ENVIRONMENTAL COMPLIANCE INSIDER'S 9th Annual Due Diligence Scorecard, Part 1

Due diligence is more than a defense to environmental violations'it's an approach to compliance that can protect the environment (and workers) and prevent incidents from ever occurring. That's why it's so important that EHS professionals understand the elements of due diligence. But this apparently simple concept can be quite complicated when you try to apply it to your workplace and operations. And there are no assurances that the steps *you* believe are reasonable to ensure compliance with the environmental laws and prevent violations will pass muster when examined by a court. However, because courts rely on the decisions in other due diligence cases when deciding the ones before them, you can examine these decisions for guidance on what constitutes due diligence and which factors the courts will focus on in their analysis.

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 Sept. 2013. First, we'll review the key facts about due diligence and then look at the facts and decisions in the cases.

5 KEY FACTS ABOUT DUE DILIGENCE

Here's a brief review of 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. And having a strong EHS program based on due diligence may even keep charges from being laid in the first place.

Example: In BC, the Crown announced that no charges would be filed against a sawmill based on an explosion and fire that killed two workers and injured many others. The government said there was no substantial likelihood of conviction for any regulatory offences due to the inadmissibility of some of the evidence gathered by investigators and the sawmill's likely due diligence defence [*Babine Forest Products*, Govt. News Release, Jan. 10, 2014].

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: A new diesel fuel tank was installed and connected to two existing tanks on the 34th floor of a building. The new tank was to serve as the fuel reservoir for a new generator on the 36th floor. The building's operations supervisor discovered a sizeable leak from the tank. He and other workers tried to clean it up. The supervisor contacted the operations manager, who eventually reported the spill about two hours

after it was initially found. The court convicted the building's owners and operators of failing to immediately report a spill in excess of 50 litres in violation of the *Safety Codes Act* and rejected their due diligence defence. The appeals court upheld their convictions. They should've tried to determine the amount of the spill much sooner and not waited until two hours after the leak was first discovered, said the court. And it was clear much sooner than that that the 50 litre reporting threshold had been met [*R. v. 1023803 Alberta Ltd.*, [2014] ABQB 645 (CanLII), Oct. 23, 2014].

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

THE SCORECARD

This year, we found just 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. (Last year's Scorecard had 10 cases.) Why so few cases' The Scorecard doesn't reflect all of the environmental prosecutions in a given year or so for several reasons. Most prosecutions of environmental violations are resolved when the company or individual pleads guilty. (Just look at the cases included in the Month in Review section of the newsletter each month and you'll see what we mean.) So in such cases, the court never gets an opportunity to assess the defendant's due diligence defence. In addition, court decisions in environmental prosecutions aren't always reported or published.

For the first time since we've compiled the Scorecard, this defence succeeded more often than it failed. In this year's Scorecard:

Wins. The defendant won in four cases from NL, NS and SK (although a new trial was ordered in one of the cases).

Losses. The defendant lost in one case from Saskatchewan.

***Insider* Says:** One of the cases in this year's Scorecard, *R. v. Rideout*, is a decision overturning the defendant's conviction, which was included in last year's Scorecard.

BOTTOM LINE

For each of this year's five 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.

ECI DUE DILIGENCE SCORECARD

Here's a synopsis of five cases decided since Sept. 2013 in which a court had to evaluate a company's (or individual's) due diligence defence in an environmental prosecution

[learn_more caption="**COMPANY/INDIVIDUAL WINS**"]

NL: *Rideout*

What Happened: A fisherman's license barred him from catching any common welk shorter than 63mm in length. To comply with his license, he used a welk grading table designed to sort the smaller welk from the legal-sized ones. After an inspection by DFO officers found that 21.5% of his catch included welk under the legal limit, he was convicted of violating the *Fisheries Act*. The trial court found that the fisherman's licence didn't allow him to catch *any* undersized welk. Although he followed the industry standard and used a grading table to sort his catch, the table didn't accurately separate the undersized well from the legal fish. And the fisherman was aware of this problem. So 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 trial court. The fisherman appealed.

Ruling: The Supreme Court of Newfoundland and Labrador overturned the conviction and ordered a new trial.

Analysis: The appeals court said the trial court had applied 'too high' or 'too exacting' a standard of due diligence. The fisherman followed industry standard in using the grading table to cull the smaller welk. There was no evidence of another workable system to ensure compliance with the law short of measuring each welk individually, which was nearly impossible. So the appeals court ordered a new trial at which the court would have to measure the fisherman's compliance efforts against the standard of *reasonable* care, not a higher standard.

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

NS: *Bird Construction*

What Happened: A property owner hired a contractor to demolish the hotel on the property. The contractor, in turn, hired a subcontractor with expertise in demolition work to handle that work as well as manage the removal of the waste from the site. A compliance officer saw a subcontractor's truck leave the site containing waste material and take that material outside of the municipality, which violated 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, but the property owner and contractor went to trial.

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

Analysis: The thrust of the municipality's argument was that the property owner and contractor 'allowed' the subcontractor

to violate the waste disposal bylaw. The contractor had selected the subcontractor because of its 'extensive experience in demolition projects' and prior positive experience working with the company, said the court. Both the contracts between the property owner-contractor and the contractor-subcontractor required the subcontractor to carry out the work in accordance with the bylaws and any demolition permits. But the defendants didn't simply expect the subcontractor to comply'they had a system in place to monitor and supervise the subcontractor's activities to ensure compliance. For example, the site superintendent monitored the subcontractor on a daily basis, completed log forms on each waste trip and compared them to invoices from the waste facilities where the materials were brought. And although the compliance officer had observed the activities at the site for several days, she only observed *one* violation. Thus, the court ruled that the defendants took all reasonable steps to ensure compliance with the bylaw, finding that it wasn't'reasonable for the defendants to more closely supervise or monitor' the subcontractor's activities.

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

SK: *Chetal Enterprises*

What Happened: During a compliance inspection of a dry cleaning business, inspectors from Environment Canada found a 45-gallon drum of the chemical tetrachloroethylene'commonly known as PERC'that was improperly stored because it didn't have a secondary containment system. As a result, the business and one of its directors were charged with violating the PERC regulations under *CEPA*.

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

Analysis: The court noted that the inspectors had conducted a thorough and comprehensive inspection of the business, which

was otherwise in compliance with all environmental requirements. 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. And he'd planned to do the same with this drum of PERC when the inspectors arrived. Thus, the court found that the defendants had acted with due diligence as to the storage of PERC at the business.

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

NL: *Biggin & Keough*

What Happened: The fishing season for turbot ended at 4:00 pm on June 4. Two fishermen didn't remove their nets until June 9. They were charged with fishing during a closed time in violation of the *Atlantic Fishery Regulations* under the *Fisheries Act*. The fishermen admitted the violation but argued that bad weather made it too dangerous for them to remove their nets on June 4.

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

Analysis: The court said the fishermen's due diligence defence was basically that compliance through all reasonable steps couldn't be achieved because the weather made it too dangerous to take such steps. It explained that due diligence doesn't require making superhuman efforts or exposing oneself to unreasonable danger. In this case, bad weather prevented the fisherman from safely retrieving their nets before the end of the season. And due diligence doesn't require putting compliance before their personal safety and the safety of

their crews, concluded the court.

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

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[learn_more caption="**COMPANY/INDIVIDUAL LOSES**"]

SK: *Western Warner Oils*

What Happened: An oil company was granted a licence to drill wells on Crown land. The licence required the company to perform certain reclamation work and to finish such work within 30 days of the completion of the project. When the company didn't do the reclamation work, a forestry official issued it an order, requiring it to do such work. The company didn't comply with the order, either. So it was charged with failing to comply with the terms of its drilling license and an order by not reclaiming three well sites.

Ruling: The Provincial Court of Saskatchewan convicted the company, ruling that it hadn't exercised due diligence.

Analysis: The court said the evidence was overwhelming 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. Given that the company didn't take *any* steps to comply with the reclamation requirement of its licence'or the subsequent order'it didn't exercise due diligence.

R. v. Western Warner Oils Ltd., [2013] SKPC 177 (CanLII), Oct. 22, 2013

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