

DUE DILIGENCE IN ENVIRONMENTAL OFFENCES

Ronda M. Vanderhoek

A Symposium on
Environment in the Courtroom (II): Environmental Prosecutions

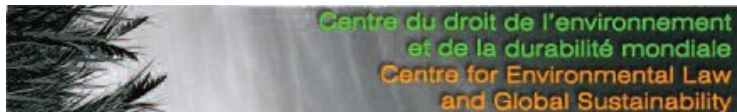
March 18-19, 2013
University of Ottawa



This project was undertaken with the financial support of:



Ce projet a été réalisé avec l'appui financier de :



The Canadian Institute of Resources Law encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following considerations:

- (1) You must acknowledge the source of this work
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of the Institute.

Copyright © 2013

Today we see an ever increasing societal focus on the environment. That focus ranges from consumer considerations such as which liquid detergent is least detrimental to the water table, to whether it is alright to pour used paint thinner down the household drain. It is clear the public is increasingly mindful of the impact our actions have on the shared environment. Likewise, businesses are making ever greater efforts to ensure that they too are seen as respecting the environment in the production of products and the provision of services. As such, lawyers have never been more focused on participating in ongoing legal training directed at helping clients to avoid regulatory prosecutions. All those involved in pursuits that bring them within a regulatory environment are heeding the call to ensure that they are demonstrably diligent in their actions in the unenviable event of prosecution.

When a prosecution does arise, the most common defence advanced is due diligence. But what exactly is due diligence and how is it being used in the courts? This paper serves as primer on the defence of due diligence from the perspective of a presenter familiar with the defence as it arises in federal regulatory prosecutions, such as those under the *Fisheries Act*. While the paper will focus on cases arising in the Atlantic Provinces, the principles have general application throughout the country for conducting a prosecution.

The defence, generally speaking, arises in the prosecution of regulatory offences. Depending on the area in which a court is situated, it may not be unusual for a provincial court judge to have infrequent experience with the defence. As a result, the case law is replete with examples of lower court decisions overturned on appeal as a result of the failure to properly apply the defence of due diligence. But whether common or not, it is necessary to be well prepared to consider the defence when it does arise in a trial.

STRICT LIABILITY

Before exploring the defence, it is necessary to first consider the nature of the offences in which it may arise- the regulatory offence. Regulatory offences are, more often than not, strict liability offences. Strict liability offences are a fairly new creature, established in the seminal case *R. v. Sault Ste. Marie*.¹ *Sault Ste. Marie* involved charges under the *Ontario Water Resources Commission Act*,² against a city contractor charged with discharging pollutants into a watercourse. *Sault Ste. Marie* provided an opportunity for the Supreme Court of Canada to establish a middle ground between full *mens rea* offences and absolute liability offences. As a result, the Crown was required to prove the *actus rea* beyond reasonable doubt, but the accused could avoid conviction by establishing, on a balance of probabilities, that he had taken all reasonable steps to avoid the commission of the offence. The Court addressed it as such:

¹ [1978] SCR 1299 [*Sault Ste Marie*].

² RSO 1970, c 332.

Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.³

Aspects of the defence have been evolving since 1978, and case law has been answering such questions as, who is the “reasonable man” and what exactly are “reasonable steps”. A survey of some representative case law will serve to assist in considering these and other questions, as well as provide direction as to what facts might support a finding of due diligence.

ONUS IS ON THE DEFENDANT TO ESTABLISH DUE DILIGENCE

A frequent source of trouble in the regulatory trial is a failure to appreciate that the burden of proof to establish the defence rests firmly with the defendant. There is no obligation on the Crown to establish that a defendant was *not* diligent. That said it is not uncommon for defence counsel to attempt to shift the burden or try to create new burdens for the Crown. Likewise some counsel will ignore the burden altogether and simply try to persuade the court, based solely on closing submissions, that the defendant was diligent. Other arguments include a simple suggestion that the legislation placed too high an onus on the defendant to avoid the commission of the offence or I “had no real choice”.⁴ But the law is clear, the defence must *prove* due diligence.

Equally important, the defendant must establish due diligence on a *balance of probabilities* as it relates to the external elements of the specific offence charged. It is a positive onus and the defendant will be convicted if he does not meet it.⁵

In *R. v. Keough*,⁶ the Newfoundland and Labrador Supreme Court addressed both the onus and the standard of proof in overturning an acquittal. The case took an interesting twist when the trial judge tried to apply the test in *R. v. S. (W.D)*,⁷ to the due diligence defence.⁸

³ *Sault Ste Marie*, *supra* note 1 at 1326.

⁴ *R v Zellstoff Celgar Limited Partnership*, 2012 BCPC 38 (CanLII).

⁵ See: *R v Henneberry*, 2009 NSCA 112 at para. 31; *R v Gemtec Ltd and Robert Lutes* (2007), 321 NBR (2d) 200 (NBCA) [*Gemtec*]; *R v Petten* (1995), 129 Nfld & PEIR 37 at para 53; *R v Keough* (2006), 260 Nfld & PEIR 278 (NLSC) at para 8.

⁶ *Keough*, *ibid.*

⁷ [1994] 3 SCR 521.

⁸ This is the test, in three parts, as stated by Cory, J:

- First, if you believe the evidence of the accused, obviously you must acquit;

[32] The trial judge achieved the wrong result by mistakenly applying the W.D. test to the defence evidence about due diligence. His approach to the evidence effectively relieved Mr. Keough of his onus of proving on a balance of probabilities that he had exercised due diligence to avoid committing the offences. ...

[38] The trial judge was right when he said that applying the W.D. "... becomes a little bit complicated when you get into regulatory offence[s]" Breaking the trial into two phases, with shifting and differing onuses of proof, is what complicates the procedure. The W.D. test did not fit into this case at all. It might only have applied in the first phase but the Crown and defence agreement on the essential facts turned that part of the trial into a perfunctory exercise. If the trial judge had ignored the W.D. test and assessed the evidence about due diligence on a balance of probabilities it would have been patently obvious to him that Mr. Keough had not met his burden of proof. Then the trial judge would have reached a different verdict.

To meet the onus, a defendant is not required to prove that he took all possible or imaginable steps to avoid commission of the offence. Nor is he held to a standard of perfection requiring superhuman effort. But he must prove that he has in place a "proper system" and took "reasonable steps to ensure the effective operation of the system". He will then be assessed against the standard of the reasonable person in similar circumstances.⁹

Since every case is factually different, the Court will ask what a reasonable person in the particular circumstances (read occupation of the defendant i.e. fisher, farmer, business owner, consultant, etc.) would have done to avoid the commission of the offence. A useful list of considerations was set out in *R. v. Commander Business Furniture Inc.*:¹⁰

- 1) the nature and gravity of the adverse effect;
- 2) the foreseeability of the effect, including abnormal sensitivities;
- 3) the alternative solutions available;
- 4) legislative or regulatory compliance;
- 5) industry standards;
- 6) the character of the neighbourhood;
- 7) what efforts have been made to address the problem;

-
- Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit; and
 - Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

⁹ *Levis (City) v Tetreault*, [2006] 1 SCR 420 at para 15; *R v Edmonton (City)*, 2006 ABPC 56 at para 703; *R v JD Irving Ltd*, [2008] NBJ No 371 at paras 42-43.

¹⁰ (1992), CELR (NS) 185 (Ont CJ) at 212.

- 8) over what period of time, and promptness of response;
- 9) matters beyond the control of the accused, including technological limitations;
- 10) skill levels expected of the accused;
- 11) complexities involved;
- 12) preventative systems;
- 13) economic considerations;
- 14) actions of officials.

A Court is entitled to consider the defendant's character and experience, and it is appropriate to distinguish between the onus placed on an ordinary person and that of the licensed fisherman.¹¹ In the fishing context, courts have interpreted the due diligence defence in the context of "what a reasonable fisherman would do to take all reasonable steps to avoid the particular breach."¹² To take it a step further, the reasonable man standard will also include a fisher in the specific fishery at issue.¹³ For example, in *R. v. Gould*,¹⁴ a conviction was entered for possession of undersized lobsters. Gould, an experienced lobster fisher, could not rely on the defence of due diligence where he had measured the lobsters using a gauge that had not been certified as accurate by visual comparison with the gauges used by the Department of Fisheries.

Likewise in considering the second prong of due diligence, "if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent",¹⁵ the Court will consider whether the defendant could reasonably believe certain facts. In *R. v. Harris*,¹⁶ such proved to be the case when the trial judge accepted the defence of due diligence when, had the crew followed Captain Harris' instructions, no offence would have been committed. In that case the crew had previously followed the Captain's instructions for well over a year and it was reasonable to believe they would continue to do so.

However, reasonable actions must relate to the offence charged and not some broader notion of acting reasonably, in which case the defence will fail.¹⁷ In *R. v. Boyd*,¹⁸ a crab fisher negligently set traps very near the line between the open and closed fishing areas

¹¹ *R v Jarvis* (1993), 120 NSR (2d) 354 (SC).

¹² *R v Symmonds* (RP), 138 Nfld & PEIR 109 at para 31.

¹³ Also see: *R v McIntyre*, [1999] NBR (2d) (Supp) No 15 at para 15 and *R v Bell*, [1992] BCJ No 2829 (SC) at 2, 4.

¹⁴ (1995), 136 Nfld & PEIR 58 (Nfld SC).

¹⁵ *Sault Ste Marie*, *supra* note 1.

¹⁶ (1997), 165 NSR (2d) 73 (CA).

¹⁷ *R v Alexander*, [1997] NJ No 19 (Nfld CA) at paras 17-18.

¹⁸ 2010 NSSC 417.

on 2 May 2009, as result the traps migrated into the closed area. The next day his traps were located fishing in the closed area whereupon he acted admirably in contacting the Department of Fisheries and Oceans (DFO). On charges related to fishing in the closed area on 2 May, the trial judge found the Respondent's positive and forthright activities the next day established due diligence. In overturning the acquittal, the appeal court said:

[35] As noted in *R. v. Alexander, supra*, the due diligence defence must "relate to the external elements of the specific offence that is charged." In this instance, the Trial Judge, when considering the charge relating to May 2, 2009, properly found that the Respondent was not diligent. The inquiry should have ended at that point. To extend the examination of the Respondent's actions beyond the date of the offence, was as described by the Court in *R. v. Kurtzman, supra*, improperly considering "some broader notion of acting reasonably."

While we know a determination of what constitutes due diligence will require consideration of such things as the standards of a particular industry, what information was available to the defendant, policies of the regulator,¹⁹ etc. In some cases the legislation that regulates the activity will itself serve as a guide. A recent example of the latter arose in the Nova Scotia Supreme Court decision *R. v. Arbuckle*.²⁰ The Respondents had been charged with being in possession of undersized herring contrary to subsection 41(1) of the *Atlantic Fishery Regulations*. At trial the Crown led evidence from fishery officers that the catch contained short herring. More specifically, the officers testified that they had sampled the catch in accordance with the sampling method set out in subsection 44(3) of the *Atlantic Fishery Regulations*, determining that there were significantly more than the permissible 10% short herring in that catch. The defence called no evidence of due diligence at all, instead focusing the attack on whether the samples taken by the fishery officers were random.

The trial judge interpreted subsection 44(3) as an element of the offence and concluded the Crown had not established, beyond a reasonable doubt, that the samples taken by the officers were taken in compliance with subsection 44(3) of the *Atlantic Fishery Regulations*; the samples were not random. Without considering due diligence, the Trial Judge determined the Crown did not prove beyond a reasonable doubt that the provisions of subsection 44(2) of the Regulations *do not apply* and acquitted. It is useful at this stage to review the section of the *Atlantic Fishery Regulations*:

44.(1) Subject to subsections (2) and (4), no person shall fish for, buy, sell or have in his possession any herring that is less than 26.5 cm in length.

(2) Subsection (1) does not apply with respect to herring that are less than 26.5 cm in length where

(a) the catching of the herring was incidental to the catching of longer herring; and

¹⁹ In *Keough, supra* note 5, "Generally, fishermen are required to contact DFO and request permission to recover the gear. Sometimes fishermen are required to carry observers on board when they go for the gear and normally only one trip is allowed for this purpose" (para 22).

²⁰ (2013) NSSC 2.

(b) the number of herring less than 26.5 cm in length retained during any one fishing trip does not exceed 10% of the number of longer herring that were caught and retained during that fishing trip.

(3) For the purposes of subsection (2), the percentage shall be determined on the basis of four or more samples taken from the catch, with each sample containing 50 or more herring. ...

The Crown appealed asking the Court to clarify whether subsection 44(3) was really just a codification of the due diligence defence. In overturning the acquittal and entering a conviction, the appeal court confirmed that proof the provisions of subsections 44(2)-(3) *did not* apply, is not an essential element of the offence under subsection 44(1). Rather subsections 44(2)-(3) constitutes a statutory due diligence defence. Since the defence called no evidence of due diligence, a conviction was entered.

The case serves to remind prosecutors that a careful analysis of the legislation may serve to demonstrate that the legislator has set out the standard for defendants to meet in certain cases. So, with respect to herring fishing, a fisher will be diligent if he employs the sampling method outlined in subsection 44(3) to ensure that the catch does not exceed 10% short herring, and if it does he must employ proper measures to bring his fishing into line with the regulations.²¹

PLANNING FOR THE DUE DILIGENCE DEFENCE

Not all cases will contain a statutory example of what will constitute diligence. Instead Prosecutors will frequently rely on investigators to gather evidence related to diligence at the same time they investigate an offence. And while the Crown need not establish a lack of diligence at trial, it has to be prepared to assess and, where necessary, challenge the defence evidence. Such will require the Crown to gain familiarity with the standards in the specific regulatory environment and break new ground in prosecuting those who may have avoided responsibility in the past.

For a long time, it proved singularly difficult to successfully prosecute consultants for environmental offences arising in their work. That is until *R. v. Gemtec Ltd. and Robert Lutes*²² turned due diligence in the environmental context on its head, when for the first time an engineering consultant company was convicted of providing advice to a client that resulted in the client violating federal environmental law. This case demonstrated that consultants who fail to incorporate environmental compliance into their advice to clients can and may be held accountable for their role in any resultant environmental offence. Consultants are now well advised to ensure they are duly diligence in both the advice provided a client and the subsequent implementation of that advice.

²¹ Also see *R v Neary*, 2010 NSSC 466 which dealt with a similar issue in the context of mackerel.

²² (2007), 321 NBR (2d) 200 (NBCA).

This case involved the convictions that arose from the appellants' involvement in recommendations and implementation of plans to close the former City of Moncton landfill site. In particular, they were convicted of charges of depositing or permitting the deposit of landfill leachate into the Petitcodiac River. The facts: the City of Moncton retained Gemtec to conduct a study for the closure of the landfill and to implement the closure plan that it had recommended. The purpose of the plan was to provide an environmentally acceptable closure plan, compatible with long term land use objectives for the property. The company provided a plan and designated Robert Lutes, its President, as the project leader. The closure plan recommended an option that would see harmful leachate continue to flow into the river environment. Concerns about the leachate were raised however the City adopted the plan and Gemtec was advised to proceed. Under the direction of the appellants, part of the work involved the installation of a 400 meter long pipe to collect leachate, flowing from various seeps, and drain it directly into the adjacent Jonathan Creek.

The Trial Judge had little difficulty in concluding that the defendants had failed to meet the onus of establishing due diligence:

[57] In my view, the due diligence raised by the defendants has not been made out. Evidence at trial established that the defendants either, at best, did not know, or at worst, were "wilfully blind" as to the requirements of s. 36(3) of the Fisheries Act. Further, the defendants were forewarned, via the correspondence of Dr. Louis Lapierre that the closure option they were recommending may not comply with Fisheries Act requirements. No evidence has been presented that they did consult Environment Canada, or the Department of Fisheries and Oceans as to whether the closure plan complied with federal regulatory requirements.

[58] Between 1995 and 2001, the defendants neither recommended nor implemented any reasonable measures to prevent toxic leachate from being deposited into the Petitcodiac River system. In fact, during that time, the defendants recommended and oversaw the installation of the Jonathan Creek pipe which collected and deposited leachate directly into Jonathan Creek. This involved the installation of approximately 400 meters of perimeter drain in 1998. The drain collected leachate from various points on the site and piped it directly into Jonathan Creek. ...

[60] In my view the evidence presented does not support the conclusion that the defendants either recommended or implemented any measures to avoid the "prohibited act", i.e., the deposit of leachate into the Petitcodiac River system. There were no provisions for proper leachate management or collection in order to minimize leachate deposits as the defendants' approach was predicated on allowing leachate to flow directly into the river system and relying on its dilution capacity to mitigate any environmental harm. [Emphasis added]

The appellants had argued their actions should be judged diligent in light of obligations imposed on them by the province. The appeal court found the trial judge had correctly rejected these arguments.

In my view, the trial judge properly directed and instructed herself on the defence of due diligence when she stated: "... my duty in this matter is not to evaluate the defendants'

action in respect to the environmental and financial requirements imposed by the Department of Environment of the Province of New Brunswick, but to determine whether the evidence supports the conclusion, on a balance of probabilities, that the defendants took reasonable steps to avoid committing the statutorily-barred activity described in section 36(3) of the Fisheries Act.”²³

Ultimately, a nuanced understanding of the industry coupled with a firm understanding of the law relating to due diligence led to this successful prosecution.

CONCLUSION

This paper has sought to clarify the defence of due diligence available in regulatory prosecutions. In doing so, some examples of how Atlantic Canadian courts have applied the defence have been provided as well as some interesting examples of the defence gone awry. Ultimately, where individuals and businesses enter regulated environments with a sound plan to avoid the commission of offences, coupled with reasonable action in that regard, the defence of due diligence may be available. When available, the defence of due diligence will require a factual foundation, established by the defence on the balance of probabilities. Where the Crown is well informed as to industry standards and challenges, where appropriate, the reasonableness of actions taken, Courts should have no difficulty assessing the defence and finding it applicable in the appropriate circumstances.

²³ *Gemtec*, *supra* note 5 at para 36.