THE ENVIRONMENTAL COMPLIANCE INSIDER'S 9th ANNUAL DUE DILIGENCE SCORECARD, Part 2: Four Lessons from Recent Due Diligence Cases

Part 1 of the *Environmental Compliance Insider*'s 9th annual Due Diligence Scorecard included five environmental prosecutions decided since Sept. 2013 in which the verdict turned on the success or failure of a company's or individual's due diligence defence. These court decisions aren't of use only to lawyers'they also provide concrete examples for EHS professionals of steps defendants took that successfully supported their due diligence defences and errors that cost them this defence. Here in Part 2 of the Scorecard, we've extracted four lessons that you can learn from these cases and apply to your own EHS program. (See the box at the end for a summary of applicable principles about the due diligence defence.)

4 KEY DUE DILIGENCE LESSONS

[learn_more caption= "Lesson 1: Due Diligence Requires Taking Reasonable Steps Only"]

Although it may sometimes seem that way, the courts honestly don't expect your company's EHS program to be perfect. To make out a due diligence defence, your company must prove only that

it made *reasonable* efforts to comply with the law and protect the environment. You don't have to take every step imaginable or extraordinary measures to exercise due diligence.

Example: A fisherman's licence barred him from catching any common welk shorter than 63mm in length. To comply with this limit, he used a welk grading table designed to sort the smaller welk from the legal-sized ones. But a DFO inspection found that 21.5% of his catch included welk under the legal limit. The fisherman was convicted of violating the *Fisheries Act* and appealed.

However, the appeals court overturned the conviction and ordered a new trial. The appeals court noted that the trial court had found that although the fisherman followed industry standard by using a grading table to sort his catch by size, the table wasn't accurate. And the fisherman was aware of 'the obvious failings of the grading table.' So he had a duty to 'come up with a workable system, which will ensure compliance with the regulation,' concluded the trial court.

The appeals court disagreed, concluding that the trial court's standard of due diligence was 'too high' and 'too exacting.' There was no evidence of another workable system to ensure compliance with the law besides the industry practice of using a grading table. The only method that would guarantee compliance was measuring each fish individually, which was practically impossible, said the appeals court. For example, it would've taken at least 400 hours to measure the full catch the fisherman had the day of the inspection. So it ordered a new trial at which a court would have to measure the fisherman's efforts to comply with the law and his licence requirements against the standard of *reasonable* care, not a higher standard [*Rideout v. HMTQ*].

In addition, the courts don't expect individuals to risk their lives or that of others in order to comply with an environmental law.

Example: After two fishermen failed to remove their nets before the fishing season for turbot ended, they were charged with fishing during a closed time in violation of the *Atlantic Fishery Regulations* under the *Fisheries Act*. Their defence: Bad weather made it too dangerous for them to remove their nets in time.

The court ruled that the fishermen had exercised due diligence, finding that compliance with the laws governing an industry doesn't 'require the risk of life or limb by its participants.' The fishermen's due diligence defence was essentially that compliance with the law through all reasonable steps couldn't be achieved because the weather made it too dangerous to take such steps. And they did remove their nets as soon as it was safe to do so.

The court explained that due diligence doesn't require making superhuman efforts or exposing oneself to unreasonable danger. To prove due diligence, the defendant must establish that it took all reasonable care to avoid committing the offence or that compliance wasn't reasonably possible because of an intervening event, such as the weather. Here, the fishermen genuinely believed that they had time to offload their catches and return to retrieve their nets before the end of the season. But then the weather worsened, making an attempt to return to the fishing ground 'life threatening' for the fishermen and their crews, said the court. And due diligence didn't require the fishermen to put compliance before their personal safety and the safety of their crews, concluded the court [*R. v. Biggin & Keough*].

But taking *no steps at all* to avoid violating an environmental law, permit or requirement certainly won't support a due diligence defence.

Example: An oil company had a licence to drill wells on Crown land, which required it to perform certain reclamation work and to finish such work within 30 days of the project's

completion. The company didn't do the reclamation work. So a forestry official issued it an order, requiring it to do so. But the company didn't comply with the order and thus was charged with failing to comply with the terms of its drilling license and an order by not reclaiming three well sites.

In convicting the company, the court found that it hadn't exercised due diligence. What steps had the company taken to comply with the requirements of its licence and later the related order' None. There was overwhelming evidence that no reclamation of any kind was done on any of the well sites. In addition, there was no evidence that anyone in the government had ever said or done anything that might have led the company to believe that it didn't have to comply with the terms of its licence. And because the company didn't take *any* steps to comply with the reclamation requirement of its licence or the subsequent order, the court concluded that it didn't exercise due diligence [*R. v. Western Warner Oils Ltd.*].[/learn_more]

[learn_more caption= "Lesson 2: You Must Have a Program to Ensure Environmental Compliance"]

Compliance with the environmental laws doesn't happen by accident or luck. Your company needs a formal, structured EHS program designed to ensure such compliance. The program should include rules, policies and procedures on satisfying the requirements under the environmental laws and any environmental permits or licences as well as monitoring and oversight to ensure the program's effectiveness. Having an effective EHS program will help support your due diligence defence if the program should fail under specific circumstances.

Example: During a compliance inspection of a dry cleaning business, inspectors from Environment Canada found a 45-gallon drum of a hazardous chemical commonly known as PERC that was improperly stored because it didn't have a secondary containment system. So the business and one of its directors

were charged with violating the PERC regulations under *CEPA*.

But the court dismissed the charges, ruling that the defendants had exercised due diligence. The drum in question had been delivered five days before the inspection. The director was away at the time. In fact, his first day back to work was the day of the inspection. The director had a system for complying with the PERC regulations, which involved transferring the PERC from the large drum into smaller containers and then placing those containers into secondary containment. He was in the process of following this system with this drum of PERC when the inspectors arrived. The system had proven to be effective overall'in fact, a thorough and comprehensive inspection of the business had found that the business was otherwise in compliance with all environmental requirements. So the court concluded that the evidence, together with all of the circumstances, established that the defendants had a 'reasonable, prudent course of action to ensure PERC was maintained in secondary containment' at the facility [*R. v. Chetal Enterprises Limited (One Hour Cleanitizing)*].[/learn_more]

[learn_more caption= "Lesson 3: Documentation Is Crucial to Proving Due Diligence"]

Taking reasonable steps to ensure environmental compliance, such as establishing environmental procedures, adequately training workers and disciplining them for infractions, isn't going to help you establish due diligence if you can't prove to a court that you took such steps. So it's important to document in writing all of your environmental efforts and measures. Having such documentation will help you prove due diligence, while failing to have it leaves you without proof that you did, in fact, exercise due diligence.

Example: A property owner hired a contractor to demolish a building. The contractor then hired a subcontractor with expertise in demolition work to handle the demolition and

manage the removal of the waste from the site. A subcontractor's truck was seen leaving the site with waste material and taking it outside of the municipality in violation of a local bylaw on the collection and disposal of solid waste. The municipality charged the property owner, contractor and subcontractor with a violation of the bylaw. The subcontractor pleaded guilty.

At trial, the court acquitted the property owner and contractor, ruling that they'd exercised due diligence. The defendants had hired a subcontractor that was known to have the necessary resources and appropriate experience to handle a demolition project of this size. And the contractor took steps to properly supervise the subcontractor (discussed more below). In addition, the contractor could *prove* that it had taken such steps, observed the court. For example, the site superintendent maintained a regular log of activities performed by the subcontractor at the site and prepared regular waste trip log forms. He also received and reviewed invoices from the recycling facilities where the site waste was taken and compared them to the log forms [*R. v. Bird Construction Group*].[/learn_more]

[learn_more caption= "Lesson 4: Adequately Supervise Your Contractors"]

If you use contractors, you must have a system in place to ensure that they're complying with the terms of the contract and the applicable environmental rules and laws. And a key element of a contractor oversight or management system is supervision of contractors to ensure their compliance.

Example: In the *Bird* case discussed above, the court explained that you can't simply contract out legal requirements to a contractor without supervising or monitoring its activities to prevent a violation that you should've foreseen. In this case, the contracts between the property owner and contactor and between the contractor and subcontractor required the

subcontractor to carry out the work in accordance with the bylaws and any demolition permits. And the defendants didn't sit back passively or act with indifference to the subcontractor's actions. They had a system in place to monitor and supervise the subcontractor's activities to ensure such compliance. For example, the site superintendent monitored the subcontractor on a daily basis and kept a log of his observations. If he had any concerns, he took immediate steps to ensure the issue was addressed. In addition, although the compliance officer had observed the activities at the site for several days, she only observed *one* violation. Thus, this system generally was effective. The court concluded that it wasn't 'reasonable for the defendants to more closely supervise or monitor' the subcontractor's activities.[/learn_more]

BOTTOM LINE

Exercising due diligence isn't just about protecting the company from liability'it's about protecting the environment from harm and preventing environmental violations and incidents from happening in the first place. So to develop an effective and comprehensive EHS program based on due diligence principles, learn from the mistakes made by the companies and individuals in these cases'and model yourself on those that got it right.

SHOW YOUR LAWYER

Rideout v. HMTQ, [2014] CanLII 8978 (NL SCTD), March 5, 2014

R. v. Biggin & Keough, [2014] CanLII 66239 (NL PC), Nov. 12, 2014

R. v. Bird Construction Group, [2014] N.S.J. No. 351, March 13, 2014

R. v. Chetal Enterprises Limited (One Hour Cleanitizing), [2014] SKPC 171 (CanLII), Oct. 9, 2014

[learn_more caption= “APPLICABLE PRINCIPLES ABOUT DUE DILIGENCE”]

The court in the *Biggin* case included in the Scorecard provided the following useful summary of principles that apply to the defence of due diligence:

1. The burden of proving due diligence rests on the defendant, provided that the prosecution has established beyond a reasonable doubt that the defendant committed the offence.
2. The defendant must prove due diligence on a balance of probabilities.
3. The defendant must establish that it took all reasonable care to avoid committing the offence or that compliance wasn’t reasonably possible because of an intervening event, such as the weather.
4. An objective standard is used in which the defendant’s act’or failure to act’is assessed against that of a reasonable person under similar circumstances.
5. The act or conduct said to prove due diligence must relate to the elements of the specific offence charged. That is, acting reasonably in the abstract or taking care in a general sense isn’t sufficient.
6. Due diligence doesn’t require ‘superhuman efforts’ or exposing oneself to unreasonable danger. The defence requires ‘a high standard of awareness and decisive, prompt, and continuing action.’
7. Courts must be careful not to set a standard of care in the context of a particular offence so high as to effectively create an absolute liability offence or prohibit individuals from safely participating in the regulated activity.[/learn_more]