The Insider’s 11th Annual Due Diligence Scorecard, Part 2: 12 Lessons from Recent Due Diligence Cases

Part 1 of the *Insider*’s 11th annual Due Diligence Scorecard included 14 safety prosecutions decided since Sept. 2014 in which a company or individual raised the due diligence defence. Lawyers aren’t the only ones who benefit from reading these court, board and tribunal decisions; safety professionals can also learn from these decisions because they provide real-life examples of what it takes to successfully prove due diligence and what mistakes can undermine this defence. Here in Part 2 of the Scorecard, we’ve culled 12 lessons from the most recent due diligence cases, which you can apply to your own workplace and OHS program. (See the box at the end for a review of six key facts about the due diligence defence.)

12 KEY DUE DILIGENCE LESSONS

[learn_more caption=”Lesson #1: Having a Good General OHS Program Isn’t Enough”]

Companies must have an OHS program—that is, a formal system that spells out general safety rules and procedures, and defines the roles and responsibilities of the employer, supervisors and workers within that system. Your OHS program

must also have specific written safety procedures and rules for the company's operations, equipment, sites and the jobs or activities that workers perform. But having a program that's generally effective won't support your due diligence defence if the program fails under specific circumstances.

Example: A roofing company installed a compliant guardrail system on the roof of a building as well as a chute with a garbage bin at the bottom. When the bin got filled, workers built a ramp on the roof and drove a motorized buggy full of garbage up the ramp and dumped it into a trailer below through an opening in the guardrail. While doing so, a worker's sleeve got caught on the buggy and he fell off the roof. He wasn't wearing fall protection at the time. The roofing company was charged with two safety violations.

The court rejected the roofing company's due diligence defence. It noted that the company had a good overall OHS program that included:

- Clear internal polices;
- Weekly safety meetings;
- Toolbox talks and testing on these talks;
- Superintendents' meetings; and
- Use of outside consultants to teach health and safety courses and conduct spot audits.

In addition, workers who failed to use safety equipment were sent home without pay and retrained. And the company used discipline to enforce its safety standards, including firing workers who repeatedly breached its safety requirements.

But although the company initially took "reasonable safety precautions at this project," the second garbage disposal process wasn't compliant. For example, there were no set procedures that covered the wearing of safety harnesses when dumping the garbage at the opening and the safe use of buggies on the roof. In addition, workers weren't given any additional

instruction or training on the second garbage disposal method. So the court found that the roofing company didn't take all reasonable steps to prevent this incident. [*Ontario (Ministry of Labour) v. Semple Gooder Roofing Corp.*].[/learn_more]

[learn_more caption="Lesson #2: You're Responsible Only for Reasonably Foreseeable Hazards"]

In reading decisions in safety prosecutions, it may appear that the courts expect companies to take steps to address any safety hazard that's imaginable. But in reality, you're responsible only for those hazards that are reasonably foreseeable, which means those hazards that a reasonably prudent person in the same circumstances would have foreseen. So if a safety hazard, incident or violation wasn't reasonably foreseeable, you won't be expected to have taken all reasonable steps to prevent or address it.

Example #1: Within four months, two car seats fell forward at the same work station on an assembly line in a plant, striking workers and causing minor injuries. The plant was charged with two safety violations. But in acquitting the plant, the court pointed out that nearly two million seats had been built at the plant, with just two falling. The falls occurred because of a "unique and particular combination of factors," which caused the workers to mistakenly believe that the seats were locked in place, explained the court. Thus, it concluded that these incidents weren't reasonably foreseeable [*Ontario (Ministry of Labour) v. Magna Seating Inc.*].

Example #2: An airline employee at an airport gate was hit in the back by an empty baggage cart and injured. The area around the plane was slippery due to packed snow on top of ice. A federal Health and Safety Officer issued the airport a compliance direction for allowing an accumulation of ice and snow. The airport appealed, arguing that it had exercised due diligence in its snow removal operations.

In rescinding the compliance direction, the federal OHS Tribunal said that snow and ice removal was "a cooperative procedure" requiring coordination between the airport and the airlines. The airport provided regular snow and ice removal, and relied on the airlines to make specific service requests when there was an immediate need for removal at a particular gate. But the airline didn't make such a request for this gate, noted the Tribunal, and thus failed to bring the snow/ice issue in the area to the airport's attention. In addition, because the airline continued it flight operations and the associated movement around this gate despite the conditions, the airport's snow clearance crew couldn't have accessed that area to remove the snow and ice anyway. So the airport couldn't reasonably have been aware of the safety hazard posed by the snow and ice at this particular gate [*Macdonald Cartier International Airport Authority*].

The flip side is that if a hazard *is* reasonably foreseeable and thus is one you knew or should've known about, due diligence requires you to have taken all reasonable steps to address it.

Example #1: In response to an anonymous tip about a smouldering fire in the dust removal system at a furniture manufacturer's factory, a Board officer investigated the factory and found various safety violations. The manufacturer was issued an administrative penalty, which was upheld on appeal. Smoking embers were "not uncommon" in the factory due to excessive sanding of hardwoods, said the Tribunal. In such circumstances, a "reasonably prudent employer" would prepare workers and train them on how to deal with the foreseeable hazard of smoking materials in the dust extractor ducting. But the Tribunal found that there was no evidence that the manufacturer trained its workers to deal with smoking items in the dust extractor system [*WCAT-2014-03205 (Re)*].

Example #2: Several employees of an oil company, city and government agency made a site visit to a section of road to

inspect the asphalt for degradation. An on-coming driver struck them, killing one and injuring two. As a result, the employers were charged with multiple safety offences. (The oil company's case was resolved separately.)

The court rejected the employers' due diligence defence. The employers and employees all understood the main hazard in doing road inspections: the traffic. Doing such inspections was a "normal activity" for these employees and so "the hazard was clearly foreseeable," said the court. And although the employers may not have foreseen the incident happening in the way that it did, they should've foreseen the need to address the traffic for the safety of their employees and taken appropriate steps. But they failed to do so. For example, although the employees were experienced, they didn't get training on these types of roadside inspection. They didn't discuss safety in the pre-inspection meeting. And they were neither offered nor did they request any PPE, such as high-visibility vests [*R. v. Department of Transportation and Works (NL) and City of St. John's*].[/learn_more]

[learn_more caption="Lesson #3: Your Expertise Is Relevant"]

When determining whether a safety hazard, violation or incident was foreseeable or what steps should've been taken to address a hazard, a court or tribunal will consider many factors, including the employer's expertise. For example, a company that specializes in excavation work will held to a higher standard when it comes to compliance with the requirements in the OHS laws on excavations and trenches than, say, a general contractor that only does such work sporadically.

Example #1: An engineering firm provided drawings for a concrete wall form to be used at a multi-storey residential construction project. Engineers from the firm inspected the forms when they were first constructed to ensure they complied with the drawings and then issued a compliance certificate.

But as the workers were using the forms to build walls on the 30th floor, a form fell over and crushed a nearby worker, who died. The engineering firm was issued an administrative penalty for failing in its safety obligations as to the drawings. It appealed, but the penalty was upheld.

The firm knew the forms were going to be used to build walls at various floors in the project's construction. But the engineering drawings didn't provide instructions on how to erect the form above the bottom parking level. In addition, the workers used an improper bracing method that differed from the one in the specifications. This change was present at the pre-pour inspection. So the engineers should've noticed the change and reviewed its effect on the safety of the form, which they didn't do. Instead, the firm blamed the concrete company for improperly using the form. But the Tribunal explained that because the firm had the engineering expertise, *it* should've identified the problematic issues rather than just leaving them for the concrete company to resolve [*WCAT-2015-00944 (Re)*].

Example #2: During an inspection, officers saw two workers working on a roof about 12-14 feet above the ground and without any type of fall protection. The employer was issued an administrative penalty for two violations and appealed. The Tribunal upheld the penalty, noting that the employer, which was engaged in the roofing business, should be aware of the hazards and OHS requirements related to this work. But there was no written fall protection plan in place at this job site and there was only sufficient fall protection equipment for one worker—not two. And the workers didn't have written work procedures or considerations for the hierarchy of fall protection. Because the employer's core business is roofing, observed the Tribunal, its senior staff should be "extremely well-versed in all aspects of the business, including the many ways a worker could ensure his safety while repairing a roof" without violating the OHS laws. That the employer wasn't

knowledgeable in this regard and clearly didn't train its staff in this regard is persuasive evidence of its failure to exercise due diligence, concluded the Tribunal [*WCAT-2015-00446 (Re)*].[/learn_more]

[learn_more caption="Lesson #4: All Safety Hazards Aren't Alike"]

All safety hazards aren't alike and don't necessitate the same response. For example, you're not expected to respond to the risk of a worker tripping over a cord in the same way you'd respond to the risk of a worker being electrocuted. Instead, it's reasonable to prioritize your safety efforts based on various factors, including the chance of an incident occurring and the risk of serious injury to a worker if one does occur.

Example: In *Ontario (Ministry of Labour) v. Magna Seating Inc.* discussed above, the prosecution argued that once the first seat fell and struck a worker, the plant was on notice of this safety hazard and should've acted promptly to address it. The court explained that in determining whether the plant had taken all reasonable care in the circumstances to prevent seats from falling, it would consider various factors, such as the "probability of recurrence and the potential for grave injury to a worker." Given the low probability of a seat falling again and the low possibility of a serious injury from a seat falling and striking a worker, the JHSC didn't identify this issue as a high priority. And in these circumstances, it wasn't unreasonable for the plant's JHSC and management not to immediately seek a solution to address the issue of falling seats, concluded the court.[/learn_more]

[learn_more caption="Lesson #5: You Must Adequately Train Workers and Supervisors"]

Having an OHS program that includes written safety rules and procedures isn't enough on its own. You must train both workers and supervisors on those rules and procedures as well

as on the relevant requirements in the OHS laws and the safe use of the equipment that they operate. And you must ensure that workers and supervisors actually understand this training and apply it on the job. (Go to the Training Compliance Centre for more on training workers.)

Example: When an officer inspected a worksite, he saw four workers in an excavation deeper than four feet and without benching. In addition, a spoil pile was located immediately to the south of the excavation. The employer was issued administrative penalties for three OHS violations, including failing to provide instruction, training and supervision. It appealed, but the penalties were upheld.

The officer had questioned the workers, foreman and site superintendent on the excavation requirements, including how far back the spoil pile should be and when a trench required benching or other protection. But none of them knew the correct answers. In fact, the superintendent argued that the excavation didn't need shoring or sloping. So although the employer claimed that it had an effective OHS program, its employees' lack of knowledge was "indicative of a lack of adequate training," which is a significant part of a safety program, particularly when the employer's main business was excavations, concluded the Tribunal [*WCAT-2014-02837 (Re)*].

You must also ensure that your training is accurate or else workers may work unsafely—and your company may be charged with a safety offence.

Example: In *WCAT-2015-00446 (Re)* discussed above, the Tribunal said the fact that one of the workers on the roof believed that fall protection wasn't required for jobs taking less than 15 minutes is "illustrative of a significant failure of the employer's training program." The OHS regulations are clear that fall protection is *never* optional when working at a height of more than three metres—that is, there's no short time duration exemption, which the employer should

know.[/learn_more]

[learn_more caption="Lesson #6: You Must Also Adequately Supervise Workers"]

Just because you've adequately trained workers doesn't mean that they'll always follow your safety rules and procedures, and comply with the OHS laws, which is why you need to adequately supervise them as well.

Example #1: An electrician and a millwright at a farm were sent to fix a large shipping door that wouldn't close. While trying to assess the situation, the door fell on the electrician and seriously injured him. The farm was convicted of two safety offences, including failing to provide supervision, and appealed. But the court upheld the convictions, ruling that the farm hadn't exercised due diligence. The door was located at a loading dock, an area in which the electrician and millwright had limited experience. But the farm send them to this unfamiliar location without any supervision [*Ontario (Ministry of Labour) v. Maple Lodge Farms*].

Example #2: In *WCAT-2015-00446 (Re)* discussed above, although the employer claimed it had appropriate supervisory mechanisms in place, one worker, a repair technician, said his supervisor almost never checked on him. The Tribunal noted that repair technicians are exposed to greater risk than roofing technicians, who were subject to regular if not constant supervision. But despite the increased risk, "repair technicians were the subject of almost no active supervision," observed the Tribunal.[/learn_more]

[learn_more caption="Lesson #7: You Can't Rely Solely on a Worker's Experience"]

You may think that you don't need to train or supervise a worker who's very experienced but you'd be wrong. You can't rely on a worker's experience alone. You're still required to

train and supervise experienced workers, although such supervision can be less hands-on or intense.

Example: An electrical services company assigned an experienced electrician, another electrician and an intern to finish tying down an electrical feeder cable in an electrical cabinet. While doing this job, the experienced electrician, who wasn't wearing any protective equipment or clothing, contacted energized bus bars in the cabinet and was electrocuted. As a result, the company was convicted of two OHS violations.

The roofing company argued that it wasn't responsible for the experienced electrician's lapse in judgment. Yes, the deceased electrician was very experienced, highly regarded and known to be safety conscious. So it was unclear why he opted to work on the cabinet while it was still energized and without any protective equipment. But the court explained that the electrician's "tragic miscalculation" didn't absolve the company of its safety duties. In fact, the evidence showed that the company did nothing that remotely satisfied the requirement to provide instruction and supervision. For example, the company took a completely hands-off approach to the electrician's work, providing no supervision at all. Instead, it relied exclusively on his experience and commitment to safety, said the court [*R. v. R.D. Longard Services Ltd.*].[/learn_more]

[learn_more caption="Lesson #8: If You Provide Proper Training & Supervision, You Won't Be Liable for a Rogue Worker's Acts"]

If you provide adequate safety training to all employees and ensure workers get proper supervision, you're unlikely to be held liable if a worker goes "rogue" and disregards his training.

Example: A supervisor assigned a relatively inexperienced worker to modify a very large and heavy spindle. It was laying

horizontal on two stands and had to be flipped over so the worker could make the necessary changes. But in violation of his safety training, he used an overhead crane to rotate the spindle by himself. As he was doing so, it fell off its stands and onto his foot, which had to be amputated. The manufacturer was charged with—but acquitted of—two OHS violations.

The court said the manufacturer had taken all reasonable precautions to prevent an incident such as this one, including providing the worker with a safety orientation and overhead crane training, and implementing a protocol for the movement of large new pieces by junior workers. Thus, it wasn't reasonably foreseeable that the worker would try to rotate the very large spindle by himself and use an overhead crane in violation of his training and with a tool that wasn't intended for that purpose, concluded the court [*R. v. ABS Machining Inc.*].

But note that if you point the finger at your workers, arguing that you took all reasonable steps and the workers simply disregarded safety protocol, courts won't always buy that argument. Workplace safety in Canada is based on the Internal Responsibility System (IRS), in which *all* workplace stakeholders—including employers, supervisors *and* workers—have a duty to ensure the safety of the workplace. So even if a worker commits a safety offence, a court may still find that you bear some responsibility.

Example: An OHS inspector saw a worker without any fall protection on a roof that was more than 7.5 metres above the ground. In addition, there was no supervisor present. The roofing company was issued an administrative penalty, which was held up on appeal. The company argued that it shouldn't be punished for the worker's failure to follow procedure because it had trained him on fall protection and provided adequate fall protection equipment. But the Board explained that a violation such as this one could potentially be "laid at the feet of more than one party." So the fact the worker may be

“most obviously culpable” doesn’t absolve the company of responsibility. The Board believed it was necessary to send a message to all employers that they’re “legally at risk when their employees behave foolishly” [*McCarthy’s Roofing Limited (Re)*].[/learn_more]

[learn_more caption=”Lesson #9: Safety Rules ≠ Physical Guards”]

When it comes to appropriate safety measures, the preference is always for engineered measures, such as machine guards, over safety rules and procedures whenever possible. Workers can easily disregard rules and procedures, endangering themselves. In contrast, it’s much harder for workers to circumvent engineered solutions, thus taking individual discretion, judgment and compliance out of the equation. So you’re unlikely to convince a court that you exercised due diligence by arguing that your safety rules and procedures were adequate replacements for engineered controls.

Example: Workers at a well site were removing a drilling pipe from the well and disconnecting it piece by piece. As a driller was trying to lift the drill stem, the trapped torque was released, causing the equipment to spin and hit a worker in the head. He died from his injuries. The employer was convicted of two safety offences.

The prosecution argued that, in determining what constituted reasonable steps, the appropriate standard of care required an engineered solution to the problem of table torque induced by the driller. The employer argued that it wasn’t reasonable to require an engineered solution given its administrative procedures. The court agreed with the Crown, noting that the OHS law mandated “engineered solutions where feasible.” The goal of such solutions is to avoid the sort of human error the court found happened in this incident. There was an effective engineered safety measure available to address this problem. And the employer implemented the same or a similar solution

when specifically ordered to do so. In addition, the solution was cheap, quick and easy to implement. In short, the court said it wasn't requiring the employer to go beyond government or industry standards—it was simply requiring it to do nothing more than apply "a small bit of common-sense engineering to a known problem" [*R. v. Precision Drilling Canada Ltd.*].[/learn_more]

[learn_more caption="Lesson #10: Industry Standards Are Relevant to Due Diligence"]

Your first duty is to comply with the requirements in the OHS laws. But sometimes the law doesn't address specific situations or hazards. So to comply with your general duty to ensure worker safety, you may implement an industry standard or practice to address that situation or hazard. In fact, courts will consider industry standards when deciding what steps you reasonably should've taken under the circumstances. Thus, if others in your industry are implementing certain safety measures, you may be unable to successfully argue that taking such measures yourself was unreasonable (For more on industry standards, see "Is Following with an Industry Standard the Same Thing as Due Diligence'")

Example: In *R. v. Precision Drilling Canada Ltd.* discussed above, the employer argued that industry practice at the time didn't mandate an engineered solution to the torque problem. But the court found that the evidence was "clear that an engineered solution was in place with other industry competitors."[/learn_more]

[learn_more caption="Lesson #11: Safety Duties May Extend to Non-Employees, Too"]

Obviously, an employer's first concern is protecting its own employees. But an employer's safety duties may extend beyond those individuals on its own payroll and include employees of contractors, visitors to the workplace and even members of the

public. So if one of those individuals is injured in your workplace, you may be held responsible.

Example: A tree faller was logging at a location within the area of a forest license owned by West Fraser Mills. But he wasn't a Mills employee; he worked for a contractor hired by Mills. He was struck and killed by a section of a rotting dead fir tree. Mills was hit with an administrative penalty for safety violations, which was upheld on appeal.

Although the duties between employers and owners may differ, the OHS laws "clearly contemplate that *both* bear responsibility for occupational health and safety," explained the court. So it may be reasonable to impose an administrative penalty on the owner of a workplace for failing to take sufficient precautions to prevent work-related injuries at its workplace. In this case, the forestry operation was a workplace under the OHS law and Mills "owned" that operation. As the owner of the forest licence, it had sufficient knowledge and control over the workplace to be able to ensure the health and safety of people at or near the workplace. It also had a duty to ensure the activities of the forestry operation were planned and conducted in compliance with the OHS laws and safe work practices. Thus, the Board could penalize Mills for violating its obligations *as an owner* by failing to take sufficient precautions to prevent the faller's death [*West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*].[/learn_more]

[learn_more caption="Lesson #12: Documentation Is Critical to Proving Due Diligence"]

Providing adequate training to workers, disciplining them for safety infractions and conducting workplace inspections isn't going to help you establish due diligence if you can't prove that you took such steps. So it's important to formally document all of your safety efforts and measures. (Go to the OHS Insider's Toolbox for model documents to help you do so.)

Failing to have such documentation may leave you without proof that you, in fact, exercised due diligence.

Example #1: In *Macdonald Cartier International Airport Authority* discussed above, the airport prevailed in part because its Winter Maintenance Plan, the personnel and equipment dedicated to snow and ice clearance duties, the procedures to implement snow and ice removal, and the weather conditions were "well documented." For example, the airport maintained a log of service requests for immediate snow or ice removal and the log for the date of the incident indicated that the airline did *not* submit such a request for the gate in question.

Example #2: In *WCAT-2014-02837*, also discussed previously, the Tribunal explained that an effective overall safety program would include regular monthly meetings on health and safety matters, such as the correction of unsafe conditions, as well as "the maintenance of a record of the meeting and matters discussed." But the employer didn't have such records. In addition, the employer didn't have any training records to indicate that workers were aware that working in an excavation more than four feet deep without benching violated the OHS regulations.[/learn_more]

BOTTOM LINE

To ensure that your OHS program could withstand scrutiny from a due diligence perspective, apply these lessons in your workplace. For example, if you think supervision of workers is lax, use the cases in which poor supervision of workers cost employers to motivate senior management to implement more proactive supervision and to demonstrate to supervisors the importance of their role. But remember that exercising due diligence isn't just about protecting the company from liability and fines—first and foremost, it's about protecting workers from injuries and preventing safety violations and incidents from occurring in the first place.

SHOW YOUR LAWYER

Macdonald Cartier International Airport Authority, [2015] OHSTC 5 (CanLII), March 5, 2015

McCarthy's Roofing Limited (Re), [2015] NSLB 150 (CanLII), Sept. 2, 2015

Ontario (Ministry of Labour) v. Magna Seating Inc., [2015] ONCJ 7 (CanLII), Jan. 9, 2015

Ontario (Ministry of Labour) v. Maple Lodge Farms, [2015] ONCJ 172 (CanLII), April 7, 2015

Ontario (Ministry of Labour) v. Semple Gooder Roofing Corp., [2015] ONCJ 183 (CanLII), April 8, 2015

R. v. ABS Machining Inc., [2015] ONCJ 213 (CanLII), April 10, 2015

R. v. Department of Transportation and Works (NL) and City of St. John's, [2014] CanLII 73922 (NL PC), Dec. 9, 2014

R. v. Precision Drilling Canada Ltd., [2015] ABPC 115 (CanLII), June 1, 2015

R. v. R.D. Longard Services Ltd., [2015] NSPC 20 (CanLII), April 17, 2015

WCAT-2014-02837 (Re), [2014] CanLII 91436 (BC WCAT), Sept. 25, 2014

WCAT-2014-03205 (Re), [2014] CanLII 91988 (BC WCAT), Oct. 30, 2014

WCAT-2015-00446 (Re), [2015] CanLII 42715 (BC WCAT), Feb. 6, 2015

WCAT-2015-00944 (Re), [2015] CanLII 42040 (BC WCAT), March 23, 2015

West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal), [2015] BCSC 1098 (CanLII), June 25, 2015

[box]

6 KEY FACTS ABOUT DUE DILIGENCE

1. There are two kinds of due diligence: reasonable steps—the type most commonly argued—and reasonable mistake of fact.
2. Due diligence is a defence that must be proven by a defendant charged with an OHS violation on a balance of probabilities once the prosecution has proven that violation beyond a reasonable doubt.
3. Courts consider various factors when evaluating a due diligence defence, most notably foreseeability, preventability, control and degree of harm.
4. Anyone charged with a violation of the OHS laws, including organizations, government agencies or companies and individuals such as corporate officers, owners, supervisors and workers, can raise a due diligence defence.
5. 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. It may also apply when a company has been issued an administrative penalty or safety compliance direction.
6. 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 essentially impossible to be convicted of criminal negligence.[/box]