ECI’S 8TH ANNUAL DUE DILIGENCE SCORECARD: Recent Cases Involving the Due Diligence Defence

D

ue diligence is a fundamental environmental compliance topic that all EHS professionals must understand. But although the concept that a company must take all reasonable steps to ensure compliance with the environmental laws and prevent violations seems simple enough, understanding its application in the real world can be far from simple. For example, what makes a particular measure reasonable’ The bottom line is that the application of the due diligence defence depends on the facts of each specific case. The good news is that courts rely on the decisions in other due diligence cases when deciding the ones before them.

As a result, patterns have emerged as to what constitutes due diligence and which factors are critical to the analysis of this defence. Thus, you can compare your company's EHS program to these cases to determine how it measures up.

The *Environmental Compliance Insider*'s annual Due Diligence Scorecard can help you make such comparisons. Since 2007, the *Insider* has compiled recent reported environmental compliance cases involving the due diligence defence from across Canada into a Scorecard. This year's version picks up where last year's left off'in June 2012. We'll start with some key facts about due diligence and then break down the results of the cases.

[box]

5 KEY FACTS ABOUT DUE DILIGENCE

Here are five key facts about the due diligence defence:

1. There are two kinds of due diligence: reasonable steps'the defence most commonly argued'and reasonable mistake of fact.

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

3. *Anyone* charged with a violation of the environmental laws, including companies and individuals such as corporate officers, owners, supervisors and workers, can raise a due diligence defence.

4. The due diligence defence applies to violations of the environmental laws as well as to other so-called 'regulatory' laws, such as the OHS laws.

Example: After the hydraulic cylinder of an elevator failed and injured five people, the elevator maintenance company was convicted of five violations of the *Technical Standards and Safety Act* and fined $400,000. An appeals court upheld the convictions and fine, rejecting the company's due diligence defence. An industry safety bulletin had put the company on notice of the hazard of unexpected oil loss in hydraulic cylinders. A worker had added 100 litres of oil to the elevator's cylinder without being able to account for the oil loss. This unexplained loss of a large amount of oil should have indicated to the company that the safety of the elevator had been compromised. Thus, the cylinder's failure was foreseeable [*The Technical Standards and Safety Authority v. Fujitec*, [2013] ONSC 497 (CanLII), Jan. 22, 2013].

5. Courts consider various factors when evaluating a due diligence defence, including foreseeability, preventability, control and degree of harm.[/box]

The Scorecard

This year, we found 10 environmental prosecutions decided since June 2012 in which the verdict turned on the success or failure of a company's or individual's due diligence defence. (Last year's Scorecard had eight cases.) As usual, this defence failed more often than it succeeded. In this year's Scorecard:

Wins. The defendant won in two cases from NL and NS.

Split decision. In one case from BC, the skipper of a fishing vessel won as to one charge but lost on another.

Losses. The defendant lost in seven cases from BC, NL, ON and QC.

The cases in the Scorecard involve the prosecution of organizations, such as companies and government districts, as well as individuals, including fishermen, ship captains, and corporate directors and presidents.

***Insider* Says:** The Scorecard doesn't reflect all of the environmental prosecutions in a given year or so for several reasons. First, most prosecutions of environmental violations are resolved when the company or individual pleads guilty. So many of these cases never result in a trial at which the due diligence defence is raised and analyzed. Second, many court decisions in environmental prosecutions aren't reported or published.

BOTTOM LINE

For each of this year's 10 cases, the Scorecard tells you what happened, whether the company (or individual) won or lost and how the court analyzed the due diligence defence. In Part 2, we'll explain the lessons you can learn from these cases and how to use them to evaluate your EHS program.

Due Diligence Scorecard

Here's a synopsis of 10 cases decided since June 2012 in which a court had to evaluate a company's (or individual's) due diligence defence in an environmental prosecution.

COMPANY/INDIVIDUAL WINS

[box]NS: *Shatford*[/box]

What Happened: 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 violating the *Fisheries Act*.

Ruling: The Nova Scotia Provincial Court acquitted the defendants, ruling that they'd exercised due diligence.

Analysis: The court acknowledged that the fisherman was clearly acting illegally. And there was no question that the company and its owner ended up in possession of fish that was the result of the fisherman's violations. So the only issue was whether they'd exercised due diligence. The court rejected the government's argument 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 inquired as to whether a dockside monitor had to be present during off-loading. The defendants had dealt with the fisherman for years and knew he was properly licensed. The court concluded that absent something in the circumstances surrounding the delivery or off-loading that suggested illegality, which wasn't present here, due diligence was established when the buyers ensured that they were buying from a licensed fisherman,

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

[box]**NL:** *Quinlan*[/box]

What Happened: A crab fisherman's licence required him to offload *all* of his catch once offloading began. When his ship returned to the dock, the processing plant couldn't handle its catch because of a 'crab glut.' So an officer of the company that owned the plant allowed the offloading of the ship's boxed crab, which had to processed quickly to preventing spoiling, but not the rest of the crab, which were in holding tanks of refrigerated seawater and not in immediate danger. The DFO charged the fisherman and company officer with violating the *Fisheries Act*.

Ruling: The Provincial Court of Newfoundland and Labrador acquitted the defendants, ruling that they'd exercised due diligence.

Analysis: The court acknowledged that the defendants had violated the offloading requirement. But the crab processing plants in the area were overwhelmed because catches were extremely good and higher than expected. And the usual purchasers hadn't made any buys in four days. The defendants tried diligently to find alternate storage space for the crab or refrigerated transport trucks without luck. The boxed crab would've died if they weren't unloaded promptly but there was still time to unload the rest of the crab. In addition, there was no evidence that the fisherman could've known what the situation was at the plant while he was out at sea. Thus, the court concluded that a unique confluence of events had created an unprecedented situation. And in light of these circumstances, the defendants acted with due diligence.

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

SPLIT DECISION

[box]**BC:** *Leask*[/box]

What Happened: DFO officers saw a commercial fishing vessel fishing without a required hail-out number. They boarded the vessel to discuss this issue with the skipper and conduct an inspection. They found that the ship's revival tank, which was used to hold injured bycatch before it was returned to the sea, wasn't being used properly. The fisherman was charged with two violations.

Ruling: The BC Provincial Court ruled that the skipper had exercised due diligence as to the revival tank violation but not the hail-out number offence.

Analysis: The skipper said poor cell phone reception had made it difficult to get a hail-out number but he was in the process of getting one when the officers came alongside the vessel. But the court said he could've gotten the number long before he set sail, which was, in fact, the process he followed now. So it convicted him on that charge. As to the revival tank charge, 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. The court found that he'd taken reasonable steps to instruct the engineer to ensure that the revival tank was being used properly. And it was unrealistic to expect the skipper to double check every order that he gave his crew to ensure compliance. So the court ruled that he *had* exercised due diligence as to the revival tank.

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

COMPANY/INDIVIDUAL LOSES

[box]**ON:** *Hernder Farms*[/box]

What Happened: Students collected water samples from a local watercourse to test water quality. The samples tested positive for e-coli. So they contacted the government. Inspectors followed the polluted watercourse to a hill on a farm's property. One side of the hill was mushy and had lots of lush vegetation, there was a pool of water and discharge oozing out of the ground. Evidence later 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.

Ruling: The Ontario Court of Justice ruled that the defendants hadn't exercised due diligence.

Analysis: The court rejected the argument that the leak was unforeseeable. There was no evidence that the sewage system was installed under an engineer's supervision. In addition, the final installation differed from the signed proposal. And the president, who'd previously failed to construct in compliance with approved plans, didn't request or get professional advice as to the proper maintenance of such a complex system. Instead, he made minimal efforts to maintain the system. For example, he'd 'occasionally' check the area and use a stick to check the fluid level in the tank. But there was no evidence of how frequently he made such checks. And given the lushness and abundance of vegetation near the source of the leak, he likely didn't do so often, concluded the court. Lastly, although the president claimed his staff didn't always follow instructions related to the system, there was no evidence of any remedial steps or discipline he undertook to ensure their compliance, noted the court. In short, the court couldn't find that 'all reasonable care was taken' by the defendants.

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

[box]**QC:** *Louiseville*[/box]

What Happened: A city had to undertake work in a zone that's flooded for about 10 days each year. The city didn't know whether it needed a C of A under the *Environment Quality Act* for the work. So a city representative brought in a consultant, who contacted the Ministry of Sustainable Development, Environment and Parks to discuss the issue and get advice. During a brief telephone conversation, a Ministry official verbally confirmed that a C of A wasn't required for the city's work. Unfortunately, this advice was incorrect. When the city proceeded with the work without a C of A, it was charged with an environmental violation.

Ruling: The Cour du Qu□bec ruled that the city hadn't exercised due diligence.

Analysis: The city's due diligence defence had to be considered in light of relevant circumstances, including the representative's 10 years of experience. He had doubts about the need for a C of A and his conversation with a consultant, who had 26 years of experience, didn't alleviate those doubts. But the only precaution he took was to have the consultant have a short telephone

conversation with a Ministry official. Other reasonable steps the city should've taken included providing plans or documentation to the official to ensure that the official had all of the relevant information at hand before issuing advice. The city should also have gotten a written report from the consultant.

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

[box]**NL:** *Rideout*[/box]

What Happened: A fisherman was licensed to catch common welk longer than 63mm in length. There was no allowable or tolerable percentage of undersized welk. To comply with the length requirement, he went to a company that made grading tables for local fisherman and bought a 'legal' welk table designed to sort the smaller welk from the legal-sized ones. The fisherman used the grading table to sort the welk he caught and took no other steps to measure the fish. During an inspection of his catch, DFO officers found that his catch included many welk under the legal limit. So he was charged with violating the *Fisheries Act*.

Ruling: The Provincial Court of Newfoundland and Labrador ruled that the fisherman hadn't exercised due diligence.

Analysis: The fisherman's licence didn't allow him to catch *any* undersized welk. Because it wouldn't be practical to measure every welk caught, said the court, the fisherman followed the industry standard and used a grading table to sort his catch. But the table didn't accurately separate the undersized welk from the legal fish. And the fisherman was aware of this problem. In addition, although the table had a 63mm mark, it was rarely used to measure the welk. Thus, as long as the law required a minimum length, it was the fisherman's duty to 'come up with a workable system, which will ensure compliance with the regulation,' explained the court.

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

[box]**NL:** *Gallant*[/box]

What Happened: 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 said that he planned to do a 'final' examination of the lobsters when he got to the wharf.

Ruling: The Provincial Court of Newfoundland and Labrador ruled that the fisherman hadn't exercised due diligence.

Analysis: 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'd reached the wharf. But he didn't take such steps. And because the fisherman was able to check each lobster he caught for compliance with size requirements, he should also have been able to check for female 'V' notched lobsters.

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

[box]**BC:** *Larsen*[/box]

What Happened: A DFO biologist drove by a commercial construction site that abutted a creek every day on her way to work. During one such trip, she noticed that vegetation near the creek seemed less dense. When she got to work, she told a DFO inspector what she'd seen and they went to the site to conduct an inspection. At the site, they saw that trees had been cut and stacked and brush had been removed. They took notes and photographs and spoke to a worker operating a Bobcat, who said he'd been hired to clear the area. As a result, the company that owned the site and an officer 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.

Ruling: The BC Provincial Court ruled that the defendants hadn't exercised due diligence.

Analysis: The defendants had a plan for the work from an environmental consultant. The DFO confirmed that it wouldn't object to the work if that plan was followed. But the defendants opted not to follow that plan or the consultant's advice. For example, they cut down trees instead of just removing hazardous limbs and didn't have an environmental monitor present during the work. By choosing to reject a plan that wouldn't have met with any complaint from the DFO, the defendants 'clearly are not entitled to a defence of due diligence,' concluded the court.

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

[box]**ON:** *Sunrise Propane*[/box]

What Happened: While workers at a propane facility were transferring propane from truck-to-truck, which is illegal, the vapours ignited, causing a series of explosions. A 25-year-old worker was killed; a co-worker suffered minor injuries. The explosion forced the evacuation of approximately 12,000 residents and caused widespread damage. And a firefighter died of a heart attack while battling the blaze. Two companies were charged with violating the *Environmental Protection Act* by discharging contaminants into the environment and not complying with orders issued afterwards. (Two corporate officers were also charged with failing to take reasonable care to prevent the corporation from violating those orders. And one company was charged with and convicted of OHS violations as well.)

Ruling: The Ontario Court of Justice convicted the companies, ruling that they hadn't exercised due diligence.

Analysis: The explosions and fires resulted in the discharge of contaminants, including gas vapour, smoke, asbestos, dust, metal fragments and other debris, into the natural environment. The discharged contaminants caused a variety of adverse effects, including personal injuries and damage to neighbouring residences and businesses. The court concluded that the risk of an explosion during propane transfers and subsequent discharge of contaminants was foreseeable. In fact, the legislation and the training for those who handle propane is focused on preventing leaks that can cause explosions. But the defendants didn't exercise due diligence to prevent leaks or the discharge of contaminants into the environment. For example, their preventative maintenance

system was ‘woefully inadequate.’ In addition, they failed to provide adequate training and supervision to workers. And the standard of care expected of the company as to training and supervision was ‘extremely high and strict’ given the dangerous nature of the propane business, added the court.

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

[box]**BC:** *North Okanagan*[/box]

What Happened: A massive amount of cow effluent entered the drinking water system operated by a regional district after it washed downhill from a field to the well head and aquifer. This water was pumped into the distribution system and sent to residents. As a result, the district was charged with four environmental offences for delivering polluted water to the users of the water system.

Ruling: The BC Provincial Court convicted the district, ruling that it hadn’t exercised due diligence.

Analysis: The district argued that it exercised due diligence in maintaining the water system and operating this well. But the court noted that the district knew that there were significant issues as to this well site. For example, it was advised several times to install a backflow preventer, but didn’t. And the step it *did* take’using a chlorine analyzer’was unreliable and faulty. 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.

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