

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



The statistics have just been released by the Association of Workers' Compensation Boards of Canada (AWCBC), indicating a record high of 963 workplace fatalities in 2003. That is a 3.1% increase over 2002. An average of 2.63 workers killed every day of the year during 2003!

What is the most effective way to reduce workplace accidents and fatalities? In Ontario, the move is towards more inspectors, more prosecutions, and higher fines. Nationally, Bill C-45 has established a new crime of OHS criminal negligence with jail terms for guilty individuals.

In my view, OHS regulators will be more successful in preventing accidents if they partner with employers rather than prosecute them. More proactive services to prevent accidents and greater economic incentives for employers to prevent accidents through workers' compensation rebates would also provide positive incentives to improve workplace safety.

Gowlings continues to provide OHS training and consulting services to obviate the need for legal services when employers are prosecuted under Canadian OHS laws. ■

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

## MOL Announces New Ticketing Program for Industrial Establishments

On July 8, 2004, Ontario's Minister of Labour, Chris Bentley, announced his plan to cut workplace injuries by twenty per cent over the next four years. As part of the plan to meet that goal, Minister Bentley gave health and safety inspectors in the industrial sector the power to issue tickets for contraventions of the Industrial Establishments Regulation, 851/90, effective January 20, 2005.

The industrial sector is Ontario's largest and most diverse sector covering a variety of industries, including manufacturing, offices, logging, restaurants and retail operations.

Ticketing is an enforcement tool that will allow MOL inspectors to issue "on-the-spot" certificates of offence, under Part I of the *Provincial Offences Act (POA)*. MOL inspectors have already had the power to issue tickets for health and safety violations in the construction, and mining sectors.

"Ticketing gives our inspectors more flexibility to deal immediately with those who violate health and safety requirements in the workplace. This initiative will also discourage anyone from trying to gain an unfair advantage over law-abiding  
*continued on p. 2*

## New Whistleblower Protection for Employees

Bill C-13 creates a new criminal offence for employers who take disciplinary action against employees for disclosing illegal conduct. Bill C-13, which came into force on September 15, 2004, amended the *Criminal Code* to, among other things, protect employees from reprisals for reporting contraventions of federal and provincial law.

Along with the federal *Competition Act* and environmental laws, the *Criminal Code* now protects employees who come forward and report OHS contraventions. Employees may now be more inclined to report OHS violations to OHS Regulators

and the police, which could lead to charges and convictions not only under occupational health and safety legislation, but also under the Bill C-45 amendments to the *Criminal Code*.

An employer, an agent of the employer, or any person in a position of authority over an employee who takes disciplinary action or otherwise adversely affects the employee's employment may be subject to criminal investigation and prosecution.

The maximum penalty that could be imposed by the courts upon a successful conviction is a 5 year imprisonment term. ■

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## MOL's New Ticketing Program

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competitors by ignoring workplace health and safety", says Bentley.

Ontario Regulation 950 outlines 81 health and safety violations under O.Reg. 851/90 that tickets can be issued for, along with the set fine for each offence. The set fine will be either \$195 or \$295, or as set by the Chief Justice of the Ontario Court of Justice. The money collected from the fines will go to the municipality. In addition, a victim surcharge is applied to all provincial fines, which goes to the provincial government's Victims' Justice Fund.

If issued a ticket, the defendant can choose to either:

1. Plead guilty and pay the set fine at the court office specified on the ticket;
2. Appear in court, request a trial, plead guilty at trial and make submissions as to penalty; or
3. Plead not guilty, request a trial, and defend against the alleged offence.

MOL inspectors can still enforce the OHSA by issuing compliance or stop work Orders or by recommending a prosecution. "Tickets, along with other prosecution tools, present an effective deterrent that can be used to promote safe workplaces," said Bentley.

Other initiatives of the MOL's enforcement strategy include the hiring of 200 new health and safety inspectors and targeting workplaces with high lost-time injury rates and higher than average claims costs compared to other workplaces in that sector. ■



## Police Officer Awarded Compensation for Mental Stress

On November 18, 2004, the Workplace Safety and Insurance Appeals Tribunal (WSIAT) released a decision awarding loss of earnings benefits to a Toronto Police Officer (the "Officer") who had taken a stress leave after being wrongfully accused of sexually assaulting two female prisoners. The case illustrates how false allegations related to the workplace that lead to mental stress, may result in workers' compensation claims.

The Officer began hearing rumours that a female prisoner was going to lay sexual assault charges against him. The Officer, knowing that the accusations were false, believed that investigators with the Special Investigations Unit (SIU) would discover the truth. However, the Officer was arrested by surprise at his home and transported to SIU headquarters where he was formally charged.

The Officer was distraught, not able to continue his employment and immediately sought counselling assistance to deal with the emotional trauma of being charged with sexual assault. In February 2002, after several days of trial, the Officer was acquitted of all charges in court.

In May 2002, the Workplace Safety and

Insurance Board (WSIB, the "Board") denied the Officer's claim for loss of earnings benefits based on a mental stress disorder as a result of the false accusations and sudden arrest. The WSIB's decision was based on the definition of mental stress. The WSIB adjudicator wrote, "I find that the arrest of (the Officer)...cannot be considered sudden and unexpected traumatic event..."

In its decision, the WSIAT disagreed with the WSIB's narrow interpretation of its mental stress policy. The WSIAT concluded, "Even though a wrongful charge of sexual assault is not specifically listed in the Board's traumatic mental stress policy, that policy is not exhaustive... a wrongful charge of sexual assault would generally be accepted as objectively traumatic particularly when the charge was proceeding to trial. He suffered a sudden and unexpected traumatic event in the nature of a wrongful sexual assault charge for which he was tried and eventually acquitted."

In the result, the WSIAT accepted that a serious criminal allegation, that was eventually dismissed in court, was a proper basis for a mental stress claim for workers' compensation benefits. ■

## School Board Fined in Caretaker's Death

The Toronto District School Board (TDSB) was fined \$150,000 arising from the death of a caretaker on June 24, 2002. The caretaker was working at a public school when he complained of breathing problems, later dying in hospital.

According to police and Ministry of Labour investigations, the caretaker was likely exposed to a mixture of liquid toilet bowl cleaner and a sanitizer/deodorizer, similar to bleach, that would have produced a very strong odour. In addition, the caretaker had not received instruction to use the products required by Workplace Hazardous Materials Information System (WHMIS) Regulation. The TDSB pleaded

guilty to the charge. A 25% victim surcharge was also levied according to the *Provincial Offences Act*. The TDSB is Canada's largest school board with 560 schools.

Employers and suppliers across Canada must meet WHMIS requirements for controlled products. A controlled product is regulated in the *Hazardous Products Act*.

Each province or territory has implemented their own WHMIS legislation that must address the three key elements: labeling, Material Safety Data Sheets (MSDS), and training. Failure to comply with WHMIS legislation may result in prosecution. ■

## MOL Shows Increasing Trend of Fines and Convictions

The Ontario Ministry of Labour has recently published statistics of its enforcement activities over a 10-year period, from 1993 to 2003 confirming the trend towards more charges and higher fines.

The number of convictions has nearly doubled since 1993. While there appeared to be a steadily decreasing trend from 1993 to 1996, dropping from 397 convictions to 162, the number of convictions nearly doubled from 1996 to 1997. The trend remained relatively steady until 2001, when there was a sharp increase in convictions in 2002 and 2003, doubling yet again to 618.

Upon conviction of a violation of the

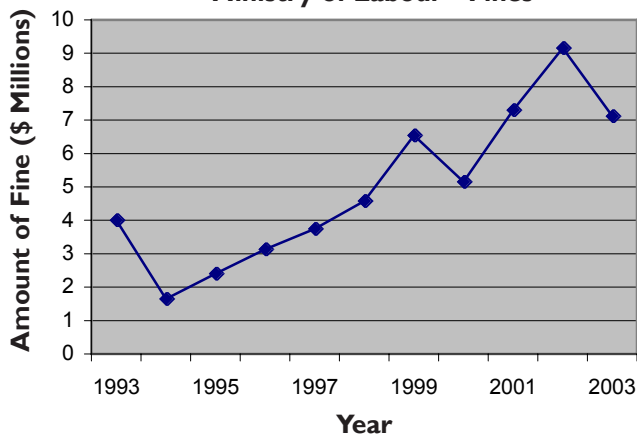
OHSA or its regulations, an employer may be fined up to \$500,000 per offence. An individual may be fined up to \$25,000 per offence or may also be sentenced to a maximum of 12 months in prison per offence, or both. The MOL has collected an average of approximately \$5 million per year in fines, for a total of \$55 million in 10 years, plus over \$1.4 million in victim surcharges or tax.

Convictions have been increasing at a rate of 5.56% per year, yet fines collected have been increasing at a greater rate of 7.5% per year. This indicates that the MOL is not only seeking, but securing higher fines upon conviction.

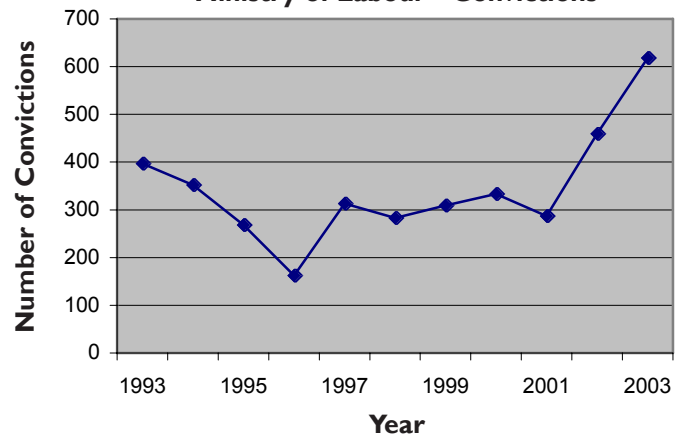
The number of individuals being convicted is on the increase. For example, 6 supervisors were fined \$5,000 to \$10,000 each, a worker was fined \$9,000, and an officer of a company was fined \$25,000, the maximum financial penalty. One individual employer, who was given a relatively modest fine of \$10,000, was also sentenced to 3 months in prison.

The importance of a strong and effective OHS management system should not be underestimated. Gowlings' OHSLAW Gap Analysis™ is a workplace audit that is designed to identify legislative gaps and assist employers in preventing accidents and legal liability. ■

Ministry of Labour - Fines



Ministry of Labour - Convictions



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Your Partner in OHS, WSIB & HR Training



### Is Your Organization OHSLAW™ Compliant?

Developed by **Norm Keith, B.A., LL.B., CRSP**, partner with **Gowling Lafleur Henderson LLP**, the OHSLAW Gap Analysis™ is an important diagnostic tool to identify and reduce workplace health and safety legal liability.

**Phase I** - Determine level of compliance with the requirements of the Occupational Health and Safety Act (OHSA)

**Phase II** - Measure level of compliance with the Industrial Establishments Regulation 851/90 (O.Reg. 851/90) and Due Diligence best practices.

Both phases of the OHSLAW Gap Analysis™ provide reports that are protected by solicitor and client privilege.

To find out how compliant your organization is, contact:

**Norm Keith, Partner**  
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## Edmonton Company Convicted for Disturbing Accident Scene

An Edmonton company, General Scrap Iron and Metals Ltd., was charged and fined \$2,000 for disturbing the scene of an accident after a worker fell from a machine and suffered head injuries. The accident occurred on August 28, 2002, approximately one month after another conviction against the company was upheld.

The prior conviction was a result from the death of a 59-year-old worker in 2000 who was crushed by a wire bale that fell on

him. Three other charges relating to the death were dropped.

According to Alberta's *Occupational Health and Safety Act* employers must report the accident as soon as possible and complete an accident investigation whereby a report of the investigation is completed and readily available for an OHS officer. A person is not permitted to disturb the accident scene unless the criteria set out in section 18 of the Act is met. ■

## Ontario Supervisor Fined \$15,000 for Health and Safety Violation

On January 12, 2005, after accepting a guilty plea, Justice of the Peace Robert Gay of the Ontario Court of Justice fined the supervisor of a London, Ontario based paint company \$15,000, exclusive of the 25% victim surcharge, for a safety violation that resulted in the death of an employee. The super-

visor and another employee were working in a basket on a boom lift truck when the employee's head came into contact with an overhead 27,000-volt power line. The worker failed to ensure that the equipment was kept a minimum distance away from the live power line overhead. ■



Training is the Key to a Safer Workplace

### OHS Due Diligence for Managers and Supervisors

<b>Ontario</b>	April 19 & 20	Ottawa
	May 10 & 11	Kitchener
	June 7 & 8	Toronto
	June 28 & 29	Barrie
	July 12 & 13	Mississauga
<b>British Columbia</b>	May 25 & 26	Vancouver
<b>Alberta</b>	May 3 & 4	Edmonton
<b>Nova Scotia</b>	June 1 & 2	Halifax

For course descriptions and registration forms, visit our website  
[www.gowlings.com/ohslaw](http://www.gowlings.com/ohslaw)

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