

H ^ R R I S & C O M P A N Y

Bill C-45 (Criminal Liability of
Organizations):
An Overview for Employers

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Introduction

- ▶ Bill C-45 became law on March 31/04
- ▶ It amends the *Criminal Code* by:
 - expanding corporate criminal liability
 - creating a legal duty on anyone who directs workers to ensure their safety
 - setting out factors for sentencing and probation of corporations



Introduction

- ▶ Bill C-45 is a direct response to the 1992 Westray disaster
- ▶ Bottom line: Employers must provide a safe workplace or face criminal consequences



Background

- ▶ The Previous Law
- ▶ The Westray Disaster
- ▶ From Westray to Bill C-45



The Previous Criminal Law

- ▶ Essential elements of a crime: *actus reus* and *mens rea*
- ▶ Application to corporations
- ▶ Vicarious liability approach (U.S.)
- ▶ Identification approach (Canada)



The Previous Criminal Law

- ▶ The Identification Approach:
 - must be "Directing Mind"
 - matters of corporate policy, not just operational matters
 - includes anyone to whom delegated
 - three conditions for liability

The Previous Criminal Law

- ▶ Other problem issues for corporate liability:
 - corporation as a “party” to offence?
 - contractor as “directing mind”?
 - crimes involving negligence?
 - sentencing considerations?



The Westray Disaster

- ▶ Previous efforts at reform
- ▶ Westray Explosion: May 9, 1992
- ▶ 26 miners killed
- ▶ Government fails to enforce the law
- ▶ Company fails to embrace safety
- ▶ Methane gas plus bad ventilation plus coal dust plus spark = disaster



Post-Westray History

- ▶ May 1992: Justice Peter Richard appointed as Commission to investigate
- ▶ May 1995: management obstructions finally cleared, hearing begins
- ▶ November 1997: Richard report issued, blasts company and government, recommends criminal law review



Post-Westray History

- ▶ October 1999: McKay motion referred to House of Commons Committee
- ▶ March 2002: House Committee issues discussion paper
- ▶ November 2002: Government responds to discussion paper
- ▶ June 12, 2003: Bill C-45 introduced



How Bill C-45 Changes the Law



Application of Bill C-45

- ▶ Bill C-45 applies to “organizations”
- ▶ This includes corporations, public bodies, societies, proprietorships, partnerships, trade unions, municipalities, and organized associations



Criminal Negligence

- ▶ Longstanding *Criminal Code* offence = criminal negligence causing bodily harm or death
- ▶ Action or omission that shows wanton or reckless disregard for lives or safety of others



Criminal Negligence

- ▶ New duty created by Bill C-45:
- ▶ Applies to everyone who directs, or has the authority to direct, how others do work
- ▶ Duty = To take reasonable steps to prevent bodily harm to that person or others, arising out of the work
- ▶ Failure to comply with duty can be criminal negligence



Criminal Negligence

- ▶ The “Marked Departure” standard
- ▶ For criminal negligence, the accused’s conduct must be a marked departure from the norms of reasonable behaviour
- ▶ Look at the conduct, not the consequences



Criminal Negligence

- ▶ Breach of Bill C-45 duty = criminal negligence where:
 - failure to take reasonable steps to prevent bodily harm
 - injury or death resulted
 - the accused's conduct was a marked departure from workplace safety norms



Corporate Criminal Negligence

- ▶ Corporation can now be convicted of criminal negligence where:
- ▶ Acting within their authority:
 - one of its representatives commits the offence; or
 - two or more representatives engage in conduct which would have been offence if committed by one person;
- ▶ And senior officer responsible for relevant activities departed markedly from reasonable standard of care re workplace safety



Criminal Offences Requiring Fault

- ▶ Three ways a corporation can be criminally liable
- ▶ All require involvement of senior officer, acting with intent (at least in part) to benefit the organization



Criminal Offences Requiring Fault

- ▶ Senior officer commits the crime
- ▶ Senior officer directs others to commit the crime
- ▶ Senior officer knows crime is being committed, but does not take reasonable steps to stop it

Important Definitions

- ▶ “Representative” = employees, directors, partners, members, agents and contractors



Important Definitions

- ▶ “Senior officer” = any individuals who play an important role in:
 - establishing policy; or
 - managing an important aspect of the organization’s activities.
- ▶ Includes a corporation’s directors, chief executive officer and chief financial officer, regardless of their duties.



Important Definitions

- ▶ A person is party to an offence where:
 - commits the offence
 - aids or abets another person in committing it

Fines for Corporations

- ▶ Summary conviction offences (less serious): Maximum fine increased from \$25,000 to \$100,000
- ▶ Indictable offences (more serious): No maximum on fine Court can impose
- ▶ Criminal negligence causing bodily harm/death = indictable offence



Sentencing Factors (Mandatory)

- ▶ Advantage or gain realized by organization;
- ▶ Degree of planning involved;
- ▶ Duration and complexity of offence;
- ▶ Any attempt to conceal assets to avoid fine or restitution;
- ▶ Impact of fine on economic viability of organization and continued employment of its employees;



Sentencing Factors (Mandatory)

- ▶ Cost to public of investigation and prosecution;
- ▶ Any regulatory penalties imposed on organization or its representatives;
- ▶ Past convictions for similar conduct;
- ▶ Any penalties imposed by the organization on its representative(s) for their role in the offence;



Sentencing Factors (Mandatory)

- ▶ Any restitution that the organization is ordered to make, or has paid, to victim(s) of the offence; and
- ▶ Any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Probation Conditions (Optional)

- ▶ Organization may be ordered to:
 - make restitution for any loss or damage suffered;
 - establish policies, standards and procedures to reduce likelihood of subsequent offence, and
 - ◆ communicate them to its employees;
 - ◆ report to the Court on their implementation;
 - ◆ identify senior officer responsible for complying with them



Probation Conditions (Optional)

- ▶ Organization may be ordered to:
 - provide the following information to the public:
 - the offence it was convicted of;
 - the sentence; and
 - any measures the organization is taking to reduce the likelihood of it committing a subsequent offence;
 - comply with any other reasonable conditions the Court considers desirable for prevention or to remedy harm



Bill C-45 and Existing OHS Regimes



Provincial Employers

- ▶ The *Workers' Compensation Act* and the *Occupational Health & Safety Regulation* set out detailed health and safety standards applicable to provincially-regulated workplaces
- ▶ Duties imposed on employers, supervisors, workers, directors and officers
- ▶ Contravention of the *Act* or the *Regulation* is an offence, and can result in jail or a fine of over \$500,000
- ▶ Corporations can be liable



Federal Employers

- ▶ Occupational health and safety regime set out in *Canada Labour Code Part II*
- ▶ General duty on employers to ensure that health and safety at work of every person employed by the employer is protected
- ▶ Contravention may be punished by a fine of up to \$1 million and/or a jail sentence of up to two years
- ▶ Corporations can be liable

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The Due Diligence Defence

- ▶ *Act* and *Code* create strict liability offences
- ▶ *Actus reus* must be proven beyond reasonable doubt
- ▶ Defence of “due diligence” – must be proven on balance of probabilities
- ▶ Did the accused take reasonable steps to avoid the violation?

Relationship to Bill C-45

- ▶ The bad news: Now a safety violation may result in charges under both the *Criminal Code* and the *Workers' Compensation Act / Canada Labour Code*
- ▶ The good news: Compliance with the requirements of the *Act / Code* would likely provide a defence to a Bill C-45 charge



The Role of the Police

- ▶ Police have duty and authority to investigate a criminal complaint
- ▶ Investigation may include a search of corporate records and documents, pursuant to a search warrant

Dealing with False Complaints

- ▶ Employees who make false or reckless complaints regarding safety matters may be subject to discipline
- ▶ Relevant factors: nature of complaint, whether deliberately fabricated or made recklessly, seriousness of repercussions, past treatment of similar offences, potential mitigating factors, employee's previous disciplinary record, etc.



Dealing with False Complaints

- ▶ If false complaint made with intent to mislead, complainant may be charged criminally with public mischief
- ▶ However, organization must be careful not to interfere with or obstruct police investigation





Minimizing Potential Liability: Duties & Responsibilities



Corporations

- ▶ Establish a comprehensive safety program
- ▶ Ensure proper training is provided
- ▶ Monitor compliance
- ▶ Enforce the program
- ▶ Investigate safety-related incidents properly and promptly, and see that appropriate remedial and/or preventative action is taken



Corporations

- ▶ Document program, compliance and enforcement
- ▶ Establish accident response plan, to avoid crisis management approach



Senior Officers

- ▶ Ensure corporation meets its obligations
- ▶ Establish safety policies and expectations
- ▶ Understand roles and responsibilities in relation to safety
- ▶ Ensure that managers are properly trained, and performing their responsibilities
- ▶ Take immediate preventative and/or remedial steps if become aware of potential offence



Managers

- ▶ Understand role and responsibilities
- ▶ Ensure up-to-date safety standards and procedures are in place
- ▶ Ensure proper training is provided
- ▶ Monitor and document compliance
- ▶ Enforce the policy
- ▶ Ensure that safety-related incidents are investigated, and appropriate remedial and/or preventative action is taken



Supervisors

- ▶ Understand safety program, and their roles and responsibilities
- ▶ Ensure that proper training is provided
- ▶ Monitor compliance
- ▶ Correct behaviour / enforce program
- ▶ Participate in investigations
- ▶ Maintain records and documentation
- ▶ Ensure any safety-related incidents or hazardous conditions are reported promptly



Workers

- ▶ Work safely and competently, free from impairment
- ▶ Understand safety program, and their roles and responsibilities
- ▶ Comply fully with the safety program
- ▶ Maintain records and documentation
- ▶ Ensure any safety-related incidents or hazardous conditions are reported promptly



Concluding Comments





Questions?

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