
EMPLOYEE SAFETY AND WORK-RELATED INJURY
Recent Trends in the Law and Managing Your Risks

Toronto – November 29, 2007

**Recent Changes to Canadian Criminal Law
and How it Affects Your Risks as Employers**

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

- **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 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**

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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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