



## The perils of calf-roping

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The Alberta Court of Appeal recently upheld a [decision](#) to convict a Calgary company under Alberta's [Occupational Health and Safety Act](#) (the Act). The convictions resulted from a workplace fatality that occurred at a customer appreciation party hosted by the employer.

### Overview

Like many other Calgary based companies, XI Technologies Inc. (the Company) hosts an annual customer appreciation event to coincide with the Calgary Stampede. In keeping with the western theme, the Company rented a calf roping machine (the Machine) to entertain party goers. The Machine was provided to the Company without an operator, or operating instructions. Instead, the Company was left to figure out how to operate the Machine on its own. Three employees of the Company were responsible for operating the Machine for customers in attendance at the party. After inspecting and testing the Machine, it became apparent to the employees that it was not functioning properly, and that the force of the truck spring used to propel the mechanical calf could present a danger to operators. Despite the apparent deficiencies and the hazards associated with the Machines operation, the employees devised an alternative operating procedure that they thought would allow the Machine to operate safely. The revised operating procedure required an operator to reach into the Machine to manually release a “hinge hook” that allowed the spring-loaded mechanical calf to exit the Machine.

Unfortunately, Mr. Shair, a software developer employed by the Company, was fatally injured after being struck by a steel lever while assisting with the operation of the Machine. The Company was charged with two counts under the Act, which alleged that it failed to ensure the health and safety of its employees, and that all equipment used at a work site would safely perform the function for which it was intended or designed. The trial judge acquitted the Company of both charges and held that the Company did everything that could be reasonably done to avoid foreseeable risks and that the cause of Mr. Shair's death was only obvious with the benefit of hindsight. The Crown successfully appealed on the basis that the trial judge's verdict was inconsistent with the evidence. The Company subsequently appealed the summary conviction appeal to the Alberta Court of Appeal.

### Prosecutions under the Act

Regulatory offences under the Act are “strict liability offences”, meaning that, the prosecution only has to establish that an offence was committed, without any requirement to establish that the accused had intent to commit the offence. As a general rule, an employer can escape liability from a regulatory offence if it

can establish that it took all reasonable steps in the circumstances to prevent the offence from occurring. This is commonly known as the “due diligence defence”.

#### Trial Decision

After a thorough review of the evidence, the trial judge determined that while the employees and Mr. Shair were aware of the hazards created by the Machine, they did not fully appreciate the significance of the risk or inherent dangers that these hazards presented to the operator. Furthermore, the trial judge concluded that the significant risk posed to the operators by reaching into the Machine to manually release the hinge hook was very obvious with the benefit of hindsight, but that the risk was not obvious to a reasonable person at the time that the Machine was used by the operator. Accordingly, the trial judge ruled that the accident was not foreseeable and that the Company took all reasonable steps to avoid the accident.

#### Summary Conviction Appeal Decision

The summary conviction appeal judge disagreed with the trial judge and concluded that the Company was liable due to its decision to continue to operate the Machine with knowledge of the dangers associated with its operation. Specifically:

The summary conviction appeal judge also concluded that a reasonable employer, unfamiliar with a piece of machinery, would have requested operating instructions or a demonstration of the Machine’s operation:

#### Alberta Court of Appeal Decision

The Alberta Court of Appeal agreed with the summary conviction appeal judge and dismissed the Company’s appeal. The Court was of the view that the summary conviction appeal judge properly found that: (i) the trial judge’s decision that the risk was only obvious with the benefit of hindsight was incompatible with the balance of evidence accepted by the trial judge, and (ii) that the Company did not do all that was reasonably practicable in the circumstances to avoid the reasonably foreseeable risks. As such, the Court determined that the Company was unable to successfully establish a due diligence defence.

#### Our View

This case serves as a strong reminder that Alberta employers will be held to a high standard when it comes to ensuring the safety of its employees. It should come as no surprise that employers will be liable under the Act for injuries sustained by employees if they allow them to operate unfamiliar equipment without prior training; particularly when the employer has advance knowledge that the operation of the equipment could expose the employees to harm. This holds true regardless of whether the equipment is being operated at a social event or in the regular course of employment.

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