

# Due Diligence 2024, The 19th Annual Scorecard



*“Perfection is not attainable. But if we chase perfection, we can catch excellence.”*

Although it comes from football, this quote from NFL coaching legend Vince Lombardi is also a fitting approach to OHS compliance. With lives literally at stake, companies and their OHS coordinators should seek perfection in meeting their obligations under OHS laws. While perfection is impossible, chasing after it yields the second most desirable outcome – namely, excellence. Capturing excellence doesn’t take mistakes and mishaps totally out of the equation; but it does insulate you against the risks of being found liable for those mistakes and mishaps, even when they cause injuries and incidents.

The reason for this is that OHS laws leave some leeway for mistakes. The mere fact that a violation occurs and somebody gets hurt isn’t enough to make you guilty. You can still avoid liability by showing that you took reasonable steps to comply with the law and prevent the violation. The name for this concept is “due diligence.” The key question: What exactly does due diligence mean in real-life situations?

The problem is that the OHS laws don’t include a specific definition of due diligence. That leaves it up to the courts and OHS tribunals to determine whether a company lived up to due diligence based on the unique circumstances involved in

each case. The one cardinal rule that applies in every case is that you can't prove due diligence unless you can show that you've created and implemented a system to ensure compliance with OHS laws.

**Result:** The best and only surefire way to know what due diligence requires you to do is to look at the actual cases. Thus, looking at what companies that successfully made out a due diligence defence did right and what companies that lost on due diligence cases did wrong enables you to draw appropriate lessons that you can then use to evaluate and adjust your own OHS program.

First, you need to do legal research to find all the cases. And even if you do manage to track them down, OHS court cases are dense legal documents written by judges for the consumption of lawyers and other judges. Unless you happen to be a lawyer, you need somebody with legal training to digest and analyze the case rulings. At roughly \$600 per hour, few OHS coordinators have the budget to hire a lawyer to do this.

That's why OHS Insider invented the Due Diligence Scorecard nearly 2 decades ago. Every January, we track down and analyze all of the due diligence cases that got reported in the previous calendar year and compile the results into a Scorecard. Here's the Scorecard for 2024.

## Due Diligence 101

You'll derive maximum value from the Scorecard if you have a grasp of how due diligence fits into OHS laws. Technically, "due diligence" is the name of a legal defence that a defendant can use to avoid liability for an OHS violation. The defence becomes necessary only when and if an OHS case goes to trial and the prosecution proves beyond a reasonable doubt that the defendant committed a guilty act (aka, "actus reus") that the OHS law bans or omitted to perform the act the law requires.

**Example:** Section 44(1) of the Alberta *OHS Code* requires employers to have a written code of practice to be followed “when workers enter and work in a confined space.” To convict an employer of a Section 44(1) violation, the prosecutor would have to prove that:

- The space was a confined space.
- Workers entered and worked in the space.
- The employer didn’t have a written code of practice for entering and working in the confined space.

The first line of defence in an OHS prosecution is to disprove the actus reus, for example, by showing that whatever space the workers entered wasn’t a confined space. But if the prosecution does prove the actus reus, the burden shifts to the defendant to avoid conviction by making out a legal defence. The most commonly used defence in OHS cases is due diligence, which basically concedes that even if the violation occurred, the defendant didn’t have a “guilty mind” in committing it. There are 2 branches of the due diligence defence:

- **Reasonable steps** applies when the defendant shows that it took reasonable steps to comply with the law and avoid the offence, such as by physically barring the entry of the confined space to keep workers out without anticipating that they’d use dynamite to blow the barrier down.
- **Reasonable mistake of fact** applies when the defendant proves that it reasonably relied on a set of facts that turned out to be wrong but, had they been true, would have made the act or omission legal, such as by relying on an assessment by a qualified engineer concluding that the space wasn’t a confined space and that workers could enter it without a written code of practice.

In the OHS context, the vast majority of due diligence cases involve the reasonable steps branch.

# The Importance of Court Cases

Although you need to understand it, it's highly unlikely that you or your company will ever have to actually rely on the due diligence defence. That's because even if you are charged, most OHS cases get settled without a trial. However, those roughly 2 dozen cases that do make it to a trial court (or when the penalty is an OHS order or [administrative monetary penalty](#), a special tribunal like the Workers' Compensation Appeal Tribunal in BC) are enormously important because they reveal how the concept of due diligence plays out in real life. Understanding the cases can help you make sound judgments about whether your own OHS program meets due diligence standards.

## 2024 Due Diligence Cases

Among the small number of reported OHS prosecutions and AMPs that actually produce a legal judgment, only a few are decided on the basis of a due diligence defence—16 in an average year. OHS due diligence case volume in 2024 was thus high with 22 reported cases, as compared to only 14 the year before, 18 in 2022, 16 in 2021, and 18 in 2019. In the 19 years that we've been tracking annual due diligence cases, defendants have won only 20% of the time. Last year, for the first time ever, there were no successful due diligence cases reported. Patterns returned to normal in 2024 with defendants prevailing in 4 of the 22 cases. In addition, 2 of the 18 cases listed in the loss column were actually mixed verdicts with the defendants making out a successful due diligence case against some but not all of the OHS charges brought against them.

**Bottom Line:** Succeeding on a due diligence defence is extremely difficult.

**Total 2024 Due Diligence OHS Cases: 22**

**Cases in Which Due Diligence Defence Succeeded: 4**

As shown in Table 1 below, 7 jurisdictions accounted for all of the OHS due diligence litigation in 2024. Due diligence cases in BC arise not only in court proceedings and prosecutions but also appeals of AMPs, where demonstration of due diligence can lead to a revoked or reduced penalty. Consequently, BC almost always reports the highest number of due diligence cases. Québec, which led the country in reported cases last year, accounted for the second most cases with 4.

**Table 1: Total Reported OHS Cases Ruling Based on Due Diligence by Jurisdiction in 2024**

Jurisdiction	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails
British Columbia	9	3	6
Québec	4	0	4
Nova Scotia	3	0	3
Alberta	2	0	2
Saskatchewan	2	0	2
Ontario	1	1	0
Federal	1	0	1
<b>TOTAL</b>	<b>22</b>	<b>4</b>	<b>18</b>

Source: OHS Insider

## Cases Involving Fatalities

Employers are generally more likely to face prosecution when their alleged OHS violations result in one or more fatalities. Thus, 8 of the 22 reported due diligence cases in 2024 involved a fatality, including one case in which 2 workers

lost their lives and another in which the victim wasn't a worker but a pedestrian. Defendants made out a successful due diligence defence in 2 of these cases, including the pedestrian fatality case.

## Rulings by Industry Sector

Although construction typically accounts for more due diligence cases than any other sector, this year's representation was especially lopsided with more than 1 in 3 reported cases involving OHS violations at construction sites. Manufacturing, perennially the second most represented sector, came in a fairly distant second with 3 cases. The other sectors to report multiple cases in 2024 were forestry and lumber, warehouses, and utilities.

**Table 2: Total Reported OHS Cases Based on Due Diligence by Sector in 2024**

Industrial Sector	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails
Construction, Roofing & Excavation	8	2	6
Manufacturing	3	0	3
Forestry/Lumber	2	1	1
Warehouse	2	0	2
Utilities	2	0	2
Oil/Gas	1	1	0
Maritime	1	0	1
Municipality	1	0	1
Railway	1	0	1

Industrial Sector	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails
Asbestos Abatement	1	0	1
TOTAL	22	4	18

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 5, followed by offences involving forklifts and other [powered mobile equipment](#) with 4. [Material handling](#) operations accounted for 3 charges. [Machine guarding](#) and defective equipment were the only other offences cited in multiple cases with 2 apiece.

**Table 3: Total Reported OHS Rulings Based on Due Diligence by Type of Charge in 2024**

Hazard/Operation	Total OHS Charges	Due Diligence Succeeds	Due Diligence Fails
Fall Protection	5	1	4
Powered Mobile Equipment	4	1	3
Material Handling	3	1	2
Safe Maintenance of Equipment	2	0	2
Machine Guarding	2	0	2

Hazard/Operation	Total OHS Charges	Due Diligence Succeeds	Due Diligence Fails
<a href="#">Traffic Control</a>	1	1	1
<a href="#">Electrical Hazards</a>	1	0	1
<a href="#">Confined Spaces</a>	1	0	1
<a href="#">Lockout/Energy Control</a>	1	0	1
<a href="#">Tire Assembly</a>	1	0	1
<a href="#">Overhead Cranes</a>	1	0	1
<a href="#">PPE</a>	1	0	1
<a href="#">Excavations</a>	1	0	1
<a href="#">Work Over Water</a>	1	0	1
<a href="#">Asbestos</a>	1	0	1
<a href="#">Emergency Rescue Plan</a>	1	0	1
<a href="#">Lighting</a>	1	0	1
Failure to Comply with Stop Work Order	1	0	1
<b>TOTAL*</b>	<b>30</b>	<b>4</b>	<b>26</b>

Source: OHS Insider

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

OHS Program Defect: Failure to:	Cases
Provide Required Safety Training/Instruction	7
Implement Required OHS Policies/Procedures (including imposing <a href="#">discipline</a> for violations)	5
Have Required Policies/Procedures	4
Furnish Required Engineering Controls	3
Perform Required Inspections	3
Furnish Required Supervision	2



<b>OHS Program Defect: Failure to:</b>	<b>Cases</b>
Perform Required Hazard Assessments	2
Properly <a href="#">Investigate Safety Incidents</a>	1
Comply with OHS Orders	1
<b>TOTAL*</b>	<b>28</b>

Source: OHS Insider

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