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M A N A G E M E N T U P D A T E

OH&S Corporate Criminal Liability Rears Its Head Again In Canada

By Cheryl A. Edwards, Shane D. Todd and Jeremy Warning

In what should serve as a stark reminder for both employers and individuals, police in Ontario recently charged a corporate employer and two individuals with criminal negligence causing death after a fatal workplace accident at a construction project. These events demonstrate that, while criminal prosecutions for workplace accidents remain rare, the police will not hesitate to pursue criminal charges as they deem appropriate. This *Management Update* examines this most recent case of potential corporate criminal liability for a workplace accident, reviews the global trend towards the criminalization of workplace safety enforcement, and suggests several strategic measures to assist employers in avoiding or mitigating the consequences of criminal charges.

THE ACCIDENT

On April 16, 2009, the City of Sault Ste. Marie's Public Works Department was performing sewer work in an approximately three metre deep excavation at the City landfill. The City had contracted with 1531147 Ontario Limited, operating as Millennium Crane Rentals ("Millennium Crane"), to provide an 80 ton mobile crane and crane operator to assist in placing concrete structures into the excavation. While all the facts are not publicly known, it appears that the crane fell into the excavation while it was being repositioned. Two City employees were working in the excavation at the time. One employee was pinned across the stomach and pelvis by the crane. He was extricated by the Sault Ste. Marie Fire Service and rushed to a nearby hospital where he later succumbed to his injuries. The second employee was not hurt.

The Ontario Ministry of Labour (the "Ministry") and the Sault Ste. Marie Police Service investigated the accident. The Ministry has now laid five charges under the Ontario *Occupational Health and Safety Act* (the "OHSA"), against Millennium Crane, including charges for failing to ensure the crane operator was properly licensed, failing to ensure the crane was maintained in a condition that did not endanger a worker, and failing to ensure that the crane was not defective and/or hazardous. An

*OHS*A charge was also laid against the crane operator for allegedly operating the crane in a manner that endangered himself and other workers. The maximum fine that could be imposed for each of the *OHS*A charges laid against Millennium Crane is \$500,000, plus the required provincial surcharge. The maximum penalty that could be imposed on the crane operator is a fine of \$25,000, plus surcharge, and/or up to twelve months imprisonment.

In addition, following a ten month investigation, the Sault Ste. Marie Police Service has charged Millennium Crane, the individual crane owner and the crane operator with criminal negligence causing death. This is the first time that an Ontario corporation has been charged this offence since amendments were made to the criminal negligence provisions of the *Criminal Code* in 2004. Those amendments were designed to make it easier for the Crown to prove criminal negligence against a corporation. If convicted, each of the individuals charged face a maximum sentence of life imprisonment and there is no limit to the fine that could be imposed on Millennium Crane. The first court date for the criminal charges is March 22, 2010.

CANADIAN CORPORATE CRIMINAL LIABILITY: A REMINDER

Prior to 2004, although corporations had been charged with criminal negligence, none had resulted in a conviction in Canada because the law required the Crown to prove beyond a reasonable doubt that a “directing mind” of the corporation had behaved in a criminally negligent manner. This proved a difficult burden for Crown Prosecutors. In addition to the failed prosecution of Curragh Resources following the Westray Mine disaster, criminal charges against corporations have been stayed or withdrawn against Syncrude Canada Ltd. following a double fatality of contract workers in a confined space,¹ and Ontario Power Generation following the drowning of two sun-bathers who were caught unaware by a controlled release of water from a dam.²

The principles underlying corporate criminal liability in Canada changed in 2004 when the federal government enacted *Bill C-45, An Act To Amend The Criminal Code (Criminal Liability Of Organizations)* (“*Bill C-45*”). *Bill C-45* amended the *Criminal Code* to permit organizations, which includes corporations, to be more readily charged and convicted of criminal negligence causing either death or bodily harm. It also created a new duty requiring everyone, including corporations, who directs how a person

works or performs a task, to take reasonable steps to prevent bodily harm to that person or any other person, arising from that work or task. In order to be prosecuted, there must be a failure to discharge the legal duty to prevent bodily harm to a person, and the failure must occur in a way that shows “wanton or reckless disregard” for the safety of others. Since a corporation can only act through its representatives, the Crown Prosecutor must prove beyond a reasonable doubt that one or more representatives of the corporation behaved in a criminally negligent manner where the potential result was serious injury or death. The Crown Prosecutor must also prove that “senior officers”, management 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.

In short, it must be proven that extraordinarily reckless behaviour has resulted in serious injury or death, and the most senior management in the company have failed to exercise reasonable care to prevent this, either through systems, or specific action.

Although workplace safety is (and technically in the past has been) enforceable under both the *Criminal Code* and provincial occupational health and safety legislation, criminal enforcement has remained relatively rare in Canada. To date there have been only two post *Bill C-45* criminal prosecutions, arising from workplace accidents, in Canada. In 2006, Transpavé Inc.³ was charged with criminal negligence causing death after an employee was fatally crushed by the “grab” of a machine used to package cement blocks on pallets when he entered a moving area of the machine to clear jammed material in the machine. Members of senior management had been informed that the light curtain system used to guard the machine was deactivated, but they had not acted to correct the situation. Transpavé Inc. pleaded guilty and was fined \$100,000 in March 2008. No *OHS* charges were commenced against that corporation, although such charges were available under the Quebec *Act Respecting Occupational Health and Safety*. Prior to that, police in Ontario laid criminal negligence charges against the owner of a small construction company⁴ after a trench collapsed, fatally injuring a worker. Those charges were dropped after the owner pleaded guilty to three charges under the Ontario *OHS*A and was fined \$50,000.

It is worth remembering that police as well as *OHS* enforcers attend at virtually all scenes of workplace accidents. Where an inquest is planned or required, a detailed police investigation



into the behaviour of the organization and individuals will occur. Criminal investigations do proceed regularly. However, currently it is usual for the police and Crown Prosecutor to defer criminal enforcement in favour of OHS regulatory enforcement, where OHS enforcers are investigating or have determined they will proceed with OHS charges. This is always a matter for police discretion, however, and is dependent on all of the facts of the incident or accident being investigated.

CRIMINALIZATION OF OHS BEYOND CANADA: A BRIEF WORD

Despite the rarity of criminal proceedings in Canada, there is a pronounced trend towards the criminalization of occupational health and safety enforcement around the world. In the Commonwealth, the United Kingdom and Australia have begun to criminalize workplace safety enforcement. In the United Kingdom, parliament enacted the *Corporate Manslaughter and Corporate Homicide Act 2007*⁵ to create a new offence called corporate manslaughter in England, Wales and Ireland, and corporate homicide in Scotland. The trial of the first charges under the new legislation, laid against Cotswold Geotechnical Holdings after the death of a worker in a trench collapse, is scheduled to begin this week. In Australia, the Australian Capital Territory amended the *Crimes Act 1900* to create an offence of industrial manslaughter where a worker dies, or is injured and later dies, in the course of employment as a result of the employer or “senior officer’s” conduct where the “senior officer” or employer is negligent or reckless.⁶ The first charges of industrial manslaughter, filed against a senior officer after a worker was electrocuted and killed after a screw pierced a wire and electrified a metal roof, were dismissed.⁷

STRATEGIC CONSIDERATIONS FOR EMPLOYERS

These recent criminal charges against Millennium Crane demonstrate that, although the risk of criminal prosecution is small, the police will pursue criminal liability in certain circumstances. Employers can take steps now to minimize the risks of a criminal prosecution following a workplace accident and to mitigate the consequence of any criminal charges that are laid.

Management and Supervisory Knowledge of OHS Laws and Requirements

Employers should ensure that supervisors, managers, officers and directors receive a reasonable amount of training focusing

on *OHS* and *Criminal Code* obligations, key regulatory requirements, and key aspects of due diligence. This knowledge will permit them to carry out their duty of reasonable care under both pieces of legislation. To ensure that this knowledge remains current, employers should consider ongoing retraining, and implementing mechanisms to communicate critical developments in occupational health and safety law and to advise of any compliance issues within the organization and failures or near-failures of the safety system.

Senior Management Systems for Involvement and Direction on OHS Matters

It is particularly important that “senior officers”, who include senior management in operations, including directors and officers, receive information on corporate compliance and act when informed of non-compliance. Summary reports can be provided, detailing such matters as equipment safety, updates on corporate training systems, supervisory monitoring systems, worker complaints about health and safety, and action taken, work refusals, joint health and safety committee recommendations, and government orders or prosecution. Orders for remedial or corrective action on any failure of the health and safety system should be issued in writing by the manager or senior officer. Follow-up on health and safety concerns brought to the attention of senior officers should also be documented in notes, directives, or meeting minutes of board of directors meetings and preserved. These steps will help increase the likelihood that managers and senior officials are found to have demonstrated reasonable care.

Due Diligence Steps

Employers should also undertake a review to ensure that the organization can establish due diligence to an extent that meets the extremely high standards established by courts in occupational health and safety prosecutions. The existence of due diligence or ongoing reasonable care should prevent a finding by investigators or the courts of “wanton or reckless” disregard sufficient to constitute criminal negligence. The courts have established a long list of factors that are relevant to the determination of due diligence, including whether:

- i) supervisory personnel knew all relevant OHS legal requirements;
- ii) workplace hazards assessments were performed by competent personnel or external experts;
- iii) work area inspections were performed to identify hazards;

- iv) written health and safety policies or procedure existed;
- v) employees had thorough training on policies and demonstrations as appropriate to ensure safe work practices and procedures;
- vi) continuous training and reminders about safe work procedures were given;
- vii) employees were advised of new hazards and communication of hazards and expected work processes occurred, especially where multiple crews or employers are present; and
- viii) safe work practices and policies and procedures involved in the incident were enforced with discipline.

Accident Response Strategies

Employers should also develop an accident response plan. While these plans do not eliminate the consequences of the accident, they can mitigate its consequences by ensuring that legal obligations are met when responding to an accident attracting a police or regulatory response. A sophisticated accident response plan can also help employers balance their obligations to co-operate with regulatory officials with the substantive legal rights that may arise when the police or the Ministry are investigating an alleged regulatory or criminal offence. At a minimum, an accident response plan should include information and training for front line personnel to ensure that statutory OHS notification, accident reporting requirements, and obligations to preserve the scene are met.

The accident response plan should establish a single point of contact for police and regulatory inspectors. This contact person should respond to requests for documents, materials, and access to the scene and witnesses. He or she can regularly communicate with legal counsel, attend witness interviews where possible, and ensure that all enquiries are fulfilled by the provision of information, policies, training documents, other material demonstrating the reasonable steps taken. The plan should require the contact person to seek external advice and assistance on key legal aspects of the investigation, including when the employer is obligated to provide requested documents or information, on what grounds it may refuse (e.g., solicitor-client privilege, litigation privilege, etc.) and when a court order or warrant is required. The plan should also provide for the creating, collecting and preserving evidence independent of the police or Ministry investigation as part of a separate corporate accident investigation, including an independent review of the undisturbed accident scene to develop alternate theories of causation.

The criminal charges against Millennium Crane serve as a reminder that employers and individuals continue to face the risk of a criminal investigation, and the prospect of reckless behaviour being treated as a “crime” after a workplace accident. Educating supervisors and senior officers about their health and safety duties, conducting a pre-emptive due diligence review and preparing an accident response plan can help employers to mitigate this risk. We will continue to update our readers on the progress of the criminal charges against Millennium Crane through the courts. ■

ENDNOTES

¹ *R. v. Syncrude Canada*, [1983] A.J. No. 845

² *R. v. Ontario Power Generation*, [2006] 73 W.C.B. (2d) 330 (Ont. C.J.).

³ *R. v. Transpavé Inc.*, [unreported] (17 March 2008), Terrebonne 700-01-066698-062 (C.Q.) ;

⁴ *R. v. Fantini*, [2005] O.J. 2361 (QL);

⁵ 2007 c.19.

⁶ *Crimes Act 1900*, s. 49 C – D online:

<<http://www.legislation.act.gov.au/a/1900-40/current/pdf/1900-40.pdf>>.

⁷ Magistrate dismisses industrial manslaughter case” (8 December 2004) ABC News, online:

<<http://www.abc.net.au/news/stories/2004/12/08/1260820.htm>>.

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