

Green Crime in the Canadian Courts: Issues and Controversies

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Received: December 15, 2012 Accepted: January 30, 2013 Online Published: May 30, 2013

doi:10.5539/jpl.v6n2p48

URL: <http://dx.doi.org/10.5539/jpl.v6n2p48>

Abstract

This paper examines the challenges prosecutors face in successfully convicting individuals and corporations of environmental or “green crime” offences in Canada. The data used in this study consist of 29 legal case files of alleged green crimes in the province of Ontario in the last five years (2008-2012). Successfully prosecuting environmental offenders appears difficult due to several complex, inter-connecting challenges. The common difficulties that are examined in this paper include: challenges of legal definition, jurisdictional issues, liability questions, constitutional rights, burden of proof, admissibility of evidence, and due process considerations.

Keywords: Canadian environmental law, green crime, unobtrusive measures

1. Introduction

Internationally, it is estimated that over \$22 billion is made annually from illegal dumping of hazardous waste, smuggling of hazardous materials, and the unlawful extraction of natural resources (International Crime Threat Assessment, 2000). Despite these alarming figures, few environmental or “green” crimes are reported, fewer still result in criminal trials, and rarely do convictions result (White, 2011). Through the unobtrusive examination of 29 legal case files in the province of Ontario over the last five years, this paper examines the challenges prosecutors face in successfully convicting individuals and corporations of green crime offences in Canada.

Green crime can be defined as crime or regulatory infractions against the environment (Lynch & Stretsky, 2003). Many criminologists have turned to using green crime over the term environmental crime to delineate the concept from the field of Environmental Criminology, which holds a broader definition of “environment” that can include social factors that lead an individual to commit crime. The term green crime refers specifically to offences against the natural environment, such as air pollution, water pollution, deforestation, wildlife poaching, and the unlawful dumping of hazardous waste. In Canada, many green crimes are considered “regulatory offences” or “quasi-crimes” as they violate municipal, provincial, national, and international policies but are not in direct violation of the Canadian Criminal Code.

The subject of green crime and environmental law in Canada has been studied extensively. Some of the topics of inquiry have included the history of environmental law (Emond, 2008; VanNijnatten, 1999; Delicaet, 1995; Hunt, 1994), racism and environmental waste disposal (Dhillon & Young, 2010), feminist perspectives on Canadian environmental law (McLeod-Kilmurray, 2009), government action regarding environmental law violations (Winfield, 2008), environmental crime as accident or crime (Snider 2004), economic aspects of Canadian environmental law (Richardson, 2004), critical perspectives on environmental law (Boyd, 2004; Hawke, 1997), overviews of environmental laws in Canada (Cotton & Zimmer, 1992), political aspects of environmental law (Hawke, 2002; Howlett, 2000), and globalization and environmental law (Paehlke, 2000; Harrison, 1995; Jeffrey, 1994; Hoberg, 1991). This study contributes to this growing body of literature by examining the legal difficulties of successfully prosecuting green crimes.

2. Method

The methodological approach of this paper is informed by unobtrusive or what is sometimes termed non-reactive measures (Webb et al., 1981). This process entails the use of data that a) involve no human contact, and b) were not created for the direct purpose of academic study. The data used in this study consist of 29 legal case files of alleged green crimes in the province of Ontario in the last five years (2008-2012). The 29 legal cases represent a

purposive sample of all cases that the researchers were able to locate through the legal database canlii.org. The search was limited to Ontario as Environmental Law changes across the provinces in Canada, allowing for a more straightforward analysis. Likewise, only cases from the last 5 years were included to allow for the examination of current trends in the kinds of issues that are present.

Legal case files are a form of unobtrusive data in that researchers can access the data without conducting interviews, observations, or other methods involving direct contact with people. Furthermore, legal case files are not created for the specific purpose of researchers using them as data in academic research. The legal challenges of prosecuting each crime were examined in each of the legal case files, revealing several recurrent themes.

3. Legal Challenges

Successfully prosecuting environmental offenders appears difficult due to several complex, inter-connecting challenges. No two cases are the same, but many common challenges emerge in different cases and are enacted in different combinations typically by the legal defence team. There are challenges of legal definition, jurisdiction, liability, constitutional rights, burden of proof, admissibility of evidence, and due process among others. Using examples from legal cases, many these complex challenges will be highlighted in this section.

Environmental law in Canada is complicated, involving various pieces of municipal, provincial, federal, and international legislation. For the most part, it is absent from the Canadian Criminal Code. A preliminary task of the state is to sort out which regulations have been violated, and in instances of legislative overlap, which regulation should be deferred to.

The cases examined in this study involved many different acts for lawyers and judges to work through and interpret including the Environmental Protection Act (*R. v. 310 Waste Ltd. et al.*, 2011; *R. v. Conestoga Rovers and Associates Inc.*, 2011; *R. v. 1365657 Ontario Limited*, 2010; *R. v. Gardex Chemicals Ltd.*, 2007; *R. v. Hanna*, 2010; *R. v. Maple Leaf Foods Inc.*, 2009; *R. v. 310 Waste Limited et al.*, 2009; *R. v. Corporation of the City of Sault Ste. Marie*, 2008; *R. v. Stelco Inc.*, 2011; *R. v. Castonguay Blasting Ltd.*, 2011; *R. v. Neilson*, 2012), Fisheries Act (*R. v. Montgomery et al.*, 2009; *R. v. Sameluk*, 2012; *R. v. St. Cyr*, 2009; *R. v. Sutherland*, 2010; *R. v. Williams Operating Corporation*, 2008), Conservation Authorities Act (*R. v. Allan*, 2009), Water Resources Act (*R. v. Inco Limited*, 2008; *R. v. Petro-Canada*, 2008; *R. v. Petro-Canada*, 2009; *R. v. Corporation City of Thunder Bay*, 2011; *R. v. R.W. Tomlinson Limited*, 2011), Niagara Escarpment Planning and Development Act (*R. v. Leckebusch*, 2012), Transportation of Dangerous Goods Act (*R. v. Quik X Transportation Inc.*, 2011) Oil, Gas, and Salt Resources Act (*R. v. Metalore Resources Limited*, 2012), Fish and Wildlife Conservation Act (*R. v. Wang*, 2012), Aggregate Resources Act (*R. v. Nichols*, 2012; *R. v. Ontario Corp. 311578*, 2012), and Crown Forest Sustainability Act (*R. v. Wetelainen*, 2008).

One common legal defence stemming from unclear, non-centralized laws is a jurisdictional defence. The claim of the defendant is that an incorrect piece of legislation has been used in bringing forth charges. For example, in *R. v. Wetelainen* (2008), the defence argued that the Mining Act should take precedence over the Crown Forest and Sustainability Act and that charges should therefore be dismissed. In *R. v. Montgomery et al.* (2009) used a defence resting on the belief that the Fisheries Act is beyond the jurisdiction of the Canadian courts. In *R. v. Nichols* (2012), the defendant argued that because the infraction occurred on aboriginal lands, that the Aggregate Resources Act could not apply. While the defence lawyers were unsuccessful in each of these cases, a challenge was placed on the prosecution to establish appropriate jurisdiction in the absence of a single, unified set of environmental laws.

Another common legal defence stemming from unclear environmental laws in Canada is a definitional defence. This defence rests on challenging the prosecutor and judge's interpretation of undefined terms within particular acts. Describing this difficulty, the judge presiding over *R. v. Leckebusch* (2012) stated, "In conducting such an analysis of the evidence and the law, I will need to, from time to time, embark on an exercise in statutory interpretation" (p. 12). One of the defences used in *R. v. Inco Limited* (2008) was surrounding the appropriate definition of "Waterway", where the judge conceded that the contaminated water pool might be better considered a ditch than a waterway. In another case, questions arose on whether or not the contaminant could be considered a "deleterious substance" (*R. v. Williams Operating Corporation*, 2008), and in another around the term "Pit" (*R. v. Ontario Corp. 311578*, 2012), and in another around the term "fish habitat" (*Sutherland*, 2010).

The appropriate determination of liability is another challenge for prosecutors to establish. That is, the question of who can and should be held responsible for the crime must be answered. Previous to 2004, this was significant challenge as corporations were not deemed to be entities that could be punished under Criminal Law. However, the Canadian Criminal Code (Sections 271.1 and 219-221) were amended in 2004 to allow for criminal liability of corporations. As many of the cases in this study indicate, this has significantly strengthened the ability to

successfully prosecute companies for green crimes. However, challenges of liability still remain. For example, in *R. v. Stelco* (2011) the defence lawyers argued that the wrong company had been put on trial, because the company had recently changed ownership. Similarly, the defence in *R. v. Conestoga Rovers and Associates Inc.* (2011) successfully argued that blame had been misattributed to CRA and Associates rather than CRA Contracting, which shared a similar name and proximity but were not working in concert under the same management.

Many cases of green crime also rely on a constitutional defence that invokes provisions of the Charter of Rights and Freedoms. One way this is done is to claim that too much time has passed since the alleged criminal infraction, violating the right to be tried within a reasonable time (Section 11b). This claim was used successfully in *R. v. 1365657 Ontario Limited* (2010), and unsuccessfully in *R. v. Gardex Chemicals Ltd.* (2007) and *R. v. Hanna* (2010). Another Charter defence involves the violation of rights to no unreasonable search or seizure (Section 8). In *R. v. Maple Leaf Foods* (2009) the defence successfully argued that investigators had engaged in an unreasonable search of the factory following an odour complaint.

Once the appropriate law, liability, and procedure are established, a challenge for prosecutors is establishing burden of proof for *actus reus*. Essentially, the prosecutor must prove beyond a reasonable doubt that the individual or corporation committed the act that violated the law. One significant issue in accomplishing this in many green crimes is a lack of corroborative evidence. There is, so to speak, no “smoking gun” in many crimes against the environment. There are also often no witnesses to the crime having taken place. In *R. v. Allan* (2009) investigators found a pile of rocks that diverted a stream towards the property of the accused. Nobody saw the accused put the rocks there, and he claimed that an obstruction further up the stream had caused the water to flood towards his land.

This ties to a further difficulty related to burden of proof to establish *actus reus*, which is the presence of ambient conditions. Ambient conditions are uncontrolled weather conditions that occur in nature. In *R. v. Inco Limited* (2008) the defence argued that particular weather conditions and environmental interactions were responsible for increased nickel content in a waterway, as opposed to any illegal dumping of hazardous material by the corporation. It became a trial of expert testimony to determine the true cause of the heightened nickel content.

The questioning of scientific knowledge and scientific experts in the courtroom is an added difficulty in establishing proof of the perpetration of an offence. In *R. v. Inco Limited* (2008) the court heard 11 days of expert testimony and evidence to refute and support each claim. The scientists themselves were, in a sense, put on trial. Describing the challenge, the judge presiding over the case stated “It would be unrealistic to expect that a trier of fact may authoritatively pronounce on the best scientific practices. A court is typically not well-equipped to do so. The court must examine the strength of evidence and determine where possible which conflicting version of evidence to accept” (p. 10). Similar challenges of expert testimony were made in *R. v. Sutherland* (2010) and *R. v. Metalore Resources Limited* (2012). Due to these challenges of scientific knowledge, evidence, and expertise, *voir dire*s become commonplace in trials relating to environmental crimes, where trials are essentially held within trials to determine evidence admissibility.

Once *actus reus* has been established, prosecutors of environmental offenders are not typically required to establish *mens rea*. According to the judge in *R. v. Neilson* (2012), “The charge before this court is a strict liability offence. Once the *actus reus* of the offence is proved a conviction must follow unless the defendant exercised due diligence to avoid the commission of the offence” (p.9). While strict liability offences do not require establishing *mens rea*, the defence is given an opportunity to establish due diligence to negate the offence. Essentially, if they can establish that reasonable steps were taken to avoid the offence, then charges can be dismissed.

Tied to a defence of due diligence is a lack of foreseeability defence. In *R. v. 301 Waste Ltd. et al.* (2011) the judge stated, “A lack of foreseeability, may, however be invoked by the defendant in a due diligence defence to say that although the event occurred, it was ‘not something that I could have foreseen’” (p. 21). In this case, the defendant argued that they could not have foreseen that their pile of compacted garbage would combust. They had, however, received a warning by a fire marshal and had experienced a smaller fire one month earlier. 301 Waste Ltd. Was convicted, but the case highlights more of the avenues that the defence has to have charges dismissed.

Similar to a lack of foreseeability defence is a mistake of fact defence. A mistake of fact defence does not rest on the accused claiming he or she did not understand the law but rather, that based on available information he or she could not have known the law was being violated. In *R. v. R.W. Tomlinson Limited* (2011), the defence

argued that the accused had believed a sewage system was a closed system based on information they had, and that it therefore did not fall under regulations of the Ontario Water Resources Act.

In cases where actus reus is established, no Charter infringement claims are successfully made, corroborative evidence establishes actus reus, and no due process, lack of foreseeability, or mistake of fact argument is made, prosecutors still face one more significant challenge to gain a conviction: the legal notion of *de minimis non curat lex*. This can be translated to mean "The law does not concern itself with trifles" (Garner, 1999, p. 443). The defence argument is that the offence is so slight and the harm so minimal that no conviction should result. Petro-Canada (2009) was successful in their defence using this claim, as was Inco Limited (2008).

4. Conclusion

Further research is necessary on this topic to begin to develop the appropriate strategies to effectively control and prevent green crime in Canada. Green crimes are not a "trifle" matter as many defence lawyers have argued, sometimes successfully, in Canadian courts. The consequences of green crimes are considerable. They can have an adverse impact on nature, wildlife, land value, public health, and the quality of life of future generations. Despite this, green crime remains on the margins of the Criminal Justice System with few cases appearing in the courts, and fewer still resulting in convictions.

This paper has outlined many of the complex and interconnected factors that make gaining successful convictions relating to green crimes difficult under current substantive and procedural laws in Canada. There are unclear laws pertaining to green crime in Canada, issues of jurisdiction, questions of who can and should be held responsible, controversies over the rights of individuals versus the environment, difficulties in collecting, analyzing, and admitting evidence into the courts, as well as procedural provisions that create an onerous task for prosecutors to gain successful convictions. It is vital for the continued protection of the environment and public health that strategies be developed and refined to better identify, report, prosecute, convict, and remediate green crimes in Canada.

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