

What Must Companies Do to Prove 'Due Diligence' in an Environmental Prosecution?



A company can commit an environmental offence and still avoid liability if it can prove that it exercised due diligence. Perfection or superhuman efforts aren't required to prove due diligence. All the company must do is show that it took "all reasonable steps" to prevent the offence and comply with the law.

The big question: Exactly what "reasonable steps" must a company take?

Unfortunately, that's hard to predict because courts decide the question on a case-by-case basis and the facts of each situation are different. But what you can do is look at actual cases to get an idea of what judges look at to decide if a company's actions measured up. Here are 2 cases illustrating the kinds of acts and/or omissions courts consider in deciding whether a company accused of an environmental offence exercised due diligence to avoid a *Fisheries Act* violation.

Company Did Take Reasonable Steps

Here's a case where a court found that a company did take the reasonable steps necessary to make out a due diligence defence.

Situation

A Northwest Territories mining company has to divert water around 2 lakes and into Kodiak Lake to access diamond deposits. Government officials approve the plan for the diversion channel's construction. Everyone involved with the project understands that the channel will carry some sediment into Kodiak Lake. The company installs a sediment curtain to limit the amount of sediment deposited. But when it tests the channel during the spring run-off, a "huge volume" of sediment overwhelms the curtain and gets deposited into the Lake. The sediment is the result of "thermal degradation" of the permafrost in the adjacent Grizzly lowlands. The company takes remedial action and builds a new streambed to allow water from the lowlands to enter the channel without erosion or thermal degradation. Still, the company is charged with violating the *Fisheries Act*.

Ruling

The Northwest Territories Supreme Court rules that the mining company exercised due diligence and dismisses the charges.

Reasoning

The company acted reasonably in the construction of the diversion channel. In fact, the Court noted, "a climate of environmental awareness" surrounded the construction. The approved plan also incorporated fish habitat enhancement and creation features. During construction, the company took special care to reduce the impact on the surrounding environment. It made changes to the design in the field to protect the environment even more than originally planned. And it took reasonable care to limit deposits of sediment into Kodiak Lake. But the permafrost degradation of the Grizzly lowlands that led to the excessive deposits wasn't reasonably

foreseeable. And the company's duty was to take reasonable steps to prevent foreseeable risks.

[R v BHP Diamonds Inc.](#), 2002 NWTSC 74 (CanLII).

Company Did Not Take Reasonable Steps

Here's a case where a court found that a company did take the reasonable steps necessary to make out a due diligence defence.

Situation

The city of Moncton hires a company to recommend and implement an environmentally acceptable plan to close a former landfill. The closure plan recognizes that the landfill is producing leachate which is flowing into the Petitcodiac River system. The city approves the plan. But leachate ends up being directed towards a vegetated area providing an unimpeded flow to the river. The company also installs a pipe to collect and drain leachate directly into the adjacent Jonathan Creek. Sample tests undertaken in response to complaints from a local environmental group indicate that the leachate is "acutely lethal to aquatic life." The company and its president are charged with 2 *Fisheries Act* violations. They claim they exercised due diligence.

Ruling

The New Brunswick court nixes the defence and convicts both defendants.

Reasoning

The court rejects the defendants' contention that they were being held to a standard of perfection rather than reasonableness. Like the mining company in BHP Diamonds, the company and its president knew about the potential environmental damage their projects might do to adjacent waterways. But the defendants in this case didn't take reasonable steps to prevent or minimize leachate deposits from the landfill the way the mining company did to control silt deposits from the diversion channel construction into Kodiak Lake. They knew that the landfill was producing leachate and that several water systems were nearby. They instead chose to rely on the river's dilution capacity to mitigate any environmental harm. They also installed a pipe to deliberately deposit leachate into a nearby creek.

[R. v. Gemtec Limited](#), 2007 NBQB 199 (CanLII).