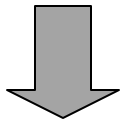


# Criminal

# Civil

## Criminal Offences

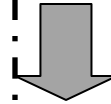
**Example – Criminal Code and Bill C-45 amendments to Code**



- New legal duty created by C-45.
- Who in CPR is subject to the duty.
- The nature of the duty.
- To whom the duty is owed.
- Sentencing and probation.

## Regulatory Offences

**Example - Canada Labour Code or Railway Safety Act**



- Due diligence - What is it.
- General and specific due diligence.
- Framework for considering/applying due diligence.
- R v CNR (April 7, 2003)
- R v CNR (June 20, 2003)



## Civil

**Example - civil action brought against CPR.**

**“An Act to amend the  
Criminal Code (criminal  
liability of organizations  
(Bill C-45).”**

# Criminal Liability of Organizations

- Parliament has passed amendments to the *Criminal Code*, which create positive occupational health and safety-related duties for **individuals** and **organizations**.

# **The new Criminal Code legal duty (s. 217.1)**

- “...Everyone 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”.

# Who is subject to the duty? (Cont.)

- *“Everyone who undertakes, or has the authority, to direct how another person does work or performs a task...”*
  - covers those who have formal authority
  - as well as those who “undertake” to direct (an Ormshaw situation)

# Who is subject to the duty? (Cont.)

- “A train will run under the direction of its conductor” (CROR 106)
- “The Locomotive Engineer of a train is in charge of and responsible for the operation of the engine of such train. (CROR 106)

# What is the nature of the duty? (Cont.)

- *“.... to take reasonable steps to prevent bodily injury or harm”*
  - “Reasonable steps” not yet defined
  - Objective standard

# What is the nature of the duty? (Cont.)

- distinct from the regulatory standard of failure to exercise all reasonable care or “due diligence”
- but just how distinct it will be from regulatory "due diligence" concepts is unclear.



# What is the nature of the duty? (Cont.)

- Unlikely that the failure to exercise steps required under a regulatory statute, or failure to exercise "due diligence" alone will equate to criminal negligence.
  - Criminal negligence occurs when an act or omission of an accused party shows wanton or reckless disregard for the lives or safety of others in a situation where the accused party is under a legal duty to act.

# To whom is the duty owed?

- *“...To that person or to any other person arising from that work or task”*
  - owed to workers performing the work or task (“...to that person”)
  - owed to the public at large (“...any other person”)

# To whom is the duty owed? (Cont.)

- *“...to any other person...”*
  - this part of the duty will be of critical importance where the public could be affected by adverse consequences arising from work activities or train operations.  
(e.g. hazardous goods derailment)

# Existing laws vs. C-45

- The Criminal Code duty closely parallels other duties/obligations under the Canada Labour Code to ensure “that the safety and health at work of every person employed by the employer is protected.” (s. 124 CLC)

# **Existing laws vs. C-45 (Cont.)**

- The amendments, however, do not supersede or replace current regulatory provisions.

# Existing laws vs. C-45 (Cont.)

- Charter protections
- Burden of proof
- Possibility of concurrent prosecutions
- May be some fed/prov issues

# Attributing liability to the Organization under Criminal Code

- Corporations have always been subject to criminal law. Nothing new with the concept.
- However the Courts limited is application. (“Directing mind” line of cases made it difficult to prosecute)

# Attributing liability to the Organization (Cont.)

- C-45 amends the law to make it easier from an evidentiary point of view to prosecute and convict an “organization”.



# Attributing liability to the Organization under C-45 (Cont.)

- The Crown must establish that,
  - One (or a combination) of the organizations “representatives”, (a director, partner, employee, member, agent, or contractor)
  - acting within the scope of their authority
  - has been criminally negligent (in a OH&S case)

- **and**

# **Attributing liability to the Organization under C-45 (Cont.)**

- a “senior officer” (or combination of senior officers) who is/are responsible for the aspect of the organization’s activities that is relevant to the offence

# Attributing liability to the Organization under C-45 (Cont.)

- a senior officer is a representative who, plays an important role in the establishment of an organization's policies **or**
- is responsible for managing an important aspect of the organizations activities.
- specifically includes a director, CEO and CFO in the case of a corporation.

# Attributing liability to the Organization under C-45 (Cont.)

- “While the courts would still have to decide in each case whether a particular person is a senior officer, I believe the proposal clearly indicates our intention that the guilty mind of a middle manager should be considered the guilty mind of the corporation itself.” (Paul Macklin, Parliamentary Secretary to the Minister of Justice and AG of Canada introducing Bill C-45 to Parliament)

# Federal Dept of Justice View

- Factory example - 1 employee turns off 3 separate safety systems – injury or death
- 3 employees turn off 1 safety system each thinking other 2 systems will stay in place – injury or death.
- 3 employees not likely to be prosecuted under criminal code.
- **HOWEVER**

# Federal Dept of Justice View (Cont)

- “..... the fact that individual employees might escape prosecution should not mean that their employer necessarily would not be prosecuted”

# Federal Dept of Justice View (Cont)

- In the 1 employee turning off 3 safety systems example the Organization might be prosecuted if basic training was not given to employee.
- In the 3 employees each turning of one safety system Justice speculates.....

# Federal Dept of Justice View (Cont)

- “the court would have to decide if the organization should have a system to prevent them from acting independently in a dangerous way and whether the lack of system was a marked departure from the standard of care expected in the circumstances”



# Criminal Negligence

- Criminal negligence
- **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.

# Criminal Negligence (cont'd)

- Definition of "duty"
- (2) For the purposes of this section, "duty" means a duty imposed by law.

# Sentencing

- Causing bodily harm by criminal negligence
- **221.** Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

# Sentencing (cont'd)

- Causing death by criminal negligence
- **220.** Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable
- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life.

# Sentencing Organizations

- A maximum penalty of \$100,000.00 where the Crown proceeded by summary conviction.
- no limit on the monetary penalty available where the Crown proceeded by indictment.

# Sentencing Organizations (Cont.)

- Courts would also be required to consider factors, including
  - the cost of the investigation and prosecution to the public,
  - prior record
  - restitution made to any victims,
  - any penalty the organization has imposed on a corporate representative as a result of the offence
  - remedial steps directed to preventing the likelihood of a subsequent offence,
  - prosecutions under regulatory statutes.

# Probationary Orders for Organizations.

- Restitution for loss or damage;
- Requiring the organization to establish and communicate policies and procedures to reduce the likelihood of a future recurrence of the offence;
- Requiring that the organization report to the Court on the implementation of remedial procedures;

# Probationary Orders for Organizations (Cont.)

- Requiring that the organization appoint and identify a senior officer responsible for implementation of remedial procedures.
- Requiring a convicted organization to disclose to the public their conviction, the sentence imposed, and any policies, procedures or other remedial measures established to prevent a recurrence of the offence, in a manner specified by the Court.



# Probationary Orders for Organizations (Cont.)

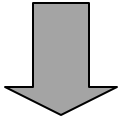
- “ No corporation would want to risk having to take ads out in the various media to tell Canadians it has been criminally negligent or it has been committing fraud.” (Paul Macklin, Parliamentary Secretary to the Minister of Justice and AG of Canada introducing Bill C-45 to Parliament)

# Criminal

# Civil

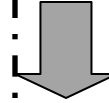
## Criminal Offences

**Example – Criminal Code and Bill C-45 amendments to Code**

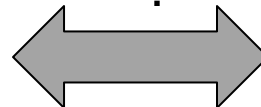


## Regulatory Offences

**Example - Canada Labour Code or Railway Safety Act**



- Due diligence - What is it.
- General and specific due diligence.
- Framework for considering/applying due diligence.
- R v CNR (April 7,2003)
- R v CNR (June 20, 2003)



## Civil

**Example - civil action brought against CPR.**

# Due Diligence – some concepts

# Due Diligence

- Due diligence in the Occupational Health and Safety world means taking all reasonable care to protect employees. You must take all reasonable precautions in the circumstances.
  - What is reasonable varies with the circumstances and the risk.
  - Due diligence is a very high standard but not an absolute one. Due diligence does not mean that accidents will not happen.

# General and Specific Due Diligence

- **Misconception:** that being generally due diligent in the workplace, is enough to establish a defense against specific charges in the court.
- Courts are not interested in what you did generally to be safety conscious but what exactly were the specific steps taken to prevent the alleged contravention.

# General and Specific Due Diligence (Cont)

- “...the trial judge appears to have been satisfied that the respondent, in the operation of the mine where the accident took place, has kept safety foremost in its corporate mind at all times and has a good inspection and reporting system to accomplish this purpose. Those are relevant facts to keep in mind with respect to sentence. They do not, however, assist the respondent to avoid responsibility for the lack of care on its part which resulted in the unfortunate fatal accident. (R v. Rio Algom (Ont C.A.))

# Due diligence process

- The “due diligence” process is based upon the following steps.
  - knowledge of legislated duties
  - identification of actual and potential hazards
  - evaluation of the hazard level
  - development of policies and procedures to eliminate/control these hazards

# Due diligence process (Cont)

- implementation of these policies and procedures
- communication and training as required
- evaluation to ensure that these policies and procedures are effective
- adjustments and enforcement as appropriate
- demonstration of commitment by all levels of the organization
- documentation of each of these steps



# Due diligence framework

- For organizational purposes look at due diligence in the context of 3 baskets;
  - basket of specific duties defined by regulation,
  - basket of CPR safety policies, procedures and practices and
  - basket of duties that arise from general duty clauses in the Canada Labour Code.

# Basket of specific duties defined by regulation.

- Risks identified in regulations are "foreseeable".
- "reasonable care" means making sure the work/equip complies with the regulations.
- training, observing, coaching, documenting and disciplining.
- periodic audits

# Basket of duties defined by policies, procedures and practices.

- “reasonable care” means training, observing, coaching, documenting and disciplining to ensure the policies, procedures and practices are complied with.
- audits
- industry “best practices”

# Basket of general duty regulations.

- General duty clauses (i.e. s. 124 of the Canada Labour Code)
- require the most work in order to sustain a defense of due diligence as there is no "road map" for supervisors to measure compliance.
- due diligence involves engaging proactively in risk assessment and control activities.
- inspections, investigations, JSAs and job briefings are important tools in the manager/supervisor's toolbox.

# Hazard identification, assessment and control

- An important part of bringing due diligence to work is to develop and implement procedures to identify hazards before an injury occurs.
  - *“It seems to me that an employer has an overriding obligation to determine the situations which might place its employees at risk, and then to take all reasonable care to eliminate those risks” ( Carlgren J, in R v. Canadian Pacific Railway and Tony Silva unreported decision at page 32)*

# Hazard identification, assessment and control

## (Cont)

- Once an accurate assessment of the risks and dangers in the workplace has been done, duties are easier to define.
  - is there competent supervision?
  - have the employees been trained with respect to both the operation of the machinery and the hazards that exist?
  - Is there a procedure in place to monitor and enforce the training given to the workers?
  - Have the protective devices required by the regulations been installed and maintained?

# Training and Supervision

- Training is another important element in carrying out due diligence. Often, proof that a worker attended a training session is submitted in court as evidence of due diligence.

# Training and Supervision (Cont)

- Does “attended” mean understand & able to apply?
- Training that requires and employee tested and to demonstrates ability
- Employee “understanding” cannot be proven without showing adequate supervision and on- the- job inspections (documented)



# R v CNR April 2003

- (Fatality Winnipeg)

# R v CNR June 2003

– (Crushed Fingertips)