

In the Provincial Court of Alberta

Citation: R. v. Syncrude Canada Ltd., 2010 ABPC 229

Date: 20100625
Docket: 090157926P1
Registry: St. Albert

Between:

Her Majesty the Queen

- and -

Syncrude Canada Ltd.

Decision of the Honourable Judge K.E. Tjosvold

A. INTRODUCTION

[1] On April 28, 2008, Todd Powell, a Senior Wildlife Biologist for the Province, received a telephone call at his Fort McMurray office from a concerned individual who wanted something done about a number of birds landing on Syncrude Canada Ltd.'s Aurora Settling Basin. The ensuing investigation revealed that several hundred waterfowl were trapped in bitumen on the surface of the Basin. All but a few of those birds died. The company was subsequently charged with failing to store a hazardous substance in a manner that ensured that it did not come into contact with any animals, contrary to s. 155 of Alberta's *Environmental Protection and Enhancement Act*, and with depositing a substance harmful to migratory birds in an area frequented by migratory birds, contrary to s. 5.1(1) of Canada's *Migratory Birds Convention Act*. This trial has been largely focussed on whether Syncrude did enough to deter birds from landing on the tailings pond but there are several other issues that must be considered.

B. EVIDENCE

[2] As part of its Aurora tar sands operation, Syncrude began depositing tailings in the Aurora Settling Basin in the Fort McMurray area in July of 2000. Tailings are deposited through

large pipes into the Basin, located some distance from the extraction plant. The pond is contained within a berm. The area within the berm is approximately the size of 8.15 quarter sections or 640 football fields.

[3] The tailings include water, sand and bitumen. When deposited, the tailings still retain heat from the extraction process so ice on the Basin will melt before ice on nearby natural water bodies. Bitumen is found throughout the pond in strands or lumps. It is also found in a mat of the type that trapped the waterfowl on April 28, 2008. The mat was described as being several inches thick, viscous and cohesive with the consistency of a frothy roofing tar. It moves within the pond and eventually sinks, taking birds with it in this case. The mat found on April 28, 2008 covered a significant part of the pond.

1. Authority to Operate the Aurora Settling Basin

[4] The Aurora Settling Basin was constructed and maintained with the approval of the Alberta Government. Syncrude was granted a mineral surface lease. The lease requires compliance with Division 2 of Part 2 of the *Environmental Protection and Enhancement Act* respecting approvals, registrations and certificates. Syncrude also received Environmental Resources Conservation Board approval for the Aurora Mine as required under s. 10 and s. 12 of the *Alberta Oil Sands Conservation Act*. Syncrude obtained a combined *Environmental Protection and Enhancement Act* approval for both Mildred Lake and Aurora mines, effective June 24, 2007. Under paras. 6.1.76, 6.1.77 and 6.1.78 of that Approval, Syncrude was required to submit a Waterfowl Protection Plan. The Plan was to include techniques and procedures for a comprehensive deterrent program and a comprehensive monitoring program. The Approval required Syncrude to implement the Plan as authorized in writing by the Director designated under the *Act*. The 2007 Plan was the first for Aurora and was submitted. It was not approved but Syncrude was not notified of this until after the incident of April 28, 2008.

[5] Syncrude was also issued collection licences and research permits by Alberta Sustainable Resource Development, including a collection licence and a research permit for 2008. The collection licences permitted Syncrude to capture, contain or hold wildlife. Syncrude was required to contact Alberta Fish and Wildlife to determine whether a recovered animal should be euthanized, transported for rehabilitation or delivered to the Fish and Wildlife office. The research permits enabled Syncrude to deter wildlife from its sites. The permits and licences required the reporting of the collection of dead wildlife.

[6] Until 1997, tar sands operators were able to obtain scientific permits, purportedly under the *Migratory Birds Regulations* to enable the recovery of birds on their tailings ponds. On advice from Justice Canada, the permits were discontinued. By letter dated April 29, 1998, Environment Canada notified Syncrude that the permits would no longer be issued. Advice from federal officials required that the tar sands operators continue to exercise due diligence to keep birds from landing on the tailings ponds. Although it was never formally entered as an exhibit, the defence and federal Crown agreed that I should see and consider a notice published in the *Globe and Mail* on March 31, 2010. It advises of a variation to para. 6(b) of the *Migratory Birds*

Regulations to allow temporary possession of found dead migratory birds and swift delivery of the birds to provincial or territorial authorities for analysis.

2. Bird Migration and Behaviours

[7] The Fort McMurray area is found on the northern edge of the Boreal Plain, a region probably second only to the Prairie Parklands in importance for migratory birds during breeding season. The area lies beneath the Central and Mississippi Flyways for migratory waterfowl. Many birds, including ducks, geese, loons, grebes and other water birds, settle in the area and others stop on their northward migration in the spring.

[8] Most water birds migrating through the oil sands region are travelling to or from the Peace Athabasca Delta, 200 kilometres north. The Delta occupies a little more than 300,000 hectares in the southeast corner of Wood Buffalo National Park. It is described as the largest fresh water delta in the world and is an ideal staging area for migratory birds on their way to their final breeding grounds. It is globally significant and may become more so as ponds and marshes in the prairies continue to decline.

[9] Migratory birds travel north in time for the breeding season, leaving the wintering grounds in peak condition. Timing of migration is prompted partly by photo period but more strongly by spring temperatures rising high enough for species food to be produced along the route. For many species early arrival on the breeding grounds is critical to securing breeding territory. The birds are looking for habitat with the most food and greatest safety from predators. Early arrival also gives more time to raise chicks and allows the birds to find more food before competition arrives.

[10] The travel time also depends on weather. Warm temperatures and following winds favour migration. Cold temperatures, northerly winds and especially precipitation slow migration speeds. In Northern Alberta, waterfowl spring migration is closely tied to the break-up of water bodies because most species of waterfowl depend on water for rest and foraging stopovers. Severe weather typically increases the length of stopovers.

[11] Waterfowl usually migrate in April and May. However, some research suggests that break-up in the oil sands region may occur as early as March 31 and migratory birds may appear as much as two weeks earlier than that.

3. Bitumen

[12] A significant amount of the bitumen in tar sands, probably between 3 and 10%, cannot be recovered and ends up in tailings ponds. Bitumen mat on the surface of the tailings pond can trap the waterfowl that land on it and the birds will eventually sink with the bitumen. As bitumen contamination increases, birds lose buoyancy and the insulating effect of feathers. There is a loss of the feathers' waterproofing, leading to hypothermia or drowning. Birds will lose their ability to fly. A heavily oiled bird will almost certainly die.

[13] Birds that attempt to preen bitumen from their feathers and those that forage on the shores of the pond may ingest bitumen which is toxic to them. Even a light oiling can interfere with a bird's reproductive abilities. Relatively small amounts of some petroleum products may also result in high levels of mortality for bird embryos.

4. Bird Deterrence

[14] Since the 1970's tar sands operators have recognized the importance of deterring birds from landing on tailings ponds. The current state of technology requires the use of large tailings ponds containing the bitumen that cannot be extracted from the tar sand, despite the obvious financial motivation to do so. Since the mid-1970's, the two original oil sands operators, Syncrude and Suncor, have invested in research, protocols and equipment to deter birds from landing.

[15] Deterring birds from the tailings ponds presents many challenges for tar sands operators:

1. Because of proximity to the Athabasca River and the Peace Athabasca Delta, the oil sands region is potentially traversed by large numbers of migratory birds. They are attracted to water bodies for rest and potential breeding sites.
2. Tailings ponds are indistinguishable from natural water bodies for many species of birds.
3. Birds become habituated to visual and auditory stimuli including that provided by deterrent equipment currently available. Habituation occurs when animals become familiar with a given stimulus and cease to pay attention to it. Auditory stimuli can produce habituation in birds within a couple days and habituation to effigies such as scarecrows can occur more quickly.
4. Migratory birds are more likely to land during headwinds, low temperatures and precipitation; conditions found with spring storms.
5. The probability of landing on the tailings ponds increases with delayed break-up in surrounding water bodies. Oil sands ponds are more attractive in the spring when warm process affected effluent may provide the only open water. Break-up of the nearby Athabasca River is significant

because birds follow river drainage systems during migration.

6. Conspecific attraction, the attraction of members of a flocking species to the presence of other members of their own species, can intensify attraction presented by open water once some birds have landed on the water.

[16] Migratory birds are able to stay in the air for some days. However, a combination of factors, including: travelling for many days without food, exhaustion, precipitation and the absence of other open water, may have forced waterfowl to land in the Aurora Settling Basin in this case. Although that is not certain, the probability of the birds landing on open water would be very high. Deterrent systems would be less effective in these conditions.

[17] Oil sands operators have used a number of deterrents with varying success. Bird deterrents are meant to prevent birds from landing or to scare them off once they have landed. A deterrent that did not prevent the bird from landing could still scare it from the surface depending on the proximity of the scaring device. Birds might also react to other birds being frightened off the pond by the device. Dr. Cassady St. Clair conducted experiments which indicated that sound cannons 100 metres from a bird are 50% effective at flushing birds from the surface of the pond. At a distance greater than 300 metres the effects were negligible.

[18] The most common deterrents are those used by Syncrude in 2008, sound cannons and effigies. Both of these deterrents can be effective. Although birds will habituate to effigies and sound cannons within days, some operators believe that habituation is unlikely in the short period during which the birds migrate through the area. Factors that counteract habituation are intensity of the stimulus (particularly with negative consequences), variation to the stimulus, time between stimuli, frequency of the presentation of the stimulus and pairing with another stimulus. Habituation to cannons occurs more rapidly when cannons are set to fire frequently, especially if set to fire in the same direction and from the same location.

[19] Oil sands operators have used other methods, starting with the elimination of vegetation on or around the pond to make it less attractive as habitat. They have also used booms to confine the bitumen mat to a smaller area, on-demand systems that fire cannons when birds are in the immediate area, peregrine effigies and speaker systems with different sounds. Although the on-demand cannon system used by Shell Albian Sands seems to be more effective at deterring shore birds than cannon systems without the on-demand feature, it had no such effect with ducks.

[20] Dr. St. Clair was qualified, by agreement, as an expert in conservation behaviour and specialized research dealing with avian deterrence in the Alberta oil sands. Conservation behaviour is the discipline at the interface between behavioural ecology (the study of animal behaviour in wild or ecological settings) and the study of human effects on bio diversity. Dr. St. Clair described the following attributes of a minimum reasonable deterrent system:

1. The system should have proven efficacy over several days, using several types of visual and acoustic deterrents. Where possible, it should have ecological relevance reinforced with negative effects, using, for example, the sound of rifle shots rather than sirens.
2. It should lessen the propensity for habituation. Research respecting on-demand deterrents is not yet conclusive enough to recommend them as a minimum. The density of deterrents should be standardized across the industry at a proven level of efficacy.
3. The system should be properly maintained and backed up. It must be fully operational in early spring; i.e., March not late April. Difficulties with access for the placement of deterrents should be overcome.
4. There should be comprehensive and consistent monitoring of landings to understand factors that promote landing.
5. Operators should use best practices and adaptive management, recognizing that they do not currently have the best solutions but continually working to find solutions using the best available information.

[21] According to Dr. St. Clair, the best practices approach would add to the minimum requirements - ongoing experimentation; industry wide standard operating procedures for monitoring and deterrence programs; consistent and appropriate training; and adaptive management with frequent adjustment to waterfowl protection plans. The training for those involved in deterrent programs would include bird behaviour and identification, experimental design and monitoring protocols.

5. Syncrude's Bird Deterrent Program

[22] Syncrude had commissioned research into bird deterrence; for example, Yonge - 1979 and Syncrude Wildlife Team - 1980. Its staff participated in the Oil Sands Bird and Wildlife Protection Committee, along with representatives of other oil sands operators and government representatives. It helped to fund the John Gully, Golder and Associates Report of 2000. Through the Oil Sands Bird and Wildlife Protection Committee, Syncrude shared information about its bird deterrent program and received information about the programs and research of other oil sands operators.

[23] Syncrude submitted a combined 2007 Waterfowl Protection Plan for its Mildred Lake operation and Aurora indicating that it had a Bird and Environmental Team (BET) of eight

employees providing *full weekly coverage*, 67 scare cannons, 27 effigies, 17 rafts and 13 boats. Syncrude's 2002 Mildred Lake Waterfowl Protection Plan reported that, in the 2001 season, deterrents were deployed by April 9. There were 14 employees on the BET providing *full weekly coverage*, 150 cannons, 100 effigies, and 45 rafts. Syncrude employees, in their statements, gave varying estimates of the numbers of deterrents available in 2008 but the evidence establishes a significant reduction prior to 2008.

[24] Appendix A to the 2007 Plan, History of Syncrude's Bird Detection Program, claims a density of floating devices with effigies and scare cannons of 1 device every 250 metres near the shoreline and 500 metres apart near the pond center. It says that Syncrude maintained one scarecrow every 200 metres of shoreline but it appears that the Appendix also meant to report one cannon for every 200 metres of shoreline. These assertions appear to be inaccurate. In its Waterfowl Protection Plan of 2009 Syncrude indicated a total density of one scare cannon for every 750 metres of the pond's approximate large-scale beach and water perimeter.

[25] Dave Matthews, the Team Leader responsible for the BET, indicated in his statement that the Team consisted of 13 staff in the late 1990's, reduced to 10 in 2007 and eight in 2008. He said that the reductions were due to retirements and employees were not replaced because the Team was doing a good job with what they had. Members of the BET, particularly Gordon Grandjambe, Fred Cardinal and Lawrence Whiteknife, also indicated in their statements that the Team had been reduced in size.

[26] In previous years, Syncrude had also used booms to confine the bitumen mat. According to Mr. Matthews, the use of booms was abandoned in 2005 or 2006, in spite of the fact that the 2007 Waterfowl Protection Plan indicated that Syncrude continued to use booms. The primary reason he provided for the decision to stop using booms was that, by the time staff had a boom set up, the tailings discharge would be moved to another location and the boom would have to be relocated. His team concluded that the mat was sinking before it became a problem.

[27] Mr. Matthews admitted that he had no formal training in dealing with wildlife. According to his statement there was no formal schedule for deployment of deterrents. He relied heavily on the experience of the team members. The employees on the BET were experienced and trained in the deployment, maintenance and operation of the sound cannons and effigies but there was no evidence that they were formally trained in bird behaviour or deterrence.

[28] Syncrude did have procedure documents. The first is a document entitled Wildlife Response Collection & Reporting, Extraction/Tailings, Environmental, Emergency Response, March, 2006 *draft*. It is primarily concerned with recovery of wildlife and reporting of wildlife incidents. A second document is entitled Bird Deterrent Tech Position and dated February 17, 2003. This document appears to be a job description which indicates, among other things, that deterrents are to be activated in all contaminated waters beginning on April 1, depending on the weather and arrival of birds. A third document labelled Propane Cannons, 001 Cannon Set Up calls for the cannons to be set up no further than 240 metres apart on land or water. Other

documents provided are largely concerned with the operation and safe handling of sound cannons, blast counts, bird patrols and oiled bird reporting.

[29] The evidence reveals that the BET did not take direction with respect to the operation of the deterrent systems from others involved in environmental matters at Syncrude. Andrea Heisler was hired in September of 2007 as a Waste Management Specialist and Wildlife Contact. Her statement does not suggest that she had any responsibility for direction of the BET. She reported to John Ellingsen, Team Leader for Environmental Affairs and Regulatory Services. His statement indicates that the BET managed the deterrents. He was unaware of which individual was ultimately accountable for the BET. Steven Gaudet, Manager for Environmental Affairs and Land Reclamation, to whom John Ellingsen reported, denied in his statement responsibility for deterrents. He indicated that environmental duties are the responsibility of all managers and team leaders. Dave Matthews, who had immediate responsibility for the Bird and Environment Team, reported to Gary Bourque, Production Operation Supervisor. Mr. Bourque relied on the BET to determine the placement of deterrents.

[30] Because of illness, one member of the team was unavailable and seven people worked as the BET during the spring of 2008. They were scheduled to work Monday through Thursday each week. Dave Matthews arranged for the team members to commence employment on April 14, 2008. Mr. Matthews and his supervisor, Gary Bourque, decided on the date for commencement. For various reasons, most team members did not actually commence work on April 14. Shirley Tremblay, Richard Tuccaro and Fred Cardinal arrived on site on April 16. Lawrence Powder and Gordon Grandjambe started on April 17. Fred Cardinal was not working after April 17 until April 28 according to his statement. Prior to the April 28, 2008 incident, the team was scheduled to work April 14 to 17 and April 21 to 24.

[31] Once they arrived, the Team began work on maintenance and deployment of cannons. They were hampered in their efforts to deploy deterrents by having only one truck. In other years there had been as many as four trucks available to the team.

[32] Todd Powell testified that, on April 28, cannons had been placed on a smaller pond at the Aurora site but not on the larger Aurora Settling Basin. There is inconsistency on this point in the employee statements. Dave Matthews indicated that, while there were cannons around the Recycling Pond, they had not been placed on the Aurora Settling Basin on April 28. Gordon Grandjambe said that he had placed six cannons around the Recycling Pond and eight on the north end of the Basin on April 17. Fred Cardinal thought he and Lawrence Powder placed six cannons at Aurora Recycling Pond and four on the Basin on April 16. However, Lawrence Powder indicated that he was not at Aurora until April 17 and placed only six cannons on the recycling pond. Lloyd Benio said he believed that prior to April 28 there were a couple of cannons at a smaller seepage pond near the toe of Cell 62 and there may have been one or two around the Recycling Pond. Randy Slack, who worked on tailings structure at Aurora, said that he was off for six days from April 27 and first saw deterrents on the Aurora tailings pond when he returned. It was part of his duties to prepare the area around the pond so that it is accessible for the BET. Steven Gaudet said that, according to the weekly update map he received on April

30, there were no cannons on the Aurora Settling Basin on April 24 but there were cannons on the pond immediately adjacent to it.

[33] More cannons had been placed around Syncrude's Mildred Lake pond. According to Dr. St. Clair, that pond's higher levels of toxicity and its size may have presented a greater risk to waterfowl and so it may have been prudent to place deterrents there first.

[34] Syncrude employees, including Dave Matthews, seemed convinced of the effectiveness of the bird deterrent program by the low number of recorded waterfowl incidents. The defence produced a chart of reported waterfowl fatalities for March, April and May from 2000-2007 with an average of 1.04 fatalities per month, despite the reduction in deterrents. However, Dr. St. Clair indicated that this average presumes an accurate census. She relied on incident reports to challenge the average but, even without the reports, I am prepared to find that there was no evidence of a methodical or comprehensive system of monitoring to produce a thorough census. Considering just the size of the Aurora Settling Basin; the work schedules and number of BET members; the fact that other employees would be focussed on their own responsibilities; and the possibility of landings during darkness, the averages could not to be comprehensive.

6. Deterrent Systems for Other Oil Sands Operators

[35] Arthur Dupuis, the Environmental Specialist for the Shell Albian Sands Muskeg River Mine, described the mine's deterrent program which included a detailed Bird Deterrent Guide, an on-demand deterrent system, sound cannons, human effigies and falcon effigies. The Guide includes a statement of roles, responsibilities, training, equipment, schedules, and work practices associated with the bird deterrent program. In 2008 the Albian Sands deterrent set-up began on March 24. Land cannons were placed on April 3. Between April 14 and May 1 floats were tested and the set-up completed.

[36] Leo Paquin, Suncor's Senior Reclamation Coordinator until May of 2008, testified that he was responsible for, among other things, Suncor's bird deterrent program. Suncor used sound cannons and effigies for bird deterrence. It had written procedures and work practices respecting bird deterrence designed primarily to ensure that employees knew their responsibilities. The documents called for preparation for deployment of scare cannons to be complete by March 15. The procedures referred to factors that could influence bird landings; assigned responsibilities; called for monitoring of bird migration, weather and ice status; designated cannon firing frequencies; specified the distribution and density of cannons and effigies; and described the proper handling of problem or recovered wildlife. In 2008, Suncor's cannon deployment was initiated on April 8.

7. Weather and Break-up

[37] The weather patterns and break-up of nearby water bodies are important because these factors can affect working conditions at the tailings ponds and whether waterfowl will land on

the ponds. The “beach” of the Aurora Settling Basin can be treacherous when saturated with snow melt or rain.

[38] Weather records for the Fort McMurray Airport indicate that, between April 1 and 8, 2008, the weather was dry with temperatures exceeding 0 degrees Celsius on five of those days. Between April 8 and 14, there was very little precipitation and the temperature reached 17.7 degrees Celsius. From April 15 to April 19, there was snow and rain but there was only one or two centimetres of snow on the ground on the morning of April 20. From April 20 to 22, a spring storm left 37 centimetres of snow on the ground. From April 23, the snow melted, leaving 13 centimetres on the ground on April 28 and one centimetre on April 29.

[39] There was only one occasion, in the preceding 65 years when snowfall in Fort McMurray in April exceeded that of April, 2008. That occurred on April 20 and 21, 1985 when 43.8 centimetres fell. Fort McMurray normally receives more than 10 centimetres of snow approximately twice in April in every five years.

[40] By April 14, the Aurora Settling Basin appeared, according to a satellite photo, to be clear of ice and there was very little snow remaining on the ground. However, Rick Corcoran, a supervisor for one of the tailings teams, gave a statement that, according to his guess, one-quarter of the Basin was covered with ice on April 17. Patrick Bailey, an equipment operator for Syncrude, indicated that the Basin was probably 95% covered with ice 10 days prior to the incident of April 28. Other employees gave different estimates of when the ice was off the pond but it appears that there was certainly a significant area of the pond open by mid-April.

[41] Break-up of nearby water bodies did not occur until early May of 2008. Dave Matthews said that, when he went to Edmonton on the Monday following the event (May 5), everything, including the river, was covered in ice apart from the odd little puddle in the ditch along the road. He could not say when the ice was off the Aurora Settling Basin.

8. Arrival of Migratory Birds

[42] The peak for migratory birds arriving in the Fort McMurray area is later in April and in early May but birds start to arrive in the first part of April or even late March. Some employee statements establish that employees first observed migratory birds in the area at various times in April of 2008. Some sightings occurred as early as the first week of April. There was a report, purportedly from Angela at Syncrude, of an oiled Canada Goose on one of the Syncrude tailings pond on April 3, 2008 but I will not rely on that report in arriving at my findings.

[43] By e-mail of April 17, 2008 to his supervisor, Bruno Erelis, (and copied to other team leaders) Rick Corcoran advised:

Guys,

I spoke to Dave Matthews again this am and expressed my concern at the # of complaints surrounding birds landing in the pond due to lack of deterrents. He will send someone up today to put out a few cannons. The remainder will be set up on Tues. or Wed. Please just let folks know that we are taking steps to solve the problem.

In the meantime I think we should check back with him on Monday to confirm.

[44] Although Mr. Corcoran said in his statement that the e-mail was not actually prompted by complaints, he himself had seen birds on the Basin before he sent the e-mail.

9. Incident of April 28, 2008

[45] For the purpose of this decision, it is not necessary to summarize in any detail the incident of April 28, 2008 and its aftermath. An estimated 500 waterfowl were found trapped in the bitumen mat on the Aurora Settling Basin on that date and apparently sank with the bitumen. It is agreed between the Crown and defence that approximately 1600 birds died during the course of the incident. Despite efforts to recover and rehabilitate oiled birds, very few survived being oiled.

C. CROWN POSITION

[46] Both the federal and provincial Crown argue, in respect of both offences, that:

1. On a proper interpretation of the legislation, the offences have been proved beyond reasonable doubt.
2. The defence has failed to establish that Syncrude exercised due diligence to prevent the birds from landing in its tailings pond.
3. The defence of Act of God should not be applied.
4. *De minimis* is not applicable in the circumstances of this case.

[47] The federal Crown also argues that:

1. The date of the offence is properly established.
2. The evidence does not disclose officially induced error.

3. While conviction for the federal offence cannot be avoided by demonstrating due diligence to deter birds from the tailings pond, the federal Crown is not seeking a conviction if the defence of due diligence is established.

D. DEFENCE POSITION

[48] Respecting the provincial charge, Syncrude argues that:

1. By adding the word “fail” to the charge, the Crown has alleged an offence unknown to law.
2. The word “fail” imposes on the Crown the obligation to prove Syncrude’s conscious dereliction of the duty to ensure that a harmful substance did not come into contact with birds.
3. The Crown has failed to prove that Syncrude did “keep” or “store” a hazardous substance.
4. The Crown has failed to prove that a hazardous substance did “come into contact with” or “contaminate” any animals.

[49] Respecting the federal charge, Syncrude argues that:

1. By adding the word “unlawfully” to the charge, the Crown has charged an offence unknown to law.
2. The Crown has failed to prove that Syncrude’s activities were unlawful since the company was acting pursuant to provincial licences, permits, leases and approvals.
3. The federal Crown has not proved that migratory birds “frequented” the “area” where Syncrude deposited tailings.
4. The Crown has not proved that the offence occurred on the date alleged.

[50] Respecting both offences, Syncrude argues that:

1. It has established that it used due diligence to avoid the contamination of birds in its tailings pond.

2. It was impossible for Syncrude to prevent birds from landing on its tailings pond and the defence of impossibility should apply.
3. The defence of Act of God should be applied.
4. The proceedings are an abuse of process because Syncrude complied with all required approvals, permits, licences and leases. [In this connection I will consider also the defence of officially induced error.]
5. *De minimis* should apply to prevent a conviction.

E. ANALYSIS

1. Wording of the Charges

[51] Syncrude is charged under s. 155 of Alberta's *Environmental Protection and Enhancement Act* which provides:

A person who keeps, stores or transports a hazardous substance or pesticide shall do so in a manner that ensures that the hazardous substance or pesticide does not directly or indirectly come into contact with or contaminate any animals, plants, food or drink.

[52] Syncrude is also charged in the same Information under s. 5.1(1) of the federal *Migratory Birds Convention Act*, which provides:

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

[53] Respecting the first count, the provincial Crown has alleged that Syncrude "... did fail to keep or store a hazardous substance ..." in the manner required. The federal Crown has alleged that Syncrude: "... did unlawfully deposit a substance that is harmful to migratory birds ..." "The words "fail" and "unlawfully" do not appear in the pertinent sections of the legislation. Syncrude argues that by adding these words the Crown has created charges that are unknown to law.

[54] Dealing first with the provincial charge, the term "fail" can be used in many different ways. One of the definitions provided in the *Oxford English Dictionary (Online Edition)* is:

10. a. trans. To leave undone, omit to perform, miss (some customary or expected action). *Obs.* exc. with *inf.* as object.

[55] The word is used frequently in a regulatory context to indicate that something was left undone. See, for example: *Libman on Regulatory Offences in Canada*, pp. 6-18 to 6-59.

[56] The word “fail” is used in the charge here to allege that Syncrude simply did not do what was required by s. 155 of the provincial *Act*. I see no reason to add any greater or different significance to the term in this context. Consequently, I find that the use of the word does not affect the validity of the charge.

[57] Syncrude also argues that the term “fail” adds to the charge the obligation to prove Syncrude’s conscious dereliction of the obligation to ensure that a harmful substance did not come into contact with birds. It follows from my finding as to the meaning of the word in the charge here that it imports no additional element.

[58] Respecting the use of the word “unlawfully” in the federal count, the addition of the word *unlawfully* to a charge is regarded as surplusage unless the term is a definitional element of the offence; and clearly it is not a definitional element of the offence here. According to Ewaschuk, the term usually reflects no more than the need for the Crown, in a criminal case, to negative common law and statutory defences, justifications and excuses available to the accused. I can see no reason why it would shift the onus back to the Crown in any case where the defence bears the onus; for example, to require the Crown to prove the absence of due diligence in an offence of strict liability. Ewaschuk, *Canadian Criminal Pleadings and Practice* at 21:10055.

[59] When the Crown alleges a particular that is not essential to the charge, it will be treated as surplusage unless the accused has relied on the particular to its prejudice. Ewaschuk at 9:10010; *R. v. Vezina*; *R. v. Côté*, [1986] 1 S.C.R. 2, paras. 49-65; *R. v. Hawkshaw*, [1986] 1 S.C.R. 668, paras. 9-10; *R. v. Saunders*, [1990] 1 S.C.R. 1020, para. 5.

[60] While Syncrude has argued that the use of the word has imposed on the federal Crown the obligation to prove that the impugned activity was not lawfully authorized under provincial authority, there is no reason to conclude here that it should have that significance. Syncrude would not have been misled by the addition of the term or prejudiced in any other manner. The use of the word “unlawfully” here is surplusage that does not require the proof of any additional element or disproof of any *additional* defence, justification or excuse.

2. Characterizing the Offences

[61] The offences here are regulatory. They fall within a very large category of offences meant to regulate conduct “... in the interests of health, convenience, safety and the general welfare of the public.” *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5 at p. 13; *R. v. Wholesale*

Travel Group Inc., [1991] 3 S.C.R. 154, paras. 121-137; *Lévis (City) v. Tétreault (City)*, [2006] 1 S.C.R. 420 at para. 13; Libman at pp. 2-4 to 2-7.

[62] These specific offences are designed to protect animals and to prevent the harm that would be caused to our ecosystem without that protection.

[63] Regulatory offences are *prima facie* offences of strict liability unless there is language in the legislation which indicates the legislative intent to include *mens rea*. *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at pp. 1325-26; *Levis (City) v. Tetreault (City)*, *supra*, at para. 16.

[64] Here the legislation places the onus on the accused. to prove due diligence and this too demonstrates a legislative intention that the offences would be offences of strict liability. The *Environmental Protection and Enhancement Act* provides in s. 229:

No person shall be convicted of an offence under section ...
155 ... if that person establishes on a balance of probabilities that
the person took all reasonable steps to prevent its commission.

[65] Section 13(1.8) of the *Migratory Birds Convention Act* provides:

A person or vessel that establishes that they exercised due
diligence to prevent the commission of an offence under this Act,
other than an offence under paragraph 5.2(a), © or (d) or section
5.3, shall not be found guilty of the offence.

[66] The term “fail” in the provincial charge does not alter or add to the intended meaning of s. 155 of the *Environmental Protection and Enhancement Act* and I can find no other language in the offence that suggests that the legislature intended to include *mens rea*.

[67] The key terms “keeps, stores or transports ... in a manner that ensures”, do not, in my view, indicate an intention to include *mens rea*.

[68] There is no language importing *mens rea* into the federal offence either. Terms such as “intentionally”, “wilfully”, “knowingly”, “for the purpose of”, “in order to”, “without authority” have been held to indicate the legislative intent to include *mens rea* but there is no similar language in the present offences. See: Libman at pp. 2-3, 2-4 and 4-4 to 4-15.

[69] In the federal *Act* the words “deposit a substance ... or permit such substance to be deposited” do not suggest *mens rea*. I conclude that both offences are offences of strict liability without any element of *mens rea*.

3. Onus and Standard of Proof

[70] In strict liability cases the Crown still bears the onus of proving beyond a reasonable doubt that the accused committed the prohibited act. The defence must establish reasonable care on a balance of probabilities. Dickson, J., speaking for the Court in *R. v. Sault Ste. Marie (City)* at p. 1325, held respecting strict liability:

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

[71] The legislation places the onus on the accused to prove due diligence in s. 229 of the *Environmental Protection and Enhancement Act* and s. 13(1.8) of the *Migratory Birds Convention Act*. The defence found in the statute will be paramount but the legislation here does not suggest a legislative intent to create a defence which differs from the common law defence. *R. v. Consumers Distributing Co. Ltd.* (1980), 57 C.C.C. (2d) 317 (Ont. C.A.) at paras. 24-26; *R. v. Edmonton (City)*, 2006 ABPC 56 at paras. 694-95.

[72] Syncrude has raised a number of additional defences. Generally, once there is an air of reality to a defence, excuse or justification, the Crown bears the onus of disproving or negating it by proof beyond reasonable doubt. Ewaschuk at 16:19005, 21:3100.

[73] Swaigen suggests that Act of God, necessity and impossibility are subsumed in the defence of due diligence. It would follow that the defence should bear the onus of proving these defences. Swaigen, *Regulatory Offences in Canada* at pp. 193, 198-202.

[74] In *R. v. British Columbia Hydro and Power Authority*, [1997] B.C.J. No. 1744 (B.C.S.C.) at para. 41, Lamperson, J. acknowledged that, in criminal cases, once a defence has an air of reality, the Crown must prove beyond reasonable doubt that it does not apply. He held, however, that, in respect of strict liability offences, the defence must establish all of its defences on a balance of probabilities.

[75] On the other hand, in *R. v. Synergy Group of Canada Inc.*, 2006 ABPC 196 at paras. 27-33, Meagher, P.C.J. cited *R. v. Perka et al*, [1984] 2 S.C.R. 232 and concluded that the Crown bore the onus of disproving necessity in respect of a strict liability offence.

[76] In spite of my doubts on this point, I will proceed to determine, with the exception of due diligence, abuse of process, and officially induced error, whether the Crown has negated the defences, excuses or justifications advanced by proof beyond reasonable doubt.

[77] The defence of officially induced error, requires proof by the defence on a balance of probabilities. *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.*, [2006] 1 S.C.R. 420 at para. 26.

[78] The accused also bears the onus to establish an abuse of process. *R. v. Pearson*, [1998] 3 S.C.R. 620 at para. 12.

4. Statements

[79] The statements of Syncrude employees have been ruled admissible as statements of the company, except for any portions that are outside an employee's scope of employment or inadmissible on some other basis; for example, hearsay. There remains the question of the proper use to be made of the admissible portions of the statements, since some statements include comment that is inconsistent with other statements or with other evidence adduced by the Crown.

[80] Syncrude maintains that I am not in a position to assess the credibility of the employee statements, citing case authority concerning assessments of credibility by appellate courts. However, trial judges and juries are often required to determine the weight that should be attached to out-of-court statements. Confessions of accused individuals often contain internal inconsistencies or contradict other statements by the accused or other evidence. There does not appear to be any reason that the mechanisms for assessing the Syncrude employee statements should be different.

[81] Once admitted, a statement is evidence for or against the accused for all purposes. It is treated as other relevant and admissible evidence and may be accepted or rejected in whole or in part. *McWilliams, supra*, at 8:130.80; *Ewaschuk, supra*, at 16:15037, 16:15070; *R. v. Hoben* (2009), 243 C.C.C. (3d) 268 (N.S.C.A.) at paras. 17-19.

[82] It should be considered along with all of the other evidence to determine whether the Crown has proved the its case beyond reasonable doubt. *R. v. Rojas*, [2008] 3 S.C.R. 111 at paras. 37, 43-45.

[83] Those portions of the statements that assist the accused may, standing alone or with other evidence, raise a reasonable doubt or, where the defence bears the onus, establish the defence on a preponderance of evidence.

5. Proof of the Provincial Offence

[84] The charge under s. 155 of the *Environmental Protection and Enhancement Act* alleges that Syncrude committed the offence on or about April 28, 2008, at or near Fort McMurray. There is no dispute that the time and place of this particular offence is proved and on the evidence I find that it is.

[85] Syncrude, however, argues that a number of the other elements are not proved. The argument depends on the meaning of several words in the charge. These are my findings with respect to the meaning of those words and the evidence bearing on the elements of the charge:

1. ... *did fail*.

Earlier in this decision I concluded that the word “fail” in this context simply means to leave undone, omit to perform or miss.

2. ... *to keep*.

Syncrude has provided portions of the *Oxford English Dictionary (Online)* definition of the word “keep”:

16. To take care of, look to the well-being of; to look after, watch over, tend, have charge of ... a thing ...
17. To maintain or preserve in proper order ...
29. Actively to hold in possession; to retain in one’s power or control; to continue to have, hold, or possess.

The defence has argued that, when the tailings were deposited in the Aurora Settling Basin, the bitumen in the tailings was being disposed of and not being kept or stored. However, Syncrude’s responsibilities for the bitumen did not end when tailings were deposited in the Aurora Settling Basin. The evidence indicates that the bitumen in the tailings would not be recovered but Syncrude still had responsibility to “take care of” the content of the Basin and it retained “power and control” over it subject to the surface lease and approvals.

3. ... *or store*.

The term “storage” is defined in s. 1(kkk) of the *Act*:

“storage” means the holding of a substance or thing for a temporary period at the end of which it is processed, used, transported, treated or disposed of;

While the offence may be made out by proving the keeping *or* storing of the harmful substance, I am satisfied, when I take into account the definition of “storage” in the *Act*, that Syncrude “stored” bitumen in its tailings pond. The tailings, including the bitumen, were being held for processing or treatment with a view to the ultimate reclamation of the land. “Treat” is defined in s. 1(rrr) of the *Act*:

“treat” means to apply any method, technique or process, including, without limitation, neutralization and stabilization, that is designed to change the physical, chemical or biological character or composition of a substance;

4. ... *a hazardous substance.*

This term is defined in s. 1(aa) of the *Act*:

“hazardous substance” means a substance or mixture of substances, other than a pesticide, that exhibits characteristics of flammability, corrosivity, reactivity or toxicity, including, without limitation, any substance that is designated as a hazardous substance within the meaning of the regulations;

There is ample evidence that the bitumen in the Aurora Settling Basin was toxic to birds.

5. ... *in a manner that ensures.*

Syncrude has provided the following *Oxford English Dictionary (Online)* definition of the term “ensures”:

6. to secure, make safe (*against, from* risks).
8. to make certain the occurrence or arrival of (an event), or the attainment of (a result);

Syncrude maintains that it would be impossible to “ensure” that birds did not land on the Aurora Settling Basin and the evidence supports that claim. It cites the *Boardman, Reit LLP v. Edmonton (City)*, [2008] A.J. No. 635 (C.A.) for the proposition that the courts interpret statutes to “... relieve against more than total physical impossibility. They demand of the citizen neither extreme

ingenuity, superhuman effort, nor massive unusual resources to comply with the *Act*.”

However, the requirement to “ensure” here should be read along with s. 229 of the *Act* which provides a defence if Syncrude established that it “... took all reasonable steps to prevent [the commission of the offence]”. This law does not require the impossible or superhuman effort.

6. ... *that the hazardous substance does not come into contact with or contaminate.*

I considered the terms “come into contact with” and “contaminate” in the non-suit decision. Syncrude argued that this phrase was designed to refer to leaks which caused the substance to move to the birds. Respecting the term “come into contact with”, I found that what is required is that the substance “be brought to a specified situation”; a situation where it is in contact with an animal, regardless of whether the substance moved to the animal or the animal moved to the substance. I also found that the hazardous substance contaminates an animal whether the animal moves into the substance or the substance moves to it.

The word “contaminate” is defined in the *Oxford English Dictionary (Online)* as follows:

a. trans. To render impure by contact or mixture; to corrupt, defile, pollute, sully, taint, infect.

The evidence clearly shows that a harmful substance in the Basin came into contact with waterfowl and they were contaminated.

7. ... *any animals.*

It is not disputed and the evidence establishes that the birds are “animals”. Section 1(e) of the *Act* provides the following definition:

“animal” means any animal other than a human;

[86] On the basis of these findings, I have concluded that the Crown has proved beyond a reasonable doubt that Syncrude kept or stored a harmful substance in a manner that failed to ensure that the substance did not come into contact with or contaminate any animals.

6. Proof of the Federal Offence

[87] Conviction of the charge under s. 5.1(1) of the *Migratory Birds Convention Act* requires proof beyond reasonable doubt that Syncrude, on or about April 28, 2008, at or near Fort McMurray, deposited a substance harmful to migratory birds in waters or an area frequented by migratory birds.

[88] Syncrude argues that the Crown has failed to prove the deposit of a harmful substance *on the date alleged*. I am satisfied that the evidence proves beyond reasonable doubt that, *on or about April 28, 2008*, Syncrude was depositing tailings which included bitumen into the Aurora Settling Basin. The word “deposit” is defined in s. 2 of the *Act*:

“deposit” means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;”

[89] On this point, Todd Powell testified that two of the tailings lines to the Basin were operating on April 28, 2008. Dr. Houlihan’s evidence also indicates that the Aurora plant was in operation every day in April and the tailings are a necessary part of that operation. The evidence does not establish that the particular bitumen that contaminated the waterfowl on April 28, 2008 was deposited on or about that date but that is not a requirement of the offence.

[90] The term “migratory birds” is defined in s. 2 of the *Act* as “a migratory bird referred to in the *Convention*”. The *Protocol* which amends the *Convention* refers to “... waterfowl (ducks, geese and swans) ...” and other birds. There is no doubt that bitumen would be harmful to these birds.

[91] I find that the evidence establishes beyond reasonable doubt that migratory birds frequented the “area” where Syncrude deposited the tailings. For the purpose of the non-suit application, I concluded that the term “area” in s. 5.1(1) would include the space over, on or adjacent to the deposit of the harmful substance, close enough to the deposit for migratory birds in that space to be attracted to the specific location of the harmful substance. I also accepted the definition of the word “frequent” from *Webster’s Third International Dictionary*: “... to associate with, be in, or resort to often or habitually: visit often.”

[92] I find that Syncrude deposited bitumen *in an area frequented by migratory birds* based on the following evidence:

1. The Basin is located under two major migratory bird flyways used by large numbers of migratory birds.
2. While there are features, such as the absence of vegetation or other deterrents, which render the Basin less appealing

to birds as habitat, a large body of water such as the basin will be attractive to waterfowl in any event.

3. Records produced by Syncrude indicate that waterfowl are recovered from the pond. The defence cited reports of an average of 1.04 birds waterfowl fatalities for March, April and May from 2000-2007. There is reason to believe this is not a complete census of bird fatalities and it does not, in any event, purport to indicate the number of birds landing. There is reason to believe that the number of fatalities and landings would be greater. David Matthews, for example, describes seeing ducks paddling around for hours and days in the cleaner part of the pond and then just flying away.
4. Syncrude's efforts and expenditures over many years to deter birds from landing on the Basin are some evidence that migratory birds will be in the area and attracted to the pond surface. That is the whole reason for a bird deterrent program.
5. The waterfowl found in the Basin on April 28, 2008 and those seen on or flushed from the pond subsequently also suggest that migratory birds "frequent" the "area". I recognize that the numbers of birds seen on the pond on those dates was, according to the evidence, unprecedented but the event still has some evidentiary significance, particularly when considered with the other evidence on this issue.

[93] When all of the evidence is considered together, I find that the Crown has proved beyond reasonable doubt the conduct charged under s. 5.1(1) of the *Act*. It is not any individual piece of evidence that convinces me to that standard but the collective effect of the evidence.

[94] Clearly, not every space under a flyway should be labelled an "area frequented by migratory birds". However a large body of water (and other substances in this case) without sufficient operating deterrents located under the flyways will inevitably be attractive to migrating waterfowl. I am satisfied that effective operating deterrents can reduce the number of birds that will land on the water body but I find that the cannons and effigies were not operating at the Aurora Settling Basin on April 28, 2008.

7. Due Diligence

[95] The defence of due diligence will be available in a prosecution for a strict liability offence if the accused reasonably believed in a mistaken set of facts which, if true, would render

the act or omission innocent; or if it took all reasonable steps to avoid the particular event. *R. v. Sault Ste. Marie (City)* at p. 1326.

[96] The defence would apply if Syncrude established on a balance of probabilities that it could not have reasonably foreseen the contravention of the statutes. Syncrude's actions must be judged on the basis of the information available to it at the time of the alleged offence. *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510 at paras. 44-49; *R. v. Starosielski*, 2001 ABPC 208 at para. 134; *R. v. Edmonton (City)* at para. 701.

[97] There is no evidence of any mistake of fact here. Syncrude should have known that the proscribed conduct would occur. Bitumen would be deposited into the Aurora Settling Basin and Syncrude would not be able to ensure, i.e., make certain, that birds would not be contaminated by the bitumen in the Basin. It was reasonably foreseeable that those events could occur on April 28, 2008 at the Aurora Settling Basin.

[98] The defence would also apply if Syncrude established that it took all reasonable care to avoid the contraventions.

... The due diligence which must be established is that of the accused alone. 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's 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. [emphasis added] *R. v. Sault Ste. Marie (City)* at p. 1331.

[99] To meet the onus, Syncrude is not required to show that it took all possible or imaginable steps to avoid liability. It was 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. The conduct of the accused is assessed against that of a reasonable person in similar circumstances. *Lévis (City) v. Tétreault*, *supra*, at para. 15; *R. v. Edmonton (City)*, 2006 ABPC 56 at para. 703; *R. v. J.D. Irving Ltd.*, [2008] N.B.J. No. 371 at paras. 42-43; Libman at pp. 7-2 to 7-3, 7-21 to 7-24.

[100] Various factors should be taken into account to determine whether the defence has established reasonable care. The defence applies in many different situations and so there can be no single comprehensive list of appropriate considerations for all cases. The decision must be based on the particular circumstances of the case. *R. v. Commander Business Furniture Inc.*

(1992), C.E.L.R. (N.S.) 185 (Ont. C.J.) at p. 212 provides a lengthy list of factors that could bear on the defence:

- 1) the nature and gravity of the adverse effect;
- 2) the foreseeability of the effect, including abnormal sensitivities;
- 3) the alternative solutions available;
- 4) legislative or regulatory compliance;
- 5) industry standards;
- 6) the character of the neighbourhood;
- 7) what efforts have been made to address the problem;
- 8) over what period of time, and promptness of response;
- 9) matters beyond the control of the accused, including technological limitations;
- 10) skill levels expected of the accused;
- 11) complexities involved;
- 12) preventative systems;
- 13) economic considerations;
- 14) actions of officials.

See also: *R. v. Goebel*, [2003] A.J. No. 591 (Alta. Q.B.) at para. 35; *R. v. Gonder* (1981), 62 C.C.C. (2d) 326 (Yukon Terr. Ct.) at para. 22; Libman at pp. 7-17 to 7-718; Swaigen, *supra*, at pp. 104-112.

[101] The question then is whether Syncrude has established that it took all reasonable steps to ensure that waterfowl would not be contaminated in its tailings pond. Whether or not Syncrude could ensure against the contamination, it must still be determined whether it took all reasonable steps toward that end.

[102] Although reasonable care to prevent the contamination of wildlife would not ordinarily be a defence to the federal charge, the federal Crown has conceded that, in the particular

circumstances of this case, Syncrude should be acquitted of the federal charge if that reasonable care is proved.

a. Gravity of the Effect

[103] The gravity of the potential harm caused by Syncrude's conduct will influence the efforts it would reasonably be expected undertake to prevent the harm. Libman at pp. 7-50 to 7-51.

[104] Until better technology is available, tailings ponds will be a part of tar sands operations, and a risk to wildlife. Operators cannot remove all of the bitumen from the tailings with current technology so this substance is found in smaller bits throughout the pond, as well as being more concentrated in a sticky mat in some parts of the pond. As the events of April 28, 2008 demonstrate, severe contamination with bitumen has dreadful and deadly consequences for waterfowl and the evidence indicates that there can be serious longer term adverse consequences from relatively mild contamination.

[105] In assessing the gravity of the loss of waterfowl, it is important to consider the broader context. There is some evidence, particularly the testimony of Dr. Robertson, suggesting that the loss of migrating waterfowl in this case, and consequent loss of their offspring, would likely affect particularly mallard populations available for hunting. However, large numbers of ducks are killed by licenced hunters. In addition many migratory birds will be contaminated or killed in other industrial circumstances.

[106] I doubt that the number of ducks lost on or about April 28, 2008 at the Aurora Settling Basin would have any significant impact on total duck populations and it may be a small number compared with the loss from hunting or total losses in industrial settings. In addition the evidence indicates that the loss on April 28, 2008 would probably have occurred even with deterrents in place. However, it is important to remember the purpose of the provincial and federal legislation. The legislation is designed to protect the environment and maintain migratory bird populations, respectively. As with most regulatory offences, the legislation is not just directed at the immediate and direct effect of the proscribed conduct but also at the potential harm if that conduct was widespread. See, for example: *R. v. Carriere*, 2005 SKPC 84 at paras. 45-47.

b. Complexity

[107] The volume of tailings produced by tars sands operations results in very large ponds, the Aurora pond being the size of about 640 football fields. There are usually more appealing water bodies for waterfowl and shorebirds to use for rest or food but they will be attracted to these ponds nonetheless. Because the Aurora facility is located under major migratory flyways there are large numbers of birds in the vicinity during migration. It is evident from the expert testimony that the challenge of deterring birds from the pond is complex. The proper design and operation of bird deterrent programs demands a high level of expertise and, when a company creates a risk such as a tar sands tailings pond, it is reasonable that the company should have in

place or access the expertise to effectively manage the risk to wildlife. Libman at pp. 7-99 to 7-101. See, respecting expertise expected of property owners: *R. v. Heinrichs*, [1995] B.C.J. No. 2546 (B.C.S.C.).

[108] In the past Syncrude had commissioned expert studies and its employees had participated in the Oil Sands Bird and Wildlife Protection Committee. The employees directly involved in the bird deterrence program, the Bird and Environmental Team, were experienced in the operation and maintenance of the bird deterrent devices. While they may have learned of bird behaviour and deterrence from their job experience, they had no real training in those areas. Dave Matthews, BET Leader and Senior Construction Specialist, stated that he had no training in managing wildlife. He relied on his experience and on the experience of the Team members to determine where cannons would be placed.

[109] The BET experience is valuable but it is not a sufficient basis for an effective bird deterrent program for tar sands operations. One example of the problem with relying exclusively on experience is found in the statement of BET member Gordon Grandjambe. He said that sound cannons cannot be placed too close together because the birds get used to the sound. He said shore-based cannons were kept roughly 1000 yards apart. The expert evidence indicates that waterfowl will become habituated to frequent firing of the cannons but does not suggest that cannons should be placed further apart to address this problem and certainly not 1000 yards apart. A more important example is the decision to commence deploying deterrents on April 14, 2008, a decision which was clearly not informed by proper training or expertise.

c. Preventive System

[110] Syncrude was obliged to have in place a system to prevent waterfowl from landing on the tailings pond and to ensure the effective operation of that deterrent system. See: Libman at pp. 7-105 to 7-106.

[111] Syncrude's bird deterrent system in 2008 was based on the use of sound cannons and human effigies. The evidence indicates that these devices can be effective. While Syncrude had documents that set out procedures for bird deterrence, the documents are not in any way comprehensive and do not reflect the complexity of effective bird deterrence. One document, apparently a job description for a Bird Deterrent Tech, indicated that deterrents were to be activated in all contaminated waters beginning on April 1, depending on the weather and arrival of birds. Dave Matthews said there was no formal schedule however. Another document concerning cannon set-up called for the cannons to be placed no further than 240 metres apart on land or water. The evidence indicates that Syncrude did not have enough cannons to achieve this density. It does not appear that these documents played any significant part in Syncrude's bird deterrent program.

[112] Syncrude had, in previous years, cut back substantially on the number of deterrents. Staff had also been reduced, primarily by retirements. Dave Matthews said that he and his supervisor, Gary Bourque, felt they could do the work with the reduced staff. Mr. Matthews and the BET

members decided to stop using booms to confine the mat. Mr. Matthews said that the decision was based on the problem of keeping up with the pouring of the tailings and their conclusion that the mat was sinking before it became a problem.

[113] Most significantly, Mr. Matthews and his supervisor Gary Bourque made the decision to bring the BET team to work on April 14, 2008. Their statements indicate that this decision was based on the weather. The hire letters specifying the April 14 start date are dated March 19, 2008. For various reasons some members of the crew were unable to start work on April 14. When the BET did get to work, there was only one truck available even though they usually used four trucks. Apparently there was a problem renting vehicles and one truck had been lent to an operations team.

[114] As a result of the late start, Syncrude did not have sound cannons deployed on the perimeter of Aurora Settling Basin before the bird landings discovered on April 28, 2008. Certain employee statements indicate that cannons were deployed at the Basin on April 16 or 17 but I am convinced that their statements are mistaken on this point. Gordon Grandjambe thought he placed eight cannons at the north end of the Basin on April 17. Fred Cardinal said he and Lawrence Powder placed six cannons at Aurora Recycling Pond and four on the tailings pond on April 16. However, Lawrence Powder indicated that he was not at Aurora until April 17 and he placed only six cannons on the recycling pond. Lloyd Benio's statement suggests that there were a few cannons near the Basin prior to April 28. These contradictory statements do not establish that the cannons had been placed on the Basin on April 28. I do not doubt that these are the employees' best recollections at the time of their statements but I am satisfied that they are mistaken. For them it was simply a matter of trying to remember what they were doing on an ordinary work day.

[115] I accept the sworn testimony of Todd Powell that the cannons had not been placed at the Basin by the time he arrived on April 28. This is confirmed by Dave Matthews' statement. The presence or absence of the cannons on April 28 would have been a matter of some importance to both Mr. Powell and Mr. Matthews. In Mr. Powell's case it would bear directly on the investigation and in Mr. Matthews' case he would be accountable for the decision as to when cannons were deployed. This conclusion is also consistent with the cannon update maps for April 24 described in Steve Gaudet's statement. For the purpose of the due diligence defence that finding would be sufficient, but for other defences advanced by Syncrude it may not be. I will make it clear here that I am convinced beyond reasonable doubt that the cannons were not placed at the Aurora Settling Basin prior to April 28.

d. Alternative Solutions

[116] Stewart, C.J. held in *R. v. Gonder* at para. 25:

Reasonableness of care is often best measured by comparing what was done against what could have been done. The reasonableness of alternatives the accused knew or ought to have known were

available is a primary measure of due diligence. To successfully plead the defence of reasonable care the accused must establish on a balance of probabilities there were no reasonable feasible alternatives that might have avoided or minimized injury to others. See also: Libman at pp. 7-135 to 7- 141.

[117] The evidence here, while disclosing no real industry standard for bird deterrence, offered a number of reasonable alternatives. The most obvious alternative was to have sufficient equipment and staff ready for deployment of adequate deterrents no later than early April. Shell Albian Sands Muskeg River Mine and Suncor were both able to commence deployment in early April in 2008. These operators also had more comprehensive written procedures, oversight by individuals with appropriate training and advance planning and preparation of equipment. I am not suggesting that Syncrude was required to adopt either of these systems, simply that there were reasonable alternatives available.

[118] I was impressed with the evidence of Dr. St. Clair who offered an opinion respecting a minimum reasonable deterrent system. Oil sands operators would be well advised to accept Dr. St. Clair's advice but I do not find that oil sands operators must meet these requirements to establish reasonable care. Dr. St. Clair's opinion does, however, provide evidence of reasonable alternatives available to Syncrude. Of particular note is the advice that the system should be operational in early spring, i.e.: March, not late April. Dr. St. Clair also suggested appropriate training for those involved in the deterrent program, including training in bird behaviour and identification, experimental design and monitoring protocols.

[119] In my view, there existed several reasonable and feasible alternatives of which Syncrude did or should have known. I have heard no evidence to suggest that these alternatives would not be economically feasible.

e. Foreseeability

[120] Foreseeability is properly considered to determine if the accused has taken reasonable steps. It is only required to take steps to avoid that which it can reasonably foresee. *R. v. MacMillan Bloedel Ltd.*, [2002] B.C.J. No. 2083 (B.C.C.A.) at para. 52.

[121] Due diligence does not require clairvoyance or that the accused should have foreseen every possible failure. *R. v. Lonkar Well Testing Limited*, 2009 ABQB 345 at para. 40; *R. v. Daishowa Canada Co.* (1991), 118 A.R. 112 at 116, aff'd. (1993) A.R. 179 (C.A.).

[122] In *R. v. Rio Algom Ltd.* (1988), 66 O.R. (2d) 674 the Ontario Court of Appeal discussed the test for foreseeability in connection with occupational health and safety legislation. Libman, at p. 7-70, described the test quoting *Rio Algom*:

The test is not whether the particular accident was foreseeable, but whether a reasonable person would have foreseen that “the

circumstances that lead to the accident created a hazard requiring remedial intervention.” See also: *R. v. Lonkar Well Testing Limited* at para. 41.

[123] Syncrude argues that it had in place a system which worked for many years to prevent the loss of all but a small numbers of birds. It says that it could not reasonably have anticipated the confluence of circumstances that resulted in the deaths of more than 1600 water fowl. There was a record snowfall on April 20 to 22 which interfered with plans to deploy deterrents. The weather and the fact that adjacent water bodies were frozen over also made it more likely that waterfowl would land.

[124] However, Syncrude’s management should have known of the circumstances that make it more likely that migratory birds will land on the tailings pond in the spring. When nearby water bodies remain frozen while the tailings pond is open, waterfowl are more likely to be attracted to the tailings pond. Adverse weather, which is not uncommon in early April, will also make it more likely that birds will land. It would be impossible to predict with certainty when break-up will occur, what the weather conditions will be prior to break-up and that migratory birds will start to appear on a specific date. It is not, however, difficult to predict that there will be years when these circumstances converge. On the evidence I have heard, this convergence is not a remote possibility. The expert evidence respecting the conspecific behaviour of birds also leads to the conclusion that, once a few birds landed, many more might follow.

[125] The magnitude of the storm was rare but not completely unprecedented. There was more snowfall on April 20 and 21 of 1985. The prospect that weather would interfere with deployment of deterrents at some times in April was foreseeable.

[126] It was apparent that deterrents should be in place as early in the spring as reasonably and safely possible and that they should be deployed as quickly as reasonably possible. Syncrude did not deploy the deterrents early enough and quickly enough. This failure can be attributed to the absence of an effective documented procedure, inadequate training and expertise, the reduction in staff, the late hiring dates, delay in getting staff to work and not having equipment ready soon enough. Syncrude’s reduction in the number of deterrents and the decision to stop using booms bring into question the effectiveness of the deterrents even if they were in place. There is no evidence to suggest that these acts or omissions were in any way the product of scientific or expert analysis.

[127] The argument that there had been low numbers of detected fatalities in previous years is a factor to be considered but it is not a persuasive basis for concluding that it was not reasonably foreseeable that more birds would be contaminated without the prompt deployment of deterrents. Firstly, there was no adequate monitoring to determine how many birds actually landed, were contaminated or died in the tailings pond. In addition there was no scientific or expert basis for predicting that the relatively low numbers would continue despite cutbacks in staff and deterrents or the later deployment of the deterrents.

[128] It may be reasonable that Syncrude did not anticipate the severity of the weather conditions or the total number of birds that would be killed but a reasonable person in Syncrude's place would have foreseen that Syncrude's acts and omissions leading up to the events of April 28, 2008 would cause an unacceptable hazard for waterfowl. Syncrude did not establish a proper system to ensure that wildlife would not be contaminated in the Aurora Settling Basin or take reasonable steps to ensure the effective operation of the system.

8. Impossibility

[129] Syncrude maintains that it was impossible to "ensure", as required by s. 155 of the *Environmental Protection Act*, that waterfowl would not be contaminated in its tailings pond and the evidence supports that assertion. Impossibility appears to be available as an excuse where it is not physically or morally possible to comply with the law. *R. v. Royka*, [1980] O.J. No. 596 (C.A.) at paras. 29-30; *R. v. 605884 Saskatchewan Ltd.*, 2004 SKPC 16 at paras. 60-62; *R. v. Belman*, [2001] O.J. No. 2288 (Ont. C.J.) at paras. 40-42; Swaigen at pp. 194-200; Libman at pp. 8-13 to 8-15.

[130] In determining whether it was impossible to comply with the law, both the offence and the defence of due diligence should be considered. This view is supported by the reference in Swaigen, at p. 194 of his text, to impossibility and necessity as opposite sides of the same coin. Necessity deals with the imperative to break the law while impossibility deals with the inability to comply with the law. The elements of the defence of necessity described by Dickson, J. in *R. v. Perka*, [1984] 2 S.C.R. 232 were confirmed in *R. v. Latimer*, [2001] 1 S.C.R. 3 at para. 28, where the Court held:

Perka outlined three elements that must be present for the defence of necessity. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

[131] While the first and third elements may be inappropriate to the defence of impossibility, the second fits comfortably. In *Latimer* the Supreme Court expanded on that element at para. 30:

... If there was a reasonable legal alternative to breaking the law, there is no necessity. It may be noted that the requirement involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative. If an alternative to breaking the law exists, the defence of necessity on this aspect fails.

[132] As I have already indicated, Syncrude could not “ensure” that waterfowl did not land on the Aurora Settling Basin on April 28, 2008 but it had a reasonable legal alternative. I am convinced beyond reasonable doubt that Syncrude could have acted lawfully by using due diligence to deter birds from the Basin, whether or not it was successful in its attempts at deterrence, and it did not do so.

9. Act of God

[133] Syncrude argues that the defence of Act of God should apply.

[134] Swaigen describes the defence of Act of God in the following terms at p. 200-201:

An Act of God is a natural event that is uncontrollable or unavoidable and causes harm completely independently of any contributing conduct or activity of man. An Act of God negates both negligence and causation, both because it is unforeseeable and because there is no human contribution.

The defence of Act of God has three components: (1) foreseeability - if the occurrence could have been foreseen, then the defence does not lie; (2) the accused must have taken every precaution to avoid the occurrence, but could not avoid it; and (3) the forces of nature involved must act without any human contribution ...

The intervention of weather conditions does not negate either causation or negligence unless the weather conditions amount to an Act of God. Adverse weather conditions are to be expected in a harsh climate like Canada’s and extremes of weather should be taken into account in designing, constructing, maintaining, and repairing facilities.

[135] In *R. v. North Canadian Enterprises Ltd.* (1974), 20 C.C.C. (2d) 242 (Ont. Prov. Ct.) at para. 21, Greco, P.C.J. held:

While the act of God relied upon need not be unique in order to afford a defence to the accused, it must nevertheless be something quite overwhelming, not merely an ordinary circumstance which could have been foreseen and guarded against.

[136] Here the convergence of adverse weather, an open tailings pond with natural water bodies frozen over and bird migration is an unavoidable natural event. The question is whether that convergence has all of the required components of the defence.

[137] I am satisfied, particularly on the evidence of Dr. St. Clair that, given the circumstances leading up to and occurring on April 27 and 28 at the Aurora Settling Basin, no one could make certain that waterfowl did not land on the Basin on April 28, 2008, although the probability could be reduced considerably.

[138] The weather conditions would have increased the risk of waterfowl landing in the Basin and interfered with efforts to reduce that risk but that is not sufficient for the defence to apply. On the first question, whether the occurrence could have been foreseen, the exact circumstances or degree of severity may have been unpredictable but the convergence of the critical factors would not be remarkable. Essentially the same efforts would be required to reduce the risk of birds landing and to overcome problems with access to the perimeter of the pond whether it was the second worst snowfall in 65 years that occurred, coupled with a late break-up and quick thaw, *or* some lesser, but still significant, amount of snow or rain.

[139] This case may be contrasted with other cases where Act of God has been raised as a defence; for example: excessive rain causing the breach of a dike or dam, a mudslide, flooded property or a contaminant to flow into a river; unusually warm weather causing melting and then flooding; or extraordinary winds causing pollution from a gravel pit. In these cases the severity of the weather was very directly related to whether the accused could foresee and prevent the harm.

See:

Cases where Act of God was found:

R. v. Byron Creek Collieries Ltd., (1978) 8 C.E.L.R. 186 (B.C. Co. Ct.);

R. v. Springbank Sand and Gravel Ltd., 25 C.C.C. (2d) 242 (Ont. Co. Ct.);

R. v. Jack Crewe Ltd. (1975), 23 C.C.C. (2d) 237 (B.C. Co. Ct.).

Cases where Act of God was not found:

Victoria School District No. 61 v. Goudie, [1984] B.C.J. No. 2783 (Co.Ct.);

Albert and McAffery Ltd. v. Arrow Transportation Systems Inc., [1984] B.C.J. No. 3096 (Co.Ct.);

R. v. Matachewan Consolidated Mines Ltd. (1992), 20 W.C.B. (2d) 202 (Ont. Ct. Prov. Div.);

R. v. Pioneer Timber Company Ltd., [1979] B.C.J. No. 1565 (Co. Ct.);

R. v. Northwest Territories (Commissioner), [1994] N.W.T.J. No. 39 (N.W.T.S.C.);

R. v. North Canadian Enterprises Ltd., *supra*;

R. v. British Columbia Hydro and Power Authority, *supra*, para. 69. (Lamperson, J. held, concerning excess spills from dams, that 100 year events are routinely planned for but 1000 year events are

usually not planned for. He found the defence applied in respect of one spill but not in respect of two others.)

[140] Furthermore, the snowstorm in this case was not especially unusual. There had been more snow on April 20 and 21, 1985, although that was the only other time in 65 years. As well, information was readily available to Syncrude about the risk of greater attraction of waterfowl to the tailings ponds when the ponds are open and adjacent waters frozen over. To foresee that the circumstances of greater attraction could easily occur when the perimeter of the Basin was saturated with heavy snow or rain takes no great predictive skills. I find there is no reasonable doubt that Syncrude should have foreseen the convergence of these circumstances.

[141] On the second element, Syncrude did not take every precaution to avoid the occurrence. In connection with the provincial offence, Syncrude was required ensure that a hazardous substance did not contaminate any animals *or to take reasonable steps to avoid that event*. The loss of the ducks on April 28, 2008 triggered the investigation leading to the charge and may be evidence of the failure to ensure but was not required as an element of the offence. It is the failure to ensure, to make certain, that contamination did not occur that is required to make out the offence but that obligation must be read along with the defence of due diligence found in s. 229 of the *Act*. For the federal offence it is the depositing of a substance harmful to migratory birds that would ordinarily be the relevant occurrence to be considered in connection with the defence of Act of God, but defence of due diligence to deter birds from the tailings pond is available as a potential defence in the particular circumstances of this case.

[142] The evidence convinces me beyond reasonable doubt that Syncrude placed itself in a position where it was unable to take reasonable steps to deter birds from the Aurora Settling Basin on April 28, 2008. It could have set up its system to place deterrents sooner and more quickly, regardless of the weather that arrived in April of 2008. It was reasonable to take those precautions and Syncrude did not.

10. Abuse of Process

[143] Syncrude argues that it has complied with all required approvals and that, consequently, it is an abuse of process for the Crown to proceed with either the federal or the provincial charge. It argues that, if it was to be sanctioned for a violation of the approvals, that should be done under s. 227 of the *Environmental Protection and Enhancement Act*. It denies any such violations.

[144] The test for abuse of process is described in *R. v. Jewitt*, [1985] 2 S.C.R. 128 at pp. 136-37:

I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young* [(1984), 40 C.R. (3d) 289], and affirm that “there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would

violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".

R. v. Campbell, [1999] 1 S.C.R. 565 at para. 20;
R. v. Regan, [2002] 1 S.C.R. 297 at paras. 52-54;
Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307 at para. 120;
Ewaschuk at 12:6155, 12:6160;
Libman at pp. 8-106 to 8-115.

[145] Abuse of process has been found in a regulatory context where the accused reasonably believed, on the basis of representations by a senior government official, that if it took certain remedial action by a specified date there would be no prosecution and the accused then proceeded to take the remedial action. *Abitibi Paper Company Limited and the Queen* (1979), 24 O.R. (2d) 742 (Ont. C.A.).

[146] Abuse of process was found on an application for *certiorari* stemming from a plain and unambiguous promise not to prosecute but the trial judge's decision to refuse a stay was not set aside. *Western Pulp Ltd. Partnership v. British Columbia*, [1988] B.C.J. No. 3127 (B.C.S.C.) at paras. 4, 22-23.

[147] In *R. v. BHP Diamonds Inc.*, 2002 NWTSC 74 at paras. 203-204 an official threatened prosecution if the company did not take certain steps to remedy harm to the environment. The company did cooperate and carry out various improvements at considerable expense. It was held that the subsequent charges did not result in oppression or unfairness amounting to an abuse of the Court's process.

[148] Laskin, J.A., speaking for the Ontario Court of Appeal in *R. v. Boise Cascade Canada Ltd.* (1995), 24 O.R. (3d) 483, held at para. 23 that the work permit to build roads and construct water crossings granted there did not provide a licence to pollute or grant immunity for poor construction that caused excessive sediment deposits. The failure to address the matter with appropriate regulations did not render the proceedings unfair or oppressive. (para. 27) If the company had complied with the permit it might have had a due diligence defence or been entitled to a stay for abuse of process. (para. 28)

[149] The failure to prosecute for earlier violations has been held not to result in an abuse of process. *R. v. British Columbia Hydro and Power Authority*, [1997] B.C.J. No. 1744 at para. 51.

[150] There is nothing in the evidence to suggest that Syncrude was promised that, even if it failed to take all reasonable steps to deter birds from its tailings ponds, it would not be

prosecuted. Nor could Syncrude reasonably take from the provincial approval process any assurance that, if it simply complied with the approval process, its bird deterrent efforts would be viewed as due diligence. The evidence does not suggest that provincial officials would, through the approval process as it existed, have sufficient knowledge of the specific details of Syncrude's operations or procedures to make that judgment for Syncrude. I arrive at that conclusion without even considering the apparent errors in the 2007 Waterfowl Protection Plan.

[151] It is conceivable that provincial officials could, through more intensive monitoring and regulation, become familiar enough with Syncrude's tailings operations to dictate in precise detail the deterrent system that would amount to reasonable steps to deter wildlife. Even if provincial officials did attempt that level of regulation, Syncrude's directing mind and will should still, given the complexity of its tailings operations and how they relate to wildlife hazards, be determining that it is taking all reasonable steps to deter birds from the tailings ponds; not simply relying on the fact that it has received approvals and is complying with them.

[152] Although I have no direct evidence of it, Syncrude's employees might have convinced themselves that, so long as they had the requisite provincial approvals and implemented them, that would be the end of their obligations to comply with environmental legislation bearing on the deterrence of wildlife from its tailings ponds. Even if I was prepared to infer that to be the case, and I am not, it would not have been reasonable for the employees to come to that conclusion.

[153] Section 227 of the *Act* creates offences for providing false information, failing to provide information and contravening the terms of an approval. Syncrude argues that the Crown should have proceeded with the offence of contravening a term of the approval if there was evidence of that offence. However, the Crown has a discretion as to which charges will be laid and the courts will show Crown discretion great deference, interfering only in a very narrow set of circumstances such as flagrant impropriety or malicious prosecution. I am satisfied that the Crown's decision to prosecute for the offence under s. 155 of the *Act* rather than restrict itself to prosecutions for violations of the approval does not call for such interference. *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 37 at paras. 32, 42-49; *R. v. Nixon*, 2009 ABCA 269 at paras. 16 -19, leave granted [2009] S.C.C.A. No. 514.

[154] Dealing specifically with the federal count, had the federal Crown taken the position that a conviction should be entered regardless of due diligence to deter birds from the tailings pond, that might well have amounted to an abuse of process. However, it did not take that position and, consequently, Syncrude has not been misled. On the contrary, federal officials made it clear that due diligence to deter birds from the tailings ponds was required.

[155] There is no basis here for finding that the charges are a violation of the public's sense of decency and fair play amounting to an abuse of process.

11. Officially Induced Error

[156] Federal officials made representations that probably led Syncrude representatives to conclude that the company would not be prosecuted under the *Migratory Birds Convention Act* if it used due diligence to keep birds from landing on its tailings ponds. That is not sufficient for the defence of officially induced error to apply.

[157] The accused must prove the following elements to have the benefit of the defence of due diligence:

- 1) that an error of law or of mixed law and fact was made;
- 2) that the person who committed the act considered the legal consequences of his or her actions;
- 3) that the advice obtained came from an appropriate official;
- 4) that the advice was reasonable;
- 5) that the advice was erroneous; and
- 6) that the person relied on the advice in committing the act.

Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc., [2006] 1 S.C.R. 420 at paras. 21-27; Libman, p. 8-115

[158] Syncrude has not established that the advice it was given was erroneous advice on a question of law or mixed law and fact. The advice suggesting that prosecution would not occur, if Syncrude used due diligence to deter birds from the tailings ponds, is a statement of policy and that policy is being reflected in the position the Crown is now taking that a conviction should not be entered if such due diligence is established. It does not support the defence of officially induced error.

[159] I find no communication by any provincial official in connection with the provincial charge that would have mislead Syncrude on a question of law or mixed law and fact.

12. *De Minimis*

[160] Syncrude argues that I should apply the doctrine of *de minimis non curat lex* (the law does not concern itself with trifles) as a defence.

[161] In *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 65, Gonthier, J., speaking for the majority and dealing with principles of statutory interpretation, cited the following explanation of *de minimis* by Sir William Scott in the case of *The "Reward"* (1818), 2 Dods. 265, 165 E.R. 1482, at pp. 269-70 and p. 1484:

The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. -- Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

[162] Gonthier, J. also observed at para. 55:

... It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment. ... Everyone is aware that individually and collectively, we are responsible for preserving the natural environment.

[163] The doctrine has been recognized as a defence in cases of strict liability. For example: *R. v. St. Paul (Town)*, [1993] A.J. No. 953 (Alta. Prov. Ct.); *R. v. Starosielski*, [2001 A.J. No. 1453 (Alta. Prov. Ct.); *R. v. G.(T.)*, [1990] A.J. No. 39 (Alta. Prov. Ct.).

[164] Other cases suggest that the doctrine should not apply in a regulatory context but I will proceed on the basis that the defence is available for strict liability offences. For example: *R. v. Petro-Canada*, 2009 ONCJ 179.

[165] On the facts as I have found them here, however, Syncrude's conduct in connection with the offences is not minimal or trivial. Unfortunately some waterfowl will die in the tar sands tailings ponds regardless of deterrent efforts. More birds will die without effective deterrents. I have no doubt that, in this context, the failure to take all reasonable steps to deter waterfowl from the Aurora Settling Basin was not at all trivial.

F. Conclusion

[166] In light of the findings I have made, Syncrude Canada Ltd. is found guilty of both counts in the Information.

Heard on March 1-4, 8-10, 15-18, 22-25, 29-31, April 6-7, 12, 19-20 and 23-29, 2010.
Dated at the City of St. Albert, Alberta this 25th day of June, 2010.

K. E. Tjosvold
A Judge of the Provincial Court of Alberta

Appearances:

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