THE INSIDER'S 12th DUE DILIGENCE SCORECARD, PART 1: A Look at Recent Cases Involving the Due Diligence Defence

Once again, it's time to focus on the all-important topic of due diligence. Having a good understanding of the due diligence defense is critical to understanding compliance with the OHS laws. Safety professionals who have a solid grasp of the factors courts consider when deciding whether a company'or an individual'exercised due diligence and how they analyze those factors will be more successful in ensuring that their companies take all reasonable steps to protect workers' health and safety and comply with the OHS acts and regulations.

For the 12th year, the *OHS Insider*'s annual Due Diligence Scorecard includes reported safety cases from across Canada that involve the due diligence defence. This year's edition includes cases decided since Sept. 2015. As always, we start with a brief review of some basic facts about due diligence, and then summarize the facts and decisions in the cases.

DUE DILIGENCE 101

Here's a quick overview of some basic facts about the due diligence defence:

- There are two kinds of due diligence: reasonable steps'the type most commonly argued'and reasonable mistake of fact;
- Due diligence is a defence'that is, it must be proven by a company or individual charged with an OHS violation on a balance of probabilities once the prosecution has proven that violation beyond a reasonable doubt;
- Anyone charged with a violation of the OHS laws, including organizations, government agencies or companies and individuals such as corporate executives, owners, supervisors and workers, can raise a due diligence defence;
- The due diligence defence applies to violations of not only the OHS laws but also environmental and other so-called 'regulatory' laws, such as traffic safety laws. (See the box at the end for an example of the due diligence defence in an environmental prosecution.) It may also apply when a company has been issued an administrative penalty or safety compliance direction;
- Courts consider various factors when evaluating a due diligence defence, most notably foreseeability, preventability, control and degree of harm; and
- Although due diligence isn't technically a defence to criminal negligence or so-called 'C-45' or Westray charges, proving that you exercised due diligence makes it nearly impossible to be convicted of criminal negligence.

***Insider* Says:** Go to the OHS Insider's Due Diligence Compliance Centre for more information on this concept, including:

- Answers to 6 FAQs about due diligence;
- Understanding the reasonable mistake of fact form of the defence;
- 10 due diligence traps to avoid; and
- Industry standards and due diligence.

The Scorecard

This year, we found nine safety prosecutions decided since Sept. 2015 involving a company's due diligence defence. (Last year's Scorecard had 14 cases.) *Remember*: The Scorecard doesn't reflect *all* of the safety prosecutions in a given period of time. That's because most prosecutions of OHS violations are resolved when the company or individual pleads guilty. In such cases, the due diligence defence is never raised and analyzed. In addition, many court decisions in safety prosecutions that *do* go to trial aren't reported or published.

In this year's Scorecard, the defendants (who were all companies this year):

- Won in one case from Saskatchewan; and
- Lost in eight cases from BC, NS and ON.

For each of the cases in this year's Scorecard, we tell you what happened, whether the company won or lost and how the court, tribunal or board analyzed the due diligence defence. And in Part 2, we'll explain the lessons you can learn from these cases and use to evaluate and improve your own OHS program.

DUE DILIGENCE SCORECARD

Here's a synopsis of nine cases decided since Sept. 2015 in which a court, tribunal or board had to evaluate a company's due diligence defence.

COMPANY WINS

[learn_more caption="SK: *Saskatchewan Power*"]

What Happened: A foreman at a coal-fired power plant was very concerned about a buildup of ice in a culvert near the utility shop. He raised his concerns with his superiors, but they didn't believe the ice was a serious problem and told him to leave it alone. But the foreman decided to address the issue

himself by placing a ‘tiger torch’ in the culvert to melt the ice. He then asked a worker who’d be driving by the culvert to check on the torch. The worker did so and saw that the torch had gone out. When the worker relit it, there was a fireball that burned his face, fingers, hand and arm. As a result, the plant was charged with four safety violations, including providing inadequate training and supervision.

Ruling: The Provincial Court of Saskatchewan acquitted the power company, ruling that it had exercised due diligence.

Analysis: The trial court found that, in general, safety was important to the company. For example, the company had specific work procedures, including one for ‘hot work,’ which would include work involving use of a tiger torch. The foreman had been properly trained on all safety procedures and had followed them in the past. But the foreman didn’t follow the hot work procedures when using the tiger torch. And in fact, he specifically defied instructions *not* to address the culvert issue. In addition, it wasn’t foreseeable that the worker, who’d only been an employee for 10 months, would use the tiger torch’a rarely used piece of equipment’and so need training on it. So the court concluded that the company had exercised due diligence as to all charges.

R. v. Saskatchewan Power Corp., [2016] SKPC 2 (CanLII), Jan. 29, 2016[/learn_more]

COMPANY LOSES

[learn_more caption=”BC: *WCAT-2015-03747*“]

What Happened: During an inspection of an employer’s plant, an occupational safety officer found an accumulation of wood dust in the packaging room. In some areas, the dust was 4-6 inches deep. The accumulation of dust was due to a leak that had been patched with duct tape and a torn boot on the pellet screen outfeed. The dust accumulations were in contact with potential ignition sources and thus posed the risk of serious injury or

death to workers'especially given that the building's emergency exit was located directly below the hazard area. And the dust accumulations had been present for two to three days. As a result, the employer was issued an administrative penalty for a high risk violation. It appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the employer hadn't exercised due diligence.

Analysis: The employer argued that it had an effective wood dust control program that educated workers on the importance of wood dust control and the actions to take to address accumulations of dust. It claimed that the dust accumulations found during the inspection were unforeseeable. But the Tribunal found that the employer didn't have an effective overall program to ensure compliance with the combustible dust requirements under the OHS laws. Given the levels of dust in the room, these areas were either missed during cleaning, the cleaning schedule wasn't adequate or the workers and supervisors weren't attentive or responsive to this hazard. And in light of the fact that the employer had been issued the same violation three other times within the prior two years, the Tribunal wasn't persuaded that the employer had taken all reasonable steps to avoid these dangerous dust accumulations.

WCAT-2015-03747 (Re), [2015] CanLII 95187 (BC WCAT), Dec. 11, 2015[/learn_more]

[learn_more caption="BC: *WCAT-2016-00094*"]

What Happened: Occupational safety officers saw a roofing company's worker on the sloped roof of a house about 18 feet above the ground. He was throwing roofing materials into a garbage bin below. Although the worker was wearing a fall protection harness, it wasn't attached to an available lifeline. When one officer asked the company's owner why the worker wasn't tied off, the owner told the officer to ask the

worker himself because he wasn't 'their baby sitter.' The worker said he'd disconnected so he could remove some debris from the roof and disentangle his rope. But he also later said his shoulder strap was down because he had a sunburn. The officer issued the roofing company an administrative penalty for violations related to fall protection, training and supervision, which it appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the roofing company hadn't exercised due diligence.

Analysis: The Tribunal acknowledged that the roofing company had taken some steps to ensure compliance with the fall protection requirements'but it hadn't taken *all* reasonable steps. For example, the workers said they only received 'informal training.' The company couldn't provide any documentary evidence of what training was provided, when it was provided and which workers received it. And that training appeared to miss important elements, such as how to prevent harness lines from getting entangled. In addition, because this worker had previously failed to wear fall protection, the company should've more closely supervised him, observed the Tribunal.

WCAT-2016-00094 (Re), [2016] CanLII 17383 (BC WCAT), Jan. 12, 2016[/learn_more]

[learn_more caption="BC: *WCAT-2016-00178*"]

What Happened: A driver for a trucking company was trying to unload a trailer full of crushed rock but the trailer gate was stuck. As he was trying to unstick the gate, the load of rock released unexpectedly. The driver was buried up to his chest and suffered fatal injuries. During an investigation of the incident, it was discovered that the driver was likely impaired by morphine or heroin at the time. This impairment contributed to two errors in judgment he made, which resulted

in the tragic incident. The Workers' Compensation Board concluded that the company had violated its duty to provide proper training and supervision to its workers. Among other things, the company had inadequate procedures for ensuring that workers weren't under the influence of drugs or alcohol. The Board issued the trucking company an administrative penalty, which it appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the trucking company hadn't exercised due diligence.

Analysis: The company argued that the driver was clearly impaired and thus at fault for the incident. But the Tribunal said it's difficult to understand how an effectively supervised worker could be permitted to operate a truck in that condition in the first place. Trucking is a safety-sensitive business. Drug impairment in this industry endangers both workers and the general public. So supervising drivers to ensure that they aren't impaired is critical. But other than a statement in the company's safety manual that impairment was prohibited and could result in termination, the company appeared to have left the issue up to its drivers, concluded the Tribunal.

WCAT-2016-00178 (Re), [2016] CanLII 18124 (BC WCAT), Jan. 21, 2016[/learn_more]

[learn_more caption="BC: *WCAT-2016-00528*"]

What Happened: An occupational safety officer saw workers and a supervisor for a construction and roofing company on a 3.12 pitch roof with no fall protection in place. They were about six feet from the roof's edge, which was about 15 feet above the ground, with no barriers in place to prevent them from falling. In addition, an extension ladder positioned against the roof was tall enough to contact power lines attached to the house if the ladder fell sideways. As a result, the

company was issued an administrative penalty for fall protection and ladder safety violations. The company appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal upheld the penalty, ruling that the company hadn't exercised due diligence.

Analysis: Although the company claimed that it provided adequate training and supervision as to fall protection, it had gotten numerous orders and administrative penalties over a two year period, noted the Tribunal. It also didn't have a documented safety program and failed to provide sufficient evidence of its training plans or schedules, fall protection plans, monitoring of workers, toolbox talks or other attempts to exercise due diligence. Moreover, it was significant that a *supervisor* was on the roof and aware that workers near the edge didn't have fall protection.

WCAT-2016-00528 (Re), [2016] CanLII 17767 (BC WCAT), Feb. 22, 2016[/learn_more]

[learn_more caption="NS: *Southwest Construction*"]

What Happened: During an inspection of a large residential construction site, an OHS inspector saw an opening in a floor for an elevator. The opening didn't have guardrails but did have caution tape around it. If a worker fell through that opening, he'd fall more than three metres. The inspector also saw a carpenter working on his knees, laying plywood within feet of this opening. Although the carpenter was wearing a fall restraint harness, his rope was too slack to provide adequate protection if he fell through the opening. As a result, the prime contractor was issued administrative penalties relating to guardrail and fall protection violations, which it appealed.

Ruling: The Nova Scotia Labour Board upheld the penalty, ruling that the prime contractor hadn't exercised due diligence.

Analysis: The Labour Board found that the unprotected opening posed a foreseeable risk to the nearby carpenter. Although it was the job of a subcontractor to install guardrails around this opening, the prime contractor had overall charge of safety on the project. And the prime contractor did take steps to ensure safety at the site, such as having a safety manual and an on-site safety officer, who did daily site inspections. But it appeared that certain safety provisions weren't strictly enforced. For example, guardrails had been in place around the opening but were taken down'and there was no evidence as to why or when that happened. Thus, the prime contractor didn't exercise due diligence to prevent the violations for which the administrative penalties were imposed.

Southwest Construction Management Limited (Re), [2016] NSLB 129 (CanLII), April 14, 2016[/learn_more]

[learn_more caption="NS: *Red Apple*"]

What Happened: An OHS inspector inspected a retail store that used a conveyor to move inventory from one level to the other. The conveyor had been in use at the store for 18 years. The inspector saw that the conveyor lacked protection at three pinch points, where a worker's clothing, hair or other body part could get caught and dragged into the moving machinery. So he issued the store a compliance order, requiring it to ensure that all pinch points on the conveyor were guarded, and imposed a $500 administrative penalty, which the store appealed.

Ruling: The Nova Scotia Labour Board upheld the penalty, ruling that the store hadn't exercised due diligence.

Analysis: Based on photos of the conveyor, it was apparent that a worker with long hair or loose clothing could become entangled in the equipment, with very serious consequences. The fact that there hadn't been any safety incidents or

injuries, or near misses involving the conveyor and these pinch points wasn't evidence of due diligence, explained the Board. The store simply never considered the possibility that it was operating potentially unsafe equipment, which it should've given the age of the conveyor. The store argued that it had never been brought to its attention that the conveyor wasn't in compliance with the OHS laws. But if you own and operator a conveyor, said the Board, you have a legal duty to know the law that applies to such devices and to comply with it.

Red Apple Stores Inc. (Re), [2016] NSLB 138 (CanLII), April 21, 2016[/learn_more]

[learn_more caption="ON: *Wal-Mart*"]

What Happened: An empty wooden pallet lay on the floor in the receiving area of a store and in an aisle that led to an emergency exit. A worker was unloading a full pallet from a truck onto a pallet jack. While walking backwards, he tripped on the empty pallet, fell and hit his head on stacks of items. The worker complained of a headache and called in sick the next day. He never returned to work and died two weeks later. The store was charged with failing to ensure the floor was kept free of obstructions, hazards and accumulations of refuse, snow or ice. It argued that it had exercised due diligence and that the worker was at fault for not 'exercising ordinary prudence.'

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

Analysis: An empty skid shouldn't have been left on the floor of the receiving area because it posed a risk that someone might trip over it. Because the aisle where this skid was left was a 'major thoroughfare in the back room' and a path to an emergency exit, it was especially critical that this area be kept clear of obstructions. Although the store pointed to its

safety sweep program and clean-as-you-go policy, it didn't produce the receiving area logs, which would show either the diligent sweep of this area or the failure to do so as well as the presence or absence of obstructions. Without this logbook for the receiving area, there was no direct evidence on which the court could conclude that that program and policy were actually implemented in that particular area. As to the store's blaming of the worker, the court explained that 'if it were a perfect world and all employees were always prudent and careful,' there would be no need for the OHS laws. And this worker didn't have a history of failing to work safely.

Ontario (Ministry of Labour) v. Wal-Mart Canada Corp., [2016] ONCJ 267 (CanLII), May 6, 2016[/learn_more]

[learn_more caption="ON: *Advanced Construction*"]

What Happened: A worker was operating a backhoe at a construction site for the extension of a subway line. A drill rig on a platform, which was owned and operated by a subcontractor, fell over and crushed his backhoe, killing him. The drill rig also fell on an excavator operated by another worker, who was so badly injured that he couldn't work for almost three years. The Ontario Ministry of Labour charged the subcontractor with OHS violations related to its failure to provide a proper platform for the drill rig.

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

Analysis: The Crown argued that the platform the subcontractor provided wasn't adequate because the soil base couldn't withstand the weight and pressure of the drill rig. In response, the subcontractor said it was reasonable for it to provide the drill rig manufacturer's specifications to another company and rely on that company to identify the soil's bearing capacity and confirm that the soil met those specifications. But the court found that sending the

specifications to that company was only a reasonable *first* step to ensuring that the platform was adequate. To exercise due diligence, the subcontractor had to follow up and confirm that the soil's bearing capacity had been identified and was adequate for the drill rig, which it didn't do. In fact, there was no evidence that the subcontractor took any other steps to confirm that the platform could support the drill rig. The court also noted that although the subcontractor did have a good safety record, a thorough written safety policy and documented daily safety meetings, proof of its general safety policy and methods didn't establish that it exercised due diligence as to the design of the drill rig platform and the soil's bearing capacity.

Ontario (Ministry of Labour) v. Advanced Construction Techniques Ltd., [2016] ONCJ 482 (CanLII), Aug. 3, 2016[/learn_more]

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The Due Diligence Defence in an Environmental Prosecution

As noted, due diligence is a defence not only in OHS prosecutions but also in prosecutions for other kinds of offences, including violations of environmental law. Here's an example of such a case.

What Happened: A company's licences authorized it to engage in commercial fishing in particular zones on Lake Erie. The licences required the company to submit complete and accurate Daily Catch Reports (DCRs), which were signed by the vessel's captain. Based on warrants, the Ministry installed a tracking device on a company vessel and later searched the ship while it was at dock. Officers seized three logbooks written by the ship's captain. A review of the logbooks revealed deficiencies when the logbook entries were compared to the DCRs. And based on information from the tracking device, the Ministry

determined that several of the DCRs submitted by the captain contained false and misleading information. As a result, the company was charged with violating provincial and federal fishing laws and regulations. The trial court acquitted the company, so the Crown appealed.

Ruling: The Ontario Superior Court of Justice overturned the acquittals and convicted the company, ruling that it hadn't exercised due diligence.

Analysis: The appeals court explained that the due diligence defence requires a company to prove that it had in place a proper system to ensure compliance with the terms and conditions of its licences and that it took all reasonable steps to ensure that the system operated properly. The trial judge erred by failing to consider what a proper system would consist of and what system the company could've reasonably put in place to ensure compliance with its licences, concluded the appeals court. In fact, there was no evidence that the company had *any* system in place to address compliance with the requirement for accuracy and completeness of records. One of the company's directors met each year with the captain to review the terms of the licences and then merely asked the captain whether he was complying and accepted his positive responses without question. In short, the director and company 'did little or nothing to ensure accurate and complete records were being kept,' said the appeals court. The director simply left compliance entirely to the captain's 'good judgment,' although he knew the captain had a lengthy history of non-compliance, including violations for misreporting in DCRs. And there was no evidence that the director stressed to the captain that there would be serious consequences if he failed to comply with the terms of the licences.

The trial court had concluded that there was little or nothing more the company could've done but 'provide a sharp pencil, log book and DCR book.' But the appeals court said 'that sets the bar far too low' and applies an incorrect standard to the

company's conduct. At a minimum, a proper system would entail the following steps:

- Semi-annual meetings with the captain to review in detail the terms and conditions of the company's licences;
- A copy of the licences' terms and conditions should be kept in both the office and on the vessel in a prominent location;
- Periodic random reviews of the logbook by the owner for completeness;
- Periodic random comparisons of the information in the logbook with that on the DCRs to ensure the information corresponds;
- A system for the imposition of warnings and discipline up to and including termination for non-compliance or repeated non-compliance; and
- A requirement that another crew member initial the daily entries in the logbook to verify the information recorded.

The appeals court concluded that there's no question that the owner of a vessel must, to a large degree, trust the vessel's captain. But that trust can't be blind. There must be a system of oversight by which the vessel's owner can reasonably ascertain that the terms of its license are being met [*R. v. Pisces Fishery Inc.*, [2016] ONSC 618 (CanLII), Jan. 26, 2016].[/box]