HACIO LAW
FIRM, FAIR AND FOCUSED ON YOU

BILL C-45
CRIMINAL LIABILITY OF ORGANIZATIONS

OVERVIEW

Bill C-45 is the Government's effort to set out rules for determining when a corporation or organization has committed a criminal offence. The legislation arose of the Westray Mine disaster where 26 men lost their lives due to the gross neglect of their superiors.

The Westray Mine Commission made 74 recommendations including #73 that:

"The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety."

As a result of this recommendation, in 2000 the Government made extensive amendments to Part II of the Canada Labour Code that included significant new rights for workers: the right to be informed about hazards in the workplace, the right to participate in correcting those hazards, and the right to refuse dangerous work. Fines of up to $1,000,000 are provided for breach of the Canada Labour Code.

On October 21, 1999, the Government introduced Bill C-259, which was its first effort to establish legislation that would create a new approach for identifying the fault element in crimes committed by corporations based on "corporate culture" and would establish a new Criminal Code offence of failing to maintain a safe workplace applicable only to corporations with a reverse onus on corporate defendants to present a due diligence defence in order to avoid conviction.

That Bill was subsequently reviewed and revised by several Standing Committees to eventually become Bill C-45.

THE POLICY BEHIND THE BILL

The policy reasons behind Bill C-45 are as follows:

1. The criminal law should apply to all persons without regard to how they choose to organize their affairs.

2. The class of persons capable of engaging the liability of the corporation should be expanded to include individuals who exercise delegated, operational authority in addition to the "directing minds".
3. Where the crime is one of negligence, corporate criminal liability should be based on the actions and moral fault of the corporation as a whole.
4. Where a subjective intent is required, it should be a requirement to prove that a "directing mind" or a person exercising operational authority formed the requisite intent and had the intention, at least in part, of benefiting the corporation.
5. The corporation could be held responsible for the acts of the employees combined with the criminal intent of a "directing mind" or a person exercising operational authority.
6. The liability of the corporation should also be engaged where a person with operational authority, for the benefit of the corporation, fails to take remedial action when aware that employees are committing a criminal offence.
7. Everyone who employs others to perform work or has the power to direct how work should be done should be under a duty to take reasonable steps to ensure safety of the workers and the public.
8. The Criminal Code should provide more guidance to the courts when imposing sentences on corporations.

THE PRINCIPLES UNDERLYING THE BILL

The basic principles behind Bill C-45 are as follows:

1. The existing definition of "every one", "person", "owner" with its lengthy list of entities that are included was repealed and replaced with definition that includes only Her Majesty and an organization. In turn, the definition of "organization" lists the major players in the Canadian economy but it also includes any association of persons that has a common purpose and a structure and holds itself out to the public as an association. It is expected that this definition will cover any way that persons, including corporations, come together. It would include a joint venture of several corporations even if the joint venture was itself not incorporated. It might also cover neighbors who, for example, come together, elect an executive, open a bank account and send out a press release under the name of the association.

2. The Government considered the "directing mind" test with its emphasis on policymaking to be too narrow given the complex corporate structures in place today. The expansion of the identification theory is achieved through the definition of "senior" officer. It includes in the case of a corporation a director,

its chief executive officer and its chief financial officer but it also includes for all organizations persons "responsible for managing an important aspect of the organization's activities."

3. If a crime is based on negligence, there is no specific decision to act negligently. Indeed, often the problem will be taking actions that are not "reasonable" given the danger or even a failure to act at all. For the organization to be held criminally liable, its representatives viewed as a whole will have had to be negligent and the senior officer in charge of the relevant aspect of the organization's activities or the senior officer's viewed collectively will have had to depart markedly from the standard of care that would have been expected. Courts are familiar with this standard of fault and consider industry practice to determine the standard to be expected.

4. If the commission of the offence requires that a person do something "knowingly" or "recklessly" or "with intent", the fault of the organization will be based on the state of mind of the senior officer who will in all cases have to intend, at least in part, to benefit the organization whether in doing the act himself, directing others to do the act or turning a blind eye to criminal activity.

5. Bill C-45 includes in the provisions dealing with criminal negligence, a new duty on every one who undertakes, or has the authority, to direct how another person does work to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work. The new s. 217.1 does not create an offence. Its significance comes from s. 219 which makes a person "criminally negligent" who shows wanton disregard for the safety of others in doing anything or "in omitting to do anything that it is his duty to do." Henceforth, in a prosecution for criminal negligence causing bodily harm or causing death, the Crown will not have to find a legal duty in some other statute such as provincial or federal occupational safety legislation. It will be sufficient to rely on the legal duty imposed by s. 217.1.

6. The Bill contains nine factors that a judge should consider when imposing sentence. These factors are intended to give the judge a complete picture of the culpability of the organization, its efforts to reform itself, the penalties the organization and its representatives have already suffered and the impact of the sentence on the viability of the organization. They include:

   - Moral blameworthiness — any economic advantage obtained by the organization, the amount of planning involved in the offence and any attempts to hide assets:
   - Public interest —the need to preserve the economic viability of the organizations and the jobs of its employees and the cost of investigation and prosecution:
   - Criminal history — any previous convictions or regulatory offences of the organization and its personnel involved in committing the offence;
   - Prospects of rehabilitation — any penalties imposed on managers by the organization, any restitution paid by the organization to victims and any measures taken by the organization to reduce the likelihood of it being involved in further criminal activity.

   As well, s. 732.1(3.1) provides possible conditions of probation for a judge to impose on an organization. They are intended to emulate the kinds of conditions that might be imposed on an individual to ensure that the offender does not re-offend or makes restitution. It also includes a power for the judge to order that the conviction, the penalty and any remedial action being taken by the organization be publicized.

7. The Bill recognizes that a court may not be as well equipped to supervise an organization as other bodies. A judge must consider, before requiring the organization to establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence, whether some other body — securities commission, provincial occupational health and safety department — is more suited to do the necessary supervising.

Finally, Bill C-45 increased the maximum fine for an organization convicted of a summary conviction offence to $100,000 from $25,000. There is no limit to the fine that can be imposed for an offence prosecuted by indictment.

CONCLUSION

Bill C-45 is a complex piece of legislation. While we all would prefer to have "plain language" in statutes, the criminal law is complex and it must attempt to cover all the

various ways that people in Canadian society interact. It will take some time for the real impact of Bill C-45 to be felt by those who it governs. In the mean time, attached is a Checklist that provides some guidance how to avoid liability under Bill C-45.