The Insider's 9th Annual Due Diligence Scorecard, Part 2: 16 Lessons from Recent Due Diligence Cases

Part 1 of the *Insider*'s 9th annual Due Diligence Scorecard provided an overview of 12 cases decided since July 2012 in which a company or individual argued due diligence in defence to a safety offence. The real value of these cases is that they illustrate what steps defendants took to successfully prove due diligence and what errors they made that cost them that defence. So here in Part 2 of the *Insider*'s annual Due Diligence Scorecard are 16 lessons that you can learn from these cases and apply to your own OHS program.

16 KEY DUE DILIGENCE LESSONS

[learn_more caption="Lesson #1: Due Diligence Doesn't Require Perfection"]

Although it may sometimes seem that way, the courts honestly 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. You don't have to take every step imaginable to prove due diligence.

Example: While workers were laying concrete piping using a makeshift winch

system, a piece of a wooden brace snapped. The cables in the system recoiled forcibly, causing the brace to pivot violently and kill a worker in its path. A company was acquitted of charges that, as a constructor, it failed 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. The court noted that the company had relied upon the manufacturer's instructions and industry standards when designing and constructing the wooden brace. It did so with the knowledge that the system would be operated by experienced pipe fitters under an experienced supervisor. Although the court acknowledged that the company could've involved a professional engineer in designing the brace, it rejected that step as necessary for due diligence. The court explained that the standard was all reasonable care that a reasonable person might have been expected to take under these circumstances. Due diligence *doesn't* require companies to take "each and every precaution," it added [*Thomas Fuller*].[/learn_more]

[learn_more caption="Lesson #2: Simply Having an OHS Program Isn't Enough"]

It's essential to have an OHS program—that is, a formal system that spells out all of the safety rules and procedures and defines the roles and responsibilities of the employer, supervisors and workers within that system. But just having an OHS program isn't enough alone to prove due diligence. That program must also be implemented effectively.

Example: A company responsible for constructing a building hired a subcontractor to provide the building's concrete structure. A worker for the subcontractor removed a piece of plywood lying on the floor and fell through the opening that had been underneath it, seriously injuring his heel and back. The construction company and subcontractor were charged with safety violations. But while the court found that the construction company had exercised due diligence, it concluded that the subcontractor hadn't.
Although the subcontractor had an OHS system, there wasn't sufficient evidence that this 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. Its use of "pre-safety inspection" cards was questionable as it appeared that boxes on them were checked perfunctorily and didn't "represent a reasonably diligent approach to advancing safety." The subcontractor also didn't inspect areas for safety issues before sending its workers to work in them. And there was no evidence on how the subcontractor dealt with supervisors who failed to take "such a minimally diligent step," added the court. So the court concluded that although the subcontractor had a general focus on safety, it didn't take every precaution reasonable under the circumstances [*Aecon Construction*].[/learn_more]

[learn_more caption="Lesson #3: You're Responsible Only for Foreseeable Events & Acts"]

In the same way that due diligence doesn't require perfection, courts don't expect companies to take steps to address any safety hazard that's conceivable. You must address only those hazards that are reasonably foreseeable. 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 hazard, event or violation was

unforeseeable, then you won't be expected to have taken steps to prevent or address it.

Example: A foundry hired a company to remove a conveyor connected to duct work. While a worker was unbolting one end of the duct work, it collapsed on a co-worker, who suffered multiple serious injuries. The company was initially convicted of failing to ensure the duct work was adequately supported while being dismantled but the appeals court ruled that it had exercised due diligence. The evidence proved that the collapse was caused by a buildup of sand in the ducts and a poor weld. Such buildup shouldn't have occurred and couldn't have been expected, concluded the court. Witnesses also testified that it wasn't practical or reasonable to inspect all of the welds in the ducts as it would've taken years to do so. And if not 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 [*Rassaun Steel*].

Conversely, if a safety incident or hazard was foreseeable, the company will be held liable if it didn't take all reasonable steps to prevent the incident or address the hazard.

Example: In *Aecon Construction*, that court noted that the subcontractor didn't focus on the issue of floor opening covers until after the incident—despite the fact that there were literally dozens of openings in the floors of this project. Thus, the risk of a worker falling through one of them, which is exactly what happened, was a foreseeable hazard the subcontractor should've addressed more thoroughly and directly.

And the fact that a company didn't foresee a specific risk doesn't mean that risk was unforeseeable.

Example: A small technology company held a customer appreciation event for which it rented a mechanical calf roping machine that was 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 company was acquitted of OHS violations at trial but the appeals court overturned the trial court's decision and convicted the company. And the Alberta Court of Appeal upheld this convictions.

The Court of Appeal noted that the company knew that the machine wasn't working properly. Although it devised a procedure to address the defective spring, this procedure required the operator to reach into the machine, thereby putting his head in the vicinity of the steel lever. And the danger created by having someone reach into the machine in this manner was reasonably foreseeable, concluded the court. The court added that the fact the company didn't recognize this risk didn't mean the risk wasn't reasonably apparent to a reasonable person in these circumstances [*XI Technologies Inc*.].[/learn_more]

[learn_more caption="Lesson #4: You Must Take Action When Aware of Safety Issues & Hazards"]

One of the most fundamental rules of due diligence is that once the company is notified or becomes aware of a safety hazard (or potential hazard) is must assess the hazard and, if necessary, take steps to address it.

Example: To clear a jammed sawmill conveyor belt, a worker climbed over a guardrail on a catwalk, stood on a platform that was more than three metres above the floor and poked at the jam. While doing so, a piece of wood knocked him to the floor below. He wasn't wearing fall protection at the time and was injured. The sawmill was convicted of safety offences and appealed, arguing that the court's conclusion that it was foreseeable that workers would climb over the catwalk's guardrail was unreasonable. But the appeals court pointed out that three workers testified that they sometimes had to climb over the guardrail to clear a jam.

In addition, there was evidence that jams were a "recognized, repeated occurrence" and sometimes required workers to access the conveyor to clear them. Thus, the company was aware of this need to access the conveyors, said the appeals court, and in fact developed a lockout procedure for this process. However, the company failed to ensure that this procedure addressed the fact that, in some instances, fall protection would be necessary [*Tembec Inc*.].

[/learn_more]

[learn_more caption="Lesson #5: You Should Conduct Safety Assessments to Identify Hazards"]

Due diligence requires you to address safety hazards you know or should know about, considering whether a reasonable person would've been aware of such hazards. Thus, you should be proactive and take steps to identify hazards or potential hazards in the workplace. One way to do so is to conduct safety assessments of your operations, especially those that are inherently dangerous. The goal is to identify any specific risks and then implement safety measures to adequately protect workers from them. If you skip assessments, you may fail to identify a hazard and a worker may get hurt—or worse. And the court is unlikely to be sympathetic to the company.

Example: Steel beams were temporarily welded to a steel frame so they could be vibrated into the ground. During this process, a beam broke free from its weld and fell on a worker, injuring him. The employer was convicted of a safety offence. The court noted that there were no guidelines specifying the process for this procedure. In particular, it expressed concern that no assessment of the potential for a safety incident was conducted on the procedure, especially given the "very real danger" to workers who were within striking distance of the steel beams. The court concluded that having an OHS program and providing safety training don't obviate the need for such evaluations of job activities [*Deep Foundations*].

[/learn_more]

[learn_more caption="Lesson #6: Safety Rules & Procedures Should Be in Writing"]

Once you've conducted safety assessment, you should develop appropriate safety rules and procedures based on the hazards you identify. And those rules and procedures should be in writing. Unlike verbal safety instructions, written safety procedures that spell out exactly what's required and when are less likely to be misunderstood. Thus, courts will typically rule that due diligence requires written safety rules and procedures.

Example: A worker injured his hand on an unguarded pinchpoint while trying to

clear a jam, which was a regular occurrence. The company and two directors were convicted of OHS violations. In upholding their convictions, the appeals court noted that the company had an informal policy requiring workers to use foam sticks when clearing jams and verbally instructed workers on this policy. But despite the fact that jams were common and the company was aware of the risks if workers used their hands to clear them, the company didn't have a formal, written policy on dealing with jams or provide adequate formal training for workers on safely handling jams [*Pack All Manufacturing*].[/learn_more]

[learn_more caption="Lesson #7: General Safety Isn't Sufficient—Must Address at the Micro Level, Too"]

It's important to provide workers with basic safety training and instruction, especially when they first start working for you. Such training will typically address safety in the workplace in general or at a "macro" level, such as emergency preparedness and response, WHMIS, etc. But you can't stop there. It's also important to address safety at the "micro" level. In other words, you must have specific safety procedures and rules for the company's operations, equipment and the jobs or activities that workers will do.

Example: In *Deep Foundations*, the company said the incident happened because it expected the worker who welded the beams to the frame to use full welds, not tack or temporary welds. The worker was a certified welder who'd previously done this work. But the court noted that there were no guidelines specifying the type of weld to be used. And the supervisor didn't speak to the welder about which type to use or examine the welds once they were done. He simply relied on the welder based on his prior work. The court concluded that there was an environment of trust based on previous work experience and qualifications. And although the company may have given adequate consideration to safety issues at a macro level, the court concluded that, on a micro level, the job specific information was "weak" given the confusion over tack and full welding requirements.[/learn_more]

[learn_more caption="Lesson #8: Training Must Make Workers Aware of Significance of Safety Duties"]

As discussed above, companies must give workers the training and information they need to perform their jobs safely. But it's also important that such training makes workers aware of the seriousness of their safety responsibilities and the consequences of failing to fulfill those duties, including injuries and discipline.

Example: During an inspection, an OHS officer saw two young workers on a roof at a height greater than 10 feet without wearing fall protection. The officer later conducted a follow-up inspection during which he again saw two workers on a roof without being connected to safety lines. The BC Workers' Compensation Appeals Tribunal noted that the employer provided fall protection training and adequate equipment to its workers. But the training and instruction weren't sufficient for workers to understand the fall protection requirements and the significance of their obligation to comply with them. And the employer should've been aware of this gap in its training based on the several fall protection violations for which it had been cited. However, it didn't take any additional steps to improve worker compliance, such as conducting more frequent site inspections by field supervisors or implementing a more stringent disciplinary process for safety

infractions [*WCAT-2012-01812*].

[/learn_more]

[learn_more caption="Lesson #9: Due Diligence Requires Adequate Supervision"]

Properly training workers doesn't always mean that they'll follow safety rules and procedures and comply with the OHS laws. That's why you also need to ensure that workers are adequately supervised.

Example: While workers at a propane facility were illegally transferring propane from truck-to-truck, the vapours ignited, causing a series of explosions. A 25-year-old worker was killed; a co-worker suffered minor injuries. The employer was convicted of violating the OHS laws by failing to provide information, instruction and supervision to a worker on the safe handling of propane. Despite the deceased worker's inexperience, he was put in charge of this site at night. But the court said there was "absolutely no evidence" that he got appropriate supervision. And it would've been fairly simple to set up some type of process that would provide adequate supervision, such as providing the worker with a phone number of someone he could call if he had any issues or problems [*Sunrise Propane*].

[/learn_more]

[learn_more caption="Lesson #10: Appropriate Supervision Depends on the Circumstances"]

As noted above, due diligence requires adequate or appropriate supervision of workers. But what constitutes adequate or appropriate supervision' The courts have said that the amount or degree of supervision depends on the circumstances. For example, young or new workers require more direct supervision than experienced ones. Experienced workers do need to be supervised but such supervision can be less hands-on.

Example: While two fallers were falling trees to clear a forestry road right-of-way, a falling tree struck and killed one of the fallers. The BC Workers' Compensation Appeals Tribunal found that their employer had exercised due diligence. The fallers were both experienced, certified and properly trained. In addition, they'd previously worked together. The fallers had reviewed the detailed falling plan with a falling supervisor. After they'd all agreed on how to proceed, the supervisor left the site and the fallers worked on their own. But the supervisor was available to all fallers each day in the yard before they left for their respective sites and by radio once they were at their sites. So the Tribunal concluded that although the fallers weren't directly supervised on the day of the incident, the employer had provided adequate supervision for them under the circumstances. The Tribunal added that if this crew was newly certified or even just new partners, more frequent direct supervision might be required [*WCAT-2013-00296*].

[/learn_more]

[learn_more caption="Lesson #11: You Must Provide Equipment Suited to Work"]

All of the best and most thorough safety training, instruction and supervision in the world won't keep workers safe if the equipment that you given them to

work with is defective, unsafe or not suited to the job.

Example #1: A hatchery worker fell and broke her leg while climbing out of a storage trailer. The top of the portable steps to the trailer was two feet lower than the trailer's floor. The hatchery, which was convicted of a safety violation, said the steps were "adequate." But the court observed that 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 steps were too low for safe access into and out of the trailer in its current location. A two foot gap between the top step and trailer was "self-evidently unsafe" and "an accident waiting to happen," said the court. 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 to protect its workers—which includes providing equipment that's adequate for the task for which it's required [*Stratford Chick Hatchery*].

Example #2: In *XI Technologies Inc*., the court said that once the company became aware that the unfamiliar equipment its workers were operating was defective, it should've taken the machine out of service.

[/learn_more]

[learn_more caption="Lesson #12: Due Diligence for Constructors and Employers May Be Different"]

In most cases, companies or organizations are charged as an employer with violating the OHS laws. But they can also be charged in some jurisdictions as constructors or prime contractors. (For more information, see "Who's Liable for Safety Violations at Sites with More than One Employer'") And the due diligence standard for constructors and prime contractors may be different than that standard for employers.

Example: As discussed above, the court in *Aecon Construction* was critical of the subcontractor's OHS program. But it ruled that the constructor had exercised due diligence. The court explained that on a project of this scope, it wasn't reasonable for a constructor to have one of its employees monitor all of the workers or supervisors all of the time. But it was reasonable to expect it to have a system for establishing appropriate OHS policies, communicating those requirements, monitoring them and enforcing compliance with them. And this constructor's sophisticated and detailed OHS system met these requirements. For example:

- Its documents set out clearly defined standards for all employers and workers, including the consequences of non-compliance;
- All personnel were required to go through its orientation program;
- Regular "walk around" safety inspections were conducted by its site supervisor or on-site safety advisor; and
- The constructor took progressively punitive steps to ensure compliance with its OHS system, including withholding payments to a subcontractor that didn't provide cards verifying that toolbox talks had been conducted.

In short, the court concluded that the constructor vigilantly applied its OHS system to this site, monitored compliance, proactively identified safety issues and took appropriate remedial steps to compel compliance.

[/learn_more]

[learn_more caption="Lesson #13: Directors Have a Duty to Understand Company's OHS Duties"]

In prosecutions for safety offences, the defendant is usually a company or corporation, which is a just legal entity and can only fulfill its safety duties through the people who run it. Thus, it's incumbent upon company owners, officers and directors to understand the OHS laws and the company's obligations under them. Ignorance of these duties won't protect the company—or its officers and directors—from liability, especially if those directors have a hands-on role in its operations.

Example: In *Pack All Manufacturing*, the appeals court explained that corporate directors have a duty to ensure that the company complied with the OHS laws and addressed known safety issues. Here, the two directors charged along with the company had "hands-on and on-site involvement" in the company's operations, which made them aware of specific safety concerns on the plant floor. One director claimed that he knew nothing about the applicable safety requirements or that they were required to have written training and safety policies because someone else "took care of all that." But neither director preserved the incident scene or even knew that they were supposed to do so. Given the fact that the company had been in business for years and had had several serious safety incidents before, including a fire, the directors had "ample opportunity" to find out exactly what their and the company's safety duties were, said the appeals court.[/learn_more]

[learn_more caption="Lesson #14: Documentation Is Crucial 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 *WCAT-2012-01812*, the Tribunal noted that although the employer documented its safety training and discipline for safety infractions, its documentation fell "short of meeting the test of due diligence." For example, it only documented safety problems when conducting site inspections and then only informally by noting them in a diary or worker's file. The Tribunal explained that "better documentation…would assist the employer in establishing it acted with due diligence." The Tribunal recommended, for instance, that the employer complete a site safety inspection form for each site visit that would establish the frequency and timing of such visits and document the compliant and non-compliant behaviour observed by those conducting the inspections.

Example #2: In *Sunrise Propane*, although the employer claimed that the deceased worker was trained on safely handling propane, the court noted that there was no evidence or records of such training. For example, one witness testified that he didn't know who had trained the worker, claiming the training records had been destroyed. He also said that he sent proof of training to an industry organization, which couldn't find any records of this worker's training. So the

court concluded that “there was no evidence of any kind of mandatory or optional ongoing training whatsoever.”[/learn_more]

[learn_more caption=”Lesson #15: High Risk Industries & Operations Are Subject to More Scrutiny”]

All companies covered by the OHS laws must take steps to ensure the health and safety of workers. But the due diligence efforts of companies in high risk industries or that engage in especially dangerous operations may be subject to more scrutiny by courts because the risk of safety incidents is so high and the possible consequences of such incidents is so serious.

Example: In *Sunrise Propane*, the court said it was difficult to imagine a more dangerous workplace than a yard filled with propane where a leak could cause explosions given the many possible sources of ignition present at any time. As a result, in an inherently dangerous business in which “the potential for substantial injury or death is extremely high,” the standard of care expected of the employer as to the safety training and supervision of its workers was “extremely high and strict” and there must be a “high degree of attention to detail” as to such training and supervision.[/learn_more]

[learn_more caption=”Lesson #16: Prior Violations Will Heighten Scrutiny of Later Compliance Efforts”]

When evaluating a company’s due diligence defence, the court will consider any prior safety violations, especially if they were for the same or similar offences. It will not go well for the company if it has been repeatedly cited for violating, say, the PPE requirements and yet still doesn’t have adequate safety measures in place to ensure compliance with those requirements.

Example: During two separate inspections, OHS officers saw workers and a roofing company’s principal on roofs without adequate fall protection. The BC Workers’ Compensation Appeals Tribunal ruled that the roofing company hadn’t exercised due diligence. The company had a number of prior fall protection violations and had been advised of its fall safety obligations in the past. Fall safety is a basic feature in the workplace, particularly for employers in the roofing industry, observed the Tribunal. But this company didn’t take steps to ensure adequate supervision of its workers and it provided little evidence of its overall safety program. The Tribunal concluded that the company’s “poor compliance history and apparent failure to take responsibility for learning and implementing the fall safety requirements” weighed against a finding of due diligence [*WCAT-2012-03407*].

[/learn_more]

BOTTOM LINE

We’d love to be able to provide a formula for establishing due diligence or a checklist of steps that, if taken, would guarantee that you could successfully prove due diligence. But it’s not so simple. However, safety coordinators are not without some guidance on how to ensure their companies exercise due diligence. By looking at cases such as those in the Scorecard, you can learn from other companies’ experiences in OHS prosecutions. The lessons from such cases can show you how to make sure your OHS program could withstand a court’s scrutiny.

SHOW YOUR LAWYER

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

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

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

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

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

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

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

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

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

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

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

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