

# Scorecard of Due Diligence Cases from 2020



Employers won on a due diligence defence in only 2 of 19 OHS cases in 2020.

## EMPLOYER USED DUE DILIGENCE (2 cases)

### **BC: Oil Well Operator's Exposure Control Program Was OK Even Though It Wasn't Site-Specific**

**What Happened:** After a worker passes out and is sent to the hospital for hydrogen sulfide exposure, the operator of an abandoned and contaminated oil well is penalized \$122,000 for failing to implement a site-specific exposure control program for air contaminants.

**Ruling:** The BC Workers' Comp Appeals Tribunal (WCAT) finds due diligence. The employer had a general exposure control plan and other programs 'generally responsive' to managing hydrogen sulfide contamination during abandonment operations, performed frequent tests, made workers use hydrogen sulfide monitors and provided respiratory equipment.

### **Qu bec: Human Error Is Foreseeable but Monumental Stupidity Is Not**

**What Happened:** While goofing around on break, a flooring worker pretending to set his shoelaces on fire with a cigarette lighter ignites flammable sealants and causes an explosion. The employer is charged with an OHS violation but claims due diligence.

**Ruling:** The Qu bec court upholds the defence. This wasn't just human error. The 'enormity of the worker's stupidity' in brandishing a lighter after just varnishing a floor was totally unforeseeable, especially since he was well trained on the dangers of flammable vapours inside a building.

*Pro-Planchers Montreal inc. c. CNESST*, 2020 QCCS 88 (CanLII), January 20, 2020

## EMPLOYER DIDN'T USE DUE DILIGENCE (17 cases)

### **BC: Due Diligence Is About Preventing Incidents Not Responding to**

## **Them**

**What Happened:** OHS inspector cites sawmill for high-risk stacking violation after lumber stack collapses. Employer appeals, citing the \$225,000 it spent in voluntarily shutting down for 1.5 days to level the yard after the incident to ensure it wouldn't happen again.

**Ruling:** WCAT upholds the violation, noting that due diligence is about preventing, not responding to incidents but cuts AMP by 20% in recognition of employer's 'post-accident compliance efforts.'

*A1900659 (Re)*, 2020 CanLII 46855 (BC WCAT), March 30, 2020

## **Alberta: Showing Due Diligence on Some Charges Doesn't Prove Due Diligence on Others**

**What Happened:** A tire repair worker ordered the driver of a semi-truck with a flat tire to inch his vehicle forward on the platform, not realizing that another worker was underneath jacking the front wheels. The court found due diligence on 4 OHS violations but found the shop owner guilty on the fifth charge, failure to ensure the isolation of hazardous energy during servicing.

**Ruling:** The Alberta high court rejected the owner's claim that the verdict was inconsistent and upheld the conviction, noting that it's possible to show due diligence on some charges but not others.

*R v. Kal Tire*, 2020 ABCA 200 (CanLII), May 13, 2020

## **BC: Prime Contractor OHS Program Doesn't Provide for Adequate Oversight of Contractors**

**What Happened:** Natural gas company acting as prime contractor on remediation site fined after bucket of contractor's excavator machine smacks a worker and pins him to the side of a metal tank.

**Ruling:** WCAT finds no due diligence. Although the employer had an OHS program, it lacked adequate procedures when contracting a company to act as a site supervisor and safety coordinator, and didn't provide for adequate monitoring of the contractor's safety coordination activities.

*A1607091 (Re)*, 2020 CanLII 46897 (BC WCAT), March 27, 2020

## **BC: Bad Luck and Good Intentions Don't Amount to Due Diligence**

**What Happened:** Pulp and paper mill socked with \$199,000 AMP after OHS inspectors find dangerous accumulations of combustible dust and energized equipment not guarded in accordance with CSA requirements.

**Ruling:** In a close case, BC WCAT finds that employer's due diligence efforts came up just short. Although the dust buildups were the unfortunate result of bad weather and bad luck, they should have been controlled; and even though the employer was diligently modernizing its machine guards, it had inadequate measures in place to ensure safety during the transition interim.

*A1801517 (Re)*, 2020 CanLII 47027 (BC WCAT), March 26, 2020

## **Qu bec: You Can't Have Due Diligence When Even Supervisors Break Safety Rules**

**What Happened:** A CNESST inspector issued a stop work order after observing workers on an arena roof over 3-metres-high without a guardrail or safety harnesses. There was no real risk of falling and workers did wear harnesses when circulating on the front edge of the roof, the employer claimed.

**Ruling:** The court found the employer guilty of a fall protection violation. The fact that one of the persons on the roof without fall protection was the foreman was a pretty good indication that safety training and due diligence were lacking.

*CNESST c. Construction G recto inc.*, 2020 QCCQ 74 (CanLII), January 15, 2020

## **Nova Scotia: Contactor Can't Blame Crew's Human Error for Blasting Violation**

**What Happened:** Fly rock from blasting operations hit a truck parked in what was supposed to be the safe zone. Two nearby workers were also in the zone but didn't get hit. The employer was charged with failing to ensure that all roads to the blast area were sufficiently barricaded or guarded. The employer claimed the zones were guarded but blamed the crew for locating the safe zone in the wrong spot.

**Ruling:** The Labour Relations Board nixed the due diligence defence and upheld the \$2,000 AMP. Although the crew was confused about where to locate the safe zone, the employer was responsible for ensuring they knew how to properly guard the road and couldn't blame the violation on human error.

*Dexter Construction Company Limited (Re)*, 2020 NSLB 42 (CanLII), May 28, 2020

## **Qu bec: OHS Program without Penalties for Violations Not Enough to Show Due Diligence**

**What Happened:** CNESST inspectors noticed a worker on a flat roof 3.86 metres above ground without a guardrail not wearing a safety harness. The prime contractor acknowledged the violation but blamed the worker for acting without its knowledge and consent.

**Ruling:** The court found no due diligence even though the worker was experienced, trained and signed an agreement to follow the prime contractor's prevention program because the program didn't provide for penalties for non-compliance.

*CNESST c. 9230-6505 Qu bec inc.*, 2020 QCCQ 793 (CanLII), February 17, 2020

## **Qu bec: Victim's Careless Is No Excuse, Especially When Employer Is Aware of It**

**What Happened:** Two window cleaning workers were electrocuted when the water pole they're using to clean touched an electric wire. The employer claimed due diligence and blamed the workers' improper use of the pole for the incident.

**Ruling:** The court rejected the due diligence defence, noting that the employer

knew that one of the victims had a history of carelessness and improperly using the pole and that this would be especially dangerous when washing windows near energized power lines.

*DAG Window Washing Inc. c. CNESST*, 2020 QCCS 1059 (CanLII), March 9, 2020

### **Qu bec: No Due Diligence to Prevent Chemical Burns**

**What Happened:** Five contract workers suffer burns while removing insulation from a chemical tank whose external surfaces contain residues of a caustic soda solution. The chemical company where the work was performed is charged with exposing the workers to the hazard.

**Ruling:** The court finds no due diligence, ruling that it was foreseeable that caustic soda residues would build up as a result of the chemical processes performed inside the tank and imposing the minimum fine of \$16,793.

*CNESST c. Kronos Canada inc.*, 2020 QCCQ 3688 (CanLII), July 18, 2020

### **Qu bec: Contractor Can't Blame Shuttering Panel Collapse on Foreman's Carelessness**

**What Happened:** After hearing a crash, workers performing construction formwork in a 10-storey building find their foreman under the metal assembly of a shuttering panel that was supposed to have been being held in place by a wooden support. The contractor denies any wrongdoing and claims that the foreman caused the support to collapse by climbing on the shuttering panel.

**Ruling:** The evidence showed that the wooden support was inadequate and posed a danger of collapsing, the court rules; and the due diligence claim fails because there was no evidence that the foreman was on the panel or engaging in any other act of carelessness; and even if there was, the contractor should have foreseen the possibility of worker carelessness.

*CNESST c. 9090-5092 Qu bec inc.*, 2020 QCCQ 2542 (CanLII), July 7, 2020

### **Qu bec: Prime Contractor with Extensive Control Must Exercise Closer Supervision**

**What Happened:** Hydro-Qu bec is charged as a prime contractor with an OHS violation after a worker at a large power plant construction project it's overseeing is killed while operating a hydraulic shovel. HQ claims it exercised proper oversight of the project and provided extensive safety specifications to all contractors, including the one that employed the victim and cites a leading Qu bec Court of Appeal case (the SEBJ case) finding it unrealistic to require a project manager to 'monitor on site, permanently, and step by step, the conduct and actions of all workers.'

**Ruling:** The court rejects the defence. HQ played a more direct, active and hands-on role than the project manager in the SEBJ case.

*Hydro-Quebec c. CNESST*, 2020 QCCS 2760 (CanLII), August 7, 2020

## **BC: Employer Didn't Do Enough to Prevent Workers from Defeating Safety Mechanism**

**What Happened:** Concrete plant hit with \$59,818 AMP for lockout violations after a worker is pinned between 2 pieces of energized machinery. The employer claims that workers regularly disarmed the electronic safety gates and that the incident was caused by operator error.

**Ruling:** WCAT nixes the due diligence defence, noting that the employer was aware that workers were going around the gates and didn't do enough to stop it. Simply warning the victim not to use the machine at issue on the day of the incident wasn't adequate supervision, it added.

*A1902764 (Re), 2020 CanLII 48060 (BC WCAT), June 24, 2020*

## **BC: Contractor With History of Fall Protection Violations Doesn't Do Enough to Avoid Another**

**What Happened:** OHS inspector spots worker on scaffolding of residential construction site without the required fall protection and fines employer \$10,000. Employer claims it didn't realize the scaffolding was over 10 feet in elevation.

**Ruling:** WCAT finds no due diligence, citing employer's failure to measure the height of the scaffolding and extensive history of fall protection violations.

*A1901614 (Re), 2020 CanLII 48026 (BC WCAT), June 4, 2020*

## **BC: Site Safety Programs Don't Prove Due Diligence When Contractors Don't Follow Them**

**What Happened:** The multi-employer natural gas site inspection got off to a rocky start when the inspector was told that not all contractors participated in site safety meetings. The inspector proceeded to observe other OHS violations like lack of machine guards and failure to clear dangerously overhanging trees.

**Ruling:** WCAT upholds AMP of \$13,277 against the prime contractor for failing to maintain a system to ensure OHS compliance at the site. There was a safety program and safety manual, but the prime contractor didn't carry out inspections or other safety measures to ensure contractors were following the rules.

*A1701571 (Re), 2020 CanLII 47054 (BC WCAT), March 30, 2020*

## **BC: Employer Doesn't Take Steps to Correct Combustible Dust Problems**

**What Happened:** After being alerted by the fire department, inspectors found problems with a boat-building facility's flammable liquids storage and dust collection systems. Upon returning a few months later, they found the problems still hadn't been corrected.

**Ruling:** WCAT upheld the \$22,739 AMP after finding 'scant evidence' of any measures the employer took to eliminate or control the risk of ignition or explosion due to combustible dust.

*A1803536 (Re), 2020 CanLII 47067 (BC WCAT), March 10, 2020*

## **BC: Employer's Reliance on Expert Doesn't Count When Expert Works for that Employer**

**What Happened:** WorkSafeBC imposed a \$310,339 AMP on a drilling contractor for failing to control silica dust hazards at a large hydro dam construction project. The employer claimed due diligence, noting that it had gotten an engineering consultant to create a site-specific ventilation plan for the tunnel at issue.

**Ruling:** WCAT was less than impressed, especially since the person who put together the plan in this case wasn't a professional Industrial Hygienist but one of the employer's own workers. Reliance on a third party expert isn't a defence when that 'expert' works for the defendant.

*A1803433 (Re), 2020 CanLII 46479 (BC WCAT), February 11, 2020*

## **BC: No Due Diligence for Employer that Violates Its Own Safety Policies**

**What Happened:** A food services supply firm was hit with a \$34,223 AMP for lockout violations after a temporary worker seriously injured her arm while trying to clean a moving conveyor.

**Ruling:** WCAT finds no due diligence. The company's OHS policies banned servicing conveyors until the motor was turned off and required that the work be done by trained personnel. But the policies weren't followed. The conveyor was still running and the cleaning was assigned to a totally inexperienced and largely untrained temp.

*A1901257 (Re), 2020 CanLII 46286 (BC WCAT), January 27, 2020*