Corporate Criminal Liability for Pot-Smoking Foremen: When Do Their Acts or Omissions Become the Company's?

Vicarious Liability for Pot Smoking Foremen: When Do their Criminal Actions Become the Company's'

By David G. Myrol[1]

A recent criminal case from Ontario provides a disturbing insight into the reach of the criminal law to make corporations vicariously liable for the poor judgment, if not criminal behaviour, of field-level management. The case is *R. v. Metron Construction Company*, a recent decision from the Ontario Court of Justice.

The case involves the deaths of four workers who fell 14 floors to the ground after a swing stage collapsed on Christmas Eve 2009. In 2012 the company entered a guilty plea to criminal negligence causing death and was sentenced to a $200,000 fine. The Crown wanted a $1 million fine and has since appealed this sentence.

The facts in *Metron* are tragic on many levels. A crew from the company was restoring cement patios on a residential apartment building in Toronto. The swing stage had been rented from a supplier. It appeared new but didn't have any markings, serial numbers, identifiers or labels with regard to the stage's

maximum capacity. There was no manual, instructions or other production information such as design drawings prepared by an engineer. All of this would have been required under OHS legislation in Ontario. Subsequent testing of the swing stage revealed that it had not been properly constructed and would not have been safe for two workers – let alone the six workers who were on the swing stage when it collapsed together with their tools and materials.

The incident happened at the end of the day. Six workers climbed onto the swing at approximately 4:30 p.m. to travel back to ground level to get ready to leave the project. Normal practice on the project was for only two workers to be on the swing stage at any time. One worker had the good sense to tie himself into one of only two life lines on the swing stage. Shortly after climbing onto the swing stage it collapsed sending four to their deaths and leaving one with serious injuries. Toxicology results on the deceased workers revealed that at the time of the incident, three of four, including the supervisor, "had marijuana in their system at a level consistent with having recently ingested the drug".

The sentencing issues in *Metron* are interesting and undoubtedly will be resolved as the law in this area continues to develop. Unions denounced the sentence as a "shameful precedent" and called for the president of the company to be put in jail. That will not happen on appeal. The company plead guilty, not the president. The company is considered at law to be a separate legal entity, fictitious but a "person" nonetheless, and no one can serve a jail sentence on behalf of another "person". The president could only go to jail if he were charged and convicted in his personal capacity.

Why is *Metron* such an important case' The sentencing implications of *Metron* are interesting in light of the disconnect in Canada between large regulatory penalties and smaller (comparatively speaking) penalties for more serious criminal convictions. However, the *Metron* case could stand for

something much more significant. The reason *Metron* is important is because the case considers what a "senior officer" means in the *Criminal Code*. The definition of "senior officer" first came into force in 2004 as a result of the *Criminal Code* amendments in Bill C-45. A "senior officer" is now defined in the *Criminal Code* as:

"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;"

What makes *Metron* important, if followed by other judges, is that it means a mid-level manager or field supervisor could be a "senior officer" of the company. In *Metron* the Court concluded the supervisor of the crew, the one whose toxicology samples were consistent with recent marijuana consumption, was a "senior officer" of the accused company. As the Court stated at paragraph 15 of the decision, those changes in Bill C-45 "clearly extend the attribution of the criminal corporate liability to the actions of mid-level managers such as" the supervisor on the Metron crew.

Bill C-45 revised the *Criminal Code* to modernize the identity model of corporate criminal liability in Canada. In Canada's version of the identity model, the Crown had to prove a person who was the "directing mind" of the company also committed the criminal offence in question – it was a fruitful playground for defence counsel and an unending game of frustration for Crown prosecutors. Hence the modernization of Canadian criminal law.

There are now two requirements in the post-Bill C-45 era that the Crown must prove before establishing a conviction for criminal negligence against a company. Those requirements are set out in section 22.1 of the *Criminal Code*, but on a

simplistic level they contain two main requirements. First, the Crown must prove a “representative” (or a group them) was a party to the offence. Second, a “senior officer” (or group of them) responsible for an aspect of the company’s activities, departed markedly from the standard of care that could reasonably be expected of them to prevent a “representative” from being a party to the offence. In many ways, the “senior officer” is the shield which protects the company from criminal liability when company “representatives” commit a criminal offence.

A “representative” of a company is defined broadly to include, amongst other things, employees, agents, and contractors. A “senior officer”, at least until *Metron*, seemed much narrower in scope (see the above definition). Metron is important because it holds that “mid-level” managers are “senior officers”, and by application, this includes field level supervisors. Wow.

The *Metron* case raises all kinds of questions. How does a company protect itself from the fallible field level supervisor that decides to get high at work’ Do his or her actions become those of the company’s’ What can executive management do to manage this risk’

The starting point for any organization is to have an effective health and safety management system that has been properly and carefully designed by competent people. However, even the best-designed system will not amount to a due diligence defence if not implemented by individuals who are competent.

What does “competent” mean in this context’ As the *Metron* case demonstrates, competency includes industry and regulatory knowledge. If the supervisor in the *Metron* case was competent in regulatory requirements, he may have understood the associated dangers and regulatory requirements relating to the situation, therefore preventing the accident in the first

place.

If a company can demonstrate that their field level supervision is properly trained, monitored, and competent in regulatory requirements, then the company may have a defence to charges laid.

Proving regulatory competency can be a difficult task and companies should not rely on subjective assessments. Currently industry has the option to utilize third party organizations such as I-CAB (International Competency Assessment Board) to quantify the regulatory competency of individuals fulfilling employer responsibilities. (For more information on I-CAB, read this interview with Robert Day, chair of the Advisory Board, who explains I-CAB's purpose and how its competency assessments can help your company.)

Getting people with regulatory competence in the right positions goes a long way in terms of preventing incidents. It provides the company a defence to charges when the conduct of those employees amounts to criminal behaviour. Whether the defence is successful will depend on the circumstances but at least the company has an answer when those employees seemingly do not.

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***Insider* Says:** For more information on C-45 and criminal negligence charges, go to the C-45 Compliance Centre. In addition, the Metron case discussed above spurred changes to Ontario's OHS system. For more information on that movement and its progress, go to the Ontario OHS Reform Compliance Centre. And for more information on I-CAB, read this

interview with Robert Day, chair of the Advisory Board, who explains I-CAB’s purpose and how its competency assessments can help your company.