

Due Diligence Defence for Vehicle Emissions Standards in Canada

October 04, 2017

In a recent case in Ontario, *R. v. Daymak Inc.*, 2017 ONCJ 251, the Ontario Court of Justice considered the requirements of the due diligence defence in the context of emissions standards charges.

Daymak Incorporated ("Daymak"), a motorized vehicle design and sales company, and its officers were charged with contravention of section 154 by not abiding by conditions set out in section 153 of the *Canadian Environmental Protection Act, 1999* ("CEPA") relating to national emissions standards for vehicles and equipment. Daymak submitted an evidence of conformity ("EOC") package to Environment Canada, indicating their intention to sell certain scooters from China in compliance with applicable emissions standards. After importation, however, Environment Canada's tests revealed the amounts of hydrocarbon and carbon monoxide emitted by the LJ50QT-K exceeded the maximum permissible quantities.

Regarding the emissions violations charge, the Crown proved beyond a reasonable doubt that scooters from each of Daymak's shipments of the scooters failed emissions tests conducted by Environment Canada's Transport Division. However, the Court ultimately held that Daymak and its officers exercised due diligence in accordance with section 238 of CEPA.

Daymak cited the following efforts to comply with CEPA standards:

- researching the reliability of the manufacturer before ordering, hiring the Motorcycle and Moped Industry Council of Canada ("MMICS") and the Motor Vehicle Import and Export Consulting Service ("MVIECS") of Canada to prepare all relevant applications and to check components;
- paying for external testing; and
- providing a notice of defect when Environment Canada discovered some scooters had adjustable carburetors that increased emission levels.

Significantly, Daymak demonstrated that its reliance on a compliance officer and compliance strategy was reasonable. Daymak adduced evidence that the emissions

problems were caused by defective and adjustable internal parts that could only have been identified by dismantling and professionally inspecting the scooters. The Crown did not establish to do so was a due diligence requirement. Rather, the Court distinguished *R. v. Canadian Tire Corporation*¹ from the present set of facts, which case involved erroneous components on labels that could be readily visible, rather than internal components.

Although a U.S. Environmental Protection Agency Evidence of Conformity (“EOC”) certificate was obtained for the scooters, the Crown argued the certificate was unacceptable due to the fact that it referred to a prior year of manufacture. However, the Crown provided no authority to suggest the testing of engines in a year prior to the year of import fell short of what constitutes due diligence. To establish that Daymak could not have reasonably prevented the violations, it relied on manufacturer testimony of carburetor and catalyst defects as the cause of increased emissions, production errors, and Environment Canada’s acknowledgement to Daymak that the company had taken proper steps to rectify engine flaws. Applying the definition of due diligence in *R. v. Petro-Canada*², the Court found Daymak had taken “reasonable care to avoid any foreseeable cause” of CEPA non-compliance.

With respect to the charges under section 153(1)(b) of CEPA, relating to EOC, the Crown argued the imports were not covered by the requisite documentation pursuant to CEPA as a result of a discrepancy in the EOC discovered during emissions testing. The accused submitted that the EOC had accurately described the product, and that Daymak had received acknowledgement that the EOC package it submitted was in a manner and form satisfactory to the Minister of the Environment. The Court found that the Crown had not provided any authority establishing that an inaccurate depiction of one aspect of the engine type meant that the entire vehicle imported was not covered by that entry documentation.

Implications

As emissions controls on vehicles, engines and equipment become more prominent in these times of increased focus on climate change and environmental regulation, companies and their management should focus their attention on ensuring they can meet due diligence defences. Companies should record their efforts to meet emissions standards, including the evidence of component manufacturers. If emissions violations are easily detectable, then they should be addressed. However, this case indicates that the standard of due diligence required for emissions controls on vehicles, engines and equipment is reasonable care to avoid any foreseeable cause of CEPA non-compliance.

¹ 2004 ONCJ 3129

² (2003), 63 O.R. (3d) 219 (C.A)

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