THE INSIDER'S 11th DUE DILIGENCE SCORECARD: Our Annual Look at Recent Due Diligence Cases

At this time each year, we focus on due diligence. Why do we give so much attention to this concept' Because understanding the due diligence defense is critical to understanding compliance with the OHS laws. If you have a solid understanding of the factors courts consider when deciding whether a company or individual exercised due diligence and how they analyze those factors, you're more likely to implement an OHS program that ensures you take all reasonable steps to protect workers' health and safety and comply with the OHS acts and regulations.

For the 11th year, the *Insider*'s annual Due Diligence Scorecard includes reported safety cases involving the due diligence defence from across Canada. This year's version includes cases decided since Sept. 2014. We'll start by reviewing the key facts about due diligence and then look at the facts and decisions in the cases.

DUE DILIGENCE BASICS

Here are the 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 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 officers, 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. 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 essentially 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 14 safety prosecutions decided since Sept. 2014 involving a company's or individual's due diligence

defence. (Last year's Scorecard had 21 cases.) Note that the Scorecard doesn't reflect *all* of the safety prosecutions in a given period of time. Most prosecutions of OHS violations are resolved when the company or individual pleads guilty. So the due diligence defence is never raised and analyzed in those cases. And many court decisions in safety prosecutions that *do* go to trial aren't reported or published.

In this year's Scorecard, the defendant:

- Won in 3 cases from Fed and ON; and
- Lost in 11 cases from AB, BC, NL, NS and ON.

For each of the cases in this year's Scorecard, we tell you what happened, whether the company/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 use to evaluate and improve your OHS program.

DUE DILIGENCE SCORECARD

Here's a synopsis of 14 cases decided since Sept. 2014 in which a court or tribunal had to evaluate a company's/individual's due diligence defence.

COMPANY WINS

[learn_more caption="**ON:** *Magna Seating*"]

What Happened: Within four months, two car seats fell forward while on an assembly line in a plant, striking workers. One suffered a cut lip and didn't miss any work; the other got a soft tissue injury to the chest and only missed one day of work. Both incidents occurred at the same workstation. As a result, the plant was charged with falling to ensure that materials don't fall and a guarding violation.

Ruling: The Ontario Court of Justice dismissed the charges, ruling that the Crown hadn't proven them beyond a reasonable doubt and that the plant had exercised due diligence.

Analysis: The court noted that nearly two million seats had been built at the plant, with only two falling. And the injuries caused by these falls were minor. So although the JHSC and the plant's management were aware of this safety hazard and did consider it, they reasonably didn't consider the hazard to be a high priority given the very low possibility of recurrence and low potential for grave injury to a worker. Thus, it was reasonable for the JHSC not to act more promptly in addressing the hazard at this work station after the first incident occurred. In addition, the cause of the falls wasn't reasonably foreseeable. So the court concluded that the plant had taken all reasonable care under the circumstances.

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

[learn_more caption="**FED:** *Macdonald Cartier*"]

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.

Ruling: The federal OHS Tribunal rescinded the compliance direction.

Analysis: Snow and ice removal was a cooperative procedure requiring coordination between the airlines and the airport,

noted the Tribunal. The evidence showed that 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. In addition, the airline's flight operations and 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 at this particular gate and had exercised due diligence as to snow and ice removal.

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

[learn_more caption="**ON:** *ABS Machining*"]

What Happened: A relatively inexperienced worker for a manufacturer was assigned by his supervisor to make modifications to a very large spindle weighing about 10,000 pounds. The spindle was laying horizontal on two stands. But it had to be flipped so the worker could make the necessary changes. In violation of his safety training, he used an overhead crane to rotate the spindle. As he was doing so, it fell off its stands and onto his foot, which had to be amputated. The manufacturer was charged with two OHS violations.

Ruling: The Ontario Court of Justice acquitted the manufacturer, ruling that it had exercised due diligence.

Analysis: The court explained that the issue was whether a

reasonable employer would've foreseen that the worker would try to rotate the spindle on his own and in the manner he used. It concluded that this worker's actions weren't foreseeable. He tried to rotate the very large spindle by himself and using an overhead crane in violation of his training and using a tool (rebar) that wasn't intended for that purpose. And he did so without knowing the spindle's weight or the load capacity of the devices he was using. 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, concluded the court.

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

COMPANY/INDIVIDUAL LOSES

[learn_more caption="**BC:** *WCAT-2014-02837*"]

What Happened: An officer was on his way to inspect a worksite when he saw a truck bearing the employer's logo being driven by the employer's superintendent, who was using a hand-held device at the time and speeding. When the officer arrived at the site, he saw four workers in an excavation deeper than four feet and a spoil pile immediately to the south of the excavation. In addition, the excavation didn't have benching. As a result, the employer was issued administrative penalties for three OHS violations, including failing to provide instruction, training and supervision. It appealed.

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

Analysis: At the worksite, the officer had asked the workers

and the foreman questions about the requirements for excavations, including how far back the spoil pile should be and when a trench required benching or other protection. None of them knew the correct answers. The superintendent also argued that the excavation didn't need shoring or sloping. So despite the employer's claims that it held regular safety meetings and had an effective OHS program, the Tribunal found that its employees' lack of knowledge was 'indicative of a lack of adequate training,' especially given that the employer's main business was excavations. And adequate training, instruction and information are all components of due diligence.

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

[learn_more caption="**BC:** *WCAT-2014-03205*"]

What Happened: The Board got an anonymous tip about smouldering fire in the dust removal system at a furniture manufacturer's factory. A Board officer went to the factory to investigate and found various safety violations, including the use of a forklift to elevate workers on a non-compliant platform, and failures to educate workers and to provide an adequate number of first aid attendants. The manufacturer was issued an administrative penalty and appealed.

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

Analysis: Smoking embers were common in the factory due to excessive sanding of hardwoods. So in such circumstances, a reasonably prudent employer would prepare workers and train them on how to deal with smoking materials in the dust extractor ducting, explained the Tribunal. But there was no evidence the manufacturer provided such training. In addition, when the officers advised the manufacturer that it required a

level 2 first aid attendant onsite, it should've secured a qualified worker immediately. Instead, the factory was without the appropriate level of first aid for several weeks. Fortunately, this understaffing didn't result in serious consequences, said the Tribunal, but it did demonstrate that the manufacturer's compliance efforts fell 'well short of the due diligence standard.'

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

[learn_more caption="**NL**: *Department of Transportation*"]

What Happened: 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 didn't notice the slowing traffic in the area. He braked abruptly, lost control of his car and struck the employees, who were on the median of the road. One employee was killed and two others were injured. As a result, the employers were charged with multiple OHS violations. (The oil company's case was resolved separately.)

Ruling: The Provincial Court of Newfoundland and Labrador convicted the city and government agency, ruling that they hadn't exercised due diligence.

Analysis: The court said the safety hazard faced by these employees while doing the site inspections was foreseeable'the traffic on the roads being inspected. So the employers had a duty to take reasonable steps to protect the employees from passing vehicles. But they failed to do so. For example, safety wasn't discussed in the pre-inspection meeting. The employees were neither offered nor did they request any PPE, such as high-visibility vests. They also weren't trained on conducting roadside inspections. And there wasn't sufficient evidence to determine whether the setup redirecting traffic at the site was reasonable for the hazards presented. The

experienced employees, who were all senior employees or supervisors in their organizations, showed 'a similar lack of appreciation of the hazard and the need to specifically address worker safety' at this site, added the court. So the court concluded that the employers didn't take all reasonable care under the circumstances.

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

[learn_more caption="**BC:** *WCAT-2015-00446*"]

What Happened: During an inspection of work being done on a two-storey house, officers saw two workers working on the roof about 12-14 feet above the ground. There was a concrete driveway directly below where they were working. To facilitate roof access, a ladder had been placed flat on the roof so it could be used like stairs. The ladder's feet were in the gutter to keep it from sliding off the roof. In addition, neither worker was wearing a harness or belt for restraint and there were no other forms of fall protection in place. The employer was issued an administrative penalty for two violations and appealed.

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

Analysis: The employer, which was engaged in the roofing business, should be aware of the hazards and OHS requirements related to this work, said the Tribunal. The employer claimed that it had an extensive training program. But the fact that one of the workers claimed that he'd been told he didn't need to use fall protection for jobs taking less than 15 minutes 'reveals an obvious flaw in the employer's training program.' In addition, 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. Lastly, the worker said his supervisor almost never checked on him. Thus, the Tribunal concluded that the employer's failure to properly instruct, train and supervise its workers was persuasive evidence of its failure to exercise due diligence.

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

[learn_more caption="**BC:** *WCAT-2015-00944*"]

What Happened: An engineering firm provided drawings for a concrete wall form to be used at a large, multi-storey residential construction project. The form, which was about 12 feet high and 20 feet wide, was to be used in the construction of stairwell walls. A concrete company's workers erected the forms and braced them in position on the bottom parking level. Engineers from the firm inspected the forms to ensure they complied with the drawings and issued a compliance certificate. The workers continued to use the forms to build walls on higher floors. But for each level above the bottom parking level, they had to install temporary load blocks to provide a footing for the wall form. On the 30th floor, a worker climbed up the side of the form to guide rebar into place. When the form started to topple over, he jumped clear. But the form fell on and killed another worker. An investigation of the incident determined that the engineering drawings for the wall form were defective in several areas, notably that they didn't provide directions 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. The engineering firm was issued an administrative penalty for failing in its safety obligations as to the drawings. It appealed.

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

Analysis: The engineering firm knew the wall forms were going to be used beyond the bottom parking level, where they were supported by the building deck. So it knew or should've known that above that level, some method of supporting the forms would be required. But the firm failed to provide design specifications and directions for erecting the forms beyond the initial level. Thus, the Tribunal concluded that the firm failed to exercise due diligence as to its duty to provide information necessary for the accurate and safe assembly of the formwork. In addition, the firm should've noticed in the pre-pour inspection that the forms had been erected using a different and unsafe bracing method than the one specified in its drawings. Its failure to review and address these 'field changes' also reflects its failure to discharge its OHS responsibilities, added the Tribunal.

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

[learn_more caption="**ON:** *Maple Lodge Farms*"]

What Happened: A supervisor at a farm sent an electrician and a millwright to fix a large shipping door that wouldn't close. The door was located at a loading dock, an area in which the workers had limited experience. The electrician went under the door and saw a cable hanging down from the top. The door then fell on him, pinning him to the ground. He broke his leg, injured his shoulder and couldn't work for almost a year. As a result, the farm was convicted of two OHS violations and appealed, arguing that it had exercised due diligence.

Ruling: The Ontario Court of Justice upheld the conviction, ruling that the farm hadn't exercised due diligence.

Analysis: The court noted that the electrician and a millwright were sent to an unfamiliar location in the workplace without any supervision. In addition, although the workers may have been trained on the use of blocking in

general'training which they vaguely remembered'they weren't trained on 'the particular danger at hand,' that is, blocking the loading dock door, said the court. Thus, the trial court's decision that the farm didn't exercise due diligence as to providing adequate training, information and supervision was reasonable.

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

[learn_more caption="**ON:** *Semple Gooder*"]

What Happened: At a roofing project on a two-storey building, the roofing company installed a compliant guardrail system on the roof. It also installed a chute with a receptacle at the bottom into which workers would dump garbage. But the receptacle soon filled up. So to keep the project moving, workers built a ramp on a different part of the roof and opened up the guardrail. They'd then manoeuver a motorized buggy full of garbage up the ramp to the opening and dump it into a trailer below. While doing so, a worker's sleeve got caught on the buggy and he fell about 22 feet off the roof and into the trailer. He wasn't wearing fall protection at the time. The worker was hospitalized for two weeks with various injuries. The roofing company was charged with two safety offences.

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

Analysis: The court noted that the company had initially complied with the OHS regulations by installing guardrails on the roof and temporary anchor systems, and providing fall protection equipment. And its initial garbage disposal process was also compliant. But there were no set procedures for the second garbage disposal process workers began using. For example, there was no process that covered when workers needed to be tied off 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., [2015] ONCJ 183 (CanLII), April 8, 2015[/learn_more]

[learn_more caption="**NS:** *R.D. Longard*"]

What Happened: An electrical services company was hired to install electrical service for a retail tenant at a strip mall. The company assigned an experienced electrician, another electrician and an intern to finish tying down an electrical feeder cable in an electrical cabinet. To do this job, the experienced electrician had to lay on the floor under the cabinet while reaching into it from below. He wasn't wearing any protective equipment or clothing. His hand came into contact with energized bus bars in the cabinet, electrocuting him. The company was charged with two OHS violations.

Ruling: The Provincial Court of Nova Scotia convicted the company of both charges, finding that it hadn't exercised due diligence.

Analysis: The court noted that the deceased electrician was very experienced, highly regarded and fully qualified. And there was nothing about the design of the electrical cabinet that made it necessary to work on it live. So it's unclear why the electrician decided to work on it while it was still energized and without wearing any protective equipment. The roofing company argued that it had exercised due diligence and wasn't responsible for the experienced electrician's lapse in judgment. But the court explained that workplace safety is a shared responsibility between the employer and employees. And the electrician's 'tragic miscalculation' doesn't absolve the company of its safety duties. The company didn't have a formal OHS program, safety manual or written safe work practices. It

also didn’t provide safety training to junior workers. And it took a completely hands-off approach to the electrician’s work, providing no supervision at all. Instead, it relied exclusively on the electrician’s experience and commitment to safety. Thus, the company didn’t take all reasonable precautions for the electrician’s safety or to ensure compliance with the OHS laws.

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

[learn_more caption=”**AB:** *Precision Drilling*“]

What Happened: A group of workers at a well site were engaged in a process in which a drilling pipe is removed from the well and disconnected 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 suffered fatal injuries. As a result, his employer was charged with two OHS violations.

Ruling: The Provincial Court of Alberta convicted the employer, ruling that it hadn’t taken all reasonable steps.

Analysis: To prove the due diligence defence, the employer had to prove it took all reasonable steps to avoid this type of incident, explained the court. In determining what constitutes reasonable steps, the Crown argued that the appropriate standard of care required an engineered solution to the problem of table torque induced by the driller. The employer argued that industry practice at the time didn’t mandate nor was it reasonable to require an engineered solution given its administrative procedures. But the court explained that the goal of engineered solutions is to avoid the sort of human error that occurred in this incident. And the evidence was clear that an engineered solution to this issue was used by other industry competitors. In fact, the employer itself engineered the same or a similar solution when specifically

ordered to do so. Moreover, the solution was cheap, quick and easy’and it was effective. Thus, implementing the engineered solution was a reasonable step the employer should’ve’but didn’t’take.

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

[learn_more caption=”**BC:** *West Fraser Mills*“]

What Happened: A tree faller was struck by a section of a rotting dead fir tree and died. At the time, he 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 was working for a contractor hired by Mills to ‘trap-tree’ fall, a method used to reduce beetle population levels within the licence area. The BC Workers’ Compensation Appeals Tribunal imposed an administrative penalty on Mills for safety violations. It appealed, arguing that it couldn’t be penalized because it wasn’t the faller’s employer.

Ruling: The Supreme Court of BC upheld the penalty, ruling that Mills hadn’t taken reasonable steps.

Analysis: The court explained that the health and safety of workers isn’t exclusively a duty of employers. So a determination that a company may be subject to an administrative penalty for failing’as an owner’to take sufficient precautions for the prevention of work-related injuries at its workplace isn’t patently unreasonable. Here, the forestry operation was a workplace under the OHS law. And owners of workplaces have a duty to provide and maintain their workplaces in a manner that ensures the health and safety of persons at or near the workplaces. The Tribunal had reasonably concluded that Mills had breached its obligations as an owner by failing to take sufficient precautions to prevent the faller’s death. So an administrative penalty was appropriately imposed, ruled the court.

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

[learn_more caption="**NS:** *McCarthy's Roofing*"]

What Happened: An OHS inspector saw a worker on a two-storey roof that was more than 7.5 metres above the ground. The roof had a pitch of approximately 9/12, which is important because higher pitched roofs require a greater degree of fall protection. However, the worker wasn't using any fall protection and no supervisor was present. As a result, the roofing company was issued an administrative penalty, which it appealed.

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

Analysis: The company argued that it had exercised due diligence by training the worker on fall protection and providing adequate fall protection equipment. So it shouldn't be punished for the worker's failure to follow procedure. But the Board explained that the fact the worker may be 'most obviously culpable' doesn't relieve the company of its responsibility to ensure compliance with the OHS laws. Penalizing an employer in a situation such as this one delivers the message to all employers that they're 'legally at risk when their employees behave foolishly,' which will only encourage greater diligence and accountability, explained the court.

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