

# BRIEF SENIOR MANAGEMENT: Supervisor's Act Can Be Basis for Criminal Liability



Workers were on swing stage scaffolding repairing balconies at an apartment building when the scaffolding collapsed. One worker was seriously injured; four died. The resulting investigation found that three of the four workers who died and the site supervisor had used marijuana before the incident. The company that employed them pleaded guilty to one charge of criminal negligence causing death under the *Criminal Code* (Code) as amended by Bill C-45. The court fined it \$200,000. But an appeals court increased that fine to \$750,000 and confirmed that a corporation can be held criminally liable based solely on the acts of a supervisor [*R. v. Metron Construction Corp.*].

## THE PROBLEM

The goal of Bill C-45 was to amend the Code to make it easier to bring criminal negligence charges for workplace safety incidents. To convict an organization of criminal negligence, the government must prove that a company 'representative' committed such negligence while acting within the scope of his authority and a 'senior officer' didn't take reasonably expected action to prevent the representative's conduct. The Code defines the terms 'representative' and 'senior officer' broadly. So when these definitions are applied, as in the *Metron* case, even the acts of a site supervisor can be a sufficient basis on which to convict a company of criminal negligence.

## THE EXPLANATION

The elements the prosecution must prove for a criminal negligence charge differ depending on whether the defendant is an individual or an 'organization,' such as a company or corporation. For organizations, the Crown must prove that:

- One or more 'representatives,' while acting within the scope of their authority, committed criminal negligence; and
- A 'senior officer' departed markedly from the standard of care that could reasonably be expected to prevent a representative from committing that offence.

The Code defines a 'representative' of an organization as a director, partner, employee, member, agent or contractor of the organization. So basically *anyone* associated with a company could arguably be considered its representative' from the lowest worker all the way to the CEO.

Under the Code, 'senior officer' is defined as a representative, as defined above, 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.

In the case of a corporation, this definition would clearly include members of senior management, such as an officer or director and CFO. However, because the definition is so broad, a person lower down in the corporate hierarchy, such as a plant manager, could also be considered a senior officer depending on the extent of his responsibilities.

In *Metron*, the company pleaded guilty to criminal negligence based on the acts of the site supervisor, who was both a 'representative' and 'senior officer' under the Code. The parties agreed that the site supervisor (Fazilov) had failed to take reasonable steps to prevent bodily harm and death by:

- Directing and/or permitting six workers to work on the swing stage when he knew or should have known that it was unsafe to do so;
- Directing and/or permitting six workers to board the swing stage knowing that only two lifelines were available; and
- Permitting persons under the influence of a drug to work on the project.

And the appeals court in *Metron* agreed that 'Fazilov fell within the definitions of representative and senior officer.' It also confirmed the company's liability for that conduct, noting that 'the criminal negligence of Fazilov, for which the respondent is criminally liable, was extreme.'

But the site supervisor wasn't a member of the company's senior management or what you'd typically consider a senior officer. He was simply hired by the project manager for this specific project. And when the company tried to distance itself from his actions based on his role within the company, the appeals court said 'the site supervisor's role should not serve to diminish the gravity of the offence. The intent of Bill C-45 is to trigger responsibility by the corporation for the conduct and supervision of its representative.'

## THE LESSON

The *Metron* case confirms that the conduct of a someone on a lower level of the company hierarchy, such as site supervisors, plant managers or others in similar positions, can be the basis for criminal liability for the company. To protect the company from such liability, it's critical that senior management ensures that supervisors are properly trained on and fully understand the company's OHS program and the safety hazards in the workplace. In addition, there should be procedures in place for reviewing pre-hiring the safety background and experience of anyone who could arguably be considered a senior officer for the company, including contractors hired to oversee a specific project or job.

**SHOW YOUR LAWYER**

*R. v. Metron Construction Corp.*, [2013] ONCA 541 (CanLII), Sept. 4, 2013