



EDITORIAL

In the dead of winter, we see that Bill C-45 has brought a further chill to employers. We provide a summary of the Scorra case in this winter version of our newsletter which hopefully will

remind employers, senior officers, and those responsible for managing workplace risk, that the Bill C-45 amendments are very real, and are now being more aggressively enforced by OHS regulators, police and Crown attorneys across Canada. In Ontario, the issue of workplace accessibility for Ontarians with disability is taking a further step forward. The Workplace Safety Insurance Board has also released new work reintegration policies which place more responsibility on employers to accommodate persons who are injured at work, have effective policies on early and safe return to work, and redefines labour and market reentry to be more of the employer's responsibility, from a legal and cost perspective.

As always, Gowlings' OHS national practice group is highly committed to providing excellent training and consulting services, to both educate management and workers of their occupational health and safety and workers' compensation responsibilities, before incidents happen. Please feel free to contact us if we can be of any assistance to you in getting 2011 off to a good, safe and healthy year.

Norm Keith, B.A., J.D., LL.M., CRSP
Partner, Gowlings

Accessibility for Ontarians with Disabilities Act: First Steps

By: **C. Michelle Small, B.A., LL.B., Associate and Cathy Chandler, B.A.Sc., CRSP, CHSC, OHS Consultant/Paralegal**

The *Accessibilities for Ontarians with Disabilities Act (AODA or the Act)* was introduced by the Ontario government in 2005. The AODA is expected to eventually replace the *Ontarians with Disabilities Act* (a 2001 act) because this latter law has been heavily criticised for its lack of enforcement mechanisms, emphasis on voluntary compliance, and its application only to the public sector.

The real substance of the AODA is not in the Act itself but is contained in the Accessibility Standards passed as Regulations to the Act. Accessibility standards are the rules that businesses and organizations in Ontario will have to follow to identify, remove and prevent barriers to accessibility.

Ontario is developing standards in the following areas:

- Customer service
- Employment
- Information and communications
- Public transportation
- Built environment (buildings and other structures)

Customer Service Standard

The Customer Service Accessibility Standard is now law. Public sector organizations have been required to comply with the Customer Service Accessibility Standards since January 1, 2010. Private sector organizations with at least one (1) employee will be required to comply by January 1, 2012. The legal requirements of the accessibility standards for customer service are set out in two Ontario Regulations under the Accessibility for Ontarians with Disabilities Act, 2005.

1. Ontario Regulation 429/07 states the requirements of the customer service standard.
2. Ontario Regulation 430/07 exempts organizations that have fewer than 20 employees (unless the organization is a designated public sector organization) from certain documentation requirements of the standard.

Compliance includes but is not limited to:

- The development of policies, prac-

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- tices and procedures governing the provision of goods or services to persons with disabilities, including a policy about the use of assistive devices
- Using reasonable efforts to ensure that these policies, practices and procedures are consistent with the principles of respect, dignity and independence
 - Allowing people with disabilities to be accompanied by their guide dog or service animal in areas of your business that are open to the public
 - Permitting people with disabilities who rely on a support person to bring that person with them while accessing your goods or services
 - Communication with customers with disabilities in a manner that takes into account their disability (such as using Braille)
 - Training customer service staff and anyone responsible for developing customer service policies, practices and procedures in the provision of accessible customer service
 - Permitting customers with disabili-

- ties who have support persons or service animals to use them while accessing the goods or services, and providing advance notice about any policy on admission fees
- Providing notice when accessibility to services or facilities is temporarily disrupted (such as indications that an elevator is temporarily out of service)
 - Developing a process for customers to provide feedback and for the organization to take action on complaints
 - Filing Accessibility Reports

Employment, Information and Communications and Transportation Standards

The goal of the proposed Accessible Employment Standard is to help employers create equal employment opportunities for people with disabilities. The proposed Accessible Information and Communications Standard outlines how businesses and organizations will have to create, provide and receive information and communications in ways that are accessible for people with disabilities. The

proposed Accessible Transportation Standard will make it easier for people to travel in Ontario.

On May 31, 2010, the Ontario government announced that it will integrate the standards relating to employment, information and communications and transportation into one streamlined regulation. The proposed integrated accessibility regulation will also include:

- Proposed timelines for compliance with accessibility standards
- Proposed framework for monetary penalties for businesses and organizations that do not comply
- Proposed designation of the License Appeal Tribunal as the tribunal to hear appeals relating to the AODA.

The proposed regulation was posted for public review from September 2 to October 16, 2010.

Built Environment Standard

The proposed Accessible Built Environment Standard provides recommendations to government on how to remove barriers in buildings and outdoor spaces for people with disabilities.

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The initial proposed standard was released for public review from July 14, 2009 to October 16, 2009. The committee that developed the standard revised the initial draft standard to reflect the public's input. At their last meeting on May 28, 2010, the committee voted on the standard clause by clause. The final proposed standard has now been submitted to the Minister of Community and Social Services who is considering what will become law and when.

The AODA targets full compliance with all of its standards by the year 2025.

Enforcement

The Ministry of Community and Social Services will enforce the requirements of the AODA. While we do not yet have reports of enforcement efforts, we do expect resources to be spent on enforcement, particularly given the sharp criticism of the former legislation. Failure to comply with the legislation may result in regulatory prosecution and monetary fines of up to \$100,000 per day of non-compliance.

Organizations will need to plan carefully for the effort and resources

required to comply with all of the standards as they become law. Expect accessibility to become a much more significant part of your organization's development.

For further information on this article please contact Michelle Small at michelle.small@gowlings.com, 1-866-862-5787 ext. 86668 or Cathy Chandler at cathy.chandler@gowlings.com, 1-866-862-5787 ext. 87351.

Pandemic Planning

By: Wayne Warren, B.A.Sc.
OHS Consultant

Influenza is a contagious respiratory illness caused by an influenza virus. An influenza pandemic is a global outbreak caused by a new influenza virus that spreads easily from person to person. An influenza pandemic can cause serious illness because people have little to no immunity to the virus.

Outbreaks of influenza have been known to occur for centuries. Three influenza pandemics – Spanish in 1918, Asian in 1957 and Hong Kong

in 1968 – killed more than 50 million people worldwide. Historical patterns suggest that influenza pandemics occur, on average, three to four times each century when a new virus subtype emerges that is readily transmitted from person to person.

The H1N1 influenza virus has been reported around the world. H1N1 is a strain of the influenza virus that in the past, usually only affected pigs. In spring 2009, it emerged in people in North America. This was a new strain of influenza and because humans had little to no natural immunity to this virus, it had the potential to cause serious and widespread illness. In August 2010, the World Health Organization declared that the H1N1 pandemic had entered the post-pandemic period. This decision was informed by epidemiological evidence from around the world showing the H1N1 influenza virus circulating at lower levels and taking on the behaviour of a seasonal influenza virus. Influenza viruses, including the pandemic H1N1 virus, are suspected to continually change, or mutate, over time. A major mutation is different in that it signals a new virus to which the

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population will have no immunity, which was the case with H1N1 influenza virus.

To ensure that we know if and when major mutations happen, Canada's National Microbiology Laboratory and labs around the world are monitoring the virus for changes regularly.

(http://www.phac-aspc.gc.ca/alert-alerte/h1n1/faq/faq_rg_h1n1-afv-eng.php#q1)

Effective planning to reduce the illness and deaths associated with an influenza pandemic remain underway at all levels of government.

The Ministry of Labour (MOL) is working closely with the Ministry of Health and Long-Term Care and the Ontario Agency for Health Protection and Promotion to monitor the outbreak of the H1N1 influenza virus. The MOL has developed tools and guidelines to help employers and workers prevent and manage the spread of the virus. These guidelines reflect the "precautionary principle." The "precautionary principle," established by the Honourable Mr. Justice Archie Campbell, in the final report of the SARS Commission Report (*Spring of Fear, December 2006*) states: "We cannot wait for scientific certainty before we take reasonable steps to reduce risk."

In addition, employers are required to comply with applicable provisions of the *Occupational Health and Safety Act* and its regulations as well as applicable provisions contained in the *Workplace Safety and Insurance Act* and the *Health Protection and Promotion Act*.

Employers working towards the development of an Influenza Pandemic Plan

ought to consider the following basic principles.

- **Communication Strategy** – Develop a crisis communication plan and provide timely and accurate information to your workers through a team designated to serve as a communication source.
- **Vaccination Program** – Encourage workers to get vaccinated for the seasonal influenza.
- **Training and Education** – Provide training and education to workers on the basics of influenza transmission and types of personal protective equipment required (if any).
- **Managing Absenteeism** – Develop policies that encourage ill employees to stay home without fear of reprisal. Ensure that the policies are flexible and consistent with public health information/guidance.
- **Childcare** – Be prepared to allow workers to stay home to care for their children if schools and/or day cares are closed. Strongly recommend that parents not bring their children to work if schools are dismissed.

For more information on how your organization can develop, implement and maintain an effective and sustainable Pandemic Plan please contact Wayne Warren at wayne.k.warren@gowlings.com, 1-866-862-5787 ext. 84409.

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Workers' Compensation Payment Based on Age Discrimination: Broad Implications of Québec Court Ruling May Affect Other Jurisdictions

By: Norm Keith, B.A., J.D., LL.M.,
CRSP, Partner

In a landmark ruling, a Québec workers' compensation tribunal has ruled that reducing injured workers' income replacement benefits, including reduction at the traditional retirement age of 65, offends both provincial human rights legislation and the *Charter of Rights and Freedoms (Charter)*. In the decision, *Cote v. Traverse Rivière-du-Loup, St.-Saint-Siméon*, the tribunal held that s. 56 of the Québec workers' compensation legislation discriminates against workers on the basis of age and, as a result, it was in breach of s. 10 of the *Québec Charter of Human Rights and Freedoms* and s. 15(1) of the Canadian *Charter*.

The case involved a 64-year-old worker who was injured on the job. His workers' compensation payments were reduced by 25% from the second year

of the date of his disability, and then by 50% from the third year, and 75% from the fourth year of his entitlement. This was based on the schedule of declining benefits set out in the legislation. The worker, Mr. Cote, argued that this age-based reduction was discriminatory under the relevant provisions of the *Québec Charter of Rights and Freedoms*, and the *Charter*.

In this decision, the tribunal reviewed s. 56 and its establishment of a distinct rule, based on the traditional retirement age of 65 years. The tribunal made a political statement in commenting that this arbitrary, but traditional, retirement age "perpetuated the myth about older persons' ability to work and this is discriminatory."

Interestingly, evidence was lead by the Attorney General of Québec that the average retirement age of workers in Québec is just in excess of 59 years of age. Therefore, it was argued to be quite reasonable to expect a reduction in income, whether at work or on workers' compensation benefits, by a claimant such as Mr. Cote. The Attorney General of Québec also argued that the reduction in workers'

compensation benefits by statute in Québec was an acceptable and reasonable compromise based on the reality of the average retirement age, and the need for certainty in funding of the workers' compensation system. These arguments were ultimately rejected by the tribunal.

In further defending the legislative provision, the Attorney General of Québec argued that for these reasons, the income replacement benefits reduction was justifiable, under s. 1 of the *Charter*. The traditional retirement age of 65 was justifiable and otherwise reasonable given the nature of funding of the workers' compensation system in Québec and the traditional retirement age, and could therefore be "saved" by section 1.

This decision has been sent to judicial review to Québec Superior Court. Judicial review is a narrow form of review by a higher Court that requires a jurisdictional error or a decision that is patently unreasonable. Judicial review is not a full right of appeal with respect to the facts and legal issues of the case.

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The decision of the tribunal in Québec, subject to being overturned on appeal, has very broad implications. First, this decision potentially affects standards of declining compensation provided by pension plans to reduce or eliminate benefits at a certain age. Further, more broadly, the reduction of benefits based on age, and a presumptive retirement age of 65, exist in other Canadian jurisdictions under workers' compensation legislation and pension legislation.

Readers should also note that there is a case currently before the Supreme Court of Canada, originating in British Columbia, that is examining pension plans and benefit reduction based on age. At the appeal level, the British Columbia Court of Appeal held that such a distinction based on age was not discriminatory, *per se*, in reducing pension entitlement on the basis of age and presumptive retirement age. It remains to be seen how the SCC will address the issue.

The tension between traditional retirement age and the funding of pension and other state compensation systems with the legal prohibition against age discrimination in human rights legislation and the *Charter* are profound. This issue could impact many Canadian jurisdictions with respect to both pension and workers' compensation legislation. It also highlights the tension between the need to properly predict and calculate the funding of workers' compensation and pension systems across Canada. Many work-

ers' compensation systems are "under water," being underfunded and are technically on the verge of bankruptcy. For example, in Ontario the Workplace Safety and Insurance Board announced austerity measures as a result of the growing unfunded liability, which is now in excess of \$12 billion.

The financial viability and certainty for those receiving benefits from workers' compensation systems and pension plans is critically dependent on the ability to properly fund both systems. These cases may have significant implications for that important societal issue.

For further information on this article please contact Norm Keith at norm.keith@gowlings.com, 1-866-862-5787 ext. 85699.

WSIB Releases Work Reintegration Polices

By: David Marchione, B.A., CHSC, OHS Consultant/Paralegal

In December 2010, Ontario's Workplace Safety and Insurance Board (WSIB) released a number of new operational policies and rolled out a modified return-to-work program, entitled Work Reintegration. The new Work Reintegration model revamps the return-to-work principles; sets out roles and responsibilities for all workplace parties; and puts greater responsibility on the WSIB to be involved in, and to help manage and navigate, the return-to-work process.

Since 1998, the WSIB has been working on a self-reliance model with respect to return-to-work issues. They determined that changes were required and began the process of amending the program around 2005. New return-to-work policies were drafted in 2006 and were released for review, but were never implemented. On December 1, 2010, a number of new policies were released.

The overall goal of the Work Reintegration program is to assist injured workers in returning to meaningful and productive work as quickly and safely as possible. The focus will be on assisting workers in returning to either their pre-injury position or another suitable occupation (SO) with the injury employer. The Work Reintegration, Principles, Concepts and Definitions policy (<http://www.wsib.on.ca/en/community/WSIB/230/OPMDetail/24347?vgnextchannel=ed6eee40cb05e110VgnVCM10000449c710aRCD&vgnnextchannel=ed6eee40cb05e110VgnVCM100000e18120aRCD>) outlines that the WSIB will be responsible for providing the tools and services required to support the efforts of the workplace parties in achieving successful outcomes. It remains the responsibility of employers and workers to identify return-to-work opportunities and issues in the workplace, and to fulfill their obligations. The WSIB has outlined penalties in cases where either workers or employers do not cooperate in the return-to-work process.

The WSIB has also recognized that decision making with respect to vocational rehabilitation services has, in many cases, taken a long time and delayed the workers' reintegration into the labour market. The new model outlines decision-making timelines with respect to workforce reintegration and work transition programs, making the WSIB responsible for responding to situations where a worker has not returned to work within six months of the workplace accident. Where possible, the WSIB will assist workers in transitioning back to work with the injury employer. Where a return with the injury employer is not possible, the WSIB will support a worker in returning to an SO with revamped vocational rehabilitation services, including job placement.

The goal of the revamped program is to keep claims moving through the compensation system through return-to-work efforts. More timely decision making and more proactive services will help remove some of the barriers that prolong claims and sometimes make it more difficult for workers to return to the workforce.

For more information on the WSIB's Work Reintegration program, or to view the new policies, go to www.wsib.on.ca. Gowlings is here to assist you with your return-to-work efforts, and to provide consultation on your roles and responsibilities. Ask us

how we can help you manage your claims and associated costs.

For further information on this article please contact David Marchione at david.marchione@gowlings.com, 1-866-862-5787 ext. 84378.

Expert Advisory Panel on Health and Safety – Report and Recommendations to the Minister of Labour

By: Norm Keith, B.A., J.D., LL.M., CRSP, Partner and Anna Abbott, B.A., LL.B., Associate

The Report of the Minister of Labour's Expert Advisory Panel on Health and Safety was released on December 16, 2010. The recommendations come from a 10-member panel, led by Tony Dean, a professor in the School of Public Policy and Governance at the University of Toronto.

In January 2010, the Minister of Labour appointed Tony Dean as Chair of the Expert Advisory Panel tasked with conducting a comprehensive review of Ontario's occupational health and safety system. The goal of the review is to eventually achieve improved compliance and zero workplace injuries, illnesses and fatalities.

The Report calls for a major overhaul Ontario's workplace safety system, and recommends that the prevention divi-

sion of the Workplace Safety and Insurance Board be replaced by a new prevention organization headed by a Chief Prevention Executive.

The establishment of a prevention organization and a Chief Prevention Officer are among the list of 46 recommendations from an investigation that was sparked by the deaths of four workers and the serious injury of a fifth last Christmas Eve in a scaffolding accident.

Key Recommendations:

- Appointment of a multi-stakeholder Prevention Council to assist in implementation of recommendations and new system structure.
- Establishment of a separate Prevention Organization and a Chief Prevention Officer to lead a more integrated, efficient and accountable system
- Mandatory training for workplace health and safety representatives as well as workers and supervisors regarding workplace rights and responsibilities
- Mandatory entry-level training for construction workers on construction site safety
- Implementation of mandatory rigorous training standards for workers who work at heights and on other high-risk activities

- Tougher and ascending monetary penalties for those who place workers at risk of death or serious injury as well as the development of administrative monetary penalties
- Improved integration of OHS training in schools and universities
- Development of an accreditation program for top-flight employers, with less focus on frequency and cost of claims, that encourages them to influence the health and safety performance of contractors in their supply chains.
- Integrated and targeted enforcement for workplaces in the “underground economy”

It will now be the responsibility of the Province to determine how to best implement the Panel’s recommendations. The Report recommends that an interim prevention council be established as soon as possible and that the prevention organization be

created within 12 months of the release of the recommendations. The Report also suggests immediate development by the Ministry of Labour of a health and safety poster to be posted in all workplaces explaining rights and responsibilities for workplace safety, and including information such as where to access more information and how to contact an inspector.

The panel focused on the role of the CEO and senior management in driving the recommended change in safety culture. This Report’s focus on senior management is reminiscent of the Bill C-45 changes to the Criminal Code whereby an Officer or a Director of an organization can be found guilty of criminal negligence for the death or injury of a worker. It remains to be seen how these recommendations may change the focus of Ministry enforcement policies.

The Panel stresses that improving health and safety in a workplace has a

direct link to better business results. The Panel further urges employers to view a cultural shift in health and safety as a positive result and states the implementation of these recommendations will allow employers to see “improved value for the investment that [they] have [made] in prevention and enforcement”.

However, it is not all good news for employers as the Panel also recommends tougher, escalating penalties for non-compliance. Employers will have to seek input into the new enforcement system and there is no indication that workers or unions will share in the increased penalties for non-compliance with OHS regulations.

For further information on how the Dean Report may impact your organization please contact Norm Keith at norm.keith@gowlings.com, 1-866-862-5787 ext. 85699, or Anna Abbott at anna.abbott@gowlings.com, 1-866-862-5787 ext 87284.



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Employer Convicted of Bill C-45 Charge Following Trial

By: Norm Keith, B.A., J.D., LL.M.,
CRSP, Partner,
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Associate

A second employer has now been convicted of a Bill C-45 charge in Québec, Mr. Pasquale Scrocca, a landscape contractor in Québec, was found guilty of criminal negligence causing death with respect to a workplace incident resulting in the death of his employee, Mr. Aniello Boccanfuso. The judgment, *R. c. Scrocca* (2010 QCCQ 8218), marks the first trial decision examining the OHS criminal negligence provisions under the *Criminal Code*.

In 2004, Bill C-45 (also known as the “Westray Bill”) amended the *Criminal Code* imposing an OHS duty on individuals, organizations and their decision-makers across Canada. Bill C-45, among other changes, established OHS negligence as a criminal offence. After a significant dormant period, there have recently been several instances of OHS criminal negligence charges being laid against individuals and corporations across Canada - the most publicized being those laid in connection with the deaths of four workers who fell from a faulty swing stage on Christmas Eve 2009.

Prior to the Québec decision, no other OHS criminal negligence case had proceeded to trial. The employee, in this case, was killed when a backhoe,

driven by his employer, failed to brake and pinned him against a wall. At the time of the incident, the backhoe was being used to move soil as part of a landscaping job at a commercial building.

The court heard evidence about the mechanical fitness of the backhoe from expert witnesses who examined the machinery and from Mr. Scrocca, himself. The machinery in question was purchased in 1976 and had not undergone any regular maintenance since that time. The mechanical inspection after the incident found that the machine had absolutely no braking capacity in the front two wheels, no brake fluid in the reservoir, and an all-over braking capacity of less than 30%. The mechanical inspection also uncovered 14 additional major issues with the machine including the fact that the horn, brake lights, parking brake, and brake pressure gauge were not functional. The defendant admitted that a certified mechanic had not inspected the backhoe for at least five years and that he had failed to check the brake fluid in the previous year because the reservoir cap was broken.

The defendant advised the court that he did not contest the mechanical faults of the backhoe, but that he did not have the requisite *mens rea*, or intent, required to be found guilty of criminal negligence. The defendant argued that he was not aware of the braking issue because he had not witnessed any leaking fluid, nor did he notice reduced braking capacity in the

time leading up to the accident. The defendant also argued that at the time of the accident, there were no regulations in place in the province of Québec requiring regularly scheduled maintenance for heavy equipment.

The court held that the intentions of Mr. Scrocca had no place in the analysis. The court explained that in criminal negligence cases there does not have to be a positive intention for the result of the act.

The court found that there was a clear breach of the duty of care imposed on an employer under s.217.1 of the *Code* - the duty to take reasonable steps to prevent bodily harm to a worker. As the owner of the vehicle, Mr. Scrocca had a duty to ensure that the vehicle was maintained in a safe condition. The backhoe had been used for 30 years with essentially no mechanical maintenance. The court found that in failing to maintain the vehicle, the defendant placed himself in a position where he could not be sure of its mechanical fitness. As a result, he would not know the risks associated with its use, which recklessly put the lives and safety of his workers in danger.

The court held that the defendant’s argument, that that machine was brought to a certified mechanic when there was a major problem, was not sufficient to meet the duty. Furthermore, the court held that the defendant’s reasons for his failure to perform regular maintenance on the backhoe, that is, that he did not observe any issues with the vehicle,

was indefensible and unacceptable - a prudent person would make sure that the equipment was looked over at least annually and would not fail to check the brake fluid just because the valve was broken.

After a joint submission from the Crown and the Defendant on sentence, the Court imposed a conditional sentence of imprisonment of two years less a day. The sentence will be served in the community with conditions, including a curfew.

This case is the first trial decision under the Bill C-45 and serves to remind employers, supervisors, officers and directors that the OHS criminal

negligence provisions carry a real risk of accountability.

Employers must be aware that neglect of OHS duties can lead to unlimited fines for the corporation and possible fines and jail time for individuals. Organizations must be proactive in assessing and managing workplace risk. Unfortunately, organizations and their senior officers will have to continue to wait for guidance from the court with respect to their duties and responsibilities under these provisions.

Gowlings is currently offering a seminar on Bill C-45 Liability: How to Protect Organizations and Senior Officers. This seminar is offered

February 22 in Calgary, March 24 in Ottawa, March 29 in Thunder Bay and March 30 in Sudbury. For more information on this seminar, please contact Aneta Paczkowska at 416-862-3580 or aneta.paczowska@gowlings.com, or visit our website at www.gowlings.com/ohslaw.

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Introducing Gowlings' newest Occupational Health and Safety Consultant!

Wayne Warren is an experienced OHS executive with 10 years' experience. He has extensive background leading and implementing organizational change, taking on leadership roles in OHS policy development & implementation, workers' compensation claims, training and disability management programs.

Prior to joining Gowlings, Wayne was senior manager of OHS for CAMH, a leader in the health care sector for mental health and addictions issues, with approximately 3,000 employees across the province of Ontario. He led the strategic transformation of the OHS function, aligning its focus and activities with the organization's business objectives. He provided direction and guidance to the Joint Health and Safety Committees across the province, and was chairman of its Workplace Violence and Risk Management Committees. He has also held senior positions at the University Health Network, one of Canada's largest teaching hospitals in Canada. Wayne led the revitalization of the organization's corporate OHS program to support compliance with OHSA and WSIA, resulting in a position of sector best practice.

Wayne provides training and consulting services to clients for Health, Safety and Workers' Compensation matters. He provides litigation support for clients faced with Ministry of Labour Orders and regulatory charges under both OHS and workers' compensation legislation.

Contact Wayne Warren today for any training or consulting work at: Wayne.k.warren@gowlings.com or 1-866-862-5787 ext. 84409.

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