New developments regarding the criminal negligence of employers

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On August 31, 2017, the Ontario Court of Justice sentenced[1] Detour Gold Corporation ("Detour Gold") to pay a fine of $2,625,333 after it pleaded guilty to a charge of criminal negligence causing the death of an employee.

Facts

Detour Gold has operated an open pit mine near the Ontario-Québec border since 2013. In April 2015, the company tried several times to have a leach reactor repaired after noticing some leaks. On June 3, 2015, a Detour Gold millwright, Denis Millette, was assigned to repair a defective joint on the reactor. While doing the repair, the employee was exposed to sodium cyanide, a highly toxic substance used in the mining industry to extract gold from ore, that had leaked out from the reactor. The employee became ill and died. The autopsy results showed that his death was caused by sodium cyanide poisoning.

On April 21, 2016, the company was charged with criminal negligence causing death under the *Criminal Code*,[2] as well as with 15 counts under the Ontario *Occupational Health and Safety Act*.[3] The company subsequently pleaded guilty to the criminal negligence charge in exchange for the charges under the *Occupational Health and Safety Act* being withdrawn.

Decision

The Court sentenced Detour Gold to pay a fine of $1.4 million, a victim fine surcharge of 30% ($420,000), and restitution to the deceased employee's family in the amount of $805,333, the equivalent of the earnings he would have received until he retired.

In its reasons, the Court found several instances of negligence on the part of Detour Gold, in

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particular, that the employee had had no training or information that would have enabled him to identify the signs of cyanide poisoning, the company had not ensured that the employee was wearing appropriate personal protective equipment, there was no clean-up procedure for sodium cyanide spills, and no one knew how to identify and treat cyanide poisoning.

Referring to the recent judgments in *Stave Lake Quarries Inc.*[4] and *Metron Construction*,[5] the Court was of the opinion that the fine had to be significant, so that businesses would not view it as the ordinary cost of doing business,[6] despite the fact that no criminal or penal charges had ever been filed against Detour Gold and the company had been experiencing deficits since it began operating in 2013.

This $1,400,000 fine is the largest fine imposed on a company convicted of criminal negligence causing death.[7]

Note that six charges relating to violations of the Ontario *Occupational Health and Safety Act*[8] are still pending against three Detour Gold supervisors.

Other recent cases

We would also draw your attention to several recent decisions in criminal negligence cases involving employers.

In its decision dated October 27, 2016, in ***Stave Lake Quarries*,**[9] the Provincial Court of British Columbia accepted the parties' joint recommendation and sentenced the employer to pay a fine of $**100,000,** plus a victim fine surcharge of $15,000, following the death of an employee. The facts reveal that while carrying out a procedure on her second day on the job, an employee driving a truck used to haul rocks failed to use the parking brake when she stopped the truck. The air brakes failed and the employee died when the truck rolled over. In that case, the employer pleaded guilty to the charge of criminal negligence, primarily because it had failed to provide a rigourous system for hiring, training, and supervising.

In another case, on July 21, 2017, the Court of Québec sentenced[10] **Century Mining Corp.** to pay a fine of $**200,000** for criminal negligence causing bodily harm, despite the fact that the company had declared bankruptcy in 2012. In that case, an employee doing drilling in a mine was crushed by a heavy truck; he suffered serious injuries and was blinded. The company was convicted of failing to identify the real risks in the situation and failing to inform the truck driver that drilling was underway.

On the other hand, **Ressources Métanor Inc.**was **acquitted**[11] on December 8, 2017, of criminal negligence causing death. A charge had been filed against the company as a result of an accident involving three employees who drowned in 2009 when the elevator car they were in descended to a level of the mine that was underwater. The facts revealed that the probes used to activate high water alarms had been disconnected and that a bolt in one of the pipes used to carry water underground was defective. In spite of those deficiencies, the Court found that Ménator's officers had not shown wanton or reckless disregard. While certain deficiencies observed in the operations were contrary to the *Act respecting occupational health and safety* ("**AOHS**"),[12] the evidence did not reveal that any person or organization was responsible for disconnecting the probes.

We are also awaiting two criminal negligence decisions in the near future, in ***R.* v. *Fournier***[13] and ***R.* v. *CFG Construction inc.***[14] We would note that in 2016, in *Fournier*, the Superior Court of Québec dismissed[15] the application for judicial review and, as did the judge who presided over the preliminary inquiry, allowed the charges of criminal negligence and involuntary manslaughter to

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proceed to trial. In that decision, the Superior Court concluded that a workplace death resulting from a violation of the AOHS could serve as the basis for an order to stand trial on a charge of manslaughter under the *Criminal Code*. We will be following this case with interest, because a conviction of an employer on a manslaughter charge resulting from a violation of occupational health and safety legislation would be a first.

Conclusion

Since Bill C-45[16] was enacted in March 2004, making it easier to bring criminal negligence charges in cases involving workers' health and safety, the number of convictions of employers has risen and the sentences imposed have skyrocketed. It is in employers' interests to consider these court decisions as one more reason to enhance their prevention measures in order to ensure compliance with the applicable occupational health and safety legislation and thus fulfil their general duty to take appropriate measures to avoid injuries resulting from doing a job or performing a duty.

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1. *R.* v. *Detour Gold,*C.J.O., No. 0511-998-164537 / 0511-998-5380 (sentence August 31, 2017).
2. *Criminal Code*, RSC 1985, c. C-46, sections 219 and 220.
3. *Occupational Health and Safety Act*, RSO 1990, c. O.1.
4. *R.* v. *Stave Lake Quarries Inc.*, 2016 BCPC 377.
5. *R.* v. *Metron,*2013 ONCA 541: see our comments on this decision here.
6. See page 15 of the decision: "The fine must also be significant enough to not be considered as a simple cost of doing business".
7. We would note that in *Metron*, the employer was sentenced to pay a fine of $750,000.
8. Charges against each of the supervisors for failing to supervise the employee and not ensuring that he was wearing personal protective equipment.
9. *Supra*, note 5.
10. *R.* v. *Century Mining Corp.*, C.Q., No. 615-01-021168-136 (sentence July 21, 2017).
11. *R.* v. *Ressources Métanor inc.,* C.Q., No.625-01-003393-149 (conviction December 8, 2017).
12. *Act respecting occupational health and safety*, CQLR c. S-2.1.
13. *R.* v. *Fournier*, No. 500-01-088108-136.
14. *R.* v. *CFG Construction inc.*, No. 200-01-175428-139.
15. *Fournier* v. *R.*, 2016 QCCS 5456.
16. *An Act to amend the Criminal Code (criminal liability of organizations)*, Assented to on November 7, 2003, 2nd Sess., 37th Parl. (Can.). See our comments at the time on the passage of this bill here.

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