

**EDITORIAL**

In Ontario, the Court of Appeal has affirmed the right of an employer to conduct an accident investigation, on the direction of their lawyer, and protect it from disclosure of the OHS regulator.

In British Columbia, a franchisor was found to be legally liable for the workplace injury by a franchisee's employee. This interesting development should remind franchisors of their important duties with respect to their own employee's health and safety, and also those of their franchisees.

The Ontario legislature has given Bill 168, second reading, and referred the violence prevention initiative to committee. The proposal to amend Ontario's *Occupational Health and Safety Act* will require every employer with more than five workers to do a workplace assessment to identify risks of workplace violence, and provide remedial measures to mitigate the risk. We have also included in this edition an article with focus on workplace inspections, from a proactive, prevention perspective and how they may benefit employers both in terms of preventing workplace accidents and in establishing a due diligence defence.

**Norm Keith, B.A., LL.B., CRSP**  
Partner, Gowlings

## Ontario's Bill 168 with Respect to Workplace Violence and Harassment Passes Second Reading On October 20, 2009

BY: CATHY CHANDLER, B.A. SC., CRSP, CHSC, OHS CONSULTANT/PARALEGAL

**B**ill 168, An Act to amend the *Occupational Health and Safety Act* with respect to violence and harassment in the workplace passed second reading in the Ontario legislature on October 20, 2009.

Ontario's Minister of Labour, Peter Fonseca introduced Bill 168 on April 20, 2009. Mr. Fonseca voiced support for the Bill during the second reading debate stating, "*We need to work together to eliminate workplace violence.*"

Opposition MPP's voiced concern about several aspects of Bill 168 including the domestic violence provisions stating, "the employer cannot reasonably be expected to know the personal relationships of employees, spouses and partners without a complete breach of people's privacy." Opposition MPP's have demanded public hearings before Bill 168 is passed into law.

Currently, the proposed amendments under Bill 168 require employers to assess the risk of workplace violence and develop policies and programs to prevent workplace violence and harassment. The Bill also requires employers to take reasonable precautions to protect an employee from domestic violence in the workplace and allow workers to remove

themselves from harmful situations if they have reason to believe that they are at risk of imminent danger due to workplace violence.

For more information on Bill 168, please contact Norm Keith at 416-862-5699 or email [norm.keith@gowlings.com](mailto:norm.keith@gowlings.com) and Cathy Chandler at 416-369-7351 or email [cathy.chandler@gowlings.com](mailto:cathy.chandler@gowlings.com).

## Appeal Court Court Affirms Solicitor and Client Privilege In Accident Investigation Report

BY: NORM KEITH, B.A., LL.B, CRSP,  
PARTNER

The Court of Appeal for Ontario has recently ruled on the important issue of a corporation's right to be protected by solicitor and client privilege. The case arose from a prosecution of Bruce Power Inc., and two management representatives, under the provisions of the *Occupational Health and Safety Act*. The prosecution alleged that the three defendants were responsible for contravening various provisions of the *Occupational Health and Safety Act* that involved a work-

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er being injured at a nuclear power plant at Tiverton, Ontario.

The Ministry of Labour inspector in this case obtained an internal draft investigation report that had been marked confidential. A member of the Power Workers' Union gave a copy of the confidential document to the Ministry of Labour inspector who was investigating the incident. A case, therefore, identified two critical issues for the Court of Appeal for Ontario to address:

1. When the Crown has come into possession of a defence document that is protected by solicitor-client and litigation privilege, does the accused bear the burden of proving actual prejudice or will prejudice be presumed?
2. In such circumstances, must the charges be stayed or is a lesser remedy appropriate?

The trial Justice found that although the confidential and corporate investigation report did not contain any legal strate-

gies, thoughts or legal opinion, it also held it could well be used to the disadvantage and prejudice of the defendants in the prosecution. In the result, the trial Justice stayed all charges as a result of the abuse of process by the Ministry of Labour in obtaining and refusing to return the document which he held was subject to solicitor and client privilege. The Justice concluded that the defendants' fair trial rights pursuant to s. 7 and 11 of the *Charter of Rights and Freedoms* were breached by reason of the prosecution's conduct in respect of their refusal to return the report, without keeping a copy. This decision was reversed on appeal to the Superior Court of Justice, which was then appealed to the Court of Appeal for Ontario. That Court held that when the Crown comes into possession of a defence document that is protected by solicitor-client and litigation privilege, prejudice to the defence will be presumed. However, this presumption in law is rebuttable by evidence to the contrary. In this case, the Crown called no

evidence to the contrary and the presumption of prejudice prevailed.

Regarding the second question, the Court of Appeal upheld the Justice's findings that the report clearly sets out items that could well be used to the disadvantage and prejudice of the defendants at trial. The appeal was allowed, the stay was restored, and submissions for costs against the Ministry of Labour were invited by the Court.

This case is important for at least three reasons.

1. It confirms the long established common-law principle upholding solicitor and client privilege; the impropriety which in-house counsel at the corporate defendant clearly identified was subject to such privilege, and the legal remedies available.
2. The Courts will presume prejudice, and likely therefore a stay the charges, if the Crown

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cannot demonstrate not only good faith in obtaining the document, but also that there is no advantage to be gained by the prosecution, or prejudice to the defendant, by the Crown's possession of the privileged document.

3. In-house counsel can participate and give advice with respect to the preparation of investigation documents in any type of regulatory and criminal investigation in order to establish privilege; this must be one of the most important roles that in-house counsel can play, together with engaging external counsel, to confirm that solicitor and client, as well as litigation privilege attaches to the investigatory documents. In-house counsel must be assertive, and consistent in their characterization of documents as subject to solicitor and client privilege in the face of regulatory investigators.

In the result, this case was favourable to the corporation and demonstrates the importance of standing up to aggressive regulators in the face of potential and actual prosecution. This decision validates solicitor and client privilege, the protection provided to internal investigations that are intended to obtain legal advice, and secure information for potential litigation. The case also identifies the value of in-house counsel during such investigations. These lessons apply not only to *Occupational Health and Safety Act* investigations by the Ministry of Labour, but to Ministry of Environment investigations, and other regulatory authorities who, in their enthusiasm to investigate, may cross the line from a good faith investigation to a breach of the *Charter of Rights and Freedoms*.

## Accessibility Deadline Looms for Designated Public Sector Employers

BY: GRAHAM WALSH B.A., LL.B.,  
ASSOCIATE

In 2005, the Ontario government introduced the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA"). The AODA was to eventually replace the *Ontarians with Disabilities Act, 2001*, which was heavily criticized for its lack of enforcement and emphasis on voluntary compliance. Further, the *Ontarians with Disabilities Act, 2001* was never designed to apply to private sector employees.

In January 2008, the government passed what is expected to be the first of five Regulations that define the new accessibility standards under the AODA. The Accessibility Standards for Customer Service regulation applies to designated public sector organizations and private sector organizations that provide goods or services either directly to the people in Ontario or to other organizations in Ontario (third parties) and have one or more employees in Ontario.

Those designated public sector organizations affected by this new customer service standard have been given until January 1, 2010 to bring their organization into full compliance. This includes all government ministries and agencies and other semi-private organizations that receive government funding including colleges and universities and Ontario's public schools.

All private sector organizations have been given until January, 2012 to comply. Essentially this new Regulation requires sector organizations to take the following actions:

1. Develop and establish policies, practices and procedures governing the provision of goods or services

to persons with disabilities, including a policy about the use of assistive devices;

2. Use reasonable efforts to ensure that their policies, practices and procedures are consistent with the following principles:
  - a) respect for the dignity and independence of persons with disabilities;
  - b) the provision of goods or services to all person in an integrated manner unless an alternate measure is necessary;
  - c) enabling a person with a disability to obtain, use or benefit from the goods or services (temporarily or on a permanent basis);
  - d) giving an opportunity equal to that given to others to obtain, use and benefit from the goods or services;
3. Communicate with customers with disabilities in a manner that takes into account the customer's disability (such as providing a publication in audio or Braille);
4. Train customer service staff, volunteers and people responsible for developing the business' customer service policies, practices and procedures in the provision of accessible customer service;
5. Permit customers with disabilities who have support persons or service animals to use them while accessing goods or services in premises open to the public and, where admission fees are charged, provide advance notice concerning what admission, if any, would be charged with respect to a support person;
6. Provide notice when accessibility to services or facilities for customers with disabilities is temporarily

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disrupted (for example, posting signs at the entrance of a building to let customers know that one or more elevators is temporarily out of service); and

7. Develop a process for all customers to provide feedback respecting the provision of customer services to persons with disabilities and for the business to take action on complaints.

Businesses with up to 19 employees must comply with the standard starting January 1, 2012 but are not required to file an accessibility report so that these smaller businesses (with limited resources) can focus their efforts on achieving results. Businesses with 20 or more employees must comply with the standard starting January 1, 2012 and file accessibility reports starting in 2012.

Unlike the *Ontarians with Disabilities Act, 2001*, the Ontario Ministry of Community and Social Services is expected to monitor and enforce the *AODA* and those organizations that fail to comply could face regulatory prosecution and monetary fines. Individual persons found guilty of an offence under the *AODA* will be subject to a fine of up to \$50,000 per day on which the offence occurs or continues to

occur. Corporations found guilty of an offence under the *AODA* face a fine of up to \$100,000 per day for each day that the offence continues to occur.

Specific standards relating to other accessibility issues in the workplace such as physical barriers are expected to be introduced within the next 2 years. Gowlings' professionals can assist your organization in ensuring that you are in compliance with the *AODA* and its specific Regulations.

For more information please contact Graham Walsh at [Graham.Walsh@gowlings.com](mailto:Graham.Walsh@gowlings.com), 1-866-862-5787 ext. 84608 or Kathryn Aldridge at [Kathryn.Aldridge@gowlings.com](mailto:Kathryn.Aldridge@gowlings.com), 1-866-862-5787 ext. 85411

### Franchisor found Responsible for the Health and Safety of Franchisee's Employees

BY: E. ELLEN RIPLEY, B.SC.,  
M.SC., LL.B., ASSOCIATE

In September The British Columbia Court of Appeal reinstated a WorkSafeBC Review Division decision in respect of a WorkSafeBC order find-

ing Petro-Canada liable for its failure to ensure the health and safety of workers employed by a licensee. The Review Division decision had been quashed earlier by the British Columbia Supreme Court on judicial review.

In February 2005, a robbery took place at a service station during which the perpetrator kicked down a swinging door that separated the cash area from the public area, and held a young worker at knifepoint. In response to the incident, Petro-Canada installed a pay window, increased the lighting, and removed a pay phone at the station. Despite these corrective actions, WorkSafeBC determined that Petro-Canada had not done enough to minimize the risk of violence since the incident, noting that better layouts and designs of the sales register counters were being employed at newer stations, but not at the station in question.

In reinstating the decision, the Court of Appeal examined the definition of "employer" and an employer's general duty to protect workers under the *Workers Compensation Act*, with particular reference to subsection 115(1)(a)(ii):

115(1) Every employer must (a) ensure the health and safety

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of ... (ii) any other workers present at a workplace at which that employer's work is being carried out ...

According to the Court of Appeal, the real issues before the Review Division were: a) whether Petro-Canada's work was being carried out at the station; and b) whether Petro-Canada's degree of control over the workplace permitted a finding that it had failed to ensure the safety of workers there. After a careful review of the Review Division decision, the Court of Appeal determined that it was not unreasonable in finding liability on the part of Petro-Canada.

In light of this decision, a franchisor may be held responsible for ensuring the health and safety of workers employed by its franchisee/licensees, depending on the extent to which the franchisor is involved in the operations of the workplace.

The Review Division found the following to be some of the relevant facts and evidence in finding that Petro-Canada was sufficiently connected to the operations of the licensee:

- Petro-Canada provided a policy manual to the licensee, which outlined certain expectations regarding the operation of the service station, in which it reserved the right to inspect the stations and closely monitor all areas of maintenance relating to safety and security.
- The licensing agreement between Petro-Canada and the licensee provided, among other things, that:
  - o The licensee was to act as agent for Petro-Canada in respect of the sale of fuel products.
  - o Petro-Canada was to control the pricing, amount and quality of the fuel supplied

to the station, and would retain title to products in the possession of the licensee, until sold.

- o The licensee was then to hold monies received from customers in trust for Petro-Canada.

In view of this Court of Appeal decision, franchisors may wish to proactively act to ensure worker safety at franchisee/licensee locations pursuant to the terms of the applicable franchise agreements.

### Superior Court Holds - No Time Limit for Certain Ontario WSIA Charges

BY: DAVID MARCHIONE, B.A., CHSC,  
OHS CONSULTANT/PARALEGAL

In September, the Ontario Superior Court of Justice reversed an earlier ruling by a Justice of the Peace that dismissed charges against an Ontario employer under the *Workplace Safety and Insurance Act* ("WSIA").

At trial, the Justice of the Peace dismissed all charges against the employer, finding that charges under section 149 of the *WSIA* were not laid within 6 months of the alleged offence, the limitation period set out under section 76 of the *Provincial Offences Act*. Under the *WSIA*, there is no limitation period for prosecuting an offence under section 149 – where a person or employer knowingly makes a false or misleading statement or representation to the Workplace Safety and Insurance Board, or where a person or employer wilfully fails to inform the WSIB of a material change in circumstances. Such circumstances may include cases where an employer has reported an incident as medical aid only when the worker lost time from work, or when a worker fails

to report to the WSIB that they have returned to work, thus receiving both their pay and WSIB wage loss benefits.

The WSIB website currently indicates 7 convictions for section 149 offences between June 8, 2009 and September 21, 2009. Prosecution of such offences is consistent with the WSIB's zero tolerance approach on fraud.

In her rationale for dismissing the initial charges, the Justice of the Peace opined that a limitation period for laying charges could not be indefinite. She noted that all other offences under the *Provincial Offences Act* ("POA") have some limitation periods, though many are longer than six months. In overturning that decision, the Superior Court found that to adopt such a limitation period "flies in the face of what appears to be the intention of the legislature."

Under the *WSIA*, most charges must be laid within 2 years "after the day on which the most recent act or omission upon which the prosecution is based comes to the knowledge of the Board." However, the *WSIA* allows for an exemption for offences under section 149. In this case, the employer argued that because a limitation is not prescribed for section 149 offences, the six month limitation period prescribed by the *POA* must apply by default. The WSIB argued that the adoption of a six-month limitation period for these types of offences would permit or encourage intentional misrepresentations or wrongdoing with respect to WSIB matters, as long as the wrongdoing was not discovered for six months.

The Superior Court held that section 149 offences under the *WSIA* related to the more serious offences involving intent to mislead the WSIB in order to gain some advantage, rather than other procedural offences. Justice Silja Seppi stated: "it defies logic that the legisla-

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ture would intent to provide a shorter time limitation for prosecution and potential of greater immunity from prosecution in situations which go the very heart of the purpose of the legislation. As submitted by the [WSIB], such an interpretation would lead to the absurd result of enabling serious infractions so long as the offender is able to hid the fraudulent conduct for six months.”

This case is now scheduled to be tried in Provincial Offences court in Brampton, Ontario.

### Workplace Inspections: A Legal Requirement and a Benefit to All

BY: ANTHONY DI GIANNI, CHSC,  
OHS CONSULTANT/PARALEGAL

Occupational Health and Safety legislation across Canada, both provincial and federal, places a legal duty on employers to ensure that workplace inspections are carried out in the workplace. Not only are these inspections legally required, there is also a moral obligation to ensure they are carried out. A workplace inspection is a necessary and important component of an effective occupational health and safety management system

where the workplace is examined on a regular basis for the purpose of identifying potential and actual hazards and implementing and monitoring effective controls.

There are many benefits to conducting effective workplace inspections. They allow you to interact with workers and discuss any potential concerns the worker or their supervisor may have about the work or the workplace, they allow a further understanding of specific jobs and tasks, and an opportunity to identify existing and potential hazards and determining their underlying causes. Once potential hazards have been identified, corrective action can be taken by implementing effective controls, such as engineering controls, administrative practices and/or personal protective equipment. Keep in mind that once the controls are implemented, you should monitor them for effectiveness and to ensure that they do not create a new hazard.

There are various types of inspections that can be carried out in the workplace, some of which are a legal requirement under provincial or federal legislation. These include pre-start operation inspections of special equipment or work processes that are often required before any work is carried out, spot

inspections undertaken on a random, sometimes daily or weekly basis, as part of a general safety responsibility, or regular planned inspections, such as those conducted by worker representatives on a health and safety committee. With any inspection, it is important to understand that having a purpose and a plan are two crucial components to ensure effectiveness. The main purpose of a workplace inspection is to identify potential and actual hazards in order to eliminate the possibility of an incident occurring. But let us take a look at what a workplace inspection plan should include.

Conducting effective workplace inspections is required by, and is also evidence of a functioning health and safety management system. Different legislation sets out the requirements for the types of inspections to be carried out, frequency of inspections and who is required to carry out inspections within the workplace. Should your organization require assistance in developing an effective workplace inspection procedure, contact the Gowlings Occupational Health and Safety Group. Gowlings has provided assistance to various organizations in various sectors in developing a workplace inspection procedure and working together with inspection teams in carrying out effective workplace inspections.

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## CONTACT

### LEGAL INQUIRIES:

#### Norm Keith

B.A., LL.B., CRSP, PARTNER  
 1-866-862-5787 ext. 85699  
[norm.keith@gowlings.com](mailto:norm.keith@gowlings.com)

### CONSULTING AND IN-HOUSE INQUIRIES:

#### Sanya Persaud

OHS NATIONAL PRACTICE MANAGER  
 1-866-862-5787 ext. 83580  
[Sanya.Persaud@gowlings.com](mailto:Sanya.Persaud@gowlings.com)

### TRAINING INQUIRIES:

#### Scheduled Courses and Seminars

#### OHS Training Coordinator

1-866-862-5787 ext. 83645  
[OHStraining@gowlings.com](mailto:OHStraining@gowlings.com)

#### In-House Courses and Seminars

#### Alpa Saraf

OHS CONSULTING COORDINATOR  
 1-866-862-5787 ext. 84348  
[alpa.saraf@gowlings.com](mailto:alpa.saraf@gowlings.com)

### WEBSITE:

[www.gowlings.com/ohslaw](http://www.gowlings.com/ohslaw)

## OHS NATIONAL TEAM

### LEGAL INQUIRIES:

**Goldie Bassi**, B.A., LL.B., LL.M., Associate, Toronto

**Cathy Chandler**, B.A.Sc., CRSP, CHSC, OHS Consultant, Toronto

**David Cory**, B.A., M.Sc., LL.B., Partner, Calgary

**Anthony Di Gianni**, OHS Consultant, Toronto

**Kathryn Aldridge**, B.A.Sc., OHS Consultant, Toronto

**John Illingworth**, B.F.A., LL.B., Associate, Waterloo

**Norm Keith**, B.A., LL.B., CRSP, Partner, Toronto

**David Marchione**, B.A., OHS Consultant, Toronto

**Laura Mensch**, B.A., LL.B., Partner, Calgary

**Mélanie Morin**, B.A., LL.B., Associate, Montréal

**Pierre Pilote**, B.C.L., Partner, Montréal

**Stephen Roberts**, B.A. LL.B., C.S., Partner, Hamilton

**Chris Sabat**, LL.B., Associate, Calgary

**Elisa Scali**, LL.B., Partner, Ottawa

**Graham Walsh**, B.A., LL.B., Associate, Toronto

**Ailsa Wiggins**, B.A., LL.B., LL.M., Special Counsel, Toronto