Bill C-45

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The Basics

Questions to be Answered Today

• Why Did the Government Change the Law?
• What Are the Statutory Provisions?
• Why Does This Apply to You and Your Organization?
• What Types of Liability Can Result?
• How Can You Use This to Your Advantage?
Bill C-45 was an amendment to the federal Criminal Code. It was designed to “expand and clarify” the common law on corporate criminal liability.

The common law is judge made law, which develops through individual cases, rather than statutes (laws passed by the legislature).
The Basics (cont’d)

- The law now covers two different types of offences: negligence-based criminal offences, and those requiring proof of mens rea (usually intentional crimes like fraud).

- Bill C-45 also now covers both personal liability of people like you, and deals with liability for your organizations.
The Basics (cont’d)

- The bases of the two liabilities are different. We will cover each in turn.
- Most of the time, the more immediate concern in your roles will be offences involving criminal negligence.
The Basics (cont’d)

- What is criminal negligence?
- Not every mistake made is negligence.
- Not every negligent act will be criminally negligent
- Not every criminally negligent act will attract criminal liability
The Basics (cont’d)

- With *mens rea* crimes, the issues are these:
- What did you know?
- Did you take all reasonable measures to prevent the criminal behaviour of other people in the organization?
Bill C-45 was known as the Westray Bill. There was a mine near Stellarton, Nova Scotia, known as the Westray mine. Its corporate owner was Curragh Resources Inc.

In the early hours of May 9th, 1992, there was an underground methane exploration in the mine that took the lives of 26 miners on duty.
History (cont’d)

- When prosecutors examined the situation, they found that two mid-level mine managers (one above ground, and one below) made a series of decisions that included turning off certain safety equipment, which if it had been operating, might have avoided the tragedy.
When the prosecutors examined the law, however, they found that the common law of corporate criminal liability did not allow them to prosecute the managers or the corporation.

This led to both public outcry and a public inquiry.
History (cont’d)

- Since no one was held accountable by the criminal law, in 2003, it was felt that the law needed to be updated.
- This was the impetus for the passage of Bill C-45
The Language of Bill C-45

- Why do we have to focus on the language of the statute itself?
- The law is a tool, just like the one that fill toolkits that you and your employees use to fix problems.
- So we start with the law in the form that we have it, that is, the statute.
The second reason is just as simple, but even more important. Because the statute is a tool, the question then becomes:

- This is a tool to do what?
- In the case of people who work for organizations who wish to avoid criminal sanctions, it provides directions on how to accomplish this.
The other side of this coin is that this can be an asset in an argument. Assume that you want to accomplish something, such as, for example, a more regular maintenance review of facilities. This is going to cost money and your superiors do not want to spend the money.
The Language of Bill C-45 (cont’d)

- They want you to give them a reason why they should nonetheless spend the money.
- Sometimes, you can point to this, and is likely to be persuasive
The Language of Bill C-45 (cont’d)

- “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;
The Language of Bill C-45 (cont’d)

- “representative”, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;
The Language of Bill C-45 (cont’d)

“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;
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 for the aspect of the organization’s 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.
The Language of Bill C-45 (cont’d)

- 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;
The Language of Bill C-45 (cont’d)

- (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 measures to stop them from being a party to the offence.
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.
“Senior officer” was clearly a definition that was designed to catch mid-level managers. Most of you will fit the second branch of the test, namely “is responsible for managing an important aspect of the organization’s activities”. 
Are You a Senior Officer?

- In other words, your role in managing the engineering aspects of the institution and the safety of those people within its care likely makes most of you senior officers within the meaning of the *Criminal Code*. 
What Does It Mean?

- If you are a senior officer, for the purposes of the criminal law, you are a potential conduit from the individual committing the wrongful act or omission to the organization.

- In other words, there are two elements to most crimes. The first is a wrongful act; the second is mental fault.
What Does It Mean? (cont’d)

- Unlike an individual, the organization has no hands to commit the act and has no brain with which to form the mental element.
- Yet, for the purposes of the criminal law, the organization is a person.
- The senior officer’s brain is the brain of the organization, in the senior officer’s area of management.
What Does It Mean? (cont’d)

- Under s. 22.2(c), this means that if you learn of the criminality of someone else in the organization, you have to do everything that you reasonably can in order to stop it from happening.
What Does It Mean? (cont’d)

- Under 22.2(a), if you do anything criminal in your area of management, the organization is liable as well.
What Does It Mean? (cont’d)

- Under s. 22.1, the following have to be true:
  - Either of the following depart markedly from the standard of care that would reasonably be expected to prevent someone connected to the organization from being involved in the offence:
    - The senior officer who is responsible for the particular area; or
    - The senior officers collectively
What Is Criminal Negligence?

- Criminal negligence is the omission of care in conducting oneself.
- Generally, the criminal law does not concern itself with omission. I am rarely required by the criminal law. For example, if you are drowning and I see you, I am generally not required to help you. Why?
What Is Criminal Negligence? (cont’d)

- This is because omissions generally do not attract criminal sanctions.
- However, criminal negligence is the exception to this general rule. There are times when we expect people to act to protect others.
- The quintessential example for this is that we expect parents to provide the necessaries of life for children.
What Is Criminal Negligence? (cont’d)

- Not every mistake that one makes is negligent.
- When I was a young lawyer, I was very worried about making mistakes.
- I will always remember what a senior lawyer told me. She said: “Make as many mistakes as you wish. Just do not be negligent.”
What Is Criminal Negligence? (cont’d)

- Negligence is unreasonable mistakes.
- Criminal negligence is an even higher standard. It talks about a marked departure from the standard of care.
- This is different than ordinary negligence. High jumping is the best analogy.
What Is Criminal Negligence? (cont’d)

- If the high jumper almost gets over the bar, but clips it with his heel, he may be negligent.
- If he goes under the bar, this is a marked departure.
What Is Criminal Negligence? (cont’d)

- In order for there to be criminal negligence, the person who is alleged to have omitted to do something must have a duty to do it.
- This is where s. 217.1 comes in. It creates a duty.
What Is Criminal Negligence? (cont’d)

- Everyone who has the ability to control the work of another has a duty to ensure that reasonable precautions are taken to ensure worker safety.

- This duty feeds into two negligence-based offences: criminal negligence causing death and criminal negligence causing bodily harm.
What Is Criminal Negligence? (cont’d)

- This is personal liability of yours, as well as the organization. Both can be liable for it.
- In the end, this is the direct response to the Westray tragedy. If s. 217.1 had existed at the time of the explosion, it would have been much easier to go after both the mine managers and the parent company.
What Is Criminal Negligence? (cont’d)

- There are other duties as well. For example, assume a pregnant woman is bleeding profusely. A second person tells others that he will help the woman by getting her to the hospital. He then does nothing. The courts have held that the second person is under a duty to do as they promised.
Intentional Wrongdoing

- Where someone in your organization is engaged in intentional wrongdoing (fraud would be a quintessential example of this), and you learn of it, what should you do?

- An example may help here. A person is using the corporation to commit fraud against the consumers of the institution.
Intentional Wrongdoing (cont’d)

- The institution keeps some of the ill-gotten gains of the scheme.
- Some of the fraudulent transactions are sprinkled all over the budget, including in your department. Something strikes you as wrong.
- When you look into the matter, you discover the scheme.
Intentional Wrongdoing (cont’d)

- What should you do?
- The rule is that you must take all reasonable measures to prevent the offence. There is no case law on this particular issue.
Intentional Wrongdoing (cont’d)

- Therefore, it is not clear whether you need to only take reasonable measures within the organization, or whether outside authorities (such as the police) should be contacted.

- My own view is that if you do everything internally, you have probably done enough.
Intentional Wrongdoing (cont’d)

- But, we will have to wait for the courts to make this decision.
Going Forward

1. Review your polices
   • Are your internal controls sufficient?
   • Can you foresee problems where your employees could be injured
   • Are you being forced to cut corners (large or small)?
Going Forward (cont’d)

2. What training is possible so that the people in your department understand the obligations placed on them by the criminal law?

3. What do you want to do? What are the barriers to those goals? Can you formulate an argument using the various liabilities to support the argument?
4. Liabilities

• Organizational
  • Criminal Negligence – Did the senior officer in charge of the area where the negligence occurred depart markedly from the standard of care that would have prevented the offence?
  • Did the senior officers as a whole depart markedly from the standard of care that would have prevented the offence?
Going Forward (cont’d)

- Was the senior officer aware of the intentional wrongdoing of another person associated with the organization?
- If so, did the senior officer take all reasonable measures to prevent the wrongdoing?
Going Forward (cont’d)

• Personal
  - Did you have the power to supervise the work of someone else?
  - Was that person (or anyone else) seriously injured or killed during the course of that work?
  - Did you take reasonable steps to protect the individual?
  - Was there a marked departure from the standard of care?