The Top 10 OHS Compliance Cases of 2022 (So Far) & Their Impact on You

The court cases most likely to directly affect your OHS program and policies.

Key OHS cases from the first 6 months of 2022 addressed issues ranging from the authority of OHS inspectors to whether workers comp bars lawsuits by foreign workers who suffer job-related injuries in Canada. Of course, there were also key rulings on perennial OHS issues like drug testing, due diligence and work refusals. Here's our Top 10 list of OHS cases for the period.

1. Court Nixes Due Diligence Defence, Upholds $560K Fine against Cement Company

A cement worker was killed while setting up a tow of a powered out truck when the loader rolled backward and crushed him. The cement manufacturer was convicted of 2 OHS violations'failure to ensure a safe work procedure and proper supervision'but insisted it wasn't guilty and that the $560,000 fine was too high. The Saskatchewan court rejected the appeal. The employer didn't show due diligence as to the safe work procedure because the procedure banning the operator from leaving the loader while setting up a tow was unwritten and there was no evidence showing it was adequately communicated to the victim; nor was due diligence shown with regard to supervision because the employer had initially assigned a safety supervisor to the site but then reassigned him leaving the site unsupervised on the day the incident occurred [*R v Langenburg Redi-Mix Ltd.*, 2022 SKQB 40 (CanLII), February 8, 2022].

> **Takeaway:** The *Langenburg Redi-Mix* case was one of a number of OHS prosecutions decided on a due diligence defence during the first half of 2022. See the OHSI Semi-Annual Due Diligence Scorecard for an analysis of recent due diligence trends.

2.No Due Diligence to Prevent Injury to Overhead

Crane Operator

Another important due diligence case involved an employer who was charged with 2 OHS violations after a 22-year-old assembler operating an overhead crane suffered serious head and shoulder injuries in a lifting incident. The Sask. court found the employer not guilty of the first charge, failing to ensure that a crane with a load rating greater than or equal to 5 tonnes is operated by a competent operator, because the operator had the education and training credentials required to be considered 'competent.' But the second charge, failure to provide and require workers to wear industrial protective headwear went the Crown's way. The employer didn't furnish the victim any head protection even though she was at risk of head injury. And the employer's contention that its strict overhead lifting safety policies proved due diligence failed because the policies addressed head injuries from falling loads but not the shifting of the crane's beam, which caused the incident [*R v Brandt Industries Canada Ltd*., 2022 SKPC 4 (CanLII), January 31, 2022].

> **Takeaway:** Crane incidents remain a leading cause of serious work injuries and significant OHS fines. You can use the OHSI's compliance game plan to avoid costly crane, hoist and sling injuries at your workplaces and sites.

3. OHS Inspector's Estimate Not Enough to Prove Excavation Violation

OHS laws give government inspectors a lot of authority and leeway to do their job. But there are also limits. A CNESST inspector learned this lesson the hard way after citing a sewer repair contractor for not shoring up the walls of an excavation of more than 1.2 metres without taking precise measurements. The contractor argued that the trench was less than 1.2 metres and that shoring wasn't required under the part of the OHS regulations exempting excavations with slopes of less than 45 degrees and that don't pose a danger of sliding and brought an expert to testify that the exemption applied. The Court of Qu□bec ruled that the inspector didn't meet CNESST's burden of proving the violation beyond a reasonable doubt and dismissed the charge. The evidence showed that the inspector didn't actually use a measuring instrument and that his determination of the trench's depth was just an estimate. In addition, the expert's testimony proved that the trench was safe without shoring [*CNESST c. Sintra inc.,* 2022 QCCQ 146 (CanLII), January 17, 2022].

> **Takeaway:** OHS inspectors make mistakes all the time. But in appealing a fine or order, the employer bears the burden of proving that the inspector did something wrong. That's why it's critical to have a policy and procedure for responding to inspections and protecting your rights during the inspection process.

4. Texting While Operating Train Isn't Cause to

Terminate When Boss Does It Too

The union admitted that an engineer used his cell phone to text his supervisor while in sole control of a moving locomotive but claimed that termination was disproportional. The federal arbitrator agreed and knocked the penalty down to 30 demerit points. Texting and driving is a serious safety violation, especially for safety-sensitive engineers who 'operate in a system of complex signals and switches where alertness and being free of distractions is of paramount importance.' But the records showed that, on occasion, the supervisor had **also texted him** while he was behind the wheel, suggesting that the practice was not only tolerated and accepted, but actually expected [*Teamsters Canada Rail Conference v Quebec-Gatineau Railways*, 2022 CanLII 30034 (CA SA), April 4, 2022].

> **Takeaway:** Sure, texting on the job can be extremely dangerous. That's why many companies implement cell phone bans in the workplace. However, the *Gatineau Railways* case is a dramatic reminder that texting and driving works both ways and that discipline becomes tricky when supervisors and co-workers enable the behaviour by using cell phones to give instructions or otherwise communicate with safety-sensitive workers while carrying out operations requiring full concentration. This is especially true when the company knows about and condones the practice.

5. Federal Arbitrators Uphold Termination of Railway Workers for Workplace Impairment

A pair of federal cases confirm the principle that being impaired by drugs or alcohol while on the job is a fire-able offence for a safety-sensitive worker. Both cases involved railway workers. In the first, a track operations foreman got fired after a post-incident test came back positive for cocaine. While the foreman had never been disciplined for drug use during his 14-year tenure, being impaired while on duty was just cause to terminate for a first offence, the arbitrator concluded [*Teamsters Canada Rail Conference Maintenance of Way Employees Division v Canadian Pacific Railway Company*, 2022 CanLII 1064 (CA LA), January 3, 2022]; a month later, an arbitrator upheld CN's termination of a train engineer with 55 demerits and 15 years of service after he tested positive for cocaine while on duty. Unlike other cases where engineers got to keep their job due to ambiguity in the test results, the results in this case clearly proved that the engineer was impaired on duty [*Teamsters Canada Rail Conference v Canadian National Railway Company*, 2022 CanLII 5833 (CA LA), February 2, 2022].

> **Takeaway:** While workplace impairment is just cause to terminate a railway or other safety-sensitive worker, employers still must have and properly implement a legally sound drug and alcohol testing policy to provide evidence of impairment.

6. Workers Comp Doesn’t Bar US Workers’ Lawsuit for Injuries Suffered on Canadian Soil

A significant case out of BC tests the limits of the workers comp bar on injured workers’ lawsuits against their employers. The case involved 5 U.S. residents employed by Delta Air Lines who, as required by airline industry regulations, stayed overnight in a local hotel during a layover in Vancouver. Delta paid the hotel bill and arranged for them to be driven back to the airport for their outbound flight the next morning. Their cab got into a traffic accident. They sued Delta for their resulting injuries. Delta claimed the lawsuits were barred by workers comp, but the BC Workers Comp Appeals Tribunal (WCAT) disagreed, finding that the crew members weren’t ‘workers’ under the law. The BC Court of Appeal, the highest in the province, found the WCAT’s interpretation of the workers comp laws to be ‘thoroughly reasoned and defensible’ and tossed Delta’s appeal [*Brown Bros. Motor Lease Canada Ltd. v. Workers’ Compensation Appeal Tribunal*, 2022 BCCA 20 (CanLII), January 20, 2022].

> **Takeaway:** The workers comp bar has come under serious challenge in recent years, particularly in the realm of workplace harassment, with a key ruling coming out of Ontario in 2021 in a case called *Morningstar v. WSIAT*.

7. Ontario Court Lets JHSC Access Company’s Online Workplace Violence Reporting Tool

A collective agreement between Catholic schools and teachers required that incidents of workplace violence in the schools be reported using an Online Reporting Tool (ORT). **The question:** Should members of the JHSC have the right to access the ORT’ The schools said no, noting that the information was private and the collective agreement didn’t provide for such access. However, the Ontario arbitrator agreed with the union that the reference manuals on which the agreement was based did and that these materials were incorporated by reference into the agreement. **Result:** The JHSC and individual members could access information in the ORT, provided that names and other identifying information is redacted [*Ontario English Catholic Teachers’ Association v Ontario Catholic School Trustees’ Association*, 2022 CanLII 24927 (ON LA), April 4, 2022].

> **Takeaway:** OHS laws specify that the workplace JHSC and health and safety representative should play a role in hazard assessment. This case is a fascinating test of how far the JHSC’s right to participate in hazard assessment extends, at least in Ontario.

8. Worker Not Fired BECAUSE He Refused Work but HOW He Refused Work

As usual, there were several significant OHS work refusal cases in the first 6 months of 2022. One of them began when a worker complained about the quality of the indoor air. He was sent home, without pay, and then fired. Retaliation,

right’ Wrong. The OHS investigator concluded that the worker was fired not for refusing work but for his inappropriate behaviour and attitude in bringing the refusal. The Alberta Labour Relations Board upheld the ruling, citing statements from 2 witnesses and other evidence that the worker was insubordinate and unduly ‘aggressive’ with co-workers and superiors [*Bortnik v. Irwin’s Safety and Labour Services Ltd.,* Board File No. OHS2020-18, February 8, 2022].

> **Takeaway:** OHS work refusal cases are often determined by not just the hazard that prompts the refusal but how the refusal process is carried out. Workers must engage the process by furnishing appropriate notification of their refusals and reasons for it; employers must then properly investigate and address the hazard and refusing worker’s concern. Go to the OHSI Work Refusals compliance centre for resources you can use to properly handle work refusals at your site.

9. OK for OHS Inspector to Recommend Rather than Order IAQ Safety Measures

Another important case testing the enforcement powers of OHS officers involved a Nova Scotia OHS inspector who, in response to a worker’s complaint, determined that a leased office building with a long history of air quality complaints did indeed have IAQ hazards. So, he recommended that the employer do an assessment of the HVAC system and implement measures to correct the problems. The union cried foul, claiming that he should have **ordered** remediation measures. True, the OHS law authorizes officers to issue orders but doesn’t say anything about recommendations or warnings, the Nova Scotia labour board acknowledged; but in practice, officers issue recommendations and warnings all the time. And to the extent they’re just exercising their broad enforcement powers, there’s nothing illegal about that. Issuing a recommendation rather than an order was reasonable in this case given that at the time there was no definitive medical evidence linking the health issues workers were experiencing with the IAQ problems [*Nova Scotia Government and General Employees Union v Nova Scotia Health Authority*, 2022 NSLB 25 (CanLII), April 13, 2022].

> **Takeaway:** In addition to upholding the OHS inspector’s authority, the case offers insight on how to comply with OHS indoor air quality requirements.

10. Employer Doesn’t Have to Stop Using Allegedly Privacy-Invasive GPS App

An elevator construction and maintenance firm issued employees a mobile device that, among other things, deploys global positioning satellite (GPS) technology to track their whereabouts during work hours. The union claimed that the app violated employees’ privacy and asked the BC arbitrator to order the firm to disable it until the grievance was resolved. The arbitrator refused. The harms employees would suffer if the GPS app was later found to be privacy-invasive could be repaired, the arbitrator reasoned; but the damage to the firm if the app was found valid would be significantly greater given the importance of the

information and its investment in the devices. However, while allowing the firm to keep using the GPS app, the arbitrator ordered it to notify the union of the information it collected using the app [*Kone Inc. v International Union of Elevator Constructors, Local 82*, 2022 CanLII 1018 (BC LA), January 14, 2022].

> **Takeaway:** New legislation in Ontario (Bill 88) requires employers to implement a written policy disclosing their use of monitoring technology for ensuring workers' safety. Look for other provinces to adopt similar laws. Either way, creating such a policy is advisable as a best practice.

'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 2022*