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The Defence of Due Diligence

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When can a practitioner defend a breach of standards on the basis that it was not done on purpose? Often this defence arises where a member's support staff makes the error. The due diligence defence was explored in the Federal Court of Appeal decision in *Office of Superintendant of Bankruptcy v. MacLeod*, 2011 FCA 4

The Office of the Superintendent of Bankruptcy contended that the tribunal (referred to as the Delegate) hearing the matter had made an error by accepting the defence of due diligence by the Trustee in Bankruptcy ("Trustee") with respect to certain violations of professional conduct provisions in the *Bankruptcy and Insolvency Act*, its rules and directives. The transactions were described as follows:

> With respect to [a number of banking infractions where money was not handled and recorded properly, although none disappeared], the Delegate found that the respondents had failed to fully comply with the relevant statutory and regulatory provisions. However, having accepted the respondents' submissions that the estates at issue represented only a small fraction of their overall business and that the infractions were the result of administrative errors which had caused no prejudice to the estates or the creditors, the Delegate found that a defence of due diligence had been established.

The Federal Court of Appeal held that the Trustee had failed to prove that he exercised due diligence to avoid a finding of misconduct.

The Federal Court of Appeal accepted that the defence of due diligence is available for allegations of professional misconduct when the legislative or regulatory provision at issue shows that an element of reasonable care is involved. Usually, wording such as "due care" or "reasonably ought to know" illustrates that a defence of due diligence is available to counter an allegation of professional misconduct.

The Federal Court of Appeal also noted that *R. v. Sault Ste. Marie (City),* [1978] 2 S.C.R. 1299 is the leading authority on the defence of due diligence in respect of offences. In that decision, the Supreme Court of Canada held that the defence of due diligence will be available if the "accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event".

For example, in the employment context, this means that a professional will not escape liability on the sole basis that the alleged infraction was committed by a staff member, unless he or she can demonstrate that: (a) the act took place without his or her direction or approval, and that (b) he or she exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

As a result, the defence of due diligence sets a heavy burden on the member. The member must demonstrate on a balance of probabilities that he or she took all reasonable steps to avoid committing the specific offence at issue, and not that he or she was acting lawfully in a broader sense.

It is not sufficient for the defendant to plead innocent good faith in the making of an unintentional error, or to plead forgetfulness, because the offence in question is a "strict liability" offence meaning that it has as its defining characteristic the absence of any need for the prosecution to prove the existence of an intention to commit the offence. As such, errors made in good faith are not tantamount to due diligence.

The Court found that proof of reasonable care in the general conduct of one's affairs is not sufficient to escape liability. It is incumbent upon the person claiming due

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diligence to show that a system was in place to prevent the prohibited act. Also, the fact that the contravention did not cause prejudice to third parties or that the contravention related only to a small portion of the person's overall practice are not relevant considerations to the establishment of a defence of due diligence.

The Court said:

> The respondents rightfully submit that, as per *Sault Ste. Marie*, a defence of due diligence will also be established if the accused "reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent." However, while the respondents invoke this alternative mode of defence, they have failed to identify a precise "set of facts" which was reasonably relied on to believe that their actions were lawful. Rather, the respondents' argument on this point seems to relate to a reasonable belief that existing control measures were adequate to prevent the infractions from occurring. In my opinion, on the evidence before us, that argument cannot form the basis of a due diligence defence.

The defence of due diligence is a difficult one to make out.

The *MacLeod* case can be found at: www.canlii.org.

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