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JULY 13, 2012

OHS & Workers' Compensation

MANAGEMENT UPDATE

After Metron: The Corporate Criminal Liability Landscape in Canada

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> On December 24, 2009, at approximately 4:30 p.m., a swing stage collapsed on a construction project at 2757 Kipling Avenue, Toronto. At least six workers were on the stage at the time of the collapse. Five of them fell approximately 14 floors to the ground. A sixth worker (the only one properly attached to a "lifeline") was held by his lifeline and was pulled to safety onto a nearby balcony.
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> Four of the five workers who fell died as a result of their injuries from the fall. [...]
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> The fifth worker [...] suffered significant injuries, but survived the fall.

Based on these dreadful and widely-known facts Metron Construction Corporation ("Metron") has been found guilty of a single charge of criminal negligence causing death. On July 13, 2012, after hearing and considering submissions from the Crown and Metron, the Ontario Court of Justice sentenced Metron to a $200,000 fine.[1]

The Court also imposed a $90,000 fine on Metron's president after he pleaded guilty, as a company director, to four charges under the Ontario *Occupational Health and Safety Act* ("OHSA").[2] All criminal charges against the company president were withdrawn by the Crown as a result of these guilty pleas.

From the perspective of workplace safety, the Metron case is remarkable in a number of ways. The case:

- Represents the first corporate criminal negligence conviction in Ontario following passage of Bill C-45 in 2004. The sentences imposed on Metron and its president are the highest monetary penalties imposed for a workplace accident under the *Criminal Code* and the OHSA. They are likely to be reference points for sentences imposed in future cases under the OHSA and the *Criminal Code*;
- Has had a significant impact outside of the courtroom. The Christmas Eve 2009 tragedy is widely regarded as a significant factor in motivating the review of the occupational health and safety system in Ontario. That review resulted in a number of fundamental changes to the regulatory system and there are many changes yet to come;

1 As required by the *Criminal Code,* a fifteen percent surcharge, totalling $30,000 was imposed in addition to the fine.

2 Pursuant to the *Provincial Offences Act,* a twenty-five percent Victim Fine Surcharge, totalling $22,500, was added to this amount.

- Demonstrates how Bill C-45 has managed to broaden the means by which to prove criminal negligence. The Metron case appears to show that one of the main objectives in amending the *Criminal Code* – making it easier to obtain criminal negligence convictions against organizations – has been met. Whether this will embolden police and prosecutors to pursue more corporate criminal negligence charges following workplace accidents remains to be seen.

In this Update, we discuss the significance of the case and what it represents in the evolution of corporate criminal liability for health and safety in Canada.

Basis for the Criminal Negligence Finding: The Detailed Facts Revealed

Several of the facts about the December 24, 2009 accident are common knowledge due to the media coverage of this event. However, the facts presented to the court to support a conviction on the charge of criminal negligence causing death reveal significant details that were not widely known. Those facts allow for fuller context on the accident and should be considered by all organizations.

a) Liability Founded on Behaviour of Site Supervisor

The agreed facts reveal that the conduct that attracts criminal liability to Metron is entirely that of the Site Supervisor – one of the deceased. It was agreed that the Site Supervisor was a "senior officer"[3] of Metron. He was responsible for managing an important aspect of the organization's activities – the construction project at 2757 Kipling Avenue – and he had a duty to take reasonable steps to prevent injury to the workers he was managing. This is notable because, prior to the enactment of Bill C-45, the Site Supervisor was not someone whose conduct would likely attract criminal liability for the corporation. He was not employed directly by Metron. He had his own construction company and was hired by the Project Manager who has also been charged under the *Criminal Code* and the *Occupational Health and Safety Act*.[4] As such, Metron's conviction demonstrates how Bill C-45 has expanded the potential routes for establishing criminal negligence by a corporation.

Organizations should take note. Establishing liability based on the conduct of a person like the Site Supervisor may not prove unique to Metron. It is common for organizations to have site supervisors, branch, store or plant managers, or some equivalent position. Individuals in these roles are not typically in the upper echelons of the corporate hierarchy, but do have a high degree of responsibility and authority at a localized level. Based on the definition of "senior officer" in the *Criminal Code* it does not appear likely that the result would have been different if the Metron case involved a larger, more hierarchical organization. Metron demonstrates that the behaviour of people with a high degree of localized responsibility can attract criminal liability for an entire organization.

b) Positive Steps Taken by Corporation

What is also significant about the criminal negligence being grounded solely on the conduct of the Site Supervisor is that his conduct displaced a number of positive steps that were taken by Metron prior to the accident. The facts accepted in court reveal that Metron had taken several steps inconsistent with wanton and reckless disregard for the lives and safety of the workers on the project. The Crown agreed that Metron representatives had:

- Required that before any work commenced, the owner of the building arrange for an engineering inspection and recertification of the roof anchors to ensure compliance with safety requirements;
- At all times, been cooperative and complied with all requests made by the Ministry of Labour inspector who had periodically inspected the project from October to December 2009;
- Conducted periodic meetings with the Ministry of Labour inspector;
- Arranged for the Project Manager to take a three-day swing stage training course, which included some fall arrest training, through the Construction Safety Association of Ontario ("CSAO")[5];
- Arranged for the Project Manager to attend, immediately after the three-day course, another CSAO course that provided instruction on how to train workers regarding the safe and proper use of suspended access equipment;
- Made arrangements for the Site Supervisor to take a fall arrest course, provided by a third-party training provider, and a swing stage operations course provided by the Project Manager;
- Arranged for other workers on the project to take a fall arrest course and swing stage operations course that were to be taught by the Project Manager or the third-party training provider;

3 "A 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, its chief executive officer and its chief financial officer", *Criminal Code*, R.S.C. 1985, c. C-46, s.2.

4 A Preliminary Inquiry into the criminal negligence charges against the Project Manager began on May 7, 2012, and concluded at the end of June. In late July a date will be set for submissions from the Crown and defence. It is anticipated that those submissions will be heard in October 2012.

5 Now the Infrastructure Health and Safety Association.

- Ordered copies of a comprehensive safety manual and instructed that a copy be given to each worker;
- Conducted periodic meetings with workers, during the project, to review safety requirements including the use of swing stages; and
- As dictated by the Metron Safety Manual, performed weekly job site inspections, which referenced both swing stages and fall protection equipment, and were recorded and submitted to Metron.

It was also agreed that Metron's president attended the project at least once per week and that he had not observed any violations on the site.

c) Conduct of Third-Party Swing Stage Provider

In addition, factors contributed to the accident that did not directly involve the conduct of Metron. The agreed facts indicate a significant cause of the swing stage collapse was the design, including that the welding completed by or for the swing stage manufacturer was defective. Had the design, including the welds, not been defective, it was agreed that the swing stage would likely not have collapsed.

The agreed facts also detail that the involved swing stage was assembled by Metron workers under the supervision of the Site Supervisor and/or Project Manager and consisted of components that did not have markings or identifiers regarding the stage's maximum capacity as required by industry standard and the OHSA. As well, post-accident examination of the swing stage revealed that the welds were cracked and broken prior to the collapse and the pin or bolt holes that connected the swing stage's modules were stressed, worn and elongated. The agreed facts do not indicate whether these conditions were something that ought to have been detected by Metron or were otherwise evidence of a marked departure from the standards expected.

d) Conduct of Site Supervisor Displaces Positive Steps by Corporation

The conduct of the Site Supervisor that displaced the positive steps that were taken by Metron, and was agreed as sufficient to render Metron criminally negligent, included:

1. **Directing or permitting six workers to work on the swing stage when he knew, or should have known, that it was unsafe to do so.** The accident occurred close to the end of the working day and the men had boarded the swing stage to travel to the ground to prepare to close and leave the project. The swing stage that was in use would have been rated to carry 1,000 pounds. The weight of the six workers and the construction equipment that was with them would have exceeded the rated capacity of the swing stage.[6]
2. **Directing or permitting six workers to board the swing stage knowing that only two lifelines were available.** The usual practice was to only have two workers on the swing stage at a time. The workers on the swing stage, given the height at which they were working, were required by the OHSA and industry standard to be protected by a fall arrest system. As part of a fall arrest system, each worker is to have their own lifeline. At the time of the accident, there were only two lifelines available for the six workers on the swing stage.
3. **Permitting workers under the influence of drugs to work on the project.** The agreed facts reveal that post-mortem toxicological analysis determined that three of the four deceased, including the Site Supervisor, had marijuana in their system. The level at which it was detected was consistent with recent ingestion. The agreed facts do not indicate anything about possible impairment or potential marijuana use by the Project Manager or the two workers who survived the accident.

A review of the agreed facts suggests that these factors were considered cumulatively to establish that Metron had failed to take reasonable steps to prevent bodily harm and death and, in so doing, had demonstrated wanton and reckless disregard for the lives or safety of others. We do not know if any of these actions, taken alone, would be sufficient to establish criminal negligence. Criminal negligence is not established by the mere breach of a health and safety requirement or industry standard. There must be wanton or reckless disregard for lives or safety before the departure from a legislated or industry standard becomes criminal.

The Sentences and Their Significance

a) Metron's President

The $90,000 fine imposed on Metron's president is the highest monetary penalty ever imposed against an individual convicted of an offence under the OHSA. Previously, the highest monetary penalty imposed on an individual had been a fine of $70,000.[7]

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6 The agreed facts indicate that, if the swing stage had been properly designed by the manufacturer, it would have had a safety factor of 4:1 meaning that it should be able to hold 4,000 pounds. The weight of the six men and equipment would have been well below this limit.

7 *R. v. Bosiljcic* (unreported, January 28, 1993, Ont. Ct. (Prov. Div.), Milton, Sclisizzi J.P.). In addition to the fine the individual was also sentenced to six months in jail. The convictions followed a trial that the defendant did not attend and the court found that there was blatant disregard for the provisions of the OHSA.

The fine imposed also exceeds that levied against the first defendant charged following the enactment of Bill C-45. In 2005, the owner of a small contracting firm, who was charged with one count of criminal negligence causing death after a worker was killed by the collapse of an excavation, pleaded guilty to three charges under the OHSA and was fined $50,000. As a result of the pleas to the OHSA charges, the Crown withdrew the *Criminal Code* charge.[8]

b) Metron

The sentence of $200,000 imposed on Metron is the highest ever imposed for a criminal negligence conviction involving workplace health and safety in Canadian history. Prior to this decision there had only been one prior sentence imposed on a corporation since the passage of Bill C-45. That was a $100,000 fine imposed in 2008 on Transpavé Inc. The St-Eustache, Quebec based company pleaded guilty to one charge of criminal negligence causing death after a worker was crushed in a machine. However, in Transpavé the fine imposed was jointly recommended by the Crown and defendant. A joint submission was not presented in Metron and, in argument, the Crown had asked the court to impose a penalty of $1,000,000 – ten times more than was imposed on Transpavé – while Metron argued that the court should impose a fine of $100,000.

The court did not utilize the option available to it under the *Criminal Code* to place a corporation on probation and impose conditions. Amongst other powers, when imposing probation the court has the power to require a corporation to:

- make restitution to a person for any loss or damage that they suffered as a result of the offence; and/or
- provide information to the public, in the manner directed by the court, setting out the offence committed, the sentence imposed and any measures the corporation is taking to reduce the chance of a subsequent offence; and/or
- comply with any other reasonable conditions to prevent the commission of subsequent offences or to remedy the harm caused by the offence.

Probation was not addressed during the sentencing submissions of the Crown or defence which made it less likely to be imposed. Candidly, all of the circumstances of the case – which includes its notoriety and pending civil claims filed against Metron – may have minimized the utility of a probation order.

Beyond its quantum, the sentence is interesting because the court sentenced Metron for the death of the Site Supervisor and the others killed in the accident. This is interesting because the Site Supervisor and Metron were treated as one for the purpose of finding Metron guilty of criminal negligence: the Site Supervisor's conduct was the conduct of Metron. However, for sentencing purposes, the Site Supervisor was considered a victim of Metron's criminal negligence. As such, the decision in Metron suggests that not only can the senior officer impute criminal liability to an organization, if that senior officer is injured or killed as a result of their conduct, the organization will be sentenced for that death or injury the same as for any other victim. Consequently, organizations should take note that they may be sentenced for all harm resulting from a criminal negligence conviction notwithstanding that the perpetrator of the criminal negligence is among the victims.

c) Sentencing Principles Under the *Criminal Code* - Corporations

The *Criminal Code* sets no minimum or maximum penalty when a corporation is convicted of criminal negligence causing death, meaning there is no limit on the amount of the fine that may be imposed on a corporate defendant. That said, the *Criminal Code* does require that the sentence imposed be proportional to the gravity of the offence and the culpability or blameworthiness of the defendant. As well, a sentence is to adhere to the principle of parity such that similar sentences are imposed on defendants convicted of similar offences in similar circumstances.

In order to guide a court in sentencing corporate defendants, the amendments to the *Criminal Code* made by Bill C-45 also augmented the sentencing factors to be considered by a court. In addition to the principles noted above, the *Criminal Code* requires a court to consider factors that are specific to corporate defendants including:

- any advantage realized by the organization as a result of the offence;
- the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- 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;
- the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- the cost to public authorities of the investigation and prosecution of the offence;

8 *R. v. Fantini*, [2005] O.J. No. 2361 (QL)(C.J.).

- any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- 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; and
- any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

In this way, the *Criminal Code* has a flexible set of sentencing criteria designed to guide a court without suggesting or prescribing the amount or nature of the penalty to be imposed.

In Metron, the court applied these factors as follows:

- **Advantage:** Although Metron had been offered a $50,000 bonus for the completion of work by December 29th, there was no evidence that the bonus was related to the incident and therefore, there was no advantage realized by Metron as a result of the offence.
- **Planning and Complexity:** The court found no evidence of planning or complexity. It accepted that the accident resulted from a momentary lapse of judgment because there was no evidence that the swing stage had previously been used by more than two workers, that workers had previously not used safety lines, or that workers had used intoxicants before using the swing stage. However, the court noted that Metron had contravened health and safety regulations for almost two months because the company operated the swing stage without a manual, instructions or other production information, and despite the fact that the swing stage did not have any marking, serial number or labels about maximum capacity. The court found this to be an aggravating factor to be considered in sentencing.
- **Conversion/Concealment of Assets:** The court heard evidence and argument from the Crown that Metron was attempting to resurrect its business through a related corporation of which Metron's president was the president and sole director, but concluded the evidence fell short of establishing that Metron was attempting to conceal or convert its assets.
- **Cost to Public Authorities:** Metron's guilty plea had significantly reduced the cost of prosecuting the offence.
- **Regulatory Penalties:** The court considered that Metron's president had been sentenced to a $90,000 fine under the OHSA.
- **Prior Offences or Sanctions:** Neither Metron nor its representatives had any prior convictions or sanctions for similar conduct.
- **Company Penalties:** Metron did not impose a penalty on any representative for the offence.
- **Economic Viability:** This was one of the most important factors in the sentencing. The court heard evidence that a significant fine could drive the company into insolvency. In particular, the court heard that the company operated at a loss in 2010 and 2011, had substantial but unspecified amounts of debt, was owed substantial unpaid and potentially uncollectable accounts receivable, and was involved in litigation that could have financial consequences. The court noted that the economic viability of Metron was impossible to accurately predict, but concluded that imposing the $1,000,000 fine requested by the Crown would likely result in bankruptcy and would violate the *Criminal Code* requirement to consider the defendant's ability to pay. The court noted, however, that the company had a long history of success and may yet survive its precarious financial circumstances and took particular note of the fact that the company could apply for an extension of time to pay the fine if the company was unable to pay the fine within the time required.

It was after considering all of these factors that the court determined that a fine of $200,000 was appropriate. The court noted that the $342,500 in fines and surcharges payable by Metron and its president, which amounted to three times Metron's net earnings in its last profitable year (the year before the accident), would send a clear message to all businesses of the overwhelming importance of ensuring worker safety.

d) Comparison to Sentencing for Corporate Manslaughter in the United Kingdom

Sentencing corporations under the *Criminal Code* can be contrasted with the approach to sentencing for violations of the *Corporate Manslaughter and Corporate Homicide Act 2007*[9] ("*Corporate Manslaughter Act*") in the United Kingdom. After that Act was passed, a sentencing guideline[10] was created, which set out the factors to be considered by a court when sentencing a corporation in circumstances where one or more persons have been killed as a result of an offence. While many of the factors set out in the guideline are consistent with the factors the *Criminal Code* requires a court to consider, the guideline contains more prescriptive commentary. In fact, with reference to sentencing a corporation convicted of corporate manslaughter, the guideline

9 2007 Chapter 19. The act created a new offence – known as corporate homicide in Scotland and corporate manslaughter in England, Wales and Northern Ireland – that is committed if the way in which an organization's activities are managed or organized causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organization to the deceased.

10 *Corporate Manslaughter & Health and Safety Offences Causing Death, Definitive Guideline*, Sentencing Guidelines Council, February 2010. http://sentencingcouncil.judiciary.gov.uk/docs/web__guideline_on_corporate_manslaughter_accessible.pdf

indicates that, because of the nature of the offence the, "appropriate fine will seldom be less than £500,000 and may be measured in millions of pounds".[11]

It also appears that courts in the United Kingdom will not place as much weight on the corporation's ability to pay a penalty as the courts in Canada will. Since the *Corporate Manslaughter Act* was enacted, there has been one sentence imposed on a corporation. In 2011, Cotswold Geotechnical Holdings was sentenced to pay a fine of £385,000 after it was convicted of corporate manslaughter. One of its employees was killed after an unsupported pit collapsed. When imposing the penalty, the sentencing judge commented that the payment of the penalty (which the judge suggested could be paid over ten years) may well put Cotswold into liquidation. However, the court's view was that was an unfortunate and unavoidable consequence of a serious breach.[12] The penalty was upheld on appeal.[13]

Criminal Negligence for Workplace Safety: A Reminder

a) The Genesis of Bill C-45 Amendments to the Criminal Code

Metron is the first corporate criminal negligence conviction in Ontario, the second in Canada, since Bill C-45 amended the *Criminal Code* on March 31, 2004. The genesis of Bill C-45 was the 1992 Westray mine explosion in Nova Scotia in which twenty-six miners were killed. No criminal or regulatory convictions were obtained against Westray or its management notwithstanding evidence that Westray management intentionally subverted health and safety prior to the explosion. Indeed, the Public Inquiry that was struck by the Nova Scotia government following the accident concluded:

> Westray managers not only failed to promote and nurture any kind of a safe work ethic but actually discouraged any meaningful dialogue on safety issues. Management did so through an aggressive and authoritarian attitude towards the employees, as well as by the use of offensive and abusive language. Westray workers quickly came to realize that their safety concerns fell on deaf ears and that management's open-door policy was mere window dressing.[14]

In addressing the absence of criminal liability for the accident, the Public Inquiry recommended legislative amendments designed to ensure that corporate executives and directors could be legally accountable for workplace safety. However, the Public Inquiry did not recommend a specific legislative change:

> The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety.[15]

b) The Bill C-45 Amendments in 2004

A few years after the report and recommendations were released, the Federal government passed Bill C-45 which significantly changed the manner in which corporate criminal negligence could be proven. Most significantly, Bill C-45 amended the *Criminal Code* to broaden or expand the Crown's ability to prove criminal negligence. Prior to the Bill C-45 amendments, in order to convict a corporation of criminal negligence, the Crown would have to prove that the "directing mind" of the corporation showed wanton and reckless disregard for the lives or safety of other persons.[16] This concept, known as the "Identification Theory", made prosecuting charges of criminal negligence against a corporation a difficult task because it was challenging to prove that the conduct of the person or people constituting the directing mind of the corporation rose to the level necessary for criminal liability.

Bill C-45 expanded the means to establish corporate liability because it jettisoned the Identification Theory and made it possible for the Crown to prove the wanton and reckless disregard for lives or safety of others through the conduct of a corporate representative[17] - either singularly or cumulatively with another representative. In addition, the Crown is required to establish that a senior officer has failed to act. The term "senior officer", which is set out above, is broadly defined in the *Criminal Code* to include people with varying degrees of managerial authority or responsibility. Metron demonstrates how Bill C-45 has broadened the means by which criminal negligence

11 *Ibid*. at p. 7.

12 BBC News, "*Gloucestershire firm fined £385,000 over trench death*" (17 February 2011), online: http://www.bbc.co.uk/news/uk-england-gloucestershire-12491199

13 BBC News, "*Cotswold Geotechnical Holdings loses death appeal*" (11 May 2011), online: http://www.bbc.co.uk/news/uk-england-gloucestershire-13367855

14 *The Westray Story: A Predictable Path to Disaster*, Report of the Westray Mine Public Inquiry, Justice K. Peter Richard, Commissioner, November 1997. http://www.gov.ns.ca/lae/pubs/westray/findings.asp

15 *Ibid*. http://www.gov.ns.ca/lae/pubs/westray/recommnd.asp

16 The Supreme Court of Canada has held that in determining whether an individual is the "directing mind" of a corporation consideration must be given to whether the discretion conferred on that person amounts to a delegation of executive authority to create and implement corporate policy rather than to carry out such policy at an operational level. *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, 2003 CanLII 163 at p. 28.

17 "Representative" is defined in the *Criminal Code* to include a director, partner, employee, member, agent of contractor of an organization.

can be proven against a corporation because the actions of a mid-level manager[18] and the Site Supervisor, attracted criminal liability for the organization.

Application of the Criminal Law to Date: A Restrained Approach

Notwithstanding the broadening of means to prove criminal negligence against a corporation, it was not intended that the *Criminal Code* would become the primary means of enforcing workplace health and safety standards in Canada. This is evident from statements made by the federal government prior to the enactment of Bill C-45 and anecdotally from how the criminal law has been used in matters of workplace safety since 2004.

In February 2002, after the Westray disaster and public inquiry, the Federal government referred the issue of extending the bases upon which criminal liability for corporations and senior officials could be found to the Standing Committee on Justice and Human Rights. The Committee tabled a report that recommended that the federal government, "table in the House legislation to deal with the criminal liability of corporations, directors, and officers".[19] This is a more specific recommendation than came out of the Westray Public Inquiry. In responding to the report, the government agreed that the *Criminal Code* needed to be amended. However, the government indicated there should be restraint in the application of the criminal law. The intentions of the government were quite clearly articulated in its response to the Committee as it wrote:

> The criminal law must be reserved for the most serious offences, those that involve grave moral fault. [...]
>
> It is the view of the Government that the first line of defence against death and injury in the workplace is workplace safety and health regulation. [...]
>
> The Government does not intend to use the federal criminal law power to supplant or interfere with the provincial regulatory role in workplace health and safety. At the same time, the Government believes that the criminal law can 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.[20]

Anecdotal evidence available from our experience to date is that the *Criminal Code* has not displaced regulatory legislation as the primary means to enforce workplace health and safety standards. First, even following serious workplace accidents, police may attend, secure the scene of the accident and take some initial investigatory steps – usually consisting of photographs of the accident scene and interviews of witnesses to the accident – to rule out an intentional criminal act. Once the police are satisfied that no intentional criminal act was involved, their investigation usually ends and the matter is investigated by the workplace safety regulator.

Second, since Bill C-45 became law, there has not been a flood of criminal negligence prosecutions arising from workplace accidents. Since 2004 there have been approximately eight cases, including Metron, where workplace accidents have resulted in criminal negligence charges. A corporation has been the defendant in four of those cases. This statistic itself suggests a restrained approach to instituting criminal charges.

This model of restraint also appears to have been applied by the Crown Attorneys that have overseen the prosecution of cases, prior to Metron, in which criminal negligence charges were laid following a workplace accident. Crown Attorneys are required to screen criminal charges to determine the appropriateness of pursuing them. There are two principal bases upon which a charge is screened. First, the evidence is assessed to determine whether a reasonable prospect of conviction exists. If, on the totality of the evidence, there is no reasonable prospect of conviction then the Crown should not pursue the charge. Second, after considering the reasonable prospect of a conviction, the Crown considers whether there is a public interest in pursuing a criminal charge. In considering the public interest, the Crown may discontinue a matter on compassionate grounds or where an alternative enforcement regime or mechanism adequately addresses it. In considering the latter, Crown Attorneys will screen criminal negligence charges arising from a workplace accident by considering the circumstances giving rise to the charge, the potential regulatory sanctions, and the need for the use of the criminal law. If the Crown determines that the matter is adequately addressed through regulatory legislation, it may withdraw a criminal charge on the basis that pursuing a conviction is not in the public interest.

18 *R. v. Metron Construction Corporation* (unreported, July 13, 2012, Ont. C.J., Toronto, Bigelow J.) at para. 15.

19 House of Commons Standing Committee on Justice and Human Rights, Fifteenth Report, 1st Session, 37th Parliament, http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c45&Parl=37&Ses=2

20 Government of Canada (Department of Justice), *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights, Corporate Liability* (Ottawa, 2002), online: Department of Justice Canada http://www.justice.gc.ca/eng/dept-min/pub/jhr-jdp/bkgr-cont.html#a2

The Response of Organized Labour: More Criminal Prosecutions Demanded

The restrained approach of police and Crown prosecutors stands in stark contrast to the calls from organized labour for more liberal use of the criminal negligence provisions against corporations and management. Organized labour's activism on this issue is not new. They were involved in lobbying the federal government for changes to the *Criminal Code* following Westray and have been campaigning for broader use of the criminal negligence provisions for some time under the moniker "Kill a Worker, Go to Jail".

Organized labour has repeatedly pressed for criminal prosecutions following serious workplace accidents. Notably, in 2006, the Quebec Federation of Labour demanded that criminal charges be laid in the Transpavé matter referred to above. Similarly, organized labour welcomed the criminal charges laid against Metron and three corporate officials when they were laid in October 2010.

Organized labour has not limited itself to clamouring for increased criminal negligence charges. In March 2010, dissatisfied with the enforcement response after a worker was killed in a British Columbia saw mill in 2004 (an administrative penalty of $297,000 was imposed by WorkSafeBC), the United Steelworkers of America laid a private charge (information) against Weyerhauser Company Limited alleging criminally negligence. The Crown in British Columbia had previously concluded that criminal charges should not be laid. In 2006 and 2008, the Crown considered whether there was sufficient evidence upon which to pursue criminal negligence charges against Weyerhauser. Each review determined that the evidence was not sufficient. After the information was sworn, the available evidence was assessed again by the Crown. The assessment determined that the evidence remained insufficient and, "did not provide a substantial likelihood of conviction against the company [...]".[21] After the private charge proceeded, as permitted by law, the Crown assumed carriage of the prosecution and directed a stay of proceedings because of its belief that there was insufficient evidence with which to obtain a conviction.

More recently, at the beginning of May 2012, the Canadian Labour Congress released a guide entitled "*Death and Injury at Work, A guide to investigating corporate criminal negligence in the event of a serious injury or fatality in a workplace*".[22] The guide, prepared to mark the twentieth anniversary of the Westray accident, is aimed at police officers. Through a series of questions and answers, the guide comments on issues such as the Bill C-45 amendments to the *Criminal Code*, the role of the police, investigatory steps to be taken, and the relationship between health and safety inspectors and police.

Each of these initiatives – lobbying, writing and laying charges – demonstrate the broad and varied approach by the labour movement to press for increased criminal negligence charges against corporations and, presumably, management, where a serious injury or fatality has occurred at a workplace. With the exception of the Weyerhauser matter, it is not clear if the actions of organized labour have actually precipitated a criminal negligence charge. It does appear that organized labour's message has resonated with one government. In May 2012, Manitoba's Justice and Labour ministers told the Manitoba Federation of Labour that a new director of investigations had been hired whose functions included reviewing policies to ensure that criminal negligence is addressed during investigations. The Minister of Labour also indicated that she would be raising the issue of criminal negligence and workplace safety at the federal-provincial labour ministers meeting in September.[23] It is unlikely that a discussion amongst labour ministers could affect the application of the criminal law because labour ministers do not have authority over the police or Crown prosecutors. However, such discussions may provide impetus for change – particularly if other jurisdictions follow Manitoba's lead by having someone specifically tasked with ensuring that criminal negligence is addressed during investigations of workplace accidents. Should it be considered at any such meeting, Metron may be seen as an example of how the Bill C-45 amendments are working as designed because the amended criminal negligence provisions facilitated a conviction against a corporation.

Clearly the labour movement sees increased criminal enforcement against corporations and senior officials as a mechanism to enhance workplace safety. Indeed, the aforementioned guide comments only on the investigation of *corporate* criminal negligence. It does not comment on the investigation of criminal negligence generally or against *individuals*. It also does not say that police ought not to pursue criminal negligence investigations against parties other than corporations. Though Bill C-45 made it easier to convict corporations of criminal negligence, it added to existing laws which, for decades, have made it a crime for any individual to show wanton and reckless disregard for the lives or safety of others. Workers have been charged criminally and under OHS laws in the past. They too have legal duties to work safely in a manner that does not endanger others. Any investigation of criminal negligence is expected to be

21 Government of British Columbia (Criminal Justice Branch, Ministry of Attorney General), Media Statement, (August 2011), online: http://www.ag.gov.bc.ca/prosecution-service/media-statements/pdf/11-16_WeyerhaeuserCo-PrivatePros-Stay-24Aug2011.pdf

22 Canadian Labour Congress, "*A Criminal Code Offence Death & Injury at Work*" (2012), online: http://www.canadianlabour.ca/sites/default/files/death-and-injury-at-work-en.pdf

23 M. Rabson, "Province starts to enforce law on criminal liability in job accidents" *The Winnipeg Free Press*, (15 May 2012), online: http://www.winnipegfreepress.com/local/province-starts-to-enforce-law-on-criminal-liability-in-job-accidents-151493085.html

balanced and consider the culpability of all involved in a workplace accident. In lobbying for more criminal negligence investigations and prosecutions, trade unions must be mindful that this could have consequences for workers as well. As the circumstances in Metron show, there are often many factors involved in a serious workplace accident.

Conclusion

Metron was involved in one of the worst workplace accidents in Canadian history and is the second corporate criminal negligence conviction arising from a workplace accident since Bill C-45. The sentences are the highest monetary penalties ever meted out under the OHSA and *Criminal Code* for a workplace accident. These facts alone would make the case notable. Yet, Metron also demonstrates how the means to prove criminal negligence against a corporation has been expanded and that the positive measures taken by a corporation can be quickly displaced by the conduct of a local manager or supervisor. Additionally, Metron has provided impetus for policy and legislative changes which are still unfolding. Ultimately, though the entire impact of the Metron case cannot be known today, what is clear is that no case in recent memory has so directly impacted the law and policy of workplace safety.

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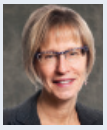

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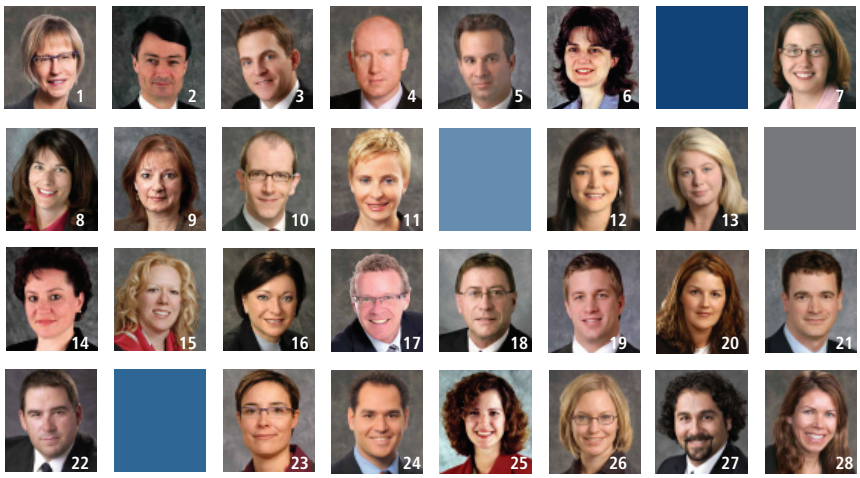

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