ECI’s 8th Annual Due Diligence Scorecard, Part 2: 10 Lessons from Recent Due Diligence Cases

Part 1 of the *Environmental Compliance Insider*‘s 8th annual Due Diligence Scorecard provided an overview of 10 cases decided since June 2012 in which a company or individual argued due diligence in defence to an environmental offence. The real value of these cases is that they illustrate what steps defendants took to successfully prove due diligence and what errors they made that cost them that defence. So here in Part 2 of the Scorecard are 10 lessons that you can learn from these cases and apply to your own EHS program. (See the box below for a review of five key facts about the due diligence defence.)

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5 KEY FACTS ABOUT DUE DILIGENCE

1. There are two kinds of due diligence: reasonable steps and reasonable mistake of fact.

2. Due diligence is a defence that must be proven by a company or individual charged with a safety violation on a balance of probabilities.

3. Anyone charged with a violation of the environmental laws, including companies and individuals, 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]

10 KEY DUE DILIGENCE LESSONS

[learn_more caption=”Lesson #1: Due Diligence Depends on the Specific Circumstances”]

One of the more frustrating aspects of this defence is that what constitutes due

diligence depends on the specific circumstances and facts surrounding the environmental offence in question. So although there are certain broad guidelines that courts will follow in analyzing this defence in the context of an environmental violation, the verdict will ultimately come down to facts, such as what happened and why, what you knew about the situation and related risks and when you had that information, what measures were in place to address the foreseeable risks and how effective they were, etc.

Example: The government accused a company and its owner of conspiring with a fisherman to help him misreport his halibut catches so that the halibut wouldn't be reduced from his quota and his trips wouldn't be subject to dockside monitoring during off-loading of the catch. The company and owner were charged with possessing fish caught in violation of the *Fisheries Act* but acquitted.

Because there was no doubt that the company and its owner were in possession of fish that was caught as a result of the fisherman's violations, the only remaining issue was whether they exercised due diligence to avoid being in possession of illegal fish. The government argued that the defendants didn't exercise due diligence because they never asked to see the conditions of the fisherman's licence or his log books, or asked whether a dockside monitor had to be present during off-loading. But the court disagreed. The defendants had dealt with the fisherman for years and knew he was properly licensed. So unless there was something in the particular circumstances surrounding the delivery or off-loading that suggested illegality, due diligence was established when the buyers ensured that they were buying from a licensed fisherman, explained the court. And here, there was nothing in the circumstances that would've alerted the defendants to any illegality in relation to this fish, it concluded [*Shatford*].

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[learn_more caption="Lesson #2: You Must Act When Aware of an Environmental Hazard"]

One of the most fundamental rules of due diligence is that once the company is notified or becomes aware of an environmental hazard'or potential hazard'it *must* assess the hazard and, if necessary, take steps to address it.

Example: A massive amount of cow effluent washed downhill from a field and entered a regional district's drinking water system through the well head and aquifer. This polluted water was then pumped into the distribution system and sent to residents. The district was charged with four environmental offences as a result

The court noted that for *over a decade*, the district was aware of significant issues as to this well site. For example, it was advised several times to install a backflow preventer, but failed to do so. And the step it *did* take'using a chlorine analyzer'was unreliable. In fact, the so-called 'failsafe' system the district relied on was actually faulty and failures of it were 'entirely ordinary,' noted the court. In addition, the district was in possession of a report that put it on notice that it had a well that was subject to contamination by ground sources. So the court concluded that the district had failed to exercise due diligence to manage the risks that it knew or ought to have known existed as to this well [*Regional District of North Okanagan*].

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[learn_more caption="Lesson #3: You're Responsible Only for Foreseeable Events & Acts"]

The courts don't expect companies to take steps to address any environmental hazard that's conceivable. You must address only those hazards that you can reasonably foresee. The standard for determining whether a hazard was foreseeable is not what risks the company actually did foresee but what a reasonably prudent person in the same situation would have foreseen. If an environmental hazard, event or violation was unforeseeable, then you won't be expected to have taken steps to prevent or address it.

Example: A crab fisherman was required to offload *all* of his catch once offloading started. When his ship returned to the dock, the processing plant couldn't handle its catch because of a glut. An officer of the company that owned the plant let the ship's boxed crab, which had to be processed quickly to preventing spoiling, be off-loaded but not the rest of the crab, which were in holding tanks and not in immediate danger. As a result, the DFO charged the fisherman and company officer with violating the *Fisheries Act*.

The crab processing plants in the area were overwhelmed because catches were extremely good and higher than expected. Plus, the usual purchasers hadn't made any buys in several days. The defendants 'moved heaven and earth to try and accommodate a proper and usual offloading' of the catch, including trying to find alternate storage space for the crab or refrigerated transport trucks. Although the boxed crab would've died if they weren't unloaded promptly, there was still time to unload the rest of the crab. There was no evidence that the fisherman could've known what the situation was at the plant while he was still out at sea. This situation was a unique problem, which had never occurred in the industry before and, in fact, hasn't occurred since then. It was essentially a 'perfect storm.' So the court said 'considerable latitude' should be given to the defendants because of the uniqueness of the confluence of events. And in light of these unprecedented circumstances, the defendants acted with due diligence, ruled the court [*Quinlan*].

Note that the fact that a specific kind of environmental incident never happened before or happened in a particular way doesn't mean that it was unforeseeable.

Example: Workers at a propane facility were illegally transferring propane from truck-to-truck, when the vapours ignited, causing a series of explosions. One worker died while the other suffered minor injuries. The explosion forced the evacuation of thousands of nearby residents and caused widespread damage. As a result, two companies were charged with discharging contaminants into the environment and not complying with orders issued afterwards in violation of the *Environmental Protection Act*.

The defendants argued that this type of explosion wasn't foreseeable because it hadn't happened before. The court explained that the issue was whether the defendants could have foreseen that a propane leak could've resulted in an explosion. It concluded that the risk of an explosion during propane transfers and subsequent discharge of contaminants into the natural environment *was* foreseeable. In fact, that's why the transportation and distribution of propane was regulated. And the training guide for those who handle propane says that every release of propane should be treated as having the potential for fire or explosion, added the court [*Sunrise Propane*].

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[learn_more caption="Lesson #4: Due Diligence Requires Taking All Reasonable Steps"]

Due diligence doesn't require perfection or the taking of extraordinary measures. To prove due diligence, you must show only that you made all *reasonable* efforts to comply with the law and protect the environment. If you didn't take steps that a court concludes a reasonable person in your position would've taken, your due diligence defence will fail.

Example: Fishermen who fish commercially in designated areas are required to get hail-out numbers before they engage in fishing and record the numbers in the vessel's log book. After DFO officers saw a commercial fishing vessel fishing without a required hail-out number, they boarded the vessel to talk to the skipper and conduct an inspection. They found that the ship's revival tank wasn't being used properly. The fisherman was charged with two violations related to the lack of a hail-out number and revival tank.

As to the hail-out number offence, the skipper claimed that cell phone reception in the area where he was anchored was poor, preventing him from getting a hail-out number. However, he was trying to get one when the officers came alongside the vessel. But the court didn't buy this argument. The skipper should've taken steps to get the hail-out number *before* he started fishing. For example, he could've gotten the number before he even set sail or arrived at the fishing ground. In fact, the court noted that this process was the one the skipper now followed. So the court found that he didn't exercise due diligence as to this offence [*Leask*].

And you must take these steps *before* an environmental offence is committed'not to fix or address it afterwards.

Example: A fisherman's licence barred him from possessing 'V' notched female lobsters. During an inspection by DFO officers, he was found in possession of two such lobsters and charged with violating the *Fishery (General) Regulations*. The fisherman's defence: he planned to do a 'final' examination of the lobsters when he got to the wharf. But the court explained that compliance with the conditions of his licence required him to take reasonable steps to determine if any lobster he caught was a female 'V' notched lobster *before* he kept it in his possession'not once he was back at the wharf. There was no evidence that he took such steps'and he could have. After all, since the fisherman was able to check each lobster when he caught it for compliance with size requirements, he was also able to check for female 'V' notched lobsters at that time, concluded the court [*Gallant*].

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[learn_more caption="Lesson #5: Regular Maintenance of Systems Is a Reasonable Step"]

As explained, the reasonable steps you should take to establish due diligence will vary depending on the circumstances. But there are certain basic steps the courts nearly always expect all companies to take. For example, having systems in place to protect the environment won't prove your due diligence if you don't ensure that such systems are regularly maintained so that they're effective and

actually function as intended.

Example: After the government was alerted that water samples from a local watercourse had tested positive for e-coli, inspectors followed the polluted watercourse to a hill on a farm's property. Evidence confirmed that a pipe that was part of the farm's unapproved sewage system had cracked. The corporation that owned the farm and its president were charged with multiple environmental offences.

The court noted that there was no evidence that the complex sewage system was installed under an engineer's supervision or that the president had requested or gotten professional advice as to the proper maintenance of this system. Rather, his efforts to maintain the system were limited. For example, he'd 'occasionally' overlook the area from a parking lot while taking out the garbage. And although he said he'd use a stick to check the fluid level in the system's tank, there was no evidence of how often he made such checks. In addition, the lushness and abundance of vegetation near the source of the leak suggested it had existed for quite some time. So it was unlikely that the president took even these minimal steps very often, found the court. Thus, the court said it couldn't find that 'all reasonable care was taken' by the defendants [*Hernder Farms Ltd.*].

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[learn_more caption="Lesson #6: You Can Rely on Competent Staff for Environmental Compliance"]

A company or organization is an entity that can't actually take any steps on its own'it relies on its employees or agents to act on its behalf. If you ensure that your staff are competent, that is, properly trained and informed on the applicable environmental laws, you can rely on them for compliance with those laws. In other words, if you exercise due diligence as to the training and supervision of employees and their conduct results in an environmental offence, you may be able to avoid liability for it.

Example: As to the revival tank charge in *Leask*, the skipper said he relied on the vessel's engineer, who was a very reliable and experienced member of the crew, to ensure the revival tank was operational and thus complied with the environmental law. And the court agreed. The skipper had taken reasonable steps to instruct the engineer to ensure that the revival tank was being used properly. Although the skipper was ultimately responsible for compliance, it was unrealistic to expect him to double check every order that he gave his crew to ensure compliance. So the court ruled that he *had* taken reasonable precautions to avoid the revival tank violation.

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[learn_more caption="Lesson #7: If Workers Violate Rules, You Must Discipline Them"]

You have a duty to ensure that workers follow your environmental rules and procedures and comply with the environmental laws. To that end, you should take steps to convey to workers the importance of such compliance'and the ramifications of environmental infractions. For example, when workers violate environmental rules, you *must* discipline them.

Example: In *Hernder Farms Ltd.*, the president claimed he'd given his staff instructions related to the system, but they didn't always follow those instructions. However, the court noted that there was no evidence that the president took any remedial steps or discipline to ensure their compliance.

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[learn_more caption="Lesson #8: Compliance with Industry Standard Isn't Always Due Diligence"]

Following industry standards may help a company comply with the environmental laws. But just because a practice is standard in your industry doesn't necessarily mean that it complies with the law'or that following it will be sufficient to establish due diligence.

Example: A fisherman's license barred him from catching any common welk shorter than 63mm in length. To comply, he bought a 'legal' welk grading table designed to sort the smaller welk from the legal-sized ones. The fisherman used the grading table to sort the welk he caught but took no other steps to measure the fish. And he knew that the table didn't accurately sort the welk by size. So an inspection by DFO officers found that his catch included many welk under the legal limit. As a result, he was charged with violating the *Fisheries Act*.

The court acknowledged that it wasn't practical for the fisherman to measure every welk he caught. So he followed the industry standard and used a grading table to sort his catch. But compliance with an industry standard is but one factor to consider in determining whether a defendant's actions constituted due diligence, explained the court. If the industry practice itself fails to meet the test of due diligence, it won't help the defendant, added the court. In this case, the grading table didn't accurately separate the undersized welk from the legal fish'and the fisherman knew about this flaw. And although the table had a 63mm mark, the fisherman rarely used it to measure the welk. So the fisherman violated his duty to 'come up with a workable system' that ensured compliance with his licence and thus failed to exercise due diligence, concluded the court [*Rideout*].

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[learn_more caption="Lesson #9: Don't Ignore Advice of Environmental Experts"]

When engaging in activities that could impact the environment or violate environmental laws, many companies chose to hire environmental consultants to advise them on how to proceed with those activities while still complying with the law. Consulting such experts is a smart decision'but only if you actually follow their advice. Ignoring this advice could result in the very violations you hired the consultant to avoid'and undermine any possible due diligence defence.

Example: A DFO biologist and inspector collected evidence at a construction site near a creek. As a result, the company that owned the site and its director were charged with violating the *Fisheries Act*. But at trial, the court ruled that the evidence from the biologist and inspector were the result of an illegal search. The defendants were acquitted, so the Crown appealed. The appeals court ordered a new trial at which the evidence from the DFO employees would be admissible.

At the new trial, the defendants were convicted. The court found that the drastic alterations to the site had harmfully disrupted a fish habitat in the creek. In addition, the defendants didn't exercise due diligence. The court noted that the defendants had retained an environmental consultant to get advice about how to comply with environmental laws. The environmental consultant provided a plan and confirmed that the DFO wouldn't object if they followed that plan. But the defendants chose not to proceed with the consultant's plan. Specifically:

- The consultant told them not to cut down trees and to remove only those limbs that presented a hazard. Instead, the defendants elected to remove a considerable number of trees, in some cases uprooting them.
- The consultant advised the defendants to have an environmental monitor present when work was being performed but they chose not to do so.
- The consultant asked to be notified when work was being performed. However, the defendants went ahead with the work without notifying the consultant.

So the court found that the evidence established that the defendants chose to reject the consultant's plan, which, if followed, wouldn't have met with any complaints from the DFO. Under these circumstances, the defendants 'are clearly not entitled to a defence of due diligence,' concluded the court [*Larsen*].

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[learn_more caption="Lesson #10: High Risk Industries & Operations Are Subject to More Scrutiny"]

All companies covered by the environmental laws must take steps to ensure compliance with such laws and to protect the environment. But the due diligence efforts of companies in high risk industries or that engage in especially dangerous operations may be subject to more scrutiny by courts because the risk of incidents that could impact the environment and/or human lives is so high and the possible consequences of such incidents is so serious.

Example: In *Sunrise Propane*, the court said it was difficult to imagine a more dangerous workplace than a yard filled with propane where a leak could cause explosions given the many possible sources of ignition present at any time. As a result, in an inherently dangerous business in which 'the potential for substantial injury or death is extremely high,' the standard of care expected of the employer as to the safety training and supervision of its workers was 'extremely high and strict' and there must be a 'high degree of attention to detail' as to such training and supervision.

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BOTTOM LINE

We'd love to be able to provide a formula for establishing due diligence or a checklist of steps that, if taken, would guarantee that you could successfully prove due diligence. But it's not so simple. However, EHS coordinators aren't without some guidance on how to ensure their companies exercise due diligence. By looking at cases such as those in the Scorecard, you can learn from other companies' experiences in environmental prosecutions. The lessons from such cases can show you how to make sure your EHS program could withstand a court's scrutiny.

SHOW YOUR LAWYER

Directeur des poursuites criminelles et penales v. Louiseville (Ville de), [2013] QCCQ 675 (CanLII), Jan. 15, 2013

Ontario (Ministry of Labour and Ministry of the Environment) v. Sunrise Propane Energy Group Inc., 2013 ONCJ 358 (CanLII), June 27, 2013

R. v. Gallant, [2013] CanLII 8718 (NL PC), Feb. 27, 2013

R. v. Hernder Farms Ltd., [2012] ONCJ 793 (CanLII), Dec. 14, 2012

R. v. Larsen and Mission Western Developments Ltd., [2013] BCPC 92 (CanLII), April 25, 2013

R. v. Leask, [2012] BCPC 423 (CanLII), Nov. 7, 2012

R. v. Quinlan, [2013] CanLII 26549 (NL PC), May 8, 2013

R. v. Regional District of North Okanagan, [2013] BCPC 271 (CanLII), Sept. 25, 2013

R. v. Rideout, [2013] CanLII 3550 (NL PC), Jan. 31, 2013

R. v. Shatford, [2012] N.S.J. No. 454, Aug. 22, 2012