

**WHAT CAN THE ACT OF GOD DEFENCE IN REGULATORY OFFENCES
TELL US ABOUT RESPONDING TO THE COVID 19 CRISIS?**

By Stanley Berger

In April 2008 water bodies in Alberta were frozen over and as a result, migratory birds were drawn to Syncrude's open tailings ponds where over 1600 waterfowl died from exposure to bitumen. Syncrude was prosecuted under federal and provincial environmental laws for the adverse impacts of the tailings on migratory birds. The company defended itself by arguing that that the convergence of record snowfalls and the freezing of the adjacent waters that the waterfowl would naturally use for sustenance during spring migration amounted to an Act of God which could not reasonably be anticipated. The company had a system of deterrents which had worked reasonably well in previous years to prevent the loss of all but a small number of birds drawn to the open tailings, but the record snowfall had interfered with their planned deployment. The Court, conceded that the convergence of adverse weather, open tailings, frozen natural water bodies and bird migration was an unavoidable natural event. (2010) ABPC 229 at par. 136) Nevertheless, the Court reasoned that while the exact circumstances or degree of severity may have been unpredictable, the convergence of these critical factors was not remarkable. The company's response was deficient whether it had been "the second worst snowfall in 65 years that occurred, coupled with a late breakup and quick thaw or, or some lesser but still significant amount of snow or rain." (at par. 138) On October 22, 2010 Provincial Court Judge Tjosvold imposed fines and orders totalling three million dollars for violations of Alberta's *Environmental Protection and Enhancement Act* and Canada's *Migratory Birds Convention Act*. see *Berger and Myers, Prosecution and Defence of Environmental Offences, Sentencing Service on Thomson and Reuters Proview* at <https://nextcanada.westlaw.com/>.

Lessons Learned: Regulatory Due Diligence During and After COVID 19

Regardless of whether one is religious or not, COVID 19 would certainly fit within the Act of God defence if faced with a charge of non-compliance with a regulatory offence. But the level of sympathy expected to be extended by a court to this defence will ultimately depend upon the magnitude of the harm-environmental, health and safety or otherwise and the steps taken by a defendant to plan for a once in a lifetime event. The nuclear industry offers an excellent example. Licensees of nuclear facilities have always been required to deploy minimum complements of workers at all times to ensure that critical activities such as the operation of the nuclear reactor and its cooling systems are maintained. There are always control room operators on hand even during a pandemic though additional precautions are taken to ensure that their health and safety are optimized. Businesses should review their regulatory licenses and approvals and identify which of their operations need to be maintained at



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all times in order to protect public health and safety and the environment. Once identified, budgets and schedules should be set for implementation. Particularly, but not exclusively where costs are prohibitive or actions are not feasible, transparent communication with the relevant regulatory authorities should be initiated without delay to ensure that there is a mutual consensus on the expectations of the parties. Finally, those expectations should be reduced to writing and kept on line so that they are readily accessible. Given the magnitude of the current crisis, regulators may not respond to e-mails in a timely fashion, so businesses should ensure that all requests for reviews of compliance plans are sent and kept electronically.