

## DOUBLE TROUBLE: PARALLEL PROSECUTIONS FOR HEALTH AND SAFETY OFFENCES

*A very recent case involving a construction supervisor suggests that parallel prosecutions brought under the Criminal Code of Canada and occupational health and safety ("OHS") legislation are now a reality.*

CANADA – Employers are now exposed to potential criminal liability for certain health and safety offences as a result of the enactment of Bill C-45, *An Act to Amend the Criminal Code of Canada*, which was proclaimed in force on March 31, 2004. At the same time, employers remain exposed to liability for violations of provincial or federal OHS legislation. Although commentators initially speculated that the government would prosecute workplace health and safety violations under either its criminal or regulatory power, employers should now be prepared for both.

The defendant was employed as a construction supervisor with Vista Construction. On April 19, 2004, he had been supervising workers repairing a drainage problem in the foundation of a house when he left the worksite. Moments after the defendant's departure, one of the workers was killed when the trench that he had been working in collapsed on top of him, burying him alive.

On August 26, 2004, the supervisor became the first person to be charged as a result of the Bill C-45 amendments to the *Criminal Code*. As a construction supervisor, he had a legal duty under section 217.1 of the amended *Criminal Code* to take "reasonable steps to prevent bodily harm" to persons under his supervision at work. The supervisor has been charged with criminal negligence causing death under section 220(b) of the *Criminal Code*, on the ground that he failed to carry out his duty to prevent harm in the

workplace. If convicted, he could face life in prison.

In addition to the police investigation that led to the laying of criminal charges against the supervisor, the Ontario Ministry of Labour launched an investigation into the fatality. The supervisor has since been charged under section 25(1)(c) of the Ontario *Occupational Health and Safety Act* with 8 counts of failing to ensure compliance with the measures and procedures prescribed by the regulations under the statute.

Although the matter has not yet gone to trial, it is likely that the criminal charges and the OHS charges will be heard together. At the time of writing, the matter is scheduled to be heard at the Newmarket Criminal Court on March 3, 2005.

It is now clear that individuals may be charged under both the *Criminal Code* and the applicable OHS legislation for the same triggering event. However, it is still unlikely that an individual or an organization will be *convicted* under both statutes.

Under section 11(h) of the *Canadian Charter of Rights and Freedoms*, a party that has been charged with an offence, whether found guilty or acquitted, may not be tried or punished for the same offence again. This is known as the "double jeopardy" defence. In order to invoke the defence, however, a final decision must have been reached on one of the offences.

Parties facing prosecutions brought *at the same time* for the same offence, on the other hand, may be able to rely on the rule against multiple convictions as a defence. This defence provides that a person cannot be subject to multiple convictions for the same offence. In order for the defence to apply, the charges must be brought concurrently, and must share a factual and legal nexus.

The effectiveness of the rule against multiple convictions in the context of concurrent proceedings brought under the *Criminal Code* and the applicable OHS legislation has yet to be tested. However, it is likely that a test case will appear before the courts in the near future, now that such proceedings have begun.

Employers should act cautiously in light of the possibility of proceedings brought under both the *Criminal Code* and OHS legislation. The threat of criminal liability will likely encourage individuals and organizations to invoke their rights under the *Charter*. However, in certain circumstances, these rights will conflict with the rights of inspectors conducting investigations into workplace accidents under the applicable OHS legislation.

Federal and provincial OHS legislation allows the government to access information relating to workplace accidents with greater ease than the Crown can in exercising its criminal law power. For instance, OHS legislation imposes an obligation on organizations to facilitate investigations into workplace accidents. Failure to comply with this obligation may lead to obstruction charges and serious penalties. In addition, OHS legislation permits regulatory investigators to attend at a workplace without a warrant and seize evidence that is relevant to their investigation. However, an inspector must obtain a warrant before searching a workplace and seizing evidence if he/she has reasonable

grounds to believe that an offence has been committed.

In contrast, section 8 of the *Charter* establishes the right to be secure against unreasonable search and seizure. As a result of this provision, the police may not attend at a workplace and seize evidence unless they have a warrant to do so. The question of whether and to what extent regulatory investigators and the police may share information regarding a workplace accident will therefore become increasingly important.

Other *Charter* rights that employers should keep in mind include the right to silence guaranteed to individuals by section 11, and the right to retain and instruct legal counsel under section 10(b). Employers should accordingly take precautions by seeking legal advice upon the arrival of investigators at a workplace following an accident.

The charges laid against the construction supervisor are a sign of things to come. More charges will likely be laid against individuals pursuant to the amended *Criminal Code* in the future, as the Crown tests the new health and safety provisions. More than ever, employers should be thoroughly familiar with their responsibilities under the applicable OHS legislation, as well as their potential criminal liability for violations of their workplace health and safety obligations.

Source: *Labour and Employment Law*, Feb 2005, Ogilvy Renault