SMALL BUSINESS ENTERPRISE CENTRE
BUSINESS & THE LAW SERIES

Orangeville – November 19, 2008

Employee Safety and Workplace Injury: The Essentials
(a) Recent changes to the Canadian Criminal Law and How it Affects Risks as Employers

(b) Due Diligence in Managing Risks

By Mervyn F. White, B.A., LL.B., Trade-mark Agent

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INTRODUCTION

- **Bill C-45, *"An Act to Amend the Criminal Code (Criminal Liability of Organizations)",* was proclaimed into force on March 31, 2004**
- **Bill C-45 introduced amendments to the *Criminal Code* of Canada that the established rules for attributing criminal liability to organizations including corporations, for the acts of their representatives and also placed a legal duty on all persons directing work to take "reasonable steps" to ensure the safety of workers and the public**

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- **Bill C-45 imposes a 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**

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- **Takes into account performance in safety which can be related to compliance with Federal and Provincial Occupational Health and Safety Legislation**
  - **Will impose severe sanctions**
    - **Personal responsibility for a bodily injury may lead to a maximum penalty of 10 years in jail**
    - **Personal responsibility for a fatality may lead to a life imprisonment**

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- **Corporate responsibility on a summary conviction may equal a fine up to $100,000.00**
- **Corporate responsibility on an indictable offence may be equal to any amount of fine set by the court (no maximum)**

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APPLICATION OF BILL C-45

- **The amendments contemplated by Bill C-45 apply 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**
    - **iii. Holds itself out to the public as an association of persons**

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- **"Representative" is defined as**

  "in respect of an organization means a director, partner, employee, member, agent or contractor of the organization"

- **"Senior officer" is defined as**

  "means 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"

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TYPES (CATEGORIES OF OFFENCES)

- **Criminal liability**
  - **An offence that requires proof of intent, knowledge, or recklessness, as well as violation of the *Criminal Code***
- **Strict liability**
  - **An offence that does not require proof of intent and the defense of due diligence is available**
- **Absolute liability**
  - **An offence only requiring proof of a regulatory violation**

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KEY REFORMS TO THE *CRIMINAL CODE* BY BILL C-45

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**
2. **The Crown will now be able to "cobble together" the essential elements of a criminal offence, which can be attributed to separate individuals within the offending organization, in order to establish criminal liability**

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3. **Representatives of the offending organization who can commit or contribute to the physical element of the offence now includes directors and officers and all others who act on behalf of the organization**
4. **A reckless corporate culture, which is tolerated by senior management, may be sufficient to establish the mental element of the criminal offence**

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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 has knowledge of the offence but failed to take all reasonable steps to prevent or stop the offence**
6. **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**

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CRIMINAL NEGLIGENCE – AMENDMENTS TO SECTION 22.1

- **New rules for attributing criminal liability**
- **Replaces traditional "identification theory" of criminal liability**
- **If acting within the scope of their authority**
  - **One or more representatives (see earlier definition) commits the offence of criminal negligence, and**
  - **Senior officer (see earlier definition) departs markedly from the standard of care that could reasonably be expected to prevent a representative from committing the offence**

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- **The physical element can be committed by the organization's representatives while the mental element of criminal negligence can stem from the organization's senior officers**
- **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**
- **However, the act of criminal negligence must be within the scope of the representative's authority before it will be imputed to the organization**

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CRIMINAL OFFENCES OTHER THAN NEGLIGENCE – NEW SECTION 22.2

- **Bill C-45 also makes it easier to hold organizations accountable for criminal offences other than negligence (i.e. criminal offences requiring intent or recklessness, which are the majority of offences in the *Criminal Code*)**
- **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**

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- **Furthermore, the physical element and the mental element will still need to be derived from the same individual (i.e., from one senior officer)**
- **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**

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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 and is imposed on anyone who directs, or has the authority to direct, another person including directors, officers, managers, line managers and employees**

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- **It will now be far easier for the Crown to convict someone of criminal negligence**
- **Duty applies to those who direct how work is done**
- **Will apply to those individuals who have authority to direct how work is done**
- **Most importantly, it should be noted that the new provision in the *Criminal Code* covers not only "work", but tasks as well**

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- **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)**

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REASONABLE STEPS – ORGANIZATIONAL DUE DILIGENCE

- **As the criminal negligence provisions of the *Criminal Code* are likely "strict liability" offences, defences of "due diligence" may be available**

  K. v. City of Sault Ste. Marie (1978)

  "…The question will be….whether the accused established all reasonable care by (i) establishing a proper system to prevent commission of the offence and (ii) by taking reasonable steps to ensure the effective operation of the system"

- **The following may satisfy the "reasonable steps" requirement in completing organizational due diligence referred to in section 217.1 by an organization:**

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- **At the organizational level**
  - **Identifying all actual and potential hazards to worker safety**
  - **Assessing the risk of those hazards**
  - **Eliminating the hazard or controlling the same**
  - **Communicating the hazards, risks and controls to all interested parties including the workers, managers**
  - **Monitoring workplace safety (e.g. checking equipment safety)**

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  - **Correcting hazards**
  - **Disciplining workers/managers who violate their duties**
  - **Fully documenting all of the above steps**
- **At the management level**
  - **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**

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- 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 and problems

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- 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
- Directors and senior managers should exhort those whom they manage to reach an accepted standard of practice
- Undertake regular training programs

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EFFECT OF BILL C-45 ON INSURANCE COVERAGE

- Bill C-45 may 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)

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- **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**
- **Normally, such a duty to defend will not extend to allegations of criminal conduct, based 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**

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- **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 seen 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**

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- **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 foresee ability 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**

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"REASONABLE STEPS" DEFENCE

- **Section 217.1 of the *Criminal Code* reads:**

  "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"

- ***Criminal Code* does not define "reasonable steps"**
- **No court decision yet that interprets what "reasonable steps" means**

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- **Reason dictates that "reasonable steps" defence will be the same or close to due diligence defence**
- **Will require adherence to provincial occupational health safety legislation**
- **Adherence to industry standards and best practices**

3

DUE DILIGENCE DEFENCE

- **Legal defence of due diligence - Get Out of Jail Free card**
- **Created by Supreme Court of Canada in *R. v. Sault Ste. Marie***
- **2 parts to legal defence:**

i) employer must prove it reasonably believed in a mistaken set of facts which, if true, would make the prohibited act or omission innocent;

a) employer has an honest subjective belief in a set of facts that, if true, would render the act innocent and;

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b) that belief is objectively reasonable in the circumstances

ii) <u>employer must prove that it took all reasonable steps to avoid the particular prohibited event</u>

- **Now codified in the *Occupational Health and Safety Act* (*"OHSA")* at section 66**
- **Reverse onus – burden of proof on accused to prove defence**

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DUE DILIGENCE – what is required

- **Section 25 of *OHSA*:**
  - **Instruct, inform and supervise workers to protect their health and safety [section 25(2)(a) of *OHSA*]**
- **Due diligence requires an employer to provide positive evidence that it:**
  - **Has established a safe and effective procedure to protect the safety of workers**

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- **Has communicated that system to the workers**
- **Has reasonable ongoing procedures in place to monitor and ensure the proper operation of that system**
- **Has put it's mind to the entire course of action and, in an organized way, has set out all the steps necessary to obtain a particular goal**

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- **Appoint competent persons as supervisors [*OHSA*, section 25(2)(c)]. "Competent person" has a very specific meaning under the Act. He or she must:**
  - **Be qualified–through knowledge, training and experience – to organize the work and its performance**
  - **Be familiar with the Act and the regulations that apply to the work being performed in the workplace**
  - **Know about any actual or potential danger to health and safety in the workplace**

8

- **Inform a worker, or a person in authority over a worker, about any hazard in the work and train that worker in the handling, storage, use, disposal and transport of any equipment, substances, tools, material, etc. [*OHSA*, section 25(2)(d)]**
- **Help committees and health and safety representatives to carry out their duties [*OHSA*, section 25(2)(e)]**
- **Take every precaution reasonable in the circumstances for the protection of a worker [*OHSA*, section 25(2)(h)]**

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- **Post in the workplace a copy of the Occupational Health and Safety Act, as well as explanatory material prepared by the ministry that outlines the rights, responsibilities and duties of workers. This material must be in English and the majority language in the workplace [*OHSA*, section 25(2)(i)]**
- **Prepare a written occupational health and safety policy, review that policy at least once a year and set up a program to implement it [*OHSA*, section 25(2)(j)]**

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DUE DILIGENCE – what the Courts have said

R. v. Dofasco Inc. **, 2007 ONCA 769 (CanLII)**

- **Charges against the employer arose when an employee suffered a serious hand injury while working on a cold-rolling steel mill.**
- **Dofasco's argued employer cannot be held where employee injured as the result of his and a co-worker's deliberate conduct in failing to follow company procedures and protocols. Injured worker said to his co-worker "to hell with it lets do it the way we used to".**
- **Workplace safety regulations are not designed just for the prudent worker, but intended to prevent workplace accidents that arise when workers make mistakes, are careless, or are even reckless. This principle also extends to deliberate acts of employees while performing their work.**

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- **Dofasco's argument ignores common sense. Employees do not deliberately injure themselves.**
- **Dofasco argued injury worker suffered was as a result of his deliberate act, but Court of Appeal found it was an act done in furtherance of productivity in the work undertaken for the employer and not for any other reason.**
- **Court of Appeal stated to suggest that the responsibility for the injury, pain and suffering rests squarely on his shoulders would be unfair because defects in the process for performing the work in question and the absence of a physical guard contributed significantly to the accident. Court of Appeal rejected this submission.**
- **Dofasco did not lead evidence that it had taken any steps to place a guard or other device at the pinch point as required. In these circumstances, Court found Dofasco cannot show that it took all reasonable steps to avoid the incident.**

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R. v. Modern Niagara Toronto Inc. **, 2006 ONCJ 336 (CanLII)**

- **Before they began to remove the cap, worker specifically asked other worker if there was pressure in the pipes and was told "no". As worker leaned over the pipe to remove one of the bolits, the cap from the vitaulic clamp blew off and struck him in the face, so that he was bleeding and unconscious. At the time, the pipe commencing from the balancing valve to the end of the line was pressurized with nitrogen gas.**
- **Employer virtually in the position of an insurer who must make certain that prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors.**

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- **Modern Niagara relied on the procedure for depressurizing pipes taught in apprenticeship training and on the experience of its workers. Modern Niagara had a general safety policy made known to all workers, there were "toolbox talks" from time to time, and safety audits by the safety consultant.**
- **Did nothing more to supplement the apprenticeship training, nor to ensure that the system they said was in place was being properly followed.**
- **Whatever system the employer thought it had in place, it was not operating effectively, and the persons in charge were not doing what they were supposed to do.**
- **The cumulative errors in this case are strong evidence that there was no safe effective system in place at all, and that the procedure the employer relied on was not sufficiently comprehensive to achieve the required objective.**

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- **There is also a compelling line of cases to the effect that an employer will not be held responsible for the isolated acts of carelessness of their worker if the employer demonstrates on a balance of probabilities that it acted in due diligence to guard against such injudicious acts:** ***R. v. Inco. Ltd. [2001] O.J. No. 4938 (Ont. Sup. Ct.); R. v. St. Lawrence Cement Inc. [l993] O.J. 1442 (Ont. Ct. Gen. Div.); R. v. Spanway Buildings Ltd., (April 3, l986, unreported, Ont. Prov. Ct.).*** **The precondition is key.**
- **Due diligence in this context requires that the employer demonstrate taking every reasonable precaution to ensure that its procedures for protection of the worker were monitored and carried out.**
- **Respondent wrongly relied on the industry standard and the apprenticeship training of its workers, and did nothing more to ensure that the procedures for depressurizing pipes were in place and were being followed by their workers.**

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- **Duty of the employer applies to all workers (inexperienced and experienced), are applicable notwithstanding the work is routine, must be enforced even if there is no history of non-compliance, are non-delegable (to apprenticeship training), and cannot be based on an industry standard that is inconsistent with OSHA and its regulations.**
- **To successfully plead reasonable care, the defendant must establish on a balance of probabilities that there were no feasible alternatives that might have avoided or minimized injury to others.**
- **There were alternatives means of communication (signs, tags) and procedures for continuity (one person does everything, no one else touches the system) that could have been readily identified and enforced had the employer addressed the issue.**

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- **Due diligence requires that the respondent provide positive evidence that it has established a safe and effective procedure to protect the safety of workers, that it has communicated that system to the workers, and that it has reasonable ongoing procedures in place to monitor and ensure the proper operation of that system.**
- **One form of the due diligence test is holding a reasonable belief in a mistaken set of acts. Such a defence is only available 1) where the employer has an honest subjective belief in a set of facts that, if true, would render the act innocent and 2) that belief is objectively reasonable in the circumstances.**
- **One of the factors to be considered in assessing the reasonableness of relying on advice is the gravity of the potential harm should that advice prove to be wrong.**
- **In considering the mistake of fact defence, the court is obliged to consider the beliefs and actions of all the relevant workers.**

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***R. v. Chrima Iron Works Limited*, 2007 ONCJ 78 (CanLII)**

- **Mr. Bahia drove the forklift to the other side of the smoke box, placed the forks into a cut out area of the smoke box, and lifted the smoke box 6 to 8 inches off the ground. The supervisor, Robert Neidig, standing beside the forklift, and beside the smoke box, commenced to tilt the smoke box by either shaking or pushing the bottom of the smoke box. It appeared the purpose of this shaking was to have the smoke box fall inward on the forklift to facilitate it being flipped or rotated. Unfortunately, the smoke box, which weighed approximately 628 pounds, fell forward onto the supervisor, Robert Neidig, causing injury to his right arm and leg.**
- **Employees of Chrima were able to quickly move the smoke box off of Mr. Neidig. An ambulance was called, and Mr. Neidig was taken to the hospital, and subsequently perished.**

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- **Neidig was certified as a forklift driver, Bahia had never received any ongoing training as to forklift.**
- **"A bad judgment call by a supervisor (someone fully cognizant of the responsibilities set out in the safety procedures) must unfortunately rest on the back of his employer who is directly responsible for compliance."**
- **Defence counsel has attempted to establish that the Accused did have in place a system or procedures to reasonably ensure a safe workplace.**
- **There were no written procedures in place for material handling, and in particular the flipping of the smoke box.**

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- **"In this day and age there should be written procedures as to health and safety issues as opposed to a "practice having developed". Really, the submissions of the defence are that this business has been in operation for a considerable number of years without having had an industrial accident, and accordingly, the *ad hoc* practices that have developed must be safe. The fact of this industrial accident occurring as it did aptly demonstrates that it was more good fortune than good management that there had not been prior accidents."**
- **Company was fined $125,000.00**

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