



EDITORIAL

The Christmas eve tragedy in Toronto 2009 has resonated with employees, unions, employers and OHS Regulators across Canada. On the eve of a sacred holiday a very profane incident occurred. Four workers died when they fell from their broken scaffold. Both *Occupational Health and Safety Act* and Bill C-45 Criminal Negligence charges have been laid. I address the legal issues in my article and suggest that blame is easier than prevention.

Gowlings is committed to prevention. We help clients understand their legal obligations, we perform risk assessments, we audit workplaces, and we develop OHS policies and procedures. WE believe that the best due diligence is an affective OHS management system.

Gowlings has trained over 8,000 individuals since 2002 in due diligence courses, JHSC Part One certification and many other subjects.. Give us a call if you want to ensure your workers to go home safe and night.

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

Regulators Gone Wild? OHS and Criminal Charges Laid in Christmas Eve Scaffolding Death

BY: NORM KEITH, B.A., J.D., LL.M., CRSP, PARTNER

In one of the most high profile workplace incidents of recent memory, both *Occupational Health and Safety Act* and Bill C-45 Criminal Negligence charges have been laid against various workplace stakeholders. The tragic incident, involving the death of four workers, seemed heightened in both emotional and media coverage, because it happened on Christmas Eve, 2009.

However, this case – and the reaction of Ontario’s Ministry of Labour and Ministry of the Attorney General, which resulted in numerous charges under the *Occupational Health and Safety Act* as well as Bill C-45 amendments to the *Criminal Code* – raises concerns about too much emphasis on blame and criminality, and too little on prevention.

Metron Construction Corporation and three individuals related to the company have each been charged with criminal negligence causing bodily harm and four counts of criminal negligence causing death. This is part of a growing trend of police investigation and criminal charges relating to workplace injury and death arising from the Bill C-45 amendments to the *Criminal Code*.

The charges arise from the deaths of four migrant workers and the critical

injury of another following the collapse of a swing stage scaffold on the 13th floor of a Toronto apartment building on Christmas Eve of 2009. The incident received national media attention when the workplace tragedy occurred. The Government of Ontario appointed the University of Toronto’s Tony Dean to conduct an inquiry into the province’s workplace safety prevention initiatives after this incident.

A crew of six men were working on repairing the balcony at 2757 Kipling Avenue when the incident occurred. As a seventh worker attempted to step onto the swing stage, it broke into two pieces and four workers fell to their death.

This past August, 61 *Occupational Health and Safety Act* (“OHS^A”) charges were laid against various parties as a result of this accident. 30 charges were laid against Metron Construction Corporation, with an additional 16 against a Metron senior manager and eight against a supervisor. Furthermore, the company that supplied the work platform, Swing ‘N’ Scaff Inc., faces four charges with its director facing an additional three charges.

INSIDE:

- Regulators Gone Wild? OHS and Criminal Charges Laid in Christmas Eve Scaffolding Deaths, p. 1
 - Employer Injury & Fatality History Now Published in Alberta, p. 2
 - Canadian Legislation to Protect Workers from MSD Injuries, p. 3
- WorkSafeBC Amends Occupational Health and Safety Regulation, p. 4
 - New Mode for Payment of CSST Assessments: Be Ready!, p. 4
 - Ministry of Labour Construction Sector Plan, p.6
 - Working Alone, p.7

The Ministry of Labour has never laid any *OHS*A charges against Metron in its 23 years of operation. However, eight orders, including some dealing with swing stages, had been issued to Metron Construction at the job site in question in the two months leading up to the deadly incident.

These charges mark the fifth time that a corporation or an individual has been charged with a contravention of the Bill C-45 amendments to the Criminal Code. To date, none of these cases have proceeded to trial. Bill C-45 was the legislative reaction of the federal government to the Westray Mine disaster. In May 1992, 26 miners died when an explosion and fire ripped through that coal mine in Pictou Country of Nova Scotia. Criminal charges in that case were thrown out at trial due to prosecutorial misconduct.

The purpose of the *Occupational Health and Safety Act*, the proactive prevention of workplace incidents, injuries, and death, may be lost in this layering of regulatory and criminal charges. The internal responsibility system, the over-

arching concept behind the legislation, is intended to encourage all workplace stakeholders, including workers, to take responsibility for their health and safety. However, the prosecutorial reaction in this case has focused on blame and not prevention.

Regardless of the outcome of all of the charges, both under the *OHS*A and the *Criminal Code*, one thing is certain, prosecutions do not prevent accidents directly or indirectly. They merely provide a general deterrent or fear of reprisal, which may motivate but not empower organizations to prevent further incidents in the future.

Although this tragic case will hopefully be an example to employers, it is important to invest in health and safety management systems, and in health and safety training and prevention, so prosecutions themselves do not speak to the HOW regarding prevention.

It is unfortunate that current government, political and regulatory climate does not encourage and motivate employers in a positive way by provid-

ing resources on the HOW but rather focusing on a culture of blame.

For further information on this article please contact Norm Keith at norm.keith@gowlings.com, 1-866-862-5787 ext. 85699.

Employer Injury & Fatality History Now Published in Alberta

By: KATHRYN ALDRIDGE, B.A.Sc.,
CRSP, CHSC, OHS
CONSULTANT/PARALEGAL

Alberta's Employment and Immigration (AE&I) Ministry has recently released records pertaining to injuries and fatalities of employers that are insured by the Workers' Compensation Board (WCB). AE&I started this initiative as part of their 10-point plan to improve worker safety, hold employers more accountable to their health and safety responsibilities, and to be more transparent with all Albertans. The Alberta *Occupational*

CANADIAN OCCUPATIONAL SAFETY
SPECIAL & PROMOTIONAL NEWS COVERS FOR LEADERS & SAFETY PROFESSIONALS

In print and online.
Your safety news and information team.

Visit www.cos-mag.com for regular updates, videos and to order your free digital subscription to COS and e-updates!

For more information contact, Mari-Len De Guzman, Editor at mdeguzman@clbmedia.ca or 905-726-5445

Annex Publishing & Printing Inc. 240 Edward Street, Aurora, ON L4G 3S9

Mari-Len De Guzman
Editor, Canadian Occupational Safety

Health and Safety Act (section 28.1) gives the Minister the authority to obtain and publish such information. Alberta is now the leading province in Canada with respect to the extent of workplace incident information provided publicly on employers.

Employers that are insured by the WCB will have their injury and fatality information published. This presently includes over 145,000 employers. Data for employers who are not required to have WCB insurance for their workers but have voluntarily registered with WCB will not be published. The information that is available for each employer includes: the number of lost-time claims; estimated number of employees; lost-time claim rate; number of fatalities; whether the employer holds a Certificate of Recognition, which is awarded to employers that have a health and safety program that meets certain standards; and industry and provincial lost-time claim rates to be used for comparison. This information is provided annually for each employer over a five-year period as a snapshot of the health and safety history. AE&I acknowledged that this data is not in and of itself a conclusive measure of how safe an organization is and how well they are managing safety but it can give a good indication of safety performance. Therefore, employers who are considering hiring or working alongside another employer can now look to see that employer's history beforehand. Many organizations who have comprehensive occupational health and safety management systems in place were likely already requesting this information from potential contractors as part of a contractor management program. Instead of making this request directly to those

contractors, simply searching the employer on AE&I can now be done to obtain information.

The annual employer report is prepared on March 31st of the year following the calendar year being reported, and is based on WCB data. The five-year history of workplace incidents shown in the report ranges from 2005 to 2009. The list of compulsory industries that are insured by the WCB and the list of voluntary industries is provided by AE&I as well. Any interested party can now go on the AE&I website, under Workplace Health & Safety, Statistics and Reports and search employer records. The site allows users to search by employer name, industry name and city/town or to browse by industry type. The snapshot history record can be viewed right away for the searched employer account(s).

Other WCBs in Canada offer injury and fatality statistics but only by industry. Whether this publication of employer information will become a trend across the country remains to be seen.

For further information on this article please contact Kathryn Aldridge at kathryn.aldridge@gowlings.com, 1-866-862-5787 ext. 85411

Canadian Legislation to Protect Workers from MSD Injuries

BY: CATHY CHANDLER, B.A. SC., CRSP, CHSC, OHS CONSULTANT/PARALEGAL

In Canada, regulatory action to protect workers from musculoskeletal disorders ("MSD") is limited.

Federal legislation

Amendments in 2007 to Part XIX of the Canada Occupational Health and Safety Regulations require employers to incorporate ergonomic-related hazards responsible for the development of MSDs into their legally mandated Workplace Hazard Prevention Program. The Workplace Hazard Prevention Program must include a hazard identification and assessment process, development of preventive measures and ergonomics training. Employers are also required to develop, implement and monitor such a program in consultation with and with the participation of the policy committee, or, if there is no policy committee, the workplace committee or health and safety representative.

Provincial legislation

Among provincial jurisdictions, British Columbia has the most comprehensive legislation related to MSD prevention. Sections 4.46 to 4.53 of British Columbia's OHS Regulation require employers to consult joint health and safety committee members and affected workers in identifying, assessing and controlling the risks associated with the development of musculoskeletal injuries ("MSI"). The employer must also ensure that a worker who may be exposed to a risk of an MSI is educated in risk identification related to the work, including the recognition of early signs and symptoms of MSIs and their potential health effects.

Saskatchewan and Manitoba have enacted similar prescriptive legislation related to the prevention of musculoskeletal injuries.

In Ontario, there is no prescriptive legislation related to the prevention of

MSDs and/or ergonomic-related hazards.

In 2007, the Ontario Ministry of Labour (“MOL”) released two MSD prevention resource documents developed by the Occupational Health and Safety Council of Ontario (“OHSCO”). The MSD Prevention Guideline and Resource Manual provide workplaces with a framework for preventing MSDs in the workplace through identification, assessment and control of MSD-related hazards. In 2008, OHSCO released an accompanying MSD Prevention Toolbox, which contains information on tools designed to aid workplaces in assessing, implementing and monitoring their MSD prevention programs.

Without prescriptive legislation in Ontario, employers must rely on the general duty clause contained in section 25(2)(h) of the *Occupational Health and Safety Act, R.S.O. 1990, Chapter O.1* (OHSA). (Several other Canadian jurisdictions contain general duty clauses, similar to Ontario’s in their OHS legislation). This clause requires employers to take every precaution reasonable in the circumstances for the protection of a worker.

The general duty clause may be interpreted to mean that the employer must take reasonable steps to prevent MSD-related hazards in the workplace. The MOL will likely consider the OHSCO MSD Prevention Guideline and accompanying materials as a determinant of what is reasonable to protect workers from MSD-related hazards.

For further information on this article please contact Cathy Chandler at cathy.chandler@gowlings.com, 1-866-862-5787 ext. 87351.

WorkSafeBC Amends Occupational Health and Safety Regulation

BY: DAVID MARCHIONE, B.A., CHSC,
OHS CONSULTANT/PARALEGAL

During its October 2010 meeting, the board of directors at WorkSafeBC approved a number of amendments to British Columbia’s Occupational Health and Safety Regulation. These revisions, which all come into effect on February 1, 2011, include changes relating to definitions, and specific requirements for items such as guards and guardrails, protective devices and clothing, lock-out, etc.

The following parts have been amended:

- Part 1 – relating to the definition of qualified registered professional
- Part 4 – relating to the definition of late night hours
- Parts 4 and 26 – relating to avalanches
- Parts 1, 4 and 20 – relating to notification of utilities
- Part 4 – relating to wire rope guardrails and prior approval
- Part 8 – relating to leg protection
- Parts 4, 6, 8, 9, 12, 23 and 31 – relating to respirator protection factors
- Part 9 – relating to alternate procedures
- Part 12 – relating to swing arm restraint
- Part 13 – relating to swing stages and prior permission
- Part 15 – relating to standards for slings

- Part 16 – relating to warning signal device
- Part 19 – relating to minimum clearance (electrical safety)
- Parts 5, 6 and 30 – relating to bio-hazardous agents

The full amendments, including strikethroughs and explanatory notes, can be accessed via the WorkSafeBC website at:
http://worksafebc.com/regulation_and_policy/public_hearings/june10_feedback/law_40_40_20.asp

For further information on this article please contact David Marchione at david.marchione@gowlings.com, 1-866-862-5787 ext. 84378.

New Mode for Payment of CSST Assessments: Be Ready!

BY ÉRIC THIBAUDEAU, ASSOCIATE &
LAURENCE BOURGEOIS-HATTO,
ASSOCIATE

Beginning January 1, 2011, the payment of assessments to the CSST will no longer be based on estimated wages for the coming year. This payment will now depend on the wages actually paid to workers and be payable directly to Revenue Québec.

From that date, Revenue Québec will provide businesses with a new slip that will be used to transmit the payment of the assessment owed to the CSST. This assessment, which is neither more nor less than your insurance premium to the CSST’s public insurance plan, must be paid at the same time as your source deductions and other employer contributions.

Since there are different payment frequencies for source deductions and other payments to Revenue Québec (weekly, monthly, yearly, etc.), the payment of your CSST premium will be done at the same frequency as that to which you are subject for the other deductions. Revenue Québec will later transmit any monies owed directly to the CSST.

In addition, the calculation of the payable premium will be done differently. Until now, employers had to estimate wages they would pay for the current year before March 15 of each year, and calculate CSST premiums accordingly. This approximate system was difficult to manage in certain industries such as construction. Indeed, an employer who was getting more contracts than expected during the year had to pay a substantial premium to the CSST in the final statement of wages, sometimes creating liquidity problems. Conversely, the company whose activities had declined significantly during the year was found to have spent unnecessarily money of which it was deprived until the final statement of wages, several months later. This system is now abolished.

The payable premium will now be calculated from the insurable wages actually paid during the period for which you are reporting to Revenue Québec. To calculate the premium, the employer will have to use its rate of assessment, which will continue to be communicated in October for the coming year. Should the premium rate change during the year, the CSST will notify employers by sending a report. Employers will then be able to adjust their payment accordingly.

For employers that have multiple classification units for their business, the

CSST will provide a single average assessment rate. This rate will be determined by the CSST, who will use the average of the rates assigned to the employer, each weighted according to their importance. However, an employer may choose to pay the premium for each unit, determined by frequency of reporting to Revenue Québec, rather than paying a blended rate.

The fiscal year of final statement of wages remains unchanged and must be submitted before March 15. But because the new system described above is based on actual wages, there should be few changes for employers. However, employers should be aware that any delay in reporting final wages

will lead to the imposition of a penalty of \$25 per day late, up to \$2,500.

Finally, note that in case of a default, penalties are steep and can go up to 15 per cent of the unpaid amount.

An explanatory guide was published by the CSST, entitled "*Save yourself a lot of formalities: the new mode of payment of the insurance premium.*" It explains the rules of this new system and provides relevant examples. This guide is available for download from the CSST website (www.csst.qc.ca/index.htm). Unfortunately, it is not yet available in English.

This new procedure for payment of the assessment based on real wages is generally well received by employers' asso

Bill C-45 Seminars: Has the Sleeping Giant Been Awakened?

2010 has seen at LEAST 8 new OHS Criminal Negligence charges under the Bill C-45 Amendments to the Criminal Code across Canada ... with more charges likely!

Gowlings, is offering a half-day seminar on Bill C-45, covering the following: the new OHS duty under s. 217.1 of the Criminal Code; who may be charged; reasonable steps to ensure legal compliance and more!

Prepared by Norm Keith, author of Workplace Health and Safety Crimes (2nd edition), the only book in Canada on Bill C-45, and leading OHS Defence counsel.

To register for this half-day seminar
please visit our website at
www.gowlings.com/ohslaw

gowlings
Lawyers • Patent and Trade-mark Agents

ciations of various industries, as it will allow the payment of assessments that are based on the reality of each employer and it will no longer be necessary to conduct the annual exercise of estimating salaries for the coming year, which is long and sometimes futile.

For further information on this article please contact Éric Thibaudeau at eric.thibaudeau@gowlings.com, 1-866-862-5787 ext. 69595 or Laurence Bourgeois-Hatto at Laurence. Bourgeois-Hatto@gowlings.com, 1-866-862-5787 ext. 69585

Ministry of Labour Construction Sector Plan

BY: ANNA ABBOTT, B.A., LL.B.,
ASSOCIATE

The Ontario Ministry of Labour develops sector-specific enforcement plans that focus on hazards specific to certain workplaces. This project is part of Safe at Work Ontario, the Ministry of Labour's compliance strategy for enforcing the *Occupational Health and Safety Act* (The "OHSA"). The plans outline what inspectors will be looking for in each sector during an inspection. The plans developed for 2010-2011

include construction, industrial, mining, healthcare, and specialized and professional services.

The Construction Sector Plan covers the construction and diving industries. The plan advises that Inspectors will be focusing on the new workplace violence provisions under the OHSA, and the changes to certain provisions of the Construction Regulation (O.Reg 213/91) in the areas of stilts, wooden guardrails, CSA standards for fall protection equipment, electrical utility safety rules, marine safety equipment and lifejackets, locates of underground services, and engineering drawings for certain structures. A summary of the changes in the Regulation can be found at: http://www.e-laws.gov.on.ca/html/source/regs/english/2009/elaws_src_regs_r09443_e.

In the coming year, Inspectors will concentrate on workplaces that have higher than average rates of lost-time injuries and are repeat or serious violators of the OHSA and its regulations. 23,000 inspections are planned for 2010-2011 fiscal year.

In addition to the compliance issues listed above, Inspectors will be focusing their inspections on how well the Internal Responsibility System is func-

tioning in the workplace as well as on sector-specific hazards.

With respect to the Internal Responsibility System, a key focus will be ensuring that a proper JHSC is functioning in the workplace, along with ensuring that proper policies and procedures are in place to protect workers. Inspectors will also be checking to ensure that good prevention and assistance provisions are in place.

The following sector-specific hazards will be the focus of the inspections:

- Falls
- Use of equipment (both heavy and light)
- Occupational illness and disease
- "Struck by" construction vehicles/equipment and non-construction vehicles

Additionally, Inspectors have been instructed to pay attention to hazards in the seven trades with the highest injury rate: formwork, demolition, siding and outside finishing, masonry, residential, roofing, heavy civil construction, millwrighting and welding.


The general hazards that will be focused on for these trades and others include electrical hazards, equipment,

Reduce your OHS Compliance Audit Costs!

Ensure ongoing compliance with the leading Canadian software solution,

EHS Auditor®

- ✓ Prepare OHS regulatory compliance checklists in minutes.
- ✓ Select preloaded audit protocols based on provincial & federal legislation.
- ✓ Choose protocols from our extensive Canadian and US database.
- ✓ Build a Legal and Other Requirements Registry.
- ✓ Evaluate with Audit Scoring and Risk Assessment capability. NEW
- ✓ Customize: Add your protocols and scoring methodologies.
- ✓ Manage responses, then analyze and report results.



Conformance Check Inc.
Compliance Audit Solutions
Free web demo call: (416) 620-0846
Email: info@conformancecheck.com
www.conformancecheck.com

ergonomic issues, falls between levels and slips and falls, noise, occupational disease, WHIMIS exposure.

Blitzes on falls, new and young workers and musculoskeletal disorders took place during the spring and summer and will be on-going. The following blitzes will take place in the late fall and early new year:

- Compliance with Violence in Workplace requirements
- Provision of worker training, personal protective equipment, written safety measures and procedures, and supervision for new and young workers
- Training, provision and maintenance of equipment, written measures and procedures and supervision to prevent musculoskeletal disorders

For further information on this article please contact Anna Abbott at anna.abbott@gowlings.com, 1-866-862-5787 ext. 87284

Working Alone

By: ANTHONY DI GIANNI, CHSC

The subject of “working alone” raises many concerns with respect to worker occupational health and safety risk and exposure. There is a broad spectrum of people who work alone. This could include the convenience store gas bar owner who is the subject of a late-night robbery or the simple failure of a

co-worker to be available to notice that a worker has a health episode such as a heart attack, stroke or epileptic fit at work. Regardless of the nature of the risk or hazard that a worker may be exposed to, working alone inherently adds risk to that worker. While not every working alone situation presents a hazardous working condition, it is the other circumstances that are present. Factors to be considered when determining whether a situation is a low or high risk include the work location, type of work being performed, interaction with members of the public, and so on.

The Canadian approach to dealing with this risk has not been consistent or uniform across our 10 provinces and three territories. Even though each province and territory and the federal government has its own occupational health and safety statute, only five jurisdictions specifically address the issue of working alone by legislation or regulation. These are Alberta, British Columbia, Manitoba, New Brunswick, and Saskatchewan. It is arguable that other jurisdictions may address the issue indirectly through general duty clauses. For example, the general duty clause for Ontario requires employers to take every precaution reasonable in the circumstances for the protection and safety of a worker. However, absent specific legal requirements, the legislation is not clearly requiring employers to take steps to protect workers who are working alone. The general duty clause, unfortunately, is

often used after the fact to issue Orders or to commence regulatory OHS charges to blame the employer and senior management if an incident occurs with a worker working alone.

It is crucial for employers to determine what high-risk activities their workers are exposed to, through effective identification, assessment and control methods. Examples of high-risk activities include working at heights; in confined spaces; with hazardous products, equipment or electricity; and working with members of the public, especially when alcohol and money are present, which may lead to the additional hazards of workplace violence and/or harassment.

The protection of lone workers can be achieved by following some basic, yet effective control measures, such as determining the length of time the person will be working alone, determining what communication, if any, is available and its effectiveness. Is it necessary to “see” the person performing the work, or is voice communication adequate? In the event of an emergency, will the communication system be effective, i.e. personal alert device worn by a medical care giver? Also consider the location of the work, type or nature of the work being performed and the characteristics required by the person who is working alone.

To entirely eliminate the practice of working alone would be a challenge. However, employers can take steps to ensure the hazards associated with working alone are minimized and controlled as much as possible.

CONTACT

LEGAL INQUIRIES:

Norm Keith

B.A., J.D., LL.M., CRSP, PARTNER
1-866-862-5787 ext. 85699
norm.keith@gowlings.com

CONSULTING AND IN-HOUSE INQUIRIES:

Sanya Persaud

OHS NATIONAL PRACTICE MANAGER
1-866-862-5787 ext. 83580
sanya.persaud@gowlings.com

TRAINING INQUIRIES:

Scheduled Courses and Seminars

Aneta Paczkowska

OHS TRAINING COORDINATOR
1-866-862-5787 ext. 83645
aneta.paczkwskaf@gowlings.com

In-House Courses and Seminars

Cassandra Patrick

OHS CONSULTING COORDINATOR
1-866-862-5787 ext. 84348
cassandra.patrick@gowlings.com

WEBSITE:

www.gowlings.com/ohslaw

OHS NATIONAL TEAM

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

Kathryn Aldridge, B.A., Sc., CRSP, CHSC, OHS Consultant/Paralegal,
Toronto

Anna Abbott, B.A., LL.B., Associate, Toronto

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

Alan Blair, B.A., LL.B., Partner, Vancouver

Cathy Chandler, B.A.Sc., CRSP, CHSC, OHS Consultant/Paralegal,
Toronto

David Corry, B.A., M.Sc., LL.B., Partner, Calgary

John Illingworth, B.F.A., LL.B., Associate, Waterloo

David Law, B.A., LL.B., Partner, Ottawa

E. Ellen Ripley, B.Sc., M.Sc., LL.B., Associate, Vancouver

Éric Thibaudeau, LL.B., Associate, Montreal

Norm Keith, B.A., J.D., LL.M., CRSP, Partner, Toronto

David Marchione, B.A., CHSC, OHS Consultant/Paralegal, Toronto

Mélanie Morin, B.A., LL.B., Associate, Montréal

Pierre Pilote, B.C.L., Partner, Montréal

Elisa Scali, LL.B., Partner, Ottawa

Ailsa Wiggins, B.A., LL.B., LL.M., Special Counsel, Toronto

The Essential Guide to Workplace Risk Management

Your complete guide to occupational health and safety, workers' compensation and human resources training, consulting and legal solutions across Canada.



2011 Essential Guide Brochure is now available!

The Essential Guide will feature new OHS articles and your guide to Gowlings' OHS courses and seminars. Please click here to view the **2011 Essential Guide Brochure** - Your complete guide to occupational health and safety, workers' compensation, and human resources training, consulting and legal solutions across Canada!