



EDITORIAL

The warming season of spring has arrived and OHS enforcement is heating up across Canada. Many provinces are emphasizing safety blitzes and legislative reform in a bid to reduce workplace injuries.

On the Bill C-45 front, a British Columbia union has taken the *Criminal Code* into its own hand and laid criminal negligence causing death charges against its employer. Not the normal role of the certified bargaining agent of the employees under labour relations legislation.

Federally, the Conservative government has finally release its Emergency Response Plan. In Quebec, the age limit on workers compensation payments has been decelerated to be in violation of the Charter.

Finally, Bill 168, Ontario's Workplace Violence Prevention law, takes effect on June 15, 2010. Employers need to conduct a risk assessment, develop a policy and program, and conduct management and workers' training all before that date. Gowlings offers comprehensive Bill 168 compliance services. For more information please visit our website at www.gowlings.com/ohslaw
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Union Initiates Bill C-45 OHS Criminal Negligence Charges

BY: NORM KEITH, B.A., LL.B., CRSP, PARTNER

In an unprecedented move, the Union that represented a worker who was fatally injured at a British Columbia saw mill in 2004 has commenced a private criminal prosecution in New Westminster, British Columbia. The worker, Mr. Lyle Hewer, a member of the United Steel Workers Union, Local 13587, died on November 17, 2004, seven-and-a-half months after the federal government enacted the Bill C-45 amendments to the *Criminal Code*. Those amendments established the new, positive duty on everyone in the workplace, including organizations, to take reasonable steps to prevent bodily harm.

The Bill C-45 amendments have only been the subject of two final court dispositions: Domenic Fantini prosecution, which resulted in a withdrawal of the Bill C-45 charge, and Transpave, a Quebec company that pled guilty to one count of Occupational Health and Safety Criminal Negligence.

Apart from one pending case involving a client of Gowlings, Millennium Cranes, on which we will not provide public comment, there have been no other prosecutions under the high profile amendments to the *Criminal Code* arising from the Westray Mine disaster and the public inquiry that followed.

In the Lyle Hewer fatality, the British Columbia OHS regulator imposed significant administrative monetary penalties on the employer. However, after a thorough police investigation, no criminal charges were laid.

Therefore, when the Union initiated the OHS criminal negligence charges against the employer, they took the criminal justice system into their own hands and decided that they knew better than the police and the Crown Attorney. Apart from the disturbing implications for all unionized employers across Canada, the specific question in this case will be whether or not the Crown Attorney will take over the criminal prosecution, and possibly withdraw the charges.

The *Criminal Code* does not set any health and safety standards under Bill C-45 amendments. Bill C-45 requires employers, management and workers to take "reasonable steps to prevent bodily harm." This is one of several problems with the way the Bill C-45 amendments were drafted. This is unfortunate and undoubtedly at least one reason why there have been so few changes. The severity of the penalty against an organization is also of concern as there is no upper limit to the amount of the fine that may be imposed by a court if there is a

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conviction. Further, although no individual is charged by the Union under the *Criminal Code*, for individuals charged with OHS criminal negligence causing death, the maximum penalty is life imprisonment.

We will be watching this case, with interest, as well as reporting on the further court developments if this prosecution proceeds.

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MOL Releases Guidance Document on Bill 168

By: CATHY CHANDLER, B.A. Sc., CRSP, CHSC, OHS CONSULTANT/PARALEGAL

Bill 168, an Act to amend the *OHS Act* to prevent and manage workplace violence and harassment comes into force and effect on June 15, 2010. The amendments explicitly set out a duty for every Ontario employer to take specific steps to proactively prevent and manage workplace violence.

On March 31, 2010, the Ministry of Labour (“MOL”) released a guidance document titled “*Workplace Violence and Harassment: Understanding the Law*” (the

“guide”). The guide is not legally enforceable.

Since the introduction of Bill 168 on April 20, 2009, many employers have sought clarification on some of the more controversial aspects of the bill, such as the provisions around domestic violence and providing personal information about a person with a history of violent behaviour to workers.

The guide attempts to provide clarification and answer questions on these controversial requirements as well as other key terms and concepts contained in Bill 168. The guide is somewhat helpful in that it clarifies that Bill 168 applies to all employers in Ontario regardless of the size of the workplace or the number of workers. Every employer must prepare a policy on workplace violence and harassment, conduct a workplace violence risk assessment, develop and maintain a program to implement the policy, and provide information and instruction to workers on the contents of the policy and program. Smaller workplaces (e.g. those with five or less regularly employed workers) are not exempt from these requirements. Interestingly, while smaller workplaces must have policies respecting violence and harassment, the policies do not have to be in writing, unless ordered by an MOL inspector.

While the guide provides for explanation around the risk assessment requirements – for instance, if an employer has more than one work location, an assessment must be conducted at each physical location – there is limited, if no, guidance on how to go about conducting the workplace violence risk assessment. Gowlings recommends a documentation review of internal policies, procedures and incident reports; employee surveys and/or interviews; and a physical audit of the workplace. The guide does not provide tools (e.g. a checklist, questionnaire template) to assist with conducting the risk assessment.

One of the most controversial aspects of Bill 168 is the requirement for employers and supervisors to provide workers with information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour when the worker can be expected to encounter the violent person at work and the risk of workplace violence is likely to expose the worker to physical injury. This provision is disconcerting to many employers because it means that employers may have to disclose personal information about a worker to other workers. Employers are concerned about breaching privacy laws and the negative impact on working relations among co-workers.

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It appears that it is going to be left to employers to evaluate the circumstances of a person's history of violent behaviour and whether the person poses a risk to workers. The guide provides no definition of personal information or history of violent behaviour. The guide provides factors for employers to consider when conducting their evaluation, such as:

- Was the history of violence associated with the workplace or work?
- Was the history of violence directed at a particular worker or workers in general?
- How long ago did the incident(s) of violence occur?
- What measures and procedures are in place in the existing workplace violence program?

Taking into consideration the factors listed above, employers likely do not need to disclose personal information about an employee that, for example, took part in a bar brawl at school 20 years ago and has had exemplary performance at work since then. With respect to privacy, the guide concedes there are laws that govern the release of personal information. Employers must take into account a person's right to privacy under those laws while still complying with Bill 168. The guide encourages employers to seek legal advice when necessary.

The domestic violence provisions, unique to Ontario, are also addressed in the guide. The Bill requires employers to take every precaution reasonable in the circumstances for the protection of workers when they are aware, or ought reasonably to be aware, that domestic violence may occur in the workplace, and that it would likely expose a worker to physical injury. Neither the Bill nor

the guide provides a definition of domestic violence. There is, however, a clear duty for employers to take action once aware that a domestic violence situation may cause injury to workers at work. The guide explains this "duty to act" could involve creating an individual safety plan for the worker while he or she is in the workplace, and consultation with the police, courts or other organizations. The guide makes clear that even if a worker does not want any steps taken, the employer may still be required to take some action to protect the targeted worker and other workers.

While it does not answer all questions surrounding our new workplace violence and harassment legislation, the guide is a useful document. A copy of the 37-page guide is available on the MOL's website.

For further information on Gowlings' Bill 168 Compliance Services, please contact Cathy Chandler at 1-866-862-5787 ext. 87351 or cathy.chandler@gowlings.com.

Government Introduces Federal Emergency Response Plan

BY: KATHRYN ALDRIDGE, B.A.Sc.,
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The federal government recently released their emergency response plan which outlines how various types of emergencies will be managed. Under the 2007 *Emergency Management Act*, the Minister of Public Safety is responsible for coordinating emergency response. Pursuant to the Act, the Federal Emergency Response Plan ("FERP") was developed. The plan is intended to facilitate an integrated approach to emergency management among the federal government, provincial/territorial

governments, non-governmental organizations and the private sector.

Public Safety Minister Vic Toews recently announced the plan and said that although it existed on an informal basis, the adoption of a formal plan now makes clear the processes to be followed and details the administration of resources. The formalization of the plan came a few months after Auditor General Sheila Fraser identified Public Safety Canada's lack of establishing a clear system. Without a formalized plan the chances for lack of or miscommunication, uncoordinated efforts, and uncertain duties and responsibilities are greater.

The FERP is designed as an all-hazards plan for natural and human-induced hazards, such as fires, floods, tornadoes, transportation accidents, pandemics, cyber incidents and terrorism. As part of the integrated response, the FERP will be triggered when a province/territory requests federal support; an emergency affects multiple jurisdictions and/or departments and

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requires a coordinated response; an emergency directly involves federal assets, services, employees, statutory authority or responsibilities, or it affects confidence in government; or on the occasion of some other emergency circumstance of national interest.

Provincial/territorial governments and organizations have their own established plans. The FERP's own protocols will need to be implemented in addition to these plans. There are three levels of response established, with Level 3 involving activation of a coordinated federal response. The primary functions of the plan incorporate considerations for operations, situational awareness, risk assessment, planning, logistics, and finance and administration. Some critics have said that even though the plan has been formalized it still does not address all key issues, such as guidance and protection of first responders.

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Section 56 of the An Act Respecting Industrial Accidents and Occupational Diseases Violates the Charter

BY: ÉRIC THIBAudeau, LL.B.,
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After an opposition from a worker who felt unjustly targeted by an *Act respecting industrial accidents and occupational diseases* (the Act), the *Commission des lésions professionnelles* (Québec's workmen's compensation tribunal, CLP) concluded that the

age limit in regards to the right to indemnities (section 56 of the Act) violates section 10 of the *Canadian Charter* (the Charter).

This decision was rendered after two decisions of the *Commission de la santé et de la sécurité du travail* (Québec's workers' compensation board, CSST) – both in first instance and in administrative review – confirmed the opposite.

According to the facts reported by the judgment, the worker, then 64 years old, suffered an industrial accident on November 29, 2007, which forced him to stop working. On November 29, 2008 – the date which marked the beginning of his second year of compensation – his indemnity was reduced pursuant to section 56 of the Act which provides for the following:

56. *The income replacement indemnity is reduced by 25% from the sixty-fifth birthday of the worker, by 50% from the second year and by 75% from the third year following the said date.*

Notwithstanding the first paragraph, the income replacement indemnity of a worker who suffered an employment injury when 64 years of age is reduced, by 25% from the second year following the date of the beginning of his disability, by 50% from the third year and by 75% from the fourth year following the said date.

As far as the worker is concerned, the above-cited section is discriminatory in that it is founded on a distinction that is directly addressed in section 10 of the Charter and that subjects him to unfair treatment. The Attorney General on the other hand, submits that the section in question represents a compromise that allows for the factual consideration of the situation of the large majority of

workers. He also raises the issue of the paying capacity of a public system such as this and further maintains that it would not be able to meet its obligations otherwise.

Through a decision of 236 paragraphs, the CLP found in favour of the worker for the following reasons. In fact, says the CLP, the distinction created by section 56 of the Act perpetuates prejudices and stereotypes against older workers specifically as they relate to their working capacity. The CLP then reminds us of the factors set out by the Supreme Court in the Law case and bases itself on the discriminatory character of a distinction rooted in age in order to justify a more liberal application of the public system; one that would benefit workers between 65 and 68 years old. Indeed, a person should not be punished for wanting to work past what would generally be considered a “normal” age.

The CLP therefore concludes that the effects of section 56 of the Act are discriminatory – and thus violate the guiding principles set out in the Charter – and the argument brought forth by the Attorney General that the system would not be able to survive otherwise cannot be given any weight considering the absence of evidence on the issue.

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Ontario Consolidating Designated Substance Regulations

BY: DAVID MARCHIONE, B.A., CHSC,
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On July 1, 2010, Ontario's standalone Designated Substance Regulations will be consolidated into a single Regulation. The consolidation is intended to make compliance easier for employers who will now be able to consult two regulations instead of 12.

Ontario currently has 12 Regulations for Designated Substances under the *Occupational Health and Safety Act* ("OHSA"). Each regulation sets out occupational exposure limits ("OELs"), and requirements such as assessment and control programs, medical examinations and clinical tests, personal protective equipment, and training. As of July 1, 2010, 11 of those Regulations will be consolidated into Ontario Regulation 490/09 – Designated Substances. The only standalone Regulation that will remain is 278/05 – Designated Substance – Asbestos on Construction Projects and in Building and Repair Operations.

The consolidation comes as part of an overall change with respect to updating OELs for various substances. On December 22, 2009, the Ontario Ministry of Labour ("MOL") announced that the McGuinty govern-

ment was strengthening protection for workers by updating OELs for 36 hazardous substances. The MOL backgrounder noted that there are now over 725 substances regulated under Ontario's *OHSA*. The exposure limits regulating the allowable amount of exposure a worker may have to a hazardous chemical substance. The MOL conducts an annual review of exposure limits in consultation with employer and worker stakeholder groups in order to ensure worker protection.

Employers should familiarize themselves with the new Regulation and the updated OELs to ensure they remain compliant.

For further information on the new legislation, click [here](#) or contact David Marchione at 1-866-862-5787 ext. 84378 or david.marchione@gowlings.com.

First National Confined Space Standard - CSA Z1006, Management of Work in Confined Space

BY: ANTHONY DI GIANNI, CHSC,
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The Canadian Standards Association (CSA) has announced its first confined space standard, *CSA Z1006 Management of Work in Confined Space*. This will be Canada's first comprehensive, national

non-legally binding standard on managing work carried out within confined spaces. Confined spaces are found in many workplaces across Canada, and in all sectors. Statistics provided by the National Institute of Occupational Safety and Health (NIOSH) illustrate that more than 60 per cent of confined space fatalities involve improperly trained rescue personnel.

"Even the most skilled workers can become trapped, injured or overcome by toxins in a confined space," says Suzanne Kiraly, president of CSA standards. "This new CSA standard, the first of its kind in Canada, defines what a confined space is and provides guidelines to managers, workers and rescuers for indentifying and avoiding potential risks while not becoming victims themselves."

Current provincial and federal confined space legislation are similar in their definitions of a confined space, which they define as an enclosed or partially enclosed space that is not primarily designed or intended for human occupancy; has a restricted entrance or exit by way of location, size or means; and can represent a risk for the for the health and safety of anyone who enters, due to one or more of the following factors: its design, construction, location or atmosphere; the materials or substances in it; work activities being carried out in it; or the mechanical, process and safety haz-

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ards present. The CSA standard is similar in its definition of a confined space and states that a confined space is a workplace that is fully or partially enclosed; is not designed or intended for continuous human occupancy; and has limited or restricted access, exiting or internal configuration that can complicate provisions of first aid, evacuation, rescue or other emergency response services.

The CSA standard will not work against existing regulations that deal with confined space, but rather, it will work in combination with them to ensure a high level of safety to workers across Canada in every jurisdiction. The definition of a confined space within the CSA Z1006 Management of Work in Confined Spaces standard focuses on the characteristics of the space and the ability of a worker or rescuer to enter and exit the space without injury, illness or death.

The CSA standard addresses various areas of confined spaces and provides detailed guidance on roles required for safe entry, training requirements for the entry team and the rescue team, along with training requirements for training providers. The standard also addresses the competency for individuals to work in a confined space related to their ability to perform specific roles. A hazard identification and risk assessment by a competent worker is also required to determine the appropriate controls to address the specific hazards of the space.

In part, the federal, provincial and territorial OHS governmental agencies fund-

ed the development of the new CSA standard. The content of the standard was developed by a volunteer technical committee comprised of stakeholders from regulators, labour, industry, producers and general interest representatives. Input is provided from all industry sectors, including steel, telecommunications, energy, manufacturing, chemical, petro-chemical, emergency services, pulp and paper, mining and railway.

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SH&E Headlines From Around the World

BY: ADAM A. NEAVE, B.A.Sc., CRSP, CHSC

Below there are 2 SH&E news stories that made headlines around the world during the first quarter of 2010.

Coal mine fire in China leaves 25 dead

Xinmi City, Zhangzhou – On March 16, 2010, CNN reported that a fire in a coal mine left twenty-five workers dead in the capital of the central Henan province, according to state-run media citing local government sources. Cables caught fire and after a rescue operation managed to save six miners, all of the workers were eventually accounted for with twenty-five of them having perished. While an initial investigation determined that the mine was in operation legally, at least three mine man-

agers have been detained and their assets have been frozen. On January 20, 2010, the State Administration of Coal Mine Safety in China (“SACMS”) reported a total of 2,631 deaths as a result of 1,161 accidents in connection with coal mines in 2009. The Director of SACMS, Zhao Tiechui, stated that there were 584 less deaths and 338 less accidents in 2009 than there were in 2008. Small coal mines, which produce 35% of China’s coal, were responsible for 70% of the fatalities despite 1,088 small coal mines that were closed during the year.

WorksafeBC imposes record penalties in 2009

Richmond, British Columbia – The provincial safety and health enforcement agency in British Columbia reported that in 2009 it imposed a record amount of fines for violations of the Occupational Health and Safety Regulation (“OHS Reg”). A total of 211 penalties against 190 employers and individuals resulted in \$4,465,313.40 in fines. The largest fine was issued to Canadian Natural Resources Ltd., in the amount of \$250,000, in relation to the death of a young worker who fell from a height on a well site in Fort Nelson. Employers from 67 different industry classifications were hit with penalties while five construction-related classification accounted for almost fifty-nine per cent (59%) of the total penalties. The maximum penalty available under the OHS Reg was \$565,329.86 in 2009.

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