An employer’s criminal negligence upheld on appeal

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On August 11, 2023, the Court of Appeal of Quebec handed down a decision in *CFG Construction inc.* c. *R.*,[1] dismissing the appeal of the guilty verdict against an employer, CFG Construction inc. (“**CFG**”), for criminal negligence having caused the death of one of its employees.

This decision serves as a reminder of the potential criminal liability of an employer, depending on its legal form, for the death or bodily injury of its employees in the workplace. More specifically, the case provides unique insight into the sanctioning of an “organization,” a term that includes a body corporate or an association of persons,[2] for faults committed by a “senior officer” under the *Criminal Code* (“**Cr.C.**”).

The facts

The decision stems from a fatal accident that occurred on September 11, 2012, on the site of a wind farm in Saint-Ferréol-les-Neiges, involving a heavy container truck owned by CFG. The truck flipped over on a downhill curve, killing the driver, a CFG employee with 25 years of experience as a truck driver. At the trial, emphasis was placed on the maintenance of the truck and its braking system.

The case

A number of decisions were rendered in this case. Regarding criminal liability, the Court of Québec handed down two judgments, one finding CFG guilty and the other establishing the sentence.

On February 14, 2019, CFG was found guilty of criminal negligence causing the death of the aforementioned truck driver. Essentially, the Court found that CFG’s failure to perform maintenance on the truck, which it had a legal obligation to do, constituted a [translation] “marked and significant departure from the conduct expected of a reasonable person, given the nature and circumstances of the activity in question”.[3] For instance, the truck involved in the accident had 14 major pre-existing defects, all of which related to its braking system.[4] The Court was decisive in establishing CFG’s liability through its foreman-mechanic, whom it considered to be a “senior officer” within the meaning

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of the Cr.C., and whose faults could be ascribed to CFG in this case,[5] as explained below.

On December 3, 2019, CFG was fined $300,000, plus a victim surcharge of 15% of the fine, and placed on a three-year probation with many conditions. This decision brings to light the factors to consider in sentencing an organization, as well as the only penalty that may be imposed, namely a fine of any amount in the case of a criminal act.[6] Among these factors, the court must consider "any advantage realized by the organization as a result of the offence".[7] In this regard, failure to incur the necessary expenses to perform maintenance on a vehicle driven by an employee may be construed as an "advantage" for the employer-owner and is considered an aggravating factor in sentencing.[8] Case law on this subject is "tenuous", but fines ranging from $100,000 to $750,000 have been given in various situations.[9]

The notion of "senior officer" set out in the *Criminal Code*

In its decision, the Court of Appeal provides the historical context that led to the inclusion of a legal mechanism in the Cr.C. governing the liability of organizations for death and bodily injury in the workplace. In 2003, Parliament passed Bill C-45, *An Act to amend the Criminal Code (criminal liability of organizations)* further to the 1992 tragedy at the Westray mine in Nova Scotia, where 26 miners were killed after methane detectors were disconnected with mine supervisors' knowledge.[10]

Among the key amendments central to the CFG case, sections 217.1 and 22.1 of the Cr.C. provide not only for the legal obligation of any person who directs 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, but also for the possibility of holding an organization "liable" for an offence of negligence by reason of the actions of certain persons working for it, either a "representative" or a "senior officer," as these terms are defined in section 2 of the Cr.C.

The CFG case as a whole is an example of how the aforementioned legal mechanism applies where an employee considered to be a "senior officer" departs from the reasonable standard of care expected in the circumstances. As mentioned above, CFG was found guilty because of the important role that the head mechanic played, in that he had the authority to carry out the maintenance required on vehicles, including on the defective truck.[11] As a result, CFG was legally obliged to ensure that the mechanic had the skills to do the work and provide him with the necessary instructions and equipment, as well as an adequate work environment.[12] In short, it is important to remember that:

> The term "senior officer" refers to "a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer".[13]
> This definition [translation] "does not only include senior executives and a company's board of directors".[14]
> Ultimately, an employee will be considered as a "senior officer" according to the functions s/he performs and the responsibilities s/he assumes in a given organization.[15]

Finally, the Court of Appeal points out that failure to fulfill the legal obligation set out in section 217.1 of the Cr.C. does not, in and of itself, constitute an offence.[16] In the circumstances of this case, failure to comply with the aforementioned section along with the provisions on criminal negligence causing death provide the basis for CFG's guilt, which constitutes the defining characteristic of this "positive" obligation in criminal law. In this regard, section 22.1 of the Cr.C. serves as the basis for CFG's liability insofar as the organization was a "party to the offence" given the role that its mechanic played in the matter.

Conclusion

The CFG case shows how criminal negligence in the workplace is condemned outside of the penal

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provisions applicable under Quebec's labour laws. Incidentally, the notion of "senior officer" within the meaning of these laws should not be confused with that codified in the Cr.C. While the former is limited in scope, the term "senior officer" in the Cr.C. is defined more broadly to include, in addition to directors and senior executives, other persons who play a significant role in leading or managing a given area of activity within an organization.

Note that in this case, CFG's guilt could have resulted from the conduct of more than one representative or senior officer.[17] It is also important to remember that the extent to which proceedings in such matters involve natural persons rather than organizations, or extend to every person who may be held liable, is a matter of prosecutorial discretion.

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1. 2023 QCCA 1032.
2. "organization," section 2 of the Cr.C.
3. *Supra* note 1 at para. 10 (as the Court of Appeal pointed out, the analytical framework for determining criminal negligence was updated further to the decision of the Supreme Court of Canada in *R.* v. *Javanmardi*, 2019 SCC 54).
4. *R.* c. *CFG Construction inc*., 2019 QCCQ 1244, para. 141.
5. *Ibid,* paras. 255 and 285.
6. *R.* c. *CFG Construction inc*., 2019 QCCQ 7449, paras. 84 and 149.
7. Section 718.21a) of the Cr.C.
8. *Supra* note 6, para. 91.
9. *Ibid,* paras. 163 to 167.
10. *Supra* note 1, paras. 60 and 62.
11. *Supra* note 4, para. 35.
12. *Ibid,* para. 381.
13. "senior officer", section 2 of the Cr.C.
14. *Supra* note 4, para. 256.
15. *Ibid*.
16. *Supra,* note 1, para. 73.
17. *Ibid*, para. 72; see also *supra* note 6, para. 14.

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