OHS Trends: The Top 10 OHS Cases of 2017-18 (So Far)

1. **Drug Addiction Doesn't Excuse Employee's Safety Violation, Says Supreme Court**

Under an Alberta coal mine's 'no free accident' policy, employees that voluntarily disclosed their drug addictions would get treatment; if they failed to disclose and later failed post-accident testing, they'd get fired. A load driver with a cocaine addiction went with the latter option and, consequently, lost his job after failing a drug test. The 'no free accident' policy was a legitimate, nondiscriminatory safety measure, reasoned one set of Justices. The driver knew about the policy and why it was necessary for safety and deliberately chose not to take advantage of its amnesty provisions. A second group of Justices reached the same outcome but on a different theory: The mine did have to accommodate the driver; but tolerating a drug addict in a coal mine was so dangerous that it imposed undue hardship [*Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII), June 15, 2017].

2. **Alberta Court Limits Use of Solicitor-Client Privilege to Avoid Disclosing Internal Incident Report**

An energy company refused to give OHS officials any materials from its internal investigation of a worker's death claiming that they were privileged since the investigation was made by

a lawyer in contemplation of litigation. After nearly 3 years of ping-ponging around in judge's chambers, the Alberta high Court ruled in the government's favour. Although the solicitor-client privilege did apply, not *all of the material* related to the investigation was necessarily privileged. Each document and bundle of materials had to be assessed individually to determine if it was shielded by the privilege [*Alberta v Suncor Inc*, 2017 ABCA 221 (CanLII), July 4, 2017].

3. **Ontario Dishes Out Record $2.6 Million Fine for C-45 Criminal Violation**

A mine worker died of acute cyanide poisoning after the toxic chemical got into his body through the skin. The company pled guilty to criminal negligence under what was once known as Bill C-45. Result: The Ontario court socked the company with a $2.6 million penalty, the highest ever against a corporation for a C-45 violation, including a $1.4 million fine + a 30% surcharge + an $800,000 restitution payment to compensate the victim's family for his lost retirement income [*R. v. Detour Gold*, C.J.O., No. 0511-998-164537/0511-998-5380, Aug. 31, 2017].

4. **Metron Construction Project Manager Gets Jail Sentence**

On Christmas Eve 2009, a swing stage collapsed at a Toronto apartment building project run by Metron Construction sending 5 workers to the ground. Only one survived the 13-storey fall. The safety violations were so egregious that the Crown laid criminal charges under Bill C-45. One of the individuals prosecuted, the project manager, was convicted of 4 counts of criminal negligence and sentenced to 3.5 years in jail for allowing 7 workers to board the swing stage knowing that it was creaky and that there were lifelines for only 2 of the men. The manager appealed claiming, among other things, that the victims' own negligence contributed to the incident. But

the Ontario Court of Appeal would have none of it upholding both the convictions and the sentence [*R. v. Kazenelson*, 2018 ONCA 77 (CanLII), Jan. 30, 2018].

5. **Quebec Finds Excavation Contractor Who Violated OHS Trenching Rules Guilty of Manslaughter**

C-45 wasn't the only criminal law in the OHS news. Another crime stemming from an OHS violation was manslaughter. It began when a worker doing sewer repair work was killed in a trench collapse. The Crown blamed the incident on the excavation contractor's violation of OHS trench safety regulations. But it also considered the offence too egregious to treat as a routine OHS violation. So, it charged the contractor not only with criminal negligence (under erstwhile Bill C-45) but also manslaughter. The contractor denied the allegations and claimed that equating an OHS violation with manslaughter was illegal. But the court refused to dismiss the charges. And now the Court of Qu□bec has found the contractor guilty on both counts [*R. c. Fournier*, 2018 QCCQ 1071 (CanLII), March 1, 2018].

6. **Alberta Case Leaves Door Open to Random Drug & Alcohol Testing. . .**

Suncor made a second appearance in our Top 10 in a case that began after the energy firm unilaterally adopted random drug and alcohol testing for safety-sensitive workers at oil sands sites. The arbitrator struck down the policy saying its privacy harms outweighed its safety benefits but the appeals court upheld it as a reasonable and necessary safety measure. The Alberta high court found the policy valid citing evidence of rampant drug use with over 2,200 documented incidents at the site. The fact that most of the workers were non-union didn't make the situation any less dangerous, the Court

reasoned [*Suncor Energy Inc v Unifor Local* 707A, 2017 ABCA 313 (CanLII), Sept. 28, 2017].

7. . . . But Then the Door Slams Shut

Two months after the above ruling, the Court of Queen's Bench pulled a stunning reversal by issuing an injunction barring the company from enforcing the policy until the union's appeal was ultimately resolved. Worker privacy counted just as much as safety, the court reasoned. And enforcement of the policy would do *irreparable* damage to those privacy rights. The latter ruling is in direct opposition to an Ontario case refusing to enjoin random drug testing for Toronto Transit Commission workers. If the policy was eventually found illegal, money damages would make up for any privacy harms suffered by the workers, the Ontario court reasoned [*Unifor, Local 707A v Suncor Energy Inc*, 2017 ABQB 752 (CanLII), Dec. 7, 2017].

8. BC Arbitrator Rules that Random Testing Violates Coal Miners' Privacy

The random drug testing saga continued'and bad results for employers—continued into January when a BC arbitrator struck down random testing for coal miners. Employees should have lower privacy expectations if they do safety-sensitive jobs, the mining company argued. But the arbitrator disagreed noting that it's not just the bodily fluids but all the personal information employees who test positive must reveal that makes random testing so intrusive. And because it's 'suspicion-less,' random testing is justifiable only if the employer can show that there's an actual problem with drug/alcohol use'not simply that the workplace is dangerous. The coal mine in this case didn't meet its burden. There was no specific evidence tying any particular accident or injury to an employee who was

under the influence of drugs or alcohol; and only 3% of all post-incident tests done at its 5 coal mines over a 5-year period had come back positive [*Teck Coal Ltd. (Fording River and Elkview Operations) v United Steelworkers, Locals 7884 And 9346*, 2018 CanLII 2386 (BC LA), Jan. 23, 2018].

9. **Nova Scotia Employer Can't Blame Employee for OHS Violation**

After spotting safety violations at a road closure, the OHS inspector issued a pair of orders to the contractor in charge of traffic control at the site, one ordering it to post the required Road Closed signage and the other requiring implementation of a proper Traffic Control Plan. The contractor asked the Labour Board to set both orders aside. While acknowledging the violations, the contractor blamed them on the Temporary Work Signaller employee and claimed it used due diligence to comply with the rules. But the Board didn't buy the contractor's attempts to 'shift the blame' to the employee. As employer, the contractor had 'overarching' responsibility for safety on the site. And the fact that the signage problem was present hours before the OHS inspector even happened on the scene cast doubt on its overall supervision over the workers and the site [*McLeod Safety Services Ltd. (Re),* 2018 NSLB 36 (CanLII), March 20, 2018].

10. **Ontario Contractor Used Due Diligence to Prevent Dump Truck Fatality**

A key due diligence ruling came down in the form of a case in which a bulldozer operator was killed after being run over by a dump truck moving slowly in reverse. The employer admitted that a dedicated signaller wasn't in place to assist the driver and steps weren't taken to ensure the victim was in the driver's view as required by OHS laws but claimed due

diligence. We distributed and regularly monitored a traffic safety policy incorporating the required signalling procedures, it argued, and it wasn't our fault those procedures weren't followed. The court agreed. The evidence was thin but enough to show that the victim, who happened to be the driver's supervisor, saw that the driver wasn't following the procedure but didn't stop him before he backed up. The victim also could and should have put himself in the driver's full view but didn't so. He had the necessary training but his judgment may have been clouded by the cannabis found in his body during the autopsy. So in a very close case, the court found that the employer had done just enough to squeak by on due diligence [*Ontario (Ministry of Labour) v. 614128 Ontario Ltd. (Trisan Construction*), 2018 ONCJ 168 (CanLII), March 14, 2018].

****

'Disagree With Our Choices'

Drop me a line at glennd@bongarde.com and let me know what you think was the biggest OHS case(s) of the past 12 months.