It's commonplace to say that “careful planning” is an obvious and vital element of any construction project, but it’s only the first foreseeable step in prevention. As all involved in 21st-century construction are (or should be) aware, occupational health and safety (OHS) is an ever-hungry, ever-present colleague. It needs constant attention and is on the project with the first set of boots to the last.

Like any other kind of law, OHS law is an evolving creature. As more “opportunities” arise for lawyers and judges to tease apart and wrestle with what legislatures intended in their drafting of OHS statutes, hopefully our understanding of how those statues actually affect construction people and projects become clearer.

Two recent high-level cases have considered the issues of risk and the standard of how they should be addressed. Following these newest additions to the ever-developing case law, employers should pay particular attention to those they insert into supervisory roles, and should always endeavour to pinpoint workplace hazards and then strive to eliminate them.

**ALBERTA v. XI TECHNOLOGIES INC., 2013 ABCA 282**

This case garnered a considerable amount of attention mostly for its tragic aspects, the death of a young man in, frankly, bizarre circumstances. However, for OHS lawyers and employers, it was the promise that Alberta’s highest court, the Court of Appeal, would take advantage of this case to understand how risks should actually be addressed. That promise emanated from the decision granting permission (“leave”) for the Court to hear the appeal.

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**WHAT’S THE RISK OF NOT FORESEEING SAFETY?**

In today’s industry, one must endeavour to pinpoint workplace hazards and then strive to eliminate them.

By Steve T. Eichler, Partner and Adam S. Oppenheim, Student-at-Law, Field LLP
In that decision (2012 ABCA 368), Mr. Justice Clifton O’Brien stated, “The extent to which an employer may rely upon operating procedures to mitigate identified risk is a matter of general public importance. While each case is fact-specific, to a degree, this appeal may assist in determining where the balance lies, and where the line may be drawn in relation to the risk versus hazard analysis.”[17]

Did it? No.

But first, here’s what happened. In appreciation of its customers, XI Technologies held its annual Stampede celebration on July 12, 2007. In line with the Western-themed festivities, the employer had its event planner procure a calf-roping machine. Nathan Shair, an XI employee, tragically lost his life while operating the machine.

The machine had been delivered absent an operator’s manual. After receiving only verbal instructions from the delivery man, XI’s employees were left to determine just how the machine was meant to work. None of them had any experience with a calf-roping machine, but it initially appeared straightforward. A party-goer would sit atop the horse and attempt to lasso the mechanical calf thrust forward by a large spring. The calf itself had to be hooked into the machine’s underbelly. However, after a test or two, it was established that the hook did not release as it should. The employees devised a scheme; one would reach into the back of the machine to manually release the hook. This, unfortunately, placed the employee in the vicinity of a large pull-lever. In the event a party-goer prematurely triggered the bounding calf, the lever would vault forward with marked force.

On this occasion, when Shair reached into the machine to unlatch the hook, the rider prematurely triggered the calf, causing the lever to propel forward striking him in the head “with significant force and velocity”, resulting in Shair’s death.

Although acquitted at trial, XI was convicted on appeal in the Court of Queen’s Bench. On appeal to Alberta’s Court of Appeal, that court held that XI had not been duly diligent. The company was cognizant that the machine was not functioning properly, and that a manual removal of the

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The Court noted that the test to be applied is not if the exact injury is foreseeable, but if a reasonable person would foresee potential danger.

hook was never the designer’s intention. Further, the employees were mindful that a premature calf release was possible, and in fact had witnessed it a number of times. There were also visible marks indicating that the lever moved with substantial force, rendering the hook’s manual release a hazardous proposition.

The Court noted that the test to be applied is not if the exact injury is foreseeable, but if a reasonable person would foresee potential danger. The Court pronounced that XI’s willingness to operate a machine with which it had no experience, and without a proper set of instructions, was an indicator of the company’s lack of due diligence. Subsequently, XI did not execute “all that was reasonably practicable in the circumstances to avoid the reasonably foreseeable risks.”

So what can employers make of this new decision from Alberta’s highest court? Do they know more about “where the line may be drawn in relation to the risk versus hazard analysis?” In our view, the answer is no. While the promise of clarity on the issue was tantalizing, the resulting decision left the public with the same murky pond when it comes to analysis of risk, a consideration of whether the reasonable person would foresee potential danger.

**R. v. METRON CONSTRUCTION CORPORATION, 2013 ONCA 541**

In another highest-provincial court and well-publicized tragedy, employers have an opportunity to learn about the workplace safety standard from the point of view of the Criminal Code. As all employers should be aware, what is erroneously still called “Bill C-45”, a bill to adopt workplace safety into the Criminal Code, essentially as a version of criminal negligence, has not been a mere bill for some time and is fully entranced as a crime.

In this tragic case, six employees of Metron Construction Corporation (“Metron”) were renovating a high-rise exterior using a swing stage. Upon the swing stage’s collapse, a site supervisor and three workers fell to their deaths. Those who were wearing safety equipment survived. One such employee suffered no wounds at all, while the other, whose safety equipment had not been properly affixed, endured substantial injury. To make ugly matters uglier, this all happened on Christmas Eve.

Metron had leased the swing stage to satisfy a restoration agreement. The swing stage was delivered absent assembly manuals or design drawings. Regardless, this stage was built and installed under the supervision of the project manager.

Following the collapse, a forensic examination revealed that the foremost causes of the accident were the swing stage’s
defective design, and its inability to hold the weight of six men. Moreover, three of the four deceased, including the project manager, had marijuana in their systems. Pursuant to s.22.1(b), 217.1 and 219 of the Criminal Code, Metron pled guilty to criminal negligence causing death.

Since the passing of Bill C-45, there has really been only one corporate conviction - Transpave Inc. That case was perhaps a poor precedent as the Quebec Court took into account the $650,000 in safety-related renovations the company made to its factory when it meted out a fine of $100,000. Perhaps following that decision, the sentencing court fined Metron $200,000. However, noting that a higher level of culpability is inherent in criminal offences, the Crown appealed the sentence and sought a fine of $1,000,000. In the Crown’s submission, the accident was 100 per cent preventable; had the project manager ensured all workers were wearing the proper safety equipment, they would have survived the collapse.

The Ontario Court of Appeal heard the appeal and noted criminal negligence causing death is one of the most serious offences in the Criminal Code: for an offending corporation, the quantum of the fine is unlimited. Writing for the unanimous Court, Justice Pepall noted that corporate criminal liability for criminal negligence “is intended to provide additional deterrence for morally blameworthy conduct that amounts to wanton and reckless disregard for the lives or safety of others.” The court observed that by pleading guilty, Metron had acknowledged the actions of its representative, the project manager, “demonstrated a marked and substantial departure from the standard that could be expected of a reasonably prudent person.” The consequence of that departure was the death of four individuals, and the significant injury to one other. The Court further held that the imposed sentence must be in proportion to the “gravity of the offence and the degree of responsibility of the offender” and imposed a $750,000 fine on Metron.

What does this mean for employers? We would suggest the Metron case is the true herald for the arrival of workplace accident law in the Canada’s criminal law. While provincial OHS law obviously has real teeth, the full force of a criminal conviction - criminal record, huge fines - is not fully in play in Canada. Given the inherent dangers of a construction site, this has particular meaning and relevance for construction companies.