The 8 Most Important OHS Compliance Cases of 2020

Key court cases tested the enforceability of COVID-19 emergency orders and their interface with OHS laws.

1. Alberta High Court Says Due Diligence for One Offence Doesn't Bar Liability for Another

One of Alberta's most significant OHS case in recent years began when 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 his co-worker was underneath jacking up the front wheels. The Crown claimed the shop owner didn't take 'reasonably practicable' measures to protect the victim but the lower court found due diligence and tossed 4 of the 5 charges. Both workers were experienced and properly trained and the incident was the result of a series of errors, miscommunications and terrible bad luck that were too bizarre to reasonably foresee, the court reasoned. The owner appealed, saying the one conviction for failure to ensure the isolation of hazardous energy during servicing (in this case, ensuring the truck was shut down and immobilized) was inconsistent with the rest of the verdict and should be reversed. But the Alberta Court of Appeal said the verdicts weren't inconsistent and that it's possible to exercise due diligence as to one violation but not another involving the same incident [R v Kal Tire, 2020 ABCA 200 (CanLII), May 13, 2020].

2. Newfoundland Court Draws a New Line on Testing Workers for Marijuana

Newfoundland has been the site of some of the country's most significant drug testing cases, including this blockbuster question whether an employer may refuse to hire a safety-sensitive construction worker who admitted to legally vaping medical marijuana containing high THC levels after work to manage pain related to Crohn's disease. The arbitrator said the worker was entitled to accommodations, but that letting him do a safety-sensitive job would be undue hardship, especially since there's no test capable of detecting current impairment. One appeal later, the Newfound Court of Appeal reversed the decision. The basic issue was who should the lack of a conclusive test denoting **current** marijuana impairment favour' If the presumption was that in case of doubt, don't hire, all an employer would have to show is that the worker who

tests positive is safety-sensitive. The standard should be higher, the court reasoned. Maybe there were other ways to determine the worker's fitness for duty, like a daily pre-shift functional assessment. At the end of the day, the burden should be on the employer to prove that it considered these alternatives and explain why they were rejected. So, the court sent the case back down to the arbitrator to evaluate whether the employer had done that in this case [*IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20 (CanLII), June 4, 2020].

3. Ontario Court Orders Nursing Homes to Provide N95 Masks to Nurses

Not surprisingly, some of the most important cases of 2020 involved the workplace safety measures mandated by COVID emergency orders and public health guidelines, including the case of nursing facilities that didn't provide workers required N95 particulate filtering respirator masks due to the worldwide shortage in the midst of an outbreak. The nurses union went directly to the Ontario Superior Court of Justice seeking an injunction ordering the facility owners to comply with the mask order and OHS PPE obligations. And that's just what the court did. The employers' suggestion that in seeking the required masks, the nurses were putting their personal interests ahead of their patients and society at large 'sorely misses the mark,' said the court. The lives of both nurses and patients were in danger and that outweighed any inconveniences the facilities would suffer as a result of the injunction [*Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467 (CanLII), April 23, 2020].

4. Violating a COVID Workplace Safety Measure Is Also an OHS Violation

An important case from Qu□bec officially confirms that employer noncompliance with workplace health measures mandated by government emergency decrees constitutes a violation of the OHS laws. The case began when a CNESST inspector discovered multiple COVID violations at a construction site, including failure to clean and disinfect toilets, and charged the employer with violating Article 51(5) of the *OHS Act*, which requires employers to 'use methods and techniques intended for the identification, control and elimination of risks to the safety or health of the worker.' The court agreed that the employer didn't comply with the COVID orders and thus also committed an OHS violation [*CNESST c. 8653631 Canada inc.*, 2020 QCCQ 6684 (CanLII), November 12, 2020].

5. Nova Scotia Upholds Health Facility Moonlighting Ban as Valid COVID Safety Measure

After the pandemic broke out, an adult treatment and rehab provider banned employees from working for other employers. Just complete your shift and go straight home, stated the directive. The provider offered to ensure union workers guaranteed shifts to make up for the income losses. When the union didn't object, the provider thought it had a deal. But a week later, the union filed a grievance. The Nova Scotia arbitrator found the provider violated the collective agreement but still tossed the grievance. Normally, employers can't tell employees what to do in their spare time; but during a pandemic, the directive was a valid safety measure. Even so, the provider didn't consult with the union the way the collective agreement required. But at the same time, the

union's conduct gave the provider a reasonable belief that it accepted the directive. Consequently, it was 'estopped,' i.e., banned in the interest of fairness from grieving the directive [*CUPE, Local 3513 v Breton Ability Centre,* 2020 CanLII 93886 (NS LA), December 1, 2020].

6. Ontario Court Orders Company to Exempt Worker from COVID Self-Isolation Policy

A machine apprentice who worked in Sault Ste. Marie and lived just over the border in Michigan claimed that company policy requiring workers returning from travel outside Canada to self-isolate for 14 days was unfair and unnecessarily forced him to be away from his 2 young kids. While the policy itself was reasonable, the arbitrator said the company should make accommodations in applying it. Exempting the apprentice from the self-isolation requirement was reasonable given that he lived in an area with much lower COVID-19 rates than other parts of the US and the company could take steps to minimize the risk of infection, such as assign him to shifts with fewer workers [*United Steelworkers Local 2251 v Algoma Steel Inc.,* 2020 CanLII 48250 (ON LA), July 20, 2020].

7. Employers Can't Refuse to Investigate Violence Complaints They Think Lack Merit

A food inspector claimed his supervisor threatened him with violence but management decided not to investigate because it was 'plain and obvious' that no violence had occurred. A federal OHS inspector cited the employer for not appointing a 'competent person' to investigate to investigate a workplace violence complaint, as required by the COHS Regs. The employer contended that the duty to investigate implied there'd be some kind of preliminary screening mechanism to avoid the need to investigate complaints that are plainly and obviously baseless. But the federal OHS tribunal disagreed, concluding that it's up to the 'competent person' and not the employer to review violence claims, the tribunal concluded [*Canadian Food Inspection Agency v. Public Service Alliance of Canada*, Case No. 2017-36, April 16, 2020].

8. Worker Can Continue Refusal Even After Safety Committee Finds 'No Danger'

- 6: Shipyard workers refuse work due to silica exposure and the employer takes measures to address their concerns;
- 8: The workers are dissatisfied with the safety measures and refuse again;
- 12: After further measures are taken, all but one worker returns to work;
- 13: An OHS officer is called in to investigate;
- 14: The workplace JHSC unanimously finds the corrective measures satisfactory and that the refusal should end but the worker continues to refuse;
- 15: The OHS officer concludes that the unanimous JHSC vote is decisive and declines the worker's request to investigate again.

The question: Was the worker entitled to another OHS officer investigation' Yes, concluded the Nova Scotia Labour Board. Although the JHSC decision is an important part of the process, a unanimous finding of no danger doesn't end the refusal or strip the worker of her rights to ask an OHS investigator to intervene [*Cummings v Irving Shipbuilding Inc*., 2020 NSLB 13 (CanLII), Jan. 30, 2020].