

*A national health & safety and workers' compensation law newsletter*



Welcome to our first issue of *OHS LAW REPORT*.

Gowling Lafleur Henderson LLP ("Gowlings") is a leading, full service Canadian law firm. This newsletter is intended to update you on important occupational health and safety and workers' compensation ("OHS") developments across Canada.

Gowlings' national OHS Team of lawyers and OHS consultants provides clients with training, consulting and legal services.

I trust that *OHS LAW REPORT* will inform and assist employers and workplace stakeholders to improve workers' health and safety and reduce workplace risk.

I welcome your suggestions on future topics for *OHS LAW REPORT*.

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

## Written Procedures and Training Required to Prove Due Diligence says Ontario Court

The recent conviction of a wafer board manufacturer in Ontario highlights the legal importance of written safe work procedures and employee OHS training specific to the hazards of the job.

In *R. v. Grant Forest Products Inc.*, the employer was prosecuted when a worker lost three fingers in the chain drive of the steel rollers used to carry wafer boards off the conveyor belt.

The evidence at trial indicated that no protective guard covered the drive mechanism. The company relied on the defence of **due diligence** at trial and argued that it had done everything reasonable in the circumstances to avoid the situation which led to the worker's injuries.

The Court identified an absence of protective meshing where the

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## Alberta Increases OHS Fines for Employers

Amendments to Alberta's *Occupational Health and Safety Act* ("Act") were made on December 4, 2002. These changes increased fines for employers, allow for the possibility of "on-the-spot" administrative penalties, extend time to commence prosecutions, and provide for the establishment of an Occupational Health and Safety ("OHS") Code.

Maximum fines for first time offences increase from \$150,000 to \$500,000. Second and subsequent

offences increase from a maximum fine of **\$300,000 to \$1,000,000**.

Alberta courts are now provided with broad discretion in applying "alternative penalties", based on the nature and circumstances of the offence. These include orders to establish an effective health and safety program, specific training for workers, conducting a safety workshop for an industry sector, and performing community service.

Perhaps the most dramatic change  
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## Nova Scotia Shift Work Workers' Compensation Claim Overturned

In December 2002, the Nova Scotia Court of Appeal released an important decision on "shift-work maladaptation syndrome" that may impact workers' compensation claims across Canada. In *Ross v. Michelin North America (Canada) Inc.*, the employee in question began working rotating shifts on a full-time basis for the employer in June of 1987.

The employer had four crews that worked an 8-hour rotating shift. The employee was aware of the requirement to work shifts when he

commenced his employment.

The employee worked this schedule for seven years before beginning to experience sleep difficulties. In November of 1999, after missing work on several occasions because of severe sleeplessness, he filed a Worker's Compensation claim.

The Nova Scotia *Workers' Compensation Act* required the employee to prove he was disabled "arising out of and in the course of employment".

The Workers' Compensation Appeals Tribunal held that a

"cognitive deficit" arose when he worked rotating shifts and allowed the claim.

The employer appealed to the Nova Scotia Court of Appeal. The Court overturned the decision of the Tribunal on the basis that the employee's cognitive deficit was a result of his natural and innate intolerance of the conflict between his personal sleeping pattern and the need to work at a time when he would naturally be asleep.

The Court held that this

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## British Columbia Court Expands Definition of "Employer"

A recent British Columbia court decision has broadly interpreted the definition of "employer" in an OHS prosecution.

In *R. v. Ted Newell Engineering Ltd.*, ("Newell") a professional engineering firm was charged as an employer with three separate counts of violating the *Occupational Health and Safety Regulations* under the Workers' Compensation Act.

An employee services building was being constructed in the resort municipality of Whistler Mountain.

Newell was contracted to provide engineering drawings for false work, reshoring, and on-site inspection services during the construction.

Newell was also contracted to provide authorizations to pour

concrete based on the engineer's professional opinion.

A representative of Newell approved the use of the false work and reshoring structures even though they did not conform to the engineer's drawings. During a concrete pour, the slab collapsed, concrete spilled onto the floor below, and four workers fell and suffered injuries.

Following an investigation, three charges were laid against Newell as an employer. The charges were defended, in part, on the argument that Newell did not fit within the definition of "employer" under the *Workers' Compensation Act*.

The court held that the purpose of the Act and Regulations is to ensure that health and safety concerns are met

in a construction project where many employers have workers.

The court also held that in such a workplace, the activities of each employer often has an impact on the workers of other employers. Therefore, Newell met the definition of "employer" under the Act.

The court went on to say that Newell was ultimately in control with respect to the decision to pour the roof slab.

Newell was the employer in the best position to determine if the requirements had been met to ensure the safety of all the workers on the site. In the decision, Newell was found guilty on two of the three charges. †

### Due Diligence Training

*Due Diligence is a legal defence to charges under Canadian OHS law. Gowlings offers Due Diligence training to help Managers and Supervisors understand their legal obligations and establish an effective OHS program. Scheduled Due Diligence courses are held in Ontario, Alberta and British Columbia. Customized in-house courses are available coast-to-coast. For more information on our Due Diligence training courses visit us at [www.gowlings.com/ohscourses](http://www.gowlings.com/ohscourses) or contact our Senior OHS Consultant, Yvonne O'Reilly, CRSP at (416) 862-3580 or [yvonne.oreilly@gowlings.com](mailto:yvonne.oreilly@gowlings.com).*

## Manitoba Amends its OHS Law to Protect Workers

Manitoba's *Workplace Safety and Health Act* ("Act") was amended in 2002 to afford better protection to workers. The amendments are the most significant that have been made to the Act in 25 years.

The changes expand the responsibilities and duties of those who have the ability to control hazards in the workplace. While this obviously includes employers, the *Act* now lists the duties of supervisors, contractors, owners and suppliers. Employers must ensure workers are trained to do their job safely and workers cannot lose pay or benefits during training.

An employer must also ensure that a supervisor is competent to ensure the work is done safely.

Supervisor's duties include advising workers of hazards in their

work area and ensuring that workers use the required safety and personal protective equipment.

Contractors, owners and suppliers have legal duties to ensure hazards are controlled.

For workplaces with 20 or more employees, an employer must develop a written workplace safety and health program in consultation with the committee. If an employer has more than one workplace, they may gain approval from the Ministry to utilize one program in all workplaces.

The *Act* details elements of a workplace OHS program including: policy statement, inspection schedule, training plan, investigation procedures, worker participation and review of the program at least every three years. †

## Written Procedures Required

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accident occurred. The trial judge stated this was an obvious hazard that should have been corrected.

Employees were minimally trained and were not given any worksite-specific safety training or instructions, and no written OHS procedures existed for the job the workers were doing at the time of the accident. Judge Belanger held that the company's safety practices were deficient and the company failed to prove, on a balance of probabilities, that it did everything reasonable in the circumstances to avoid the situation that led to the worker's injuries. The decision is under appeal. †

## Ontario Employers Required to Complete Certified Member Training

The Workplace Safety and Insurance Board ("WSIB") has identified that thousands of employers have yet to complete Certification Training for their Joint Health and Safety Committees ("JHSC"). Employers in Ontario with 20 or more workers must have a JHSC. One management and one worker member of the JHSC must complete Part One and Two Certification training to be considered a "certified member".

Part One courses are offered by WSIB-approved providers.

Part Two Certification, also known as Workplace Hazard

Specific training, builds on the skills and information learned in Part One.

The WSIB has identified the four steps of Part Two Certification for an employer to complete:

1. conduct a workplace hazard assessment;
2. determine the significant workplace hazards;
3. determine the training needs, and
4. ensure at least two JHSC members complete required workplace-specific training.

Failure to comply with this requirement may result in orders or even a prosecution.

Gowlings is an approved provider of a two-day Part One course, has assisted many employers with conducting their Workplace Hazard Assessment, and has developed a one-day course on office hazards as part of the training requirement for Part Two.

For further information on how Gowlings can assist you to complete the certification process visit us at [www.gowlings.com/ohscourses](http://www.gowlings.com/ohscourses) or contact our Senior OHS Consultant, Yvonne O'Reilly, CRSP at [yvonne.oreilly@gowlings.com](mailto:yvonne.oreilly@gowlings.com) or (416) 862-3580. †

## Compensation Claim Overturned

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intolerance was a personal characteristic and that there was no evidence that this condition was either caused, or aggravated, by the requirements of the job.

The appeal was allowed and the workers' compensation benefits

were denied.

This decision would appear to support the proposition that the mere fact that an employee becomes symptomatic at work is not sufficient to satisfy the legal requirement that the symptoms arise out of and in the course of employment. †

## Alberta Increases OHS Fines

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is the creation of an OHS Code to replace the existing 11 regulations. The Code, currently in draft, will cover detailed safety rules that are presently in the regulations. The proposed Code will address many new subjects including the prevention of workplace violence.

The Alberta government has

decided to publicize the safety records of employers and has indicated that they will post the "best and worst" performance records on its website and in other publications of the Ministry. Stay tuned for more information about what Alberta's new attitude on "getting serious about safety" will mean to employers. †

## Proposed "Health & Safety Crime" Added to Criminal Code

In November 2002, the Federal Minister of Justice and Attorney General announced the government's intention to amend the Criminal Code to add a "corporate health and safety" offence for directors, officers and corporations. The commitment relates to 1 of 74 recommendations from the Westray Mine Disaster Public Inquiry.

The federal government appears intent on bringing forth an amendment to the Criminal Code relating to the liability of directors and officers of Canadian corporations this year. No draft of the provision was available for review at the time of writing. We will be monitoring this amendment and advise of new developments in the next OHS LAW REPORT. †

## Gowlings' National OHS Team

For more information on Gowlings' OHS training, consulting and legal services please contact Norm Keith for legal inquiries or Yvonne O'Reilly for training and consulting inquiries.

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