The OHS Insider 14th Annual Due Diligence Scorecard: Using Recent Cases to Assess Your OHS Program

WHAT'S AT STAKE

While preventing OHS violations and injury remains the paramount objective, showing "due diligence" is the key to avoiding liability for any that do occur. The key to due diligence is having the right OHS program. But how can you tell if your own program measures up' In 2005, we invented a unique tool to help OHS directors make that assessment: the Annual Due Diligence Scorecard tracking and drawing practical lessons from every OHS prosecution across Canada in the past year.

Note to Users

If you already know the ABCs of due diligence, you can skip the next section and go right to the Scorecard. But if you want a concise lesson or refresher, keep on reading.

DUE DILIGENCE BASICS

Although "due diligence" has become part of the OHS compliance vocabulary, the term is frequently misunderstood. Technically, "due diligence" is the name for a legal defence used by defendants to avoid liability for an OHS offence.

How It Plays Out

Stage 1: As the prosecution begins, the Crown has the burden of proving that the defendant committed an act the law bans or omitted to do something it requires, such as ensuring machine guards are in place to bar workers' access to pinch points.

Stage 2: When and if the Crown proves the so-called *actus reus* beyond a reasonable doubt, the burden shifts to the defendant to show on a balance of probabilities that it acted with due diligence. There are 2 branches of the due diligence defence:

- **Reasonable steps:** The most common branch is showing that you took reasonable steps to comply with the law and protect workers' health and safety, ensure compliance with OHS laws and prevent the offence; and

The Factors of Reasonableness

In judging what steps it was reasonable for an employer to take, courts consider:

**The foreseeability of the hazard and likeliness to occur*

**The hazard's preventability*

**The degree of potential harm*

**The employer's control*

- **Reasonable mistake of fact:** The other option is to show that you reasonably relied on a set of facts that turned out wrong but had they been true would have made the act or omission legal.

'Due Diligence' as OHS Program Standard

Safety professionals and OHS directors tend to use the term "due diligence" as a standard for measuring their OHS programs. And while there's a slight disconnect between the lawyer and layperson use, *both* versions work. The simple reason: Both assign a central role to the OHS program. The principle that due diligence is impossible without a sound OHS program is as old as the due diligence defence itself.

The Key Role of the Court Cases

Using due diligence to judge the soundness of an OHS program is 100% sensible but tricky to apply on a practical basis. The problem is that due diligence gets decided case-by-case. So, it's hard to judge whether your own OHS program measures up—unless, of course, you actually get prosecuted.

Of course, there's a much better way: Look at how courts have ruled in prosecutions against *othe*r companies and draw the lessons necessary to evaluate your own OHS program. Recognizing that most OHS directors don't have the budget, time or resources necessary to find and analyze all of the cases, we invented the Due Diligence Scorecard to do it for them.

THE 2018 SCORECARD

This year's version of the Scorecard is actually 2 for the price of 1, covering both 2017 *and* 2018. Through the end of October 2018, there have been 13 OHS prosecutions turning on a due diligence defence. As is usually the case, the success rate was below 20%. Here's the breakdown:

- **Wins:** The due diligence defence worked in 2 cases, from Alberta and Ontario;
- **Losses:** The defence failed and the defendant was found guilty in 11 cases which took place in BC (7), Nova Scotia (2), Ontario and Qué

THE 2017 SCORECARD

While 2018 is following previous patterns, 2017 is a bit of an outlier in terms of both case volume and relative success of the due diligence defence with defendants winning 5 of the 21 cases. And among the remaining 16, 3 were split decisions with defendants scoring a due diligence win on at least one OHS charge.

- **Wins:** The due diligence defence worked in 5 cases, from Ontario (4) and Saskatchewan;

- **Losses:** The defence failed and the defendant was found guilty in 13 cases, including BC (4), Ontario (4), Nova Scotia (2), Québec (1), Newfoundland (1) and New Brunswick (1);
- **Mixed:** There were also 3 split decisions with defendants winning on some due diligence defences but losing on the others, from Alberta, Manitoba and Saskatchewan.

BOTTOM LINE

Here's a synopsis of 37 cases decided since January 2017 in which a court or other tribunal ruled on a company's (or individual's) due diligence defence in an OHS prosecution.

COMPANY WINS

Alberta: *Precision Diversified Oilfield Services*

What Happened: During a "tripping out" procedure, the driller used the rig controls to lift the drawstring from the well while the floorhands disconnected drill pipe from the drawstring. Release of torque from the drillstring caused some part of the drilling equipment to rotate unexpectedly and hit one of the floorheads in the head. How the torque built up and was released is unclear. All that's certain is that an accident happened and a worker was killed as a result.

Ruling: The company was convicted but an appeals judge overturned the verdict and ordered a new trial. The Alberta Court of Appeal upheld the appeals court.

Analysis: The mere occurrence of the accident wasn't enough to prove *actus reus*; while that should have rendered due diligence moot, the court went on to say that the trial judge was wrong to find against the company for not using an expensive engineering control that the prosecution didn't prove was "reasonably practicable" to implement and where evidence showed the company's safety measures were consistent with industry standards.

R v Precision Diversified Oilfield Services Corp, 2018 ABCA 273 (CanLII), Aug. 22, 2018

Ontario: *Trisan Construction*

What Happened: A bulldozer operator was killed after being run over by a dump truck moving slowly in reverse. The employer admitted that OHS violations had occurred—a dedicated signaller wasn't in place to assist the driver and steps weren't taken to ensure the victim was in the driver's view—but claimed due diligence.

Ruling: The trial court convicted the employer but the Court of Justice reversed.

Analysis: In a close case, the court ruled that the employer did just enough to squeak by on due diligence. Thin as it was, the evidence showed that the victim, the driver's supervisor, had cannabis in his system which might have explained why a person with his training messed up as he did. Specifically, he saw that the driver was violating the safety procedure for going in reverse and knew that he wasn't in the driver's full view but still let him back up the truck.

Ontario (Ministry of Labour) v. 614128 Ontario Ltd. (Trisan Construction), 2018 ONCJ 168 (CanLII), March 14, 2018

Ontario: *Cobra Float Service*

What Happened: A worker is killed when the curb machine he's unloading from a flatbed truck tips over and pins him underneath. There are no witnesses and it's unclear exactly how the incident happened.

Ruling: Court finds employer exercised due diligence and dismisses charge of failing to ensure safe unloading of

equipment.

Analysis: The incident was unforeseeable given that the victim was a highly regarded, experienced loader whom had successfully unloaded curb machines from this kind of trailer using that particular equipment 27 times before the incident.

Ontario (Ministry of Labour) v. Cobra Float Service Inc., 2017 ONCJ 763 (CanLII), Nov. 15, 2017

Ontario: *Thomson Metals*

What Happened: Cab portion became unhinged in excavator fall causing serious injury to the operator inside who wasn't wearing a seat belt. MOL inspector determines that bolts and washers used to secure cab were unsuitable and not in accordance with manufacturer's specifications.

Ruling: Ontario Court of Justice ruled that employer did just enough to prove due diligence and dismissed all charges.

Analysis: Documentation showed that the excavator arm assembly was regularly inspected even though the operator cab wasn't. There were no inspection or maintenance procedures in the manufacturer's manual that the employer could rely on or clear evidence showing that failure to maintain the bolts and washers caused the cab to uncouple and the incident wasn't foreseeable.

Ontario (Ministry of Labour) v Thomson Metals and Disposal GP Inc., 2017 ONCJ 764 (CanLII), Nov. 14, 2017

Ontario (applying Federal law): *Ornge*

What Happened: Pilot air results in the crash of an air ambulance helicopter killing the 5-member crew. The ambulance

operator is charged for not providing the crew night vision goggles (NVGs).

Ruling: The court dismisses all charges.

Analysis: The Crown's argued that an employer's operation must be "all but spotless" safety-wise to prove due diligence. But the court disagreed reasoning that due diligence requires reasonable, not spotless care. And failure to provide NVGs wasn't unreasonable since use of the equipment in this situation was mandated by neither aviation regulations nor industry standards. Maybe there were other things the operator could have done to prevent the accident but providing NVGs wasn't one of them

R.v. 7506406 Canada Inc. (Ornge), 2017 ONCJ 750 (CanLII), Nov. 10, 2017

Ontario: *Samuel, Son & Co.*

What Happened: A steel worker was found crushed to death pinned under a half-ton coil of steel. The victim was working alone and there were no eyewitnesses. What was clear, though, is that he had authored his own misfortune by improperly raising the coil car ultimately causing the coil to tip. The company was charged with 3 OHS offences but found guilty of only one: failing to provide the victim proper instruction. The company appealed.

Ruling: The Ontario Court of Justice reversed the conviction.

Analysis: The Crown didn't prove the *actus reus*, i.e., show the company violated any OHS laws; and even if it had, the company would still win because it showed due diligence. Its safety program was "very thorough, continuous and up to date." The tragedy happened because the victim showed "extreme negligence" in elevating the car holding the coils in place.

The company provided the victim extensive training, including 80 hours of hands-on training from co-workers. And the victim's negligence was unforeseeable given his good safety record and experience processing 225 coils without incident.

Ontario (Ministry of Labour) v. Samuel, Son & Co. Limited, 2017 ONCJ 611 (CanLII), Sept. 8, 2017

Saskatchewan (applying federal law): *Viterra Inc.*

What Happened: A grain terminal worker asked to check the blockage in a receiving pit entered the pit without his supervisor's knowledge or permission and was engulfed in the accumulated grain. The Crown charged the company with 6 OHS offences for failing to train, supervise and make the victim aware of engulfment hazards inside a confined space.

Ruling: The trial judge tossed the charges.

Analysis: The mere fact that an incident occurred and a worker got killed didn't prove the *actus reus.* And even if it were enough to prove OHS violations, the company proved due diligence. The victim received ample training and instruction warning him not to enter a confined space without authorization. And he didn't follow the safety procedure for unjamming the clog which called for using a pole *without* entering the space.

R v Viterra Inc., 2017 SKCA 51 (CanLII), June 21, 2017

COMPANY LOSES

Québec: *Hydro-Québec*

What Happened: Weight of a hydraulic excavator moving over a pile of snow lying atop a temporary ramp causes it to tip over and sink into the water below drowning the operator inside the cabin. The prime contractor claims due diligence citing its

extensive prevention program and safety procedures for carrying out the operation.

Ruling: The prime contractor is convicted of an OHS violation.

Analysis: Just *having* a prevention program isn't enough; what dooms the prime contractor's due diligence defence is lack of evidence showing it was actually implemented, specifically with regard to assessing the ramp's suitability to support an excavator moving over hazardous terrain.

CNESST c. Hydro-Québec, 2018 QCCQ 7269 (CanLII), Sept. 10, 2018

Nova Scotia: *Aecon Construction*

What Happened: The outrigger of a swing stage fell as it was being moved from a penthouse roof and hit a construction worker on the ground 4 floors below. The victim survived but suffered catastrophic injuries. The construction manager was charged as constructor with, among other things, failing to ensure that the swing stage and its components were properly disassembled, secured or stored. We weren't the constructor, we didn't commit a violation and even if we did, we exercised due diligence, the company contended.

Ruling: The court rejected all 3 arguments.

Analysis: The company was the constructor because it had control over work at the project including disassembly of the swing stage; 2. It committed an OHS violation because the evidence clearly showed that the outrigger was improperly disassembled and not safely secured; and 3. It fell short of the all-reasonable-steps required for due diligence because it failed to meet OHS requirements, industry standards or its own safety policies in moving the outrigger from the penthouse roof.

R.v. Aecon Construction Group Inc., 2018 NSPC 22 (CanLII), June 25, 2018

Ontario: *Nault*

What Happened: A warehouse worker (and JHSC member) initiated a work refusal contending that 2 of his co-workers were using their cellphones while operating a forklift. The MOL inspector was called in and cited each driver for dangerous operation of equipment.

Ruling: Both drivers found guilty as charged.

Analysis: Neither driver made out a due diligence defence. They didn't deny having their cellphones on them but contended that they used them only when bringing the forklifts to a full stop and thus weren't actually "operating" the equipment even though they were in the operator's seat. But the court didn't buy it. Using a cellphone while a forklift is stopped is no more defensible than a driver's using a cellphone at a red light. Moreover, simply *having* the cellphones in their possession was a violation of the warehouse's clear no cellphones at work policy.

Ontario (Ministry of Labour) v. Nault, 2018 ONCJ 321 (CanLII), May 11, 2018

BC: *A1605590*

What Happened: Government inspectors cite saw mill employer for OHS violations after discovering unsafe and illegal accumulations of combustible wood dust in various locations in the mill complex.

Ruling: The BC Workers' Compensation Appeals Tribunal (WCAT) rejects the employer's due diligence argument and upholds the

charges.

Analysis: While the employer might have had an OHS program, the dust accumulations and failure to explain its dust mitigation measures showed that the program wasn't implemented effectively, particularly with regard to daily inspections for potential safety hazards like combustible dust.

A1605590 (Re), 2018 CanLII 75932 (BC WCAT), March 27, 2018

BC: *A1607029*

What Happened: A maintenance worker lacerated his finger while servicing a robotic machine that wasn't locked out. The OHS inspector fined the employer $75K for a lockout violation. The employer claimed it exercised due diligence noting that the victim was a senior millwright with 40+ years' experience who was trained in the proper lockout procedure and actually used it earlier that same day. It also claimed that the operation wasn't maintenance but an adjustment for which lockout wasn't required.

Ruling: The BC WCAT upheld the fine.

Analysis: The employer had a lockout procedure in place but didn't implement it effectively. Maybe the employer was right in claiming that the Board didn't understand the difference between maintenance and adjustment. But it was easy to see how a worker, including an experienced one, could experience the same confusion—especially since it didn't post the lockout procedure at the robotic stacker and the safety notice it did post was unclear as to whether it applied to adjustments, maintenance or both.

A1607029 (Re), 2018 CanLII 75854 (BC WCAT), March 26, 2018

Nova Scotia: *McLeod Safety Services*

What Happened: After spotting safety violations at a road closure, the OHS inspector issued a pair of Compliance Orders to the contractor in charge of traffic control at the site, one ordering it to post the required Road Closed signage and the other requiring implementation of a proper Traffic Control Plan. While admitting the violations, the contractor blamed them on the Temporary Work Signaller employee and claimed it used due diligence to comply with the rules.

Ruling: The Nova Scotia Labour Board didn't buy the contractor's attempts to "shift the blame" to the employee and upheld both Orders.

Analysis: As employer, the contractor had "overarching" responsibility for safety on the site. And the fact that the signage problem was present hours before the OHS inspector even happened on the scene cast doubt on its overall supervision over the workers and the site.

McLeod Safety Services Ltd. (Re), 2018 NSLB 36 (CanLII), March 20, 2018

BC: *A1700374*

What Happened: Employer providing security services at saw mill complex fined $75K after one of its guards riding on a golf cart to conduct patrol falls 10 feet into an open pit. We had a "robust and effective" OHS program and the Board never told us what else we could have done to prevent the incident, the employer claimed.

Ruling: The BC WCAT found no due diligence and upheld the fine.

Analysis: There were steps the employer could and should have taken such as carrying out its own hazard assessment of the

workplace and not simply relying on the one done by its client, the site owner, as well as providing orientation and safety training on those hazards and ensuring first aid and prompt response to workers working alone.

A1700374 (Re), 2018 CanLII 74990 (BC WCAT), March 15, 2018

BC: *A1701653*

What Happened: After inspecting the excavation and determining that the sides weren't properly sloped, the prime contractor asked the excavator contractor to fix the problem; a second inspection led to the same result. So, the prime contractor called in a government safety inspector who cited the excavating contractor for a trio of OHS violations and imposed a $43,536 fine.

Ruling: The BC Workers' Compensation Appeals Tribunal refused to set aside the fine.

Analysis: The fact that the excavation contractor allowed the violations to continue even though the prime contractor brought the violation to its attention on 2 different occasions cut the legs out from its due diligence defence. Sure, the contractor completed a safety checklist, but that was before the work had begun and the trenching violations became apparent.

A1701653 (Re), 2018 CanLII 75795 (BC WCAT), March 7, 2018

BC: *A1605352*

What Happened: A government inspector responding to a chemical spill in the shop area of a metal electroplating company cited the employer for inadequate emergency response procedures and ordered it to install a real-time hydrogen cyanide gas (HCN) monitor to deal with the dangerously elevated HCN levels. The employer, who contended that the monitor was unnecessary, was

fined $50K for not complying with the order. The employer appealed, arguing among other things that it used due diligence to control HCN exposure levels.

Ruling: The employer lost on both counts.

Analysis: The employer didn't use due diligence either to prevent hazardous exposure before the spill or to comply with the order to install the HCN monitor. The employer played fast and loose with its HCN prevention even though it was aware that amyl nitrate had been banned and that there was no longer an antidote for HCN exposure. And conducting occasional walk through air tests wasn't an adequate substitute for real-time HCN monitors.

A1605352 (Re), 2018 CanLII 74893 (BC WCAT), Feb. 16, 2018

BC: *A1701806*

What Happened: An OHS inspector observes workers on a condo roof wearing harnesses not attached to a lifeline. When asked about the situation, the roofing contractor shrugs his shoulders and explains that his workers don't use lifelines because they consider them a "hindrance" and a "tripping hazard."

Ruling: The $5K administrative monetary penalty is richly deserved, the BC WCAT finds.

Analysis: The contractor's due diligence defence is almost laughable, especially given the "startling" admission that his crews wouldn't use the safety equipment provided to them. Roofing is a highly dangerous occupation and workers who refuse to obey with mandatory safety equipment rules should be suspended or dismissed.

A1701806 (Re), 2018 CanLII 75184 (BC WCAT), Feb. 8, 2018

BC: *A1700655*

What Happened: Asbestos abatement contractor fined, as employer, $15K for a pair of OHS violations, including issuing a clearance letter for a house when asbestos had been safely removed from only one section.

Ruling: The BC WCAT upholds the fine and nixes the due diligence defence.

Analysis: The employer didn't even enter parts of the house. A reasonable person exercising due diligence would have done more than just visually check the renovated attic before issue the clearance letter for the entire house.

A1700655 (Re), 2018 CanLII 75792 (BC WCAT), Feb. 7, 2018

BC: *A1607090*

What Happened: A street light subcontractor was fined a hair under $50K for failing to maintain the required minimum 3-metre clearance between the signal arm it was installing and overhead power lines. The subcontractor claimed due diligence.

Ruling: The BC WCAT said no dice and upheld the penalty.

Analysis: This was a second offence and the subcontractor didn't do much to bolster its OHS program in the 2 years since the first one. Example: Its "Pre-Task Plan" training handout identified the hazards of working near live power lines but didn't tell workers how to protect themselves other than warn them to "keep away."

WCAT Decision Number: A1607090, Dec. 11, 2017

Ontario: *Sunrise Propane Energy Group*

What Happened: Leaks in either the transfer hoses or bypass system series of explosions at a propane storage facility kills a worker, damages surrounding buildings and spills asbestos forcing an evacuation and major clean-up. After a 14-day trial, the facility operators are convicted of 7 OHS and environmental violations.

Ruling: The Ontario Superior Court upholds the convictions, including the finding that the operators didn't exercise due diligence.

Analysis: The operators' safety system "was severely lacking," specifically in truck drivers' oversight and preventative maintenance. And the fact that one of its safety engineers noticed a potentially damaged hose in the yard but took no action did little to persuade the judge on the soundness of the due diligence defence.

R.v. Sunrise Propane Energy Group Inc., 2017 ONSC 6954 (CanLII), Nov. 27, 2017

BC: *A1604203*

What Happened: An OHS inspector observes a slew of OHS citations—fall protection, pit guarding and incident investigation, at a condo construction site; 2 months later, he returns to the site and notes the same violations + a new one: lack of respiratory protection for workers exposed to silica dust. The inspector sends one bill to the employer imposing fines for each separate group of offences. Total: $59,655.

Ruling: The BC WCAT upholds the second penalty order but not the first.

Analysis: The evidence clearly showed that the employer

committed the offences and didn't exercise due diligence to prevent them. So, a fine was definitely in order. But imposing 2 sets of fines on the same day for offences committed 2 months apart without clearly notifying the contractor that it faced a second fine for not fixing the original offences when they were first noted was dirty pool and not a fair way to enforce the OHS laws. The Board should be trying to promote compliance, not maximize penalties.

A1604203 (Re), 2017 CanLII 95991 (BC WCAT), Nov. 21, 2017

Ontario: *Wal-Mart Canada*

What Happened: A Wal-Mart worker using a manual skid jack to move a pallet loaded with toilet paper from a truck to the store receiving area is moving backward and doesn't see the empty skid that someone carelessly left in the aisle. So, he trips and bangs his head on the floor. Wal-Mart is charged with not keeping the receiving area floors clear of hazards. Wal-Mart denies the charge, claims it exercised due diligence and blames the worker for the incident.

Ruling: The Ontario Superior Court upholds the lower court's ruling that Wal-Mart didn't exercise due diligence.

Analysis: Wal-Mart had an impressive program to keep aisles free of tripping hazards. But the problem was in the implementation. With all these measures in place, how and when did that skid get left in the aisle' How long was it there' It was up to Wal-Mart to answer these questions. But it was unwilling (or perhaps unable) to produce logs and other evidence explaining the safety breakdowns. And because Wal-Mart didn't meet its burden to prove reasonable steps on a balance of probabilities, its due diligence defence failed.

R.v. Wal-Mart Canada Corp., 2017 ONSC 6726 (CanLII), Nov. 8, 2017

BC: *A1606046*

What Happened: In January, an elevator maintenance contractor is cited, as an employer, for lockout violations. In June, one of its workers is electrocuted while re-wiring an elevator control panel. The employer is fined $75K for the first offence in July, and $150K for additional lockout offences in the subsequent January. The employer contests both sets of fines and claims due diligence.

Ruling: The BC WCAT nixes both due diligence defences but does reduce the $75K penalty for the first set of offences while upholding the $150K for the subsequent violations.

Analysis: Jan. violations: The employer did take steps to improve its OHS program and bring in a new safety officer before the first inspection but still wasn't doing enough to train and supervise its workers. Even so, the violations weren't high risk and merited a penalty of only $15K. June violations: The same deficiencies plaguing the employer's safety efforts in Jan. were still in evidence in June. The difference is that a worker was dead as a consequence. And since it was a repeat penalty, a higher fine multiplier applied.

A1606046 (Re), 2017 CanLII 95769 (BC WCAT), Nov. 16, 2017

BC: *A1604968*

What Happened: Saw mill employer fined $29K for several offences including improper guarding of energized equipment. While acknowledging that equipment was unguarded during the inspection, the employer noted that the normal wasn't in place because the mill was shut down and undergoing maintenance at the time.

Ruling: In a close call, the WCAT finds no due diligence.

Analysis: The employer was more knowledgeable than the inspector about the plant and its operations and its explanation about closure for maintenance generally held water. But that didn't account for the missing mid-rail or bottom rail of the guarding around the notcher saw which even the employer admitted rendered it inadequate to prevent a worker from coming into contact with the equipment.

A1604968 (Re), 2017 CanLII 145395 (BC WCAT), Oct. 17, 2017

New Brunswick: *RCMP*

What Happened: The Crown charged RCMP with OHS violations for failing to protect the 3 officers gunned down by an assailant armed with assault weapons during a Moncton shooting.

Ruling: RCMP convicted on 3 of 4 charges.

Analysis: The RCMP knew that its current weaponry for front line response officers was inadequate to stop an "active threat" and had implemented a plan to equip officers with carbines 6 years before. But there were delays and the plan hadn't been implemented by the time of the Moncton shooting. As a result, the Moncton officers were sent to respond to the threat without adequate firepower. And while the risk was remote, the potential consequences were so grievous as to warrant action.

R.v The Royal Canadian Mounted Police, 2017 NBPC 6 (CanLII), Sept. 29, 2017

Newfoundland: *Vision Electrical*

What Happened: Contractor charged with engaging in "electrical

work” without a permit claimed it didn’t know a permit was required.

Ruling: The Newfoundland Provincial Court rejected the contractor’s “mistake of fact” due diligence argument.

Analysis: The defence didn’t work because the contractor didn’t bother to check the regulations before starting the work; as a result, its mistake of believing a permit was unnecessary was unreasonable.

R.v Vision Electrical Limited, 2017 CanLII 50430 (NL PC), Aug. 4, 2017

Ontario: *Matcor Automotive*

What Happened: Deciding it was a “quick fix,” a maintenance worker tried to repair the overheating cell of a robotic machine without locking out the equipment and suffered crushing injuries rendering him a paraplegic.

Ruling: The employer was convicted on 3 charges including failure to follow lockout requirements and provide training and instructions.

Analysis: The employer had lockout programs but they were “systems on paper” that weren’t followed in practice. The biggest flaw was condoning and even encouraging the unwritten practice of letting workers service perform “quick fix” operations which was essentially nothing more than a dangerous shortcut allowing for servicing of equipment without following the lockout rules.

R. v. Matcor Automotive Inc., 2017 ONCJ 560 (CanLII), June 5, 2017

Nova Scotia: *S.A. Construction & Renovations*

What Happened: Inspector issues $5K penalty against contractor for fall protection, scaffolding and guardrail violations on multi-storey apartment construction site. The contractor argues due diligence claiming that it simply followed the recommendations of its outside safety consultant.

Ruling: No due diligence, says the Nova Scotia Labour Board.

Analysis: Reasonably relying on the faulty advice of its safety consultant might be grounds for both the "reasonable steps" and "mistake of fact" branches of the due diligence defence. The problem is that the contractor didn't furnish evidence of what the consultant actually told it to do. And without that crucial information, the contractor had no due diligence leg to stand on.

S.A. Construction & Renovations Limited (Re), 2017 NSLB 43 (CanLII), March 29, 2017

New Brunswick: *Safety First Contracting*

What Happened: A traffic safety contractor admits to traffic control violations for temporary road closures but blames them on site personnel's failure to follow required safety procedures.

Ruling: The Nova Scotia Labour Board rejects the due diligence defence and upholds the $500 fine.

Analysis: Site personnel did, in fact, have the proper signage and had received adequate training and instructions on safe handling of temporary traffic closures. But the argument that the violations were unforeseeable was belied by the fact that the contractor had been warned twice in the month before the incident that a temporary road closing might happen and that it needed to ensure that its personnel were prepared to post the necessary signage. The other problem is that it didn't

call the signer to testify during the proceeding.

Safety First Contracting (1995) Limited (Re), 2017 NSLB 12 (CanLII), Feb. 15, 2017

Ontario: *FCA Canada*

What Happened: A welder suffered serious injuries after falling from the section of an elevated platform that was unguarded to allow for vehicles to enter and exit the platform on a conveyor. The employer was charged with a guardrail violation but presented what looked like a strong due diligence defence. Before the prosecution even began, the sides agreed on the following facts:

- Nobody had ever fallen off the platform before the incident;
- No safety issues about the lack of guardrails had ever been raised by internal staff, the JHSC or outside auditors;
- The platform was inspected each week and rigorously audited throughout the year; and
- Warning plates and safety mats were in place at the time of the incident.

The argument was that the victim defeated the safety measures that should have been adequate to protect him.by recklessly entering the platform through the unguarded area.

Ruling: The Ontario Court of Justice found the employer failed to exercise due diligence and upheld the guilty verdict.

Analysis: The whole idea of the OHS Act is to protect the heedless and reckless worker. The employer could and should have foreseen that some knucklehead would try to go through the opening and installed a swing gate or some other kind of guard to prevent it.

R. v. FCA Canada Inc., 2017 ONCJ 910 (CanLII), Jan. 31, 2017

Québec: *9090-5092 Québec Inc.*

What Happened: Stripping work on the third floor of a building under construction weakens the platform covering the elevator shaft on the floor above. The platform eventually gives way and the worker standing on it falls through the shaft. The subcontractor responsible for the formwork is charged with an OHS violation even though the victim didn't work for the company. You got the wrong defendant, we didn't violate the law and even if we did, we exercised due diligence to prevent it, the subcontractor claims.

Ruling: The Court of Québec rejects all 3 arguments.

Analysis: It was appropriate to charge the subcontractor given its control over the hazard; the *actus reus* was proven because the subcontractor removed the third floor which weakened the platform above while failing to prevent workers on the fourth floor from accessing the compromised platform over the shaft; and due diligence failed because even if the subcontractor's claim about the victim's extreme recklessness and record of removing safety barriers were to be believed, the subcontractor was aware of his bad safety habits and should have realized that simply posting warning ribbons wouldn't keep him off that platform.

CSST c. 9090-5092 Québec Inc., 2017 QCCQ 581 (CanLII), Jan. 24, 2017

MIXED RESULTS

Manitoba: *Kroeker Farms*

What Happened: Worker loses tip of his index finger after making contact with a moving conveyor. The employer is charged with 5 OHS offences.

Ruling: 4 not guilty, 1 guilty

Not Guilty: The employer was acquitted of 4 charges related to the safety of the conveyor. The conveyor had been in use for over 30 years, was scrupulously inspected and had recently undergone safety improvements ordered by WSH officers. The employer was also actively involved in the WSH program designed to bring agricultural operations into line with the more rigorous safety requirements imposed on other industries and the incident was the result of a cause that was foreseen by neither the employer nor the WSH agents with which it worked.

Guilty: The employer also had safe work procedures but didn't put them in writing, dooming its due diligence defence on that particular count.

R v Kroeker Farms Limited, 2017 MBPC 49 (CanLII), Nov. 2, 2017

Alberta: *Kal Tire*

What Happened: A tire repair shop worker orders the driver of a semi-truck with a flat tire to inch his vehicle forward not realizing that his co-worker is underneath the vehicle jacking up the front wheels. Both workers are experienced and well trained and the shop has clearly written lockout policies designed to prevent such incidents. But these safety measures are undone by a bizarre series of blunders, miscommunication and plain bad luck and the shop is charged, as employer, with 5 OHS violations.

Ruling: 4 not guilty, 1 guilty.

Not Guilty: The fact that the lockout policy didn't work isn't dispositive since due diligence requires reasonableness and not perfection. The lockout policy did, in fact, account for the blunders that were reasonably foreseeable, including the

possibility of miscommunication between a pair of veteran workers. But what was not foreseeable was that a truck that had been safely positioned on a platform after a walk around would need to be repositioned because of a mistake as to which tire needed fixing and that another worker would slide under the truck without being seen less than a minute after walk around. Accordingly, the policy's failure to deal with this situation wasn't due to want of reasonable steps.

Guilty: The one violation that stood up was the employer's failure to use an energy isolating device or alternative lockout procedure providing equivalent protection.

R v. Kal Tire, 2017 ABPC 246 (CanLII), Sept. 28, 2017

Saskatchewan: *Rowlett*

What Happened: SaskPower lineman is electrocuted while repairing high voltage transmission lines in rural area at night after a blackout. Supervisor charged with 3 OHS violations including failing to:

1. Revise the job hazard identification after a change in job conditions;
2. Ensure use of a jumper cable before cutting the shield wire; and
3. Ensure use of Class II rubber gloves.

Ruling: 1 not guilty (Count 3), 2 guilty (Counts 1 and 2).

Not Guilty: The supervisor mistakenly believed that wearing Class II rubber gloves would violate SaskPower safety policy. This was a reasonable mistake especially for a 20 year veteran that had repaired broken shield wire without wearing such gloves 75 to 100 times in his career, and the safety precautions he did take were also appropriate had the mistaken set of facts been true.

Guilty: The reasonable mistake of fact due diligence defence didn’t work for failure to redo the hazard assessment. Specifically, it was unreasonable to treat a change in repair location as only a “minor” change not triggering the need for a revised assessment especially since there were no provisions in the rule book saying reassessments aren’t required after minor changes. The reasonable steps claim for Count 2 also failed. He was supervising workers inexperienced in repairing high voltage transmission power lines and should have taken more time to ensure the plan was communicated clearly and the risks were evaluated fully or at the very least made it clear how the jumper and cut would be made.

R v Rowlett, 2017 SKPC 12 (CanLII), March 1, 2017