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2010 WINTER GAMES WILL STAY TRUE TO PREVAILING WORKPLACE HEALTH AND SAFETY TRENDS

At the end of July 2005, John Furlong, the Chief Executive Officer of the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC), made the following statement:

“As athletes strive for higher levels of excellence on the field of play at the Olympic and Paralympic Games, we will strive to achieve the highest standards of health and safety for workers at all 2010 Games construction sites and all venues during the Games ... We firmly support the understanding that all workplace safety-related incidents are preventable. Our intention is to develop an organizational culture of safety first ... The attention on the building of venues and the hosting of the Winter Games gives us an opportunity to create awareness and showcase a new model of workplace safety ... This safety focus can be a legacy of preparing for and staging the Games.”¹

VANOC intends the 2010 Winter Games to be a benchmark for occupational health and safety, and envisions the Games to be “a catalyst for continual improvement in health and safety performance”².

Needless to say, workplace health and safety is expected to figure prominently in relation to the estimated 1,200 full-time employees and 35,000 volunteers who will be working at the various competition, training and non-competition venues.

Changed Times

VANOC's commitment to a superior standard of workplace health and safety is clearly a sign of the times.

Occupational health and safety entered the limelight after the May 9, 1992 Westray disaster which left 26 Nova Scotian coal miners dead. In response to the Westray disaster and recommendations from a subsequent public inquiry, the federal government, among other things, enacted section 217.1 of the *Criminal Code*³.

Section 217.1, which came into force on March 31, 2004, represents an effort to make criminal sanctions more readily available in cases of serious workplace health and safety violations. It is intended to supplement – not supplant – occupational health and safety regimes which exist at the provincial level and call for all reasonable care to be taken in ensuring the well-being of workers.

Amendments to the *Criminal Code*

Section 217.1 reads as follows:

“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.”

¹ “Vancouver 2010 Commits to Excellence in Olympic and Paralympic Games Venue Construction Safety” (July 22, 2005) (<http://www.vancouver2010.com/en>) (last accessed: August 10, 2006).

² *Ibid.*

³ *Criminal Code*, R.S.C. 1985, c. C-46.

Concurrent with the enactment of section 217.1, the federal government expanded the definitions of “every one” and “person” under section 2 of the *Criminal Code* to include an “organization”. The term “organization” was defined broadly to mean a public body, body corporate, society, company, firm, partnership, trade union or municipality, or an association of persons that is created for a common purpose, has an operational structure and holds itself out to the public as an association of persons.

The federal government also added section 22.1 to the *Criminal Code*. That section reads, in part, as follows:

“In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if ... 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 ...”

“Representative” was also defined broadly to mean, in respect of an organization, “a director, partner, employee, member, agent or contractor of the organization”.

The upshot of the amendments to the *Criminal Code* is that a wider range of individuals may be subject to criminal sanctions, and organizations face expanded potential criminal liability. Representatives of organizations – including officers, managers and other individuals acting in a supervisory capacity – are subject to a strict legal duty of care. Organizations may be found liable for the actions or omissions of lower-level employees or, for that matter, agents or contractors.

Liability Under the *Criminal Code*

Failure to discharge the legal duty of care established by section 217.1 may have serious consequences.

As far as individuals are concerned, failure to discharge the duty may give rise to a charge of criminal negligence causing death or bodily harm.⁴ Such a charge has the potential to attract a lengthy prison sentence. Sections 220 and 221 of the *Criminal Code* respectively provide as follows: “[e]very person who by criminal negligence causes death to another person is ... liable ... to imprisonment for life” and “[e]very one who by criminal negligence causes bodily harm to another person is ... liable to imprisonment for a term not exceeding ten years”.

An organization may also face harsh consequences if the duty under section 217.1 is not discharged. In the case of criminal negligence causing death or bodily harm, there is no limit on the amount of the monetary fine that a court may impose on the organization. There is also the possibility that the court will place the organization on probation. Conditions of a probation order made in respect of the organization may include “mak[ing] restitution to a person for any loss or damage that they have suffered as a result of the offence” and “establish[ing] policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence”.⁵

Section 718.21 of the *Criminal Code* sets out the factors that a court must take into account when sentencing an organization. Those factors include the following:

- any advantage realized by the organization as a result of the offence;

⁴ To obtain a conviction on a charge of criminal negligence, the prosecution must prove beyond a reasonable doubt that the actions or omissions of the accused exhibited a wanton or reckless disregard for the lives or safety of other persons – that is, the accused’s conduct amounted to a marked departure from the standards of a reasonable person in all the circumstances of the case.

⁵ Subsection 732.1(3.1) of the *Criminal Code*.

- the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- the cost to public authorities of the investigation and prosecution of the offence; and
- whether the organization has – or any of its representatives who were involved in the commission of the offence have – been convicted of a similar offence or sanctioned by a regulatory body for similar conduct.

Relevant Jurisprudence

A review of the jurisprudence suggests that there has only been one case to date involving the above-noted amendments to the *Criminal Code*. The case of *R. v. Fantini*⁶ arose out of circumstances in which a young worker was crushed or suffocated to death after the trench in which he was working collapsed.

Domenico Fantini had been “directly supervising the work of [the worker] ... shortly before the collapse of the trench” and had been “direct[ing] the worker ... and watch[ing] him work in the trench”.⁷ Mr. Fantini was 67 years old and had over 25 years of experience as a general contractor. He had no prior record of occupational health and safety infractions and no criminal record, and was remorseful about what had happened. There was no evidence that the accused had attempted “to cut corners to increase ... profits”.⁸

Various charges were laid against Mr. Fantini under Ontario’s *Occupational Health and Safety Act*⁹. He was also charged with the offence of criminal negligence causing death.

In *R. v. Fantini*, the prosecution made the following submissions:¹⁰

- “Employers are obligated to ensure that their workers are safe.”
- “Deaths of workers in the construction industry, especially in the class of trenches, are far too common. The dangers are well known and employers must be made to understand not only that safety must be the priority for the protection of workers, but they must be made to understand that it is a priority to protect their financial interests.”
- “The Crown is seeking a fine ... to send [a] message to other employers ... [The worker] was killed as a result of the negligence of Mr. Fantini. This was not the mere failure to follow technical rules ... [T]his was a clear failure to follow well known and obvious procedures to prevent the deaths of workers. Mr. Fantini knew that [the worker] was going to go into the trench ... [H]e was directed to slope the trench to prevent the collapse yet he did not do so.”
- “[Mr. Fantini] must pay [for his clear and seriously negligent actions]. Other employers must be made aware that should they do likewise, they will pay ... [O]therwise senseless and tragic deaths like this will re-occur and we will have learned nothing.”

In an apparent plea bargain, Mr. Fantini ultimately pled guilty to certain of the *Occupational Health and Safety Act* charges. He was fined \$50,000 and required to pay a victim surcharge of around \$10,000. In

⁶ *R. v. Fantini*, [2005] O.J. No. 2361 (Ct. Just.).

⁷ *Supra*, note 6 at para. 19.

⁸ *Supra*, note 6 at para. 29.

⁹ *Occupational Health and Safety Act*, R.S.O. 1990, c. O-1.

¹⁰ *Supra*, note 6 at para. 27.

exchange, the prosecution withdrew the remaining *Occupational Health and Safety Act* charges and the charge of criminal negligence causing death.

In passing sentence, Mr. Justice Gorewich stated he was “hopeful that with the imposition of [the] fines ... the message [would go] out to people in [Mr. Fantini’s profession] that not only care must be taken but extreme care must be taken”. The judge also noted that Mr. Fantini was a “small contractor”, and suggested that if the accused had been a “corporate defendant”, the fines would likely have been “far greater”.¹¹

Steps to Protect Against Liability

It is abundantly clear that organizations should take steps to protect themselves against liability arising out of non-compliance with workplace health and safety legislation and regulation. Here are some suggested steps:¹²

- Promulgate and communicate a clear occupational health and safety policy. Implement safe work rules and procedures that are understood and followed by workers, and firmly and consistently enforce such rules and procedures.
- Ensure that all representatives of the organization are aware of their legal duty of care and potential liability (criminal and otherwise) for failing to discharge same.
- Provide workers with orientation, on-the job training, instruction and supervision aimed at workplace health and safety.
- Keep records of training sessions indicating date, persons in attendance and topics covered.
- Keep records of meetings and crew talks where occupational health and safety issues are discussed.
- Respond to workplace health and safety infractions by meting out appropriate disciplinary sanctions. Keeps records of sanctions meted out.
- Build occupational health and safety compliance into job descriptions, and establish workplace health and safety as a separate and independent criterion in performance evaluations.
- Assign responsibility and resources for implementing an occupational health and safety program to an identified person or identified persons.
- Assign responsibility and resources for conducting risk assessments and identifying hazards.
- Respond appropriately to risks and control or eliminate identified hazards.
- Promptly and properly investigate incidents or accidents, and take corrective measures to address shortcomings in workplace health and safety.
- Raise and address workplace health and safety issues, and monitor compliance with occupational health and safety standards, at all levels of the organization. Responsibility for occupational health and safety does not lie solely with upper or middle management or supervisors who direct workers at the operational level.

¹¹ *Supra*, note 6 at para. 30.

¹² Many of these suggested steps are found on WorkSafe BC’s Due Diligence Checklist (http://www2.worksafebc.com/PDFs/common/due_dil_checklist.pdf) (last accessed: August 11, 2006).

- Discourage shirking of responsibility for workplace health and safety. Every supervisor in an organization has a vested interest in creating and maintaining a healthy and safe workplace.
- Require contractors to conform to workplace health and safety legislation and regulation.
- Maintain equipment log books and maintenance records, and implement a preventative maintenance schedule as required by manufacturer recommendations and industry standards.
- Review statistics on the frequency and severity of workplace accidents, as well as occupational injury and illness trends over time.
- Have an emergency response plan. Conduct drills to ensure the plan is effective.

It is worth underscoring, at this juncture, that some organizations implement “whistle-blowing” policies and procedures to give representatives of the organization the ability to raise concerns about internal conduct that is improper or irregular or in contravention of the law. Parenthetically, it is noted that VANOC has engaged a “Toronto-based company to set up a whistle-blowing web site and toll-free ‘hotline’ to allow ... employees, perhaps even ultimately its volunteers and contractors, to report abuses within the corporation” and “to create a place for employees to complain anonymously to VANOC”.¹³

Concluding Thought ...

It is worth concluding with the following thought. Pressure from occupational health and safety advocates for aggressive enforcement of section 217.1 of the *Criminal Code* is unlikely to subside. Confirmation of this is found in a comment made by Lawrence McBrearty, the National Director of the United Steelworkers¹⁴, around the time of the federal government’s enactment of section 217.1. That comment was as follows:

“Our campaign must continue ... We will be watching very closely to see if the actual language ... puts responsibility for health and safety at the boardroom level.”¹⁵

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¹³ J. Lee, “Vanoc to Set Up Whistle-Blower Web Site and Hotline: Service Will Allow Staff, Contractors to Report Abuses Anonymously to Senior Managers”, *The Vancouver Sun* (July 17, 2006), B1 and B4.

¹⁴ The United Steelworkers, incidentally, is the trade union that was representing the coal miners at the Westray mine.

¹⁵ “No More Westrays: Justice Minister Cauchon Congratulates Steelworkers” (<http://www.usw.ca/program/content/988.php>) (last accessed: August 9, 2006).