

Introduction

Welcome to a presentation on Due Diligence.

Objective. . . to have participants gain a better understanding of proper due diligence and its' importance in maintaining a healthy and safe workplace.



Purpose?

- to understand what due diligence means in practice, and why you care.
- to infect our workplaces with a prevention obsession by considering:
 - Why is due diligence an issue in OHS?
 - Who might need it? ...cont'd



- **How can you establish it?**
 - **how does the court set a standard?**
 - **comparing yourself to the standard**
 - **components of due diligence defences**
 - **must it be in writing?**
 - **liability of corporate officers, directors, managers**
- **What *consequences* do you avoid when you've got due diligence?**



Why is due diligence an issue in occupational health and safety?

- **courts see OHS offences as strict liability offences**
- **unlike criminal charges, not necessary for prosecution to prove *intentional wrong doing***
- **due diligence is a *defence* in strict liability cases**
- **strictly liable for your unlawful act, unless you produce proof that you were *not negligent*. . . must prove you took all reasonable care**



Who might need to prove that they took reasonable care?

Who, in your workplace, has direct authority and ability to make health and safety decisions?

(Section 2, Internal Responsibility System)



Please Note: these slides are for information "**ONLY**"

"Internal Responsibility System

2 The foundation of this Act is the Internal Responsibility System which
(a) is based on the principle that

- employers, contractors, constructors, employees and self-employed persons at a workplace, and
- the owner of a workplace, a supplier of goods or provider of an occupational health or safety service to a workplace or an architect or professional engineer, all of whom can affect the health and safety of persons at the workplace,

share the responsibility for the health and safety of persons at the workplace;

...cont'd



(b) assumes that the primary responsibility for creating and maintaining a safe and healthy workplace should be that of each of these parties, to the extent of each party's authority and ability to do so;

(c) includes a framework for participation, transfer of information and refusal of unsafe work, all of which are necessary for the parties to carry out their responsibilities pursuant to this Act and the regulations; and

(d) is supplemented by the role of the Occupational Health and Safety Division of the Department of Labour, which is not to assume responsibility for creating and maintaining safe and healthy workplaces, but to establish and clarify the responsibilities of the parties under the law, to support them in carrying out their responsibilities and to intervene appropriately when those responsibilities are not carried out. 1996, c. 7, s. 2." - *Occupational Health and Safety Act*



All these have duties under the OHS Act...

- employer
- constructor
- contractor
- employees
- supervisors
- self-employed
- owner of premises
- supplier:
 - goods
 - services

the greater the control, the greater your accountability in court.

(Section 23, Nature and extent of duties and requirements)



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"Nature and extent of duties and requirements

23 (1) A specific duty or requirement imposed by this Act or the regulations does not limit the generality of any other duty or requirement imposed by this Act or the regulations.

(2) Where a provision of this Act or the regulations imposes a duty or requirement on more than one person, the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement.

(3) Notwithstanding subsection (2), but subject to subsection (5), where the person with the greatest degree of control fails to comply with a duty or requirement referred to in subsection (2), the other person or persons on whom the duty or requirement lies shall, where possible, comply with the provision.

...cont'd



(4) Where the person with the greatest degree of control complies with a provision described in subsection (2), the other persons are relieved of the obligation to comply with the provision only

(a) for the time during which the person with the greatest degree of control is in compliance with the provision;

(b) where simultaneous compliance by more than one person would result in unnecessary duplication of effort and expense; and

(c) where the health and safety of persons at the workplace is not put at risk by compliance by only one person.

(5) Where the person with the greatest degree of control fails to comply with a provision described in subsection (2) but one of the other persons on whom the duty or requirement is imposed complies with the provision, the other persons, if any, to whom the provision applies are relieved of the obligation to comply with the provision in the circumstances set out in clauses 4(a) to (c) with the necessary modifications. 1996, c. 7, s. 23." -

Occupational Health and Safety Act



Court sets standard by considering:

- **was a violation foreseeable?**
- **specific rules, laws, codes, policy in the industry or workplace**
- **customary practice in the industry (if it exceeds legal minimums)**
- **was there a high level of potential hazard?**
- **a high probability of harm?**
- **a high level of needed expertise?**
- **a high ability in the accused to control the conduct involved?**



Court then compares the amount of care proven by the accused to this reasonable standard, to see if it fell short



Components of successful due diligence defences...

Samples here are not an exhaustive list...

Circumstances of each case differ as to what every reasonable precaution will be



Menu items are considered in earlier cases:

- **written health & safety policy**
- **training for competency & prevention**
 - **general**
 - **specific**
 - **workers**
 - **supervisors**
- **hiring practices & performance management**
 - **what is expected by the organization?**
 - **enforce expectation with warnings, discipline**
 - **include results in appraisals ...cont'd**



- **adequate supervision**
- **written safe work procedures**
- **hazard identification**
 - **workers & supervisors (two-way)**
 - **to and from JOHSC or employee H&S representative**
- **safety talks**
- **systematic reporting & follow-up**
 - **hazard, incidents, refusals**
 - **regular inspections ...cont'd**



- **Build OH&S into tendering practices & project management**

- **specify hiring/tendering criteria on safety**
 - **e.g.: safety certification of company, filing of safety coordination plan for the job, specify standards that will be expected on the project**
- **if customer is not forming the OHS Committee or representative, include in the specifications who will**
- **audit for compliance with H&S aspects of the contract**
- **treat non-compliance as breach of contract**
 - **stop work and/or money ...cont'd**



• **Joint Committee/Representative required?**

- **Cooperative team**
 - **needs training & terms of reference**
- **identifies problems & proposes solutions**
- **internal audit & warning system for employer and (if necessary) N.S. Dept. of Environment and Labour** ...cont'd



- **Written health & safety program**

- **to count, it must be communicated and *lived***
- **monitor effectiveness, and update as needed in consultation with JOHS Committee or health & safety representative ...cont'd**



- ***Due diligence* always depends on the facts of the situation,**
- **but it is *too late* to build a defence after an incident,**
- **so, build it into your system now.**




Does everything have to be written down?

- **the OHS Act says what has to be written... the rest is optional**
- **if it's not written down when it happens...could you find evidence to prove it a year later when you need it in court?**



Liability of Officers, Directors, Managers

- **liable if you knowingly accepted what was happening, or authorized it: OHS Act S. 77** *Participation in offence* 
- **if an individual lacks power over a problem, due diligence requires them to send information up the line**
- **due diligence requires solving problems that are your responsibility**
 - **IF YOU HAVE THE ABILITY & AUTHORITY, FIX IT. . .**
DON'T JUST REPORT IT ...cont'd



Note: this slide is for information **ONLY**.

Participation in offence

"77 An officer, director, manager or agent of a corporation who directs, authorizes, assents to, acquiesces or participates in the commission of an offence pursuant to this Act is guilty of that offence. 1996, c. 7, s. 77."



What consequences do you avoid by implementing due diligence?

- **penalties under the old Act = \$10,000 or 1 year maximum**
- **penalties under the new Act - \$250,000 or 2 years maximum**



- **payment to court of any resulting profit**
- **\$25,000 per day for continuing offence**



creative sentencing options include:

+PLUS+

- **payment for mandatory advertising of the offence**
- **payment for public education program on OHS concepts**
- **other community service**



you have so much more to gain. . .

- **The techniques of effective planning and in-house communication can spread to other aspects of your organization**
- **labour/management cooperation can increase**
- **cost of accidents, damage, and lost time goes down**
- **quality of product, morale, and reputation goes up**
- **and, *most important of all* . . .**



. . . you and the people who share your working life make it home to their families at the end of the day!



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Please Note: for additional information on the topic of Due Diligence, the following web sites are recommended:

- **[Due Diligence in Occupational Health and Safety](#)**
- **[Notes On Possible Due Diligence Defence](#)**



This presentation was created by the:

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