

# Federal OHS Case Illustrates Two Important Due Diligence Principles



When faced with OHS violations, an employer may argue that it exercised ‘due diligence,’ that is, that it took all reasonable steps to comply with the law and address safety hazards. But proving due diligence is challenging. And what constitutes ‘reasonable steps’ usually depends on the specific circumstances of each case. However, there are certain basic due diligence principles on which employers can rely. A recent case under federal OHS law illustrates two of these principles. Here’s a look at that case.

## THE CASE

**What Happened:** An airline employee was standing on the apron at an airport gate completing paperwork when he was struck in the back by an empty baggage cart as it and other attached empty carts were being towed away from the airplane. He suffered contusions on his upper and lower left leg, and bruises to his left thigh and lower back. At the time, the area around the plane was covered in packed snow on top of ice and was slippery, which contributed to the incident. A federal Health and Safety Officer concluded that the airport was in violation of OHS law for allowing an accumulation of ice and snow and issued it a compliance direction. The airport appealed, arguing that it had exercised due diligence in its snow removal operations and asking for the direction to be rescinded.

**What the Tribunal Decided:** The federal OHS Tribunal rescinded the direction.

**The Tribunal’s Reasoning:** The airport had a Winter Maintenance Plan that complied with industry standards, and snow and ice removal procedures in place. In addition to regular snow and ice removal, airlines were expected to make specific service requests when there was an immediate need for removal. But the airline didn’t make such a request for this gate and so failed to bring the snow/ice issue in the area to the airport’s attention. The Tribunal noted that the personnel and equipment dedicated to snow and ice clearance duties and the procedures followed to implement those duties were well documented by the airport, as were the weather conditions prevailing on and around the date of the incident, which indicated periods of continuous snow. In addition, the airline’s flight operations and all the associated movement around this gate continued despite the prevailing weather. The Tribunal concluded that the weather conditions and the continuation of flights on the apron at the gate inhibited

access to the area for the airport's snow clearance crews without instructions and directions from the airline. So the Tribunal rescinded the direction because the airport wasn't aware of the safety hazard posed by the snow or ice and had exercised due diligence as to snow and ice removal [*Macdonald Cartier International Airport Authority*, [2015] OHSTC 5 (CanLII), March 5, 2015].

### ANALYSIS

This case illustrates two useful due diligence points. First, employers have a duty to address only those safety hazards they know or should know about, not all safety hazards period. After all, it's not reasonable or practical to require employers to address an unknown hazard. Here, snow and ice removal was a joint responsibility involving both the airport and the individual airlines. The airport's crews couldn't clear snow when airplanes were at the gate. So the airport relied on airline's gate management to advise when aircraft were leaving gates so that airport personnel could clear snow as best as possible. In addition, the expectation under the Winter Maintenance Plan was that airlines would notify the airport if there was an unsafe condition on the tarmac that needed immediate attention. But the airline in this case never informed the airport that snow and ice had accumulated at this gate, making the surface slippery and unsafe. Thus, the airport was unaware of this issue and so couldn't reasonably be expected to take steps to address it.

Second, the case demonstrates the importance of good recordkeeping. The Tribunal noted that the airport's snow and ice removal policies and procedures were 'well documented.' In addition, the airport's records were used to prove the weather conditions at the relevant times. And the airport's log of service requests proved that the airline had never requested that this gate be cleared of snow and ice. By having these safety records available, the airport was able to prove that it exercised due diligence.