

When occupational injury becomes a crime: C-21, the bane of boards of directors

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INTRODUCTION

Chapter C-21¹ (Bill C-45) came into force on 31 March 2004. It amends the *Criminal Code* to reflect our intolerance for the fact that a worker may be injured or killed due to the negligence of his or her employer.

The *Act* also revolutionizes the criminal liability of corporations. The traditional approach developed by the courts is known as the "doctrine of identification"², according to which a corporation could be held criminally liable if it could be established in evidence that the individual who was the "directing mind" had personally committed the crime. Thus, a corporation that benefited from fraud committed by one of its representatives, responsible for managing an important aspect of the corporation's activities, nonetheless avoided criminal proceedings inasmuch as it was concluded that the representative was not the directing mind³. The new system established by Chapter C-21 is based on an assumption. The corporation is assumed to have been a party to a crime of negligence if it is established that the employees acted in a manner consistent with a crime of negligence and their superiors failed to intervene. The assumption also applies to crimes that require intent, such as fraud, and even murder or manslaughter. In this case, the assumption rests on the senior officer's knowledge of the offences committed by the representatives.

An assumption of this kind, as well as the concepts that underlie it, reflect the legislator's commendable efforts to surmount the impasse created by the jurisprudence. Of course, as with all legislation, implementation brings complications. We begin by discussing a number of these.

As indicated by the title, this article illuminates the participation of organizations in crimes of negligence leading to what have become commonly known as "occupational injuries".

The first section is devoted to examination of the new provisions of the *Criminal Code* that establish the assumptions of criminal liability by organizations and duty of the principal. We cover the concept of "due diligence" developed in the field of occupational health and safety, and discuss the elements used to define the diligence standard to which the *Criminal Code* will subject the principal. These elements constitute both the weapons of the prosecution and the shield of the accused. The second section discusses the problem of interaction between an investigation by a workplace inspector conducted under the *Act respecting occupational health and safety*⁴, a coroner's investigation conducted pursuant to the *Act respecting the determination of the causes and circumstances of death*⁵ and a police investigation conducted pursuant to the *Criminal Code*. Our next topic is the rights of persons charged. Finally, the third section addresses the problem associated with the criminal liability of an organization for the actions of its contractors and agents. Because "representative" is an elastic concept, a consequence of the contractual activity of the organization, the latter must be in possession of the means necessary to control those who engage its liability.

¹ *An Act to amend the Criminal Code (criminal liability of organizations)*, S.C. 2003, c. C-21 (Bill C-45).

² *Canadian Dredge & Dock Co. Ltd. v. The Queen*, [1985] 1 S.C.R. 662.

³ For an environmental law example, see *R. v. Safety-Kleen Canada Inc.*, (1997) 114 C.C.C. (3d) 493.

⁴ R.S.Q., c. S-2.1, hereinafter A.O.H.S.

⁵ R.S.Q., c. R-0.2, hereinafter A.D.C.C.D.

I. Study and Analysis of New Legislative Provisions

Chapter C-21 adds new concepts to the *Criminal Code*: "organization", "representative" and "senior officer". They are defined in section 2:

" **"organization"** means

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons;

"representative", in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;

"senior officer" means 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;"

Section 22.1 C.C. describes the reasoning according to which an organization is assumed party to a crime of negligence committed by its representatives:

"22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- (a) acting within the scope of their authority
 - (i) one of its representatives is a party to the offence, or
 - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs -- or the senior officers, collectively, depart - - markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence."

Section 22.2 C.C. sets out the reasoning according to which an organization is assumed to be a party to an offence requiring evidence of intent:

"**22.2** In respect of an offence that requires the prosecution to prove fault -- other than negligence -- an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence."

As proof of intent is more demanding than proof of negligence, section 22.2 C.C. stresses participation by a senior officer. The latter must at the very least intend to benefit the organization through the offence to which the representative is a party. Furthermore, it is no longer a matter of a "collective" representative. It must be proven that a particular representative is a party or is on the point of being a party to the offence.

Chapter C-21 also adds a new element to the issue of criminal negligence. Section 217.1 specifies the duty of the principal with regard to the safety of his or her workers:

"**217.1** 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."

The above section is added to the sections of the *Criminal Code* that define specific duties with respect to facilitating or directing implementation of sections 219, 220 and 221 C.C., cited below:

"**219.** (1) Every one is criminally negligent who

- (a) in doing anything, or
- (b) in omitting to do anything that is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "**duty**" means a duty imposed by law.

220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable:

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years⁶; and
- (b) in any other case, to imprisonment for life.

221. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years."

A. Who is Contemplated by the New Provisions?

1. Organization

The definition of "**organization**" reflects the legislator's efforts to include every form of organization, including governments and municipalities. Paragraph (a) of the definition lists known forms of civil institutions that usually have formal organizational structures. For example, a company has by-laws that define the titles and responsibilities of its representatives. Paragraph (b) gives a generic definition of unspecified associations of persons more likely to have informal organizational structures. This generic definition covers three aspects: purpose; structure; and social identity. Consequently, an association of volunteers that defines its purpose as helping the needy, assigning defined roles and responsibilities to its members and holding itself out to the public as such, meets the definition of "organization".

Sections 22.1 and 22.2 C.C. establish an assumption of participation by the organization in crimes committed by its representatives. This method of participation is in addition to the traditional methods regarding individuals, for example abetment (s. 21 C.C.). Thus an individual may be a party to a criminal offence in which an organization is assumed to have participated.

2. Individuals

(a) Persons Directing Work

Section 217.1 C.C. is more complex as its application is universal. The legal duty to take the necessary measures to avoid injury to a worker binds "everyone who undertakes, or has the authority, to direct how another person does work or performs a task." This section primarily contemplates individuals who, without acting within the structure of an organization, make use of the work of others in either a voluntary or paid capacity.⁷ Section 217.1, by reason of its

⁶ Is the supervisor of a firearms factory, found guilty of criminal negligence as the result of an accident suffered by a worker while handling weapons, liable to the minimum four years imprisonment under paragraph 220(a) C.C.?

⁷ Norman KEITH, *Workplace Health and Safety Crimes*, LexisNexis Butterworths, Markham, On., p 72, wonders whether a volunteer acting as director of a charitable organization is directing work within the meaning of section 217.1. His hesitation is surprising. There is no doubt whatever that the response to his question is in the affirmative.

formulation, can apply to any situation that involves a relationship of subordination authorizing one of the parties to direct the work of the other.

(b) Organization Representatives

Because section 217.1 is universal in its application, it also contemplates the representatives of an organization who, without being senior officers, nevertheless direct the work of others, either the work of representatives of that organization, or the work of persons who are not members thereof. Consider, for example, a foreman who supervises some 20 workers within an organization of 4,000 employees. In this situation, marked failure by the foreman to take the steps necessary to avoid injury to a worker under his supervision constitutes, if a worker is indeed injured, criminal negligence by a representative of the organization or, in the language of paragraph 22.1(a), constitutes conduct making that foreman a party to criminal negligence causing personal injury. If the incident is to incur the organization's criminal liability, it remains to evaluate the conduct of the superior officer in light of paragraph 22.1(b). It is also possible that the organization representative has engaged the services of a person who is not a member of the organization. Marked negligence by a representative causing injury to a member of the public could also be attributed to the organization.

(c) Senior Officers of the Organization

A person who occupies a position as senior officer may be personally charged with criminal negligence if the scope of that person's authority entails directing work. Since section 217.1 applies to all those who undertake, or have the authority, to direct how another person does work or performs a task, all the representatives of an organization who have such responsibility are contemplated, whatever their place in the hierarchy.

B. What Incidents Are Contemplated by the New Legislation?

Chapter C-21 has arisen from a serious industrial accident at the Westray mine in Plymouth, Nova Scotia. Large quantities of methane saturated the air in the mine while the miners were working the face. The machines were equipped with methane detectors that shut them down when saturation point was reached. This safety device was unpopular because it slowed down the work, especially since saturation episodes were frequent. The miners, with the knowledge of the supervisors and managers, deactivated the gas detectors. There was an explosion that killed 26 miners. Criminal proceedings against the mine and its officers were undertaken, but later abandoned because of the difficulty of establishing evidence.⁸ Chapter C-21 speaks directly to this problem by explicitly relating employer negligence associated with occupational safety to criminal negligence (s. 217.1 C.C.) and by laying the groundwork for an assumption of the organization as party to a crime (s. 22.1 C.C.). Obviously industrial accidents are the target. However, the term "work" is defined in a general way, and is not limited to paid work or to a specific sector (construction work and office work are both covered).

⁸ Commissioner K. Peter RICHARD, *The Westray Story, A Predictable Path to Disaster. Report of the Westray Mine Public Inquiry*, Government of Nova Scotia, November 1997.

Furthermore, the term "another person" in section 217.1 includes the public at large. This means that, even if the duty to take reasonable steps is incumbent on a person who directs another person's work or task, worker injury is not specified. The injured party could be a member of the public.

Finally, the expression "bodily injury" includes psychological trauma⁹. Specifically included are on-the-job harassment, sexual harassment and job-related stress (e.g. depression, burn-out).¹⁰

C. Penalties Adapted to the Organization

We mention here the addition of new *Criminal Code* provisions relating to sentencing, including those that define the probation conditions to which an organization may be subject.

Section 718.21 C.C. sets out the factors to be considered when sentence is imposed on an organization convicted of a crime:

"A court that imposes a sentence on an organization shall also take into consideration the following factors:

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to public authorities of the investigation and prosecution of the offence;
- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- (g) whether the organization was -- or any of its representatives who were involved in the commission of the offence were -- convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;

⁹ *R. v. McCraw*, (1991) 128 N.R. 229 (T.U.A.C.).

¹⁰ N. KEITH, *op. cit.*, pp. 41-42. The latter is of the opinion that an injury recognized by provincial legislation on financial compensation for occupational injury is contemplated by section 217.1 C.C.. This legislation also recognizes such occupational diseases as tendonitis caused by repetitive movement.

- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence."

Subsections 732.1(3.1) and (3.2) set out the conditions of probation that a judge may prescribe in respect of an organization:

"(3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:

- (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;
- (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- (f) provide, in the manner specified by the court, the following information to the public, namely,
 - (i) the offence of which the organization was convicted,
 - (ii) the sentence imposed by the court, and
 - (iii) any measures that the organization is taking -- including any policies, standards and procedures established under paragraph (b) -- to reduce the likelihood of it committing a subsequent offence; and
- (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

(3.2) Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph."

Finally, we point out that an organization may be required to pay a fine in an amount based on the crime of which it is convicted and the type of proceedings used to establish guilt. Where a crime has been committed, the amount of the fine that may be imposed on the organization is without limit. Where the offence is a summary conviction offence, the amount shall not exceed \$100,000.¹¹

D. Due Diligence

Sections 22.1 and 217.1 C.C. specify that a senior officer and any person who has the authority to direct how another person does work or performs a task is bound to ensure that the persons working under their authority commit no crime of negligence (22.1), and cause no bodily injury to others (217.1). In our opinion, in either case, persons in a position of authority over workers are subject to the same diligence standard. The labour arena has inherent hazards, hazards that employers are duty bound to neutralize, hazards that determine the diligence standard. This appears appropriate based on Canadian jurisprudence as it addresses occupational health and safety.

Federal and provincial governments already require that every player in the labour arena (employee, employer, supervisor, foreman, contractor) comply with detailed safety rules. The requirements of existing laws and regulations are incontestably relevant to our need to define the due diligence standard in criminal law. Furthermore, because section 219 C.C. specifies that the omission to do something that it is our "duty" to do is a form of criminal negligence, it implicitly refers to the obligations set out by provincial and federal legislation on occupational health and safety¹². Provincial legislation specifically imposes a general obligation of diligence on persons who employ the work of others¹³. The general obligation of diligence has been defined by Canadian jurisprudence.

It should be pointed out that a diligence standard based on application of regulations does not arise in criminal law as a "defence" against a strict liability offence¹⁴. As we say in the introduction, the elements of due diligence defined in the context of strict liability offences relating to occupational health and safety constitute the weapons of the prosecution and the shield of the defence. The prosecution must prove that the accused failed the diligence requirement. The defence must raise a reasonable doubt with respect to the prosecution's evidence. In this way, both parties must refer to the standards established by the occupational health and safety laws and regulations.

The general diligence requirement contemplated in the provincial and federal legislation covers three aspects: planning, effectiveness and authority.

¹¹ S. 735. C.C.

¹² *R. v. Titchner*, (1961) 131 C.C.C. 64; *R. v. Leblanc*, [1977] 1 S.C.R. 339.

¹³ All the provinces impose this general obligation of diligence, except the Yukon. The terms used are quite similar from province to province ("every employer must take the necessary steps to protect the health and safety of employees"). See N. KEITH, *op. cit.*, pp. 106-107.

¹⁴ *R. v. Sault Ste Marie (City)*, [1978] 2 S.C.R. 1299.

1. Planning

Legislators concerned with occupational health and safety require the employer to identify and monitor work-related hazards. The employer is responsible for identifying hazards, and may not claim ignorance of the facts unless reasonable investigation has been conducted to determine them. In the context of strict liability offences, this is known as the "error of fact" defence. The employer fails the test if the hazard is obvious or would become so on reasonable investigation. In any case, the employer is bound to become familiar with the work he requires of others. If that initiative is not taken, it is assumed that the employer is aware of the hazard, unless it is not foreseeable by a reasonable person. Although the planning duty arises from implementation of occupational health and safety legislation, it is now widely known and undoubtedly a minimum requirement where crime is an issue.

The obligation on the employer is to define the hazards associated with the work required of employees and develop methods to alleviate them. The employer must be very meticulous, take the initiative and examine all the actions required of employees in the context of their work, and identify attendant risks. The employer must develop methods to reduce the risks and ensure implementation of the methods by supervising the work¹⁵.

Each new task, even the most limited, must be examined and evaluated for the risk entailed¹⁶. Similarly, the methods used to reduce the risk of accident must be adapted to each specific situation. Even if the employer has developed safety procedures, they no longer suffice if the risk is heightened momentarily. The employer is obliged to define a "tailor-made" procedure and adapt it to the risk specific to a given task¹⁷.

The employer must ensure that the employees have the skill and information required to perform each task required of them¹⁸.

Usual practice recognized by stakeholders cannot be used to determine the due diligence standard. This standard is determined by the risk as such. It is the risk created by the task to be performed that determines the degree of diligence required¹⁹.

The planning duty stems from the general safety requirement imposed on employers by provincial legislation. These acts and numerous regulations contain many detailed safety standards adapted to the innumerable aspects of work. These standards direct employer attention to the potential dangers of work. Complying with the standards is however not sufficient. In all

¹⁵ *R. v. Rio Algom Ltd.*, [1988] O.J. No. 1810 (Ont. C.A.); *R. v. Tim-minco Ltd.*, [2001] O.J. No. 1448 (Ont. C.A.).

¹⁶ *R. v. Dagmar Construction Ltd.*, [1989] O.J. No. 1665 (Ont. C.A.); *R. v. Van-Rob Stampings Inc.*, (1996) O.J. No. 1 (Ont. P.C.).

¹⁷ *R. v. Bayview Wellington Homes (Port Union) Inc.*, [2003] O.J. No. 1103 (Ont. P.C.); *R. v. Canron Inc.*, [1995] O.J. No. 4311 (Ont. P.C.).

¹⁸ *R. v. A.W. Leil Cranes & Equipment (1986) Ltd.*, [2003] N.S.J. No. 524. (N.S.P.C.); *R. v. Bellai Brothers Ontario*, [1993] O.J. No. 1600 (Ont. P.C.).

¹⁹ *Dziwenka et al. v. Regina et al.*, [1972] S.C.R. 419 (Supreme Court of Canada) (civil liability case cited in the field of occupational health and safety); *R. v. Stuart Olson Construction Inc.*, [1993] S.J. No. 109 (Sask. S.C.); *R. v. General Scrap Iron and Metals Ltd.*, [2001] A.J. No. 828 (Alta. P.C., decision upheld by the Superior Court, [2002] A.J. No. 897).

circumstances, employers must be familiar with the work they have their employees perform and the inherent risks. In this regard, provincial legislation requires employers (specifically in the construction industry) to hold meetings at which employees are encouraged to voice their comments on safety in the workplace. These comments are an important source of information that must be integrated into the work process on a regular basis. Finally, the planning duty requires the employer to consider employee fatigue and errors of judgment²⁰. The employer cannot rely on their common sense, as a repetitive task performed over a long time period can lead an employee to adopt conduct that makes the task easier but heightens the risk of injury to himself or his peers.

2. Effectiveness

It is not sufficient to identify risks and determine appropriate safety measures. The employer must ensure implementation.

The employer must ensure that the employees have the appropriate safety equipment required, make the work supervisor aware of safety matters and ensure that the latter enforces safety rules²¹.

The employer must give employees adequate training in light of the seriousness of the risk inherent in each specific task. The terms "continuous training" and "tailor-made training" are appropriate here²².

In addition to the production aspect of the work (the operations required by the employer), training must cover safety aspects. The same applies to employee supervision. In addition to the work itself, supervision must encompass employee safety. The employee must receive instructions on safe working methods²³.

An accident prevention program must be taught to employees and posted in the places they frequent daily.²⁴

Safety equipment, whether defined by regulation or use of which is a reasonable requirement, is mandatory and the equipment must be in good condition. The tools or machinery supplied to perform a task must also be inspected to ensure proper operation. Normal operation of the machine must not create a danger for its operator. Where advisable, the employer must equip the machine with an appropriate device (e.g. to prevent direct operator contact with

²⁰ *R. v. St. Mary's Cement*, [1996] O.J. No. 5307.

²¹ *C.S.S.T. v. Marc Filiatreault Couvreur Inc.*, D.T.E. 2001T-842 (Quebec Labour Court).

²² *Ontario v. Helmer Pederson Construction Ltd.*, [1990] O.J. No. 653 (Ontario Provincial Court).

²³ *R. v. Napanee (Town)*, (1990) 8. C.O.H.S.C. 121 (Ontario Provincial Court); *R. v. Collins & Aikman Canada Inc.*, [1998] O.J. No. 6304 (Ontario Provincial Court); *R. v. St. Mary's Cement*, [1999] O.J. No. 942 (Ontario Provincial Court); *R. v. St. Lawrence Cement Inc.*, [1992] O.J. No. 3770 (Ontario Provincial Court).

²⁴ *Construction et pavage Dufour Ltée v. C.S.S.T.*, [1999] J.Q. No. 4684; *C.S.S.T. v. Chevrons Royal Inc.*, [2000] D.T.T.Q. No. 45.

moving parts). Rather than relying on operator common sense, the employer must take the initiative required to make the machines safe²⁵.

In short, simply encouraging employees to work in a safe manner does not constitute an effective accident prevention system. An effective system includes the following elements: instructions written by the employer; work procedures addressed to the employees explaining how to deal with risks; procedures for communication between employees and supervisors; regular training and supervision of employees and supervisors; training updates; and regular evaluation of the system as a whole²⁶.

3. Authority

The duty of authority stems logically from stewardship and its corollary, liability for the actions of others. Due diligence by the employer implies that the latter demonstrate intolerance for dangerous employee behaviour, especially high-risk behaviour, for example working at a high elevation without a safety harness²⁷. Imposition of sanctions to ensure compliance with regulations is an essential aspect of diligence²⁸.

Of course an employee sanctioned by the employer can successfully file a claim with the labour tribunal. This should not discourage the employer from sanctioning dangerous behaviour, as employee complaint has no effect on employer obligation to ensure employee safety. Furthermore, the courts have ruled that the employer is required to impose sanctions to ensure employee safety, and dismissed many grievances from at-fault employees accordingly²⁹.

As we have seen, the employer has a planning duty, i.e. he must examine the actions entailed by the work, recognize the attendant risks and take the means necessary to alleviate them. The employer has the further duty to protect employees from themselves and their peers. This duty implies continuous and active presence of a person in a position of authority over the employees. The presence in the workplace of such a person is essential as that person acts on

²⁵ *C.S.S.T. v. Entreprises Lagacé (1982) Inc.*, D.T.E. 90T-163 (Quebec Labour Court). See also *C.S.S.T. v. 96599614 Quebec Inc.*, [2000] D.T.T.Q. No. 42; *R. v. Inco Ltd.*, [1999] O.J. No. 4648 (Superior Court of Ontario, decision upheld by the Court of Appeal and fines increased to \$500,000, [2000] O.J. No. 1866; *R. v. Adamako*, [2002] O.J. No. 3050 (Ontario Provincial Court); *R. v. Drosis Supermarket Ltd.*, [2003] N.B.J. No. 383 (Superior Court of New Brunswick).

²⁶ C.A. EDWARDS and C.E. HUMPHREY, *Employer Liability for Contractors Under the Occupational Health and Safety Act*, Carswell, Scarborough, Ontario, 2000, p. 9.

²⁷ *C.S.S.T. v. Aluminium Jocelyn Paquette Inc.*, [2000] D.T.T.Q. No. 22; *R. v. St. Mary's Cement*, [1996] O.J. No. 5307 (Ontario Provincial Court).

²⁸ *C.S.S.T. v. Marc Filiatreault Couvreur Inc.*, D.T.E. 2001T-842; *R. v. St. Lawrence Cement*, [1992] O.J. No. 3770.

²⁹ *Pavaco Plastics Inc. v. ACTWU*, (1991) 21 L.A.C. (4th) 312 (Ontario Arbitration Commission); *Royal Oaks Mine Inc. v. USW* (unreported decision of the Ontario Arbitration Commission, 22 April 1992); *United Steel Workers of America, Local 6500 v. Inco* (unreported decision of the Ontario grievance arbitrator, 28 January 2003). The last three decisions are cited by C.A. EDWARDS and C.E. HUMPHREY, *Due Diligence Under the Occupational Health and Safety Act, A Practical Guide*, Carswell, Scarborough, Ontario, 2000, p. 22. See also *Gould Manufacturing of Canada v. IMAW*, (1978) 18 L.A.C. (2d) 286 (Ontario Arbitration Commission), reported by Lancaster's Health and Safety Law Reporter, July-August 2003, vol. 19, nos. 7-8.

behalf of the employer, performs the employer's duties and incurs the employer's liability³⁰. The mere presence of such a person is not sufficient: the person must act effectively to ensure employee safety³¹. Furthermore, the employer is always responsible for ensuring that the person delegated to supervise the work complies with safety regulations³². A foreman who witnesses breaches of safety regulations by employees must act effectively to remedy the situation³³.

II. Analysis of Interaction Between Criminal Investigation and Regulatory Body Investigation

When an accident occurs in a workplace, various entities begin investigation. Each of these entities has specific means and pursues specific aims. The aim of investigation by the Commission de la santé et de la sécurité du travail [workmen's compensation] is to prevent occupational injury. The C.S.S.T. is empowered to enforce attendance of witnesses at its investigation. The aim of a coroner's inquest is to identify the causes of a death. The coroner is also empowered to compel attendance at an investigation. A police investigation aims at suppressing crime. A police officer is not empowered to compel witnesses to attend an investigation. However, evidence gathered in investigations by the C.S.S.T. and the coroner may be used during a criminal trial to prove the guilt of certain individuals. Interaction among the various investigations is a complex subject with which players in the labour arena must be familiar.

A. Powers of Investigation of the C.S.S.T.

In the context of the A.O.H.S., an "inspector"³⁴ is appointed under the *Public Service Act* to enforce compliance with workplace safety standards. An inspector's function is primarily preventive and may entail, in addition to orders or advice to employers, imposition of fines. In the performance of his duties, an inspector may, at any reasonable hour of the day or night, enter a workplace before or after occurrence of an accident. The inspector has access to all the books, registers and records of the organization or its representatives, including a supplier or other person carrying on an activity in the fields contemplated by the act and the regulations. A person having custody, possession or control of these books, registers or records shall give communication of them to the inspector and facilitate his examination of them³⁵.

Section 185 A.O.H.S. specifies as follows:

"No person may hinder an inspector in the performance of his duties, mislead or attempt to mislead him by concealment or false or untruthful statements, refuse to give his name

³⁰ *R. v. Inco Ltd.*, [2001] O.J. No. 4938 (Superior Court of Ontario); *R. v. Jeters Roofing and Wall Cladding Inc.*, [1999] O.J. No. 5244 (Ontario Provincial Court).

³¹ *R. v. Alcon Construction Inc.*, [1994] N.B.J. No. 185 (New Brunswick Provincial Court).

³² *R. v. Northland Fleet Services (Yukon) Ltd.*, [1993] Y.J.N. No. 32 (Yukon Territorial Court, decision upheld on appeal, [1993] Y.J. No. 180).

³³ *R. v. Pattar Cedar Products Ltd.*, [2002] B.C.J. No. 2813 (British Columbia Provincial Court).

³⁴ Section 177 A.O.H.S.

³⁵ Section 177 and s. 179 A.O.H.S.

and address to the inspector or neglect to obey an order he may give under this act or the regulations."³⁶

This provision and the affirmative obligations of workers³⁷ and employers³⁸ are supported by the threat of criminal sanction:

"235. Every person who makes a false declaration or neglects or refuses to provide the information necessary for the application of this act or the regulations is guilty of an offence.

236. Every person who contravenes this act or a regulation or refuses to conform to a decision or order rendered under this act or the regulations or incites a person to do so, is guilty of an offence and liable to a fine of not less than \$200 nor more than \$500 in the case of a natural person, and to a fine of not less than \$500 nor more than \$1,000 in the case of a legal person."

For any subsequent offence, the fines provided for in the first paragraph are increased to a minimum of \$500 and a maximum of \$1,000 in the case of a natural person and to a minimum of \$1,000 and a maximum of \$2,000 in the case of a legal person.

[...]

238. The court may, on an application by the prosecutor, order a person convicted of an offence under a provision of section 236 or 237 to conform to the requirements of the Act or the regulations within the time it fixes or to carry out any measure it considers likely to contribute to the prevention of work accidents or occupational disease. [...]"

1. Cooperation by the Organization

An "employer" is the person who, under the terms of a contract for work, uses the services of a worker. The employer is contemplated in subsection 51(14) of the A.O.H.S.:

"51. Every employer must take the necessary measures to protect the health and ensure the safety and physical well-being of his worker. He must, in particular,

[...]

(14) cooperate with the health and safety committee, or as the case may be, the job site committee and with any person responsible for the application of this act and the regulations and provide them with all necessary information;

[...]

³⁶ Section 185 A.O.H.S.

³⁷ See subsection II.A.3. Cooperation by Other Organization Representatives.

³⁸ See subsection II.A.1. Cooperation by the Organization.

Every employer must inform the Commission of an incident, by the most rapid means of communication, and, within 24 hours, make a written report to it, in the form and with the information prescribed by regulation... The scene of the incident must remain unchanged until it has been investigated by the inspector, ..."³⁹

Contractors related to the employer by a service contract or lease and hire of services are deemed employers, not employees of the latter. In a construction site context, each contractor who leases services to a "principal contractor" (i.e. the owner of the construction site or the person responsible for performance of all the work) is deemed an employer within the broad sense of section 194 A.O.H.S. ("anyone... who has work done by an employee")⁴⁰. In other words, contractors have the same obligations as employers.

2. Cooperation by Senior Officers

Every director, officer, manager, supervisor, foreman or agent of the employer who interacts with the workers is deemed party to an offence committed by the organization⁴¹. As they are deemed to participate in the actions of the "employer", they fall under the concept of employer and are subject to the same obligations.

3. Cooperation by Other Organization Representatives

A "worker" is a person who performs work under a contract of employment. The worker is contemplated in subsection 49(6) of the A.O.H.S.:

"49. A worker must:

[...]

6) cooperate with the health and safety committee and, where such is the case, with the job-site committee and with any person responsible for the application of this act and the regulations.

A worker must respond to questions asked by the inspector."

B. Investigative Powers of Coroner

The coroner must investigate all deaths in order to identify the deceased and the causes of death⁴². A coroner, although not authorized to make any finding of individual criminal liability⁴³, has considerable investigative power. A coroner having reasonable and probable cause to believe that an object or a document useful for the performance of his duties is to be found in a place

³⁹ Section 62 A.O.H.S.

⁴⁰ See the *Act respecting labour relations, vocational training and manpower management in the construction industry* (c. R-20), s. 1(j).

⁴¹ S. 241 A.O.H.S.

⁴² Ss. 1 & 2 A.D.C.C.D.

⁴³ S. 4, A.D.C.C.D.

may authorize search of the place and seizure of an object or document,⁴⁴ and may enter that place and examine or seize any relevant object or document found there⁴⁵. Furthermore, the coroner may summon a person to be examined at an inquest whom he believes in a position to provide useful or enlightening information for the inquest⁴⁶. The coroner may order a person summoned by him to bring with him any object or document he indicates⁴⁷. Every person summoned to testify before a coroner must, on pain of contempt of court, answer the questions put to him⁴⁸. All these provisions apply to any person, including an organization, a senior officer and a representative of an organization.

C. Investigative Powers of Police Officers

The situation is different when dealing with a police investigator. No one is obliged to cooperate with the latter, except when the police officer has obtained a search warrant, in which case one should make sure the warrant is valid. Furthermore, it is often advisable to cooperate in a police investigation even if there is no obligation to do so. Consequently, whenever there is a question of police investigation, the organization and the individuals contemplated by the investigation should engage the services of a lawyer to ensure respect for their rights and representation of their interests.

D. Right to Counsel and Right to Remain Silent

1. Right to Counsel

Every person, organization, senior officer and worker, has the right to counsel at all times during investigation by the CSST, coroner, or the police. In some cases, every representative of an organization should engage the services of independent counsel to ensure confidentiality.

Even if the A.O.H.S. requires the players in the labour arena to provide information, such information is restricted to a minimum, i.e. it concerns solely the facts relating to the incident. It would be unfortunate for the person questioned to go beyond the requirements of the law and reveal information which there is no requirement to reveal. Furthermore, emotion produced by the incident can have an impact on witness perception. Here again the assistance of counsel is key, as soon as possible after the incident. Furthermore, written statements to a C.S.S.T. investigator should be examined by counsel prior to submission. These written statements, made by physical persons, should mention the regulatory context and specify that they may not be used to incriminate the author. Individuals questioned by a C.S.S.T. investigator should also require the presence of a lawyer during the interview.

The information collected by the coroner may be used as evidence in criminal proceedings. However such information cannot be used to incriminate the persons who supplied

⁴⁴ S. 49, A.D.C.C.D.

⁴⁵ S. 50, A.D.C.C.D.

⁴⁶ S. 112, A.D.C.C.D.

⁴⁷ S. 114, A.D.C.C.D.

⁴⁸ S. 126, A.D.C.C.D.

it, unless that person is charged with perjury⁴⁹. The same is true for representatives of the organization, specifically senior officers, required to submit documents to the coroner.

In all situations, counsel retained following a work accident must be familiar with, in addition to the A.O.H.S. and the A.D.C.C.D., the facts surrounding the incident and the past behaviour of the organization with respect to occupational health and safety authorities. Obviously counsel must be aware of the status of the investigators and the law pursuant to which they are soliciting information. Furthermore – and this is fundamental to adequate representation of the client – counsel must promptly seek to determine the client's status according to the various investigators. For example, advice will vary considerably depending on whether the client is a simple witness or a suspect.

Every individual is entitled to remain silent in the matter of a police investigation. As many persons automatically tend to cooperate with police officers, prior consultation with a lawyer is advisable. It may be beneficial to cooperate in a police investigation once all relevant factors have been assessed.

E. Subsequent Use of Evidence Gathered During Investigations in the Context of Criminal Proceedings

Organizations, their employees or representatives, supervisors and managers, etc., are required to cooperate with a C.S.S.T. investigation, and the information they provide may be used to prove their contravention of the A.O.H.S. or its regulations. Anyone who engages in an activity governed by a specific act cannot claim the right to silence as grounds to refuse to provide information required thereby⁵⁰. This exception to the non-incrimination principle is warranted specifically by the fact that it would be difficult to monitor implementation of occupational health and safety standards without allowing public authorities access to workplaces, files and evidence of key players.

Criminal offences obey different rules. The principle underlying the right of an individual charged with a criminal offence is that a human being cannot be required to provide information that will be used to incriminate him. A person may be subpoenaed to appear at the trial of a third party. But the information revealed cannot be used to prove his own guilt.

For this reason, during legal proceedings the party seeking to establish that a person has committed a criminal offence cannot have recourse to information obtained by a C.S.S.T. investigator or coroner⁵¹. Such information may however be used against a third party. For example, information provided by an organization's secretary may be used to incriminate a senior officer. Information that an organization is required to provide to the C.S.S.T. or the coroner may be used against the secretary⁵².

⁴⁹ Section 127 A.D.C.C.D. stipulates that "The coroner shall inform witnesses of their right to request the protection of section 5 of the *Canada Evidence Act* [...] regarding any question tending to incriminate him".

⁵⁰ *Thomson Newspaper Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154.

⁵¹ *R. v. White*, [1999] 2 S.C.R. 417.

⁵² *R. v. Amway, op. cit.*

F. Requirement to Comply with Procedural Guarantees

The procedural guarantees that an organization may demand are relatively restricted compared to those to which an individual is entitled. The organization does enjoy constitutional rights that may apply. Although an organization does not have the human attribute that allows an accused to remain silent, it does have its own interest. It has the right to a fair trial, within a reasonable time⁵³, a right that includes the right to obtain before trial all evidence held by the prosecution. Furthermore, nothing prevents an organization from contesting the validity of an act by invoking rights specific to individuals⁵⁴.

III. Mandataries, Subcontractors and Limited Partners of an Organization

A. Organization Liability for Actions of Subcontractors

Builders often use the services of specialized companies commonly known as "subcontractors". The presence of subcontractors raises a problem with the definition of organization "representative". The concept of "representative" includes organization contractors (e.g. a general contractor employed by an organization to construct a building complex). However, does the definition of representative include subcontractors (i.e. contractors hired by a general contractor)?

Provincial occupational health and safety legislation covers all aspects of the liability of the person who employs the labour force when analyzing this legislation, provincial judges give less importance to a player's official title than to "degree of control" over the work of others⁵⁵. Based on this criterion, owners may be held liable for the actions of subcontractors hired by a general contractor. If the subcontractor is required to perform work on organization property and under the direction of organization representatives, the organization demonstrates control over the subcontractor and may be held liable for his actions. In short, the control exercised by the organization on individuals risks making them organization representatives. In such situations, the organization has no choice but to exercise effective control over its subcontractors, specifically through contracts and through supervisors assigned to the work site.

B. Organization Liability for Actions of Mandataries

The *Civil Code of Quebec* defines mandate as "a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a judicial act with a third person"⁵⁶. Under a service contract, a contractor is made responsible for performing work. Through a mandate, the mandatary is made responsible for performing a judicial act on behalf of the mandator. The two types of contract are often related. The general contractor hired by the organization to erect a building is both a contractor and a mandatary of the organization, as the contractor must not only perform work but hire skilled workers on behalf

⁵³ *R. v. C.I.P. Inc.*, [1992] 1 S.C.R. 843.

⁵⁴ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

⁵⁵ *R. v. Stelco Inc.*, [1989] O.J. No. 3122 (Ontario Provincial Court).

⁵⁶ Article 2130, C.C.Q.

of the organization. These subcontractors are third parties who contract with the mandator organization through the mandatary, the general contractor.

The situation of mandataries is similar to the previously discussed situation for subcontractors. In civil law, the organization is liable for the faults of its mandatary (e.g. a general contractor who fails to pay his subcontractors). This civil liability stems from the legislation⁵⁷. In criminal law, the organization's liability for the actions of its mandataries may, in our opinion, stem from the "control" exercised by the former over the latter.

Note that, in civil law, the mandator may be exonerated if he proves that "*he could not have prevented the injury*" caused by his mandatary⁵⁸. The term "prevent" recalls the wording of paragraph (b) of section 22.1 of the *Criminal Code*, requiring a senior officer to intervene to "prevent" commission of a crime. We have come full circle to the recurring theme of diligence. In short, the mandator, who risks being charged with the faults of his mandataries, has no other option than to make very sure his mandataries are controlled by contract and by his supervisors.

CONCLUSION

To assign criminal liability to a corporate body, the concept of identification required evidence that the physical person representing the directing mind of that body had personally committed the crime. Current legislation explicitly equates the obligation of a senior officer to adequately exercise authority over the conduct of representatives to being a party to an offence. This "stewardship obligation" is the cornerstone of the reform. The assumption of organization as party to a criminal offence is based entirely on belief in the existence, within the organization and all its ramifications, of a clearly established and effective hierarchy linking decision-makers and performers. Reflecting the importance given to this new "stewardship obligation", the new subsection 732.1(3.1) of the *Criminal Code* authorizes a judge to intervene in the management of an organization and require that it define its policies and their implementation.

Chapter C-21 imposes on both organizations and individuals new requirements with which they must comply in short order. In addition to attentive study of occupational health and safety legislation, more fundamentally this entails development and promotion of a "culture of safety".

⁵⁷ Article 2164, C.C.Q.

⁵⁸ *Ibid.*