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REGULATORY INVESTIGATIONS AND PROSECUTIONS: RECENT NOTEWORTHY COURT CASES

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Workplace Health and Safety

In November, the Ontario Court of Appeal released its decision in *R*. v. *Dofasco Inc.*. The major issue in this case was whether an employer could be held liable for breaches of the *Occupational Health and Safety Act* when the employee was injured as a result of his deliberate conduct in failing to follow company procedures and protocols. Unanimously, the Court agreed that the employer was liable.

It was alleged that the company had failed to ensure that a pinch point was properly guarded. Although the company admitted the failure to guard, it argued that it had in place procedures that employees were to use that supplanted the need for a physical guard. The injured employee was aware of these procedures but ignored them when working with the machinery. In ruling against Dofasco, the Court adopted the reasoning that one of the purposes of the *Occupational Health and Safety Act* is to protect workers from their own negligence. The Court stated "employees do not deliberately injure themselves. The requirement for guarding of machinery is to protect employees in the workplace from injuries due to both inadvertent and advertent acts."

Although *Ontario's Occupational Health and Safety Act* and Part II of the *Canada Labour Code* place obligations on workers to follow the procedures which they have been trained by employers, this decision underlines that even when employees do breach their statutory obligations, the company is still exposed to prosecution. That isn't to say that the actions of workers and their training are irrelevant to the issue of whether an employer may be at fault for their negligence. To the contrary, employers who take every precaution reasonable in the circumstances of their workplace to properly train and supervise employees to ensure they follow company procedures cannot, in law, be found at fault if an employee breaches the rules and hurts himself.

Workplace Health & Safety and Environmental

In Ontario's environmental statutes (the *Environmental Protection Act* and the *Ontario Water Resources Act*) and its *Occupational Health and Safety Act*, the Crown has available to it a provision that permits it to apply to the Courts for an Order authorizing investigative techniques. These provisions have been used by the Crown from time to time since the release of the Ontario Court of Appeal's decision in *Regina* v. *Inco* in 2001. That decision found that the Crown could not utilize the wide inspection powers found in regulatory statutes to compel witness statements for use in prosecutions. Both the Ministry of the Environment and the Ministry of Labour developed a practice of using the investigative technique provisions to obtain orders requiring employees to attend before investigators for the purpose of providing the investigators with statements that could be used against their employers. In *Morrison* v. *Butson*, however, Superior Court Judge O'Driscoll was asked to review the authorizing provisions to

determine the validity of orders issued requiring production of witness statements. After a thorough review of the provision found in the *Occupational Health and Safety Act*, the Court found that a reasonable interpretation of the wording did not provide an issuing Court with the jurisdiction necessary to issue such orders.

This decision supports the position that in the face of an investigation (as opposed to an inspection) by the Ministry of the Environment or the Ministry of Labour, a company and its employees cannot be compelled to produce evidence to the investigators in the form of statements. Rather, the regulators are left to rely on the consensual co-operation of witnesses, those they are investigating and/or searches authorized by warrant.