



EDITORIAL

There are a number of new court and tribunal important decisions of note that are covered in this edition of this newsletter.

The most interesting, and perhaps disturbing, court decision is the Italian prosecution, conviction, and sentencing of a Chief Executive Officer! Jail terms are not normally given in Canadian OHS prosecutions and convictions of individual offenders. However, as more Bill C-45 charges are laid and more cases work their way through the judicial system, the Italian case may be one that is a real possibility in Canada.

The AODA requires Ontario employers to start implementing accessibility standards. Time is running out for Ontario employers to comply with the Customer Service Accessibility Standard under the AODA which takes effect January 1, 2012. Gowlings is offering a number of seminars to help employers understand and comply with these legal obligations.

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

Random Alcohol Testing Upheld

By: Goldie Bassi, B.A., LL.B., LL.M., Associate

In July 2011, the New Brunswick Court of Appeal addressed the controversial issue of random workplace alcohol testing. In the case of *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Limited* dismissed a union's appeal and confirmed a lower court's decision, which upheld mandatory unannounced alcohol testing of employees in safety sensitive positions to be reasonable and lawful.

The employer, an operator of a kraft paper mill, had an alcohol and drug policy in place that mandated testing for "safety-sensitive positions" in a number of scenarios. One of these scenarios was unannounced random alcohol testing. A millwright who was selected for a random breathalyzer test felt dishonoured because the consumption of alcohol was against his religious faith.

The union filed a grievance on behalf of the employee with the New Brunswick Labour Arbitration Board alleging that "... there was no reasonable grounds to test or significant accident or incident which would justify such a measure", therefore the employer lacked the

authority to implement mandatory random alcohol testing. The Board in allowing the grievance held that an employer does not possess unfettered and unilateral discretion to implement rules in the workplace. All rules must be reasonable and consistent with the collective agreement. Evidence presented by the employer did not show a significant risk of safety concerns related to alcohol impairment at the workplace. The benefit to be gained from the testing was minimal at best, while the intrusion to employee privacy was high. Therefore, the Board held that the random alcohol testing provisions of the employer's alcohol and drug policy failed to meet the reasonableness test.

The employer brought a judicial review application to the Court of Queen's Bench, which overturned the Board's decision. In applying the six-part *KVP* test, which sets out the standards an employer must meet in order to unilaterally implement rules, the Court focused on the requisite requiring each rule to be reasonable. After a review of the workplace operations, the Court held that random alcohol testing of

INSIDE

- Random Alcohol Testing Upheld, p. 1
- The New Canada Consumer Product Safety Act: Are you Prepared?, p. 2
- Electrical Safety in the Workplace, p. 6
- ThyssenKrupp CEO sentenced to jail over death of seven workers in Italy plant fire, p. 7
- Student Death Reaffirms Importance of Health & Safety Training in Schools, p. 8
- Certificate of Recognition Program Now Available in Ontario, p.9
- Nova Scotia auditor discovers alarming lack of fire inspections, p.10
- Bill C-45 Update: Criminal Negligence charges withdrawn against personal care worker, p.11

employees (even in the absence of an existing alcohol program, or an accident or incident justifying such testing) is reasonable where: (1) the workplace is inherently dangerous; and (2) the form of testing chosen by the employer has the lowest impact on employee privacy.

The union appealed to the Court of Appeal, which dismissed the appeal and confirmed the decision of the Court of Queen's Bench in favour of the employer. **The Court of Appeal held that where the workplace is inherently dangerous, an employer is not required to prove an existing alcohol problem in their workplace before implementing a policy requiring unannounced alcohol testing.** In

assessing the workplace, the Court held that the Arbitration Board's finding that the kraft paper mill presented itself as a "dangerous work environment" was sufficient to satisfy the test of inherently dangerous. Contrary to the finding of the Arbitration Board, the Court of Appeal equated the paper mill with a railway operation or a chemical plant, and further held that the existence of a \$350 million pressure boiler with a high potential for an explosion resulting in grave personal injury and environmental damage, alone supported the contention that the paper mill is inherently dangerous.

It remains to be seen whether courts across the country will follow suit. Although, drug and alcohol testing for safety sensitive positions has been long upheld where reasonable grounds (evidence of reckless employee behaviour or occurrence of suspicious accident) to test exist, arbitration boards across the country, however,

have been reluctant to allow random testing. This case represents the first judicial effort to directly address the issue of random alcohol testing.

There also appears to be a divide between random alcohol testing and random drug testing. Thus, it remains to be seen if the Court of Appeal's decision will evolve to extend to random drug testing as well, which tends to be viewed as more intrusive and less reliable in assessing current impairment than random alcohol testing.

The New Brunswick Court of Appeal's decision in this case will certainly play a key role in changing the existing national views on alcohol and drug testing.

For further information on this article please contact Goldie Bassi at goldie.bassie@gowlings.com, 1-866-862-5787 ext 86690.

The New Canada Consumer Product Safety Act: Are you Prepared?

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

On June 20, 2011, the new Canada Consumer Product Safety Act (CCPSA or the Act) came into force. The CCPSA creates new, and in some cases onerous, obligations for manufacturers, importers and distributors of consumer products in Canada.

The Act defines a consumer product as a product, including its components, parts or accessories, that that may reasonably be expected to be obtained by an individual to be used for non-

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commercial purposes, including for domestic, recreational and sports purposes and includes its packaging. This includes anything from hockey helmets to table lamps to children's toys. The Act does not apply to natural health products, food, cosmetics, medical devices and drugs – these products are covered by other legislation. (Refer to Schedule 1 of the Act for a complete list of product exemptions).

The Act replaces the *Hazardous Products Act*, 40-year-old legislation, with modern laws to protect Canadians from unsafe products. The purpose of the new legislation is to protect the public by addressing or preventing dangers to human health or safety (Reference - "Danger to Human Health or Safety" (s.2, CCPSA): "any unreasonable hazard - existing or potential - that is posed by a consumer product during or as a result of its normal or foreseeable use and that may reasonably be expected to cause [death or adverse health

effect]...") that are posed by consumer products in Canada, including those that circulate within Canada and those that are imported.

The CCPSA heightens industry's responsibility to ensure that they are not marketing potentially dangerous consumer products, which can lead to unintentional injuries.

Unintentional injuries are the leading cause of death among Canadian children and youth, from one to 19 years of age. Many of the unintentional injuries to children and youth involve consumer products. Bunk beds present numerous hazards to young children resulting in injuries such as falls and strangulations. Magnet-related injuries have increased sharply in recent years. Between 1993 and 2007 there were 328 cases of children aged 13 years or younger who sustained an injury associated with magnets. In April 2004, Health Canada acted to ban the sale, advertisement and importation of baby walkers in

Canada. There are numerous hazards in and around the home that present an injury risk to children and youth. Trampoline-related injuries have become increasingly common in recent years due to the availability of relatively low-cost backyard models. Falls from the trampoline involving impact with the ground surface are the most severe, generating almost two-thirds of all fractures and one in five patients admitted to hospital. Drowning and near-drowning can occur in association with bath seats, in particular when a child is left unattended. Children playing around dangling blind or curtain cords are exposed to a strangulation hazard. Furniture, televisions and large appliances are frequently associated with injuries sustained in the home (Reference - *Child and Youth Injury in Review, 2009 Edition – Spotlight on Consumer Product Safety*).

The intent of the new CCPSA, therefore, is to improve the safety of consumer products purchased by

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Canadians and help to prevent unintentional injuries, especially to children and youth.

What are the key provisions of the new *Canada Consumer Product Safety Act*?

Preparing and Maintaining Documents

The CCPSA requires those who manufacture, import, advertise, sell or test consumer products for commercial purposes to prepare and maintain specific documents. For example, the CCPSA requires that a retailer document the name and address of the product's supplier, and the location where and the period during which they sold the product (but not the name of the individual to whom the product was sold). All other persons, (i.e. those that manufacture, import, advertise, sell or test products for commercial purposes) must prepare and maintain documents that indicate the name and address of the person from whom they obtained the product and the location where and the period during which they sold the product.

Persons are required to keep documents until the expiry of six years after the end of the year to which they relate, unless regulations specify another time period.

Confidential Business Information & Personal Information

“Confidential business information” – in respect of a person to whose business or affairs the information relates – means business information:

(a) that is not publicly available;

(b) in respect of which the person has taken measures that are reasonable in the circumstances to ensure that it remains not publicly available; and

(c) that has actual or potential economic value to the person or their competitors because it is not publicly available, and its disclosure would result in a material financial loss to the person or a material financial gain to their competitors.

The CCPSA outlines two circumstances in which the Minister of Health may disclose confidential business information without consent:

1. **Written Agreement:** The Minister of Health may disclose confidential business information to a person or a government that carries out functions relating to the protection of human health or safety or the environment – in relation to a consumer product – without the consent of the person to whose business or affairs the information relates, and without notifying that person if the person to whom or government to which the information may be disclosed agrees in writing to maintain the confidentiality of the information and to use it only for the purpose of carrying out those functions.
2. **Imminent Danger to Health, Safety, Environment:** The Minister of Health may, without the consent of the person to whose business or affairs the information relates and without notifying that person

beforehand, disclose confidential business information about a consumer product that is a serious and imminent danger to human health or safety or the environment, if the disclosure of the information is essential to address the danger.

Duties in the Event of an Incident

Mandatory reporting is the requirement for industry to report any incident related to a consumer product they supply as outlined in Section 14 of the CCPSA. The intent of this section is to provide better intelligence on the use of consumer products and the potential risks with respect to human health and safety, enabling early and proactive response to emerging hazards / trends and respond, where appropriate, to consumer product health and safety incidents.

Upon learning of an "event" that may involve a company's product, it is expected that the company undertake an evaluation to determine if it meets the requirement to be reported to Health Canada and if the product involved is a consumer product as defined in the legislation. This determination is undertaken prior to timelines commencing for the mandatory incident reports. The following questions can assist in the determination of a reportable incident:

- Does the event relate to a consumer product that I sell, manufacture or import in Canada for commercial purposes (including its components, parts or accessories or packaging)?
- Does it meet the criteria of an

incident in either one of paragraphs 14(1) (a) through (d)?

- Does it indicate an unreasonable hazard posed by the normal or foreseeable use of the product or the foreseeable misuse of the product?

Determining "Related" – "Is my product connected or involved?"

When evaluating an event, the CCPSA requires a person to determine if the product involved (including its components, parts or accessories and its packaging) is related to a consumer product that they manufacture, import or sell in Canada for commercial purposes.

The event need not involve a consumer product that is exactly identical to the product the person manufactures, imports or sells in Canada. This may be the case, for instance, if the consumer product the person supplies shares a component, accessory or part with the product involved in the incident. An additional consideration for the aspect of "relate" requires a person to determine if the consumer product is connected with the event.

In accordance with section 14(1)(a-d), an "incident" with respect to a consumer product means:

14. (1)...(a) An occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual's death or in serious adverse effects on their health, including a serious injury;

(b) A defect or characteristic that may reasonably be expected to result in an individual's death or in serious adverse effects on their health, including a serious injury;

(c) Incorrect or insufficient information on a label or package – or the lack of a label or instructions – that may reasonably be expected to result in an individual's death or in serious adverse effects on their health, including a serious injury; or

(d) Recall or other measure that is initiated for human health or safety reasons by (i) foreign entity, (ii) a provincial government, (iii) a public body that is established under an Act of the legislature of a province, (iv) an aboriginal government as defined in subsection 13(3) of the Access to Information Act, or (v) an institution of an entity referred to in subparagraphs (ii) to (iv).

For an event to be an incident, particularly for paragraphs 14 (a) to (c), it should be determined that the event indicates an unreasonable hazard posed by the normal or foreseeable use or misuse of the product. Foreseeable use would include not only the use of a consumer product for its primary, ordinary or intended purpose, but also the misuse of a product that is reasonably foreseeable.

Compliance and Enforcement

The Minister of Health may designate inspectors for the purpose of the administration and enforcement of the Act and the regulations. The Minister of Health may also issue orders, including ordering a person who manufactures,

imports or sells a consumer product for commercial purposes to recall it, if the Minister believes on reasonable grounds that a consumer product is a danger to human health or safety.

Penalties

The CCPSA brings forth increased fines and penalties, including higher penalties where it can be proven that the contravention was done knowingly or recklessly. For contraventions of the Act, other than section 8, 10, 11 or 20, the maximum penalty is a fine of not more than \$5,000,000, imprisonment for a term of not more than two years, or both. For contraventions of section 8, 10, 11 or 20 of the Act, or when a person knowingly or recklessly contravenes another provision of the Act, a provision of the regulations or an order made under the Act, the maximum penalty is a fine in an amount that is at the discretion of the court, imprisonment for a term of not more than five years, or both.

Administrative monetary penalties may also be levied for contravention of an order made under s. 31 or 32 of the Act. A notice of violation would be issued and state the monetary penalty to be paid by the company. The amount of penalty depends on the risk associated with the product (low, medium, high) and the company's history of violations.

For further information on the CCPSA go to: <http://www.hc-sc.gc.ca/cps-spc> or contact Cathy Chandler at cathy.chandler@gowlings.com, 1-866-862-5787 ext 87351.

Electrical Safety in the Workplace

By: Laurence Polley, P.Eng., CHSC
C&R Engineered Solutions Inc.

Although workplace electrical safety has received significant attention since the release of *CSA Z462-08 Workplace Electrical Safety*, the most recent Ontario Electrical Safety Report published by the Electrical Safety Authority (ESA) indicates that there is still much to be done. While overall trends are down, there are significant upward trends, especially among skilled and experienced workers. (This report is based primarily on fatality and injury data from Ontario, but since Ontario represents 50% of all such incidents in Canada, it provides a good snapshot of the status of electrical workplace safety.)

The highlights of this report indicate that electrical injuries have been associated with three key areas over the last 10 years:

1. Powerline contact accounted for 49% of all fatalities, even with a 29% decline over the period.
2. Workplace electrocutions

(fatalities) make up 60% of all electrocutions.

3. The electrical trade continues to experience critical injuries and fatalities and the trend is up! For example, the number of serious incidents with electricians has increased six-fold from five to thirty incidents in the last five years, compared to the previous period, and the number of electrocutions has increased from 8% to 20% of all occupational electrocutions.

A 2008 survey of IBEW electricians regarding 347 VAC (typical lighting circuits) safety was quite revealing:

1. 64% had more than 20 years' experience in the trade.
2. **Only** 42% associated a high risk with working on energized circuits.
3. 49% indicated that **they are requested to work** outside established safe work practices.

The report states that in the industrial and commercial sector, 33% of occupational fatalities are electrical tradespeople, and 75% of all fatalities and critical injuries of an electrical nature were human error-related

(improper procedure, improper use, incorrect installation or human error). Panelboard-related injuries accounted for almost 50% of all critical electrical injuries and, where ESA investigated, they were all preventable. Electricians are supposedly well trained, but the statistics show otherwise and the trend is disturbing.

So what does this mean for the safety professional and the employer? Electricity is known as the silent killer because you can't spot the hazard easily, unlike, for instance, exposed rotating machinery. How many times have you seen an open electrical panel? Can you determine at a glance if it's live and therefore very hazardous?

The CSA standard *Z462-08 Workplace Electrical Safety*, which covers both shock and arc flash hazards, is a great resource for identifying and mitigating electrical hazards. And remember, many types of workers are exposed to electrical hazards – janitors, maintenance personnel, HVAC and instrument technicians, etc. – therefore, the hazard awareness part of any electrical safety program needs to include all affected workers. The



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statistics indicate that three quarters of the electrical injuries and fatalities were human error-related – a strong indication that hazard awareness and appropriate training needs attention!

For further information on this article please contact Laurence Polley at lpolley@engineeredolutions.ca, 905-864-0400 x 233.

ThyssenKrupp CEO sentenced to jail over death of seven workers in Italy plant fire

By: Kitty Leung, H.B.Sc., M.P.H.
OHS Consultant

A court in Turin has sentenced Harald Espenhahn, ThyssenKrupp's CEO, to 16-and-a-half years in prison and a life-long ban from holding public offices on charges related to the deaths of seven workers in December 2007 at a steel plant in Turin, Italy. Espenhahn was convicted with "voluntary multiple murder with eventual malice," a first in Italy for a workplace incident. Five other managers were convicted of "culpable murder with conscious guilt" and were

sentenced to 10 years or greater in prison. The managers, along with Espenhahn, were also convicted with "malicious omission of safety measures." The company, ThyssenKrupp, was fined 1 million euros (1.35 million CAD) and for a six month period, the company will not be allowed to benefit from Italian state subsidies and is banned from advertising its products in Italy. The court's decision regarding this case is a landmark ruling in Italy and it sets an important precedent in holding a CEO responsible for workplace incidents.

The incident occurred when a fire broke out in the steel plant at around 1:30 am, after the workers had already worked four hours of overtime. The fire sparked when a pipe burst and spilled oil onto the molten steel. The workers initially tried to extinguish the flames with fire extinguishers, however, three out of the five fire extinguishers near the accident site were empty, half-empty or non-functional. The workers then tried to extinguish the flames with a water hose. When the water came into contact with the liquid hydrogen and refrigerant, it caused an explosion,

which ultimately killed the workers. One worker died immediately in the fire while the other six workers died from their burns over the course of three weeks in the hospital following the explosion.

At the time of the accident, the company was gradually dissolving the factory as they had decided to shut down the existing plant to relocate to another site. The prosecutor claimed that during this time, ThyssenKrupp's senior management knowingly did not invest in health and safety, and failed to maintain basic safety standards. The prosecutor alleged that if the senior manager decided to reduce investment in health and safety, then he must be aware that there is a high likelihood that a serious accident can occur. By making that decision, the senior manager accepted the risk and the potential legal consequences of that risk. Therefore, the prosecutor argued that if a serious accident resulting in a fatality occurs as a result of the senior manager's actions, the senior manager in question must be deemed guilty of homicide. The judge accepted the prosecutor's assertions that Espenhahn was aware of the risk of

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fire at the Turin plant and knowingly did not invest in fire safety. The judge therefore sentenced Espenhahn to 16-and-a-half years in prison.

ThyssenKrupp described this ruling as “incomprehensible” and stated that the fire was a “tragic accident.” The defense has already filed for an appeal.

In Canada, Bill C-45, an amendment to the *Criminal Code*, came into effect on March 31, 2004. Bill C-45 establishes new rules for attributing criminal liability relating to health and safety in the workplace to organizations, including corporations and their senior officers. To date, there have only been a small number of cases where charges have been laid, with only two cases resulting in convictions. There are currently multiple Bill C-45 prosecutions before

the courts awaiting resolution. It remains uncertain whether Canada will follow the footsteps of Italy in terms of imposing severe penalties to organizations and senior officers in cases of criminal negligence causing injury or death with respect to a workplace incident.

For further information on this article please contact Kitty Leung at kitty.leung@gowlings.com, 1-866-862-5787 ext 85411.

Student Death Reaffirms Importance of Health & Safety Training in Schools

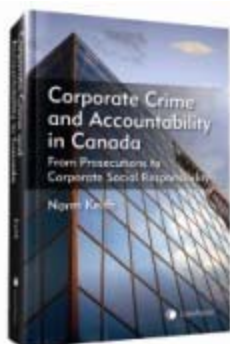
By: Ryan D. Campbell, B.A., J.D.
Associate

An auto-shop assignment at an Ottawa-area high school has become

a tragic accident, resulting in the death of Grade 12 student Eric Leighton, and injuring five others, including the 33-year-old teacher.

On May 26, 2011, 18-year-old Leighton was cutting an empty 55-gallon metal drum that would be used to fabricate a barbeque for his year-end project. The drum had contained peppermint oil, the fumes of which are highly flammable when mixed with air. The fumes ignited and caused an explosion.

The event has triggered an inquiry into the safety procedures in place in the classroom, and what changes should be made to ensure student safety. Of particular concern is the fact that this assignment was not part of the regular curriculum. Moreover, cutting steel drums that once held combustible



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Author Norm Keith has successfully defended more than 1,000 regulatory and criminal charges against corporations across Canada. He studied trends in corporate crime during his master in law degree. Drawing on this experience, he provides a reliable, concise and practical review of corporate crime, regulatory offences, and accountability of corporations under Canadian law.

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substances is a notoriously dangerous activity that has killed others in the past.

Less than six months before this incident, the Tony Dean Panel released its final report on Occupational Health and Safety in Ontario to the Minister of Labour. The report recognizes the importance of cultivating health and safety in Ontario culture from an early age, and identifies opportunities to improve and expand the health and safety content in Ontario's primary and secondary school curriculum.

Specifically, the panel recommends:

- The Ministry of Education should work with school boards, private schools and teacher organizations to expand the health and safety content of primary and secondary school curricula, and update teacher resource material to allow them to effectively teach these curricula
- The Ministry of Education should make high school graduation dependent upon demonstration of knowledge of occupational health and safety

While the health and safety precautions taken by the Ottawa Catholic School Board in relation to the Leighton incident are unknown to the author, the incident reaffirms the importance of introducing Ontarians to health and safety at a young age.

For further information on this article please contact Ryan D. Campbell at ryan.campbell@gowlings.com, 1-866-862-5787 ext 83558.

Certificate of Recognition Program Now Available in Ontario

By: David Marchione, BA, CHSC, CRSP, OHS Consultant/Paralegal

The Infrastructure Health and Safety Association (IHSA), in a partnership with the Ontario General Contractors Association (OGCA) have developed a Certificate of Recognition (COR) audit program for health and safety that has been tailored for contractors in Ontario.

The COR for occupational health and safety is a national program currently being used in several provinces across Canada. It is based on the "National Audit Standard" set out by the Canadian Federation of Construction Safety Associations.

The COR is being used by many project owners across Canada as an element of pre-qualification, or as a condition of entering into a contract. Some provinces, such as Manitoba, offer rebates in workers' compensation premiums for firms who hold a COR. In Alberta, firms that do not hold a COR are not eligible for Partners in Injury Reduction (PIR) rebates offered by the provincial compensation board. These firms are also unable to bid on certain projects within the province.

The development of an accreditation program was a key recommendation by the Dean Panel in its review of the Ontario Health and Safety Management System. In anticipation of such a program, the IHSA is launching a pilot COR program in the

province. There are currently over 20 OGCA member firms that are registered to participate in the COR pilot. There are approximately 40 spaces open to employers on a first-come, first-served basis.

For further information on this article please contact David Marchione at david.marchione@gowlings.com, 1-866-862-5787 ext 84378. For more information on the COR program, please contact 905-625-0100 or visit the OGCA website at <http://www.ogca.ca/ihsa-and-ogca-collaborate-on-ontario-cor-program>.

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More details can be found at www.gowlings.com/ohslaw

Nova Scotia auditor discovers alarming lack of fire inspections

By: Anna Abbott, B.A., LL.B.,
Associate

In May 2011, the auditor general of Nova Scotia, Jacques Lapointe, released a report identifying the lack of required fire inspections in Nova Scotia. Lapointe criticized the Office of the Fire Marshal (OFM) for not meeting minimum fire safety inspection frequencies specified in legislation and policies for buildings under its inspection responsibility.

The auditor general's office found 47 per cent of required inspections were not completed since the audit began in the fall. He said there was also no evidence that "significant fire safety deficiencies discovered during inspections were corrected."

He also said the OFM does an

inadequate job of monitoring municipalities to make sure they inspect buildings for fire safety. Only five of 56 municipalities have been reviewed since 2003 to see if they comply with the Fire Safety Act. Of those five municipalities, none had completed all of the required inspections.

The auditor general found particularly low inspection rates for public schools. The report identified that public schools had low rates of inspection because there was confusion as to whether the inspection responsibility fell to municipalities or the province.

The report further identifies the Nova Scotia Labour department as falling short in its leadership for fire safety issues and its failure to address previous audit findings. The report outlines inadequate monitoring of municipalities, inadequate management information system, and failure to complete inspections in

accordance with the required frequency as issues previously brought to the attention of the department.

Lapointe made 25 recommendations to improve Nova Scotia's fire safety record:

- OFM should maintain an inventory of buildings requiring inspection
- OFM should enter all inspection and investigation activities in a timely manner
- OFM should complete inspections not completed by the municipalities
- Implement a plan to ensure compliance with identified deficiencies

The Honourable Marilyn More, Nova Scotia Minister of Labour and Advanced Education, was discouraged with the report's findings, but has agreed to address all of the 25 recommendations with 18 months.

New Seminar! Accessibility Standards for Customer Service Seminar

Gowlings offers a three (3) hour seminar on the new Accessibility Standards for Customer Service (ASCS), made under the *Accessibility for Ontarians with Disabilities Act*, S.O. 2005 (the *AODA*). This seminar includes a legal overview of the contents of the *AODA* and the *ASCS*, compliance requirements and practical compliance solutions.

Seminar topics include:

- A review of the purposes and legal duties under the *AODA*
- Understanding definitions, process and penalties under the *AODA*
- The complimentary legal duty to accommodate under the Human Rights Code
- The requirements of the *ASCS* for all employers in Ontario
- The legal requirement under the *ASCS* for written specific policies, procedures and practices
- And More!

Who should attend?

OHS Managers, HR Managers, Risk Managers, Health & Safety Committee members, and Senior Operations Managers

For more information on this seminar please visit our website at www.gowings.com/ohslaw.

A summary of the report and recommendations can be found at <http://www.oag-ns.ca/May2011/summary.pdf>

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

Bill C-45 Update: Criminal Negligence Charges Withdrawn Against Personal Care Worker

By: Anna Abbott, B.A., LL.B.
Associate

Criminal charges have been withdrawn against a personal care worker who was accused of causing the death of a nursing home resident. The worker, Diane Peck, was charged with one count of criminal negligence causing death and one count of failing to provide the necessities of life following the death of a resident at the Community Nursing Home in Pickering, Ontario on April 4, 2011.

The resident died due to complications with a leg injury. Police alleged that Ms. Peck injured the leg of the 91-year-old resident, an Alzheimer's patient, by dropping her during an unassisted lift, contrary to the resident's personal care plan and the home's policy of using two employees and a mechanical lift for moving incapacitated residents. Further, the

police alleged that the fall was not officially reported to the home supervisors, and that the injury was only discovered days later by other staff members.

The injury was eventually reported to police by family members of the deceased. Ms. Peck was arrested and held for a bail hearing on May 24, 2011. Charges were withdrawn by Crown Counsel on July 27, 2011 on the basis that there was no reasonable prospect of conviction. According to defence counsel for Ms. Peck, the charges were withdrawn after it became increasingly apparent that the Crown could not prove how or when the injury was sustained based on forensic examinations made following the laying of charges.

This is the second withdrawal of Bill C-45 criminal negligence charges for lack of a reasonable prospect of conviction in Ontario this year. Charges were withdrawn against Millennium Crane Rentals, its president and the driver of a mobile crane in Sault Ste Marie, Ontario in March 2011.

Even though the charges were eventually withdrawn, this case serves to remind employers that they must be vigilant in providing training to employees and supervisors with respect to workplace health and safety policies and procedures. Employers should be sure to train employees on the importance of reporting any injuries, minor or serious, affecting any

person at the workplace.

Following the decision in *Blue Mountain Resorts Limited v. Ontario (The Ministry of Labour and The Ontario Labour Relations Board)*, 2011 ONSC 3057, the divisional court made it clear that the reporting obligations for employers under the OHS Act extends to include any person who is critically injured at the workplace, not just employees. All employers, both private and public across the province, should look carefully at their reporting policies, training obligations and OHS management systems to ensure all relevant personnel understand the required reporting obligations.

Employers can only limit exposure to liability if they are able to properly manage workplace incidents. Failure to report a critical injury and failure to secure the scene of a critical injury are distinct offences under the OHS Act and can lead to orders, charges and increased penalties. Further, failure to report a fatality or critical injury may increase the likelihood of charges or a conviction for Bill C-45 charges under the *Criminal Code*.

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