The Insider’s 8th Annual Due Diligence Scorecard, Part 2: What You Can Learn

Part 1 of the *Insider*‘s 8th annual Due Diligence Scorecard gave you an overview of 15 cases decided since July 2011 in which a company or individual argued due diligence in defence to an OHS violation. But the value of reading such cases is in using them to avoid the mistakes these defendants made and duplicate the steps they took that enabled them to successfully prove due diligence. So in Part 2 of the *Insider*‘s annual Due Diligence Scorecard, we’ve extrapolated 15 lessons that you can learn from these cases and apply to your company’s OHS program. (See in the lower right hand of this article for six key facts about the due diligence defence.)

15 KEY DUE DILIGENCE LESSONS

[learn_more caption=” **Lesson #1: You Must Take *All* Reasonable Steps’Not Just Some**“]

The courts don’t expect your company’s OHS program to be perfect. To make out a due diligence defence, your company must prove only that it made reasonable efforts to comply with the law and protect workers’ health and safety. But the courts *do* expect you to take *all* reasonable steps toward compliance’not just some steps.

Example: A housing authority’s OHS coordinator got the results of a test on insulation, which confirmed the presence of asbestos. He told two maintenance supervisors about the test results and safety measures to be taken. But they didn’t follow through on those measures and he didn’t follow up with them. As a result, the housing authority, OHS coordinator and one of the maintenance supervisors were charged with safety violations. (The authority and supervisor pleaded guilty.)

In convicting the OHS coordinator, the court said there was nothing wrong with what he did’the problem was that he didn’t do enough to ensure appropriate safety measures were implemented. What he *should* have done, said the court, was:

> Immediately report the test results to his supervisor, with whom he met and spoke to regularly;

> Report the test results to the JHSC, whose meetings he generally attended;

> Follow up with the maintenance supervisors; and

> Institute a formal hazard assessment for any work or activity in the areas where asbestos was present [*R. v. Della Valle*]. .[/learn_more]

[learn_more caption=" **Lesson #2: You're Responsible for Foreseeable Events & Acts**"]

The OHS laws only require companies to protect workers from reasonably foreseeable hazards. The standard for determining whether a hazard was foreseeable is not what risks the company actually did foresee but what a reasonably prudent person in the same situation would have foreseen. If a safety incident or violation *was* foreseeable, the company will be held liable if it didn't take all reasonable steps to prevent the incident or violation.

Example: A backhoe operator snagged a natural gas riser, causing gas to seep into a nearby butcher shop. The shop exploded, killing two people, seriously injuring five others and causing extensive property damage. The operator was convicted of two OHS violations. The court pointed out that the operator *knew* the risk of working around live gas lines and the potentially serious consequences of hitting a gas line with his backhoe. So doing so was clearly a foreseeable hazard. But the operator, who had plenty of time, didn't take reasonable steps to avoid snagging a gas line, such as carefully digging with a shovel to expose the riser. In short, the court called the operator's actions incredibly risky and the incident 'entirely foreseeable' [*R. v. Riemer*]. .[/learn_more]

[learn_more caption="**Lesson #3: You *Must* Take Action When Made Aware of Safety Issues & Hazards**"]

If a hazard was not only foreseeable but *actually known* to the company, failing to address it is fatal to successfully arguing that you exercised due diligence.

Example #1: During blasting for a roadway construction project, flyrock showered a nearby trailer court, destroying a shed, crashing through a trailer's roof and forcing a tenant to run for safety. The contractor and a supervisor were convicted of OHS violations and appealed. In upholding their convictions, the court noted that they knew damage from blasting was foreseeable because a prior blast during this project had caused flyrock to reach the same trailer court, thus demonstrating what could happen if proper safety precautions weren't followed. The practical wisdom from that prior incident should've 'informed reasonableness and safe practice,' said the court. It added, 'Past experience can be a reliable predictor of future incidents or damage' [*R. v. Government of Yukon*].

Example #2: A technology company held a customer appreciation event that featured a mechanical calf roping machine operated by the company's employees. The machine had a faulty spring. So the operator had to reach into it to manually release a hook. While a worker was doing so, he was hit in the back of the head by a steel lever and died. The appeals court pointed out that before the fatality, another worker operating the machine had been hit on the shoulder by the lever. So although the specific type of injury the worker who died suffered may not have been foreseen, the potential danger of being struck by

this lever while reaching into the machine was a ‘reasonable prospect,’ explained the court. Once this hazard was detected, a reasonable employer would have discontinued use of the machine and not permitted untrained workers to operate it. But despite being aware of the potential dangers associated with the machine, the company allowed the continued use of this equipment [*R. v. XI Technologies Inc.*]. .[/learn_more]

[learn_more caption=” **Lesson #4: Safety Rules & Procedures Must Be in Writing**“]

Your company’s safety rules and procedures *must* be in writing. Verbal safety procedures are too easily misunderstood, which can have serious’and often fatal’consequences. Written safety procedures that spell out exactly what’s required and when are less likely to be misunderstood. As a result, courts will typically rule that due diligence requires written safety procedures.

Example: A worker removed a fence guarding the back of an induction hardener to troubleshoot a leak and was seriously injured by an electrical shock. The employer was convicted of failing to provide the worker with sufficient instruction on troubleshooting leaks. The employer had troubleshooting procedures but they weren’t in writing and were, in fact, primarily learned on the job. For example, these procedures weren’t included in the written Hazardous Energy Control Program. Thus, the instructions as to troubleshooting were confusing. So the court concluded that due diligence required the employer to develop a written policy on troubleshooting [*Ontario (MOL) v. Linamar Holdings Inc.*] [/learn_more]

[learn_more caption=” **Lesson #5: You Must Properly Train Workers**“]

Yes, your OHS program must include thorough, written safety rules and procedures. But that’s not enough to prove due diligence. You must also properly train workers on those rules and procedures. And that training must be adequate.

Example #1: In the *Linamar* case discussed above, the court ruled that the employer needed to develop not only a written policy on troubleshooting but also a related program for training workers on that policy.

Example #2: A flagger working along a highway was run over by an excavator operated by a co-worker and crushed to death. His employer was convicted of, among other things, failing to provide proper training to workers at the site. The court found that although the employer provided *some* instruction and training to workers, it was minimal and not to the extent required to prove due diligence [*R. v. Concord Paving Ltd.*]. [/learn_more]

[learn_more caption=” **Lesson #6: You Must Document Training**“]

Providing adequate training to workers isn’t going to help you prove due diligence if you can’t demonstrate that you provided such training. So you must document the nature and extent of the training the company provides its workers.

Example #1: In the *Concord Paving* case discussed above, the court noted that the employer’s OHS program manual contained a form for documenting the safety courses that workers took. But at trial, it didn’t produce any such forms for the workers involved in the incident to prove that they’d taken any safety courses.

Example #2: A temporary worker for a salvage company fell approximately three metres from an opening in a wall onto a pile of pipe, suffering a broken leg and three broken ribs. The company was convicted of several safety violations. Among other factors that led to a finding of no due diligence, the court said that although the company claimed that it provided workers with a safety orientation, it had no documentation to prove that claim [*R. v. Canadian Consolidated Salvage Ltd. (Clearway Recycling)*]. [/learn_more]

[learn_more caption=" **Lesson #7: Training Alone Isn't Enough'Appropriate Supervision Is Also Critical**"]

As important as adequate training is, you must also ensure that workers are appropriately supervised while on the job in order to prove due diligence. That's because proper supervision is the best way to ensure workers are actually applying their training.

Example: At a bridge construction project, a safety inspector saw workers working 20 to 50 feet above the ground without adequate fall protection in the form of guardrails or handrails. In addition, the workers were attached to a horizontal lifeline that wasn't properly engineered. The employer appealed its conviction for violating the fall protection and supervision requirements, pointing to the training it provided to workers on fall protection. But the Tribunal explained, 'Training alone does not meet the requirements of due diligence, if there is not adequate supervision to ensure that the knowledge provided through training is being correctly and consistently applied' [*WCAT-2012-00224*].

And the need for appropriate supervision applies to *all* workers'even those who are experienced.

Example: During an inspection of a residential construction project, a safety officer saw an experienced journeyman carpenter working about 18 feet above the ground without his fall protection harness attached to a lifeline. The construction company was penalized for fall protection violations, which it appealed. The Tribunal acknowledged that the carpenter had more than 20 years' experience and was familiar with the fall protection requirements. In fact, he admitted that he should've attached his harness to a lifeline. But the Tribunal noted that there was no evidence that he was properly supervised to ensure he complied with these requirements. It appears that the company simply opted to rely on his experience, training and knowledge [*WCAT-2012-00416*]. [/learn_more]

[learn_more caption=" **Lesson #8: Workers Must Understand the Importance of Safety Compliance**"]

Companies have a duty to ensure that workers follow safety rules and procedures and comply with the OHS laws. To that end, you should take steps to convey to workers the importance of safety compliance'and the ramifications of safety infractions. For example, when workers violate safety rules, you must discipline them.

Example #1: At a residential construction site, a safety officer saw two workers, who were approximately 18 feet above the ground, not wearing fall protection harnesses. And there was no fall protection equipment on the roof. The construction company was penalized for a fall protection violation and appealed. The employer argued that it provided extensive training on fall

protection requirements. But the Tribunal said the company's training and education efforts weren't sufficient for workers to understand the importance of complying with those requirements or the consequences of non-compliance. For example, the company didn't implement a progressive discipline program for safety infractions until *after* this incident [*WCAT-2011-02413*].

Example #2: A safety officer inspecting a roofing project saw a worker and supervisor on a roof about 24 feet above the ground when neither was connected to a lifeline. During an inspection of another company worksite, two workers on a roof weren't connected to lifelines. The company was penalized for failing to comply with the fall protection requirements and provide adequate training and supervision. It appealed. The Tribunal said that although the company provided fall protection training and had a progressive discipline program for safety infractions, it knew that workers were ignoring the fall protection requirements. So it should've realized that its efforts weren't preventing or deterring fall protection violations and done more, such as providing bonuses for safety compliance [*WCAT-2011-02507*]. [/learn_more]

[learn_more caption=" **Lesson #9: Blaming Workers Is Unlikely to Be Successful**"]

When a company is charged with a safety offence, it may try to point the finger at the workers involved, arguing that it took all reasonable steps and the workers simply disregarded safety protocol. Such an argument is unlikely to convince a court.

Example #1: In *WCAT-2011-02413* discussed above, the company argued that it was the independent actions of the workers that led to the violations, saying they forgot to put their fall protection equipment back on after their lunch break. The Tribunal noted that although the workers themselves could've been hit with violations for their actions, their failure doesn't relieve the company of its duties under the OHS laws.

Example #2: In *Linamar*, which was previously discussed, the employer argued that the worker got injured because he didn't use a spotter as required. But the court noted that the training wasn't clear as to the proper use of a spotter. [/learn_more]

[learn_more caption=" **Lesson #10: Supervisors Should Be Held to a Higher Standard**"]

Because supervisors are responsible for ensuring that workers follow safety rules and comply with the OHS law, they should be held to a higher standard when it comes to safety infractions. So when a supervisor violates a safety rule, the consequences should be more severe than if a worker had committed the same infraction.

Example: In *WCAT-2011*-02507 mentioned above, a worker and supervisor were seen by a safety inspector not wearing fall protection equipment when required. But the Tribunal said it wasn't apparent that the company held the supervisor more accountable for his actions than the worker, noting 'the supervisor is responsible for setting an example to workers.' In fact, the employer simply gave both a verbal warning. [/learn_more]

[learn_more caption=" **Lesson #11: You Can't Delegate Supervision to Co-Workers**"]

You must ensure that workers are supervised by *actual supervisors* and not leave that responsibility to their co-workers.

Example: A 22-year-old sawmill worker got caught in the pinchpoint of a canter machine and died. The sawmill was convicted of violating the supervision requirements. The Tribunal noted that the worker was young and had been on the job for less than a year. A supervisor had warned him before this incident about performing duties that weren't his own. Under these circumstances, he should've been closely supervised but he wasn't. The fact that there were experienced and knowledgeable co-workers working in the same area as this worker wasn't a substitute for the presence of an actual supervisor. So the Tribunal concluded that the sawmill failed to satisfy its duty to provide adequate supervision [*WCAT-2011-02783*]. [/learn_more]

[learn_more caption=" **Lesson #12: You Also Can't Delegate Compliance to Contractors**"]

In general, employers can't avoid fulfilling their OHS duties by delegating them to someone else, such as a contractor or subcontractor.

Example #1: In *Canadian Consolidated Salvage*, previously discussed, the company argued that the *prime contractor* was responsible for supervising all workers'including the company's'and complying with all safety requirements. So it had no duty to ensure the safety of its workers at that site. But the court said because the company was the injured worker's employer under the OHS laws, it was responsible for ensuring his safety at the site. And there was no evidence that the company took 'any steps whatsoever' to protect its workers.

Example #2: The contractor and supervisor in the *Yukon* case argued that hiring an experienced blaster relieved them of their duties under the OHS law. The court explained that the OHS law has 'overlapping obligations' that mean *everyone* had a duty to ensure a safe blast. And there was no evidence that the contractor had a system in place to ensure that all blasting was done safely.

The same rule applies to suppliers who provide you with equipment and materials.

Example: In the *XI Technologies* case, the company argued that it wasn't foreseeable that the supplier would provide it with an unsafe machine. In essence, the company assumed that the equipment would be safe to use. But the appeals court explained that the OHS law required *the company*, as an employer, to take reasonable steps to *ensure* that such equipment was, in fact, safe to operate as intended. And there were 'rudimentary steps' the company could've taken to do so. For example, the company should've asked the supplier for adequate operating instructions or a demonstration of the machine's proper use, especially considering that it was completely unfamiliar with this equipment. This relatively simple step would've alerted operators to the fact that the machine wasn't working properly. But instead of getting instructions or a demonstration from the supplier, the company chose to rely on its untrained employees to figure out how to safely run the machine. [/learn_more]

[learn_more caption=" **Lesson #13: You Must Ensure Safety Information Is Accurate**"]

Companies must give workers the information they need to perform their jobs safely, such as MSDSs and safety signage. If that information is inaccurate,

it’s almost as bad as’if not worse than’not providing the information at all.

Example: A safety officer discovered that there were stickers posted in areas on a seagoing vessel that said the areas were ‘asbestos-free’ even though materials containing asbestos were present. In ruling that the company didn’t exercise due diligence, the Tribunal pointed out that the company couldn’t explain how inaccurate decals had been put up. And it didn’t have a system in place for double-checking or otherwise ensuring the accuracy of such signage [*WCAT-2012-00145*]. [/learn_more]

[learn_more caption=” **Lesson #14: ‘Human Error’ Isn’t an Excuse for Non-Compliance**“]

Companies are composed of human beings and humans make mistakes. But courts are unlikely to buy that argument that because a safety violation was simply the product of human error, the company should be excused from liability.

Example: A safety officer inspecting a construction site found that the company hadn’t gotten an underground locate of all utility services before starting excavation work. The company’s excuse for this oversight was that it was ‘due to human error.’ But the Tribunal rejected this excuse as non-responsive. It pointed out that ‘accidents are usually due to human error.’ The issue here was whether the company took steps to prevent *this particular human error* from occurring, which it hadn’t [*WCAT-2012-00070*]. [/learn_more]

[learn_more caption=” **Lesson #15: Egregious Violations Are Especially Costly**“]

Most safety violations are the result of flaws in the OHS program of a company that’s genuinely trying to comply but fell short. But if the violations are particularly egregious, say, because they’re the result of wanton disregard for safety or the failure to take simple and inexpensive steps, the company will not only get convicted but likely face an especially high fine.

Example: A truck driver was killed when a 15-metre-high wall of dirt and rock fell on him. Two companies were convicted of multiple safety violations. That two experienced construction companies could leave a sheer 50-foot wall without any shoring whatsoever was shocking, said the court. It described their conduct as ‘egregious and outrageous,’ noting that the wall could’ve been properly supported for a relatively small amount of money. As a result, the court imposed record fines totally $2,472,500 on the companies [*R. v. Perera Development Corp.*]. [/learn_more]

BOTTOM LINE

[box]As explained in Part 1, there’s no formula for establishing due diligence, no checklist of steps or actions that, if taken, would guarantee a successful due diligence defence. The best you can do is learn from other companies’ experiences in safety prosecutions. The cases in which the due diligence defence failed illustrate what not to do and which omissions will undercut due diligence. The successful cases can provide a sort of blueprint or guide for the steps and actions your company *should* be taking. [/box]

SHOW YOUR LAWYER

[box]**6 KEY FACTS ABOUT DUE DILIGENCE**

1. There are two kinds

Ontario (Ministry of Labour) v. Linamar Holdings Inc., [2012] ONCJ 295 (CanLII), May 7, 2012

R. v. Canadian Consolidated Salvage Ltd. (Clearway Recycling), [2012] ABPC 133 (CanLII) May 8, 2012

R. v. Concord Paving Ltd., [2012] CanLII 31899 (NL PC), June 8, 2012

R v. Della Valle, [2011] NSPC 67 (CanLII), Sept. 14, 2011

R. v. Government of Yukon, [2012] YKSC 47 (CanLII), June 11, 2012

R. v. Perera Development Corp., Action No. 100171909P1, Alberta Provincial Court, June 4, 2012

R. v. Riemer, [2012] SKPC 6 (CanLII), May 16, 2012

R. v. XI Technologies Inc., [2012] ABQB 549 (CanLII), Sept. 24, 2012

WCAT-2011-02413, [2011] CanLII 74872 (BC WCAT), Sept. 28, 2011

WCAT-2011-02507, [2011] CanLII 73943 (BC WCAT), Oct. 6, 2011

WCAT-2011-02783, [2011] CanLII 92374 (BC WCAT), Nov. 7, 2011

WCAT-2012-00070, [2012] CanLII 14299 (BC WCAT), Jan. 10, 2012

WCAT-2012-00145, [2012] CanLII 13893 (BC WCAT), Jan. 17, 2012

WCAT-2012-00224, [2012] CanLII 14355 (BC WCAT), Jan. 25, 2012

WCAT-2012-00416, [2012] CanLII 14341 (BC WCAT), Feb 13, 2012

of due diligence: reasonable steps and reasonable mistake of fact.
2. Due diligence is a defence that must be proven by a company or individual charged with a safety violation on a balance of probabilities.
3. Anyone charged with a violation of the OHS laws, including companies and individuals, can raise a due diligence defence.
4. The due diligence defence applies to most violations of so-called ‘regulatory’ laws, such as OHS and environmental laws.
5. Although due diligence isn’t technically a defence to criminal negligence or ‘C-45’ charges, proving that you exercised due diligence makes it 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.[/box]