

# DUE DILIGENCE IN OCCUPATIONAL HEALTH AND SAFETY

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## Overview

This paper discusses due diligence in the occupational health and safety context as it relates to the defence of a regulatory prosecution or administrative proceedings. The paper begins with a general overview of the defence of due diligence, followed by a review of recent significant decisions from Western Canada. The purpose of the case review is to focus on how courts and administrative tribunals have applied the principles of due diligence, particularly with respect to foreseeability, that is, the types of hazards an employer is expected to foresee, and how the employer is expected to respond to those hazards. The emphasis is on what practical lessons can be learned to apply to the workplace to avoid incidents, and to defend a prosecution or to respond in administrative proceedings.

Brief reference will also be made to the protection of persons other than workers at a worksite, and criminal prosecutions in the area of occupational health and safety.

## Due Diligence – general principles<sup>1</sup>

The general principles of due diligence as a defence to a prosecution starts with the judgment of Dickson J. in the leading case of *R. v. Sault Ste. Marie (City)*.<sup>2</sup> In recognizing strict liability as one of three categories of offences, the other two being *mens rea* offences and absolute liability offences, the Court described strict liability offences as follows:

Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or

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<sup>2</sup> [1978] 2 S.C.R. 1299

omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.<sup>3</sup>

The key concepts of the defence are the objective consideration of what a reasonable person would have done in the circumstances, and the two branches of the defence being:

1. The accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or
2. the accused took all reasonable steps to avoid the particular event.

This statement of the key concepts of reasonable care, or due diligence, will be found in virtually every Court decision where the defence of due diligence is in issue. The following section of this paper discusses in more detail the purpose of strict liability and the due diligence defence.

### **The Purpose of Strict Liability and the Due Diligence Defence**

Regulatory duties and responsibilities under applicable occupational health and safety legislation are enforced through administrative penalty systems<sup>4</sup> and regulatory or quasi criminal prosecutions. The public policy underlying the enforcement of regulatory measures was described by the Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 as the safe operation of modern society. Increased government regulation in all aspects of life was necessary for public safety and health, as described by the Court as follows:

29 Regulatory measures are the primary mechanisms employed by governments in Canada to implement public policy objectives. What is ultimately at stake in this appeal is the ability of federal and provincial governments to pursue social ends through the enactment and enforcement of public welfare legislation.

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33 In short, regulation is absolutely essential for our protection and well-being as individuals, and for the effective functioning of society. It is properly present throughout our lives. The more complex the activity, the greater the need for and the greater our reliance upon

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<sup>3</sup> *Ibid.*, p. 1326

<sup>4</sup> For example, in British Columbia proceedings can be taken by way of an administrative penalty or a regulatory prosecution under the *Offence Act*, but not both. See *Workers Compensation Act*, s. 196(7).

regulation and its enforcement. For example, most people would have no idea what regulations are required for air transport or how they should be enforced. Of necessity, society relies on government regulation for its safety.

With increased government activity and control in all aspects of life came a new method of enforcement, the regulatory or public welfare offences, which required a different approach by regulatory bodies and the Courts. Criminal law was not seen as an appropriate mechanism for breaches of public welfare legislation, but the Courts sought to preserve the right to challenge the validity of the myriad rules and regulations while still maintaining the integrity of the regulatory system.

The purpose of strict liability and the due diligence defence in regulatory offences was described by the Court in *R. v. Sault Ste. Marie* as follows:

The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to *Pierce Fisheries* and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.<sup>5</sup>

Therefore, in the prosecution of a strict liability offence, the Crown is required to prove *the actus reus* beyond a reasonable doubt. The Crown is not required to prove *mens rea*. If the Crown can prove the elements of the *actus reus* beyond a reasonable doubt, the defendant will be found guilty unless the defendant can prove due diligence on the lower standard of a balance of probabilities.

Liability arises from the failure of a person to have taken reasonable steps that could have been taken to avoid the harm:

Liability rests upon control and the opportunity to prevent, i.e. that the accused could have and should have prevented the pollution. ...

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<sup>5</sup> *Ibid.*, p. 1325

The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by “supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control” (Lord Evershed in *Lim Chin Aik v. The Queen*,<sup>6</sup> at p. 174). The purpose, Dean Roscoe Pound has said (*The Spirit of the Common Law* (1906)), is to “put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale.” As Devlin J. noted in *Reynolds v. Austin & Sons Limited*,<sup>7</sup> at p. 139: “a man may be responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark.” Devlin J. added, however: “If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim.”<sup>8</sup>

### **Statutory Due Diligence Defence**

In addition to the common law due diligence defence established in *R. v. Sault Ste. Marie*, some legislation specifically includes a form of statutory due diligence defence. For example, in the Ontario *Occupational Health and Safety Act*, R.S.O. 1990, Chap. O.1, section 66(3) provides:

- (3) On a prosecution for a failure to comply with,
- (a) subsection 23(1) [duties of constructor];
  - (b) clause 25(1)(b), (c) or (d) [duties of employers]; or
  - (c) subsection 27(1) [duties of supervisor],
- it shall be a defence for the accused to prove that every precaution reasonable in the circumstances was taken.

Although this statutory defence has been described in some cases as a codification of the common law due diligence defence,<sup>9</sup> this statutory defence is narrower than the common law due diligence defence in *R. v. Sault Ste. Marie* in that the statutory defence is available only in relation to the duties in the specified sections of the *Act*, and the wording of the statutory defence is similar only to the one branch

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<sup>6</sup> [1963] A.C. 160

<sup>7</sup> [1951] 2 K.B. 135

<sup>8</sup> *R. v. Sault Ste. Marie*, *supra*, at pp. 1321-1322

<sup>9</sup> *R. v. Hershey Canada Ltd.*, 2006 ONCJ 420, at para. 24; *R. v. Ayrfield Holdings Ltd.*, 2007 ONCJ 658, at para. 20

of the common law defence, that is, the person took all reasonable steps to avoid the particular event, and does not include the second branch, that is, the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent.

The availability of one or both of the statutory and common law due diligence defences was described in *R. v. Bradsil 1967 Ltd.*,<sup>10</sup> as follows:

All charges under the *Occupational Health and Safety Act*, whether under provisions of that *Act* specifically mentioned in subsec. 66(3) thereof or not, are offences of "strict but not absolute responsibility", with respect to which *either* the statutory defence of "every precaution reasonable in the circumstances", *and/or* the common law defence of "due diligence" as enunciated by the Supreme Court of Canada in *R. v. City of Sault Ste. Marie*<sup>11</sup> will be applicable; if one is not, or to the extent that it is not, the other will be: *R. v. Cancoil Thermal Corp.*<sup>12</sup> The "common law" justification, excuse or defence consists of *two branches*, namely:

(i) That defendant exercised "all due diligence" to avoid committing the *actus reus* of the offence charged - *equivalent* to the statutory defence of "every precaution reasonable in the circumstances" under subsec. 66(3) of the *Occupational Health and Safety Act*: *R. v. Corp. of City of Sault Ste. Marie, supra*; *R. v. Cancoil Thermal Corp. (Ont. C.A.), supra*; or

(ii) That defendant had an honest and reasonable belief in a state of facts which, if true, would have rendered his/her act or omission innocent: *R. v. Corp. of City of Sault Ste. Marie, supra*; *R. v. Cancoil Thermal Corp.*

When reviewing a regulatory provision relating to an alleged offence, or for advice with respect to the due diligence required to meet an employer's obligation, it will be important to review the statute to determine if a statutory due diligence defence exists.

### **Due Diligence Defence as a Breach of the Charter Right to Presumption of Innocence**

The statutory due diligence defence in the Ontario *Occupational Health and Safety Act*, and the common law due diligence defence in *R. v. Sault Ste. Marie*, were the subject of a Charter challenge in *R.*

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<sup>10</sup> 1994 CarswellOnt 4450 (Ont. C.J.)(Prov. Div.), at para. 16; see also subsection 66(3) considered in *Ontario (Ministry of Labour) v. Taggart Construction Ltd.*, 2007 ONCJ 660

<sup>11</sup> [1978] 85 D.L.R. (3d) 161

<sup>12</sup> (1986) C.C.E.L. 219 (Ont. C.A.)

*v. Ellis-Don Ltd.*<sup>13</sup> The Supreme Court of Canada relied on *R. v. Wholesale Travel Ltd.* to decide that the onus of proving the defence of due diligence violates the presumption of innocence in s. 11(d) of the Charter, but is a demonstrably justified reasonable limit on that right under s. 1 of the Charter.

## Recent Western Canadian decisions on due diligence

### Generally

The following discussion of recent decisions from Western Canada focuses on Alberta because of three significant cases recently considered by Alberta courts, all of them finding in favour of the employer in establishing a due diligence defence. One recent Saskatchewan case is also noted, which followed and quotes the three Alberta cases. The discussion of due diligence in the British Columbia administrative context refers to the due diligence defence as it is found in the *Workers Compensation Act* and in the analysis of decisions of the Review Division and Workers' Compensation Appeal Tribunal, which is guided by the written policies established by the Workers' Compensation Board.

The focus in the following discussion is on foreseeability, and practical pointers for establishing a due diligence defence in response to a prosecution or administrative proceedings. The first Alberta case, *R. v. Lonkar Well Testing Ltd.*, is particularly helpful in this respect as the bulleted points in the discussion below summarize the Court's findings on foreseeability and the standard of care expected of an employer in ensuring the health and safety of workers.

### Alberta

The three recent Alberta decisions are of interest for their findings in favour of the employer in defence of a charge under the general duty of care provision of Alberta's *Occupational Health and Safety Act*, which requires employers to ensure, as far as it is reasonably practicable for the employer to do so, the health and safety of workers engaged in the work of that employer. The findings of the Court in all three cases focus on foreseeability in the Court's analysis of the reasonable care or due diligence defence.

The first case, *R. v. Lonkar Well Testing Ltd.*, is useful in its discussion of foreseeability in finding the employer had taken reasonable care to warn a worker of the dangers associated with the escape of gas vapours, when the worker had taken steps to dismantle a pressure vessel beyond the point at which he had been instructed to stop. The case also provides specific practical pointers for establishing a due diligence defence.

In the second case, *R. v. Sunshine Village Corp.*, the appeal court quashed a conviction of an employer where the employees involved in the operation that resulted in a worker's death were found to

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<sup>13</sup> *R. v. Ellis-Don Ltd.*, [1992] 1 S.C.R. 840, reversing 76 D.L.R. (4th) 347, 1990 CarswellOnt 64 (Ont. C.A.)

have been trained, were aware of the danger, and knew the procedures that were in place. Unfortunately, the employees had no explanation as to why they did not follow the procedures on that one occasion. The Court found that the fact that these otherwise conscientious and respected employees should be careless and absent minded at the same time was simply not foreseeable.

The third case, *R. v. Procrane Inc.*, is of interest with respect to due diligence and foreseeability because of the Court's view of the facts, and the decision summarizes the Alberta case law preceding it, including the two decisions above, *R. v. Lonkar Well Testing Ltd.*, and *R. v. Sunshine Village Corp.* The case is also useful for its summary of the burden of proof on the Crown where an employer has been charged under a general duty provision such as found in the Alberta *Occupational Health and Safety Act*, i.e. the proof of an accident may be sufficient to establish the *actus reus* of an offence, also known as the "accident as *prima facie* breach approach".

*R. v. Lonkar Well Testing Ltd.*, 2009 ABQB 345

*R. v. Lonkar Well Testing Ltd.* is an appeal of a conviction of a corporation under the Alberta *Occupational Health and Safety Act* for failing to ensure the health and safety of a worker. The facts of the case are that a meter malfunctioned on a pressure vessel in a sweet well operation. To prepare for its replacement by the manufacturer, a supervisor instructed a worker to remove half of the flange bolts, but told the worker not to carry out any additional work until he returned. The worker carried out more work than instructed and he dismantled the pressure vessel. He was later found unconscious and he died by suffocation due to the low level of oxygen as a result of hydrocarbons released when the pressure vessel was dismantled. The central issue in the case was the extent of the warnings given to the worker about of the danger of gas vapours, and whether or not the warnings given to the worker, and other factors, were sufficient to establish a due diligence defence.

In reviewing the trial judge's analysis of the due diligence defence, the Court discussed in some detail the standard of care of an employer in ensuring the health and safety of workers. The Court's analysis of due diligence at paras. 30 – 42 of the case is summarized with the Court's case citations footnoted, as follows:

- **Take reasonable care, and do what is reasonably practical:** The trial judge had adopted the proposition stated in a prior case that "although the standard of care is not perfection, the employer is nevertheless 'virtually an insurer' of safety compliance." However, on appeal, the Court stated that the Act does not call for clairvoyance on the part of the employer, and ensuring the health and safety of the workers is limited to those things that are reasonably practical. The responsibility of an employer towards its employees is not an insurer or guarantor

of worker safety. Employers are required only to take reasonable care and do only what is reasonably practical. The duty falls short of absolute liability.

- **Specific safety breach vs. ensuring workers' safety:** There is a distinction between situations where specific safety regulations were alleged to have been breached, such as the requirement for a guard on a machine, and those cases where there is no breach of a legislatively mandated safety precaution or industry standard, but the employer is required to ensure the workers' health and safety. Logically, an employer who has breached a specific positive obligation mandated by regulation must provide a compelling rationale to support a finding that it took all reasonable care to ensure the safety of workers. Where there is no breach of a legislatively mandated safety precaution or industry standard, it falls to the trial judge to determine, in the absence of any specific regulatory breach giving rise to the tragedy, whether the employer has probably taken such steps as were reasonably practicable in the circumstances to ensure the workers' health and safety, not that the employer had to make certain that harm did not occur to the worker, i.e. absolute liability. For the due diligence defence to be substantively meaningful, the Act must be understood to impose strict rather than absolute liability.
- **Fact specific circumstances:** Reasonable care will vary with the circumstances and specificity of the charges being prosecuted. Case law has not approved a preset sequence of questions to be applied to all scenarios. There is no duty imposed on an employer by health and safety laws to anticipate every possible failure.<sup>14</sup>
- **Hindsight:** The wisdom gained by hindsight is not necessarily reflective of reasonableness prior to the incident.<sup>15</sup>
- **Supervise, improve, exhort:** In discussing the rationale underlying a defence of reasonable care, Dickson J. in *Sault Ste. Marie* cited case law to the effect that control may be exerted to ensure safety in three ways: supervision or inspection, improvement of business methods, or exhorting those whom one may be expected to influence or control. Due diligence entails "communicating adequate instructions of safety precautions to employees, either verbally, or in writing, and following up to ensure that the instructions are carried out."<sup>16</sup>
- **Seek expert advice, establish safety system, monitor:** What should an employer do to ensure as far as reasonably practicable the health and safety of a worker engaged in a neutralization process involving an inherently dangerous chemical?
  - First, at a minimum the employer would be required to seek the advice of a qualified expert on the use of a safe procedure.

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<sup>14</sup> *R. v. Petro-Canada*, 2008 ONCJ 558, [2008] O.J. No. 4396 (Ont. C.J.) at para. 172 and cases cited therein

<sup>15</sup> *R. v. Cargill Ltd. - Cargill Ltée*, 2000 ABPC 208, 283 A.R. 100 (Alta. Prov. Ct.), citing *R. v. British Columbia Hydro & Power Authority*, [1997] B.C.J. No. 1744, 25 C.E.L.R. (N.S.) 51 (B.C.S.C.), and *R. v. Sobeys Inc.*, [2000] N.S.J. No. 32, 181 N.S.R. (2d) 263 (N.S.S.C.)

<sup>16</sup> *R. v. Altapro Cleaning & Disaster Restoration Ltd.*, 2004 ABPC 197, 36 C.C.E.L. (3d) 294 (Alta. Prov. Ct.), at para. 95, citing *R. v. Quasar Petroleum Ltd.*, [1979] A.J. No. 597 (Alta. Dist. Ct.)

- Two, the employer would be required to take the advice received to its safety committee or otherwise develop an appropriate system or protocol to protect its workers in a manner consistent with that advice.
- Three, the employer would be required to monitor the system implemented for compliance.
- **Training, materials, testing, direction, supervision:** The question which the Trial Judge was required to answer was whether Lonkar took all reasonable steps to ensure the worker's safety. Did it do everything reasonably practicable to address foreseeable risks in terms of training, materials, testing, direction and supervision? Part of that assessment requires careful consideration of foreseeability.
- **Foreseeability and unforeseeability:**
  - Foreseeability is properly considered as part of the reasonable care or due diligence defence.<sup>17</sup>
  - Thibideau J. framed the test in the negative: whether the circumstances of the accident were so bizarre as to be reasonably unforeseeable.<sup>18</sup>
  - "In law, 'foreseeable' does not mean 'imaginable'. The human mind is capable of imagining all sorts of fantastic and bizarre situations, but that does not make them 'foreseeable' in law. The legal concept of foreseeability incorporates the idea that the event is not only imaginable, but that there is some reasonable prospect or expectation that it will arise ..."<sup>19</sup> [Emphasis added]
  - The test in the occupational health and safety context is not whether the defendant in fact foresaw the accident but whether a reasonable man would have foreseen a potential source of danger. This approach is in keeping with the high onus placed on employers by legislation to reasonably ensure a safe and healthy working environment.<sup>20</sup>

In *Lonkar*, the appeal Court found that the company had taken reasonable care in the circumstances to warn the worker of the dangers associated with the escape of gas vapours. The Court concluded that the trial judge's finding that there should have been a specific warning that gas vapours could be lethal was a requirement based on hindsight, was not reasonably practicable having regard to the reasonable care taken by the company, nor as a step that would respond to a foreseeable potential danger. The Court concluded that "although cases of bizarre and unforeseeable acts are exceedingly

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<sup>17</sup> *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (Ont. C.A.), and *R. v. Rio Algom Ltd.* (1988), 66 O.R. (2d) 674 (Ont. C.A.)

<sup>18</sup> *Ontario (Ministry of Labour) v. Brant Corrosion Control Inc.*, 2008 ONCJ 731 (Ont. C.J.)

<sup>19</sup> *Fallowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 4, [2008] N.W.T.J. No. 27 (N.W.T. C.A.)

<sup>20</sup> *R. v. Rio Algom Ltd.*, *supra*, at para. 25

rare, in my view this unlikely and inexplicable scenario which resulted in [the worker's] tragic death falls squarely within that category."<sup>21</sup> The Court allowed the appeal and quashed the conviction.

*R. v. Sunshine Village Corp.*, 2010 ABQB 493

A second recent Alberta decision finding in favour of an employer is *R. v. Sunshine Village Corp.*, in which a conviction under a general duty provision was quashed on appeal. The provision is again section 2(1)(a)(i) of the Alberta *Occupational Health and Safety Act*, which requires every employer to ensure, as far as it is reasonably practicable for the employer to do so, the health and safety of workers engaged in the work of that employer.

The charge against the company arose from an incident on August 31, 2004 when a 25 year old employee of the company died when a work platform secured to a chairlift cable entered the terminal building and a foldable access stair made contact with the building, broke and hit the worker in the head. The chair continued to move in the terminal and the worker's head struck the building. The worker was a mechanic's helper who had been assisting a mechanic with maintenance work on the towers on one of the chairlifts.

The Trial Judge found that the death was the result of the momentary carelessness or lack of attention of three employees, the criminal liability of the company stemming from the lack of steps taken to support the otherwise careful employees.

The Trial Judge stated that it would have been reasonable and practicable to have special procedures, labeling or signage to highlight the risk of the foldable access stair remaining in an upright position when entering the terminal building. The special procedure suggested by the Trial Judge in this case was to stop the chair before it entered the terminal building to check for anything hanging from the chair, and to check the access stairs, and workers' positions in the platforms. Cautionary signs or symbols would provide additional visual aids "that might shake an unmindful or temporarily inattentive employee into action and avoid an incident." The Trial Judge concluded with the following comment regarding the standard of care:

The test is not perfection. The test is what is reasonable and practicable. I find Sunshine Village failed to ensure, as far as what was reasonable and practicable to do so, the health and safety of Jan –Karl Stunt ....

The appeal focused on the due diligence defence, with the employer's submissions summarized as follows:

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<sup>21</sup> *R. v. Lonkar Well Testing Ltd.*, 2009 ABQB 345 at para. 79

- the company was aware of the potential danger, the safety procedure in place was well known to the three employees, and the procedure had been followed earlier that day for each move from tower to tower;
- the findings of fact of the employees' momentary inattention and carelessness ought not to have grounded a conviction; the two employees were unable to provide any explanation as to why they did not follow the procedure, nor why they did not identify the worker was sitting in the upper portion of the chair as it entered the terminal;
- it was not foreseeable that the otherwise careful employees would be simultaneously and momentarily inattentive in an obvious situation where any reasonable person trained to operate the equipment would see the worker in the upper chair as it entered the terminal.

The appeal Court's findings on due diligence and foreseeability are as follows:

[89] Based on my review of the evidence, the employees in this case were trained, were aware of the danger, and knew the procedures that were in place. Unfortunately, no one had an explanation as to why they did not follow the procedures on this day. Unlike the situation in *Dofasco*, the employees in this case did not make a conscious decision to disobey an instruction or work practice in order to get the work done. I am mindful of the case law cited above that states that employee error or misconduct is not a defence. However, it is relevant in the defence of due diligence.

[90] Foreseeability must be addressed when considering the due diligence defence. It is foreseeable risks that are to be considered. The fact that these otherwise conscientious and respected employees should be careless and absent minded at the same time, is simply not foreseeable. Although cases of bizarre and unforeseeable acts are exceedingly rare, in my view the inexplicable scenario that resulted in the death of Jan-Karl was exactly that – bizarre and unforeseeable similar to the situation described in *Lonkar*. For a potential danger to be foreseeable, there must at least be a reasonable prospect or expectation that it will arise. Neither Stephane nor Lindsay had any explanation as to why they did not follow the protocol they had been trained to follow. These employees testified that they had properly executed the previous tower moves in accordance with their training.

The appeal was allowed and the conviction was quashed.

*R. v. Procrane Inc.*, 2011 ABPC 28

In *R. v. Procrane Inc.*, the company was charged under the general duty provision of the *Occupational Health and Safety Act* after an employee was fatally injured when he was struck by a piece of equipment during the assembly of an oil rig. The worker was employed by Procrane Inc. Procrane had been contracted by another company, Academy Services, to provide a crane, operator and rigger to lift a piece of equipment. Academy Services employees were responsible for inserting a safety pin to secure two pieces of equipment together. For an unknown reason, the safety pin was not attached to the

equipment. The Procrane worker stepped on one of the two pieces of equipment in an effort to free a wire sling, the two pieces disengaged and one piece fell and struck the worker on the head.

The Court considered the test for proof of the *actus reus* in cases involving a general duty provision such as the Alberta *Occupational Health and Safety Act* which provides that every employer shall ensure, as far as is reasonably practicable for the employer to do so, the health and safety of the workers engaged in the work of that employer. The Court quoted relevant passages from *R. v. Rose's Well Services Ltd.*, 2009 ABQB 1 (Alta. Q.B.) and *R. v. Lonkar Well Testing Ltd.*, *supra*, before stating the test as follows:

[22] Based on these decisions, this Court is satisfied that the appropriate test is that proof that an accident occurred is *prima facie* proof of a breach of this provision, provided that all of the necessary elements of the *actus reus* are proven beyond a reasonable doubt. The Crown is not required to go further than proving the accident, although the Crown may choose to do so in a particular case. Once the accident is proven and the *actus reus* of the offence made out, the burden of proof shifts to the Defendant to prove the defence of due diligence on a balance of probabilities. Referring to the defence of due diligence within the general duty provision does not create a greater burden of proof on the Crown before the burden of proof shifts to the Defence.

[23] Section 2(1)(a)(i) of the *Occupational Health and Safety Act* refers to workers engaged in the work of the employer. Being engaged in the work of the employer means that the worker must be performing his or her duties in the course of employment and that the accident or incident must be related to or connected to the work being done. To engage in the work of the employer means, not only while performing the work of the employer, but related to or connected to the performance of the work of the employer. This Court finds that the causal connection is one of the necessary elements of the *actus reus* that must be proven by the Crown, that is, that the accident or incident occurred while the worker was engaged in the work of the employer, and was related to or connected to the performance of the work of the employer.

[24] In this case the Crown has proven that Patrick McFadden was a worker engaged in and performing the work of Procrane when the incident occurred. This is sufficient to prove the *actus reus* of this offence beyond a reasonable doubt. Applying the "incident as *prima facie* breach" approach, the Crown has proven the *actus reus* of the offence under s. 2(1)(a)(i) of the *Occupational Health and Safety Act* beyond a reasonable doubt. The onus now shifts to the Defence to establish due diligence on a balance of probabilities.

The Court then analyzed the issue of whether the employer had established a defence of due diligence, i.e. whether the employer took reasonable care and did what was reasonably practicable to ensure the health and safety of the worker in the specific circumstances of the case. The Court summarizes the Alberta case law on due diligence, including quoting the two decisions above, *R. v. Lonkar Well Testing Ltd.*, and *R. v. Sunshine Village Corp.*

Two facts that appear to be important in the Court's decision that the employer had established a due diligence defence are the employer had a safety program and safety policies in place, and the company's employees were not aware that the safety pin that would have prevented the incident had not been inserted, which was the responsibility of another company. The Court refers to the company's safety program as follows:

42 Procrane has an exemplary safety program. There were clear and mandatory safety policies in place with ongoing training. It was clear that employees could refuse to work in the event they had a concern about safety and this was fully supported by Procrane's president and communicated to every employee upon commencement with the company.

On foreseeability, the Court found that the equipment appeared to be secure, the worker's decision to step on the equipment was completely unforeseeable and unexpected, and it was apparently a spontaneous action by him in the circumstances of the lift. It was completely unforeseeable that the worker would step on the equipment and that it would instantly fall. It was one of the "bizarre and unimaginable accidents that are rare".

## Saskatchewan

*R. v. 101009484 Saskatchewan Ltd. dba Robwell Constructors Limited Partnership*, 2011 CarswellSask 104, 2011 SKPC 31

This case is of interest for the Court's very brief reference to the *actus reus*, its findings on due diligence, and foreseeability.

The facts are that workers at a mine site were clearing a PVC pipe with compressed air. Unexpectedly, the end of the pipe whipped 41 feet, and beyond concrete barriers. The pipe struck a worker in the face and he died from his injuries.

The company was charged with five offences including failing to ensure that all work was sufficiently and competently supervised, failing to ensure the health, safety and welfare at work of the workers, failing to develop a written program for the training of workers, and failing to ensure that workers were trained in all matters necessary to protect the health and safety of the workers.

The Court's analysis of the *actus reus* is brief in stating that while the company did not admit the *actus reus*, it was not strenuously contested and counsel stated in its brief that the company did not dispute that the pipe struck the worker resulting in his death. The Court then concluded that with this statement in mind, and having reviewed all of the evidence, the Court was satisfied that the *actus reus* for all of the offences had been established beyond a reasonable doubt.

The Court's reasoning in considering the due diligence defence refers to three areas of significance, as follows:

1. The operation of the air compressor;
2. What was reasonably expected, i.e. foreseeability;
3. The safety steps taken by the company.

On the first point concerning the operation of the air compressor, the Court found that the worker operating the compressor took "unilateral action" contrary to the specific instruction of the company. The Court referred to *R. v. Procrane Inc.*<sup>22</sup>, relying upon *R. v. Z-H Paper Products Ltd.*<sup>23</sup>, in emphasizing the following:

Assuming that the employer has taken all reasonable precautions, how can he prevent a breach of a *Regulation* solely within the control of the employee, where the employee does the prohibited act intentionally, or through his own negligence or inadvertence. Surely, in those circumstances as has been said, "the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim".

On foreseeability, the Court relies on the Alberta Court of Queen's Bench decision in *R. v. Sunshine Village Corp.*, quoting *R. v. Lonkar Well Testing Ltd.*, as follows:

For a potential danger to be foreseeable, there must be at least a reasonable prospect or expectation that it will arise. "Foreseeable" is not the equivalent of "imaginable". If s-s 2(1)(a)(i) required not only foreseeing and addressing a potential danger so as to ensure the health and safety of workers, but imagining all the bizarre and unforeseeable situations which might create a further danger, then the employer's liability under this provision would be absolute. This approach would render meaningless the phrase "as far as reasonably practical".

Finally, on the safety steps taken by the company, the Court found that the company created an atmosphere of safety by a general attitude and specific precautions taken by the company. The general attitude of safety was the work done by the company to establish and maintain a safe work environment.

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<sup>22</sup> 1991 CarswellSask 229, 99 Sask. R. 297 (Sask. Q.B.)

<sup>23</sup> (1979), 107 DLR (3d) 163, 52 CCC (2d) 91, CarswellOnt 1357 (Ont. Div. Ct.)

The specific precautions included explicit and repeated directions to stay clear of the end of the line, to respect that air pressure in a line is a hazard, to not approach the line until the pressure had been bled off, by supplying two-way radios, by conducting weekly safety meetings and daily toolbox meetings where hazards were identified, by insuring there was a concrete barrier, by having competent and experienced supervisors onsite who did checks throughout the day, by ensuring its employees had participated in a safety training program, and by emphasizing the importance of safety, highlighted by the company's hiring of a full-time safety manager, and by the mine owner overseeing the company's work and ensuring any hazards were addressed.

The Court found that the company had established on a balance of probabilities that they took all reasonable steps to avoid the commission of the offence, and dismissed all charges.

## British Columbia

Generally, a decision of an officer of the Workers' Compensation Board (operating as "WorkSafeBC") for example, the imposition of an administrative penalty for a violation of a provision of the *Workers Compensation Act* or the *Occupational Health and Safety Regulation*, can be appealed to a review officer in the Review Division of WorkSafeBC. A decision of the Review Division can then be finally appealed to the Workers' Compensation Appeal Tribunal ("WCAT"), which is independent of WorkSafeBC.

Recent WCAT written decisions generally follow a standard format with reference to the *Act* and Board policies, as described below, when the WCAT reviews decisions of the Review Division on an appeal of an administrative penalty.

Section 196 of the *Act* provides that the Board may impose an administrative penalty on an employer if it considers that the employer has failed to take sufficient precautions for the prevention of work-related injuries or illnesses, or the employer's workplace or working conditions are unsafe, or the employer has failed to comply with Part 3 of the *Act*, the *Regulation*, or an applicable order. Section 196 also provides that the Board must not impose an administrative penalty if an employer exercises due diligence to prevent the failure, non-compliance, or conditions to which the penalty relates.

The Board is guided by policies for considering an administrative penalty. For example, policy item D12-196-1 establishes six criteria for establishing a *prima facie* case for imposing an administrative penalty, summarized as follows:

The Board will consider imposing an administrative penalty when the employer:

- committed a violation resulting in high risk of serious injury, serious illness or death;
- is in violation more than once;

- is in violation more than once, and the violations demonstrate a lack of commitment to compliance;
- failed to comply with a previous order within a reasonable time;
- knowingly or with reckless disregard violates one or more sections of the *Act* or the regulations.

The next step is to consider the additional factors listed in policy item D12-196-1 to assist in determining whether or not to actually impose an administrative penalty. The factors are as follows, which include a consideration of due diligence:

- employer has an effective, overall program for complying with the *Act* and regulations;
- employer has otherwise exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates;
- whether the violations or other circumstances have resulted from the independent action of workers who have been properly instructed, trained and supervised;
- the potential seriousness of the injury or illness that might have occurred, the number of people who might have been at risk and the likelihood of the injury or illness occurring;
- the past compliance history of the employer, including the nature, number and frequency of violations, and the occurrence of repeat violations;
- the extent to which the employer was aware or should have been aware of the hazard or that the *Act* or regulations were being violated;
- the need to provide an incentive for the employer to comply;
- whether an alternative means of enforcing the regulations would be more effective; and
- other relevant circumstances.

In addition to the *Act's* s. 196(3) reference to due diligence, and the policies noted above, the due diligence defence is also referenced in the WorkSafeBC prevention manual, as policy item D12-196-10. The policy states that “due diligence” is defined at common law, with the standard set in the policy reflecting the leading Supreme Court of Canada case – *R. v. Sault Ste. Marie*. The specific policy is:

The Board will consider that the employer exercised due diligence if the evidence shows on a balance of probabilities that the employer took all reasonable care. This involves consideration of what a reasonable person would have done in the circumstances. Due diligence will be found if

the employer reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if the employer took all reasonable steps to avoid the particular event.

In determining whether the employer has exercised due diligence under section 196(3), all the circumstances of the case must be considered.

Generally, WCAT decisions will refer to due diligence, but there is little or no reference to foreseeability, and the analysis of whether or not the employer exercised due diligence is generally brief. The following WCAT decision is one somewhat unusual example of due diligence analysis in an administrative context.

WCAT-2011-00701 dated March 17, 2011

This recent decision of the WCAT provides a view of WorkSafeBC's process of imposing an administrative penalty with reference to due diligence in unusual circumstances following the incident. The case involved an employer who supplied cranes to worksites. A worker of another employer was injured when his finger was crushed, the cause found to be a communication breakdown between the injured worker and the crane operator. A WorkSafeBC safety officer issued an inspection report to the employer requiring the employer to deliver an accident investigation report by a specified date. The officer's evidence was that the report was received nine months after the specified date. An administrative penalty of \$7,593.47 was imposed for failing to comply with the general duty provision of the *Workers Compensation Act*, s. 115(1)(b) requiring every employer to comply with the regulations and any applicable order, and the more specific provisions of the *Act* requiring the employer to investigate and report on an accident.

The penalty was confirmed following review by an officer in the Review Division.

The employer appealed to the WCAT, asserting that it did not commit the violation, and it exercised due diligence to prevent the violation.

The WCAT found that the employer was negligent in the way in which it chose to send the information to the Board, finding the employer was wrong not to take the Board more seriously and ensure that its accident investigation report reached the Board officer in a timely way. The WCAT described the circumstances as follows:

[27] I do not doubt K's testimony that she did fax the information to the Board several times in an attempt to comply with the various Board orders. I note that although the Board officer had designated a specific fax number in the narrative of his inspection reports, the evidence is that K instead sent the information to the fax number for the Board listed in the heading of the inspection reports. According to the Board officer's testimony, the fax number to which the employer sent the information represented the Board's head office location, not his office location.

[28] I agree with the review officer that even accepting that K did make efforts to send and re-send the information to the Board officer, she was well aware by the telephone calls from the Board officer and his issuance of repeat orders that he was not receiving the information. It is a mystery why for so long K would continue to use a fax number that had obviously, repeatedly, failed to do the job. It is also inexplicable why the Board head office never ensured the Board officer received the information sent by the employer to the head office, by re-routing it to his office location. Further, it is incredible that in the conversations between the Board officer and K, the idea never arose in their discussions that the employer should try an alternate fax number or a completely different method of delivery such as courier, electronic mail attachment, or even personal delivery by an employer's employee to the Board officer at his office. Instead, months went by with a "comedy of errors". To top it all off, even when the employer did manage to successfully send its information to the Board officer in late June 2007, the information was deficient, failing to meet the regulatory criteria for an employer's accident investigation report.

The WCAT found the employer in violation of the *Act* and the employer did not exercise due diligence to prevent the violations. The WCAT concluded that the employer fell well short of meeting the due diligence standard of having taken all reasonable care to avoid the violations. The WCAT acknowledged that the Board erred in failing to re-route the fax to the Board officer, however, this did not detract from the evidence which illustrated to the WCAT that the employer viewed the requirement to provide a report as more of a nuisance than an important statutory obligation, that evidence stated to be the repetitive use of a fax number that had proven unsuccessful in the past.

Despite the criticism of the employer for failing to ensure the report was delivered to the Board officer in a timely way, the WCAT ultimately allowed the employer's appeal by cancelling the administrative penalty and substituted a warning letter from the Board to the employer.

### Protecting persons other than workers

In British Columbia, injury to persons other than workers at a worksite is more likely to result in a civil suit under the *Occupiers Liability Act*<sup>24</sup> rather than an investigation by WorkSafeBC. The general purpose of the *Occupiers Liability Act* is described as determining "the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which the occupier is responsible by law."<sup>25</sup>

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<sup>24</sup> R.S.B.C. 1996, c. 337.

<sup>25</sup> *Ibid.*, s. 2.

Alberta and Manitoba have similar occupiers' liability legislation,<sup>26</sup> but not in Saskatchewan where Courts apply the common law of occupiers' liability.

However, in British Columbia the Review Division of the Workers' Compensation Board has considered the issue of injury to a person other than a worker at a work site. In 2002 a member of the public was walking along a public trail along a dyke when she was struck by a dump truck in a construction area. Following an investigation by a Board officer, an administrative penalty of \$52,500 was imposed against the city, \$66,000 against the contractor, and \$52,000 against an engineer.

Many of the submissions to the Review Officer of the Review Division related to the fact that the person injured was not a worker. The Review Officer's response to those submissions is as follows:

... it is reasonable to interpret provision of the *Act* or regulations as applying in appropriate situations to persons other than workers where the provision in question specifically refers to non-workers or is silent on the matter. However, where a provision is expressly limited to workers, then it must be interpreted with that limitation. ...

With respect to section 115 [general duties of employers to workers], the mere fact that the accident in this case occurred to a non-worker does not mean that the order and penalties under that section are necessarily invalid. The orders and penalties were not issued because of the accident per se but because of an unsafe situation that preceded the accident. The orders and penalties may be valid if that unsafe situation was one that might affect workers.<sup>27</sup>

Reference was also made to section 107 of the *Act*, which states that the purpose of Part 3 of the *Act* "is to benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety."

The Review Officer affirmed the penalty against the contractor, the penalty against the engineer was reduced to \$36,000, and the penalty against the city was cancelled because of the finding that the City had taken contractual and practical steps to protect the public.

## Criminal prosecutions in British Columbia

### **Weyerhaeuser**

In 2004, a worker was buried under a pile of wood chips at a Weyerhaeuser facility in British Columbia. Weyerhaeuser received significant administrative penalties, but the Crown declined to lay criminal charges. In 2010, the Steelworkers union brought a private criminal prosecution alleging that

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<sup>26</sup> Alberta, see *Occupiers' Liability Act*, RSA 2000, c O-4; Manitoba, see *The Occupiers' Liability Act*, CCSM c. O8.

<sup>27</sup> P. 7.

Weyerhaeuser was criminally negligent. In March 2011, a Provincial Court Judge agreed that the matter could go to the Crown for a decision on whether to lay charges. The matter is still with the Crown.

### ***Queen of the North***

The *Queen of the North* ferry ran aground and sank in March 2006. Two passengers were unaccounted for and have been presumed dead. The navigating officer of the ferry was charged with criminal negligence under the *Criminal Code*. The preliminary hearing was finished in May 2011. A trial date is at least a year away.

### Conclusion

This paper has focused on due diligence in the occupational health and safety context as it relates to the defence of a regulatory prosecution or in administrative proceedings. The review of recent significant decisions from Western Canada demonstrates how Courts in Alberta and Saskatchewan have applied the principles of due diligence to find in favour of the employer. The practical lessons of these cases for employers with respect to due diligence, particularly as set out in the case of *R. v. Lonkar Well Testing Ltd.*, can be summarized as follows:

- The responsibility of an employer towards its employees is not an insurer or guarantor of worker safety. Employers are required only to take reasonable care and do only what is reasonably practical. The duty falls short of absolute liability.
- Control of the workplace may be exerted to ensure safety in three ways: supervision or inspection, improvement of business methods, or exhorting those whom one may be expected to influence or control. Due diligence includes communicating adequate instructions of safety precautions to employees, either verbally, or in writing, and following up to ensure that the instructions are carried out.
- Develop an appropriate system or protocol to protect workers, and monitor the system implemented for compliance.
- Do everything reasonably practicable to address foreseeable risks in terms of training, materials, testing, direction and supervision.
- In law, 'foreseeable' does not mean 'imaginable'. The legal concept of foreseeability incorporates the idea that the event is not only imaginable, but that there is some reasonable prospect or expectation that it will arise.

The test in the occupational health and safety context is not whether the employer in fact foresaw the accident, but whether a reasonable person would have foreseen a potential source of danger. This

approach is in keeping with the high onus placed on employers by legislation to reasonably ensure a safe and healthy working environment.