THE DECLINE AND FALL OF THE DUE DILIGENCE DEFENCE?

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Over the last two decades, enforcement activity has increased in the realm of environmental and comparable regulatory schemes. This article discusses due diligence as a defence against these prosecutions and its increasing importance for energy companies. It begins with a survey of jurisprudence applying this defence, its public policy origins, and concerns that the defence has been eroding over time. The article then considers the role of the defence going forward and provides practical advice for organizations to better mitigate risks.

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I. INTRODUCTION

This article is about one of the primary means of defending against environmental and comparable regulatory prosecutions. While perhaps trite, at the outset, it bears repeating that conviction for an environmental offence is a very serious matter. It often entails seven-figure financial penalties, significant adverse publicity in the news, and reputational harm in the public sphere. Even if these are avoided, a conviction may nonetheless carry severe secondary consequences, such as the inability to participate in government grant and incentive schemes, or public tendering processes. Plus, at the most extreme, charges risk potential imprisonment for directors and officers.

Due diligence is often considered a business' first line of defence against environmental prosecution. As we have felt an increase in enforcement activity during the last ten to 20 years, the availability of this defence is correspondingly increasingly important for energy companies. Aside from the importance of the scheme to operators, it also carries broad social importance. The initial policy justifications for the defence included the "trade-off" of not punishing some offenders (namely, those who successfully make out the defence) because the larger cohort of potential offenders are motivated to operate more safely through better prevention systems. The ability to escape conviction by documenting and demonstrating robust, well-maintained systems is a powerful incentive to thoughtfully design and maintain them.

Against this backdrop, there have been concerns that the defence is eroding over time. Courts increasingly apply twenty-twenty hindsight analysis in trial decisions when identifying what could have been done to prevent the environmental or regulatory offence, rather than whether the measures taken were objectively reasonable at the time of the offence. But if evidence of an offence is proof the defence cannot be made out, then the defence no longer exists.

We begin at the (modern) origin of the defence, the guiding case *R. v. Sault Ste. Marie*,[1] and the associated public policy origins of due diligence as a defence, highlighting how the specific concerns that originally animated the defence (in particular: promoting responsible operations and corporate accountability) are more important than ever.

We then critically examine more recent decisions and the increasingly narrow use of hindsight judgment, juxtaposing them with the practical role and challenges faced by businesses who must identify hazards and design systems to prevent and respond to as yet unknown events. We will conclude by considering the role of the defence going forward, providing practical advice for organizations to better mitigate risks going forward.

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[1] 1978 CanLII 11 (SCC) [*Sault Ste Marie*].

II. ORIGIN AND CREATION OF THE DUE DILIGENCE DEFENCE

A. DIVISION OF POWERS AND PUBLIC WELFARE OFFENCES

Public welfare offences, or regulatory offences, are the primary mechanisms employed by governments in Canada to implement public policy objectives.

Both Parliament and provincial legislatures have the power to enact environmental regulations, provided that the exercise of jurisdiction has no more than incidental effects on the jurisdiction of the other.[2] The environment presents a double aspect, where both Federal and Provincial governments have a compelling interest to regulate.[3] Parliament, however, has the exclusive power to enact prohibitions, backed by a penalty and for a public purpose, under the criminal law power in section 91(27) of the *Constitution Act, 1867*.[4] Despite this, and although the pith and substance of any provincial legislation related to the environment must fall within the class of subjects assigned to the province,[5] provincial regulatory schemes may also permissibly employ quasi-criminal regimes as long as they are tied to a valid regulatory purpose.

B. ABSOLUTE LIABILITY OFFENCES AND PUBLIC POLICY PRE-*SAULT STE. MARIE*

Until the landmark decision *Sault Ste. Marie* in 1978,[6] public welfare offences were most often absolute liability offences — meaning proof of the underlying conduct of the offence (the *actus reus*) was proof of liability, with no possibility for asserting any defence.

It was thought that this high standard served two main purposes. First, imposing absolute liability was considered to be an effective way to use deterrence to protect societal interests. It was argued that the lack of any "loophole[s]" would incentivize taking steps beyond what would be carried out under a more relaxed standard.[7] Second, absolute liability was also considered to provide administrative efficiencies, as it eliminated the substantial burden of proving mental fault.[8]

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2 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 36 [*Western Bank*]; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40.

3 *Western Bank*, *ibid* at paras 30–35; *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23.

4 *Reference re Firearms Act*, 2000 SCC 31.

5 Halsbury's Laws of Canada (online), *Environment*, "Overview: Provincial Jurisdiction Over the Environment: Provincial Legislative Jurisdiction" (I.4(1)) at HEN-21 "Limits to Provincial Jurisdiction" (2022 Reissue); Dale Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada" (1973) 23:1 UTLJ 54 at 85; *R v Crown Zellerbach Canada Ltd*, 1988 CanLII 63 (SCC); *R v Hydro-Québec*, 1997 CanLII 318 (SCC).

6 *Sault Ste Marie*, *supra* note 1.

7 *Ibid* at 1310–11.

8 *Ibid*.

However, the absolute liability regime was not without criticism. The tension between regulatory enforcement and individual fairness was described in *Sault Ste. Marie* as follows:

> "[A]bsolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.
>
> Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.[9]

Indeed, one of the most compelling criticisms of the absolute liability regime was that it ran contrary to fundamental principles of penal liability. Another key criticism was that it did not actually serve to incentivize the greatest possible precautionary measures — and may in fact do the opposite, leading to "cynicism and disrespect for the law."[10] Where no amount of diligence can save an accused from conviction, why bother investing in any further diligence at all?

Finally, absolute liability is predicated on the idea that these sorts of offences carry lesser stigma than criminal conviction.[11] While this may have been true when regulatory offences first began to proliferate — and often incurred only a modest penalty, like parking tickets today — by the era of *Sault Ste. Marie*, the potential financial penalties were severe and there was the possibility of criminal conviction. And, as will be discussed, today the stigma associated with these offences is even greater, and the potential penalties more severe.

In light of this tension, courts in Australia and England began to create a "middle ground" between *mens rea* offences and absolute liability offences. The High Court of Australia's 1941 decision in *Proudman v. Dayman* was a key development in this respect, with the Court stating: "As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence."[12]

Leading up to *Sault Ste. Marie*, some Canadian courts had also taken steps to acknowledging the possibility of such a defence.[13]

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9 *Ibid* at 1310.
10 *Ibid* at 1311.
11 *Ibid* at 1311–12.
12 *Proudman v Dayman*, [1941] 67 CLR 536 at 540.
13 See e.g. *R v McIver*, [1965] 4 CCC 182 (ONCA) (the Court of Appeal for Ontario noted it was open to an accused to show that he had a reasonable belief in facts which, if true, would have rendered the act innocent).

C. *SAULT STE. MARIE*

Sault Ste. Marie came before the courts against this backdrop of ongoing dialogue about the appropriate mental fault standard for regulatory offences. In 1972, the City of Sault Ste. Marie (the City) was charged under section 32(1) of the then *Ontario Water Resources Commission Act*[14] for discharging, causing, or permitting to be discharged, refuse pollution into two watercourses. The disposal had been carried out by a third party, under contract with the City, and that party had been duly convicted under the *Ontario Water Resources Commission Act*. The issue remained whether the City was also guilty of an offence.

The case's path to the Supreme Court of Canada was circuitous, passing through five courts. The City was acquitted in Provincial Court (Criminal Division) but later convicted following a trial *de novo* on a Crown appeal. The City then appealed to the Divisional Court, which quashed the conviction, and on another appeal the Court of Appeal for Ontario directed a new trial.[15] Finally, in 1978, the Supreme Court of Canada granted leave to appeal to the Crown.

While leave was granted with respect to two issues — duplicity of charges and *mens rea* — it is the latter that has cemented the case as among the most cited Supreme Court of Canada decisions of all time.[16] Justice Dickson for a unanimous Supreme Court recognized the category of strict liability offences, in addition to the existing categories of *mens rea* offences and absolute liability offences. This resulted in the three categories of offences that continue to exist in more or less the same form today:

- *Mens rea* offences: These offences require some positive state of mind such as intent, knowledge, or recklessness be proved by the prosecution. Many traditional criminal offences fall into this category. In contrast, public welfare offences will only fall into this category if words such as "wilfully," "with intent," "knowingly," or "intentionally" are included in the statutory provision creating the offence.[17]

- Strict liability offences: If the prosecution can establish that the accused committed the *actus reus* of the offence, liability will follow unless the accused can prove (on a balance of probabilities) that it took all reasonable steps to prevent the commission of the offence. Public welfare offences are prima facie in this category.[18]

- Absolute liability offences: If the prosecution can establish that the accused committed the *actus reus* of the offence, liability will follow. No defences are available. For an offence to be found to impose absolute liability, there must be clear legislative language that guilt follows mere proof of the proscribed act, which requires consideration of the overall regulatory scheme, the subject matter

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14 RSO 1970, c 332, as amended by *Ontario Water Resources Act*, RSO 1990, c O.40.
15 *R v Sault Ste Marie* (1976), (1977) 13 OR (2d) 113 (CA).
16 Number 43 most cited according to CanLII at the time of writing, which only includes published decisions (CanLII, "Search Results," online: [perma.cc/7UUR-SD7U]).
17 *Sault Ste Marie*, *supra* note 1 at 1309–10, 1325–26.
18 *Ibid*.

> of the legislation, the importance of the penalty, and the precision of the language used by the legislature.[19]

In reaching this conclusion, Justice Dickson endorsed many of the prevailing criticisms of the absolute liability regime. In particular, he rejected the argument that individuals are more likely to maintain high standards of care if they are aware that ignorance or mistake will not excuse them for regulatory contraventions.[20] He noted that such arguments rest on assumptions which cannot be established, and further, there is no evidence that a higher standard of care results from absolute liability; if a person is already taking every reasonable precautionary measure, it is difficult to prove that they are likely to take additional measures, knowing that whatever further steps they take will not serve as a defence in the event of breach.[21]

In terms of administrative efficiency, Justice Dickson noted that due diligence was already admissible in sentencing, so such evidence was being put to the court in any event. Finally, he rejected the notion that no stigma attaches to convictions for regulatory offences, observing that an accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial, and the potential outcome of conviction.[22]

The Supreme Court ultimately directed a new trial to allow the defendant municipality to lead evidence on due diligence.

D. CODIFICATION OF DUE DILIGENCE DEFENCE TO STRICT LIABILITY

After the due diligence defence was conclusively established in *Sault Ste. Marie*, it quickly proliferated across the country. As it became a more established doctrine in Canadian law, legislatures began codifying the defence in various federal and provincial statutes governing regulatory offences across different sectors. These legislative provisions vary in detail, with some simply providing that the defence is available, while others outline the elements of the defence, including the standard of care expected, the burden of proof, and the factors to consider in assessing due diligence.

For example, section 78.6 of the *Fisheries Act* provides that:

> 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
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> (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.[23]

Similar provisions can be found in dozens of statutes today.

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19 *Ibid*.
20 *Ibid* at 1311.
21 *Ibid*.
22 *Ibid* at 1311–12.
23 RSC 1985, c F-14.

However, lack of codification for the defence is not a bar to its use. As long as an offence is properly characterized as one of strict liability, based on the *Sault Ste. Marie* factors, a defendant may avail itself of the defence at common law.

III. DEVELOPMENT OF THE DUE DILIGENCE DEFENCE POST-*SAULT STE. MARIE*

A. BRANCHES: REASONABLE CARE AND MISTAKE OF FACT

Sault Ste. Marie held that an accused may avoid conviction on a strict liability offence by establishing that:

> [They] took all reasonable care. This involves consideration of what a reasonable [person] 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 [they] took all reasonable steps to avoid the particular event.[24]

This divided the due diligence defence into two separate branches. The first, the defence of mistake of fact, applies when the accused establishes that they "did not know and could not reasonably have known of the existence of the hazard."[25] The second, the defence of reasonable care, can arise "when the accused knew or ought to have known of the hazard," but is able to establish that they took reasonable care to avoid the otherwise unlawful occurrence.[26] The two branches exist as alternatives; once the test for the first branch is met, the due diligence defence is established, and the accused need not establish the second.[27]

However, the relationship between the branches of due diligence is not always as clear as this delineation would suggest, and often only reasonable care is referred to as "due diligence" (with mistake of fact being treated separately). For the purposes of this article, we use the phrase "due diligence defence" primarily to refer to the reasonable care branch, given its distinct treatment in the case law. We separately discuss mistake of fact below.

B. THE *CHARTER* AND STRICT LIABILITY

In 1991, the Supreme Court of Canada released its most significant judgment on due diligence since *Sault Ste. Marie*: *R. v. Wholesale Travel Group Inc*.[28] This case addressed the constitutionality of strict liability offences in light of the *Canadian Charter of Rights and Freedoms*,[29] which had been incorporated into Canada's Constitution in the years since *Sault Ste. Marie*.

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24 *Sault Ste Marie*, *supra* note 1 at 1326.
25 *R v MacMillan Bloedel Ltd*, 2002 BCCA 510 at para 47 [*MacMillan Bloedel* BCCA].
26 *Ibid*.
27 *Ibid* at paras 47, 51.
28 [1991] 3 SCR 154 [*Wholesale Travel*].
29 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

The accused corporation, a travel agency, was charged with five counts of false or misleading advertising contrary to section 36(1)(a) of the *Competition Act* (the *Act*).[30] Section 37.2(2) of the *Act* was a statutory defence which was established if the accused showed due diligence and had taken reasonable measures to make timely retraction. The accused asserted that an offence which has imprisonment as a penalty but does not require the Crown to prove guilty intent is a violation of section 7 of the *Charter* (the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"), and the reverse burden of the due diligence defence violates section 11(d) of the *Charter* (the presumption of innocence).[31]

While the Supreme Court agreed that section 7 requires some degree of fault, it went on to hold that proof of negligence is sufficient fault for the purpose of regulatory offences.[32] On this, the Supreme Court again highlighted the underlying public purpose of public welfare offences:

> Regulatory offences provide for the protection of the public. The societal interests which they safeguard are of fundamental importance. It is absolutely essential that governments have the ability to enforce a standard of reasonable care in activities affecting public welfare.
>
> …
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> It must be remembered that regulatory offences were historically developed and recognized as a distinct category precisely for the purpose of relieving the Crown of the burden of proving *mens rea.* This is their hallmark. The tremendous importance of regulatory legislation in modern Canadian industrial society requires that courts be wary of interfering unduly with the regulatory role of government through the application of inflexible standards. Under the contextual approach, negligence is properly acceptable as the minimum fault standard required of regulatory legislation by s. 7.[33]

The Supreme Court also rejected the presumption of innocence argument, noting that "[q]uite simply, the enforcement of regulatory offences would be rendered virtually impossible if the Crown were required to prove negligence beyond a reasonable doubt."[34]

As part of its analysis, the Supreme Court endorsed the view that the regulated defendant is, by virtue of licencing, assumed to have made the choice to engage in the regulated activity and must bear the burden associated with that operation.[35] In sum, the Supreme Court held that "[t]he differential treatment of regulatory offences is justified by their common goal of protecting the vulnerable."[36]

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30 RSC 1970, c C-23, as amended by RSC 1985, c C-34.
31 *Wholesale Travel*, *supra* note 28 at 171–72, citing *Charter*, *supra* note 29, ss 7, 11(d).
32 *Wholesale Travel*, *ibid* at 238.
33 *Ibid* at 239.
34 *Ibid* at 246.
35 *Ibid* at 229.
36 *Ibid* at 234.

C. ELEMENTS OF THE DUE DILIGENCE (REASONABLE CARE) DEFENCE

To successfully invoke the reasonable care defence under *Sault Ste. Marie*, an accused must establish that they "took all reasonable care."[37] This imports an objective test through the use of the word "reasonable," but provides little guidance on the specific analysis and factors to be considered by a court in assessing the requisite standard of care to establish the defence.

Since *Sault Ste. Marie*, courts have provided considerable additional guidance on how the test applies. Generally, courts have held that the defence of due diligence is a context-driven exercise, where the trier of fact must take into consideration "the purpose, the background, the standard practice and the desirable goal of the legislation … when determining the standard [to be] imposed."[38] This analysis typically requires consideration of industry standards.[39]

Facing this uncertainty, it is unsurprising that courts have sought to develop and refine a list of factors to be considered in assessing the due diligence defence. In *R. v. Gonder*,[40] the Territorial Court of Yukon set out five factors, which were expanded upon and explained in *R. v. Placer Developments Ltd.* as follows:

> *Gravity of potential harm* — The greater the potential for substantial injury, the greater the degree of care required.
>
> …
>
> *Alternatives* — Reasonableness of care is often best measured by comparing what was done against what could have been done.
>
> …
>
> *Likelihood of Harm* — The greater the likelihood of harm, the higher the duty of care.
>
> …
>
> *Degree of Skill Expected* — Anyone choosing to become involved in activities posing a danger to the public, or to the environment, assumes an obligation to take whatever measures may be necessary to prevent harm.
>
> …
>
> *Matters beyond control of accused* — No accused can be held accountable for unforeseeable accidents and for activities beyond the reach of what they might reasonably be expected to influence or control.[41]

Almost a decade later, in 1992, the Ontario Divisional Court in *R. v. Commander Business Furniture Inc.* set out a wide-ranging 14-point list of the relevant factors, canvassed from other decisions:

1) [T]he nature and gravity of the adverse effect;
2) the foreseeability of the effect including abnormal sensitivities;
3) the alternative solutions available;

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37 *Sault Ste Marie*, *supra* note 1 at 1326.
38 *R v Black Top Cabs Ltd*, 1998 CarswellBC 3354 at para 24 (BCSC).
39 *R v Bata Industries Ltd*, [1992] 70 CCC (3d) 394 at 426 (ON Ct J (PD)) [*Bata Industries*].
40 [1981] 62 CCC (2d) 326 at 332–33 (YK Terr Ct) [*Gonder*].
41 *R v Placer Developments Ltd*, 1983 CarswellYukon 14 at paras 27–37 (Terr Ct) [*Placer Development*].

4) legislative or regulatory compliance;
5) industry standards;
6) the character of the neighbourhood;
7) what efforts have been made to address the problem;
8) over what period of time and promptness of response;
9) matters beyond the control of the accused including technological limitations;
10) skill level expected of the accused;
11) the complexities involved;
12) preventative systems;
13) economic considerations; and
14) actions of officials.[42]

The G*onder*, *Placer Development*, and *Commander Furniture* factors (which exhibit considerable overlap) continue to be routinely applied today. Courts have been clear, however, that the factors are not exhaustive, nor should there be rote application to the facts of a case. As the Alberta Court of Justice has noted, "[t]he defence applies in many different situations and so there can be no single comprehensive list of appropriate considerations for all cases."[43]

Of the factors, foreseeability, in particular has proven to be subject of the greatest judicial debate. In *Pope & Talbot Ltd. v. British Columbia*, the Court reiterated that the foreseeability of a contravention is a relevant consideration under both branches of the defence.[44] The case law development around foreseeability — and its erosion of the underlying policy rationale of the due diligence defence — will be explored later in this article.

Apart from the issue of foreseeability, courts have held that the accused does not need to prove the exact cause of the event resulting in the charge in order to successfully establish the due diligence defence. Where the exact cause can be demonstrated, however, this may assist the accused in availing itself of the due diligence defence as they may be able to point to specific steps that were taken to prevent the breach.[45]

What is consistent across many cases is that the greater the likelihood of harm and the greater the awareness of danger is, the higher the threshold of due diligence. Nevertheless, courts have stated that defendants are not to be held to standards of perfection, nor in theory are they expected to show "superhuman efforts."[46]

D. LIABILITY OF DIRECTORS AND OFFICERS

Many environmental statutes provide for the ability to prosecute directors and officers personally for offences committed by an organization. In practice, this has occurred relatively infrequently — typically only where there is some notably egregious conduct by

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42 *R v Commander Business Furniture Inc*, [1992] OJ No 2904 at 38–39 (Ct J (PD)) [*Commander Furniture*].
43 *R v Syncrude Canada Ltd*, 2010 ABPC 229 at para 100 [*Syncrude*].
44 *Pope & Talbot v British Columbia*, 2009 BCSC 1715 at para 66 [*Pope & Talbot*].
45 *R v Petro-Canada*, 2003 CanLII 52128 at para 20 (ONCA).
46 *Syncrude*, *supra* note 43 at para 99.

the directors or officers. In such cases, directors and officers can rely on the due diligence defence.

The leading case in this context is from the Ontario Court of Justice in *R. v. Bata Industries Ltd*.[47] Bata Industries Ltd. (Bata) was charged with violating the *Ontario Water Resources Act*[48] and Ontario's *Environmental Protection Act*[49] for causing or permitting the discharge of liquid industrial waste into the ground and into the natural environment. The Ontario Ministry of the Environment also charged three directors with failing to take all reasonable care to prevent an unlawful discharge into the environment or the groundwater.

The Court held that the due diligence defence was not established because Bata failed to prove that it had a proper system in place to prevent the discharge and that reasonable steps were taken to ensure that the system that was in place was effectively operated. When evaluating whether the three directors had successfully established the defence of due diligence, the Court developed a minimum profile against which the director's liability should be measured:

> I ask myself the following questions in assessing the defence of due diligence:
>
> (a) Did the board of directors establish a pollution prevention "system" as indicated in R. v. Sault Ste. Marie (City) …; i.e., was there supervision or inspection?; was there improvement in business methods?; did he exhort those he controlled or influenced?
> (b) Did each director ensure that the corporate officers have been instructed to set up a system sufficient within the terms and practices of its industry of ensuring compliance with environmental laws, to ensure that the officers report back periodically to the board on the operation of the system, and to ensure that the officers are instructed to report any substantial non-compliance to the board in a timely manner?
>
> I reminded myself that:
>
> (c) The directors are responsible for reviewing the environmental compliance reports provided by the officers of the corporation but are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties.
> (d) The directors should substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders.
> (e) The directors should be aware of the standards of their industry and other industries which deal with similar environmental pollutants or risks.
> (f) The directors should immediately and personally react when they have notice the system has failed.[50]

With respect to the standard of care applicable to directors and officers, the judge noted that there was very little judicial guidance available to him, and that evolving legal

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47 *Bata Industries*, *supra* note 39.
48 RSO 1980, c 361.
49 RSO 1980, c 141.
50 *Bata Industries*, *supra* note 39 at 429 [emphasis in original] [footnotes omitted].

standards and legal precedent may enhance and clarify directors' responsibility in the future.[51]

The standards in *Bata Industries* are a good measure of the level of environmental responsibility expected of corporate directors, officers, and companies, and have been subsequently applied in numerous cases.[52]

E. OTHER DEFENCES TO STRICT LIABILITY

As noted, the second, though less often referred to, branch of the due diligence defence established in *Sault Ste. Marie* is mistake of fact, which applies where no *mens rea* exists because there was a reasonable and honest belief in a set of facts that, if true, would have resulted in the offence not occurring. This is assessed on an objective standard, where a reasonable person in the same circumstances would have made the same mistake.[53]

Importantly, as the name implies, the defence relates to factual mistakes. For example, the defence may exist where a reputable third party laboratory transmits the wrong set of sample test results, leading to the incorrect belief that the monitoring system shows no harm. But it often does not apply where the facts are known but the inference that could be drawn from them (for example, the potential effect on the environment) were not.[54]

There are other defences to environmental or regulatory charges beyond due diligence, of course, that we do not address here:

- Officially induced error of law: In other instances, an error arises in advice given by regulatory authorities, where the offending action can be shown to have been taken only after seeking to understand from authorities if it would be permissible.[55]

- Technical defences: These can be raised to show that the evidence does not support the necessary elements of the offence established under statute. Correspondingly, the admissibility of some evidence can be challenged. This may include objections based on *Charter* breaches, which has lessened but nonetheless some application when it is a corporation that faces jeopardy.

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51 *Ibid*.

52 See e.g. *Ontario (Ministry of the Environment, Conservation and Parks) v Thomas Cavanagh Construction*, 2019 CarswellOnt 12959 at paras 86–92, leave ref'd 2019 ONCA 686 (convicted of discharging sediment from a construction site. The Court noted the absence of any system, practices, or policies in place to prevent environmental harm and the lack of response by the director to address the spill); *R v Anachemia Solvents Ltd*, [1994] OJ No 1201 at 21–28 (Ct J (PD)) (PCB waste was transported contrary to regulations. Charges were dismissed against the transportation company, waste recycler operation and their respective presidents. It was reasonable for the transportation company to rely on the information of the waste recycler and the waste recycler had testing procedures to prevent receipt of prohibited wastes).

53 *R v MV Marathassa*, 2019 BCPC 13 at paras 154, 167 [*Marathassa*].

54 *Ibid*; *MacMillan Bloedel* BCCA, *supra* note 25; *R v Ellis Don Corporation*, 2006 ONCJ 590.

55 *R v Jorgensen*, 1995 CanLII 85 (SCC); *Lévis (City) v Tétreault*, 2006 SCC 12 at para 26 [*Lévis v Tétreault*].

- Necessity and impossibility: The related defences of necessity and impossibility arise in similar though opposite circumstances: necessity where an accused reasonably breaks the law in light of the available alternatives, impossibility where an accused reasonably fails to comply with the law for the same reasons. To show necessity, for instance, an accused must show there was imminent peril or danger, that the accused has no reasonable legal alternative course of action, and that there was proportionality between the harm inflicted and the harm avoided.[56]

IV. DECLINE OF THE DUE DILIGENCE DEFENCE

A. A STANDARD OF PERFECTION? *R. V. IMPERIAL OIL LTD.* COMPARED TO *R. V. MACMILLAN BLOEDEL LTD.*

In 2000, *R. v. Imperial Oil Ltd.*[57] signaled a shift in the treatment of foreseeability. In this case, Imperial Oil Ltd. (Imperial Oil) was charged with contravening the federal *Fisheries Act*[58] and British Columiba's *Waste Management Act*[59] when an effluent discharge from one of its refineries failed a toxicity test. The refinery used methylcyclopentadienyl manganese tricarbonyl (MMT), a gasoline additive. Imperial Oil attempted to assert the due diligence defence, arguing that it tested its effluent more frequently than required by its permit and that it had an environmental management system and an environmental risk assessment program.[60] At the time, MMT was not considered to be harmful to fish, and the Material Safety Data Sheet provided by the supplier did not indicate that it posed a danger to fish. Subsequent to the toxicity test, new research indicated that MMT was harmful to fish.

At trial, Imperial Oil was acquitted after successfully establishing the reasonable care branch of the due diligence defence.[61] On appeal, the summary conviction appeal judge reversed the acquittal and entered a conviction, primarily due to disagreement with the trial judge about the likelihood that the risk assessment program would have identified the problem.[62]

The Court of Appeal upheld the conviction. Despite acknowledging that there was no toxicity warning from the supplier, and no published scientific research suggesting the chemical was hazardous, the majority nevertheless concluded that Imperial Oil should have known that the substance was toxic based on Imperial Oil's nature and size, "the sensitivity of the local environment, the information that … [it] possessed concerning the risks of MMT, the simplicity of testing to determine toxicity, and … [Imperial Oil's] access to a broad range of expert advice."[63] As a result, the majority found:

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56 *R v Rio Tinto Alcan Inc*, 2017 BCCA 440 at para 29.
57 2000 BCCA 553 [*Imperial Oil* BCCA].
58 *Fisheries Act*, *supra* note 23.
59 RSBC 1996, c 482, as repealed by *Environmental Management Act*, SBC 2003, c 53.
60 *Imperial Oil* BCCA, *supra* note 57 at para 17.
61 *R v Imperial Oil Ltd*, 1997 CarswellBC 2906 (BCPC).
62 *R v Imperial Oil Ltd*, 1999 CarswellBC 21 (BCSC).
63 *Imperial Oil* BCCA, *supra* note 57 at para 29.

> It is not an answer for the appellant to say that it had in general a good safety system, that it tested more frequently than necessary, and that it had a program which would likely have detected the hazard within the near future. Because the appellant did not identify the substance as toxic, it was not a priority within the risk assessment program.[64]

Justice Newbury dissented, expressing the view that the majority was "applying a standard of perfection to conclude that despite all this evidence, the appellant did not conduct itself with due diligence."[65]

Notably, the Court's reasons were silent on the issue of "mistake of fact."

Not long after *R. v. Imperial Oil Ltd.*, the Court of Appeal for British Columbia was again asked to consider the issue of foreseeability in *R. v. MacMillan Bloedel Ltd.*, but this time under the mistake of fact branch, coming to a somewhat different result.[66]

MacMillan Bloedel Ltd. (MacMillan Bloedel) was charged with depositing deleterious substance into water frequented by fish contrary to the *Fisheries Act*.[67] It was common ground that the company committed the *actus reus* of the offence, and that it occurred because of fuel leakage from pipes at its facility. The pipes were found to have deteriorated as a result of an unforeseeable microbiological process (that is, not ordinary corrosion).[68] The trial judge concluded that, while MacMillan Bloedel honestly believed the underground pipes were sound, this belief was unreasonable and that there was insufficient evidence to show that MacMillan Bloedel had taken all reasonable care. The summary conviction appeal judge overturned the decision of the trial judge, holding that MacMillan Bloedel was entitled to the defence because the leakage was not caused by aging, but by an unforeseeable microbiological process.[69]

The Court of Appeal likewise applied the two-part analysis, resolving the appeal on mistake of fact. The Court's critical holding was that in evaluating the defence, the focus of the inquiry is on the act that actually occurred, not the general risk of environmental contamination:

> In my view, the focus of the inquiry must be the foreseeability of the *actus reus* of the offence charged, not "the general foreseeability of environmental contamination" or "the foreseeability of the specific cause". In the circumstances of this case, the fact that the leak occurred as a result of an unforeseeable cause is determinative of the issue in favour of MacMillan Bloedel.[70]

This approach, which centers the foreseeability analysis on the occurrence of the particular event giving rise to the charge (in other words, the *actus reus* of the

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64 *Ibid* at para 28.
65 *Ibid* at para 34.
66 *MacMillan Bloedel* BCCA, *supra* note 25.
67 *Ibid*; *Fisheries Act*, *supra* note 23.
68 *MacMillan Bloedel* BCCA, *ibid* at para 4.
69 *R v MacMillan Bloedel Limited*, 2001 BCSC 617 at paras 5–6.
70 *MacMillan Bloedel* BCCA, *supra* note 25 at para 44.

contravention), was confirmed in *Pope & Talbot v. British Columbia*.[71] It reflects the *Sault Ste. Marie* warning to not punish the "morally" innocent.[72]

These two cases foreshadow what appears to be contrasting standards: one for "reasonable care" requiring almost perfection in the face of considerable uncertainty; and one for "mistake of fact" that recognizes that it is not possible to foresee every potential breach of regulatory statutes.

B. THE CONTINUED DECLINE: SELECTED CASES FROM 2010 TO PRESENT

Over the subsequent decades, courts have continued to refine the test. Leading decisions highlight the considerable challenges defendants now face in establishing reasonable care due to the application of increasing levels of hindsight.

1. *R. V. SYNCRUDE CANADA LTD.*

In *R. v. Syncrude Canada Ltd.*,[73] Syncrude Canada Ltd. (Syncrude) was charged with failing to store a hazardous substance in a manner that ensured that it did not come into contact with any animals, contrary to section 155 of Alberta's *Environmental Protection and Enhancement Act*,[74] and with depositing a substance harmful to migratory birds in an area frequented by migratory birds, contrary to section 5.1(1) of Canada's *Migratory Birds Convention Act, 1994*.[75]

Syncrude deposited tailings (including water, sand, and bitumen) in the Aurora Settling Basin in the Fort McMurray area. On 28 April 2008, a "mat" of bitumen — "several inches thick, viscous and cohesive with the consistency of a frothy roofing tar"[76] — was found covering a significant portion of the basin. Waterfowl were trapped in the mat and sank with the bitumen, with approximately 1,600 birds dying over the course of the incident.[77]

The Court applied the *Commander Business Furniture* factors, with a particular focus on the following:

- Gravity of the effect: The gravity of the effect must be considered in the broader legislative purpose — to protect the environment and to maintain migratory bird populations. The Court acknowledged that it was unlikely that the number of ducks lost in the incident would have any significant impact on total duck

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71 *Pope & Talbot*, *supra* note 44; See also *Weyerhaeuser Co v British Columbia* (17 January 2006), 2004-FOR-005(b), online: Forest Appeals Commission [perma.cc/NG58-7MJ2] (the Court also disavowed the Forestry Appeals Commission decision, which appeared to treat foreseeability as a precondition to raising the due diligence defence).

72 *Sault Ste Marie*, *supra* note 1 at 1310.

73 *Syncrude*, *supra* note 43.

74 RSA 2000, c E-12.

75 SC 1994, c 22.

76 *Syncrude*, *supra* note 43 at para 3.

77 *Ibid* at para 45.

populations, but considered the potential broader impacts if this same sort of conduct were widespread.[78]

- Complexity: The design and operation of bird deterrent requires significant expertise, particularly given the size of the ponds (the Aurora pond was about the size of 640 football fields). Syncrude's employees did not have formal training, though the Court acknowledged they had some experience in the operation and maintenance of deterrence devices through their work experience.[79]

- Preventative system: At the relevant time, Syncrude's deterrence was primarily sound cannons and human effigies — which the Court accepted can be effective mechanisms for bird deterrence. However, the evidence indicated that Syncrude did not have enough cannons to achieve the appropriate density. Syncrude had cut back substantially on both the number of deterrents and the number of staff. Further, there was a late start in 2008, meaning Syncrude did not have sound cannons deployed on the perimeter before the bird landings.[80]

- Alternative solutions: The Court heard evidence from an expert that the system should have been operational in early spring (in other words, March, not late April) and that Syncrude could have undertaken appropriate training for its staff. The Court noted that "[o]il sands operators would be well advised to accept [the expert's] advice but I do not find that oil sands operators must meet these requirements to establish reasonable care."[81]

- Foreseeability: While the Court accepted that the incident resulted from a unique convergence of circumstances, it did not consider the incident to be unforeseeable. For example, the record snowfall that delayed deployment of certain deterrents was "rare but not completely unprecedented."[82] Overall, the Court was of the view that a reasonable person in Syncrude's position would have done more.[83]

The Court held that the due diligence defence was not made out and similarly rejected Syncrude's various other defences, including impossibility, Act of God (which also came down to foreseeability), abuse of process, officially induced error of law, and that any harm was *de minimis*.[84]

The decision risks the implication that perfect operation of the deterrent system is the standard. More accurately, it is this: due diligence systems must be administered in nimble and pragmatic fashion and show consistent efforts to be proactive. "Ticking the box" in a system is not enough, and that choices that accept some risk will sometimes have

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78 *Ibid* at paras 103–106.
79 *Ibid* at paras 107–109.
80 *Ibid* at paras 110–15.
81 *Ibid* at para 118.
82 *Ibid* at para 125.
83 *Ibid* at para 128.
84 *Ibid* at paras 129–66.

to bear consequences (for example, Syncrude's contractor's choice to set up deterrent systems later in the migration season than industry peers).

2. *R. v. Rio Tinto Alcan Inc.*

Rio Tinto Alcan Inc. (Rio Tinto) operates an aluminum smelter in Kitimat, British Columbia, which is powered by a hydroelectric generating station near the Kemano River.[85] Rio Tinto is responsible for operating the generating station. Not all power generated by the station is needed for the smelter, with any surplus directed into the BC Hydro grid. Water for the generating station comes from a nearby Nechako reservoir. The water leaves the generating station through a channel and flows into the Kemano River. The volume of water flowing through the generating station can be reduced if electrical generation needs to be lowered. This, in turn, reduces the water level of the Kemano River downstream from the generating station.[86]

The Kemano River is home to salmon and eulachon, the latter being an endangered species. Rio Tinto follows a protocol for the protection of eulachon (the Eulachon Protocol) in co-operation with the Haisla First Nation and the Department of Fisheries and Oceans (DFO).[87]

In March 2011 an employee of BC Hydro became aware of a serious problem with its connector to Rio Tinto's power lines. By April, the connector required immediate repairs and BC Hydro described its condition as an emergency, that is, serious risk of a cascading blackout potentially affecting industry and homes in a large part of the province. In order to facilitate the repairs, the power output of the generating station needed to be reduced.[88]

Between April 11 and 13, Rio Tinto and BC Hydro finalized arrangements for the connector replacement and for the associated "ramp down" of the generating station.[89] As part of these preparations, Rio Tinto spoke to DFO about its plans and trade-offs and was, verbatim, advised to "do what you have to do."[90] On April 14, over a three hour period, the replacement of the connector was completed by BC Hydro. During this time, as a result of the reduction in water volume flowing through the generating station, the water level of the Kemano River dropped by 40 centimetres in the span of 30 minutes. During the ramp down, salmon fry were observed stranded on the sides of the river and birds were seen feeding on the dead fish.[91]

Following the incident, Rio Tinto was charged under the *Fisheries Act* with (1) unlawfully lowering the water level of the Kemano River; and (2) unlawfully destroying fish by decreasing their water supply.[92]

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85 *R v Rio Tinto Alcan Inc*, 2017 BCCA 440 [*Rio Tinto* BCCA].
86 *Ibid* at paras 10–13.
87 *Ibid* at para 11.
88 *R v Rio Tinto Alcan Inc*, 2017 BCSC 1144 at paras 9–11 [*Rio Tinto* BCSC].
89 *Ibid* at para 12.
90 *Rio Tinto* BCCA, *supra* note 85 at para 16.
91 *Ibid* at paras 17–18.
92 *R v Rio Tinto Alcan Inc* (4 March 2015), Terrace 30203-1 at para 4 (BCPC).

In considering the due diligence defence, the trial judge acknowledged that BC Hydro's pressure to ramp down the generating station in order to repair the connector was a relevant consideration. However, he reviewed Rio Tinto's correspondence with BC Hydro and considered that Rio Tinto was very concerned about its obligations to the eulachon fishery at the time of the incident and that Rio Tinto prioritized eulachon over other fisheries, such as Kemano salmon (which faces different challenges than the more numerous, and further-swimming, Fraser River Nechako salmon in the area).[93]

The trial judge concluded that Rio Tinto opted to implement a rapid ramp down at high tide in order to minimize the exposure of eulachon eggs to air, but that Rio Tinto failed to take sufficient mitigation measures with respect to salmon fry.[94] In particular, the judge noted that Rio Tinto could have more fully *considered* conducting the ramp down at night (despite acknowledging evidence that this would have exacerbated security and equipment issues in an emergency situation) or *considered* placing personnel on the river to rescue any stranded fry (despite acknowledging evidence that this must be arranged weeks in advance).[95]

While the trial judge gave some weight to DFO's direction (or lack thereof) to Rio Tinto, he rejected Rio Tinto's argument that DFO provided authorization for the manner of ramp down, commenting "[t]his position might be tenable if some effort has been made to accommodate the salmon fishery. There were no efforts made whatsoever."[96] In short, Rio Tinto's being between the proverbial rock and a hard place led to conviction. The trial judge applied hindsight to second guess Rio Tinto's due diligence efforts and came to a result-oriented (that is, absolute liability type) conclusion. The due diligence defence failed because Rio Tinto could not show, with contemporaneous documents, that speculative options were impossible, despite having evidence that they *were* considered but deemed ill-advised.[97]

The judge also rejected Rio Tinto's defences of necessity and officially induced error of law, and held Rio Tinto guilty on both counts.[98] The trial judgment was upheld on appeal to the Supreme Court of British Columbia (except with respect to a $125,000 fine).[99] Leave to appeal to the Court of Appeal for British Columbia was refused.[100]

3. *R. v. Brookfield Gardens Inc.*

In *R. v. Brookfield Gardens Inc.*,[101] Brookfield Gardens Inc. (BG) was charged with unlawfully depositing or permitting the deposit of agricultural runoff containing pesticides in water frequented by fish. BG had sprayed pesticides on its crops a few days before a heavy rain event occurred. After a fish kill, samples of the water adjacent to BG's field as

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93 *Ibid* at paras 98–105.
94 *Ibid* at paras 119–22.
95 *Ibid* at paras 123–32.
96 *Ibid* at para 143.
97 *Ibid* at paras 144–49.
98 *Ibid* at paras 150–76.
99 *Rio Tinto* BCSC, *supra* note 88.
100 *Rio Tinto* BCCA, *supra* note 85.
101 2015 CarswellPEI 83 (PC), rev'd 2017 PESC 5, aff'd 2018 PECA 2.

well as samples from two washouts leading to the river revealed large concentrations of the pesticides which had been previously sprayed on the field.[102]

BG successfully established a due diligence defence at trial.[103] It was reversed on appeal, however.[104] The evidence included: (1) two trips in a truck around the field post-spraying, albeit without exiting the truck; (2) viewing the weather forecast prior to spraying the field; (3) measuring the distance from the river to the edge of the field to ensure compliance with buffer regulations; (4) planting to prevent destruction of the rows in the case of a rain event; and (5) planting sorghum grass to act as a buffer.[105] The appeal judge described this evidence as "scant to say the least," based on expert evidence that the field lacked conservation practices, plus unfavourable comparisons with BG's practices in other fields to avoid agricultural runoff.[106]

The trial and appeal decisions arguably simply reflect different appreciations of hindsight analysis. While the appeal reasons focus on evidence that more measures could have been undertaken, the trial reasons explicitly grapple with whether the efforts taken were reasonable pre-event and therefore enough to establish a due diligence defence, noting that the standard is not perfection.

4. *R. v. University of British Columbia*

In *R. v. University of British Columbia*,[107] CIMCO Refrigeration (CIMCO) attended the University of British Columbia (UBC) Thunderbird Arena in September 2014 to repair the refrigeration system, under contract with UBC. While working on the repairs, the CIMCO mechanic discharged an ammonia-containing solution down a storm sewer outside the arena, which drained into a culvert downstream, which in turn drained into Booming Grounds Creek and then the Fraser River. Environment Canada investigators found approximately 70 dead fish in Booming Grounds Creek. CIMCO pleaded guilty to depositing a deleterious substance into the storm sewer under conditions where the substance may enter waters frequented by fish.[108]

The Crown also brought charges against UBC, alleging that UBC permitted and participated in the discharge of the ammonia solution into the storm sewer.[109]

At trial, UBC relied on the due diligence defence, and in particular that it should not be held responsible for its failure to have a safe ammonia disposal system because it contracted out this responsibility to CIMCO.[110] UBC said that CIMCO was qualified in the management and disposal of ammonia, and it relied upon CIMCO to fulfil its responsibilities in a manner that complied with environmental regulations. UBC also relied

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102 *Ibid* at paras 1, 6–9, 67.
103 *Ibid* at paras 112–14.
104 *R v Brookfield Gardens Inc*, 2017 PESC 5.
105 *Ibid* at para 67.
106 *Ibid*.
107 2020 BCSC 1126 [*UBC* BCSC].
108 *R v The University of British Columbia* (26 November 2018), Richmond 60501-1 (BCPC) at paras 1–6.
109 *Ibid* at para 4.
110 *Ibid* at para 5.

on its policies and procedures dealing with ammonia vapour or gas at the arena. Ammonia is a dangerous substance, in both gaseous and liquid solution form. It is well understood that the nature of the work has led to workplace fatalities in the past. Technicians are therefore carefully trained and heavily regulated.[111]

There was no dispute that UBC's policies and procedures in place at the arena appropriately identified ammonia as toxic and emphasized the need to minimize exposure. There was also no dispute that the *arena's* systems ignored the potential for ammonia to discharge into the stormwater system.[112]

While the Court accepted that part of UBC's preventative systems were delegating the disposal of ammonia to its expert contractor, this was not enough to avoid liability. The Court held that the potential use of the storm sewer to discharge the ammonia solution was a matter that was entirely within the knowledge and under the control of UBC.[113] The Chief Engineer for Thunderbird Arena was present when the discharge occurred and had barred the contractor from using the sanitary drain inside the arena while expressly permitting the discharge into a storm sewer. The Chief Engineer had not, however, been trained in storm water disposal and protection methods (or otherwise). A storm drain environmental policy existed, but had not been rolled out to the arena.[114]

Conversely, UBC argued that it was not foreseeable that its specialized contractor would fail to discharge its obligations to both know and follow the law concerning ammonia disposal.[115] This argument was also rejected — with the judge noting that the evidence established that UBC was aware of the toxicity of ammonia, the risks associated with ammonia, and the potential for pollution of its stormwater systems.[116]

UBC was convicted at trial. UBC appealed on several bases, including the finding that it had failed to make out the due diligence defence.[117] An appeal to the British Columbia Supreme Court was dismissed. The judge found it remarkable that the pollution discharge prevention policy was not extended to the arena, given that a recent chlorine leak from UBC's pool had killed hundreds of fish. The judge also emphasized that the individuals "responsible for operations at the arena admitted they had no knowledge or training in pollution prevention as it related to storm sewers."[118] Finally, UBC was unsuccessful in seeking leave to the Court of Appeal for British Columbia.[119]

C. CONFUSION: *R. V. MOSSMAN AND MECKERT* AND *R. V. GREATER SUDBURY (CITY)*

The decisions above highlight the varying ways that, with hindsight, courts may determine that operators could have done more and were therefore not duly diligent:

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111 *Ibid* at paras 49, 56.
112 *Ibid* at paras 49–51.
113 *Ibid* at paras 54, 60.
114 *Ibid* at paras 60–62, 66–68.
115 *Ibid* at para 64.
116 *Ibid* at paras 65–69.
117 *UBC* BCSC, *supra* note 107 at para 91.
118 *Ibid* at para 162.
119 *R v University of British Columbia*, 2021 BCCA 188.

Syncrude illustrates the hazard of not proactively adjusting systems (in response to changing weather as well as industry practices), *UBC* shows the risk of relying on external experts when internal systems might have been effective if deployed more extensively, and the *Rio Tinto* decision shows the need for systems to robustly document choices between competing risks.

Yet, while operators have likely taken measures to address the types of concerns that led to convictions in the aforementioned cases, courts are also likely to find new ways that defendants failed to take every reasonable step available to them. Two more recent cases below — *R. v. Mossman and Meckert*[120] and *R. v. Greater Sudbury (City)* [121] — hint at where, and how much further, hindsight-based analysis in assessing due diligence may go.

1. *R. v. Mossman and Meckert*

In *Mossman*,[122] the defendants participated in the operation of the Yellow Giant Mine site, a gold mine owned by Banks Island Gold (BIG). The defendant, Mr. Mossman, was the President and Chief Operating Officer of BIG. Mr. Meckert was not an officer but the Chief Geologist and involved in the day-to-day operations of the mine. BIG obtained the mineral rights to the Yellow Giant Mine site in British Columbia and put the site into commercial production on 1 January 2015.[123] BIG obtained the requisite permits required under the provincial *Mines Act*.[124]

During the course of operating the mine, a number of alleged environmental offences were identified by regulatory authorities: (1) discharge of mine waste into the environment; (2) carrying on unauthorized works in and about a stream; (3) discharging substances above-permitted amounts; and (4) failing to report environmental spills and dumping.[125] "Anonymous" reporting to the authorities and subsequent investigations led to charges under the *Environmental Management Act*, *Fisheries Act*, and former *Water Act* in force at the time of the alleged offences (now the *Water Sustainability Act*).[126]

At trial,[127] the Court acquitted Meckert on all counts but convicted Mossman on 13 of 23 counts. A key finding supporting Mossman's convictions was that, unlike Meckert, he "was unquestionably the key operating mind of BIG on the ground at the Yellow Giant Mine site."[128] The Court determined that Mossman was, in his role as President and Chief Operating Officer responsible for ensuring compliance with the terms of the permits (which

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120 2023 BCPC 157 [*Mossman*].
121 2023 SCC 28 [*Greater Sudbury*].
122 *Mossman*, *supra* note 120.
123 *Ibid* at paras 31–34.
124 RSBC 1996, c 293.
125 *Mossman*, *supra* note 120 at para 6.
126 *Environmental Management Act*, *supra* note 59; *Fisheries Act*, *supra* note 23, c F-14; *Water Act*, RSBC 1996, c 483.
127 The original 2018 trial decision was appealed in *R v Banks Island Gold Inc*, 2020 BCSC 167, and a retrial was ordered. Subsequent appeals to the Court of Appeal for British Columbia, (*R v Mossman*, 2020 BCCA 299), and the Supreme Court of Canada, (*R v Mossman and Meckert*, 2021 CanLII 37631), were unsuccessful. At retrial, *R v Mossman and Meckert*, 2023 BCPC 157, Meckert was found not guilty on all counts and Mossman was convicted on 13 counts. This decision was appealed in *R v Mossman*, 2024 BCSC 443 and was reversed in part.
128 *Mossman*, *supra* note 120 at para 36.

he himself had applied for) and accepted the duty and responsibility to ensure the mine was operated "safely and with due regard for the environment."[129] This required Mossman to cease operations at the mine until the exceedances were resolved. Part of BIG's problem was that exceedances were not identified because the testing lab stopped testing because BIG stopped paying. Nonpayment, in turn, was attributed to a disgruntled former employee, and the Court accepted that . Mossman had knowledge of neither the nonpayment nor the end of routine effluent testing.

While the defendants asserted a technical defence, not a pure due diligence defence, the Court's comments are nevertheless applicable (and potentially concerning) with respect to the due diligence defence. The Court convicted Mossman in part due to the lack of an internal "fool proof system" to ensure monitoring and compliance efforts were carried out in accordance with BIG's permits.[130] The Court was clear that the Crown did not need to prove that Mossman "directed, permitted, or authorized any single discharge containing metal levels over the prescribed limits as particularized in each relevant charge," but only that the "failure to have a fool proof system in place led to the exceedances."[131]

While the existence of a robust compliance and monitoring system may be the heart of a successful due diligence defence, the Court in *Mossman* appears to have elevated this requirement to needing something more. This language suggests that having a monitoring system in place that may be subject to error from time to time — even where the project proponent takes reasonable steps to ensure monitoring and compliance efforts are discharged — may not be sufficient to shield against liability. In other words, it appears to be approaching a standard closer to perfection, as Justice Newbury warned in *Imperial Oil*.

The Court's comments in *Mossman* are particularly stark given the canvassing of the due diligence case law near the outset of the judgment. Here, the Court notes that the due diligence defence traditionally requires that "all reasonable steps" be taken to avoid the harm caused[132] and that "reasonableness" is evaluated from by considering what a reasonable person would do in similar circumstances.[133] On its face, the traditional requirement to take all *reasonable* steps seems to be plainly a lower standard than requiring the implementation of a "fool proof system" (at least in some cases).

2. *R. v. Greater Sudbury (City)*

Greater Sudbury dealt with the place of contractors and subcontractors within a due diligence defence.[134] While repairing a downtown watermain, an employee of Interpaving Limited struck and killed a pedestrian. The City of Greater Sudbury (Greater Sudbury) conceded that it owned the construction project, that a fence ought to have separated the public and the construction site, and that it sent its quality control inspectors to the project site to oversee Interpaving's contract compliance. Greater Sudbury denied, however, that it

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[129] *Ibid* at para 111.
[130] *Ibid* at para 104.
[131] *Ibid*.
[132] *Ibid* at paras 10, 12, citing *Lévis v Tétreault*, *supra* note 55 at paras 13–16.
[133] *Mossman*, *ibid* at para 12, citing *Lévis v Tétreault*, *supra* note 55 at para 15.
[134] *Greater Sudbury*, *supra* note 121.

was an "employer" under the Ontario *Occupational Health and Safety Act*[135] as it had delegated control over the repair work to Interpaving Limited.[136]

The majority of the Supreme Court of Canada held that Greater Sudbury's lack of control and oversight were not relevant to whether the Greater Subury attracted "employer" obligations. Rather, it was by virtue of hiring the general contractor and quality control inspectors that Greater Sudbury was an employer and thus obligated to ensure compliance with the *OHSA* regulations.[137] This decision makes understanding due diligence increasingly important because it limits the ability to rely on contracted expertise to protect against liability. The issue of whether Greater Sudbury had established a due diligence defence was remitted to provincial court for determination.[138]

The majority commented that, from a policy perspective, shifting the burden to the employer to establish a due diligence defence rather than the contractor should incentivize the employer to take the steps within their control to achieve workplace safety and prevent future harm.[139] Acts such as supervision and inspection promote this purpose. Control is an implicit consideration when assessing "what could have been done" and the latter remains limited to measures within the workplace actor's control.[140] The majority suggested that appropriate due diligence may include pre-screening a constructor before hiring to ensure their expertise, and reviewing their compliance record with the *OHSA*.

However, *Greater Sudbury* leaves owners with an unclear understanding of their due diligence obligations. Although the majority highlighted the purpose of bringing owners under the umbrella of liability should incentivize owners to ensure workplace safety, it can be difficult to determine what is within an owner's control without the benefit of hindsight when the owner lacks expertise.[141] The decision creates a new layer of uncertainty that operators face, as contracting practices come under scrutiny.

D. MISTAKE OF FACT: *R. V. CORPORATION (CITY OF THUNDER BAY)*, *R. V. GIBSON ENERGY ULC*, AND *R. V. MV MARATHASSA*

The mistake of fact defence, unlike its cousin the due diligence defence, does not appear to be as susceptible to the same type of hindsight-based analysis. Mistake of fact thus appears to have been successful in some situations where due diligence alone may have failed, because the mistake of fact analysis courts engage in typically avoids hypothesizing

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135 RSO 1990, c. O.1 [*OHSA*].

136 *Greater Sudbury*, *supra* note 132 at paras 1–2.

137 *Ibid* at para 31.

138 *Ibid* at para 6.

139 *Ibid* at para 49.

140 *Ibid* at para 56.

141 See e.g. *R v Bondfield Construction Company Limited*, 2022 ONCA 302. The general contractor of the project (Bondfield) was charged with failing to ensure compliance with certain *OHSA* regulations. Bondfield had subcontracted JMR Electric Ltd. to undertake electrical installations at the project. JMR purchased two emergency generators from Toromont Industries Ltd. When commissioning the generators, a Toromont service technician inadvertently opened the wrong switchgear cabinet (which was energized) and the worker's paintbrush made contact with live electricity, burning the technician in an arc flash. Despite Bondfield contracting out the job because it did not have a master electrician licence the Court found it failed to disconnect the electrical equipment, as well as lock and tag the cabinet. The issue of whether Bondfield conducted proper due diligence was remitted for redetermination.

about whether more steps could have been taken. It may be easier for a decision-maker to step into an operator's shoes to determine whether an event was foreseeable notwithstanding a reasonable but mistaken belief, than to exclude a litany of potential steps that were available at the time the offence occurred.

Yet this divergence risks unintended consequences. If it becomes easier to argue that your beliefs were reasonably held but mistaken than it is to show that your prevention systems reflected reasonable care, operators may be discouraged from investing in preventative measures and incented to turn a blind eye to on the ground conditions. While an operator cannot be wilfully blind when relying on "mistake of fact," rolling the dice on succeeding on it may become the preferred choice.

1. *R. v. Corporation (City of Thunder Bay)*

In *R. v. Corporation (City of Thunder Bay)*,[142] the City of Thunder Bay (Thunder Bay) was charged with taking water from a river in such a manner that left a number of smelt either dead or dying on dry land and otherwise landlocked in small pools and puddles. Thunder Bay argued that it had "relied on a mistaken set of facts that had they been true the event would not have occurred."[143] Thunder Bay maintained that this was a "once only" event, as no similar event had been reported since the dam had begun operating in 1984 — there had always been a continuous flow of water sufficient to not interfere with downstream use.[144] The Crown argued that Thunder Bay should have foreseen the event given unusual spring freshet and dry conditions.[145]

The Court found that Thunder Bay had engaged in discussions with the Ministry of Natural Resources and other interested parties in an attempt to quantify the minimum flow which would be sufficient to not interfere with downstream use. However, there was no permit provision and Thunder Bay did not receive any information about the required flow.[146] The Court was accordingly satisfied that "the City *did not know or reasonably could have known* that the incident would occur based on their belief that the dam had operated successfully since it opened with no reported incidents of this nature and that the minimal flow maintained by seepage was adequate to maintain a flow that would not interfere with the downstream use."[147] The Court also found that Thunder Bay was "alive to the anticipated dry spring conditions and acted *reasonably* in making inquires as to minimal flow levels thereby exercising due diligence."[148] On the grounds that *both* the mistake of fact and due diligence defences were established, Thunder Bay was acquitted.

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142 2011 ONCJ 852.
143 *Ibid* at para 26.
144 *Ibid*.
145 *Ibid* at para 27.
146 *Ibid* at paras 14, 34.
147 *Ibid* at para 40 [emphasis added].
148 *Ibid* [emphasis added].

2. *R. v. Gibson Energy ULC*

The defence of mistake of fact was unsuccessfully raised in *R. v. Gibson Energy ULC*,[149] however, concerning the failure to take reasonable care in relation to a treated water spill. The reasons apply a very due diligence-like set of considerations. Chlorinated water leaked from Gibson Energy ULC's (Gibson Energy) fire suppression system into a retention pond and then into a creek connected to the North Saskatchewan River.

Gibson Energy was charged with permitting the deposit of a deleterious substance in water frequented by fish, and for failing to take protective measures to address the effects *after* the spill. The defence of mistake of fact was raised on the latter charge. An Environment Canada enforcement officer advised Gibson Energy that the level of chlorine from the leak was slightly lower than the level deleterious to fish. The threshold identified by the enforcement officer was "fundamentally wrong," however, and the level of chlorine deleterious to fish was actually much lower.[150]

The judge found that in these circumstances Gibson Energy was required to make an active inquiry into whether the grounds for their belief of the chlorine threshold was reasonable. Gibson Energy knew the water in the fire suppression system was chlorinated and line breaks and valve malfunctions frequently occurred. Despite Gibson Energy's knowledge of the past leaks of toxic substances from their systems, Gibson Energy did not have policies or an emergency plan in place to deal with chlorine releases.[151] The judge held mistake of fact was not available to Gibson Energy, since

> [T]hey knew or clearly should have had sufficient knowledge themselves about chlorinated, potable water and its toxicity, before they had contact with Environment Canada. Their efforts to mitigate the effects of the water escaping their property ought to have already begun.[152]

Gibson Energy had not made any reasonable inquiries about the toxicity levels of chlorinated water that would establish a reasonable belief that the enforcement officer's report was an acceptable threshold.[153] For these reasons, the defence of mistake of fact could not be relied on.

3. *R. v. MV Marathassa*

In *R. v. MV Marathassa*, the accused was acquitted by the defence of mistake of fact for discharging fuel oil harmful to migratory birds from its motor vessel, the Marathassa, into waters around English Bay.[154]

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149 2019 ABPC 191.
150 *Ibid* at para 89.
151 *Ibid* at paras 60–69.
152 *Ibid* at para 100.
153 *Ibid* at para 101.
154 *Supra* note 53.

While anchored, the vessel was observed to have a ring of fuel surrounding its hull.[155] The spill was caused by two shipbuilder defects relating to the alarms and a valve.[156] The fuel alarm sensors had been improperly installed which created small holes in the fuel tank resulting in a leak into a pipe passage compartment,[157] and debris stuck inside a valve created an incomplete seal where fuel could leak through.[158] When the crew had washed out one of the cargo holds, water from the cleaning exercise was discharged overboard and the fuel oil in the pipe passage compartment was suctioned through the faulty valve into the overbroad discharge pipe causing the spill.[159]

Under the mistake of fact defence, the accused must establish that they did not know or could not have known of the hazard. On that basis the Marathassa argued that it reasonably mistakenly believed that the vessel was built to international shipping standards and was free of any defects which would cause the discharge of fuel oil, given extensive regulatory requirements and the external auditing within the shipbuilding process. The ship was constructed in Japan, known as one of the highest ranking shipbuilding communities in the world.[160]

The alarms were tested regularly, the defect was not visible, tightening the valve would not have closed the gap created by the debris, and the valve was only dismantled upon knowledge of the spill path.[161] The Marathassa also had extensive pollution prevention systems and training which covered pollution prevention for fuel oil discharges. The judge found the Marathassa's belief that the alarms were properly installed and the valve was free of debris were reasonable. As those hazards were therefore not foreseeable to the Marathassa, the mistake of fact defence was made out.[162] The judge went further, and also ruled that reasonable care had been taken and also found a due diligence defence.[163] The reasons supporting the mistake of fact defence and the due diligence defence overlapped on the high standards of shipbuilding and the thorough implementation of the pollution prevention safety plan.

V. CONCLUSIONS ON CASE LAW

As the foregoing shows, demonstrating "reasonable care" as part of a due diligence defence is marked with decisions that second guess systems with the benefit of hindsight, which has made it increasingly difficult to establish the defence. The tendency to do so from time to time is inevitable, but our concern is the establishment of narrowing trend, that may lead to perverse consequences that, animated by a spirit of deterring bad actors, undermine the social benefit and policy objectives of having well-functioning systems serve as a defence.

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155 *Ibid* at paras 1, 49.
156 *Ibid* at paras 8, 37.
157 *Ibid* at para 40.
158 *Ibid* at paras 42, 49.
159 *Ibid* at para 43.
160 *Ibid* at paras 80, 87.
161 *Ibid* at paras 265–66.
162 *Ibid* at paras 7–12.
163 *Ibid* at paras 10, 281–83.

The bar to successfully invoke the due diligence defence has been rising for some time — for example "all reasonable steps" risks becoming "could something more have been done." To be clear, "standard of perfection" is absolute liability in practice, where evidence of the offence is proof the defence of due diligence cannot succeed. To be real, courts must do more than pay lip service to the idea that defendants need not make superhuman efforts. The temptation to punish polluters is strong, but for it to exist courts must accept that the obligation to imagine an additional preventative technique with the benefit of hindsight exceeds a standard of reasonable care against foreseeable risks. These same cases then go on to seemingly require defendants to have implemented all possible safeguards and to have possessed perfect foresight.

As the due diligence defence becomes more challenging to invoke, strict liability will become increasingly equivalent to absolute liability. This trend should be concerning for several reasons.

First, it is inconsistent with the very reason the due diligence defence was considered a necessary development in the law in *Sault Ste. Marie*. As canvassed at the outset of this article, there was a real need for a middle ground for mental fault between absolute liability and subjective *mens rea*. This need persists today, with greater urgency given the proliferation of regulatory offences and enhanced enforcement. Justice Dickson aptly noted in *Sault Ste. Marie* that absolute liability provides a poor incentive for prevention[164] — why bother with taking steps to reduce risk if you know you will be convicted in any event?

While courts appear to be animated by a genuine desire to promote responsible business practices, the unintended consequences of these decisions may be the opposite, turning environmental penalties into a cost of doing business. Indeed, most environmental charges are resolved by pleas and (often hefty) fines. Seeing the regulatory environment, defendants are less willing to go to trial, even where they may have once had a good foundation for a due diligence defence.

Mistake of fact outcomes add a useful perspective here. That analysis has better allowed "in the moment" foreseeability to support some successful defences.[165] That is, because the mental framework is less susceptible to hindsight analysis, it better reflects the *Sault Ste. Marie* policy objectives. That having been said, if showing that a system was in place can diminish the prospect of a successful defence, then defence strategies may shift to showing that risks were not identified. In turn, that may lead to — overtly or not — avoiding systems that document risks, so that if they materialize they can be claimed not to be foreseeable at the time of an offence. We expect all parties would agree that the better outcome would be *rewarding* proactively ferreting out risks, by allowing strong efforts that fall short to nonetheless escape conviction. In short, making reasonable care very difficult to show is counterproductive.

The case law illustrates that establishing a due diligence defence will depend on more than whether typical risks were assessed and planned for. Both the performance of those measures in real time, and whether identifying potential risks was sufficiently nimble will

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[164] *Sault Ste Marie*, *supra* note 1 at 1311–12.
[165] *Marathassa*, *supra* note 53.

be at issue. It is not enough to "set it and forget it," and we therefore suggest having counsel (whether internal or external) involved in planning early and often, to help evaluate where decision-making may be second guessed down the road. What may be "reasonable" planning for technical experts may not be the same as what a judge thinks after an event, and hence not what the law requires. We accordingly suggest considering the following best practices to limit the risk of environmental incidents.

VI. PRACTICES FOR BUSINESSES

As above, a major policy benefit of establishing a strict liability regime, as opposed to an absolute one, is the instillation of a sense of control and accountability for managers and corporations through the mechanisms of due diligence. Not only do they have the obligation to exercise reasonable care in order to comply ("doing" due diligence), but they can also avoid prosecution by relying on its defence ("showing" due diligence). Businesses may hesitate to invest significant resources in managing certain risks if an unfortunate event beyond their control will undoubtedly result in a hefty fine. In other words, if efforts will not (or are unlikely to) affect liability, then there is less incentive to invest in prevention.

A. "DOING" DUE DILIGENCE

Below is a reminder of the best practices corporations can adopt to ensure environmental compliance.

1. UNDERSTANDING APPLICABLE LAWS

Understanding the regulatory framework a business operates in is a necessary exercise that will inform the areas of focus and the level of diligence required to be compliant. In addition to federal, provincial, and municipal laws, authorizations often prescribe detailed thresholds and targets. Using professionals such as external legal counsel and environmental engineering firms can assist in determining the extent of environmental obligations — from both technical and "on the ground" perspectives. Organizing, retaining, and updating those memos is healthy and important.

2. CRITICAL RISK ASSESSMENTS

Criticial Risk Assessments (CRAs) may be time consuming and difficult to organize, but are an excellent tool to evaluate — and document the assessment of — potential exposure, establish priorities, mitigation measures, and future monitoring. From the perspective of establishing a due diligence defence, CRAs illustrate the thought process and efforts put into the evaluation of environmental harm and can be used to show what events were foreseeable at a certain point in time. In addition, these exercises use factors and data points that are similar to the ones developed by case law such as gravity of harm, likelihood, alternatives, and controls. In the event of prosecution, such determinations could assist the court when assessing the accused's behaviour.

Despite logistical challenges, it is important to support the exercise by: (1) having all of the right people participate (legal, environmental, governance, ethics and integrity, finance, risk, and so on); and (2) including concise yet comprehensive language in the CRA

evidencing the rationales and conclusions. Again, each participant and the larger environmental management system should carefully organize, retain, and update the CRAs.

3. COMPLIANCE PROGRAMS AND AUDITS

Once the above analyses of the law and risks are completed and documented, a company can establish its specific compliance program. Every program is unique but should at a minimum clearly include standard operating procedures that aim at minimizing environmental harm, like handing hazardous materials, waste disposal, emissions controls, and so on. Reporting requirements and permit renewals should be built into a schedule that managers have responsibility over. The same managers should run regular checks, inspections, and audits to assess compliance with the program and ensure that all equipment and systems run as anticipated. Finally, environmental compliance is an iterative process that requires continuous improvement considering lessons learned, changes in regulations, or best practices. Maintaining accurate records of all the foregoing can be a challenge but it is a must and can make the difference between a pass after a few exchanges with the regulators, and a fine after a lengthy and expensive court process.

4. ENVIRONMENTAL COMPLIANCE TRAINING PROGRAMS

A major component of a compliance program consists of providing environmental compliance training to employees. It is essential for ensuring awareness and understanding of environmental regulations and corporate policies. Training programs may cover topics such as regulatory requirements, waste management, pollution prevention, emergency response procedures, and best practices for environmental stewardship. By investing in employee training, corporations can enhance compliance awareness and foster a culture of environmental responsibility. Keeping, organizing, and updating copies of the training materials, dates, and attendance is fundamental to leading a full due diligence defence.

5. INCIDENT MANAGEMENT PROCEDURES AND EMERGENCY PREPAREDNESS

Due diligence also requires an operator to develop and implement emergency preparedness and response plans to effectively address environmental incidents that may occur during business operations. Ensure employees are trained in these procedures to handle events such as spills, releases, or accidents, and the latest contact information of the relevant regulators is readily available. Timely and effective reporting of the incident to the relevant authorities often sets the basis for the laying down of charges or not. The incident report should include all relevant facts, the timeline as well as the preliminary assessment of the harm, and ongoing and upcoming measures to minimize the impacts. Documenting the situation as it unfolds is not only a legal requirement but can also be used as a shield in the event of prosecution.

6. DIRECTORS AND OFFICERS OVERSIGHT AND INTERNAL REPORTING

Environmental compliance managers play a pivotal role for corporations in the implementation of their due diligence processes, being the designers and internal auditors of environmental compliance. It is however insufficient to leave all these responsibilities

on managers alone. Environmental statutes impose obligations on directors and officers and contemplate personal liability if they fail to ensure compliance with environmental laws. At a minimum, directors and officers must approve the policies and procedures that ensure compliance with applicable regulations as well as the mechanisms that enforce them. Regular supervision by and internal reporting to the board on those topics has been required by the courts to show the duty of care was fulfilled. Keep a copy of those resolutions, minutes, and emails.

B. "SHOWING" DUE DILIGENCE

One could argue that the evidence is just as important as the substance when it comes to demonstrating due diligence in the environmental context. Robust record keeping forms an integral part of a strong due diligence defence which then facilitates exchanges and communication with the authorities.

1. ROBUST RECORDS

When determining which records to keep and organize we should bear in mind that we wish to show all reasonable precautions were taken to minimize harm to the environment. Anything useful in illustrating remediation efforts, pollution control measures, or sound waste management practices could be a starting point. As noted, the types of documents described above should be kept in a comprehensive and organized manner. Considering that inspectors or regulators are the main recipients of these records, it might be useful to organize them by media (for example by air, water, soil, or waste), areas (landfill, facility, or creeks) and incidents. The objective being to simplify the retrieval of data following a request for review and build a due diligence defence in the event of prosecution.

2. EFFECTIVE COMMUNICATION

Readily available and accurate records make timely reporting much easier and show credibility. During an incident, early and transparent engagement is key with the relevant authorities but also other stakeholders like the community, Indigenous peoples, neighbours, or employees.

C. CHALLENGES FOR CORPORATIONS

Navigating the environmental compliance framework is challenging and requires considerable resources for companies. Due diligence systems are expensive, especially when a business is multifaceted, crosses over many fields (such as port operations, transportation of hazardous waste, landfills, and air emissions), and requires numerous permits to operate. Large corporations with multiple sites across various jurisdictions have to follow different sets of rules to ensure compliance and adds complexity to a centralized record-keeping system.

Technological progress and continuous improvement obligations require those systems to be routinely updated and tested adding to the costs. As a company goes through changes over time, record keeping methods shift, become outdated, or are simply abandoned. Useful historical data is therefore lost or made unusable and institutional knowledge is destroyed.

Such loss is further amplified when there is a high turnover in the workforce which is common for remote natural resources sites. This results in organizations sometimes scrambling to keep up with their environmental compliance programs which in turn puts their businesses at risk.