

**CORPORATE CRIMINAL LIABILITY COMES TO CANADA: TRANSPAVÉ
CONVICTED AND FINED FOR CRIMINAL NEGLIGENCE CAUSING DEATH**

(Part I)

MAY/JUNE 2008 ISSUE OF COS MAGAZINE

By: Cheryl A. Edwards

With the first conviction of a Canadian corporation of a “criminal negligence” for a workplace safety offence, the “criminalization” of occupational health and safety, a possibility since 2004, has become a reality. Effective March 31, 2004, workplace safety became a matter for both potential OH&S regulatory enforcement and criminal enforcement in Canada. With origins in the tragic 1992 Westray mine explosion in Nova Scotia, Bill C-45 amended the *Criminal Code of Canada*, creating far-reaching changes to the OH&S landscape in Canada and making it easier to convict organizations of “criminal negligence” under the *Criminal Code*. But it has taken until 2008 to see the first corporate criminal conviction under the Bill C-45 amendments.

This article examines the first corporate conviction and penalty, and provides a reminder of answers to frequently asked questions about the Bill C-45 amendments to the *Criminal Code*. A second article in this series will suggest strategic measures for the future given the prospect of corporate criminal charges arising from workplace safety matters.

The First Corporate Criminal Conviction

On December 7, 2007, Transpavé Inc., a company based in St-Eustache, Québec which manufactures concrete blocks and stones for patios, pled guilty to a charge of criminal negligence causing death arising from a tragic workplace accident. By their plea, Transpavé becomes the first corporation in Canada to be charged and convicted under the Bill C-45 amendments to the Criminal Code.

At the plea of guilty and recent sentencing hearing, the court was told and the company agreed to the following matters. The engineer and inspector for the Commission de la Santé et de la Sécurité au Travail (CSST) explained that the light curtain system had been disabled by a pen cap, and had been disabled for the majority of time in 2004 and 2005. The light curtain system should have guarded against access by a young worker, Steve L'Écuyer, when he entered a moving area of the machine to clear a jam on October 11, 2005. Mr. L'Écuyer was fatally crushed on that date by the “grab” of the machine used to package cement blocks on palettes. The grab was activated by a control lever that became unstuck while the worker was in the danger zone of the machine, attempting to clear a pileup of paving blocks.

The Court was told and the Company also agreed with conclusions in the CSST Report that machine safety and hazard awareness training was not provided to Mr. L'Écuyer or others. The Company did not have any type of inspection program to confirm whether guarding systems were operational. Training systems for new operators were not reviewed by management. A member of management had noted in the past that the light curtain guarding system was disabled but had not taken any action to address the situation.

Upon the plea of guilty by Transpavé in December, 2007, the sentencing hearing was adjourned and sentencing was rendered March 17, 2008, by Mr. Justice Paul Chevalier of the Court of Québec. A penalty of \$100,000.00 was imposed on Transpavé further to a joint submission on sentence made by Crown and Defence lawyers. Both the Crown and Defence jointly proposed that a monetary penalty appropriate in the circumstances ought to be \$100,000.00. Justice Chevalier accepted this joint submission, and additionally imposed an automatic \$10,000.00 victim assistance surcharge.

Starting from the principle that any sentence must be proportional to the seriousness of the crime and the level of responsibility for the crime, and must take into account any mitigating or aggravating circumstances, Justice Chevalier noted the following considerations in arriving at the sentence:

- The crime was serious because it resulted in an individual's death;
- No one at Transpavé knew that the control lever could get stuck or unstuck. Also the deactivation of the light-sensitive motion detector was unknown to Transpavé or its officers;
- Transpavé advised that it is a family business employing one hundred persons;
- Transpavé's owners demonstrated sensitivity towards all staff members and the victim's family by engaging the services of a psychologist to help employees in coping with the death of their colleague. They personally called each employee and advised of the time and location of the deceased's funeral, and they offered condolences to the deceased's family both at his funeral and in court through counsel;
- Transpavé realized no benefit as a result of the offence;
- No planning was involved in carrying out the offence. The crime was an unplanned act of negligence;
- Before the accident, Transpavé had in place a health and safety committee, a code of conduct, and safety standards that had to be respected by employees;

- Transpavé had not attempted to conceal or convert its assets to avoid paying a fine;
- Transpavé and its directors had no prior record of having committed a similar crime or regulatory offence;
- Following the accident Transpavé complied with all of the recommendations of the CSST, the Québec agency responsible for workplace health and safety and workers' compensation;
- A key consideration in the sentencing decision was that Transpavé spent more than \$750,000.00 on health and workplace safety measures following the accident. Justice Chevalier noted that Transpavé's plants now meet safety standards which are higher than those generally applicable in North America; and
- Another consideration, noted by Justice Chevalier, was that the imposed sentence should not endanger the economic viability of the company or put at risk the jobs of the hundred individuals it employs.

The Bill C-45 Provisions Amending The Criminal Code: A Reminder

By way of reminder, Bill C-45 amended the *Criminal Code* to create new duties and possible criminal liability for individuals and "organizations", which include corporations. Because of the complexity of these *Criminal Code* requirements, and the amount of time that has been passed since they became law in March, 2004, answers to key FAQs about the Bill C-45 Amendments are set out below, as follows:

1. Is the new *Criminal Code* duty different from OH&S duties to take all reasonable precautions or all reasonable care? How?

The new duty found in section 217.1 of the *Criminal Code* requires that "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". "Everyone" includes individuals, organizations as broadly defined, and corporations.

This duty parallels traditional OH&S standards, but also expands on the matters contained in most OH&S statutes. Firstly, the duty applies to any individual with authority to direct another person in the performance of work, while OH&S legislation generally imposes duties on employers, supervisors, constructors, owners, directors and officers. The *Criminal*

Code may apply more widely to anyone who “undertakes” to direct work, including lead hands and working forepersons. Secondly, the *Criminal Code* duty also requires that reasonable steps be taken to prevent bodily harm to any person, which would include the public or volunteers who may enter the workplace or be affected by workplace activities.

2. Does violation of the *Criminal Code* duty mean we are guilty of criminal negligence?

Breach of the *Criminal Code* duty does not necessarily mean that an organization or individual is guilty of criminal negligence. In order for a breach of the duty of care to amount to criminal negligence, the Crown must prove beyond a reasonable doubt in court that the breach of the duty occurred in a “wanton or reckless” manner.

Section 219 of the *Criminal Code* states that “Everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.” The provisions of Section 219 broadly state that for the purposes of the criminal negligence section, Section 219 of the *Criminal Code*, “duty” means a duty imposed by law.

Criminal cases have found that for criminal negligence to occur, a breach of a duty must represent a “marked” and significant departure from the standard of a reasonably prudent person in the circumstances. There must be more than mere failure to meet an OH&S or *Criminal Code* standard through inadvertence. There must be evidence of behaviour which shows complete disregard for, or indifference to the duty. As one court put it, there must be a finding of a “devil-may-care attitude” that shows a criminal standard has been met.

3. Wasn’t Bill C-45 all about creating director and officer criminal liability?

Not exactly. While the Westray inquiry which concluded in 1997 recommended that Canada “amend or introduce legislation to ensure that corporate executives and directors are held properly accountable for workplace safety and the wrongful and negligent acts of their corporations”, ultimately Bill C-45 created a mechanism which allowed corporations to be more readily convicted of criminal negligence. The *Criminal Code* continues to allow individual charges of criminal negligence, which could include charges against a supervisor, or director or officer, for breach of a duty in a wanton or reckless manner, but that was not the primary focus of the Bill C-45 amendments when they were passed and came into force in 2004.

4. Does Bill C-45 create both corporate and individual criminal liability?

Yes, it does both. The provisions create new criminal duties and liabilities for both individuals and organizations (which are defined to include corporations). Both individuals and organizations can now be convicted of criminal negligence for failure to perform the duty, when the failure to perform the duty occurs in a manner that shows wanton or reckless disregard for the lives or safety of others.

5. What is necessary for an organization (including a corporation) to be convicted under the *Criminal Code* of criminal negligence?

The process for convicting an organization of criminal negligence in the workplace safety context involves two steps. First, the Crown must prove beyond a reasonable doubt that the actions of a single representative (employee, partner, contractor, agent of the organization) breached the *Criminal Code* duty in a wanton or reckless way. This could involve reckless ignoring of safety rules or physical protective devices where the potential result is serious harm or death. Second, after the breach of duty is established, the Crown must then show that a senior officer with operational or executive authority, or as drafters put it, someone with “real clout” who is responsible for the part of the organization involved in the breach, either failed to act or insulated themselves from obtaining the knowledge to act. The Crown has to prove a marked departure from what would reasonably be expected of a senior officer with obligations to protect workers and the public.

6. What are the potential liabilities under the *Criminal Code* provisions as amended by Bill C-45?

For individuals, the maximum penalty for criminal negligence causing death is life imprisonment, and the maximum penalty for criminal negligence causing bodily harm is ten years’ imprisonment. However, individuals are subject to a range of *Criminal Code* sentencing options from absolute discharge, to probation, to life in prison, depending on the specific circumstances of the contravention.

Organizations including corporations are subject to different penalties depending on how the Crown proceeds. Where the Crown proceeds by summary conviction (the least serious manner of proceeding), the maximum fine is \$100,000.00 for an organization. Where the Crown proceeds by indictment (the most serious manner of proceeding), there is no limit on the amount of the fine for the corporation or organization. Organizations may also be placed on probation and the terms of a probationary order can include such matters as: requiring the organization to make restitution, financial or otherwise, relating to the offence; requiring

the organization to report to the court or the public on implementation of remedial steps; requiring the appointment of a senior officer to be responsible for implementing remedial procedures; requiring the organization to disclose its conviction to the public. Probation orders including these types of terms are available in addition to monetary penalties.

Readers should watch for Part II outlining strategic measures for the future in the September/October issue of this magazine.

Cheryl A. Edwards is a former Ontario Ministry of Labour OH&S Prosecutor and is Lead in Heenan Blaikie's national OHS and WSIB Practice Group. Cheryl has more than 20 years of experience providing strategic, focused, practical advice and in-house training for public and private sector organizations. She also has extensive experience representing clients at trials, complaints, inquests and appeals. For more information on any of the issues discussed in this article, please, contact Cheryl at: Email: cedwards@heenan.ca; Direct Line: 416 360.2897; Cell: 416.452.4958