



BILL C-45:
**FROM BOARDROOMS
TO COURTROOMS**

**Bill C-45
and the New
Health & Safety
Crime**

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Outline of Bill C-45 Seminar

- Introduction to Bill C-45
- The Westray Disaster and Bill C-45
- New *OHS* Duty in *Criminal Code*
- *OHS* Criminal Liability for Individuals and Organizations
- Implications and Action Items

Legal Services

Introduction to Bill C-45



Introduction to Bill C-45

- Establishes *OHS* legal duty in *Criminal Code*
- Known as the “Westray Bill”
- Reform criminal law for organizations
- Applies to federal and provincial workplaces
- In addition to existing *OHS* legislation
- In force effective March 31, 2004

Summary of Bill C-45

1. “Establish rules for attributing to organizations, including corporations, criminal liability for the acts of their representatives”.

Summary of Bill C-45

2. “Establish a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public”.

Summary of Bill C-45

3. “Set out factors for courts to consider when sentencing an organization”.

Summary of Bill C-45

4. “Provide optional conditions of probation that a court may impose on an organization”.

Legal Services

New OHS Duty in *Criminal Code*



New *OHS* Duty in *Criminal Code*

- Bill C-45 establishes a new *OHS* legal duty
- Requirement to take “reasonable steps”
- New duty dove-tails with s. 219 of *Criminal Code*
- New crime of *OHS* criminal negligence
- Applies to both individuals and organizations

New OHS Duty in *Criminal Code*

- OHS legal duty – s. 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”.

New OHS Duty in *Criminal Code*

- Applies to every one who directs how others do work ... [or] has authority to direct how work is done
 - From bargaining unit lead hands to senior executives
 - Protection of public as well as workers
 - Legal duty to take “reasonable steps” - *not defined*
 - Legal duty to prevent “bodily harm” - *defined*

New *OHS* Duty in *Criminal Code*

- “Bodily harm ... means ... any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature”

s. 2(1) *Criminal Code*

New *OHS* Duty in *Criminal Code*

- New *OHS* legal duty dove-tails with s. 219 of *Criminal Code*:
 - “ 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 purpose of this section, “**duty**” means a duty imposed by law.”

New *OHS* Duty in *Criminal Code*

- Possible unintended consequences of new OHS legal duty:
 - Applications to farms and ranches where OHS Laws do not apply
 - May apply to environmental damage that leads to “bodily harm”
 - May lead to manufactures liability when “bodily harm” occurs

Legal Services

Criminal Negligence for Individuals



OHS Criminal Negligence for Individuals

- Applies to every individual to whom the new duty in s. 217.1 of the *Criminal Code* applies
- Prohibited act: contravention of new duty in s. 217.1 to take “reasonable steps” to prevent bodily harm
- Fault element: individual shows “wanton or reckless disregard for the lives or safety of others”
- Prosecution must prove both prohibited elements of the offence beyond a reasonable doubt

OHS Criminal Negligence for Individuals

- Penalties for criminal negligence:
 - ✓ Injury - 10 years in prison
 - ✓ Death - life imprisonment



OHS Criminal Negligence for Individuals

- Easier now to convict an individual of criminal negligence
- Duty applies to those who direct how what work is done, or
- Those individuals who have authority to direct how work is done
- OHS Criminal Code Duty now makes breach of duty easier to prove

Legal Services

Criminal Negligence for Organizations



OHS Criminal Negligence for Organizations

- New rules for attributing criminal liability
- Replaces “identification theory” of liability
- Applies to all organizations, including corporations
- Increases likelihood of criminal conviction

OHS Criminal Negligence for Organizations

- **“Organization”:**

“Public body, body corporate, society, company, firm, partnership, trade union, municipality and associations, with a common purpose, with an operational structure that holds itself out as an association.”

OHS Criminal Negligence for Organizations

- If acting within the scope of their authority ...
 1. One or more **representatives** commits the offence of *OHS* criminal negligence
 - and**
 2. **Senior officer** departs markedly from the standard of care that could reasonably be expected to prevent a representative from committing the offence

Definition of Representative

- **“Representative”:**

“Is a director, partner, employee, member, agent, or contractor of the organization”

Definition of Senior Officer

- **“Senior officer”:**

“Means a representative who plays an important role in the establishment of the 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”.

OHS Criminal Negligence for Organizations

- Penalties for criminal negligence:
 - ✓ \$ **UNLIMITED**
 - ✓ Non-tax deductible



OHS Criminal Negligence for Organizations

- Implications for organizations:
- Criminal liability caused by the acts or omissions of “representatives”
- larger number of individuals who may affect criminal liability of the organization
- Organization may be convicted even though no individual is found guilty

Legal Services

Implications of Bill C-45



Implications of Bill C-45

- Higher individual/organization *OHS* legal risk
- No insurance for *OHS* criminal negligence penalties
- Increased importance of *OHS* law compliance
- Legal response protocol required to manage incidents
- Increased importance of accident/injury prevention
- Mandatory to develop *OHS* management system

Legal Definition of Due Diligence

R. v. City of Sault Ste. Marie (1978):

“...[T]he question will be...whether the accused established all reasonable care by [1] establishing a proper **system** to prevent commission of the offence and [2] by taking **reasonable steps** to ensure the effective operation of the **system**.”



Three Categories of Offences

Type of Offence	Example	Unlawful Act	Intent	Due Diligence Defence
Criminal (<i>mens rea</i>)	Criminal Negligence	✓	✓	
Strict Liability	OHSA or EPA	✓		✓
Absolute Liability	Bylaw or HTA	✓		

Due Diligence

- Legal defence to **OHS** charges
- An effective occupational health & safety management system



Due Diligence

- Successful defences of due diligence demonstrate:
 - **Identified** all actual and potential occupational hazards (applicable to the offence)
 - **Assessed** the risk of exposure of workers to hazards identified
 - **Eliminated** hazard or implemented **controls**, where necessary, to minimize risk of exposure to hazards
 - **Communicated** hazards, risks and controls to workers, JHSC and management

Due Diligence

Continued ...

- **Monitored** workers, work practices and workplace (equipment, machinery, facilities)
- **Corrected** unsafe work practices and **remedied** hazardous situations
- **Disciplined** worker/supervisor if they were in violation of their legal duties or corporate OHS policy or procedure
- **Documented** all of the above mentioned steps and actions

Legal Services

Developing an *OHS* Management System



Developing an *OHS* Management System

OHS management system includes ...

- Policy
- Program
- Training
- Auditing



Developing an *OHS* Management System

- Develop of an effective *OHS* Management System by ...
 1. Hazard Identification & Control Programs
 2. *OHS* Training for Managers
 3. Continuous Improvement by *OHS* Auditing

Legal Services

Action Items for All Organizations



Action Items for all Organizations

- *OHSLAW* Gap Analysis™ of current legislative requirements (see handout material)*
- Due diligence training for managers and supervisors
- *OHSLAW*™ Incident Legal Protocol for incidents of high legal risk of police prosecution
- Implement or improve your *OHS* management system

* **Protect your Gap Analysis by *solicitor & client privilege***



Legal Services

Question and Answer Period



Can Gowlings' OHS Team Help You?

- ✓ Provide *OHSLAW* Gap Analysis™ anywhere in Canada
- ✓ Provide *OHS* senior executive briefings and Due Diligence training to managers & supervisors
- ✓ Perform job hazard analysis, develop written safe work procedures and manage workers' compensation claims
- ✓ Provide legal advice and representation regarding OHS regulator's order, major incidents and OHS charges

Visit us at: www.gowlings.com/ohscourses or contact:

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