Bill C-45 & Criminal Liability

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On November 7, 2003, Bill C-45 received Royal Assent; it will come into force on proclamation. This bill, officially known as "An Act to amend the Criminal Code (criminal liability of organizations)" is Parliament's response to the Westray Mining disaster, when 26 coal miners died in an explosion at that Nova Scotia mine in May 1992. There was considerable public outrage following the tragedy and particularly following the lack of any charges proceeding to trial, either against the mining company or any of its officers. (Although two officers were charged in 1993 with manslaughter and criminal negligence causing death the criminal charges against were stayed.) A public inquiry held later found that blame for the disaster rested with the mine's owners and managers, citing glaring safety abuses.

Bill C-45 entails five keys aspects. It:

• **Establishes a duty in criminal law** to protect the health and safety of everyone in the workplace. (Making a positive duty subject to criminal sanction is not unique in Canadian criminal law, but it is certainly not commonplace.)

• **Proposes severe penalties of imprisonment** if failure to protect worker health and safety results in bodily harm or death.

• **Broadens the scope of who is responsible** for worker health and safety to all levels of management and everyone else that can "direct how another person does work or performs a task."

• Makes it **possible to charge organizations**, including government departments, agencies and corporations, **with criminal negligence** if bodily harm results from their failure to protect workplace health and safety.

• Puts the **duty for ensuring workplace health and safety on an equal footing for everyone** in Canada. This duty is important and serious and is now clearly described in a single statute – the Criminal Code of Canada.

Traditional Criminal Law

Traditionally, criminal law has been concerned with breaches of society's norms, as set out in the federally regulated Criminal Code of Canada). In order to prove an offence was committed, the Crown prosecutor must prove two elements, the actus reus—the criminal act (taking the loaf of bread the store) and the mens rea—mental intent (proving I meant to take it without paying). The burden of proof in this regard is on the Crown to prove beyond a reasonable doubt these two elements.

However, when the accused is not a human person, but rather a corporate entity, proving specific actions and the intent behind them becomes much more tricky. Since corporations can only act through their employees and agents, it is difficult to prove that the person(s) who carried out the illegal act had that intention. Over the years, the courts have dealt with criminal charges against corporations and other groups of persons, such as trade unions, and case-by-case, they have elaborated rules for determining when a corporation should be

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convicted of a crime.

At its most basic, a corporation will be found guilty of a criminal offence if its "directing mind" committed the prohibited act and had the necessary state of mind. To be a "directing mind", a person must have so much authority in the corporation that the person can be considered the "alter ego" or "soul" of the corporation (as those terms used in recent case law). To be convicted, the directing mind has to be intending, at least in part, to benefit the corporation by the crime. However, in corporations having many people aboard, rarely do the criminal action and the criminal knowledge coincide.

A New Approach to the Criminality of Corporations

Bill C-45 addresses these concerns. Firstly, it broadens who can be caught in the net of corporate liability by going beyond corporations, targeting organizations. Under this bill, an organization is a public body, body corporate, society, company, firm, partnership, trade union or municipality, or an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons. Secondly, Bill C-45 focuses on an organization's senior officer, being a representative that plays an important role, either through the making of policy or who manages important aspects of the organization. A 'representative' is defined as a director, partner, employee, member, agent or contractor of the organization. This is a widening of the net. Whereas before this proposed amendment, only the heart and soul of the company was considered, now the focus is on key managers, key policy makers. Further, CEOs and CFOs are included by virtue of the positions they hold, whether they set policy or have an active role in managing or not.

For offences based on negligence, the court must determine whether an individual acted so carelessly or with such reckless disregard for the safety of others as to deserve criminal punishment. For a conviction based on negligence, an organization is a party to the offence if (a) acting within the scope of their authority, one of its representatives is a party to the offence, or two or more of its representatives engage in conduct that would make that representative a party to the offence if it had been the conduct of only one representative; and (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence. Whereas prior to Bill C-45, an act committed by one person within a company along the direction (that is, the intention) of another did not result in conviction. The result may now be different, due to the notion of "aggregate" intention. Further, the fact that individual employees might escape prosecution should not mean that their employer necessarily would not be prosecuted.

In offences based on intent, to find the organization guilty, the court would now have to find that the senior officer responsible, or senior officers collectively, must have departed markedly from the standard of care that could be expected. To be convicted, the organization, through a senior office who had the intent—at least in part—to benefit the organization, (a) acting within the scope of their authority, is a party to the offence, (b) having the mental state required and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence. The organization might be convicted if, for example, the director of safety systems failed to give the one negligent employee basic training necessary to perform the job.

Penalty Provisions

Corporations cannot be imprisoned so the Criminal Code provides for fines when corporations are convicted of crimes. In the case of a summary conviction offence (less serious offences that are punishable for individuals by up to six months in jail and/or a $2,000 fine), the Code provides for a fine of up to $25,000 for corporations. (Of course, individuals within the organization can be jailed.) Bill C-45 would increase the maximum fine on an organization for a summary conviction offence to $100,000. For the more serious, indictable offences, the Code already provides no limit on the fine that can be imposed on an organization. Bill C-45 proposes factors that a court should consider in fining an organization, which are in addition to those factors already in the Code that are applicable to both individuals and corporations (such as an abuse of a position of trust).

The gravity of the crime, including the extent of injury caused or whether death results, is already considered when determining sentencing. Under the reforms in

Bill C-45, new factors would reflect for organizations the considerations that govern sentencing individuals. Judges already apply many of these factors but it is expected that providing a list will result in judges having a more complete picture of the organization. The following are the new factors:

a) **Moral blameworthiness**

i) The economic advantage gained by committing the crime.

ii) The degree of planning involved: careful planning shows a deliberate breaking of the law and should be punished more than a case where the senior officers took advantage of an unexpected opportunity to make a quick, illegal profit.

b) **Public interest**

i) The need to keep the organization running and preserve employment.

ii) The cost of investigation and prosecution.

iii) Any regulatory penalties, which are distinct from those under the Criminal Code, imposed on the organization for the offence.

c) **Prospects of rehabilitation**

i) Penalties imposed on managers and employees for their role in the crime.

ii) Previous convictions or regulatory offences.

iii) Restitution

iv) Attempts to hide assets to avoid paying a fine.

v) Measures taken to reduce the likelihood of further criminal activity.

vi) Penalties imposed on managers and employees for their role in the crime.

What does this mean?

Legally, Bill C-45 is a big change. It is the criminalization of an act of omission, the criminalization of a positive duty to act. This is rare. Through this criminalization, offenders face harsher sanctions, greater risk. Practically, however, it is unclear what the change will be. The Alberta OHS Act has real teeth. With the recent increase of fines and the panoply of alternative options to fines and jail time available to sentencing courts, the Alberta Act is a truly viable alternative to the harsh criminal process. Indeed, the regulatory Act has not been exhausted: no Albertan has gone to jail for OHS offence. Of course, only time will tell.