



During summer vacation, Gowlings' OHS team has been busy adding staff, expanding its training programs and conducting OHS Law Gap AnalysisTM across Canada. I am pleased to announce that Kathryn Aldridge, has joined our team as our newest OHS consultant. Kathryn graduated from Ryerson University's prestigious environment, health and safety degree program and has worked for a national OHS consulting firm with an emphasis on industrial hygiene.

I am pleased to announce that Olga Jordache is the new OHS Practice Coordinator. Olga is a graduate of Wilfrid Laurier University's business program and will be leading the administrative, marketing, and sales initiatives of the OHS practice.

Another new member is Aneta Pigulowska who has joined the OHS team as OHS Practice Assistant.

The Minister of Labour (Ontario) announced the addition of 200 new inspectors to meet a mandate of Minister Chris Bentley to "crack down" on the 10,000 worst employers in Ontario. Gowlings continues to be committed to helping organizations improve worker health and safety and reduce legal risk by providing excellence in training, consulting and legal services.

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

First Bill C-45 Charge Pending

The first charges under the Bill C-45 amendments to the *Criminal Code* have been laid against a supervisor of a construction project in York Region. In a media release dated August 26, 2004, the York Regional Police stated, "York Regional Police have arrested a Newmarket man in connection with a trench collapse in King Township on April 19, 2004 that claimed the life of a 38-year old Toronto man."

This first charge under Bill C-45, known as the Westray Bill, will be watched closely by health and safety professionals, risk managers, executives, and legal counsel across Canada. Twenty-six miners were killed at the Westray mine in 1992. No manager or employer was ever held legal-

ly responsible for the Westray disaster.

On March 31, 2004, Bill C-45 came into force, amending the *Criminal Code* to establish a new OHS duty on everyone who directs how work is done or has authority to direct how work is done in the workplace. This new duty, if breached, would give rise to the crime of OHS Criminal Negligence.

The police media release went on to state that, "The individual accused has been charged with one count of criminal negligence causing death." The accused was supervising the deceased and another man as they repaired a drainage problem at 10th Concession residence in the Township of King.

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Ontario Adding Enforcement Officials

The Ontario Ministry of Labour (MOL) is in the process of hiring 200 new inspectors, in addition to filling the 24 positions that were vacant earlier this year. The MOL reported that since 1996 the number of inspectors has decreased from 278 to 205 representing the lowest proportionate number of inspectors among all Canadian provinces.

Statistics for workplace injuries in Ontario appear to suggest a correlation between the number of inspectors and the number and severity of workplace injuries. Although the number of lost-time

injuries has decreased by 6%, the number of no-lost-time injuries has increased, resulting in an overall increase in non-fatal injuries of 3%. However, workplace fatalities have increased thus triggering the Ministry's move to toughen enforcement.

Since 1997, there has been a 26% increase in the number of workplace fatalities in Ontario. The Workplace Safety and Insurance Board (WSIB) also reports occupational fatalities. The WSIB statistics includes provincially and federally regulated workers and motor vehicle acci-

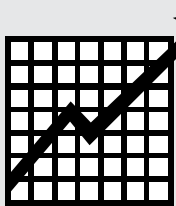
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WSIB Reports Increase in Workplace Related Fatalities

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dents during the course of work.

The WSIB reported a 42% increase in traumatic fatalities and a

54% increase in deaths to occupational diseases for the same period.

The MOL's goal is to reduce workplace injuries by 20% in the next four years, resulting in 60,000 fewer injuries per year. The WSIB is funding the hiring of the 200 new MOL inspectors.

The inspectors will initially be targeting 6000 high-risk employers, inspecting their workplaces at least four times per year, in addition to investigating fatal and critical injuries, work-refusals and stoppages, and responding to complaints. Of these employers, 25% are in the construction sector, where the fatality rate increased nearly 50% in 2003.

We expect increased numbers of orders issued by MOL inspectors and increased numbers of OHS prosecutions. ■

Supreme Court Workers' Compensation Ruling Costs Nova Scotia Employers Millions

The Supreme Court of Canada's decision in October 2003, held that Nova Scotia's restriction of workers' compensation benefits for employees disabled by chronic pain as a violation of the *Charter of Rights and Freedoms*. The Supreme Court also ruled that the unconstitutional sections of the *Workers' Compensation Act* (the Act) and policies relating to chronic pain benefits be removed by April 3, 2004.

Rather than amending the Act, the Nova Scotia government issued its Chronic Pain Regulations on July 22, 2004, via an Order-in-Council, effective retroactively to April 2, 2004.

The Chronic Pain Regulations (the Regulations) establish statutory authority to include chronic pain that is directly connected to an original compensable injury. They set out the legal requirements for eligibility, and degree of a worker's impairment, and compensation payable, based on a modified version of the American Medical Association Guides to Evaluation of Permanent Impairment, 5th Edition (AMA Guide 5th Edition), and the retroactivity period.

The Supreme Court ruled that,

- (1) Injured workers with chronic pain must have the same access to the workers' compensation system as other injured workers; and
- (2) An individual assessment should be conducted to determine the appropriate

programs and services each worker should receive and the worker's eligibility for long term benefits.

The Regulations waive the AMA's requirement for an existing permanent impairment. However, if a worker does have a permanent pain-related impairment, they will be eligible for a permanent benefit based on the degree of the impairment. If a worker does not have a permanent pain-related impairment, the worker may be eligible for temporary benefits in line with the AMA Guide. The regulations provide for assessment on workers' chronic pain retroactive to August 17, 1985.

The WCB reported that benefit liabilities grew by 11.4% in 2003, largely as a result of the Supreme Court ruling. The WCB estimates that the increase in cost to all employers range from \$198.5 million to \$316.4 million. With the WCB currently operating under a \$412 million unfunded liability, the Board has announced that it will increase employers' premiums again in 2005.

Nova Scotia pays the second highest rates in the country, next to Ontario. In an effort to bring accident costs under control, the Nova Scotia government will be implementing a financial incentive program in addition to its experience-rating programs, in January 2006 to encourage employers to implement OHS programs that will reduce the number and severity of workplace injuries. ■

Nova Scotia OHS Due Diligence for Managers and Supervisors



Due diligence is a legal defence to charges under Canadian OHS law. Gowlings offers due diligence training to help Managers and Supervisors understand their legal obligations and establish an effective OHS program. A scheduled due diligence course is being held:

Nova Scotia OHS Due Diligence course - November 17 & 18, 2004 - Halifax

Customized in-house courses are also available.

For more information, visit us at www.gowlings.com/ohscourses or contact Olga Jordache at 1-866-862-5787 ext. 3580 or olga.jordache@gowlings.com

Regular Updates of Ontario's Occupational Exposure Limits to Commence

The Ministry of Labour ("MOL") of Ontario has adopted a new system for updating the Occupational Exposure Limits ("OEL's") for over 700 hazardous substances in the workplace. OEL's, which are regulated under the *Occupational Health and Safety Act*, restrict the amount and duration of workers' exposure to hazardous workplace substances.

"The last time OEL revisions were made it took 15 years. The governments new revision system ensures Ontarians

will never again have to wait that long for updated standards that make workplaces safer and healthier" said Labour Minister Chris Bentley.

Under the MOL's new system, OEL's will be reviewed and updated on a regular basis, ensuring that the protection of Ontario workers is always based on the most current scientific and medical knowledge. In addition, the MOL has placed more restrictive limits on four substances: Manganese Dust, Benzene, Carbon Monoxide, and 1,3-Butadiene. ■

NDP Proposes to Increase Fines for Officers and Directors of Corporations

Peter Cormos, NDP member of the Ontario Legislative Assembly, has tabled Bill 20, a private members bill proposing dramatic increases in fines and penalties for corporations, officers and directors under Ontario's *Occupational Health and Safety Act*.

Bill 20 proposes that the general penalty provision be increased for individuals, school boards and other non-corporate organizations, from \$25,000 and/or 12 months in prison to a maximum of \$100,000 and/or up to 2 years in prison.

It also proposes an increase in a maximum fine for corporations from \$500,000 to \$1,000,000. Bill 20 proposes that if a corporation is guilty of an offence, that every director or officer of the corporation who "authorized, permitted, or acquiesced in that offence", will also be guilty of an offence and, upon conviction, have a fine of \$100,000 and/or 2 years in jail.

Although the Minister of Labour, Chris Bentley, has not publicly supported Bill 20, it remains to be seen whether the McGuinty government will support this NDP proposal. ■

Alberta Supplier Sentenced in OHS Prosecution

On August 3, 2004, an Edmonton employer plead guilty, as a supplier, to failing to ensure worker training and competency pursuant to the *Occupational Health and Safety Act*. The company was fined \$5,000 and an order was granted to allocate an additional \$45,000 to community charitable foundations.

The charge, and subsequent conviction, resulted from an investigation into

a July 24, 2002 incident, where a worker sustained fatal injuries from a fall. This is the first time a supplier has been convicted in Alberta.

This case emphasizes the importance of worker training and competency, especially for managers and supervisors. The conviction appears to be following recent trends in Alberta of aggressive enforcement, prosecutions and higher fines for workplace accidents. ■

OHSLAW Gap Analysis™

Developed by Norm Keith



Gowlings' OHSLAW Gap Analysis™ will:

- Provide an independent, third-party review of an organization's OHS legislative (phase 1) and regulatory (phase 2) compliance
- Prepare a report that is protected from third party disclosure under solicitor and client privilege
- Help reduce potential risk for legal liability under OHS law and Bill C-45

A Gowlings OHS consultant, will:

- Perform an "on the ground" assessment and review of your workplace
- Prepare a detailed report assessing the level of your organization's OHS legislative conformance
- Identify OHS legislative "gaps" and recommendations on how to rectify them

For further information on having an OHSLAW Gap Analysis™, please contact Norm Keith at 1-866-862-5787 ext. 5699 or norm.keith@gowlings.com

Workplace Fatality Results in \$300,000 Fine

A major Canadian waste disposal company was recently fined \$300,000 for a violation of the *Occupational Health and Safety Act* (Ontario). A worker employed by the waste disposal company was in the path of a reversing end-loader and was run over by the vehicle. The worker had been assigned temporary duties as a signaler guiding vehicles that were reversing at the transfer station.

Prior to the accident there had been previous worker complaints to management about the speed at which the operator of the front-end loader drove in the vicinity of

workers at the transfer station.

The employer had failed to prevent operators from reckless driving on the job prior to the fatal accident. The employer pleaded guilty to the offence of failing to ensure that mobile equipment was operated by a competent person.

Fines in this range are becoming more frequent for medium to large sized employers found guilty of an offence relating to a fatality. The maximum fine for a corporation to be fined for an offence under the *OHS Act* is \$500,000. ■

First Charge Laid Under Bill C-45

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The workers had been using a mini-excavator to dig a 12-foot trench at the front of the garage. The deceased had been working inside the excavation when the ground gave way and he became trapped by heavy dirt. Emergency services were not able to revive

the victim.

The maximum penalty under the *Criminal Code* for conviction of criminal negligence causing death is life imprisonment. The accused is scheduled to appear in the Ontario Court of Justice in Newmarket on September 28, 2004. The Ministry of Labour investigation is continuing. ■



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

Gowlings is offering Bill C-45 seminars in the following locations and also provides them on-site for employers and associations:

TORONTO
September 22, 2004

OSHAWA
October 5, 2004

HAMILTON
October 14, 2004

Cost: \$345.00 + GST = \$369.15

includes continental breakfast and seminar materials

For further information, visit www.gowlings.com/ohscourses
and for group discounts contact

Olga Jordache, OHS Practice Coordinator at 1-866-862-5787 ext. 3580.

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