

A national occupational health & safety (OHS) and workers' compensation law newsletter



The year 2004 has seen huge change in OHS law across Canada. From the Bill C-45 Amendments to the *Criminal Code* to the new Alberta OHS Code, employers face new responsibilities and liabilities in managing workplace risk. Now, the Canada Revenue Agency is working with OHS and workers' compensation regulators to address under-reporting and the underground economy.

We understand from reliable sources that a broader, national initiative is under consideration. We may soon see a single government inspector demanding workers' compensation as well as payroll records.

For governments, preventing under-reporting through integrated law enforcement promotes efficiencies and reduces costs. For employers, such an approach raises privacy and fairness issues.

We acknowledge the legal and moral obligations of employers to comply with the law. What powers, however, should inspectors have during enforcement of laws? Unless employers address this fundamental issue and influence the approach, they may find themselves as victims of a regulatory police state. ■

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

Canada Revenue Agency Joins Forces with Workers' Compensation Boards

Approximately 1000 Ontario employers have been identified as requiring to register with the WSIB as part of a pilot project called the CRA/WSIB Joint Registration Initiative.

The Joint Registration Initiative is a program that allows the Workplace Safety and Insurance Board (WSIB) in Ontario and the Canada Revenue Agency (CRA) to share information with each other to identify employers who have registered with one agency but not the other. This program may be expanded to other provinces.

Employers required to register with the WSIB will receive a joint CRA-WSIB registration letter encouraging them to regis-

ter and will be assessed and required to pay premiums and interest retroactive to January 1, 2002. Those employers that do not register voluntarily will be assessed premiums based on information obtained from CRA records and be subject to prosecution.

A misunderstanding of the WSIB's registration requirements may result in significant retroactive assessments, often in excess of \$100,000 plus interest, and potential prosecution for various offences, including failing to register as an employer. The maximum penalty for an offence under the WSIA is \$100,000 for an employer, and \$25,000, 6 months in prison

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Employer's Due Diligence Defence Successful

In one of the most important OHS prosecutions in the last five years, an Ontario employer has been acquitted on the defence of due diligence. The case involved a worker at a mining plant who was fatally injured when he placed himself into a moving part.

Judge Beasley heard a total of sixteen witnesses over the course of seven days at trial. The employer had a joint health and safety committee that actively inspected the workplace. The joint health and safety committee had never determined that there was a need to guard the rear of the

machine where the worker was caught and fatally injured. Management and union representatives had periodically inspected the plant, including the machine in which the worker was caught. Neither management nor any worker that testified at the trial identified as a possible hazard the moving part behind the machine.

The Ministry of Labour had inspected the part numerous times during the course of the operation of the equipment. The Ministry of Labour inspectors clearly had been in the vicinity of and had

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New OHS Law for B.C. Agricultural Operations

On January 1, 2005, new Occupational Health and Safety (OHS) requirements will come into force for all agricultural operations in British Columbia. For the first time, all parts of the *Workers' Compensation Act (WCA)* and the *Occupational Health and Safety Regulation (OHSR)* will be applicable to farms and farming operations throughout B.C. As a result, the *Regulations for Agricultural Operations*, along with its associated policies and supporting materials, will no longer be in force.

A number of new requirements under the *WCA* and the *OHSR*, will be applicable to farms, including but not limited to: expanded use of risk assessments; lockout procedures during equipment maintenance and repair; the use of roll-over protective structures on farm equipment; handling of pesticides and other hazardous substances; confined space entry procedures; and; measures and procedures to address harmful levels of physical agents such as noise, vibration, heat and cold.

The Workers' Compensation Board is allowing a one-year transitional period for farm employers to comply with their new legal duties under the *WCA* and *OHSR*. Beginning in 2006, however, these new OHS requirements for agricultural operations in B.C. will be fully enforceable, as they are for all other workplaces in the province. ■



Ontario Passes New Personal Health Protection Law

On November 1, 2004 the *Personal Health Information Protection Act, 2004 (Act)* came into effect in Ontario. The *Act* is a part of the *Health Information Protection Act, 2004*, which also includes the *Quality of Care Information Protection Act, 2004*. As signified in its title, the legislation aims at protecting personal health information. It differs from existing rules that are sporadically set out in several statutes and in professional standards by providing a unified and comprehensive scheme for safeguarding personal health information.

The *Act* governs the collection, use, and disclosure of personal health information in the possession of both health information custodians, such as health care providers, and non-health care information custodians, such as insurance companies and employers.

Disclosure of personal health information to a third party under the *Act* must

meet one of three requirements:

- 1) consent of the individual whose information is the subject of disclosure is obtained by a custodian;
- 2) disclosure is permitted under one or more of the enumerated exceptions set out in the *Act*; or
- 3) disclosure is otherwise required by law, such as is the case under the *Workplace Safety and Insurance Act, 1997*.

The *Act* provides individuals a right to access their health care records and correct any inaccuracies, as well as file complaints for a breach of the *Act*. Complaints by individuals will be investigated by the Privacy Commissioner of Ontario, who can make binding orders to ensure full compliance. The *Act* contains stiff penalties where along with the availability of damages in appropriate cases, an individual may be fined up to \$50,000 and a corporation up to \$250,000 per offence. ■

Proposed Amendments to Asbestos Regulation

The Ministry of Labour of Ontario has released proposed amendments to Regulation 838, a regulation respecting Asbestos on Construction Projects and in Building and Repair Operations. Feedback from the public is encouraged until December 3, 2004.

Regulation 838 applies to building owners, constructors, employers and workers that may be exposed to asbestos during work activities. Significant changes will include:

- ♦ All asbestos containing materials (non-friable and friable) and the type must be identified.
- ♦ A prohibition of the application or installation of asbestos more than 0.1% asbestos.
- ♦ Established standards for asbestos analysis, including the number of bulk samples to be submitted.

- ♦ A provision for glovebag removal is outlined.
- ♦ NIOSH approved respirators according to the new Schedule.
- ♦ A HEPA filtered ventilation system under negative pressure for certain Type 2 & 3 procedures.
- ♦ Visual inspection by a competent person for Type 3 procedures.
- ♦ Clearance air testing for certain Type 3 procedures, with specific details on testing and analysis.
- ♦ Training requirements for abatement workers and supervisors.

The proposed amendments will provide better worker protection against exposure to asbestos. An evaluation and possible revision of existing Asbestos Management Programs will be necessary to ensure the program covers the new legislative requirements, if amended. ■

Private Member Bill Proposes Harassment as a Workplace Hazard

Bill 126, introduced on October 14th, 2004 in the Legislative Assembly of Ontario, proposes to amend the *Occupational Health and Safety Act* to protect workers from harassment in the workplace. The Bill proposes that harassment and sexual harassment be specifically included as workplace hazards in Ontario's *Occupational Health and Safety Act*.

The NDP Private Members' Bill requires employers to ensure that every worker is protected from workplace-related harassment, and to prepare policy and guidelines. It also requires harassment prevention training for workers including those who exercise managerial functions.

The Bill's definition of "harassment" is that it "...includes sexual harassment and harassment because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability".

The Bill also proposes a definition of the phrase "workplace-related harassment" to mean:

- a) "harassment by a worker's employer or supervisor or by another worker, whether or not the harassment occurs at the workplace, or
- b) harassment that has the effect of interfering with the performance of any work-

er at the workplace or that creates an intimidating, hostile or offensive work environment for any worker."

The Bill appears to use the same approach as the *Ontario Human Rights Code* with respect to identifying categories of prohibitive grounds of harassment. These prohibitions already exist in the *Human Rights Code*.

Case law in Ontario, and elsewhere in Canada, has already identified workplace harassment as a potential hazard. There have been a number of tribunal decisions, at various levels, clearly establishing that harassment or threats of violence from a co-worker, customer, or stranger to the workplace were all hazards.

The Bill ignores the more serious issue of workplace violence and focuses on workplace-related harassment. The coroner's jury recommendations into the shooting death of four employees at OC Transpo, in the spring of 1999 in Ottawa, have yet to be addressed by the Ontario government. The coroner's inquest jury recommended that every Canadian government, including Ontario, pass legislation to require employers to take appropriate prevention measures in order to prevent and manage workplace violence. British Columbia, Alberta, Saskatchewan, and soon the Federal Government, have taken steps to do so. ■

Canada Revenue Agency Joins Forces with Workplace Safety and Insurance Board

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or both, for an individual.

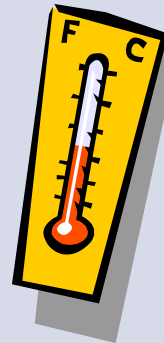
Section 75 of the *WSIA* requires that employers in Ontario register with the *WSIB* within 10 days of becoming an employer. That is, within 10 days of hiring direct employees or contracting for

the services of workers who do not provide proof of their own *WSIB* coverage by way of a Certificate of Clearance.

We recommend employers review their workers' compensation practices to ensure compliance and avoid legal liability. ■

Occupational Exposure to Cold Work Environments

As mentioned in our July 2003 article dealing with heat stress, some provinces have passed regulations dealing specifically with temperature extremes, many referring directly to their own stan-



dards. Exposure to cold work environments can result in serious injury, including frostbite, hypothermia and death.

Employers should review their cold work programs and take action to ensure they have all their requirements in place. This will help to avoid potential work refusals and related injuries, as well as compliance and stop work Orders and potential prosecution.

1. Assess your workplace (indoor and/or outdoor) for potential cold exposure. Identify sources of cold and wind chill. Determine if your existing written cold stress management program requires revision.
2. Review legislative requirements for your jurisdiction and assess the controls you have in place or may need to implement.
3. Determine if any workers require extra precautions.
4. All workers, including plant or field workers, managers, supervisors, travelling workers and office staff, should be educated about the organization's cold stress management program and to recognize the signs and symptoms of cold stress. First aid providers should be prepared to respond to emergencies involving exposure to cold temperatures.
5. Monitor your workers' exposure and the effectiveness of controls implemented. ■

Due Diligence Defence Successful

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observed the machine in question and never identified the need or the rear of the machine. Judge Beasley said that the employer,

"...has established on a balance of probabilities that it took all reasonable care to prevent what was ultimately a tragic accident that could not have been reasonably anticipated. In my view there is overwhelming evidence of the efforts taken by the accused to establish and maintain a safe workplace ... There is a corresponding lack of evidence to suggest the contrary. Not one single witness who was in the reduction floor area of the plant...ever considered [the moving part] to represent a safety hazard."

The court rejected an argument by the employer that the frequent presence of the Ministry of Labour inspectors in the plant, including a general awareness in inspection of the machine in question, amounted to proof of the defence of officially induced error. The court held that the employer did not specifically seek the advice of any Ministry of Labour inspector with respect to whether or not it needed to guard the rear of the equipment.

Judge Beasley went on to state,

"although the primary responsibility for worker safety is appropriately placed on

the employer by the Occupational Health and Safety Act, it is clear that Act envisions shared responsibility between all parties. Just as any employee has the right to expect compliance by the employer, so does the employer expect that any individual employee will govern him- or herself appropriately and by their conduct make the workplace safe and secure for all".

This decision provides guidance to both employers and OHS regulators, with respect to the appropriate standard of care required to prove the defence of due diligence. This case also stands for the proposition that a wholly unforeseeable and unanticipated act by a worker, contrary to general instruction of the employer and the supervisor will not result in employer legal liability.

This case also underscores the importance of tracking all OHS regulator visits to the workplace, identifying where they have inspected the workplaces, the importance of getting input from the OHS regulators with respect to whether or not they have any recommendations to improve the workplace to comply with OHS laws.

This record keeping of OHS regulator visits performed diligently, may provide a valuable source of evidence, if a serious accident occurs and an employer is required to defend itself in court to avoid OHS legal liability. ■

Gowlings' National OHS Team

For legal inquiries contact:

Norm Keith, B.A., LL.B., CRSP
Partner
1-866-862-5787 ext. 85699
norm.keith@gowlings.com

For training and consulting inquiries contact:

Olga Jordache
OHS Practice Coordinator
1-866-862-5787 ext. 83580
olga.jordache@gowlings.com

Visit our website:

www.gowlings.com/ohslaw

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

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

Karen Borden, B.A., LL.B.
Associate, Toronto

Thierry Carriere, B.C.L.
Associate, Montreal

Kacey Krenn, B.A., LL.B.
Associate, Vancouver

Adam Neave, B.A.Sc.
OHS Consultant, Toronto

Kim Nutz, B.A., LL.B.
Associate, Calgary

Elizabeth Rankin, B.A.Sc.
OHS Consultant, Toronto

Elisa Scali, LL.B.
Associate, Ottawa

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a Safer Workplace

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- NEW** ▶ **Advanced Workers' Compensation Claims Management (Ontario)**
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