



## EDITOR'S NOTE

It is September once again, and as children head back to school, employees head back to work, employers are once again presented with the challenge of managing workplace risk.

In this edition of our newsletter, we report on several developments regarding Workers' Compensation laws across Canada.

Also, back by popular demand, is our *Pre-Start Health and Safety Review* full day course with two guest professional engineers, Laurence Polley of C & R Engineered Solutions and Danny Marmora of Giffen Koerth to help you understand the legal and practical engineering requirements of s. 7 of the Regulation for Industrial Establishments. Enhanced enforcement by the Ministry of Labour of this requirement for employers is more critical than ever in this current zero tolerance climate.

In addition, federally regulated prisons have now gone "smoke free" applying not only to staff but also to inmates.

Finally, look for our new courses and seminars for 2009 by visiting us at [www.gowlings.com/ohslaw](http://www.gowlings.com/ohslaw).

**Norm Keith, B.A., LL.B., CRSP**  
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## The Importance of Emergency Preparedness: *Don't Find Out the Hard Way*

BY: KATHRYN ALDRIDGE-FISHER, OHS CONSULTANT

Recently in the Greater Toronto Area (GTA) a devastating explosion and fire occurred at an industrial propane facility. Several significant injuries, including fatal, and property damage resulted. The event garnered widespread media and government attention, which suffice it to say, was not positive. The incident demonstrates just how important it is for companies to take measures in order to prevent and prepare for emergencies.

The explosion took place at approximately 4:00 a.m. on August 10, 2008, starting with a large explosion, followed by smaller explosions and an ensuing fire. Metal and other debris was propelled into the air causing damage to the surrounding area. Since the facility was located in close proximity to a residential neighbourhood and local businesses, considerable damage to those buildings was unavoidable due to the extent of the explosion. Thousands of residents were forced to evacuate from their homes, and streets were blocked off for days until firefighters and governmental regulators were able to put out the fire, investigate and ensure the area was safe to re-enter. The investigation of the incident is still on-going, and the cause is still uncertain at this point.

This incident is an example of why having an effective Emergency

Preparedness and Response (EPR) program as part of an organization's Occupational Health and Safety Management System (OHSMS) is critical. First and foremost, the OHSMS and EPR program should address how this type of emergency (and others) can be avoided. The program should also identify how the emergency will be managed and put to an end as soon as possible. Clear communication with employees, the public, neighbouring businesses, emergency responders, and the media is incredibly important in this process to prevent or minimize all types of losses.

In the event of a serious emergency, it is quite likely that regulatory authorities will be involved. Along with that comes the possibility of legal liability and enforcement if non-compliance with applicable laws and negligence is found. Civil litigation against the organization (and/or individuals within the organization) can also ensue, not to mention negative public perception. Organizations, do not find out the hard way. Ask yourselves if you really are prepared for an emergency. If you know your EPR program is lacking, or worse – non-existent, now is as better time than ever to work on improving the program. ■

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## Challenging the Tribunal? Don't Bother!

### Ontario Court of Appeal Decision in *Mills v. Ontario*

BY STEPHEN C. ROBERTS, B.A., LL.B., C.S.

It appears that the Workplace Safety and Insurance Appeals Tribunal (the Tribunal) has once again gained the status of “invincible” after a recent Ontario Court of Appeal decision determined that Ontario courts should respect the authority and validity of findings made by the Tribunal. Essentially, this means that all those with matters before the Tribunal can count on their decisions as being final.

On June 3, 2008, the Ontario Court of Appeal released its decision in *Mills v. Ontario*, setting aside the ruling of the Divisional Court and reinstating the decision of the Tribunal which denied workers compensation benefits to the worker. In arriving at its decision, the Court applied the recent ruling of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, which determined that there should now only be two standards of review – correctness and reasonableness. This was only the third time that the Court of Appeal has cited this decision.

#### Facts

In 1979, the worker injured his back while unloading a freezer from a truck during the course of his employment at

a dairy. He filed a workers' compensation claim and was off work for two weeks. He continued to work for the same employer until 1988, until he was laid off. The worker then worked in a grocery store until 1990. Between 1979 and 1990 there were no records of any back complaints. Between 1990 and 1993 he worked as a truck driver. In 1990 he began treatment for back pain and was referred to an orthopaedic specialist. In 1993 he claimed that his back problems were related to his 1979 work accident. The WSIB denied his benefits and he appealed to the Tribunal.

#### History

The Tribunal made a determination that it was unable to establish continuity and compatibility between the worker's accident in 1979 and his current complaints and the denial of benefits was upheld. The worker then applied for judicial review, and appeared before the Divisional Court in 2006. The Divisional Court determined that the Tribunal had made several small errors in fact-finding and that the cumulative effects of these errors resulted in a patently unreasonable decision by the Tribunal. Accordingly, the Divisional Court held that the worker should be allowed benefits for his ongoing injury.

#### Issue

The Court of Appeal was required to determine whether the Divisional Court erred in setting aside the decision of the Tribunal.

#### Decision

The most significant issue to be decided by the Court of Appeal was the amount of deference that should be given to findings of fact made by the Tribunal. The Court of Appeal suggested that the application of the reasonableness standard requires “a contextual approach to deference where factors such as the decision-making process, the type and expertise of the decision-maker, as well as the nature and complexity of the decision will be taken into account.” In applying this test to the Tribunal, the Court found that, as a minister of the Crown making a decision of public policy, “the range of decisions that will fall within the ambit of reasonableness is very broad” and that the decision of the Tribunal should have been shown great deference. Although “one could well justify reaching a different result than the one reached by the Tribunal”, there was an evidentiary basis for the Tribunal's finding that there was no history of continuing back problems.

After considering all of the evidence before it, the Court of Appeal determined that neither the reasoning nor the conclusion reached by the Tribunal was unreasonable and that the Divisional Court erred in interfering with the findings of fact made by the Tribunal. The decision of the Tribunal was restored accordingly.

It should be noted that the Divisional Court has also found another Tribunal decision to be patently unreasonable in *Rodrigues v. Workplace Safety and Insurance Appeals Tribunal*. However, the Court of Appeal has granted the Tribunal leave to appeal the Divisional Court Decision and this appeal will likely be heard in the fall. It will be noteworthy to follow this appeal to see if the Tribunal remains “invincible”. ■

**GOWLINGS**

November 6, 2008  
Toronto

### Pre-Start Health & Safety Review Course

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**To register or to learn more about this course, please call us at 416.862.3645 or, visit us online at: [www.gowlings/ohslaw](http://www.gowlings/ohslaw).**



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## New Needle Safety Regulation Scope of Regulation Extended to Cover Additional Health Care Workplaces

BY: CATHY CHANDLER, OHS CONSULTANT

In August 2007, the Ontario government announced a new Needle Safety Regulation (O. Reg. 474/07) under the *Occupational Health and Safety Act (OHS Act)*. Currently, the regulation applies only to hospitals and will come into effect September 1, 2008. The new regulation mandates the use of safety-engineered needles (SENs). A SEN is a hollow-bore needle that is designed to eliminate or minimize the risk of a skin puncture injury to the worker or a needless device, licensed as a medical device by Health Canada.

Currently, the Ministry of Labour and the Ministry of Health and Long-Term Care are jointly consulting with industry and labour stakeholders on a proposal to extend the scope of the Needle Safety Regulation to additional health care workplaces such as long-term care homes, designated psychiatric facilities not captured in the current regulation (i.e., those that provide outpatient and other services under the *Mental Health Act*), laboratories and specimen collection centres. The provincial government is looking to implement the proposed extension of the Regulation to these additional health care workplaces by April 1, 2009. In addition, the provincial government intends to mandate the use of SENs in home care and other workplaces such as doctor's offices and ambulances sometime in 2010.

To address patient care, availability and other issues, the Needle Safety Regulation provides several exceptions to the requirements for when a SEN is required. A SEN is not required if:

- A worker determines that the use of a SEN would pose a greater risk of harm to himself or herself, another worker or the

patient than would a conventional hollow-bore needle;

- An employer is unable, despite making a reasonable effort, to obtain a SEN that is appropriate for the work; and
- An emergency is declared or a situation exists that constitutes or may constitute a serious risk to public health, an employer's supplies of SENs have been exhausted, and postponing work would create a greater risk of harm than the risk of using a hollow-bore needle that is not a SEN.

Needlestick injuries can transmit blood-borne diseases including Hepatitis B, Hepatitis C and HIV. SENs have been designed with built-in safety features that eliminate or minimize the risk of a needle puncture to the user (e.g. hinged needle cap, retractable needle), thereby protecting health care workers from injury and exposure to blood-borne diseases. ■

## 2008 Occupational Exposure Limit Proposal

BY: ANTHONY DI GIANNI, OHS CONSULTANT

The Ontario Government is strengthening protection for workers by implementing updated occupational exposure limits (OELs) for hazardous workplace substances and proposing changes for 2008. The Ontario Ministry of Labour (MOL) is seeking input on the proposed adoption of new or revised OELs or listings of 21 chemical substances. Ontario currently has OELs for over 725 hazardous chemical substances.

Regulated under the *Occupational Health and Safety Act (OHS Act)*, OELs restrict the amount and duration of a workers' exposure to a hazardous substance, such as asbestos, silica and lead. OELs are established concentrations which, if not exceeded, will generally not cause adverse health effects to those workers exposed.

On July 18, 2008, the MOL began a 60-day consultation period for changes to 2008 limits allowing stakeholders to comment on the proposed new and revised OELs for the listed hazardous substances. The proposed limits are based on recommendations by the American Conference of Governmental Industrial Hygienists (ACGIH) whose recommendations regarding exposure limits are the basis of OELs in Canada, the United States and Europe.

The MOL has posted a table on their website that contains new or revised OELs or listings, proposed for 21 substances based on changes recently recommended by the ACGIH. Included in the proposal are the proposed OELs for two substances not previously listed in Ontario regulations. It includes the consolidation of four separate listings for aluminum and its compounds into one listing for aluminum metal and insoluble compounds and the withdrawal of three listings due to ACGIH's determina-

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## 2008 Occupational Exposure Limit Proposal (cont'd)

tion of insufficient data to support the OEL. In addition, the proposal includes the withdrawal of specific exposure limits for welding fume, not otherwise specified, in accordance with ACGIH practice. Worker exposure to welding fume would be regulated by the OELs for the individual components of the fume along with the OEL for particles, insoluble or poorly soluble.

The MOL fully acknowledges that stakeholder input is an essential part of the OEL updating process. Since a reduction in the exposure limits or changes in the particle size fraction may impact sampling and analytical methods, the MOL is seeking comments regarding these changes as revised limits. The MOL invites stakeholders to submit their comments on any or all of the proposed OEL changes. The MOL advises stakeholders that specific concerns should contain a clear description of the rationale and appropriate documentation to support the concern. In addition, where an exposure limit for a hazardous substance has not been recommended and is not under consideration by the ACGIH, the MOL invites stakeholders during this consultation period, to nominate the substance for the development of an OEL. The submission should include a proposed limit and supporting documentation used by a jurisdiction that has adopted the proposed limit. The 60-day consultation period ends September 18, 2008. Submissions to the MOL may be mailed, faxed, or sent electronically. Visit [www.labour.gov.on.ca](http://www.labour.gov.on.ca) for additional information.

Controlling the amount of time that workers are exposed to potentially harmful chemicals, and setting acceptable limits for these chemicals, can help prevent long-term health problems from developing and can reduce health care and compensation costs for employers. For information on how you can make your workplace a safer one, visit [www.gowlings.com/ohslaw](http://www.gowlings.com/ohslaw). ■

## New Return to Work and Re-employment Regulation under Workplace Safety and Insurance Act

BY: DAVID MARCHIONE, OHS CONSULTANT

On September 1, 2008, Ontario Regulation 35/08 – Return to work and Re-employment in the Construction Industry, the newest regulation under the *Workplace Safety and Insurance Act (WSIA)* will come into force. This regulation replaces Ontario Regulation 259/92 which was in place under the former *Workers' Compensation Act* and continued after the change to the *WSIA* in 1999. The new regulation applies to all workplace accidents after September 1, 2008. Ontario Regulation 259/92 will still apply to all accidents before September 1, 2008.

The new regulation applies to all employers engaged primarily in construction, regardless of the number of workers they employ, and workers who perform construction work. The new regulation clarifies the return to work and re-employment obligations for the construction sector and brings the requirements for return to work and re-employment more in line with those for non-construction employers. This includes requirements for return to work such as initial contact between the parties following a workplace injury, and ongoing throughout the period of the worker's recovery, worker co-operation in identifying suitable work, and providing the WSIB with information regarding return to work. The regulation also sets out the requirement for employers to accommodate the work or the workplace to the point of undue hardship.

However, it also states that employers are not required to accommodate the workplace if they do not have control over the workplace.

Under the *WSIA*, employers are required to re-employ a worker following a workplace injury. Under the new regulation, the duration of this obligation remains the same as under O. Reg. 259/92. However, it includes a statement that the obligation to re-employ ends on the date that the worker declines an offer of re-employment by the employer in accordance with the regulation.

Where a worker is terminated following their re-employment after a workplace injury, the presumptions surrounding a breach of the re-employment obligation are the same as under the old regulation. Employers may rebut this presumption by showing that the worker's termination was not related to the workplace injury.

Similar to the old regulation, O. Reg. 35/08 sets out the requirement for return to work at both unionized and non-union construction projects. It sets out clear requirements where workers are able to return to either their pre-accident job, other construction work, or work outside of the construction industry. Employers should be mindful of these requirements and apply them according to their own workplace and the worker's functional abilities. Failure to do so may result in increased claim costs and/or penalties for breach of the re-employment obligation.

For a copy of the new regulation, please visit [http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_080035\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_080035_e.htm) ■

## Federal Prisons Go Smoke Free

BY: JENNIFER HOGAN, OHS CONSULTANT

Last month, Correctional Services of Canada (CSC) began implementing a complete smoking ban in federal prisons. The ban applies to all prison correctional officers and staff, as well as prison inmates. In maximum security prisons, the complete smoking ban took effect on May 5, 2008. The ban was also applied to medium security and minimum security facilities as of May 20, 2008 and June 2, 2008, respectively.

The issue of protecting workers from occupational exposure to second-hand smoke gained heightened awareness in 2002 when Heather Crowe, a waitress who spent nearly 40 years of her life working in smoke-filled restaurants, was diagnosed with lung cancer. Her case was highly publicized and before her death, Crowe explained, “my doctors told me I had a smoker’s tumour and, therefore, I’m dying. I never smoked a day in my life... The air was blue where I worked and I’m dying of lung cancer from second-hand smoke.”

In federal prisons, there have been a number of past work refusals initiated by corrections officers in relation to the hazard of second-hand smoke. One of the first work refusals occurred in 2000 when a corrections officer refused to be reassigned to a living unit as the exposure to second-hand smoke in the living unit constituted a danger. The investigating Canada Health and Safety Officer (CHSO) found, however, that there must be a reasonable expectation that the correctional officer would eventually develop a chronic illness or disease after being exposed to second-hand smoke during the single shift and the CHSO found that expectation to be unreasonable.

In October 2005, Howard Page, a corrections officer of 7 years, refused to work for health reasons related to second-hand smoke. Similar to the work environment Crown conveyed, Page explains, “in the winter . . . when the win-

dows are closed, the smoke has nowhere to go and . . . you can sometimes see a bluish haze hanging just below the ceiling.” The investigating CHSO issued a direction to CSC, ordering them to protect any person exposed to second-hand smoke. CSC applied for a stay after conducting maintenance work on the ventilation system and issuing the January 2006 indoor no-smoking ban. On August 10, 2006, the Appeals officer determined that the likelihood that the near zero exposure to second hand smoke would cause injury to the health of employees is so remote that no danger exists. The Appeals Officer rescinded the direction issued by the CHSO.

Although the CSC won the August 2006 legal battle, work refusals related to second-hand smoke exposure continued. On November 8, 2006, a work refusal was initiated by five correctional officers at one facility claiming that employees continued to be exposed to second-hand smoke. The investigating CHSO directed CSC to take measure to correct the hazard or condition or alter the activity that constitute the danger or protect any person from the danger. On appeal of the decision, CSC was directed to make every reasonable effort to address the issue and protect the employees from being exposed to second-hand smoke inside the workplace.

The complete smoking ban, currently being implemented, expands CSC’s January 2006 policy prohibiting indoor smoking, to prohibiting all smoking on prison property, both indoors and outdoors. CSC spokesperson, Lynn Brunette, explains, “since the partial ban was not working, in order to ensure a safe, healthy, smoke-free environment, we decided to move forward on a total ban.”

The introduction of the complete smoking ban, however, is not without concern. Last year, Canada’s federal prison system handled nearly 20,000 inmates. Although the complete smoking ban will eliminate occupational second-

hand smoke exposure, there are concerns that nicotine withdrawal will invoke escalated violence. Union of Canadian Correctional Officers spokesperson, Lyle Stewart states that, “contingency plans are in place to deal with any backlash from angry inmates.” Stewart explains the concern is, “about if there’s any organized attempt to lead a riot or revolt.”

With potential backlash yet to be a reality, Physicians for a Smoke-free Canada (PSC) applauded CSC’s decision to ban smoking in federal prisons. PSC’s Executive Director, Cynthia Callard, states, “prison guards and prison inmates deserve the same health protection as all Canadians. They should not be forced to assume the very real and very dangerous risks of breathing second-hand smoke as a condition of employment or a condition of their prison sentence.” ■

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