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The Biggest OHS Law Story of 2008, Bar None…

by by Steve T. Eichler and Christen Elawny

Far too often in our hectic modern world, life lessons fail to take root where perhaps they should. Perhaps surprisingly, even tragedies – be they on a small scale or a large scale – eventually seem to fade over time. Fortunately, there are occasions when we as a society can learn from past events and make necessary alternations. One successful example of this exists in Occupational Health and Safety Law in Canada. On May 5, 1992, twenty-six miners were killed when a methane gas explosion occurred at the Westray Mine in Plymouth, Nova Scotia. The incident has since become known as the "Westray Mining Disaster." As a result of the disaster, a number of non-criminal charges were laid against the company. Additionally, criminal charges of manslaughter were laid against two of the mine managers. These charges were ultimately dropped by the Crown as a result of a lack of evidence.

The outrage following this disaster and the resultant lack of any criminal charges being laid, resulted in the passing by the Canadian Government of Bill C-45 amendments to the Criminal Code, which took effect in March 2004. These amendments permit charges of criminal negligence to be laid against organizations (such as corporations) and their representatives (including directors and managers) for breaches of Occupational Health & Safety responsibilities which amount to wanton or reckless disregard of the duty to take reasonable steps to ensure the safety of workers and the public.

Since the enactment of the amendments to the Criminal Code, there have only been two instances where charges have been laid. In one decision, Dominic Fantini, 68, had been supervising two workers who were repairing the foundation of a house when the trench they were working in collapsed; one worker died. Fantini had left the worksite moments before the accident. Mr. Fantini pleaded guilty to three offences under Ontario's Occupational Health & Safety Legislation, whereupon the Crown dropped the Criminal Code charge.

The more recent decision in the Transpavé case has resulted, for the first time in Canadian legal history, in a company being found guilty of criminal negligence causing the death of a worker pursuant to the Bill C-45 amendments to the Criminal Code. Transpavé was a manufacturer of concrete blocks northwest of Montreal. On October 11, 2005 Mr. Steve L'Ecuyer, a 23 year old employee, was crushed to death by a concrete press used to arrange the stones on pallets. Mr. L'Ecuyer had just relieved a co-worker who was going on break and was trying to manually free stones that were blocking the machine, when it descended and crushed him.

Quebec Workplace Health and Safety (Commission de la sante et de securite du travail - CSST) found that a safety barrier meant to prevent the machine from operating when someone was underneath it had been disabled. Workers said it had been disconnected some two years earlier because it was causing production slowdowns. There was also evidence that Mr. L'Ecuyer did not have the training to appreciate the dangers of his situation. Most importantly, perhaps, there was evidence that members of management were aware of the dangerous situation but did nothing to correct it. Despite this, however, the police investigation into the accident turned up "no evidence beyond a reasonable doubt" that would lead to an individual being charged.

Accepting a sentence jointly suggested by Crown and Defence Counsel, Quebec Court Judge Chevalier meted out a fine of $100,000 and also ordered a $10,000 compensatory fine for court costs. In accepting the joint submission, Judge Chevalier noted not only the company's guilty plea (which was demonstrative of its remorse and spared the victim's family and co-workers from having to testify at trial), but also noted the efforts taken by Transpavé to address safety concerns at its two factories. The court had heard at the sentencing hearing in February 2008 that the company had spent in excess of $750,000 to this end. The company has also followed every recommendation made by the provincial workplace health and safety board after its investigation of the death. Although the Crown Prosecutor had asked that Judge Chevalier place the company on probation, so as to allow monitoring of the company's newly elevated health and safety standards, it does not appear that this was ordered by the Court.

Although the Transpavé sentence reflects the same elements as an Alberta Court would consider for a fatality under Alberta's Occupational Health and Safety Act – including post-accident conduct, size of the organization, existence of past convictions – recent Alberta OHS decisions involving fatalities have resulted

in fines in the neighbourhood of $350,000. Of course, those decisions involved provincial OHS legislation, not the Criminal Code, thus not resulting in a criminal record, as Transpavé will now have.

With the Transpave sentencing, it would appear that in the right circumstances, Crown Prosecutors will lay Criminal Code charges for breaches of workplace safety obligations. This case should serve as a reminder to management of organizations – including companies, corporations and even associations and societies – of the need to be involved in OHS efforts, to ensure that the duty to take reasonable steps to ensure the safety of workers and the public is not being wantonly or recklessly disregarded. As the Transpavé case shows, Bill C-45 has successfully established a new legal duty on the part of those responsible for directing the work of others and requiring them to take reasonable steps to prevent bodily harm arising from such work. That duty extends to organizations – meaning companies, societies, trade unions, partnerships, etc. – which can be found guilty of its breach by the actions of their representatives, including directors, partners, employees, members, or even agents or contractors.

In addition to the threat of charges under the Occupational Health and Safety Act, therefore, the threat of criminal charges and a criminal record for the organization arising out of Bill C-45 establish a new positive duty on individuals and organizations to take "reasonable steps to prevent bodily harm" to workers, the public, and others involved in workplace activity. The good news is that the traditional steps taken to protect oneself from OHS-related charges – whether they be under Alberta's Occupational Health and Safety Act or the Criminal Code – are still the best: establish good, safe work practices and procedures which can be monitored, demonstrated and taught so as to illustrate due diligence.

Organizations must also keep in mind that the protection of health and safety in the workplace requires competent supervision and effective management of the organization's processes and procedures. Accordingly, an organization must ensure that training and instruction regarding occupational health and safety are provided to managers and supervisors, as well as to the front-line employees.

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