

Two Companies Prevail in Recent Ontario OHS Prosecutions



The Case of the Month is often an OHS prosecution in which a company or individual was found liable for a safety violation because of something it did wrong. Just look at the cases in the annual Due Diligence Scorecard every year more companies lose than win. But companies can actually prevail in OHS prosecutions. In fact, it recently happened not once but twice in Ontario. And although you can learn a lot from safety cases in which companies lose, cases where companies won can also teach you the kinds of OHS programs and safety measures companies need to prove due diligence. Here's a look at these cases and what you can learn from them.

THE RASSAUN STEEL CASE

A foundry hired a company to remove equipment. While doing so, one of the company's workers was seriously injured when a large section of ductwork fell on him. The company was convicted of a general duty violation for failing to ensure the ductwork was adequately supported while being dismantled. It appealed and argued due diligence, claiming that the collapse wasn't reasonably foreseeable.

The appeals court acquitted the company. It found that the collapse was caused by a buildup of sand in the ducts and a poor weld. The evidence showed that such buildup not only

shouldn't have happened but also couldn't have been expected. Witnesses also testified that it wasn't practical or reasonable to inspect all of the welds in the ducts, noting that it would've taken years to do so. Thus, there was no basis on which to conclude that the collapse was 'a foreseeable risk,' concluded the court. And because the collapse wasn't foreseeable, the charge had to be dismissed [[R. v. Rassaun Steel & MFG. Co. Ltd.](#), [2012] ONCJ 705 (CanLII), Nov. 14, 2012].

THE THOMAS FULLER CASE

Workers were laying concrete piping at a construction site using a makeshift winch system. A 4 x 4 piece of a wooden brace that was part of this system snapped, releasing the tension in the system. The cables recoiled with great force and the wooden brace pivoted violently. A worker who was in its path was killed. As a result, a company was charged, as a constructor, with failing to ensure that the wooden brace was designed and constructed to resist the force likely to be exerted by the winch cables.

The court found that the Crown had failed to prove this charge beyond a reasonable doubt and that the company had exercised due diligence. The company had relied upon manufacturer instructions and industry standards when designing and constructing the wooden brace. The court specifically rejected the argument that the company should've also involved a professional engineer in designing this equipment. It explained that the issue was whether the company took all of the care that a reasonable person might have been expected to take in these circumstances. 'All reasonable care' doesn't require a defendant 'to take each and every precaution that would be reasonable to take in the circumstances,' noted the court. Yes, the company could've consulted with engineers, put gauges on the device or used a steel structure instead of a wooden one. But for various reasons, a reasonable person wouldn't, in all of the circumstances, have been expected to

do so, said the court. *Bottom line*: Due diligence doesn't require a company to take every reasonable steps the mind can conceive of after the incident has happened [[R. v. Thomas Fuller and Sons Ltd.](#), [2012] ONCJ 731 (CanLII), Nov. 23, 2012].

ANALYSIS

After reading case after case in which due diligence defences fail, it's easy to conclude that the defence only works in theory and never in practice. But these two cases show that companies and individuals charged with OHS violations can actually win. For example, the *Rassaun* case is a good illustration of the importance of foreseeability in the analysis of due diligence defences. That is, to prove due diligence, companies must only take reasonable steps to address *foreseeable* hazards; they don't need to take steps to prevent anything that could possibly happen under the sun. Similarly, the *Thomas Fuller* case demonstrates that due diligence doesn't require perfection. It's easy to play Monday morning quarterback and come up with a list of all of the possible steps a company should've taken but that's not the standard. Rather, companies should be expected to take only those steps that a reasonable person in those same circumstances would've taken. (For more information on the due diligence defence, including each year's Due Diligence Scorecard, go to the [Due Diligence Compliance Centre](#).)