Is Following an Industry Standard Enough to Show Due Diligence?Scorecard of Legal Cases

You won’t be held liable for violating an OHS law if you can show that you used due diligence, that is, took all reasonable steps to comply with the requirement and prevent the violation. One of those ‘reasonable steps’ may be following an industry standard in selecting equipment, providing training or carrying out a hazardous operation. But industry standards aren’t equivalent to OHS laws. Accordingly, following an industry standard doesn’t automatically prove you acted reasonably; conversely, not following an industry standard doesn’t automatically prove you acted unreasonably. How and how much weight industry standards have in determining reasonable steps depends on a number of additional factors.

The best and only way to demonstrate this is to look at actual cases in which industry standards figured into a due diligence ruling. By our research, there have been 9 such reported OHS cases. Of these, the employer won 4, which is well above the norm for due diligence cases in general where the defence succeeds in less than 20% of cases. Here’s a quick briefing on how each of these cases turned out and why the particular company won or lost its due diligence defence because it did or didn’t comply with an industry standard.

Resources: Go to the OHS Insider site for a more complete analysis of the interplay between industrial standards and reasonable steps due diligence.

EMPLOYER LOSES

- ## 1. Alberta: Stacking Bales the Industry Way Isn't Due Diligence

  What Happened: A worker died after a bale of scrap metal tipped over and fell on him. The company claimed that its practice of stacking the bales four-high meets industry standards.

  Ruling: The court ruled that the company didn't show due diligence. Even if stacking bales in fours was an industry practice, its purpose was to maximize the efficiency of storage space, not to provide the safest working conditions and the company shouldn't have let workers work near the stacks.

  R. v. General Scrap Iron & Metals Ltd., 2002 ABQB 665

- ## 2. Alberta: Stacking Fibreboard the Industry Way Isn't Due Diligence

  What Happened: A stack of fibreboards collapsed on a worker and crushed him to death. The company denied liability, arguing that it stacked the boards the way everybody in the industry does.

  Ruling: The court found the employer guilty of several OHS violations and fined it $144,000. The court expressed doubt that such an industry standard exists and that even if it did, it was obviously unsafe to follow. The standard didn't provide for the use of metal

uprights to secure the stacked materials, the court noted. Moreover, there were 2 previous incidents at the company in which stacks stacked the industry way had collapsed. That should have been a clear signal to the employer that following the standard wasn't safe.

R. v. Canadian MDF Products Co., 2002 ABPC 82

3. Alberta: Industry Standard-Based Safety Rule Wasn't Clearly Communicated to Workers

What Happened: As oilfield service company workers were unloading a highly flammable petroleum product from their service truck into a metal storage tank, heat from the truck engine caused the tank to explode. The explosion occurred either because the truck wasn't grounded and bonded to the tank or because it was parked too close to the tank (about 3 metres) with its engine running. The company claimed it had a clear safety rule requiring trucks to be at least 15 metres from the tank during unloading, exceeding the industry norm of 7 metres.

Ruling: The court rejected the company's due diligence defence and upheld conviction. It was great that the company 'attempted to set its standards to a high level.' But the issue wasn't whether the company had a sound safety rule but whether it had a clear one. The evidence showed that the company didn't clearly communicate the 15-metre and that workers were unaware of it.

R. v. Rose's Well Services Ltd., 2009 ABQB 1 (CanLII)

4. Ontario: Industry Standard

Violates OHS Requirements

What Happened: A construction worker not using fall protection equipment fell to his death through an opening in the floor. The company was charged with failing to ensure that the worker wore a harness or safety belt. The company argued that it was following industry standard.

Ruling: The court found the company guilty, saying that the industry standard was irrelevant because the OHS law specifically requires use of the fall protection equipment.

R. v. Seamless Renovation Inc., Ont. P.C., 1992 (unreported)

5. Nova Scotia: Worker Lacks Training Necessary to Follow Industry Standard

What Happened: A construction worker carrying floor joists while walking on a six-inch beam fell and suffered serious injuries. After being charged with 2 scaffolding violations, the company claimed that it exercised due diligence, contending that laying floor joists to walk on six-inch beams is industry standard in Nova Scotia.

Ruling: The court rejected the company's due diligence defence. Maybe laying floor joists to walk on six-inch beams is industry practice. The problem is that the worker didn't have enough experience and skill to do that job safely. The worker in this case had only 2 months' experience. And while he claimed he had 4 years of experience, the company should have his credentials and not just taken him at his word.

R. v. Barrington Developments Ltd. et al., 1994 CanLII

18964 (NS PC)

EMPLOYER WINS

1. Ontario: Not Unreasonable to Fail to Furnish Safety Equipment Not Required by Industry Standards or OHS Laws

What Happened: On a cold but not freezing night in March, the lead deck hand of a 68-foot trawler fishing boat fell overboard. The crew couldn't rescue him and his body was later pulled out of Lake Erie. The boat owner was charged with not taking 'every precaution reasonable in the circumstances' to protect a worker. Specifically, the Crown claimed the owner failed to furnish and ensure the proper use of cold water protective equipment.

Ruling: The Ontario court dismissed the charge. There was no evidence that OHS laws or industry standards required cold weather protective equipment in conditions like these. It's not enough for precautions to be 'reasonable in some abstract sense.' Reasonableness depends on the actual circumstances, the court reasoned. Here, the temperatures were above freezing (6ø C), sailing conditions were perfect and the deck was dry.

Ontario (Ministry of Labour) v. Great Lakes Food Company Ltd., 2022 ONCJ 447 (CanLII)

2. Ontario: Not Unreasonable to Fail to Furnish Safety Equipment Not

Required by Industry Standards or Laws

What Happened: An air ambulance operator claimed it used due diligence to protect workers who died when their helicopter crashed as a result of pilot error. The Crown disagreed citing the company's failure to furnish the crew night vision goggles (NVGs). To prove due diligence, an employer's operation must be 'all but spotless' safety-wise, the Crown argued.

Ruling: The court sided with the company, noting that due diligence requires reasonable, not spotless care. The claim that the operator didn't act reasonably because it didn't provide NVGs didn't hold water, the court reasoned, noting that use of NVGs in this situation was mandated by neither aviation regulations nor industry standards. Maybe there were other things the operator could have done to prevent the accident but providing NVGs wasn't one of them.

R. v. 7506406 Canada Inc. (Ornge), 2017 ONCJ 750 (CanLII)

3. Quebec: Not Unreasonable to Fail to Implement Safety Measures Not Required by Industry Standards or OHS Laws

What Happened: A dump truck trailer overturned at a construction site, hitting the cab of the dump truck next to it and killing its driver instantly. The Crown argued that the company didn't show due diligence because it failed to provide a security perimeter around each truck as it dumped its load. The trial court disagreed and dismissed the charge.

Ruling: The appeal court upheld the not guilty verdict,

noting that neither OHS law nor industry practice required security perimeters. And the prosecution didn't prove that factors or conditions existed that triggered the need for a perimeter in this case.

Commission de la santé et de la sécurité du travail c. Excavations Bergevin & Laberge Inc., [2009] QCCS 526 (CanLII), Feb. 11, 2009].

4. Ontario: Employer that Followed Industry Standards Not to Blame for Worker's Carelessness

What Happened: A millwright fixing a machine lost his life as a result of getting caught in a moving part. It turned out that the victim didn't lock out the machine even though industry standard and company safety policies mandated lock out.

Ruling: The court ruled that the company used due diligence to prevent the lockout violation. Lockout was required and the millwright was experienced and should have known better. 'Employers are not to be held to a standard of perfection nor are they to be held responsible for what could be termed rogue acts by employees.'

R. v. Long Lake Forest Products Operating as Nakina Forest Products Ltd., Ont. Ct. of Justice, 2003