Brief Your CEO on the Importance of Responding to Environmental Hazard Warnings



A loose wheel causes the derailment of two tank cars being moved on a rail siding next to the mainline near the shore of Burrard Inlet in British Columbia. An oncoming train crashes into the toppled cars spilling roughly 11,000 liters of ethylene glycol into the inlet. The BC appeals court upholds the rail company's *Fisheries Act* conviction and $75,000 penalty, noting that it had been warned of loose wheels on certain cars but didn't take reasonable steps to address the problem [*R v. Canadian Pacific Railway Co*., [2008] BCSC 1681 (CanLII)].

Duty to Address 'Reasonably Foreseeable' Hazards

Companies shown to have committed environmental offences may rely on the due diligence defence to avoid liability. To prove due diligence, companies generally must show that they took all reasonable steps to comply and prevent "reasonably foreseeable" hazards. While courts determine "reasonably foreseeable" based on the unique facts involved, there are a few hard and fast rules. One of those rules is that a hazard is reasonably foreseeable when a company has actual knowledge of it. That includes not only actual knowledge but also what a company should reasonably be expected to know.

Why the *Canadian Pacific* Railway Lost on Due Diligence

The company in *Canadian Pacific* learned this lesson the hard way. Having determined that the loose wheel caused the derailment, the court concluded that the company knew or should reasonably have known that some of its cars might have loose wheels. Key evidence included two advisories from the American Association of Railways (AAR) warning the industry that wheel sets produced at a particular repair centre were prone to become loose on an axle. The AAR recommended removing certain tank cars with these wheels from service. The derailment occurred a year after the second AAR warning.

There was no way to tell whether the tank cars that derailed were equipped with the defective wheels referred to in the AAR warning bulletins because they were destroyed in the accident. Still, the evidence showed that the company received both bulletins. So, it should have taken steps to identify whether any of its cars had defective wheels, the court reasoned. It would have been "quite easy for a company of this size to keep a record of the cars inspected due to the [bulletins] and it would have been prudent to do so, given the severity of the problem they were trying to prevent." But the company couldn't produce any evidence of having done so. **Result:** Its due diligence defence failed.

Compliance Takeaway & 3 Steps to Take

The lesson of *Canadian Pacific* is that warnings from third parties can put the company on notice of hazards. Such third parties may include trade associations, consultants you hire, and other companies in the same industry.

Of course, responding to warnings is just one part of due

diligence. The duty to take reasonable steps to guard against foreseeable risks also involves actively looking for problems. Nobody expects you or your fellow officers and directors to personally inspect the workplace. But you must ensure that somebody does and that.

- The workplace is regularly inspected by someone.
- Workers are encouraged to report any hazards they encounter.
- Identified hazards are eliminated or adequately addressed.

The company’s EHS coordinators, supervisors, and other company officials can serve as your eyes and ears. If they’re aware of hazards, by association, you’re aware of them, too. If no action is taken to address those hazards, you and the company run the risk of liability.