

2023 Due Diligence Cases Scorecard



EMPLOYER WINS ON DUE DILIGENCE (0 cases)

For the first time since we began publishing the Due Diligence Scorecard in 2005, not a single employer won on a due diligence defence in a reported OHS case in 2023.

EMPLOYER LOSES ON DUE DILIGENCE (14 cases)

Ontario: Contractor Can't Blame Crane Fatality on "Rogue" Worker

What Happened: A concrete block being hoisted by a crane at a construction site falls and kills a worker. After the Crown proves 2 OHS violations, the employer claims it used all reasonable steps to ensure the workers were properly trained and blames the incident on the swamper in charge of the rigging for not following the safety procedures.

Ruling: The Ontario Court of Justice rejects the due diligence defence, finding it "improbable" that the swamper "suddenly decided that morning, of his own volition, to set aside all of his training and go rogue." The fact that nobody was paying attention when the problem occurred also suggested that it had happened before, the Court added.

Ontario (Ministry of Labour, Immigration, Training and Skills Development) v. Limen Group Const. (2019) Ltd., 2023 ONCJ 535 (CanLII), November 29, 2023

Québec: Worker's Failure to Follow Conveyor Safety Procedures Was Foreseeable

What Happened: A worker cleaning a dumpster is pressed for time. So, he decides to take a short cut by jumping on a moving conveyor. He loses his balance and falls to his knees causing his shoes to get stuck between the conveyor and the flap at the back of the trailer. He cries out for help but it takes over an hour for anybody to hear him. By then, he suffers injuries requiring amputation of both legs from the knee down. Charged with an OHS violation, the employer

claimed that it exercised due diligence and that the victim's decision to disobey conveyor safety rules was totally unforeseeable.

Ruling: The Québec Superior Court disagrees and upholds the conviction. For one thing, the safety procedures didn't follow manufacturer's instructions. More damning, it notes that the employer was aware that other workers were regularly ignoring the rules and leaving the conveyor running while cleaning dumpsters from the trailer.

Claude Chagnon Enterprises Inc. vs. CNESST, 2023 QCCS 972 (CanLII), March 27, 2023

Québec: Relying on Worker's Experience Isn't Enough to Show Due Diligence

What Happened: A garage mechanic loses his life when the forklift tire he's repairing explodes sending part of the rim crashing into his skull. CNESST charges the employer with failing to protect a worker performing repair work. The employer claims due diligence contending that the victim's carelessness caused the explosion. And since the victim was an experienced tire technician, the incident was unforeseeable.

Ruling: The Court of Québec court doesn't buy it. True, the wheel's initial assembly wasn't done according to industry standard, in effect turning the tire into a time bomb. But the employer did nothing to ensure that the work methods were safe, other than relying on the victim's experience. Given the absence of controls, it was entirely foreseeable that an incident like this would happen.

CNESST c. 9033-5878 Quebec inc. (Pneu Dauville), 2023 QCCQ 3842 (CanLII), June 14, 2023

BC: Confined Space Safety Measures Aren't Operation-Specific

What Happened: An explosion inside a large storage tank at a natural gas compression station seriously injures 2 subcontractor workers who are inside cleaning it during a planned maintenance shutdown. WorkSafeBC charges the prime contractor with a series of high-risk OHS violations, including failure to conduct a confined space hazard assessment and ensure effective isolation of an energy source. The prime contractor appeals.

Ruling: WCAT nixes the prime contractor's due diligence defence and upholds the \$80,626 AMP. The company had done a confined space entry hazard assessment and developed safe work procedures for entry, WCAT acknowledges. However, the assessment and procedures didn't account for or identify all of the hazards the work activity performed.

A2100880 (Re), 2023 CanLII 120422 (BC WCAT), November 23, 2023

Québec: Project Manager Must Make Contractor Aware of Its OHS Prevention Program

What Happened: CNESST officials investigating an excavation collapse at a residential construction site determine that the walls weren't properly shored

and charge the project manager with an OHS *Construction Code* violation. The project manager claims that the excavation requirements don't apply because installation of semi-buried trash cans for housing complex residents isn't "construction," while arguing that it used due diligence to comply anyway and blaming the excavation contractor for the violation.

Ruling: The Court of Québec finds that the construction rules do apply and rejects the project manager's due diligence defence. While the project manager had a strictly enforced prevention program, there was no evidence that it notified the operator of the excavator about the program and its requirements.

CNESST c. Mirabel Urbain Real Estate Project inc., 2023 QCCQ 10033 (CanLII), December 13, 2023

Alberta: Company Took a "Laissez Faire" Approach to Workplace Safety

What Happened: Prosecutors charge a machinery manufacturing company with over 30 OHS violations after a worker suffers fatal injuries while operating a manual lathe. Fourteen of these charges are at issue during the appeal. The company is convicted on all but one charge (failing to ensure that the lathe was free from obvious defects).

Ruling: There was no due diligence, the Alberta Court of Justice reasons, given the company's "laissez faire approach to safety in the workplace." Among the numerous failings cited are lack of a formal training program, not maintaining written records about the victim's experience and qualifications, not retaining an engineer to provide advice on safety controls for the manual lathe and being "content" to rely on the employees to manage their own affairs day-to-day in their lathe work.

R v Inland Machining Services Ltd., 2023 ABCJ 125 (CanLII), June 14, 2023

BC: Construction Manager Loses the Due Diligence Battle but Wins the Penalties War

What Happened: WorkSafeBC hits the construction manager at an oil and gas pipeline construction project with \$ y \$254,697 in AMPs for 8 high-risk OHS violations at the site, including lack of a first aid program and failure to remove dangerous trees from a roadway. The manager denies the violations and contests the penalties.

Ruling: After tossing 3 of the charges on a technicality, WCAT rejects the manager's due diligence defence and upholds the other violations. But all is not lost. The tribunal also decides that the violations were neither high-risk nor repeat offences. As a result, it says AMPs against the manager aren't warranted and cancels the penalty order.

A2201298 (Re), 2023 CanLII 105611 (BC WCAT), October 31, 2023

Québec: Brewery Didn't Do Enough to Protect Workers

from Boiling Water Hazards

What Happened: A maintenance worker at a brewery suffers second degree burns on the arms and chest after accidentally removing the valve from a silo containing 6,000 liters of hot water. The Crown charges the employer with failing to safely maintain the silo so as to protect the worker from the risk of burns. The employer insists that it has a thorough OHS prevention program and blames the violation on the worker's failure to follow the required safety procedures.

Ruling: The Court of Québec rules that the employer didn't take all the reasonable steps necessary to exercise due diligence, citing the:

- Lack of hot water warning signs at the rear of the silo;
- The absence of padlocks from the valves, making it easy for workers to remove the valves and be exposed to scalding hot water; and
- Fact that the only training the victim received was delivered by his previous employer.

CNESST c. Knowlton Brewery, 2023 QCCQ 9840 (CanLII), November 9, 2023

Québec: Failure to Enforce Fall Protection Policy Dooms Contractor's Due Diligence Defence

What Happened: A roofing contractor is cited for an OHS violation after a CNESST inspector observes several roofers working without fall protection. The contractor denies committing a fall protection violation and claims it took all reasonable steps to prevent any offences that did occur. We have a detailed prevention policy, and we enforce it with an iron fist, the roofer argues.

Ruling: The Court of Québec rejects the due diligence defence, finding the contractor guilty of a fall protection offence and imposing the minimum fine of \$18,157. Although workers signed the policy, they couldn't tell the inspector exactly what it required with regard to fall protection. Moreover, the contractor's claims about the policy's being zero tolerance didn't jibe with the actual disciplinary records showing that workers got away with safety violations, including failure to properly use required fall protection equipment.

CNESST c. 9269-2110 Quebec inc. (Renaud Toit), 2023 QCCQ 4627 (CanLII), July 14, 2023

BC: No Due Diligence to Prevent Rescue Boat Violations but Infractions Don't Warrant Penalties

What Happened: During a maritime rescue drill exercise, the line hoisting the rescue boat breaks, dropping the boat and its crew into the sea, resulting in several serious injuries. The employer suspends drills for 4 months to investigate the incident. Shortly after they resume, a second incident occurs when a rescue boat brake line gets snagged on a gate and the boat crashes into the side of the ship. WorkSafeBC hits the employer with an AMP of \$646,302 for failing to provide proper training to the line handler. The employer notes that the handler was Federally certified and that painter line handling training is

required for certification.

Ruling: WCAT finds no due diligence. Even though painter line handling training is required for Federal certification, there's no evidence that the employer trained or provided the handler proper instruction on rescue boat operations with that particular kind of boat and crew. WCAT also upholds the citation for failing to ensure that the davit was capable of safely performing its function. However, WCAT concludes that the nature of the violations were relatively minor even though they had significant consequences, and cancels the penalty orders.

A2101681 (Re), 2023 CanLII 81604 (BC WCAT), August 30, 2023

Québec: Employer Didn't Use Due Diligence to Prevent Traffic Control Violation

What Happened: A CNESST inspector spots workers picking up waste in a busy Montreal street without traffic being blocked and cites their employer for an OHS violation. The employer insists that one of the workers in the inspector's photos was an ex-employee related to a current worker.

Ruling: The Court of Québec finds the story about the worker's being there picking up garbage of his own accord "improbable," especially since he's wearing the same orange bib as the other workers. There's also plenty of other evidence to support the inspector's contention that the workers were endangered by traffic. Nor did the employer use due diligence to prevent the offence. There was a safety training program, the Court acknowledged, but the employer put it in place only **after** the violation occurred.

CNESST c. Plateau Sanitaire inc., 2023 QCCQ 6208 (CanLII), September 21, 2023

Québec: Employer Can't Blame Powered Mobile Equipment Violation on Operator Error

What Happened: A land surveyor is crushed to death by the tracks of a mechanical excavator operated by a contractor's worker during work to construct a building and install power transformers at a Hydro-Québec electrical substation. CNESST issues a stop work order and charges Hydro-Québec, as project operator, with powered mobile equipment violation. Hydro-Québec blames the incident on operator error and asserts a reasonable mistake of fact due diligence defence.

Ruling: The Court of Québec finds Hydro-Québec guilty. Even if the operator made a mistake, Hydro-Québec should have foreseen the possibility of operator error. Moreover, Hydro-Québec didn't take all necessary steps to control traffic hazards and failed to ensure that a flagger was posted during mechanical excavation operations where the equipment is moving in reverse. To the extent it didn't believe such precautions were necessary, Hydro-Québec committed an error of law, which isn't a defence to an OHS violation.

CNESST c. Hydro-Québec, 2023 QCCQ 9821 (CanLII), October 23, 2023

BC: Due Diligence No Defence to Obstructing an OHS Investigation

What Happened: WorkSafeBC issued multiple orders requiring a store owner to

update its communicable disease prevention plan during the COVID-19 pandemic. When inspectors showed up to perform a follow-up site inspection, the owner ordered them to leave, resulting in a \$5,000 AMP for failure to cooperate with" OHS inspectors.

Ruling: WCAT upholds the penalty. The owner didn't raise a due diligence defence; but even if it had, WCAT notes that it "cannot imagine any circumstance where an employer could prove they had exercised due diligence in a contravention that involves intentional failure to cooperate with" a WorkSafeBC OHS investigation.

A2201702 (Re), 2023 CanLII 41429 (BC WCAT), April 26, 2023

Québec: Employer Ignored Veteran Truck Driver's Complaints about Unsafe Brakes

What Happened: A truck driver with 25 years of experience loses control of a heavy container truck fully loaded with waste while descending a gravel slope with an 11.9% angle of descent. The truck overturns and the driver is killed. The Crown charges the employer with failure to properly maintain the truck's braking system. The lower court finds the employer guilty of criminal negligence and OHS violations and the case ends up in Québec's highest court.

Ruling: The Québec Court of Appeal upholds the verdict, including the rejection of the employer's due diligence defence. During trial, the Crown presented evidence showing that the driver had complained to the chief mechanic and even senior executives about the problems he was having with the brakes but his concerns were dismissed as "whining" and no road test to evaluate the brakes was performed.

CFG Construction inc. vs. R., 2023 QCCA 1032 (CanLII), August 11, 2023