

*A national occupational health & safety (OHS) and workers' compensation law newsletter*



Reflecting on 2006, we have seen some dramatic developments in OHS law across Canada. The first organization/employer was charged under the Bill C-45 amendments to the *Criminal Code*, arising from a fatality in Québec. Union pressure to lay criminal charges may have been a contributing factor. Ontario introduced important changes to its Confined Space Regulations whose implications for industry are still being sorted out. British Columbia joins other provinces and the federal government in providing an influenza pandemic guideline. First aid training for pilots in Canada's aviation industry may be a thing of the past.

To assist clients in complying with growing OHS obligations, Gowlings has established a referral program, through its website, to provide expert referrals on technical services to complement our training, consulting, and legal services. Please visit our website and review the referral program subject areas when you need assistance. For further information on how to join Gowlings' referral program, please contact Olga Jordache at 1-866-862-5787, ext 83580.

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

## First Organization Charged Under Bill C-45

By Norm Keith, B.A., LL.B., CRSP

The big occupational health and safety (OHS) news relating to the Bill C-45 amendments to the *Criminal Code*, is the first charge against an organization. This is the first time the courts may deal with the many complex questions that arise from the specific language of Bill C-45.

Bill C-45 amended the *Criminal Code of Canada*, the primary, national criminal statute, on March 31, 2004. Known as the Westray amendment to the *Criminal Code*, in memory of the 26 miners that were killed in a coal mine disaster in Pictou County, Nova Scotia, it added a new OHS duty to the *Criminal Code* thereby estab-

lishing a new crime of OHS Criminal Negligence in Canada.

A Québec company, Transpavé, is the accused in the second confirmed OHS Criminal Negligence charge. The prosecution relates to the workplace death of a worker, Steve L'Ecuyer, 23, who was fatally injured after being crushed by heavy machinery. The indictment under the *Criminal Code* does not provide particulars of the charge, other information on the nature or cause of death, the alleged specifics of wrongdoing of the organization charged, or what type of penalty the prosecutors may be looking for if they secure a conviction.

*continued on p. 2*

## Tough New Confined Space Regulations in Force in Ontario

By Elizabeth Rankin, B.A.Sc.

Since the new Confined Space Regulations were announced by the Ontario Ministry of Labour ("MOL") in December 2005, there have been two more accidents involving workers in confined spaces, resulting in seven deaths: one in Kimberly, British Columbia and the other in Lac Brome, Quebec. In both cases, not only did the workers doing the work succumb to atmospheric hazards in the confined spaces, but workers who tried to rescue them also died. Although

these cases were not in Ontario, they reinforce the need for more stringent regulation of work in confined spaces.

Ontario's new Confined Space Regulations came into force on September 30, 2006. These consist of the Confined Spaces, Ontario Regulation 632/05, and amendments to the four main industry sector regulations:

- Construction Projects, Ontario Regulation 213/91;
- Industrial Establishments, Regulation 851, R.R.O. 1990;

*continued on p. 4*

### Also in this OHSLAW™ Report

- Proposed First Aid Changes for Aviation Industry, p. 3
- WorkSafeBC Issues Draft Influenza Pandemic Guideline, pg. 3
- Ergonomics Orders Suspended for Brewers Retail, p. 4
- Contractor Gets 30 Days in Jail, p. 5
- Alberta Imposes Largest Penalty Ever for Workplace Accident, p. 6
- Firefighter's Cancer Compensation - Ontario, p. 6
- Ontario MOL Lays 7 Charges in 2005 Loading Accident, p.6
- Wrongful Dismissal Not a Traumatic Event for Workers' Compensation, p. 7

## Québec Company Charged Under Bill C-45

*continued from p. 1*

In a brief statement, the employer said that it intends to plead not guilty and defend the charges.

In the Canadian Press report, Lia Levesque reported that "the inquiry by the provincial health and safety commission found that the optic security system was "neutralized" ... the commission also found that L'Ecuyer lacked the training to realize the danger he was in ... he also used a dangerous method to try and retrieve paving stones from a working area."

This is, of course, not the first time a corporation has been charged with an offence causing death under the *Criminal Code*, relating to a workplace fatality. However, it is the first case after the Bill C-45 amendments to the *Criminal Code* to result in such a prosecution. Bill C-45 amended the *Criminal Code* to replace the term "corporation" with the much broader term "organization". In addition to the four key elements of Bill C-45, the new law also establishes a new and lower threshold to establish organizational guilt. Section 22.1 of the *Criminal Code* has set out a two-step formula to establish organizational guilt that applies to the new crime of OHS Criminal Negligence. The first step is proof of the failure of any "representative" of the organization to take "reasonable steps to prevent bodily harm"; and, the second step requires proof that a "senior officer" of the organization failed to ensure that the organization did not

depart from the standard of care that could reasonably be expected to prevent a representative of the organization from being a party to the offence. In other words, that the senior officer made sure that the organization had put OHS due diligence in place in the organization.

Here are four critical elements of the new crime that every OHS Professional and managerial personnel in Canada absolutely need to know:

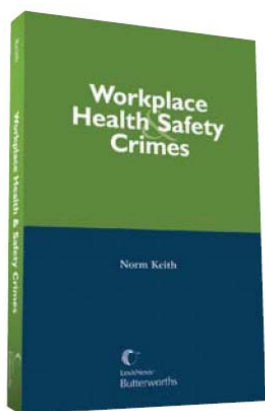
1. The new legal duty applies to everyone who undertakes, or has authority, to direct how another person does work or performs a task;
2. The new legal duty requires those identified in element 1. (above) to take "reasonable steps to prevent bodily harm" to any person; "reasonable steps" is not defined, but it generally is accepted to include compliance with OHS statutes and Regulations and also the principles of the legal defence of the second branch of the due diligence defence as enunciated by the Supreme Court of Canada in *R.v. Sault Ste. Marie*;
3. The police and Crown Attorneys, not OHS regulators, investigate and prosecute offences under the *Criminal Code*, including the new offence of OHS Criminal Negligence; and the police have broader investigator powers including arrest, wiretap evidence gathering and other powers that OHS inspectors do not have anywhere in Canada;
4. Individuals charged with a breach of the new duty may, upon conviction, face up

to life imprisonment in the event of a workplace fatality and up to ten years if there is a workplace injury, and an organization may face a fine of an unlimited amount.

This case, if it proceeds to trial, may help define how broadly the new OHS crime will be interpreted. The first Bill C-45 charge, against a 68-year-old construction supervisor, was withdrawn as part of a broader plea bargain agreement. Domenico Fantini was the supervisor who was charged with OHS Criminal Negligence after a workplace fatality involving a trench collapse. York Regional Police charged Mr. Fantini with one count of OHS Criminal Negligence causing death. The charge was withdrawn as part of the plea bargain that saw him plead guilty to three counts of contravening the *Occupational Health and Safety Act* of Ontario. Mr. Fantini was given a fine of \$50,000 and three years to pay.

In summary, the recent charge against Transpavé is the second OHS Criminal Negligence charge under the Bill C-45 amendments to the *Criminal Code*. This charge is the first against an organization and will potentially, if it proceeds to trial, provide judicial guidance on the complex language of the Bill C-45 amendments relating to organizational liability now facing all organizations in Canada.

For further information on Bill C-45 and what your organization can do to reduce its legal risk, contact the author at 1-866-862-5787, ext 85699 or by email at [norm.keith@gowlings.com](mailto:norm.keith@gowlings.com). ■



### Workplace Health & Safety Crimes (Bill C-45)

Norman A. Keith, B.A., LL.B., CRSP

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## Proposed First Aid Changes for Aviation Industry

By David Marchione, B.A.

The federal government is considering a proposal to lift a regulation requiring air transport pilots to learn first aid. This change will bring aviation safety standards in line with Canada's Occupational Health and Safety Regulations.

The proposed changes would affect approximately 10,000 pilots aboard passenger aircraft. The change would exempt all cockpit crew members from requiring first aid training "due to their critical involvement in the safe and effective operation of an aircraft."

By removing the requirement for pilots to be trained in first aid, the aviation industry will save approximately \$9.2 million over the next 15 years. The savings will come from training, other fees and replacements required to do pilots' jobs while they learn first aid.

An aviation industry and government working group are aiming to incorporate new technology and industry standards into the federal occupational health and safety code for airborne workers. Other proposed changes to the aviation health and safety standards involve more adequate rest, sleeping facilities, sanitary conditions, better noise protection, electrical safety, material handling and deficiency reporting procedures. ■



## WorkSafeBC Issues Draft Influenza Pandemic Guideline

By Kathryn Fisher, B.A.Sc.

In September 2006, WorkSafeBC, the public communication arm of the Workers' Compensation Board in British Columbia, issued a draft guideline (G6.34-2) regarding influenza pandemic preparedness. The purpose of the guideline is to identify how the OHS Regulation in BC may be applicable to the preparation and management of an influenza pandemic with respect to protection of workers from this potential occurrence.

In the midst of numerous discussions in the media warning of a possible influenza pandemic it may not come as a surprise that WorkSafeBC has decided to address the issue through the establishment of this guideline. Pandemic influenza is of particular concern because it can spread very quickly among populations and its health effects tend to be more detrimental to humans. Occupational exposure may be probable if measures are not taken to ensure an infected employee or customer does not infect others in the organization.

Although there is no specific reference in BC's OHS Regulation that employers must prepare for a potential influenza pandemic, there is a requirement under section 6.34 of the OHS Regulation for the employer to develop an Exposure Control Plan "if a worker has or may have occupational exposure to a bloodborne pathogen, or to other biohazardous material as specified by the

Board".

The guideline references this legal duty and further states that "when there is confirmed human-to-human transmission and the pandemic influenza virus has been characterized by health authorities, WorkSafeBC would specify it as a "biohazardous material", thereby requiring employers to have an Exposure Control Plan in place where workers have or may have occupational exposure to the pandemic influenza virus.

The guideline provides information on what the Exposure Control Plan must address, as a minimum, and notes that some workplaces would require a more comprehensive plan than others (i.e. a hospital vs. an isolated workplace).

If a pandemic occurs it could have a significant effect on workplaces. It may be prudent for all employers, not just those in BC, to review the guideline and address this issue as part of their emergency preparedness and response plan. In light of the SARS outbreak in Ontario, organizations cannot afford to ignore this risk. Effective preparation for potential emergencies can yield many benefits: it can assist in the protection of workers' health, the continuity of business operations and helps demonstrate due diligence.

The guideline can be found on WorkSafeBC's website: [www.worksafebc.com](http://www.worksafebc.com). Gowlings is available to assist organizations in developing or evaluating the effectiveness of your Emergency Plan. ■

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## Confined Space Regulations in Force

*continued from p. 1*

- Mines and Mining Plants, Regulation 854, R.R.O, 1990; and
- Health Care and Residential Facilities, Ontario Regulation 67/93.

These are collectively referred to as "the regulations" in this article. Regulation 632/05 covers employers who are not covered by the sector regulations, such as municipal works and transportation, for example.

Employers who have a confined space or employers whose workers may enter a confined space must have a written confined space program. The regulations require that the program must be adequate and must provide an entry permit system, and a method for recognizing each confined space, assessing the potential exposure hazards, development of confined space entry plans, and general training of workers.

Recognition of confined spaces requires an evaluation of the spaces into which a worker may enter to determine if the space meets the legal definition of a confined space, as set out in the regulations. The initial evaluation of the space is intended to determine whether a particular space is a confined space. The space must be evaluated against each criteria in the legal definition:

- whether the space is fully or partially enclosed;
- whether the space was designed and constructed for continuous human occupancy; and
- whether atmospheric hazards may arise in the space as a result of its construction, location, contents, or created by the work that is done in it.

The confined space entry plan is a detailed written procedure that explains how the entry into a specific confined space will be undertaken. The plan is the document that tells workers what they must do to ensure

their own safety and that of their coworkers.

The permit is the specific document, or form, that must be completed showing verification of compliance with the requirements of the entry plan. It is typically used as a tool to ensure appropriate authorization to workers to enter the confined space and to record compliance measures, worker entries and exits, and the results of atmospheric testing.

The employer's program must set out in detail how the permit is to be used and authorized, including how the permit system will work when contractors or subcontractors are doing the work.

The requirement that on-site rescue procedures and equipment be available for immediate implementation is of great concern to many employers. The Guidance Document makes it very clear that an employer must be prepared to retrieve a worker from the confined space, and this may involve entry. Workers acting as rescuers must be trained in first aid and CPR, rescue procedures and in the use of the rescue equipment.

Some employers who currently provide confined space entry services may need to evaluate their ability to continue to provide such services in light of the risk of prosecution should they be unable to rescue a worker in need of rescue.

MOL inspectors can issue Orders to comply with particular sections of the regulations, and can issue Stop Work Orders if they perceive a situation of imminent danger, such as a confined space entry in progress without proof of adequate on-site rescue procedures in place.

Gowlings strongly urges employers to review their confined space programs to ensure they have the necessary mechanisms in place to ensure compliance with the regulations, and to provide proof of due diligence if the need arises. ■

## Ergonomics Orders Suspended for Brewers Retail

*By Shana Wolch, B.Ed., LL.B.*

A recent decision of the Ontario Labour Relations Board (the "Board"), suspended 4 Orders intended to reduce potential hazards at the workplace, pending appeal. The Orders, issued by a Health and Safety Inspector under Ontario's *Occupational Health and Safety Act*, addressed the lifting and handling of 28 case bottles of beer and required Brewers to reduce the number of case bottles that were lifted at a time, and modify the manner in which they were handled.

The Inspector determined that the lifting requirements were excessive based on guidelines established in a 1991 book on ergonomics. The Board, however, found that what might be a hazard to female workers might not be to male workers. Therefore, reducing the number of cases to be lifted by both male and female employees was beyond the Inspector's mandate. The Board went further by pointing out that the workplace is filled with "an endless variety of people" and that safety standards should not discount measurable differences.

When granting the suspension of the Order pending appeal, the Board took into account the modifications that Brewers had already made such as ensuring female workers had assistance in the areas identified by the Orders, the negative impact the Orders might have on the profitability or efficiency of the brewery and the fact that there had been no recently reported injuries.

The Board concluded that Brewers would likely succeed in having the Orders rescinded or modified on appeal and therefore suspended the Orders pending appeal. ■



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## Contractor Gets 30 Days in Jail

By David Marchione, B.A.

On October 25, 2006, a partner of Peaks & Valleys Contracting, a roofing contractor in Seeley's Bay, Ontario, was ordered to serve 30 days in jail for a violation of Ontario's *Occupational Health and Safety Act* ("OHSA").

The conviction follows an accident on September 14, 2004, where a worker fell approximately three stories from the roof of a row house into a refuse bin below and suffered a bruised shin bone.

Prior to the fall, the worker had been instructed to ascend the roof to remove old shingles so they could be replaced. It was the worker's first day on the job, and he had been on the roof for approximately 10 minutes at the time of his fall.

After the fall, as he lay injured in the bin, the defendant put a fall harness on the worker and told him to tell the Ministry of Labour investigators that he had been wearing it on the roof. The worker originally did as instructed by his employer.

The defendant plead guilty, as employer, to ensure fall protection was used by a worker, as required by the Regulations for Construction Projects, contrary to the OHSA. At a separate trial, the constructor on the project was also convicted of two violations of the OHSA. ■



## Alberta Imposes Largest Penalty Ever for Workplace Accident

By Adam Neave, B.A.Sc.

A workplace fatality has cost a company \$345,000 in fines under the *Occupational Health and Safety Act* ("OHSA"). H&H Stucco & Siding Ltd. pleaded guilty to failing to ensure the health and safety of a worker and was fined \$300,000 plus a \$45,000 victim fine surcharge.

The charges resulted from an Alberta Human Resources and Employment Workplace Health and Safety ("WHS") investigation into a March 27, 2003 incident in Edmonton, where a worker was killed when he fell from a fourth floor balcony at a condominium construction site. Medican Developments Inc., the owner and prime contractor of the worksite, has also been charged as a result of the incident, with failing to ensure that H&H Stucco & Siding Ltd. complied with the OHSA. Medican Developments will appear in court on December 15, 2006.

This penalty was imposed less than one month after a WHS source told Gowlings that provincial courts and crown prosecutors are poised to seek increased fines in

OHSA prosecutions. Gowlings' source also confirmed the WHS is in the process of hiring two additional prosecutors in Alberta. Previously, the highest fine ever imposed under the OHSA was \$150,000.

In other news, WHS has released its Targeted Inspection results. WHS targets employers in high-risk industries who demonstrate poor health and safety performance. Targeted employers are selected based on past injury statistics, such as frequency and/or severity rates.

Random worksite inspections for compliance with the OHSA, the Regulation and the adopted code are then conducted at the worksites of targeted companies. During the 2005/2006 fiscal year, 7,625 targeted inspections were conducted at 1,768 high-risk companies, which resulted in 4,703 orders (including voluntary compliance orders).

In recent years, targeted employers have reduced their lost-time claim rates, which is the focus of this initiative.

Gowlings will continue to monitor trends in enforcement of Alberta's OHS laws. ■

## Did You Know?

In 2004, there were 18,450 falls to lower level accepted as lost time injuries across Canada. The top 3 contributing industries were Construction with 4,017 falls, Manufacturing with 2,817 falls and Transportation with 2,034 falls.

Figures are according to the Association of Workers' Compensation Board of Canada Statistics.

# FAQ

Ask the  
**OHS Legal Expert**

**Q** You asked. We answered.

Can an employer compel a worker to act as a rescuer for a confined space emergency in which they may need to enter the space to rescue a worker in an emergency situation?

**A** Read the answer at [www.gowlings.com/ohslaw](http://www.gowlings.com/ohslaw)

## Firefighter's Cancer Compensation - Ontario

By Kim Nutz, B.A., LL.B.

At the beginning of October 2006, members of all three parties in the Ontario government gave unanimous support to an NDP private members Bill (Bill 111) that would make it easier for firefighters with certain types of cancers to make claims for compensation for diseases contracted on the job.

At this time, British Columbia, Alberta, Saskatchewan, Manitoba, and Nova Scotia all recognize the relationship between exposure and firefighter deaths from cancer, but up until this year, Ontario's Workplace Safety and Insurance Board (WSIB) had denied 300 to 463 claims for firefighters.

Bill 111 itself lists 12 types of diseases attributed to firefighting that would be recognized and compensated without question, such as brain cancer, bladder cancer, kidney cancer, non-Hodgkin's lymphoma, leukemia, and heart disease as long as the firefighters met all conditions, such as not smoking. Essentially, the Bill would change the onus as to who has to prove the disease was contracted at work



from the firefighter to the WSIB itself.

In other provinces, legislation has been enacted which recognizes designated cancers but requires the firefighter or worker to be employed as a firefighter either full time and/or part-time for varying periods of time. For instance, in Alberta the minimum period of exposure to the hazards of a fire scene for leukemia, to be deemed as caused by employment of the firefighter, is 5 years. The periods of exposure in Alberta range from 5 to 20 years depending on the type of cancer. In BC, the periods of exposure are similar.

The first jurisdiction to legislate the firefighters presumption, was Manitoba when it amended its *Worker's Act* in 2002, retroactive to January 1, 1992. Alberta followed suit in April 2003, with Saskatchewan and Nova Scotia enacting their legislation in May 2003. Finally, British Columbia followed suit in November 2005.

The Ontario NDP member responsible for the Bill, Andrea Horwath, is optimistic, as are her colleagues, that with the unanimous support of the House on second reading, that it is just a matter of time before the Bill comes into effect. ■

## Ontario MOL Lays 7 Charges in 2005 Loading Accident

By David Marchione, B.A.

In 2005, a 19 year old employee of a Burlington, Ontario bus refurbisher was crushed by a garbage bin after the lift truck he was operating tipped over. The truck was found laying on its side with a bin loaded on its forks. The worker was discovered under the bin and was pronounced dead at the scene.

The Ministry of Labour has charged the employer with seven (7) violations under the *Occupational Health and Safety Act*. Charges revolve around failing to provide information, instruction and supervision to a worker, failing to acquaint a worker or a person with authority over a worker with any hazard in the work, and failing to take every precaution reasonable in the circumstances for the protection of a worker. As well, the company is facing specific charges under the material handling section of the Regulations for Industrial Establishments.

The maximum penalty for a corporation convicted of an offence under the *Occupational Health and Safety Act* is \$500,000, plus a 25% victim fine surcharge. ■

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## Wrongful Dismissal Not a Traumatic Event for Workers' Compensation

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

A worker claimed for compensation benefits after her long-term employer wrongfully dismissed her. The claim alleged that stress arising from the wrongful dismissal amounted to a "traumatic event" under the Nova Scotia *Workers' Compensation Act* (the "Act"), and thus, was compensable as a workplace injury. The Workers' Compensation Board denied the worker's claim, which was further confirmed by the Appeals Tribunal on grounds that the alleged stress did not originate from a workplace "accident".

The worker pursued an appeal of the decision through the court system, eventually reaching the Nova Scotia Court of Appeal, which agreed with the Appeals Tribunal and dismissed the claim. The Court held that the Appeals Tribunal had correctly held that wrongful dismissal is not a workplace "accident" under the Act since

any stress experienced by the worker from the wrongful dismissal was not a "traumatic event" within the meaning of the Act. The Court reasoned that an unjust dismissal may not be an "accident" under the Act, since the objectives of:

... the provisions setting out the inclusions and exclusions from the meaning of the term "accident" are to establish the limits of the historic trade off between no fault benefits for workers and freedom from civil liability for employers. The exclusion of stress claims from being accidents, unless the stress results from a "traumatic event", plays a role in achieving this overall purpose. The question of what the term "traumatic event" means lies close to the heart of how the workers' compensation scheme should operate.

It should be noted that the worker was, however, successful in her civil claim against her employer for wrongful dismissal. ■

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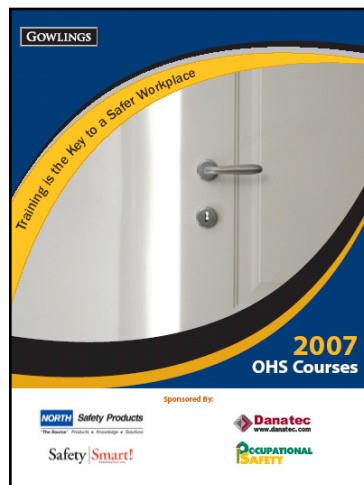
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