

# DUE DILIGENCE DEFENCES TO MARITIME OFFENCES

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Presented by:

Brad M. Caldwell

Caldwell & Co

401 – 815 Hornby St.

Vancouver, B.C. V6Z 2E6

Tele: 604 689 – 8894

Web: <http://www.admiraltylaw.com/FisheriesIndex.php>

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## Introduction

Owners and operators of ships in Canada are highly regulated. Statutes passed by both the federal and provincial governments apply to ships and under many of these statutes, there are numerous applicable regulations. For example, CanLII currently lists 57 active regulations under the *Canada Shipping Act, 2001* and 41 active regulations under the *Fisheries Act*. Most, if not all, of these statutes and regulations impose obligations upon ship operators and have offence provisions that impose sanctions upon persons who breach these obligations. Other than *Criminal Code* offences that apply to operators of ships, most of these type of offences are referred to as regulatory or public welfare offences, as their primary focus is the protection of societal interests, not the punishment of moral fault.

For persons charged with regulatory offences, there are often a large number of possible defences available to them. However, the most common and successful defence is the due diligence defence. This paper will describe the due diligence defence as developed by the Supreme Court of Canada. It will then show how it has been codified in both federal and provincial statutes that apply to ships and give some examples of cases applying this defence to ships under these statutes. Finally, it will set out some of the general principals that are considered by the courts when deciding whether or not to allow a defence of due diligence.

This paper will be useful to (a) ship operators attempting to put systems into place to ensure that crew are being duly diligent;<sup>1</sup> and (b) ship operators preparing defences to regulatory prosecutions.

## Common Law Due Diligence Defence

The common law due diligence defence was first recognized by the Supreme Court of Canada in 1978 in the case of *R. v. Sault Ste. Marie (City)*.<sup>2</sup> In an often quoted passage the court said as follows:

*[T]here are compelling grounds for the recognition of three categories of offences rather than the traditional two:*

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<sup>1</sup> See the Factors for Consideration in a Due Diligence Defence, item 7 and the discussion of *R. v. Gulf of Georgia Towing Co.* below.

<sup>2</sup> [1978] [2 S.C.R. 1299](#) (SCC).

1. *Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.*

2. *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. Mr. Justice Estey so referred to them in Hickey's case.*

3. *Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.*<sup>3</sup> [emphasis added]

With respect to burden of proof, the onus is upon the crown to prove the prohibited act and the onus then shifts to the accused to prove that he or she was duly diligent. The rationale for this shifting burden is that “[i]n a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence.”<sup>4</sup> With respect to the standard of proof, the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on a balance of probabilities that he or she has a defence of reasonable care.<sup>5</sup>

With respect to the application of this defence, the court declared that there was a presumption that public welfare offences were strict liability offences. Initially, this presumption was only applied to offences where there was a risk of imprisonment<sup>6</sup>, but this requirement was eventually relaxed.<sup>7</sup>

It should be noted that the due diligence defence is two pronged. It can be based upon either (a) due diligence or (b) mistake of fact. However, in practice the due diligence aspect also applies to the mistake of fact defence, because a mistake of fact must be a reasonable mistake of fact in order to qualify.<sup>8</sup> Since successful mistake of fact defences are less common, this paper will focus primarily on the due diligence defence, although many of the cases referred to also consider the mistake of fact defence.

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<sup>3</sup> Pp. 1325-6.

<sup>4</sup> P. 1325.

<sup>5</sup> *R. v. Sault Ste. Marie*, p. 1325.

<sup>6</sup> See for example the discussion of the impact of the *Charter* on this decision at paragraphs 19-21 of *R. v. M.V. B.T. Barbro* (1991) 121 N.B.R. (2d) 379 (Prov. Ct.).

<sup>7</sup> *Libman on Regulatory Offences in Canada*, p. 6.8., note 6.

<sup>8</sup> See: *R. v. Tavares*, [1996 CanLII 11084](#) (Nfld. C.A.) and *R. v. David Wayne Raymond*, [2006 NBPC 27](#) at para. 34-5.

## Statutory Due Diligence Defence

Prior to *R. v. Sault Ste. Marie*, regulatory legislation sometimes provided that certain narrowly defined conduct could exculpate persons from liability for committing a prohibited act. For example, section 6 of the *Oil Pollution Prevention Regulations* issued under the former *Canada Shipping Act*, R.S.C. 1970, c. S-9, provided that it would not be an offence to discharge oil from a ship if the discharge was “due to damage to or leakage from the ship as a result of stranding, collision or foundering if all reasonable precautions were taken.”<sup>9</sup> Also, under an amendment to the *Fisheries Act* in 1970, a due diligence defence was provided with respect to offences committed by employees and agents without the knowledge and consent of the employer.<sup>10</sup> However after the release of the *R. v. Sault Ste. Marie* in 1978, a number of regulatory statutes incorporated much more general *R. v. Sault Ste. Marie* type defences.

### *Canada Shipping Act*, R.S.C. 1970 [no longer in force]

This *Act* did not have a general due diligence defence other than the more specific defences referred to above. Furthermore, after *R. v. Sault Ste Marie*, the courts did not immediately apply the common law due diligence defence to *Canada Shipping Act* offences.<sup>11</sup> However, commencing in 1989, courts began recognizing the availability of a common law due diligence defence. The first such case was *R. v. Snow*.<sup>12</sup> In this case, a vessel owner was charged with failing to exhibit certain lighting from a sail boat as required by the *Collision Regulations*. The Court held that the practise of many other similar sailing vessels to not follow this rule, did not give rise to a due diligence defence.

In *R. v. M.V. B.T. Barbro*<sup>13</sup> (Prov. Ct.) a vessel was charged with discharging oil into a harbour. Although the facts are not entirely clear, it appears that a bursting pipe caused the discharge. In rejecting a due diligence defence, the court said that although the equipment at issue was reported to the officer as having been operating properly the previous day, “the officer was not present at the time of the accident and there is no evidence as to the actions taken by the crew at that time. As the officer testified, an increase in the pressure in the pipes should have been

<sup>9</sup> There are still similar provisions in the *Vessel Pollution and Dangerous Chemical Regulations*, SOR 2012 – 269.

<sup>10</sup> *Fisheries Act*, R.S.C. 1970, c. 17 (1<sup>st</sup> Supp.).

<sup>11</sup> See: *R. v. Esso Resources Canada Ltd.*, [1983] N.W.T.R. 59 (NWT Court) (Barge being filled with oil overflowed into river after employees fell asleep – Absolute liability offence).

<sup>12</sup> *R.v. Snow* (1989), 8 W.C.B. 523; See also: *R. v. M.V. B.T. Barbro* (1991), 121 N.B.R. (2d) 379 (Prov. Ct.). (There is a presumption of strict liability in public welfare offences that was not rebutted; *R. v. Watson* (1996) 147 Nfld. & P.E.I. R. 124 (C.A.); *R. v. M.V. “Glenshiel”*, [2001 BCCA 417](#) (Charge of discharge of oil from a sunken ship – No dispute that a strict liability offence).

<sup>13</sup> *R. v. M.V. B.T. Barbro*, *supra*.

detected in sufficient time for corrective measures to have been taken so that the pressure was not allowed to continue to increase to the point that the pipes separated.”

In *R. v. Watson*<sup>14</sup> the master of a ship was charged with acting as a master without a valid master’s certificate. After rejecting an argument that a lighthouse and buoy yacht used by an environmental group to interfere with fishing activities was a “pleasure craft”, the court also rejected a due diligence defence based upon the fact that the accused master relied upon legal advice of his lawyer about whether or not the vessel was classified a pleasure vessel rather than what he was told by the port authority.

### *Canada Shipping Act, 2001*

When this legislation came into force in 2007, it contained a general due diligence defence. Section 254 of the *Act* provides as follows:

#### *Persons*

*254(1) No person may be found guilty of an offence under this Act if the person establishes that they exercised due diligence to prevent its commission*

#### *Vessels*

*2) No vessel may be found guilty of an offence under this Act if the person who committed the act or omission that constitutes the offence establishes that they exercised due diligence to prevent its commission.*

It is noteworthy, that this statutory defence only applies to the offence section of the *Act*. However, sections 228 to 244 of the *Act* create a separate administrative monetary penalty (“AMP”) regime. Section 233 of the AMP provisions requires the Minister make a choice as to which type of proceeding he or she will pursue in the event of a contravention. Given the failure of Parliament to apply the s. 254 statutory due diligence defence to AMP proceedings, there is some uncertainty as to whether a due diligence defence is available in defence of AMP proceedings. Base upon the *expressio unius est exclusio alterius* rule of statutory interpretation, it could be argued that the express application of the due diligence defence to offences implicitly excludes its application to AMP proceedings.<sup>15</sup> However, the AMP section of the *Canada Shipping Act* includes section 237, which provides:

*Every rule and principle of the common law that renders any circumstance a justification or an excuse in relation to a charge for an offence under a relevant provision applies in respect of a violation to the extent that it is not inconsistent with this Act.*

<sup>14</sup> *R. v. Watson, supra.*; For a similar case see also *R. v. Empire Sandy Inc.*, [1987 CanLII 4290](#) (Ont. C.A.)

<sup>15</sup> See for example s. 129.17 of the *Canada Marine Act*, discussed below, which specifically provides a due diligence defence to AMP proceedings.

Based upon this provision, it is arguable that the common law defence of due diligence is available in an AMP proceeding as a common law justification. In this regard, there seems to be a trend towards allowing due diligence defences in AMP proceedings under other legislation.<sup>16</sup> In addition, there are a number of cases where the defence has been assumed to apply in TATC proceedings, with no objection from the Minister.<sup>17</sup>

With respect to offences, to date there are not a large number of reported cases applying the *Canada Shipping Act, 2001* s. 254 statutory due diligence defence. However, one case where the due diligence defence was successfully applied is *R. c. Cloutur*.<sup>18</sup> According to the unofficial English translation on CanLII, this case involved charges being laid against the pilot of the container ship “Canada Senator” after it collided with a sailboat while overtaking it at night on the St. Lawrence River. The pilot was charged with violating the *Collision Regulations* by (1) failing to proceed at a safe speed (Rule 6), (2) failing to use all available means to determine if a risk of collision existed (Rule 7), and (3) failing to take action to avoid a collision (Rule 8). After a very lengthy review of the evidence, the collision regulations and a discussion of the due diligence defence, the Quebec District Court concluded that the pilot exercised due diligence and dismissed the charges.

There are several other cases where the defence has been raised, but rejected.

In *R. v. Cowan*,<sup>19</sup> the operator of a sailboat was charged with operating the vessel in a careless manner, without due care and attention or without reasonable consideration for other persons, contrary to section 1007 of the *Small Vessel Regulations*. In rejecting a defence of due diligence, the B.C. Provincial Court said as follows:

*[41] Mr. Cowan takes the position that Active Pass is not a narrow channel within the undefined meaning of the [Collision Regulations](#). He says there is no “correct side”. In my view, by taking the route he did, he put himself in the position of not being able to see any large vessel such as the SOBC [a B.C. Ferry on route to Vancouver Island] until the last moment and of not being able to hear any warning whistle it might give, because of*

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<sup>16</sup> See for example: *Whistler Mountain Ski Corp v. British Columbia (General Manager Liquor Control and Licensing Branch)*, [2002 BCCA 1604](#) and the discussion in Libman, pp. 2-8 to 2-13.

<sup>17</sup> See: *James Harrison v. Minister of Transport*, 2014 TATC File No. MP-0200-33 at para. 106 (Failing to ensure vessel registered – Although not necessary for decisions, would have accepted due diligence defence); *Baffin Fisheries (2000) Ltd. v. Minister of Transport*, 2011 TATC File no. MA-0059-37 at para 126 (Failure to ensure vessel inspected – due diligence defence rejected); *Excursions de peches des Iles Iles Inc. v. Minister of Transport*, 2011 TATC File No. MQ-0085-37 at para. 48 (Failure to ensure inspection certificate obtained - defence rejected); *Richard Caines v. Minister of Transport*, 2011 TATC File no. MA-0028-37 at 36 (Failure to have inspection certificate for VHF radio – due diligence defence rejected); *Mckeil Ships Limited v. Minister of Transport* 2011, TATC File No. MO-0014-37 at para. 42(Failure to have a lifeboat under a functioning davit – no due diligence defence); *Joseph Campbell v. Minister of Transport* 2010 TATC File No. MP-0024-33 at 38-9 (No valid inspection certificate – no due diligence defence); *Atlantic Towing v. Minister of Transport*, 2009 TATC File No. MA-009-37 at paras. 50 & 71 (failure to arrange inspection – no due diligence defence established).

<sup>18</sup> *R. c. Cloutur*, [2007 QCCQ 13533](#).

<sup>19</sup> *R. v. Cowan*, [2014 BCPC 334](#).

*the sound barrier created by the intervening land barrier of Galiano Island and because of the high level of noise of his engine.*

[42] *This is a case, I think, of an experienced local and international mariner and a skilled, highly regarded former commercial [airline] pilot who knew of the potential hazard but who, despite the rules of the sea, relied on this skill and experience to avoid trouble. In doing so he exercised poor judgment and breached the standard of care expected of mariners on the sea. **The potential for grave harm was significant.** The fact that no harm did occur is not an answer. Capt. Glentworth could have caused the SOBC to make a wider swing than it did and collide with the on-coming pleasure craft. That there was no collision with the Antares I or other pleasure craft was due partly to the skill of Capt. Glentworth and partly to good luck.*

[43] *It is not enough to establish a defence that from Mr. Cowan's perception, he had sufficient control of the Antares I at Mary Anne Point to avoid a collision. The Master of the SOBC, had the **grave responsibility for the safety of hundreds of passengers** on his ship and to avoid causing harm to other vessels around it. It was his perception from what he observed that the Antares I was putting itself on a potential collision course with the SOBC. He had no communication with Mr. Cowan to know his intentions. He could only act on what he observed, and act quickly.*

[44] *It is for these reasons I conclude that on a balance of probabilities, Mr. Cowan did not exercise diligence . . . [emphasis added]*

In *R. v. Ralph*<sup>20</sup> a 65-foot fishing vessel, the "Melina & Keith II" rolled over and sank while it was at anchor with its propeller running and its turbot net in the water. Four of eight crew members died. Subsequent to the sinking, the master of the vessel was charged with number of *Canada Shipping Act* offences including (1) failure to maintain a proper deck watch, (2) failure to keep a proper look-out and (3) failure to ensure the crew understood lifesaving and fire fighting equipment. With respect to items one and two, the Newfoundland Court of Appeal upheld the trial Court's rejection of a due diligence defence because the master was in the galley making sandwiches at the relevant time and there was not a 360-degree view on the back deck where the crew were working. With respect to item three, the Court also upheld the trial Court's finding that the crew were not adequately instructed regarding the use of the safety gear.

In *R. v. Bridle*<sup>21</sup> a speedboat operating at night collided with a 33 foot pleasure boat that was anchored in a bay without an all-round white light as required by Rule 30(b) of the *Collision Regulations*. As result, it was issued a federal contravention's violation ticket. In convicting the vessel operator, the B.C. Provincial Court rejected an argument that leaving one of the interior

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<sup>20</sup> *R. v. Ralph*, [2013 NLCA 1](#).

<sup>21</sup> *R. v. Bridle*, [2008 BCPC 52](#).

lights on was due diligence given the fact that the operator had the option of returning the vessel to a dock (about a one-hour trip) before nightfall.

*Arctic Waters Pollution Prevention Act, R.S.C. 1970 [no longer in force]*

Under the 1970 legislation, there was no due diligence defence. However, in the case of *R. v. Le Chene No. 1*,<sup>22</sup> the court recognized a common law due diligence defence. This case involved a ship that was pumping jet fuel to an on-shore storage facility. During the procedure, the coupling of a hose came apart causing a spill into the ocean. At a sentence hearing, a Northwest Territory's Court accepted a guilty plea based upon a finding that while pumping, the ship did not "exercise all care and skill that would be appropriate and did not take all reasonable precautionary measures to ensure that an oil spill would not occur, or if it did occur, that it would be immediately detected".

*Arctic Waters Pollution Prevention Act, R.S.C., 1985, c. A-12*

The current legislation now has a fairly narrow statutory due diligence provision. S. 20 provides as follows:

*In a prosecution of a person for an offence under subsection 18(1), it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of, and that all due diligence to prevent its commission was exercised by, the accused.*

To date, there do not appear to be any reported cases applying the s. 20 due diligence defence.

*Migratory Birds Convention Act, R.S.C. 1970, c. M-12 [no longer in force]*

Under the 1970 legislation, there was no due diligence defence. However, in the case of *R. v. Chapin*<sup>23</sup> (SCC) the *Sault St. Marie* due diligence defence was successfully applied to a charge of hunting within one-quarter mile of bait.

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<sup>22</sup> *R. v. Le Chene No. 1*, [1987] N.W.T.R. 209 (NWT Court).

<sup>23</sup> *R. v. Chapin* [1979] 2 S.C.R. 121.



*Migratory Birds Convention Act, 1994 c. 22*

Section 5.1 of this Act prohibits persons or vessels from depositing a substance that is harmful to migratory birds. Section 13 (1.8) provides for the following due diligence defence:

*A person or vessel that establishes that they exercised due diligence to prevent the commission of an offence under this Act, other than an offence under paragraph 5.2(a), (c) or (d) or section 5.3, shall not be found guilty of the offence.*

In the case of *R. v. Fleming*,<sup>24</sup> the court held that steering a boat, laying decoys and retrieving birds is hunting. Similarly, in *R. v. Colbourne*,<sup>25</sup> the court held that driving a boat while someone else shoots is “hunting”. It concluded that leaving one’s gun at home while driving a boat for someone who is shooting birds does not amount to due diligence.<sup>26</sup>

**Occupational Health and Safety Legislation**

In *R. v. Courtnakyle Fisheries Ltd.*,<sup>27</sup> a vessel owner was charged under the Nova Scotia *Occupational Health and Safety Act* with, amongst other things, (a) having an uncaged propeller, (b) having a diver without a secondary air supply, and (c) having a diver without a buoy and line. This legislation did not have a statutory due diligence defence. With respect to the charge of not having a buoy and line, the court held that the (presumably common law) due diligence defence was established because the strong tidal current made a buoy and line useless, but for a very limited time. With respect to not having a secondary air supply, the court rejected a due diligence argument that an alternate air supply was not necessary because the divers relied upon the buddy system. With respect to the lack of a propeller guard, this attempted due diligence defence was rejected because it appeared to just be caused by lack of a timely repair.

In *WCAT-2014001756 (Re)*,<sup>28</sup> a worker at a B.C. shipping terminal died after a loading ramp collapsed. As a result of an inspection that occurred after the collapse, an administrative monetary penalty was assessed against the shipping terminal. Section 196(3) of the B.C. *Workers Compensation Act*<sup>29</sup> provides that an administrative monetary penalty will not be imposed in the face of due diligence by the employer. In rejecting a due diligence defence, the Workers Compensation Appeal Tribunal said as follows:

*I do not accept this argument because it is directed at the wrong issue. The question is not whether the employer took all reasonable steps to identify the particular defect that led to the boarding ramp collapse. Rather, the question is whether the employer took all*

<sup>24</sup> *R. v. Fleming*, [2003 CanLII 8818](#) (NL PC).

<sup>25</sup> *R. v. Colbourne (W.)*, [2007 NLTD 152](#).

<sup>26</sup> See also: *Duffett and Hobbs v. HMTQ*, 152 [2005 NLTD 178](#).

<sup>27</sup> *R. v. Courtnakyle Fisheries Ltd.*, [2005 NSPC 69](#).

<sup>28</sup> *WCAT-2014-01756 (Re)*, [2014 CanLII 41629](#).

<sup>29</sup> *Workers Compensation Act*, RSBC 1996, c. 422.

*reasonable steps to identify its inspection obligations in relation to the marine boarding facilities. I do not consider the engineer's report to meet this requirement. At most, the report was unclear as to the required frequency of NDT analysis and a prudent person should have inquired further as to the precise nature of required NDT analysis and the frequency of such inspections. [para. 87].*

*Coastal Fisheries Protection Act, R.S.C., 1985, c. C-33*

This *Act* does not contain a statutory due diligence provision. However, section 18.5 incorporates by reference all provisions of the *Fisheries Act* with respect to both indictable and summary conviction offences. Presumably this section would also incorporate the statutory due diligence defence contained in the *Fisheries Act*.

[Canada Marine Act, S.C. 1998, c. 10](#)

This Act deals primarily with Canadian Port authorities. S. 126 of the *Act* creates offences primarily designed to require persons and ships to co-operate with enforcement officers.

Section 127(2) provides a due diligence defence to both persons and ships.

Section 129.01 creates an administrative monetary penalty regime to be established by regulation. Currently, no regulations have been passed to create an AMP regime. Section 129.17 provides a due diligence defence in a proceeding under the AMP regime.

[Fisheries Act, R.S.C. 1985 c. F-14](#)

In 1991, a general due diligence defence was incorporated into the legislation by s. 78.6, which provides as follows:

*No person shall be convicted of an offence under this Act if the person establishes that the person*

*(a) exercised all due diligence to prevent the commission of the offence; or*

*(b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.*

Since 1991 there have been a very large number of court cases that have applied the statutory due diligence defence to *Fisheries Act* offences. In doing so, most of them have assumed that s.

78.6 is a codification of the *Sault Ste. Marie* defence.<sup>30</sup> Given the large number, it is beyond the scope of this paper to list them all. Many of them can be found listed in rough chronological order in the fisheries section of the admiraltylaw.com website.<sup>31</sup> A number of them are also listed in Libman by category of offence.<sup>32</sup>

Two cases illustrate the different approach taken by courts to a pollution offence under the *Fisheries Act*, as contrasted with a fishing offence under the same legislation. In 1979, the due diligence defence was applied to a *Fisheries Act* pollution offence in the case of *R. v. Gulf of Georgia Towing Co.*<sup>33</sup> This case involved a fuel barge in a remote location that was pumping fuel to four onshore tanks that were inter-connected. As a result of an interconnecting valve being left open, one of the tanks overflowed when another tank was being filled. In overturning the provincial court decision and finding that there was no due diligence, the County Court said as follows:

*In view of the obviously immediate and **disastrous consequence** of carrying on a pumping operation of the kind in question with respect to any one of the four tanks with a connecting valve leading to one of the three other tanks which had already been filled, reasonable precautions must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout.*

In upholding the County Court decision, the B.C. Court of Appeal said as follows:

*I would suggest this: that due diligence under the circumstances here might include specific written instructions, maybe locking devices for other valves, possible alarm systems. But in the end I am of the view that the trial judge decided — and rightly decided — that this company did not make adequate provisions in its systems or otherwise to prevent a spill caused by a valve being open that should not have been open. **I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake.** For fuel barges, if one does nothing but hire careful people, train them carefully and tell them not to leave valves open, inevitably a valve will be left open. I am sure they have not hired infallible people. There will inevitably then be a spill. It seems to me that the consequences are so serious that something will have to be devised by the company if it is to be protected here to prevent spills when employees are not as careful as they are told to be. [emphasis added]*

<sup>30</sup> See, for example, *R. v. D'Entremont*, [1994 CanLII 4497](#) (NS SC).

<sup>31</sup> Go to [Fisheries topics – Offences - Due diligence](#).

<sup>32</sup> Libman, *supra* at s. 6.5(h).

<sup>33</sup> *R. v. Gulf of Georgia Towing Co. Ltd.*, [1979] W.W.R. 84, [1979 CanLII 483](#) (BCCA)

The *Gulf of Georgia Towing* case can be contrasted with a fishing case where the court was prepared to somewhat relax the expected standard of care. In *R. v. Chandler*,<sup>34</sup> the captain of a crab fishing vessel was charged with possession of undersize crabs. In upholding the trial judge's finding of due diligence, the B.C. summary conviction Appeal Court distinguished two lobster cases because unlike the lobster cases, after the initial measuring by the crew member of the crab fishing vessel the crabs were not accessible to be checked until they were off loaded at the end of the trip<sup>35</sup>. In applying the test set out in *R. v. Gulf of Georgia Towing Co Ltd.*, the court said, "in the present case, it **could not be said that the consequences of possessing undersized crabs has the same consequential environmental impact as an oil spill**, particularly given the ability to mitigate the possession of crabs by returning the crabs to the sea when sorted by the buyers" (para 43).

For a more recent appellate decision allowing a due diligence defence to a fisheries charge, see *R. v. Rideout*, (Handrigan J.)<sup>36</sup>. This case involved a fish harvester who was charged with violating a licence condition that prohibited him from retaining whelk that were less than 63 mm in overall length. At trial the fish harvester gave evidence that his primary method of grading the whelk for size was by using a grading table that was an open table with a series of bars in the middle. The crew dumped the shell fish on the table and spread them out evenly causing the small ones to fall through the grate. Although the table measured the girth rather than the length, his evidence was that this was the industry standard and no other measurement method was available. Given the small size of the fish and size of the catch (24,309 pounds), this was the only practical method of measurement available. At the first instance the Provincial Court Trial Judge rejected a due diligence defence on the grounds that "[t]he reality is that measuring every single whelk would be time consuming, and, therefore, expensive. It would not, however, be impossible. Here I hasten to add that while measuring every single whelk to ensure that it was less than 63mm long might have been expensive, it is incumbent on the fishers to conduct the fishery so as to comply with the conditions of their licences. In other words, the requirement to comply with the licence condition is not waived just because it might impinge on the profit margin of the fishery [para. 26]". Upon summary conviction appeal, the decision of the Trial Judge was set aside on the grounds that he set too high a standard. The Appeal Court noted that the Crown had not led any evidence that there was any other method of measuring the catch other than measuring each whelk. It noted that based upon the time it took the Crown to measure six bags of whelk, it would have taken 10 regular work weeks to measure a three-day catch. The matter was remitted for a new trial before a different trial judge.

### Factors for Consideration in Due Diligence Defence

<sup>34</sup> *R. v. Chandler* (3 June 2004) File No. 23728 Prince Rupert Prov. Ct. (Seidemann Prov. Ct. Judge) upheld on appeal oral transcribed reason 7 December 2005 (Court File No. 23728 Prince Rupert, B.C.).

<sup>35</sup> After the crabs were measured they were placed into a chute that sent them into a 10-foot-deep hold full of circulating water.

<sup>36</sup> *R. v. Rideout*, 2014 NLTD 27, [2014 CanLII 8978](#).

## Introduction

A recent decision of the Ontario Superior Court of Justice, *R. v. Pisces Fishery Incorporated*,<sup>37</sup> summarized the principals applicable to the defence of due diligence as follows:<sup>38</sup>

1. The reasonableness of the care taken must be assessed in light of the specific circumstances of the offence(s) before the court: *R. v. Emil K. Fishing Corp.*, [2008 BCCA 490 \(CanLII\)](#) at paragraph 19.<sup>39</sup>
2. The degree of care warranted in each case is governed by a consideration of and balancing of the gravity of the potential harm<sup>40</sup>, the alternatives available to the defendant, the likelihood of harm, the degree of knowledge<sup>41</sup> or skill<sup>42</sup> expected of the defendant, and the extent to which the underlying causes of the offence are beyond the control of the defendant: *R. v. Gonder (1981)*, 62 C.C.C. (2d) 326 at paragraph 22 (YTC);
3. Evidence of a standard practice in the industry is only one important component in determining the appropriate standard of care: *R. v. Gonder*, *supra*, paragraph 17;<sup>43</sup>
4. Those who engage in an activity within a regulated area are taken to be aware of and to have accepted the responsibility of meeting an objective standard of conduct: *Wholesale Travel Group Inc. v. The Queen; Attorney General for Ontario et al, Intervenors (1991)*, [1991 CanLII 39 \(SCC\)](#), 84 D.L.R. (4<sup>th</sup>) 161 at page 220 (SCC), cited in *R. v. Petten*, [1995] N.J. 118 at paragraph 47 (Nfld. SC-TD);

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<sup>37</sup> *R. v. Pisces Fishery Incorporated*, [2016 ONSC 618](#).

<sup>38</sup> For slightly different lists see both *R. v. Commander Business Furniture Inc.* (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Prov. Div.) and Libman, section 7.3.

<sup>39</sup> At paragraph 19 the Court said: "defence of due diligence will only be available if the accused can demonstrate that it has exercised due diligence to avoid the specific type of occurrence giving rise to the charges against it." It went on at para. 22 to say, "the "particular event" at issue was the retention of prohibited species of salmon. The accused was not required to demonstrate the mechanism by which that event occurred."

<sup>40</sup> See also *R. v. Gulf of Georgia Towing Co*, *supra*, at para. 43, *R. v. Cowan*, *supra* at paras. 42-3, and *Emil K Fishing*, *supra* at para. 26.

<sup>41</sup> See also: *Keeping v. Canada (Attorney General)*, (2003) 224 Nfld. & P.E.I.R. 234 (Nfld. C.A.); *R. v. Longmire* (1997), 162 N.S.R. 2d 52 (S.C.), [1997 CanLII 470](#); *R. v. Smith*, [1996 CanLII 2803](#) (B.C.S.C.) (salmon gillnetter hired an experience deckhand to give him breaks).

<sup>42</sup> See also: *R. v. Simmons*, (2003) 229 Nfld. & P.E.I.R. 257 (Prov. Ct.) (The court considered that there was a greater duty of care on a professional fish harvester than on a member of the general public); *R. v. Genge* (1983), 44 Nfld. & P.E.I.R. 109 (Nfld. S.C.).

<sup>43</sup> See also: *R. v. Thibeau*, [1996] N.S.J. No. 610 (Practise of hauling all traps and rebating them before dealing with undersize lobsters); *R. v. Harris*, (2001) 203 Nfld. & P.E.I. R. 324 (Prov. Ct.) (Ct. accepted that in the ground fish fishery it was common for boats to not have the means available to weigh their catch at sea);

5. A defendant will not be held liable for unforeseeable events or activities beyond which they might reasonably be expected to influence or control: *R. v. Placer Developments Ltd.*, [1985] B.C.W.L.D. 581 at paragraph 37;<sup>44</sup>
6. The failure of government officials to properly exercise statutory responsibilities to inspect or take preventative action will not provide a defence where the defendant acted negligently: *R. v. Placer Developments Ltd.*, *supra*, at paragraphs 55-56;
7. A corporate defendant must show that there was a system in place to prevent the prohibited act from occurring and that reasonable steps were taken to ensure the effective operation of that system: *R. v. Safety-Kleen Canada Inc.*, [1997 CanLII 1285 \(ON CA\)](#), 1997 CanLII 1285 at paragraph 24; *R. v. St. Lawrence Cement Inc.*, [1993] O.J. No. 1442 at paragraph 29.

## Safety Systems

In *R. v. Sault St. Marie*, Justice Dickson explained the need for proof of safety systems as follows:

*One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior [let the master answer for the servant] has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.*<sup>45</sup> [emphasis added]

For ship operators charged with strict liability offences, the need to demonstrate that a safety system was in place is often problematic. A review of the case law gives some guidance on what systems would be acceptable in certain circumstances. For example, in the *Gulf of Georgia Towing Co.* case referred to above, both the County Court and the Court of Appeal gave the detailed suggestions on appropriate safety measures for dealing with pumping oil into on-shore tanks. In *R. v. Emil K. Fishing Corp* referred to above, involving a charge of illegal bycatch of fish, the court accepted evidence that the vessel “was equipped with appropriate gear for segregating and releasing bycatch, including a brailer, sorting box and revival tank” and found this adequate to satisfy the due diligence

<sup>44</sup> See also: *R. v. Tremblett* (2004), 238 Nfld. & P.E.I.R. 336; *R. v. Snow*, *supra*;

<sup>45</sup> This was adopted with approval by the Ontario Court of Appeal in *R. v. Safety-Kleen*, *supra*.

test (paras. 5 & 27). In *R. v. Pisces Fishery Incorporated* referred to above, the court set out list of suggested conduct for a corporation to verify catch logs were being properly prepared.<sup>46</sup> In *R. v. Quinlan Brothers Ltd.*<sup>47</sup> the Newfoundland Court of Appeal suggested the measures that a fish processor ought to have put into place to verify that its weigh masters were properly weighing crab. Depending upon the circumstances, a number of preventative measures are likely to be helpful in establishing a due diligence defence including:

1. Hiring experienced crew;
2. Training crew;
3. Having written guidelines and/or posted notices;
4. Periodic checking to ensure crew are doing the job properly;
5. Alarm systems;
6. Calibrating measuring equipment regularly;
7. Proper maintenance of equipment and machinery;
8. Communications with the Department of Fisheries and/or other relevant parties when mechanical or other difficulties are encountered;
9. Avoiding fishing close to area boundaries and
10. Cross checking accuracy of logs and other records, when possible.

### Superhuman Efforts Not Required

One guiding principal not referred to by the Court in *R v. Pisces*, is the principle that reasonable care and due diligence does not mean superhuman efforts. In essence, to require superhuman efforts would convert a strict liability offence into an absolute liability offence. This statement is referred to in *Libman On Regulatory Offences in Canada* by reference to several non-maritime cases.<sup>48</sup> It is also referred to with approval by the Newfoundland Court of Appeal in *R. v. Quinlan Brothers Ltd.* and several other fishing cases.<sup>49</sup> Although not specifically referred to, the principal appears to have been applied by the Newfoundland Court of Appeal in the case of *R. v. Rideout* referred to above.

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<sup>46</sup> *R. v. Pisces, supra*, para. 52 (Suggested system for employer to monitor performance of Captain in filling out log books).

<sup>47</sup> *R. v. Quinlan Brothers Ltd.*, [2011 NLCA 22](#).

<sup>48</sup> *Libman, supra*, s. 7.3(c).

<sup>49</sup> *R v. Quinlan, supra, para. 13*; See also *R. v. Jones, supra* at para. 37 and *R. v. Gallant*, [2013 PCNL 1312A00830](#) at para. 20.

## Conclusion

The due diligence defence is just one of many defences available to a vessel operator charged with an offence. However, it is probably the most successful defence. This is likely because it is a defence on the merits as opposed to a technical defence. Even if one is unable to succeed with a due diligence defence at trial, if one can establish that the conduct fell just short of due diligence, it puts one in a good position to ask for leniency with respect to sentencing.

Advance planning by way of review of safety systems, puts vessel operators in a good position to advance due diligence defences.

This paper was prepared and presented to the C.M.L.A. Education Seminar on June 17, 2017 at Halifax, Nova Scotia by:

**Brad M. Caldwell**

Caldwell & Co.

401-815 Hornby St.

Vancouver, B.C. V6Z 2E6

Tele: 604 689 8894

E-mail: [bcaldwell@admiraltylaw.com](mailto:bcaldwell@admiraltylaw.com)

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