A Good Track Record Doesn’t Prove Environmental Compliance



On Jan. 1, 1999, it became illegal to import products containing the refrigerant Freon. In 2000, Environment Canada discovered that an Ontario company’s stores were in possession of more than 4,000 bar refrigerators containing Freon, which had been illegally imported after the ban took effect. It charged the company with three violations of the *Ozone Depleting Substance Regulations 1998*. The company raised a due diligence defence, arguing that it had relied on its supplier to comply with the regulations. It also noted that it had an “unblemished record” of environmental compliance. But the court wasn’t impressed. Although the company had no prior environmental convictions, it still had to show that it had taken all reasonable steps to prevent *these violations* from occurring. Because the company didn’t meet this burden, its due diligence defence failed, the court explained [*R. v. Canadian Tire Corp.*].

THE PROBLEM

Companies that commit environmental offences won’t be held liable if they can prove that they exercised due diligence. A company should take pride in the fact that it has a solid EHS program and that it has never committed or been convicted of an environmental offence. But if the company *is* ever charged with an environmental violation, its track record of environmental compliance won’t insulate it from liability. As the *Canadian Tire Corp.* case shows, a past record of compliance isn’t proof of due diligence. What ultimately determines due diligence isn’t a company’s track record and what it has generally done in the past, but what it did to prevent the particular violation with which it’s charged.

THE EXPLANATION

“The past is prologue.” William Shakespeare wasn’t an environmental lawyer, but his words do a pretty good job of summing up how the law works. Consider a man with no prior criminal record who’s charged with armed robbery. He won’t be able to get off simply by arguing that this crime was the first he’d ever committed (although his lack of a prior record might result in a lighter sentence). In other words, in a criminal prosecution, the defendant’s guilt or innocence isn’t determined by his overall criminal record, or lack thereof, but by whether he committed the armed robbery as charged.

Environmental prosecutions operate according to the same principles. What matters isn't the company's overall track record but what it did, or didn't do, to prevent the particular environmental offence with which it's charged. So just because a company has complied with environmental laws in the past doesn't mean that it's doing so in the present. As far as judges and prosecutors are concerned, an unblemished history of compliance could just be the product of pure luck. Or maybe the company did, in fact, violate an environmental obligation in the past but simply didn't get caught. A good compliance track record, in other words, isn't proof of due diligence. At most, it's a factor a court will consider in deciding how severely to punish the company once it has been convicted.

When you think about it, this principle makes perfect sense. After all, if having an unblemished record automatically proved due diligence, companies with no history of violations would be at liberty to commit at least one violation before they could be held liable. The law demands that a company with a good environmental track record not rest on its laurels but continue exercising due diligence to ensure compliance with the laws. Thus, although the company isn't expected to be perfect, it *is* expected to be persistent and consistent in its continuing efforts to comply with environmental laws.

The company in the *Canadian Tire Corp.* case fell short of this standard. The court noted that the company had an unblemished record, had distributed its corporate environmental policies, done "environmental good deeds" and created an EHS program designed to ensure compliance with the law. "But broadly-worded policy, proclamation of general philosophical objectives and reliance on an overall good prior record does not directly speak to adherence to the necessary standard of care" required for compliance with the regulations, the court explained. In short, the court said that the company must show that "it acted reasonably with regard to the prohibited act alleged". The company failed to show that it had taken all reasonable steps to ensure that it didn't import fridges containing Freon after it became illegal to do so. So the court convicted it and fined it $75,000.

THE LESSON

Senior management should feel good about the company's track record of complying with environmental laws. But we can't allow complacency to set in. Remember that the company's liability for environmental offences (and possibly that of individuals such as officers and directors) is based on specific actions and omissions, not its general performance in the past. Due diligence, in other words, isn't about what we did yesterday; it's about what we're doing today and will continue to do in the future. So although we all should take pride in our company and its accomplishments with regard to environmental compliance, our work isn't over. We must remember that even a slight relaxation of our efforts and diligence is enough to undermine our previous successes and cause the company to incur liability.

SHOW YOUR LAWYER

R. v. Canadian Tire Corp., [2004] CanLII 4462 (ON S.C.), July 21, 2004