

# AB Case Shows How Different Courts Can Come to Different Decisions on Due Diligence



Each year in our Due Diligence Scorecard, we explain that courts generally consider the same factors when analyzing a due diligence defence. But although courts may all look at the same factors, they may not come to the same conclusions as to how those factors play out in a specific case. A recent decision from Alberta in which an appeals court overturned the trial court's conclusion that the company had exercised due diligence is a good example of how different courts looking at the same facts can come to very different conclusions. Here's a look at both court decisions in this case.

## THE CASE

**What Happened:** During the Calgary Stampede, a small technology company held a customer appreciation event at a hotel. For the event, the company rented 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.

**How the Trial Court Ruled:** The trial court dismissed the charges, ruling that the company had exercised due diligence. The company wasn't in a business that involved inherently dangerous work and didn't regularly use the equipment involved in the incident. Thus, its knowledge of any hazards or risks the machine presented was minimal. So the company relied, to some extent, on the expertise of the experienced party planner and entertainment company it hired for the event. But it did take some steps on its own to ensure the safe operation of the machine. For example, a company employee developed safe work procedures for the machine's use, which he thought would eliminate any hazards. However, because of his inexperience with the equipment, he couldn't fully appreciate the risks the faulty spring posed, noted the court. As a result, the court ruled that, although the company's actions weren't perfect, given these circumstances, no reasonable person could have done more than the company did to

avoid this incident [*R. v. XI Technologies Inc.*, [2011] ABPC 313 (CanLII), Oct. 28, 2011].

**How the Appeals Court Ruled:** The Alberta Court of Queen's Bench overturned the trial court's decision and convicted the company on both charges, ruling that the company *could and should have done more* to prevent this incident. For example, the company knew that the machine posed a safety hazard because, before the fatality, another worker operating the machine had been hit on the shoulder by the same lever that later killed his co-worker. Armed with this knowledge, a reasonable employer would have discontinued the machine's use, said the appeals court. But this company permitted workers to continue to operate it.

The appeals court also found that the company didn't take all reasonable steps to ensure the machine was safe to operate in the first place. As the trial court noted, the company was unfamiliar with the operation of this type of machinery. So when it was delivered, the company should've asked for thorough operating instructions or a demonstration of how the machine should be operated. But it didn't. Instead, the company was content to rely on its own inexperienced employees to figure out how to run the machine. And the failure to take these "rudimentary steps" to ensure the machine was safe to use shows a lack of due diligence, concluded the appeals court [*R. v. XI Technologies Inc.*, [2012] ABQB 549 (CanLII), Sept. 24, 2012].

## ANALYSIS

As these decisions show, facing the same facts, different courts can come to diametrically opposed conclusions as to what constitutes due diligence. Let's look at just one factor in the case—the company's lack of experience with the machine in question. For the trial court, this unfamiliarity in a way lessened its expectations as to what the company could reasonably be expected to do. But for the appeals court, the company's inexperience heightened its duty to take steps to get the knowledge that it lacked about the machine's safe use before permitting its employees to operate it. Which court is "right"? It's likely that the company will appeal this decision, so a third court could get a crack at it. We'll have to wait and see what ultimately happens. The lesson here is that because reasonable minds can disagree on what constitutes due diligence under particular circumstances, you want to do everything possible to *prevent* safety incidents and violations from occurring in the first place. Otherwise, your OHS program could come under scrutiny and whether it survives or not could come down to which court hears your case.