

Environmental Law: Compliance Reviews Reduce Risk

Many businesses in British Columbia are discovering the harsh realities of recent developments in government regulations, and the trend to create 'regulatory' offences. Unlike traditional criminal offences, 'regulatory' offences do not offer many defences. For example, the traditional requirement that the Crown must prove beyond a reasonable doubt that the accused intended to commit the crime is often displaced by requiring evidence that the accused took "all reasonable steps to prevent the occurrence of the offence". Regrettably for the accused, the benefit of hindsight, and all the wisdom that it brings, is not available before the offence occurs. This makes it relatively easy for the Crown to obtain convictions. Due diligence is difficult to demonstrate simply because the event which led to the charges implies insufficient due diligence. This favoured tool of government is used to regulate innumerable activities including: impact on the environment, workplace safety, and the specific manner in which certain industries are conducted (such as logging and transportation).

How can you improve your prospects when you are charged with a regulatory offence? Foresight rather than hindsight is critical. The prerequisites for good defence are the thorough understanding of the impact that the applicable legislation has on your business, and knowing what you can do to ensure compliance.

A number of businesses undertake a legal compliance review. This involves a team of people, including lawyers, and process engineers, examining the business. The composition of the team varies according to the undertaking involved. The team prepares a report that identifies areas of non-compliance and areas of risk. If the report is prepared by a lawyer for the purpose of advising on legal compliance, it may be protected by legal "privilege". Privilege can be waived at the discretion of the client.

Showing that this type of analysis has been done, and acted on, significantly improves the prospects for successfully defending a criminal prosecution.

Even if a compliance review does not save you from a conviction, it can still help you when the court decides on the appropriate penalty. Recently the B.C. Provincial court considered a compliance review in the context of assessing due diligence. The accused was convicted but, in sentencing, the judge carefully considered the fact that a compliance review had been performed before the incident. It was clear that the trial judge considered the compliance review, and the progress made by the accused in correcting the identified problems, were significant factors in setting a relatively low fine.