THE INSIDER'S 9th ANNUAL DUE DILIGENCE SCORECARD: Recent Cases Involving the Due Diligence Defence

Due diligence is a fundamental workplace safety topic that all safety professionals must understand. But although the concept that a company must take all reasonable steps to ensure compliance with the OHS laws and prevent safety violations seems simple enough, understanding its application in the real world can be far from simple. For example, what makes a particular safety measure reasonable' The bottom line is that the application of the due diligence defence depends on the facts of each specific case. The good news is that courts rely on the decisions in other due diligence cases when deciding the ones before them. As a result, patterns have emerged as to what constitutes due diligence and which factors are critical to the analysis of this defence. Thus, you can compare your company's OHS program to these cases to determine how it measures up.

The *Insider*'s annual Due Diligence Scorecard can help you make such comparisons. Since 2005, the *Insider* has compiled recent

reported safety cases involving the due diligence defence from across Canada into a Scorecard. This year's version picks up where last year's left off'in July 2012. We'll start with some key facts about due diligence and then break down the results of the cases. The Scorecard itself begins midway at the bottom of the post.

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6 KEY FACTS ABOUT DUE DILIGENCE

Here are six key facts about the due diligence defence:

1. There are two kinds of due diligence: reasonable steps'the defence most commonly argued'and reasonable mistake of fact.

2. Due diligence is a defence that must be proven by a company or individual charged with a safety offence on a balance of probabilities.

3. *Anyone* charged with a violation of the OHS laws, including companies and individuals such as corporate officers, owners, supervisors and workers, can raise a due diligence defence.

4. The due diligence defence applies to violations of the OHS and environmental laws as well as to other so-called 'regulatory' laws.
Example: After the hydraulic cylinder of an elevator failed and injured five people, the elevator maintenance company was convicted of five violations of the *Technical Standards and Safety Act* and fined $400,000. An appeals court upheld the convictions and fine, rejecting the company's due diligence defence. An industry safety bulletin had put the company on notice of the hazard of unexpected oil loss in hydraulic cylinders. A worker had added 100 litres of oil to the elevator's cylinder without being able to account for the oil loss. This unexplained loss of a large amount of oil should have indicated to the company that the safety of the elevator had been compromised. Thus, the cylinder's failure was

foreseeable [*The Technical Standards and Safety Authority v. Fujitec*, [2013] ONSC 497 (CanLII), Jan. 22, 2013].

5. Although due diligence isn't technically a defence to criminal negligence or so-called 'C-45' charges, proving that you exercised due diligence makes it essentially impossible to be convicted of criminal negligence.

6. Courts consider various factors when evaluating a due diligence defence, including foreseeability, preventability, control and degree of harm.

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***Insider* Says:** For more information on due diligence, go to the OHS Insider's Due Diligence Compliance Centre, which contains each year's Due Diligence Scorecard as well as dozens of other articles and information on this defence, including:

- Understanding the reasonable mistake of fact defence
- 10 due diligence traps to avoid
- Industry standards and due diligence.

The Scorecard

This year, we found 12 safety prosecutions decided since July 2012 in which the verdict turned on the success or failure of a company's or individual's due diligence defence. (Last year's Scorecard had 15 cases.) As usual, this defence failed more often than it succeeded. In this year's Scorecard:

Wins. The defendant won in three cases from BC and Ontario.

Split decision. In one case from Ontario, the constructor won but the employer lost.

Losses. The defendant lost in 8 cases from Alberta, BC and Ontario.

Most of the cases in the Scorecard involve companies

prosecuted as employers under the OHS laws. But two cases involved the prosecution of companies as constructors/prime contractors and one case involved the prosecution of both a corporation and two of its directors.

***Insider* Says:** The Scorecard doesn't reflect all of the safety prosecutions in a given year or so. Most prosecutions of safety violations are resolved when the company or individual pleads guilty. So many of these cases never result in a trial at which the due diligence defence is raised and analyzed. And many court decisions in safety prosecutions aren't reported or published.

BOTTOM LINE

For each of this year's 12 cases, the Scorecard tells you what happened, whether the company (or individual) won or lost and how the court or tribunal analyzed 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.

Due Diligence Scorecard

Here's a synopsis of 12 cases decided since July 2012 in which a court or tribunal had to evaluate a company's (or individual's) due diligence defence in an OHS prosecution.

COMPANY WINS

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ON: *Rassaun Steel*

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What Happened: A foundry hired a company to remove equipment, including a conveyor connected to duct work. Workers used a support system to hold the duct work in place as they were working on it. While a worker was unbolting one end of the duct work, it collapsed on a co-worker. He suffered a

fractured skull, crushed and cracked pelvis, collapsed lung, broken scapula, several broken ribs, a broken thumb and torn aorta. The company was convicted of failing to ensure the duct work was adequately supported while being dismantled. It appealed and argued due diligence, claiming that the collapse wasn't reasonably foreseeable.

Ruling: The Ontario Court of Justice overturned the conviction, ruling that the company had exercised due diligence.

Analysis: The court found that the collapse was caused by a buildup of sand in the ducts and a poor weld. The evidence showed that such buildup not only shouldn't have happened but also couldn't have been expected. In addition, witnesses testified that it wasn't practical or reasonable to inspect all of the welds in the ducts, noting that it would've taken years to do so. And but for the poor weld and sand buildup, the incident wouldn't have happened, said the court. Thus, it found that there was no basis on which to conclude that the collapse was 'a foreseeable risk' the company should've taken steps to address.

R. v. Rassaun Steel & MFG. Co. Ltd., [2012] ONCJ 705 (CanLII), Nov. 14, 2012

[box] **ON:** *Thomas Fuller* [/box]

What Happened: Workers were laying concrete piping at a construction site using a makeshift winch system. A 4 x 4 piece of a wooden brace that was part of this system snapped, releasing the tension in the winch system. The cables recoiled with great force and the wooden brace pivoted violently. A worker who was in its path suffered fatal injuries. A company was charged, as a constructor, with failing to ensure that the wooden brace was designed and constructed to support or resist all loads and forces to which it was likely to be subjected.

Ruling: The Ontario Court of Justice acquitted the

constructor, ruling that it had exercised due diligence.

Analysis: The company had relied upon the manufacturer's instructions and industry standards when designing and constructing the wooden brace. It did so knowing that the system would be operated by experienced pipe fitters under an experienced supervisor. The court also rejected the argument that the company should've involved a professional engineer in designing this equipment. The issue was whether the company took all of the care that a reasonable person might have been expected to take *in these circumstances*'not whether it took every conceivable step possible. Yes, the company could've consulted with engineers, put gauges on the device or used a steel structure instead of a wooden one. But for various reasons, a reasonable person'under these specific circumstances'wouldn't have been expected to take such steps, said the court.

R. v. Thomas Fuller and Sons Ltd., [2012] ONCJ 731 (CanLII), Nov. 23, 2012

[box] **BC:** *WCAT-2013-00296* [/box]

What Happened: Two fallers were falling trees to clear a forestry road right-of-way. They separated and started to fall trees in a narrow section of the right-of-way. One of the fallers starting falling a tree without realizing that the other was in the tree's path. The second faller was struck by the tree and died. The employer was issued an administrative penalty for improperly supervising its workers and appealed.

Ruling: The BC Workers' Compensation Appeals Tribunal canceled the penalty, ruling that the employer had exercised due diligence.

Analysis: The Tribunal noted that the employer had a detailed plan for falling the trees in this area. The fallers, who were both experienced, certified and properly trained and had worked with each other before, reviewed this plan with a

falling supervisor. After all three agreed on how to proceed, the supervisor left the site and the fallers worked on their own. However, the supervisor was available to all fallers each day before they left the marshalling yard for their respective sites and was available by radio. Thus, although the fallers weren't directly supervised on the day of the incident, the employer did provide adequate supervision for them under the circumstances, concluded the Tribunal. The incident happened because the faller who died unexpectedly departed from normal practice and changed direction, working towards the other faller instead of away from him. And the Tribunal said the employer had no reason to believe or expect that he'd depart from standard falling practices.

WCAT-2013-00296, [2013] CanLII 36803 (BC WCAT), Jan. 30, 2013

SPLIT DECISION

[box] **ON:** *Aecon Construction* [/box]

What Happened: A company responsible for constructing an eight floor commercial building hired a subcontractor to provide the building's concrete structure. A worker for the subcontractor was assigned to run a grinder over the concrete on the fourth floor to prepare it for finishing work. There was a lot of debris in the area he needed to clear first. As he was doing so, he removed a piece of plywood that was just lying on the floor. The worker fell about 12-13 feet through the opening in the floor underneath the plywood, seriously injuring his heel and back. The opening should've had a guardrail system around it or a secured and marked protective covering. The construction company was charged as a constructor with safety violations; the subcontractor was charged with safety offences as an employer.

Ruling: The Ontario Court of Justice ruled that the construction company had exercised due diligence, but the subcontractor hadn't.

Analysis: As to the construction company, the court said it was reasonable to expect a constructor on a project of this size to have a system in place for establishing OHS rules and procedures, communicating those requirements, monitoring compliance with them and enforcing the rules vigilantly. And the construction company satisfied all of those requirements. Thus, it took all reasonable precautions for a constructor to take in these circumstances, concluded the court.

But as to the subcontractor, there wasn't sufficient evidence that its OHS system was efficient. For example, the subcontractor didn't address the issue of floor opening covers in its safety materials or discuss the topic with workers in toolbox talks until *after* the incident. And given the fact that there were dozens of openings in the floors of this project, the risk of a worker falling through one of them was a foreseeable hazard the subcontractor should've addressed more thoroughly and directly. So although the subcontractor had a general focus on safety, the court concluded that it didn't take all reasonable steps as to this particular and common workplace hazard.

Ontario (Ministry of Labour) v. Aecon Construction Group Inc., [2013] O.J. No. 3237, June 6, 2013

COMPANY/INDIVIDUAL LOSES

[box] **BC:** *WCAT-2012-01812* [/box]

What Happened: An OHS officer inspected a worksite and saw two young workers installing shingles on a roof at a height greater than 10 feet. Neither worker was using a fall protection system or connected to an anchored safety line. The officer discussed the fall protection requirements with the site supervisor and explained how he could ensure compliance. But during a follow-up inspection, the officer again saw two workers on a roof 15-18 feet above grade without being connected to safety lines (although they were wearing fall

protection harnesses). So the construction company was issued an administrative penalty for failing to comply with the fall protection requirements.

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

Analysis: Five months before the first inspection, the company had been penalized for a fall protection violation. So after the first inspection, the company was clearly on notice that there was a problem with workers' complying with the fall protection requirements. The court concluded that the training and supervision the company provided wasn't sufficient for workers to understand these requirements and the importance of complying with them. But it didn't take any additional steps to improve compliance, such as conducting more frequent site inspections by field supervisors or implementing a more stringent disciplinary process for safety infractions. And the company's documentation of the steps it *did* take fell 'short of meeting the test of due diligence,' added the court.

WCAT-2012-01812, [2012] CanLII 54788 (BC WCAT), July 10, 2012

[box] **ON:** *Deep Foundations* [/box]

What Happened: Piles were temporarily welded to a steel frame in order to be vibrated into the ground at a water main excavation site. While a pile was being vibrated, a beam broke free from its weld and fell on a worker, breaking his arms and a leg and severely damaging an ear. The employer was charged with a safety violation.

Ruling: The Ontario Court of Justice ruled that the employer hadn't exercised due diligence.

Analysis: A supervisor for the employer claimed that he expected the certified welder who he'd used before to attach the piles using full welds, not tack or temporary welds. But the supervisor didn't directly or specifically tell the welder

what he expected or examine the welds once they were done. The employer simply relied on the welder's qualifications and previous work. And there were no guidelines specifying the process for this procedure. For example, no one conducted a safety assessment of the process. So although the employer may have considered safety in general, it didn't assess the safety of this particular work activity or take reasonable steps to ensure the safety of workers performing it, concluded the court.

Ontario (Ministry of Labour) v. Deep Foundations Contractors Inc., [2012] O.J. No. 5331, Aug. 17, 2012

[box] **ON:** *Pack All Manufacturing* [/box]

What Happened: Workers were verbally instructed to use foam sticks to clear jams of materials, which happened regularly. But a worker was injured when his hand came into contact with an unguarded pinchpoint near a hopper while trying to clear a jam. The company and two directors were convicted of OHS violations and appealed.

Ruling: The Ontario Court of Justice ruled that the company and directors hadn't exercised due diligence.

Analysis: The uncontroverted evidence showed that the hopper set-up gave workers access to an unguarded in-running nip hazard. An informal company policy of using foam sticks to clear jams in the hopper didn't negate the need for a guard. And at least one member of management knew workers were using their hands to clear jams. But despite the fact that jams were common, the company didn't have a formal, written policy on dealing with them or provide adequate training for workers on safely handling jams. In addition, the corporate directors had a duty to ensure that the company complied with the OHS laws and addressed known safety issues, especially given their hands-on and on-site involvement with the company's operations. In short, the appeals court agreed that neither

the company nor its directors exercised due diligence as this hazard.

Ontario (Ministry of Labour) v. Pack All Manufacturing Ltd., [2012] O.J. No. 5311, Nov. 6, 2012

[box] **BC:** *WCAT-2012-03407* [/box]

What Happened: An OHS officer inspecting a worksite saw two workers on a roof about 20 feet above grade and without adequate fall protection. In a separate inspection, an officer saw the roofing company's principal and three workers on a roof 14-20 feet above grade and again without appropriate fall protection. The roofing company was assessed an administrative penalty for fall protection violations and appealed.

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

Analysis: The company had many excuses for the violations. For example, the principal claimed that in the first incident, the workers had been using fall protection while he was there and they must have taken it off when he left. In the second incident, the company claimed that it was properly using a safety monitor system instead of fall protection because of the roof's pitch. It also argued that the prime contractor was the one responsible for safety at the site. The Tribunal noted that the company provided little evidence of its overall safety program. The company had prior fall protection violations and should know the requirements'especially given that it was in the roofing industry. But it didn't take steps to ensure adequate supervision of its workers. And it didn't take any steps to assess whether a safety monitor system was appropriate for the roof in question, which it wasn't.

WCAT-2012-03407, [2012] CanLII 89247 (BC WCAT), Dec. 31, 2012

[box] **ON:** *Stratford Chick Hatchery* [/box]

What Happened: At worker at a hatchery fell and broke her leg while climbing out of a storage trailer. The trailer had a set of three portable steps, the top of which was two feet lower than the trailer's floor. The hatchery was convicted of violating the general duty clause of the *OHS Act* by failing to provide adequate egress from the trailer. It appealed.

Ruling: The Ontario Court of Justice ruled that the hatchery didn't exercise due diligence.

Analysis: The hatchery claimed that the steps were 'adequate.' Although the steps may have been adequate when the trailer was in a different location and its tires had been deflated, they were no longer adequate once the trailer was moved. The court said the steps were too low for safe access into and out of the trailer in its current location, noting that a two foot gap between the top step and trailer was 'self-evidently unsafe' and 'an accident waiting to happen.' By supplying workers with a set of steps that was too short to access the storage trailer safely, the hatchery failed to take every precaution reasonable in those circumstances for the protection of its workers, concluded the court.

Ontario (Ministry of Labour) v. Stratford Chick Hatchery Ltd., [2012] ONCJ 47 (CanLII), Jan. 30, 2013

[box] **ON:** *Tembec* [/box]

What Happened: A worker went to clear a jammed sawmill conveyor belt by climbing over a guardrail on a catwalk, standing on a conveyor platform that was more than three metres above the floor and poking at the jam. A piece of wood came up and knocked him to the floor below. As he wasn't wearing fall-arrest equipment, he sustained injuries that included broken bones. The sawmill was convicted at trial of one safety offence and appealed, arguing that the court's conclusion that it was foreseeable that workers would climb over the catwalk's guardrail was unreasonable.

Ruling: The Ontario Superior Court of Justice ruled that the sawmill hadn't exercised due diligence.

Analysis: The appeals court noted that, at trial, three workers testified that they sometimes had to climb over the guardrail to clear a jam and that they were never told not to do so or to wear fall protection if they did. In addition, there was evidence that jams were frequent and sometimes required workers to access the conveyor to clear them. But although there was a lockout procedure for this process, the procedure didn't address the use of fall protection nor were workers trained on the use of fall protection, observed the court.

R. v. Tembec Inc., [2013] ONSC 4278 (CanLII), June 24, 2013

[box] **ON:** *Sunrise Propane* [/box]

What Happened: While workers at a propane facility were transferring propane from truck-to-truck, which is illegal, the vapours ignited, causing a series of explosions. A 25-year-old worker was killed; a co-worker suffered minor injuries. The explosion forced the evacuation of approximately 12,000 residents and caused widespread damage. And a firefighter died of a heart attack while battling the blaze. A company was charged with violating the OHS laws by failing, as an employer, to provide information, instruction and supervision to a worker on the safe handling of propane and to take every reasonable precaution to ensure the propane facility was installed and operated in accordance with regulatory requirements and safe industry practice. (Two companies and their directors were also charged with and convicted of environmental violations.)

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

Analysis: Although the defendants claimed that the deceased worker was trained on safely handling propane, there was no

evidence or records of such training. And the fact he ran toward the explosion instead of away from it supports the conclusion that he wasn't properly trained, said the court. There was also no evidence that workers got appropriate supervision. And the standard of care expected of the company as to training and supervision was 'extremely high and strict' given the dangerous nature of the propane business, noted the court. Lastly, there was no system in place to ensure that the facility complied with the requirements of the *Technical Standards and Safety Act*.

Ontario (Ministry of Labour and Ministry of the Environment) v. Sunrise Propane Energy Group Inc., 2013 ONCJ 358 (CanLII), June 27, 2013

[box] **AB:** *XI Technologies Inc.* [/box]

What Happened: During the Calgary Stampede, a small technology company held a customer appreciation event for which it rented a mechanical calf roping machine. The machine 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, sustaining fatal 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 dismissed the charges, ruling that the company had exercised due diligence. But the Alberta Court of Queen's Bench overturned the trial court's decision and convicted the company on both charges, ruling that the company didn't exercise due diligence. The company appealed again.

Ruling: The Alberta Court of Appeal upheld the company's convictions, ruling that it didn't exercise due diligence.

Analysis: The company knew the machine wasn't working

properly. So it set up a procedure that required the operator to reach into the machine to manually detach a hook. But this procedure didn’t address the danger creating by having someone reach into the machine in this manner, which was reasonably foreseeable under the circumstances. Thus, the company didn’t do all that was reasonably practicable to avoid the reasonably foreseeable risks, concluded the court. For example, once it was clear the machine wasn’t working properly, the company should’ve stopped using it.

R. v. XI Technologies Inc., [2013] ABCA 281 (CanLII), Aug. 13, 2013