

CORPORATE CRIMINAL LIABILITY: COMING TO A CONSTRUCTION PROJECT NEAR YOU?

By: Cheryl A. Edwards and Julie Thibault

Effective March 31, 2004, workplace safety became a matter for both OH&S regulatory and criminal enforcement. Bill C-45 amended the *Criminal Code*, creating far-reaching changes to the OH&S landscape. It has taken until 2008, however, to see the first corporate criminal conviction and penalty under the Bill C-45 amendments to the *Criminal Code* ("Bill C-45 amendments").

After passage of Bill C-45, organizations in all business sectors braced for a potential onslaught of criminal prosecutions arising from tragic workplace accidents. With construction projects being among the most hazardous of workplaces, with multiple overlapping activities, contractors, equipment and overlapping and complex OH&S responsibilities, it would not have been surprising to see multiple *Criminal Code* cases arise in this sector. Parallel OH&S and criminal prosecutions have been commenced against construction employers, and police and MOL investigators have regularly recommended criminal prosecution after serious workplace accidents. Since the enactment of Bill C-45, the Crown has generally preferred not to proceed with criminal prosecution where regulatory OH&S prosecution is available and seems a more applicable prosecution tool. However, with the first corporate criminal conviction since the enactment of Bill C-45, this may change.

The First Corporate Criminal Conviction

On December 7, 2007, Transpavé Inc., an industrial business based in St-Eustache, Québec which manufactures concrete blocks and stones for patios and the first corporation to be charged under the Bill C-45 amendments to the *Criminal Code* ("Bill C-45 amendments"), pled guilty to a charge of "criminal negligence" causing death arising from a workplace accident.

At the plea of guilty and recent sentencing hearing, the court was told that the light curtain system, which is a guarding mechanism that senses when a person or object enters a protected zone of a machine, had been disabled on a machine by a pen cap. The guarding system had been disabled for the majority of time in 2004 and 2005. The light curtain system should have guarded against access when a young worker, Steve L'Écuyer, entered a moving area of the machine to clear a jam on October 11, 2005. Mr. L'Écuyer was fatally crushed by the "grab" of the machine used to package cement blocks on palettes. On March 17, 2008, Transpavé received a fine of \$100,000.00 in addition to an automatic \$10,000.00 victim assistance surcharge. One key factor considered by Justice Chevalier of the Cour du Québec in imposing the penalty was that Transpavé spent more than \$750,000.00 on health and safety measures following the accident. The

sentence was five times the corporate maximum available under the Quebec *OHS*A.

It is troublesome that in this case the “Commission de la Santé et de la Sécurité au Travail” (“CSST”), Quebec’s workplace safety enforcement body, gave its investigation report to police who, in turn, used it to prosecute Transpavé. The police did not conduct an extensive investigation; it relied on the CSST to conduct the investigation. The CSST report indicated that corporate senior officers were aware that the light curtain guarding system had been disabled in 2004 and 2005 and failed to act.

The Bill C-45 Amendments: A Reminder

The Bill C-45 amendments to the *Criminal Code* created a new duty and possible criminal liability for individuals and defined “organizations”, which include corporations.

Organizations may now be more readily charged and convicted of the *Criminal Code* offence of criminal negligence causing death or criminal negligence causing bodily harm. The term “organization” is broadly defined in the *Criminal Code* to encompass most types of entities. The definition clearly permits consideration of charges to the entity without regard to corporate structure. “Organization” means “a public body, body corporate, society, company, firm, partnership, trade union or municipality, or an association of persons that is created for a common purpose, has an operational structure and holds itself out to the public as an association of persons”.

The new duty created by Bill C-45 is as follows: *Everyone, including an organization, who directs how a 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 (which would include the general public), arising from that work or task.* This legal duty not only applies to supervisors or managers but also to individuals such as lead hands, or those who, on their own initiative, undertake to direct the work of others.

Criminal prosecution of an organization for criminal negligence requires the police and the courts to be satisfied that there was a failure to perform the legal duty to prevent bodily harm to a person; and that the failure occurred in a way that shows “wanton or reckless disregard” for the safety of others. Wanton or reckless disregard requires an extreme lack of caring, or recklessness, to amount to behaviour that is a “crime”.

Since an organization can only act through its representatives, the Bill C-45 amendments created a specific two-step process to establish the necessary proof of the above matters to convict an organization of criminal negligence. The Crown must prove beyond a reasonable doubt that:

1. one or more representatives of the organization behaved in a criminally negligent manner where the potential result is serious injury or death; and
2. a senior officer with operational or executive authority responsible for the aspect of the activities relevant to the offence, departed markedly from the standard of care reasonably expected in the circumstances. As the drafters of Bill C-45 put matters, this could be triggered by a failure by senior officers to act upon knowledge of a safety problem, or from actions by senior officers to insulate themselves from obtaining the knowledge of problems in order to correct the situation.

The terms “representative” and “senior officer” are also defined in the *Criminal Code*. “Representative” includes a contractor of an organization. “Senior officer” includes any “representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, the CEO, and CFO”.

Bill C-45 and Implications for Construction Projects and Construction Contracting

As many readers will be aware, a number of participants covered by the Ontario Occupational Health and Safety Act (“*OHS*”) exist at workplaces defined as “construction projects”. All are subject to the stringent OH&S regulatory environment that has existed in Ontario for over a decade. “Owners” engaging in contracting for a construction project will generally do so by engaging a general contractor as “constructor”, although the owner exercising too much control can also become the “constructor” with the responsibilities and liabilities attaching to that workplace participant. General contractors will generally act as “constructor”. Contractors at the work site will generally be responsible and potentially liable under the broad *OHS* definition of “employer”, for the activities of their own workers and all subcontractors. Added to this complexity, including the responsibility of each party to exercise due diligence respecting their activities at the project, are the new *Criminal Code* responsibilities and potential liabilities.

Ontario has seen *Criminal Code* prosecution in the construction sector, both before and after passage of the Bill C-45 amendments. A number of construction supervisors have faced prosecution for criminal negligence in Ontario. Generally their actions have been found to be imprudent, but not amounting to the kind of “devil-may-care” attitude toward life or safety that amounts to criminal negligence. One noteworthy prosecution that preceded the first corporate *Criminal Code* conviction discussed above, occurred in Ontario just after passage of the Bill C-45 amendment.

Dominico Fantini, sole proprietor of a contracting firm known as Vista Construction, became the first employer (although an individual sole proprietor, not a corporation) charged with criminal negligence causing death under the Bill

C-45 amendments. The charge was laid after a worker was killed in a trench collapse in Ontario in April 2004. Mr. Fantini and his firm failed to shore or properly slope the trench. In addition to personal charges of criminal negligence causing death, Mr. Fantini was also charged as “employer” with eight offences under the Ontario *OHS*A and its Regulations. The *Criminal Code* charge was withdrawn after Mr. Fantini pled guilty as an “employer” to three *OHS*A charges and received a \$50,000.00 fine personally (plus a 25% victim surcharge) on March 3, 2005.

Several key implications and issues arise from the risk of regulatory and criminal prosecution. Owners, constructors and employers at construction projects, and their counsel, should keep in mind the following:

- **The breadth of *Criminal Code* duties.** The duty to take reasonable steps to prevent bodily harm extends to the duty to protect contractors, and the duty to protect the general public. Due diligence respecting contracting activities takes on greater urgency given the risk of criminal negligence prosecution for an organization failing to protect contractors. Contractor and general contractor prequalification, pre-job meetings, ongoing supervisory monitoring, systems for communication at construction projects, and enforcement of safety practices continue as the best means to establish OH&S due diligence. Safety management at projects must include systems to protect the public passing by, or who could be affected by the project;
- **The definition of “representative” includes contractors.** The broad definition of “representative” includes a contractor to an organization. A representative behaving in reckless manner can subject constructors or employers at a hazardous project to risk of criminal as well as OH&S prosecution;
- **The definition of “organization”.** Developers engaging in a practice of creating new corporations for individual construction projects need to be aware that the *Criminal Code* definition permits wide ranging assessment of entire operational structure of a business. Criminal Code prosecution against one or more corporations or joint ventures comprising the structure managing a project could occur;
- **The need for corporate senior officer steps.** Complete delegation of OH&S responsibilities to safety managers or the Joint Health and Safety Committee at the project will not suffice as the reasonable care expected of senior officers. The behaviour of senior officers will be assessed in determining whether corporate criminal negligence has occurred. Policy directives from senior management, inquiries about safety systems and their operation, and directives where safety systems are deficient, are necessary for the exercise of reasonable care or due diligence by senior officers in today’s OH&S environment; and

- **The need for immediate accident response.** Obtaining immediate advice in the event of a tragic workplace accident at a construction project often means the difference between an imprudent, crisis-driven approach that reveals unnecessary incriminating information, and a legally compliant but thoroughly managed approach to incident reporting, preserving details and evidence, obtaining expert analysis and privileged expert reports, and protecting the rights of organizations and individuals. Ideally, owners, general contractors and larger employers will create accident response plans. An accident response plan can delicately balance obligations to cooperate and not obstruct regulatory officials with the increased rights which exist during the criminal process.

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R. v. Transpavé Inc. (March 17, 2008), Terrebonne 700-01-066698-062 (C.Q.)

R. v. Fantini, [2005] O.J. 2361