

## WHERE ARE ALL THE BILL C-45 OH&S PROSECUTIONS?

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The “criminalization” of OH&S in Canada was front page news in late 2003 and early 2004. Effective March 2004, a far-reaching and frightening change to the OH&S landscape in Canada took place with the provisions of Bill C-45 coming into force. Workplace safety suddenly became a matter for both criminal and OH&S regulatory enforcement. While not applying exclusively to OH&S matters, the combination of Bill C-45’s origins in the tragic 1992 Westray explosion, its creation of an important new criminal law duty to protect workers, and the already stringent Canadian OH&S environment, resulted in the clearest of messages to business organizations that a potent new world of OH&S enforcement existed.

Many Canadian organizations sat up and paid close attention to this message, by reinforcing existing OH&S due diligence programs, and expanding their programs to protect workers and others in the workplace as necessary. Voluntary and charitable organizations, not traditionally covered by OH&S legislation, took notice. Writers, conference organizers, lawyers and trade unions readied themselves for the coming onslaught of Bill C-45 criminal prosecutions. So what has happened since Bill C-45 became effective? Where are all the Bill C-45 OH&S-related criminal prosecutions?

### The Results of the First Bill C-45 Prosecution

Many readers will know by now that the first charge commenced under the Bill C-45 amendments to the Criminal Code has come and gone. A young father was fatally crushed, in April, 2004, working in an unsupported trench at a project to install weeping tiles at the basement walls of a home in King Township, Ontario. Domenico Fantini, the owner of a small contracting firm known as Vista Construction, was charged with one count of criminal negligence causing death. The Ontario Ministry of Labour also commenced charges against Mr. Fantini under the Ontario Occupational Health and Safety Act. The OH&S charges involved eight separate alleged contraventions of the Construction Regulations as an employer and as a constructor.

On March 3, 2005, the Criminal Code charges were withdrawn by the Crown Prosecutor and Mr. Fantini pleaded guilty as an employer to three OH&S charges in connection with the incident. He was fined personally a total of \$50,000.00. The facts read at the court proceeding<sup>1</sup> indicated that the owner of the home at which the accident occurred, an individual apparently familiar with construction projects, had specifically directed Mr. Fantini to slope the excavation of the trench at a 45° angle to prevent a trench collapse. This was not done. The trench was not shored or sloped at all.

## Looking to the Future: What Should Canadian Organizations Expect?

In the months following this resolution, several commentators and one or two corporate representatives have been heard proclaiming that the Bill C-45 changes to the Criminal Code were really never much to worry about in the first place, and certainly now there is no need for concern. There are many reasons for organizations and individuals not to become complacent.

This writer, for one, does not believe that Bill C-45 is a fleeting change to the OH&S landscape in Canada. It is part of a world-wide trend which embraces the existence of parallel criminal law and OH&S protection of worker safety. Canada is just starting on this new path allowing prosecution of organizations and individuals for both “regulatory” OH&S contraventions, and at the same time as criminals for reckless and intentional conduct that shows disregard for worker and public safety.

Here are just three good reasons to keep up heightened pressure within your organization to ensure full and complete OH&S compliance, due diligence steps and the additional steps required by Bill C-45.

- 1) **Pressure From Trade Unions and Workplace Safety Advocates for Criminal Prosecutions Will Continue to Mount.** The political clout of organized labour played an important part in the enactment of Bill C-45. The United Steel Workers of America, who represented the workers at the Westray mine, actively lobbied the federal government to enact new “criminal” provisions to motivate organizations and senior management to take a greater role in protecting worker safety. It is not unrealistic to expect that organized labour will be equally active in attempting to convince prosecutors to bring more criminal prosecutions for behaviour which has led to workplace accidents.

Indeed, in the United States, the United Steel Workers, along with an organization titled the National Council for Occupational Safety and Health, are engaged in an ongoing campaign to pressure local prosecutors to bring criminal prosecutions against corporations that consistently and flagrantly violate OH&S laws. Pressure south of the border has been mounting for years for more criminal OSHA prosecutions and more stringent criminal penalties. The United Steel Workers in Canada state on their website that the “next challenge” with respect to Bill C-45 is to “ensure that the law is properly enforced”.<sup>2</sup>

- 2) **The Lack of a Clear Line Between OH&S Negligence and Criminal Negligence May Result in More Criminal Prosecutions Than Some Expect.** As any organization that has experienced a tragic workplace accident, particularly one involving a fatal worker injury, will know, the task of dealing with regulatory enforcers and police at the door can be daunting. Multiple police and OH&S regulatory enforcers may arrive. Photographs, measurements, videos and statements may be taken by police and one or more regulatory bodies. Policy and procedure documents, training and hazard assessment records, meeting minutes, even confidential internal accident investigation reports may be demanded. Unless the situation is carefully managed by an organization, incomplete records, inaccurate statements, emotional and even accusatory remarks may be recorded, leaving the police and regulatory enforcers with a mix of potentially incomplete information from which to make a decision about a prosecution.

Add to this the fact that the line between a complete and total failure to comply with OH&S requirements, and the “wanton and reckless disregard” necessary for a criminal prosecution to be mounted, is a very blurry one. Let’s take a situation in which an organization, whether small or multinational, has completely failed to appreciate that a particular task involves a hazard. Thus no one has ever read or applied the OH&S provisions relating to the task. Let us say that the location at which the accident occurred is remote, and even if there is a safety manager or director, that person has never visited that location. And let’s say that senior officers within the organization have taken no steps whatsoever to become apprised of OH&S requirements, Bill C-45 duties to protect workers and the public, and they have never even seen the corporate health and safety policy, let alone reports of how effective the corporation’s policies and procedures and systems for assessing workplace hazards are, because they have delegated all of these tasks to a safety manager. Lets say, finally, that the hazard associated with the task would not have been difficult at all to identify, and it is a very high-risk activity.

A criminal investigator or prosecutor must be satisfied that the conduct of the organization (through mechanisms set out in Bill C-45) or the individual to be charged criminally violates a known duty and that the conduct amounted to “wanton or reckless disregard” for life or safety. In the above situation, it seems inevitable that OH&S prosecution would occur. But is lack of knowledge of the hazard or the legal requirements likely to trigger a criminal charge? Does it have to be an overt act of negligence, i.e. a complete failure to provide safety equipment where the organization knew or ought to have known that it should have been provided? The vast discretion that criminal prosecutors would have in determining whether there ought to be corporate or individual Bill C-45 charges is terribly frightening. With close scrutiny and detailed investigation, many workplace tragedies which now result in OH&S prosecution could look a lot like there was “wanton or reckless disregard” for safety.

- 3) **The Failure of Many Corporate Senior Officers to Take Safety Seriously Will Fuel Corporate Criminal Bill C-45 Prosecutions.** The structure of the Criminal Code as amended by Bill C-45 is such that corporate or organizational criminal prosecutions can occur where a representative (defined broadly) engages in “wanton or reckless disregard” for safety (in other words criminal negligence) and a senior officer has failed to take the necessary reasonable care to prevent this.

The drafters of the legislation, and the Department of Justice Plain Language Guide to Bill C-45<sup>3</sup> have quite clearly suggested that criminal prosecutions in the OH&S context should occur where a culture which encourages, tolerates or leads to non-compliance with health and safety standards exists within an organization and senior management permit or tolerate this. The Department of Justice has gone so far as to say that in situations where senior management have been wilfully blind about OH&S issues, in other words, they insulate themselves from obtaining the necessary knowledge to assess and deal with safety situations, this could lead to a corporate or organizational criminal prosecution.

It is not widely discussed publicly, and there are of course multiple shining corporate

examples to the contrary, but this writer hears regularly from frustrated OH&S directors or managers of organizations where upper management believes that OH&S is “for the safety committee or safety people to worry about”, or worse, ignores significant ongoing high risk safety issues.

Let’s imagine an investigation by the police and OH&S enforcers into a situation where either joint health and safety committee recommendations, trade union representative concerns, external or internal safety audit results, or safety manager concerns and recommendations, were ignored or deferred by senior management, and the very issue ignored causes a high profile workplace tragedy. Assuming the evidence is available, it seems from all public statements from the Department of Justice so far that criminal prosecutors would likely bring criminal charges against the corporation or organization, taking the position that its senior officers did nothing to prevent the “wanton or reckless disregard” of safety standards by the organization that may have caused the tragedy.<sup>4</sup>

Of course it still remains to see whether Bill C-45 OH&S-related criminal prosecutions will occur with any frequency. But organizations that are not engaging in tightening of corporate and organizational “due diligence”, ensuring senior management steps and systems for oversight of safety matters, ensuring management of safety issues where contractors and members of the public could be endangered by corporate activities, and creating proactive accident response plans, are ignoring strategic corporate and individual responses to the “criminalization” of health and safety at their peril.

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<sup>1</sup> Proceedings before the Ontario Court of Justice, R. v. Fantini, March 3, 2005, Newmarket, Gorewich, J.

<sup>2</sup> United Steel Workers of America, Westray Bill Explained, Celebrated: Those Who Sacrificed Their Lives Remembered” at [www.uswa.ca/program/content/1661.php](http://www.uswa.ca/program/content/1661.php)

<sup>3</sup> “Criminal Liability of Organizations: A Plain Language Guide to Bill C-45”, Department of Justice, Ottawa, 2003

<sup>4</sup> This article contains some excerpts and content from a forthcoming CLV Special Report “Corporate and Organizational Liability for OH&S under Bill C-45” by Cheryl A. Edwards and Ryan J. Conlin, being published by Thomson/Carswell in 2005.