

# **The Decline and Fall of the Due Diligence Defence?**

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June 13, 2024



# Introduction

## The Due Diligence Defence

- Conviction of an environmental offence is a serious matter
- Due diligence is a first line of defence
- Modern origin in *R v. Sault Ste. Marie*
- Is the defence eroding?
- Recent decisions create a high bar for hindsight
- Risk of abandoning policy justifications for *Sault Ste. Marie* counterproductive to developing preventative systems



# Genesis of the Defence

## Regulatory Offences & Strict Liability

- Regulatory offences were historically considered absolute liability offences
- Absolute liability regime was critiqued
- *R v. Sault Ste. Marie* addressed the *mens rea* standard
- The decision recognized three categories of offences:
  - *Mens rea* offences
  - Strict liability offences
  - Absolute liability offences



# Genesis of the Defence

## Codification and Development

- Legislatures began codifying the due diligence defence
- SSM bifurcated defence into “mistaken set of facts” & “all reasonable steps”
- Objective test used to establish “reasonable care”
- Directors and officers may be personally prosecuted
- Standard factors identified in caselaw now applied
- Other defences to strict liability



# Erosion of the Defence

## A Standard of Perfection

- The early 2000s signalled a shift in foreseeability
- *Imperial Oil* used an additive that was considered not harmful
- Due diligence defence failed; *Imperial Oil* convicted
- *MacMillan Bloedel* deposited deleterious substance into water
- Due diligence defence initially failed; overturned on appeal



# Erosion of the Defence

## Modern Decline

- The test for establishing reasonable care has been refined
- Defendants face challenges in establishing the defence
- Efforts must be nimble, pragmatic, and consistent (*Syncrude*)
- Even speculative options must be fully considered/documentated (*Rio Tinto*)
- Delegation of responsibility may not delegate liability (*UBC*)



# New Uncertainties

## Potential for Further Evolution

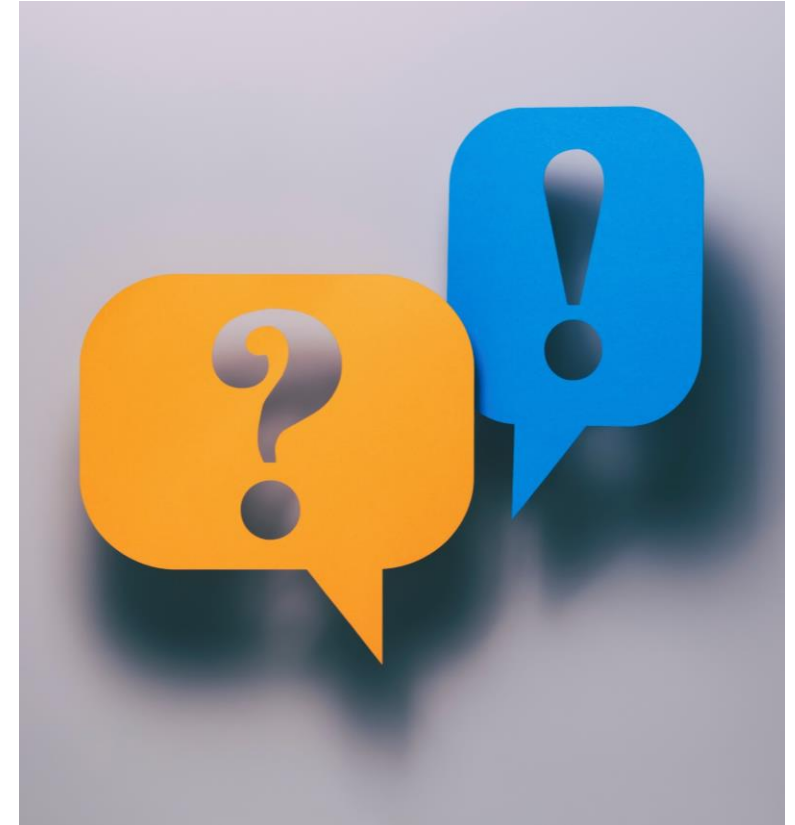
- *R v. Mossman and Meckert*
  - How robust must monitoring and compliance be?
- *R v. Greater Sudbury (City)*
  - Is there a level of control that is required?



# Mistake of Fact

## The Contrast

- The accused did not and could not know
- Honest belief in a set of facts
- Assessed on an objective standard
- But reasonable inquires must be made to confirm belief
- Establishing the defence is fact specific





# Business Practices

## “Doing” Due Diligence

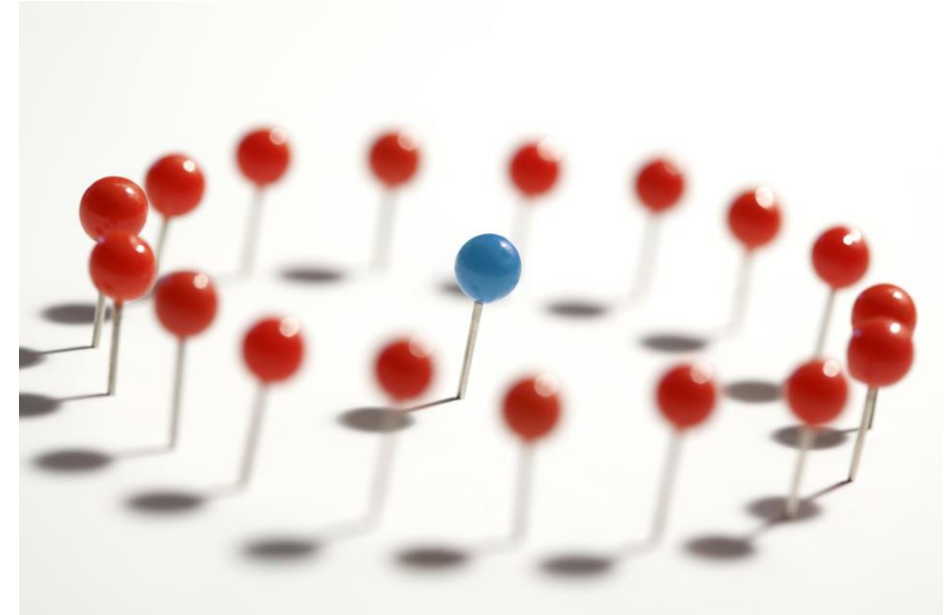
- Understand the applicable regulatory frameworks
- Conduct critical risk assessments
- Establish compliance programs
- Develop and implement emergency preparedness
- Role of directors and officers



# Business Practices

## “Showing” Due Diligence

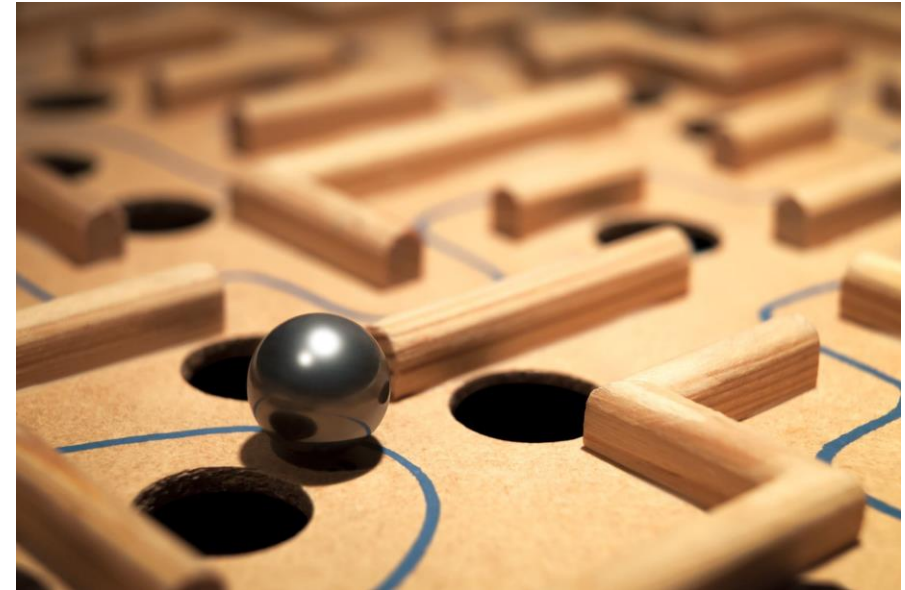
- Evidence is just as important as substance
- Records should be comprehensive and organized
- Objective is to simplify the retrieval of data
- Retain documents involved in “doing” due diligence



# Business Practices

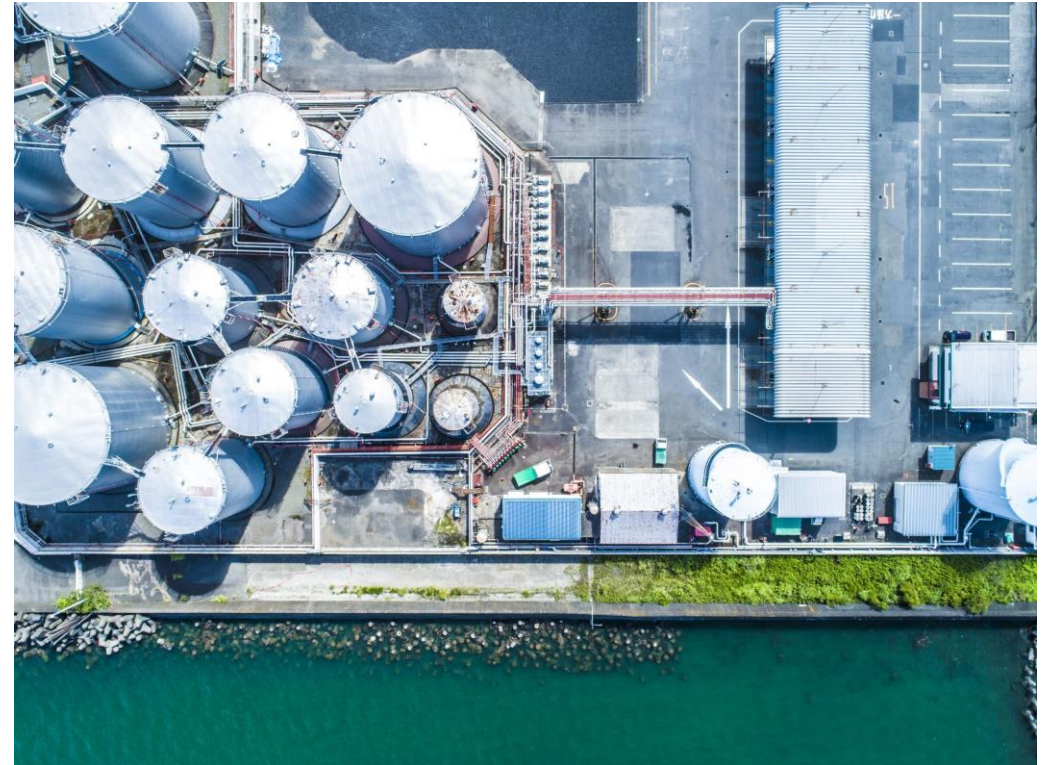
## Challenges for Corporations

- Due diligence systems can be expensive and complex
- Multi-faceted businesses require numerous permits
- Rules may vary across jurisdictions
- Technological progress and improvement obligations
- Loss of historical data



# Conclusion

- Successfully invoking the due diligence defence is getting harder
- The benefit of hindsight
- Trending away from the middle ground
- Promotion of responsible business practices
- Involvement of counsel





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