

# Due Diligence 2022, The 17th Annual Scorecard



The year in due diligence and the practical lessons for your own OHS program.

## Are you doing everything necessary to comply with the OHS laws of your jurisdiction'

While the paramount objective is to prevent OHS violations and injuries, nobody expects you to be perfect. Stuff happens. Your liability for the 'stuff' you fail to prevent will come down to whether you exercised due diligence to ensure compliance with the OHS law you broke. The problem is that due diligence is hard to judge until after the fact. The only way to know if you meet the standard is to get cited or prosecuted 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.

Of course, being prosecuted or cited for an OHS offence is the last thing any company wants. Luckily, there is another approach to gauging whether OHS program is compliant: Look at the actual OHS cases involving **other** companies, determine why they did or didn't meet due diligence standards and draw appropriate lessons for your own OHS program. Of course, 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. That's why OHS Insider has created and published an annual Due Diligence Scorecard every year since 2006. Here's an analysis of the 2022 due diligence cases and how to use them to improve your own OHS compliance efforts.

## What Due Diligence Is All About

(**Note:** You can skip this part if you already know how due diligence works.) Technically, 'due diligence' is a legal defence against 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. That's because environmental laws are what are called 'strict liability' statutes. Simply committing an offence makes you guilty regardless of whether you engaged in it deliberately, recklessly or negligently. OHS laws operate on the same principles.

But the *Sault Ste. Marie* Court ruled that strict liability was too harsh and that defendants shown to have committed an offence should be able to avoid liability via 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

Although reasonable mistake of fact comes into play once in a while, almost all OHS cases involve the reasonable steps branch of the due diligence defence. The problem is that there's no single definition of 'reasonable steps.' As a result, courts and tribunals (which we'll refer to collectively as 'courts') have to decide the issue one case at a time based on 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 the real world. Each case is a 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 draw lessons about your own OHS program.

## The 2022 Due Diligence Cases

First, some clarification about the data. There are hundreds of AMPs and OHS prosecutions across Canada each year. But the vast majority of them get settled. Among the small handful that actually go to trial, only a few get reported. And not all of these raise a due diligence issues. There were 18 reported OHS due diligence cases in 2022, as compared to 16 in 2021, 18 in 2019 and 16 in an average year. In the 17 years that we've been tracking annual due diligence cases, defendants have won only 22% of the time. After hitting a record low of less than 10% in 2021, this year's success rate dropped to 16.6%.

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

## Total Cases

**Total Cases: 18**

Cases in Which Due Diligence Defence Succeeded: 3

Cases in Which Due Diligence Failed: 15

As shown in the Table 1 below, to date, 5 jurisdictions have accounted for all of the OHS due diligence litigation in 2022. Unlike most jurisdictions, 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 reduced penalty. Consequently, BC always has the most due diligence cases.

**Table 1: Total Reported OHS Cases Ruling Based on Due Diligence by Jurisdiction in 2022**

Jurisdiction	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails
British Columbia	10	1	9
Saskatchewan	3	1	2
Ontario	2	1	1
Qu�bec	2	0	2
<b>TOTAL</b>	<b>18</b>	<b>3</b>	<b>15</b>

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 2022**

Industrial Sector	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails
Construction, Roofing & Paving	5	1	4
Manufacturing Plants	4	0	4
Sawmills	2	1	1
Forestry/Lumber	1	0	1
Oil/Gas	1	0	1
Retail	1	0	1
Fishing	1	1	0
Bakery	1	0	1
Traffic Control Services	1	0	1
Asbestos Abatement	1	0	1
<b>TOTAL</b>	<b>18</b>	<b>3</b>	<b>15</b>

Source: OHS Insider

## Due Diligence Rulings by Hazard/Violation Type

Surprisingly, failure to provide and ensure proper PPE was the most common charge in 2022, edging out perennial top ranker fall protection 6 to 4. More strikingly, 2 of the 3 instances in which a due diligence defence actually succeeded involved PPE charges. Lockout and machine guarding also accounted for 4 charges each. The only other violation type represented more than once was traffic control.

**Table 3: Total Reported OHS Rulings Based on Due Diligence by Type of Charge in 2022**

Hazard/Operation	Total OHS Charges	Due Diligence Succeeds	Due Diligence Fails
PPE	6	2	4
Fall Protection	4	1	3
Machine Guarding	4	0	4
Lockout	4	0	4
Traffic Control	2	0	2
Material Handling	1	0	1
Overhead Cranes	1	0	1
Electrical	1	0	1
Asbestos	1	0	1
Tree Falling	1	0	1
COVID Prevention	1	0	1
Defying Stop Work Order	1	0	1
<b>TOTAL*</b>	<b>27</b>	<b>3</b>	<b>24</b>

Source: OHS Insider

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

## 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. As illustrated by Table 4, lack of or failure to implement safe work procedures was the most cited problem area, followed closely by failure to ensure proper safety instructions and training. Third most common was not implementing an OHS or specific safety program, such as for fall protection, locking out hazardous energy sources and traffic control. 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 Defences in 2022**

OHS Program Defect: Lack Of	Cases
Safe Work Procedures	6
Safety Training/Instruction	5
OHS or Other Safety Program	4
Proper Supervision	3
Over-Reliance on Worker/Supervisor Experience	3
Lack of OHS Rules Enforcement	2
Engineering Controls	2

**OHS Program Defect: Lack Of**  
COVID Infection Controls  
**TOTAL**

**Cases**  
**1**  
**26**