Learn how OHSA changes in Ontario and Alberta will affect your business

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January 22, 2018

OHSA changes in Ontario

Ontario: Schedule 30 to Bill 177

- Effective December 14, 2017
  - Increased maximum fines
  - Changed the limitation period for laying charges
  - Changed accident notification rules

Increase to maximum fines: Corporations

- New maximum: **$1.5 million**
- Old maximum: $500,000

Increase to maximum fines: Corporations

- Last increase: 1990 (from $25,000 to $500,000)
- $500,000 with inflation 1990 to 2017: $840,000
- $1,875,000 total maximum with Victim Fine Surcharge

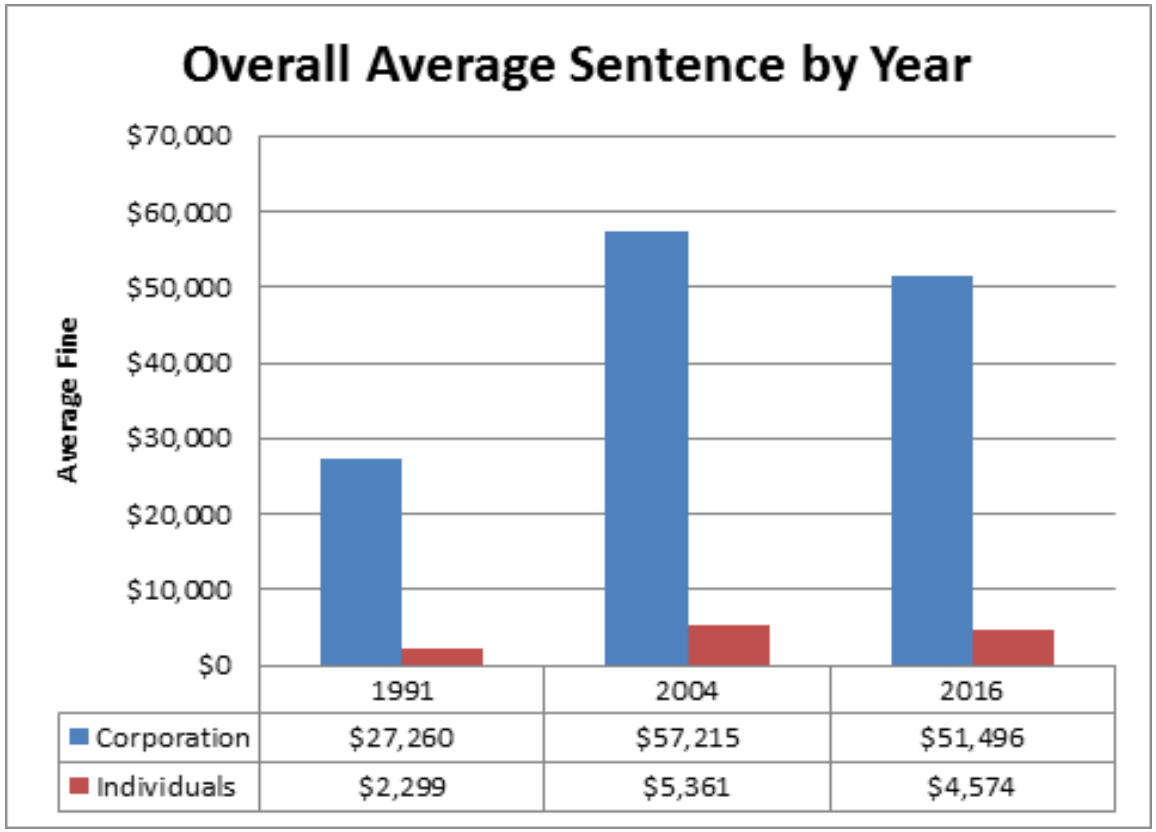
Increase to maximum fines: Individuals

- Supervisors, directors, workers
- New maximum: **$100,000**
- Old maximum: $25,000

Increase to maximum fines: Individuals

- Last increase: 1979 (from $10,000 to $25,000)
- $25,000 with inflation 1979 to 2017: $82,000
- $31,250 total maximum with Victim Fine Surcharge

Actual fines - Ontario

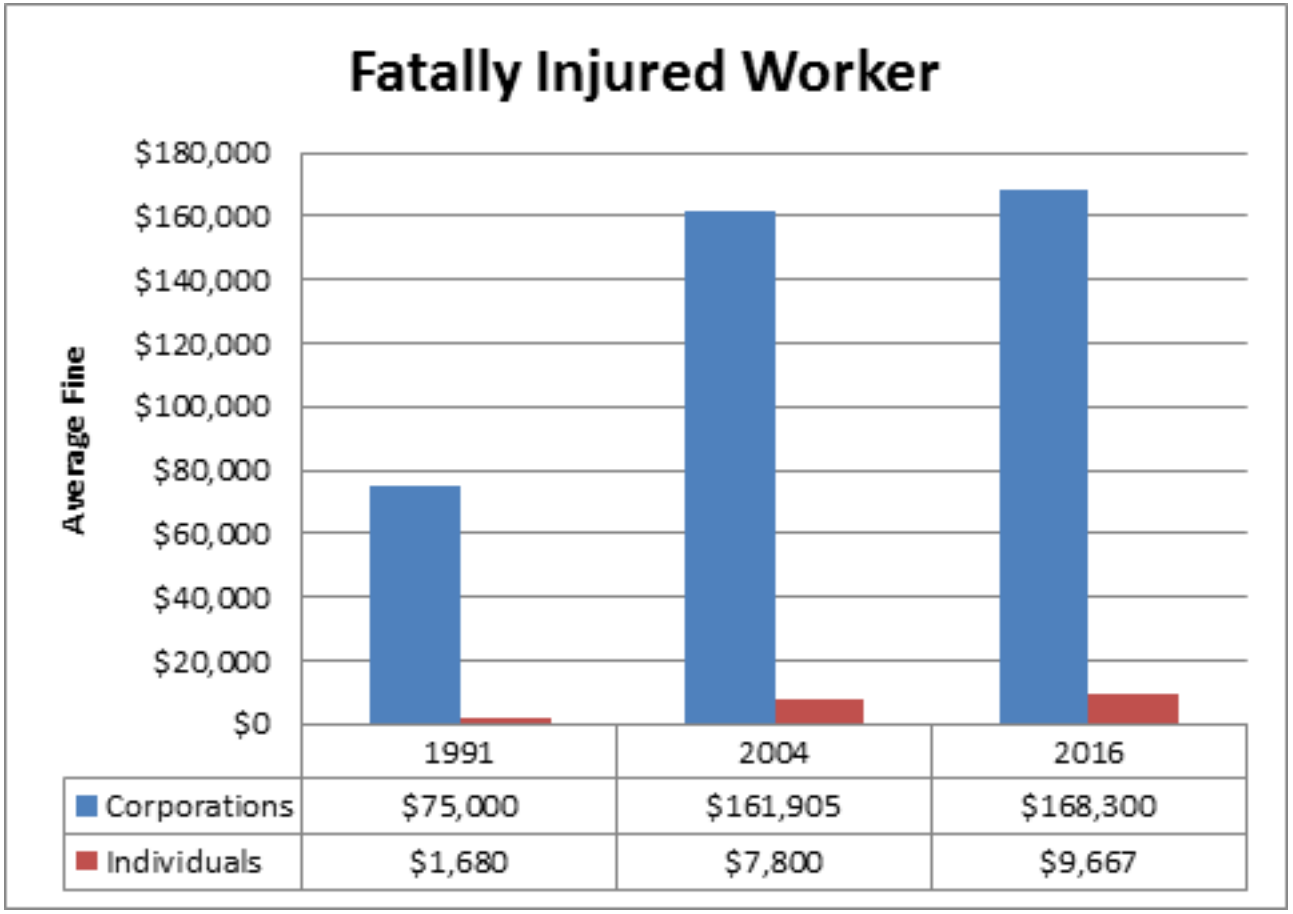


	1991	2004	2016
Corporation	$27,260	$57,215	$51,496
Individuals	$2,299	$5,361	$4,574

Averages calculated by Dentons Canada LLP

Data source: Exner et al., "Annotated Occupational Health and Safety Act", Thomson Reuters

Actual fines - Ontario



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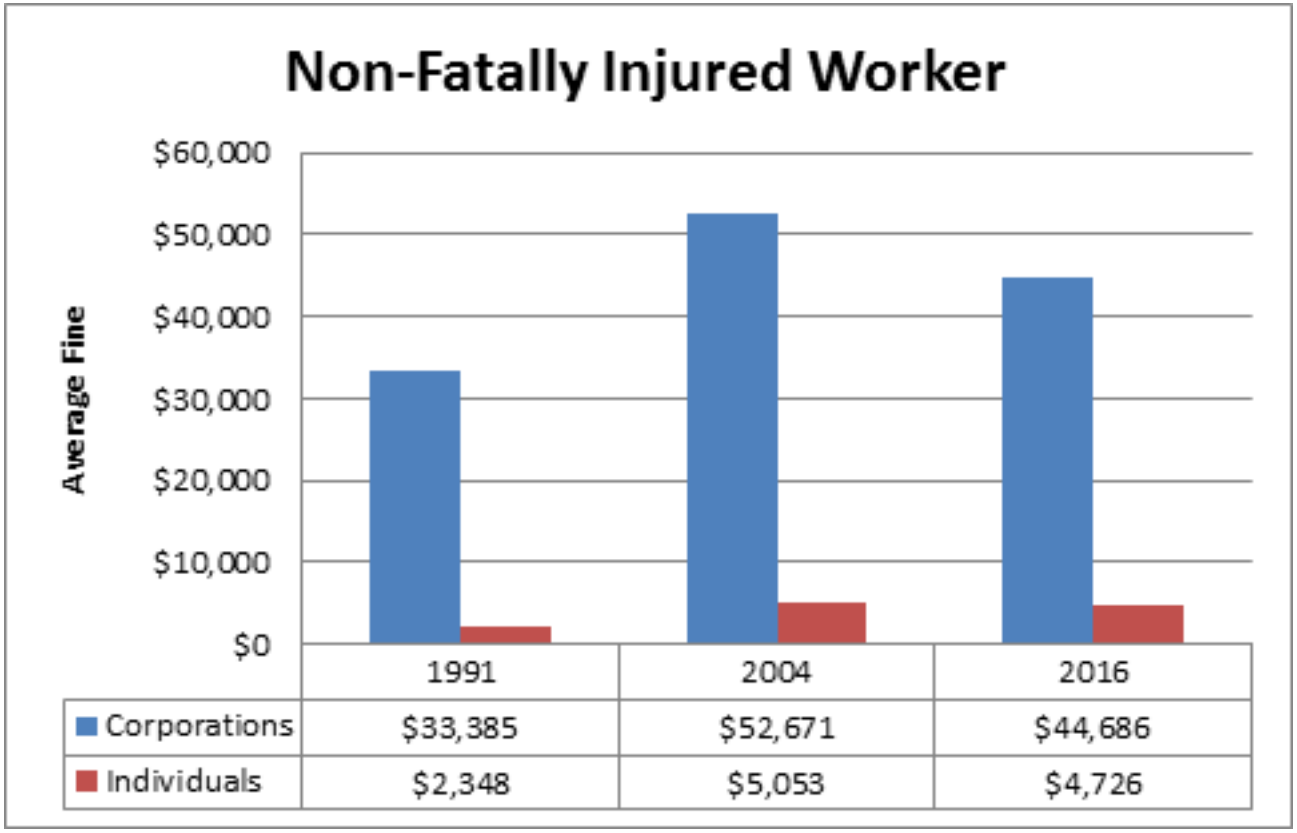
Actual fines - Ontario

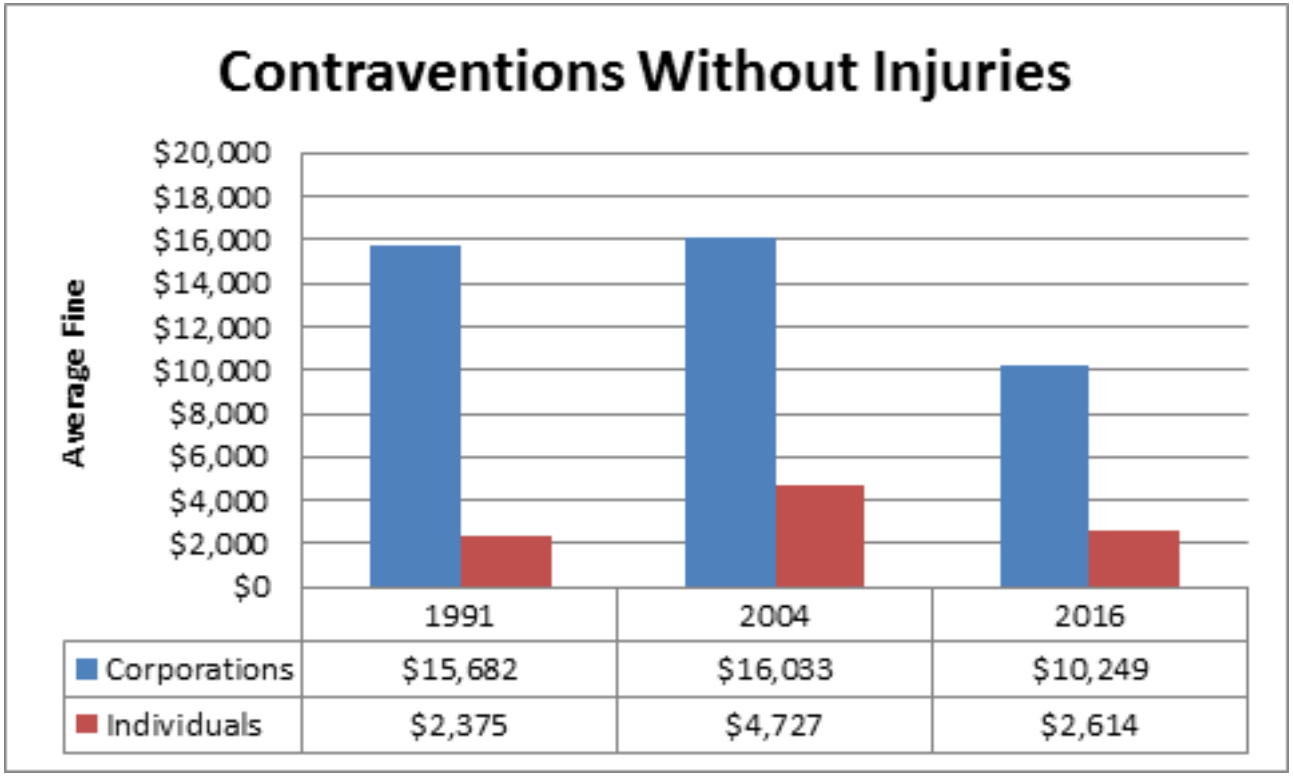


	1991	2004	2016
Corporations	$33,385	$52,671	$44,686
Individuals	$2,348	$5,053	$4,726

Averages calculated by Dentons Canada LLP

Data source: Exner et al., "Annotated Occupational Health and Safety Act", Thomson Reuters

Actual fines - Ontario



	1991	2004	2016
Corporations	$15,682	$16,033	$10,249
Individuals	$2,375	$4,727	$2,614

Averages calculated by Dentons Canada LLP

Data source: Exner et al., "Annotated Occupational Health and Safety Act", Thomson Reuters

How do courts react to increases in maximum fines?

- “The average fine after *Bill 208* is $33,504, about six times the previous average”.

  R.M. Brown, “Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation”, 30 Osgoode Hall L.J. 691 (1992)

How do courts react to increases in maximum fines?

- Cotton Felts factors for setting fine include:

  "the **maximum** penalty prescribed by statute"

- *Agra Foundations Ltd.* (Alta, 2011):

  "The Court interprets the increase in statutory fines under this section of the Act as indicative of the **legislature's intention to warn employers** than fines to be imposed will be sufficient to be felt by the employer and will be sufficient to serve as a warning to others that infractions of the legislation will be costly."

So what do we expect to happen with fines?

- Ministry of Labour prosecutors?
- Courts?

Change to limitation period for laying charges

- Old limitation period: one year

- New limitation period: later of:
  - One year, or
  - One year after the day upon which an inspector becomes aware of the alleged offence.

Change to limitation period for laying charges

- What does change mean?
  - Reportable accidents: one year if reported
  - Non-reportable accident: potentially indefinite
  - Retroactive?

Change to limitation period for laying charges

- MOL inspectors:
  - Unannounced inspections: MOL inspectors ask for accident history?
  - If accident, will MOL inspectors ask about previous accidents?
  - One accident lead to charges relating to multiple incidents?

Change to limitation period for laying charges

- Practical considerations for employers:
  - Documenting accidents?
  - Investigating accidents?
  - Documenting results of investigation?
  - Investigations under privilege?

New reporting rules: structural inadequacy of building

- S. 25(2)(n):
  - Employer that does not own building:

    must notify MOL if JHSC or health and safety representative “has identified potential structural inadequacies of a building, structure, or any part thereof, or any other part of a workplace, whether temporary or permanent, as a source of danger or hazard to workers.”

Government has power to make regulations with new reporting obligations

- Government can make regulation specifying:
  - additional notice requirements under
    - S. 51 (fatality or critical injury)
    - S. 52 (notice to JHSC for certain non-critical injuries)
    - S. 53 (accident, premature or unexpected explosion, fire, flood or inrush of water, failure of any equipment . . .)
  - Including:
    - who is required to provide the notice
    - deadline for providing notice
    - information in notice

OHSA changes in Alberta

Bill 30 – Introduction and coming into force

- Late last year, Bill 30: *An Act to Protect the Health and Well-being of Working Albertans* received first reading in the Legislative Assembly of Alberta.
- Bill 30 introduced amendments to Alberta's *Occupational Health and Safety Act* (OHSA) and *Workers' Compensation Act.*
- Bill 30 received Royal Assent on December 15, 2017 and is now the law.
- The majority of the OHSA amendments come into force June 1, 2018.

Psychological well-being and harm

- Under the old OHSA, “health and safety” is not defined.
- Under the new OHSA, “health and safety” is defined to specifically include physical, psychological and social well-being.
- Currently, the OHSA does not impose specific obligations regarding harassment or psychological injury.
  - The OHS Code requires employers to develop policies and procedures to deal with potential workplace violence, but the definition of “violence” is limited to conduct that causes, or is likely to cause physical injury.
- Under the new OHSA, “violence” will include psychological injury or harm and will specifically include domestic violence.

New obligations relating to workplace harassment and violence

- Employers must ensure none of their workers are subjected to or participate in harassment or violence at the work site.
- Supervisors must ensure none of the workers under their supervision are subjected to or participate in harassment or violence at the work site.
- Workers must refrain from causing or participating in harassment or violence.

Expanded obligations of work site parties

- The obligations and responsibilities of employers, workers, suppliers, contractors and prime contractors have been revised and expanded.
- The definition of “owner” has been changed and owners will have specific obligations under the new OHSA.
  - Currently, owners do not have any stated obligations unless they are the prime contractor.
- New categories with specific obligations have been added:
  - Supervisors;
  - Service providers;
  - Self-employed persons; and
  - Temporary staffing agencies.

Changes to the prime contractor requirements

- Under the old OHSA, a prime contractor is required if there are 2 or more employers involved in work at the work site.
- Under the new OHSA, a prime contractor will be required on every construction and oil and gas work site, or a work site designated by a Director if there are 2 or more employers or self-employed persons, or one or more employers and one or more self-employed persons involved in work at the work site.
- Under the old OHSA, the prime contractor was deemed to be the owner, unless the owner entered into an agreement (oral or written) with another person to be the prime contractor.
- Under the new OHSA the “person in control of the work site” is required to designate in writing a person as the prime contractor.
  - If the person in control of the work site fails to make the designation, that person is deemed to be the prime contractor.
- The prime contractor’s name must be posted in a conspicuous place at the work site.

JWSHSC – mandatory

- Under the old OHSA, joint work site health and safety committees (JWSHSC) are not mandatory unless ordered by the Minister.
- Under the new OHSA, employers who employ 20 or more workers with work that is expected to last 90 days or more, or if at a work site designated by a Director, must establish a JWSHSC.
- If there are 20 or more workers in total from 2 or more employers/self-employed persons at a work site and the work is expected to last 90 days or more, the prime contractor (if applicable) or (if no prime contractor) all employers and self-employed persons, must coordinate the establishment of a JWSHSC for the work site.

HSR – mandatory

- Employers who employ 5-19 workers with work that is expected to last 90 days or more, or if designated by a Director, must designate a health and safety representative (HSR).
- The Director may approve an alternative measure to ensure the health and safety of workers.
- If there are 5-19 workers in total from 2 or more employers/self-employed persons at a work site and the work is expected to last 90 days or more, the prime contractor (if applicable) or (if no prime contractor) all employers and self-employed persons, must coordinate the designation of a HSR for the work site.

JWSHSC/HSR – duties

- The JWSHSC's duties include:
  - Receiving, considering and disposing of safety concerns and complaints;
  - Participating in identifying hazards;
  - Developing, promoting and checking the effectiveness of safety measures;
  - Cooperating with an OHS officer;
  - Developing and promoting safety education programs;
  - Making recommendations to the employer, prime contractor or owner about health and safety;
  - Regularly inspecting the work site;
  - Participating in investigations of serious injuries and incidents; and
  - Maintaining records relating to its duties.
- The HSR's duties are the same as a JWSHSC, with necessary modifications.

Working with the JWSHSC/HSR

- If the JWSHSC/HSR brings a safety matter to the attention of the employer, self-employed person or prime contractor, and makes recommendations to remedy the matter:
  - If the matter can be resolved by that party within 30 days, it must do so;
  - If the matter cannot be resolved by that party within 30 days, it must respond in writing stating how and when the concern will be addressed; or
  - If the party disagrees with the recommendations or does not accept that there is a concern, that party must give reasons why.
- If the parties cannot resolve a problem or address a concern, the matter may be referred to an officer.

JWSHSC/HSR – time away and entitlement to pay

- The JWSHSC members and HSR are entitled to the following time off with pay from their regular duties:
  - The necessary time to prepare for each meeting (as determined by the member or HSR);
  - The time required to attend meetings;
  - The time required to attend health and safety training as approved; and
  - The necessary time to carry out the member or HSR's duties (as determined by the member or HSR).

Dangerous work and discriminatory action

- Under the old OHSA, workers had a duty to refuse work where there was an imminent danger.
- The new OHSA gives workers the right to refuse dangerous work.
  - Where a worker refuses work under this section, he/she is entitled to continue to be paid, although the employer may temporarily assign the worker to alternate work.
- “Discriminatory action” replaces/expands the current OHSA definition of “disciplinary action”.
  - Where an officer determines that discriminatory action has been taken against a worker, a presumption applies in favour of the worker and the employer has the onus to prove that the discriminatory action was taken for reasons other than those prohibited under the OHSA.

Health and safety program

- Section 37 of the new OHSA requires that employers with 20 or more workers must establish (together with the JWSHSC) a health and safety program.
  - The section lists certain minimum elements, including:
    - Health and safety policy;
    - Hazard identification;
    - Emergency response plan;
    - Worker and supervisor health and safety orientation and training; and
    - Investigation procedures.
  - The health and safety program must be reviewed every 3 years or if there is a change in circumstances at the work site that creates or could create a hazard to workers.

Serious injuries and incidents

- Under the old OHSA, the reporting requirement applied for injuries where the worker was admitted to hospital for more than 2 days.
- Under the new OHSA, the reporting requirement is triggered where a worker is admitted to hospital (beyond emergency room assessment).
- Additional list of reportable incidents occurring at mines or mine sites.
- Near misses must now be investigated and reported (previously, just had to be investigated).
- The employer or prime contractor’s investigation report must be provided to the Director, the JWSHSC/HSR/made available to workers.

Stop work/stop use orders

- The new OHSA gives officers the power to issue stop work orders applicable to more than one work site where the officer is of the opinion that activities that involve a danger to the health and safety of workers are being carried on by workers of the same employer at more than one work site.
- While a stop work order or a stop use order is in effect, workers who are directly affected are entitled to continue to be paid and may be reassigned.

Reviews/appeals

- Reviews may be requested of some officer's orders to the Director of Inspection by written submissions. Orders include:
  - Compliance orders;
  - Stop work orders;
  - Stop use orders; and
  - Dangerous work refusal orders.
- Appeals of other orders go to the appeal body.
- The Labour Relations Board is the appeal body.

Offences and penalties

- List of conduct considered an offence has been expanded.
  - Now specifically includes items such as intentionally obstructing or failing to cooperate with a Director or officer and making a false entry in any record required to be kept under the legislation.
- Penalties have not changed.
  - $500,000/6 months imprisonment for a first offence.
  - $1,000,000/12 months imprisonment for a second offence.
- New OHSA expands the courts' ability to impose creative or alternative sentences by adding items such as research programs, establishing scholarships and a broad provision: any other purpose that furthers the goal of achieving healthy and safe work sites.

Publication of information

- Under the new OHSA, more information will be published regularly including data on claims and injuries, orders, administrative penalties, tickets issued to employers and investigation reports completed by an officer.
- Only some of these are currently being published.

Occupationalhealthandsafetylaw.com

Court finds that "accident as prima facie breach" principle precludes an order for particulars on an OHSA "general duty" charge

Posted on Jan 9th, 2018 By **Cristina Wendel**
Categories: **Caselaw Developments**, **Prosecutions / Charges**

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The "accident as *prima facie* breach" principle has been before the court in several recent cases, often with some discrepancy in its application. The principle was again before an Alberta court recently in the context of an application for particulars.

The principle provides that in some cases, proof that an employee was injured in an accident while performing his or her employment duties proves the *actus reus* for an occupational health and safety (OHSA) "general duty" charge, as long as the necessary elements are proven beyond a reasonable doubt. The burden then shifts to the accused to establish a due diligence defence.

In this case, a worker was seriously injured in a workplace incident and the employer was charged with 8 counts. Count 1 of the Information was a "general duty" breach allegation stating that the employer had failed to ensure, as far as it was reasonably practicable to do so, the health and safety of the worker, contrary to section 2(1)(a)(i) of the *Occupational Health and Safety Act* (Alberta). After receiving the Crown's disclosure, the employer applied for particulars of Count 1 on the basis that there was information contained in the Crown

Thank you

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