The Top 10 OHS Compliance Cases as of June 2024 & Their Impact on You

1. Nova Scotia Supervisor Not Guilty of C-45 Criminal Negligence for Young Worker's Fatal Fall

In a significant ruling, a Nova Scotia court ruled that a supervisor was not guilty of criminal negligence resulting in a worker's death under the law still commonly called Bill C-45. Adopted in 2005, the law amends the Canadian *Criminal Code* to provide that persons who direct work and fail to take reasonable steps to prevent bodily harm to those performing it are criminally negligent to the extent they show "wanton or reckless disregard" for the lives or safety of others.

The case began when a young worker installing blueskin tape on a tower fell 18 feet to his death. The foreman of the victim's crew was charged with criminal negligence. After hearing from over a dozen witnesses, the court concluded that the Crown didn't meet its burden of proving beyond a reasonable doubt that the foreman broke any safety laws; and even if he did, there was no proof that he did so with wanton or reckless disregard of the victim's safety. **Result:** A verdict of not guilty [*R. v. Gooch*, 2024 NSSC 4 (CanLII), January 4, 2024].

Takeaway & Impact on You

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Potential liability for criminal negligence extends not just to corporate officers and directors but also to managers and supervisors that control the work. Coincidently, the *Gooch* acquittal comes just 7 months after another Nova Scotia supervisor was found guilty of the same criminal negligence offence in connection with a worker's death [*His Majesty the King v Jason Andrew King*, 2023 NBKB 084, June 5, 2023]. The key point for OHS coordinators is to recognize the need to take steps to manage supervisor liability risks as well as criminal liability risks under C-45 to protect not just supervisory staff but the entire company.

2. B.C. Shipyard Fined Over $710,000 for Worker's Death Inside a Confined Space

Once a relative rarity, 6-figure fines for OHS violations have become commonplace, not just in Ontario but across Canada. As of June 1, there have been at least 25 such fines reported. The biggest fine reported involved a worker who died of carbon monoxide poisoning while performing arc gouging work inside a confined space on a ship. WorkSafeBC inspectors responding to the incident hit the shipyard owner/employer with over $700,000 worth of administrative monetary penalties for multiple deficiencies in its confined space entry program, including high-risk violations for failure to ensure that: i. a proper hazard assessment was done inside the space; ii. a standby worker was stationed outside the space while a worker was inside; and iii. a qualified person carried out air testing and kept adequate test records [*Victoria Shipyards Co. Ltd./Seaspan*, February 14, 2024].

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Work becomes **150 times more dangerous when it's carried out inside a confined space.** There are roughly 100 confined spaces-related fatalities in Canada each year, more than half of them to would-be rescuers. Compliance with OHS requirements would have prevented almost all of these deaths. In addition to endangering lives, inadequate confined safety measures expose your company to the risks of stop work orders, massive fines, and even criminal liability if the violation is the result of 'wanton recklessness.' Using the OHS Insider's Confined Spaces Compliance Game Plan can help you prevent confined space fatalities and violations.

3. Alberta OHS Board Upholds Stop Work Order for Asbestos Violation

In addition to dishing out fines, OHS inspectors can issue stop work orders in response to safety violations that pose an immediate danger to workers. This is a particularly onerous penalty since it forces companies to shut down or partially shut down for the period until the OHS violation is corrected.

In April, Alberta OHS inspectors issued a stop work order at a hotel after observing removal of materials that could contain asbestos (ACMs). As ordered, the employer sent the material for testing to an independent lab, which reported that 1 of the samples contained 1-5% Chrysotile asbestos; the other 6 samples were negative. The employer then asked the Alberta OHS Appeals Board to lift the stop work order contending that asbestos wasn't an issue for this type of work and that no drywall work was being done. The Board refused, reasoning that even a small presence of asbestos is enough to justify the

order and that while it would no doubt cause inconvenience to the company, the order wouldn't inflict irreparable financial harm [*Westgate Property Management Ltd. v Occupational Health and Safety*, 2024 ABOHSAB 5 (CanLII), April 5, 2024].

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According to workers' comp data, asbestos exposure is the nation's leading cause of workplace death, with mesothelioma, asbestosis, and other asbestos-related diseases accounting for more than 1 of every 3 fatality claims accepted by Canadian workers' comp boards since 1996. Despite not having been in use since 1990, ACMs are present in workplaces across the country—within walls, ceilings, tiles, insulation, and even car parts. You can use the OHS Insider Compliance Game Plan to implement a legally sound Asbestos Exposure Control Plan at your workplace.

4. Ontario Tribunal Draws a Line on Employer's Duty to Investigate Workplace Harassment

A significant case took place in Ontario involving a fitness worker who complained to her employer about being sexually harassed by a co-worker. The problem is that she didn't do so until more than 6 months after being terminated. Consequently, the employer contended it had no obligation to investigate the complaint. The Ontario Human Rights Tribunal agreed and dismissed the harassment complaint. Failure to investigate a harassment complaint is normally a violation of a worker's right to be free from discrimination in the workplace, the Tribunal reasoned; but that's not the case when the worker is

no longer in that workplace [*Rougoor v. Goodlife Fitness Centres Inc.*, 2024 HRTO 312 (CanLII), February 28, 2024].

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Workplace violence and harassment have become an increasingly common basis for OHS enforcement action and litigation. Failure to properly investigate violence and harassment complaints is a key issue in many of these cases. The *Rougoor* case is among the first to address how this duty applies when the person who complains no longer works for the company. Even so, it's crucial for employers to implement an effective workplace violence and harassment compliance game plan that provides for prompt, thorough, and fair investigation of worker complaints.

5. Worker's Failure to Use Required Fall Protection Doesn't Excuse Employer's OHS Violation

Tying in power lines in a bucket truck 15 feet above the ground was just another day on the job for the 2 highly experienced Saskatchewan Power Corporation (SPC) journeymen workers that lost their lives on Oct. 8, 2020. At least it should have been. Regrettably, neither of them had their safety belt lanyards anchored to the "D" ring when the bucket tipped 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. The Sask. court rejected 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 [*R. v. Saskatchewan Power Corporation*, 2024 SKPC 12 (CanLII), April 30, 2024].

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OHS laws require employers to take safety measures to protect workers from reasonably foreseeable hazards. The *SPC* case reflects the consensus view among courts across Canada that the possibility of workers' taking short cuts and evading safety rules is a reasonably foreseeable hazard. That makes it imperative to establish, implement and strictly enforce a legally sound Fall Protection Compliance Game Plan at your site.

6. Ignorance of the Law Is No Excuse for Employer's OHS Violation

The dollars involved belied the significance of the Nova Scotia case that began when an inspector fined the owner of a boatyard $1,000 for violating electrical safety requirements contained in the OHS regulations. Give me a break, the owner argued, I'm not an electrician and I 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. But the argument didn't work. Ignorance of the law isn't a valid defence against an administrative monetary penalty, reasoned the Nova Scotia Labour Board. And since the owner didn't demonstrate that it exercised due diligence to comply, the penalties stood [*Yarmouth Boat Works Ltd. (Re)*, 2024 NSLB 13 (CanLII),

February 27, 2024].

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The old maxim that ignorance of the law is no excuse isn't quite true, at least in the OHS enforcement context. There's actually a form of the due diligence defence that applies when the defendant proves by a preponderance of evidence that they reasonably believed in a set of facts that turned out to be wrong, but had they been right would have made the charged act or omission innocent. Go to the OHS Insider site to find out more about the Reasonable Mistake of Fact Due Diligence Defence.

7. Giving Workers General Training Manuals Isn't Due Diligence, Says Alberta Court

As usual, there were several cases involving an employer's attempt to make out the due diligence defence for an OHS violation. One of the more notable cases was the prosecution following the death of a worker who was run over by a Ford F-550 truck while performing a visual inspection of a catch basin. Prosecutors charged the employer that owned the truck and supervisor who drove it with multiple OHS violations.

Both defendants denied the charges and blamed 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. The Alberta court convicted 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 risk of being caught between a moving part of powered

mobile equipment and another object), and the supervisor on 3, while rejecting the defendants' respective due diligence defences. 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 [*R v Volker Stevin Contracting Ltd*., 2024 ABCJ 85 (CanLII), April 11, 2024].

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For OHS coordinators, monitoring court cases is imperative because it sheds light on what steps a company is reasonably expected to implement to prove "due diligence" and thus avoid liability for a safety violation. Using the OHS Insider Due Diligence Scorecard is one of the best ways to keep track of the cases and draw the appropriate practical lessons for your own OHS program. The other moral of the *Stevin Contracting* case is the need to implement an effective Powered Mobile Equipment Compliance Gameplan to prevent vehicle incidents and injuries at your workplace.

8. Reduced Productivity Not Just Cause to Fire Worker Returning from Injury

After missing over a year of employment with a work-related back injury, a warehouse worker attempted a gradual return to work. Nearly 6 months and several accommodations into the effort, the company concluded that the worker wasn't capable of maintaining an adequate work rate and terminated his employment due to "frustration of contract." The union claimed

the employer failed to make reasonable accommodations. The BC arbitrator sided with the union. While the injury did slow the worker's production, the employer didn't keep adequate records documenting the worker's alleged failure to meet the company's 800 to 1,000 cases per shift processed standard. Moreover, the company was inconsistent in enforcing the standard, and its concerns about the risk of reinjury weren't medically supported. So, the arbitrator reinstated the worker to his pre-injury position [*Martin-brower of Canada Co. v Teamsters, Local Union 31*, 2024 CanLII 15442 (BC LA), February 14, 2024].

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Vocational rehabilitation and ensuring injured workers' swift and safe return to work is a legal requirement. Workers comp laws of most jurisdictions (all but Alberta, Saskatchewan, Northwest Territories, and Nunavut) require employers to offer injured workers suitable employment when they're medically capable of performing essential job functions. Return to Work is a tricky process with multiple layers, so it's imperative to implement a RTW Game Plan to ensure compliance and achieve optimal outcomes.

9. & 10. Arbitrators Split on Post-Incident/For Cause Drug Testing

Drug and alcohol testing is essential to maintaining a sober workplace where all workers are fit for duty. The 2024 cases shed light on a crucial aspect of the issue, namely for cause testing of workers in response to safety incidents or other indications of drug or alcohol use. In the first case, a company went too far in carrying out post-incident testing. It began when a power line technician suffered serious leg

injuries while skidding wooden poles. The employer sent supervisors to the hospital to escort the technician to a test site where he'd have to climb a flight of stairs. The technician and his family protested and the company appeared to back off. But it later sent its operations supervisor to the victim's home to warn him of the consequences of refusing a drug test, carrying a pamphlet clearly explaining the potential consequences of refusing a drug test. The union filed a grievance contesting the company's right to test, claiming it invaded the technician's privacy. The Alberta arbitrator basically agreed and awarded the technician $7,500 in damages [*ATCO Electric Ltd. (ATCO) v Canadian Energy Workers Association (CEWA*), 2024 CanLII 37038 (AB GAA), April 26, 2024].

A month later, a federal arbitrator reached a different decision in another case involving an Air Canada flight attendant who was asked to submit to reasonable cause hair follicle drug testing after crew members reported that he was acting strange and had made disturbing remarks about hijacking a plane. After begrudgingly giving their consent to collecting the sample and sending it to the lab, the flight attendant and union sued to prevent the company from relying on the test results. The federal arbitrator denied the cease-and-desist order, finding that the company had legitimate safety concerns about the flight attendant and that follicle testing was the least intrusive mode available in the circumstances. The union could file a grievance later once the test results came back and the company decided what, if any, discipline to impose [*Air Canada v CUPE, Air Canada Component,* 2024 CanLII 46083 (CA LA), May 21, 2024].

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The *Atco Electric* and *Air Canada* cases illustrate the importance of having and properly implementing a legally sound drug and alcohol testing policy setting out the bases for testing, including protocols and procedures for post-incident and cause testing.