

# Scorecard: Using Real-Life Cases to Evaluate If Your OHS Program Is Compliant



## What's At Stake

While perfect compliance should be the goal of every OHS program, violations may still occur. The good news is that OHS laws neither expect nor require perfection, only due diligence. Thus, even if you do commit a violation and somebody gets injured or even 'heaven forbid' killed as a result, you can still avoid liability by showing that you exercised due diligence. But how can you tell if you're living up to the standard? One way to get a definitive answer is to get prosecuted and see if the court accepts your due diligence defence. Of course, this is the last thing you'd ever want to go through.

## Using the Due Diligence Scorecard to Improve Your OHS Program

A better compliance strategy is to look at what happens in prosecutions of other companies and draw appropriate lessons for your own OHS program. The downside of that approach is that it requires you to track down, read through and analyze literally dozens of court cases from across the country. And because few OHS directors have the time or inclination to do

this'or the budget to hire a lawyer to do it for them'the OHS Insider created the annual Due Diligence Scorecard to summarize the year in due diligence litigation, including not just who won and who lost but also why they won and lost and how to apply the compliance lesson of each case to make legally sound judgments about the adequacy of your own OHS program.

## Background: What Is 'Due Diligence'

You can skip this part if you already know how due diligence law works. But if you want a brief overview or refresher, keep reading. Technically, 'due diligence' is the name of a legal defence a defendant can use to avoid liability after the prosecution proves beyond a reasonable doubt that an OHS violation occurred, i.e., that the defendant performed an act the law prohibits or omitted to perform an act the law requires (called the *actus reus*, Latin for 'guilty act').

**Explanation:** OHS, environmental and other public welfare laws are like criminal laws in the sense that they're enforced by the government and provide for penalties. But to secure a criminal conviction, the prosecution must prove not only the *actus reus*, but also the defendant's state of mind in committing the act, e.g., intentional, reckless, grossly negligent, etc. (called the *mens rea*, or 'guilty mind'). By contrast, there is no *mens rea* required for an OHS conviction; proving the *actus reus* is enough.

At least that's how things played out when the laws were first enacted. But in 1978, the Canadian Supreme Court eased the rules in a case called *R v. Sault Ste Marie*. Concluding that absolute liability was too strict, and *mens rea* wasn't strict enough, the Court decided that the OHS and other public welfare laws should fall somewhere in the middle. A defendant who violates one of these so-called 'strict liability' laws should be able to avoid liability by showing that it exercised

due diligence. There are 2 branches of the due diligence defence:

- **Reasonable steps:** The most common branch is for the defendant to show that it took reasonable steps to comply with the law and protect workers' health and safety, ensure compliance with OHS laws and prevent the offence; and
- **Reasonable mistake of fact:** The other option is for the defendant to show 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.

## Due Diligence as an OHS Compliance Standard

Over time, 'due diligence' has assumed a second meaning outside the courtroom, i.e., as a standard that safety professionals and OHS directors use as a compliance standard. Knowing that you're exercising due diligence, in other words, is assurance that you're doing everything the law requires. And the reason that the due diligence legal defence works as a compliance principle is that both concepts assign a central role to the OHS program. The principle that due diligence is impossible without a sound OHS program comes right from the *R v. Sault Ste Marie* case itself.

## The Key Role of the Court Cases

The role of the court cases is in illustrating how the principles of due diligence play out in real-world situations. And while each case is different, the rulings form patterns that shed light on what OHS directors and OHS programs must do to meet the standard of due diligence.

# The 2019 Due Diligence Cases

Across Canada, there were 18 cases in which a court or tribunal based an OHS ruling on a due diligence defence in 2019, as compared to 16 in an average year. While that may seem like a low number, keep in mind that there are literally hundreds of OHS prosecutions each year but the vast majority of them get settled. On those occasions when cases do go to trial, due diligence fails far more often than it succeeds. Thus of the 18 reported cases from 2019, the defendant made out a successful due diligence defence only 4 times (below the 10-year average of 29%).

**Total Cases: 18** Cases in Which Due Diligence Defence  
Succeeded: 4  
Cases in Which Due Diligence Failed: 13  
Split Decisions: 1

As shown in the table below, 5 jurisdictions accounted for all of the due diligence litigation, with BC leading the way with 7 cases, followed by Alberta with 6 cases. The BC WCAT is not only the busiest due diligence tribunal but also the strictest, siding with the prosecution in 100% of the cases. Qu bec had the same rate, albeit with a smaller sample size. Defendants in Sask. and Ontario fared much better, prevailing at 50% clips. Unusually, Nova Scotia didn't have any reported cases in 2019. [Click here](#) for a Scorecard summary of each case.

**Table 1: Court & Tribunal Total OHS Cases Ruling Based on Due Diligence Defence by Jurisdiction in 2019**

Jurisdiction	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails	Split Verdict
British Columbia	7	0	7	'
Alberta	5	2	3	'
Ontario	2	1	1	'
Qu�bec	2	0	2	'
Saskatchewan	2	2	0	1
<b>TOTAL</b>	<b>18</b>	<b>4</b>	<b>13</b>	<b>1</b>

Source: OHS Insider

# Rulings by Industry Sector

Continuing recent patterns, 50% of all due diligence cases in 2019 involved construction and roofing, 9 of 18. Interestingly, none of those construction or roofing defendants were able to win their due diligence defence. There were 2 cases apiece against saw mills and warehouses, with both sectors winning 1 of 2. Other sectors on the list include oil, auto repair, logging, manufacturing and utilities.

**Table 2: Court & Tribunal Total OHS Cases Ruling Based on Due Diligence Defence by Sector in 2019**

Jurisdiction	Total Cases	Due Diligence Defence Succeeds	Due Diligence Defence Fails	Split Verdict
Construction, Roofing & Paving	9	0	9	0
Mfg. Plants	1	0	1	0
Saw Mills	2	1	1	0
Logging	1	0	1	0
Oil & Gas	1	1	0	0
Warehouse	2	1	0	1
Utilities	1	0	1	0
Auto Service & Repair	1	1	0	0
<b>TOTAL</b>	<b>18</b>	<b>4</b>	<b>13</b>	<b>1</b>

Source: OHS Insider

## Due Diligence Rulings by Hazard/Violation Type

Excluding a single outlier case involving 40+ asbestos charges, failure to provide or ensure proper use of fall protection was the leading violation contested in OHS due diligence prosecutions (25%) with almost all of these cases involving roofing and construction companies; closely behind was failure to ensure proper repair, maintenance and use of equipment at 21%. Overall, there were 28 OHS charges for 10 hazard/violations. Notable absences included not just newfangled issues which have only recently become subject to regulation such as workplace violence, working alone, emergency preparedness, ergonomics and even cold/heat stress

but also ‘old school’ issues like WHMIS and noise hazards.

**Table 3: Court & Tribunal Total OHS Rulings Based on Due Diligence Defence by Hazard/Violation in 2019**

Industry	Total OHS Charges	Due Diligence Succeeds	Due Diligence Fails
Vertical Fall Protection	7	0	7
Maintenance & Use of Machinery or Equip.	6	1	5
Approaches to Energized Equip. or Power Lines	2	0	2
Machine Guarding	3	0	3
Vehicular & Pedestrian Traffic	1	0	1
Excavation/Confined Spaces	1	0	1
Forklifts	3	0	3
Lockout Tagout	1	0	1
Materials Handling, Transport, Stacking	3	0	3
Wall/Floor Openings	1	0	1

Source: OHS Insider

## Due Diligence Losses by OHS Program Breakdown

In the 13 cases where a court or tribunal rejected a due diligence defence, some defect in the defendant’s OHS system was a decisive factor. In most of the 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 supervision and instruction. As a safety coordinator, you’d do well to conduct a ‘reasonable steps’ audit of each of the listed problem areas:

**Table 4: OHS Program Breakdowns Cited in Cases Where Employers Lost Due Diligence Cases in 2019**

OHS Program Defect	Cases
Safety Training	7
Supervision/Instruction	5
Safe Work Procedures	4
Hazard Assessment	3
Over-Reliance on Worker Experience	2
Workplace Inspection	1
Failure to Enforce OHS Rules	1
Lack of Safety Culture	1
<b>TOTAL</b>	<b>24</b>

Source: OHS Insider