

## EMPLOYER NOT GUILTY IN WORKER FATALITY

*R. v. Timminco Limited* (October 29, 2004), (O.C.J.) [unreported]

A worker was killed by a crown press machine when caught by its index beam. The index beam was a moving part on the machine. There were no eyewitnesses to the accident.

The employer was charged under the mining regulations of the *Occupational Health and Safety Act* with failing to guard or fence an exposed moving part of a machine that may endanger the safety of any person, unless the machine's position, construction or attachment provides equivalent protection.

The Court found that the index beam was an exposed moving part on the crown press that did not have a guard or fence. However, the Court found that the position of the index beam within the crown press was sufficient to provide equivalent protection to a guard or fence. The ruling was based on the fact that the index beam was at the rear of the press and that access to the beam was impeded by hoses, safety chains and restricted entry signs. The Court was also influenced by the fact that the worker was prohibited from being at the rear of the press while the machine was operating. The Court ruled that the offence had not been proven beyond a reasonable doubt and dismissed the charge.

The Court also ruled on whether the employer had established a due diligence defence. A defence of due diligence is available if an employer reasonably believes in a mistaken set of facts which if true would render the act or omission innocent, or if the employer took all reasonable steps to avoid the particular event. The Court found the employer not guilty on the basis of both branches of the defence.

In finding that the mistake of fact branch of the defence had been established, the Court relied on the fact that not once in the ten years the crown press had been in operation did any worker, Joint Health and Safety Committee ("JHSC") member, foreman, supervisor or the Ministry of Labour ever register a concern about the safety of the press. Additionally, the Court relied on the fact that the worker was not permitted to be at the rear of the press when the machine was operating.

In finding that the due diligence branch of the defence had been established, the Court found that the employer had taken all reasonable care to prevent the accident. The Court characterized the efforts taken by the employer to establish and maintain a safe workplace as "overwhelming". The Court relied on the employer's health and safety education program, the existence of written safety procedures, regular inspections of the workplace by the JHSC, foreman and management, and the numerous inspections by the Ministry of Labour.

This decision demonstrates the value of a formal, comprehensive and structured health and safety program. Even in the circumstances of a worker fatality, an employer may be found not guilty if they have a sufficient health and safety program.