# In the Provincial Court of Alberta

**Citation: R. v. Dockman, 2017 ABPC 112**

**Date:** 20170510
**Docket:** 150100550P1
**Registry:** Calgary



Between:

**Her Majesty the Queen**

- and -

**Michael Louis Dockman and**
**Dockman & Associates Ltd.**

Accused

**Corrected judgment:** A corrigendum was issued on May 16, 2017; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Judgment of the Honourable Judge W.J. Cummings**

## Introduction

[1] Michael Louis Dockman and Dockman & Associates Ltd.; are charged jointly on a six count Information alleging contraventions of various provisions of an enforcement order issued under the authority of the ***Environmental Protection and Enhancement Act***, SA 2000, Chapter E – 12 as amended. ("the EPEA"). The alleged offences are all characterized as strict liability offences.

[2] The charges arise in relation to the operation of a water treatment plant providing treated water to various residential acreage properties located in the vicinity of Airdrie, Alberta.

[3] Defence brought a preliminary application for a stay of these proceedings (without the benefit of a *Charter* notice but with the consent of the Crown) based on the theft of their own documents prior to trial while those documents were stored within their own possession and control. Defence argued the totality of those documents would have assisted them in advancing the defence of due diligence and without them, they have been denied the opportunity to make full answer and defence. The Court finds this was not one of the clearest of cases where a stay of proceedings should be directed and the application was dismissed.

[4] The issue of liability for the alleged offences as between Mr. Dockman and Dockman & Associates Ltd. was considered and the Court finds, both in fact and in law, that liability resides solely with Mr. Dockman.

[5] The Court then finds the Crown has proven the *actus reus* of each of the alleged offences beyond a reasonable doubt. Defence raised the defence of due diligence but the Court finds on the balance of probabilities, Mr. Dockman failed to establish due diligence in relation to any or all of the charges before the Court.

[6] Accordingly, Mr. Dockman is convicted of all six counts appearing on the Information and all counts are dismissed as against Dockman & Associates Ltd.



**The Charges**

[7] The six counts as they appear on the Information are specific and detailed and are better identified in the court's discussion appearing at paragraphs 174 to 226 of these reasons.

**The Evidence**

[8] The Crown called six witnesses: Craig Knaus, Jackie Godlien, Craig Reich, Leslie Miller, Nico Mattucci and Aaron Janzen.

[9] Mr. Dockman elected to give evidence as was his right but not his obligation. Defence also called Orland McMillan.

[10] I will refer to Mr. Dockman and all of these various witnesses by their surnames for ease of reference in these reasons and not out of disrespect.

[11] The parties tendered ten exhibits by consent, the first of which was an executed Statement of Agreed Facts dated December 5, 2016 (the "Agreed Statement").

**Facts**

[12] The operative contents of the Agreed Statement are as follows:

1. A signed copy of this Statement of Agreed Facts, tendered by the prosecution as Exhibit 1, contains facts admitted pursuant to s. 655 of the *Criminal Code of Canada* for the purpose of dispensing with the formal proof thereof and is admissible as a full exhibit.
2. At all relevant times Michael Louis Dockman was the sole director and shareholder of Dockman & Associates Ltd. (the "Corporation"). A copy of an Alberta Corporate Registries Search pertaining to Dockman & Associated Ltd. and tendered by the prosecution as Exhibit 2 is admissible as a full exhibit.
3. At all relevant times, Mr. Dockman operated a water treatment and distribution system known as the East Airdrie (Sharp Hill) Waterworks system (the "Waterworks System"). The Waterworks System treated and distributed potable and irrigation water to its customers in the Sharp Hill subdivision near Airdrie, Alberta.

4. The Sharp Hill subdivision consists of residential parcels and was developed by 692591 Alberta Ltd. A copy of an Alberta Corporate Registries Search pertaining to 692591 Alberta Ltd. and tendered by the prosecution as Exhibit 3 is admissible as a full exhibit.
5. On June 11, 2002, Alberta Environment (now Alberta Environment and Parks or AEP) issued Approval No. 151716-00-00 (the "Approval") to the Corporation for construction, operation and reclamation of the East Airdrie Waterworks System. A copy of the Approval tendered by the prosecution as Exhibit 4 is admissible as a full exhibit.
6. The Approval expired in June 2002. AEP extended the Approval to June 1, 2013 by means of a letter dated June 12, 2012. A copy of this letter tendered by the prosecution as Exhibit 5 is admissible as a full exhibit.
7. The Corporation held a license to divert groundwater from wells and treated the water to make it potable, while mixing the reject water from the treatment process with storm water in order to deliver irrigation water and potable water in separate pipes to each residential lot.
8. The raw ground water obtained from the wells contained relatively high concentrations of fluoride and a reverse-osmosis filtering system was used by the Waterworks System to remove excess fluoride from the raw groundwater. The treatment system injected chlorine into the drinking water as a disinfectant to ensure it was free of harmful pathogens while in the distribution system.
9. On May 30, 2013, AEP issued Enforcement Order EO-2013/03-SR (the "Enforcement Order") to Michael Dockman and the Corporation. The Enforcement Order was served on Michael Dockman and the Corporation on the same day. A copy of the Enforcement Order tendered by the prosecution as Exhibit 6 is admissible as a full exhibit.
10. On September 20, 2013, AEP amended the Enforcement Order to remove clauses 14 to 20. The Amended Enforcement Order was served on Michael Dockman and the Corporation on the same day. A copy of the amended Enforcement Order tendered by the prosecution as Exhibit 7 is admissible as a full exhibit.
11. The Enforcement Order expired on January 20, 2014.
12. Monthly log sheets entitled "Monthly Reports" were maintained at the Waterworks System on which were recorded the results of monitoring for parameters including pH and fluoride. The original Monthly Reports for the time period June 1, 2013 to January 17, 2014, tendered by the prosecution collectively as Exhibit 8, are admissible as a full exhibit.
13. Michael Dockman was one of the individuals who made entries in the Monthly Reports.
14. Health Canada publishes Guidelines for Canadian Drinking Water Quality ("Drinking Water Guidelines") which contain a Table 2 prescribing Maximum Acceptable Concentrations for Chemical and Physical Parameters in Canadian drinking water based on health or aesthetic objectives. At the time the Enforcement Order was in effect, the relevant Drinking Water Guideline was the version issued in August 2012. A copy of the Summary Tables from the August 2012 Drinking Water Guidelines, tendered by the prosecution as Exhibit 9 is admissible as a full exhibit.

15. Telephone calls to 1-780-422-4505 are answered by staff in the course of their duties at the provincial Co-ordination and Information Centre (CIC) operated by Alberta Transportation. When a call is answered, staff contemporaneously record the information given by the caller on an electronic Call Information Form and a unique reference number is generated. The staff then forward the Call Information Form to the appropriate agency for either emergency or compliance response and a copy of the Form is archived. The role of CIC staff is limited to collecting appropriate information and ensuring that it is passed along. Copies of archived Call Information Forms generated by CIC as a result of contravention reports by or on behalf of Michael Dockman and Dockman and Associates Ltd. under the Enforcement Order for the time period June 1, 2013 to January 31, 2014 and tendered by the prosecution collectively as Exhibit 10 are admissible as a full exhibit.



[13] The terms defined and used in the Agreed Statement will be used throughout the course of these reasons.

**Issues**

[14] The issues are as follows:

1. First, should this Court direct a stay of proceedings as a consequence of the alleged theft of documents?
2. Second, if a stay is not granted, where does liability rest as between Dockman and the Corporation?
3. Third, has the Crown proven the *actus reus* of each of the alleged offenses beyond a reasonable doubt?
4. Fourth, if the *actus reus* has been proven, has the accused established the defense of "due diligence" on a balance of probabilities, such that they took all reasonable steps to prevent the commission of the alleged offenses?

**The Stay Application**

[15] The Crown waived any requirement for a *Charte*r Notice to be filed by Defence claiming *Charter* relief in relation to the accused's application for a stay of proceedings.

**Facts**

[16] The following additional facts relate directly to the stay application.

[17] Dockman had more than an 11 year involvement with Waterworks System treating and then distributing potable and irrigation water to its customers in the Sharp Hill residential subdivision near Airdrie from the time the Corporation became the holder of the Approval effective June 11th, 2002, until the Approval's expiry on June 1st, 2012. The Approval proceeded through an initial extension to June 1st, 2013 and a further extension to January 20th, 2014 by way of the Enforcement Order and the Amended Enforcement Order.

[18] In addition to the Corporation's real estate consulting business, Dockman has been involved in several small businesses throughout his life. Dockman and McMillan partnered an active real estate service company and to the time of trial, Dockman remained as one of its

shareholders. Dockman and McMillan originally partnered to consider the Sharp Hill development in its early stages.

[19] Dockman was founding president and chairman of the Rocky View Water Co-op and served for three and a half years prior to him becoming involved in the Waterworks System in 2001.

[20] The Waterworks Systems plant was comprised of two buildings. The plant itself was comprised of a pond for brackish water, water wells supplying water and a small, one room building containing a desk together with reverse osmosis treatment equipment. An on-site office for operating the water utility was located right beside the storm water pond providing the irrigation water.

[21] The door to the buildings were secured by a lock. Mattucci, Godlien and Dockman had keys.

[22] Even when the facility was operational, it was attended to by a rotation of people without 24 hour, seven day a week on-site supervision.

[23] On average, Godlien went to the building twice a week. Typically, no one else was there while she was at the building. On occasion, Dockman came with her and on one or two other occasions, she met Mattucci but most of the time she was there alone.

[24] Mattucci would try to go to the plant every day, but that fluctuated with his other work as a truck driver.

[25] The plant's office was broken into in February, 2016 and was almost entirely emptied of its contents. The Waterworks System's documents had all been left at the plant in the office. The entirety of its records collected over the span of more than 11 years were contained within seven filing cabinets located in the plant's office, all of which had been removed from the office, along with all of the contents of the cabinets.

[26] Five of the filing cabinets were stolen but two of the seven cabinets were found outside behind the building.

[27] For the purposes of these proceedings, I am prepared to accept Dockman's evidence that all of the records located in the office, whatever they amounted to, had been stolen and had not somehow been misplaced.

[28] Dockman recollected, but had no evidentiary basis to say they included the following:

1) Several training and policy manuals.

2) A copy of the Approval.

3) Copies of the "seven day reports" to the Director.

4) The original Monthly Records for April and May, 2013.

5) A copy of the Enforcement Order.

6) Records of the de-commissioning of the Waterworks System's well five.

7) Dockman's own disorganized records of his phone calls to the Alberta Environment call centre concerning pH excess and fluoride and other matters.

[29] If an emergency arose when nobody was in the plant over the term of the Enforcement Order, which was normally the case, no one would be physically present to deal with that emergency. If Dockman was not at the plant and had he been notified by Mattucci or Godlien by telephone of an emergency, there were various operating procedures in place to deal with that emergency.

[30] Dockman was not physically present in the plant to deal with emergencies from and after August 1st, 2013. By September 1st, 2013, Dockman had moved to Edmonton to attend university.



**Parties Positions- Stay of Proceedings**

**Defence**

[31] Mr. Anderson for the co-accused argues the February, 2016 theft of an undetermined scope and quantity of relevant records contained in seven filing cabinets relating to the Waterworks System had been owned or operated by East Airdrie Water System Ltd., North East Water System Ltd. and the Corporation for 11 years put those documents entirely out of their reach. As a result, they have been denied the right to make full answer and defence and an unfair trial results. They had no obligation to preserve or produce evidence at trial unless ordered to do so by the Court. No other remedy will cure the prejudice occasioned by the theft of their records and a stay of proceedings is the only just remedy. Defence briefly raises, but does not argue, the equality rights section of the *Charter*, section 15(1).

**Crown**

[32] Mr. Roginski for the Crown first submits the documents sought to be relied on by Defence were in their own possession at the time of their theft and accordingly, there is no allegation of, or state involvement in their loss.

[33] Crown then argues the following:

[34] While the onus is on Dockman to establish a *Charte*r violation, for multiple reasons, he has failed to meet that burden by failing to establish the necessary evidentiary and legal foundation and a stay of proceedings ought to be denied.

[35] There is insufficient evidence as to the materiality and importance of these records to establish actual prejudice**.** Simply saying the contents of filing cabinets have disappeared does nothing to tie the relevance of the contents to the accused's defence of due diligence. If the Court were to find actual prejudice occurred by the theft of the records, Dockman still had an obligation to show he took reasonable steps to care for them.

[36] Dockman has, by his admissions contained in the Agreed Statement, conceded that particular documents are now part of the evidentiary record including the relevant monthly log sheets and Enforcement Order and from the Crown's perspective, it is remote that anything in those documents might support a defence of due diligence.

[37] Dockman knew he was in possession of the records before they were stolen, knew he had been charged with these offences, knew this trial was on the horizon and ought to have taken care to inventory and take reasonable steps to safeguard those documents rather than leave them in an unprotected location. It's not enough to say the records were in a locked building without demonstrating what sort of care was taken to avoid their disappearance.

[38] The Crown argues there is no merit to this application and it ought to be dismissed.

**Law - Stay of Proceedings**

[39] Section 24(1) of the *Charter* provides that anyone whose rights or freedoms are guaranteed by the *Charter* have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[40] The parties cite the following authorities relative to the application:

By Defence: ***R. v. O'Connor***, [1995] 4 SCR 411 (SCC): ***R. v. Carosella***, [1997] 1 SCR 80 (SCC.

By the Crown: ***R. v. Luong***, 2000 ABCA 301 at para. 9: ***R. v. Grimes***, 1998 ABCA 9.

[41] The onus is on the person asserting a *Charter* breach to establish the infringement or denial of the right: ***Luong***, para 9.

[42] In ***Grimes*** the accused sought to uphold a stay of proceedings arguing that certain school and bank records necessary for his defense in possession of third parties after what was claimed to be routine destruction of those records. The Court of Appeal found the trial judge erred by applying the tests in lost evidence cases and in doing so, considered ***Carosella*** but limited its interpretation to the deliberate destruction of records for the purpose of ensuring they would be rendered unavailable to certain parties. At paragraph 11, the Court in ***Grimes*** saw those facts not to align with disclosure cases. The destroyed evidence in ***Carosella*** was never in the possession of the Crown and the Crown's obligation to preserve and disclose evidence never arose as set out in ***R. v. Stinchcombe***, [1994] A.J. No. 216, 149 Q.R. 167 aff'd [1995] 1 SCR 754.

[43] At paragraph 13, the Court commented that section 7 of the *Charter* does not provide an unlimited, unrestricted right to disclose and produce every conceivable item of information and evidence. Not every failure to produce or disclose and not every loss or destruction will result in finding that the right to a fair trial and to a full answer and defence has been breached.

[44] The Court in ***Grimes*** applied the Supreme Court's reasoning in ***R. v. La***, [1997] 2 SCR 680 (SCC) which involved the inadvertent loss of a tape recording in the possession of the Crown. At paragraph 16 in ***Grimes***, the Court referenced the Supreme Court's comments to the effect that even where the Crown has discharged its duty by disclosing all relevant information in its possession and explaining the circumstances of the loss of this evidence, an accused may still rely on the *Charter* to right to make full answer and defence. In extraordinary circumstances, a stay may still be appropriate where the loss of a document may be so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial. But even then, an accused must still establish actual prejudice to his ability to make full answer and defence.

[45] The Court considered the circumstances surrounding the bank records and found there was no evidence those records would serve to corroborate the accused's evidence. At paragraph 21, citing ***Stinchcome***, the Court commented that a judicial stay must be based on clear evidence and cannot be founded entirely on speculation of counsel.

[46] At paragraph 24 in ***Grimes***, the Court considered the effect of the inadvertent loss of relevant evidence in ***La***. In extraordinary circumstances, the loss of the document may be so

prejudicial to the right to make full answer and defence that it impairs the accused's right to receive a fair trial. In those circumstances, a stay may be the appropriate remedy. Citing ***O'Connor,*** a stay of proceedings is only appropriate in the "clearest of cases" were the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were to continue.

[47] At paragraph 25, the Court in ***Grimes*** concluded that to stay proceedings, a trial judge must be satisfied, on a balance of probabilities, that the lost evidence is of such major importance to the defence that a fair trial cannot be had without it or that the loss of that evidence deprives the accused the opportunity to make full answer and defence. Then, and only as a last resort in the "clearest of cases", should a stay result.



**Analysis-Stay of Proceedings**

[48] Defence briefly argues a stay should result in this case by virtue of infringement of section 15(1) of the *Charter* which paraphrased, provides that every individual is equal before the law and has the right to equal protection and equal benefit of the law without discrimination of various forms. The section was only briefly referred to by Defence counsel in oral argument without filing a *Charter* notice, without expanding the argument in oral or written argument and without citing any cases in support.

[49] Rather, Defence relies on extracts from two disclosure cases to support their stay application, ***O'Connor*** at paragraph104 and the dissent in ***Carosella*** at paragraph 70, both dealing with disclosure of records in the possession of a third-party.

[50] I refer to ***O'Connor***. There, the accused was not in possession of the disclosure sought at any time, quite unlike the circumstances of this case where Mr. Dockman essentially admits that all of the documents he claims he needed to make full answer and defence were in his own possession at material times and not in the possession of the Crown or some third-party agent of the Crown.

[51] Whatever the accused's records over a period of 11 years amounted to, it's clear they were kept by Dockman within the confines of his Waterworks System's on-site office. On that basis, no reasonable inference could be drawn to find those records were in any way to be within the Crown's control, nor could either Dockman or the Corporation be construed to be the Crown's agents in maintaining them.

**Materiality and Relevance**

[52] What am I able to conclude concerning the materiality and relevance of the stolen documents?

[53] Even if the documents that had been stolen were somehow relevant to the accused's case, many of those documents had been generated by, or would have been delivered to Alberta Environment and to the lab undertaking water analyses over the 11 year history of the Approval and then over the life of the Enforcement Order. Some, if not a portion of those documents may have been recoverable by him from those sources. By way of example, the lab where Godlien delivered water samples and the regulator themselves may have some of the sampling records he claims are relevant to his defence.

[54] Dockman testified as well that in the course of his meeting with Knaus and King on May 30th, 2013, he was left with a copy of an Enforcement Order he maintains he was compelled to sign, but which is now lost. But this overlooks the fact that both accused have admitted the Approval, the Enforcement Order and the Amended Enforcement Order have all now been accepted in evidence under the terms of the Agreed Statement. On that basis, I am unable to see how any form of order Dockman says he signed but is now lost has any relevance at this stage.

[55] Moreover, the Monthly Reports for April and May, 2013 he claims were stolen in February 2016, would have predated the Enforcement Order and the Amended Enforcement Order and would, as a result, have marginal, if any, relevance. As well, I recognize Godlien testified in a general sense the log sheets comprising Exhibit 8 were kept on a desk inside the building at the water treatment plant, but that does nothing to address the materiality or relevance of the specific documents she was referring to.

[56] Dockman clarifies that well five provided water of a pH level that when blended with water from the other two wells resulted in treated water that had a pH within the range specified in the Approval. He maintains well five was not available to the system over the time the Enforcement Order was in effect and him not having the records relating to that well limits his ability to know when they finally stopped using that well and is forced to estimate the period of time. But that misses the point. When Dockman stopped using the well is irrelevant as are any records that might demonstrate that and the only real issue related to his later defence of due diligence is what actions he took to bring the well back into service.

[57] Dockman also testified he kept most of his own disorganized records of his phone calls to the CIC call centre concerning pH excesses and fluoride, among others, were in the office. He also testifies the collection of Call Information Forms (Exhibit 10) was a complete list of those sheets and that he was the only person that made any calls to Alberta Environment. He has, of course, admitted the completeness of those sheets in his evidence and it is difficult to see how a collection of disorganized personal phone calls could contradict that admission.

[58] Dockman has, by his own admissions in the Agreed Statement, conceded some of the documents he claims were stolen are now part of the evidentiary record including the Monthly Reports and the Enforcement Order.

[59] I find Dockman's blanket assertion the stolen contents of seven filing cabinets located in the Waterworks System's on-site office, as well as the specific materials he says would have assisted him with his defence, are insufficient, both in their relevance and importance, to establish actual prejudice to either accused in making full answer and defence.

[60] Last, any submissions made by Mr. Anderson may have made as counsel for the co-accused that the stolen documents referred to by Dockman does not amount to evidence and does not assist with establishing actual prejudice. (***Grimes***)

**Reasonable Care**

[61] But even if the Court were to find there was actual prejudice, did Dockman discharge an implied obligation placed upon him to demonstrate that he took reasonable steps to care for these records? I find he did not.

[62] Dockman is a sophisticated businessman with considerable exposure to the water treatment business over more than 14 ½ years, at least 11 of which were with this system and

three and a half years before as founding president and chairman of another water treatment system, Rocky View Water Co-op. He also testified he had involvement in several small businesses throughout his life which included real estate consulting.

[63] Surely, with this sort of business experience with a particular emphasis on water treatment plants, Dockman would have known the records generated in the course of this system's several years of operation were important to its day-to-day and long-term operations and management, to its customers and to the Provincial regulatory authority overseeing its operations.

[64] Even when the plant was operational over the term of the Approval and Enforcement Order, Dockman testified it was visited only at sporadic, fluctuating times by a rotation of people whose function it was to take readings without any suggestion they were there to provide security services.

[65] But yet, Dockman left the security of the facility in a vulnerable state after his departure on September 1st, 2013 by choosing to move to Edmonton. He admits he was not physically present to deal with emergencies from and after August 1st, 2013 and by his absence, he appears to have left others in charge, effectively extracting himself as the one primarily responsible for the plant.

[66] The only evidence relating to physical safeguards for the contents of the building before and after Dockman's departure to Edmonton, beyond those which might have been offered by Mattucci's and Godlien's sporadic visits, appeared to have been limited to a lock on the door.

[67] Dockman knew full well he had possession of these records in the office. He also would have known he had been charged with these offences around the date of the Information, January 23rd, 2015, some 13 months before the February, 2016 break-in. If, for no other reason, surely he would have known over those months the documents stored in the office would be needed to support his legal position in relation to this prosecution. All of his other obligations to his customers and Alberta Environment aside, I find it remarkable there was no evidence at all that he took steps to relocate the records to a secure storage facility or to adequately secure and guard the plant's office if they were to remain on site.

[68] The inference overall has to be that Dockman neither took steps to identify the records he had in his possession and which he now claims are material to his defence, nor did he take reasonable steps to safeguard any of those documents.

[69] I agree with the Crown. Dockman either ignored or turned a blind eye to the preservation of his own documents and now wants to use their disappearance as grounds for a stay of proceedings. Dockman took no reasonable or appropriate care to safeguard his records which, at all material times, were in his own possession, nor did he use any efforts to marshall or reconstruct them from known sources once he learned they had been stolen.

[70] Even in the widest sense, the Crown's obligations simply cannot reach as far as imposing a duty upon them to preserve an accused's records from a loss resulting from theft or destruction while those records were in the accused's sole possession.

[71] In my view, given the lack of care Dockman displayed in preserving his files, he becomes the author of his own misfortune in not now having those records to support his due diligence defence in these proceedings.

[72] The onus is on the accused to establish the infringement or denial of a *Charter* violation and it is their burden to establish actual prejudice. Applying ***Grimes***, I am not satisfied on the balance of probabilities the documents Dockman describes and claims were stolen falls into the category of them, being of such major importance to his defense that a fair trial could not be conducted without them thus depriving him with the opportunity to make full answer and defence. Overall, there is insufficient evidence of materiality and importance of the records to establish actual prejudice.

[73] Even if actual prejudice had been established, I am not satisfied Dockman took reasonable care to preserve his own records to avoid their theft or destruction.

[74] A stay of proceedings is only appropriate in the "clearest of cases" where prejudice to the accused's right to make full answer and defense cannot be remedied or were irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued. This is not one of those cases.

[75] The co-accused's application for a stay of proceedings is respectfully dismissed.

**Liability for Compliance**

[76] Before addressing the issue of the *actus reus* of the alleged offences and the liability for compliance, it will be of benefit to understand the procedural framework and the specific authorization this particular water treatment plant was operating under. Knaus' evidence is helpful in that respect.

**The Regulatory Framework**

[77] Knaus testified he was generally familiar with drinking water treatment facilities over the course of his employment from his perspective as a compliance manager with Alberta Environment. He has worked for the Alberta Ministry of Environment, first as an inspector of industrial operations including inspection of drinking water and wastewater treatment facilities and then, as an investigator. For the period of June, 2013 to the end of January, 2014, he was a statutory Director which allowed him to make statutory decisions through the provisions of environmental protection legislation which included the ability to issue orders in the nature of the Enforcement Order.

[78] In broad terms, Knaus provided the following regulatory framework for drinking water facilities in Alberta.

[79] Legislation identifies which activities require specific authorizations and which do not. Regulations identify which activities require specific approval under the EPEA. Since groundwater was under consideration in this particular case which was not considered high quality, examined approval under that Act was needed.

[80] A party wishing to conduct the operation of a drinking water treatment facility makes application to an Alberta Environment approvals group who considers the application, studies the report submitted and a statutory decision is made by the designated director and an approvals manager to determine if it is appropriate to issue the authorization.

[81] Once the authorization is issued, all the terms and conditions of the authorization require the party receiving the authorization follow all of its related terms and conditions.

[82] Knaus' compliance group was charged with the responsibility of doing periodic inspections under the authorization to make sure there is compliance with the authorization, the EPEA and any other associated regulations, such as potable water regulations. An Alberta Environment compliance group determines whether or not the operator is within or outside of compliance and if there are areas of deficiency which require improvement. Periodic inspections are done to measure compliance and provide the operator with opportunities to continually improve their operation.

[83] Matters of non-compliance are referred to Alberta Environment's investigations group to determine the need for warranted potential enforcement action. That action could take the form of a warning letter, administrative penalty or prosecution. Other remedial actions to protect the public or the environment are considered and the potential for remedial action by way of an environmental protection enforcement order may arise.

[84] A drinking water treatment facility requires an authorization if the facility meets the definition under the activities designated by regulation. Regulations carried out through authorizations and remedial orders needed to rectify ongoing issues are undertaken through the placement of enforcement orders.

**The Specific Regulatory Framework**

[85] According to Knaus, the process adopted in respect to the water treatment facility in this case was adapted to fit the particular circumstances.

[86] Knaus testified he personally issued the May 30th, 2013 Enforcement Order to the Corporation and to Dockman in his capacity as the Corporation's director. The purpose of that order was twofold:

[87] First, to provide the legal authority for the operation of the water treatment plant in question.

[88] Second, the June 11th, 2002 Approval was set to expire the day after he issued the Enforcement Order and as a result, there would be no legal authority for the operation of this treatment plant. The Enforcement Order was issued to allow authorization for the plant's continued operation under certain requirements to ensure the continued safety of the water it was producing.

[89] The Enforcement Order was also issued to provide feedback to Alberta Environment concerning the operator's intentions concerning the next authorization and in particular, to address their desire to access Rocky View Water Co-op as a water source and to operate as a distribution system, as opposed to a water treatment facility.

[90] The continued operation in this case, however, could not be done through an Approval. In 2012, the original application was set to expire the day before its expiration date and an application had been made by the operator to obtain a three month extension to keep the plant operational. Even though a three month extension had been requested, Alberta Environment granted a 12 month extension.

[91] Because the first extension had been granted, a second extension could not be undertaken without a basis to allow the Director to make an informed decision, a decision which procedurally would be subject to appeal.

[92] Over the course of that year, no application had been provided by the operator to the department and it became apparent an application would not be able to be received and processed prior to the expiration of the first extension. The Corporation and Dockman, as operator, wanted to continue operating the plant and the only option was to look at some other mechanism to provide authorization until an application could be submitted. The Enforcement Order of May 30th, 2013 was implemented to allow for this.

[93] Legislation required that if Dockman and the Corporation wanted to operate a water treatment system, they required an approval. If they wished to act as a distribution system by acquiring treated water from another approval holder, the legislation required they could make application to obtain a registration through the code of practice for distribution systems undertaking the distribution of treated water, but that would exclude the ability to treat water. Had Dockman and the Corporation secured an agreement to tie this water treatment system into the Rocky View Water Co-op system, they would be obliged to make an application for a distribution system and to obtain a signed registration from the Director before starting the distribution of water. Those arrangements never occurred.



**Particular alterations to the approvals**

[94] Knaus testified most of the first part of the Enforcement Order of May 30th, 2013 for the continued operation of this system expiring on June 1st, 2012 was extracted directly from the Approval of June 11th, 2002. The Approval provided all of the limits and actions needed to ensure the water plant was operated in a safe, reliable manner and to ensure it was providing safe, potable water. The table in the Enforcement Order came directly from the expiring Approval and included Clause 3 originating from the table identified in section 5.1.1 of the Approval.

[95] The majority of the table contained in Clause 4 of the Enforcement Order originated from table 6-1 entitled "monitoring and reporting – East Airdrie Waterworks System" as was contained in the expiring Approval.

[96] The table however was not quite the same. The main difference related to the reporting frequency of testing, that is, monitoring how many times a particular testing activity was required to be conducted in a given week. The prior Approval required these had to be monitored, sometimes once per week, sometimes once per day.

[97] The frequencies for monitoring for the volume of treated water, residual of treated water, fluoride concentration of treated water and examination of bacteria in treated water were all increased in the Enforcement Order. Particularly, the frequency for monitoring fluoride concentration under the approval was once per week but under Clause 4 of the Enforcement Order, it was to be monitored five days per week.

[98] The frequency for monitoring pH concentration of treated water under the Approval was once per day but was reduced under Clause 4 of the Enforcement Order to just five days per week.

[99] The rationale for changing the monitoring frequency was based on the operator's past performance determined through inspections of this facility which showed the operator was not meeting the terms concerning frequency of monitoring under the Approval. Knaus himself was not satisfied the Approval had been followed and he wanted to set more reference points for the

department and provide more oversight over the operation to ensure the quality and safety of the water it was producing.

[100] Clause 5 of the Enforcement Order required that on July 12th, 2013, and continuing at the same time each month thereafter, the parties were to compile and submit four particular pieces of identified information electronically to a particular email address, [Leslie Miller's email address]. These reports were to be accompanied by monitoring results. The difference between the Approval and the Enforcement Order in this respect was such that the Approval required monthly reports be maintained by the operator and be made available for inspection but were not to be submitted monthly. The Enforcement Order by contrast required information be submitted monthly, not just maintained to allow the Department an opportunity to review this information on a more frequent basis.

[101] Clause 9 of the Enforcement Order required the parties immediately report any contravention under the Order to the director by telephone to phone number 1–780– 422–4505. Knaus included this reporting requirement in the Enforcement Order because from his perspective, it was necessary the department become aware of contraventions from a public safety perspective, to position the department take action to help rectify non-compliances.

[102] In addition to the telephone reporting, Clause 11 of the Enforcement Order required that within seven days of reporting to the Director, the parties were required to submit a written "7 day report" detailing the description of the contravention, the circumstances leading up to it, the corrective action taken to remedy it and the steps taken to prevent a recurrence. That information would come to the Director and be relayed to the inspector responsible for looking after the facility.

[103] The September 20th, 2013 Amended Enforcement Order signed by Knaus maintained the original Enforcement Order as a valid and enforceable order and was designed to allow the further continued operation of the water system. It eliminated Clauses 14 through 20 of the Enforcement Order concerning the operator taking steps to connect their water system with the Rocky View Water Co-op system, but without amending other terms of the original Enforcement Order.

### *Actus Reus/ Mens Rea*

[104] The parties positions concerning the *actus reus* of the offences alleged and the application of *mens rea* to those offenses is as follows:

**Crown**

[105] The Crown argues the Enforcement Order and subsequent Amended Enforcement Order are both valid on their face and meet all of the statutory requirements. This includes, but is not restricted to, the pre-condition to a valid enforcement order requiring the Director be of the opinion there has been a contravention of the EPEA without the necessity of proving all of the allegations which might support the contravention. Both co-accused were subject to a valid Enforcement Order and both were required to comply with its terms.

[106] The Crown argues all of the alleged offenses are strict liability offenses under the EPEA, not *mens rea* offences. Even though the Enforcement Order created joint and several liability between Dockman and the Corporation, it was Dockman, in his personal capacity, who had full

power and control over the activity of this water treatment plant and liability for all of these offences must rest with him solely.

[107] The Crown disagrees with Defence's contention that Dockman's contravention of the order should rest on "party liability" under section 21 of the ***Criminal Code of Canada*** and argues it is not necessary to attribute *mens rea* to Dockman for him to be convicted in his personal capacity.

[108] The Crown argues the *actus reus* on each of the six counts have been proven beyond a reasonable doubt.

**Defence**

[109] Defence first questions the validity of the original Approval and Enforcement Order. They contend Dockman's alleged contravention of the Enforcement Order should rest on section 21 ***Criminal Code*** "party liability" through the application of section 3 of the ***Provincial Offenses Procedure Act*** SA 2000, Chapter P – 34 ("POPA") and that it then becomes necessary to find *mens rea* to render Dockman liable in his personal capacity for any of these offences. They argue *mens rea* cannot be attributed to Dockman as a result of him having no active involvement, in his personal capacity, in any of the circumstances surrounding the offences alleged.

[110] Defence then reverts to their submissions concerning their application for a stay of proceedings necessitated by the theft of documents. Defence continues to say the co-accused have been unable to make full answer to the allegations surrounding the *actus reus* on all six counts as result of the theft of those documents and they remain defenceless without them.

[111] Beyond that, Defense puts the Crown to their strict burden of proof, that is, proof beyond a reasonable doubt in relation to the *actus reus* in relation to each of the offences alleged on all six counts.

**Law re: Liability for Compliance**

[112] I refer to the following paraphrased sections of two provincial statutes concerning the liability for compliance in this case, those being:

[113] POPA governs procedure for contravention of provincial enactments. Section 3 provides that except to the extent that they are inconsistent with POPA, the provisions of the ***Criminal Code*** that are applicable to summary convictions and related proceedings apply in respect of every matter to which POPA applies.

[114] The EPEA defines "waterworks system" in section 1(zzz) to mean any system providing potable water to, among others, a privately owned development or private utility which includes, but is not restricted to, the following components: i) water wells connected to water supply lines, surface water intakes or infiltration galleries constitute the water supply; ii) water supply lines; iii) on-stream and off-stream water storage facilities; iv) water pump houses; v) water treatment plants; vi) potable water transmission mains; vii) potable water storage facilities; viii) potable water pumping facilities; ix) water distribution systems; and x) watering points.

[115] Various other relevant sections of the EPEA are as follows:

[116] Section 2 identifies the purpose of the EPEA is to support and promote the protection, enhancement and wise use of the environment while recognizing in subparagraph (j), the important role of comprehensive and responsive action in administering the Act.

[117] Section 212(1)(a) provides the Director may amend, add or delete a term or condition from an Enforcement Order, and (b) may cancel an Enforcement Order.

[118] The Director (for the purpose of the case at bar) is defined in section 1(r) to mean a person designated as a Director for the purpose of the EPEA by the Minister responsible for the Act.

[119] Section 215 provides that where an enforcement order is issued to more than one person, all persons named in the order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for the payment of the costs in doing so, including any costs incurred by the Director under section 214(2).

[120] Section 227 characterizes offenses under the Act. Section 227(g), paraphrased, makes a person who contravenes an enforcement order guilty of an offense.

[121] Section 228(2) provides that a person who commits an offense referred to in section 227(g)(a) of the EPEA is liable, in the case of an individual, to a fine of not more than $50,000.

[122] Section 228(2)(b) provides that in the case of a corporation, a corporation is liable to a fine of not more than $500,000.

[123] Section 229 provides that no person shall be convicted of an offense under section 227(g) if that person establishes, on a balance of probabilities, that the person took all reasonable steps to prevent its commission.

[124] The parties cite the following authorities:

[125] By the Crown: ***R. v. Sault Ste. Marie (City)***, [1978] 2 SCR 1299; ***R. v. Gemtec Ltd.***, 2007 NBQB 199; ***R. v. Auto Body Services (Red Deer) Ltd.,*** 2014 ABPC 168.

[126] By Defence: ***R. v. Fell*** (1982), 34 OR (2d) 665, (Ont. CA).

**Validity of the Approval and Enforcement Order**

[127] Let me first address the validity of the original Approval and the Enforcement Order and related amendments upon which this prosecution is built in the context of the enabling legislation.

[128] The evidence shows, and I accept, that at all material times, Knaus acted as a Director appointed under ministerial order under the EPEA and had been delegated by the Minister through the regional compliance manager who issues designations for the Director under the Act. He was thereby authorized to make statutory decisions, which included the ability to issue the Enforcement Order and to authorize its amendment.

[129] I accept further that Knaus, in his capacity as Director, issued and signed the Enforcement Order and was then of the opinion that Dockman and the Corporation had then contravened the EPEA based in part on the numerous detailed deficiencies and contraventions of the Approval which arose as a result of inspections of the Waterworks System conducted on March 20th, 2012 and February 28th, 2013 predating the Enforcement Order of May 30th, 2013.

[130] Section 210(1) of the EPEA requires only that in making an enforcement order, the Director be of the opinion that the EPEA has been contravened and section 210(3) requires an enforcement order issued under subsection (1) contain the reasons for making it. Those sections are adequately carried out by the contents of the preambles to the Enforcement Order.

[131] Given those sections, I see no basis for Defence to argue the Crown is somehow put to the strict proof the contraventions as a basis for the Enforcement Order, knowing section 210(1) simply requires the Director be of the opinion contraventions occurred prior to an enforcement order being issued. Section 210(3) has also been complied with by the inclusion of the Directors' reasons. The preambles in both the Enforcement Order and the Amended Enforcement Order clearly show the basis for Knaus' opinion concerning contraventions of the EPEA.

[132] Paragraphs nine and ten of the Agreed Statement also show both Dockman and the Corporation were issued and served with the original Enforcement Order on May 30th, 2013 and the Amended Enforcement Order was then served on Dockman on September 20th, 2013. Section 210(3) requiring service upon the person to whom an enforcement order is directed had been thereby been complied with.

[133] Accordingly, I find Dockman and the Corporation were both subject to the terms of a valid enforcement order as provided for under the provisions of the EPEA.

**But knowing that, who is potentially liable?**

[134] Defence argues that liability cannot befall Dockman even when the offence for the principle, the Corporation is one of strict liability. They argue Dockman as an aider or abettor must display *mens rea* to be found liable for the Corporation's offence as that party liability arises from section 21 of the ***Criminal Code*** and as enunciated by the Ontario Court of Appeal's decision in ***Fell***.

[135] ***Fell*** was a case where Fell and two corporations he controlled were charged with Combines Investigation offenses. Fell was at all material times an officer and guiding mind of a Corporation entering into arrangements with persons interested in acquiring a type of dealership authorizing them to sell an item for use on commercial buildings, participate in sales and in the course of doing so, were provided with various marketing and sales tools which included a false and misleading representation concerning government approval. The Court found that even where the offence was one of strict liability insofar as the liability of the company was concerned, the existence of *mens rea* was necessary to convict an aider or abettor employing section 21, which meant knowledge of the circumstances constituting the offense was required.

[136] In taking the position Defence has in this case, Defence seems not take into account the express provisions of section 215 of the EPEA which makes both Dockman and the Corporation jointly and severally liable for carrying out the terms of the Enforcement Order. The order was issued to them both and they were both statutorily obliged to comply with its terms. One cannot escape liability at the expense of the other through the application section 21 of the ***Criminal Code***. The legislation invoked in ***Fell*** had none of those features and I do not see it to have application to this case.

[137] The Crown seeks a conviction against Dockman solely and not the Corporation and in my respectful view, they are correct in doing so, for the reasons that follow.

**Analysis**

[138] In ***Sault Ste. Marie*** at page 1322, the Supreme Court of Canada addressed the relationship of liability to control over a particular activity, by saying the following:

> The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control."
>
> **Where does control over the activities of the Waterworks System reside, and why should Dockman in his personal capacity incur liability?**

[139] First, it is clear Alberta Environment issued the Enforcement Order against the Corporation on May 30th, 2013 on the basis of the Corporation having previously been issued the original Approval some 11 years before.

[140] Dockman testified the Corporation was still a subsisting corporation and it was not actively engaged in its former business of subdivision planning and development. At paragraphs two and three of the Agreed Statement, Dockman acknowledged further that at all material times, he was the sole director and shareholder of the Corporation and that he, in his personal capacity, operated the Waterworks System. With these admissions, it is clear the system had not been operated by the Corporation and it, in effect, had nothing to do with its operation.

[141] Dockman also explained the genesis of that and other companies he had involvement with in the operation of water treatment systems.

[142] The Corporation did not originally own the Waterworks System. He testified, a numbered company, 692591 Alberta Limited operated by he and one other individual originally owned the system, but that company has since ceased doing business.

[143] The original company Dockman formed to conduct this system under the Approval was originally named East Airdrie Water System Limited but was renamed North East Water Systems Ltd., NEWS as it became known. Dockman was its sole shareholder and director. NEWS was a distinct corporate entity, separate and apart from the Corporation even though he maintained common ownership of both. NEWS had no approval to operate the Waterworks System other than through the Corporation.

[144] Dockman also drew a clear distinction between his operation of the Waterworks System and another water distribution system, the Rocky View Water Co-op which he founded in conjunction with the construction of five various phases of the Sharp Hill subdivision around 1995. He served as president of that entity for three and a half years until he became involved in the Waterworks System in 2001. The Waterworks System had no connection with the Rocky View Water Co-op.

[145] The operation of the Waterworks System originated with the idea of acquiring more access to water from Rocky View Water Co-op but that access was denied. Alternatively, Dockman located and connected three groundwater wells but the water from those wells had too high a fluoride content to meet standards and needed to be treated. The solution was a reverse osmosis process treatment plant which treated water and mixed its reject water with storm water to provide irrigation water to the system's customers. Both processes were needed. The reverse

osmosis process created a high quality treated water for the treated water needs of customers inside their houses and irrigation water for customers' acreage lots outside. Irrigation pipes were installed to deliver irrigation water to each lot. Storage tanks were constructed, monitoring equipment designed and the water treatment building constructed. The system went into operation in 2002 shortly after the June 11th, 2002 Approval.

[146] The corporate structure Dockman describes does not serve to separate him from having complete, direct personal control over the Waterworks Systems business activities, nor does it pass any of that control to the Corporation.

[147] Even though the Corporation had been named as a party to the Enforcement Order and the Amended Enforcement Order, that characterization followed from the original June 11th, 2002 Approval, that does not alter how Dockman, in his personal capacity, conducted the system's activities over the full duration of the Enforcement Order and its extended term under the Amended Enforcement Order.

[148] In the course of his testimony, Dockman maintained NEWS owned and operated the Waterworks System with him as sole shareholder and Director and that it dealt with the Waterworks System's revenues and payables.

[149] But this assertion runs contrary to the substance of his admission appearing in paragraph three of the Agreed Statement where Dockman admits at all relevant times, that he, in his personal capacity, operated the Waterworks System. Despite any of the corporate organization Dockman describes, I must regard that admission as binding upon the both the parties and the Court for the purpose of this prosecution.

**Dockman's Control**

[150] Even had that admission not been made, there are aspects of Dockman's and other witnesses' evidence that shed considerable light on Dockman's complete personal control over the Waterworks System as follows:

**Funding**

[151] Dockman solely took it upon himself to fund the plant's operations. He testified NEWS' financial situation in May, 2013 was difficult. He was losing money and had been supporting NEWS for several years by moving money from other businesses back and forth. The status of those businesses was becoming difficult and he, in turn, was having difficulty keeping a sufficient flow of money to NEWS to operate the plant.

**Workers**

[152] Dockman hired workers to assist with the conduct of the plant's operations but without relinquishing his own control over the plant. Dockman himself worked at the plant from time to time over the period of the Enforcement Order but not as a certified operator.

[153] He engaged two workers, his stepson, Mattucci as certified operator, and Godlein as support both in relation to assistance in taking the plant's water measurements and as a courier running water samples to labs.

[154] Dockman did not regard Godlien as being an employee of NEWS but knew she gave him an invoice once monthly which he paid once monthly. Godlein thought she worked for Dockman personally although she could not remember if her paycheque was drawn on a company account.

[155] Godlein also looked to Dockman for support. She had no formal training in drinking water treatment and was not certified but she received instructions from Dockman concerning her function at the plant of recording numbers off gauges on a sheet she had been provided. If she came upon a problem or something was not working, she would phone Dockman. Except on one occasion where she phoned Mattucci only because Dockman was out of town. Godlien saw Dockman to give her latitude in the performance of her functions and found him easy going with the times she was required to attend the plant.

[156] Most of the time, Godlein contacted Dockman to provide him with the numbers she entered on the sheets on the days she attended the water treatment plant.

[157] With respect to Mattucci, Dockman testified he supported Mattucci with the plant's operation. Dockman regarded Mattucci to be the certified operator over the period June 1st, 2013 to January 20th, 2014.

[158] Even though Dockman testified Mattucci had been employed by NEWS, Dockman testified he created invoices for the amounts he owed Mattucci and paid him both personally in cash for the sake of convenience, and then at other times, by way of a periodic paycheque through NEWS.

[159] Mattucci however, regarded himself as being employed by Dockman in his capacity as the operator of the system but looked to Dockman to deal with possible contraventions. For instance, Mattucci testified that had fluoride outside the limits provided for in the Enforcement Order been recorded, he would call Dockman while he was still at the facility to let him know.

[160] Dockman corroborates much of this. He testified he supported Mattucci in the operations and did all other things an *owner* would do by dealing with customers, money, billing, collecting and dealing with other entities. In the rare circumstance of a customer not paying their bill, he would be the one to "turn the valve", an act of distinct finality with a customer which I infer meant he would be the one to cut a customer's water supply off if their bill was not paid. It seems reasonable to infer that only someone in complete control of the system would exercise that degree of influence over its customers.

**Interaction with Alberta Environment**

[161] Dockman effectively took it upon himself to deal with the regulator, Alberta Environment. Despite Dockman's testimony it was Mattucci's responsibility to report excess pH or fluoride in the system to Alberta Environment and not his, he still knew it was his ultimate responsibility to ensure they had been contacted with the information.

[162] The Call Information Forms (Exhibit 10) bear this out. They demonstrate that on at least 18 occasions over the period June, 2013 to December, 2013, Dockman personally contacted the provincial government call centre responsible for collecting and forwarding contravention reports for emergency or compliance responses pertaining to the Waterworks System to Alberta Environment.

[163] Dockman also testified that on various occasions, he would initial Monthly Reporting logs documenting the system's testing results in the column designated for the operator.

[164] In the first instance, it seems clear Dockman in his personal capacity took on the overriding responsibility of contacting the regulator concerning the system's operational reporting requirements. Both Godlien and Mattucci seem to corroborate that.

[165] Beyond that, Dockman was the only one who dealt with Alberta Environment concerning the vital issue of the continued operation of the plant at the time the Enforcement Order was expiring. There is no evidence either Mattucci or Godlein were authorized or had anything to do with the Regulator at this level.

[166] It was Dockman who met face-to-face with Knaus in their May 30th, 2013 meeting and then again received Reich's confirmation on July 16th, 2013 that the Approval in relation to this facility had expired leaving the Enforcement Order in place with Reich's very direct comments that he read it, follow it and direct any related questions to Knaus.

[167] McMillan had nothing to do with the process. He was Dockman's business partner in another venture and was acting as nothing more than as a friend and support person in the context of a September 20th, 2013 meeting with Alberta Environment.

[168] True, the Enforcement Order, on its face, created joint and several liability between Dockman and the Corporation and both were required to comply with the order. But on the whole of the evidence and the admissions made, there is no basis to conclude the Corporation owned, operated or had any control whatsoever over this facility over the duration of the Enforcement Order. Dockman in his personal capacity treated the Waterworks System as his own business and in that respect, exercised full and effective power and control over its operations.

[169] Accordingly, responsibility for any non-compliance under the Enforcement Order rests with Dockman solely, and on the authority of ***Sault Ste. Marie,*** he, and he alone must incur responsibility for any resulting liability.

**Has the Crown proven the *actus reus* of each of the offences alleged beyond a reasonable doubt?**

[170] All six counts appearing on the Information have the following common features. They all name Michael Louis Dockman and Dockman & Associates Ltd. jointly as co-accused, all allege the jurisdiction to be Airdrie, Alberta and each count alleges individual offenses contrary to section 227(g) of the EPEA.

[171] The burden on the Crown to prove the *actus reus* on each of these six counts is proof beyond a reasonable doubt as enunciated by the Supreme Court of Canada in ***R. v. Lifchus***, [1997] 3 SCR 320 (SCC) and ***R. v. Starr***, [2000] 2 SCR 144 (SCC).

[172] Reasonable doubt is not an imaginary or frivolous doubt, it must not be based upon sympathy or prejudice but rather on reason and common sense and that it is logically derived from the evidence or absence of evidence. Probability or likelihood is not enough and in those circumstances, I must give the benefit of the doubt to the accused. On the other hand, it is virtually impossible to prove anything to the impossibly high standard of proof of absolute certainty and the Crown is not required to do so. Based upon the evidence, I must, in this case, be sure the *actus reus* of each of the alleged offences have been proven. The standard falls closer to absolute certainty than to proof on a balance of probabilities.

[173] I offer the following separate analysis concerning the *actus reus* in relation to each count.

**Count 1**

[174] Count 1 alleges on or between the 1st day of June, 2013 and the 20th day of January, 2014, the co-accused contravened Clause 3 of the Enforcement Order by providing water through the Waterworks System that did not meet a fluoride concentration limit of treated water entering the water distribution system of between 0.6 mg/L (milligrams per litre) and 1.0mg/L. (milligrams per litre) and thereby committed an offense.

[175] Clause 1 of the Enforcement Order provided that all definitions contained in the Approval apply to the Enforcement Order, whether the approval has expired or not.

[176] Clause 3 of the Enforcement Order provided that the Parties (meaning the Corporation and Dockman) shall immediately, and continue to, until further written notice from the Director, at all times provide water through the Waterworks System that meets limits for Fluoride concentration of treated water entering the water distribution system of greater than or equal to 0.6 mg/L or less than or equal to 1.0 mg/L. This effectively means the permissible limit was between point six and one milligram per litre.

[177] Paragraph 8 of the Agreed Statement settles the parties' agreement that the raw groundwater obtained from the wells servicing the Waterworks System contained relatively high concentrations of fluoride and a reverse osmosis filtering system was used by the system to remove excess fluoride. The evidence also shows the Waterworks System had operated for 11 years under the Approval mandating the same limits under the Approval's paragraph 5.1.1 as were continued under paragraph 3 of the Enforcement Order.

[178] Paragraph 5.1.2 of the Approval also required the Waterworks System be maintained and operated within the requirements of the Guidelines for Canadian Drinking Water Quality.

[179] Mattucci testified the Monthly Reports (Exhibit 8) were tables recorded from the operations of the Waterworks System recording the results of testing the system's water. Those reports covered the period from June 1st, 2013 to and including January 17th, 2014.

[180] The column entitled "fluoride" showed the monitoring results of measurements for fluoride.

[181] A review of the "fluoride" column contained in the Monthly Reports showing monitoring results commencing June 1st, 2013 to and including January 17th, 2014 demonstrates by my count at least 77 sufficiently legible entries (taken from those identified by the Crown in their written submissions) to be able to determine they fell outside the specified fluoride concentration limits of the Enforcement Order throughout the period of the Order and some of those entries, considerably outside those limits.

[182] Defence takes no exception to the Crown's calculations and raises no contrary argument.

[183] I am satisfied beyond a reasonable doubt the Crown has proven the *actus reus* of the offense alleged in count 1.

**Count 2**

[184] Count 2 alleges on or between the 1st day of June, 2013 and the 20th day of January, 2014, the co-accused contravened Clause 3 of the Enforcement Order by providing water through the

Waterworks System that did not meet a pH limit of treated water entering the water distribution system of between 6.5 and 8.5 and thereby committed an offense.

[185] Again, Mattucci testified the Monthly Reports (Exhibit 8) were tables recorded from the operations of the waterworks facility recording the results of testing the systems water. Those reports covered the period June 1st, 2013 to and including January 17th, 2014.

[186] Mattucci testified as well that the column entitled "pH" was another test they did from the treated water which measured pH and temperature at the same time and both pH and temperature for the water were recorded in their respective columns.

[187] Clause 3 of the Enforcement Order required the Corporation and Dockman immediately, and continue to, until further written notice from the Director, at all times provide water through the Waterworks System that meets limits, among others, pH of treated water entering the water distribution system of 6.5 to 8.5.

[188] A review of the column entitled "pH" contained in the Monthly Reports (Exhibit 8), the monitoring results for the months commencing June 1st, 2013 to and including January 17th, 2014 showed, by my count, at least 159 sufficiently legible entries (from those identified by the Crown in their written submissions) that fell outside the specified pH limits of the Enforcement Order throughout the period of the order. These contraventions, by comparison to the entries demonstrating compliance, were overwhelming. Over the same period, by my count, only 20 entries had been noted as falling within the prescribed limits over the same period.

[189] Defence takes no exception to the Crown's calculations and raises no contrary argument.

[190] I am satisfied beyond a reasonable doubt the Crown has proven the *actus reus* of the offense alleged in count 2.

**Counts 3 and 4.**

[191] Counts 3 and 4 can be considered together.

[192] Count 3 alleges on or between the 1st day of June, 2013 and the 20th day of January, 2014, the co-accused contravened Clause 4 of the Enforcement Order by failing to collect samples and analyze for fluoride concentration in treated water entering the water distribution system five days per week, and thereby committed an offense.

[193] Count 4 alleges on or between the 1st day of June, 2013 and the 20th day of January, 2014, the co-accused contravened Clause 4 of the Enforcement Order by failing to collect samples and analyze for pH of the treated water entering the water distribution system five days per week, and thereby committed an offense.

[194] Clause 4 of the Enforcement Order required the Corporation and Dockman shall, beginning June 2nd, 2013 and every month thereafter, collect samples and analyze the water in the Waterworks System for the parameters of both pH of treated water and fluoride concentration of treated water at a frequency of five days per "week". The definition of "week" originally contained in the Approval and carried forward in the Enforcement Order meant any consecutive seven day period.

[195] Again, Mattucci testified the Monthly Reports were tables recorded from the operations of the facility recording the results of testing the water over the period June 1st, 2013 to and

including January 17th, 2014 and contained monitoring results relating to fluoride and pH recorded in their respective columns.

[196] In written argument, the Crown provided a helpful tabulation of a summary of the sampling frequency taken from the Monthly Reports (Exhibit 8) in respect of the fluoride and pH using what they referred to as a seven day rolling window for each month from June, 2013 to January, 2014. The tabulation gathered only incidents where a minimum of five samples over a consecutive seven day period had not been met for both pH and fluoride.

[197] Without specifically addressing all of the contraventions flowing from the Monthly Reports, I have randomly selected two obvious contraventions of the Enforcement Order in relation to sample frequency for fluoride.

[198] The first, over the period June 1st to June 7th, 2013 inclusive. No samples had been recorded for the first three days of that period. Even though four fluoride samples had subsequently been recorded each day from June 4th to and including June 7th, the minimum five fluoride samples over a consecutive seven day period had not been met.

[199] The second, over the period June 24th to June 30th, 2013 inclusive. Even though four fluoride samples had been recorded for four days throughout that period, those days were interspersed by three separate days where no sample had been recorded, thereby contravening the requirement for a minimum five samples to be taken over a consecutive seven day period.

[200] In addition, and without specifically addressing all of the contraventions flowing from the Monthly Reports, I have also randomly selected two obvious contraventions of the Enforcement Order in relation to sample frequency for pH.

[201] The first, over the period July 1st to July 7th, 2013 inclusive. Four pH samples had been recorded for that period but those four days were interspersed by three days where no sample had been properly recorded, thereby contravening the requirement for a minimum five samples to be taken over a consecutive seven day period. It is interesting to note that period might have been compliant but for an entry for pH on July 3rd which had very clearly been crossed out signifying the obvious intention that a sample had not been obtained for that particular day.

[202] The second, over the period August 1st to August 7th, 2013 inclusive. Four pH samples had been recorded for that period but those four days were interspersed by one day where no sample had been recorded, and concluded by two days where no entries appeared, thereby contravening the requirement for a minimum five samples to be taken over a consecutive seven day period.

[203] Defence takes no issue with the Crown's identification and assessment of what the Crown says amounts to 64 contraventions of the monitoring frequency mandated by the Enforcement Order for one or both of fluoride or pH during the term of the Enforcement Order.

[204] I have reviewed and considered the relevant evidence including the testimony of witnesses, the requirements of the applicable provisions of the Enforcement Order and the Monthly Reports (Exhibit 8). I have also reviewed and considered the Crown's assessment of the sampling frequencies for both fluoride and pH on a rolling seven day window throughout the months of June, 2013 to and including January, 2014, with which defence takes no issue and raises no contrary argument.

[205] I am satisfied beyond a reasonable doubt the Crown has proven the *actus reus* of the offenses alleged in both counts 3 and 4.

**Count 5**

[206] Count 5 alleges on or between the 12th day of July, 2013 and the 20th day of January, 2014, the co-accused contravened Clause 5 of the Enforcement Order by failing to submit electronically in writing the information required to be provided by Clause 5 of the Enforcement Order and thereby committed an offense.

[207] Clause 5 of the Enforcement Order required the Corporation and Dockman, beginning on July 12th, 2013 and continuing on the 12th of every month thereafter, submit a collection of information electronically in writing to an email address [Leslie Miller's email address]. The information required under specific provisions of the Enforcement Order comprised the analytical results for the required monitoring, the name of the certified operator, summary of all incidents that required reporting and a summary of any operational problems.

[208] Leslie Miller had been an inspector with Alberta Environment and Parks under Knaus' direct employ inspecting water treatment facilities and in the course of those inspections, had occasion to inspect the Waterworks System. Miller moved to another regulatory body in November, 2013 over the time the Enforcement Order was in effect.

[209] The email address [Leslie Miller's email address] appearing in Clause 5 of the Enforcement order was Miller's business email address while she was employed with Alberta Environment. Between July 12th, 2013 and when she left Alberta Environment in November, 2013, she never received any of reports required by Clause 5 of the Order. She did not check her email address after leaving Alberta Environment in November, 2013.

[210] Knaus knew the email address had been associated with Miller and monitored the address into March 2014 after her departure. He found no reports required by Clause 5 of the Enforcement Order in this email inbox over that time.

[211] I am satisfied beyond a reasonable doubt the Crown has proven the *actus reus* of the offense alleged in Count 5.

**Count 6**

[212] Count 6 alleges on or between the 1st day of July, 2013 and the 20th day of January, 2014, the co-accused contravened Clause 9 of the Enforcement Order by failing to immediately report by telephone any contravention of any of the clauses of the Enforcement Order to the Director and did thereby commit an offense.

[213] Clause 9 of the Enforcement Order required the parties immediately report by telephone any contravention of any of the clauses of the Enforcement Order to the Director at phone number 1-780-422-4505.

[214] Paragraph 15 of the Agreed Statement established that phone calls to that phone number are received by Alberta government staff at a call centre known as CIC. Calls are recorded and then forwarded to the appropriate government agency. CIC's function was to simply record calls and pass them along.

[215] The parties also agree that all of the call information generated as result of contravention reports made by or on behalf of Dockman and the Corporation under the Enforcement Order for

the time period June 1st, 2013 to January 31st, 2014 were contained in the Call Information Forms (Exhibit 10).

[216] The Crown invites the Court to review the period between November, 2013 and January, 2014 as being a period of time where numerous failures to report contraventions for pH and fluoride concentration limits under Clause 3 of the Enforcement Order and then in respect of sampling frequencies for fluoride and pH under Clause 4 occurred. Over that period, the Crown isolates a total of 65 days where those contraventions occurred, alone or in combination, with no evidence of them being reported by telephone as required by the Enforcement Order.

[217] Over that period, I note the only evidence of telephone reporting shown in Exhibit 10 contained only three call information reports bearing telephone call dates of November 19th, 2013, November 28th, 2013 and December 27th, 2013.

[218] Keeping in mind Clause 9 of the Enforcement Order which required immediate telephone reporting of contraventions, I need go no further than to select a circumstance where obvious contraventions for concentration limits and sampling frequencies for both fluoride and pH occurred in the Monthly Reports but were not supported by an immediate telephone call documented in the telephone Call Information Forms (Exhibit 10).

[219] On November 13th, 2013, fluoride concentration was logged in the Monthly Report at 1.66, outside the limit of 0.6 to 1.0 mg/L. That same day, pH concentration was logged at 9.41, outside the limit of 6.5-8.5. Moreover, over the period November 7th to November 13th, 2013 inclusive, only three fluoride samples had been recorded thereby contravening the requirement for a minimum five fluoride samples to be taken over a consecutive seven day period. No call information sheet bearing November 13th, 2013 as a call date documenting a phone call reporting those deficiencies on that date formed part of Exhibit 10. That, on its own account, constitutes a contravention of the requirement for immediate telephone reporting.

[220] But even then, there was no apparent telephone contact concerning the deficiencies within the few days that followed and in fact, there were no telephone Call Information Forms that made any mention at all of these deficiencies. The next Call Information Forms that followed in sequence bore a date of November 19th, 2013, some six days later, reporting excesses on November 14th and 15th, but none on November 13th, 2013.

[221] Dockman eventually admitted in his evidence that he was the only person who called Alberta Environment.

[222] These circumstances constitute a clear contravention of the requirement for immediate telephone reporting as required by Clause 9 of the Enforcement Order.

[223] Again, Defence takes no issue with the Crown's identification and assessment of what the Crown says amounts to an overwhelming failure by Dockman to report contraventions of the Enforcement Order by telephone, as required by Clause 9 of the Enforcement Order.

[224] I have reviewed and considered the relevant evidence including the testimony of witnesses, the requirements of the applicable provisions of the Enforcement Order, the Monthly Reports and the telephone Call Information Forms (Exhibit 10). I have also considered the Crown's assessment of the fluoride and pH limits and sampling frequency contraventions occurring throughout November and December, 2013 and January, 2014, with which Defence takes no issue.

[225] Further, as already identified, Clause 5 of the Enforcement Order required electronic transmission to [Leslie Miller's email address], of all of the particular reports required under Clauses 5 and 8 of the Enforcement Order, which, in Clause 5, included summaries of incidents constituting contraventions under any provision of the Enforcement Order. The complete absence of any email reporting to that email address, including any reporting which may concern any of the contraventions already considered would, in and of itself, clearly demonstrates Clause 9 of the Enforcement Order had been contravened.

[226] On all of the evidence, I am satisfied beyond a reasonable doubt the Crown has proven the *actus reus* of the offense alleged in Count 6.

**Due Diligence**

[227] The discussion now turns to a consideration of the defence of due diligence as raised by Defence.

**The Parties Positions:**

**Defence**

[228] Defence refers to section 229 of the EPEA and relies on ***Sault Ste. Marie*** suggesting the Supreme Court equates due diligence with an absence of negligence and which consists of taking all reasonable steps a reasonable person would take to avoid the particular event.

[229] Defence argues (in a general sense) due diligence for an employer delegating work to an employee or independent contractor consists of setting up and implementing a system to prevent breaches of the law.

[230] Defence also argues reasonable steps to avoid an occurrence of prohibited acts must take into account the foreseeability of harm to the public.

[231] They argue further that Knaus' amendment to the Enforcement Order and his vague discussion of Dockman's options in their meetings created an environment where Dockman was pressured by Knaus into not shutting the water system down on October 1st causing Dockman and the Corporation unnecessary exposure to contraventions of the Enforcement Order. Defence argues had Dockman been permitted to shut the plant down on July 15th, 2013 or after a meeting with Alberta Environment on October 1st, 2013, the alleged compliance problems would not have arisen.

[232] Last, they argue Dockman displayed due diligence by continuing to submit a series of reports after September 20th, 2013, by addressing a mechanical problem in November and by Dockman keeping a departmental inspector, Larry West, fully apprised of the problems over the period. They argue the fact that Dockman and Mattucci maintained contact with the department through West until the plant was shut down on January 20th, 2014 all goes to due diligence.

**The Crown**

[233] The Crown argues the accused has failed to establish any due diligence which might serve as a defence to these charges.

[234] To establish due diligence, the Crown points out the accused must establish they either took all reasonable steps to ensure compliance with the terms of the Enforcement Order or they acted upon reasonable, but mistaken belief they were in compliance with the order.

[235] The Crown argues the contraventions alleged pertain to very specific contraventions of the terms of the Enforcement Order and for the defence of due diligence to succeed, any steps taken by Dockman as evidence of due diligence must demonstrate targeted efforts to comply with the Enforcement Order's specific provisions.

[236] The Crown argues no such evidence was adduced and any of what Dockman points to as general measures to promote compliance does not constitute due diligence. Defense must be specific to the conditions of the Enforcement Order set by Alberta Environment and to the contraventions that occurred under its terms. Due diligence can only be measured in this case by assessing those steps taken by Dockman to ensure compliance with the order and the issue solely relates to what steps he took to achieve that.

[237] The Crown also says Dockman had the primary duty to ensure compliance on the Enforcement Order but yet attempted to deflect blame for non-compliance to his subordinates.

[238] The Crown argues the accused's argument concerning foreseeability of harm to the public does not set off the need for due diligence. Dockman was simply obliged to maintain an authorization to operate the plant and operate within its terms.

[239] The Crown argues its case is built on the fact that an Enforcement Order was in place, he had notice of it and elected to operate by providing water from his facility to residents. He thereby had the continuing obligation to comply with the terms of the Enforcement Order. If that was not his intention, he should not have continued to operate.

[240] The Crown goes on to provide a factual basis to support the absence of the accused's due diligence in respect of each and every of the six counts before the court.

**Law: Defence of Due Diligence**

[241] Section 229 of the EPEA sets out the statutory defence of "due diligence" by saying that no person shall be convicted of an offence under the section charged which in this case, is section 227(g), if that person establishes, on a balance of probabilities, that the person took all reasonable steps to prevent its commission.

[242] The parties cite the following authorities: By Defence: ***Sault Ste. Marie*** supra. By the Crown: ***Sault Ste. Marie***, supra at page 1322; ***R. v. Imperial Oil Ltd.*** 2000 BCCA 553 at para. 27-28 (BCCA); ***R. v. Rio Algom Ltd.,*** [1998] O.J. No. 1810, (Ont. C.A.) at para. 31.

[243] In ***Sault Ste. Marie***, the Supreme Court of Canada better defines the nature of strict liability offences. At page 1326 Justice Dickson comments as follows:

> "Offenses 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 would 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. These offenses may properly be called offenses of strict liability."

[244] The Crown need only prove the guilty acts beyond a reasonable doubt and the onus then shifts to the accused to avoid liability by proving reasonable care, on a balance of probabilities. What the accused intended to do, what he knew or did not know are matters left to the accused.

[245] Courts have required that the steps taken to demonstrate due diligence be concentrated on the "particular event" giving rise to the charges, rather than measures which might only in some general way, promote compliance.

[246] In ***Imperial Oil Ltd,***, a case involving environmental offenses under Waste Management and Fisheries Act legislation where the accused admitted the *actus reus* of the offenses in respective of the discharge of effluent which failed a toxicity test, but argued reasonable care in the exercise of due diligence in maintaining an safety inspection system and undergoing testing more frequently than required.

[247] Citing ***Rio Algom Ltd,*** the Court in ***Imperial Oil Ltd.*** noted the focus should be on whether the defendant took all reasonable precautions to prevent the occurrence of the prohibited event, rather than on a more general level of good conduct.

[248] At paragraphs 27 and 28, the Court went on to examine the specific events in issue giving rise to the failures that allowed the Court to conclude those failures demonstrated a lack of due diligence.

[249] The Court finally held that it was not an answer for the accused to say, in general**,** that it had a good safety system, that it undertook more than frequent testing and that it had a program to detect a future hazard to constitute due diligence. The court found the trial judge's related findings were inconsistent with the suggestion that Imperial Oil exercised due diligence with respect to the specific events constituting the *actus reus*.

**Analysis**

[250] The Supreme Court in ***Sault Ste. Marie***, requires I direct the enquiry in this case to the accused's actions in complying with the specific provisions of the Enforcement Order which have been contravened. For the defence to succeed, the accused must, on the balance of probabilities, be able to show they took all reasonable steps to ensure they took steps to comply with the particular terms of the Enforcement Order the Crown claims were contravened and to adduce evidence of due diligence targeting those specific terms.

[251] Dockman points to various considerations which he asks me to take into account in assessing the issue of due diligence, a few of which follow:

- Mattucci's role and the nature of the supervision program that guided him and Dockman's related support and supervision of the facility.

- Dockman's attempts to tie the Waterworks System into the Rocky View Water Co-op by becoming a commercial customer.

[252] These activities seem to me to constitute nothing more than general measures which in Dockman's mind, may have promoted general compliance with the provisions of the Enforcement Order but do not constitute specific steps taken to ensure compliance with specific provisions of the Enforcement Order.

[253] Some of the more specific factors Dockman points to as establishing due diligence on his part are as follows:

**Theft of records**

[254] Dockman once again points to the adverse effect of the theft of records which he continues to argue denied him any opportunity to demonstrate due diligence in his attempts to comply with the Enforcement Order. For all of the same reasons expressed by this Court in denying the accused's application for a stay of proceedings, the loss of those records does not set off, nor does it negate, the need for Dockman to demonstrate due diligence in relation to the various contraventions as have now been established under the terms of the Enforcement Order.

**Foreseeability of harm**

[255] Dockman argues reasonable steps to avoid an occurrence of the prohibited acts should take into account the foreseeability of harm which in this case, relates to excesses of pH and fluoride concentrations. Dockman's contention there is no evidence, the expert Janzen's evidence included, which proves any harm which might have seriously affect the users of the water system.

[256] Janzen's expertise in drinking water treatment monitoring and regulation certainly assists me in understanding the nature of a reverse osmosis system as a process of filtration, the need for stability in pH and optimal fluorides in water and the resulting health affects if they are not. As helpful and convincing as his evidence is, any of his views on the associated health risks are inconsequential to Dockman's obligations to demonstrate due diligence in this case.

[257] I agree with the Crown when they say the regulatory framework within which the Waterworks System operated did not leave it up to Dockman to safeguard the health risks associated with this system. The regulator, Alberta Environment, was charged with responsibility for the risks to the public associated with drinking water produced by this facility by them structuring appropriate conditions in Dockman's approval. Overall, Dockman was then obliged to maintain his authorization to operate the facility within its terms and was obliged to continue reporting contraventions to the regulator to allow them to respond to associated ongoing risks. The only due diligence required of Dockman was to take all reasonable measures to ensure the specific terms of the Enforcement Order had been complied with and in performing his responsibilities, he had no regulatory role in dealing with, or anticipating any of the risks to the public associated with drinking water produced by this facility.

[258] Accordingly, the foreseeability of harm to the users of the Waterworks System as Defence argues has nothing to do with Dockman exercising due diligence.

**Dockman's declared intention to cease operating the Waterworks System**

[259] Dockman provided a lengthy history in his testimony of how he dealt with the regulator from and after June 1st, 2012, starting with his attempts to file a re-licensing application for the continued operation of the system leading to discussions with Alberta Environment concerning an Enforcement Order as a mechanism to accomplish that end. He directs the Court's attention to a meeting of May 30th, 2013 at Alberta Environment offices with Knaus and another Alberta Environment representative, Mr. King, where the Enforcement Order was presented to him and where he says he was left with the impression the Order had to be signed before he left and that he left him feeling pressured. He left that meeting with a copy of an Enforcement Order but left also with the intention to appeal the Order or have it changed.

[260] He maintains Knaus did not explain some of the contents of the Order and left wanting the opportunity to comment on some of the substantive changes, primarily the reporting frequencies. Knaus was not willing to change the terms back to those provided in the Approval but suggested he might look at Dockman's request for changes over the next few days if Dockman would provide his comments. There was very little discussion about the appeal process. Dockman provided comments to Knaus by email following the meeting. Knaus replied, but provided only one or two changes to unrelated issues and did not address what Dockman saw to be the central issues of reporting frequencies.

[261] Between May 30th and when he sent his email, Dockman considered various aspects of the Order to see whether it was possible for him to meet Alberta Environment's requirements, which included consideration of his staff and the money he needed to operate.

[262] Knaus testified over the months of June, July and August, 2013, he had frequent conversations with Dockman, some about his non-compliance with the Order and some concerning him asking for changes to the Order and what was needed to support those changes before Knaus would consider amending the Order.

[263] Dockman testified to another meeting he attended on September 20th, 2013 with Knaus at Alberta Environment's office. McMillan accompanied him. The gist of the meeting was to discuss him closing the facility. He testified he then told Knaus he could not meet the terms of the Enforcement Order and gave Knaus notice he would be closing the plant on October 1st as a result of his August move to Edmonton. He had been commuting to and from Edmonton and living in Airdrie to attend to the plant and support its operations on the weekends.

[264] He also testified to having considered both a sale and a lease of the plant, both of which were not successful.

[265] Defence suggests these sorts of discussions serve to temper Dockman's continued obligation to comply with the Enforcement Order and stand as some evidence of due diligence and in so doing, argue Knaus' credibility is brought into issue as a result of these interactions.

[266] As I see it, this is not a credibility contest between these two witnesses on this issue. The fact that Knaus and Dockman engaged in discussions in which termination of the operation of the system was discussed and the outcome of those meetings does nothing to address Dockman's continued obligation to operate the Waterworks System and to comply with the terms of the Enforcement Order.

[267] Any suggestion Knaus was trying to force Dockman into an unwanted course of action in these meetings is neither justified nor relevant. I agree with the Crown when they say Dockman had dealt with and had become knowledgeable as to the operation of the sort of plant, both as one of the founding directors of the Rocky View Water Co-op and then over 11 years with this plant. He was a sophisticated businessman in his own right and had become sophisticated in the operation of water treatment facilities over those years. I am not at all prepared to draw the inference Dockman was unsophisticated and had somehow been forced into continuing the operation of this facility by Alberta Environment.

[268] The evidence shows that Dockman, at one point, had restrictive covenants on the titles of his customers' Sharp Hill properties and effectively had a monopoly to supply water to them. Whether or not that monopoly persisted after the discharge of those restrictive covenants, Dockman clearly had continuing obligations to provide the service to the residents then and

through the term of the Enforcement Order and the Amended Enforcement Order. Had he terminated the service summarily, he would have been left to deal with some very disadvantaged homeowners.

[269] The fact is that Dockman was not authorized to operate the system without an approval from Alberta Environment. The Enforcement Order had been created for his benefit as a mechanism to allow him to continue operating the system and supply water to his customers. Knaus testified, and I accept, that there was no EPEA requirement forcing an operator to continue operating a system, but if they choose to continue operating, they were obliged to do so in accordance with the Authorization issued to them. The reality here was that Dockman had moved to Edmonton and contemporaneously, continued trying to operate the Waterworks System. That, of course, was his decision and not Alberta Environment's.

[270] Dockman also had his investment in the plant to consider. He testified he had unsuccessfully tried to arrange a sale or lease to hand the facility off to another operator and it seems clear he had some interest in preserving the plant's value by continuing its operation.

[271] The fact is the Enforcement Order had been put in place, Dockman had notice of it and had the option to stop supplying water and shut the facility down to avoid the alleged contraventions, but made his own decision to keep operating the plant. The fact that he expressed an intention to Knaus to close the system down does not constitute due diligence.

**His efforts to supply reports after September 20, 2013 and to solve a mechanical problem in November, 2013**

[272] Dockman testified that after September 20th, 2013, he kept tabs on the plant as best he could from a distance. Mattucci was attending the plant and Godlien was providing support, until the middle of November, 2013 when he drove from Edmonton to meet with the residents but was excluded from a meeting which ended his direct relationship with the residents. In November, an operational problem arose. The "O" ring broke in one of the reverse osmosis filters rendering the reverse osmosis process inoperable and had to be replaced off-site. Alberta Environment was notified and an on-site inspection by Larry West, a Compliance Inspector with Alberta Environment resulted.

[273] According to Dockman, the broken "O" ring resulted in an increase in fluoride going to the water treatment plant. Trucked water would have been an interim solution as result, but he did not know if it had been ordered on this occasion, as he was in Edmonton.

[274] Dockman argues that he displayed due diligence by continuing to submit a series of reports after September 20th, 2013 and by addressing the November mechanical problem by keeping an Alberta Environment inspector apprised of the problem and maintaining contact with the department through West until the plant was shut down on January 20th, 2014.

[275] Those, in a general sense, project a degree of effort by Dockman to stay in touch with Alberta Environment and to correct an operational problem with the plant, but do not address specific steps taken by him to avoid a particular non-compliance with the Enforcement Order. On that basis, neither of those efforts amount to due diligence.

**Due diligence specific to each count?**

[276] The issue persists as to what specific steps Dockman took to ensure compliance with each contravention of the Enforcement Order. The following factual basis supports the absence of

Dockman's due diligence in relation to contraventions referred to in respect of all six counts appearing on the Information.

**Count 1-Fluoride Limits**

[277] The evidence discloses numerous monthly contraventions of fluoride limits as required by the Enforcement Order. While there is evidence the facility utilized a reverse osmosis system to contain these problems, there is no evidence demonstrating Dockman had taken any steps over the course of the Enforcement Order to ensure compliance with the prescribed limits.

[278] Dockman testified Mattucci would tell him whenever something had broken in the plant. He recollected an increase in the fluoride level when the "O" ring membranes broke and suggested trucked water would have been the first thing to be done to reduce the amount of fluoride while the membrane was being replaced. But when asked if trucked water had been used on this occasion, Dockman testified he could not recall, he was in Edmonton.

[279] He went on to testify that he thinks, but was not sure if a notice concerning an unacceptably high fluoride reading brought about by the "O" ring deficiency had been mailed to customers. He quite candidly admits he was in Edmonton then and his involvement with the facility was much less focussed in the fall of 2013 when this occurred and was unable to provide any indication as to what steps had been taken to bring the fluoride concentration back into compliance with the Enforcement Order.

[280] He was aware there were many operational problems with the plant in November and December, 2013. There were dramatic increases in the flow of water in November, 2013, three or four times over the plant's normal flow beyond its capability. He was present at the plant some of the time while this was happening but most of the time he was in Edmonton. He had been kept informed about the flow increase by Mattucci and Godlien by telephone, email and text but they were unable to provide him with an explanation. He reviewed the logs on his trips from Edmonton in November and December but could not provide a reason why this was occurring.

[281] Dockman gave no explanation of why trucked water might have affected compliance with fluoride limits. Simply stating trucked water as a potential solution to restoring acceptable fluoride limits does nothing to show when that measure was introduced and how it assisted with restoring acceptable fluoride limits. Similarly, his evidence about how the water flow affected compliance and what he did to correct is wholly inconclusive.

[282] The defense of due diligence must be specific to the Enforcement Order. In the circumstances of this case, that meant seeing both fluoride and pH stay within the prescribed limits of the Enforcement Order and required the appropriate reporting to the Alberta Environment to allow them to deal with the associated risks.

[283] Fluoride must also stay within the prescribed limits of the Enforcement Order and also requires the appropriate reporting to the Alberta Environment. Due diligence must be specific to the Fluoride contraventions occurring under the terms of the Enforcement Order. Dockman's limited comments concerning fluoride contraventions occurring under the terms of the Enforcement Order do not establish due diligence.

**Count 2-pH limits**

[284] Dockman testified that well five provided water at a pH level which, when blended with water from wells six and nine, resulted in treated water which fell within the pH limit specified in the approval. His explanation for why pH in treated water was too high was as a result of the other two wells, wells six and nine producing ample raw water but well five was needed to keep pH within the limit. Well five, however, had been destroyed as a result of destruction of a pump and was not operational over a portion of the term of the Enforcement Order. His records concerning this had been destroyed and he did not know when they stopped using well five.

[285] He was specific as to why the well stopped working. It had been "plugged up" and had been repeatedly repaired by a chlorination process but after a few months into the Enforcement Order, it stopped working. He testified no steps had been required nor had any steps been taken to bring it back into operation during the term of the Enforcement Order. He maintained it was not required for the water system to perform its functions.

[286] But the question left unanswered is why he saw no need to have the well repaired if it, in combination with the other wells, was as an integral part of him complying with the pH limits required under the terms of the Enforcement Order.

[287] Dockman's reports to Alberta Environment through the call centre on June 6th, June 8th, June 11th, June 13th, June 18th, June 21st, June 28th, July 8th, July 15th, July 30th, August 7th, August 23rd and August 30th, 2013 all, in their own ways, refer to pH excesses as result of the pump moderating pH not being functional.

[288] It is worth noting that on July 15th, Dockman reported the well-used to monitor the system was not working but would be back to normal when the well was repaired. The June 21st report also specifically referred to the pump on well five moderating pH as being broken.

[289] All of these reports, directly, or by inference, suggest the well five pump failure throughout the period of the Enforcement Order was attributable to pH excesses but were logged without any indication as to what efforts were being made to repair the well to allow the excesses to be corrected, or when those repairs might be completed.

[290] Reporting these occurrences as Dockman had is one thing, but his efforts to correct problems with the pump, the apparent reason for pH excesses, is quite another. Dockman's inattention to the problems he reports does not meet the test of due diligence in relation to the contraventions set out in Count 2.

[291] As with fluoride limits, pH must also stay within the prescribed limits of the Enforcement Order and also requires the appropriate reporting to the Alberta Environment. Due diligence must also be specific to the pH contraventions occurring under the terms of the Enforcement Order but was not.

**Counts 3-Failing to comply with Monitoring Frequencies for Fluoride in treated water**

**Count 4-Failing to comply with Monitoring Frequencies for pH in treated water**

[292] Monitoring fluoride and pH frequencies was attended to at various times by Mattucci, Godlien and Dockman himself but their efforts individually and collectively appear to me to constitute a disjointed, *ad hoc* approach to meeting the terms of the Enforcement Order.

[293] Mattucci testified he tried to go to the water treatment plant every day when he started working at the plant but his attendances would fluctuate with his other work as a truck driver.

[294] Mattucci testified he was spending too many hours working, it was too much for him and he would tell Dockman so he could do the reporting for him. Dockman knew Mattucci was working a 13 hour day and was tired and did not want to do reporting at the end of the day. Dockman felt it was appropriate to support him by doing the reporting himself.

[295] Monitoring frequencies quite clearly had become less stringent with the commencement of the Enforcement Order. The operation of the plant over the prior 11 years under the prior Approval required pH monitoring once per day, which, implicitly, would have required daily attendance by an operator. The frequency of pH and fluoride monitoring required under the Enforcement Order, however had been markedly relaxed to five of seven days.

[296] Dockman however testified that Mattucci's job was to do the tests four to five days out of seven and Mattucci would pick which days. That, however, runs contrary to the imperative of the Enforcement Order. Four of seven days was not compliant with the Enforcement Order. A regime of five of seven days was needed and it was not up to Mattucci to pick days suitable to him outside of that specific order.

[297] Dockman also testified that prior to Mattucci, he had retained the services of Aquatech, a company in the business of servicing water systems considerably larger than this one and were in high demand throughout Southern Alberta. They did a good job for him, but according to him, Mattucci was licensed and capable of performing the same functions at a substantially reduced monthly cost.

[298] Dockman's decision to terminate Aquatech's participation with the plant and retain Mattucci as the operator with Godlien and as a support person turned out to be a less than favourable decision.

[299] Mattucci readily admits his obligations at the plant became too much for him given his daytime employment as a truck driver. Mattucci was not an impressive witness in these proceedings. He was unsure, tentative, imprecise, almost scattered with his evidence. He seemed reluctant to commit with his comments and I was left with the sense that is how he may have approached his functions at this water treatment plant.

[300] Dockman seemed to want to blame Mattucci for the contraventions.

[301] Dockman testified Mattuci underwent training by way of an accredited course before obtaining his certification as an operator, but any sort of regular training program beyond that was only undertaken between him and Mattucci. He testified also that he gave Mattucci the benefit of all of his experience and made sure he had all the qualifications, had read all the papers and had all of the operations manuals he needed to do the job.

[302] Overall, he believed it was Mattucci's responsibility to make sure Alberta Environment was contacted in the event of any excess pH or fluoride in the system. Dockman thought Alberta Environment did not necessarily think he personally had to make contact with the Department but that it was simply his responsibility to ensure contact with them was being maintained. That of course, runs contrary to Dockman's assertion that he was the only one who dealt with Alberta Environment.

[303] Dockman also knew Mattucci had working 13 hour days and testified he felt it was necessary for him to support him by doing things himself.

[304] Any suggestion Mattucci had the primary duty for compliance with the Order, when in fact Dockman himself was in control of the system and had the primary duty to ensure compliance, runs entirely contrary to the evidence.

[305] The Crown argues, and I agree, that some level of reasonable diligence could have been achieved by Dockman doing some of the following:

[306] There is no clear evidence that Mattucci and Godlien had a clear understanding of the requirements of the Enforcement Order nor was there any monitoring of their performances under the Order. Even though a copy of the Enforcement Order had been left at the plant, there is no specific evidence Dockman took steps to know Mattucci understood its requirements and his resulting responsibilities. In fact, Mattucci himself testified there was no standard operating procedure he would follow to operate the plant nor was there a set of written instructions directing what he was to do on any particular day.

[307] Quite clearly then, there was no formal scheduling system to ensure fluoride in pH monitoring for the was done as required, no system to ensure that Monthly Reports were emailed to Leslie Miller and no system to ensure contraventions reported to Alberta Environment requirements were being dealt with.

[308] Godlien testified she had no formal training in drinking water treatment but testified she received instructions from Dockman concerning what she was supposed to do with the building which seemed limited to her knowing how to write down numbers off gauges on a sheet that she had been given. She seemed no more prepared to undertake her functions than Mattucci was with his as the plant's certified operator.

[309] Dockman's efforts to comply with the Enforcement Order's monitoring frequency requirements under using these sorts of resources, his own efforts included, do not amount to due diligence.

**Count 5-Failure to submit electronic information under clause 5 of the Enforcement Order**

[310] Dockman testified that on May 30th, 2013 and afterwards he was not aware of the requirement contained in the Enforcement Order necessitating he submit electronic information to Leslie Miller at a particular email address. He testified he had a lot of things to do in June and this was not a priority for him for the first several weeks of June and early July.

[311] His justification for not doing so was inconclusive. He testified he had tried to shut the business down, these were monthly reports normally done by his administrative people and as with other aspects of his authorization, there were problematic changes and he did not see these reportings to be feasible.

[312] He addressed one particular deficiency concerning a grab sample referred to in paragraph six of the Enforcement Order required to be taken before August 1st, 2013. He testified that sample was taken late and he recalls the analysis to have been provided by him delivering the report to Alberta Environment's front desk to the attention of Craig Naus, not to Leslie Miller's email address as required under paragraph eight of the Enforcement Order. None of this

explanation demonstrates any steps taken by him to comply with the requirement, in fact, much to the contrary. From all indications, Dockman simply ignored the requirement.

[313] There is no evidence of due diligence in respect of Dockman's obligation to report specific matters by email under the terms of the Enforcement Order with respect to the contraventions set out in count 5.

**Count 6-Failure to immediately report contraventions of the Enforcement Order by telephone**

[314] Dockman's attempts to blame Mattucci for him failing to report contraventions suggesting he was somehow responsible is not convincing**.**

[315] Mattucci certainly knew the guidelines for pH and fluoride and was familiar with the necessary frequency of reporting. He testified that while he reported deficiencies a couple of times, all of this was too much for him to handle and that he would tell Dockman about deficiencies and he would usually do the reporting. He also testified he let Dockman know every time the fluoride was outside the limits.

[316] But Dockman testified in August, 2013, pH was in excess of the range set out in the Enforcement Order but he was not living in Airdrie at the time. As a matter of course, he would hear this from Mattucci, and he, in turn would call Alberta Environment and report three or four occurrences at a time. He knew there was a seven day limit on written reports and, as a result, he provided emails within seven days of when the event occurred.

[317] He also knew about the provision in the Enforcement Order requiring immediate reporting if pH or fluoride exceeded the limits but "immediate" to him meant "as soon as realistically possible" after the information came to him.

[318] But while Dockman's decision to group reports and remit them seven days after an occurrence may, in his mind, amount to the provision of immediate reports, it does not, on any reasonable interpretation, amount to compliance with the Enforcement Order. Dockman provided no basis for why this occurred and I am left to draw the inference it was done solely for his own personal convenience.

[319] Moreover, an examination of the Monthly Records in relation to the contents of Call Information Forms there were numerous contraventions that were not contained in the Call Information Forms and thus, were not reported. Their absence utterly defies the requirement for immediate reporting.

[320] Dockman initialled certain of the monthly logs in the column "operators initials" and it's clear he attended the facility periodically. He also had access to the entire record of contraventions as had been recorded in the Monthly Records but there is no evidence he took direct action in relation to any of those contraventions.

[321] Even though Dockman claims Mattucci was responsible for reporting contraventions, it was Dockman who made all the contravention reports to the CIC call center. Moreover, Dockman testified he personally had taken the role of communication with the Regulator. His personal decision to move to Edmonton did not remove his obligation as a named party to the Enforcement Order to ensure compliance with the Enforcement Order, regardless of his physical ability to attend the facility or to adequately monitor and support his staff.

[322] There is no evidence of due diligence in respect of requirement to immediately report contraventions under the terms of the Enforcement Order as referred to in Count 6.

**Due Diligence?**

[323] Overall, Dockman was not entitled to pick and choose which specific conditions of the Enforcement Order he would abide by but was expected take all reasonable measures to ensure all of its provisions were being complied with. On the balance of probabilities, Dockman has failed to demonstrate due diligence in relation to the contraventions set out in each of Counts 1 to 6 inclusive

**Verdict**

[324] Having considered the whole of the evidence, I am satisfied the Crown has proven the *actus reus* of all of the contraventions alleged in Counts 1 to 6 inclusive and I am further satisfied Mr. Dockman has failed to demonstrate due diligence in relation to any and all of those counts. Convictions on all six counts should result and I am satisfied those convictions ought to be entered against Mr. Dockman solely.

[325] I find Michael Louis Dockman guilty on Counts 1 to 6 inclusive on the Information and dismiss those counts as against Dockman & Associates Ltd.

[326] I thank counsel for their helpful oral and written submissions.

Heard on the 5th day of December, 2016;
the 6th Day of December, 2016;
the 7th day of December, 2016;
the 8th day of December, 2016;
the 22nd day of February, 2017; and
the 23rd day of March, 2017;

Dated at the City of Calgary, Alberta this 10th day of May, 2017 .

Original Signed By

W. J. Cummings
A Judge of the Provincial Court of Alberta

**Appearances:**

P. Roginski
for the Crown

J. Anderson
for the Accused

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**Corrigendum of the Decision**

**Of**

**The Honourable Judge W. J. Cummings**

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Several editing changes have been made to this Judgment and therefore this Judgment is replaced in its entirety.