

Is Trying to Comply with the Law Enough for Due Diligence?



SITUATION

The Canadian Vessel Inspection Certificate for a commercial fishing company's boat has expired. To get it renewed, the company must get the fishing vessel inspected by Transport Canada. But in the meantime, it can get a short-term certificate or an extension of its current certificate, which it has done in the past. The company rejects these options and contacts Transport Canada to start the inspection process. An inspector comes twice but doesn't return for a necessary follow-up inspection. In addition, the company is waiting for approval of its stability books. While this process is underway, the vessel embarks on a fishing trip. The company is charged with violating the *Canada Shipping Act, 2001* by sailing without a valid certificate. It argues due diligence, claiming that it did everything possible to get the vessel inspected and that it was essentially at Transport Canada's mercy.

QUESTION

Did the fishing company exercise

due diligence'

- A) No, because it didn't take every possible step to comply with the law.
- B) No, because it knowingly violated the inspection certificate requirement.
- C) Yes, because it took all reasonable steps to ensure compliance.
- D) Yes, because it was Transport Canada's fault the company didn't get the inspection certificate renewed in a timely manner.

ANSWER

B. The company didn't exercise due diligence because it allowed the ship to sail knowing it had an expired inspection certificate.

EXPLANATION

Due diligence requires companies to take reasonable steps to comply with the environmental law and avoid violations. Trying to comply with the law but falling short isn't enough nor is knowingly committing an environmental offence.

This situation is based on a case decided by the Canada Transportation Appeal Tribunal in which the tribunal ruled that the company hadn't exercised due diligence. The company argued that it had done everything possible to avoid the violation, including repeatedly contacting Transport Canada to schedule the required inspections. It said it shouldn't be penalized because the agency didn't have enough inspectors. However, the Tribunal noted that the company had other options, which it had used before but chose not to use this time. *Bottom line:* The company didn't have to let the vessel sail with an expired certificate. It made 'a conscious decision' to sail before the inspection process was complete, which doesn't demonstrate due diligence to avoid the offence,

concluded the tribunal.

WHY WRONG ANSWERS ARE WRONG

A is wrong because it misstates the requirements of the due diligence defence. Due diligence doesn't require perfection or the taking of every step conceivable to ensure compliance. To prove due diligence, a company must demonstrate only that it made all *reasonable* efforts to comply with the law and protect the environment. So here, the company only had to take those steps that a reasonable person in its position would've taken.

C is wrong because there were reasonable steps the company could've taken but didn't to avoid the ship's sailing without a valid certificate. For example, the company could've gotten a short-term certificate or an extension of its current certificate. And the company knew it had these options because it had used them in the past. In addition, the company could simply have not let the vessel sail at all until its certificate was renewed.

D is wrong because although Transport Canada may have been partly at fault for the company's not getting the necessary inspections done in a timely manner, its conduct had no bearing on the violation. The company wasn't charged with failing to get the vessel inspected; it was charged with letting the ship sail with an expired inspection certificate. It's commendable that the company did what it could to get the inspection process finished. But even if the government was dragging its heels in this process, the decision to permit the ship to sail anyway lay solely at the company's feet. That is, it knowingly decided to commit the violation of sailing without a valid inspection certificate.

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