

## The *Transpavé Inc.* Case: a Quebec Company Pays for its Negligence

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On March 17, 2008, the Court of Québec fined *Transpavé Inc.* \$110,000 after it pleaded guilty to a charge of criminal negligence causing the death of one of its employees. This is a first in Canada since the *Criminal Code* was amended so that an organization could be found guilty of criminal negligence in occupational health and safety matters.

Before reviewing the Court of Québec's ruling and considering its impact in the future, the amendments to the *Criminal Code* that made it possible for *Transpavé Inc.* to be convicted merit attention.



### The amendments made to the *Criminal Code*

For a long time, the *Criminal Code*<sup>1</sup> has provided for punishment for criminal negligence. This offence is committed when a person who, in doing something or in failing to do something that is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons. Following the Westray mine tragedy in Nova Scotia where 26 employees lost their lives, Parliament passed *Bill C-45*, which took effect on March 31, 2004. Its purpose is to extend the offence of criminal negligence to the sphere of the organization of work, in order to protect the health and safety of Canadian workers.

The amendments are of major importance for companies and their managers.

First of all, Section 217.1 of the *Criminal Code* expressly imposes a duty on a person directing the work of another person "to take reasonable steps to prevent bodily harm to that person". Obviously, by imposing such a duty to supervise, Parliament was paving the way for criminal prosecutions in occupational health and safety matters since fault in the performance of that duty or a failure to perform that duty could justify an allegation of the wanton or reckless disregard that is required to constitute the offence of criminal negligence.

<sup>1</sup> *Criminal Code*, R.S.C. 1985, ch. C-46.



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Secondly, Section 2 of the *Criminal Code* introduces the concept of an “organization” which, as a “person”, could be found guilty of criminal negligence. The term “organization” includes a public body, body corporate, society, company, firm, partnership, trade union, municipality and, under certain conditions, an association of persons.

Thirdly, Section 22.1 of the *Criminal Code* no longer provides that it is necessary that a person be the “directing mind” of an organization to cause it to incur criminal liability. From now on, any “representative” of the organization, namely a director, partner, employee, etc., could cause it to incur criminal liability if he or she does not fulfil his or her duty to supervise the work.

These statutory amendments to the *Criminal Code* paved the way for Transpavé Inc. to be charged under criminal proceedings.

### **The facts in the Transpavé Inc. ruling**

Transpavé Inc. (“Transpavé”) operates a plant that manufactures concrete slabs and blocks. While trying to clear away boards that were jamming a conveyor, an employee lost his life when he was crushed by a pallet loader’s grappling hook. When the accident occurred, the safety system had been disabled, without the knowledge of Transpavé or its senior officers.

Prosecuted in the Court of Québec, Transpavé pleaded guilty to the charge of criminal negligence having caused the employee’s death. The judge noted the three derelictions of duty by Transpavé, which it acknowledged by its guilty plea. First of all, by not finding the cause of the jamming nor correcting the situation at the root of the accident, Transpavé breached its duty of foresight imposed by the *Act respecting Occupational health and safety*<sup>2</sup>. Secondly, it breached its duty of effectiveness by failing to implement appropriate measures to mitigate the risks of accidents. Lastly, it breached its duty of authority toward its employees since they contravened workplace safety instructions by disabling the safety system.

All that remained was for the judge to determine the penalty. While the *Criminal Code* provides for the imposition of a fine in the case of an organization, it does not specify any maximum.

### **Mitigating and aggravating factors**

The judge spelled out the principles that guide the determination of the penalty: [translation] “that, on the one hand, the penalty should be proportional to the seriousness of the offence and the degree of the offender’s responsibility and, on the other hand, it should be adapted to the mitigating or aggravating circumstances related to the commission of the offence and to the offender’s situation”.

As for the severity of the offence, the judge qualified it as serious since a person died.

However, in the judge’s opinion, Transpavé benefited from several mitigating circumstances related to the commission of the offence. The company did not profit from the offence, which was committed passively, that is to say, without being planned. In addition, it had not been convicted of any similar prior statutory or criminal offence. Lastly, after the accident occurred, Transpavé did not try to conceal any elements in anticipation of a potential prosecution. On the contrary, it invested \$750,000 in occupational health and safety to avoid the re-occurrence of such an accident, even surpassing the C.S.S.T.’s recommendations in this respect. Furthermore, the judge pointed out that the owners called upon psychologists to provide support to the employees. Thus, he drew the conclusion that the organization was not insensitive to the human tragedy that occurred.

Although the judge did not expressly mention it, the only aggravating factor seemed to be the company’s sound financial health. This factor is relevant since the *Criminal Code*<sup>3</sup> does not allow the sentence to have an impact on the economic viability of the organization and thus put the continued employment of its employees at risk.

<sup>2</sup> *Act respecting Occupational Health and Safety, R.S.Q., S-2.1.*

<sup>3</sup> Section 718.21(d).

## The penalty

By mutual agreement, the parties suggested a fine of \$100,000 to the judge as a penalty satisfactory to the interests of justice. The judge ratified the parties' suggestion, considering it adequate given all the aforementioned mitigating circumstances and especially Transpavé's pro-active investment of \$750,000 in occupational health and safety. However, the judge added a victim surcharge of \$10,000 to this fine, as he was entitled to do under the *Criminal Code*<sup>4</sup>, to be allocated to the fund to assist victims of criminal acts.

## Lessons to be learned from the ruling

Needless to say, the *Transpavé Inc.* ruling will echo throughout the occupational health and safety world. Unfortunately, chances are that it will not be the last ruling of this kind.

So, what lessons should we retain from this ruling?

First of all, we have to recognize that despite the substantial investment in occupational health and safety made *a posteriori* by Transpavé, the final fine of \$110,000 was no less significant, by the judge's own admission. Thus, we must recognize the fact that, although commendable and taken into account in determining the penalty, the measures taken after the accident did not have the weight one might have expected. Consequently, the predominance of the virtues and advantages of the prevention of industrial accidents over compensation for them is re-affirmed by the imposition of this heavy penalty.

Secondly, Transpavé was convicted of criminal negligence causing death following its guilty plea and without there being a trial. Except for a few brief references to the organization's derelictions of duty, the judge did not really express an opinion on the principles of criminal negligence with regard to the failure of a manager, a foreman or even a team leader to supervise the work. Therefore, we will have to wait for a ruling where an organization's guilt will be contested to see how these new provisions of the *Criminal Code* will be applied.

Lastly, the judge's determination of the penalty was greatly facilitated by the parties' joint recommendation. It is true that a judge has broad discretion and is not bound by a recommendation if he feels that it is unreasonable, inadequate, contrary to public interest or likely to bring justice into disrepute<sup>5</sup>. In the present case, the judge ratified the parties' recommendation. It would have been interesting to see what penalty the judge would have imposed in light of all the mitigating circumstances and especially the organization's sizeable investments to prevent any future accident.

<sup>4</sup> Section 737.

<sup>5</sup> *Bazinet c. R.*, 2008 QCCA 165 [CanLII].

## Conclusion

To summarize, the *Transpavé Inc.* ruling clearly shows us that criminal law now plays a role in the protection of workers' health and safety. In making this the case, did Parliament go too far? Did it try to fill a gap in the regulatory regime governing occupational health and safety? Is the repressive effect of criminal law really necessary to ensure that occupational health and safety standards are respected? The debate is wide open.

However, it is important to remember that criminal law gives organizations and their senior officers another good reason to increase their efforts in matters of accident prevention, in order to avoid consequences as dramatic as the death of an employee.

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