THE ENVIRONMENTAL COMPLIANCE INSIDER'S 7th ANNUAL DUE DILIGENCE SCORECARD: Recent Cases on the Due Diligence Defence

In discussing the definition of hard-core pornography, US Supreme Court Justice Potter Stewart famously said, 'I know it when I see it.' Canadian courts take a similar approach to due diligence. There's no formula for what a company must do to prove that it took all reasonable steps to ensure compliance with the environmental laws, such as X + Y + Z = due diligence. Whether what a company did'or didn't do'was enough to establish due diligence all depends on the facts of the

specific case. But when you look at due diligence cases together, patterns emerge. That is, you start to see that courts look at the same factors and for certain actions when evaluating due diligence defences. So you can use these cases as a barometer against which to compare your company's EHS program.

The *Environmental Compliance Insider*'s annual Due Diligence Scorecard is a good place to start this comparison. Since 2007, the *Insider* has compiled reported environmental cases involving the due diligence defence from the past year and across Canada into a Scorecard. This year's version picks up where last year's left off'in Sept. 2011. We'll start with answers to some frequently asked questions about due diligence and then break down the results of the cases.

DUE DILIGENCE FAQs

[learn_more caption="**Q What Is 'Due Diligence'**"]

A There are actually two types of due diligence:

Reasonable steps. One type of due diligence requires a defendant to prove that it took all reasonable steps to protect the environment, ensure compliance with environmental laws and prevent violations. Because this type of due diligence is the easiest to prove, it's the most common form of the defence used.

Reasonable mistake of fact. When arguing the second type of due diligence, a defendant must prove that it reasonably relied on facts that turned out to be untrue. However, if those facts *had* been true, what it did'or failed to do'would've been legal. The so-called 'reasonable mistake of fact' defence is harder to prove than the reasonable steps form of due diligence and thus isn't raised as often.

***Insider* Says:** For more information on this form of due diligence, see "Mistake of Fact': The Other Side of Due

Diligence,’ June 2009, p. 1.

[/learn_more]

[learn_more caption=”**Q Who Must Prove Due Diligence’**“]

A Due diligence is a defence. That is, the prosecution must first prove ‘beyond a reasonable doubt’ that the defendant committed a violation of environmental law. If the Crown succeeds, then the burden switches to the defendant to prove that it exercised due diligence. The standard of proof that the defendant must meet is an easier one than the prosecution’s. A defendant must prove that it exercised due diligence only on a balance of probabilities. If the defendant is successful, it’ll avoid liability for the violation.

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[learn_more caption=”**Q Who Can Use This Defence’**“]

A Either form of the due diligence defence can be raised by *anyone* charged with an environmental violation, including organizations, such as companies, and individuals, such as presidents, owners, corporate officers, supervisors and workers.

[/learn_more]

[learn_more caption=”**Q To What Types of Violations Does Due Diligence Apply’**“]

A The due diligence defence generally applies to violations of so-called ‘regulatory’ laws, such as environmental, OHS, transportation of dangerous goods and highway safety laws.

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[learn_more caption=”**Q What Factors Do Courts Consider as to Due Diligence’**“]

A Due diligence cases are very fact specific. But when

determining whether a company proved that it exercised due diligence, courts do tend to look at the same key factors, including:

Foreseeability. Many due diligence defences are won or lost based on whether a company adequately addressed *foreseeable* hazards. Companies must take all reasonable steps to address both general hazards and hazards specific to their particular industry, operations and materials. The due diligence defence will fail if a reasonable person in the company's position would have foreseen that something could go wrong and acted accordingly. But the defence will succeed if the incident was so unusual or strange that the company couldn't have reasonably expected it to occur. *Bottom line*: A hazard is foreseeable if the company knows or should reasonably know about it. And if it's foreseeable, the company *must* take reasonable steps to protect workers from it.

Preventability. If a company has an opportunity to prevent a violation or environmental incident, then it must make all reasonable efforts to do so, such as by identifying hazards, implementing engineering controls, creating policies and properly training workers and supervisors. Companies that don't take steps to avoid preventable incidents or violations won't be able to prove due diligence.

Control. Courts look at whether someone had control over the situation that resulted in the incident or violation and failed to act. In other words, was someone there who could've prevented environmental harm or an environmental offence'

Degree of harm. All hazards aren't created equal. That is, if a hazard could potentially cause a great deal of harm, such as the pollution of a lake filled with fish or a drinking water supply, a company is expected to make more of an effort to address it. So courts expect a company to protect the environment from even rare hazards if they pose the risk of serious harm.

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THE SCORECARD

This year, we found eight safety prosecutions decided since Sept. 2011 in which the verdict depended on the success or failure of a company's or individual's due diligence defence. As has been the pattern, this defence failed more often than it succeeded. In this year's Scorecard:

Wins. The defendant won in one case from Newfoundland.

Split decision. The defendant won on some charges and lost on others in a case from BC.

Losses. The defendant lost in six cases from Fed, BC, NL and ON.

The cases in the Scorecard involve the prosecution of both companies and individuals, including commercial fishermen, corporate officers and directors and a site manager.

Insider **Says:** Remember that most prosecutions of environmental violations are resolved with plea bargains and so never get to the point where the due diligence defence is raised. And many court decisions in environmental prosecutions aren't reported or published.

BOTTOM LINE

For each of this year's eight cases, the Scorecard tells you what happened, whether the company (or individual) won or lost and how the court evaluated 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.
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DUE DILIGENCE SCORECARD

Here's a synopsis of eight cases decided since Sept. 2011 in

which a court had to evaluate a company's (or individual's) due diligence defence in an environmental prosecution.[/box]
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COMPANY WINS

NL: *Saulter*

What Happened: The government broadcast the closing date (June 8) for the turbot gillnet fishery over Coast Guard radio. A fisherman learned of this date on June 6. He set two strings of nets on June 7. He retrieved one set on June 7 but because of the combined weight of the fish, ice and wet nets, retrieving the second set would've been dangerous. He planned to return to retrieve these nets later on June 7 after offloading the first set. But because of bad weather, he couldn't safely retrieve the second set of nets and offload the turbot caught in them until June 10. So the government charged him with fishing during a closed season in violation of the *Atlantic Fisheries Regulation*s.

Ruling: The Newfoundland Provincial Court ruled that the fisherman had exercised due diligence and dismissed the charge.

Analysis: The court explained that due diligence doesn't require superhuman efforts or 'exposing oneself to unreasonable danger.' The combination of the need for multiple trips because of the weight of the fish and gear and the bad weather created an 'imperfect storm,' said the court. It concluded that the fisherman didn't intentionally delay to gain the benefit of a larger catch, but acted diligently and reasonably. He tried to retrieve the nets as expeditiously as possible. His safety concerns caused a delay in doing so, but these concerns were legitimate and reasonable under the circumstances.

R. v. Saulter, [2011] CanLII 77634 (NL PC), Dec. 6, 2011

SPLIT DECISION

BC: *Zellstoff Celgar LP*

What Happened: A mixture of dilute weak black liquor and weak black liquor soap (a by-product of the digestion of wood chips) overflowed a pulp mill's tank, spilled into its main sewer line and entered its effluent treatment system, compromising the system's effectiveness. Some also spilled onto a roadway and entered a nearby river. As a result, the mill was charged with violating the *Fisheries Act* and *Environmental Management Act* as well as its permit requirements as to its spill ponds. It argued that it had exercised due diligence.

Ruling: The BC Provincial Court ruled that the company had exercised due diligence as to the spill pond charges but not as to the remaining charges.

Analysis: The overflow was caused by a build up of soap in the tank. After a previous soap-related incident, the mill had implemented procedures regarding soap. If the mill's workers had followed those procedures, the foreseeable spill would've been prevented. So the court convicted the mill on the charges relating to the discharge, ruling that there was 'compelling evidence to suggest the cause of the offences lay with [the mill]'s failure to follow its own procedures regarding a soap carryover.'

As to the spill pond charges, the court said it was reasonable for the mill to use the spill ponds for long-term storage and, in fact, such use was its only option. The government's suggestion that the mill should've shut down its operations until issues with the ponds and effluent treatment system were resolved wasn't a reasonable option. So although the mill's ponds weren't in good working condition at the time of the spill, the mill had made all reasonable efforts as to the ponds and thus exercised due diligence. Thus, the court

acquitted it on the charges related to the ponds.

R. v. Zellstoff Celgar LP, [2012] BCPC 38 (CanLII), Feb. 16, 2012

COMPANY/INDIVIDUAL LOSES

ON: *Neilson #1*

What Happened: A waste transfer site accepted several loads of waste from haulers who didn't have the appropriate Certificates of Approval. The company that operated the site said it believed the haulers were covered by another operator's certificate. But the company and two of its officers were charged with multiple violations of the *Environmental Protection Act*.

Ruling: The Ontario Court of Justice convicted the defendants, ruling that they didn't exercise due diligence.

Analysis: The court acknowledged that the hauler involved had previously had an arrangement in which it was covered by another company's C of A and had given a letter to that effect to the waste transfer site company. But that letter was a few years old and the company had never taken any steps to ensure that the arrangement was still in effect. And in fact, the arrangement had ended several years ago. In addition, the court criticized the company's system for ensuring haulers had the proper certificates, noting that dispatchers only checked unfamiliar trucks. It concluded that 'nothing was done to support a defence of due diligence.'

Ontario (Ministry of Labour) v. Neilson, [2011] ONCJ 853 (CanLII), Sept. 16, 2011

FED: *Baffin Fisheries (2000) Ltd.*

What Happened: A commercial fishing company needed to get its fishing vessel inspected to renew its expired Canadian Vessel Inspection Certificate. Although the inspection process has

been started, it wasn't complete when the vessel embarked on a voyage. So the company was charged with violating the *Canada Shipping Act, 2001* by sailing without a valid certificate.

Ruling: The Canada Transportation Appeal Tribunal ruled that the company hadn't exercised due diligence.

Analysis: 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 was at Transport Canada's mercy and shouldn't be penalized because the agency didn't have enough inspectors. But the court noted that the company could've gotten a short-term certificate or an extension of its current certificate as it had previously done but chose not to do this time. And the company made 'a conscious decision' to sail when it knew it had an expired inspection certificate, which doesn't demonstrate due diligence to avoid the offence, added the court.

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

NL: *Devereaux*

What Happened: A capelin fisherman had a daily catch limit of 45,000 pounds. He divided his hold in two and planned to store the catch from his second trip of the day in the front hold so he could monitor it. But a board separating the two holds broke, allowing some of the catch from the second trip to spill into the rear hold. As a result, he caught 58,629 pounds during two trips, exceeding his limit by over 13,000 pounds. He was acquitted of violating the *Fisheries (General) Regulations* but the government appealed.

Ruling: The Newfoundland Supreme Court convicted the fisherman, ruling that he didn't exercise due diligence.

Analysis: The fisherman argued that he'd exercised due

diligence, claiming he didn't know the board separating the holds had broken until he was offloading the catch and it was too late to avoid the violation. The appeals court wasn't impressed. In concluding that the method the fisherman used to measure the catch was unreliable, the court pointed to the fact that he'd exceeded his limit by 13,629 pounds or *30% more* than he was allowed to catch. After his first trip, he knew he was close to his daily limit. So he should've been more careful during the second trip. But at best, he exercised poor judgment; at worst, he was 'reckless and unmindful' of his limit, concluded the appeals court.

HMTQ v. Devereaux, [2012] CanLII 31288 (NL SCTD), Jan. 6, 2012

BC: *Ambrosi*

What Happened: A company had a permit to operate a landfill that required the company to submit annual reports, which it failed to do. In addition, it didn't compact the waste at the landfill or apply acceptable cover materials. So the government charged the company and its principal with violating the *Environmental Management Act*.

Ruling: The BC Supreme Court ruled that the defendants didn't exercise due diligence.

Analysis: The evidence demonstrated that the defendants operated the landfill with 'inadequate manpower and marginal equipment.' Although the principal claimed the company had financial problems, no evidence was submitted to support this 'bald assertion,' noted the court. As to the annual reports, the principal claimed he was being targeted by the Ministry and refused to submit annual reports until he knew that all other landfill operators were filing such reports and he had copies of them. This assertion is his attempt to explain his failure but doesn't establish due diligence, concluded the court.

R. v. Ambrosi, [2012] BCSC 409 (CanLII), March 21, 2012

ON: *Neilson #2*

What Happened: During inspections of a chemical recycling and waste management plant, the site manager was asked about a large tanker trailer located inside a building. First, he said he didn't know what was inside it. When a test of its content revealed the presence of PCBs above the limit allowed for indoor storage, he told MOE officials he didn't know how the PCBs got into it. He later told an official that the company *did* know about the PCBs. So the manager was charged with providing false information to an MOE official.

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

Analysis: The site manager was in a prominent position in the company and was its primary contact on environmental matters. Given his position, he should've been aware, or taken steps to ensure that he was made aware, of the presence of PCB-contaminated waste so he could respond with accuracy to MOE inquiries. Because there was no evidence that he acted with due diligence as to this situation, the court convicted him.

R. v. Neilson, [2012] O.J. No. 1386, March 22, 2012

BC: *Blackwell*

What Happened: A company that operated landfills allowed construction and demolition waste to be improperly dumped at the landfills. Its landfills also contained bear attractants, such as animal carcasses and milk containers. In addition, the company didn't file required written annual reports for years. So the government charged the company and its director with violating the terms of the landfill permits.

Ruling: The Newfoundland Supreme Court convicted the defendants, ruling that they didn't exercise due diligence.

Analysis: The director argued that he thought he could provide

the annual reports orally. But even if oral reports were permitted, which they weren't, he didn't provide any evidence that he given any oral reports. In addition, the court rejected the defendants' argument that other people had dumped the construction waste at the landfills without permission. The landfills were easy to enter without authorization. But the director and company didn't take any steps to prevent unauthorized dumping or remove unauthorized waste. Thus, they didn't exercise due diligence, concluded the court in convicting the defendants.

R. v. Blackwell, [2012] BCPC 149 (CanLII), May 15, 2012 [/box]