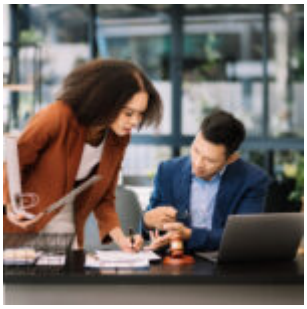
2024 Due Diligence Cases Scorecard



EMPLOYER WINS ON DUE DILIGENCE (4 cases)

In 2024, there were 4 cases in which an employer who committed an OHS violation successfully made out a due diligence defence. That’s 4 more than the year before. Here’s a summary of each ruling.

1. Ontario: Constructor, Not Accused Employer, Had Control Over the Worksite

What Happened: A road grader strikes and kills a pedestrian crossing an intersection at a municipal construction site. The Canadian Supreme Court rules that the city can be charged as an employer for an OHS violation (failing to ensure that a signaler was in place) even though it had hired a constructor to oversee the work. The case then goes back down to trial where the city argues that it exercised due diligence.

Ruling: The Ontario court agrees and dismisses the charge. Although the required traffic control measures at the intersection were wanting, it was the constructor and not the city that exercised control over the situation. The city did conduct quality control inspections to ensure that the constructor was complying with the safety requirements

contained in the contract. But, the court concluded, “Such inspections did not constitute control over the workplace and the workers on it.”

2024. *v. Greater Sudbury (City)*, 2024 ONSC 3959 (CanLII), August 23, 2024.

2. BC: Engineering Firm Cooperates with General Contractor’s “Robust” Safety Program

What Happened: A worker suffers life-altering injuries after getting hit by a bulldozer at a multi-employer oil pipeline construction site. WorkSafeBC fines the employer, an engineering firm, $6,629 for failing to adequately oversee safety supervision at a site where heavy equipment is in use. The employer appeals.

Ruling: The BC Workers’ Compensation Appeals Tribunal (WCAT) rules that the engineering firm took all reasonable steps to comply, noting that this was a multi-employer worksite, and that the worker was injured by a machine operated by someone working for another employer, the general contractor with numerous safety supervisors on site, as well as a “a relatively robust safety plan” that established “controlled areas” marked by sandwich boards posted at the entrances, reminding workers to sign in and notify the site supervisor. The general contractor also held regular safety meetings. Meanwhile, the engineering developed processes to ensure cooperation with the general contractor’s program.

A2201919 (Re), 2024 CanLII 98933 (BC WCAT), September 19, 2024.

3. BC: Lumber Company Demonstrated

Ongoing Investment in & Commitment to Worker Safety

What Happened: WorkSafeBC fines a lumber company $172,533 after a worker not wearing or trained in use of fall protection suffers serious injuries in a fall of more than 10 feet from an unguarded platform inside a de-barking machine.

Ruling: The WCAT rules that the employer showed due diligence and voids the fine, citing the company's "multi-layered" OHS program and "unwavering commitment to improving safety on the worksites." While the platform was unguarded, the company had invested millions of dollars to improve safety at the site. Nor could the WorkSafeBC inspector cite any specific problems in its fall protection program. The reason the victim didn't receive training in the use of fall protection was that it wasn't required for his job. "If an employer that goes to the lengths this employer does is not exercising due diligence. . . . it is difficult to imagine what employer could ever succeed on a due diligence defence."

A2300358 (Re), 2024 CanLII 109362 (BC WCAT), October 1, 2024.

4. BC: Victim Ignored Prime Contractor's Warnings about Falling Material Hazards

What Happened: Heavy wind gusts blow roofing insulation packages weighing 60 pounds each off the ninth level deck of a residential construction site, one of which falls on a supervisor below who later dies in hospital. WorkSafeBC fines the prime contractor $164,343 for 2 OHS violations, including failure to adequately cover and guard or prevent inadvertent entry by workers to an area into which material may be dropped, dumped, or spilled.

Ruling: The WCAT nixes the fine. The prime contractor, which had voluntary COR status, exercised due diligence to secure

materials on site, plan work, and protect workers from overhead hazards by extensively investigating other near miss incidents of blowing materials and implementing corrective actions. The victim in this case violated one of those corrective actions warning personnel to keep away from danger areas during windy periods.

A2200787 (Re), 2024 CanLII 22777 (BC WCAT), February 22, 2024.

EMPLOYER LOSES ON DUE DILIGENCE (18 cases)

There were 18 reported cases in which a defendant shown to have committed an OHS violation tried to make out a due diligence defence but failed. Here's a summary of each case.

1. Nova Scotia: Ignorance of the Law Is No Defence

What Happened: A government inspector fines the owner of a boatyard $1,000 for failing to obey OHS orders to ensure that materials not associated with electrical equipment are placed or stored in close proximity to the electrical equipment. Give me a break, the owner argues, I'm not an electrician and I didn't and shouldn't be presumed to know the technical details contained in the electrical safety standards, especially since nobody identified them as issues in previous inspections.

Ruling: The Labour Board rejects the argument. Ignorance of the law is no defence against an administrative monetary penalty. And since the owner didn't do everything reasonably possible in the circumstances to avoid unsafe working conditions in its Boat and Machine Shops, it didn't have a valid due diligence defence.

Yarmouth Boat Works Ltd. (Re), 2024 NSLB 13 (CanLII), February 27, 2024.

2. Québec: Simply Denying Having Committed an OHS Violation Isn't Due Diligence

What Happened: CNESST cites a construction company for an OHS fall protection violation after observing workers at the edge of a mezzanine over 3-metres-high where no guardrail is in place. The company denies being the workers' employer and claims there's no proof that the fall distance was over 3 metres.

Ruling: The Québec court rejects both arguments and the burden shifts to the company to prove due diligence. Simply denying a charge isn't enough, the court reasons. To make out the reasonable steps branch of due diligence, the defendant must demonstrate that it met 3 duties: i. foresight – that is, identifying the risks and appropriate safety measures; ii. Efficiency – or implementation of concrete means to ensure safety, such as equipment, training, and supervision; and iii. authority, or

intolerance of dangerous conduct and the imposition of discipline against workers who don't obey the rules. The company in this case didn't show it met any of these duties.

CNESST c. Construction Quatrium inc., 2024 QCCQ 308 (CanLII), February 6, 2024.

3. Québec: Relying on Supervisor's Experience Isn't Enough to Show Due Diligence

What Happened: A CNESST inspector issues a stop-work order to the project manager of a construction site after spotting workers on a scissor lift platform on an elevated floor at the edge of an opening without a guardrail sufficient to prevent the platform from falling. The project manager denies the

allegation and contends that even if it were true, it exercised due diligence to prevent the violation.

Ruling: The Court of Québec finds the project manager liable, reasoning that the evidence established "beyond any reasonable doubt" that there was a risk of falling from the scissor lift and that the employer knew of the danger. Yet, there was no prevention program on the site. Nor were there weekly site meetings or meetings with subcontractors. Instead, the project manager simply circulated a general "info-letter" to workers every 2 weeks and relied on the experienced superintendent to manage the risk.

CNESST v. 4198191 Canada inc., 2024 QCCQ 411 (CanLII), February 13, 2024].

4. Alberta: General Training that Isn't Operation-Specific Isn't Enough

What Happened: A worker performing a visual inspection of a catch basin is killed after being run over by a company-owned Ford F-550 truck driven by a supervisor. Prosecutors charge the employer, a highway construction contractor, and supervisor with multiple OHS violations. Both defendants deny the charges and blame the tragedy on the victim's own carelessness in starting the work while the driver was still behind the wheel of the truck with the motor running.

Ruling: The Alberta court convicts the employer on 4 charges, including failure to provide training, failure to ensure the worker was kept a safe distance from powered mobile equipment, and the risk of being caught between a moving part of powered mobile equipment and another object. Although the company had general training guides and manuals cautioning workers to "be alert to other manpower, equipment, and materials in your working vicinity," none of these materials addressed the specific situation that led to the worker's death in this case, namely, where a vehicle is parked in a site designed to

act as a shield from traffic. The supervisor is also convicted of 3 charges.

R v Volker Stevin Contracting Ltd., 2024 ABCJ 85 (CanLII), April 11, 2024.

5. Saskatchewan: Victims' Failure to Use Fall Protection No Defense Against OHS Violation

What Happened: Tying in power lines in a bucket truck 15 feet above the ground should have been old hat for the 2 highly experienced Saskatchewan Power Corporation (SPC) journeymen workers that end up losing their lives. Regrettably, neither of them has their safety belt lanyards anchored to the "D" ring when the bucket tips over. Prosecutors charged SPC with 4 OHS violations and won conviction on 3—failure to provide safe equipment, proper training, or fall protection on elevated work platforms.

Ruling: The Saskatchewan court rejects SPC's due diligence defences. SPC didn't adequately inspect the equipment, especially when it was aware of the risk of bolt breakages; and it was reasonably foreseeable that journeymen workers with nearly 20 years of experience might forget to clip in their fall protection while being elevated, a situation the company could have easily rectified.

2024. *v. Saskatchewan Power Corporation*, 2024 SKPC 12 (CanLII), April 30, 2024.

6. Québec: Forklift Tire Explosion Risk Was Foreseeable Even If Exact Cause Wasn't

What Happened: A warehouse worker suffers serious injuries after the forklift tire he's repairing unexpectedly explodes.

He dies of those injuries a few days later. CNESST charged the employer with violating Section 237 of the *OHS Act* which bans any action or omission that "directly and seriously" compromises a worker's safety. The case goes to trial and the employer is found guilty.

Ruling: The Québec court rejects the employer's appeal and due diligence defence, finding that forklift tire inflation is a dangerous operation. While this particular explosion might not have been foreseeable, the risk that such an explosion might occur during the operation was foreseeable. But the company took no measures to ensure it was carried out safely, other than requiring workers to use an inflation cage. Nor did the company provide specific training for this type of wheel, relying instead on the experience of its workers.

9033-5878 Québec inc. v. CNESST, 2024 QCCS 3161 (CanLII), August 28, 2024.

7. Alberta: Machine Servicing Company Left Workers to Fend for their Own Safety

What Happened: A worker using an emery cloth to polish a rotating machine part loses his life when his long-sleeved coveralls get caught in the machine. The lathe to which the rotating part is attached has an emergency stop mechanism, but the worker can't reach it while performing the work. And there's no other way for him to stop the machine. After being found guilty of over a dozen OHS charges, the employer appeals, contending, among other things, that the court was wrong to reject its due diligence defences.

Ruling: The Alberta court upholds the convictions, finding that person in charge of safety at the workplace "understood absolutely nothing about a risk assessment, a hazard assessment, chief components of a risk assessment, or the steps for calculating the level of seriousness of identified risks." The company was more concerned about profitability

than safety, and, instead of establishing an OHS system, ran a "laissez faire" operation that "left workers to their own devices" to fend for safety.

R v Inland Machining Services, 2024 ABKB 664 (CanLII), November 13, 2024].

8. Saskatchewan: Basic Toolbox Talks OK for General Training but Not Technical Forklift Training Requirements

What Happened: At the end of his 12-hour shift, a young worker steps off the forklift he's operating as it's moving in reverse toward a concrete pillar. The machine pins his foot against the pillar causing crushing injuries resulting in permanent mobility impairment. The Crown charges the manufacturing employer with 2 OHS violations.

Ruling: The Saskatchewan trial court finds the employer not guilty on the first charge—failure to provide the victim with "information, instruction, training, and supervision" necessary to ensure his health and safety. The evidence shows that the victim "was provided with substantial (and thereby sufficient) information, training, supervision, and instruction. . . and was regularly made aware of the safe work practices on the topic of forklifts," including via toolbox talks. However, the court convicts the employer of failing to ensure that only properly trained workers operated forklifts. The victim clearly lacked the necessary forklift operation training. While they met the safety training and information requirements, the toolbox talks and training system weren't enough to show due diligence to ensure a worker received special training to operate a forklift. Nor was it reasonable for the employer to believe that the victim was adequately trained for forklift operation.

R v Brandt Industries Canada Ltd., 2024 SKPC 35

(CanLII), October 7, 2024.

9. Nova Scotia: Power Company, Contractor Didn’t Use Due Diligence to Prevent Survey Worker’s Drowning Death

What Happened: A dam site worker goes into the water to retrieve a malfunctioning remote-controlled vessel and drowns. The victim isn’t wearing a life jacket and there’s no boat or rescue equipment at the site. The prosecution lays 16 OHS charges against 2 companies as “employers”, including the power company responsible for the site and the contractor hired to perform surveying at the site. The defendants deny the charges and claim they exercised due diligence to comply with any OHS requirements they might have violated.

Ruling: The Nova Scotia trial court convicts the defendants on 5 total charges and acquits them on 11. The power company and contractor did use due diligence to ensure the victim wore a life jacket by furnishing PFDs, providing him training, and having his supervisor order him to wear the equipment, but the victim violated the rules. However, the companies didn’t use due diligence to ensure there was adequate rescue equipment at the site. Nor did they take all reasonable steps to ensure that the Safe Work Policy for work over water was implemented.

2024. *v. Brunswick*, 2024 NSPC 49 (CanLII), August 2, 2024.

10. Nova Scotia: Simply Having an Adequate Safety Policy Isn’t Due Diligence

What Happened: During the COVID-19 pandemic, a warehouse changed its automated lighting schedule in accordance with its revised business hours without considering that a washroom used by delivery personnel would be left totally dark for over an hour each day. Sure enough, a delivery worker suffered a

fatal injury after falling and hitting his head in the pitch-dark washroom.

Ruling: The warehouse owner was convicted of 4 OHS violations resulting in a worker's death, including failing to ensure that the toilet facility was adequately lit. The company had an "adequate" illumination policy but didn't take steps to implement it. Instead, it kept the policy in an OHS binder in a location unknown to workers. Not surprisingly, none of the workers or managers were familiar with the policy.

2024. *v. The Brick Warehouse LP*, 2024 NSPC 26 (CanLII), April 10, 2024.

11. Federal: No Proof Railway Actually Implemented Its Track Inspection Protocols

What Happened: Transport Canada fines Canadian National Railway $133,000 after inspectors find 26 non-compliant joints and 28 rail joints with a missing bolt along a "key route." The federal tribunal upholds the penalty and CN appeals.

Ruling: The federal court nixes the appeal and CN's due diligence defence. Since Transport Canada proved the actus reus, CN had to prove by a preponderance of evidence that it took all reasonable steps to prevent the offence. In an attempt to meet this burden, CN argued that its own track inspection procedures not only met but exceeded federal requirements. But the court didn't buy it because CN didn't provide evidence showing that it implemented those procedures along the key route before the Transport Canada inspection took place.

Canadian National Railway Company v. Canada (Attorney General), 2024 FC 1297 (CanLII), August 21, 2024.

12. BC: Safety Policies Aren't Worth Much When Workers Ignore Them

What Happened: Ignoring instructions, an excavation crew that has trouble tracking the path of a buried gas line doesn't contact the power company for help or implement hand digging measures until the situation is clarified. Instead, it follows normal procedures and begins mechanical digging. Sure enough, the excavator breaches the live polyethylene line, releasing flammable natural gas into the air. WorkSafeBC fines the excavation contractor nearly $30,000 for an OHS violation, a repeat offence. The contractor appeals, claiming that it provided proper training and had adequate safety violations and blames the violation on "the independent action of properly trained and experienced workers."

Ruling: The WCAT rejects the contractor's due diligence defence and upholds the fine and fine amount. Safety policies are just the first step, it reasons. "Safety policies and programs do not amount to much if they are not enforced, or if they are ignored." And that's exactly what happened with the crew in this case.

A2400690 (Re), 2024 CanLII 121657 (BC WCAT), November 15, 2024.

13. BC: Worker's Experience Is No Substitute for Written Lockout Procedure & Training

What Happened: WorkSafeBC issues a stop-work order and administrative monetary penalty of $23,386 against a manufacturer for failing to implement a lockout procedure after a worker reaches behind the running blade of a radial arm saw to clear away pieces of debris and suffers serious finger injuries. The manufacturer claims it exercised due diligence in trusting that the victim, who had 22 years of

experience in operating the saw, was an expert who would know better than to stick his hand near a running saw blade.

Ruling: The WCAT rejects the employer's due diligence defence. Experience in operating a saw is no substitute for having a written lockout procedure. A duly diligent employer would have also ensured that workers received suitable training for operating the saw and not simply relying on a worker's past training from a prior employer, the agency reasons in upholding the stop-work order, penalty, and penalty amount.

A2301304 (Re), 2024 CanLII 121757 (BC WCAT), November 5, 2024.

14. Québec: Trusting Experienced Machinist to Work Safely Is Not Due Diligence

What Happened: A stabilizer of a concrete pump weighing 110,000 pounds suddenly sinks into the ground, forcing the machine to tilt dangerously to its left. Although nobody is injured, CNESST inspects the construction site and charges the employer with not ensuring the machine's stabilizers had affixed support plates that meet CSA standards. The employer blames the incident on the machine operator.

Ruling: The Court of Québec acknowledges that the machine operator deliberately decided to begin the work without having plates of sufficient dimensions affixed under the stabilizers, contenting himself with placing small wooden plates of small dimensions. In so doing, the operator went against not only the employer's safety policies but also his many years of experience with the machine. But that didn't mean the employer was without blame, said the court, faulting the company for thinking it could give the operator "carte blanche" to work without supervision and control.

CNESST v. Pompage Élite inc., 2024 QCCQ 7447 (CanLII), December 12, 2024.

15. BC: Due Diligence Requires Inspection, Training & Supervision, Not Just Policies

What Happened: WorkSafeBC fines the prime contractor of a construction project $45,717 for OHS violations, including allowing workers to use a table saw without blade guards. We have written safety policies on proper use of equipment, including table saws, the employer argues.

Ruling: The WCAT rejects the employer's due diligence defence and upholds the penalty. Safety policies are only an avenue to due diligence. At a minimum, the employer should also have conducted regular inspections of the worksite and discussed the safe and proper use of table saws. The agency also finds "that a minimum level of supervision of table saw safety was lacking on that particular site" and that blade guards weren't available even if workers wanted to use them.

A2302574 (Re), 2024 CanLII 98892 (BC WCAT), September 19, 2024.

16. BC: Providing Workers Fall Protection Equipment Isn't the Same as Requiring Them to Use It

What Happened: A roof cleaning firm that's been cited for 8 prior fall protection violations over a 2-year period is fined $8,374 after a WorkSafeBC inspector observes a worker sitting on the roof of a house 19 feet above grade without fall protection. The worker tells the inspector that he has fall equipment on-site but wasn't using it because "it was only a quick job" and he was in a rush. The firm claims due diligence, arguing that it provided fall protection equipment, installed an anchor point on the roof, trained the worker in fall protection, and disciplined him for failing to follow his

training while advising that he'd be fired for any further incident.

Ruling: The WCAT upholds the penalty. OHS laws require employers not simply to make fall protection equipment available to workers but also "ensure" that they use it. Moreover, the employer didn't implement a proper fall safety plan as the regulations require. The employer's track record of fall protection violations also likely makes the Tribunal reluctant to afford it the benefit of the doubt.

A2300747 (Re), 2024 CanLII 42967 (BC WCAT), April 29, 2024.

17. BC: Asbestos Contractor Didn't Exercise Due Diligence to Obey Stop-Work Order

What Happened: WorkSafeBC hits an asbestos abatement contractor with a $30,000 for defying a stop-work order issued for previous asbestos violations.

Ruling: The WCAT rejects the contractor's appeal, finding that it didn't exercise any diligence, let alone due diligence to comply with the stop-work order. Transferring its workers to another asbestos remediation contractor didn't meet the terms of the stop-work order, which the Board carefully explained to the employer. "Even if I were to accept the employer's argument. . . which I do not. . .the simple answer would still be that a reasonably prudent employer would check with the Board that such conduct was not contrary to the stop-work order."

A2300599 (Re), 2024 CanLII 32448 (BC WCAT), March 15, 2024.

18. BC: Failure to Properly Investigate

Earlier Incident Dooms Employer’s Due Diligence Defence

What Happened: A forestry operations company hires a prime contractor to conduct ground-based logging activities on a cut block for which it holds a forest license. During the work, a logging machine being operated on a steep slope becomes unstable and rolls twice down the slope, seriously injuring the operator. Rather than the prime contractor, WorkSafeBC smacks the employer with $69,550 in penalties for failing to ensure that forestry operations were planned and carried out in accordance with regulatory requirements and safe work practices.

Ruling: The WCAT finds that the employer didn’t exercise due diligence to prevent the violation. The employer was aware of a near-miss incident that occurred less than 14 months earlier in which the ground collapsed and the hoe chucker rolled onto its side on the skid trail. That incident involved the same prime contractor, cut block, piece of equipment, and operator. In addition to not considering key factors like weather conditions, soil stability, slope, equipment orientation, and operator competency, the employer’s investigation of that earlier incident didn’t identify corrective actions to prevent it from recurring.

A2102510 (Re), 2024 CanLII 22802 (BC WCAT), February 6, 2024.