

## **\$850,000 fine against company and owner/director signals increased risk under OHSA**

**Fine amounts against employers and individuals under OHSA increasing**



BY Luiza Vikhnovich and Jemma Lewis / 25 Apr. 2024

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The Ontario Court of Justice (Ottawa Region) recently accepted a guilty plea and joint submission on penalty, arising out of a workplace explosion in January 2022 that tragically killed six workers and left a seventh with catastrophic injuries. The employer, Eastway Tank, Pump & Meter, was fined \$600,000 while its owner and director, Neil Greene, was fined \$80,000. Both were also fined an additional 25 per cent victim fine surcharge, amounting to a total fine of \$850,000.

The decision is significant because it is among the highest penalties imposed on a corporation of relatively modest size and with no prior charges under Ontario's Occupational Health and Safety Act (OHSA). Historically, penalties of this magnitude have been limited to large corporations in the mining and steel industries (for example), and even then only after prior convictions. The fine of \$600,000 is itself among the largest ever issued under health and safety legislation in Canada. The penalty against Greene represents 80 per cent of the maximum fine available at the time and the highest penalty against an individual defendant for a single charge under the OHSA, in Canadian history.

The decision sends a clear warning to Ontario businesses, of all sizes and in all industries, and their owners, officers and directors, that significant fines, even for a first offence, may increasingly be a risk.

In January 2022, a workplace explosion left six people dead and one person severely injured. Flammable vapours near a newly built tank truck ignited and exploded while a “wet test” was underway. A “wet test” is a standard procedure used to ensure the integrity of a tank prior to operation by flushing the tank compartments with diesel fuel.

Post-investigation, the Ministry of Labour, Immigration, Training and Skills Development (Ministry) laid charges against Eastway and Greene under the OHSA. At their core, the charges alleged Eastway and Greene failed to: (1) ensure that diesel fuel to be used for the wet testing of trucks was not contaminated with gasoline or any other flammable liquid or substance; (2) provide adequate information, instruction and supervision to workers on safe fuel storage and handling procedures; and (3) ensure the process of loading and “wet testing” a tanker truck was carried out in an area with no potential sources of ignition.

## **Guilty pleas to health and safety charges**

On April 5, 2024, by way of joint submission, Eastway pled guilty to two counts (\$600,000) and Greene to one count (\$80,000). At the time of the incident, the maximum penalty for a corporation under the OHSA was \$1.5 million, and for an individual for a single charge was \$100,000 and/or up to one year in jail. In accepting the joint submission, the court would have considered traditional sentencing factors including the extent of actual and potential harm to the public, the need for deterrence, the corporate defendant’s size, and the maximum penalty prescribed by statute at the time of the offence.

Of note, a criminal investigation into the explosion continues and may result in criminal charges and penalties, separate and apart from those already imposed under the OHSA.

Throughout the last decade, fine amounts imposed against employers and individuals under the OHSA have increased considerably. In December 2017, the Ontario Legislature tripled the maximum corporate fine and quadrupled the maximum individual fine. As of July 2022, a director or officer could be fined up to \$1.5 million and all other persons up to \$500,000. As of Oct. 26, 2023, the maximum corporate fine increased to \$2 million per offence (not retroactive).

## **What does this mean for Ontario businesses?**

Director and officer obligations under the OHSA are not new. They are part of the overlapping system of duties imposed on workplace parties by the OHSA. Under s. 32 of the OHSA, a director or officer is required to “take all reasonable care” to ensure the corporation complies with the OHSA, applicable regulations, and any order issued by the Ministry.

That said, historically, it has been rare to see charges against officers and directors who do not have meaningful oversight of the operations at issue. The decision in Eastway suggests those days may be over and even members of senior management with no direct, hands-on responsibility for operations, will increasingly be held responsible.

What should Ontario businesses do in light of the clear trend toward a wider net of responsibility and higher fines? How much “due diligence” will be considered reasonable in the circumstances?

The answer will depend on a variety of factors including: industry, scope of work, regulatory requirements, and compliance history. What we do know is that health and safety is the responsibility of every actor in the workplace. All the more reason why every organization should take a close and honest look at its own operations and safety protocols.

Ask yourself:

- Education: Is your organization, at all levels, sufficiently informed and educated on health and safety legal requirements and best practices? What training is in place for directors and officers; site or frontline managers; and workers? How often is it reviewed and updated?
- Delegation: Does your organization subcontract all or some of its work? If so, does the subcontracted organization have sufficient knowledge, adequate training, and proper certifications in place, if necessary? Do you know?
- Systems: Does your organization have a meaningful health and safety management system to both identify and address workplace risks, gaps, and hazards? Are audits conducted; by an internal or external body; how often? How and by whom are the results reviewed and addressed?
- Reporting: Who, within your organization, receives regular updates regarding health and safety compliance? In what circumstances does health and safety information move up the corporate chain of command? To whom? If you are at the board level, what questions should you be asking?
- Supervision: Are your workers appropriately supervised?
- Record keeping: Is all of the above sufficiently and properly documented?
- Review and revisit: How often is all the above reviewed and revisited? By whom?
- Professional assistance: Health and safety is serious business and, in some cases, taking “reasonable care” includes seeking professional help and legal advice.

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