

Due Diligence 2020, The 15th Annual Scorecard



2020 OHS due diligence cases and the lessons to apply to your own OHS program.

Sure, you've got an OHS program. But are you doing enough to comply with OHS laws? The most definitive way to find out is to get cited for an OHS violation and then mount a due diligence defence. The court or tribunal will then look at what you did and didn't do to ensure safety and avoid violations and let you know if it was enough to comply. And if it wasn't, you'll know how badly you missed the target by the penalties you get for committing the violation.

Of course, being prosecuted is hardly an effective way to measure your due diligence and OHS compliance. What does work is looking at what happens in OHS cases involving other companies, figuring out why they did or didn't meet due diligence standards and draw appropriate lessons for your own OHS program. Tracking down and analyzing cases from across the country requires time and specialized skills that you may not have; and hiring a lawyer to do it for you is pretty expensive. With that in mind, OHSI created the Annual Due Diligence Scorecard in 2006.

Due Diligence, 101

(**Note:** You can skip this part if you already know how due diligence works.) Technically, 'due diligence' is a legal

defence you can use to avoid liability if you're hit with an administrative monetary penalty (AMP) or a prosecutor proves beyond a reasonable doubt that you committed an OHS violation. The defence comes from a 1978 Canadian Supreme Court case called [R v. Sault Ste Marie](#) in which the Crown proved that municipal workers dumped garbage into waterways. By the letter of the law, the municipality violated the Ontario water protection law by 'causing' or 'permitting' water pollution. As with OHS laws, the environmental law didn't say a defendant had to do it deliberately, recklessly or negligently; it simply had to commit the offence to be guilty.

But the Court ruled that this 'strict liability' standard was too harsh and that defendants shown to have committed an offence should be able to avoid liability by proving by a preponderance of the evidence that they exercised 'due diligence' to comply. What emerged was a legal defence consisting of 2 branches:

- **Reasonable steps** applies when the defendant shows that it took reasonable steps to comply with the law and avoid the offence; and
- **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.

Why the Court Cases Are So Critical

Due diligence applies not just to environmental but also OHS and other non-criminal 'regulatory' laws that impose penalties for offences without requiring a guilty mind (what lawyers call '*mens rea*').

Although reasonable mistake of fact comes into play every so often, most OHS due diligence cases involve the reasonable steps branch. And because there's no definition of 'reasonable steps,' courts have to decide the issue one case at a time on

the basis of the specific facts and circumstances involved. **(Exception:** 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.)

The court cases are the key to compliance because they illustrate how these legal principles play out in real-world situations. Each case tells the tale of an actual company's OHS compliance experience and what it did right or, in the vast majority of cases, wrong. And while no 2 cases are ever exactly the same, by emulating what companies did right and avoiding what they did wrong, you can use the cases to improve your own OHS compliance efforts.

The 2020 Due Diligence Cases

First, some clarification about the data. There are hundreds if not thousands of AMPs and OHS prosecutions across Canada each year. But the vast majority of them get settled. Among the dozens that actually go to trial, only a few get reported not all of which raise a due diligence issue. There were 19 reported OHS due diligence cases in 2020, as compared to 18 in 2019 and 16 in an average year. In the 15 years that we've been tracking annual due diligence cases, defendants have won only 27% of the time. Last year, that figure dipped below 20%. And this year, it was barely above 10%, 2 of 19 cases. **Bottom Line:** Proving due diligence is extremely difficult.

Total Cases: 19

Cases in Which Due Diligence Defence Succeeded: 2

Cases in Which Due Diligence Failed: 17

As shown in the table below, 4 jurisdictions accounted for all of the due diligence litigation. Because of the way the reporting systems in those provinces work, BC and Qu bec

accounted for 17 of 19 cases. Perhaps due to COVID-19, Alberta and Nova Scotia were the only other provinces that reported due diligence cases in 2020. [Click here](#) for a Scorecard summary of each case.

Table 1: Total Reported OHS Cases Ruling Based on Due Diligence Defence by Jurisdiction in 2020

Jurisdiction	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails
BC	10	1	9
Qu�bec	7	1	6
Nova Scotia	1	0	1
Alberta	1	1	1
TOTAL	19	2	17

Source: OHS Insider

Rulings by Industry Sector

Continuing historic patterns, the sector with the largest number of cases (6 of 19) in 2020 was construction. For the first time in 3 years, a construction defendant actually won a case this year. At 4 cases apiece, energy and manufacturing were the second most commonly represented sector. The only other industry with more than 1 case was pulp and paper mills.

Table 2: Total Reported OHS Cases Based on Due Diligence Defence by Sector in 2020

Industrial Sector	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails
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Construction, Roofing & Paving	6	1	5
Oil, Energy & Gas	4	1	3
Mfg. Plants	4	0	4
Pulp & Paper Mills	2	0	2
Window Cleaning	1	0	1
Utilities	1	0	1
Auto Service & Repair	1	1	0
TOTAL	19	2	17

Source: OHS Insider

Due Diligence Rulings by Hazard/Violation Type

Overall, there were 30 OHS charges for 12 kinds of hazards. Collectively, hazardous substances of different kinds, including flammables and combustible dusts, was the most common type of hazard involved, generating 10 due diligence rulings. The only successful defence was made out by a Qu bec flooring contractor in a case where a worker's 'monumental stupidity' caused an explosion. As usual, fall protection was the single most common violation (22%) with almost all of these cases involving roofing and construction companies.

Table 3: Total Reported OHS Rulings Based on Due Diligence Defence by Hazard in

2020

Industry	Total OHS Charges	Due Diligence Succeeds	Due Diligence Fails
Vertical Fall Protection	7	0	7
Air Contaminants & Hazardous Chemicals	4	1	3
Maintenance & Use of Machinery or Equip.	3	0	3
Combustible Dusts	3	0	3
Flammables	3	1	2
Machine Guarding	3	0	3
Lockout	2	0	2
Excavation/Confined Spaces	1	0	1
Blasting	1	0	1
Lockout Tagout	1	0	1
Materials Handling, Transport, Stacking	1	0	1
Electrical Hazards	1	0	1
TOTAL	30	2	28

Source: OHS Insider

Due Diligence Losses by OHS Program Breakdown

The other recurring pattern were the basic OHS program breakdowns that caused a due diligence defence to fail. In most cases, the problem wasn't the absence of a required OHS

program element, e.g., training, hazard assessment, safe work procedures, etc., but failure to implement it properly. In some cases, *both* defects were in evidence. As illustrated by Table 4, safety training was, by far, the most cited problem area, followed closely by failure to enforce safety rules. As OHS coordinator, 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 Defenses in 2020

OHS Program Defect: Lack of	Cases
Safety Training	8
Enforcement of Safety Rules	6
Supervision/Instruction	5
Safe Work Procedures	4
Prime Contractor Oversight	3
Hazard Assessment	3
Over-Reliance on Worker Experience	3
Workplace Inspection	2
Safety Culture	1
TOTAL	34

Source: OHS Insider