

August 2004

BILL C-45 CRIMINAL LIABILITY OF ORGANIZATIONS

As of March 31, 2004, the “the Westray Act” (*An Act to Amend the Criminal Code, Criminal Liability of Organizations*, S.C. 2003, c. 21) (the “Act”), so called because it implements several recommendations made by the judicial inquiry into the Westray Mine disaster, became effective. This legislation redefines the law with respect to the potential criminal liability of organizations including municipalities. In addition to increasing risk exposure of organizations themselves, the new law also establishes new obligations on employees and other “representatives” of such organizations.

NEW DUTIES AND LIABILITIES **DUTY OF PERSONS DIRECTING WORK**

The *Act* establishes that anyone who either undertakes, or has authority, to direct *how* another person is to do work or a task is under an affirmative duty to “take reasonable steps to prevent bodily harm” to that person or to any other person. As this provision applies not only to persons who actually provide such direction, but also to those who have the authority to do so, one may not escape liability by inaction.

There is no judicial interpretation yet available to assist in analysing this provision. The scope of the duty may extend to directions given or capable of being given to persons other than employees, such as, for example, contractors, visitors and volunteers. That having been said, the duty only arises in relation to anyone who has authority to direct the manner of the work/activity.

Liability will only arise where there is a failure to take reasonable steps to ensure the safety of others. We must await judicial determination of what is meant by “reasonable steps”. Presumably, compliance with any governing health and safety statutes will satisfy the duty in most instances.

ORGANIZATIONAL NEGLIGENCE

Prior to the introduction of the *Act*, corporations, municipal or otherwise, charged with criminal offences, usually as a result of actions of an employee, could defend themselves on the basis that the actions took place without direction or approval and therefore were not the corporation’s actions. If the directing mind(s) of the corporation took all due care, the acts of the employee would not be attributed to the company. The *Act* amends the *Criminal Code* by adding s. 22.1 which imposes a more onerous standard.

In the case of an offence that requires the prosecution to prove negligence, a twofold test for the *actus reus* of the offence is created. **[The *actus reus* of the offence is the physical act of an offence as opposed to any mental element (*mens rea*)].** First, under s. 22.1 (a), it is necessary to show either (i) that a “representative” of an organization, while acting within the scope of his/her authority, is a party to an offence; or (ii) more than one “representative” of an organization, acting within the scope of his/her authority, have carried out separate actions, which, if done by one person, would have rendered that person a party to the offence.

The latter condition is aimed at the cumulative effect of the actions of more than one “representative”. For example, imagine a situation where two employees disconnect two separate safety systems. The failure of either to operate may not result in particular danger, but the failure of both does.

The potential for liability arising out of the uncontrolled acts of independent contractors must be considered in light of the

fact that s. 22.1(a) makes a corporation liable for acts of a “representative” which includes an “agent” or “contractor”. An organization may not avoid liability for criminal negligence, for instance, by arguing that the acts are those of an independent contractor. It will be important to consider when it is appropriate to “contract out” without retaining supervision over the manner in which the work of an independent contractor is carried out.

The second element of the *actus reus* test, however, does limit potential exposure somewhat. Subsection 22.1(b) requires proof that the senior officer(s) responsible for the particular aspect of the organization’s activity conduct himself/themselves in a manner that “departs markedly” from the standard of care, which could reasonably be expected of the senior officers to prevent a representative of the organization from being a party to the offence. Senior officers are those who play an important role in establishing policies or who are responsible for managing an important aspect of the organization’s activities and in the case of a body corporate includes a director, chief executive officer and chief financial officer.

Not every departure from the standard of care by a senior officer will result in criminal liability for negligence; the departure must be “marked”. This, arguably, requires a significant departure from the standard of care, such as a complete disregard for or indifference to the duty. What constitutes a marked departure from the standard of care will, of course, turn on the facts of each case and future judicial determinations.

INTENTIONAL OFFENCES

Section 22.2 of the *Act* deals with offences requiring some level of intention or knowledge to satisfy the *mens rea* requirement or mental element of an offence. In order for an organization to be held liable, the prosecution must show that one of its senior officers, acting within authority, and with the intent at least in part to benefit the organization:

- (a) is party to the offence;
- (b) with the appropriate *mens rea* directs another representative to commit the act specified in the offence; or
- (c) knowing that another representative is about to be a part to the offence, does not take reasonable measures to intervene.

PENALTIES

Fines payable by organizations for summary conviction offences have been increased to a maximum of \$100,000. There is no maximum fine for indictable offences. Courts

have already made it clear in the case of large corporations that fines should not be so low as to amount to a “licensing fee”.

The *Act* also provides the possibility of a probationary order against an organization that could set terms such as restitution, publication, and requiring the development and publication of health and safety policies.

In sentencing an organization, the Court is instructed to consider a broad range of factors including whether the organization gained any advantage because of the offence, whether the organization attempted to conceal assets, the costs of investigation and prosecution, and measures taken by the organization to reduce the likelihood of recurrence.

DUE DILIGENCE

Some of the questions organizations need to ask themselves in order to limit the potential for criminal exposure are:

- (1) What activities do we have authority to control?
- (2) What risks to employees and others are potentially related to these activities?
- (3) Are any of our representatives directing activities, which are not necessarily within our authority?
- (4) What health and safety legislation governs activities within our authority?
- (5) Are all senior officers and all personnel potentially directing the activities of others or authorized to do so sufficiently informed about safety risks, any applicable health and safety legislation, and the potential impact of this legislation?
- (6) Are there systems in place to communicate any updates and changes to governing health and safety legislation?
- (7) Is there sufficient communication between different branches of the organization to avoid the potential for risks arising out of the interaction of separate activities?

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