

Corporate criminal liability for workplace safety a step closer

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On June 12, the prospect of both regulatory and *Criminal Code* prosecutions emanating from a serious workplace accident became much more real.

The federal government introduced anticipated amendments to the *Criminal Code* in Bill C-45, which, if passed, will create positive occupational-health and safety related duties for corporations, individuals, and other parties defined as "organizations." Bill C-45 will make it easier to convict those parties of criminal negligence for work-place safety violations.

The amendments do not supersede current provisions in Canadian regulatory workplace safety statutes. Rather, new, additional, "criminal" offences are created for defined "organizations" and individuals who fail to protect workers and the public. The following are key note-worthy aspects of the Bill.

1. *Corporate criminal liability will apply to a broad range of organizations:*

The breadth of application of the proposed amendments may surprise some. Bill C-45 does not limit potential liability to individuals or to corporations as they are known in a commercial law sense. The Bill imposes a new duty and potential liability on a broadly defined series of "organizations," which include public bodies, corporations, societies, companies, firms, partnerships, trade unions, municipalities, and any other organization that is created for a common purpose, has an operational structure and holds itself out to the public as an association of persons. This expansive definition shows an intent that the provisions apply as widely as possible. Few public or private sector corporations or voluntary associations will be able to successfully argue that they do not fall within the definition of an "organization."

2. An explicit new duty will exist within the criminal negligence sections of the Criminal Code.

This proposed new duty requires that those who under-take or have the authority to direct how another person does work or performs a task take reasonable steps to prevent bodily harm to any person arising from the work. Note that there would exist an obligation not only to workers but to the public at large. Application of existing criminal negligence provisions would mean that parties who fail in this duty and show wanton and reckless disregard for safety in doing so could be found criminally negligent. The duty will apply to all organizations as defined above and to managerial personnel (regardless of whether they are front-line supervisors, or officers or directors) who have the power to direct work. The duty will also clearly apply to any individual employee who “undertakes” to direct another how to perform any “task” in the workplace.

3. Mere failure to exercise regulatory obligations or failure to exercise “due diligence” will not equal criminal negligence

The proposed duty closely parallels obligations already imposed on corporations and individuals under most Canadian occupational health and safety (OH&S) regulatory statutes.

A question that logically arises is what, if anything, “criminalization” means for already-regulated individuals and organizations. 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.

Needless to say, this standard is distinct from the regulatory standard of failure to exercise all reasonable care in the circumstances or “due diligence.” Just how distinct it will be from regulatory “due diligence” concepts will be dependent on case law developments.

4. Bill C-45 is directed to making convictions for criminal negligence occur more readily for complex organizations, including corporations

It is already possible for a corporation to be convicted of criminal negligence under the *Criminal Code*. But the proposed amendments alter a barrier that has historically hindered criminal prosecution of corporations for workplace safety infractions.

At present, corporations can only be convicted where the Crown can prove that the corporation's "directing mind" (*i.e.*, an individual responsible for developing and implementing corporate policy) has been involved in criminal activities or actions that demonstrate the necessary criminal intent to convict the corporation. Canadian cases require that the "directing mind" occupy a senior executive position.

Under Bill C-45, a new two-step process would substantially ease the burden on the Crown when attempting to establish corporate criminal negligence.

As drafted, the Crown would have to show that the actions of a single corporate "representative" or group of representatives, who could be mere employees, demonstrated a lack of care that constitutes criminal negligence (*i.e.*, reckless ignoring of safety rules or physical protective measures, when the potential result is serious harm or death).

Then the Crown would have to show that a "senior officer" with operational authority or executive authority, or as the drafters have put it, "real clout," has either failed to act or has operated in a manner that insulated him or her from obtaining the knowledge to act. The senior officer has to have engaged in a marked departure from what would be expected of an officer with obligations to take reasonable steps to protect workers and the public. "Senior officer" is defined to include persons who play an important role in establishing the organization's policies, and persons responsible for important aspects of an organization's activities, and in the case of a corporation, includes directors, the CEO and CFO.

The proposals do not eliminate the "directing mind" doctrine, as it would still be necessary to prove culpability of a senior official. However, the doctrine would be

altered to eliminate the requirement to show the senior official's direct involvement, and it would be altered to allow the actions of lesser corporate representatives to make the organization party to the offence of criminal negligence.

This clearly signals an expectation that senior management take a proactive role in health and safety matters. The conduct of senior management could very well come under unprecedented scrutiny from investigators. After any tragic workplace accident, it is not difficult to imagine investigators bowing to public or other pressure to closely examine whether a breach of this new *Criminal Code* duty has occurred.

5. Sentencing factors are set out and creative options for sentencing organizations are proposed

The Bill provides for a maximum penalty of \$100,000 for an organization, including a corporation, if the Crown proceeds by summary conviction. There would be no limit on the monetary penalty for an organization, including a corporation, if the Crown proceeds by indictment.

Individuals would remain subject to a complete range of *Criminal Code* sentencing options, from absolute or conditional discharge to a maximum of life imprisonment, depending upon the specific offence and the interests of justice.

The proposals set out numerous factors courts would be obliged to consider when imposing sentence on an organization after a *Criminal Code* conviction. These factors include whether any regulatory penalty has been imposed respecting the matter, the cost of the investigation and prosecution to the public, restitution made to any victims, any penalty the organization has imposed on a corporate representative as a result of the offence, and remedial steps directed to preventing the likelihood of a subsequent offence.

The Bill would give the court a broad range of options for sentencing organizations, including corporations, in addition to fines. Probation orders could include conditions such as restitution for loss or damage; requiring the organization to establish and communicate policies and procedures to reduce the likelihood of a

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future recurrence of the offence; requiring that the organization report to the Court on the implementation of remedial procedures; requiring that the organization appoint and identify a senior officer responsible for implementation of remedial procedures.

Possibly the most interesting of the proposed creative sentencing options is authority for a probation order requiring a convicted organization to publicly disclose its conviction, the sentence imposed and any remedial measures established to prevent a recurrence of the offence, in a manner specified by the court.

Imagine a court directing the posting of a criminal conviction and sentence prominently on a corporate website, in a corporate annual report or in the news media. For many organizations the resulting profound impact on public relations and public image would far outweigh any monetary penalty.

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