WINNERS & LOSERS: Is Hiring a Competent Contractor Enough to Establish Due Diligence?



When a company uses a contractor, it generally can't delegate all of its responsibilities under OHS law to that contractor or simply assume that the contractor will comply with all safety requirements. To prove due diligence, the company must show that it took all reasonable steps to ensure that the contractor complied with the OHS laws. For example, the company should take reasonable care when hiring contractors to ensure they're qualified to do the work and do it safely. But is hiring a competent contractor enough' Here are two cases that address this issue. (Although one case involves environmental violations, the same principles apply to safety violations.)

***Insider* Says:** For more on effectively managing contractors in your workplace, go to the OHSInsider's Contractors Compliance Centre.

DUE DILIGENCE

Facts

A sawmill hired a contractor to dig an excavation pit below steam pipes so footings could be installed for a new ramp. The sawmill required the contractor's workers to pump water onto the top of a hog fuel pile so it could be absorbed. Although the workers initially complied with this requirement, a worker

for the contractor moved the hose, permitting the water to be pumped onto the roadway, where it flowed into a creek some distance away. As a result, the sawmill was charged with two violations of the *Fisheries Act*.

Decision

The BC Provincial Court ruled that the sawmill had exercised due diligence.

Explanation

In terms of general due diligence, the court found that the sawmill had a proper system to prevent environmental harm and took reasonable steps to ensure the effective operation of that system. As to the contractor, the sawmill took reasonable steps to ensure the contractor was reputable and did good quality work before hiring it. The sawmill also provided sufficient supervision of the contractor given the size of the project. And it provided clear and uncomplicated instructions to the contractor's supervisor as to how and where they should pump the water. Thus, the court concluded that it wasn't reasonably foreseeable that the contractor's workers would disregard these straightforward instructions

R. v. Pacifica Papers, [2002] BCPC 265 (CanLII), March 25, 2002

NO DUE DILIGENCE

Facts

The transportation ministry hired a contractor to perform maintenance and repairs on traffic and roadside lights. A safety inspector saw one of the contractor's workers on a boom truck lifting an overhanging traffic light onto a pedestal. The head of the boom was very close to high voltage electrical wires. And there was no traffic control in place at the site. The ministry was charged with failing to take reasonable

precautions to ensure the health and safety of persons at a project.

Decision

The Nova Scotia Provincial Court convicted the ministry, ruling that it didn’t exercise due diligence.

Explanation

The ministry said that it had taken reasonable care in selecting the contractor to do this work, including ensuring that the contractor had an adequate OHS system. It argued that selecting a competent contractor was all it needed to do to prove due diligence. The court agreed that’on paper’the contractor’s OHS system was ‘complete and reasonable.’ But the ministry had a duty to take steps to ensure the contractor *actually implemented* this system and monitored it. The ministry failed to do so, instead relying on the contractor’s ‘naked promise to carry out the work reasonably and legally,’ which it didn’t do.

R. v. Nova Scotia (Minister of Transportation and Public Works), [2002] N.S.J. No. 436, Sept. 30, 2002