

**UPPING THE ANTE: THE APPLICATION OF THE
*CRIMINAL CODE TO WORKPLACE ACCIDENTS***

BRIAN MACDONALD

This paper is for general discussion purposes and does not constitute legal advice or an opinion.

For legal advice regarding your particular circumstances, please contact us.

TABLE OF CONTENTS

INTRODUCTION 1

CORPORATE LIABILITY UNDER THE BILL C-45 AMENDMENTS... 1

SENTENCING UNDER THE CRIMINAL CODE..... 2

C-45 IN ACTION..... 4

CONCLUSION 5

INTRODUCTION

On November 7, 2003, Bill C-45, An Act to Amend the *Criminal Code* (Criminal Liability of Organizations), received Royal Assent and became, among other provisions, section 217.1 of the *Criminal Code of Canada* “*Criminal Code*.” Designed to expand the accountability of corporations for workplace safety, the legislation ultimately came into force on March 31, 2004.

CORPORATE LIABILITY UNDER THE BILL C-45 AMENDMENTS

The portions of the *Criminal Code* affected by Bill C-45 contain a number major points of which employers need to be aware. In particular, there is now an explicit legal duty for all individuals directing work to take reasonable steps to ensure the safety of the workers they are directing. Perhaps more importantly, this criminal liability may be attributed to corporations for the acts of individual corporate representatives. Finally, there are now statutory factors for the courts to consider when sentencing a convicted organization, and there are optional conditions of probation that a court may impose on an organization.

The essence of criminal negligence under the *Criminal Code* has always been a breach of a duty imposed by law. Historically, the *Criminal Code* has specifically provided that everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

The main effect of the Bill C-45 amendments is to broaden the basis upon which already-existing criminal liability may be attributed to corporations as a result of the acts of individual corporate representatives. Organizations are now not only criminally liable for the actions of those who exercise executive authority, such as the directors or the chief executive officer, but also for the actions of employees who merely exercise operational authority, including middle managers, supervisors and potentially even lesser supervisory figures, such as lead hands.

For example, the Bill C-45 amendments allow the Crown to establish corporate criminal negligence by proving that those who control the actual operation of a construction site (as opposed to those who set policy in the corporation’s head office) acted so carelessly and with such reckless disregard for the safety of others as to deserve criminal punishment.

The Bill C-45 amendments also widen the circle of individuals, referred to as “representatives” of the corporation, whose actions may be considered to be the acts of the corporation for the purpose of making the corporation criminally liable. “Representatives” of the corporation are defined to mean “directors, partners, employees, agents and contractors.” As a result, corporations will be held accountable for the acts of virtually anyone who works for, or is affiliated with, the company.

It is also important to understand that the Bill C-45 amendments make a corporation liable for crimes of negligence where the acts or omissions of its representatives, taken as a whole, exhibit a marked departure from the standard normally expected in the circumstances, even if no single individual has acted with criminal negligence. As a result, corporate liability is now based on demonstrated cumulative criminal negligence.

SENTENCING UNDER THE *CRIMINAL CODE*

As part of the amendments to the *Criminal Code* brought about by Bill C-45, the the maximum fine on an organization for a summary conviction offence has been increased to \$100,000.00. If the Crown elects to proceed by way of indictment, fines on convictions for indictable offences would remain without limit. In determining the appropriate sanction, the court must consider the following **ten** factors:

1. **The economic advantage gained by committing the crime** (the more money the corporation made as a result of the offence, the higher the fine will likely be);
2. **The degree of planning involved in carrying out the offence and the duration and complexity of the offence;**
3. **Whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;**
4. **The impact that the sentence would have on the economic viability of the organization and the continued employment of its employees** (a corporation should not normally be placed into bankruptcy by a fine such that its employees are thrown out of work, just as individuals should not be fined so heavily that they will not be able to provide for their families);
5. **The cost to public authorities of the investigation and prosecution of the offence** (given that many corporate offences require lengthy

investigations, the cost of mounting a case should be considered by the court);

6. **Any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence** (the courts should also consider fines already levied by the provincial courts pursuant to the Ontario Ministry of Labour prosecutions, which can reach into the hundreds of thousands of dollars);
7. **Whether the organization was - or any of its representatives who were involved in the commission of the offence were - convicted of a similar offence or sanctioned by a regulatory body for similar conduct** (just as an individual's criminal record is an important element in determining the appropriate sanction, the courts will consider whether the corporation and its workers had been sanctioned for similar activities in the past, whether by the criminal courts or by occupational health and safety regulators);
8. **Any penalty imposed by the organization on a representative for their role in the commission of the offence** (the courts will consider whether a corporation has disciplined or even fired employees who participated in the offence in the hopes that this will send a powerful message to other potential wrongdoers in the corporation);
9. **Any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence** (compensating victims shows that the corporation is trying to make up for the harm that it caused); and
10. **Any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence** (new policies and practices, such as an effective and enforced compliance program, may indicate that the corporation has learned its lesson).

These provisions contemplate that in some cases probation will be appropriate to ensure that the organization complies with the law in the future. A court can also order an organization to take other steps to prevent a recurrence.

If a provincial occupational health and safety department is already overseeing changes in an organization's safety practices, courts are expressly required to consider whether this regulatory body is more suitable to supervise the organization's probation conditions.

The penalties for individuals are also severe. Criminal negligence causing death is punishable by up to life in prison. Criminal negligence causing bodily harm is punishable by up to 10 years in prison.

C-45 IN ACTION

Since coming into force in 2004, there have been very few charges and only one conviction under Section 217.1. In 2006, a Quebec company called Transpavé was charged with criminal negligence causing death. An employee had entered the moving area of a machine used to package cement blocks to clear jammed material. He was fatally crushed. The senior management of Transpavé was aware that the guard on the machine had been deactivated almost two years earlier by employees to increase productivity, but they did not act to correct the situation.

Judge Paul Chevalier accepted a joint sentencing submission by the Crown and Transpavé, and levied the maximum allowable fine of \$100,000.00 plus \$10,000.00 to cover court costs.

While to date, Transpavé is the only accused who has been convicted under the Bill C-45 amendments, that may change. Currently before the courts is the case of 11531147 Ontario Inc., carrying on business as Millenium Crane Rentals. While working on a project with the City of Sault Ste. Marie in the spring of 2009, a crane fell into an excavation site, landing on two employees. One of the employees was not hurt. The second employee was pinned across his pelvis by the crane, and eventually died of his injuries. Both individuals were employees of the City of Sault Ste. Marie. After a 10-month investigation, in February, 2010, the Sault Ste. Marie Police decided to charge Millenium Crane, the individual crane owner and the crane operator with criminal negligence causing death. In addition, the Ontario Ministry of Labour has laid five charges against Millenium Crane under the *Occupational Health and Safety Act*, and one charge against the crane operator.

In April, 2011, the Crown dropped the criminal charges against Millenium Crane, citing the difficulty in meeting the evidentiary burden. The Assistant Crown indicated that the engineering opinion obtained by the Crown cast doubt on whether the crane's brake mechanism actually caused the accident, as the charges alleged. The charges under the *Occupational Health and Safety Act* have not been dropped.

Currently before the courts is the case of Metron Construction Group. The charges were laid in October, 2010, based on events that took place ten months prior. On Christmas Eve, 2009, a scaffolding collapsed

on a Kipling Avenue highrise building being worked on by Metron Construction Corp. Four workers were killed, the surviving worker suffered severe injuries to his leg and spine. He has sued the companies involved as well as the owner of the highrise building and the labour ministry for roughly \$16.3 million in damages.

In October, 2010, three men were charged under the Bill C-45 amendments. Joel Swartz, Metron's president, and two other senior employees were charged with four charges each of criminal negligence causing death and one count each of criminal negligence causing bodily harm. The company was also charged. As noted above, these charges have potentially huge penalties for both the individuals and the company, including substantial jail time.

The *Criminal Code* charges against the company are in addition to the 61 charges the Ministry of Labour laid against Metron, including failure to provide proper training for the use of a "fall protection system," and four charges against Swing 'N' Scaffold, the makers of the faulty equipment.

While charges were laid in Millenium Crane's case, these charges represent the first time that senior management employees have been charged in Ontario with criminal negligence causing death for events that took place at the workplace. No decision has yet been reached with respect to Metron.

In more unusual circumstances, in March, 2011, the United Steelworkers were granted approval from a British Columbia judge to proceed with their private action case against Weyerhaeuser over the death of sawmill worker Lyle Hewer. The decision of the British Columbia court means that charges have been laid against Weyerhaeuser. The Crown must now determine if they wish to stay the charges or pursue them. The Crown chose not to lay charges after the death of Mr. Hewer in 2004, notwithstanding the United Steelworker's request that they do so. At present, it is not clear if the Crown intends to pursue the charges.

CONCLUSION

The federal government has stated that it does not intend to use the federal criminal law power to supplant or interfere with the largely provincial regulatory role in workplace health and safety. Rather, the government's view is that the criminal law will provide "an important additional level of deterrence if effectively targeted at - and enforced against - companies and individuals that show a reckless disregard for the safety of workers and the public". Indeed, it is clear from the Millenium

Crane and Metron cases that *Criminal Code* and the *Occupational Health and Safety Act* can be complementary.

Further, the federal government has thus far been true to its word. Since Bill C-45 became law in 2004, it has only been used three times. In the case of Transpavé, the defendant plead guilty, and the charges against Millenium Crane were dropped. The charges against Metron are currently before the Courts. While the fact that two of the three times the Bill C-45 amendments have been used were in 2010 may indicate that its use is increasing, employers can for the moment take comfort in the fact that these broad new criminal powers have been used sparingly.