

# The Top 10 OHS Compliance Cases of the Last Half of 2023 & Their Impact on You



Every year, the courts and legal tribunals of Canada issue a number of crucial decisions that have a direct impact on your OHS program. So, it's important for OHS coordinators to keep up with the new cases that are coming down each day. But that's not an easy thing to do, especially if you're not a lawyer trained in legal research. That's why, in addition to our regular Month In Review, the OHS Insider puts together a list of the most important OHS cases that occurred in the previous 6 months. Here's a briefing on what we believe are the 10 most significant rulings of the entire 2023 year and their practical implications for your own OHS program.

## **1. Company that Hires Constructor Can Be Charged as "Employer" for OHS Violation, Says Top Court**

The Canadian Supreme Court finally issued a landmark ruling with major liability implications for companies that rely on so-called constructor/prime contractor arrangements to guard against liability for OHS violations at projects where companies of multiple employers work. The case arose from the tragic death of a pedestrian struck by a road grader while crossing an intersection at a municipal construction site. Controversially, the Ontario top court ruled that the city

could be charged as an employer for an OHS violation (failing to ensure that a signaler was in place) even though it had hired a constructor to oversee the work. In a split decision, the Supreme Court agreed that a project owner can be liable as an employer even if it's not the constructor in control of the project. **Result:** The city would have to answer the charge and prove that it showed due diligence to comply [[R. v. Greater Sudbury \(City\)](#)], 2023 SCC 28 (CanLII), November 10, 2023].

***Takeaway:** For decades, owners of projects involving multiple employers have relied on [OHS laws](#) allowing for delegation of safety and compliance to the “constructor” (called “prime contractor” in some jurisdictions) in charge of the work. The Greater Sudbury decision throws into question whether owners will still be able to rely on constructor arrangements to limit their OHS liability. Facing the risk of liability as “employers,” companies will have to take even greater care to ensure [they exercise due diligence when entering into constructor/prime contractor arrangements](#).*

## **2. Supervisor Convicted of C-45 Criminal Negligence for Worker's Drowning Death**

The so-called Westray Law, aka, Bill C-45, that took effect nearly 2 decades ago to hold those “in control” of work criminally accountable for egregious indifference to life and safety hasn't generated the stream of criminal prosecutions that many expected. However, there were some important C-45 convictions in 2023. In August, the highest court in Québec upheld a verdict in a fatality case that occurred when a veteran worker driving a heavy container truck down a steep gravelly slope lost control of the vehicle and plunged headlong into a ditch. After a 3-month trial, the employer was found guilty of criminal negligence resulting in a worker's death. The employer appealed to the province's top court, the Court of Appeal ruled that the verdict was reasonable and the

trial was fair [[CFG Construction inc. vs. R.](#), 2023 QCCA 1032 (CanLII), August 11, 2023].

***Takeaway:** OHS violations can rise to the level of criminal negligence when they demonstrate reckless indifference and a “devil may care” approach to health and safety and one or more fatalities occur. To secure a conviction, the Crown must prove its case beyond a reasonable doubt, rather than by a preponderance of the evidence in a standard OHS case. Thus, criminal prosecutions remain relatively rare. However, they do happen and, as OHS coordinator, it’s incumbent on you to protect your company and its officers and directors against risks of [criminal liability under C-45](#).*

### **3. Supervisor Convicted of C-45 Criminal Negligence for Worker’s Drowning Death**

Another C-45 conviction came down earlier in the year. It involved a construction supervisor who now faces life in prison after being found guilty of criminal negligence in the drowning death of a young worker at wastewater treatment plant in 2018. The supervisor decided to conduct a leak test when water leaked into a hole that was 8-feet deep and 3.5 feet wide while a worker was inside cleaning debris. The rubber plug inserted into the pipe while the test was performed came loose and 14,000 litres of water gushed into the hole, trapping the worker who wasn’t even notified that the test was being performed. The New Brunswick court found the supervisor guilty of the C-45 criminal offence (Section 219 of the *Criminal Code*) of engaging in an act or omission causing a person’s death with “wanton or reckless disregard for the lives or safety of other persons” [*His Majesty the King v Jason Andrew King*, 2023 NBKB 084, June 5, 2023].

***Takeaway:** The Internal Responsibility System (IRS) on which Canadian OHS laws are based assigns liability for health and safety to not just employers but all stakeholders, including*

*supervisors. As the King case illustrates, supervisors can also be liable for criminal negligence under C-45. That makes it incumbent on OHS coordinators to [take steps to manage supervisor liability risks](#) to protect not just supervisory staff but the entire company.*

## **4. & 5. Courts Limit Workers Comp Coverage of PTSD**

Workers comp claims for post-traumatic stress disorder (PTSD) and other forms of work-related mental stress are on the rise across Canada. A pair of 2023 cases illustrate the important coverage limits that apply to such claims. One case involved a firefighter that developed PTSD as a result of his job. The question was whether the stress he suffered was due to his work as a firefighter or his getting fired from the job. The Ontario WSIA Tribunal ruled that both were contributing factors. So, it approved his claim for health benefits but denied him future loss of earnings since those losses were a result of being terminated, not from being diagnosed with PTSD. The employer appealed, contending that getting fired was the sole reason for the firefighter's diagnosis. And since workers comp doesn't cover mental stress from termination and other work-related stressor, the firefighter shouldn't have gotten any benefits. The Ontario court found that the Tribunal's ruling was reasonable and refused to set it aside [[City of Toronto v WSIAT and Beebeejaun](#), 2023 ONSC 3875 (CanLII), June 29, 2023].

A similar case took place in Manitoba where a worker sought workers comp benefits claiming that his captain caused him mental trauma and aggravated his preexisting PTSD by accusing him of being a member of the Russian Mob. The Manitoba WCB rejected the claim, noting that workers comp doesn't cover stress related to labour relations or employment, including conflicts with management. The worker appealed but the

province's top court, the Court of Appeal, agreed with the WCB's determination. Adding insult to injury, it also ordered the worker to pay \$500 to cover the agency's legal costs in defending the appeal [[\*Hyra v The Workers Compensation Board of Manitoba et al\*](#), 2023 MBCA 79 (CanLII), September 11, 2023].

*Takeaway: [Workers comp coverage of PTSD and mental stress](#) varies by jurisdictions and OHS directors need to be familiar with the rules of their own province. Originally, mental stress was deemed work-related only when it was the cause of a discrete traumatic event that occurred at work. In recent decades, most jurisdictions have expanded the rules to cover gradual and chronic stress due to workplace harassment and other work-related stressors. However, in no case does coverage of mental stress include the normal stresses and pressures of the job—deadlines, fear of getting fired, personality conflicts, pay cuts, etc. Even so, OHS coordinators would be well served to recognize and help their workers manage the debilitating effects of mental stress while [ensuring their workplace is psychologically safe](#).*

## **6. Failure to Follow Industry Standard Undermines Due Diligence Defence**

As usual, some of the most important OHS cases of 2023 involved whether a company accused of a safety violation exercised due diligence to prevent the offence. As in previous years, due diligence defences failed more often than they succeeded. One key case from Québec began with the tragic death of a garage mechanic when the forklift tire he was repairing exploded. CNESST charged the employer with failing to protect a worker performing repair work. The employer claimed due diligence contending that the victim's carelessness caused the explosion. But the Québec court didn't buy it, noting that the initial assembly of the wheel wasn't done according to industry standard, in effect turning the

tire into a time bomb and faulting the employer for doing nothing to ensure that the work methods were safe, other than relying on the victim's experience [[CNESST c. 9033-5878 Quebec inc. \(Pneu Dauville\)](#), 2023 QCCQ 3842 (CanLII), June 14, 2023].

***Takeaway:** While technically voluntary, industry and standards created by nongovernmental organizations like CSA, ANSI, ISO and NFPA can have a major impact on your liability, especially if you're ever accused of an OHS violation. So, it's essential for OHS coordinators to understand the [impact of voluntary standards](#) and their potential effect on your OHS program. 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.*

## **7. Alberta Companies Fined \$775,000 for Powered Mobile Equipment Fatality**

Alberta handed out of the year's biggest OHS fines, a combined \$775,000 against two companies for an incident in which a worker was killed when the bulldozer they were operating at an oilsands site broke through the ice and plunged into a tailings pond. The operation shouldn't have been attempted after measurements showed that the ice wasn't the minimum 17-inches thick required under the construction site safe work operation plan. The prime contractor was fined \$420,000 for failing to ensure the safe operation of the work and a contractor was fined another \$325,000 for failing to protect the victim [[Suncor Energy Service Inc; Christina River Const. Ltd.](#)]

***Takeaway:** Incidents involving bulldozers, forklifts, loaders and other forms of powered mobile equipment are among the*

*most devastating and gruesome that can take place in any workplace. Not surprisingly, such incidents are a common source of OHS violations and perennially draw some of the country's highest OHS fines. All of this makes it imperative for OHS coordinators to implement a legally sound [Powered Mobile Equipment Compliance Gameplan](#) to prevent such incidents and injuries at their workplace.*

## **8. Worker's Failure to Follow Conveyor Safety Rules Was Foreseeable**

Should employers who implement sound safety rules be liable for an OHS violation that happens because workers don't follow those rules? A case illustrating the factors courts consider in deciding that issue started when a worker cleaning a dumpster decided to take a short cut by jumping on a moving conveyor. He lost his balance and fell to his knees causing his shoes to get stuck between the conveyor and the flap at the back of the trailer. He cried out for help, but it took over an hour for anybody to hear him. By then, he had suffered injuries requiring amputation of both legs from the knee down. Charged with an OHS violation, the employer claimed that it exercised due diligence and that the victim's decision to disobey conveyor safety rules was totally unforeseeable. But the Québec court disagreed and upheld conviction. For one thing, the safety procedures didn't follow manufacturer's instructions. More damning, the employer was aware that other workers were regularly ignoring the rules and leaving the conveyor running while cleaning dumpsters from the trailer [[Claude Chagnon Enterprises Inc. vs. CNESST](#), 2023 QCCS 972 (CanLII), March 27, 2023].

**Takeaway:** *Workers taking short cuts and evading safety rules is something you should expect in seeking to prevent conveyor incidents and injuries. The only way to guard against liability is to implement a [legally sound conveyor safety and](#)*



[compliance game plan](#) to minimize the risk of those injuries and incidents.

## **9. BC Health Authority Fined \$355,000 for Inadequate Workplace Violence Investigation**

BC handed out one of the biggest fines—\$355,244—ever imposed in Canada for a workplace violence violation. The offender was a health authority that improperly investigated incidents that had previously occurred at the facility. WorkSafeBC inspectors checked the files and found that workplace violence incident reports lacked key information, like the underlying causes and corrective actions. Had it done so, subsequent events of violence might have been prevented [Northern Health Authority].

***Takeaway:** Implementing [effective policies to prevent workplace violence and harassment](#) is becoming an OHS priority, especially in high risk settings like healthcare and late night retail. Investigating complaints and incidents is a crucial part of any prevention program, as the BC health region learned the hard way.*

## **10. Federal Court Bars Canadian Nuclear Safety Commission's Random Drug Testing Rules**

Drugs and drug testing are a perennial source of crucial litigation pitting the employer's duty to ensure a safe workplace against the worker's right to privacy. One of the year's most significant cases involves the ongoing battle between the Canadian Nuclear Safety Commission (CNSC) and the unions over new regulations requiring nuclear power plants to perform random, post-incident, reasonable cause and pre-



assignment alcohol and drug testing on safety-sensitive and safety-critical workers. After losing in lower court, the unions won the latest round in October when the Federal Court of Appeal granted a stay banning CNSC from enforcing the regulations until the court's rule on their constitutionality. Allowing the drug testing to proceed would result in potentially irreparable harm without significantly reducing the risks of a nuclear incident, the court reasoned [[Power Workers' Union v. Canada \(Attorney General\)](#)], 2023 FCA 215 (CanLII), October 27, 2023].

***Takeaway:** Keeping drugs and alcohol out of the workplace has become even more challenging since Canada legalized recreational cannabis. The bottom line: You have not only the right but also the duty to ensure workers don't perform their jobs while they're impaired, especially in a safety-sensitive workplace. But there must also be a legal foundation that's fair and respectful of workers' privacy and other legal rights. The key documents are a legally sound:*

- [Substance abuse policy](#); and
- [Drug and alcohol testing policy and procedures](#).

*Drop me a line at [glennnd@bongarde.com](mailto:glennnd@bongarde.com) and let me know what you think were the biggest OHSI cases of 2023*