surface water assessment. She

was the author of a March 15, 2013 report titled ‘Impact Assessment of the Discharge of Aluminum Chloride Hydroxide Sulphate to Sheldon Creek’. That report was filed as Exhibit #26.

She testified that Sheldon Creek is both a warm water fish habitat as well as a cold water spawning habitat. She stated that the analysis of the water samples taken by Mr Bywater and Ms. Wassink revealed lowered pH levels, increased conductivity and high concentrations of aluminum. She stated that low pH could cause harm or be lethal to aquatic life and that the pH levels found in the samples had pH levels reduced to lethal levels. The pH imbalance had the capacity to harm or kill aquatic life, noting as an example the risk of burning or damaging the gills of fish. The elevated conductivity and the increased concentration of aluminum could also cause metabolic upset.

She described aluminum chloride hydroxide sulphate to be a coagulant used in water treatment. It acts to react with particulate in the water to form a precipitate (clumps) that settle to the bottom (of the water source). It is a corrosive, acidic material that dissociates to form aluminum, hydroxide, sulphate, hydrogen and salts. She had conducted certain chemical analyses of the water samples taken. The comparative results are set out in Table 9 of her March 15, 2013 report. On page 9 of that report she notes that the ‘*comparative chemical analysis indicate that the samples contained a precipitate consisting of aluminum sulphate and sodium chloride consistent with spilled aluminum chloride hydroxide sulphate. The downstream samples also contained dead algae and insects which is consistent with the aquatic toxicity of the discharged materials.’*

She stated that the water analysis findings were consistent with the presence of the Delpac material.

Ms. Boyd described the impact on water and the potential for adverse impact on plant and wildlife.

She performed an analysis comparing the actual concentrations of aluminum measured in the March 29 samples taken at one of the Control Chem catch basins and at the outfall to the creek to the concentrations that would be expected to be found following the discharge of the concentrate levels first estimated and reported by Mr. Fast on April 3. The analysis was performed by incorporating data set out in the MSDS for the Delpac product. Two gallons of the Delpac product with an initial concentration of 15 to 60 percent as noted in the MSDS mixed in 750 gallons of water would result in 35 to 141 mg/litre of aluminum. She noted that the catch basin sample contained 432 mg/litre of aluminum while the outfall sample contained 613 mg/litre. She estimated that the outfall measured concentration would require 34 to 136.7 litre of product to be present in the three totes emptied assuming no dilution occurred at the outfall. She stated that the lower concentration of 432 mg/litres in the upstream catch basin was ‘unusual’. She later speculated that this might have been the result of the discharge of the Delpac preceding the discharge of the clean water. This sequence of liquid discharge would or could have led to a flushing or dilution of the content of the earlier tote(s).

The report concludes with the following findings:

'*In summary, on March 29, 2012 the discolouration of Sheldon Creek was traced back to Control Chem Canada Ltd. The discolouration was determined to be the result of emptying totes containing a solution of aluminum chloride hydroxide sulphate to a storm sewer connected to Sheldon Creek. The migration of this material resulted in the pH of Sheldon Creek being reduced to lethal levels. Conductivity, aluminum chloride, sulphate and iron were also significantly elevated and would contribute to toxicity. The discharged material in the catch basin and at the outfall was lethal to Daphnia in bioassays. The material was lethal to aquatic invertebrates trapped within the discharged material and to fish in the vicinity of the discharge into Sheldon Creek.'*

Frank Silva was the Production Co-ordinator at Control Chem. He had been a co-defendant in this proceeding. On April 15, 2015 he pled guilty to count 1. He was fined $5,000. The remaining 4 counts against him were withdrawn.

He testified as a prosecution witness and was assisted by an interpreter in the Portuguese language while giving his evidence. He testified that he had been employed by Control Chem for approximately 20 years from September of 1994. He has modest formal education, stating that he had completed grade 4 in Portugal and stated that this would be an equivalent to grade 9 in Ontario. He stated that he was unable to read in the English language. He made frequent reference to this inability to read in English. This assertion was not challenged or tested by either the prosecution or defence during the course of the trial. He frequently asked for the interpreter's assistance in reviewing documentation presented during his evidence.

There was extensive evidence as to the training Mr. Silva received. He acknowledged training regarding Transport of Dangerous Goods and Workplace Hazardous Materials Information System ('WHMIS'). Mr. Silva's training records were produced and Mr. Silva confirmed that he had signed these records in acknowledgements of training received.

Training on company procedures and regulatory matters generally consisted of a presentation by another employee and, if written materials, the reading of those materials to him. He would sign or initial the training document or training log to evidence his participation.

He acknowledged participating in periodic emergency spills simulations, estimated to take place 1 to 2 times per year. These were in house training exercises. He acknowledged participation in a December 6, 2011 spill drill simulating the spill and containment of Delpac material. His duties included the monthly physical inspection of the content of the emergency spills kits located throughout the company premises. The kits were stored near all external doors and contained equipment and materials to be used in the prevention and cleanup of spills. He acknowledged that he was a person to be contacted in the case of a spill. In that event he would contact those in charge and assist in the cleanup if he were able.

Mr. Silva's work duties in February 2012 included supervisory responsibility for the two other production staff members, although his evidence was neither clear nor completely forthright on that point. He stated that the two others would come to him for direction on production matters and he acknowledged that he provided training to those two same individuals. Mr. Silva approved the vacation requests of at least one of the other produc-

tion staff. He acknowledged participated in training the company truck drivers as part of their shipping/driving orientation training. He carried both a company issued pager and latterly a cell phone to assist in case of emergency matters, alarm monitoring and short notice shipping/receiving matters. He carried a list of telephone contact numbers in both his wallet and his truck, including emergency external contacts.

Mr. Silva stated that he reported to Doug Fast, the Control Chem president. Mr. Silva had some signing authority with respect to purchase orders for production materials, including annual signing authorizations for specific suppliers. This authority was to be employed when Mr. Fast was not present to authorize purchases.

He acknowledged that he signed off on all product formulation sheets, the so-called product recipe instructions. The formulations were prepared by the company chemist and then approved by both Doug Fast and Frank Silva before adoption. All three parties sign the sheets as evidence of review and/or approval.

Mr. Silva stated that Control Chem utilized three different general types of containers in the conduct of it's' business; 5 gallon containers, drums generally containing approximately 210 litres of material and totes with a general capacity of 1,000 litres.

Mr. Silva also was responsible for the operation and cleaning of filtration system (referred to in the proceeding as the 'Ultra Filtration System'). This equipment was used to clean and recycle waste water created during either the manufacturing of product or the result of cleaning of plant premises and equipment. He stated that both city water and recycled water was used in the production process.

He acknowledged dumping the content of three totes into the storm drain that day and self-identified as the person appearing in the surveillance recording. He also acknowledged emptying the content of the fourth tote onto the parking lot surface. He stated that it was his belief that three of the totes emptied into the drain contained water, with the remaining tote that was emptied onto the surface of the parking lot containing approximately 100 to 120 litres of soapy water previously used to cleaning equipment. He explained the circumstances of this action. He required what he referred to as 'a couple of tanks' that morning. He went on to state that he required 2 totes that day to be used in the shipment of calcium chloride. He stated that a work mate, Chad Marnier, told Silva that Marnier had recently filled 3 totes, two large and one small, with tap water and that those totes were available to Mr. Silva. Marnier explained that he had overfilled water in two mixing tanks and had emptied the excess water into these totes.

Silva acknowledged that he did not test or otherwise confirm the content of the totes to be water before draining the content of each into the storm drain. His recollection was that there were no labels on the totes. He was aware of the presence of the company surveillance cameras. He explained is actions as '*stupid of me- I took a chance'.*

Marnier later testified that Marnier had filled only two totes with water and that Marnier had not labelled the content of either after filling them with water. Silva stated that he had requested and obtained a letter/note from Marnier in preparation of Silva's defence. The note was filed as Exhibit 32. Marnier's note states that he had filled two rinsed out

totes with water. The note contained no reference to a third tote. Silva testified that he did not read the note before asking his spouse to provide it to Mr. Silva's lawyer.

Mr. Silva testified that he told Mr. Bywater on February 29 that Mr. Silva had 'dumped water' earlier that day. It was not clear from his evidence what water he was referring to when speaking with Mr. Bywater. Mr. Bywater testified that Mr. Silva had acknowledged power-washing or cleaning totes that day.

Mr. Silva testified that he had a telephone conversation with Doug Fast during which Mr. Silva admitted to 'dumping water'. He stated that Mr. Fast was upset by this admission. Mr. Silva's evidence was quite spare and confusing with respect to the time of this phone discussion and the matters discussed. He appears to be referring to a February 28 or 29 discussion with Mr. Fast. Mr. Fast testified that Mr. Silva admitted to him to power washing.

He admitted to using water in other out of door activities, including releasing water from totes to melt ice and clear snow from ramps and the parking lot and while power washing ramps, tanks and forklift equipment.

Mr. Silva was familiar with the PAC or Delpac products and described the liquid to be colourless and odourless.

He acknowledged in cross-examination that he was employed in the production area in a supervisory role. He also acknowledged receiving training in environmental management matters. He professed a general awareness of the ISO 9001 and ISO 14001 programs and acknowledged that he had received training with respect to the ISO 14001 program. Certain of his company training records were reviewed with him. He acknowledged receiving certain of this training and identified his signature/initials signifying the delivery of specific training. He was presented with the text of a number of company documents referred to as '*SOP's*' or '*Standard Operating Procedures*', including SOP No. 7D – Disposal of Wastewater, He stated that he could not recall ever seeing this document prior to February 29 2012.

He initially testified that he had no role in the creation of the SOP's, nor did he provide any input to the creation of these procedures. It was clear from the totality of his evidence that he did, in fact, have a role in the development of these procedures. He specifically acknowledges that he was consulted and his practices incorporated into certain of the SOP's.

His work duties were set out in a written job description, describing his role to be a Production Manager. He acknowledged his signature under date of December 22, 2011, within that document.

He stated that he may have participated in the ISO 14001 Environmental Standards accreditation. He was aware of the periodic external audit of the environmental processes and stated that he would have some limited interactions with the auditor.

He stated that he did not consider the soapy water in tote four to be 'wastewater', nor was there any SOP in place at February 29, 2012 with respect to the dumping or dispo-

sition of clean water. He did not believe that his actions of February 29, 2012 contravened company policy. He did acknowledged that company policy prohibited the dumping of waste water and acknowledged that there were signs throughout the plant that prohibiting the dumping of wastewater.

Douglas Fast is a chemist and the president of Control Chem. He testified that he co-founded the water treatment business with a partner in 1989. His partner left the company in 2012. There were approximately 35 company employees in March of 2012. Frank Silva reported directly to Mr. Fast. Mr. Fast is away from his premises 50 to 60% of the time for work related travel. He remains in charge while travelling and maintains contact with his employees by telephone and e-mail.

Mr. Fast described the various management and environmental control initiatives he has implemented or adopted as he grew his company. A great deal of his evidence focused on the adoption of two International Standards Organization programs. One was the ISO 9000 (or 9001) program, a set of quality management systems. The other was the ISO 14000 (or 14001) a set of environmental standards systems.

Mr. Fast explained that he chose the ISO 9001 program as a means of implementing management systems and controls in his business when he determined that company growth required that he move beyond an entrepreneurial model of management to an operating company business model. He stated that Control Chem was an early adopter of this program. ISO 9001 is built around documented standards and processes for the various aspects of the business activity and is supported by periodic external audits, at least one annually. Mr. Fast elected to have two external audits conducted each year.

Mr. Fast described the system in summary form to be '*document what you do and do what you documented'.* '*Continuous Improvement'* is an embedded philosophy of the ISO systems. He stated that accreditation was both time consuming and expensive. ISO 9000 certification was achieved in 1994-5 and ISO 9001 in 2011. Mr. Fast described the costs to be 'tremendous' but the desired outcome was achieved; *'moving us to a structured company with systems and controls'.*

Control Chem obtained ISO 14001 Environmental Standards certification in 2009 and has been continuously registered since that time. The standards were developed based upon a review of what were described to be the company 'aspects' and 'impacts'. Examples of company aspects would include the blending of materials or products and the methods of delivering product to customers. Each aspect was examined and systems developed, documented and implemented to mitigate environmental risk (the impacts).

Tools employed included the development and implementation of written policies, creation and adoption of Standard Operating Procedures ('SOP's), documented training, identification and remediation of deficiencies in adherence and periodic external audits of practices and procedures. The external audit findings are documented in written 'improvement/non-conformance reports' as well as auditor recommendations referred to as 'Opportunities for Improvement'. Mr. Fast testified that all identified opportunities for improvement are adopted. There are two categories of non-conformance findings, major and minor. A major issue can suspend ISO 14001 certification pending remediation. A

company is granted time to correct a minor finding. Mr. Fast testified that the company has never had a major non-conformance finding.

The company employs a further environmental control system tool, a triennial legal requirements review. This is a third party review of the legal/ regulatory aspects of the company. It measures and updates the Control Chem operations as against current legislation. The entire operation of the company is reviewed and a compliance report issued. The report contains a so-called '*gap analysis*' identifying any deficiencies as measured against the then current regulatory framework requirements. Mr. Fast states that this report is provided to the ISO auditor.

Mr. Fast stated that the 5275 John Lucas Drive premises had been purpose built for Control Chem and he had caused certain features to be incorporated in the factory building to minimize the risk of environmental harm. A number of these design elements addressed the risk of potential spills. Others were designed to capture environmental benefits from required processes. The features included:

- There were no sewer drains in the factory floor. This was to eliminate the risk of spilled material entering the sewer system.

- The fluid compounding area was surrounded by a 3 inch high containment area, capable of containing up to 20,000 litres of spilled material.

- Bulk inventory storage tanks were of double wall construction, with the inner storage tank contained within a larger security tank.

- Factory compressors provided winter heat to the plant.

- A closed heating system to ensure no open flame risk.

- Containment of all mixing stations and pumps.

- All factory passage and loading doors were surrounded by a raised barrier to ensure no spilled materials left the building.

All inventory handling and processing was to occur within the factory premises. Only the receiving and shipping functions would have an out of doors aspect. Mr. Fast referred to this as a '*company mantra'* – '*nothing leaves the building'*. He explained that adherence to this general policy would ensure that any potential for spillage would be contained to within the factory building. He stated that an inside spill would present as a '*housekeeping'* matter as the exterior and public environment would not be at risk.

Control Chem invested in a wastewater filtration system, the Ultra-filtration system. Mr. Silva was trained to operate and clean this machinery and was the primary person to do so. This machinery enabled the re-use of all spent liquids. The solid materials captured by this process were compounded and fixated in such a manner to ensure no leaching of this material upon disposal. This process was developed by Mr. Fast and his staff to allow for the disposal of the solid waste without environmental risk. The adoption of this technology and process meant that a third party liquid waste disposal service was no

longer required, as all liquids were now re-used in the Control Chem manufacturing or maintenance aspects and solid waste had been rendered inert.

Mr. Fast stated that risk of spills was addressed by a number of operating controls, including those to prevent and/or remediate spills both within and outside of the company premises, including during transport. There was annual spills training, internal and external audits to review what was referred to as spill mitigation status and management review meetings two times per year. Those meetings would include the periodic consideration of company policies, procedures and objectives, a review of the so-called 'non-conformance logs' and review of the emergency response plan. Minutes were prepared and provided to the external auditor. Frank Silva would attend on occasion, depending on the nature of the specific meeting agenda. There were also formal production staff meetings, held at least once per year, where Mr. Fast would review issues that included emergency procedures.

Mr. Fast provided extensive detailed evidence as to production staff training. Training was by a combination of in-house and third party resources, with the majority of training provided by Control Chem staff. Third party training was provided for subjects including Transport of Dangerous Goods, Working at Height, WMSS and Light Fire response.

The company Standard Operating Procedures were the subject of internal training. SOP's were reviewed with production staff to ensure that they understood and could properly fulfil the task/duty described. Individual written training records were maintained. Staff members would sign and date the record to confirm that the specific training had been received. A number of these records, including those for Frank Silva, were received in evidence.

Certain of Mr. Silva's records described him to be the 'Production Manager', others as a 'Production Co-ordinator'. Mr. Fast explained that Mr. Silva acted as both a manager and in a working position, and for that reason Mr. Fast identified Silva as a 'co-ordinator' rather than a 'manager'. Mr. Fast acknowledged Mr. Silva to be responsible for Control Chem shipping/receiving, trucking and production functions, including responsibility for other production staff. He confirmed that Mr. Silva had purchase order signing authority in the absence of Mr. Fast.

Mr. Fast testified that he frequently attended throughout the premises and property to ensure that all was in order, practicing what he referred to as *'management by walking around'.*

Mr. Fast described a 2001 inspection by Ministry Inspector Tracy Goodwin that led to what he described to be *'sea change'* in his view on disposal of water. The inspection identified rain water collection in tubs and storage tanks kept out of doors. He stated that the Ministry staff person made it clear to him that this collected rain water was not exempt from the prohibition on discharge into the storm water system. He acknowledged that this inspection also identified certain totes filled with waste water inside the building that were not labelled as required.

The Ministry also directed that no truck washing was to occur on the company premises. In consequence, Mr. Fast ordered that all outside use of water cease. A third party

truck washing facility was found and the SOP for truck maintenance was amended to address truck washing, outside washing of the forklifts ended and air compressor condensate was recycled through the Ultra Filtration system. The intended result was that there was to be no outside discharge of water into the environment. Mr. Fast believed that Mr. Silva understood this policy.

Mr. Fast testified that by March 2012 spill risk issues had been limited to truck loading and unloading and shipping/delivery events only. By ensuring that no other company activity took place out of doors, environmental risk was limited to those aspects. Delivery trucks were modified to install spill containment features and drivers were trained in loading/unloading and spills management. Each truck contained a so-called 'spills kit' of materials to aid in containment and clean up.

Mr. Fast spoke several times by telephone with Mr. Silva on March 29 and 30. He specifically asked Mr. Silva if there had been a spill at Control Chem and was told there had not been. Mr. Silva did refer to power washing activity during a March 30 phone discussion but then went on to indicate that this was historic activity. Mr. Fast stated that he accepted the word of his 20 year employee that there had been no spill. He first learned of Mr. Silva's true actions when Mr. Silva disclosed during the April 2 meeting with Ms. Wassink that he had drained totes into the storm system. With that admission, Mr Fast stated that he realized that he had been misled.

With this new information he realized that he had a duty to report and called Ms. Wassink that same afternoon to do so. He sent a confirming email to her on April 3 providing additional information as to the content of the totes.

He assumed to that point that there was only a small quantity (approximately 2 gallons) of PAC material in the water disposed of, perhaps residue originally in a transfer pump. He had also assumed that the spill was local only to the outfall area. He attempted to recreate the 'white paint' substance but was unable to do so. Upon learning the true extent of the spill and the true number of totes emptied he realized that he had underestimated the amount of PAC involved. He revised his assumptions and stated that if one of the three totes had contained 'pure poly' the creek would turn white as observed. He appeared to conclude that Mr. Silva had poured two totes of softened tap water and one of PAC into the storm drain. He testified that he could not explain Mr. Silva's conduct in so doing. He declared that it made no sense to him and the action went against all training. The conduct was also a breach of the direction provided in SOP 7D, disposal of waste which directed that no spent water was to enter the storm sewer.

The Region of Halton invoiced Control Chem $76,718.82 for reimbursement of the cost of containment and remediation. Mr. Fast stated that these cost were paid without question, as it was the right thing to do.

Chad Marnien worked with and reported to Frank Silva in the Control Chem production department in March 2012. He stated that 'Frank ran the shop'.

He acknowledged that it was he who had filled two totes with clean water, the same two totes that were among the three emptied into the storm drain by Frank Silva on March 29. He had overfilled two mixing tanks with clean water and drawn down the level of the

two tanks by pumping the excess water into two totes. He did not label the content of these two totes. He made Mr. Silva aware of the two totes and the content and stated that he was certain that Mr. Silva knew the identity and location of the two totes. He stated that the usual practice would have been to later use this clean water for blending in the production process. He first learned that the water had been dumped into the storm sewer when he viewed the surveillance video. He stated this dumping was against company policy and that he had been trained not to dump anything outside, referring specifically to the so-called mantra – '*nothing leaves the building'*. He testified that he had observed Mr. Silva dumping waste water into the outside storm drain on 'a couple of occasions'. The material in both instances was air compressor water. He neither challenged Mr. Silva nor told anyone about this action as Mr. Silva was his boss.

He confirmed that he had written a note on Mr. Silva's behalf describing how Mr. Marnian had come to fill the two totes with water. He believed that Mr. Silva read the note upon receiving it. He had no reason to believe that Mr. Silva did not read the note. He could recall seeing Mr. Silva reading product formulation sheets and material picking sheets but could not recall seeing Mr. Silva read a Material Safety Data Sheet.

Mr. Marnian confirmed that he had received Control Chem training in matters including, Standard Operating Procedures, spills training, transportation and proper labelling. He was familiar with handling polyaluminum chloride products, referred to as PAC or Delpac and stated that it was a commonly used product. He described the product to be clear and odourless.

Ronald Oleka is the Control Chem Research and Development Chemist. He described the various types and sizes of totes used by Control Chem, including describing the characteristics of so-called regular and light totes, stating that one type is clearly distinguishable from the other in size and construction. Mr Oleka prepares the formulations of company products. These formula are maintained in formula books and are the 'recipes' for the ingredient of various strengths and volumes of company products. Each of Mr. Oleka, Doug Fast and Frank Silva signed each formula sheet to acknowledge approval. Mr. Oleka stated that Mr. Silva would double-check the accuracy of Mr. Oleka's formulae. He never encountered interpretation problems during these interactions with Mr. Silva and was confident that Mr. Silva understood Mr. Oleka.

He would also discuss potential formulation safety issues with Mr. Silva. All formula sheets referenced the Material Data Safety Sheets for the applicable product ingredients. The company only purchased product materials that had a MSDS.

He viewed the surveillance video during his testimony. He stated that he had not previously seen this video. He identified the four totes by size, with three being the smaller 1,000 litre capacity totes and the fourth the larger 1,200 capacity. He professed to see differences in colouration of the content but acknowledged that the differences in the opacity between totes as well as light conditions could cause these differing observations.

He was not asked to test the content of any tote on March 29 or 30 and stated that he would not usually test the content of company totes.

He testified that Doug Fast always instructed employees not to discharge anything into the sewers. To do so would contravene company policy, procedures and employee training.

Grace Perez-Alaveda was the company accountant on March 29 and reported to Doug Fast. She stated that she considered herself part of the company senior management. She described being present in the reception area when two men arrived that day and asked to speak with someone in production. She escorted them to the shop area to meet Frank Silva. She later assisted in the search for any sewer plan, including placing a call to Mr. Fast on behalf of Mr. Silva. She testified that following the first call to Mr. Fast that afternoon, Mr. Silva told her that Chad had given Mr. Silva 'two totes of water' and Mr. Silva had 'poured the water at the back'. She had never heard of anyone dumping liquids '*out back'* before that day. She stated that Mr. Silva did not lead her to believe that this posed an environmental problem' and she did not mention Mr. Silva's admission to Mr. Fast during their second telephone discussion that day.

John Dragasevich is the Executive Vice President and Technology Officer for Newterra Environmental. He was the president and founder of a predecessor company, Filter Technologies, the vendor of the Ultra-Filtration system purchased and used by Control Chem. He provided expert opinion evidence with regard to industrial water processing and treatment systems utilizing filter membrane technology. His report headed 'Ultrafiltration Technology Review' was filed in this proceeding. He concluded that the Control Chem system was '*operating properly for the purpose as originally designed and yielding the desired results'*.

He stated that the membrane components of the system would typically last about seven years if properly cleaned and maintained. The Control Chem system recycles approximately 95% of the process water. He described the Control Chem environmental processes to be innovative, progressive and forward thinking when adopted. He testified that the Defendant was 'on the leading curve' with the steps taken. He made specific reference to the Control Chem's innovation in developing a means of solidifying the waste created in the filtration process. He stated that this '*literally made a cement block out of it …*' rendering the waste non-leachable. This eliminated the need to haul any liquid waste. He has made other customers aware of this procedure.

The Control Chem system had what he referred to as a 'variable feed stream' with the filtration time changing with the nature of the liquids introduced. It would filter 4,000 litres of clean water in approximately two hours. The concentration of more typical feed stream material would take approximately twenty four hours to filter for an equivalent volume.

Andrew Reed is a service representative employed by the vendor company of the Ultra Filtration system purchased and operated by Control Chem. He testified as to the maintenance and operation of the Control Chem system, confirming that the system had operated satisfactorily under Mr. Silva's supervision.

Submissions – Actus Reus

Prosecution

The Prosecution submits that a number of elements are not in dispute:

- Date of the offence being March 29, 2012.

- Location of the offence: 5275 John Lucas Drive Mississauga.

- Identity of the Corporation and Director: Control Chem Canada Ltd, Douglas Fast a Director.

- Frank Silva emptied three totes of liquids into the Control Chem catch basin on March 29, 2012. He further drained the content of a fourth tote onto the Control Chem parking lot but there was no evidence that the content then drained into the catch basin.

- Water in Sheldon Creek was observed to be a milky white in appearance on March 29, 2012.

- Control Chem uses Aluminum Chloride Hydroxide Sulphate to produce Control Chem product.

- Control Chem reimbursed the City of Burlington for the cost of the clean-up of Sheldon Creek.

In summary, the Prosecutor submits that Frank Silva emptied an unknown amount of Deepak into the Control Chem catch basin. This material then drained into Sheldon Creek and caused the pH level of the creek water to fall from an average 8.0 +/- to measured levels of 3.79 to 3.98. The result was increased acidity of the creek water, a condition lethal to aquatic life. Sheldon Creek is both a warm water fish habitat and a cold water spawning area.

The Prosecutor submits that the result was a 'deemed impairment' of Sheldon Creek as defined in s. 1(3) of the Ontario Water Resources Act ('OWRA'). The water was turned milky white ss.(c), the material was found to be toxic as determined by a generally accepted scientific test ss.(d) and the material or derivative causes or may cause injury to or interfere with any living organism as a result of using or consuming the water ss.(b)(i).

Control Chem contravened s.30 (2) of the OWRA as it failed to notify Ministry 'forthwith' as required by that subsection. The Control Chem written notice of April 3, 2012 did not constitute notice 'forthwith' or in a reasonable time'. The Prosecutor submits that forthwith is to be interpreted to mean as 'promptly as reasonably possible under all of the circumstances' and relies upon R. Muskoka Baptist Conference (1986) 16 WBC 77 in support of that proposition. The Court was also directed to the direction found in R.v. Castonguay [2013] SCR 323 para 2 'when in doubt, report'.

Mr. Silva was aware during his first conversation with Mr. Bywater that he should have disclosed his actions earlier that day. He knew that he had drained three totes into the catch basin. He must have known that the catch basin led ‘somewhere’. He could have taken steps to determine the content of the drained totes. Mr. Bywater observed a white powdery sediment at the mouth of the catch basin closest to the loading dock, the location of the dumping activity. Mr. Silva should have seen this same residue and known something was amiss.

Each of Douglas Fast, Frank Silva, Ronald Oleka, and Grace Perez-Alaveda had obligations to report the discharge as each became aware on March 29 of a possible discharge and all failed to do so forthwith or in a reasonable time.

Section 1 of the EPA sets out a definition for each of the terms ‘discharge’, contaminant’, ‘adverse effect’ and ‘natural environment’. The Prosecutor submits that Sheldon Creek clearly falls within the definition of ‘natural environment’ and that Delpac was the contaminant that Frank Silva discharged into Sheldon Creek on March 29, 2012. The consequent reduction in the pH level of the water of the creek fulfils the definition of ‘adverse effect’.

Frank Silva was in control of the four totes and the content of each on March 29 when he discharged the content of three of the totes into the catch basin at 5275 John Lucas Drive. Discharge of the Delpac material into the catch basin constitutes a release into the natural environment and this discharge was not one in the normal course of business. The reporting requirement has wide breadth. Evidence of an adverse effect is not a precondition to the EPA s.92 (1) requirement for notify. Frank Silva did not forthwith notify the Ministry as required, nor did he ever do so. Frank Silva was employed by Control Chem on February 29 and his failure to provide notice is attributed to Control Chem.

The Prosecutor submits that 5275 John Lucas Drive Burlington was not an approved waste disposal site as at March 29, 2012, nor was Control Chem in receipt of any such approval for that location at March 29, 2012. Certificates of Search issued pursuant to s. 175 of the EPA were filed as Exhibits 29 and 30 setting out the result of the search of EPA records for any Certificate of Approval. The draining of Aluminum Chloride Hydroxide Sulfate into the 5275 John Lucas Drive catch basin was not an intended use of this material (Kermecho Co. v. Ontario (Minister of the Environment) (1992) 35 A.C.W.S. (3d) 321.

Defence

Control Chem is acknowledged to be a person for the purposes the prohibition and charging sections of the EPA and OWRA. It was further acknowledged that the *Interpretations Act* s.29 (1) includes ‘a corporation …’ as parties included in the definition of a person. Counsel submits that the Prosecutor must prove that Control Chem was either the ‘doer’ or the one who ‘failed to do’. The totality of the evidence was that Frank Silva was the person who discharged or deposited. He did so of his own accord and his actions were contrary to Control Chem's environmental management systems policies, procedures and training.

Defence submits that the Prosecutor has not proven that a discharge occurred, as the contaminant or chemical that is the subject of the discharge has not been proven. Ministry staff did not identify and examine any of the four totes during their investigation. Counsel acknowledges that one of the four totes (the so-called tall tote) observed on the video surveillance likely contained water and that the fourth tote located near the forklift ramp contained soapy water. There was no direct evidence as to the content of the other two totes. The discharging itself has not been proven in that the Crown had failed to prove that the discharge of the chemical or contaminant had to occur at the time when the same entered the natural environment, in this case when Frank Silva opened the valve on each tote to allow the release of the liquids. This is the act of discharge, not any subsequent movement or travel after the discharge is first released into the natural environment.

Counsel referred to the Supreme Court of Canada interpretation of the terms 'cause' and 'permit' in R.v. Sault Ste. Marie (City) (1978), 85DLR93d) 161 (SCC). That court was interpreting what is now s.30 of the OWRA. The Court held that the offence of 'discharging, causing or permitting a discharge' is committed by anyone who was in a position of influence or control and could have prevented the discharge but failed to do so.

Defence asserts that Frank Silva was acting outside of the scope of his employment or duty to the company when he discharged the content of the four totes. In such circumstances it should not be held that Control Chem 'caused' or 'permitted' the discharge. Similarly, Control Chem should not be found to have permitted the discharge as the company did not have any control over Frank Silva when he discharged the content of the totes (R.v. Rivtow Straits Ltd [1992]BCJ No 63, 8 CELR (NS) 16 (BCSC). Counsel states that Mr. Silva's actions were unforeseeable and were not '*part and parcel'* of his employment duties. Counsel references a finding in R.v. Dan Gamache Trucking Inc., 2005 BCSC 1487 in support where it was held, in part *'… In the present case, Gamache had control over its owner/operators. It is not necessary to prove that Gamache actually knew of each breach of the Act or Regulations to prove that it 'permitted' the breaches. However, depending on the facts, there may be some instances when it could not be found that Gamache had 'permitted' something to occur if it had no means of forseeing or knowing that the breach might occur, or of controlling that breach'.*

Control Chem did not 'arrange' the discharge, nor facilitate it in any way. To the contrary, all company policy and instructions spoke against such activity. Counsel specifically references the overarching company mantra of 'nothing leaves the building'. The company standard operating procedure SOP # 7D ' Disposal of Waste' directed that no 'spent water' was to enter the sewer at any time. Company policy and practice was amended following the inspection by Provincial Office Tracy Goodwin in 2001. Steps were taken to ensure that rainwater was not collected and later released into the storm drains; compressor condensate water was no longer disposed of in a similar manner. Onsite truck washing ceased. Mr. Fast testified that Mr. Silva was in charge of the facility and understood that nothing was to be discharged into the storm system. The content of the four totes could have, and should have been recycled through the ultrafiltration system.

Counsel referenced a discussion of the concepts of 'management' and 'control' as set out in P&L Tire Recycling Inc. v. Ontario (Director, Ministry of the Environment, [1992] OEAB no 21 (Ont Environmental App Bd). In paragraph 71 of that decision the Board opined as follows:

'Management and control are overlapping concepts. It is impossible to state precisely where one leaves off and the other begins. The Oxford Encyclopedic English Dictionary defines "manage" as 'organize; regulate; be in charge of a (business, etc.)'. "Management" has a corresponding definition as 'the process or an instance of managing'. "Control" as a noun is defined as 'the power of directing, command', or alternatively as 'the power of restraining'. Thus, control includes both the power to make things happen and to prevent the, As a verb, 'control' means to 'have control or command of; dominate, exert control over; regulate; hold and check; restrain'. Black's Law Dictionary (5th Edition) defines 'control' as 'the power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee'.

Counsel submits that Control Chem did not have control over what he refers to as the 'undertaking' of March 29, 2012, the discharge of the totes into the storm system. Only Frank Silva had full management and control over that undertaking.

Counsel submits that the obligation to report a spill arises only when there is knowledge of a spill. To require Control Chem to report a spill that Control Chem was unaware of is logically inconsistent. Only Frank Silva knew about the spill on March 29, 2012. Frank Silva had the obligation to report and failed to do so. Doug Fast promptly fulfilled Control Chem's duty to report when he first learned on April 2 that Mr. Silva had dumped liquids into the catch basin on March 29. Reporting occurred in several ways. Provincial Officers Wassink and Noordhof were present in the Control Chem boardroom when Frank Silva disclosed his conduct for the first time and would have been notified of the spill or discharge concurrently with Mr. Fast. Mr. Fast directed that any available video surveillance records be delivered to Ms. Wassink. This video record was delivered to Ms. Wassink in the early afternoon of the same day.

There was an initial partial review of the video record that same morning while Mr Fast was directing Chris Newhouse, the company IT consultant, in the retrieval of the video information. It occurred in the company server room while Mr. Newhouse was accessing the recording for downloading. Mr. Silva could be seen draining the totes during this initial review. Mr. Fast testified that the two Ministry officers were present and that they also saw that portion of the video record. Ms. Wassink testified that she did not see that portion of the video recording until she viewed the downloaded material upon returning to her office on April 2.

Counsel acknowledges that s.92 (2) of the EPA creates an obligation to report a spill immediately when a person knows or ought to know that the pollution is spilled and that the reporting must occur as soon as is reasonably practical in the circumstances. Section 30 (2) of the OWRA requires that reporting occur immediately.

The company must have knowledge of a spill in order to trigger the duty to report. R.v. Toronto Electric Commissioners, 1991 Carswell Ont 233, WCB (2nd) 222, 6 CELR (NS) 301 was referenced in support of this proposition. In that case an oil leak into a sewer

system was identified on January 10, 1986. It was not until January 22, 1986 when those responsible learned that the oil was contaminated with PCB's. Reporting occurred on January 23. The court found that, on the facts of that case, the Defendant had met the obligation set out in s.16 (3) of the OWRA to report forthwith.

Counsel submits that Mr. Silva purposely misled the Ministry and City of Burlington officials, his co-workers and Mr. Fast between March 29, 2012 and April 2, 2012. He denied any spill occurred in response to Mr. Fast's direct questioning during phone conversations on March 29 and 30.

At no time prior to April 2 did Mr. Silva disclose to the Ministry officers that he had drained the content of three totes into the storm basin on March 29. Chad Marnian testified that on March 29 he knew nothing of a spill. Mr. Oleka testified that he first learned of the Ministry presence when exiting the Control Chem building at approximately 11:00 pm on March 29. He asked Ministry staff why they were on the premises and was told that the reason was 'none of his business'

There is no prescribed manner of reporting set out in either the EPA or the OWRA. Provincial Officer Wassink testified that there were a number of ways by which a spill could be reported, including notice by email, facsimile transmission or delivery of a videotape, so long as the delivering party had knowledge of the content of the video.

Counsel submits that Control Chem did report forthwith. The first reporting was via Mr. Silva's disclosure to Mr. Fast and the Ministry officers on April 2 during the meeting in the Control Chem boardroom. The second reporting occurred as Mr. Fast and the Ministry Officers concurrently viewed portions of the video record during the downloading process in the Control Chem server room. The third reporting occurred with the delivery to Ms. Wassink a copy of the video surveillance record early in the afternoon of April 2. The fourth notice was provided via Mr. Fast's April 2 follow up telephone conversation and the fifth via the April 3 email providing additional detail to Ms. Wassink,

Findings regarding the Actus Reus of each charge

In summary, and for the following reasons, I am satisfied that Prosecutor has proven beyond a reasonable doubt all elements of each of the five charges.

Identity

A certified copy of an Ontario Corporation Profile Report under date April 16, 2012 was filed in this proceeding. It reports that Control Chem Canada Ltd. was incorporated on February 13, 1989 as an Ontario business corporation.5275 John Lucas Drive Burlington Ontario is both the registered office and the mailing address. Douglas Fast is named as the Administrator and a Director. There was no challenge to this certificate evidence. I am satisfied that the defendant has been properly identified to be Control Chem Canada Ltd.

Defence acknowledged that Control Chem is a 'person' as defined in the Interpretations Act, s 29(1) and is therefore a person for the purposes of the Environmental Protection Act and the Ontario Water Resources Act.

Spill or Discharge of material

The OWRA and EPA contain identical definitions of the term ‘discharge’ to include when used as a verb, add, deposit, leak or emit, and when used as a noun to include, addition, deposit, emission or leak.

S.91 (1) of the EPA defines the term ‘spill’ when used with reference to a pollutant, to mean a discharge,

(a) into the natural environment,
(b) from or out of a structure, vehicle or other container, and,
(c) that is abnormal in quality or quantity in light of all of the circumstances of the discharge.

I am satisfied beyond a reasonable doubt that on March 29, 2012 Frank Silva discharged three totes of liquid materials into a storm drain located within the defendant premises parking lot at 5275 John Lucas Drive. Mr Silva testified that he had done so and the act was recorded by the Control Chem surveillance camera system. Mr. Silva’s admission to this act and the video record of this conduct was not challenged.

I am satisfied beyond a reasonable doubt based on the deliberate action by Mr. Silva of draining the content of the totes into the storm sewer that this action was in the nature of a ‘deposit and therefore constitutes a discharge as defined in both the OWRA and the EPA.

The discharge was abnormal both in quality and in quantity in that the discharge was a contravention of Control Chem policy. I am satisfied beyond a reasonable doubt that the action was a spill as defined by s. 91(1) of the EPA.

In addition, I have no reasonable doubt that the storm drain system that services 5275 John Lucas Drive drains any content into Sheldon Creek via an open pipe or ‘outfall’ located upon the land at 5288 John Lucas Drive. I base this finding of fact on the testimony as to the results of the flow and die tests conducted by City of Burlington and Ministry employees on March 29 and 30, and on Mr. Bywater’s testimony that on March 29 he traced the path of the milky white discharge upstream from the outflow to the Control Chem premises by observing the content of catch basins at various interim points in the direct route from the outfall to and onto 5275 John Lucas Drive. Once the discharge entered the storm basin it could only follow the course of the storm system to and into Sheldon Creek. Any discharge as defined by either the EPA or OWRA occurred at the moment the totes were drained into the catch basin. There was no evidence of any other possible route or outcome.

Content of the totes

Three totes were drained into the storm basin, one taller than the other two. Mr. Silva testified that he believed all three contained tap water. Mr. Marnien testified that he had filled two large totes with clean water. He did not label the content. He testified that the

totes used had a measured capacity of 1250 litres but had a total practical capacity of approximately 1500 litres. Mr. Oleka viewed the surveillance tape as part of his testimony and identified the totes observed. He stated that three were of 1000 litre capacity and one was a 1250 litre tote.

Ministry investigators did not attempt to identify the specific totes observed in the surveillance video, nor read any labels affixed or sample any remaining content.

Mr. Marnien filled two totes with tap water. His evidence appears to indicate that he used two of the larger sized totes. Only one tote of this larger type was drained by Mr. Silva. It is possible that Mr. Marnien's memory was not reliable on this point and he filled two totes of differing capacity. It is also possible that two of the three totes contained content other than the clean water stored by Mr. Marnien. I am not able to determine what was contained in each of the three totes discharged over the storm drain that day. There is insufficient reliable evidence as to the content of each of the three totes.

I am satisfied beyond a reasonable doubt that at least one of those three totes contained a quantity of the Delpac material of sufficient concentration and adequate volume to cause the observed impairment of Sheldon Creek.

I note the following in support of this finding:

- The Delpac product was stored in bulk at the Defendant premises and sold by it.

- The March 29 observations of Sheldon Creek were consistent with the introduction of the Delpac material to that watercourse. The milky white discolouration and the clumping and settling of particulate material is consistent with Ms. Boyd's evidence as to the impact Delpac would have if introduced to this watercourse.

- The powdery residue surrounding the Control Chem catch basin the observed by Officer Bywater on March 29 was similar to the powdery substance observed by Officer Bywater below the bulk storage tank for the Delpac material in the Control Chem production area/warehouse.

- Mr. Fast's report of the spill or discharge to the Ministry referred to the liquid content as including approximately two gallons of the Delpac material. He testified that during his subsequent attempts to replicate or recreate the '*white paint substance'* phenomenon he formed the view that far more than two gallons of Delpac must have been discharged and that it would require one of the three totes to contain in his words *'pure poly'* in order to cause the phenomenon observed.

- The Tracy Brown March 15, 2013 Impact Assessment Report identifies elevated levels of chloride, sulphate and aluminum in the catch basin and downstream water samples taken. All are constituent elements of the Delpac product.

Impact of Spill on Environment

Defence did not challenge Ms. Boyd's expert evidence or the content of her Impact Assessment report as to the discharge/spill impact on the natural environment of Sheldon

Creek. I am satisfied beyond a reasonable doubt that the spill or discharge, whatever the source or content, did impair the water of Sheldon Creek, did discharge a contaminant causing an adverse effect and was a spill of a pollutant that caused an adverse effect to Sheldon Creek.

S.30(1) of the OWRA states 'Every person that discharges or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water or of any waters is guilty of an offence.

S.1 (3) of the OWRA provides:

'For the purposes of this Act, the quality of water shall be deemed to be impaired by the discharge of material if the material or a derivative of the material enters or my enter the water, directly or indirectly, and,

(a) the material or derivative causes or may cause injury to or interfere with any living organism that lives or comes into contact with,
    (i) the water, or
    (ii) soil or sediment that is in contact with the water;
(b) the material or derivative causes or may cause injury to or interfere with any living organism as a result of it using or consuming,
    (i) the water,
    (ii) soil or sediment that that is in contact with the water, or,
    (iii) any organism that lives or comes in contact with the water or soil or sediment that is in contact with the water;
(c) the material or derivative causes or may cause a degradation in the appearance, taste or odour of the water,
(d) a scientific test that is generally accepted as a test of aquatic toxicity indicates that the material or derivative, in diluted or undiluted form, is toxic;
(e) peer-reviewed scientific publications indicate that the material or derivative causes injury to or interference with organisms that are dependent on aquatic ecosystems; or
(f) the material or derivative has a prescribed characteristic or is a prescribed material.'

There is evidence to support the examples of deemed impairment as defined in s1(3) (a) (i), (b) (i), (c) and possibly (d).

Tracy Boyd testified that reduced pH levels have an adverse impact on health of fish in in such a habitat. Extremes in pH can cause direct physical damage or burning of the skin, gills and eyes. Table 3 of Exhibit 26 records the pH levels in the various water samples taken on March 29. The measured pH at the catch basin and the outfall were less than half of that measured in the upstream sample. Ms. Boyd's opinion as to the impact is set out on page 3 of Exhibit 26 where she states '*The pH at the outfall is below that tolerated by resident aquatic species and could be lethal. Changes in pH will also affect the toxicity of many dissolved compounds'.* This clearly falls within the concept of '*may cause injury to or interfere with any living organism ….* ' as set out in s.1(3) (a) (i) and s. 1 (3) (b) (i).

The water in Sheldon Creek was discoloured as a result of the spill. Photo's documenting this fact were received in evidence. I am satisfied that there was deemed impairment by the '…. *degradation of appearance …. of water…'* as defined in s.1 (3) (c).

There was certain bioassay testing of the toxicity of the water samples. The results are set out on pages 10 and 11 of Exhibit 26. Daphnia (small planktonic crustaceans) were introduced to the various samples. All Daphnia introduced to the catch basin and outfall samples died within 48 hours of exposure. This test may well be one that is *'… generally accepted as a test of aquatic toxicity….'* as referenced in s.1 (3) (d). If so, the observed 100% Daphnia mortality would evidence a further head of deemed impairment.

This evidence satisfies me beyond a reasonable double that the March 29 discharge impaired the quality of the water of Sheldon Creek contrary to s.30(1) of the OWRA.

'Adverse effect' and 'contaminant' and 'natural environment' are all defined in s.1 (1) of the EPA as follows:

' "Adverse effect" means one or more of,

(a) impairment of the quality of the natural environment for any use that can be made of it,
(b) injury or damage to property or to plant life,
(c) harm or material discomfort to any person,
(d) an adverse effect on the health of any person,
(e) impairment of the safety of any person,
(f) rendering any property or plant or animal life unfit for human use,
(g) loss of enjoyment of normal use of property, and
(h) interference with the normal conduct of business'

' "contaminant" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of them resulting directly or indirectly from human activities that causes or may cause an adverse effect'

' "natural environment" means any air, land and water, or any combination or part thereof, of the Province of Ontario'

Sheldon Creek clearly falls within the definition of natural environment. There was no challenge raised on this point. The evidence is clear and leaves no reasonable double that liquid material was drained into the Control Chem catch basin and then via the City of Burlington storm sewer system, directly into Sheldon Creek.

I am satisfied beyond a reasonable doubt that the liquid contaminant Della did enter the natural environment and cause an adverse effect as defined in that the result was an impairment of the quality of the natural environment for any use that can be made of it, and thereby contravening the prohibition set out in s. 14(1) of the EPA. I rely on the following evidence for that finding:

- the deleterious change to the chemistry of the water of Sheldon Creek at, and immediately downstream of the outfall. Those changes include the significant reduction in pH level from that normally found, the elevated levels of conductivity of that water and the increased levels of chloride, sulphate and aluminum concentrations. The testimony of Tracy Boyd and her report filed as Exhibit 26 are specifically accepted and relied upon for this finding.

- the resultant 'milky-white' appearance of the water of Sheldon Creek at and immediately downstream of the outfall as a minimum impaired the esthetic value of that portion of the watercourse and the otherwise benefit and pleasure of the view of that natural environment.

Role of Frank Silva

Defence submits that Mr. Silva's conduct should not be attributed to Control Chem in that he was not acting within the scope of his employment when he drained the content of the three totes. Company policy expressly prohibited such draining/spilling. His actions contradicted his training and were outside of the nature of the Defendant's undertaking. Defence asserts instead that Mr. Silva's actions must be considered as those of a so-called 'rogue employee' acting on his own behalf and in his own unascertained interest and purpose.

I cannot accept that proposition. I am satisfied beyond a reasonable doubt that Mr. Silva was acting within the general scope of his duties on March 29/30, albeit in a clearly prohibited manner. His conduct must be considered that of the Defendant. I rely specifically on the following evidence for this finding:

- Both the EPA (s.192) and the OWRA (s.114) deems the actions of an employee of a corporation to be the acts of the corporation. The language of identical in both provisions and state – *'For the purposes of this Act and the regulations, an act or thing done or omitted to be done by an officer, employee or agent of a corporation in the course of his or her employment or in the exercise of his or her powers or the performance of his or her duties shall be deemed to be also an act or thing done or omitted to be done by the corporation.'*

- Mr. Silva was responsible for the day to day conduct of the operations of the facility. There was competing evidence as to his job title or description specifically as to whether Mr. Silva was the 'Production Manager' versus 'Production Co-ordinator. What is not in dispute is the fact that, as Mr. Fast testified and in his words*, 'He (Frank Silva) ran the facility, he worked at the facility for 20 years (and after Tracy Goodwin's visit in 2000 we definitely had an enlightening experience and made those changes that were necessary)'.*

- The evidence disclosed that Mr. Silva was responsible for the day to day operation of the inventory, production and shipping/receiving activities of the facility. Those duties included the supervision and direction of other employees, the

other two production employees and, to a possibly lesser degree, the delivery employees.

- Mr. Silva reported directly to Mr. Fast. There was no other ancillary or parallel reporting or supervision.

- Mr. Silva testified that empty totes were required on March 29 to be used for the shipping of a calcium chloride. Calcium chloride is a company product. It is one of the company products produced for inventory and stored in bulk. It can be produced using the output water from the Ultra Filtration system.

On its face, the actions of identifying and emptying totes to be re-used for the delivery of company product would clearly fall within the scope of Control Chem's undertaking and usual day to day business activities. Those same activities would appear to be among the duties or tasks for Mr. Silva to either supervise or directly conduct in the normal course of his employment. Mr. Silva fulfilled the tote emptying task in a manner that contravened both his training and Control Chem policy but the general nature of the task identifying and readying totes for product was not a rogue activity.

Notice of the discharge/spill

Control Chem is a corporate entity. The guiding hand(s) of that entity are obliged to ensure that there is sufficient management, clear direction and oversight to ensure that sufficient and timely notice of any discharge or spillage is provided to both the EPA and OWRS. Individual officers and employees must be tasked and effectively trained in this responsibility.

The case law is clear and unambiguous and I am guided by the following principles established in those decisions:

1. The term 'forthwith' is to be interpreted to mean as promptly as reasonably possible under all of the circumstances – R.v. Muskoka Baptist Conference (1986) 16 WBC 77.

2. A company must have knowledge of a spill in order to trigger the duty to report – R.v. Toronto Electric Commissioners, 1991 Carswell Ont 233, WBC (2nd) 222, 6 CELR (NS) 301.

3. When in doubt, report – R.v. Castonguay [2013] SCR 323.

It would appear that the Castonguay decision may have substituted the existence of 'doubt' for 'knowledge' as the reporting trigger.

It is agreed that MOE officials and Mr. Fast both first learned of the discharge/spillage of the totes when Frank Silva disclosed this action during the April 2 meeting in the Control Chem boardroom. Ms. Wassink testified that there are no prescribed methods of disclosure. I can see no impediment to finding that Mr. Silva's disclosure while in that meeting does constitute an actual notice of the discharge/spillage and was the first notice given

to MOE and OWRA representatives. Videographic notice was provided by early afternoon that same day with the delivery of the surveillance images.

Mr. Fast provided further notice later that same day when spoke to Ms. Wassink by telephone and further verbally reported the discharge. On April 3 he provided a further written report disclosing greater detail as to the volumes and nature of the liquids discharged/spilled.

I am satisfied that Mr. Silva's April 2 disclosure does not constitute reporting as promptly as reasonably possible in all of the circumstances. I rely on the following evidence received in support of that finding:

- Mr. Silva held a position of responsibility and authority at Control Chem. He was trained in spills containment and clean up. He reported directly to the company president and apparently had no collateral reporting obligations. The totality of the combination of the evidence of Messrs. Fast and Silva satisfy me that Mr. Silva had been assigned and had accepted certain management and supervisory responsibilities and duties, including the responsibility to report spills. He was issued and possessed a copy of the Control Chem Emergency Response Plan/Manual. He acknowledged in evidence that his duties included the reporting of any spill. He carried a list of emergency contact names and phone numbers.

- Mr. Silva was acting within the general scope of his duties on March 29 and 30.

- The evidence disclosed no reason to disbelieve Mr. Silva's testimony that he thought that he was discharging clean water into the catch basin. While there remains the unexplained discrepancy among the number of totes filled with overflow water by Mr. Marnien (2), the number of totes required for the liquid calcium chloride order (2) and the number of totes emptied (3), there was no evidence to suggest that Mr. Silva intended to discharge anything other than clean water. The then current version of SOP 7D, the Disposal of Waste operating procedure, was silent as to the proper disposal of clean water. The SOP was later amended to broaden and more completely describe the prohibition. For those reasons it is reasonable to conclude that no reporting requirement arose concurrently with the actual discharge activity.

- By the early afternoon of March 29 Mr. Silva should have known that his actions may have been responsible for the phenomenon observed in Sheldon Creek. There is some evidence that he did know. He attended the creek with Mr. Powell. Mr. Powell testified that Mr, Silva speculated that it may have been the cleaning material Silva had discharged that had caused the phenomenon observed. Mr. Silva initially committed Control Chem to take responsibility for the clean-up but later withdrew that offer.

- A white powdery residue was observed around the perimeter of the catch basin. The presence of this residue ought to have further alerted to the possibility that his actions were responsible.

The Crown submitted that other Control Chem staff had an obligation to report and failed to do so. The evidence does not support that proposition. While it appears that Mr. Silva did make limited admissions to other employees as to outside water use, the information he shared failed to disclose the magnitude of his actions and would not/did not alert those other employees to a possible reporting obligation. Mr. Marnien testified that he first learned of the discharge when he viewed the surveillance video. Mr. Oleka testified that he was not aware that anything was amiss until he encountered MOE staff as he left his office late on the evening of March 29. Ms. Grace Perez- Alameda testified that Mr. Silva told him that he had *'poured water at the back'*, and while she had never heard of anyone doing that before, Mr. Silva did not lead her to believe that there was any 'environmental problem'. Mr. Fast stated that he relied on Mr. Silva's assurances on March 29 and 30 that the company had done nothing wrong as the word of a reliable 20 year employee. This evidence satisfies me that prior to the morning of April 2 no other staff member had actual knowledge of Mr. Silva's actions and any limited disclosure Mr. Silva may have provided to those other staff members was insufficient to raise any doubt in each as to the possibility of an obligation to report.

At a minimum, Mr. Silva's disclosure to Mr. Powell as to the possibility that cleaning product had been discharged satisfies me that upon Mr. Silva's attendance at the creek doubts had been raised in his mind. At that point Control Chem had a duty to report. Mr. Silva was the party tasked with fulfilling the Defendant's reporting obligation. He failed to do so forthwith. Mr. Silva was acting generally within the scope of his employment duties that day. His failure to report must be deemed the failure of Control Chem to report forthwith. I am left in no reasonable doubt that Control Chem that failed to report the discharge/spill forthwith as required.

Status of 5275 John Lucas Drive

The evidence leaves no reasonable doubt that Control Chem deposited waste onto the land at 5275 John Lucas Drive Burlington on March 29, 2012, specifically Aluminum Chloride Hydroxide Sulphate when Mr. Silva discharged the content of the three totes into the Control Chem catch basin. I rely on the earlier findings set out in these reasons in support of that finding. This was not an intended use of this material. To the contrary, company policy prohibited such a deposit of waste.

In the Certificates of Search issued pursuant to s.175 of the EPA and filed as Exhibits 29 and 30 both state that 5275 John Lucas Drive Burlington was not a waste disposal site for which an environmental compliance approval had been issued. This certificate evidence was not challenged at trial.

Submissions - Due Diligence

The actus reus of each of the five charges has been proven beyond a reasonable doubt. Defence as asserted the defence of due diligence with respect to each charge.

The concept of due diligence and the framework for this defence was established in R. v. Sault Set Marie (City) [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353.

Paragraph 60 of that decision held that the defence could be made out in one of two ways:

'*Offences in which there is no necessity for the prosecution to prove the existence of men's rea, the doing of the prohibited act prima facie imports the offence leaving open to the accused to avoid liability by proving that he took all reasonable care. This involves the consideration of what a reasonable man would have done in the circumstances.*

The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.'

Paragraph 33 sets out the standard a defendant must meet as follows:

'Once the actus reus is established beyond a reasonable doubt, the defence of due diligence is open to the defendant. The defendant must establish on the balance of probabilities that they are duly diligent, that is, they must establish that they exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking all reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself'.

That decision also held that the defence is available when an employer is charged in respect of an act committed by a company employee. Paragraph 72 held as follows:

'Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused direction or approval, thus negating wilful involvement of the accused and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself'

Prosecution

The Prosecutor submits that the Defendant was not duly diligent in the systems implemented and monitored. Specific submissions included the following:

- The policies were inadequate in that appropriate supervision of adherence to the policies was deficient. The Prosecutor reviewed the fourteen factors set out in R.v. Commander Business Furniture Inc., [1992] O.J. No. 2904 p.19 that the court must weigh and balance in assessing due diligence and submitted that it was not enough to have a generally good system in place. There must be both a

sufficient system and frequent and effective monitoring of compliance of the environmental protection system.

- The ISO Registration and Standards compliance are business and commercial certificates. In addition, the Defendant did not file sufficient additional documentation with which to assess the level of compliance to those standards. Omissions noted included the bi-annual ISO audit reports.

- The mantra '*nothing goes outside, all operations inside'* was not codified in policy or procedure. In fact there were outside operations including receipt of product, loading of trucks, outside storage of inventory and blue drums filled with soft water serving as protection for the building. There was no documentation for this outside work other than those for truck maintenance.

- There was evidence that Mr. Silva had discharged water outside in the past.

- Training and Spills Drills alone due not establish due diligence.

- The adoption and use of the Ultra-Filtration had no relevance to the actions of March 29.

- The labelling procedures were inadequate. There was no evidence as to the procedures for the labelling of all containers, nor was there evidence of the Defendant's inventory handling/keeping procedures. The blue barrier drums protecting the building perimeter were not labelled as to the content. There was no evidence of a specific labelling SOP. The labelling deficiency had been previously raised by Ministry staff. The Tracy Goodwin December 3, 2001 Waste Inspection Report was specifically referenced as noting that totes on site containing waste were not labelled. A subsequent inspection of waste totes found that they were now labelled but it was recommended that a better description of the nature of the waste be provided on the label. There was no evidence of any improvement to labelling after the follow up inspection.

- SOP 7(D) 'Disposal of Waste' was not amended to specifically prohibit the discharge of filtered water into the sanitary or storm sewer until June 8, 2013. The version of the SOP in force on March 29, 2012 was a prohibition on the discharge of spent water. The amendment did not include a reference to 'water' or 'soft water'. (The Amended SOP 7D defined 'filtered water' in the following way – '*Filtered Water (Clean Water) – Filtered Water from the 8 Tube filtration systems').*

- The Defendant's environmental protection systems were reactionary in nature. It was only after March 29, 2012 that catch basins were covered during the course of the business day.

- The spill reporting system was inadequate. Mr. Maren testified that he had never seen documentation for the reporting system.

The direction set out in paragraph 3 of R.v. Island Industrial Chrome Co. Ltd., [2002]B.C.W.L.D. 929 para.3 was cited where it was held that '*the court must examine the specific conduct which was or was not exercised in relation to the 'particular event' giving rise to the charge'* . The Prosecutor describes the conduct to be the dumping of unlabelled totes over the catch basin.

The standard of care required of Control Chem must be tied to the nature of the Control Chem business and the number of chemical products held.

It was reasonably foreseeable that unlabelled totes could lead to dangerous consequences. A reasonable person would have better labelling procedures in place and would have had catch basins covered at all times during business operations.

Defence

Defence submits that due diligence has been made out on the balance of probabilities under each of the two heads of that defence, mistake of fact and reasonable care.

Specific submissions included the following:

- ISO certification is not entirely outside of the scope of regulatory regime. Two cases were provided in support of that proposition. In R.v. ECL Environmental Services Ltd. [2003] A.J. No.1700, a decision of the Alberta Provincial Court, where the post offence completion of ISO 1400 certification by the defendant was found to a 'highly significant mitigating factor'. In R.v. Prototype Circuits Inc., 1998 CarswellOnt 6815, ISO 14001 certification and subsequent certification auditing were ordered as part of the sentence following conviction for offences contrary to the Canadian Environmental Protection Act.

- Proper labelling forms part of all production training, including WMIS and TPD. Mr. Silva had been periodically trained with respect to both. The various MSDS are in effect labelling. A Government of Canada conducted in September 2010 made no reference to any labelling deficiencies in the report of that inspection. That report, headed Inspection Report for Sellers of Restricted Components' was received in evidence as Exhibit (61). Many SOP's make specific reference to labelling, including SOP 7D and, the SOP for the cleaning of totes. The Prosecutor had the opportunity to further explore with the various witnesses Control Chem compliance with proper labelling. The Prosecutor did not do so.

- Mr. Silva acted alone in discharging the content of the totes. His conduct was described to be 'wonton', 'aberrant', 'advertent' and 'rogue' in nature. Mr. Silva operated the Ultra Filtration system. He knew he could have called upon Mr. Oleka to test the content of the totes but did not do so. His actions were unimaginable and unforeseeable.

- Defence relies in part on two findings in R.v. Courtaulds Fibres Canada (1992),76 CCC (3d) 68 (Ont Prov Ct). In that instance the court found that spills had occurred because of human error and faulty equipment. In para 23 the court held '*Once a worker is properly trained by the employer for the tasks to be per-*

formed, it would be unreasonable to conclude that the employer should be responsible for the employee's error, which neither training nor anticipation could prevent or foresee'. The court went on to find in para 39 as follows – '*Reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt and continuing action. To demand more would, in my view, move a strict liability offence dangerously close to one of absolute liability'.*

- The Court was referred to paragraph 99 of Her Majesty the Queen and Syncrude Canada Ltd. 2010 ABPC 229 where that court discussed what was required of a defendant when attempting to demonstrate that it was duly diligent. The court held as follows – *' To meet the onus, Syncrude is not required to show that it took all possible or imaginable steps to avoid liability. It is not required to achieve a standard of perfection or show superhuman efforts, It is the existence of a 'proper system' and 'reasonable steps to ensure the effective operation of the system' that must be proved…..'.*

- In R.v Servisair Inc.,2012 APBC 63, the defendant was charged with contravening the Canada Labour Code following the death of an employee during the course of his duties. In summary, he fell out of the bucket of a de-icing truck during the operation of that de-icing equipment. He was described as a very experienced employee who deliberately failed to carry out the mandatory policy of wearing fall protection equipment when conducting de-icing tasks. The court found that the required policy was well known to employees, there was no evidence that the company 'turned a blind eye' to non-compliance by employees nor was there evidence that the company benefited in any way by this non-compliance. The court held that the defence of due diligence was made out as follows- *'In the circumstances of this case, given that the company had no prior knowledge of an employee failing to wear fall protection equipment and was therefore unaware this safety issue existed, and given the equipment was readily available and convenient to use, I am satisfied, on the balance of probabilities, that the company took all reasonable steps to prevent the accident. The defence of due diligence is made out in this case ...'.*

- Defence asked the court to accept the proposition set out in para. 18 of R.v Z-H Paper Products Limited ,1979 OJ No 4519,27 OR (2d) 570 (Ont Div Ct) as follows – *' Fourthly, in establishing and carrying on an industrial business, an employee quite properly should be accountable for the acts of his servants. Sanctions imposed upon him by legislation induce the employer to introduce and implement proper training programmes, safety standards and to hire competent and conscientious supervision. On the other hand, once the employer has acted as a reasonable person in this regard and has taken all normal and reasonable precautions, necessary to carry on his business safely, in my view, it cannot be said that by imposing absolute liability on his, especially where the breach of regulation is brought about by the act of another person disobeying not only the regulation, but the standing order of the employer, the law is promoting a higher standard of care. Assuming that the employer had taken all reasonable precautions, how can he prevent a breach of a regulation solely within the control of the employee, where the employee does the prohibited act intentionally, or through his*

own negligence or inadvertence. Surely in those circumstances as has been said, " the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim." Reynolds v. G.H. Austin and Sons Ltd., [1951] 2 K.B. 135 at p.149'. The proposition was adopted and accepted by the Saskatchewan Court of Queen's Bench in R.v Procraine Inc., [1992] 2 WWR 90, 99 Sask R 297 (QB) para 18, a 1991 decision following a defence appeal of a conviction against it for a breach of occupational health and safety legislation of that province.

- Defence submits that the guiding definition of the concept of foreseeability in relation to the defence of due diligence is that set out and adopted in R.v. Lonkar Well Testing Limited, 2009 ABQB 345 CarswellAlta 823. Para 40 of that decision reads as follows – '*Foreseeability is properly considered as part of the reasonable care or due diligence defence: R. Timminco Ltd.(2001),54 O.R.(3d) 21 (Ont. C.A.) and R. v. Rio Algom Ltd. (1988), 66 O.R. (2d) 674 (Ont C.A.). Thibideau J. in Ontario (Ministry of Labour) v. Brant Corrosion Controls Inc., 2008 ONJC 731 (Ont. C.J.), framed the test in the negative: whether the circumstances of the accident were so bizarre as to be reasonably unforeseeable. The Court in Fullowka v. Royal Oak Ventures Inc., 2008 NWTCA 4, [2008] N.W.T.J. No. 27 (N.W.T.C.A.) explained foreseeability in the following terms:*

  53 … In law," foreseeable" does not mean "imaginable". The human mind is capable of imagining all sorts of fantastic and bizarre situations, but that does not make them "foreseeable' in law. The legal concept of foreseeability incorporates the idea that the event is not only imaginable, but there is some reasonable prospect or expectation that it will arise...'

- It was submitted that Control Chem had a reasonable expectation and belief in the mistaken fact that Frank Silva would comply with the company policies, training and overarching mantra that '*nothing leaves the building'*. This reasonable but mistaken belief constitutes a sufficient due diligence defence. Defence referenced the commentary found in R.v. National Waste Services Inc., 2004 ONCJ 53, 9 CELR (3d) 74 in support of the proposition.

Findings on defence of Due Diligence

Reasonable Care

I am satisfied that the Defendant has proven on the balance of probabilities that it took all reasonable care in the circumstances leading the March 29, 2012 discharge of the offending liquids.

The Commander Business Furniture decision (supra) established out a list of fourteen factors among those to be considered when assessing the sufficiency of a due diligence defence. Not all are applicable in every instance. In the text '*Regulatory and Corporate Liability From Due Diligence to Risk Management'* 2007 Edition, chapter 4, the authors Messrs. Archibald, Jull and Roach suggest that the factors be considered in a matrix format under to broad categories. The first category considers the severity and likeli-

hood of harm from the prohibited act (the risk assessment consideration). The second category considers the precautions taken (the risk management consideration). I have attempted to employ this matrix format in assessing the sufficiency of the steps taken by Control Chem.

The authors offer caution with respect to the concept of 'hindsight bias' while performing this assessment; the bias being the risk of overstating the predictability of past events, particularly when the cause of the harm was identified at or prior to trial.

The discharge or spilling of chemicals into the natural environment presents clear and likely risk of severe harm. I have specifically considered the due diligence efforts Control Chem relied upon to guard against the risk of discharge or spill into the natural environment.

The evidence reveals the Defendant to have had farsighted, thoughtful, methodical and well documented philosophy and standards to address environmental protection generally and specifically addressing the issue of spills avoidance/mitigation. Control Chem generally presents as an enterprise with a culture of strong commitment to proper environmental standards. Management recognized the high risk of severe harm that could follow from a spill or discharge of any materials employed and robust steps were taken to minimize this risk and harm.

Mr. Fast testified that any spill that occurred within the company building would present only what he described to be a 'housekeeping issue' so long as the material was contained within the building. There would be no risk to the broader natural environment'. He took steps to minimize the out of doors movement and handling of materials. He described the few exceptions. The receipt and delivery of inventory and product were two necessary exceptions. The need for safe and segregated storage of certain inventory (the so-called 'caustics') required an additional exception.

He described how the factory premises were purpose built to incorporate spill containment features. He adopted the ISO production and environmental standards. In fact, his testimony with respect to ISO 9001 and ISO 14001 satisfied me that these were standards of high value to him. By example, he elected a twice yearly audit of the company compliance when a single annual audit would suffice for continued certification consideration. The codified policies and procedures attendant to this certification allowed for the objective and measurable review for compliance.

Standard Operating Procedures were developed and staff trained in their proper application. The Court received copies of certain employee training records (including those for Frank Silva) evidencing the training provided.

Periodic spill training was conducted and the results documented. Frank Silva organized and participated in this training. In fact, a simulated spill and clean-up exercise of the Delpac product was organized and supervised by Mr. Silva only a few months prior to March 29, 2012. He understood the duty to report any environmental spill and acknowledged that he was required to do so. He admitted that he was provided and had ready access to emergency contact names and phone numbers.

Mr. Fast created an overarching company mantra with regard to material storage and handling – '*nothing leaves the building'*. The message is succinct and unambiguous. The totality of the evidence of the evidence of each of Frank Silva and Chad Marnien satisfied me that each understood this prohibition.

Control Chem amended SOP 7D 'Disposal of Waste' following the March 29 discharge in order to broaden the definitions contained to reference and define the term 'filtered water'. The Prosecutor asserted that this amendment should be seen as acknowledging that SOP 7D was deficient on March 29, 2012. I do not accept that characterization. Such a characterisation is more in the nature of the type of hindsight bias discussed above.

Did Mr. Silva adequately comprehend the company policies and procedures? I am satisfied that he did. Mr. Silva professed not to be able to read in the English language. He made frequent reference to this fact during the course of his evidence. Neither the Prosecutor nor Defence chose to question his on this fact or to otherwise examine Mr. Silva's English language reading comprehension. The Court was left to rely on the totality of the evidence regarding Mr. Silva's skills, duties and role in order to determine whether Mr. Silva's training was doomed ab initio. The totality of that evidence satisfies me that any such deficiency was not sufficient to materially impede Mr. Silva's ability to understand his training and conduct his company duties. It is clear from the evidence that Mr. Silva managed the production function at Control Chem. He both supervised and participated in the batching of company product, both to customer order and for inventory. The company produced and maintained written formula sheets setting out the specific product inputs and proper production procedures. Mr. Silva participated in the creation of the formula sheets and his written approval was required on each before a new product sheet could be employed. The review of these formula sheets, the subsequent following of instructions as to identity and quantity of required product inputs and the successful batching of company product must require some level of comprehension of the English written word. I must give little weight to Mr. Silva's self-disclosed deficiency. Mr. Silva acknowledged that he knew and understood that nothing was to leave the building. There was no ambiguity on his understanding of that element of his training.

Mr. Fast took further steps that eliminated the need to transport waste of any nature, in effect further reducing the need for materials to leave the building and any risk to the environment that that action might present. A filtration system was purchased and installed in order to recycle all spent water/liquids. Frank Silva operated and cleaned this system. This system allowed Control Chem to reuse all recycled liquids. The need to store and transport liquid waste was eliminated. There was no longer any liquid waste leaving the building. The filtration system also produced quantities of solid waste. The company developed a process that rendered the resulting waste inert and eliminated the risk of any leaching of the solid material after disposal. This process was shared with other industry participants. Mr. Dragasevich testified that the filtration system would require approximately two hours of operation to filter 4,000 litres of clean water. It would appear that it would have required a modest effort for Mr. Silva to properly dispose of any clean water in the totes.

Defence submits that the Prosecutors labelling concerns are a 'red herring'. While I cannot agree with this defence submission, I am not satisfied that the evidence disclosed any systemic deficiency with respect to labelling requirements. We will never know the nature of the content of two of the three totes drained. One or two may have been unlabelled and filled with water. There is some evidence to suggest that only one tote contained water. We know that Mr. Marnien did not label the two tall totes after he filled them with water. There was no evidence as to labelling or lack of labelling on the other tote(s). Ministry staff did not attempt to subsequently locate and examine the totes emptied by Mr. Silva. The evidence satisfies me that the company had documented labelling procedures and policies. Frank Silva testified that labelling was an important step in the production process. SOP 7H 'Cleaning Reusable Totes and Drums' referred specifically to the removal and re-affixing of labelling. Defence submits that the MSDS are a form of labelling. Mr. Oleka testified that the company would only purchase input materials from suppliers who could provide a MSDS for the product. The Defendant stores and handles between 50 and 100 separate products or product inputs. Control Chem experiences two external ISO audits per year. It is not plausible to believe that it could conduct its business and maintain ISO registration if significant labelling deficiencies were generally tolerated. The Court did not hear testimony as to any audit findings or recommendations but did learn of a sole labelling deficiency identified during a 2001 Ministry inspection arising out of the inspection of certain waste materials stored and awaiting offsite transport and disposal. The deficiency was corrected. The subsequent installation of the Ultra Filtration System entirely eliminated the need to store such waste on site. The Prosecutor pointed to the Mr. Marnien's testimony there were no content labels attached to the external blue barrier water filled barrels. Mr. Fast testified that the barrels were always labelled by way of stencil lettering.

Was the action by Frank Silva on March 29, 2012 reasonably foreseeable when viewed through the lens of the 'overall objective test'? I am satisfied that this action was not reasonably foreseeable. Mr. Silva was a company employee for approximately twenty years. He held a position of significant authority and responsibility. He reported directly to the company president. The evidence suggests that he was a contributor to the growth of the company. Mr. Fast described Mr. Silva's contribution in the following words '*…twenty years of outstanding performance and one day of horrible performance…'.* Mr. Silva appears to have been the recipient of thorough and detailed training and worked in an environment the subject of comprehensive and documented policies and procedures of environmental standards. There was no evidence of any prior such misconduct. I am satisfied that a reasonably objective person, knowledgeable as to the practices and procedures at Control Chem with respect to environmental protection, Mr. Silva's training and duties within the company and his employment performance prior to the events of March 29, 2012 would not have foreseen such aberrant behavior by Mr. Silva.

The totality of the evidence satisfies me that the scope of the Defendant's efforts to avoid and remediate any out of doors spills or discharge was broad, thorough, detailed, well documented, understood by employees and subject to frequent internal and external compliance review. The environmental risks guarded against were serious in nature and the steps taken and monitored were proportionate to this level of risk to the safety of the public and the natural environment.

Reasonable Mistake of Fact

The Defendant has failed to prove on the balance of probabilities that it had a reasonable expectation and reasonably held but mistaken belief that Frank Silva would comply with company policies, training and the overarching mantra that *'nothing leaves the building'.*

Defence relied upon a conclusion found in R. v National Waste Services Inc., 2004 ONCJ 53, 9 CELR (3d) 74 in support. Paragraph 22 of that decision stated as follows – *'In the case at bar the Court finds that the defendant, through the actions of its manager, had every reasonable expectation and reasonably believed in the mistaken fact that its trained driver would follow the given instructions. Did the defendant take all reasonable steps to avoid the particular event? In the Court's opinion all the steps in the Defendant' Manual and procedures were reasonable and designed to avoid the particular event. The event, however, occurred because the driver did not comply with the given instructions.'*

This was the sole case cited in support. In that case, a company truck driver had telephoned the company operations manager to report a torn tarp. The driver was instructed to remediate the problem by using another available tarp to cover the torn portion of the first tarp. The driver did not follow the manager's instructions, continued his travel and was subsequently stopped and the company charged with the offence of 'carrying load without cover', contrary to regulation pursuant to s.16(1)(3) of the EPA.

The authors of Regulatory and Corporate Liability (supra) caution on page 4-23 of their text that '*the mistake of fact defence as framed is quite narrow. The belief must be reasonable, which again imports an objective component. The cases in this area have generally required the defendant to take reasonable steps to inform him or herself. Mistake of fact could have been an escape clause that would have been a backdoor way of avoiding due diligence. The objective component of reasonableness avoids this.'*

Mr. Silva did not inform Mr. Fast or any other company employee of his intended act before draining the three totes. He did not seek advice as to any other course of action to drain the totes. It should not have been expected that he would do so, as he was clearly aware that he was about to perform a prohibited act. He was also aware of the available and proper procedure, the use of the Ultra-filtration system. He did not require direction or advice as to how he should properly fulfil the task of emptying the content of the totes.

The mistake of fact relied upon appears to be Mr. Fast's belief that Mr. Silva would always comply with company policies and procedures as well as the fundamental principal of Control Chem's spills avoidance policy – 'nothing leaves the building'. That appears to be an overly broad definition as to the scope of the 'fact'. In R.v Chrima Iron Works Ltd., [2007] O.J. No. 726 the court considered the mistake of fact defence in a similarly broad scope of the fact relied upon. In that case the defendant had been charged with breaching provisions of the Occupational Health and Safety Act following the death of a worker in an industrial accident. The specific fact relied upon was that the supervisory employee, an individual said to have worked for the company for thirty eight years with an unblemished safety record, *'would only carry out the work safely in accor-*

dance with the company's safety policies and procedures ….'. In paragraph 39 of that decision the court held, in part, as follows – *'To accept the defence that the employer through its supervisor and other employee would always act within established procedures would, to this Court, provide a defence in almost every case of an industrial accident. This cannot be the intent of the Supreme Court of Canada in R. v. Sault Ste. Marie.'.*

The fact relied upon by the Defendant, that Mr. Silva would always act within established procedures, is essentially the same as that set out in Chrima Iron Works Ltd. The fact or belief is overly broad or elastic in nature lacks the necessary objective component.

Decision on the Charges

Having found that the actus reus of all charges have been proven beyond a reasonable doubt and that the Defendant having proven that it was duly diligent on the balance of probabilities with respect to all charges, all charges are dismissed.

Released: March 15, 2016 **Signed: "Justice of the Peace P. Macphail**