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PROSECUTION DISPOSITION REPORT (TRIAL)

File Name: R. v. Findlay Creek Properties Ltd., 1374537 Ontario Limited, Taggart Construction Ltd. and Michael Taggart

LSB File #: 09-5181

IEB File #: 0631-7F4KGH

Person(s) charged: Findlay Creek Properties Ltd., 1374537 Ontario Limited, Taggart Construction Ltd. and Michael Taggart

Date of Report: June 25, 2010

Offence(s):

Counts 1 to 6: All Defendants

- Count 1: Contravening a condition of a Permit to Take Water by not maintaining a record of the daily flows from each sedimentation/retention pond to the East-West ditch.
- Count 2: Contravening a condition of a Permit to Take Water by failing to submit to the Director a copy of the water quality data within 3 days of receipt.
- Count 3: Contravening a condition of a Permit to Take Water by exceeding the concentration of Total Suspended Solids.
- Count 4: Contravening a condition of a Permit to Take Water by failing to ensure that no turbid water was discharged to Findlay Creek.
- Count 5: Having discharged or caused or permitted the discharge of a material, namely suspended solid silt into Findlay Creek, which was not in the normal course of events and which may have impaired the quality of the water of any waters did commit the offence of failing to forthwith notify the Minister of the said discharge.

Count 6: Discharging or causing or permitting the discharge of a material, namely suspended solid silt, into or in Findlay Creek which said discharge may impair the quality of the water of any waters.

Count 7: Michael Taggart Only

Count 7: Failing to take all reasonable care to prevent the corporation from discharging or causing or permitting the discharge of material, namely suspended solid silt.

Legislation:

Counts 1-4: Section 107(3) of the *Ontario Water Resources Act* (OWRA)
Count 5: Section 30(2) of the OWRA, committing an offence under 107(1) of the Act
Count 6: Section 30(1) of the OWRA, committing an offence under 107(1) of the Act
Count 7: Section 116(1) of the OWRA, committing an offence under 107(1) of the Act

Date(s) of offence(s): Count 1: May 26, 2008
Count 2: May 24, 2008
Counts 3-7: May 20, 2008

Investigator: Dale Ryan
Crown: Paul McCulloch
Defence Counsel: Jennifer Mesquita, Gowlings, 1374537 Ontario Limited
Charles Birchall, Fogler Rubinoff, other 3 defendants

Date of charge: September 29, 2009
First Appearance Date: November 26, 2009
Date of trial/plea: June 24, 2010

Plea(s): Count 6: Findlay Creek Properties Ltd. – Guilty

Disposition: Count 6: Findlay Creek Properties Ltd. – Guilty

All remaining counts against Findlay Creek Properties Ltd.
and all counts against the remaining defendants withdrawn
by the Crown

Date of Disposition: June 24, 2010
Justice of the Peace: Her Worship Beverly Souliere
Level of Court: Ontario Court of Justice
Location of Court: Ottawa

Jurisdiction: East Region

Other Ministry's prior convictions used in sentencing: No

Prior Conviction(s): Findlay Creek Properties Ltd. - No

Date of Sentence: June 24, 2010

Sentence: Findlay Creek Properties Ltd.: \$60,000 fine, exclusive of the Victim Fine Surcharge, 60 days to pay

Detailed reasons given/copy obtained:

		Given	Copy Ordered
1.	Judgment	No	No
2.	Sentencing	No	No

Copy of Information, as sworn, in file: Yes

Appeal: No

FACTS IN SUPPORT OF DISPOSITION:

The following agreed statement of facts was read into the record and provided to the court as an exhibit:

The Parties

1. Findlay Creek Properties Ltd. ("FCP") is an Ontario incorporated company that is developing a residential housing subdivision known as Findlay Creek Village through a joint venture with another company, 1374537 Ontario Limited. The subdivision is being built on lands owned by FCP that prior to being subdivided were legally described as Lots 18, 19 and 20, Concession 4, City of Ottawa.
2. FCP (in conjunction with 1374537 Ontario Limited) is responsible for the planning and development approval processes for the subdivision. Taggart Construction Limited, ("Taggart Construction"), another provincially incorporated company, is responsible for carrying out the construction work at the Findlay Creek Village site pursuant to the plans specified by and under the supervision and direction of FCP.

The Larger Context

3. The development of Findlay Creek Village began in 2002 and has been subject to a number of planning and environmental approvals processes. There will be approximately 5,300 homes in the completed subdivision, 2,250 of which will be

homes built by the joint venture. Presently, 1,346 homes have been sold and 1,158 homes have been constructed and are now occupied. A map of the subdivision as of October 2009 is attached as Tab 1.

4. The housing development is named after Findlay Creek which flows along the southern part of the property to the north and east of the provincially significant Leitrim wetland. Findlay Creek is a tributary of the South Nation River. The Creek provides cool water habitat for fish and has been stocked with brook, brown and rainbow trout by the Ontario Ministry of Natural Resources in the past.
5. A drainage channel flows across the western portion of the housing development that has been referred to as the East-West Ditch (the "Channel"). The Channel flowed into Findlay Creek at the time of the event. Historical evidence suggests that the Channel was created by farmers some time in the past. However, the Channel had become part of the Findlay Creek system and contributed to the fish habitat.
6. In order to prepare the land for development, it was necessary for FCP to re-route the Channel. The re-routing of the Channel was approved by the federal Department of Fisheries and Oceans and is referred to as the Findlay Creek Extension. As part of its work at the site, Taggart Construction was retained by FCP to construct the Findlay Creek Extension. The work was carried out in accordance with plans specified by and under the supervision and direction of FCP. Michael Taggart is the Vice President of FCP and oversaw the construction of the Findlay Creek Extension and dealt with officials from the Ministry of the Environment (the "MOE") concerning the same.
7. The work required for the Findlay Creek Extension required water to be pumped from excavations. The taking of this water was authorized under Permit To Take Water 0816-7E7L9S dated April 25, 2008 ("PTTW") and issued by the MOE jointly to FCP and 1374537 Ontario Limited.
8. In accordance with the PTTW, and the authorization from the Department of Fisheries and Oceans, during construction activities the excavation that would become the Findlay Creek Extension had to remain dry. Water was therefore pumped from the Findlay Creek Extension excavation to two sedimentation ponds (shown on the aerial photograph as "small sedimentation pond" and "large sedimentation pond" respectively at Tab 2). The ponds allowed the sediment to settle out of the water before being discharged into outlet channels lined with rocks and filter cloth ("rip rap"), which further allowed the sediment to settle out of the water before being discharged into the Channel.
9. In compliance with conditions in the PTTW, FCP and 1374537 Ontario Limited took regular samples of the water in the Channel upstream of the two discharge outlets (one for the large sediment pond and one for the small sediment pond) and

one downstream of the two discharge outlets, and analyzed the samples for sediment content. The test results were submitted to the MOE as required by the PTTW, within three days of receipt from the laboratory.

Specific Facts

10. On May 26, 2008, a MOE Provincial Officer conducted an inspection at the Findlay Creek Extension Project to determine whether the conditions in the PTTW were being complied with.
11. James Smith works for IBI Group, the company contracted by FCP and 1374537 Ontario Limited to conduct the water sampling required by the PTTW. On May 28, 2008, Mr. Smith received test results from the laboratory and submitted the same to the MOE Provincial Officer as required by the PTTW. Mr. Smith reported that the TSS measurement in Findlay Creek upstream of the discharge point for the small sediment pond on May 20, 2008 was 7 mg/L whereas the TSS measurement immediately downstream of the discharge point from the same sedimentation pond was 1510 mg/L.
12. Subsequent examination by the defendants determined that the cause of the high sediment levels in the Channel immediately downstream from the discharge outlet for the small sedimentation pond was not due to the discharge of sediments from the small sedimentation pond itself. Rather, it was due to a section of the bank downstream from the discharge outlet that had sloughed or eroded.
13. The construction of the discharge outlets resulted in the vegetation on the banks of the Channel being removed. Cocoa mats had been laid down in this section of the bank area to prevent sloughing or soil erosion. However, part of the bank still sloughed into the Channel. This was likely due to heavy rainfall that occurred on and during the long weekend prior to May 20, 2008 thus causing the cocoa mats to lift thereby allowing the release of sediment into the Channel. Upon discovery of the sediment release, an employee of Taggart Construction promptly repaired the bank where the soil had eroded.
14. A Technical Specialist in the MOE concluded that discharge of sediment that resulted in TSS levels of 1510 mg/L had the potential to impair the water quality and fish habitat.
15. There was no evidence of any actual adverse impact to the environment or to fish in Findlay Creek.
16. Since this event has occurred, FCP, 1374537 Ontario Limited and Taggart Construction have taken additional steps to minimize the possibility that a high TSS event could occur again following a heavy rainfall event, including

- a) rerouting the discharge from the small and large sedimentation ponds to a stormwater collection system that has now been established;
- b) retaining an expert in stormwater management and erosion and sediment control planning to provide additional training to employees working at the Findlay Creek Village site as well as at other sites;
- c) developing and implementing an Environmental Management Plan for Findlay Creek Village that sets out detailed soil erosion and sediment control measures.

A fairly detailed explanation of the joint submission on penalty was provided on the record including:

- \$25,000 minimum fine
- need for general deterrence
- factors in environmental cases:
 - sensitive nature of the environment affected – Findlay Creek contains fish habitat and adjacent to significant Leitrim Wetland
 - the size of corporation – Findlay Creek Properties is the owner of a very large subdivision development
 - stress importance of sediment control
- Some mitigating factors
 - took quick action to mitigate once discovered
 - guilty plea
 - have taken steps to prevent from occurring in the future
- Aggravating Factors in 110.1 of OWRA do not apply
- Previous cases under OWRA involving sediment discharges have resulted in fines in \$20,000 to \$30,000 range, pre-minimum sentence regime and pre increases in maximum fines
- Federal Fisheries cases – fines in \$70 to \$100,000 range – more significant amount of sediment discharged

Detailed reasons for withdrawing the charges were also provided on the record, including:

- Count 2 – no reasonable prospect of conviction, inspector made error in assessing dates
- Counts 3-4 – relate to same event as count 6 – all involve discharge of sediment but counts 3-4 involve discharge limits set out in the PTTW; further information obtained indicated the sediments came from the sloughing, not from the water from the sediment ponds.
- Counts 1 and 5 withdrawn as part of guilty plea; normal practice for Crown to agree to plea on reduced number of charges in exchange for guilty plea

- Withdrawal against other defendants because it was determined that Findlay Creek Properties was the corporate entity that failed to ensure proper measures were carried out in this case
- Withdrawal of Count 7 against Michael Taggart as no specific evidence that personally failed to take reasonable care; however Ministry of the Environment will consider charging individuals in many cases, just because didn't proceed against an individual in this case doesn't mean will not in the future.

cc: Hard Copy: Canada Law Book (1)

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