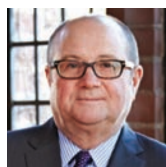
Focus ENVIRONMENTAL LAW

Quebec railway tragedy will test the law

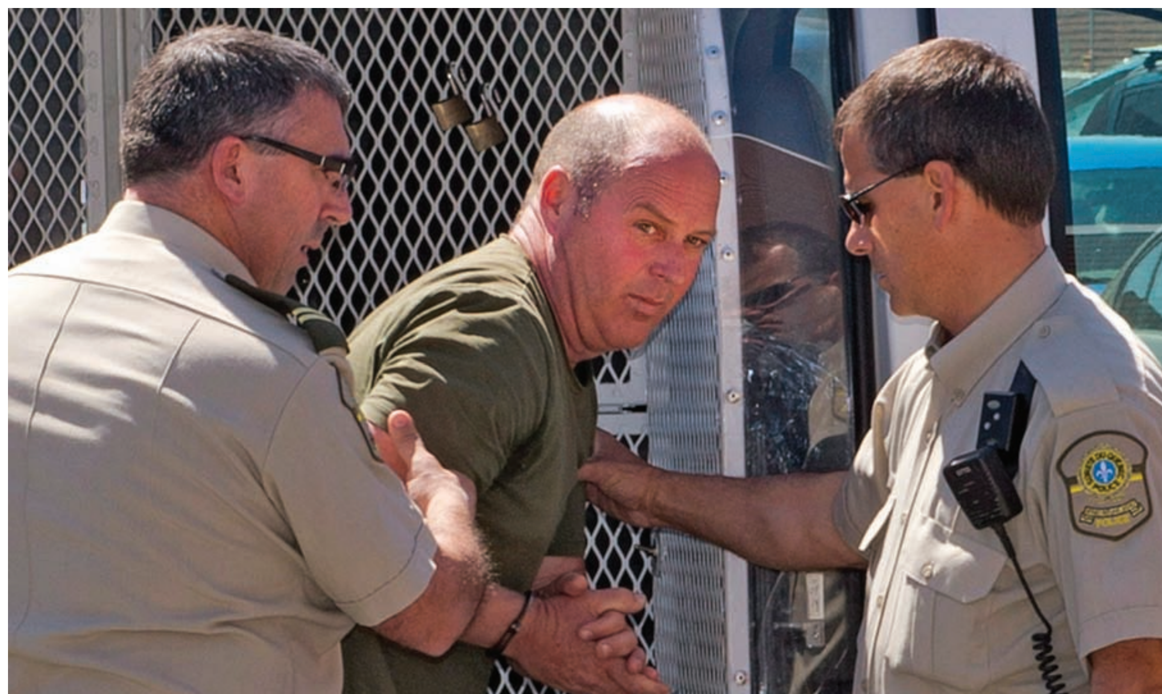
Bill-45 Criminal Code amendments to be applied in an environmental context for the first time



Bruce McMeekin

The flexibility of the criminal law as a sanction for catastrophic environmental damage is soon to be tested. On Jan. 15, it is expected that the preliminary inquiry will be set for the Montreal Maine & Atlantic railway (MM&A) and three of its employees (including the engineer and dispatcher) on 47 counts of criminal negligence causing death. All of the charges arise from the 2013 derailment of a crude-oil bearing train and subsequent spill, explosion and fire in Lac-Mégantic that caused the deaths of 47 people and the devastation of the community.

The bar to obtain convictions is high. For the accused employees, the Crown must prove that they acted in a manner that constituted a marked and substantial departure from what was reasonably expected of them in the circumstances, creating a risk of physical harm to the public that they recognized but continued with, or simply did not think about. For the MM&A, the Crown must prove that one or more of its employees (accused or not) was a party to the offence, and that one or more relevant senior officers markedly (and substantially) failed to take reasonable steps to prevent the employees from being parties. The latter arises from the 2004 Bill C-45 amendments to the *Criminal Code*. Although they have been referred to in other cases, this is the first time the amendments will have been applied in the environmental context.



Former Montreal Maine and Atlantic Railway Ltd. engineer Thomas Harding is escorted by police to a court appearance in May, 2014. He is one of three employees facing 47 counts of criminal negligence causing death in the Lac-Mégantic, Que. accident. RYAN REMIROZ / THE CANADIAN PRESS

Prior to the introduction of the *Charter*, and for some years afterwards, most would have agreed that criminal negligence required a degree of advertence or recklessness, meaning that the offender knowingly engaged in what, in the circumstances, was a dangerous act (meaning it could seriously injure another person) not caring about the risk it created to others. It was that "uncaring" element that essentially distinguished criminal negligence from civil negligence or inadvertence. The offender may not have intended to cause harm to others, but nevertheless the blatant disregard for human safety was so morally repugnant it deserved to be stigmatized as a criminal act. In that sense, it was less an objective measure of conduct and more a branding of unacceptable behaviour.

This changed post-*Charter* when over the course of a number of judgments the Supreme Court essentially redefined criminal negligence to be a measure of conduct governed by community standards. The harm must arise from a marked and substantial departure from the standard of care that one would reasonably expect in the circumstances. The accused need only have recognized and run an obvious and serious risk to others or, alternatively, gave no thought to that risk, both being inferred from the accused's conduct.

This prosecution will be challenging for all of the parties. What do the adverbs "marked and substantial" mean? They were obviously intended by the court to distinguish criminal departures from the required standard of care from those that engage civil and regulatory liability (a "mere" departure). But there is little judicial guidance on what constitutes a marked and substantial departure from other departures, other than it is a question of degree. Arguably this creates the risk that a trier of fact may err by incorrectly measuring the seriousness of the departure by the damage it has caused.

There is also the issue of the role played by the federal railway regulator. In its accident report, the Transportation Safety Board found that unsatisfactory regulatory oversight by Transport Canada (TC) was a factor contributing to the disaster. Despite being aware of significant operational changes at MM&A, TC did not provide adequate regulatory oversight to ensure the associated risks were addressed. This conclusion, if proved true in the criminal litigation, may do nothing more than colour the equities of the prosecution. But it could play a more robust role if it is accepted as a factor that is relevant to determining the seriousness of the alleged departures of care.

Lastly, there is the conduct of the accused employees from which the trier of fact is required to infer whether they recognized and ran a serious and obvious risk to others, or gave no thought to the risk. From released transcripts of phone calls between the engineer and dispatcher recorded in the hours immediately before the derailment, it is apparent that the engineer knew that the single engine (of five) left running on the stopped train experienced a fire and had been shut down. That is important because the engineer braked the train using a combination of air and hand brakes. Without engine power the former would slowly disengage. The engineer offered to re-attend at the train to start another engine but was told there was no need. That is just one potential fact among many, but if true, it is inconsistent with the requirement that the accused be unconcerned about risk.

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Standards: Court held that a 'comfort letter' is not a certificate of compliance

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sought compensation from ICI for its costs of doing so.

The court rendered a decision almost entirely in favour of JIP. It awarded JIP $4.75 million of the $5.25 million it had been claiming, despite the fact that JIP had been put on notice concerning the prior use of the island as a munitions factory, and despite the existence of the Ministry "comfort letter" that had been issued to ICI.

Perhaps the most important aspect of the decision concerns the applicable limitation period for cost recovery actions arising from the remediation of brownfield sites. In adopting an "aggregate approach" to the issue, the court held that as long as a claimant reasonably incurs at least some remediation costs within the relevant limitation period, it may recover all previously incurred remediation costs — even those that would otherwise be beyond the limitation period. This raises the spectre of indeterminate liability for previous landowners, as such prior remediation costs could conceivably span years or even decades.

The court justified this approach by invoking the "polluter pay" and retroactivity principles inherent in British Columbia's *Environmental Management Act*. It held that prior owners could protect themselves by obtaining a "certificate of compliance" from the Ministry, certifying that the lands have been remediated to current legislative standards, and limiting the future liability of a certificate holder in certain circumstances.

ICI argued that the "comfort letter" issued by the Ministry in the 1980s (prior to the introduction of the current legislative scheme in 1999) was the functional equivalent of a certificate of compliance, for which there is still no prescribed form. While acknowledging the difficulty of ICI's position, the court ultimately held that the comfort letter did not meet the current requirements for a certificate of compliance. It also noted that the site had not been remediated according to current standards at the time the prior remediation work was undertaken.

The implications of these findings are significant. Regardless of the reasonableness of a landowner's remediation efforts at the time of sale and any assurances received from the Ministry as to the sufficiency of those efforts prior to the introduction of current brownfields legislation, retroactive liability may nevertheless arise in any instance in which an actual certificate of compliance has not been obtained.

The defendant has appealed the decision. In the interim, however, previous owners of contaminated sites may face significant potential liability for remediation costs if they have not obtained certificates of compliance in respect of past remediation work.

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