# Simply Having an Environmental System Isn’t Enough to Meet the Standard of Due Diligence

Company inspectors discover a slow drip from a suction flange on a pipe connected to a tank at a B.C. oil refinery. The company assumes that the fluid is pure MMT, a gasoline additive that’s insoluble in water. And since the refinery’s separator is capable of handling MMT, management dismisses the risk of discharge. In fact, however, the fluid is later found to be a compound of MMT and LP46, a slightly soluble effluent that the separator **can’t** handle. By the time the problem is fixed, effluent has been discharged into a nearby inlet. The Crown charges the company with violating the B.C. *Waste Management* and *Fisheries Act*. The company denies responsibility. We had an appropriate environmental safety system, it argues. And, even though it didn’t detect the problem, due diligence doesn’t demand perfection, only reasonable efforts. The B.C. Court of Appeal disagrees and finds the company guilty [*R. v. Imperial Oil*, 2000 BCCA 553 (CanLII).

## The Problem

An environmental safety system, no matter how highly developed, can’t guarantee that accidents won’t happen. But it

can help the company, as well as its corporate officers and directors, avoid liability if accidents do occur. The corporate officials in *Imperial Oil* were right: Due diligence **doesn't** require perfection, only reasonable efforts. Creating a strong system suggests that the company took all reasonable precautions to comply with environmental laws and prevent incidents. It's also, according to the famous *Sault Ste. Marie* case [*R. v Sault Ste. Marie*, 1978 CanLII 11 (SCC), [1978] 2 SCR 1299] that invented the due diligence defence, something all companies must do to ensure due diligence. But the *Imperial Oil* case illustrates an important lesson: Simply putting a good environmental safety system into place isn't necessarily enough to ensure due diligence.

## The Explanation

Imperial's "Haz-Ops" system was a well-developed and generally effective program. It went beyond legal requirements. For example, it provided for more frequent inspections than required by the refinery's permit. The Haz-Ops system was also comprehensive in scope. If events hadn't intervened, the system would have probably detected the MMT problem within one or 2 years. The trial court ruled that "nothing more could reasonably be expected of any other company in this situation," and dismissed the charges. But the appeals court overruled the trial court and the B.C. Court of Appeal supported the appeal court's decision to find Imperial guilty.

Understanding why Imperial couldn't just rely on its Haz-Ops program can help you get a grasp of the practical dimensions of due diligence. The Haz-Ops program did, in fact, detect the leak. The problem was that the company assumed the fluid was pure MMT and didn't test the substance to verify its assumption. Had it done so, it would have discovered that the substance was a compound that its separator couldn't handle and taken steps to remedy it before it got into the inlet. This failure to follow up fatally compromised Imperial's due

diligence defence. A company with as much expertise as Imperial “should have known that the substance [it was leaking] was toxic,” the Court ruled.

# The Solution

You and your fellow officers and directors can feel justifiably proud of the company’s efforts to put in place an environmental safety system to ensure a clean operation. But let *Imperial Oil* serve as a reminder that establishing such a system is just the beginning rather than the end of your obligations under the law. As the *Imperial Oil* Court said, “it’s not an answer. . . for the company to say that it had in general a good safety system, that it tested more frequently than necessary and that it would have likely detected the hazard within the near future.”

The Bottom Line

Due diligence isn’t just about general measures and having a solid environmental record. It’s also about how you handle specific situations. Thus, a company that’s generally careful can still be guilty of an environmental offence if it acts carelessly in a specific incident. Stated differently, 99 out of 100 won’t cut it if it’s that “1” you miss that results in the environmental damage.

This might sound like a standard of perfection. But it’s not. Nobody is saying you have to be perfect. But the mistakes you do make can’t be due to a lack of reasonable care. What a case like *Imperial Oil* is saying is that you must show reasonable care at all times and in all circumstances no matter how good your environmental safety system happens to be.