



Bill C-45, also commonly known as the Westray bill, received Royal Assent on November 7, 2003, and comes into force on March 31, 2004. It will result in a new offence, OHS criminal negligence, potential fines in the millions of dollars and life imprisonment for individuals. This criminalization of occupational health and safety in Canada will change the landscape of accident investigations. Bill C-45 will result in police investigations and criminal charges. Employers and individuals will need legal advice during investigations to ensure that their rights, under the *Charter of Rights and Freedoms*, are represented and protected.

The best answer to the risk of Bill C-45 is the development of a comprehensive OHS management system. Gowling OHS consultants are available to help. We recommend starting with an *OHSLAW Gap Analysis*[™]; for further information see page 3.

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

Bill C-45 Comes Into Force on March 31, 2004

Bill C-45 has been passed, given royal assent and establishes for the first time in Canadian history a duty to ensure workplace health and safety under the *Criminal Code*. Bill C-45 will come into force on March 31, 2004. Bill C-45, which applies to all Canadian workplaces, compels all employers to prepare how to demonstrate that they have met their legal obligations relating to workplace health and safety.

Bill C-45 will impose a new legal duty on all "organizations" and it will be in addition to all existing occupational health and safety (OHS) legislation. The new OHS legal duty states: "Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that

person, or any other person, arising from that work or task".

Some of the key points of Bill C-45 are:

□ The legal duty applies to everyone who undertakes, or has the authority, to direct how work or a task is performed. This legal duty could potentially apply from a lead hand or a co-worker, up to a senior operations manager or vice-president.

□ The organization's liability will depend on the actions of the "senior officer". This could involve an officer or director, and even someone in the role of plant manager - an individual who is responsible for managing an important aspect of the organization's activities.

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Alberta's New OHS Code: Effective April 30, 2004

Alberta's new *Occupational Health and Safety Code* ("OHS Code") was officially launched by the Minister of Human Resources and Employment, Clint Dunford, on November 13, 2003. The *OHS Code* comes into effect on April 30, 2004. By this date, employers must be compliant with the vast array of new procedures and requirements introduced under the *OHS Code*.

Introduction of the *OHS Code* completes

the legislative initiatives of the province's Work Safe campaign that began over two years ago. Alberta's *Occupational Health and Safety Act* ("OHS Act") was amended effective as of December 4, 2002. A new OHS Regulation took effect on March 31, 2003. The remaining 11 Regulations incorporating detailed technical requirements have been consolidated into the *OHS Code*.

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WSIB Revisions to NEER and CAD-7 Experience Rating Systems

The Workplace Safety and Insurance Board (WSIB) of Ontario has made changes to the NEER and CAD-7 experience rating systems, which took effect January 1, 2004. The purpose of the changes is to partially restore the size of refund and surcharge incentives that have eroded over the past decade due to declining injury and premium rates. These declining rates directly reduce the size of the rebates and surcharges available to employers, resulting in good performers not getting enough incentive, while poor performers are not being held with enough accountability.

Under the new systems, higher refunds will be available to employers who are performing well, lower surcharges will be assessed to employers with low cost claims, and higher surcharges will be assessed to employers who are not per-

forming well.

The minimum rating factor has been increased from 25% to 40%, resulting in higher refunds and surcharges for smaller employers. The maximum rating factor has also been increased from 90% to 100%. This results in higher refunds and surcharges for larger employers. Firms can actually get back 100% of their expected costs. In addition, there will be no reserves on low cost non-health care loss of earnings claims, which will result in higher refunds and lower surcharges for employers with low cost claims.

Claims with less than 8 days loss of earnings, claims with non-economic loss only, claims with 100% cost relief through the Second Injury and Enhancement Fund, and occupational disease claims with long latency periods will not be included in the firm's frequency count. However, these

injuries must still be reported to WSIB within three days.

Finally, the rating factor has been increased. It will be multiplied by 125% and 150% respectively for 2005 and 2006 and later issues. This is expected to offset the impact on incentives caused by the reduction in expected cost and to increase the effectiveness of CAD-7 through increased incentives to partially off-set years of erosion in incentives. The enhancements to NEER and CAD-7 became effective January 1, 2004. The new system applies to all claims occurring on or after January 1, 2004, while all claims prior to January 1, 2004 will be assessed under prior programs. These interim measures have been made to provide appropriate incentives until the entire program can be revised. ■

Manitoba to Review and Update Safety and Health Regulations

The Workplace Safety and Health Division of the Manitoba Labour and Immigration Department has announced the updating and revision of 35 workplace safety and health subjects in a detailed regulation review. Representatives of management, labour and technical-professional groups, are invited to provide recommendations to update all regulations. Workplace stakeholders are encouraged to review the comments and proposals, and to submit them to the Workplace Safety and Health Division no later than March 31, 2004. ■

Alberta Courts Use Progressive Sentencing Alternatives

Two recent prosecutions of employers under Alberta's *Occupational Health and Safety Act (OHS Act)* involve donations to safety-related organizations as part of the penalty imposed by the Court.

On December 23, 2003, *Burlington Resources Ltd.* was convicted under the "working alone" provision of the General Safety Regulations under *OHS Act*. As the result of the company's agreement to pay \$100,000 to the Job Safety Skills Society, a non-profit society that provides workplace safety training to high school students, the Grand Prairie Provincial Judge imposed a fine of only \$5,000. The charge related to the death of a contract worker. Alberta Human Resources and Employment Minister, Clint Dunford, said "What is most important is preventing further workplace tragedies".

On January 19, 2004, *Arc Resources Ltd.* pleaded guilty to one charge under the *OHS Act* in connection with the death of a

worker employed by a drilling services company. The employer agreed to make a donation of \$50,000 to the Alberta Shock Trauma Air Rescue Society, and as a result the Court fined the employer \$30,000.

These two recent prosecutions and convictions demonstrate that Alberta's Human Resources and Employment Ministry is keeping their promise to aggressively enforce the *OHS Legislation* in Alberta. The willingness of both the prosecution, and the Courts, to accept donations to health and safety organizations, rather than merely paying a fine, is a progressive step in ensuring that monetary penalties are directed towards improving health and safety in preventing workplace accidents. Alberta is one of several jurisdictions in Canada that encourages flexibility in sentencing for those convicted of an occupational health and safety offence. ■

Bill C-45 Comes Into Force on March 31, 2004

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□ The term "corporation" has been replaced by the term "organization" to cover modern business structures and non-business associations.

□ The *Criminal Code* requires that everyone who directs how work or a task is performed must take "reasonable steps"; criminal charges and penalties would follow if it was determined this was not met. Taking reasonable steps would include, at minimum, full compliance with applicable OHS legislation and regulations.

□ What must be considered and included in your OHS program is incorporating best practices and industry standards, so as to demonstrate your taking all reasonable steps. It is unclear if industry standards and best practices will now be established nationally, or if the police investigating offences under the *Criminal Code* will be influenced by OHS legal requirements from the applicable jurisdiction. Criminal charges will result in a criminal record upon conviction. High fines and jail terms up to life imprisonment, and the public shaming terms of probation are far reaching to an individual and to an organization. ■

Ontario Employer Fined \$350,000 for OHS Contravention

Ontario Power Generation Inc., was given the highest fine for a single count conviction in the amount \$350,000 for contravention of the *Ontario Occupational Health and Safety Act*. The prosecution was in relation to a worker who was helping remove coal dust and pieces of coal when he became caught in an unguarded pinch-point in a conveyor belt. The conveyor belt was used to transfer coal between the junction house and a coal stor-

age silo. The Ministry of Labour investigation found that guarding devices were missing on the conveyor at a number of hazardous pinch-points near the tail pulley. Ontario Power Generation Inc. pled guilty, as an employer, to failing to ensure an in-running nip hazard on the conveyor belt was guarded. The fine, imposed by Justice of the Peace Kerry Boon, also carried a 25% victim surcharge or tax. ■

"From Boardrooms to Courtrooms: Bill C-45 and the New Health & Safety Crime"

Want to learn more about how the changes to the *Criminal Code* could affect you and your organization? Gowlings is offering Bill C-45 seminars in the following locations:

- April 6, 2004 - Calgary
- April 7, 2004 - Edmonton
- April 15, 2004 - Halifax
- May 6, 2004 - Montreal
- May 11, 2004 - Ottawa
- May 19, 2004 - Toronto
- May 26, 2004 - Winnipeg
- June 29, 2004 - Vancouver

Norm Keith, and his national team of lawyers and consultants have conducted careful analysis of Bill C-45 and have developed practical steps to take to avoid criminal liability. These Bill C-45 Seminars will help you reduce the risk of 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. ■

OHSLAW Gap Analysis™

Developed by Norm Keith, a leading Canadian OHS Lawyer, Gowlings' *OHSLAW Gap Analysis*™ will help your organization identify non-conformances with OHS legislation across Canada. All organizations are required to meet the legal requirements mandated by the applicable OHS legislation in their jurisdiction (provincial or federal). Gowlings provides an independent, third-party review of an organizations' OHS legislative compliance to help you determine if you are at potential risk for legal liability.

A Gowlings OHS consultant, under the direction of Norm Keith, will conduct the *OHSLAW Gap Analysis*™ by performing an assessment and review of your workplace. We will then prepare a detailed, privileged and confidential report assessing your level of OHS legislative conformance. Our report will identify OHS legislative non-conformances or "gaps" and how to rectify them to be legislatively compliant. For further information on having an *OHSLAW Gap Analysis*™, please contact Yvonne O'Reilly, Senior OHS Consultant, at 1-866-862-5787 Ext. 3580

Alberta's New OHS Code: Effective April 30, 2004

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The *Code* contains practical hazard controls designed to regulate workplace safety and reduce workplace accidents.

As previously reported in this newsletter, the amended *OHS Act* increased fines for first and subsequent offences, created alternative penalties and instituted practices for public reporting of employers' safety performance records. The *OHS Code* compliments these changes and comprises the prescriptive part of an overall plan to prevent injuries and fatalities in workplaces throughout Alberta.

Unlike the pre-existing Regulations, the *OHS Code* is divided into 39 parts, which are organized under three sections: 1) Core Requirements Applicable to All Industries; 2) Requirements Applicable to All Industries; and 3) Requirements Applicable to Specific Industries and Activities. The *OHS Code* also includes new requirements. Highlights of the standards that employers in all industries must comply with in the *OHS Code* include the following:

□ The mandatory assessment of work sites so as to identify and eliminate existing or potential hazards;

□ The obligation to establish a plan for responding to emergencies requiring rescue or evacuation, and to train designated workers so as to facilitate the execution of

the emergency response plan;

□ The creation of an entry permit system for confined space entry, and the creation of a code governing the practice and procedures for workers entering and working in such confined spaces;

□ The development of a formal noise management program if workers are exposed to excess noise at a work site;

□ The obligation to ensure that workers be equipped with appropriate personal protective equipment, when necessary;

□ The mandatory designation by the manufacturer, or certification by a professional engineer, that machinery or equipment used to move, raise or lower workers is appropriate for that purpose; and

□ The development of policies and procedures respecting potential workplace violence.

Employers must work quickly to ensure that their policies and procedures will be compliant with the *OHS Code's* new requirements when it comes into force on April 30th. Employers who fail to comply with these updated standards and procedures will be subject to prosecution and significantly increased fines and alternative penalties now available to courts under the *OHS Act*. ■

Gowlings' 2004 Training Brochure

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

www.gowlings.com/ohscourses

Gowlings' National OHS Team

Norm Keith, B.A., LL.B., CRSP
Partner
1-866-862-5787 ext. 5699
norm.keith@gowlings.com

Yvonne O'Reilly, CRSP
Senior OHS Consultant
1-866-862-5787 ext. 3580
yvonne.oreilly@gowlings.com

**For further information on
Gowlings' National OHS
Team: please contact
Norm Keith for legal
inquiries, or
Yvonne O'Reilly for
training and consulting
inquiries.**

Thierry Carriere, B.C.L.
Associate, Montreal

John Illingworth, B.F.A., LL.B.
Associate, Toronto

Kacey Krenn, B.A., LL.B.
Associate, Vancouver

Tina Maisonneuve, LL.L., LL.B.
Associate, Toronto

Adam Neave, B.A.Sc.
OHS Consultant, Toronto

Kim Nutz, B.A., LL.B.
Associate, Calgary

Elizabeth Rankin, B.A.Sc.
OHS Consultant, Toronto

Elisa Scali, LL.B.
Associate, Ottawa