ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Hearing - July 20, 1999
Date of Decision - August 17, 1999

IN THE MATTER OF Sections 84, 86, 87, 90, 156, and 223 of the *Environmental Protection and Enhancement Act,* (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF an appeal filed March 31, 1999 by Mr. Bryan Phillips on behalf of the Municipal District of Cardston No. 6 with respect to Administrative Penalties #99/10-PRA-AP-99/12.

Cite as: Municipal District of Cardston No. 6 v. Director, Enforcement and Monitoring Division, Alberta Environmental Protection.

HEARING BEFORE

Dr. William A. Tilleman, Chair
Dr. John P. Ogilvie
Ms. Patricia M. Cross

APPEARANCES

Appellant: Mr. Bryan Phillips, Municipal District of Cardston No. 6, Mr. Gary Leavitt, Mr. Terry Helgeson, Mr. Duncan Thompson

Department: Ms. Joanne Smart, counsel, Alberta Justice, representing Mr. Fred Schulte, Director, Enforcement and Monitoring, Alberta Environment, Mr. Rick Chisholm, Mr. Stuart McLennan, Ms. Erika Gerlock

EXECUTIVE SUMMARY

In Alberta, the use of pesticides is regulated under Part 8 of the *Environmental Protection and Enhancement Act* (Act), S.A., 1992, c.E-13.3. Section 156 (1)(a) of the Act prohibits the selling, distribution, usage, application, handling, storage or transportation of a pesticide except in accordance with the regulations with respect to that pesticide and the label for that pesticide. The relevant regulations are set out in *Pesticide Sales, Handling, Use and Application Regulation* (PSHUAR), and in the *Pesticide (Ministerial) Regulation* (PMR).

This is an appeal by the Municipal District of Cardston No. 6 (Municipality) of a $5,000 administrative penalty assessed against the Municipality in respect of two offences: the first is for a violation of s.5(1) (a) of the PSHUAR for applying a pesticide in a manner which causes or is likely to cause an adverse effect; the second is for a violation of s.9 of the PMR for using a restricted pesticide within 30 metres of an open body of water without a special use approval.

A violation of either of these regulations is subject to an administrative penalty as a contravention of s.156 of the Act and under s.2(1) of the *Administrative Penalty Regulation*. The $5,000 penalty under appeal was issued by Mr. Fred Schulte, Director of Enforcement and Monitoring Division, Alberta Environment, against the Municipality.

Following a review of the Director's decision and the evidence presented at the appeal hearing, the appeal by the Municipality is denied.

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I. BACKGROUND

A. Statutory Background

[1] At issue in this case is the wrongful spraying of pesticides under s. 156(1)(a) of the *Environmental Protection and Enhancement Act*[1] (the Act). Section 156 states no person shall sell, distribute, use, apply, handle, store or transport a pesticide except in accordance with the regulations with respect to that pesticide and the label for that pesticide.

[2] The regulations governing the use and application of pesticides are set out in *Pesticide (Ministerial) Regulation*[2] (PMR) and in the *Pesticide Sales, Handling, Use and Application Regulation*[3] (PSHUAR). The PMR deals generally with licencing requirements for the controlled use of restricted pesticides. The PSHUAR deals with the prevention of adverse effects by regulating the sales, handling, use and application of pesticides.

[3] Section 9(1)(b) of the PMR states that unless a person holds a special use approval issued by the Director, no person shall use or apply a pesticide listed in Schedule 1, 2, or 3 within a horizontal distance of 30 metres from an open body of water.

[4] Pursuant to s.5(1)(a) of the PSHUAR, no person shall use, apply, supply, handle, transport, display, store or dispose of a pesticide in a *manner* or at a *time* or *place* that causes or is likely to cause an adverse effect.

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1 S.A. c.E-13.3.

2 A.R. 43/97.

3 A.R. 24/97.

B. Factual Background

[5] On or about June 25, 1997, the Municipal District of Cardston's (Municipality) herbicide crew sprayed Tordon 22K, a restricted use herbicide,[4] Tordon 22K, within 30 metres of the Belly River in Southern Alberta. The Municipality did not have a special use permit in accordance with the regulations, to spray Tordon 22K. The Municipality decided to use Tordon 22K to control leafy spurge, a plant that is noxious, difficult to eradicate, and costly; leafy spurge can easily dominate native species and ruin the diversity of prairie landscapes.

[6] At the time of the incident, the Municipality had been issued Special Use Approval No. 10533-01 which permitted the application of AMITROL-T, ESCORT, 2,4-D, DICAMBA (Dicamba is the active ingredient in Banvel) and TRANSLINE within 30 metres of an open body of water; however, no other pesticides were included or allowed within 30 metres of the water.

[7] An employee on the Municipality's spraying crew, who was present at the application of Tordon 22K along the banks of the Belly River, reported the contravention to Alberta Environment approximately two weeks later on July 9, 1996.

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[4] Tordon 22K label has a notice to the user identifying the pesticide as a control product which can only be used in accordance with the directions on the label. Under the heading of Environmental Hazards, the label instructs: Do not apply directly to water. Do not apply where runoff is likely to occur. Do not contaminate water by cleaning of equipment or disposal of wastes. Do not contaminate irrigation ditches or water used for irrigation or domestic purposes. See Written Submissions of the Department, Tab 37.

[8] Alberta Environment staff conducted an investigation of the alleged spraying. Investigators found blue stains from the marker dye[5] along the banks, and on the exposed rocks actually in the water. In addition, chemical analysis of vegetation samples taken 1-2 metres and 4.7 metres from the water edge contained significant levels of "picloram".[6]

[9] The application of picloram close to an open body of water has a significant potential to cause an adverse effect because of its phytotoxic, soluble, mobile and persistent (potent) qualities. It has the potential to enter and contaminate water, to cause non-target vegetation damage, and to cause ongoing and unforeseen damage to other users of the water.[7]

[10] The Municipality's crew supervisor, Mr. Gary Leavitt, was not a certified applicator as required by the regulations[8]. Mr. Leavitt sprays under the licence of his supervisor, Appellant municipal employee, Mr. Bryan Phillips. But Mr. Phillips was not present on the day in question. Ms. Nicole Lefebvre, who was a certified applicator and who sprayed Tordon 22K, was present at the site though not in charge.

[11] Mr. Leavitt, who was in charge, claims to have *not* seen the special use approval but admits to knowing that Tordon 22K is not to be used within 30 m of an open body of water. Mr. Leavitt also admits to having mixed the contents of both his tank and the tanks of other employees who did spray Tordon 22K. In addition, Mr. Leavitt stated that he had told the complainant to spray along the river but did not stipulate at what distance.

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[5] Blue marker dye is added to the pesticide in order to make it readily apparent to subsequent investigators.

[6] Picloram is the active ingredient in Tordon 22K. Chemical analysis revealed that the first sample contained 23 ppm of picloram and the second sample contained 41 ppm of picloram.

[7] Written Submissions of Alberta Environment, paragraph 28.

[8] Section 3(1) of *Pesticide (Ministerial) Regulation*, A.R. 43/97, states:

> No person shall use or apply a pesticide listed in Schedule 1 or 2 unless that person
> (a) holds the appropriate class of applicator certificate listed in Schedule 5 for that use or application, or
> (b) is working under the supervision of an applicator and in accordance with the latest edition of the *Environmental Code of Practice for Pesticides*, published by the Department.

C. Procedural Background

1. Preliminary Assessment

[12] The assessment of an administrative penalty involves a two-step analysis: the first is essentially an objective determination under schedule of s.3(1) of the *Administrative Penalty Regulation*[9] (APR); and the second is a subjective assessment of the relevant factors by the Director as set out in s.3(2) of the regulations.[10]

[13] The regulatory scheme for assessing the penalty under s.3(1) of the APR, is as follows:

Variation From Regulatory Requirement

		Major	Moderate	Minor
Potential For Adverse Effect	Major	$5,000	$3,500	$2,500
	Moderate	$3,500	$2,500	$1,500
	Minor	$2,500	$1,500	$1,000

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[9] A.R. 143/95.

[10] Section 3(2) of the *Administrative Penalty Regulation*, A.R. 143/95 states:

> In a particular case the Director may increase or decrease the amount of the administrative penalty from the base penalty after considering the following factors:
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> (a) importance of compliance with the regulatory scheme;
> (b) the degree of wilfulness or negligence in the contravention;
> (c) whether or not there was any mitigation of the consequences of the contravention;
> (d) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;
> (e) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention;
> (f) any other factors that, in the opinion of the Director, are relevant.

[14] The Director assessed the base penalty for the contravention of s.9(1)(b) of the PMR for not having a special use permit at $1,500. The Director reached this assessment for the following reasons: first, he deemed the failure to have a special use approval to be a minor variation from the regulatory requirement; second, he assessed the 'potential for adverse effect' to be moderate.[11]

[15] The Director assessed the base penalty for the contravention of s.5(1)(a) of the PSHUAR causing an adverse effect at $3,500. The Director based this assessment on the finding that the 'variation from regulatory requirement' was major, as the actual release was a violation of the environmental limit.[12] The 'potential for adverse effect' was assessed as moderate for similar reasons.[13]

[16] The Director then performed the second stage of the assessment under s.3(2) of the APR which empowers the Director to increase or decrease a base penalty after considering the enumerated factors. Upon considering the enumerated factors, the Director decided the penalty would be increased by $1,500.[14] The total *initial* assessment was $6,500.[15]

2. Final Assessment Decision

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[11] Written Submissions of Alberta Environment, paragraph 42.

[12] This is a violation of an environmental limit in the release of a pesticide into the environment in a location in which no release was permitted. Written Submissions of Alberta Environment, Tab 3, page 2.

[13] Written Submissions of Alberta Environment, paragraph 43.

[14] The Director's analysis of the factors is as follows:
under s.3(2)(a) the penalty was increased by $1,500;
under s.3(2)(b)the penalty was increased by $500 because the on-site supervisor did not see the approval;
under s.3(2)(c) penalty was increased by $500 because the appellant did not respond to Alberta Environment's request to advise what steps were taken to ensure that a violation does not recur;
under s.3(2)(d) the penalty was decreased by $500 because there was no prior history of enforcement action against the appellant;
under s.3(2)(e) there was no adjustment;
and under s.3(2)(f) the penalty was decreased by $500 because the appellant co-operated with the investigation.

[15] Written Submissions of Alberta Environment, paragraph 44.

[17] Subsequent to the preliminary assessment, Alberta Environment and the Municipality met on February 26, 1999. At that time, the Municipality indicated mitigating steps had been taken following the preliminary assessment. For example, these steps included: hiring a new assistant field man to assist Mr. Leavitt; ensuring that people hired for spray crews know what they are doing; giving better instructions; and significantly, the discontinued use of Tordon 22K near open water.[16]

[18] In making his final decision, the Director took the above mitigating factors into account and reduced the administrative penalty by $1,500.[17] Therefore, on March 8, 1999, the Appellant received Administrative Penalty No. 99/10-PRA-AP-99/12 with a final assessment of $5,000.

3. Notice of Appeal

[19] On March 31, 1999, the Appellant filed a Notice of Appeal, essentially on the ground that the employee who sprayed the Tordon 22K was the same employee who reported the incident to Alberta Environment, and who, incidentally, had been terminated by the Municipality following the spraying incident. One possible inference to be drawn from the Appellant's argument is that it did not want to be held accountable for what it considered to be the deliberate misdeed of an employee.

II. DISCUSSION

A. Standard of Review

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[16] Written Submissions of Alberta Environment, paragraph 57.

[17] The Director used the factors set out in s.3 of the *Administrative Penalty Regulation* to reduce the penalty. Pursuant to s.3(2)(c), the Director may consider whether or not there was any mitigation of the consequences of the contravention and pursuant to s.3(2)(f) any other factors, that in the opinion of the Director, are relevant.

[20] The issue of the Environmental Appeal Board's (Board) standard of review was raised at the Cardston hearing. Two previous Board decisions were raised which addressed the degree of deference the Board must show to a decision by the Director. The decisions were *Superior Vet and Farm Supply v. Director of Pollution Control, Alberta Environmental Protection*[18], (*Superior Vet*) and *Hayspur Aviation Ltd. v. Director of Pollution Control, Alberta Environmental Protection*[19] (*Hayspur*). In both decisions, the Board applied the substantial evidence test to the determination of whether to confirm or reverse the decision of the Director. Historically, the Board's position has been that the Director's decision should be sustained if the discretion exercised by the Director in interpreting the regulations is supported by substantial evidence when based on a review of the whole record *and* the evidence subsequently presented to the Board.

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18 *Superior Vet and Farm Supply v. Alberta (Director of Pollution Control) Alta Environmental App. Bd.* (1997) 23 C.E.L.R. (N.S.) 193.

19 *Hayspur Aviation Ltd. v. Director of Pollution Control, Environmental Protection*, (1997) 23 C.E.L.R. (N.S.) 177.

[21] Following the *Superior Vet* and *Hayspur* decisions, the issue of the Board's standard of review has been dealt with by the Courts. The standard of review applicable to decisions of the Board was set out by the Alberta Court of Appeal in *Chem-Security (Alberta) Ltd v. The Lesser Slave Lake Indian Regional Council and the Environmental Appeal Board (Alberta)*[20]. In that decision, Justice Berger concluded that a hearing before the Board is a *de novo* hearing. Justice Berger reached this conclusion on the basis that s.87(2) of the Act empowers the Board to consider any new evidence that was not before the Director. Accordingly, the Board is not bound by the evidentiary findings of the Director. The Board must make its decision on the basis of the evidence before it, including evidence received and presented to the Board up to the time of the hearing.[21]

B. The Kienapple Principle

[22] Counsel for the Appellant raised the issue of "double jeopardy". The Appellant submitted that the two penalties assessed were for the same act of spraying the Tordon 22K at one location along the Belly River; this, according to the Appellant violates the *Kienapple*[22] principle. The *Kienapple* principle is premised on the fundamental concept of penal legislation that a person cannot be convicted for more than one offence arising out of the same conduct, matter or delict. Accordingly, the Appellant submits that one of the penalties must be dropped. The Board believes, though, this argument fails on the basis that the rule against multiple convictions only applies where there is no additional and distinguishing element contained in the second "offence".[23]

[23] In *R. v. Wigman*[24], the Supreme Court of Canada applied a two-part test which must be met in order for the *Kienapple* principle to apply:

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20 (1996) Appeal No.16947, Alta.C.A.;(1997) 56 Alta.L.R. (3d) 153; (1997) 23 C.E.L.R. (N.S.) 165.

21 This view is consistent with s.87(2)(d) of the Act.

22 *Kienapple v. the Queen* (1974) 15 C.C.C. (2d) 524, S.C.C.

23 We must also point out that *Kienapple* was a Criminal Code of Canada matter and that the application of the *Kienapple* prinicple to administrative offences and regulatory penalties is less than clear because of the possibility of s.11(h) of the Charter applying to both federal and provincial regulatory offences in certain circumstances, see *e.g. R v. Wigglesworth* (1987) 2 S.C.R. 541; 37 C.C.C. (3d) 385; 45 D.L.R. (4th) 235 at p.252.

24 *R. v. Wigman* [1987] 1 S.C.R. 246, S.C.C.; [1987] S.C.J. No.13.

> "...there must be a factual and legal nexus between the charges. Multiple convictions are only precluded under the Kienapple principle if they arise from the same "cause", "matter", or "delict", and if there is sufficient proximity between the offences charged. This requirement of sufficient proximity between offences will only be satisfied if there is no additional or distinguishing element contained in the offence for which a conviction is sought to be precluded by the Kienapple principle."[25] (Emphasis added).

In the present instance, the Appellant cannot satisfy the second part of the test because an examination of the two "offences" reveals an additional and important distinguishing element. The two regulations are different in nature and purpose. The first offence is for a violation of s.5(1)(a) of the PSHUAR, the gravamen of which is the careless use, application, supply, handling, transportation, display, storage or disposal of a pesticide: (1) in a manner, or (2) at a time, or (3) place that causes or is likely to cause an adverse affect. The purpose of this section is the prevention of adverse effects by regulating the *method* and *location* in which a pesticide is applied. An examination of the wording of the regulation reveals that not only is it prohibited to use or apply a pesticide in a manner that causes an adverse effect, but as well, it is prohibited to use or apply a pesticide in a manner that is *likely* to cause an adverse effect.

[24] The second and in our opinion equally serious offence as far as the overall regulation of pesticides is concerned is the violation of s.9(1)(b) of the PMR. The gravamen of this offence is the application of a restricted pesticide *without a licence* within 30 metres of an open body of water. In comparison, the purpose of this section is the controlled use of restricted pesticides. The distinguishing element is that s.9(1)(b) of the PMR *only* regulates the use or application of a pesticide listed in Schedule 1, 2 or 3 within a horizontal distance of 30 metres from an open body of water and s.5(1)(a) of the PSHUAR prohibits *any* use, application, supply, handling, transportation, display, storage or disposal of a pesticide in a manner or at a time or place that causes or is likely to cause an adverse effect.

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[25] *Ibid* at p. 256.

[25] Unlike s.9(1)(b) of the PMR, there is no spatial requirement in s.5(1)(a) of the PSHUAR. This infers that the actions of the Appellant both inside and outside of the 30 metre zone may be subject to a penalty as a violation of the regulation. In this respect, the application of Tordon 22K within 30 metres of the Belly River without a special use approval was only one factor in the Municipality's conduct which could be considered a violation of s.5(1)(a) of the PSHUAR. A review of the evidence shows that, contrary to the regulations, the crew was sent out under the supervision of a person who was not certified to apply Tordon 22K[26]; the crew supervisor was aware of the special use approval but had never read it; and the crew supervisor did not know where one of the employees was for the main portion of the day. When these facts are considered together, it becomes evident that there was little effort exerted in either controlling the use, application or handling of the pesticides so as to prevent adverse effects.

[26] Section 3(3) of *Pesticide (Ministerial) Regulation*, A.R. 43/97.

[26] Significantly, during the actual application, contrary to s.156 of the Act[27], the pesticides were free-poured into the packs without measurement[28] and the crew supervisor admitted to not measuring off the prescribed distances from the water's edge.[29] In addition to picloram, the presence of dicamba[30] at 1-2 m of the water's edge is a violation of the "no observable pesticide impact" zone of 5 metres.[31] Therefore, the application was in a manner that caused or was likely to cause an adverse effect both inside and outside the 30 metre zone. Regardless of whether or not the Appellant had sprayed Tordon 22K within 30 metres of the Belly River, which it did, the other transgressions amount to a violation of s.5(1)(a) of the PSHUAR.

[27] Section 5(1)(a) of the PSHUAR prohibits causing adverse effects. An 'adverse effect'[32] is defined in the Act as impairment of or damage to the environment, human health or safety or property. Given the environmental and toxicological characteristics of picloram, it is obvious that the careless conduct by one or more of the Municipality employees on the day in question was likely to cause impairment or damage to the environment, human health or safety or property. Therefore, the Appellant has contravened the regulations by using a restricted pesticide in a manner which causes or is likely to cause an adverse effect. This violation is in addition to and separate from the charge for violating s.9(1) of the PMR for the failure to have a special

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27 Section 156 of the Act requires that use of a pesticide be in accordance with the regulations with respect to that pesticide and the label for that pesticide.

28 The label requirements for Tordon 22K require that the directions for use and cautionary statements be carefully followed. The label also stipulates that the treatment of leafy spurge is as follows: Amount per hectare (litres): 9; Hectares treated per 2L: 0.2;
Amount (mL) per 100 m2: 90.

29 In his testimony at the Board hearing, Mr. Leavitt stated that he did not have a measuring tape with him.

30 Dicamba is the active ingredient in Banvel. Chemical analysis revealed that the first sample contained 17 ppm of dicamba and the second sample contained 6.8 ppm of dicamba. Written Submissions of Alberta Environment, paragraphs 25 and 27.

31 Condition 4 of the Appellant's special use approval states:

> Protection of surface water shall be evidenced by no herbicide injury to vegetation in the "no observable impact" zone. Any evidence of herbicide injury to vegetation in the "no observable impact zone" shall be deemed to constitute an adverse effect.

32 s.1(b) of the Act.

use approval. Accordingly, the Appellant has not satisfied the second part of the test laid out in *R. v. Wigman.*[33] Therefore, the *Kienapple* principle does not apply to the present case.

C. Vicarious Liability

[28] The primary issue raised by the Municipality was whether they could avoid liability for alleged deliberate and willful disobedient acts of a disgruntled employee. The Municipality maintains that the complainant employee's actions in spraying the Tordon 22K pesticide along the banks of the Belly River were beyond the scope of her duties. The Director rebutted this argument, on the basis that the Municipality, as the admitted employer at the relevant time, was vicariously liable.

[29] Vicarious liability has been specifically addressed in s.239 of the Act. Section 239 states:

> 239 For the purposes of this Act, an act or thing done or omitted to be done by a director, officer, official, employee or agent of a corporation in the course of his employment or in the exercise of his powers or the performance of his duties shall be deemed also to be an act or thing done or omitted to be done by the corporation.

Therefore, the Municipal District of Cardston, as a corporation, is vicariously liable for the actions of those persons it employs to carry out the spraying of pesticide. Consequently, as one or more employees of the Municipal District of Cardston mixed and sprayed Tordon 22K contrary to the regulations, the Appellant by those acts is liable for their actions.

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33 *Supra.*

[30] The Board has considered the allegations of the Appellant that the complainant employee deliberately violated the 30 metre buffer zone. There was conflicting evidence presented on this point and it is unlikely that it will ever be resolved. But it does not matter at the end of the day, for in the normal course of employment, the Appellant is vicariously liable for the actions of its employees. In holding the Appellant liable, the Board relies on *British Columbia Ferry Corporation v. Invicta Security Service Corp*[34]. In *B.C. Ferry*, the court found that the defendant security company was vicariously liable for a fire deliberately set by an on-duty security guard. In reaching its decision the court quoted with approval from a decision of Lord Denning in *Morris v. C.W. Martin & Sons Ltd*:[35]

> "Suppose [the guard] had been merely negligent . . . by lighting a cigarette and dropping the stub end carelessly, and thus causing a fire. No one could doubt that his act of negligence would be done in the course of his employment. [The security company] would be liable for his act . . . Now suppose that he did it deliberately. That should make no difference. Especially as ninety-nine cases out of one hundred it would be impossible to know for certain whether the act was done negligently or deliberately. In this very case [the guard] at first denied that he caused the fire."

[31] Lord Denning's reasoning applies to the case at hand. It would be virtually impossible to ever truly know what happened on the banks of the Belly River, before, during and after the mixing and spraying occurred. For our purposes, however, it is not relevant; the truly critical facts were admitted during the Board hearing by the Appellant: an employee of the Municipality (either Ms. Lefebvre or someone else) sprayed Tordon within 30 metres of an open body of water.

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[34] *British Columbia Ferry Corporation v. Invicta Security Service Corp,* [1997] 35 B.C.L.R. (3d) 41 B.C.S.C.

[35] [1965] 2 All E.R. 725 (Eng. C.A.).

[32] The Alberta Court of Queen's Bench has considered the exception to vicarious liability, see *e.g., Backes v. King*[36]. Exceptions to vicarious liability apply where it can be shown that the act in question was: (1) an independent act of the employee, and (2) entirely beyond his scope of duties. In those special circumstances, the employer may not be held responsible. But that is not the present case; the spraying of Tordon 22K was clearly within the scope of the complainant employee's powers and duties. Although there is conflicting evidence as to what her instructions were as to where to spray, it cannot be rightly said that she was not authorized to spray, at least somewhere. (The spraying of pesticide was, in fact, the main function of the complainant's job.)

[36] *Backes v. King*, [1992] A.J. No. 1277, Action No. 8901-16841.

[33] The Appellant's counsel also raised s.219 of the Act. This section essentially states that no person shall be convicted of an offence if that person establishes on the balance of probabilities that he took all reasonable steps to prevent the commission of the offence by the other person referred to in s. 219(1)[37]. Counsel for the Appellant argued that *if* this defence is available to officials found liable, that it ought to be extended to relieve corporations of their liability under s.239 of the Act *vis a vis* the actions of the corporation's employees. In other words, it would be "reverse" vicarious liability. The Board simply cannot accept that interpretation. With the greatest respect to counsel, the Board knows of no precedent or principle of law which would support this argument in the context of employer-employee relations, particularly on the facts of this case.

D. Appropriateness of Penalty

[34] The Board has reviewed all of the evidence before it, and, after careful consideration, the Board concludes on the balance of the evidence, to confirm the Director's final assessment decision.

[35] In confirming the appropriateness of the $5,000 penalty the Board relies on two factors. First, the evidence is undisputed that one or more of the Appellant's employees mixed and sprayed Tordon 22K near the Belly River on the day in question contrary to both regulations. Second, the Appellant was given fair and early notice of the regulatory requirements for the restricted use of Tordon 22K. In April, 1996, Mr. Rob Burland, an Aquatic Specialist with Alberta Environment had discussed with

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[37] Section 219(1) of the Act is as follows:

> Where a person who is acting under the direction of
>
> (a) a Minister of the Government,
> (b) an official of the Government,
> (c) a member of a council of a local authority, or
> (d) the chief administrative officer or a designated officer of a local authority
>
> commits an offence under this Act, the Minister, official, member of council, chief administrative officer or designated officer is also guilty of the offence and is liable for the punishment provided for the offence, if he knew or ought reasonably to have known of the circumstances that constituted the commission of the offence and had the influence or control to prevent its commission, whether or not the other person has been prosecuted for or convicted of the offence.

Mr. Bryan Phillips (Agricultural Fieldman) the fact that Tordon 22K was not appropriate for use in the area and accordingly, would not be included in the special use approval. But that is not all. In February, 1997, Alberta Environment issued guidelines to all municipalities, agricultural service boards and fieldmen in the province notifying them of what was required.

[36] In summary, the Board cannot on the totality of the evidence find due diligence or reasonable care by the Appellant. Not only was Tordon 22K sprayed along the river's banks contrary to regulations, but Banvel was *also* sprayed within 5 metres of the water's edge in direct violation of the regulations and the conditions of the special use approval.[38] This represents a clear and additional violation of the pesticide regulations for which the Appellant could have been charged but was not.

III. CONCLUSION

[37] For the reasons listed above and pursuant to s.90(3) of the Act, the Board confirms the decision of the Director. The appeal is dismissed and the penalty must be paid by September 20, 1999.

Dated on August 17, 1999, at Edmonton, Alberta.

"original signed by"

Dr. William A. Tilleman

"original signed by"

[38] Chemical analysis confirmed that dicamba, the active ingredient in Banvel was present in both samples taken 4.7 metres and 1-2 metres from the water's edge.

Dr. John P. Ogilvie

"original signed by"

Ms. Patricia M. Cross