The 8 Most Important OHS Compliance Cases of 2019

1. Ontario High Court Casts New Doubt on Construction Site Liability Rules

As in other jurisdictions, OHS laws in Ontario allow owners of sites in which construction work is done by multiple employers to assign principal responsibility for ensuring the work is done safely and in compliance with OHS laws to a "constructor." In what may be 2019's biggest case, the Ontario Court of Appeal cast doubt on what we thought we understood about constructor rules by finding that the owner of a municipal construction project may also be charged as an "employer," even though it designated a third-party contractor to act as constructor for the site. The key question for the lower court: Did the owner exercise control over the work' [*Ontario (Labour) v. Sudbury (City),* 2019 ONCA 854, October 28, 2019].

2. Court Finds No Discrimination in Nixing Medical Cannabis User for

Safety-Sensitive Job

The clash between the disability rights of legal cannabis users and the employer's need to ensure workplace safety was the focus of this Newfoundland case involving an employer's decision to revoke a job offer to a construction worker after he disclosed that he used medical cannabis each night after work to treat his Crohn's disease. The arbitrator tossed the discrimination grievance, reasoning that while the worker was entitled to reasonable accommodations, letting him do a safety-sensitive job while he still had THC in his system would be undue hardship. The union appealed but to no avail [*IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*, 2019 NLSC 48 (CanLII), Feb. 22, 2019].

3. Arbitrator Says Workplace Violence Investigation by Company Official Isn't 'Impartial'

In one of the first cases testing cutting edge new federal OHS rules requiring workplace violence complaints to be investigated by an "impartial" person, an arbitrator sided with the union in ruling that a Canada Post manager failed the test. In theory, managers who do internal investigations may be impartial; but the new rules say that the investigator must "be seen by the parties to be impartial." And since the union made it known that it didn't trust the manager's impartiality, the investigation didn't satisfy the requirements of the new rules [*Canada Post Corporation v. Canadian Union of Postal Workers*, 2019 OHSTC 5 (CanLII), Feb. 15, 2019].

4. BC Hits Hospital with Record

$650K Penalty for Workplace Violence Violation

What makes this case so stunning isn't just the size of the Administrative Monetary Penalty but the fact that it was for workplace violence, a hazard that doesn't typically generate heavy fine volume. In addition to the fact that health care is a high-risk industry, the workplace violence hazards at this Port Coquitlam hospital were particularly high given that patients were individuals charged with crimes but judged not mentally fit to stand trial and 2 attacks had already taken place.

5. Alberta Court Declines to Apply *Precision Drilling* 'Lack of Particulars' Defence

In a landmark August 2018 called *R v Precision Drilling*, the Alberta Court of Appeal dismissed an OHS case because the prosecution didn't clearly allege what violation the employer committed. Just because somebody gets killed doesn't automatically mean a violation occurred, the Court explained. A roofer charged with OHS violations tried the same argument that worked in *Precision* but this time the strategy failed. Unlike the *Precision* case which involved a complex machine accident, the details of this case were straightforward and the particulars the prosecution provided were clear enough to enable the roofer to understand the offences it was charged with, the court concluded [*R v Spar Roofing & Metal Supplies Limited O/A Spar Marathon Roofing Supplies*, 2019 ABPC 272 (CanLII), November 1, 2019].

6. Saskatchewan Prosecutor Didn't Wait Too Long to Bring Its OHS Case

One of the most hotly litigated issues in recent times involves the so-called *Jordan* rule, which gives the Crown has 18 months to start an OHS prosecution; delays longer than that are presumed unreasonable and grounds for dismissal. Key question: When does the clock start' A roofing contractor claimed it begins when the OHS inspector issues the citation, 21 months in this case; the Crown claimed it begins only after OHS charges are laid, in this case 7 months before. The Sask. court sided with the prosecution. The OHS inspector's actions start the clock if they're *required* by OHS laws ("shall" do); but the inspector's actions in this case were discretionary ("may" do), the court reasoned. So, there were still 11 months on the *Jordan* clock when the prosecution began [*Pro-image Roofing and Gutters Ltd. v R*, 2019 SKQB 267 (CanLII), October 7, 2019].

7. Fear of Inmate Attack ≠ Grounds for *Manager* to Refuse Work, Says Federal Board

A federal OHS Tribunal rejected the work refusal of a Corrections Manager who claimed that the employer's refusal to let him carry pepper spray put him in danger of attack. While acknowledging that attack by a violent inmate is a real possibility in a correctional institute, unlike prison guards, CMs aren't at *imminent* risk on a daily basis [*Correctional Service of Canada v. Aldred*, 2019 OHSTC 11 (CanLII), May 13, 2019].

8. Ontario High Court Rejects Employee Right to Sue for Harassment Tort

Employers heaved a huge sigh of relief in March when the Ontario Court of Appeal reversed a $966 million lower court allowing employees who are harassed at work to sue the company for money damages. There is no such thing as a harassment tort, the Court reasoned in dismissing the lawsuit of an RCMP employee against management for alleged bullying and harassing at work [*Merrifield v. Canada (Attorney General),* 2019 ONCA 205, March 15, 2019].

'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 2019