

Workplace safety is no game

Roll the dice and you may go straight to jail

By Sonia Sahota

Imagine yourself facing criminal charges and the stigma of a criminal conviction, or serving jail time and paying a hefty fine. Could you have done something differently to avoid such consequences?

This article chronicles five decisions where criminal convictions were handed down for workplace accidents since a broader regime of criminal liability under the *Criminal Code* was brought into force in 2004. The operation of the *Criminal Code* is independent of provincial regulatory schemes for occupational health and safety. Therefore, an organization may be prosecuted under the *Criminal Code* while also being charged for a violation of British Columbia's *Occupational Health and Safety Regulation*.

Prior to the enactment of the 2004 amendments to the *Criminal Code*, corporate criminal liability had to be established through the actions or omissions of the corporation's directing minds (i.e. policymakers). This made it difficult to successfully prosecute in circumstances where operational decisions were to blame. The 2004 *Criminal Code* amendments sought to address these shortcomings by providing new rules for attributing criminal liability to organizations, their representatives and those who direct the work of others. The impetus for these changes was the 1992 Westray coal mine accident in Nova Scotia where 26 miners were killed by a methane gas explosion. Despite serious safety violations and employee concerns, the owners of the Westray mine failed to implement changes. The operating philosophy throughout the company

prioritized profits over workers' safety. Notwithstanding the apparent culpability of the owner, Westray was acquitted of all criminal charges and prosecution of its managers was ultimately abandoned.

The central sections of the *Criminal Code* that are now used to find criminal liability for workplace accidents are Section 219 and Section 217.1, which operate together to overcome the limitations of the former legislation. Section 219 establishes the offence of criminal negligence by providing that "everyone is criminally negligent who, in omitting to do anything that is his duty to do, shows wanton and reckless disregard for the lives or safety of others", whereas Section 217.1 establishes the duty of care by requiring that "everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task". If convicted, corporations and their representatives may face hefty fines while representatives may also be subject to imprisonment. A conviction of criminal negligence causing death faces a maximum sentence of life in prison.

The 2008 decision in *R. v. Transpavé*ⁱ Inc. marks the first time that a sentence was handed down under the new *Criminal Code* provisions. In this case, a 23-year worker was fatally crushed as he tried to clear a pileup of stones on *Transpavé's* production line. The machine being used was equipped with a safety mechanism intended to prevent this very sort of accident; however, the motion detector for the safety switch had been turned off. The company pleaded guilty and was

sentenced to a fine of \$100,000. In settling on a seemingly low fine, the judge observed that since the accident *Transpavé* had spent more than \$750,000 to upgrade safety standards and make other health and safety improvements.

Another early case tried under the new provisions is *R v. Metron Construction Corp.*ⁱⁱ This case involved the death of four workers and injuries to another worker after all of them fell over 30 metres when a swing stage they were riding collapsed while being lowered from a high-rise construction site. The swing stage was equipped with two safety harnesses, although only one of the workers was properly tethered. The company pleaded guilty to one count of criminal negligence causing death and was sentenced to a fine of \$200,000, which was later increased to \$750,000 on appealⁱⁱⁱ by the Crown.

By a separate action^{iv}, Metron's project manager, Vadim Kazenelson, was charged with four counts of criminal negligence causing death and one count of criminal negligence causing bodily injury. At trial, the judge found that Mr. Kazenelson had the authority to direct the workers on the swing stage and knew beforehand that safety harnesses were not available yet did nothing to rectify that situation. He had also permitted the workers, and himself, to board the swing stage even though he had no information regarding its load capacity. The court determined that Mr. Kazenelson had breached his duty to take reasonable steps to prevent bodily harm to the workers and was charged under section 219 of the *Criminal Code* and sentenced to three and a half years in prison. Mr. Kazenelson's appeal of the jail sentence was dismissed.

In 2016, a B.C. employer was found guilty of criminal negligence causing death and sentenced to pay a fine of \$100,000. In *R. v. Stave Lake Quarries Inc.*^v, Kelsey Kristian was killed on her second day of employment with Stave Lake Quarries ("SLQ"). She was given a brief orientation of the rock quarry and cursory instruction on the use and operation of a rock quarry haul truck of which she had no previous training or experience in operating. No additional safety training or supervision was provided. During a break in activity, Ms. Kristian turned off and parked the truck near the top of a slope. She did not engage the parking brake nor chock the tires (none were provided in the truck). The truck remained in its position on the slope until its air brakes had bled down to a level that caused the truck to start rolling. Ms. Kristian was standing on the truck's running board at the time and was fatally crushed when the rock hauler lost control and rolled over. SLQ acknowledged its lack of a formalized training system and its failure to provide training and supervision to Ms. Kristian. In addition to providing a general deterrence, the court's sentencing of SLQ was intended to deter both SLQ and others from conducting unsafe practices and to not be seen simply as the "cost of doing business".

Most recently in *R. v. Fournier*^{vi}, the owner and operator of an excavation company in Quebec was convicted of manslaughter for failing to protect the health and safety of his workers. Mr. Fournier had been working with his employee, Mr. Levesque, on a sewer line replacement within an eight-metre deep, near-vertical trench that had not been properly shored. Additionally, the soil excavated from the trench was stockpiled too close to the trench opening, further causing instability to its walls. These factors caused the trench to collapse, burying Mr. Levesque and partially burying Mr. Fournier. Mr. Fournier was injured but survived. Mr. Levesque suffered a traumatic brain injury that ultimately led to his death. Mr. Fournier was charged with both criminal negligence causing death and manslaughter. He was convicted of the more serious charge of manslaughter and

was later sentenced to serve 18 months in jail and two years of probation after the prison term expires.

The impacts of a serious workplace accident are far reaching. The changes to the *Criminal Code* that have more easily enabled convictions for workplace injury are relatively recent but are being put to use. As the cases discussed here show, a corporate culture that fails to prioritize workplace safety or to implement rigorous systems for hiring, training and supervision can no longer take refuge behind legislative shortcomings.

ABOUT

Sonia Sahota, LLB, P.Eng, is a partner at Civic Legal LLP, a British Columbia law firm with expertise in municipal law, land development, construction, procurement and complicated contract matters. Visit www.civiclegal.ca for contact and additional information. ■

- i 2008 QCCQ 1598
- ii 2012 ONCJ 506 (CanLII)
- iii 2013 ONCA 541 (CanLII)
- iv 2015 ONSC 3639 (CanLII)
- v 2016 BCPC 377 (CanLII)
- vi 2018 QCCQ 1071 (CanLII)

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Civic Legal LLP

www.civiclegal.ca

Main 604 639 3639 | Email info@civiclegal.ca
710 - 900 West Hastings St. Vancouver, BC, V6C 1E5

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