

**AMENDMENTS TO THE *CRIMINAL CODE* TO HOLD CORPORATIONS ACCOUNTABLE
FOR WORKPLACE SAFETY**

Bill C-45, *An Act to amend the Criminal Code (criminal liability of organizations)*

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INTRODUCTION

On November 7, 2003, Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, popularly known as the “Westray Bill”, received Royal Assent. The origins of Bill C-45 are rooted in the tragic deaths of twenty-six miners in the Westray mine explosion in Nova Scotia in May 1992 and the subsequent inquiry into that disaster. The Bill’s amendments to the *Criminal Code* will come into force on **March 31, 2004**.

The reforms contained in Bill C-45 are designed to ensure that “employers are held fully accountable for safe work environments” (the Honourable Martin Cauchon, the former Minister of Justice). Once Bill C-45’s amendments come into force, the *Criminal Code* will:

- (a) establish the rules under which criminal liability may be attributed to corporations for the acts of individual corporate representatives;
- (b) establish an explicit legal duty for all individuals directing work to take reasonable steps to ensure the safety of workers and the public;
- (c) set out factors for courts to consider when sentencing a convicted organization; and
- (d) provide optional conditions of probation that a court may impose on an organization.

The Federal Government has stated that it does not intend to use the federal criminal law power to supplant or interfere with the largely provincial regulatory role in workplace health and safety (in Ontario, see the Ontario *Occupational Health & Safety Act*). Rather, the Government’s view is that the criminal law will provide “an important additional level of deterrence if effectively targeted at – and enforced against – companies and individuals that show a reckless disregard for the safety of workers and the public”. The first line of defence against death and injury in the workplace remains an organization’s proactive compliance with workplace health and safety legislation.

ATTRIBUTING CRIMINAL LIABILITY TO ORGANIZATIONS: THE ORGANIZATION'S "DIRECTING MIND"

CURRENT LAW

- Corporations can only act through individuals who represent them. Under the current law, if a corporate representative commits a prohibited act (with the requisite guilty state of mind), the corporation will not normally be considered a party to the offence unless the corporate representative is a "directing mind" of the corporation. This is so because the law identifies the corporation with its directing mind.
- At present, a corporate representative will only be considered to be a "directing mind" if he or she occupies a senior position and exercises executive authority (e.g. a director, chief executive officer (CEO) or chief financial officer). The Supreme Court has distinguished these senior executives from "normal employees" who "merely" exercise delegated operational authority.

BILL C-45 CHANGES

- Bill C-45's *Criminal Code* amendments broaden the circle of individuals who may constitute the corporation's directing mind (see the broad definition of "senior officers").
- The amendments make organizations criminally liable not only for the actions of those who exercise executive authority (e.g. directors or the CEO), but also for the actions of employees who "merely" exercise operational authority, including middle managers and supervisors (and potentially even lead hands).
- For example, the amendments would permit the Crown to establish corporate criminal negligence by proving that those who controlled the actual operation of a mine (as opposed to those who set policy in the corporation's head office, either as senior executives or on the board of directors) acted so carelessly or with such reckless disregard for the safety of others as to deserve criminal punishment.
- The proposed legislation also widens the circle of individuals whose actions may be considered to be acts of the corporation for the purposes of making the corporation criminally liable. "Representatives" of a corporation are defined to mean directors, partners, employees, agents and contractors. As a result, corporations will be held accountable for the acts of virtually anyone who works for, or is affiliated with, the company.
- Note that Bill C-45's application extends beyond simply corporate entities. Bill C-45 broadly defines "organization" to encompass all kinds of entities (e.g. partnerships, municipalities, trade unions, etc.) as well as all "associations of persons" created for a common purpose (where the association has an operational structure and holds itself out to the public as an association).

CORPORATE CRIMINAL LIABILITY GENERALLY

CURRENT LAW

- As stated above, to fix corporations with criminal liability, the Crown must prove that senior corporate officials with executive authority (e.g. directors or executives) intentionally commit crimes or whose actions demonstrate a lack of care that constitutes criminal negligence.
- Since high-level corporate officials in large organizations delegate general operational responsibilities to subordinate managers and are almost never personally involved in the specific conduct or specific decisions that result in deadly workplace safety violations, it is extremely rare for corporations to be fixed with any criminal liability, even in the most serious cases.
- In essence, larger corporations are shielded from criminal liability by virtue of their complex decision-making processes.

BILL C-45 CHANGES

- Bill C-45's objective is to enhance the effectiveness of the *Criminal Code* in holding corporations accountable for workplace safety at all levels in the organization. Consequently, the amendments make corporations criminally liable:
 - as a result of the actions of "senior officers" who oversee day-to-day operations even if they are not directors or executives;
 - when officers with executive or operational authority intentionally commit crimes to benefit the organization, or direct employees to do so;
 - when officers with executive or operational authority become aware of offences being committed by other employees but do not take action to stop them; and
 - when the actions of those with authority (either executive or operational) and other employees, taken as a whole, demonstrate a lack of care that constitutes criminal negligence.

CORPORATE CRIMINAL LIABILITY FOR NEGLIGENCE-BASED OFFENCES

CURRENT LAW

- Criminal negligence occurs when an act or omission of an accused party shows wanton or reckless disregard for the lives or safety of others in a situation where the accused party is under a legal duty to act. The Crown must prove that the accused party's conduct represented a marked and significant departure from the standard that could be expected of a reasonably prudent person in the circumstances. Criminal negligence causing death is punishable by up to life imprisonment and criminal negligence causing bodily harm is punishable by up to 10 years imprisonment.
- Despite the fact that the offences of criminal negligence causing death and criminal negligence causing bodily harm have been in the *Criminal Code* for many years, criminal prosecutions of corporations for death and injury in the workplace have been rare.
- One obstacle faced by the Crown in prosecuting negligence-based offences is that the complicated structure of corporations makes it difficult for the Crown to establish the key elements of the crime: that employees of the organization committed the requisite acts and that a senior officer should have taken reasonable steps to prevent them from doing so.

BILL C-45 CHANGES

- The amendments make a corporation liable for crimes of negligence where the acts or omissions of its representatives, taken as a whole, exhibit a marked departure from the standard normally expected in the circumstances, even if no single individual has acted with criminal negligence. As a result, corporate liability may now be based on demonstrated cumulative criminal negligence.
- To illustrate, consider the following hypothetical situation. Two employees and a contractor simultaneously, but independently of one another, turn off three separate safety systems situated at three separate locations in a mining operation. Because the mine's safety systems are down, a miner is killed. Standard industry practice is to install a safeguard system that prevents any more than one safety system from being turned off at any one time. However, the manager of mining operations – the “senior officer” responsible for the operations aspect of the organization's activities – has “cut corners” and failed to obtain the overarching safeguard system.
- In these circumstances, the corporation could be charged with criminal negligence based on the aggregate fault of the employees, the contractor (as a “representative” of the corporation) and the mining operations manager. This prosecution could go forward even though the manager is not a senior corporate executive; even though the manager did not have any direct involvement in any of the decisions to actually turn off the safety systems (but whose failure to implement the overarching safeguard system constituted a marked departure from that which would be expected of a “senior officer” in the circumstances); and even though the employees and the contractor, individually, might not have shown reckless disregard for the lives of other employees (*i.e.* each individual may have turned off one of the safety systems in the belief that the other two systems would still be in place).

PROSECUTING NEGLIGENCE-BASED OFFENCES: ESTABLISHING AN EXPLICIT LEGAL DUTY TO PROTECT WORKERS

CURRENT LAW

- Under the *Criminal Code*, a core requirement of the offence of criminal negligence is to establish the breach of an existing legal duty.
- Corporations and individuals (whether directors, officers or employees) may be found to be criminally negligent if they breach their legal duty “to do an act if omitting to do it is or may be dangerous to life” (see section 217 of the *Criminal Code*).
- Workplace health and safety statutes and regulations across Canada, as well as the common law, impose further legal obligations and duties on all workplace parties (whether a corporation or an individual) to take reasonable precautions to protect the health and safety of workers.
- However, the *Criminal Code* does not contain an explicit legal duty to ensure a safe workplace.

BILL C-45 CHANGES

- The amendments impose an explicit legal duty (contained in the *Criminal Code*'s negligence sections) on those who “undertake or have the authority to direct” how another person does work. These individuals are expressly obligated “to take reasonable steps to prevent bodily harm to any person, or any other person, arising from that work” (see section 217.1 of the *Criminal Code*). Corporations (by their representatives) or individual citizens who breach this positive legal duty through wanton and reckless disregard for workplace safety may be found criminally negligent.
- The Government's decision to place this express obligation in the *Criminal Code* is “an important signal” of the Government's intention that “everyone take their responsibility for worker safety very seriously”,¹ whether acting as an individual or as part of a corporation. In the Government's view, the inclusion of this explicit duty will encourage corporate accountability by facilitating Crown prosecutions in the face of serious workplace safety violations (*i.e.* rather than having to establish that such a workplace safety duty exists, the Crown would rely on the express legal duty now contained in the *Criminal Code*).
- Negligence would still be determined on the criminal standard (*i.e.* conduct amounting to a “marked and significant departure” from the standard of a reasonable person) versus the “due diligence” standard enshrined in the Ontario *Occupational Health & Safety Act*. In addition, the Crown would be required to prove the guilt of the accused party “beyond a reasonable doubt”.

¹ Hansard debates, September 15, 2003, the Honourable Joe Peschisolido (Parliamentary Secretary to the President of the Queen's Privy Council for Canada and Minister of Intergovernmental Affairs, Lib.)

CORPORATE CRIMINAL LIABILITY FOR OFFENCES OTHER THAN NEGLIGENCE

CURRENT LAW

- Corporations, through the actions of their representatives, may be criminally liable for *Criminal Code* offences requiring “subjective intent” (*i.e.* offences deliberately or intentionally committed by representatives such as money laundering or obtaining a benefit based on a forged document).
- Currently, corporate criminal liability for these types of offences is only triggered if the “directing mind” (a senior executive) formed the requisite intent for the commission of the crime (*i.e.* the CEO of the corporation “cooked the books” and thereby induced others to provide funds to the corporation). The Crown must also prove that the individual with the “directing mind” acted within his or her assigned field of operation and by design or result, acted with the intent to (at least in part) benefit the corporation.

BILL C-45 CHANGES

- As stated above, corporations may face criminal liability where officers with executive or operational authority intentionally commit crimes to benefit the organization, or direct employees to do so. Thus, by effectively loosening the constraints as to who can be considered a directing mind, the amendments enable the Crown to establish corporate criminal liability based on the conduct of lower level managers who commit *Criminal Code* offences with the intent to (at least in part) benefit the corporation.
- In sum, the corporation itself may be fixed with criminal liability for “intentional” crimes that are committed on behalf of or for the benefit of the corporation where a senior person with executive or operational authority:

(a) **acting within the scope of his or her authority, acts to commit an offence; or**

(b) **acting within the scope of his or her authority and while possessing the necessary criminal intent, directs the work of other corporate representatives such that a criminal offence is committed; or**

For example, the liability of a corporation could be triggered where a person exercising operational authority over the corporation’s accounting functions implements improper practices with the intent to evade taxes. Even though these practices are carried out by employees who are unaware of their illegal effect, both the senior officer and the corporation could be found guilty of an offence.

(c) **knowing that corporate representatives are about to commit an offence, fails to take all reasonable steps to stop the corporate representative’s criminal activities.**

For example, a manager in the corporation’s procurement department becomes aware that several employees are obtaining kickbacks from a supplier that deals in stolen goods.

While the senior officer may have done nothing to set up the arrangement, he or she fails to stop the misconduct or notify the authorities so that the corporation will continue to obtain the benefit of a lower price on supplies. Based on Bill C-45's amendments, the procurement manager's failure to take reasonable remedial action may fix the corporation with criminal liability. Note that all senior officers are required to take reasonable remedial action in face of such known criminal activity even if the activity takes place outside their scope of authority (e.g. criminal corporate liability may still be engaged even in circumstances where a marketing department manager fails to take reasonable remedial action to stop sales department employees from, for example, bribing municipal officials to obtain a contract, despite the fact that the marketing manager has no operational authority over sales department employees).

SENTENCING A CORPORATION

CURRENT LAW

- Fines are virtually the exclusive way of punishing a corporation. Currently, in the case of a summary conviction offence (i.e. less serious offences that are punishable for individuals by up to six months in jail and/or a \$2,000 fine), the *Criminal Code* provides for a fine of up to \$25,000 for corporations. The *Criminal Code* does not provide any limit on fines for the more serious indictable offences that can be imposed on an organization.
- The *Criminal Code*'s sentencing principles are designed to guide the courts when imposing sentences on individuals. However, these sentencing principles do not provide guidance with respect to corporations.

BILL C-45 CHANGES

- The amendments increase the maximum fine on an organization for a summary conviction offence to \$100,000. Fines on conviction for indictable offences would remain without limit.
- In determining the appropriate sanction, the court must consider the following **ten** factors:
 1. ***The economic advantage gained by committing the crime*** (the more money the corporation made as a result of the offence, the higher the fine will likely be);
 2. ***The degree of planning involved in carrying out the offence and the duration and complexity of the offence;***
 3. ***Whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;***
 4. ***The impact that the sentence would have on the economic viability of the organization and the continued employment of its employees*** (a corporation should not normally be placed into bankruptcy by a fine such that its employees are thrown out of work, just as individuals should not be fined so heavily that they will not be able to provide for their families).
 5. ***The cost to public authorities of the investigation and prosecution of the offence*** (given that many corporate offences require lengthy investigations, the cost of mounting a case should be considered by the court).
 6. ***Any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence*** (the courts should also consider fines already levied by the provincial courts pursuant to the Ontario Ministry of Labour prosecutions, which can reach into the hundreds of thousands of dollars).

7. ***Whether the organization was - or any of its representatives who were involved in the commission of the offence were - convicted of a similar offence or sanctioned by a regulatory body for similar conduct*** (just as an individual's criminal record is an important element in determining the appropriate sanction, the courts will consider whether the corporation and its workers had been sanctioned for similar activities in the past, whether by the criminal courts or by occupational health and safety regulators).
8. ***Any penalty imposed by the organization on a representative for their role in the commission of the offence*** (the courts will consider whether a corporation has disciplined or even fired employees who participated in the offence in the hopes that this will send a powerful message to other potential wrongdoers in the corporation).
9. ***Any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence*** (compensating victims shows that the corporation is trying to make up for the harm that it caused).
10. ***Any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence*** (new policies and practices, such as an effective and enforced compliance program, may indicate that the corporation has learned its lesson).

CORPORATE PROBATION

CURRENT LAW

- Probation is virtually unheard of for corporate offenders.

BILL C-45 CHANGES

- The probation conditions available to a court under the amendments may have a serious impact on an organization's business. These conditions include: providing restitution to victims of the offence, or requiring that the corporation inform the public of the offence, the sentence imposed and the remedial measures being undertaken by the organization (e.g. requiring the corporation to run ads in the media, place a notice in an annual report or post a statement on the company's website admitting to criminal acts).
 - The amendments contemplate that in some cases probation would be appropriate to ensure that the organization complies with the law in the future. A court can order an organization to:
 - implement policies and procedures to reduce the likelihood of further criminal activity;
 - communicate those policies and procedures to employees;
 - name a senior officer to oversee their implementation; and
 - report on progress.
 - If a provincial occupational health and safety department is already overseeing changes in an organization's safety practices, courts are expressly required to consider whether this regulatory body is more suitable to supervise the organization's probation conditions.