8th ANNUAL DUE DILIGENCE SCORECARD: Recent Cases on the Due Diligence Defence

In discussing the definition of hard-core pornography, US Supreme Court Justice Potter Stewart famously said, 'I know it when I see it.' Canadian courts take a similar approach to due diligence. There's no formula for what a company must do to prove that it took all reasonable steps to ensure compliance with the OHS laws, such as X + Y + Z = due diligence. Whether what a company did'or didn't do'was enough to establish due diligence all depends on the facts of the specific case. But when you look at due diligence cases together, patterns emerge. That is, you start to see that courts look at the same factors and for certain actions when evaluating due diligence defences. So you can use these cases as a barometer against which to compare your company's OHS program.

The *Insider*'s annual Due Diligence Scorecard is a good place to start this comparison. Since 2005, the *Insider* has compiled reported safety cases involving the due diligence defence from the past year and across Canada into a Scorecard. This year's version picks up where last year's left off'in July 2011. We'll start with answers to some frequently asked questions about due diligence and then break down the results of the cases. The Scorecard itself begins below.

DUE DILIGENCE FAQs

Q. What Is 'Due Diligence"

A There are actually two types of due diligence:

Reasonable steps. One type of due diligence requires a defendant to prove that it took all reasonable steps to protect workers' health and safety, ensure compliance with OHS laws and prevent violations. Because this type of due diligence is the easiest to prove, it's the most common form of the defence used.

Reasonable mistake of fact. When arguing the second type of due diligence, a defendant must prove that it reasonably relied on facts that turned out to be untrue. However, if those facts *had* been true, what it did'or failed to do'would've been legal. The so-called 'reasonable mistake of fact' defence is harder to prove than the reasonable steps form of due diligence and thus isn't

raised as often.

***Insider* Says:** For more information on this form of due diligence, see 'The Flip Side of Due Diligence, The 'Reasonable Mistake of Fact' Defence,' *Insider*, Sept. 2006, p. 1.

Q. Who Must Prove Due Diligence'"

A Due diligence is a defence. That is, the prosecution must first prove 'beyond a reasonable doubt' that the defendant committed a violation of the OHS law. If the Crown succeeds, then the burden switches to the defendant to prove that it exercised due diligence. The standard of proof that the defendant must meet is an easier one than the prosecution's. A defendant must prove that it exercised due diligence only on a balance of probabilities. If the defendant is successful, it'll avoid liability for the OHS violation.

Q. Who Can Use This Defence'"

A Either form of the due diligence defence can be raised by *anyone* charged with an OHS violation, including organizations, such as companies, and individuals, such as presidents, owners, corporate officers, supervisors and workers.

Q. To What Types of Violations Does Due Diligence Apply'"

A The due diligence defence generally applies to violations of so-called 'regulatory' laws, such as OHS, environmental, transportation of dangerous goods and highway safety laws.

Q. Is Due Diligence a Defence to C-45 Charges'"

A Technically, due diligence isn't a defence to criminal negligence'or 'C-45"charges in the same way that it's a defence to OHS violations. But as a practical matter, proving that you exercised due diligence makes it impossible to be convicted of criminal negligence.

Explanation: To prove criminal negligence, the Crown must show that the defendant:

1) Violated the duty to take 'reasonable steps' to prevent bodily harm; and

2) Showed wanton or reckless disregard for the safety of others.

If a defendant can prove that it exercised due diligence'that is, *took* all reasonable steps to prevent the incident and the injury or fatality'then it can create reasonable doubt as to either or both of these elements of the crime. For example, if a company implemented measures to keep the incident from happening, it'll be hard for the Crown to prove that it acted wantonly or recklessly. Thus, due diligence is, in effect, a defence to C-45 charges.

Q. What Factors Do Courts Consider as to Due Diligence'"

A Due diligence cases are very fact specific. But when determining whether a company proved that it exercised due diligence, courts do tend to look at the same key factors, including:

Foreseeability. As you'll see in the cases in the Scorecard, many due diligence

defenses are won or lost based on whether a company adequately addressed *foreseeable* hazards. Companies must take all reasonable steps to address both general hazards and hazards specific to their particular industry, equipment and materials. The due diligence defence will fail if a reasonable person in the company's position would have foreseen that something could go wrong and acted accordingly. But the defence will succeed if the incident was so unusual or strange that the company couldn't have reasonably expected it to occur. *Bottom line*: A hazard is foreseeable if the company knows or should reasonably know about it. And if it's foreseeable, the company *must* take reasonable steps to protect workers from it.

Preventability. If a company has an opportunity to prevent a violation or safety incident, then it must make all reasonable efforts to do so, such as by identifying hazards, implementing engineering controls, creating safe work policies and properly training workers and supervisors. Companies that don't take steps to avoid preventable incidents or violations won't be able to prove due diligence.

Control. Courts look at whether someone had control over the situation that resulted in the incident or violation and failed to act. In other words, was someone there who could've prevented what happened'

Degree of harm. All hazards aren't created equal. That is, if a hazard could potentially cause a great deal of harm, such as a fatality, a company is expected to make more of an effort to address it. So courts expect a company to protect workers from even rare hazards if they pose the risk of serious harm, such as death.

The Scorecard

This year, we found 15 safety prosecutions decided since July 2011 in which the verdict depended on the success or failure of a company's or individual's due diligence defence. As has been the pattern, this defence failed more often than it succeeded. In this year's Scorecard:

Split decision. In one case from BC, the employer won on one charge but lost on another.

Losses. The defendant lost in 14 cases from AB, BC, NL, NS, ON, SK and YK.

Most of the cases in the Scorecard involve companies prosecuted as employers or prime contractors. But there are also several cases that involve the prosecution of individuals, including a:

- Supervisor;
- Backhoe operator; and
- Safety coordinator.

***Insider* Says:** Remember that most prosecutions of safety violations are resolved with plea bargains and so never get to the point where the due diligence defence is raised. And many court decisions in safety prosecutions aren't reported or published.

BOTTOM LINE

For each of this year's 15 cases, the Scorecard tells you what happened, whether the company (or individual) won or lost and how the court or tribunal evaluated the due diligence defence. In Part 2, we'll explain the lessons you can learn from these cases and how to use them to evaluate your OHS program.

Here's a synopsis of 15 cases decided since July 2011 in which a court or tribunal had to evaluate a company's (or individual's) due diligence defence in an OHS prosecution.

SPLIT DECISION

BC: *WCAT-2011-02783*

What Happened: A canter machine at a sawmill was temporarily shut down so a photocell could be cleared. But it wasn't locked out. Although it wasn't a 22-year-old worker's job to clear the photocell, he entered a hazardous area in the machine to do so'without the operator's knowledge. When the photocell was clear, the operator restarted the machine, not knowing that the worker was still in the hazardous area. He got caught in a pinchpoint and was killed. The sawmill was charged with violating lockout and supervision requirements.

Ruling: The BC Workers' Compensation Appeals Tribunal ruled that the sawmill had exercised due diligence as to compliance with the lockout requirements but not as to the supervision requirements.

Analysis: The Tribunal noted that the sawmill's practice of first trying to clear a photocell from outside of the machine without locking it out was consistent with the manufacturer's recommended procedures and industry practice. In fact, after a prior incident involving the cleaning of photocells, the Board didn't tell the sawmill that its procedures weren't compliant. Based on these facts as well as the sawmill's extensive safety efforts and the safety training it provided on lockout procedures to the worker who died, the Tribunal concluded the sawmill had exercised due diligence as to lockout.

But the Tribunal found the sawmill's efforts to properly supervise this worker lacking. The worker was young and had been on the job for less than a year. He'd been warned by a supervisor before this incident about performing duties that weren't his own. Given these circumstances, the worker should've been closely supervised. Instead, the sawmill relied on experienced and knowledgeable co-workers working in the same area as this worker to supervise him, which didn't satisfy its duty to provide adequate supervision, ruled the Tribunal.

WCAT-2011-02783, [2011] CanLII 92374 (BC WCAT), Nov. 7, 2011

COMPANY/INDIVIDUAL LOSES

NS: *Della Valle*

What Happened: A housing authority maintenance worker reported concerns about insulation to his supervisor, who asked him to take a sample. The supervisor gave the sample to the OHS coordinator and asked him to drop it off for testing. The testing company reported to the OHS coordinator that the insulation contained asbestos and told him what safety measures to take, including

informing workers of the hazard. He told two maintenance supervisors about the test results and safety measures to be taken. But they didn't follow through on those measures and the OHS coordinator didn't follow up with them. Months later, an electrical contractor reported the situation to the Department of Environment & Labour, which charged the housing authority, OHS coordinator and one of the maintenance supervisors with OHS violations. (The authority and supervisor pleaded guilty.)

Ruling: The Nova Scotia Provincial Court convicted the OHS coordinator, ruling that he didn't exercise due diligence.

Analysis: There was nothing wrong with what the OHS coordinator did; the issue was whether he'd done enough, said the court. In concluding that he hadn't, the court explained that, as the OHS coordinator, he 'bore a general responsibility for health and safety within the organization.' And the presence of asbestos was, in fact, the kind of workplace safety issue that required a systemic response. But once the OHS coordinator reported the test results to the maintenance supervisors, he played a passive role and just assumed that they'd take appropriate action. To exercise due diligence, there are other steps he should have taken, said the court, such as reporting the test results to his supervisor and the JHSC and following up with the maintenance supervisors.

R v. Della Valle, [2011] NSPC 67 (CanLII), Sept. 14, 2011

BC: *WCAT-2011-02413*

What Happened: A safety officer inspected a residential construction site at which a foreman and two workers were installing roofing material. The foreman was using appropriate fall protection. But the two workers, who were approximately 18 feet above the ground, weren't wearing fall protection harnesses. And there was no fall protection equipment on the roof. So the construction company was penalized for a fall protection violation and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal ruled that the company hadn't exercised due diligence.

Analysis: The employer argued that it had taken all reasonable steps to ensure compliance with the fall protection regulations, including providing extensive training on fall protection and requiring workers to be certified in the use of fall protection systems. It said the violation was solely the fault of the workers, who'd forgotten to put their fall protection back on after lunch. But the Tribunal said the company's training and education efforts weren't adequate because workers didn't understand the importance of complying with the fall protection rules or the consequences that could result from their non-compliance. For example, it was only after this incident that the company implemented a progressive discipline program for safety infractions, noted the Tribunal.

WCAT-2011-02413, [2011] CanLII 74872 (BC WCAT), Sept. 28, 2011

BC: *WCAT-2011-02507*

What Happened: A safety officer inspecting a roofing project saw a worker and supervisor working on a roof about 24 feet above the ground. Although they were both wearing fall protection equipment, neither was connected to a lifeline. A

week later, an inspection of another company worksites revealed two workers on a roof without being connected to lifelines. Given the company's history of prior fall protection violations, the Board imposed an administrative penalty on it for failing to comply with the fall protection requirements and provide adequate training and supervision. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal ruled that the roofing company hadn't exercised due diligence.

Analysis: A company's efforts to comply with the OHS law must be truly responsive to the unique factors and problems in the workplace, explained the Tribunal. Here, although the company provided training on fall protection and had a progressive discipline program for safety infractions, it knew that workers were ignoring the fall protection requirements. Thus, the Tribunal said the company should've known that its efforts weren't working to prevent fall protection violations and done more, such as providing bonuses for safety compliance. In addition, the company didn't hold supervisors to a higher standard than workers when it came to safety compliance. For example, the supervisor who didn't wear fall protection when required should've gotten more than just a verbal warning.

WCAT-2011-02507, [2011] CanLII 73943 (BC WCAT), Oct. 6, 2011

BC: *WCAT-2012-00070*

What Happened: A safety officer inspected a construction site after getting an anonymous tip that one of the construction company's subcontractors had contacted an underground cable while excavating. The officer found that the company hadn't ensured that it got an underground locate of all utility services before starting excavation work. It was penalized for that violation and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal ruled that the construction company hadn't exercised due diligence.

Analysis: The company acknowledged that it should've gotten a utilities locate before beginning excavation work but didn't. *Its excuse*: The failure was an 'oversight due to human error.' The Tribunal called this excuse non-responsive, noting that 'accidents are usually due to human error.' The issue was whether the company took steps to prevent this particular human error from occurring. And the company didn't provide evidence of any effective checks or balances to ensure that the supervisor responsible for the site conducted a utilities locate before excavating work began.

WCAT-2012-00070, [2012] CanLII 14299 (BC WCAT), Jan. 10, 2012

BC: *WCAT-2012-00145*

What Happened: A safety officer inspected a seagoing vessel and identified several areas, including the passenger lounge, in which asbestos-containing materials were present. But there were stickers posted in these areas identifying them as 'asbestos-free.' The company, which was aware of the presence of asbestos in those areas, was penalized for a signage violation and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal ruled that the company hadn't exercised due diligence.

Analysis: The company knew that the area above the ceiling tiles contained vermiculite, which, in turn, contained asbestos. Because of gaps in the tiles, pieces of vermiculite would fall to the ground and seats in the passenger lounge. Cleaning staff, relying on the decals that indicated the area was free from asbestos, used a regular vacuum cleaner to remove it, which was unsafe for them and further dispersed the asbestos. In addition, all workers had to work in or pass through the lounge as part of their duties and thus were exposed to this hazardous substance. The company couldn't explain how inaccurate decals had been put up and didn't have a system for double-checking or otherwise ensuring the accuracy of such signage, indicating a lack of due diligence, said the Tribunal.

WCAT-2012-00145, [2012] CanLII 13893 (BC WCAT), Jan. 17, 2012

BC: *WCAT-2012-00224*

What Happened: A safety officer inspected a bridge construction project after learning that a worker had backed a crane into a decking machine. While he was there, he saw workers working 20 to 50 feet above the ground. The officer concluded that the appropriate fall protection in the circumstances was the use of guardrails or handrails, which weren't present at the site. Instead, the workers were attached to a horizontal lifeline that wasn't properly engineered. As a result, the employer was penalized for violating the fall protection and supervision requirements. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal ruled that the employer didn't exercise due diligence.

Analysis: The employer claimed that it had exercised due diligence, pointing to the training it provided to workers on fall protection. But the Tribunal explained that training wasn't enough to establish due diligence'adequate supervision was also required. In this case, the employer should've ensured that compliant guardrails were used when practicable before using the less desirable option of horizontal lifelines. And it shouldn't have allowed such lifelines to be used at all when it didn't have evidence that they were safe.

WCAT-2012-00224, [2012] CanLII 14355 (BC WCAT), Jan. 25, 2012

BC: *WCAT-2012-00416*

What Happened: A construction company hired an experienced journeyman carpenter to work on a residential construction project. During an inspection of this project, a safety officer saw the carpenter working on a third-storey balcony about 18 feet above the ground without his fall protection harness attached to a lifeline. The construction company was penalized for fall protection violations, which it appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal ruled that the construction company hadn't exercised due diligence.

Analysis: The carpenter had more than 20 years' experience and was familiar with the fall protection requirements. In fact, he acknowledged to the safety officer that he should've attached his harness to a lifeline while he was working on the

balcony. In addition, the carpenter had attended toolbox meetings at the site at which fall protection was discussed. But although the carpenter was properly instructed and trained, there was no evidence that he was properly supervised to ensure he complied with the fall protection requirements, said the Tribunal. It appears that the company didn't recognize its duty to supervise the carpenter, simply choosing to rely on his experience, training and knowledge.

WCAT-2012-00416, [2012] CanLII 14341 (BC WCAT), Feb 13, 2012

ON: *Linamar Holdings Inc.*

What Happened: A worker removed a fence guarding the back of an induction hardener to troubleshoot a leak. He was seriously injured by an electrical shock. His employer was charged with failing to provide the worker with sufficient instruction on troubleshooting leaks. The employer raised a due diligence defence, arguing that the worker didn't follow its procedures.

Ruling: The Ontario Court of Justice convicted the employer, ruling that it hadn't exercised due diligence.

Analysis: The employer's procedures with regard to troubleshooting weren't in writing and were, in fact, primarily learned on the job. For example, it didn't include guidelines or instructions for troubleshooting procedures in its Hazardous Energy Control Program. Plus, these procedures weren't machine specific. As a result, the instructions as to troubleshooting and partial lockout weren't clear and were contradictory and confusing. And given the amount of troubleshooting done in the workplace and how 'inherently risky' it is, the court concluded that due diligence required the employer to develop a written policy on troubleshooting and a related program for training workers on that policy.

Ontario (Ministry of Labour) v. Linamar Holdings Inc., [2012] ONCJ 295 (CanLII), May 7, 2012

AB: *Canadian Consolidated Salvage Ltd. (Clearway Recycling)*

What Happened: A company was salvaging metal from a former industrial plant. A temporary worker supplied by another company fell approximately three metres from an opening in a wall onto a pile of pipe. He suffered a broken leg and three broken ribs. The company was charged with several OHS violations.

Ruling: The Alberta Provincial Court convicted the company on all counts, ruling that it hadn't exercised due diligence.

Analysis: The company argued that the *prime contractor* was responsible for supervising all workers'including the company's'and complying with all safety requirements. So it had no duty to ensure the safety of its workers at that site. But the court said that the company was the injured worker's employer under the OHS laws and so it had a duty to ensure his safety at the site. However, there was no evidence that the company took 'any steps whatsoever' concerning the safety of its workers, noted the court. In addition, although the company claimed it provided workers with a safety orientation, it had no documentation to support that claim.

R. v. Canadian Consolidated Salvage Ltd. (Clearway Recycling), [2012] ABPC 133

(CanLII) May 8, 2012

SK: *Riemer*

What Happened: A backhoe operator was demolishing some buildings when he snagged a natural gas riser with his equipment. Gas seeped into a nearby butcher shop, which exploded. Two individuals were killed and five others were seriously injured. In addition, two buildings were destroyed and others seriously damaged. The government charged the operator with two violations of the OHS laws.

Ruling: The Saskatchewan Provincial Court convicted the operator of both OHS violations, ruling that he hadn't exercised due diligence.

Analysis: The court noted that the operator knew the risk of working around live gas lines and the potentially disastrous consequences of snagging a gas line with the bucket of his backhoe. As there was no pressing urgency, he had plenty of time to carefully dig with a shovel to expose the riser. So the court concluded that the operator didn't prove that it wasn't reasonably practicable to do more than he did to comply with the OHS law and prevent these violations. And at sentencing, the court noted that the operator's actions were incredibly risky and 'entirely foreseeable.'

R. v. Riemer, [2012] SKPC 6 (CanLII), May 16, 2012

AB: *Perera Development Corp.*

What Happened: A truck driver was removing debris from an excavation when a 15-metre-high wall of dirt and rock collapsed on him. He died from his injuries. The prosecution charged two related companies as employer and/or prime contractor with numerous OHS violations, arguing that they cut corners to complete the project and knew of the dangers associated with an improperly shored-up wall of the pit for about two months without taking steps to address it.

Ruling: The Alberta Provincial Court convicted the companies of multiple violations, ruling that they hadn't exercised due diligence.

Analysis: The court expressed shock that two experienced construction companies could leave a sheer 50-foot wall without any shoring whatsoever. Describing their conduct as 'egregious and outrageous,' the court noted that the wall could've been properly shored for a relatively small amount of money compared to the overall cost of the construction project. The court concluded that although the companies had some safety protocols in place at the site, these systems were inadequate and honoured more in the breach than in being followed. It fined the companies $1.25 million and $900,000 respectively plus the 15% victim surcharges, for a record total of $2,472,500.

R. v. Perera Development Corp., Action No. 100171909P1, June 4, 2012

NL: *Concord Paving Ltd.*

What Happened: While working along a public highway, a flagger got too close to an excavator operated by a co-worker. He was run over by it and crushed to death. His employer was charged with several OHS violations, including failing to provide proper information, instruction, training and supervision to workers

at the site.

Ruling: The Newfoundland and Labrador Provincial Court convicted the employer, ruling that it hadn't exercised due diligence.

Analysis: The court said that although there was evidence that the employer provided some instruction and supervision to workers, it was minimal and not to the extent required to prove due diligence. For example, the employer's OHS program manual contained a form for documenting the safety courses taken by workers. But it didn't introduce such forms for the workers involved in the incident to prove that they'd taken any safety courses. In addition, there was no evidence that anyone supervised the workers by periodically watching how the excavator drivers, heavy equipment operators and flaggers were doing their jobs. And although several people at the site saw the flagger who was killed get too close to the heavy equipment, none of them reported this safety issue to a supervisor.

R. v. Concord Paving Ltd., [2012] CanLII 31899 (NL PC), June 8, 2012

YK: *Government of Yukon*

What Happened: The Yukon Department of Community Services (Department) hired a contractor to build a roadway extension. The contractor then hired a licensed blaster to blast away rock along the route. The blaster conducted a particularly large blast, which showered a nearby trailer court with flyrock ranging from pebble-sized pieces to ones weighing 22 kg. One destroyed a shed; another crashed through a trailer's roof, landing in the living room. A tenant who was outside had to run for cover. But no one was hurt. The Department, the contractor, a supervisor and the blaster were charged with OHS violations. The blaster pleaded guilty; the rest went to trial and were convicted. So they appealed.

Ruling: The Yukon Supreme Court upheld the convictions of the contractor and supervisor, ruling that they hadn't exercised due diligence. (It overturned the government's conviction on grounds unrelated to due diligence.)

Analysis: The contractor argued that the incident was unforeseeable. But the court noted that both the contractor and supervisor knew about a prior blasting incident on this road that caused a rock to go through the roof of a trailer in this same trailer court. So the risk to the trailer court from a large blast if proper safety procedures weren't taken was not only foreseeable but also actually known. The court also rejected the argument that the defendants had exercised due diligence simply by hiring an experienced blaster. They still had a duty to ensure that the blast was done safely and the blaster was properly supervised. In short, there was no evidence that the contractor had a system in place to ensure blasting was done safely, concluded the court.

R. v. Government of Yukon, [2012] YKSC 47 (CanLII), June 11, 2012

AB: *XI Technologies Inc.*

What Happened: A small, family-owned technology company held a customer appreciation event at a hotel during the Calgary Stampede. The event featured a mechanical calf roping machine, which was operated by the company's employees. Because the machine had a faulty spring, the operator had to reach into it to

manually release a hook. While a worker was disengaging this hook, he was struck in the back of the head by a steel lever and later died from his injuries. The company was charged with failing to take all reasonable steps to ensure the safety of a worker and that all equipment provided at a worksite could safely perform its intended function. The trial court ruled that the company had exercised due diligence and dismissed the charges [*R. v. XI Technologies Inc.*, [2011] ABPC 313 (CanLII), Oct. 28, 2011]. So the government appealed.

Ruling: The Alberta Court of Queen's Bench convicted the company, ruling that it hadn't exercised due diligence.

Analysis: The trial court had concluded that the danger to workers operating the machine when they reached into it wasn't obvious. But the appeals court disagreed. Before the fatality, another worker operating the machine had been struck on the shoulder by the lever. So the danger of being hit by this lever was not only foreseeable but known. At this point, a reasonable employer would have discontinued use of the machine. Instead, a company employee, who wasn't familiar or experienced with such equipment, simply changed the operating instructions in a way he thought would protect the operator. The appeals court also found that the company didn't take all reasonable steps to ensure the machine was safe to operate. For example, when the machine was delivered, it didn't ask for thorough operating instructions or a demonstration of how the machine should be operated. Had it done so, the machine's faulty spring would've been discovered. So the appeals court concluded that the company had failed to take 'rudimentary steps' to ensure the machine was safe to use.

R. v. XI Technologies Inc., [2012] ABQB 549 (CanLII), Sept. 24, 2012