



Bill C-45, amending the Criminal Code to create an OHS criminal negligence offence, is one of the most important developments in OHS law in Canada in many years.

The Westray mine disaster and recent corporate governance scandals have resulted in this important piece of legislation being tabled. Gowlings is tracking the legislative development of Bill C-45 and will provide an opportunity to learn more about the amendments to the Criminal Code at a series of seminars we are providing across Canada.

Bill C-45 reminds us that OHS prevention and regulatory compliance is the best risk management strategy to avoid regulatory and possibly soon, criminal sanctions when accidents and injuries occur in the workplace.

Privacy laws are also changing that will impact OHS and HR professionals. Effective January 1, 2004 the Federal privacy law will apply to all provinces who have not passed comparable legislation. Gowlings is offering a full day course to help you and your organization comply with the new privacy law.

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Update on Criminal Code Amendments

On June 12, 2003, the Honourable Martin Cauchon, Minister of Justice and Attorney General of Canada, introduced a new bill to ensure "employers are held fully accountable for safe work environments". Bill C-45 establishes criminal liability for organizations and individuals when they fail to take reasonable steps to prevent workplace accidents that affect workers, or the public in general. These proposed changes create additional legal liability for directors, officers, and corporate decision makers.

The bill received second reading on September 19, 2003 and is being studied in Committee. The bill may be passed into law before the end of November 2003.

Minister Cauchon emphasized the intent of the proposed legislation when he stated, "if this duty is wantonly or recklessly dis-

regarded and bodily harm or death results, an organization could be charged with criminal negligence". In the case of a death, the maximum penalty for an individual convicted of criminal negligence is life imprisonment.

Bill C-45 establishes, for the first time, a Criminal Code duty on "every one who undertakes, or has the authority, to direct how another person does work or performs a task ... to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."

There are three important elements of the proposed amendments:

1. The proposed legal duty is similar to the general duty clauses currently found in all OHS statutes. However, it elevates the stigma and the penalty to that of a crime

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Supreme Court Rules on Disabled Employees Workers' Compensation Claims

A recent Supreme Court of Canada decision relating to a claim for chronic pain compensation will have far-reaching effects on the equality rights of disabled workers under the *Charter of Rights and Freedoms* ("the Charter"). In this case, the appellants suffered from the disability of chronic pain attributable to a work-related injury. The issue in this case was right of the claimants to use the *Charter* to expand their entitlement to benefits.

The Workers' Compensation Board of Nova Scotia only provided temporary disability benefits and rehabilitation services. When temporary benefits were discontinued there was an appeal of the Board's decisions on the ground that the Functional Restoration (Multi-Faceted Pain Services) Program Regulations and portions of s.10b of the Workers' Compensation Act infringed s. 15(1) of the *Charter*.

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Workwell Audits - Incentive for Due Diligence

A Workwell Audit is an OHS assessment tool used by the Workplace Safety and Insurance Board ("WSIB") in Ontario to determine regulatory compliance. By auditing compliance with legal requirements and industry best practice, it measures how a firm is managing health and safety through their hazard identification, assessment and control program.

The WSIB introduced the new Workwell Core Audit Tool in August 2002, replacing the Workwell Resource Audit Document. The new audit tool contains many of the same elements as the previous audit document, but the weight given to the various sub-elements has changed.

Candidates for a Workwell Audit are chosen using a selection matrix that consists of 11 possible filters or criteria that indicate a firm's performance. The higher the frequency and severity of accidents, the

more likely an employer will be targeted for a workwell audit.

Once a firm is selected for a workwell audit, they are notified in writing. The auditor will then schedule the first audit. The audit is performed in person and requires verification of all elements through observation, documentation or interviews. Following the first audit, the auditor provides the firm with a report, outlining deficiencies. If the firm fails the first audit, a second audit is scheduled in 6 months to allow the firm sufficient time to improve.

If the firm fails the second audit, a penalty is levied, which is a portion of the firm's annual premium, with a maximum of \$500,000. This penalty is in addition to any rate increase on the annual premium or any other surcharges under the experience rating system in which the firm partici-

pates.

Since the introduction of the new Workwell Core Audit Tool in August 2002 to the end of May 2003, the WSIB has audited 217 firms. Of those, only 12 firms passed the first audit, for a failure rate of 95%. Since second audits are scheduled 6 months later, only 67 of the 205 firms that failed the first audit have had their second audit. Of those, only 46 passed and 21 failed. The lowest penalty levied was \$1,252 and the highest was \$62,545.

To avoid a financial penalty under Workwell audit, ensure that your OHS management system meets all legal requirements and industry best practice. Gowlings offers assistance in Workwell audit compliance. For further information please contact Yvonne O'Reilly at 1-866-862-5787 Ext. 3580. ■

Homeowner Convicted of OHS Offence

A homeowner, who was overseeing the construction of a new family residence in Richmond Hill, Ontario, was fined \$20,000 for a violation of the Occupational Health and Safety Act.

On April 1, 2002, a trim carpenter, who was hired to install door and window trim at a new two-storey home, fell approximately 3.2 metres through a stairwell opening on the first floor to the basement below. The worker was taken to Sunnybrook Health Science Centre, where the worker died the next day. A Ministry of Labour investigation found there were no guardrails at the sides of the stairwell opening.

The homeowner pleaded guilty, as a constructor, to failing to ensure a guardrail system was used where a worker had access to the perimeter or open side of a floor and was exposed to a fall of 2.4 metres (eight feet) or more. ■

Supreme Court Rules on Disabled Employees

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That provision excluded chronic pain from the purview of the regular workers' compensation system and provided, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program beyond which no further benefits were available. The appeal process took the case to Canada's highest court.

The Supreme Court declared that Nova Scotia's restriction of workers' compensation benefits, for employees disabled by "chronic pain", to a limited four-week "functional restoration program," violated equality rights guaranteed to the disabled

in s.15(1) of the *Charter*.

The appropriate comparator group for the s. 15(1) analysis in this case was held to be the group of workers subject to the Act who do not have chronic pain, and who are eligible for compensation for their employment-related injuries. The Act and the Regulations imposed differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability and thereby contravened s. 15(1) of the *Charter*.

This case now permits dissatisfied injured workers recourse to the *Charter* to ensure equal benefits under workers' compensation laws. ■

Gowlings' 2004 Training Brochure

Visit our website to review our latest series of OHS, WSIB and HR training courses from January to June 2004.

www.gowlings.com/ohscourses

B.C. Inquest Addresses Legislation Changes to Workplace Violence

A coroner's inquest was recently held in Kamloops, British Columbia in response to the workplace deaths of Richard Anderson, David Mardon and James McCracken at the Ministry of Water, Land and Air Protection. Mr. Anderson had been informed that he was being terminated from his position as Regional Pollution Protection Manager at the Ministry. He later returned to the workplace, armed with a gun, and shot his two colleagues before fatally shooting himself.

Workplace violence is a growing and disturbing trend in Canadian workplaces. The Anderson inquest resulted in the jury making a number of recommendations to prevent workplace violence including the following:

1. The Government review the Occupational Health and Safety Regulations and consider:

a) Expanding the definition of "workplace violence" to cover implied or express threats of violence by one worker to another;

b) Amending the subjective test for reporting undesirable workplace conduct and replace it with provisions making such reporting mandatory;

c) Amending the Regulations to allow for confidentiality in reporting of threats of violence; and

d) Amending the provisions governing workplace violence to make it clear that any express or implied threat to a co-worker is prohibited.

2. The Government review the manner in which employees are informed of workplace violence regulations and government policies and procedures regarding workplace violence. This review should include:

a) Consideration of adopting and government-wide policy requiring employees to review the regulations and relevant Ministry policies regarding workplace violence on an annual basis and documenting the review in the employee's personnel file;

b) Ensuring that the contact numbers for reporting threats of violence are posted in the workplace;

c) Ensuring an external Ombudsman be available to all employees requiring assistance; and

d) Ensuring that all employees are made aware of all the avenues available to raise concerns or complaints.

3. The Government review its current workplace violence training programs to ensure that they include mandatory training on how to deal with threats by one worker towards another.

While it remains to be seen whether the British Columbia government will amend the Occupational Health and Safety Regulation in accordance with the recommendations from the coroner's inquest, it is clear that violence has become an increasingly important issue in today's workplace. Employers must take steps to develop a violence prevention policy and provide prevention training to employees. ■

Privacy Law Update - PIPEDA in Place January 1, 2004

OHS and human resources managers will have a new challenge effective January 1, 2004 when the Personal Information Protection and Electronic Documents Act ("PIPEDA") takes effect. This legislation impacts the collection, use or disclosure of "personal information", as defined in the Act.

This new law augments existing confidentiality and privacy legal duties on employers in health and safety, workers' compensation and employment law requirements.

Gowlings offers a course on the new privacy laws, which covers PIPEDA and recent case law trends. For further information refer to the course description online at www.gowlings.com/ohscourses.

Alberta OHS Law Update

Alberta's occupational health and safety legislation has gone through several changes over the last year. We are approaching the last phase of the amendments to the *Occupational Health and Safety Act* ("OHS Act"). The new *Occupational Health and Safety Code* ("Code") is expected to be approved by late-October, and is to come into force April 30, 2004.

The Code will have a major impact on employers. As well as incorporating the existing 11 Regulations into the Code, new requirements have also been established for areas such as hazard assessments, emergency procedures and violence prevention.

If you have not already started preparing for the proposed changes, ensure your organization will be ready

to mobilize all necessary resources within the phase-in period.

An employer must be able to demonstrate legal compliance by having the following documentation available:

- OHS policy
- OHS program
- hazard assessment program
- training records
- inspection reports
- written work procedures
- audit records

In our next issue of *OHSLAW Report*, a full update will be provided on the specific requirements within the Code.

For information on Gowlings' "Alberta OHS Act Update" seminars, please contact Yvonne O'Reilly at 1-866-862-5787 Ext. 3580. ■

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with a permanent criminal record.

2. It would apply to "every one who undertakes, or has the authority, to direct how another person does work or performs a task". Bill C-45 extends legal duties to a new level that will likely include foremen, lead hands, and even co-workers.

3. The requirement "to prevent bodily harm to that person, or any other person, arising from that work or task" goes farther than any current OHS legislation in Canada. Bill C-45 casts the net to include all workers as well as the public that may be affected by the work or task.

Bill C-45 refers to the term "organization" rather than corporation. The definition includes "a public body, a body corporate, a society, a company", and adds "a firm, a partnership, a trade union or an unincorporated association".

Bill C-45 has widened that scope by proposing to amend the term "representative" to mean a director, partner, employee, member, agent or contractor of the organization. It also provides a definition of a "senior officer", to mean a representative

who plays an important role in the establishment of the organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer or its chief financial officer. In short, Bill C-45 substantially lowers the threshold for organizations to be charged and convicted of a criminal offence.

Minister Cauchon has stated, "tougher penalties will help to ensure that the punishment matches the seriousness of the crime". It is proposed that the fines for summary convictions be increased from a maximum of \$25,000 to \$100,000. There is no set maximum fine for an indictable offence.

Employers would be well advised to assess their current OHS programs, training budgets and real commitment to workplace health and safety. An effective program with demonstrated clear communication throughout the organization is not only the way to ensure compliance with your legal obligations, but more importantly it helps to ensure the health and safety of your employees. ■

"Bill C-45: From Boardrooms to Courtrooms" Seminars

Want to learn more about how the proposed changes to the Criminal Code could affect you and your organization? Gowlings is offering seminars in the following locations:

- November 25, 2003 - Ottawa
- November 27, 2003 - Toronto
- December 2, 2003 - Vancouver
- December 9, 2003 - Waterloo
- January 22, 2004 - Hamilton
- February 3, 2004 - London
- February 18, 2004 - Sudbury
- March 9, 2004 - Edmonton

Norm Keith, and his team of lawyers and consultants, provide legal analysis of Bill C-45 and practical information on what steps to take to avoid criminal liability.

For further information, visit www.gowlings.com/ohscourses or contact Yvonne O'Reilly, Senior OHS Consultant, at 1-866-862-5787 Ext. 3580. ■

Gowlings' National OHS Team

For more information on Gowlings' OHS Team services please contact
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