



---

# *AMENDMENTS TO THE CRIMINAL CODE*

## **C-45 CRIMINAL LIABILITY OF ORGANIZATIONS**





# OVERVIEW

---

- Background
  - The Problem
- Old Law
  - Criminal liability of corporations
  - Workplace safety
- New Law - Bill C-45
  - Changes to criminal liability of organizations
  - New duty of care
  - Sentencing of corporations



# PROBLEM

---

- Criminal Law 101: Crime = bad act + guilty mind
- To obtain a criminal conviction the Crown must prove beyond a reasonable doubt:
  - Accused committed the prohibited act
  - Accused had the state of mind for the prohibited act
    - ❖ Knowledge of a relevant fact (e.g. that possessed goods are stolen property), or
    - ❖ Intention or recklessness (e.g. intentional application of force for assault)
    - ❖ Criminal negligence – gross absence of care (e.g. wanton and reckless disregard for the lives or safety of others; driving dangerously)





# PROBLEM

---

- A corporation is a “fiction” as it has no separate existence, no physical body and no “mind”. It can only act through individual people, often numbering in the thousands and working out of dozens of different locations
- How does a corporation commit a prohibited act?
- How does a corporation have a state of mind?





## OLD LAW

---

- **Criminal liability of corporations**
  - section 2 of Criminal Code "every one", "person", "owner", and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively
  - No generally applicable rules in Criminal Code for determining liability for all criminal offences
  - Left to courts to develop the rules





## OLD LAW

---

- *Canadian Dredge and Dock Co. v. The Queen*  
[1985] 1 S.C.R. 662
  - the officer or managerial level employee who committed the physical act must be the “ego”, a “vital organ” and virtually the “directing mind” of the corporation so that his actions and intent are the action and intent of the company itself.
  - the Crown must show that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.
  - “identification theory” is more limited approach than vicarious liability (US approach) and director and officer liability.





## WORKPLACE SAFETY - OLD LAW

---

- No specific provision in the Criminal Code, but can charge a person with criminal negligence where the person:
  - is doing something or omitting to do something the person has a “legal duty” to do AND
  - shows wanton or reckless disregard for the lives or safety of others, and causes death or injury
- NOTE: “legal duty” includes provincial statutory duties (e.g. OH&S) and common law duties (e.g. negligence) – Examples
  - Ontario Occupational Health and Safety Act s.25(2)(h) - an employer shall take every precaution reasonable in the circumstances for the protection of a worker
  - Common law duty – duty to refrain from conduct that the person reasonably foresees could cause harm to a person





## C-45 - OVERVIEW OF CHANGES

---

- Modernize the Code definitions
- Codify rules for attributing criminal liability to organizations
- Establish a legal duty to ensure the safety of workers and the public
- Set out factors for a court to consider when sentencing an organization and
- Provide optional conditions of probation that a court can impose on an organization
- **C-45 in force on March 31, 2004**







## STOP – TAKE NOTE!!

- Bill C-45 does not expand liability for directors and officers!
- Criminal law requires *personal* fault, not vicarious fault
- Old law/same law: directors and officers subject to prosecution where they commit crime, or aid or abet another to commit a crime





## NEW DEFINITIONS

---

- **Ensure that the Criminal Code can be applied to any organization without artificial distinctions based on their mode of associating:**

“organization”

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, and

(iii) holds itself out to the public as an association of persons.





## NEW DEFINITIONS

---

- Define the people whose acts and mental states can be attributed to the organization:
  - Acts: “representative” means a director, partner, employee, member, agent or contractor of the organization.
  - Mental states: “senior officer” means a representative who:
    - (1) plays an important role in the establishment of the organization's policies; or
    - (2) is responsible for managing an important aspect of the organization's activities; and,
    - (3) in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer
- What’s new – senior officer (corporate “ego”) includes those with management authority





## NEW LIABILITY RULES

- Rules for liability for crimes of subjective mental state
- Criminal Law 101: subjective mental state means guilty knowledge or intention actually in the mind of the accused, e.g. corruption, bribery
- Organization liable where:
  - “senior officer” has intent to benefit the organization and:
    - commits the offence (does the prohibited act with the guilty state of mind);
    - has the guilty state of mind and directs another person to do the act; or
    - knows that a representative is about to commit the offence and does not take reasonable steps to stop it.
- What’s new – separation of act and mind; liability where failure to prevent offence; expansion of “senior officer”





## NEW LIABILITY RULES

---

- Rules for liability for criminal negligence offences
- Criminal Law 101: criminal negligence offences are based on act or omission which shows gross departure from standard of care determined objectively – outside the mind of accused
- Organization liable where:
  - acts and omissions of “representative(s)”, within the scope of their authority, taken as a whole, add up to the offence; and
  - responsible “senior officer(s)” showed a marked departure from standard of care expected in the circumstances to prevent the offence
- What’s new – aggregating negligence





## NEW LEGAL DUTY OF CARE

---

- Codified duty of care for all persons who direct the work of others to take reasonable steps to prevent harm to the workers or the public
- Breach of duty alone is NOT an offence
- Duty can be the basis of criminal negligence charge, where:
  - (1) breach of duty (2) shows wanton and reckless disregard for life or safety of people AND (3) results in death or bodily harm
- What's new – duty builds on existing statutory (e.g. occupational health and safety) and common law duties





## SENTENCING AN ORGANIZATION

---

- Factors for a court to consider when sentencing organization:
  - **Moral blameworthiness** - economic advantage; planning involved in the offence; attempts to hide assets
  - **Public interest** - need to preserve the economic viability and employment; the cost of investigation and prosecution
  - **Criminal history** - previous convictions or regulatory offences of the organization and its personnel involved in committing the offence
  - **Prospects of rehabilitation** - penalties imposed on managers by the organization; restitution paid by the organization to victims; measures taken by the organization to reduce the likelihood of further criminal activity





## SENTENCING AN ORGANIZATION

---

- Optional probation conditions for organizations:
  - Make restitution to victims
  - Establish policies to reduce the likelihood of further criminal activity
  - Communicate the policies to employees
  - Name a senior officer to oversee implementation
  - Report on the implementation of the policies
  - Inform the public of the offence, the sentence and remedial measures being undertaken by the organization

