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R. v. Courtaulds Fibres Canada

Between

**Her Majesty The Queen, and
Courtaulds Fibres Canada**

[1992] O.J. No. 1972

76 C.C.C. (3d) 68

9 C.E.L.R. (N.S.) 304

17 W.C.B. (2d) 61

Ontario Court of Justice - Provincial Division
Cornwall, Ontario

Fitzpatrick Prov. Div. J.

June 19, 1992

(16 pp.)

Pollution -- Offences -- Strict liability offences -- Defences -- Due diligence -- Discharge of pollutants into waterway from aging plant facilities -- Whether efforts to solve problem expended for sufficient period to constitute due diligence.

This was the trial of the accused corporation on charges under the Environmental Protection Act and Ontario Water Resources Act. Pollutant or contaminant acid was released into the waters of the St. Lawrence River from pipes running from aging plants of the accused. Spills were due to human error or faulty equipment. At issue was whether the accused "permitted" the discharge so as to constitute the offence and whether the defence of due diligence had been made out in light of evidence that the accused company had made efforts to educate its employees through mandatory study sessions and steps taken to improve the equipment over the last 11 months.

HELD: The accused was acquitted. The potential of spills impairing the quality of water and inflicting damages was all that was needed to give rise to the offence. Due diligence and reasonable

care required a high standard of awareness and decisive, prompt and continuing action. However, superhuman efforts were not required. To demand any more would make the offence one of absolute liability. While the aging plant needed immediate attention, all of the environmental ills could not be addressed in 11 months. However, such a period of time given the continuous efforts of the accused to address the problem proved the accused used reasonable care and exercised due diligence. The time the accused was engaged in remedial actions, the state of the factory and the problems all were to be considered and balanced. Eleven months of concerned attention and ongoing consultation with the Ministry constituted a sufficient period to make out the defence.

Statutes, Regulations and Rules Cited:

Environmental Protection Act.
Ontario Water Resources Act.

F. Mencarelli, for the Provincial Prosecutor.
R. McLeod, Q.C., for the Accused.

FITZPATRICK PROV. DIV. J. (orally):-- **Courtaulds Fibres** Canada is charged with 13 counts under Section 13(1) of the Environmental Protection Act, and 13 counts under the Section 16(a) of the Ontario Water Resources Act. These charges arose as a result of 13 incidents or "spills", which it is alleged occurred between December, 1988, and March of 1990.

Courtaulds Fibres Canada is a wholly owned subsidiary of **Courtaulds Fibres** Incorporated, in the United States, and the latter is, in turn, a wholly owned subsidiary of Courtaulds P.L.C. of London. England.

Courtaulds Fibres Canada is located towards the east end of the City of Cornwall, on the north side of Highway Number Two, and on the south side of the highway is the St. Lawrence River. **Courtaulds Fibres** Canada produces rayon fibre, and has a capacity of about 75 million pounds a year. **Courtaulds Fibres** Canada consists, in its manufacturing process, of three major areas of sections.

The first section produces the solution from which the fibre is made. It is called the "viscose making plant." The evidence disclosed it to be very up-to-date, and according to the evidence of Mr. Drumer, the Vice President of Operations, and the most senior company executive at Cornwall, it is the most modern plant in existence, of any viscose producer. This plant was built during the years 1982 to 1983.

The second section of the plant is usually called the "spin finish". That is the spinning and

finishing section where the fibre is actually produced. This section of the plant was built In 1948. The third section comprises of a very large area which deals with the acids into which the solution containing cellulose is spun. It contained, at the time of Mr. Drumer's arrival in January of 1988, approximately 80 tanks, 100 pumps, and a huge network of pipe work. Most of this area of the plant was built between 1948 and 1952. The acid recovery part of the process was the critical area, where modernization of equipment and the channelling and containment of any spills required urgent attention.

The effluent from the plant was carried by two major pipes, one for alkaline, and the other for acidic discharges, extending, submerged, about 200 feet into the St. Lawrence River. Each pipe has what is known as a "diffuser," at the end of each. It is a rather impressive word for what is in reality just holes in a section of each pipe, to assist in the dilution of the discharges. I think it's important to note that these pipes were installed with the approval of the Ministry, in 1978.

I do not propose to describe all 13 incidents in detail. I find, on reviewing the evidence, that spills occurred in all 13 instances, that they occurred on the Company's property, and involved machinery and equipment owned and used by the Company, its employees, or contractors hired by the Company. I also find that in each incident, a pollutant or a contaminant acid, oleic acid and/or zinc, was released into the waters of the St. Lawrence River, and had the potential to cause an adverse effect on these waters, and on the aquatic life which might be found therein.

The defense to these charges, on the merits, concerns itself mainly, first of all, with whether the Company permitted the discharge. In other words, whether it failed to prevent an occurrence which it ought to have foreseen, whether the contents of the spills, acid and zinc, might or did impair the quality of the water. Finally, the main thrust of the defense submissions, on the merits, the question of due diligence. It is my view that the question of "permitting" is so interwoven with the defense of due diligence, that I propose to consider the former in coming to a decision on the latter.

With regard to the so-called "science" argument, as to the question as to whether or not the discharge material might impair the quality of the water, on that argument, the evidence of Doctor Sprague and Doctor Hutchinson came under close scrutiny, with reference to their substantially opposing views of the effect the spills would have had on the waters of the St. Lawrence and the aquatic life therein.

I would conclude, that in view of the judgment of Madame Justice Corbett, in the *Toronto Electric Commissioners v. the Queen*, that it is the potential of the spills impairing the quality of the water and inflicting damage on the aquatic life therein, which constitutes the offence.

In that judgment, Madame Justice Corbett stated: "In my opinion, the offence is constituted when the Crown proves that any material discharged into Lake Ontario may impair the quality of the water course." She continued: "The section is broad and the use of the words "may impair", shows the intention of the legislation is not to prohibit the results of certain acts but to prevent the

discharge of any material which, by its nature, may impair the quality of the water course."

It is true that the substance at issue in the *Toronto Electric Commissioners v. The Queen* was P.C.B.'s, and that in the present case the spills consisted of acid, oleic acid and zinc. I am asked to find that Madame Justice Corbett's judgment, though of course it is binding on me, can be distinguished here, because clearly the contents of the spills are patently far less lethal than P.C.B.'s. To make that distinction, would, in my view, be to take an extremely narrow view of Madame Justice Corbett's judgment. The wider view, and I believe the correct one, is to conclude that if oleic acid and zinc may impair the quality of the waters, and I find on the evidence presented that they could have, then that essentially constitutes the offence.

Before proceeding to a consideration of the due diligence defense, I think it necessary, since they formed an important, indeed a crucial part of the Crown's case, to determine the use which might be made of the Spill Occurrence Reports. These reports are required to be filed by Statute, and were properly filed by the Company after each spill, except in one instance when there was a late filing, which had a satisfactory explanation.

Since these reports were made as required by Statute, the admissibility thereof into evidence cannot be a matter of serious dispute. The crucial question is, whether they can be fully admissible for the truth of their contents.

In view of the judgment of the Ontario Court of Appeal in *R. v. Strand Electric, O.R.*, 1969, Volume 1, at page 90, I conclude that they can be. Further that although that judgment was a pre-Charter judgment, its conclusions are still valid and unchanged by Charter considerations. I cannot conclude that the Corporation's Charter Rights are infringed by the use of these reports for the truth of their contents.

I turn now to the crucial question, as to whether or not, on the merits, the defense has proved that the Corporation took all reasonable care, and therefore displayed due diligence. The defense of due diligence, in strict liability cases, finds its genesis in the words of Mr. Justice Dickson, as he then was, in *R. v. the City of Sault Ste. Marie*, 40 C.C.C., 2nd, page 353, at page 374 when he defines strict liability offences as "offences in which there is no necessity for the prosecution to prove the existence of mens rea, the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man should have done in the circumstances. The defense will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."

As I outlined earlier, the defendant Company's plant had three main sections. One of these, the viscose making plant, was very up-to-date. The spin finish section, built in 1948, required, on Mr. Drumer's evidence, some improvements and modernization which would have cost perhaps as much as one million dollars.

The main problems were to be found in the section which handled the acids. The evidence disclosed it was built between 1948 and 1952, using the current materials, carbon steel, either lined with rubber or lead, and thus subject to corrosion.

On Mr. Drumer's own evidence, this plant had another major weakness. I would refer to his evidence at page 25 thereof.

In answer to a question from Mr. McLeod, Mr. Drumer said:

"A. Either lined with rubber, or lined with lead. It was subject to corrosion, and subject to more accelerated wear than other parts of the Plant. This section of the Plant had also another major weakness. This is because it was constructed in 1948 to 52. It was constructed according to the practice and requirements of that period.

Q. I'm sorry, sir, "the construction and practices of that period," that "period" meaning?

A. 1948 to 1932.

Q. "Practices" meaning what? Are you talking industrywide, or are you talking Companywide? Please help His Honour on that, if you can.

A. Generally industrywide. So for example, the construction of the floors, the way the tanks were located, pumps and pipe work, were such that any spillage could not be contained. In fact, not only did the spillages could not be contained, but the main effluent channels taking the various cooling waters from the Plant, were deliberately directed right in between the main tanks, so that if there was any spillage, the spillage would then go into the main channel, and go then into the river. The Plant also was very poorly instrumented. So for example, most of the tanks were not equipped with any level alarms. Essentially, people had to observe the levels in the various tanks, and then try to act to prohibit a spillage. The other very big weakness was that any equipment failures, as for example a failure of a valve, or failure of a gland on a pump, could result in major loss of chemicals, which again could not be prevented from entering the channel, water channel, which would directly flow into the river."

There had been a Control Order governing effluent imposed on the Company by the Ministry, in 1977. On the expiration of that Order, the evidence would seem to be clear that the Company continued to feel bound by the conditions of that Order, and attempted to abide by its terms. We were informed that in the middle of the 80's, and the late 80's, the Ministry was considering the

imposition of a new Order, but one was not made. In the years 1988, 1989, and 1990, a Company Official, Mr. Harwood, was very engaged as the Company's nominee to MISA, giving expert advice to the Ministry, with reference to that program. It is significant that as early as 1985, Mr. Helliard of the Ministry, and Mr. Martin representing the Company, had been engaging in continuing and detailed discussions as to the Ministry's requirements for the Company. It is clear that although a new Control Order was contemplated, the terms of such an Order were never determined by the Ministry.

One has to conclude, I believe, that during 1988, 1989, and 1990, the Company was making an earnest effort to address environmental concerns, and was engaged in a continuous dialogue with the Ministry's Officials to that end.

There is no doubt, that at the time of Mr. Drumer's appointment, apart from the viscose making plant, Courtaulds was an aging facility. The years had taken their toll, and equipment had become antiquated and prone to breakdown, and thus subject, inevitably, to spills.

The spills occurred because of human error and/or faulty equipment. Once a worker is properly trained by the employer for the tasks to be performed, it would be unreasonable to conclude that the employer should be held responsible for an employee's error, which neither training nor anticipation could prevent or foresee.

Equipment failure, in the case of aging equipment, or equipment which previously had caused difficulty, must be closely scrutinized, to determine whether or not the failure could have been prevented by the Company, or whether the Company exercised all due diligence in keeping that equipment in good repair. Spontaneous failure of sound equipment is of course subject to the same scrutiny, but clearly not to the same degree.

In the case at bar, I must conclude, that certainly from Mr. Drumer's arrival, employees were being properly trained, particularly with regard to environmental concerns, and as I will presently detail, aging equipment was receiving as urgent attention as was possible, in the circumstances.

I take these efforts and actions to be part of the due diligence demonstrated by the Company, and therefore part of the equation which I must use in considering whether or not the Company can be concluded to have been duly diligent, in all of the circumstances.

Against that background, and with a clear and urgent need to modernize the various critical sections of the plant, and educate the work force on environmental concerns, the Company, in January of 1988, appointed Mr. Drumer Vice President of Operations, and thus the senior Company Official at Cornwall. Mr. Drumer is, by profession, a Chemical Engineer, of some 28 years experience, at the time he joined the Company in Cornwall. For the three years immediately preceding that appointment, he was Vice President of Operations of a Courtaulds facility in New Jersey, and was deeply involved in environmental matters at that plant. His legal advisor on such matters, at that time, was a lawyer, Mr. Edward Hogan, who was the Chairman of the New Jersey

Environmental Lawyers Association.

One cannot escape the conclusion, of course, that Mr. Drumer's appointment at the Cornwall plant was triggered largely by the Company's rising anxiety over the deteriorating condition of certain areas of the plant, and the burgeoning environmental problems.

Mr. Drumer wasted no time facing these concerns and problems, on his arrival at Cornwall. He immediately arranged seminars for all Management, from supervisors up, and engaged a counsel who was extremely experienced in Environmental law, to attend, and in fact give these seminars.

Specific attention was given to the requirements and provisions of the Environmental Protection Act, and the Ontario Water Resources Act, as they affected the Company, in its manufacturing operation.

It is to be noted that Mr. Drumer's arrival on the scene occurred some 11 months before the first spill with which we are here concerned. Mr. Drumer then moved to make needed improvements to the equipment. An immediate concern was the installation of level alarms on the various tanks. After further meetings with counsel, instructions were issued for the installation of 95 level alarms. This was done, commencing in the autumn of 1988, and finishing in early 1989. Mr. Drumer also turned his attention to the acid recovery system, the source of so many problems, realizing that major changes had to be made. He called on the technical skills to be found throughout the Courtaulds operation, to assist in planning these changes, and at the same time was dealing with the always present problem in these circumstances, of attempting to persuade Head Office to advance the funds that were necessary for what was to be a very expensive undertaking.

At the same time, employees on the line were attending meetings and receiving instructions and directions as to their responsibilities and duties, when dealing with environmental problems such as the spills which we are concerned with here. As previously mentioned, all spills which are the subject of these charges, were, as required by Statute, promptly reported, with one noted and explained exception.

When one considers the actions taken by Mr. Drumer, almost from the day of his arrival at Courtaulds, there can be no doubt that he effected a dramatic change of attitude, and a remarkable change of procedures, with regard to environmental problems at the Cornwall plant. I have not here detailed all of the actions taken by Mr. Drumer, and ordered by him, in this area, but the overwhelming impression is, that he did all that could be done at that time, to address as quickly and as completely as possible, the environmental problems which the Company faced.

I may say, I was very impressed by Mr. Drumer's evidence. He is clearly a highly skilled, highly trained, and highly motivated Executive, who grasped at once the problems facing the Company in the environmental field, and did not allow even the consideration of profit, to interfere with what he determined had to be done, to deal with these problems.

Even witnesses for the Crown, specifically Officials of the Ministry, admitted that his arrival on the scene, heralded the beginning of a dramatic turnaround. For example, Mr. Helliard, the Area Supervisor with the Ontario Ministry of the Environment, in giving his evidence, on page 38 of his evidence, Mr. McLeod questioned him as follows:

- "Q. On this area then, Mr. Helliard, can we agree that particularly since 1988 and the arrival of Mr. Drumer as the senior person at the Courtaulds plant, a plant with whom you had some considerable connection for many years, and I'm sorry this question is so long, but particularly since 1988, there has been in your perception an increased effort on the part of the Company, to try as best they could, given financial restraints, to meet the requirements for environmental compliance, that you, as the relevant abatement officer, had placed before them?
- A. He has been a positive influence on that plant in many other areas besides the environmental, but as far as my dealings with him, certainly in the environmental area, and I think with the people who report to him, have been very positive, and when you think about it, a lot of the improvements lately have been under his initiation somewhat, and also his, you know, to take on the problems and want to deal with them, ones that were very difficult, such as these spill problems, and develop solutions. So I, you know, I'm very pleased with these efforts that he's made, and people that report under him, also have worked very hard to deal with these problems, and I acknowledge that."

Counsel for the Crown also concedes that this was so. The critical questions to be answered are these: Was what was done, done soon enough? Was it enough? Or was it too little, too late?

It is urged on me by counsel for the Company, that all the steps which were taken to improve equipment, in order to prevent spills, the holding of study sessions which were mandatory for all personnel involved in production, and detailed plans being put into operation for further improvement, are persuasive and conclusive evidence that the Company did all that could be done, and considering the time frame involved, did it as quickly as possible, and thus took all reasonable care and due diligence to prevent the spills in question.

The Crown urges on me that whilst the actions referred to, might provide the Company with the defense of due diligence some time in the future, if further spills occurred, they were not taken soon enough to allow the Company to rely on those actions, to provide a defense on the case at bar.

Admittedly, this was an aging plant, and needed immediate attention. No one could seriously suggest that all of the environmental ills of this Company could be addressed in 11 months. However, I conclude that such a period, given the continuing, and earnest, and widespread efforts of the Company to address its environmental problems, does prove that the Company used all reasonable care, and exercised due diligence with reference to the spills we are dealing with.

Reasonable care and due diligence do not mean superhuman efforts. They mean a high

standard of awareness and decisive, prompt, and continuing action. To demand more, would, in my view, move a strict liability offence dangerously close to one of absolute liability.

The question of how long a company must prove that it was due diligent, before it can become a valid defense, cannot be clearly answered by considering only how long the Company was so engaged. The state of the facility, the age of the facility, the problems to be addressed, and the scope of the actions taken to deal with them, as well as the time the company was engaged in remedial action, must all be weighed and balanced.

In the present case, it is my conclusion that when all of these matters have been considered, a period of 11 months of concerned attention, and also considering the consultations I have noted from the years 1985, between the Ministry Officials and the Company Officials, constitute a sufficient period to make the defense of due diligence a valid defense, and one which has been proved by the Company.

Therefore, having so found that the Company has proved that it was duly diligent with regard to all of the counts, I find the Company not guilty on all counts.

---- End of Request ----

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