

ECI's 7th Annual Due Diligence Scorecard, Part 2: What You Can Learn from Recent Due Diligence Cases



Part

1 of the *Insider's* 7th annual Due Diligence Scorecard gave you an overview of eight cases decided since Sept. 2011 in which a company or individual argued due diligence in defence to an environmental violation. But the value of reading such cases is in using them to avoid the mistakes these defendants made and duplicate the steps they took that enabled them to successfully prove due diligence. So in Part 2 of the *Insider's* annual Due Diligence Scorecard, we've extrapolated six lessons that you can learn from these cases and apply to your company's EHS program. (See the box below for a review of five key facts about the due diligence defence.)

6 KEY DUE DILIGENCE LESSONS

Lesson #1: You're Expected to Know the Laws with Which You Must Comply

Ignorance of the law isn't a defence. So if you argue that you didn't know about or misunderstood an environmental requirement, don't expect the court to rule that you exercised due diligence.

Example: A company that operated landfills was required under its permits to file written annual reports with the Ministry of Environment but failed to do so for years. The government charged the company and its director with violating the terms of the landfill permits. The director argued that he thought he could provide the annual reports orally. But oral reports weren't allowed under the law. And even if they were, the director didn't present any evidence that he'd given any oral reports. So the court convicted the defendants, ruling that even if it accepted that the defendants were uninformed about their reporting duties'as opposed to being simply indifferent to compliance'there was no evidence that they exercised due diligence to determine exactly what their obligations were [*R. v. Blackwell*].

Lesson #2: Choosing to Violate the Law Isn't Due Diligence

Once you understand your obligations under environmental law, you must take steps to fulfill those obligations and avoid violations. What you *can't* do is choose to knowingly commit an environmental offence and expect to get away with it.

Example: A commercial fishing company's Canadian Vessel Inspection Certificate had expired. To get it renewed, the company needed to get its fishing vessel inspected. The inspection process had been started. But it wasn't done when the vessel embarked on a voyage. The company was convicted of violating the *Canada Shipping Act, 2001* by sailing without a valid certificate. The company argued that it had done everything possible to get the vessel inspected and avoid the violation, claiming that it was essentially at Transport Canada's mercy. But the Canada Transportation Appeal Tribunal said the company didn't have to let the vessel sail with an invalid certificate. For example, it could've gotten a short-term certificate or an extension of its current certificate, which, in fact, it had done on other occasions. Instead, the company made 'a conscious decision' to sail when it *knew* it had an expired inspection certificate and thus was violating the law [*Baffin Fisheries (2000) Ltd. v. Canada (Minister of Transport)*].

Lesson #3: You Must Take All Reasonable Steps

Due diligence doesn't require perfection or the taking of extraordinary measures. To prove due diligence, your company must demonstrate only that it made all *reasonable* efforts to comply with the law and protect the environment. Failing to take steps that a reasonable person in the company's position would've taken will undercut your due diligence defence.

Example: A capelin fisherman with a daily catch limit of 45,000 pounds divided his hold in two, planning to store the catch from his second trip of the day in the front hold. But a board separating the two holds broke, allowing some of the catch from the second trip to spill into the rear hold. As a result, he caught 58,629 pounds during two trips'more than 13,000 pounds over his limit. He was

convicted of violating the *Fisheries (General) Regulations*.

The court found that the fisherman didn't take reasonable steps to avoid exceeding his limit. For example, because he knew he was close to his daily limit after his first trip that day, he should've been more careful during the second trip to comply with the requirements of his license. But the method he used to measure the catch was clearly unreliable given that he'd exceeded his limit by 30%. So the court concluded that it was equally as clear that the fisherman didn't act with reasonable care [*HMTQ v. Devereaux*].

Conversely, the courts don't expect you to take unreasonable or unrealistic measures to ensure compliance.

Example: A by-product of the digestion of wood chips overflowed a pulp mill's tank, spilled into its main sewer line, entered its effluent treatment system and compromised the system's effectiveness. Some also spilled onto a roadway and entered a nearby river. The mill was charged with violating the *Fisheries Act* and *Environmental Management Act* as well as its permit requirements as to its spill ponds.

The court ruled that the company had exercised due diligence as to the spill pond charges. It was reasonable for the mill to use the spill ponds for long-term storage and, in fact, such use was its only option. The government's position that the mill should've shut down its operations until issues with the ponds and effluent treatment system were resolved wasn't a realistic option and could've caused additional environmental issues. So the mill shouldn't be faulted for 'failing to take such a dramatic and potentially harmful step,' concluded the court [*R. v. Zellstoff Celgar LP*].

Similarly, the courts don't expect you to risk life and limb to avoid violating environmental law.

Example: The government announced that the turbot gillnet fishery would close on June 8. A fisherman set two strings of nets on June 7. He retrieved one set that day but it wasn't safe to get the second set because of the combined weight of the fish, ice and wet nets. He planned to return to retrieve these nets later that day after unloading the first set. However, bad weather prevented him from safely getting the second set of nets and offloading the turbot caught in them until June 10. He was charged with fishing during a closed season in violation of the *Atlantic Fisheries Regulations*.

The court ruled that he'd exercised due diligence and dismissed the charge. Due diligence doesn't require superhuman efforts or 'exposing oneself to unreasonable danger,' explained the court. It said the combination of the need for multiple trips because of the weight of the gear and fish and the bad weather created an 'imperfect storm.' The fisherman didn't intentionally delay to gain the benefit of a larger catch, but acted diligently and reasonably under the circumstances. Although his safety concerns caused a delay in retrieving the second set of nets until after the season was closed, those concerns were legitimate and reasonable, concluded the court [*R. v. Saulter*].

Lesson #4: You Must Ensure Workers Follow Environmental Procedures

One of the cornerstones of due diligence is the establishment of environmental rules, policies and procedures. But if workers don't actually follow those

procedures, the environment could be harmed'and your company exposed to liability.

Example: In the *Zellstoff* case discussed above, the court convicted the mill of the charges related to the spill. It found that the overflow had been caused by soap entering the evaporator. After a previous soap-related incident, the mill had implemented soap-related procedures, including procedures for:

- Minimizing the risk of a so-called 'soap inversion' or 'soap carryover';
- Recognizing when soap inversions are imminent; and
- Addressing them when they happen.

If workers had followed these procedures, the foreseeable spill would've been prevented, said the court. For example, under the mill's procedures, as soon a soap carryover is discovered, the evaporator must be shut down and its contents returned to the tanks'not diverted into the main sewer line where the material could end up in the effluent treatment system. But workers didn't take these steps and instead let the soap mixture drain into the main sewer line. So the court ruled that there was 'compelling evidence to suggest the cause of the offences lay with [the mill]'s failure to follow its own procedures regarding a soap carryover.'

Lesson #5: Senior Management Must Ensure Environmental Compliance

At the end of the day, the buck stops with senior management. That is, officers, directors, owners and other members of senior management have a duty to ensure that the company complies with the environmental laws and any permits or licences it has. If the company commits an environmental violation, the court may ultimately choose to hold senior management responsible.

Example #1: In the *Blackwell* case discussed above, the landfill company and its director were also charged with allowing construction and demolition waste to be improperly dumped at the landfills. They argued that other people had dumped such waste without their permission. And the director argued that he wasn't responsible for the landfills' daily operations.

Because the director was one of the permit holders, he was responsible for what was deposited at the landfills. So it was the duty of both the director and the company to take the necessary steps to ensure that others didn't dump unauthorized waste. But there was 'very little evidence of any effort, much less due diligence, in this regard,' concluded the court.

Example #2: A company's landfill permit required it to submit annual reports and to compact the waste at the landfill or apply acceptable cover materials. But it didn't comply with these requirements. The company and its principal were convicted of violating the *Environmental Management Act*. The defendants operated the landfill with 'inadequate manpower and marginal equipment,' said the court. As an excuse for failing to ensure that the company was in compliance, the principal claimed he was the subject of a government conspiracy and refused to comply with the annual report requirement until he had proof all other landfill operators were filing such reports. Although this claim was his attempt to explain his failure, it didn't establish his due diligence, ruled the court [*R. v. Ambrosi*].

To fulfill this duty, members of senior management must be adequately informed

about the company's operations and any environmental issues. Remember you can be held liable for not only what you do know but also what you *should have known*.

Example: MOE inspectors asked the site manager of a chemical recycling and waste management plant about a large tanker trailer inside a building. First, he said he didn't know what was inside it. When confronted with test results that confirmed the presence of PCBs above the limit allowed for indoor storage, he claimed that he didn't know how the PCBs got into it. Later, he told an official that the company *did* know about the PCBs. The manager was convicted of providing false information to an MOE official.

The court noted that the site manager was in a prominent position in the company and, in fact, was its primary contact on environmental matters. Given his position, he should've been aware or taken steps to ensure that he was made aware of the presence of PCB-contaminated waste so he could respond with accuracy to MOE inquiries. But there was no evidence that he took all reasonable steps to avoid providing inaccurate information to the MOE [*R. v. Neilson*].

Lesson #6: Only Reasonable Mistakes of Fact Are Excusable

Although most cases involve the reasonable steps form of due diligence, companies may also argue reasonable mistake of fact in defence to an environmental offence. But for this type of due diligence defence to succeed, the alleged mistake must be both honest *and* reasonable.

Example: A waste transfer site accepted several loads of waste from haulers who didn't have the appropriate Certificates of Approval. The company that operated the site and two of its officers were convicted of violating the *Environmental Protection Act*. The company argued reasonable mistake of fact that is, it believed the haulers were covered by another operator's certificate. In fact, the haulers *did* previously have an arrangement in which they were covered by another company's C of A and they'd given a letter about that arrangement to the waste transfer site company. However, the letter was several years old. The company never took any steps to confirm that the arrangement was still in place. And in fact, it had ended a few years ago. The court concluded that it was 'patently not reasonable to rely on a document continuously for years on end' [*Ontario (Ministry of Labour) v. Neilson*].

BOTTOM LINE

As explained in Part 1, there's no formula for establishing due diligence, no checklist of steps or actions that, if taken, would guarantee a successful defence. The best you can do is learn from other companies' experiences in environmental prosecutions. The cases in which the due diligence defence failed illustrate what not to do and which omissions will undercut due diligence. The successful cases can provide a sort of blueprint or guide for the steps and actions your company *should* be taking.

SHOW YOUR LAWYER

Baffin Fisheries (2000) Ltd. v. Canada (Minister of Transport), [2011] C.T.A.T.D. No. 26, Oct. 19, 2011

HMTQ v. Devereaux, [2012] CanLII 31288 (NL SCTD), Jan. 6, 2012

Ontario (Ministry of Labour) v. Neilson, [2011] ONCJ 853 (CanLII), Sept. 16, 2011

R. v. Ambrosi, [2012] BCSC 409 (CanLII), March 21, 2012

R. v. Blackwell, [2012] BCPC 149 (CanLII), May 15, 2012

R. v. Neilson, [2012] O.J. No. 1386, March 22, 2012

R. v. Saulter, [2011] CanLII 77634 (NL PC), Dec. 6, 2011

R. v. Zellstoff Celgar LP, [2012] BCPC 38 (CanLII), Feb. 16, 2012

[box]

5 KEY FACTS ABOUT DUE DILIGENCE

1. There are two kinds of due diligence: reasonable steps (the most common) and reasonable mistake of fact.
2. Due diligence is a defence that must be proven by a company or individual charged with an environmental violation on a balance of probabilities.
3. Anyone charged with a violation of the environmental laws, including companies and individuals such as officers, directors, owners and supervisors, can raise a due diligence defence.
4. The due diligence defence applies to most violations of so-called 'regulatory' laws, such as environmental and OHS laws.
5. Courts consider various factors when evaluating a due diligence defence, including foreseeability, preventability, control and degree of harm. [/box]