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Update of Penal and Criminal Law in Occupational Health and Safety Matters

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Every year, several judgments are rendered in penal law cases involving occupational health and safety issues. However, judgments in an occupational health and safety context resulting from the laying of criminal negligence charges are more rare. While the sections of the *Criminal Code*[1] which facilitate the filing of criminal negligence charges are now ten years old[2], criminal negligence convictions in Quebec based on breaches of section 217.1 of the *Criminal Code* can still be counted on the fingers of one hand.[3]

The most significant conviction in Canadian history is still very recent: we are referring of course to the conviction of Metron Construction Corporation ("Metron") by the Ontario Court of Appeal on September 4, 2013.[4]

In this article, we will summarize some of the applicable concepts and highlight a few noteworthy judgments rendered in 2013 in penal and criminal law pertaining to occupational health and safety matters.

SOME CONCEPTS APPLICABLE IN PENAL AND CRIMINAL OCCUPATIONAL HEALTH AND SAFETY CASES

Sections 236 and 237 of the *Act Respecting Occupational Health and Safety*[5] ("AOHS") set out the main penal offences relating to occupational health and safety.

Section 236 AOHS provides that every person who contravenes the AOHS or its regulations or who refuses to conform to, or incites a person not to conform to, a decision or order rendered under that statute or its regulations, is guilty of an offence and liable to fines in amounts which, in 2014, range from:[6]

In the case of a natural person:
For a first offence, between $634 and $1,584;
For a second offence, between $1,584 and $3,168;
For any subsequent offence, between $3,168 and $6,336.

In the case of a legal person:
For a first offence, between $1,584 and $3,168;
For a second offence, between $3,168 and $6,336;
For any subsequent offence, between $6,336 and $12,671.

As for section 237 AOHS, it provides that every person who, by an act or omission, does anything that directly and seriously compromises the health, safety or physical well-being of a worker is guilty of an offence and liable to fines in amounts which, in 2014, range from:[7]

In the case of a natural person:

For a first offence, between $1,584 and $3,168;
For a second offence, between $3,168 and $6,336;
For any subsequent offence, between $6,336 and $12,671.

In the case of a legal person:

For a first offence, between $15,839 and $63,355;
For a second offence, between $31,678 and $158,389;
For any subsequent offence, between $63,355 and $316,777.

The fines provided for at sections 236 and 237 AOHS are reassessed on January 1st of each year.[8]

In order to secure a conviction for any of the offences provided for in these sections, the Commission de la santé et de la sécurité du travail ("CSST") must prove each of the essential elements of the offence in question beyond a reasonable doubt. These are strict liability offences.[9]

With respect to the criminal law of occupational health and safety, section 217.1 of the *Criminal Code* imposes a duty on "[e]very one who undertakes, or has the authority, to direct how another person does work or performs a task [...] to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task." Where an employer breaches this duty, it may be found to have omitted to do something that it was its duty to do, within the meaning of section 219 of the *Criminal Code*, and may, therefore, be charged with criminal negligence. The penalties that can be imposed reflect the inherent seriousness of such an offence.[10] In particular, an individual charged with criminal negligence causing death is liable to imprisonment for life.[11] In the case of an organization, there is no limit to the amount of the fine which can be imposed.[12]

NOTEWORTHY JUDGMENTS IN 2013

PENAL LAW

In *Commission de la santé et de la sécurité du travail* v. *Dollarama, s.e.c.*,[13] the Court of Appeal had to determine whether a limited partnership convicted under section 236 AOHS was subject to the penalties applicable to legal persons referred to in that section, or to a different penalty. This question arose because a limited partnership is not "a legal person" under Quebec law.[14] The Court held that section 236 AOHS is unambiguous and establishes a clear dichotomy between natural persons and legal persons; limited partnerships do not fall in either category. It upheld the judgment of the Superior Court,[15] the latter having found that, despite the legal vacuum that existed in the AOHS regarding the penalty to be imposed on a limited partnership, Dollarama was not absolved of its wrongdoing insofar as the *Code of Penal Procedure*[16] expressly provides for the penalty which is to be imposed in such cases (albeit a penalty that is less severe than those set out in the AOHS[17]).

On October 29, 2013, the Quebec Court of Appeal rendered another decision in *Commission de la santé et de la sécurité du travail* v. *Coffrages CCC ltée.*[18] In that decision, the Court overturned the judgment of the Superior Court acquitting Coffrages CCC ltée of an offence under section 237 AOHS, and restored the judgment of the Court of Québec convicting the company of the offence.[19] The Court of Québec ruled that, while the site was in compliance with the regulations, the conditions for performing certain tasks were unsafe and the equipment was inadequate. For example, the worker had received no training or advice on the method to follow and the premises were cramped and located near a ditch. The overall effect was that, in the circumstances, there was an "easily foreseeable" danger of serious injury , therefore rendering the materialization of the danger "nearly certain". Conversely, the Superior Court held that the employee's unforeseeable actions were the result of gross negligence "by a person acting with extreme recklessness", and found that the premises were safe. The Court of Appeal restored the Court of Québec's judgment and concluded that the employer was guilty of the offence.

CRIMINAL LAW

On September 4, 2013, the Ontario Court of Appeal sentenced Metron to a fine of $750,000 for criminal negligence causing death.20 This was an appeal of the trial judge's decision sentencing Metron to pay a $200,000 fine after it had pleaded guilty to criminal negligence causing death. This criminal prosecution was instituted following the collapse of a swing stage located on the 14th floor of a building on December 24, 2009, which, among other damage, caused the death of a supervisor and three employees. Since the *Criminal Code* applies across Canada, this decision is extremely relevant for Quebec employers.

The Ontario Court of Appeal found that the fine imposed at trial was manifestly unfit. According to the Court, the trial judge placed too much emphasis on existing case law which imposed fines in relation to offences under the occupational health and safety legislation. In so doing, he did not consider the increased level of culpability inherent in a criminal conviction. In addition, the inherent gravity of the offence of criminal negligence causing death must be considered. Since the section of the *Criminal Code* dealing with fines imposed on organizations sets no limit and does not require the court to consider either the accused company's ability to pay or its economic viability, these were not determining factors in setting the amount of the fine.

The Court added that a fine of $200,000 did not reflect the added degree of moral blameworthiness that comes with a conviction for criminal negligence causing death, the particularly serious circumstances of this case, or the serious consequences for the victims and their families. The supervisor's negligence, for whom Metron was criminally liable, was "extreme".

This judgment of the Ontario Court of Appeal is the first decision of an appeal court on the subject and is particularly enlightening on the issue of the criteria which should guide the courts in determining the penalty for an offence of criminal negligence occurring in the context of a workplace accident. This is also the largest fine ever imposed on a company convicted of criminal negligence causing death. In 2008, prior to this decision, the most costly conviction was $100,000.[21]

CONCLUSION

We consider the judgment of the Ontario Court of Appeal in the Metron case to be a key decision rendered in 2013. The increase of the fine, upon review, to an amount nearly three times higher than the one that was originally imposed on Metron at trial is part of a clear trend aimed at differentiating the various coercive agents of the state as well as at reducing tolerance and increasing severity when dealing with employers who break the law.

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[1] RSC 1985, c C-46.

[2] Bill C-45 (*An Act to amend the Criminal Code (Criminal Liability of Organizations*), assented to on November 7, 2003, 2nd sess., 37th Parl. (Can.) came into force on March 31, 2004.

[3] There have been two cases: *R.* v. *Transpavé*, 2008 QCCQ 1598, in which the company was fined $110,000, and *R*. v. *Scrocca*, 2010 QCCQ 8218, in which the employer, a natural person, was given a conditional sentence of two years' imprisonment less a day plus a victim fine surcharge of $100. Note that in the case of *R*. v. *Gagné*, 2010 QCCQ 12364, the accused, two natural persons, were acquitted.

[4] *R*. v. *Metron Construction Corporation*, 2013 ONCA 541 ("Metron").

[5] CQLR, c S-2.1.

[6] These amounts are the figures suggested by the CSST in its guide entitled Cadre d'émission des constats d'infraction, January 2014, online: http://www.csst.qc.ca/publications/200/Documents/DC200_1053web.pdf.

[7] Id.

[8] AOHS, section 237.1.

[9] Strict liability offences relieve the CSST of the burden of proving the existence of the "intention" to commit the offence ("*mens rea*"). The accomplishment of the act targeted by the offence gives rise to a presumption that the offence was committed (*R*. v. *Sault Ste-Marie*, [1978] 2 S.C.R. 1299).

[10] Note that the objective of the penalty, under regulatory penal law, is not the same as under criminal law. Under the regulatory penal law in occupational health and safety matters, [translation] "the primary purpose of the penalty is to ensure compliance with the law and the prevention of offences"; it should have a "dissuasive" effect (*Commission de la santé et de la sécurité du travail* v. *9189-5201 Québec inc. (Monsieur Filiatreault Couvreur)*, 2013 QCCQ 14262). In criminal law, the penalty is more punitive and condemnatory in nature (*Metron, supra*, note 4, paras. 75 to 80).

[11] *Criminal Code*, section 220(b).

[12] *Id*., section 735.

[13] 2013 QCCA 336.

[14] *Civil Code of Québec*, RLRQ c C-1991, article 2188.

[15] 2011 QCCS 5630.

[16] Chapter C-25.1.

[17] Judgment of the Superior Court, *supra*, note 15, paras. 46 to 49.

[18] 2013 QCCA 1875.

[19] 2012 QCCS 5737.

[20] *Metron*, supra, note 4.

[21] *R*. v. *Transpavé inc., supra*, note 3.