

Criminalization of Health and Safety For Organizations

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On May 9, 1992 an explosion at the Westray Mining site in Nova Scotia killed 26 miners. Charges were subsequently laid against the company and the two mine managers and after five years in the Courts, proceedings were terminated. Throughout this period governments were struggling with a way to modernize some of the Criminal Code definitions and to codify rules for attributing criminal liability to organizations.

As a result, on April 1, 2004 amendments were implemented to the Criminal Code (a federal statute) whereby there now is a legal duty to ensure the safety of workers and the general public. Known as "Bill C-45" this law effectively brings into the Criminal Code occupational health and safety obligations and violations.

The legislation changes the Criminal Code to say that "everyone" (in addition to an individual) may be an "organization". It then defines "organization" to not just be an incorporated entity but to include a firm, partnership, trade union or municipality or an association of persons that is created for a common purpose, has an operational structure and holds itself out to the public as an association of persons.

The terms, “representative” and “senior officer” are defined in the legislation and it is clear that the definitions focus on the function of the individual rather than on any particular title in the organization.

This legislation imposes a positive duty on any person or organization who does or who has the authority to direct another persons work to take responsible steps to prevent bodily harm to any person arising from that work.

This effectively means that all persons are potentially liable, not just managers, supervisors, officers or directors. Imposing this obligation on foremen and lead hands can create frightening situations. The potential risk of criminal liability may be there.

Specifically, the law says that an organization may be guilty of negligence if one or more of its representatives breaches his or her duty and a senior officer or officers in their work show a marked departure from the standard of care that would and should be expected.

In the past, individuals have always been capable of being charged with criminal negligence, i.e. a serious car accident involving a fatality or serious injuries. Now individuals can be charged with criminal negligence for incidents that have caused death or bodily harm as a result of work place safety violations.

For “organizations”, now they too can be criminally charged. The sanctions of the criminal law can be very devastating just going through the process of trial, let alone the adverse publicity it may have on your organization.

In the event of a serious incident or fatality in the workplace one can now be assured that the occupational health inspector will be arriving and police investigators will be there also. This opens up new areas that organizations must consider, i.e. search and seizure rights, statements to the police by your employees, the right to silence, the arrest procedure and many others which would not have been an issue if it was simply an inspector from the Ministry attending your workplace site.

Convictions for criminal negligence for an individual have always and will continue to attract serious penalties, such as jail. Obviously an “organization” cannot be jailed but the legislation has attempted to put some teeth into the sentencing process for a judge to impose on an organization. The law states a judge must first look at any advantage that an organization has realized as a result of the incident and the degree of planning that occurred and the duration of the offence. Has there been a history of non-compliance with OHSA regulations? These are but a few of the factors that the Court must consider.

By way of sanctions on an organization the Court may impose a period of probation and as part of the probation, order that the organization establish policies, standards and procedures that reduce the likelihood of a reoccurrence of the offending

conduct. The organization may be ordered to make restitution to the injured party and report back to the Court on the progress that it is making to comply with all of these other conditions that might be imposed.

Finally, the Court may order that the organization inform the public of its conviction and the terms of its sentence. One can foresee a Judge ordering the organization to take out an advertisement in the local newspaper setting out the details of the offence and the sanctions, or in the case of a public company (also an organization) requiring that all the details of the conviction and sentence be set out in its annual report.

In summary, this legislation should cause all organizations to review their current procedures and to be more proactive now in preventing offences from happening. Likewise, organizations should be developing emergency response plans for dealing not only with OHSIA infractions but potential Criminal Code violations. Persons in your organization need to know how to respond now, not when it is too late!