IN FACT AND IN LAW

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Bill C-45 and Safety in the Workplace:
What You Should Know!

By Jean Beauregard and Marc Cigana

For quite a while now, Québec legislation, like that of most Canadian provinces, provides that the directors, officers, employees or representatives of a legal person (for example: an incorporated company) can be sued personally for the commission or omission of acts that could directly and seriously compromise the health, safety or physical integrity of a worker. This offence is covered under section 237 and 241 of the *Occupational Health and Safety Act* (R.S.Q., c. S-2.1).

An employer may also be sued if the evidence proves that its representative, mandatary, or worker in its employ has committed an offence, unless that offence was committed without the employer's knowledge and without its consent, and notwithstanding any measures taken to prevent commission of the offence.

In addition to provincial legislation, the *Criminal Code*, which comes under federal jurisdiction, has for a good many years contained the offence of "criminal negligence". Section 219(1) of the *Criminal Code* stipulates as follows:

> **"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."**
>
> **(Emphasis ours)**

For the purpose of section 219, "duty" is defined as an obligation imposed by law.

The Federal Parliament, through Bill C-45, very recently passed legislation making it a criminal offence where a person or an organization takes its obligation of supervision lightly and death or bodily injury results from such negligence. The new section 217.1 of the *Criminal Code* will read as follows:

> **"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."**

With the coming into force of section 217.1 (and all legislative amendments provided for in Bill C-45) on March 31, 2004, the duty of supervision incumbent on persons who direct the performance of work falls clearly under the *Criminal Code*. While the section does not create new offences in the context of employment-related injuries, it will facilitate prosecutions for criminal negligence, within the meaning of section 219 of the *Criminal Code.*

Who is Contemplated By the New Provisions?

The real innovation of Bill C-45, as regards safety in the workplace, is the expansion of the category of "persons" who are liable to prosecution, as well as expansion of the class of personnel who can incur the criminal liability of an organization.

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The Concept of an "Organization"

Previously, in addition to a natural person, a legal person, such as a company, could be prosecuted. Now, the word "persons" will include "organizations".

An "organization" within the meaning of section 2 of *Criminal Code* is:

- a public body, body corporate, society, company, firm, partnership, trade union or municipality,

or

- an association of persons that (i) is created for a common purpose; (ii) has an operational structure; (iii) holds itself out to the public as an association of persons.

This new concept is more of a clarification of existing law, and broadens its application to entities that perhaps prior to the amendment could not have been prosecuted.

Attribution of Criminal Liability Through "Representatives"

The most important amendment is the enactment of new section 22.1 which will read as follows:

"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 term "representative" is defined as "a director, partner, employee, member, agent or contractor" of the organization. It is readily apparent that the Legislator intended to broaden the range of persons who can engage a company's criminal liability.

Prior to the enactment of this amendment, a "legal person" was liable for wrongful conduct if, and only if, its "directing mind" or "alter ego" personally committed an offence. Case law had previously expanded the scope of the concept to include any officer sufficiently senior in the corporate hierarchy to influence the company's orientation in a given sector of activity.

Now, not only can a company still be convicted by virtue of its "directing mind", but it may also be convicted by virtue of the aggregated actions of several employees, even if no individual employee personally committed an offence. Thus, acts that are not negligent to the point of constituting "criminal" negligence, may nevertheless cumulatively constitute collective negligence incurring a company's criminal liability.

The sanction

An organization cannot be imprisoned upon being found guilty.

As regards criminal offences, it may however be condemned to paying a fine the amount of which is at the court's discretion (section 735 of the *Criminal Code*). This means that there is no maximum provided for by law. Moreover, a recent innovation under section 732.1 (3.1) of the *Criminal Code* is that the court may, as an additional condition of a probation order made in respect of an organization, prescribe that the offender do one or more of the following:

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- compensate a person for any loss or damage that they suffered as a result of the offence;
- establish policies, rules and procedures to reduce the likelihood of the organization committing a subsequent offence;
- communicate those policies, standards and procedures to its representatives;
- report to the court on the implementation of those policies, standards and procedures;
- identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- inform the public, in the manner specified by the court of the offence of which the organization was convicted, the sentence imposed, and any measures that the organization is taking - including the formulation of policies, standards and procedures - to reduce the likelihood of it committing a subsequent offence; and
- comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

Conclusions

These important legislative amendments are primarily a reaction to the Westray Mine tragedy in Nova Scotia, as is evident from the record of the Parliamentary debates on Bill C-45. However, in their highly laudable desire to avoid a recurrence of such a disaster, have the parliamentarians been too radical?

Will such unfortunate accidents be transformed into opportunities for the institution of criminal proceedings? Or, to the contrary, will the message sent by Parliament encourage companies to increase their vigilance and review certain practices, thereby contributing to improving safety in the workplace? Only the future will tell. However, one thing is certain, and that is that no Canadian company should take these new provisions lightly.

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