

OCCUPATIONAL HEALTH AND SAFETY LAW: OFFENCES AND THE DUE DILIGENCE DEFENCE

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1.0 OVERVIEW:

- General Liability Under O&HS Law in Alberta
- Who is Liable?
- Strict Liability Offences
- What is Due Diligence?/What is not Due Diligence?
- Developing a Due Diligence Defence
- Recent Developments in Due Diligence Case Law



2.0 Liability Under OHSA

- *Occupational Health and Safety Act ("OHSA")*
- Liability imposed on Employer, Employee & certain Directors, Officers and Agents of a corporation.



- **Obligations of Employer:**

↓ Use all reasonable efforts to ensure the health and safety of:

- (a) workers engaged in the work of that employer; and
- (b) other workers present at the work site.



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AND

- Use all reasonable efforts to ensure that workers engaged in the work of that employer are aware of their responsibilities under the OSHA and regulations.



2.0 Liability Under OHSA

- Obligations of a Worker:
 - (a) take reasonable care to protect the health and safety of himself and other workers;
 - (b) cooperate with his employer for purposes of protecting the health and safety of himself and all other workers;



2.0 Liability Under OHSA

- Offences and Penalties

- ↓ 1st Offence - fine up to \$150,000 plus up to \$10,000 per day - up to 6 months in jail
- ↓ 2nd or More Offences - fine up to \$300,000 plus up to \$20,000 per day - up to 12 months in jail
- ↓ Danger to a person or work site - up to \$300,000 and 12 months in jail



3.0 Strict Liability Offences

- Three types of offences in Canada:
 - (a) criminal;
 - (b) strict liability; and
 - (c) absolute liability
- Most OHSA offences are strict liability offences



3.0 Strict Liability Offences

- Elements of Strict Liability Offences
 - (a) Prosecution must prove beyond a reasonable doubt that the prohibited act was committed
 - (b) The defendant must fail to prove on a balance of probabilities that all reasonable steps were taken to prevent the commission of the offence (i.e. due diligence defence)



4.0 What is Due Diligence?

- Starting Point - *R. v. City of Sault Ste. Marie*

"... 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 omission innocent, or if he took all reasonable steps to avoid the particular event."



Reasonableness

- “Reasonableness” of care is measured by comparing what was done to what could have been done. The accused must establish that there were no reasonable feasible alternatives that might have avoided or minimized injury.



Due Diligence Defence - Reasonableness

- gravity of (potential) harm
- likelihood of harm
- knowledge & skill that can reasonably be expected of the accused
- alternatives available to the accused
- foreseeability of the situation
- nature of offence



5.0 Examples of OH&S Due Diligence

- Corporation and senior management demonstrate active support for the work and recommendations of H&S committee and H&S programs
- Safety orientation and training for new employees and existing employees on new job assignments



More examples...

- Safety audits - external/internal
- Regular safety meetings
- Discipline for breach of H&S policies and procedures
- System of recognition and reward for individuals, departments and organizational safety goals



6.0 What Is Not Due Diligence

- improper design & operation of equipment
- failure to take remedial action after becoming aware of a potential problem
- failure to anticipate foreseeable problems
- failure to ensure adequate training of employees
- failure to comply with legislation & regs



6.0 What Is Not Due Diligence

- failure to provide emergency or safety equipment
- failure to establish proper operating policies and practices
- failure to provide adequate supervision



7.0 Developing a Due Diligence Defence

- Health & Safety Policies and Procedures
 - (a) Corporate Health & Safety Policy
 - (b) Specific Task Policies and Procedures
 - (c) Education and Training
 - (d) Roles and Responsibilities
 - (e) Communication
 - (f) Audits/Continual Improvement



8.0 Case Law

- Discussion

