Company’s Ignorance of the Law & Passivity Undermine Due Diligence Defence

To prove due diligence as a defence to violations of the OHS and environmental laws, you must show that you took all reasonable steps to ensure compliance with the law and prevent such violations. Although the exact steps you must take aren’t always clear, doing nothing at all to prevent violations is certain to undermine your due diligence defence. A recent case from Qu□bec illustrates how a company’s ‘passive’ approach to environmental compliance resulted in its conviction. Here’s a look at the decision in that case.

THE CASE

What Happened: In the spring of 2011, environmental inspectors visited the premises of a company engaged in trucking and snow removal four times to perform inspections. During the inspections, they noted a deposit of used oil on the property and a spill into an adjacent stream. They notified the company that it was in violation of environmental law. But at another inspection in March 2012, the inspectors made essentially the same observations. So the company was charged with having emitted, deposited, discharged or released a hazardous material into the environment or allowed the emission, deposit, discharge or release therein in violation of the *Environmental Quality Act* and the *Regulation respecting hazardous materials*. The company argued that it had exercised due diligence.

What the Court Decided: The Court of Qu□bec convicted the company, rejecting its due diligence defence.

The Court’s Reasoning: The court explained that to successfully present a defence of due diligence, a defendant must demonstrate, on a balance of probabilities, that all necessary precautions were taken to avoid committing the offence. Here, the company performed a number of oil changes on a number of vehicles every three months. The used oil was placed in small tanks before being poured into larger tanks. When the big tanks were full, the company contacted a contractor to collect the used oil. But these tanks weren’t watertight. They didn’t have plugs, so rainwater could accumulate in them and cause them to overflow. In fact, there were signs of hydrocarbons everywhere on the property:

- The ground around a 2,276-litre diesel fuel tank was stained and gave off a strong smell of diesel fuel;
- The inspectors noted a strong smell of hydrocarbons everywhere;
- Traces of oil were shining on water on the ground; and
- There was an oily film on the stream.

The court concluded that given the inspectors' observations in 2011 and 2012, it's clear the company didn't care about the environment. Despite the notice of offence in 2011, it didn't take any corrective action. The company in no way identified the risk of pollution entailed by its activities and the oil changes on its equipment every three months. The company's owner exhibited 'nonchalance with respect to the handling of hazardous materials,' observed the court. He was unaware of the law and just relied on common sense. In short, the company remained passive day after day as it carried out its activities. It remained passive even after the notice of offence in 2011. Thus, it didn't demonstrate due diligence [*Director of Public Prosecution c. 3723259 Canada Inc.*, [2017] QCCQ 5290 (CanLII), May 15, 2017].

ANALYSIS

The lesson from this case is that your EHS program must be proactive'that is, you must be familiar with the OHS and environmental laws that apply to your workplace, activities and equipment, and ensure that you're in compliance with the applicable requirements. And when you've been put on notice that you're in violation of those requirements, you certainly must take appropriate steps at that point to get compliant.

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