

## THE METRON CONSTRUCTION CORP. CASE: ANOTHER CONVICTION FOR CRIMINAL NEGLIGENCE IN THE AREA OF OCCUPATIONAL HEALTH AND SAFETY

ÉLODIE BRUNET

with the collaboration of  
Anne-Sophie Lamonde, student-at-law

SINCE THE ADOPTION OF BILL C-45<sup>1</sup> AMENDING CERTAIN PROVISIONS OF THE *CRIMINAL CODE* IN MARCH OF 2004,<sup>2</sup> EMPLOYERS HAVE HAD TO TAKE ON INCREASED RESPONSIBILITY IN THE AREA OF OCCUPATIONAL HEALTH AND SAFETY. INDEED, THE EFFECT OF SECTIONS 22.1 AND 217.1 OF THE *CRIMINAL CODE* IS TO FACILITATE THE LAYING OF CRIMINAL NEGLIGENCE CHARGES IN CASES INVOLVING THE HEALTH AND SAFETY OF WORKERS.

Section 217.1 of the *Criminal Code* states that "every one 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." An employer who breaches this duty may be found to have "omitted to do anything that it is his duty to do" within the meaning of section 219 of the *Criminal Code*, and could therefore be charged with criminal negligence. A charge of criminal negligence causing death is punishable by imprisonment for life.<sup>3</sup> For organizations, a conviction for criminal negligence brings with it the possibility of fines with no strict pecuniary limit.<sup>4</sup>

Although there was a great deal of debate about section 217.1 of the *Criminal Code* at the time it came into effect, only a small number of court decisions have dealt with criminal negligence within the meaning of these provisions. In Quebec, the cases of *Transpavé*,<sup>5</sup> *Scrocca*<sup>6</sup> and *Gagné*<sup>7</sup> addressed such circumstances.

In Ontario, a charge of criminal negligence was laid in *Fantini*,<sup>8</sup> but was withdrawn for various reasons, despite the fact that Mr. Fantini was convicted of an offence under the *Ontario Occupational Health and Safety Act*<sup>9</sup> and charged a fine of \$50 000. However, in July 2012, the province's first conviction for criminal negligence in the area of occupational health and safety was handed down against Metron Construction, by the Ontario Court of Justice in *R. v. Metron Construction Corporation*.<sup>10</sup>

<sup>1</sup> *An Act to amend the Criminal Code (Criminal Liability of Organizations)*, assented to on November 7, 2003, 2<sup>nd</sup> sess., 37<sup>th</sup> Parl. (Can.).

<sup>2</sup> R.S.C. 1985, c. C-46.

<sup>3</sup> *Criminal Code*, section 220(b).

<sup>4</sup> *Criminal Code*, section 735.

<sup>5</sup> 2008 QCCQ 1598 (C.Q.), in which the company was sentenced to a fine of \$110,000.

<sup>6</sup> 2010 QCCQ 8218 (C.Q.), in which the employer, a natural person, received a conditional sentence of two years' prison less a day with a surcharge of \$100.

<sup>7</sup> 2010 QCCQ 12364 (C.Q.) in which the accused, two natural persons, were acquitted.

<sup>8</sup> [2005] O.J. No. 2361 (Ont. C.J.).

<sup>9</sup> *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

<sup>10</sup> 2012 ONCJ 506 (ON CJ).

In a second decision arising from the same tragic accident, *R. v. Swartz*,<sup>11</sup> the president and sole director of Metron Construction, Joel Swartz, was also convicted under the *Occupational Health and Safety Act* of Ontario and its regulations.

It should be noted however that both Metron Construction and Mr. Swartz pled guilty to the offences with which they were charged.

### FACTS GIVING RISE TO THE CHARGES

On December 24, 2009, four Metron Construction employees died in an accident in Toronto, falling 14 floors after the suspended swing stage on which they were standing collapsed. A fifth employee was seriously injured. The sixth employee was wearing a safety harness, which saved his life.

The investigation revealed that the supervisor, who died in the accident, allowed too many employees to work simultaneously on the same swing stage without determining whether the structure could support their weight or verifying whether the employees were wearing safety harnesses. In addition, the autopsies performed on the four victims revealed that three of them, including the supervisor, had consumed cannabis just prior to the accident.

A subsequent investigation showed that the swing stage was defective and poorly constructed and as such, was not even safe for two employees. In addition, the swing stage had only two lifelines and had not been delivered with an instruction manual, as required by the *Occupational Health and Safety Act* of Ontario.

### REASONS FOR THE DECISION IN *R. V. METRON CONSTRUCTION CORPORATION* (CONVICTION FOR CRIMINAL NEGLIGENCE)

As noted above, the company pled guilty to the offence of criminal negligence causing death. Metron Construction was convicted in connection with the actions and omissions of its representative, in this case the supervisor on the job the day of the accident.

Since a guilty plea was entered, the Court only had to determine the amount of the fine. The prosecution requested a \$1 million fine, whereas Metron Construction, in defence, suggested a fine of \$100,000.

The parties agreed that there were very few precedents in the case law. The only decision which the parties referred to the Court was the *Transpavé* case from Quebec. The Court also referred to the case law on the determination of fines in cases of death due to the failure to comply with the Ontario *Occupational Health and Safety Act*. The fines imposed in those cases ranged from \$115,000 to \$425,000.

The Court analyzed the factors to be considered in determining the penalty for an organization,<sup>12</sup> including the company's economic viability, the fact that it pled guilty (thereby substantially reducing the cost to the public administration), the fact that Mr. Swartz also pled guilty to charges under the *Occupational Health and Safety Act* of Ontario, and that neither Metron Construction nor Mr. Swartz had a prior record for similar offences.

The Court noted that the amount sought by the prosecution was too high in light of Metron Construction's financial situation at the time of the judgment. It was not desirable to impose a fine that was so high it might lead to the company's bankruptcy.

<sup>11</sup> 2012 ONCJ 505 (ON CJ).

<sup>12</sup> Listed in section 718.21 of the *Criminal Code*.

The Court also held that there were a number of aggravating factors, including the serious nature of the offences, their tragic consequences, and the fact that the swing stage, which was shown to be defective and in violation of several provisions of the *Occupational Health and Safety Act* of Ontario, was used for two months prior to the accident. The Court held that these factors justified the imposition of a higher fine than that submitted by the defence.

The Court settled on a fine of \$200,000, with an additional victim fine surcharge of 15%, or \$30,000.

### REASONS FOR THE DECISION IN *R. V. SWARTZ* (CONVICTIONS UNDER THE *OCCUPATIONAL HEALTH AND SAFETY ACT* OF ONTARIO)

As previously noted, the company's president, Mr. Swartz, also pled guilty to the charges against him. In this second judgment,<sup>13</sup> the Court stated that the deterrent effect must be strong enough to warn other employers that such offences will not be tolerated. Considering the serious violations of the applicable legislation, their tragic consequences, and the lack of a prior record over a career spanning more than 20 years in the construction industry, the Court approved the parties' joint recommendation of a \$22,500 fine on each of the four counts, for a total of \$90,000, with an additional 25% victim fine surcharge. The Court remarked that the fine imposed was well above Mr. Swartz's income for the previous year.

<sup>13</sup> *Supra*, note 11.

### CONCLUSION

To our knowledge, the fine imposed on Metron Construction is the largest to date, since the adoption of section 217.1 of the *Criminal Code*.

While the judgments resulting from the tragedy which occurred on Metron Construction's work site were rendered in Ontario, they could be applied in Quebec, since the relevant provisions of the *Criminal Code* have effect throughout Canada.

These judgments reiterate the importance placed by the legislator on the health and safety of workers and that such offences will be taken very seriously.

ÉLODIE BRUNET

514 878-5422

[ebrunet@lavery.ca](mailto:ebrunet@lavery.ca)

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE LABOUR AND EMPLOYMENT LAW GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

PIERRE-L. BARIBEAU 514 877-2965 pbaribeau@lavery.ca  
PIERRE BEAUDOIN 418 266-3068 pbeaudoin@lavery.ca  
JEAN BEAUREGARD 514 877-2976 jbeauregard@lavery.ca  
VALÉRIE BELLE-ISLE 418 266-3059 vbelleisle@lavery.ca  
MONIQUE BRASSARD 514 877-2942 mbrassard@lavery.ca  
ÉLODIE BRUNET 514 878-5422 ebrunet@lavery.ca  
MICHEL DESROSNIERS 514 877-2939 mdesrosniers@lavery.ca  
JOSÉE DUMOULIN 514 877-3088 jdumoulin@lavery.ca  
MICHEL GÉLINAS 514 877-2984 mgelinas@lavery.ca  
JEAN-FRANÇOIS HOTTE 514 877-2916 jfhotte@lavery.ca  
MARIE-HÉLÈNE JOLICOEUR 514 877-2955 mhjolicoeur@lavery.ca  
NICOLAS JOUBERT 514 877-2918 njoubert@lavery.ca  
PAMÉLA KELLY-NADEAU 418 266-3072 pkellynadeau@lavery.ca  
VALÉRIE KOROZS 514 877-3028 vkorozs@lavery.ca  
JOSIANE L'HEUREUX 514 877-2954 jlheureux@lavery.ca  
NADINE LANDRY 514 878-5668 nlandry@lavery.ca  
CLAUDE LAROSE, CRIA 418 266-3062 clarose@lavery.ca  
GUY LAVOIE 514 877-3030 guy.lavoie@lavery.ca  
GUY LEMAY, CRIA 514 877-2966 glemay@lavery.ca  
VICKY LEMELIN 514 877-3002 vlemelin@lavery.ca  
CARL LESSARD 514 877-2963 clessard@lavery.ca  
CATHERINE MAHEU 514 877-2912 cmaheu@lavery.ca  
ZÉÏNEB MELLOULI 514 877-3056 zmellouli@lavery.ca  
VÉRONIQUE MORIN, CRIA 514 877-3082 vmorin@lavery.ca  
FRANÇOIS PARENT 514 877-3089 fparent@lavery.ca  
MARIE-CLAUDE PERREAULT, CRIA 514 877-2958 mcperreault@lavery.ca  
MARIE-HÉLÈNE RIVERIN 418 266-3082 mhriverin@lavery.ca

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