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BILL C-45 AND ITS EFFECT ON CRIMINAL LIABILITY AND INSURANCE COVERAGE FOR CHARITIES

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A. INTRODUCTION

The Canadian Government has recently introduced amendments to the *Criminal Code of Canada,* R.S.C. 1985 c.C-46 (the "Criminal Code"), which will effect when organizations and their representatives will face criminal liability for negligent conduct. Bill C-45, "*An Act to Amend the Criminal Code (Criminal Liability of Organizations)*," received Royal Assent on November 7, 2003, but has not yet been proclaimed into force at the time of this article's publication. It is anticipated that the amendments will come into force and effect shortly.

When the amendments are proclaimed into force, Bill C-45 will impose a Criminal Code duty on organizations and their representatives to protect their workers and the public by creating a Criminal Code duty similar to the duty already found in the *Occupational Health and Safety Act* (Ontario), which requires that employers take every reasonable precaution to protect their employees.

B. EFFECT OF BILL C-45 ON CRIMINAL LIABILITY

The amendments contemplated by Bill C-45 will apply not only to corporations, but to all types of organizations, including non-share capital corporations, profit-making corporations, partnerships, and unincorporated organizations. "Organization" is defined in Bill C-45 to mean:

> (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.

The key reforms to the Criminal Code proposed by Bill C-45 include, but are not limited to:

1. Imposing criminal liability on organizations will no longer require that the criminal conduct or act of the organization be committed by a directing mind of the organization. Traditionally, to impose criminal liability on corporations in Canada, the Crown, applying the "identification theory," had to establish that the directing minds of the organization and the organization itself were effectively one and the same in committing the offence. Establishing this will no longer be necessary to obtain a conviction under Bill C-45.

2. The Crown will now be able to "cobble together" the essential elements of a criminal offence, such that the *actus reus* (the "Physical Element") and the *mens rea* (the "Mental Element") can be attributed to separate individuals within the offending organization in order to establish criminal liability.

3. The class of representatives of the offending organization who can commit or contribute to the Physical Element of the offence has been expanded from directors and officers to all representatives who act on behalf of the organization, such as directors, partners, employees, members, agents or contractors of the organization.

4. For crimes of criminal negligence, the Mental Element of the offence will be proven against offending organizations from the collective fault of the senior officers of the organization. In other words, a reckless corporate culture, which is tolerated by senior management, may be sufficient to establish the Mental Element of the criminal offence.

5. Where the criminal offence is based on allegations of criminal intent or recklessness, the Crown will establish the Mental Element where a senior officer is a party to the criminal offence, or where a

senior officer had knowledge of the offence but failed to take all reasonable steps to prevent or stop the offence.

6. Finally, a specific and explicit legal duty will be imposed on those who direct the work or task of others, to ensure that such individuals take all reasonable steps to prevent bodily harm at work.

7. Criminal Negligence – Section 22.1

To facilitate imposing liability on organizations for criminal negligence, the amendments will add section 22.2 to the Criminal Code, which reads as follows:

> 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.

It is immediately evident from a reading of the new Criminal Code provision that criminal liability for negligence will no longer need to derive from the same individual as the Physical Element can be committed by the organization's representatives while the Mental Element can stem from the organization's senior officers. Furthermore, the Physical Element itself need not be derived from one individual, as more than one representative can cause it, and the Mental Element also need not be derived from one individual, as it can stem from more than one senior officer. In short, an organization's criminal liability for negligence can now be established through the aggregation of the representatives' and senior officers' acts, omissions and state of mind.

There are a number of identifiable problems with section 22.1of the Criminal Code:

a) Section 22.1 will impose criminal liability for negligence on organizations based on the collective results of the policies, procedures and omissions of the organization, as well as the

actions of the organization's representatives. In this manner, an organization may be liable for criminal negligence even though no single individual within the organization has committed a criminal offence.

b) Section 22.1 will impute the individual Mental Element of a senior officer to the entire organization. This is a marked change from the traditional concept of corporate criminal liability developed at common law, which required that the directing minds of the corporation be found to be the corporation's mind before imposing criminal liability on the corporation for the directors' criminal negligence.

c) A senior officer is defined by Bill C-45 as:

> "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."

This broad definition has effectively eliminated the common law concept of limiting corporate criminal liability to the conduct of only those senior officers with decision-making powers.

d) Section 22.1 requires that the senior officers depart markedly from the "standard of care." There is no clear definition of this standard and it would vary depending on the activities of the organization.

It is, however, encouraging to note that there is still one conceptual limit on how criminal liability may be imposed on organizations. That is, the act of criminal negligence must be within the scope of the representative's authority before it will be imputed to the organization.

In light of the broad range of individuals whose actions and intentions can trigger the criminal liability of the organizations they represent, it is highly recommended that organizations take immediate steps to establish a system of checks-and-balances to monitor the acts and omissions of its representatives and senior officers in fulfilling their duties.

8. Criminal Offences Other Than Negligence – Section 22.2

Bill C-45 will also make it easier to hold organizations accountable for criminal offences other than negligence (i.e. criminal offences requiring intent or recklessness, which is the majority of offences in the Criminal Code) by adding section 22.2 as follows:

> 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.

This new provision of the Criminal Code is more limiting than section 22.1 in that criminal liability is restricted to the conduct of the senior officers. Furthermore, the Physical Element and the Mental Element will still need to be derived from the same individual (i.e., from one senior officer). However, the definition of a "senior officer" remains broad and, thus, an organization is as equally liable for the criminal conduct of someone with operational management authority as it is for someone with policy-making authority. The obvious problems with section 22.2 are as follows:

a) It is difficult to see the difference between subsection (a) and subsection (b). A senior officer who has the mental state required, and directs others to commit the offence, is a party to the offence.
b) It states that an organization will be criminally liable if one of its senior officers has "the mental state required to be a party to the offence" and directs others to commit the offence. This mental state is not defined and will require judicial clarification. As this new provision deals with criminal offences, the mental state must include intention, be it general or specific.

Once again, due to the high possibility that an organization may become criminally liable as a result of the criminal conduct of one senior officer, it is highly recommended that organizations take immediate steps to establish a check-and-balance system to monitor the acts and omissions of its senior officers in fulfilling their duties.

9. A New Duty – Section 217.1

Bill C-45 has also introduced a form of "criminal negligence" into the Criminal Code to address workplace safety, or the lack thereof, by adding section 217.1 as follows:

> Everyone 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.

This duty to prevent bodily harm applies to both individuals and organizations as the term "everyone" has been defined to include an organization. Furthermore, this duty is not limited to the senior officers of an organization, but is imposed on anyone who directs, or has the authority to direct, another person. Most importantly, it should be noted that the new provision in the Criminal Code covers not only "work," but tasks as well. This is broad enough to cover most activities, including those not traditionally considered work, but also those of a volunteer nature. When combined with the definition of "organization," which includes an "association of persons," it is reasonable to conclude that the activities of volunteers carried out on behalf of non-profit organizations, such as churches and charities, will be covered by this provision. As such, anyone who undertakes, or has the authority, to direct the activities of volunteers, members, employees or agents of charities, non-profit organizations, churches or philanthropic groups will be under a legal duty to take reasonable steps to prevent bodily harm to those persons under their control and direction.

The problem with section 217.1 is that its location in the Criminal Code suggests that it is a criminal offence, but its wording is insufficient to meet even the standard of advert negligence, which is the lowest level of *mens rea* required in the Criminal Code. In fact, the use of the term "reasonable steps" makes it more akin to a regulatory offence. It will be interesting to see how the courts resolve this ambiguity. In the meantime, many legal commentators are assuming that section 217.1 will be designated as a criminal offence and that, more specifically, it will be further designated as a criminal negligence offence. As such, the legal community is also assuming that the standard of care and the penalties for violating section 217.1 will be the same as those applicable to a criminal negligence offence. However, the ambiguity concerning what is required under section 217.1 paired with its potential for criminal penalties may give rise to challenges under the *Canadian Charter of Rights and Freedoms.*

This could potentially expose those who direct the work or task of others to criminal sanction for conduct that would traditionally be considered as negligence, and more appropriately dealt with through

existing regulatory provisions, such as those found in the *Occupational Health and Safety Act* (Ontario). It will also most likely lead to a blurring of the distinction between civil and criminal negligence. All this will have a detrimental effect on insurance coverage, which will be discussed in the next section.

The use of the term "reasonable steps" have led some legal commentators to feel that there is still a defence of due diligence available to an organization charged with a violation of section 217.1 under the Criminal Code. Others have disagreed as the defence of due diligence is only applicable with regulatory offences. At the very least, however, taking reasonable steps would assist in defending against criminal negligence charges. Therefore, it is highly recommended that organizations exercise due diligence by:

- Conducting a legal audit to review the organization's existing policies and programmes to determine whether or not they are inconsistent with applicable legal requirements;
- Having an ongoing audit programme;
- Establishing a safety system and ensuring that all reasonable steps are taken to ensure that the system is effective;
- Implementing business methods in response to any discovered needs;
- Requiring that the corporate officers report to the Board in a scheduled, timely fashion;
- Ensuring that all corporate officers are aware of the standards of their industry;
- Requiring that corporate officers immediately and personally react when they see that a system has failed;
- Publicizing both contingency and remedial plans for dangers or problems;
- Exercising due diligence in selecting competent persons when any of the officers' duties are delegated;
- Utilizing reports from outside professionals;
- Recording all steps taken to ensure that due diligence is being exercised;
- Making due diligence an integral part of every employee's performance review; and
- Directors and senior managers should exhort those whom they manage to reach an accepted standard of practice.

C. EFFECT OF BILL C-45 ON INSURANCE COVERAGE

By introducing the possibility of bringing criminal negligence charges against those who direct the work of others, Bill C-45 will seriously affect insurance coverage for directors and officers, where such insurance coverage was previously available. For example, many Directors and Officers liability

insurance policies provide for a duty to defend against civil lawsuits founded in negligence, or against allegations laid under regulatory legislations, such as the *Occupational Health and Safety Act* (Ontario). This duty to defend would impose on the insurer a duty to provide and pay for reasonable legal expenses incurred in defending a claim. Normally, such a duty to defend would not extend to allegations of criminal conduct. This is based, in part at least, on the public policy principle that one cannot buy insurance to cover criminal activities. As such, it is possible that a director or officer could be charged under the new provisions of the Criminal Code for conduct that would have traditionally been considered a regulatory offence (and for which a duty to defend would have been imposed upon the insurer) and not be covered for legal defence costs.

What is striking about this is that activities which previously resulted in civil liability based on negligence may now be adjudged criminal in nature. This, in turn, will detrimentally affect insurance coverage. It must be remembered that insurance policies usually impose two obligations on insurers: the duty to defend (discussed above) and the duty to indemnify (i.e., the duty to pay for the damages sustained). Most insurance policies, either through specific exclusionary clauses, or caselaw based on public policy, generally do not cover conduct that is designed to cause a loss or for which the loss is predictable. Criminal conduct, by its very nature, is predicated in the predictability of the outcome or loss sustained. This is the Mental Element of the criminal offence. A criminal act requires that a perpetrator turns his or her mind to committing the act, or, in the certain limited cases, wilfully turn his or her mind away from the dangers posed by his or her activities (wilful blindness or recklessness).

As such, the distinction between insurance coverage for non-intentional torts versus intentional torts is very important in light of the amendments introduced through Bill C-45. By its very nature as a criminal charge (which contemplates either a form of criminal intent or a recklessly negligent mind), Bill C-45, and specifically section 217.1, may have the effect of creating a form of "intentional" or "criminal" negligence. While this may seem illogical and contradictory at first glance, it would appear that the intent of the legislation is to create a new level or type of negligence, which is based on the recklessness of an organization, but for which the penalties imposed are more stringent. It would seem appropriate to anyone that, while a "new" form of criminal negligence has been created by the legislation, the underlying negligence – based on the foreseeability of the event – has not changed, and as such insurance coverage

should be provided. It should, however, be anticipated that insurers will attempt to limit their obligations to cover losses arising from such criminal negligence and will argue that it is an excluded risk. Although there are reasonable arguments to be made that insurance should be extended to cover such losses, such arguments may be resisted by the insurers, and will probably require judicial review and determination.

D. CONCLUSION

In short, the conduct contemplated by section 217.1 would normally be dealt with through civil concepts of negligence law, or regulatory legislation such as the *Occupational Health and Safety Act* (Ontario). Now that such conduct may be adjudged criminal, insurers will be well-placed to deny either a duty to defend or a duty to indemnify if criminal charges are laid under section 217.1 or if a civil claim for damages is pleaded too broadly or where the conduct in question is described in terms not truly negligent. Until Bill C-45 comes into force and the courts are given an opportunity to interpret the new provisions, however, it is unclear that a violation is a criminal offence or that there will be no insurance coverage for a violation of section 217.1. In the meantime, it is highly recommended that organizations take pro-active steps in exercising due diligence, which may assist in defending against criminal charges.

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