



Welcome to the special Occupational Health and Safety Edition of TM@Work. With recent amendments to OHS legislation, the scope of corporate and individual criminal liability for workplace accidents and injuries has expanded.

Contents:

- Did you know? Five Common Occupational Health and Safety Pitfalls
- Workplace Safety and Health Criminal Negligence Charges—The Courts Weigh In
- Legislative Update—Bill 23 and Bill 32

Failing to protect your business from workplace accidents can have costly and time-consuming repercussions. The lawyers in our OHS Practice Group, co-chaired by Grant Mitchell Q.C. and Jamie Alyce Jurczak, are experienced in assisting organizations in avoiding difficulties in the occupational health and safety regulatory regime, including defence services, accident response, appeals of regulatory orders, legislative compliance audits and training, and balancing safety with other legal obligations. Click [here](#) for more information about our OHS practice group.

Did you know? Five Common Occupational Health and Safety Pitfalls

We regularly provide advice to employers about health and safety obligations. A failure to follow health and safety legislation can result in criminal charges and significant fines. Most employers are primarily concerned with meeting obligations to prevent major accidents and incidents. However a failure to follow certain procedural aspects of the legislation can also result in charges and fines, or make it difficult to prove due diligence in a major prosecution. These are the most common issues that we see:

1. Serious workplace incidents must be reported immediately

The Manitoba *Workplace Safety and Health Act* (WSHA) Regulations require that when a serious incident occurs at a workplace, an employer must immediately and by the fastest means of communication available, notify the Workplace Safety and Health division of the incident. A failure to do so can result in a charge for a failure to report. Waiting even a half an hour can give rise to a charge for a failure to report. “Serious incident” is defined in the Regulations. If you are unsure whether an incident is “serious”, get immediate advice. If you are not in a position to get immediate advice, err on the side of treating the incident as serious.

2. The scene of a serious incident must be preserved

When a serious incident occurs at a workplace, the scene must not be disturbed until at least 24 hours after the Workplace Safety and Health division is notified, unless a safety and health officer directs otherwise. The officer may release the scene, or direct that it be preserved longer than 24 hours. The only exception to this is where it is necessary to disrupt the scene to free a trapped person or to avoid

the creation of an additional hazard. Disturbing the scene beyond those limited circumstances could result in a charge for disturbing the scene of a serious incident.

3. A safety and health committee is required for workplaces of 20 or more workers

Every employer must establish a workplace safety and health committee for each workplace where at least 20 or more of the employer's workers are regularly employed. On a construction site where at least 20 workers are involved, or expected to be involved, in work on a construction project, the prime contractor is responsible for establishing a committee.

For workplaces with more than 10 but less than 20 workers regularly employed at a workplace, an employee not associated with management must be designated as the worker safety and health representative, and will be expected to fulfill the same duties as those set out for committees.

4. A written safety and health program is required for workplaces of 20 or more workers

Employers must establish a written workplace safety and health program for each workplace where 20 or more workers of that employer are regularly employed. There are 11 specific items that must be included in the written program, according to WSHA. A failure to have a program that meets all 11 requirements can result in a charge for a failure to have a written safety and health program.

While WSHA only requires a written program for workplaces with 20 or more workers, we recommend that all workplaces implement a written program. All too often we have seen smaller employers who are unable to defend a prosecution and prove due diligence, because they could not point to a written program to demonstrate that they took safety and health seriously.

5. Training must take place on a regular, recurring basis

WSHA requires that an employer must provide information, instruction and training to a worker to ensure their health and safety. This training must take place before the worker begins performing a work activity, when they are to perform a different activity than the one they were originally trained to perform, and when they are moved to another area of the workplace that involves different facilities or hazards. Unfortunately, we see far too many instances in which training did not extend much beyond a new worker's orientation at their time of hire. One of the most common charges that comes up is a failure of the employer's duty to provide training. Be sure to document all training that takes place.

Workplace Safety and Health Criminal Negligence Charges—The Courts Weigh In

In 2004, Bill C-45 (also known as the "Westray Bill") amended the *Criminal Code* imposing stricter OHS duties on individuals, organizations and their decision-makers across Canada to ensure the worker safety. Bill C-45 established OHS negligence as a criminal offence, and imposed a legal duty to "take reasonable steps to prevent bodily harm" to workers. For years, there was very little application of the new provisions, and many wondered if it would ever impact the OHS landscape.

Then, in 2008, the Quebec construction company Transpavé Inc. became the first company charged and convicted under the provisions of C-45. This was followed by several OHS criminal negligence charges being laid against individuals and corporations across Canada. A number of these cases have now proceeded to trial, interpreting the effect of C-45. These cases provide some guidance on C-45 and are also a sobering reminder of the very real risk of accountability in the face of an occupational accident.

In *R. v. Scrocca* (2010 QCCQ 8218), a case from the Court of Quebec, a landscape contractor was found guilty of criminal negligence causing death after a workplace incident resulted in the death of his employee. Prior to the *Scrocca* decision, no other OHS criminal negligence case had proceeded to trial. **Mr. Scrocca was sentenced to imprisonment of two years less a day.** The sentence will be served in the community with conditions, including a curfew.

The employee in this case was killed when a backhoe, driven by his employer, failed to brake and pinned him against a wall.

The machinery in question was purchased in 1976 and had not undergone any regular maintenance since that time. The mechanical inspection after the incident found that the machine had absolutely no braking capacity in the front two wheels, no brake fluid in the reservoir, and an all-over braking capacity of less than 30%. The mechanical inspection also uncovered 14 additional major issues with the machine including the fact that the horn, brake lights, parking brake, and brake pressure gauge were not functional.

Mr. Scrocca stated that the machine was brought to a certified mechanic when there was a major problem, and that he did not perform regular maintenance on the backhoe because he did not observe any issues with the vehicle. He also argued that at the time of the accident, there were no regulations in place in the province of Québec requiring regularly scheduled maintenance for heavy equipment. He advised the Court that he did not have the requisite intent required to be found guilty of criminal negligence.

The Court held that Mr. Scrocca's positions were indefensible and unacceptable, holding that a prudent person would make sure that the equipment was looked over at least annually. The fact that the machine was brought to a certified mechanic when there was a major problem, was not sufficient to meet the duty required under the *Criminal Code*.

The Court further held that the intentions of Mr. Scrocca had no place in the analysis, explaining that in criminal negligence cases there does not have to be a positive intention for the result of the act. The court found that there was a clear breach of the duty to take reasonable steps to prevent bodily harm to a worker. As the owner of the vehicle, Mr. Scrocca had a duty to ensure that the vehicle was maintained in a safe condition. The backhoe had been used for 30 years with essentially no mechanical maintenance. The court found that in failing to maintain the vehicle, Mr. Scrocca placed himself in a position where he would not know the risks associated with its use, which recklessly put the lives and safety of his workers in danger.

Following *Scrocca*, the Court of Quebec rendered a decision in *R v. Gagné* (2010 QCCQ 12364). In this case, two ex-employees of a company, were acquitted of accusations of criminal negligence causing death and bodily harm. The company was not charged.

The charges followed a collision between a train and a maintenance vehicle. The accident caused a death and injured three others. The accident occurred because the operators of the train and of the maintenance vehicle failed to communicate with each other, and failed to ensure that the necessary traffic permits were in place to ensure the safety of those working around train tracks.

The Court held that the Crown failed to prove the charges beyond a reasonable doubt. According to the Court, the two men were guilty of errors of fact but not criminal negligence. The required mental element was not present in this case, and the events of October 13th 2006 were

attributable to an error of fact that arose from a corporate culture of deficient training, not wanton and reckless disregard for the lives and safety of others. The differing treatment of intention by the court in *Gagné* as compared to *Scrocca* demonstrates the extent to which the law in relation to Bill C-45 is still developing.

Note, the Court in *Gagné* was extremely harsh in its commentary about the employer's lax corporate culture and identified it as the root cause of the accident. This commentary suggests that had the corporation been charged, the result may have been different.

Meanwhile, a case proceeding in British Columbia is also worthy of some attention. Following a decision by the Crown not to proceed with Criminal Code charges, the United Steelworkers recently gained judicial approval to proceed with a private prosecution of Weyerhaeuser over the death of a worker that took place in 2004, where the worker was buried under wood chips. It has been stated publicly that the Union may launch private prosecutions in other provinces where prosecutors decline to pursue criminal charges in cases involving fatalities.

Legislative Update – Bill 23 and Bill 32

Two government bills are currently before the Manitoba legislature that are of interest to employers.

Bill 23, *The Employment Standards Code Amendment Act*, proposes amendments that will permit an employer and employee to enter into a written flextime agreement, at the request of an employee. Such an agreement may alter an employee's hours to a maximum of 10 hours per day and 40 hours per week. Bill 23 also amends the standard for dismissal from "deliberate misconduct" to "just cause". This Bill received Royal Assent on June 16, 2011 and the amendments take effect on January 1, 2012.

<http://web2.gov.mb.ca/bills/39-5/b023e.php>

Bill 32, *The Essential Services (Health Care) and Related Amendments Act*, proposes to modify the existing essential services regime to provide for mandatory negotiation and that there can be no strike or lockout prior to reaching an essential services agreement. Bill 32 provides for an interest arbitration to set the terms of the essential services agreement, if a consensual essential services agreement cannot be reached. It also provides for arbitration of disputes arising under an essential services agreement.

Note that this bill applies only to hospitals, personal care homes, regional health authorities and other specifically named employers.

This Bill received Royal Assent on June 16, 2011 and the amendments are now in force.

<http://web2.gov.mb.ca/bills/39-5/b032e.php>

Beware Bill 219

In our March newsletter, we provided an update on the recent legislative amendments that came into force February 1, 2011 regarding harassment under the *Workplace Safety and Health Act and Regulations*. We have been alerted by some of our clients, who have been approached to learn about the legislative changes regarding workplace violence and harassment brought about by “Bill 219”. Please note that Bill 219 was a private member’s bill that was not passed into law. We invite you to review our *March newsletter* for a comprehensive update on the current requirements with respect to workplace violence and harassment, including the actual amendments that came into force February 1, 2011.

This newsletter is prepared as a service for clients of Taylor McCaffrey LLP (“TM LLP”) and other persons dealing with workplace issues including labour relations, employment, human rights, privacy and occupational safety and health. It is not intended to be an exhaustive statement of the law or an opinion on any subject. Although we endeavour to ensure the accuracy of the newsletter, no one should act upon it without a thorough examination of the law with regard to the facts of a specific situation. No part of this newsletter may be reproduced without prior written permission of TM LLP. This newsletter has been sent to you courtesy of TM LLP. © 2011 Taylor McCaffrey LLP

We are proud to be the Manitoba member of the Employment Law Alliance. ELA is a network of over 3,000 lawyers and firms providing employment and labour expertise in Canadian jurisdictions and more than 100 countries, including all U.S. states. We work closely together to ensure that our clients’ legal matters are handled seamlessly wherever they do business.

