



DUE DILLIGENCE INVESTIGATIONS

PROTECTING THE INTEGRITY OF YOUR COMPANY

Introduction

If asked, many companies would say that they have “*due diligence investigation*” processes in place; however, these processes are often designed to review financial and operational affairs of a particular company and fail to closely inspect the background of the main principles or executives of the company. As well, many companies do nothing more than cursory checks on individuals who they are considering hiring; increasingly this lack of a robust background investigation is causing legal and financial problems for companies. There are an abundance of legal findings across Canada, as well as internationally that clearly articulates the liability facing companies who do not carry out appropriate due diligence investigations. In order to inspect this issue closer one must first begin with a definition and understanding of what “*due diligence*” consist of.

Discussion

Most legal definitions of “due diligence” use wordings similar to this following: “*Reasonable verifications and precautions taken to identify or prevent foreseeable risks*”¹. What these actual “reasonable verifications and precautions” are may vary depending on the amount of “risk” involved in the decision that the company has to make. As it pertains to the issue of companies conducting background checks on new hires, one raise the point that the cost of conducting background checks is excessive. However, should the question not be: “*What is the cost of not performing due diligence and the potential of negligent hiring?*” In a 2008 report released by the U.S. Bureau of Labor Statistics, 13 percent of the 5,840 workplace fatalities that happened in 2006 were the result of assaults and violent acts. And a recent article released by *Human Resources Management* noted the average settlement of a negligent hiring lawsuit is nearly \$1 million. In the event that employment background checks were not conducted, the employers in those cases could be held liable for the incidents².

The case of conducting appropriate due diligence related background investigations on potential employees seems clear, this in turn would lead to the assumption that the same amount of vigor, if not more, should be put toward full and complete due diligence investigations on companies, including their executives when mergers or acquisitions are about to take place. In fact, when one considers the potential legal ramifications of doing business with companies who are not in compliance with the Corruption of Foreign Public Officials Act (CFPOA), and have in fact been the subject of previous investigation in this regard, then the risk increases exponentially. It is

¹ <http://www.duhaime.org/LegalDictionary/D/DueDiligence.aspx>

² <http://www.iso.com/Research-and-Analyses/ISO-Review/Negligent-Hiring-Employer-Risk.html>

obviously extremely important for business to have proper “due diligence” policies and procedures in place, however it is just as important to ensure that these procedures are being followed through suitable supervision and compliance audits, as well as having a plan in place should extra or enhanced investigative activity be required.

Often companies do not have sufficient resources in house to conduct these enhanced investigative activities; as such outside firms will have to be sought to assistance. Presidia has experienced these types of requests for assistance and in general terms we have found a three phase approach that works well, that being:

- **Phase One:** Open source intelligence and database exploitation to confirm the information being provided by the subject business or individual. This phase often results in obtaining suitable information for well informed decisions to be made.
- **Phase Two:** A more comprehensive investigation the companies and individuals in question, which may include the use of investigative resources “on the ground” either in jurisdictions within Canada or internationally.
- **Phase Three:** Should the information uncovered in phases one or two require further investigative activity then a complete investigation can be initiated to uncover all possible details. This may include surveillance activity to verify information and intelligence gathered to date.

Conclusion

As noted previously many companies undertake due diligence prior to making key business decisions, such as corporate mergers or hiring of individuals into important or critical positions, the depth of these due diligence processes often depend upon the risk associated with the planned activity and the sufficiency of in-house resources. Based upon the multitude of legal rulings in Canada and internationally it is clear that often these due diligence process are undertaken with insufficient vigor. This may be as a result of the “corporate culture” viewing due diligence as an obligatory exercise to be conducted quickly, or if may be as a result of the personnel engaged in these activities not having a sufficient understanding of the true requirements. Whatever the reason, companies must be vigilant against these informal and inconsistent approaches to such an important aspect of business. The company’s reputation and potentially its future are at stake, as such the question that needs to be asked is “*Are my company’s due diligence sufficiently documented and robust?*” If the answer is less than positive, then perhaps it is time to seek assistance...

About the Author



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W.H. (Bud) Garrick has more than 30 years of experience in the realm of police and security operations both domestically and internationally. He served with the Canadian Forces Military Police for 27 years, retiring as a Lieutenant Colonel and Commanding Officer of the Canadian Forces National Investigation Service, upon retirement he assumed the position of Deputy Director General for Criminal Intelligence Service Canada. He is currently the Vice President of Presidia Security Consulting.

Additional Articles from Presidia Security³

Ask the Question – What is Your Security Strategy?

Security is often thought of as a tactical issue that should remain at the “gates and guards” level. While these tactical security pieces may be important they are most effective as part of a security strategy that is designed to mitigate the threats and risks to your company and its operations. True security strategy is integrated into a company’s “C Suite” and is seen as an enabler. The questions and discussion that follow outline the framework for a company security strategy.

Assessing and Tracking Threats - Protecting Your Employees and Your Company

Recent incidents of violence in the workplace in Canada tragically illustrate what happens when threats materialize into actions; they serve as a stark reminder to businesses across the country of their responsibility to protect their employees in the spirit of “due diligence” and “due care and attention.” Rarely, if ever, do these violent situations manifest themselves without some sort of prior indicators. This underscores the importance of having proper procedures in place to track and assess threats to your employees. Take the time to review the following recommendations to determine whether your company is prepared to address threats to employees.

Executive Protection Considerations

In today’s fiscally challenged business environment it may be difficult to justify providing an Executive Protection Program for an organization’s key executives. However, in making this important decision one also has to consider what the cost would be to the organization’s bottom line and, perhaps more importantly, to its reputation should a key member of the senior leadership team be the target of an act aimed at harming or embarrassing the individual and the organization.

Take a Moment to Celebrate Success

Take a moment today to think about the successes you have had and the team that got you there. It is well worth it.

A Solid Foundation for Administrative Investigations

"Is it time for the implementation of standards, including proper training and oversight, as it pertains to the conduct of “administrative investigations”? It could be argued that administrative investigations are purely “administrative” in nature and as such there is no requirement for an enhanced capability. However, it can also just as easily be argued that these types of investigations can have a very negative impact on the lives of those being investigated, including the potential loss of their livelihood. They also bring with them a large degree of “personal and institutional liability” on the part of those individuals conducting the investigations and the” “organizations for which they are employed."

³ Available online at our website: www.presidiasecurity.com/library.html

Marine Port Security - Published in FrontLine Magazine

"Since 9/11, marine port security has been the subject of increased scrutiny as it is clear that contraband flows - undetected and uninterrupted - through access and egress points of both Canada and the United States. Numerous reviews initiated by the United States Government Accountability Office (GAO) and the Canadian Standing Senate Committee on National Security and Defence have clearly articulated that ports are a haven for criminal activity and organized crime, as well as targets for potential terrorist activity. Both these reviews demand an increase in the level of intelligence sharing among partner agencies focused on policing and security of marine port operations."

Setting up an Intelligence Hub - Published in FrontLine Magazine

Intelligence in some form is in use today across a broad spectrum. No longer just the purview of Government entities, business intelligence is a common term and practice among corporations. Today, in the internet age, there is an abundance of readily accessible information about any given topic, organization or person. The immense growth of social networking in recent years has added to a rich information bank that is readily accessible to anyone with an internet connection. The challenge today is to sift through vast quantities of information to uncover and piece together the information you require into an intelligence picture that supports your operations. The value of your own information can increase exponentially when combined with open source research and information from other entities with whom you are willing to share.

Security Policy

"Policy writing: next to cleaning the coffee break area, doing personnel assessments or wrestling a hungry grizzly bear, it is probably one of the least desirable tasks in any organization. Its mere mention can send employees scrambling over desks and seeking cover in the hopes of being spared the mind---numbing drudgery of documenting the company's rules, procedures and practices. There is a good reason for this: writing is hard work – and writing clearly, concisely and meaningfully is even harder still. When it comes to communicating an effective security policy, capturing that policy on paper (or, in today's digital environment, electronically) is only the first – albeit most critical – step. Disseminating the policy and ensuring compliance are close second and third priorities, followed by periodic reviews to ensure the aforementioned policy continues to meet your organization's requirements. "

Travel Security

"Media reports continue to include stories about company executives, oil field workers and regular travellers who have been the victims of kidnappings, armed robberies and murder while visiting foreign countries. Recent events have seen a Canadian woman kidnapped in northern Nigeria and her captors demanding \$136,000 for her release. This woman was a financial advisor who was in Nigeria with other Canadians as part of an exchange program and she was kidnapped as she was entering a house after attending a social event. There are also ongoing reports of oil workers being kidnapped by rebels in South America and Africa; it would appear that these types of incidents are increasing rather becoming a thing of the past. "

Duty of Care

"The dynamic threat environment that persists in today's business climate demand constant vigilance and discipline. Under the Canadian Criminal Code, companies owe a duty of care to their employees. This means businesses must take "reasonable steps" to protect workers, whether they are in Canada or working internationally. If companies do not meet this duty of care, they can be found criminally and financially liable under the Criminal Code. In the most extreme cases, the company can face hefty fines and the executives can be prosecuted and potentially jailed. In addition to the criminal prosecution, individuals can also face personal civil litigation. "