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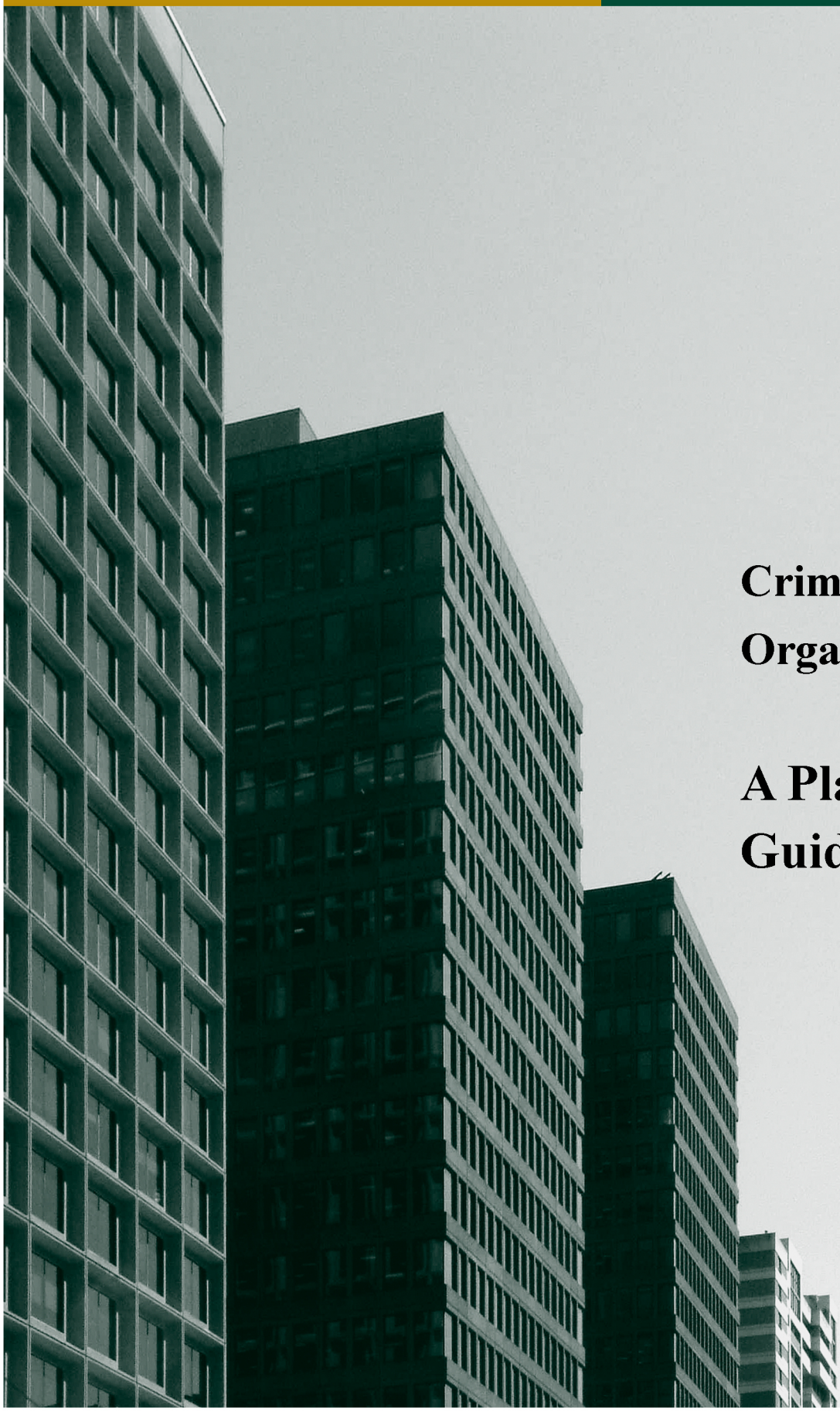

Criminal Liability of Organizations

A Plain Language Guide to Bill C-45

Department of Justice Canada
Ministère de la Justice Canada

Canada

A PLAIN LANGUAGE GUIDE

BILL C-45 - AMENDMENTS TO THE CRIMINAL CODE AFFECTING THE CRIMINAL LIABILITY OF ORGANIZATIONS

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BACKGROUND

The Government tabled Bill C-45 on June 12, 2003. If passed, it will amend the *Criminal Code* to modernize the law with respect to the criminal liability of corporations and the sentencing of corporations. The House of Commons Standing Committee on Justice and Human Rights held hearings into this subject in May 2002 and recommended that the Government table legislation. The Government Response (www.canada.justice.gc.ca/en/dept/pub/ccl_rpm) set out the principles that would be enacted in the *Criminal Code*. The passage of Bill C-45 will transform these principles into law.

Because the *Criminal Code* covers a wide range of crimes by all kinds of persons, the legislation employs more complex and specific language than that which was used in the Response. This Guide outlines how the law will apply in the most common situations. It is intended to assist the reader understand how the Government's proposed legislation may affect them or the corporation they work for.

Section I provides background information on Canada's current laws regarding corporate criminal liability.

Section II describes Bill C-45, by explaining who it applies to, which activities it pertains to, and what sentencing options exist under the proposed legislation.

SECTION I: CURRENT CANADIAN LAW

Criminal liability generally

The *Criminal Code* requires various elements to be proven before a person can be convicted of a crime. The commission of a prohibited act by the accused – for example, causing bodily harm, counselling a person to commit an offence, driving while impaired, or touching a person for a sexual purpose, must first be proven.

The Crown must also prove that the accused had the requisite guilty state of mind in committing the offence. A person cannot be found guilty of a crime if, for example, the court concludes that the person was suffering from a mental disorder at the time the act was committed or did not know of certain facts that give the act its criminal quality. Depending on the offence, that state of mind can differ. For example, the accused must:

- know a fact (e.g. that goods are stolen), or
- have a specified intent, either to achieve a certain outcome (e.g. to mislead) or to do a certain act (e.g. to intentionally apply force to another person).

Some offences, however, are based on negligence and judged "objectively" so that the person's conduct is itself proof of the necessary "criminal" fault. Some examples, as defined in the law, include:

- storing a firearm "in a careless manner";
- operating a motor vehicle "in a manner that is dangerous to the public"; and
- showing "wanton and reckless disregard" for the lives or safety of others.

Criminal liability of corporations

Corporations are already subject to the *Criminal Code*. The definition in section 2 of "every one", "person", "owner" includes "public bodies, bodies corporate, societies, companies". However, determining whether a corporation has committed a prohibited act and whether a corporation has the requisite mental state is far more complicated than for an individual.

Corporations can only act through their employees and agents. For example, although we commonly consider that a bank makes a loan, in actuality it is the bank employees who gather information, check out security, authorize the loan and transfer money to the customer's account. The question becomes whether a bank making a loan to a borrower who uses the money for a criminal purpose like importing drugs, is committing a crime? The bank has made a loan that is used for a crime, so clearly it committed a prohibited act. But did the bank know of the criminal purpose and intend to finance it?

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 convicted of a crime.

Basically, a corporation is guilty of a crime 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 (terms used in recent case law). Determining who is a directing mind depends on the facts of each case, but generally the person must have authority to set policy rather than simply having authority to manage. As well, the directing mind has to be intending, at least in part, to benefit the corporation by the crime.

In the above example, it is highly unlikely that the bank president and the board of directors would be aware of the loan. The bank makes many loans every month. If the borrower deceived the bank and no one knew of the criminal intent of the borrower, no crime has been committed by the bank. But what if the bank manager or the regional manager knew? Currently, whether they would be a "directing mind" would depend on how much authority they had to develop loans policy. Moreover, they would have to be acting at least in part for the benefit of the bank and not for their personal benefit in order for the bank to be convicted.

Criminal liability of directors, officers and employees

Under current Canadian law, officers and directors of a corporation cannot be convicted of a crime for acts of the corporation solely because of their status as directors or officers. If they are directing the corporation to commit crimes that will benefit the corporation, or

are otherwise participating in criminal activities within the corporate context, they may be held criminally responsible. In such circumstances, it is likely that the directors and officers would be charged with the offence jointly with the corporation.

SECTION II: CHANGING THE LAW UNDER BILL C-45

The provisions of Bill C-45 are a compilation of the existing rules with new reforms, which will modernize the law to reflect the increasing complexity of corporate structures. Bill C-45 deals only with the criminal responsibility of the organization and makes no change in the current law dealing with the personal liability of directors, officers and employees. Directors and officers, like anyone else, are liable for all crimes that they commit *personally,* whatever the context.

Why does C-45 refer to an organization rather than a corporation?

The Standing Committee hearings and the Government's Response both dealt with corporate criminal liability. However, the *Criminal Code* definition of "person" includes bodies in addition to corporations, and it is important to ensure that the same rules for attributing criminal liability apply to all forms of joint enterprises carried out by individuals, regardless of their structure.

In amendments to the *Criminal Code* in recent years, it has been necessary to develop new definitions because neither "person" nor "corporation" would cover all the "bodies" that may be involved in a crime. For example, in 1997, "criminal organization" was defined as "a group, however organized" of three or more persons for the commission of criminal offences. A biker gang would be an organization even if it were not a corporation or society. Similarly, in 2001, the terrorism offences defined an "entity" as a person, group, trust, partnership or fund or an unincorporated association or organization. A terrorist entity is not a corporation but it can have assets and its members commit crimes.

For this reason, Bill C-45 refers to an "organization" and then defines it to mean:

- "a public body, a body corporate, a society, a company" [This comes from the existing definition of "every one"]; and
- "a firm, a partnership, a trade union or an association of persons created for a common purpose." [This is new].

These new provisions that define an "organization" will also apply to other groups that have an operational structure and make themselves known to the public . This will ensure the law does not apply to an informal group that gets together regularly, for example, to discuss politics or to play bridge.

Who are the "directing minds" of the organization?

In determining who is sufficiently important within the organization to be considered to be its directing mind, Bill C-45 refers to a "senior officer". This is a more familiar expression than "directing mind". The definition of "senior officer" includes everyone who has an important role in:

- setting policy (which is the current Canadian law); or
- managing an important part of the organization's activities (which is new).

The definition therefore focuses on the function of the individual, rather than on any particular title. For example, the "executive assistant to the president" could have a great deal of authority and effectively speak for the president in one organization and have only minor administrative functions, like scheduling the president's meetings, in another organization.

In addition, the new definition makes it clear that the directors, the chief executive officer and the chief financial officer of a corporation are, by virtue of the position they hold, automatically "senior officers". A corporation charged with an offence cannot argue that the individuals occupying these positions actually had no real role in setting policy or managing the organization and therefore were not senior officers.

What does it mean that an organization is a party to an offence?

The Bill refers to "a party to an offence", and Section 21 of the *Criminal Code* provides that a person is a party to an offence if the person actually commits the offence or aids or abets another person to commit it. Section 22 of the *Criminal Code* makes a person who counsels another person to commit an offence also a party to that offence. Accordingly, the use of "a party to an offence" in Bill C-45 reflects both sections of the Code, providing a broader definition that will apply to more activities than only when an organization "commits an offence".

For whose physical acts is an organization responsible?

To obtain a conviction, the Crown must prove both the commission of the prohibited act and the requisite guilty mental state. Bill C-45 differentiates between crimes requiring the Crown to prove negligence (proposed s. 22.1) and crimes requiring the Crown to prove knowledge or intent (proposed s. 22.2), and establishes separate rules for each.

Currently, to prove the commission of the physical act by an organization, the Crown will usually show that the physical act was committed by employees of the organization. However, it has been found that the term "employee" is not broad enough to capture all the individuals who may act on behalf of an organization. Therefore Bill C-45 uses "representative," which is defined under the proposed amendments to s. 2 to mean directors, partners, members, agents and contractors, as well as employees. These representatives must be acting within the scope of their employment at the time of the alleged crime.

How does an organization become a party to a crime of negligence?

In 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.

In general, for an organization to be found guilty of committing a crime of negligence, the Crown will have to show that employees of the organization committed the act and that a senior officer should have taken reasonable steps to prevent them from doing so. However, the complicated structure of organizations requires that this relatively straightforward idea be expressed in legal language that covers the many different ways that an organization acts.

With respect to the physical element of the crime, Bill C-45 (proposed s. 22.1 of the *Criminal Code*) provides that an organization is responsible for the negligent acts or omissions of its representative. The Bill provides that the conduct of two or more representatives can be combined to constitute the offence. It is not therefore necessary that a single representative commit the entire act.

For example, in a factory, an employee who turned off three separate safety systems would probably be prosecuted for causing death by criminal negligence if employees were killed as a result of an accident that the safety systems would have prevented. The employee acted negligently. On the other hand, if three employees each turned off one of the safety systems each thinking that it was not a problem because the other two systems would still be in place, they would probably not be subject to criminal prosecution because each one alone might not have shown reckless disregard for the lives of other employees. However, the fact that the individual employees might escape prosecution should not mean that their employer necessarily would not be prosecuted. After all, the organization, through its three employees, turned off the three systems.

As for the intent necessary to find the organization guilty, the proposed amendments under Bill C-45 would require that the senior officer responsible, or senior officers collectively, must have departed markedly from the standard of care that could be expected. 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.

Similarly, in the example of three employees engaging in the negligent conduct, the court would have to decide whether the organization should have had a system to prevent them acting independently in a dangerous way and whether the lack of such a system was a marked departure from the standard of care expected in the circumstances. The court would consider, under this example, the practices put in place by the person in charge of safety at the factory and the practices of other similar organizations.

How does an organization become a party to an offence where intent or knowledge has to be proven?

The proposed reforms in Bill C-45, specifically the addition of section 22.2 of the *Criminal Code*, would set out three ways an organization can commit a crime requiring an awareness of a fact or a specified intent. In all cases, the focus is on a senior officer who must intend to benefit the organization at least to some degree. The most obvious way for an organization to be criminally responsible is if the senior officer actually committed the crime for the direct benefit of the organization. For example, if the CEO fudges financial reports and records, leading others to provide funds to the organization, both the organization and the CEO will be guilty of fraud.

However, senior officers may direct others to undertake such dishonest work. The Bill therefore makes it clear that the organization is guilty if the senior officer has the necessary intent, but subordinates carry out the actual physical act. For example, a senior officer may be benefiting the organization by instructing employees to deal in goods that are stolen. The senior officer may instruct employees to buy from the supplier offering the lowest price, knowing that the person who offers to sell the goods at the lowest price can only make such an offer because the goods are stolen. The employees themselves have no criminal intent but the senior officer and the organization could be found guilty.

Finally, an organization would be guilty of a crime if a senior officer knows employees are going to commit an offence but does not stop them because he wants the organization to benefit from the crime. Using the stolen goods example, the senior officer may become aware that an employee is going to get a kickback from the thieves for getting the organization to buy the stolen goods. The senior officer has done nothing to set up the transaction. But, if he does nothing to stop it because the organization will benefit from the lower price, the organization would be responsible.

Sentencing an Organization

How are organizations punished for committing a crime?

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. 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.

At what level should the fine be set?

Canadian law does not provide a mechanical process where the punishment is pre-determined. There are few minimum sentences and judges have a great deal of latitude to craft the appropriate sentence. 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 proposed reforms in Bill C-45 to s. 718.21 of the *Criminal Code*, 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 factors are:

Moral blameworthiness

- The economic advantage gained by committing the crime - The more money the organization made, the higher the fine should be.
- 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.

Public interest

- The need to keep the organization running and preserve employment - Just as individuals should not be fined so heavily that they will not be able to provide for their families, so an organization should not normally be so heavily fined that bankruptcy results and, as a result, employees are left without work.
- The cost of investigation and prosecution - Many corporate fraud offences require lengthy investigations and the cost to the public of detecting the crime and building a case should be considered by the judge.
- Any regulatory penalties, which are distinct from those under the *Criminal Code*, imposed on the organization for the offence - Courts consider whether individuals have been punished in other ways, for example, by losing their jobs. Similarly, a court would consider whether the public interest is served by adding a large fine to the penalties that may have already been imposed by a body such as a securities commission.

Prospects of rehabilitation

- Penalties imposed on managers and employees for their role in the crime - An organization shows how seriously it responds to criminal activity if, for example, it disciplines or fires employees who participated in the offence.
- Previous convictions or regulatory offences - Just as the criminal record of an individual is very important to determining the appropriate penalty, so it is important for a judge to consider whether the organization and its workers had been sanctioned for similar activities in the past, not just in the criminal courts but by regulators like occupational health and safety departments.

- Restitution – Compensating victims shows that the organization is trying to make up for the harm it caused.
- Attempts to hide assets to avoid paying a fine – An organization that tries to pretend it is poor, rather than being open with the court about its financial situation, is showing that it has not changed its ways.
- Measures taken to reduce the likelihood of further criminal activity - New policies and practices, like spot audits or changes in personnel, could indicate that the organization has learned its lesson.

What is corporate probation?

Courts often place individual offenders on probation. The court imposes conditions on the offender, such as reporting to a probation officer, not drinking alcohol or taking drugs and performing community service and, in observing these conditions, the offender avoids going to jail. Probation is virtually unheard of for corporate offenders. But, there may be circumstances in which probation would be appropriate to ensure that the organization take steps to reduce the chances it will commit further crimes.

The Bill proposes to put in the *Code* a specific section dealing with probation orders for organizations (s. 732.1(3.1)). The list of conditions the judge can impose includes:

- providing restitution to victims of the offence to emphasize that their losses should be uppermost in the sentencing judge's mind;
- requiring the corporation to inform the public of the offence, the sentence imposed and the remedial measures being undertaken by the organization. Having to run ads in the media admitting to criminal acts could have a serious effect on an organization's business.

The new section also sets out conditions that may be imposed by the court to supervise the efforts of the organization to ensure it does not commit crimes in the future. A court can order an organization to:

- implement policies and procedures to reduce the likelihood of further criminal activity;
- communicate those policies and procedures to employees;
- name a senior officer to oversee their implementation; and
- report on progress.

Courts are not necessarily well equipped to supervise corporate activities and the organization may already be subject to extensive regulation by government bodies. There is no need for a court to get involved in overseeing changes in an organization's safety practices, for example, if a provincial occupational health and safety department is already doing so. Such an agency has trained inspectors and expertise that the courts lack. Therefore, the section requires the court to consider whether another body would be more suitable to supervise the organization.

FOR MORE INFORMATION

This Guide on Bill C-45 has addressed what the Department of Justice anticipates will be the most common questions about the Government's proposed legislation.

For further information, please contact the Department of Justice, online at **www.canada.justice.gc.ca** or by telephone at **(613) 957-4222**

To access the latest online version of the Bill, please visit Canada's Parliamentary Web site at **www.parl.gc.ca**