BRIEF SENIOR MANAGEMENT: Financial Incapacity ≠ Due Diligence

A company operated a hazardous waste transfer station in Saskatchewan. The Minister of the Environment issued an Environmental Protection Order to the company and its sole director on the grounds that they were improperly storing hazardous substances and waste dangerous goods in such a way that was causing or may cause an adverse effect on the environment. The Order required the company and director to take certain actions by a specified deadline, which they failed to do. The court convicted the company and director of failing to comply with the Order, rejecting their argument that some of the actions in the Order were too 'financially onerous' for them to undertake [*R. v. EnviroGun Ltd.*].

THE PROBLEM

When companies and/or individuals are charged with environmental offences, they can avoid liability if they prove that they exercised 'due diligence,' that is, they took all reasonable steps to comply with the environmental law. What constitutes all reasonable steps in any particular situation may be up for debate. But what's clear is that taking no steps at all is *not* due diligence'even if you claim, as the defendants in the *EnviroGun* case did, that financial problems prevented you from complying.

THE EXPLANATION

Defendants in environmental prosecutions often raise the due diligence defence. And a key issue in such cases is often what reasonable steps should have been taken to comply with the law or an environmental order and did the defendants, in fact, take such steps. Obviously, the Crown and the defence may disagree as to what steps are 'reasonable.' But if you do nothing at all to comply with the law or order, it's unlikely that you'll be able to successfully prove due diligence. And don't expect the court to be sympathetic if you claim that you didn't take any steps because you couldn't afford to do so.

The defendants in *EnviroGun* made several mistakes. First, they claimed they had financial problems that prevented compliance but didn't provide sufficient proof of such problems. Yes, there was evidence that the municipality foreclosed on and took possession of the property because the defendants failed to pay property taxes. But the court found that although the defendants claimed a financial inability to comply with the Order, they presented no details of their financial state.

Second, even if the defendants had proven they had financial problems, they didn't comply or try to comply with the Order by taking the required actions that they could afford to take. The Order required them to:

- Characterize all substances stored;
- Complete a Classification System for the site following accepted terms and procedures in the industry;
- Remove all hazardous substances and dangerous materials following safe legislated practices;
- Carry out a formal Phase II site assessment in accordance with environmental industry standards;
- Provide to the Ministry a Corrective Action Plan in accordance with industry standards; and
- Carry out and comply with the terms and conditions of that Plan.

The court acknowledged that there was a question of what level of compliance would, in this case, constitute due diligence. And it accepted the director's evidence that carrying out the Corrective Action Plan couldn't be done by the deadline. But why couldn't the defendants conduct the inventory, complete the classification system and develop the Plan' The court found that the first two requirements were the least onerous requirements of the Order to carry out because the information needed was within the defendants' capacity. Thus, there was the possibility of *some* compliance with the Order 'without a large outlay of money,' particularly with respect those requirements, concluded the court.

Lastly, the defendants never told the Ministry that they couldn't comply with the Order for financial or any other reasons, or requested an extension of the deadline. When the director did communicate with the Ministry'which he didn't do until *after* the deadlines had passed for compliance'he didn't raise issues of compliance with the Order but expressed frustration with what he considered to be 'unreasonable treatment.' And the defendants didn't appeal the Order, which they had the right to do. (For information on appealing OHS orders, see, 'Dealing with Inspectors: How Do You Appeal an Order from a Safety Official'')

THE LESSON

As the court in *EnviroGun* explained, for the defence of due diligence to be successfully raised, the defendants must show good faith in doing, or attempting to do, acts that would constitute compliance or avoiding acts that would violate the law. Here, there was no evidence of any attempt at compliance with any of the Order's requirements, even those that could be complied with for little or no money. Instead, the defendants decided on their own that they couldn't afford to comply with the Order at all and so didn't. *Bottom line*: Financial problems are no excuse for environmental violations and don't establish due diligence.

SHOW YOUR LAWYER

R. v. EnviroGun Ltd., [2015] SKPC 18 (CanLII), Feb. 5, 2015