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Workplace Safety: Another Criminal Code Prosecution

WORKPLACE SAFETY: ANOTHER CRIMINAL CODE PROSECUTION

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For the third time, police have laid Bill C-45 *Criminal Code* charges arising from a workplace fatality. Millennium Crane Rentals of Sault Ste. Marie, Ontario, along with two individuals, have been charged with criminal negligence causing death.

In April, 2009, a City of Sault Ste. Marie employee, James Vecchio, was crushed when a crane collapsed into the excavated hole in which he was working. The City was undertaking sewer work at the city landfill when the accident occurred.

The *Criminal Code* workplace duty of care was enacted in 2004 by Bill C-45. It requires every employer who undertakes or directs work to take reasonable steps to prevent bodily harm to any employee or any other person arising from that work. The criminally negligent breach of the duty of care causing death is an indictable offence punishable by a maximum sentence of life imprisonment and/or unlimited fines. When a criminally negligent breach causes bodily harm, the maximum penalty is 10 years imprisonment and/or unlimited fines.

Thus far, the C-45 provision has been used on only two occasions. In 2004, a supervisor with a small Newmarket, Ontario, construction company was charged when a trench collapsed causing fatal injuries to a worker. However, the C-45 charge was withdrawn when the supervisor pleaded guilty to parallel provincial *Occupational Health and Safety Act* ("OHSA") charges. In 2008, a Transpavé, a Quebec paving stone manufacturer, pleaded guilty to criminal negligence causing the death of one of its employees and was fined \$100,000.

Millennium Crane is also charged with five offences contrary to the OHSA. The crane operator is charged with one OHSA count. Each charge laid under the OHSA against the company is subject to a \$500,000 fine, in addition to an automatic 25 per cent victim impact surcharge. The maximum fine for the individual is \$25,000 per charge, plus the surcharge.

In comparison to the OHSA and other provincial workplace safety statutes, C-45 criminal prosecutions require the Crown to prove fault on behalf of each accused. For criminal negligence, the fault requirement is a *marked and substantial departure from the standard of care which, in the circumstances, could reasonably be expected to prevent the commission of the offence*. In law, this is a more serious fault requirement than that for OHSA offences, wherein the fault level is negligence – a *mere departure* from the standard of care reasonably expected in the circumstances. Moreover, in OHSA prosecutions fault is a presumed element of the offence, but a presumed element rebuttable by the defendant if it can establish that it met the standard of care by taking all reasonable care to prevent the commission of the offence (the so-called reverse onus inherent in strict liability offences).

In the case of organizations or corporate defendants charged with a C-45 offence, the fault must be that of the senior officer or officers responsible for the part of the organization's activities relevant to the offence. This is also true of OHSА prosecutions, the two primary differences between them again being the more serious level of fault required for C-45 offences and the rebuttable presumption of fault for OHSА offences

What is often forgotten about the C-45 duty of care is that it applies to protect *any* person from death or bodily harm originating from a workplace mishap. In this case the fatality was a City, and not a Millennium employee. Non-workers are also protected. If a company's criminal negligence causes the spill of a dangerous chemical into the natural environment, it is still exposed to a prosecution under the C-45 provision if the spill seriously harms or causes the death of civilians or non-workers, but not employees.

This new prosecution drives home yet again the importance of corporate leaders embracing and fostering a culture of regulatory compliance within their organizations.

The Millennium charges are returnable in the Sault Ste. Marie courts shortly. We will keep you updated as the matter progresses.

Bruce McMeekin is a partner in the Markham office and represents corporations and individuals subject to investigation or prosecution for regulatory and white-collar criminal offences. If you have questions about the Criminal Code workplace duty of care please contact Bruce or any other member of the Criminal Law, Regulation and Enforcement Group.