



Protecting your employees and yourself:

Amendments to the Criminal Code

Bill C-45, an Act to amend the *Criminal Code* (the "Amendments"), came into force on March 31, 2004. The purpose of the amendments is to establish criminal liability of organizations, or individuals within those organizations, for failure to take all reasonable steps to prevent workplace accidents.

Prior to the enactment of the Amendments, corporations could be liable for regulatory offences, such as those contained in the *Occupational Health and Safety Act*, and for the unlawful acts or omissions of the corporation through its agents. A corporation could also be liable for criminal offences where the person responsible for the criminal acts or omissions was a directing mind of the corporation.

However, the law did not impose criminal liability on a wide range of decision-makers within an organization. This did not reflect the reality that many decisions that result in workplace accidents are not made by the "directing minds" of the corporation or organization.

In 1992, 26 miners were killed in the Westray Mine in Nova Scotia as a result of explosions that were caused by the negligent acts of the individuals who owned and operated the mine.

Those individuals could not be charged or prosecuted under the law that existed at that time. Bill C-45 was the Federal Government's response to the Westray mine disaster.

The Amendments expand the personal liability of supervisors at all levels by creating a broad duty of care on "everyone who undertakes or has the authority to direct how another person

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does work or performs a task." The Amendments also provide that all organizations are now accountable for the acts or omissions of the "representatives".

The definition of "organization" includes a public body, body corporate, society, company, firm, partnership, trade union or municipality. The definition of "representative" includes a director, partner, employee, member, agent or contractor of the organization. The Amendments are far-reaching in application.

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Judicial Appointment



**Mr. Justice
Neil G. Gabrielson**

McKercher McKercher & Whitmore LLP is proud to congratulate **Neil G. Gabrielson** on his recent appointment to the Court of Queen's Bench of Saskatchewan.

Neil was a partner with McKercher McKercher & Whitmore LLP for 30 years. His steadfast commitment to excellence has benefited the Firm and his many clients.

Neil also served the legal profession, as President of the Law Society of Saskatchewan and as Vice-Chair of the Canadian Bar Association's National Ethics Committee and Chair of the Ethics and Professional Standards Committee of the Saskatchewan Branch, as well as in many other roles.

Neil's colleagues and many friends at the Firm wish him well and sincerely thank him for his years of dedicated service.

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Bill C-45 amends the *Criminal Code* to:

1. Establish rules for attributing to organizations, including corporations, criminal liability for the acts of their representatives;
2. Provide that the physical element (*actus reus*), and the mental element (*mens rea*) of a criminal offence do not need to be completed by the same individual, thereby allowing for a situation where a senior officer makes the ultimate decision, while individual employees or lower management carry out the acts relating to that decision;
3. Establish a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public, thereby not limiting liability to senior officials within the organization;
4. Attribute the mental element (*mens rea*) of criminal negligence, or criminal intent for crimes of intent or recklessness, to a corporation or organization;
5. Set out facts for courts to consider when sentencing an organization, which includes factors such as:
 - a. the advantage realized by the corporation in committing the offence;
 - b. the degree of planning and the complexity of the offence;
 - c. any attempt to conceal the offence;
 - d. whether the organization has committed prior offences;
 - e. the cost of the investigation and prosecution of the offence;
 - f. any restitution paid by the organization;
 - g. any measures that the organization has undertaken to reduce the likelihood of committing a subsequent offence.



6. Provide optional conditions of probation that a court may impose on an organization, including:
 - a. making restitution;
 - b. establishing new policies, standards and procedures to reduce the likelihood of subsequent offences, communicating those policies to the organization's representative, reporting to the court on the implementation of those policies, and identifying the senior officer responsible for compliance with those policies;
 - c. providing information to the public;
 - d. complying with any other reasonable conditions that may be requested by the Court to prevent subsequent offences or to remedy the harm caused by the offence.

“The consequences of failing to take all reasonable steps to prevent workplace accidents are potentially very severe.”

The consequences of failing to take all reasonable steps to prevent workplace accidents are potentially very severe. For example, an individual charged and convicted of criminal negligence causing bodily harm is punishable by up to 10 years in prison. For criminal negligence causing death, an individual could face life imprisonment. For organizations, there is no limit on the amount of monetary fine that could be imposed for criminal negligence causing bodily harm or death.

The Amendments to the *Criminal Code* impose more serious consequences than had previously been in place for the failure of an employer or organization to take all reasonable steps to prevent workplace accidents. All employers, senior officers and decision makers within an organization should ensure that the current policies, standards and procedures of the organization are sufficient to protect against liability that may result from a preventable workplace accident.

All supervisors should be made aware of the potential liability they face in the event they do not follow the policies, standards and procedures set out to prevent workplace accidents.

Contributed by Violet M. Paradis

Union violates human rights of union member

The Saskatchewan Court of Appeal in *Regina (City) v. Kivela*, 2006 SKCA 38 confirmed that a union can be held jointly responsible with the employer for workplace discrimination. In that case, a human rights tribunal awarded damages against the employer and the union for discriminating against a truck driver who had been denied permanent status as a result of suffering from cerebral palsy.

The Court of Appeal accepted the finding that the seniority provisions of the collective agreement were had an adverse effect on this employee, and that it would not have been undue hardship to accommodate the employee's disability. Both the union and the employer were found to have had a duty to act as soon as the discriminatory effect of the seniority system was discovered.

"... unions can also be responsible for human rights violation where the discrimination arises from the operation of the collective agreement."

The decision confirmed that employers cannot simply rely upon compliance with the terms of a collective agreement as a defence to a human rights complaint.

The decision, however, also confirms that unions can

also be responsible for a human rights violation where the discrimination arises from the operation of the collective agreement.

For more information on this and other Labour and Employment Law issues, please contact our office at info@mckercher.ca for a copy of our latest *Labor and Employment Law* newsletter.

New to our team

McKercher McKercher & Whitmore LLP is pleased to announce that **Rod Donlevy**, **Michel Thibault** and **Richard Gabruch**, formerly of Donlevy & Company, joined the Firm effective January 1st, 2006, bringing a wealth of experience and knowledge to our team of lawyers and legal professionals.



W. Roderick Donlevy

Rod Donlevy has a broad range of expertise in the areas of Commercial and Corporate Law, Civil and Criminal Law, Health Care Law and Not For Profit Institutional Law. Rod joins the Firm as a Partner.



Michel G. Thibault

Mike Thibault practises in the areas of General Corporate Law, Employment Law, Family Law, Wills and Real Estate. He joins the Firm as a Partner.



Richard K. Gabruch

Rich Gabruch practises in the areas of Corporate and Commercial Law, Real Estate, General Litigation, Family Law and Estate Law. He joins the Firm as an Associate.



Silas E. Halyk, Q.C.

McKercher McKercher & Whitmore LLP is pleased to announce that **Silas E. Halyk, Q.C.** joined the Firm as Counsel, effective February 1st, 2006.

Si shares the Firm's commitment to professional excellence. He is a prominent Saskatchewan practitioner who has made many contributions to the legal profession and this province throughout his impressive and diverse career.

Si's legal practice focuses on Criminal and Civil Litigation. He is a Chief Federal Negotiator for the Department of Indian and Northern Affairs Canada. Si has worked on numerous federal and provincial public inquiries. His respected credentials as a lawyer and negotiator will be tremendous assets to the Firm and our clients.

Of Note

- ◆ **T.G. (Casey) Davis, C.A.**, a partner with the Firm, has returned to full-time legal practice after a five year term as President and CEO of Morris Industries Ltd. During his work with Morris, Casey continued his legal practice. With his expertise as a Chartered Accountant and experienced lawyer, the Firm is very pleased to welcome Casey back to the Firm on a full-time basis.
- ◆ The Firm is pleased to welcome **James P. Gorkoff**, **Daniel P. Kwochka** and **David M.A. Stack** to the Partnership, effective January 1st, 2006. Jim practices in the areas of General Commercial Law, Corporate Law and Governance, Commercial Financing and Real Estate Law. Dan works out of our Regina office, with a practice focusing on General Litigation, Insurance Law, Criminal Law and Secured Transactions. David's practice is in the areas of Civil Litigation, Corporate and Commercial Law, Labour Law and Administrative Law.
- ◆ The Firm also welcomes its newest associates, **Serena D. Palmer** and **Pamela R. Kovacs**. Serena and Pamela joined the Bar in 2006 after articling with the Firm. Serena works in the Saskatoon office while Pamela is in the Firm's Regina office. Serena has a practice in the areas of Corporate and Commercial Law and Civil Litigation. Pamela's preferred areas of practice are Corporate and Commercial Law, Insurance Law and Wills and Estates Law. **Shawn V. Moen** also joins the Firm as an Associate in August, 2006. Shawn articulated with Chief Justice Robert D. Laing at the Court of Queen's Bench.
- ◆ Three new articling students have joined the Firm. **Jason N. Jacobson** and **Paul L. Clemens** are in the Saskatoon office while **Christie L. Hoffman** is in the Regina office.
- ◆ The Firm congratulates **Chief Justice Robert D. Laing** on his recent appointment as Chief Justice of the Saskatchewan Court of Queen's Bench. Chief Justice Laing was a partner with McKercher McKercher and Whitmore LLP for several years before his appointment to the judiciary in 1994.
- ◆ The Firm is pleased to report that **major renovations** of the Saskatoon office have been completed. We are proud to be part of a major revitalization of the City's south downtown.

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