

Environmental Law Bulletin

BHP Billiton and Weyerhaeuser successfully raise the due diligence defence to pollution charges

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In September of 2002, Davis & Company was successful in persuading the B.C. Court of Appeal to uphold the B.C. Supreme Court's decision to acquit Weyerhaeuser Company Ltd. of pollution charges under the federal **Fisheries Act**. The charges were laid against the Company and two of its employees personally after diesel fuel had leaked from its underground fuel lines into fish bearing waters. The leaks were caused by a rare and unanticipated form of corrosion which had attacked the underground lines. The charges against the corporate employees were dropped after a series of motions early in the proceedings. The B.C. Provincial trial court convicted the company on the basis that it had failed to exercise 'due diligence' or to "take all reasonable care" in preventing the offences. The company appealed to the B.C. Supreme Court, asserting that, in the circumstances, the trial court had erred in applying the legal test of due diligence which had been established by the Supreme Court of Canada. The

The B.C. Court of Appeal held that because the company could not reasonably have anticipated the cause of the problem, it could not have reasonably have been expected to take steps to prevent it.

B.C. Supreme Court agreed with the company and the B.C. Court of Appeal upheld its decision on appeal by the Crown.

The B.C. Court of appeal held that because the company could not reasonably have anticipated the cause of the problem, it could not reasonably have been expected to take steps to prevent it. This decision now constitutes the leading case in this province on the proper interpretation of the due diligence defence and the requisite standard of diligence one must meet in order to advance a due diligence defence successfully. It has been followed by the courts in other Canadian jurisdictions. Before this decision, B.C. courts, perhaps mindful of the ever

increasing and important concern in this province for environmental protection, appeared to be raising the bar by which they measured “diligent conduct” higher and higher

with each decision. By October 2000, with the decision of ***R v. Imperial Oil*** (2000) 36 C.E.L.R. (NS) 109 (B.C.C.A.), the standard of diligence was raised to a level which it seemed was becoming impossible to meet, even for sophisticated companies who had implemented excellent and comprehensive environmental preventative programs. As a result, many in the legal profession and in industry began to question whether the due diligence defence could ever be advanced successfully.

The ***Weyerhaeuser*** decision reaffirms that reasonable conduct in the particular circumstances of the case is the measure of due diligence. This decision makes it clear that the standard of diligence is not one of perfection; rather, it is one of reasonableness and reality. Weyerhaeuser’s defence and subsequent appeals were presented by Ross Clark and Michelle Pockey.

In December, 2002, Ross Clark and Bruce Thompson of Davis & Company’s Vancouver and Yellowknife offices were successful in obtaining acquittals from the Supreme Court of the Northwest Territories of all pollution charges brought by the Crown against BHP Billiton Diamonds Inc. in relation to its Ekati diamond mine development located in barren lands. The Crown had proceeded by indictment and was seeking substantial fines against the Company. The acquittals followed a two week preliminary hearing and a three month trial in Yellowknife. The charges arose after the company engineered, constructed and operated an enormous diversion channel to divert water from certain lakes as

part of its mine project, which had proceeded under the protection of an Authorization issued by the Department of Fisheries and Oceans. When the channel was opened extensive permafrost degradation occurred adjacent to the channel and silt was transported into three of the lakes on the property.

Applying the Supreme Court of Canada test for due diligence, the Court determined that the company and its employees had exercised all reasonable care in taking steps to prevent the offence in the construction and design of the diversion channel. The Court emphasized the importance of the reasonableness of the accused’s conduct from the perspective of the people dealing with the problems at the time rather than examining the issues with the benefit of hindsight and speculation. The Company was also successful in asserting that its ***Fisheries Act*** Authorization applied to the entire Ekati Project, including the construction and operation of the diversion channel, rather than to specific impacts, as argued by the Crown.

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Environmental Law Group

Environmental Law Practice Group at Davis & Company consists of a team of lawyers with extensive experience in advising clients in all aspects of environmental law. This experience ranges from providing clients with an understanding of the ever-changing regulatory landscape to acting on complex civil litigation and in the defense of environmental prosecutions.

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