Due Diligence 2023, The 18th Annual Scorecard



Does your OHS program meet the standard of “due diligence”?

Like most OHS coordinators, you’re familiar with the term “due diligence.” In everyday parlance, “due diligence” refers to the standard that companies are expected to show to ensure that their OHS programs are effective and compliant with regulatory requirements. If you exhibit due diligence, you won’t be held liable for the OHS violations you fail to prevent. That description of due diligence as an informal standard of compliance is essentially accurate. But in the real world, it’s a lot more complex. Due diligence is actually a legal defence that arises in the context of a prosecution for an OHS offence where the Crown proves that a violation occurred. Due diligence, or the absence thereof, then determines whether the defendant should be held liable for that violation.

The prospects of your company’s having to rely on the due diligence defence in an actual OHS prosecution are incredibly unlikely. While OHS charges have become more common, only a tiny handful of cases actually reach trial. However, those cases, rare as they may be, are the crucible in which due diligence is forged. It’s during these cases that courts and tribunals apply the concept of due diligence to real-life situations. As such, they offer incredibly important insight for other companies facing the same situations. Looking at

what successful companies did that caused them to win on a due diligence defence reveals what to do right, while due diligence cases that go against companies shed light on practices and assumptions to avoid. Looking at the cases thus enables you to evaluate whether your own OHS program meets the standard of due diligence and identify adjustments and improvements you need to make.

The Due Diligence Scorecard

Unfortunately, few OHS coordinators have the time or training to gather up and analyze all of the due diligence cases that come down each year—nor the budget to hire a lawyer to do the leg work for them. That's why OHS Insider created the Due Diligence Scorecard. Every year at this time, we track down the recent due diligence cases that you need to know about and compile the results into a Scorecard. Here's the Scorecard for recently concluded 2023. You can also go to the OHS Insider website for a summary of each case explaining who won and what they did right and wrong.

The Due Diligence Defence

For context, you need to understand some basic legal information about the due diligence defence and how it works.

> ***Instruction to Readers:*** *If you're familiar with these principles, you can skip this section and go directly to the 2023 Scorecard analysis. But if you're new to the Insider—or you simply want a refresher on the basics of due diligence—keep on reading.*

OHS enforcement agencies across Canada hand out thousands of administrative monetary penalties (AMPs) and fines each year. While those on the receiving end of these penalties can appeal, few ever do. But there are exceptions. It's only when

the accused decides to fight the charge at a trial or OHS administrative tribunal that the due diligence defence may come into play. But first, the Crown faces the burden of proving that the defendant committed an act the law prohibits or omitted to perform an act that the law requires. If the Crown can't prove the so called "actus reus" beyond a reasonable doubt, the defendant wins; but if the actus reus is proven, the burden shifts to the defendant to prove by a reasonable preponderance of the evidence that it exhibited due diligence and shouldn't be liable for the act or omission.

The simplest and therefore most common way for a defendant to prove due diligence is to show that it took all reasonable steps to comply with the OHS law in question and prevent the offence. There's also a second branch of due diligence called "reasonable mistake of fact" that requires the defendant to prove that it reasonably relied on a set of facts that turned out to be untrue but had they been true would have made what the defendant did or didn't do legal. All but one case in the 2023 Scorecard involved the "reasonable steps" branch of due diligence.

The 4 Factors of Reasonable Steps Due Diligence

While each case is different, courts look at the same basic factors in determining whether a defendant took all the reasonable steps necessary to establish due diligence:

Factor 1. Foreseeability

Companies are expected to protect their workers from foreseeable hazards, including both general hazards and hazards specific to the particular industry, equipment and materials. Courts consider whether a reasonable person in the company's position would have foreseen that something could go wrong. A due diligence defence is likely to be successful if

the incident was a freak occurrence, one that was so unlikely that the company couldn’t reasonably have expected it to occur.

Factor 2. Degree of Potential Harm

The greater the potential harm if a certain violation were to occur, the more a company is expected to do to ensure that it doesn’t occur. Thus, companies have a duty to guard against even remote risks if they involve a risk of serious harm.

Factor 3. Preventability

Courts also consider whether the company had a chance to prevent something from going wrong and, if so, whether it made an effort made to do so. If a company has an opportunity to prevent an incident from happening, it must take all reasonable steps to do so, such as identifying hazards, preparing safe work procedures, training workers and supervisors and disciplining those who violate safety rules. If a company can show that it took such steps but the incident happened anyway, it may be able to successfully argue that it exercised due diligence.

Factor 4. Control

Courts also look at who had control over the situation—that is, who was present and could have prevented what went wrong. For example, suppose a supervisor sees a worker violate the company’s safety rules but doesn’t discipline the worker or order him to follow proper procedure. If the worker gets hurt as a result, it may be difficult to prove due diligence because a supervisor was present, had control of the situation and yet didn’t take reasonable steps to prevent the injury.

The 2023 Due Diligence Cases

First, some clarification about the data. Among the small number of OHS AMPs and prosecutions that actually go to trial each year, only a few get reported. And not all of those reported cases get decided on a due diligence defence. There were only 14 reported OHS due diligence cases in 2023, as compared to 18 in 2022, 16 in 2021, 18 in 2019 and 16 in an average year. In the 18 years that we've been tracking annual due diligence cases, defendants have won only 22% of the time. For the first time ever, the success rate for the due diligence defence this year was 0%—not a single employer was able to prove due diligence in 2023. **Bottom Line:** Succeeding on a due diligence defence is extremely difficult.

Total Cases: 14

Cases in Which Due Diligence Defence Succeeded: 0

Cases in Which Due Diligence Failed: 14

Province	**Total Cases**	**Due Diligence Defence Succeeds**	**Due Diligence Defence Fails**
Québec	8	0	8
British Columbia	4	0	4
Alberta	1	0	1
Ontario	1	0	1
TOTAL	**14**	**0**	**14**

Source: OHS Insider

Rulings by Industry Sector

Construction almost always accounts for more due diligence cases than any other sector. So Manufacturing, perennially the second most represented sector, nearly kept pace lagging

construction by only 1 case. Sawmills were the only other sector with multiple cases during the year.

Table 2: Total Reported OHS Cases Based on Due Diligence by Sector in 2023

Industrial Sector	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails
Construction, Roofing & Paving	5	0	5
Oil/Gas	2	0	2
Manufacturing Plants	1	0	1
Hydroelectric	1	0	1
Brewery	1	0	1
Auto Service & Repair	1	0	1
Retail	1	0	1
Waste Collection	1	0	1
Marine Transport	1	0	1
TOTAL	**14**	**0**	**14**

Source: OHS Insider

Due Diligence Rulings by Hazard/Violation Type

Following previous patterns, failure to provide required fall protection was the most commonly cited OHS violation with 4, followed by failure to ensure safe maintenance of dangerous equipment with 3. Not protecting workers against machine hazards and traffic hazards were the only other violations cited in multiple cases, with 2 each. After topping all

violations in 2022, there was only one charge involving lack of PPE in 2023.

Hazard/Operation	**Total OHS Charges**	**Due Diligence Succeeds**	**Due Diligence Fails**
Fall Protection	4	0	3
Safe Maintenance of Equipment	3	0	3
Traffic Control	2	0	2
Machine Guards	2	0	2
Confined Spaces	1	0	1
Lockout/Tagout	1	0	1
Powered Mobile Equipment	1	0	1
Tire Assembly	1	0	1
Overhead Cranes	1	0	1
PPE	1	0	1
Excavations	1	0	1
First Aid	1	0	1
Communicable Disease Plan	1	0	1
Emergency Response & Rescue Plan	1	0	1
Obstructing OHS Investigator	1	0	1
TOTAL	**22**	**0**	**22**

Source: OHS Insider

*Charges exceed the number of cases because many cases involve multiple charges

Due Diligence Losses by OHS Program Breakdown

In addition to specific OHS charge, it’s instructive to look at the kind of safety program breakdowns that caused a due diligence defence to fail. After finishing number 2 last year, failure to ensure adequate safety training and instruction was, by far, the most common breakdown, with 8 citations. Many of this year’s cases involved unsuccessful attempts by companies to blame OHS violations on the failure of workers to obey safety rules. As is typically true, this argument proved unpersuasive in 2023, with several courts making it clear that having sound OHS rules isn’t enough if those rules aren’t consistently enforced. Courts also sent the clear message that worker violations are the kind of common occurrence that employers should reasonably foresee and take steps to guard against. Here’s a summary of all the OHS program breakdowns cited in the 2023 cases.

Compliance Strategy: You should conduct a “reasonable steps” audit of each of the listed problem areas at your own workplace:

Table 4: OHS Program Breakdowns Cited in Reported Cases Where Employers Lost Due Diligence Defences in 2023

OHS Program Defect: Lack Of	**Cases**
Safety Training/Instruction	8
Enforcement of OHS Rules	5
OHS or Other Safety Program	3
Proper Supervision	3
Safe Work Procedures	3

OHS Program Defect: Lack Of	**Cases**
Over-Reliance on Worker/Supervisor Experience	2
Hazard Assessment	2
Engineering Controls	2
Oversight of Contractors	2
Following Manufacturer’s Instructions	1
TOTAL	31

Source: OHS Insider

*Breakdowns exceed the number of cases because many cases involved multiple OHS program breakdowns