



## Criminal liability for workplace deaths and injuries

### *Criminal Code* offences and their application by the courts

#### What are the *Criminal Code* offences that can be used?

In the context of criminal liability for workplace deaths and injuries, several charges can be laid against an organization or an individual who is criminally negligent in directing the work of others.

These offences are:

1. criminal negligence causing death
2. criminal negligence causing bodily harm
3. manslaughter by unlawful act
4. unlawfully causing bodily harm

#### 1. Criminal negligence causing death (section 220)

The offence of criminal negligence causing death in the occupational health and safety context requires proof beyond a reasonable doubt of the following elements:

- a breach of the legal duty (i.e., the duty pursuant to section 217.1 of the *Criminal Code* or any other duty emanating from a provincial/federal statute – including provincial legislation on workplace safety – or the common law)
- the breach amounts to a **wanton or reckless disregard for the lives and safety of others**
- a person died as a result
- the act or omission constituting the breach of a legal duty caused the person's death

**Penalty:** A maximum penalty of life imprisonment for an individual, in the case of an organization, a fine in the discretion of the court.<sup>1</sup>

#### 2. Criminal negligence causing bodily harm (section 221)

The offence of criminal negligence causing bodily harm in the occupational health and safety context requires proof beyond a reasonable doubt of the following elements:

- a breach of the legal duty (i.e., the duty pursuant to section 217.1 of the *Criminal Code* or any other duty emanating from a provincial/federal statute – including provincial legislation on workplace safety – or the common law)
- the breach amounts to a *wanton or reckless disregard for the lives and safety of others*
- a person suffered bodily harm as a result
- the act or omission constituting the breach caused the person's bodily harm

**Penalty:** A maximum penalty of ten years imprisonment (individual) or, in the case of an organization, a fine in the discretion of the court.

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<sup>1</sup> The offence provides a mandatory minimum penalty of imprisonment of four years if a firearm is used in the commission of the offence.

## **What does a *wanton or reckless disregard for the lives and safety of others* mean?**

The requirement that an accused's behaviour (including omissions) showed *wanton or reckless disregard for the lives or safety of others* has been interpreted by the Supreme Court of Canada in *R v J(F)*, [2008] 3 SCR 215 to mean a "marked and substantial departure" from what a reasonably prudent person would have done in the same circumstances.

## **What type of conduct can satisfy this legal standard in the occupational health and safety context?**

The following cases illustrate the factual scenarios that have been held by Canadian courts to satisfy the requirement that an organization or individual who undertakes or has authority to direct the work of others exhibited a "marked and substantial departure" from what a reasonably prudent person would have done in the same circumstances.

In *R v Metron Construction Corporation*<sup>2</sup>, a swing stage carrying a construction site supervisor and five workers collapsed, falling 14 floors to the ground. The site supervisor and three workers died. One worker survived the fall but suffered serious injuries. The sixth worker on the swing stage was properly attached to a life line that prevented him from falling - he was uninjured.

In this case, Metron Construction pled guilty to criminal negligence causing death. It was conceded that the facts outlined in the agreed statement of fact supported a finding of criminal negligence. The plea was based on the site supervisor's failure to take reasonable steps to prevent bodily harm and death by:

- Directing and/or permitting six workers (including himself) to work on a swing stage, when he knew or should have known that it was unsafe to do so (i.e., the swing stage did not have any markings, serial numbers, identifiers, or labels identifying its maximum capacity (as required by health and safety legislation and industry practice))
- Directing and/or permitting six workers (including himself) to board a swing stage knowing that **only** two lifelines were available (i.e., industry standards and health and safety legislation require all employees working at great heights on scaffolds to be attached to a lifeline)
- Permitting persons under the influence of drugs to work on the project

In *R v Scrocca*<sup>3</sup>, a worker died during a dirt unloading operation with a backhoe. During one of the unloading trips, the brakes of the backhoe failed and it continued to roll down a slope striking a worker and pinning him against a wall. The worker died of his injuries. The facts demonstrated that the cause of the accident was a major defect in the braking system. The court based its finding that Mr. Scrocca exhibited a "marked and substantial departure" from what a reasonably prudent person would have done in the same circumstances on the following facts:

- Expert evidence demonstrated that Mr. Scrocca had not checked or had the brakes checked for at least five years and probably much longer
- Evidence that the backhoe had been in use for 30 years and, apart from minimal maintenance, the backhoe never received a full mechanical inspection

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<sup>2</sup> *R v Metron Construction Corporation*, 2012 ONCJ 506.

<sup>3</sup> *R v Scrocca* [2010] QJ No 9605.

In *R v Stave Lake Quarries Inc.*<sup>4</sup>, a worker was killed when a rock hauler she had been operating rolled over and crushed her to death. On the day of her death, the employee had been performing a simple hauling task prior to being instructed to cease work for the day. Her supervisor left the site to obtain replacement parts for another machine. The employee did not immediately park her rock hauler. She later stopped working and left the machine near the top of a slope without engaging the parking brakes or placing rocks under its tires to prevent rolling. The air brakes eventually lost pressure and the rock hauler began to roll down the slope. The employee attempted to get inside the cab of the machine to stop it, but as it continued down the slope, its passenger side ascended a berm, causing the machine to roll over on its left side, crushing the employee under its weight.

Stave Lake Quarries Inc. (SLQ) pled guilty to one count of criminal negligence causing death, acknowledging in the agreed statement of facts that through one or more of its senior officers, the company showed wanton or reckless disregard for their employee's life. In this case, SLQ's guilt was founded upon the combined effect of SLQ's lack of a rigorous system in: (1) hiring; (2) training; and, (3) supervision of the rock quarry. For example:

- The employee was hired because she was a friend of the owner's family without consideration of the fact that she was not competent or qualified to do the job
- The employee did not have a licence to operate an air brake vehicle, however she was tasked with doing so on the day she died
- While the employee was trained by an experienced operator, she was only trained for one day prior to her death (i.e., not given any books or written materials about using the machine, nor was she instructed in basic safety procedures)
- None of the experienced operators at the site bothered to ensure that the inexperienced employee had parked the rock hauler safely, which would have been a simple task, preventing the tragic incident

### 3. Manslaughter by Unlawful Act (paragraph 222(5)(a))

The offence of manslaughter by unlawful act requires proof beyond a reasonable doubt of the following elements:

- the commission of an unlawful act, which can be either a criminal offence or a regulatory/provincial offence
- the unlawful act must be **objectively dangerous** and must cause death
- the conduct of the accused constitutes a **marked departure from the conduct of a reasonable person placed in the same circumstances**<sup>5</sup>
- having regard to all the circumstances, a reasonable person would have foreseen the risks of bodily harm

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<sup>4</sup> *R v Stave Lake Quarries Inc.*, [2016] BCJ No. 2583.

<sup>5</sup> At the time the Fact Sheet was prepared the Quebec Court of Appeal decision in *R v Javanmardi*, 2018 QCCA 856, was on appeal to the Supreme Court of Canada. The QCCA decision affirms the *Fournier* ruling with respect to the elements required to prove unlawful act manslaughter when the unlawful act is a breach of a strict liability offence. A lower court decision in Ontario (*R v Szejnmler*, 2013 OJ No 5268) does not articulate this second element.

**Penalty:** A maximum penalty of life imprisonment or, in the case of an organization, a fine in the discretion of the court.<sup>6</sup>

**For the purposes of manslaughter by unlawful act, what constitutes a *marked departure*?**

In *R v Fournier*<sup>7</sup>, the employer was working with an employee at a construction project, replacing underground sewer and water mainlines. The walls of the excavation were not shored properly as required by the *Quebec Safety Code* because excavated earth was placed too close to the excavation site. The excavated walls collapsed and the worker was crushed by a slab of concrete that fell into the excavated hole. The defendant was ultimately found guilty of manslaughter by unlawful act (para 222(5)(a) of the *Criminal Code*). The court noted that a reasonable person in the same circumstances would have foreseen the risks of bodily harm and allowing the work to continue under those circumstances constituted a marked departure from the standard of care a reasonable person placed in the same circumstances would have allowed to occur. The *Fournier* decision stands for the proposition that the unlawful act does not have to be a criminal offence but it must be an act that is both unlawful and objectively dangerous.

**4. Unlawfully Causing Bodily Harm (section 269)**

The offence of unlawfully causing bodily harm requires proof beyond a reasonable doubt of the following elements:

- An unlawful act that is criminal or regulatory in nature (federal or provincial legislation) and that is objectively dangerous
- Objective foresight of bodily harm that is concurrent with the underlying offence
- Bodily harm that is more than merely trivial or transitory

**Penalty:** For an individual, a maximum penalty of ten years imprisonment on indictment or 18 months on summary conviction. In the case of an organization, a fine, the amount in the discretion of the court.

**For the purpose of unlawfully causing bodily harm what constitutes objective foresight of bodily harm that is concurrent with the underlying offence?**

In *R v Hritchuk*<sup>8</sup>, the defendant service manager pled guilty to unlawfully causing bodily harm after employees used an unsafe method to drain gasoline from a vehicle and a fire resulted that permanently injured an employee. The dealership had the appropriate tool to perform the task safely but it was inoperative. The service manager knew that the device was inoperative but did not know that the employee victim was using an unsafe method to empty the gas. The service manager was responsible for ensuring that the correct device was available and used in accomplishing the task, thereby ensuring a safe work environment. These facts were sufficient to support objective foresight of bodily harm.

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<sup>6</sup> The offence provides a mandatory minimum penalty of imprisonment of four years if a firearm is used in the commission of the offence.

<sup>7</sup> *R v Fournier*, [2016] QCCS 5456.

<sup>8</sup> *R v Hritchuk*, 2012 QCCS 4525.

**Additional information**

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