Court accepts joint submission and orders employer to pay fine of C$100,000 following workplace fatality

May 01 2018 | Contributed by Dentons

Litigation, Canada

- **Facts**
- **Decision**

In *R v Allen Services & Contracting Ltd* (2018 NWTTC 03 (CanLII)), the Territorial Court of the Northwest Territories considered and accepted a joint submission from the crown and defence, sentencing the employer to a C$100,000 fine.

Facts

The matter arose following a workplace incident in June 2016, in which a worker was killed. The worker had been operating a vibrating roller packer used to compact a new access road in the Northwest Territories. The packer rolled off the road and the worker either fell or attempted to jump out of the packer as it rolled over. The packer rolled on top of him, killing him.

The employer faced a number of charges and pled guilty to a charge of failing to ensure that the worker was properly supervised.

Decision

The court considered the significance of a joint submission, noting that it is normally the result of a negotiation process between lawyers. This process is important to the administration of justice; thus, the courts should defer to a joint submission within the bounds established by the Supreme Court of Canada in an earlier case. The Supreme Court of Canada had stated that when considering a joint submission on sentence, the trial judge should accept the submission unless doing so:

- would bring the administration of justice into disrepute; or
- would otherwise be contrary to the public interest.

This would occur where the joint submission is such that it would be "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the criminal justice system". Therefore, the trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".

To apply this test, the court reviewed established sentencing principles, noting that the ultimate aim of imposing a significant fine was behaviour modification, both specific deterrence (deterring the employer from similar offences in the future) and general deterrence (deterring other employers from committing similar offences). However, the sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender.

The court applied the following factors and considerations when assessing the amount of the C$100,000 fine proposed by the joint submission:

- Nature of the offence – there was a recognised danger that the packer could roll over. It was equipped with a rollover protection structure and had several warning labels stating that seat belts must be worn. Evidence proved that the worker had not been wearing a seat belt at the time of the incident. However, there was no evidence that anyone had told the worker to wear his seatbelt. The court found that the worker should have been instructed to wear a seatbelt and that his supervisor should have ensured that he was wearing a seatbelt and not operating the packer on or near an inclined surface. The failure to do so was a serious omission.
- Nature of the offender – the employer was a relatively small, privately-held corporation with revenue in 2017 of slightly over C$1 million.
- Degree of blameworthiness – the court recognised that this was not a situation in which the employer had taken chances to make money. However, a young worker with no formal training had been put in charge of heavy equipment without proper instruction or supervision. Instruction and supervision with respect to the safe operation of the packer should have been integral to the company's operations.
- Capacity to pay a fine – given the employer's revenue in past years, the court was satisfied that C$100,000 was a significant amount and would have a substantial deterrent effect.
- Maximum fine under the legislation and range of fines – the maximum fine under the Northwest Territories Safety Act was C$500,000. On review of similar cases, the court was satisfied that C$100,000 was within the range of fines normally imposed for this type of offence.
- Previous convictions – the employer had no history of safety or other regulatory infractions.
- Harm and potential harm – the worker died as a result of being crushed by the packer. Had he been wearing his seatbelt, he likely would have been held in the protective structure and protected.
- Contributory negligence – the worker should have been wearing his seatbelt and the court assumed that he would have seen the prominent warning labels; therefore, he chose not to wear his seatbelt. However, he was a young man who would have relied on his supervisors and may have believed that there was no real possibility of a rollover. While levels of tetrahydrocannabinol were found in his blood, indicating that he had consumed hashish or marijuana in the hours before the accident, the evidence was not properly before the court and did not establish that cannabis consumption was relevant to his death. However, the court recognised that this may have been one of the matters forming the negotiations for the joint submission.
- Post offence conduct – the employer had spent over C$37,000 to fly the worker's family to the Northwest Territories on more than one occasion and had created a memorial to the worker. The employer had cooperated with the investigation and the guilty plea was a mitigating factor on sentence. The presence of one of the owners at the sentencing hearing was also significant.
- Balancing of factors – the court noted that none of these factors could be considered in isolation, nor would one override the others.

The court considered all of these factors and accepted the joint submission, ordering the employer to pay a fine of C$100,000. The court waived the 15% victim crime surcharge because it was satisfied that it would result in undue hardship to the employer.**(1)**

For further information on this topic please contact Cristina Wendel at Dentons by telephone (+1 780 423 7100) or email (cristina.wendel@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) For more information please see www.occupationalhealthandsafetylaw.com.

Cristina Wendel

employmentlawtoday.com
Apr 26, 2018

Armoured car employee's work refusal due to Christmas crowds was not justified

No proof the holiday shopping crowds presented a danger: Adjudicator
By Adrian Miedema

A federal adjudicator has decided that an armoured car worker was not justified in refusing to do a "run" at a mall because of the crowds during the Christmas shopping season.

The employee claimed that due to crowds, he was unable to maintain a "21 foot perimeter" when he went into the mall, crowded with Christmas shoppers, and that that put him at increased risk of a robbery. He therefore argued that under the *Canada Labour Code,* he was justified in refusing to work.

The adjudicator rejected the employee's argument, finding that the evidence had not proven that there were serious crowds at the mall in the morning when he did the "run." Further, there had not been a robbery at the particular shopping centre in the last 10 years. The adjudicator concluded that the employee was not exposed to an imminent or serious threat to his life or health. Therefore his work refusal was not justified.

For more information see:

- *Pogue v. Brink's Canada Ltd.*, 2017 CarswellNat 8663 (Can. Occupational Health & Safety Trib.).

Adrian Miedema is a partner with Dentons Canada LLP in Toronto. He can be reached at (416) 863-4678 or adrian.miedema@dentons.com. Adrian's discussion of this case also appears in the Dentons blog www.occupationalhealthandsafetylaw.com.

CPP: Canadians will soon pay more and get more

Mary Picard,
Dentons Canada LLP

New contribution obligations required by CPP and QPP "enhancements" will mean bigger employer and employee payroll contributions and bigger payments for retired Canadian workers.

In 2016, the federal Finance Minister and nine provincial counterparts agreed to change the Canada Pension Plan ("CPP"). The changes became law in December 2016.

The Québec government recently followed suit by introducing legislation that will make changes to the Quebec Pension Plan ("QPP") to mirror the CPP changes.

Increased payout

The changes are described by both governments as "enhancements." Benefit amounts will increase as will payroll contribution obligations of employers and employees.

Retired Canadian workers will receive bigger payments from the CPP and QPP. The maximum amount of the payout from the CPP to a retired Canadian has been estimated by the federal Department of Finance to rise from $13,110 a year to nearly $20,000 when the CPP enhancements are fully implemented.

Implementation

The Department has estimated that full implementation will occur after approximately 40 years of making contributions. So, the sad reality is that older Canadian workers will never enjoy the fruits of the CPP higher benefits. However, they will be required to start contributing more to fund them in a few months.

This article describes the higher contributions to the CPP that will be required commencing January 1, 2019, and several strategies that Canadian employers are considering in response. For simplicity, it will describe the details of the CPP changes.

Employers and employees contribute equal amounts to the CPP by payroll deductions. That will not change. Every employer and employee pays a percentage of the employee's income, subject to certain portions of income being exempt.

Exemptions

The first $3,500 of income is currently exempt from CPP contributions. In addition, income in excess of an amount set by the Government of Canada, called the Year's Maximum Pension Earnings or "YMPE" amount, is exempt.

In 2018 that YMPE cap amount is $55,900. In 1996, the rate that each employer and employee had to pay was 2.8% of applicable income. It increased gradually to 4.95% in 2003 and has remained constant since then.

New contributions

There are two parts to the new contribution obligations required by the CPP "enhancements."

First, the contribution rate will increase from the current 4.95% to 5.95%. The increase will be applied gradually, over a seven-year phase-in period, commencing January 1, 2019.

Second, an entirely new, second tier of contribution obligations will be imposed on higher-income earners, commencing in 2024. Employees who earn more than the YMPE amount at that time will be required to contribute an additional percentage (currently projected to be 4%) of those above-the-YMPE earnings.

Employers will have to match that. Note that there will be a cap on the earnings that will be subject to this new tier of contribution obligations.

Public response

There has been no noticeable public outcry by employers and employees regarding these increased contribution obligations. The increases are being implemented so very gradually for the first few years that they may not be noticed.

Impact

The federal Department of Finance has estimated that an individual with an annual salary of $54,900 will contribute only an additional $6 per month in 2019. By the end of the seven-year phase-in, contributions for that individual would be approximately $43 per month higher.

The significant impact will likely not be felt until 2024, when higher-income earners will notice a much bigger bite taken out of their earnings. Some consultants and employers have been mulling over options to react to these new obligations.

Plan adjustments

The higher contributions cannot be avoided, but changes can be made to compensation and benefit plans to reduce or entirely negate the impact. The following describes some options.

Employers who sponsor defined contribution pension plans and group registered retirement savings plans could reduce the required contributions to those plans by the same amount of the higher CPP contributions, so that the net effect on employer costs and employee take-home pay is nil.

Mandatory employee contributions to defined benefit pension plans could be reduced so that employees would not suffer a reduction in take-home pay. The defined benefit promise in such plans would have to be reduced for there to be a financial advantage for employers.

Employers who sponsor defined benefit pension plans should seek advice as to whether the CPP and QPP changes have any relevance to the computation of benefits, or contributions, in the defined benefit plans.

Some pension plans require employee contributions based on how much they contribute to the CPP. And,

See Pensions and Benefits, page 96

some plans have "integration" with benefits payable from the CPP, such as an offset to the amount of the benefit to take account of the CPP benefit payable.

It is notable that reducing benefits and contributions to employer-sponsored pension plans in response to CPP and QPP changes will result in the shift of pension responsibilities from employers to governments.

Salary and bonus

Other elements of compensation could be reviewed, including salary and bonus plans, to determine whether the increased costs to employers and employees of higher CPP and QPP contributions could be offset by changing payments to employees from such plans.

Restrictions

Any changes to compensation and benefit plans to minimize the impact of the CPP and QPP enhancements will be subject to restrictions in collective agreements, fixed-term employment contracts, and the obligation to provide reasonable notice of significant changes to terms of employment.

Significance

The details of the changes to Canada's state-sponsored pension plans are complicated, and the higher contribution obligations may not be noticed for a few years.

Employers should nevertheless consider whether there is a financial (or other) benefit to considering changes to the terms of their compensation and benefit plans in order to manage the impact of the CPP and QPP changes.

REFERENCES: *Canada Pension Plan*, R.S.C. 1985, c. C-8, amended by S.C. 2016, c. 14; Bill No. 149, *An Act to enhance the Quebec Pension Plan and to amend various retirement-related legislative provisions* (introduced in the Quebec legislature on November 2, 2017, currently before the Committee on Labour and the Economy), proposing to amend the *Act Respecting the Quebec Pension Plan*, C.Q.L.R. c. R-9; Department of Finance Canada, *Backgrounder: Canada Pension Plan (CPP) Enhancement,* online: https://www.fin.gc.ca/n16/data/16-113_3-eng.asp.

BRIEFLY SPEAKING

INTELLECTUAL PROPERTY: Earlier this year, the **Federal Court** upheld the **Trademarks Opposition Board**'s decision **refusing Hamdard Trust's trademark registration** on grounds of **non-distinctiveness**.

The **trademarks** at issue relate to the name of a **Punjabi-language newspaper** used by two entities. Hamdard Trust publishes an Indian newspaper called "**AJIT**," whereas **Navsun Holdings** publishes a Canadian newspaper called "**AJIT WEEKLY**."

Both parties also operate a corresponding **website** with an **electronic version** of their respective newspapers, again in the **Punjabi language**.

Hamdard Trust applied to **register** the word mark **AJIT** for use in association with printed publications and newspapers. **Navsun opposed** the registration, alleging (among other things) that the AJIT mark was **not distinctive**. The **Board rejected** the **registration**, finding that **Navsun's mark** was **sufficiently known** to negate the distinctiveness of Hamdard Trust's mark as of the material date.

On **appeal**, the **Federal Court** held that since **distinctiveness** of a mark can only be acquired through **use in Canada**, Hamdard Trust's evidence regarding **reputation in India** and knowledge or confusion of the mark among immigrants to Canada was **irrelevant**. Notably, the **Court distinguished** between **distinctiveness** in the context of applying to register or maintain a **trademark**, and distinctiveness in the context of a **passing off action**.

In the former case, distinctiveness can only be acquired through use of a mark in Canada. However, in the latter case, in trying to establish that there was a **misrepresentation**, distinctiveness of a mark relevant to an assessment on **confusion** can be acquired through use of a plaintiff's mark **outside Canada**.

The Federal Court concluded that the **Board** had correctly applied the **applicable law** and that the **new evidence** introduced in the appeal would **not** have **materially affected** the Board's **decision**. *Trust v. Navsun Holdings Ltd.*, 2018 CarswellNat 340, 2018 CarswellNat 88, 2018 FC 42 (F.C.) – Jasleen Chahal, Gowling WLG (Canada) LLP

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Employee’s 'theory' that he was dismissed for questioning his employer’s safety systems was just a theory, not evidence

Employee still received aggravated and punitive damages for manner of dismissal; employer didn't give reason for abrupt firing
By Cristina Wendel

A judge in a recent wrongful dismissal action dismissed the employee’s allegation that he was dismissed after making suggestions about improvements to the employer’s safety systems. The employee was a relatively short-term employee (25 months), working as a Control Systems Specialist. His duties included designing, implementing and monitoring various control systems for machines manufactured by the employer.

The employee testified that the employer had been involved in a fatality in California, involving one of its machines. As a result, the employee claimed that he became concerned about the employer’s future liability and took it upon himself to do some research regarding safety systems. He sent an email to his general manager making suggestions, including a redesign of the system and a rewrite of the safety manual. The general manager had replied to say that the employer was looking for an expert, would be reviewing training methods, and that he was open to further discussion. He also stated that the employer’s goal was not to escape liability but rather, to “build machines that do not hurt people.” The day after this email exchange, the employee was called into a meeting and terminated without cause. He was not given a reason and when he asked, he was told that the employer’s counsel had instructed it not to give a reason. He was escorted out of the office in a civil manner. The employee followed up a few days later, again asking for a reason for his dismissal but the employer did not respond.

At trial, the employee's theory was that he was dismissed because he was questioning the employer’s safety systems. Other employees had told him he “wasn’t a good fit.” The employer denied that the reason for the employee’s dismissal was his concern with the safety system. The general manager testified that the employer had been experiencing some financial challenges that resulted in 12 employees being dismissed, managers taking a salary cut, overtime hours being lost, and several projects being in jeopardy. He claimed that the timing of the dismissal the day after the employee’s emails about his perceived safety issues was a coincidence and that the employee was dismissed because he was not a good fit.

In addition to damages for reasonable notice of termination, the employee claimed he was entitled to aggravated and punitive damages as a result of the manner in which he was dismissed. His evidence was largely related to the employer’s refusal to give him a reason for the dismissal and the timing with relation to his emails about the safety concerns. The judge found that the employee’s theories were not supported by the evidence and were insufficient to justify an award of aggravated or punitive damages. The judge held that the employer’s conduct was not malicious and high-handed so as to warrant additional damages and dismissed that aspect of the employee’s claim.

For more information see:

• *Dragos v. Hunterwood Technologies Ltd.*, 2018 CarswellAlta 249 (Alta. Prov. Ct.).

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Possession of small amount of marijuana was just cause to fire employee

March 13 2018 | Contributed by Dentons

Litigation, Canada

The Newfoundland and Labrador Court of Appeal has upheld the firing of a unionised millwright who was caught with a small amount of marijuana in his pocket during screening before boarding a helicopter that would transport him and other employees to an offshore platform.**(1)** The employer had a policy prohibiting possession of illegal drugs, including marijuana, "while on company facility or while performing company business".

The employee, who was employed on a call-in or casual basis, claimed that he was "in disbelief that it was there" and that he "did not know how it got in his pocket". The labour arbitrator found that the employee likely knew that he possessed the marijuana (noting that he did not protest "loud and long" that it was not his or that he had no knowledge of possessing it), but had forgotten about it and not checked his pockets carefully. The arbitrator upheld the employer's decision to dismiss the employee; however, the Newfoundland Supreme Court set that decision aside.

The Newfoundland and Labrador Court of Appeal restored the arbitrator's decision, stating:

> "*To avoid disciplinary action, the employee was required to establish that he had taken all reasonable care to ensure that he did not breach the Policy by having possession of marihuana. The arbitrator reviewed the circumstances and the explanation provided by the grievor and concluded that he had not satisfied this onus. Rather, the arbitrator found that the grievor more probably than not knew about the marihuana in his pocket, but had forgotten it was there and had not carefully checked his pockets before entering the screening area... The employee's actions did not establish that he had taken all reasonable care to ensure that he did not breach the Policy. He did not meet the standard of the reasonable person in similar circumstances.*"

The employer's decision to dismiss the employee was therefore upheld.**(2)**

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Endnotes

(1) *Terra Nova Employers' Organization v Communications, Energy and Paperworkers Union, Local 2121*, 2018 NLCA 7 (CanLII).

(2) For more information please see www.occupationalhealthandsafetylaw.com.

Adrian Miedema

Jail term upheld on appeal in criminal negligence case against Metron project manager

February 27 2018

Litigation, Canada

The Ontario Court of Appeal has upheld the criminal negligence (Bill C-45) conviction and three-and-a-half-year jail term imposed on Vadim Kazenelson, a project manager for Metron Construction.**(1)** The charges arose from an incident in which four workers fell to their death and a fifth sustained permanent injuries after a swing stage collapsed. None of the workers was attached to a lifeline (for further details please see "First Ontario corporation fined for criminal negligence in workplace accident").

In handing down the sentence, the trial judge had stated that not only had Kazenelson done nothing to rectify the dangerous situation, but:

- he had permitted all six workers to board the swing stage together with their tools;
- he did so in circumstances where he had no information with respect to the swing stage's capacity to bear the weight of the workers and their tools safely; and
- he "adverted to the risk, weighed it against Metron's interest in keeping the work going, and decided to take a chance. That is a seriously aggravating circumstance in relation to the moral blameworthiness of his conduct".

Kazenelson was aware that there was a deadline for completing the work and that his boss was intent on meeting it.

The Ontario Court of Appeal rejected Kazenelson's arguments that he should not have been found guilty of criminal negligence. Kazenelson's argument that the "approach of the trial judge stretches penal negligence too far" given that this was the first conviction of an individual supervisor under Section 217.1 of the Criminal Code (added by Bill C-45 in 2004) was rejected. The appeal court also rejected the argument that Kazenelson had not shown "a wanton and reckless disregard for the workers".

With respect to the jail sentence, the appeal court rejected the argument that Kazenelson's jail term should be shortened because the other workers were "contributorily negligent". The court agreed with the trial judge's reasoning that such argument:

> "*would ignore the reality that a worker's acceptance of dangerous working conditions is not always a truly voluntary choice. It would also tend to undermine the purpose of the duty imposed by s. 217.1 of the Criminal Code, which is to impose a legal obligation in relation to workplace safety on management.*"

The appeal court also rejected the argument that, because Kazenelson was a first-time offender, the trial judge had placed too much emphasis on "general deterrence".

This case has sent, and will continue to send a message to employers and supervisors that criminal negligence charges – in addition to Occupational Health and Safety Act charges – are a real possibility after serious workplace accidents, particularly those involving fatalities or serious permanent injuries.**(2)**

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Endnotes

(1) *R v Kazenelson* (2018 ONCA 77 (CanLII)).

(2) For more information please see www.occupationalhealthandsafetylaw.com.

Adrian Miedema

employer controlling their whereabouts and activities during off-hours. For these reasons, the employer's policy violated the requirement of the employer to act reasonably, fairly and in good faith under the collective agreement.

With respect to the constitutional rights of the lawyers, the SCC held that the mandatory unpaid standby duty policy did not limit the ability of the lawyers to make the type of fundamental personal choices guaranteed under section 7 of the *Charter*. There was no violation of the employees' *Charter* rights.

WHAT THIS MEANS FOR EMPLOYERS

This decision reminds employers that management rights must be exercised reasonably and in compliance with the collective agreement. Whether the unilateral imposition of the policy is reasonable and fair will depend on the circumstances and the terms of the particular collective agreement. Employers in unionized environments must be aware of the added difficulty of introducing a policy that attempts to change a long-standing practice of the employer. Employers must also ensure that new workplace policies are the result of a reasonable "balancing of interests". Where policies intrude on the personal lives of employees or restrict their personal interests, those policies are invalid unless the employer demonstrates a competing management interest that overrides the interests of the employees.

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[1] *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.*, [1965] O.L.A.A. No. 2, 16 L.A.C. 73.

• COURT STRIKES DOWN NON-COMPETE WHICH WOULD HAVE PREVENTED EMPLOYEE FROM STARTING A BAND IN MEXICO AND PLAYING AT A STAFF RETREAT IN CANCUN •

Andy Pushalik, Partner, Dentons Canada LLP.

A recent case from the Ontario Superior Court of Justice may cause some employers to reconsider the scope and application of their non-competition covenants. In *Ceridian Dayforce Corp. v. Daniel Wright*, [2017] O.J. No. 6156, 2017 ONSC 6763, the Plaintiff employer brought a summary judgment motion for a declaration that the non-compete clause in its former employee's employment contract was binding and enforceable.

The Judge summarized the key provisions of the non-compete provisions as follows:

1. The non-competition period, defined as the "Restricted Period" means the period up to 12 months from the date the employee ceases to be employed by the Company as determined by the Company in its sole unfettered discretion, provided that the Company informs the Employee of the length of the period within 5 business days of the Employee ceasing to be employed by the Company.
2. The Employee shall not, "directly or indirectly provide services, in any capacity, whether as an employee, consultant, independent contractor, owner,

or otherwise, to any person or entity that provides products or services or is otherwise engaged in any business competitive with the business carried on by the Company or any of its subsidiaries or affiliates at the time of his termination (a "Competitive Business") within North America".

3. The Employee shall not "be concerned with or interested in or lend money to, guarantee the debts or obligations of or permit his name to be used by any person or persons, firm, association, syndicate, company or corporation engaged in or concerned with or interested in any Competitive Business within North America".
4. Nothing restricts the Employee from holding less than 1 % of the issued and outstanding shares of any publicly traded corporation.
5. During the Restricted Period, the Company is to pay the Employee his or her base salary, less applicable deductions.

In striking the clause down, the Judge ruled that the non-compete was overly broad for a number of reasons, the most important being that it prevented the employee from providing services in any capacity to any competitive business. To make her point, the Judge noted that the clause, if upheld, would prevent the employee from working as a janitor for a competing business or starting a band in Mexico and being engaged as an independent contractor by a competitor to play at a staff retreat in Cancun. In the Judge's view, this was a complete restraint of trade which went far beyond what was necessary to protect the Plaintiff employer's proprietary interest. The fact that the prohibition stretched to include affiliate companies which were engaged in lines of business that were completely unrelated to the Plaintiff employer's business and prevented the employee from holding 1 per cent or more of the issued and outstanding shares of any publicly traded corporation was cited as additional protections which were unreasonable.

With respect to the clause's temporal scope, the Judge ruled that the evidence did not support the need for a 12-month period. Moreover, the clause was ambiguous because it did not set the time period of the restriction until after the employee's employment was terminated.

Lastly, it is important to note that none of the problems with the non-compete clause that were identified by the Judge were cured by the fact the company had intended to pay the employee his salary for the duration of the restricted period.

This decision serves as a good reminder to employers about the need to draft non-competition clauses as narrowly as possibly and tailor them to the job in question. As this case demonstrates, a blanket prohibition which blocks a departing employee from pursuing any activity with a competitor is unlikely to withstand judicial scrutiny.

• AN UNREASONABLE REINSTATEMENT •

Edward Noble.

A recent appellate court decision out of Saskatchewan considers the limits of an arbitrator's discretion to substitute a lesser penalty in favour of termination for employee misconduct. Faced with a situation in which an employee who was found to have: (a) committed time theft; (b) instructed a subordinate to falsify his time sheet; (c) and lied about it, was reinstated by an arbitration board, the Saskatchewan Court of Appeal, in *Yorkton Cooperative Association v. Retail Wholesale Department Store Union*, [2017] S.J. No. 540, 2017 SKCA 107, determined that, given the seriousness of the employee's conduct, the decision to substitute her termination with a suspension was unreasonable.

BACKGROUND

Denise Osbourne worked as a supervisor for the Yorkton Cooperative Association (the "Co-op").

Appeal court upholds C$5.3 million combined fine in Sunrise Propane case

February 13 2018

Litigation, Canada

In 2008 explosions at a propane facility in Toronto resulted in the death of one worker and damage to many houses.**(1)** An Ontario court has now upheld a combined fine of more than C$5.3 million, plus a 25% victim fine surcharge, against Sunshine Propane Energy Group, a related company and two corporate directors.

The appellants in *R v Sunrise Propane Energy Group Inc* (2017 ONSC 6954 (CanLII)) were found guilty of seven charges under the Environmental Protection Act and the Occupational Health and Safety Act.

With respect to the Occupational Health and Safety Act charge of failing to provide information and instruction to the worker, the court noted that the worker who died had only four to five months' experience at the company and was effectively left in charge of the yard on the day of the explosions – "a position prohibited by his lack of education, experience and training". The trial court held that the explosions were a foreseeable event given that an untrained employee had been left in charge, and the appeal court agreed. The appeal court also agreed that the fact that the worker ran towards the explosions, instead of away from them, showed his lack of training.

The appeal court also held that the fines imposed were appropriate. The Environmental Protection Act fines of C$5.02 million (including C$100,000 against each of the corporate directors) were unprecedented; however, there were a number of aggravating factors, including the "widespread damage and effects caused by the appellants' reckless behaviour in conducting truck-to-truck transfers without licence and with full knowledge of the risk". In addition, "the magnitude of the event was unprecedented in Ontario". The Occupational Health and Safety Act fines of C$280,000 were also appropriate in the circumstances.**(2)**

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Endnotes

(1) For details on the trial decision and fines please see here.

(2) For more information please see www.occupationalhealthandsafetylaw.com.

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Adrian Miedema

Appeal court holds that fact of accident alone is not enough to convict

February 06 2018 | Contributed by Dentons

Litigation, Canada

In *R v St John's (City)* (2017 NLCA 71 (CanLII)) the Newfoundland and Labrador Court of Appeal held that a trial judge was wrong to find a city guilty of Occupational Health and Safety Act charges solely because an accident had occurred in which a worker died. It held that the trial court should have gone further and analysed each charge.

The charges were filed against the city of St John's after an accident on a road construction site that resulted in one worker dying after being hit by a car. Seven charges were brought against the city, including failure to provide adequate training and failure to maintain adequate traffic control.

The trial judge held that the mere fact of the car striking the employee was proof of the *actus reus* (guilty act) of the charges. The appeal court decided that this was wrong; the trial judge should have analysed each charge to determine whether the prosecutor had called evidence to prove each element of the offence. The trial judge had wrongly focused on the consequences of the alleged breach of the Occupational Health and Safety Act (ie, the accident and the worker's death), rather than "the identification and proof of the actual elements of each offence".

The decision is a welcome reminder that prosecutors cannot simply rely on the fact that an accident took place in seeking to obtain a conviction on Occupational Health and Safety Act charges. Instead, they must prove each charge.**(1)**

For further information on this topic please contact Adrian Miedema at Dentons Canada LLP by telephone (+1 416 863 4511) or email (adrian.miedema@dentons.com). The Dentons Canada LLP website can be accessed at www.dentons.com.

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(1) For more information please see www.occupationalhealthandsafetylaw.com.

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Canada: The Effects of Cannabis Legalization on the Workplace

By Florence Cadieux-Lulin, Arianne Bouchard and Christian Létourneau © Dentons

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[Editor's note: Canada has postponed the legalization of recreational marijuana until at least August or later, CNBC reports (https://www.cnbc.com/2018/02/16/canada-postpones-marijuana-legalization-again.html)*.]*

Recreational use of cannabis soon will be legal in Canada. According to data from other jurisdictions that have already adopted similar legislation, the legalization of cannabis could lead to an increase in the consumption of cannabis because of the decrease in the stigma associated with it.

In light of this, it becomes even more important for Canadian employers to adopt clear policies on the use of drugs and alcohol by their employees, notably to prevent workplace accidents, increases in claims for sickness or occupational injury benefits, decreases in employee productivity and absenteeism related to the use of these substances. Employers who already have such policies should also review them in order to ensure that they adequately cover new situations related to the legalization of cannabis as well as verify that their employees are aware of and understand the policies.

Main Points

- The legalization of cannabis does not alter the respective rights and obligations of employers and employees with respect to the use of drugs and alcohol in the workplace or the performance of work under the influence of these substances.
- Thus, employers still have a duty to protect the health and safety of their employees, both physically and psychologically. In accordance with their obligations of prevention and protection, employers will retain the right to regulate the consumption, possession and trafficking of cannabis at work, as they currently do with alcohol. They may also prohibit or modulate the right of employees to perform work while under the influence of cannabis, which can include, for example, control over cannabis use during employee breaks and for a reasonable period of time before the start of work.
- Employees retain the obligation to perform their work with care and diligence, and to ensure that they do not endanger the health, safety or physical well-being of others in the workplace. Failure to do so may result in disciplinary action, which can go as far as dismissal.
- In a pre-hiring context, the requirement for an employee to undergo a drug test, including cannabis, will only be justified under two circumstances: (1) where the workplace or position in which the employee is hired or promoted is one that has important safety concerns as well as (2) where there are reasonable grounds to believe that the employee has a problem of consumption that could affect his or her work performance, or when the employee admitted that he or she has such problem.
- Random and/or systematic drug tests, screening and searches on the job remain prohibited. The state of intoxication and/or possession of substances by an employee may, however, be verified by these means, primarily in a high-risk workplace, if (1) the employer has reasonable grounds to believe that an employee is impaired during the performance of his or her work, if (2) the

employee was involved in a major incident or work-related accident, or (3) the employee resumes work after having been absent due to problems related to consumption or for purposes of following a treatment aimed at curing him or her of substance dependence. In addition, to prevent the relapse of a dependent employee who has been rehabilitated, employers may continue to enter into last chance agreements to reinstate an employee in the workplace if he or she undertakes not to repeat certain behaviors, on pain of immediate dismissal. These agreements must, however, be limited in time.

- Employers will, nonetheless, have to contend with the additional challenge of ensuring the reliability of cannabis testing. These are indeed controversial because the presence of cannabis in the blood is detectable for a longer period of time than the period for which the employee can be considered "under the influence."
- Under human rights and freedoms legislation, employers also retain the obligation to accommodate employees who are addicted to drugs, including cannabis or alcohol, seeing as this problem is considered a disability. However, this obligation applies only to employees with a real problem of dependency and not to any employee who is a recreational user of such substances. Once it is determined that an employee has an addiction, his or her employer cannot automatically terminate the employment for reasons related to these problems. In this kind of situation, employers must, on the contrary, make arrangements to enable the dependent employee to continue working within their organization, to the extent that the appropriate accommodations do not constitute undue hardship for them. For example, the transfer to a less hazardous workplace or the offer to follow a detoxification therapy may be proposed.
- In a unionized context, employers will have to ensure that the adoption, modification and enforcement of drug or alcohol policies is performed in accordance with the provisions of the applicable collective agreement.

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Court of Appeal holds general duty clause can impose higher obligations than regulatory requirements

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Litigation, Canada

- **Facts**
- **Decision**
- **Comment**

In *Ontario (Labour) v Quinton Steel (Wellington) Limited* (2017 ONCA 1006 (CanLII)) the Ontario Court of Appeal held that the Ministry of Labour can prosecute employers under the general duty clause of the Occupational Health and Safety Act even where the charges impose greater obligations than those set out in the regulations under that act.

Facts

A trial and appeal justice had decided that the employer could not be found guilty of failing to provide guardrails around a temporary work platform. They reasoned that the Industrial Establishments Regulation under the Occupational Health and Safety Act, which deals with the issue of guardrails, did not require guardrails in this situation (a temporary work platform at a height of six feet). As such, the courts held that the Ministry of Labour could not use the 'general duty' clause in Section 25(2)(h) of the act, which requires employers to take every precaution reasonable in the circumstances, to impose obligations greater than those in the regulation.

Decision

The Ontario Court of Appeal disagreed, stating that regulations cannot be expected to anticipate the circumstances of all Ontario workplaces. The key question in this case was whether the installation of guardrails was a reasonable precaution. The court held that the trial justice failed to address this point.

The appeal court concluded that:

> "*It may not be possible for all risk to be eliminated from a workplace, as this court noted in* Sheehan Truck*, at para 30, but it does not follow that employers need do only as little as is specifically prescribed in the regulations. There may be cases in which more is required – in which additional safety precautions tailored to fit the distinctive nature of a workplace are reasonably required by Section 25(2)(h) in order to protect workers. The trial justice's erroneous conception of the relationship between Section 25(2)(h) and the regulations resulted in his failure to adjudicate the Section 25(2)(h) charge as laid.*"**(1)**

The court allowed the appeal and ordered a new trial before a different justice.**(2)**

Comment

Ministry of Labour inspectors will likely consider using this decision to issue compliance orders or charges under the general duty clause even where the regulations deal with the specific safety issue at hand (eg, guardrails and fall arrest), but do not apply in the particular case. For instance, inspectors may issue compliance orders or charges for failing to provide guardrails around a temporary work platform that is only one foot high.

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Endnotes

(1) At paragraph 45.

(2) For more information please see www.occupationalhealthandsafetylaw.com.

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'Accident as *prima facie* breach' principle precludes order for particulars

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Litigation, Canada

The 'accident as *prima facie* breach' principle has been before the courts in several cases, often with some discrepancy in its application. In *R v Midwest Pipelines Inc* (2017 ABPC 222) the principle was again before an Alberta court in the context of an application for particulars.

Background

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* (ie, guilty act) for an occupational health and safety (OHSA) general duty charge, provided that the necessary elements are proven beyond a reasonable doubt. The burden then shifts to the defendant to establish a due diligence defence.

Facts

In this case, a worker was seriously injured in a workplace incident and the employer was charged with eight counts. The first count was a general duty breach allegation stating that the employer had failed to ensure, as far as reasonably practicable, 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 the first count on the basis that the disclosure contained information which left the employer uncertain about which act or omission the crown intended to rely on to sustain the count.

Decision

At the application hearing, the first issue before the court was whether the accident as *prima facie* breach principle for an OHSA general duty charge would preclude an order for particulars. The court reviewed the principle, noting that the case law had established that the principle requires that – in order for the crown to prove the essential elements of an OHSA general duty charge beyond a reasonable doubt – it must prove that:

- there was an employee;
- the employee was injured in an accident; and
- the employee was performing his or her duties in the course of his or her employment when injured.

The court noted that the principle does not relieve the crown of establishing beyond a reasonable doubt that the employer committed a wrongful act, but rather reflects that sometimes proof of the consequence (ie, the accident) is sufficient to establish that a wrongful act was committed. However, the principle would not apply in all cases as there may be instances where the wrongful act by the employer cannot be inferred from the circumstances of the accident.

Requiring the crown to provide particulars of the specific acts, omissions or breaches by the employer would transform those particulars into essential elements of the *actus reus* of the offence, which the crown would then need to prove beyond a reasonable doubt. The court found that this would be inconsistent with the principle applicable to an OHSA general duty charge and would place a higher onus on the crown.

In this case, it was known why the incident happened. A boom stick being held above the ground by a hook and sling held by a caterpillar tractor fell from the hook and sling, severely injuring the worker. The court determined that it was appropriate to apply the accident as *prima facie* breach principle and thus it was precluded from making an order for particulars of the acts, omissions or breaches by the employer for the Count 1 OHSA general duty charge.

The court proceeded in obiter to find, in a somewhat confusing decision, that if it was wrong to conclude that the accident as *prima facie* breach principle precluded it from ordering particulars, then it would have made an order for particulars as requested by the employer.**(1)**

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Endnotes

(1) For more information please see www.occupationalhealthandsafetylaw.com.

Cristina Wendel

When is a release effective to bar a safety-related complaint?

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Litigation, Canada

In *Wieler v Saskatoon Convalescent Home* (2017 SKCA 90 (CanLII)) the Saskatchewan Court of Appeal ruled that a release signed by a terminated employee barred her complaint against her employer under occupational health and safety (OHS) legislation.

The employee, a nurse at a long-term care home, was dismissed by the employer during the probationary period on the basis that she was "not suitable". After seeking legal advice, she signed a release in exchange for one month's termination pay.

Less than one month after signing the release, the employee filed a complaint with the Saskatchewan Ministry of Labour Occupational Health and Safety Division, alleging that before her termination she had raised safety issues with management regarding bullying and unsafe staffing levels.

The court stated that OHS legislation is for the general benefit of employees and that such benefit should not be bargained away via a release or other agreement. However, after the occurrence of a so-called 'triggering event', which provides a worker with the right to file a complaint under the legislation, that right becomes personal to the worker. Where a worker has given a release in respect of a personal right, the validity of the release must be reviewed. In addition, for the release to be effective to bar the personal OHS complaint, the timing of signing the release (ie, before or after the personal OHS issue arose) must be examined.

In this case, the release was valid and the personal OHS issue occurred before it had been signed. Therefore, the employee was barred from advancing her OHS complaint, which was dismissed.**(1)**

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Benefits CANADA

2018 to be a busy year for pension reforms

Julius Melnitzer | January 3, 2018

If there's one thing that's clear about pension reform in 2018, it's that sponsors will have their hands full, particularly in Ontario.

"There's no question in my mind that impending changes to Ontario's pension laws will motivate administrators and service providers to up their game," says Mary Picard, a partner at Dentons Canada LLP's Toronto office.

Most importantly, Jan, 1, 2018, saw the new administrative monetary penalties regime under Ontario's Pension Benefits Act come into force. Although pre-existing enforcement tools, primarily compliance orders and fines of up to $100,000 for a first offence and $250,000 for subsequent breaches of the act, will remain in place, administrative penalties — which don't require prosecution in provincial court — give regulators more cost-effective tools to address non-compliance.

"The stick has been too big and unwieldy," says Picard. "My guess is that the new penalty regime will make the issues of a regulatory penalty for pension non-compliance as smooth a process as issuing a parking ticket — and likely with better results."

Read: How can Canada's retirement system better address pension portability?

Add to that the proposed creation of the Financial Services Regulator Authority, which will take over from the Financial Services Commission of Ontario (FSRA) and will have greater resources than its predecessor, and the result is likely a more intense emphasis on plan governance that will require plan sponsors and administrators to focus on understanding their obligation to ensure compliance.

Seen from that perspective, the government's intention to require plan administrators to establish written governance policies for defined benefit plans, announced in May 2017 and introduced in November in Bill 177, may be a significant help.

"While we don't know exactly what the Ontario government will require in these governance statements, they could well resemble what the British Columbia and the Alberta governments have already enacted," says Picard. "If that's the case,

Ontario plan members and unions will have a lot more information about who's doing what in running their pension plans, and that will make it easier for members and unions to ask questions and raise concerns."

This coming year, then, should see Bill 177 and its applicable regulations take shape. The main features of the legislation, which Ontario introduced in November, include:

Read: **Can the feds overcome opposition to pass target-benefit pension bill?**

- Limited provisions to reflect the new funding framework announced in 2017.
- A registry for missing plan beneficiaries.
- Provisions for written funding and governance policies.
- Allowing for discharge of administrators on the purchase of annuities.
- Changes to the pension benefits guarantee fund.
- Amending certain unproclaimed provisions of the pension act to augment the rights of individuals having an interest in the variable benefits of a retired member.

Otherwise, it's unclear how quickly or whether the government will proceed with its April 2017 announcement that it will be addressing the regulatory framework related to defined contribution plans.

Quebec also has changes in the works. In November, the minister of finance tabled Bill 149, aimed at strengthening the financial security of employees who will retire in the coming years and harmonizing the Quebec Pension Plan with the Canada Pension Plan.

The legislation contemplates the creation of two plans within the QPP. The first will be a basic plan retaining the current system, which has been around since 1966. The second component will increase QPP premiums with a first additional contribution introduced progressively between Jan. 1, 2019, and 2023, with a second to follow in 2024.

Read: **Ontario releases more details on funding cushion in new DB framework**

Finally, on the federal front, Bill C-27 awaits second reading debate. The legislation would allow federally regulated employers to offer target-benefit plans to their workers.