

Questions and Answers

Amendment to the *Criminal Code of Canada* (C-45) and how it affects the health and safety responsibilities of senior managers and managers/supervisors

1. When did Bill C-45 come into effect?

Bill C-45, an amendment to the *Criminal Code of Canada*, came into effect on March 31, 2004.

2. What are the key elements of Bill C-45?

- Bill C-45 establishes rules for attributing to organizations, including corporations, criminal liability for the acts of their representatives;
- it establishes a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public;
- it sets out factors for courts to consider when sentencing a convicted organization; and,
- it provides optional conditions of probation that a court may impose on an organization.

3. Does C-45 replace the *Occupational Health and Safety Act*?

No. Bill C-45 is federal legislation and is an amendment to the *Criminal Code of Canada*. The Occupational Health and Safety Act is Territorial legislation.

4. Why was the *Criminal Code of Canada* amended?

The *Criminal Code of Canada* was amended to make it easier to attach criminal responsibility to an organization for negligence related to health and safety in the workplace. Bill C-45 creates a positive duty on organizations and their representatives who have authority to direct how others do work or perform a task to take reasonable steps to prevent bodily harm to persons performing the work or task, and to the public, arising from the work or task.

A “representative” under Bill C-45 means a director, partner, employee, member, agent or contractor of the organization. This includes senior officers.

5. What is criminal negligence under the *Criminal Code of Canada*?

Under the *Criminal Code of Canada*, a person or organization is liable for crimes of negligence if they do anything, or omit to do anything that it is their duty to do, and do so in a manner that shows “wanton or reckless disregard for the lives or safety of others.”

6. What does “wanton or reckless disregard for the lives or safety of others” mean?

One court has described “wanton or reckless disregard for the lives or safety of others” as a marked or substantial departure from the conduct that could be expected of a reasonable person in the same circumstances.

7. How does Bill C-45 affect the health and safety responsibilities of senior managers and managers/supervisors in the Yukon government?

The legal duty created by Bill C-45 is similar to the duty under the Occupational Health and Safety Act to take every precaution reasonable in the circumstances for the protection of a worker. However, C-45 makes it easier to attach criminal liability to an organization as a result of the acts or omissions of senior managers and managers/supervisors. The provisions of Bill

C-45 have not yet received extensive judicial interpretation; however, full compliance with the OHSA should provide a strong defense to a charge of criminal negligence.

8. How does an organization become liable for criminal negligence under Bill C-45?

Bill C-45 provides that an organization will be held liable for negligence offences when:

- one or more senior officers depart markedly from the standard of care that could have been expected to prevent a representative of the organization from being a party to the offence;
- a representative of the organization is a party to the offence; or
- more than one representative of the organization engages in conduct such that had it been the conduct of one person, that person would have been a party to the offence.

9. What is a senior officer under Bill C-45?

The definition of senior officer includes anyone who has an important role in:

- establishing an organization's policies; or,
- managing an important part of the organization's activities.

The definition focuses on the individual, rather than on any particular title. For example, the "executive assistant to the president" could have a great deal of authority, and effectively speak for the president in one organization, and have only minor administrative functions, like scheduling the president's meetings, in another organization.

10. What does "party to an offence" mean under the *Criminal Code of Canada*?

Under the *Criminal Code of Canada*, everyone is a party to an offence who:

1. commits it;
2. does or omits to do anything to aid any person to commit the offence; or,
3. encourages others in the organization to commit the offence.

11. How are charges different under the Occupational Health and Safety Act?

Charges under the *OHSA* relate to civil, not criminal, negligence. The *OHSA* creates a general duty on employers to take all reasonable precautions to protect the health and safety of workers. In addition, the *OHSA* and its regulations set out many specific requirements of the employer. For instance, duties that specifically relate to toxic substances, hazardous machinery, worker education, and personal protective equipment.

12. Could you provide an example of how an organization may be a party to an offence of criminal negligence under C-45?

The following scenario sets out the factors that may lead to a conviction under Bill C-45. In offences based on negligence, the court must determine whether an individual acted so carelessly or with such reckless disregard for the safety of others as to deserve criminal punishment.

In general, for an organization to be found guilty of committing a crime of negligence, the Crown will have to show that employees of the organization committed the act and that a senior officer should have taken reasonable steps to prevent them from doing so. However, the complicated structure of organizations requires that this relatively straightforward idea be expressed in legal language that covers the many different ways that an organization acts.

With respect to the physical element of the crime, Bill C-45 (*now s. 22.1 of the Criminal Code*) provides that an organization is responsible for the negligent acts or omissions of its representative. The Bill provides that the conduct of two or more representatives can be combined to constitute the offence. It is not therefore necessary that a single representative commit the entire act.

For example, in a factory, an employee who turned off three separate safety systems would probably be prosecuted for causing death by criminal negligence if employees were killed as a result of an accident that the safety systems would have prevented. The employee acted negligently. On the other hand, if three employees each turned off one of the safety systems each thinking that it was not a problem because the other two systems would still be in place, they would probably not be subject to criminal prosecution because each one alone might not have shown reckless disregard for the lives of other employees. However, the fact that the individual employees might escape prosecution should not mean that their employer necessarily would not be prosecuted. After all, the organization, through its three employees, turned off the three systems.

As for the intent necessary to find the organization guilty, the proposed amendments under Bill C-45 would require that the senior officer responsible, or senior officers collectively, must have departed markedly from the standard of care that could be expected. The organization might be convicted if, for example, the director of safety systems failed to give the one negligent employee basic training necessary to perform the job.

Similarly, in the example of three employees engaging in the negligent conduct, the court would have to decide whether the organization should have had a system to prevent them acting independently in a dangerous way and whether the lack of such a system was a marked departure from the standard of care expected in the circumstances. The court would consider, under this example, the practices put in place by the person in charge of safety at the factory and the practices of other similar organizations. (Source: Federal Government, "A Plain Language Guide to Bill C-45")

13. What do senior managers and managers/supervisors need to know about health and safety?

Under the *OHSA*, all employers must have a health and safety policy, and develop and maintain a program to implement the policy. Under policy 3.48, Corporate Health and Safety, Deputy Heads have been tasked with the responsibility to develop and maintain the departmental specific health and safety program.

Senior managers should be aware of how management and other employees are responding to their health and safety responsibilities and take appropriate action if necessary. They must comply with all applicable legislation, policies, guidelines, and best practices.

Senior managers and managers/supervisors must be proactive in addressing health and safety issues and take appropriate steps as necessary. This includes, but is not limited to the following:

- to be competent in health and safety (e.g. trained and experienced);
- to be knowledgeable of workplace hazards, and their prevention and remediation (e.g. advise employees of actual or potential dangers);
- to ensure that employees receive proper instruction on how to perform their work safely;
- to ensure that employees work in compliance with all applicable laws, and policies;
- to take every reasonable precaution to ensure the safety of employees;
- to respond in a timely manner to all health and safety concerns personally witnessed, or raised by employees;
- to cooperate with all workplace parties to prevent accidents, and promote a healthy and safe work environment; and
- to ensure that work carried out by external contractors is in compliance with all applicable laws, and policies.

14. Where can I get more information about Bill C-45 and its possible effects?

Contact Corporate Health and Safety and/or Legal Services Branch.. You may also want to read the "Plain Language Guide to Bill C-45" prepared by the federal government. It provides additional examples.

In the first case where charges were laid, known as R V. Fantini, the employer was charged under this section of the criminal code although the charges were apparently later removed in exchange for a guilty plea under the Occupational Health and Safety legislation of Ontario. Mr Fantini was a 67-year-old small contractor. His employee died in a trench cave in. Mr Fantini plead guilty to not following the obligations of the Occupational Health and Safety Act and was personally fined \$50,000.00.