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BILL C-45 AND CRIMINAL LIABILITY FOR WORKPLACE ACCIDENTS

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INDEX

CRIMINAL LIABILITY OF ORGANIZATIONS	3
1. SUMMARY	3
2. BACKGROUND.....	4
A. PRE-BILL C-45.....	4
i. <i>Criminal Liability Generally</i>	4
ii. <i>Criminal Liability of Corporations</i>	4
iii. <i>Criminal Liability of Directors, Officers and Employees</i>	4
B. HISTORY BEHIND C-45.....	4
3. BILL C-45	5
A. DEFINITIONS	5
i. <i>“Organization”</i>	5
ii. <i>“Senior Officer”</i>	5
iii. <i>“Representative”</i>	5
B. ESTABLISHING LIABILITY.....	6
i. <i>The Organization as a Party to a Crime of Negligence</i>	6
ii. <i>The Organization as a Party Where Fault must be Proven</i>	6
iii. <i>Duty of Persons Directing Work</i>	7
C. OFFENCES	7
i. <i>Punishment</i>	8
ii. <i>Corporate Probation</i>	8
4. BILL C-45 PROSECUTIONS	10
A. FANTINI INCIDENT	10
B. TRANSPAVE INCIDENT.....	10
C. WEYERHAEUSER INCIDENT	10
5. HOW CAN EMPLOYERS PROTECT THEMSELVES AGAINST CRIMINAL LIABILITY?.....	12

CRIMINAL LIABILITY OF ORGANIZATIONS

1. SUMMARY

On March 21, 2004, Bill C-45, *An Act to Amend the Criminal Code*, came into effect. Born out of the 1992 Westray Mine disaster, Bill C-45 helps to establish criminal liability for organizations and individuals who fail to take reasonable steps to prevent workplace accidents. The changes that Bill C-45 made to the *Criminal Code* not only created additional legal liability for companies (by broadening the definition of who represents an organization and making it easier to criminally convict a company for the acts or omissions of its corporate decision makers) but also for all persons who direct or supervise work in the workplace.

Although rarely used to date, the provisions in Bill C-45 represent a significant risk to employers, management and senior employees. Companies are therefore advised to examine their safety and training systems and ensure their policies and practices are designed to ensure worker safety and minimize workplace hazards.

2. BACKGROUND

A. Pre-Bill C-45

i. Criminal Liability Generally

The *Criminal Code* requires the Crown prove various elements before a person is convicted of a crime. For most offences, the accused must not only commit the prohibited act, but also have a guilty state of mind when committing the offence. Some offences, however, are based on “negligence” – the person’s conduct itself is all that is required for criminal fault, and a mental element is not required.

ii. Criminal Liability of Corporations

Determining whether a corporation has committed a prohibited act and whether a corporation has a guilty state of mind is far more difficult than compared to an individual. Prior to Bill C-45, a corporation was only guilty of a crime if its “directing mind” committed the prohibited act or neglect and had the guilty state of mind. To be a “directing mind”, a person essentially had to have so much control or authority in the corporation that they would be considered the “alter ego” or “soul” of the corporation. Generally, such a person was able to set policy for the corporation rather than merely having the authority to manage people. For a corporation to be guilty in such an instance, the directing mind also had to intend to benefit the corporation when committing the crime.

iii. Criminal Liability of Directors, Officers and Employees

Prior to Bill C-45, officers and directors of a corporation could not be convicted of a crime for the acts of the corporation solely due to their position as officers or directors. They could only be held criminally responsible if they themselves directed the corporation to commit crime (that would benefit the corporation) or if they were otherwise participating in criminal activities within the corporate context.

It was also very difficult for directors or senior management of a corporation to be held to account for serious health and safety violations because they didn’t have the required guilty state of mind to commit a crime of criminal negligence. This was because health and safety matters were delegated to levels far below senior management.

B. History behind C-45

Bill C-45 was prompted by recommendations from the judicial inquiry into the 1992 Westray Mine disaster, where 26 miners were killed in Pictou County, Nova Scotia. Despite evidence of known safety concerns prior to the accident, no individual or corporate employer was ever convicted of a criminal or occupational health and safety offence. The resulting public outcry led to calls for more stringent worker safety legislation and gave rise to Bill C-45. The intent of Bill C-45 was to elevate responsibility for health and safety matters to senior management so that they could be held to account. Because of C-45, it is no longer enough for managers to delegate responsibility for health and safety matters to levels below to avoid prosecution.

3. BILL C-45

A. Definitions

i. “Organization”

Bill C-45 refers to an “organization”, not a corporation:

“organization” means

(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, and

(iii) holds itself out to the public as an association of persons

Reference to an organization thus ensures that the criminal liability rules in Bill C-45 apply to all forms of common enterprises, regardless of their corporate structure.

ii. “Senior Officer”

Bill C-45 refers to a “senior officer” rather than directing mind:

“senior officer” 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

The definition therefore focuses on the function of an individual rather than any particular title.

iii. “Representative”

The term “employee” was not considered broad enough to encompass all of the individuals who may act on behalf of a corporation. As a result, Bill C-45 uses the term “representative” instead:

“representative”, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization

A representative must be acting within the scope of their authority at the time of the alleged crime for the organization to be held responsible for their actions. It should also be noted, however, that C-45 may apply even if there is no “employment” relationship. Given the broad definition of “organization”, a representative could also include a volunteer or merely a member of a club or association.

B. Establishing Liability

i. The Organization as a Party to a Crime of Negligence

Bill C-45 adds s.22.1 to the *Criminal Code*:

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

(ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible of the aspect of the organizations' activities that is relevant to the offence departs – or the senior officers, collectively, depart – 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.

For an organization to be found guilty of a crime of negligence, the Crown must now show both that one of the organization's representatives committed the prohibited act in question and that a responsible senior officer should have taken reasonable steps to prevent them from doing so.

Bill C-45 also imposes criminal liability on organizations for negligence even where no single individual has committed a criminal offence: the conduct of two or more representatives can be combined to constitute the offence for which the organization is found guilty.

ii. The Organization as a Party Where Fault must be Proven

Bill C-45 adds s.22.2 to the *Criminal Code*:

22.2 In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

(a) acting within the scope of their authority, is a party to the offence;

(b) having the mental state required to be a party to the offence 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 steps to prevent bodily harm to that person, or any other person, arising from that work or task.

This section sets out three ways an organization can commit a crime that requires a specified intent. The first way is for an organization's senior officer to commit the criminal act or criminal neglect, within the scope of their authority. The second way is for the organization's senior officer to instruct another representative of the organization to commit the offence (criminal act

or criminal neglect). The final way is for an organization's senior officer to know that a representative will commit a criminal act or criminal neglect but do nothing to stop them. In all three cases, the senior officer must intend to benefit the organization to some degree for the organization to be criminally liable for the senior officer's actions.

iii. Duty of Persons Directing Work

Bill C-45 adds s.217.1 to the *Criminal Code*:

217.1 Every one 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 section imposes liability on an individual to take reasonable steps to ensure the safety of a subordinate when supervising or directing their work. In other words, employees can be found criminally liable for acts or omissions that harm those whom they supervise. Unfortunately, Bill C-45 does not define "reasonable steps", and it is not entirely clear what level of responsibility an individual has for their subordinate's safety.

C. Offences

Criminal Code sections 22.1, 22.2 and 217.1 are not themselves offences under which individuals or organizations can be criminally charged. Rather, these sections assist in making it easier for the Crown to prove other criminal offences. In particular, the new duties created by sections 22.1, 22.2 and 217.1 would likely dovetail with *Criminal Code* sections 219 ("criminal negligence") and 220 ("criminal negligence causing death"):

219(1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.

220 Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

It is under such sections of the *Criminal Code* that a corporation or individual would be charged by the Crown as a result of a serious workplace accident.

i. Punishment

Obviously, an organization cannot be imprisoned. As a result, the *Criminal Code* provides for fines where organizations are convicted of criminal offences. In cases of a “summary conviction” offence (those that are generally of less severity), the *Criminal Code* provides for a fine of up to \$100,000 for organizations. For more serious “indictable offences”, there is no limit on the fine that can be imposed on an organization. These fines are not tax deductible.

Individuals convicted of a summary offence face up to 6 months in jail and/or a \$2,000 fine, while individuals convicted of a indictable offence face lengthy maximum sentences.

Bill C-45 also added to the *Criminal Code* a number of factors that a court must take into account when considering how much to fine an organization that has been found guilty of a criminal offence:

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) 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;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to public authorities of the investigation and prosecution of the offence;
- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- (g) 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;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

ii. Corporate Probation

There may be situations where it is appropriate to put an organization on probation to ensure that the organization takes steps to reduce the chances it will commit further crimes. As a result, Bill C-45 added a specific section dealing with probation orders for organizations:

732.1 (3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:

- (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;

4. BILL C-45 PROSECUTIONS

A. Fantini Incident

Section 217.1 provided the basis for the first charge under Bill C-45, which arose out of a construction site fatality on April 19, 2004. A worker digging a trench at a home construction site became trapped when the ground surrounding him gave way and buried him. The worker died of his injuries before emergency workers arrived. Although the homeowner had instructed the on-site supervisor, Mr. Domenico Fantini, to slope the excavation trench at a 45 degree angle (to prevent a collapse), the trench was “not shore or sloped at all”. [*R. v. Fantini*, [2005] O.J. No. 2361]. Mr. Fantini was charged with criminal negligence causing death, and also faced an additional eight charges under the provincial *Occupational Health and Safety Act* (“OHS”).

As a result of an apparent plea bargain in March 2005, Mr. Fantini pled guilty to three of the OHS charges (receiving a \$50,000 fine) in exchange for the Crown dropping the criminal charge. Mr. Fantini’s company was not charged in this incident.

The Fantini case illustrates two disturbing C-45 possibilities. First, the authorities may potentially use a criminal charge (or the threat of laying criminal charges) to pressure an accused into pleading guilty to a health and safety regulatory offence. Second, evidence gathered against an individual or company pursuant to statutory compulsion in a Workers Compensation investigation could also potentially be used against them in a C-45 criminal proceeding.

Thus far, parallel OHS and *Criminal Code* prosecutions have been rare. The possibility does exist, however, that the threat of *Criminal Code* charges will encourage unwarranted guilty pleas under provincial health and safety acts. It is also possible that the investigative powers of health and safety acts could be used to obtain evidence for criminal proceedings that the Crown would otherwise be unable to acquire under their criminal law powers.

B. Transpave Incident

In September, 2006, a criminal negligence causing death charge using C-45 provisions was laid against a company. Transpave (a Quebec paving stone manufacturer) employee Steve L’Ecuyer had been crushed to death by heavy machinery in October, 2005. Quebec’s provincial health and safety commission investigated the accident, and concluded that the company’s safety system had been “neutralized”, that Mr. L’Ecuyer did not have proper training and that he followed unsafe work procedures.

The criminal proceedings are ongoing as of the date of writing.

C. Weyerhaeuser Incident

In March, 2007, WorkSafe BC levied a \$297,000 fine (the largest in Worksafe BC history) against Weyerhaeuser in connection with a 2004 sawmill worker death. Although New Westminster police had also conducted a lengthy investigation into this incident and recommended criminal charges against Weyerhaeuser, Crown Counsel declined to proceed, citing the unlikelihood of a successful prosecution.

The United Steelworkers Union has recently called for a “special prosecutor” to be appointed to look into forest industry deaths in B.C.

5. HOW CAN EMPLOYERS PROTECT THEMSELVES AGAINST CRIMINAL LIABILITY?

To establish a breach of the duty to take reasonable steps imposed by Bill C-45, the Crown must prove the breach “beyond a reasonable doubt”. Unfortunately, “reasonable steps” are not defined by the legislation.

After the Crown has proved a breach of this duty, an accused can escape liability by showing they exercised “due diligence” (i.e. they took all the precautions reasonable in the circumstances to prevent the accident/injury). What constitutes due diligence depends on the circumstances in each case. Generally, an employer can establish due diligence by demonstrating that it developed a “proper system to prevent the commission of the offence”. In the occupational health and safety context, factors considered include whether the employer:

- identified all actual and potential occupational hazards;
- assessed the risk of exposure of workers to hazards identified;
- eliminated hazards or implemented controls to minimize risk of exposure to hazards;
- communicated hazards, risks and controls to workers and management;
- monitored workers, work practices and workplace;
- corrected unsafe work practices and remedied hazardous situations
- appointed appropriate and sufficient supervisory personnel;
- reviewed the workplace for foreseeable health and safety risks;
- developed policies and procedures to protect workers against risks;
- implemented and maintained disciplinary guidelines;
- received regular reports on the operation of their health and safety program; and
- documented all of the steps and actions.

It is therefore advisable for employers to perform compliance audits and periodic reviews to ensure workers are protected by their workplace policies, practices and procedures. Keeping in mind the following steps will help employers establish a due diligence defence should an employer ever be faced with a C-45 criminal prosecution:

- have written policies, practices and procedures respecting worker safety in place;
- establish a program to monitor the workplace to ensure that employees are following the policies, practices and procedures; and

- provide appropriate education and training to employees to enable them to carry out their work according to the policies, practices and procedures.

Most significantly, there must be a direct link between a company's senior management and the people on the ground who implement the company's health and safety program. Companies must take these issues seriously, and ensure that someone in the senior management oversees and monitors the implementation of the program.

Lawyers who are experienced in workplace health and safety law and familiar with the implications of C-45 can work with a company to ensure that it has systems in place that will protect senior management from accusations of safety failures and delegated responsibility and offer a strong defence to any regulatory or criminal proceeding.

Should the unthinkable occur and a serious accident or worker death occur, a company should involve a lawyer immediately. At a minimum, provincial Workers Compensation officers will likely arrive and begin an investigation. These officers have subpoena powers, the ability to question individuals under oath and the ability to demand documents related to the accident be produced. It is unclear whether information gained from such investigations can be used in a parallel C-45 criminal proceedings. As a result, companies are strongly encouraged to have legal representation in order to protect themselves and senior management against any potential criminal liability.