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CORPORATE CRIMINAL LIABILITY BASED SOLELY ON SUPERVISORY ACTION?

A recent case establishes when a corporation will be held criminally responsible for violations of the *Occupational Health and Safety Act* ("OHSA") and the *Criminal Code* for work place safety violations.

Charges were laid against Metron Construction Corporation ("Metron") under both the Ontario *Occupational Health and Safety Act* ("OHSA") and the *Criminal Code.* Metron pled guilty to a single charge of criminal negligence causing death. On July 13, 2012, Metron was sentenced to a $200,000 fine plus a 15 percent surcharge. The fine represents the largest monetary penalty ever imposed on an organization in Canada for criminal negligence arising from a workplace accident.

The Metron conviction suggests that organizations, with otherwise positive and pro-active safety records, may be at risk of *Criminal Code* prosecutions following workplace accidents based solely on the conduct of a single individual or "representative" of the "organization".

By way of background, the current corporate criminal negligence provisions in the *Criminal Code* – known as the Bill C-45 amendments – came into force on March 31, 2004 and were a response to the May, 1992 deaths of 26 miners in Nova Scotia's Westray coal mine explosion. No criminal or regulatory convictions were ever obtained against Westray or its management despite evidence that Westray's management had apparently intentionally subverted health and safety before the explosion.

To prove criminal negligence, the Crown has to prove that the "directing mind" of the corporation showed wanton and reckless disregard for the lives or safety of other persons. This approach, known as the "identification theory", made prosecuting charges of criminal negligence against a corporation challenging because of the difficulty in proving that criminal conduct had been perpetrated by the "directing mind" of the corporation – a person with sufficient authority to be considered the alter ego or soul of the corporation.
Bill C-45 jettisoned the identification theory such that, in order to prove criminal negligence against an organization under the amendments, the Crown now has to establish:

1. That there has been wanton and reckless disregard for lives or the safety of others through the conduct of a corporate "representative", acting within the scope of their authority, either alone or through the combined conduct of

multiple representatives ("representative" is broadly defined to include a director, partner, employee, member, agent or contractor of an organization); and

2. That a "senior officer" of the organization departed markedly from the reasonable standard of care expected to prevent the representative from causing harm ("senior officer" includes an individual 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). "Senior officer" is also broadly defined under the *Criminal Code* and encompasses people with varying degrees of managerial authority or responsibility. Based on the wording of the definition, and as exemplified by the Metron case, a "senior officer" includes management with localized authority that would likely have been insufficient for them to be the "directing mind" under the identification theory.

The Metron case is notable because the Crown's burden of proof under the revised test for corporate criminal negligence outlined above was collapsed into the conduct of one person: the site supervisor. It was agreed by the organization in pleading guilty – and the Court implicitly accepted this by granting the conviction – that the site supervisor was both a "representative" and a "senior officer" of Metron.

He was a "senior officer" because he was responsible for managing an important aspect of the organization's activities: the construction project where the accident occurred. He also had a duty to take reasonable steps to prevent injury to the workers under his supervision.
He failed in his duty by:

(i) 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 was rated to carry 1,000 pounds. The weight of the six workers and the accompanying construction equipment exceeded that capacity;

(ii) Directing or permitting six workers to board the swing stage knowing that only two lifelines were available. The usual practice was to have only 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 standards 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; and

(iii) Permitting workers under the influence of drugs to work on the project. The post-mortem toxicological analysis determined that three of the four deceased, including the site supervisor, had marijuana in their system at levels consistent with recent ingestion.

These factors cumulatively established that Metron, through the site supervisor, failed to take reasonable steps to prevent bodily harm and death and, in so doing, demonstrated "wanton and reckless disregard" for the lives or safety of others even though there was no suggestion of wrongdoing, or knowledge of wrong-doing, by Metron's higher level management.

Indeed, the site supervisor's conduct in this case entirely displaced the numerous positive steps taken by Metron prior to the accident – steps that would otherwise be inconsistent with "wanton and reckless disregard" for the lives and safety of the workers on the project. These steps included making arrangements for safety training for the site supervisor and others on the site; requiring the owner of the building to arrange for an engineering inspection and recertification of the roof anchors before any work commenced to ensure compliance with safety requirements; and providing full cooperation to the Ministry of Labour inspector who periodically inspected the project. 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.

Metron involved a guilty plea not a court determination of the organization's liability after a full trial on the merits and its implications must be considered in this light. Further, Metron's conviction was based on facts agreed between the Crown and defence. The agreed facts may not represent the totality of the evidence that would have been considered by Metron in evaluating possible defences and, ultimately, deciding to plead guilty. It does not appear on the face of the statement of agreed facts that it was agreed or suggested that the site supervisor was not acting within the scope of his authority at the time of the events.

Nevertheless, Metron's conviction suggests that even an organization that takes meaningful, positive steps, or even one which exercises due diligence to ensure workplace safety, can ***possibly*** find itself liable for criminal negligence causing death and exposed to substantial fines based on the conduct of a single individual, provided that he or she is responsible for managing an important aspect of the organization's

activities. Once it is established that such a person has by act or omission failed to take reasonable steps to prevent bodily harm to any person, including himself or herself, it appears that the test for corporate liability could be met.

This risk of exposure should concern any organization that assigns an individual to manage important aspects of its activities, such as a site, project, store or plant manager. If a serious workplace accident occurs and there is culpable behaviour by someone in such a position, police officers and prosecutors may be emboldened by the Metron guilty plea and conviction to prosecute the corporation based on the conduct of the local manager.

It is the view of the authors that it remains arguable and indeed consistent with the intention of the Bill C-45 amendments, that the preconditions for a conviction against an organization for criminal negligence remain that the Crown must show recklessness by a representative acting within the scope of his/her authority, and show that a senior officer failed to take reasonable care to prevent this. While it may be necessary to wait for further clarity from the courts on the proper interpretation of this test, after a full trial dealing with the issue, organizations are well advised to take the necessary steps to manage risk through the establishment and implementation of a local health and safety program, and regular, vigilant and documented monitoring of the functioning of the program and of local management.

While taking these positive measures to promote workplace safety might not legally shield an organization from consideration for prosecution for criminal negligence, depending on how the *Criminal Code* is ultimately interpreted when a local manager has been found criminally negligent, such steps should nevertheless afford some protection. That is, if an organization can demonstrate that it consistently addressed health and safety in the workplace and took steps to ensure the implementation of a local health and safety program, a Crown Attorney may, as a matter of prosecutorial discretion, decline to pursue criminal negligence charges against the organization and seek to prosecute only the individual involved. Further, if the organization is prosecuted notwithstanding its positive steps, should a conviction be entered, those steps may be considered by a court as a mitigating factor at sentencing. It is clear though, that a pro-active approach including careful monitoring of site and workplace activities and preventive measures remains crucial to protect everyone's health and safety, as well as an organization's interests.

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