

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

Result of First Bill C-45 Prosecution: Criminal Code Charge Withdrawn, Supervisor Fined \$50,000 under OHS

There has now been a resolution of the first Bill C-45 Prosecution in Canada. Bill C-45, an amendment to the *Criminal Code*, took effect on March 31, 2004. Bill C-45 established a positive Occupational Health & Safety (OHS) duty on all individuals and organizations who directed persons to take "reasonable steps" to prevent bodily harm.

The first Bill C-45 criminal prosecution involved a workplace fatality. On April 19, 2004, a worker who had been using a mini-excavator to dig a 12-foot trench at the front of a garage of a residential property in King Township, north of Toronto, was fatally injured when ground collapsed around him and he became trapped by heavy dirt. The supervisor of the deceased worker, Domenico Fantini, 68 years of age at the time, was charged with one count of OHS criminal negligence causing death.

Mr. Fantini was also charged with eight (8) counts of contravening the *Occupational Health & Safety Act (OHS)* of Ontario and related regulations. The penalty that an individual faces under the *OHS* is a maximum fine of \$25,000 plus a 25% victim sur-

charge (tax), per count, or twelve (12) months in jail, or both.

Mr. Fantini's charges under the *OHS* and the *Criminal Code* have now been fully resolved. On March 3, 2005, the Bill C-45 charge against Mr. Fantini was withdrawn and he pleaded guilty to three of the eight offences under the *OHS*.

Mr. Fantini pleaded guilty to failing to ensure that a worker did not enter an excavation that was not properly shored or sloped; failing to ensure that a worker was wearing protective head gear; and failing to ensure the worker was wearing protective footwear.

As a result of a joint submission by both the Ministry of Labour prosecutor and counsel for Mr. Fantini, he was fined a total of \$50,000, plus a 25% victim surcharge.

This first Bill C-45 charge was withdrawn and therefore resolved in favour of the defendant. However, it did not satisfy many OHS professionals and Bill C-45 watchers across Canada. The withdrawal of the Bill C-45 charge raises a number of important and unresolved questions including:

1. Did the York Regional police have

a strong case to charge Mr. Fantini in the first place?

2. What is the standard of care expected under Bill C-45?
3. Did the Ministry of Labour influence the decision of the police to withdraw the charge against Mr. Fantini as part of the plea bargain agreement?

Since there has been no prosecution of a corporate executive or organization in the first year of Bill C-45, it may be indicative that the purpose of Bill C-45 is being missed by police and crown attorneys across Canada. The Bill C-45 amendment to the *Criminal Code* was not intended to target first-line supervisors or managers, but rather senior executives, like those in the Westray disaster.

Gowlings will continue to monitor Bill C-45 prosecutions across Canada and keep readers of the *OHSLAW™* Report updated on a quarterly basis.



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

Norm Keith is a partner with Gowlings, where he specializes in Occupational Health, Safety, Workers' Compensation, Employment and Emergency Response law. He has successfully defended more than 1,000 charges under OHS legislation across Canada. He is a speaker at numerous conferences across Canada, and author of *Canadian Health and Safety Law, Workplace Health and Safety Crimes (Bill C-45)*, other leading texts and numerous articles.

Upcoming Seminar

BILL C-45 and Contracting Out

TORONTO
June 22, 2005

3-hour morning seminar
presented by **Norm Keith**

For more information and to register, visit our website at
www.gowlings.com/ohslaw



U.S. OHS Criminal Prosecution

On March 17, 2005, Motiva Enterprises LLC pleaded guilty to negligently endangering workers at its refinery in Delaware City, Delaware. The company agreed to accept a fine of \$10 million in a plea bargain. The prosecution resulted from occurrence on July 17, 2001 when a 415,000 ton capacity tank at Motiva's Delaware City refinery exploded causing sulphuric acid, water and hydro carbons to be released into the natural environment. A worker was fatally injured and several others received serious injuries. The spill into the Delaware River resulted in thousands of dead fish and crabs.

One of the important aspects of the investigation, was the combined Occupational Safety and Health administration, environmental protection agency's investigation, and the Delaware State police.

Assistant Attorney General Thomas L. Sansonetti, said "violations of our nation's environmental and worker safety laws often go hand in hand, and can exact a terrible human price...this prosecution puts those who would violate those laws on notice that people of the United States expect them to mend their ways and act now to care for the environment and their employees."

This landmark case and penalty indicates the extent to which regulatory, environmental, and criminal liability all flow from the same event. In Canada, if a workplace accident also involves environmental pollution a Bill C-45 charge of OHS criminal negligence may follow.

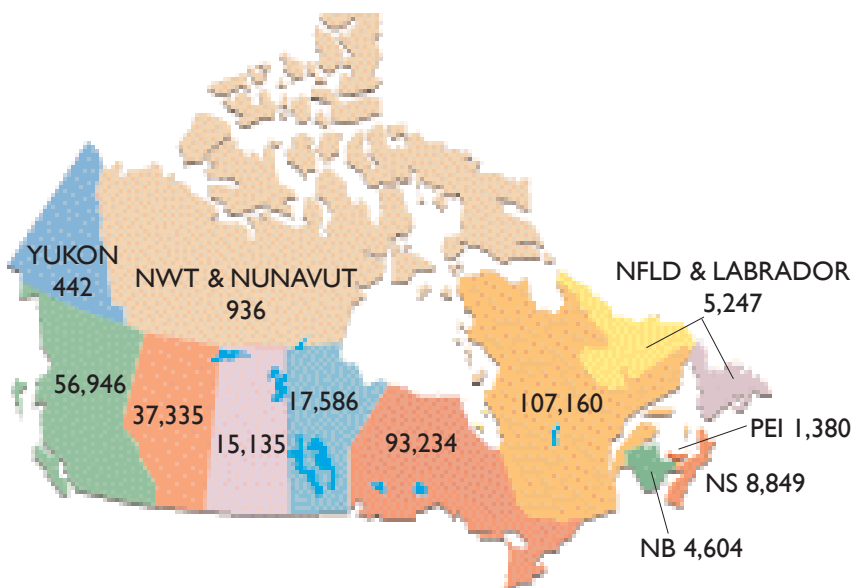
Penalties under Bill C-45 for individuals include life imprisonment, and organizations charged and convicted may face fines of an unlimited amount if convicted.

2003 Canadian Injury and Disease Statistics Released

The Association of Workers' Compensation Boards of Canada (AWCBC) has recently released its national work injury and disease statistic to and including the year 2003. Of particular note, in 2003, is the total number of accepted time

in loss injury which was down to 348,854 from 359,174 in 2002. The AWCBC reported 963 workplace fatalities in 2003, an increase from 934 in 2002. The number of accepted loss time injury and fatalities by province are shown below.

Accepted Time-Loss Injuries in 2003 - Total for Canada: 348,854



Fatalities in 2003 - Total for Canada: 963

