CAUT LEGAL ADVSORY

Bill C-45

An Act to Amend the Criminal Code of Canada

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I. Introduction

Federal Bill C-45, which came into force in March 2004, has serious implications for academic staff associations and its members. The Bill amends certain provisions of the *Criminal Code* of Canada *(the "Code").* The purpose is to make it possible to convict more and different kinds of *organisations* for criminal actions or negligence of any of their *representatives* who are responsible for directing the work of others, where, among other things, such actions or omissions result in *bodily harm* to anyone in the workplace[1].

Prior to this bill, under the *Code* a corporation could be held criminally liable for the wrongful death or injury to an employee, but the provisions lacked scope and enforceability. This was acutely demonstrated in the Westray Mine disaster of 1992. Despite blame for the disaster falling on the mine's owners and managers, no one was required to pay fines or serve a jail sentence. This, in part, was because of the narrow definitions in the *Code*. Problems included the definition of whose actions or omissions might be used to convict the organisation and the absence of a clear articulation in the *Code* of the legal duty not to cause harm to others.

Bill C-45 addresses injury to others in the criminal law context and does not alter the existing provincial obligations or liability that employers and workers have not to injure others in the workplace (under provincial occupational health and safety legislation[2], human rights legislation, labour and employment standards legislation).

A key change effected by bill C-45 is the change in definition of organisation. *Now, not only corporations are included in the definition, but also trade unions and other associations.* A further key change is the means by which liability is attached to the organisation. The acts or

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[1] The bill also deals with fraudulent acts causing financial harm, but this memo is addressing the acts or omissions causing bodily harm for which the organisation AND its representatives might be held criminally liable.

[2] For recent cases where workers have been held liable for breach of occupational health and safety legislation in Ontario (fines and imprisonment can be ordered by the court for failure to comply with industry health and safety standards, whether or not the employer had such standards implemented in the workplace), see *R. v. Campbell* (Jan. 15, 2004, [2004] O.J. No. 129 QLS, Note: sentence suspended for individual Campbell, no record of an appeal), and, *R v. Walters* (December 4, 2003, unreported; sentence upheld, [2004] O.J. No. 5032 (QLS), per Justice Epstein) Note: sentence was $500 fine to the individual Walters.

omissions targeted by the bill are those of the organisation's representatives (a new and very broad term which includes employees, agents, contractors and *members*) or those of the organisation's senior officer. "Senior officers"[3] is a new term, more broadly defined than the old "directing mind" concept. It includes anyone who plays an important role in organizational policy-making, or is responsible for managing an important aspect of the organization's activities. It includes at the very least a "director', the CEO, and the CFO. The definition suggests a broad sweep of possible actors. In particular, in academe, where policy-making is often a joint undertaking of the associations and the university, the definition begs the question: who is the senior officer responsible for policy-making? How much of a role do academic staff, other staff, or the academic staff association play in developing organizational policy, for example, the anti-harassment policy?

The *Code* amendments do not mean that the individuals who commit the wrongs or omissions will not be held liable in their own right, but rather that the organisations that allow their employees, agents, members and others to commit the wrongs or fail to protect others, will be held liable also, with fines up to $100,000 for less serious harms, and with no set limit on fines for more serious harms. The organisations may also be required to perform community service or restitution. Individuals found guilty of acts or omissions (negligence) may be fined or serve a jail term.

No convictions have been obtained under the new provisions to-date, and therefore *interpretation* remains open to determination by the courts. But there are several implications for faculty and academic staff associations that arise out of this legislation.

1. The amendments expand the potential for legal liability (and therefore increase the need for more comprehensive insurance coverage) for criminal acts and omissions of employees in the "scope of their employment" (i.e. while directing the work of others, while failing to direct the work of others, while failing to create or implement workplace safety policies (including anti-harassment policies) in accordance with reasonable industry standards).

2. Academic staff associations (and academic staff themselves) need to consider their role in developing institutional policies to ensure that the organisation employing its members is meeting its obligations for safe workplace practices (in order to prevent harm to others). This was already an issue under occupational health and safety, as well as human rights legislation, but now is more clearly defined in the *Code* as well.

3. The legislation affects the work of joint occupational health and safety committees (on which academic staff associations play a role pursuant to legislation). It is the joint

[3] Section 22.1 (see Appendix A of this Advisory)

committee that is required by provincial law to develop and implement (and receive complaints about breaches of) health and safety policy. This role becomes sharper in the harsher light of criminal liability.

4. All of the above demand changes to collective agreement language in order to adequately protect and limit academic staff legal liability for acts/omissions causing harm to others in the *scope of their employment*.

5. Whether a union or not, academic staff associations are now included in the definition of an organisation that can be charged for the acts or omissions of its "representatives" which cause harm to others. Academic staff associations need to consider and implement measures to reduce risk of the association's, their senior officers's and their representatives' criminal liability.

II. The abc's of the legislative changes as they affect academic staff associations and academic staff

A. Summary of significant changes effected by Bill C-45

1. The definition of "organisations" now includes corporations, associations, unions, companies, partnerships, municipality and public bodies. All academic staff associations are "organisations" under this expanded definition.

2. Both post-secondary institutions and academic staff associations (as well as other staff associations) can now be held criminally liable for the negligent action (omission) of their *representatives* if the senior officer responsible for some aspect of the organisation's activities departs markedly from the *standard of care reasonably expected* to prevent the harm.

    "representative" of an organisation includes a director, employee, member, agent or contractor of the organisation.

    "standard of care reasonably expected" raises questions: a) how to determine the standard of care; b) does the standard change over time as new standards are developed?

3. Universities, colleges and academic staff associations can also be held liable for the overt acts of its representatives if, one of its senior officers, intending at least in part to benefit the organisation, causes harm to others, or, if one of its senior officers, knowing that a representative of the organisation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the

offence.

> As stated above, “senior officer”in s. 22.1 is broadly defined by s. 2 as 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 organisations activities.

4. The bill clarifies the legal duty not to cause harm to others in the workplace. Everyone who undertakes to direct, 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.

> Joint health and safety committees, as well as various joint committees of the administration and the academic staff association, develop and share responsibility at times for organization policies such as health and safety policies, anti-discrimination and harassment policies, which are aimed at setting out acceptable practices and preventing harm to employees and others in the workplace. Consequently, this provision, combined with the provisions regarding responsibility for development of workplace policies, make it arguable that criminal liability can now attach to the members working on such joint committees as well as to members responsible for “directing” the work of others, and to the organizations that they represent on the committee.

5. The codification of the legal duty to cause no harm to others in the workplace does not create new law in theory, but by setting it out in the *Code*, it does provide clarification and a codification of the existing common law duty, and therefore may change the law in practice.

> This clarification should be heeded by academic staff associations and known by its members. It is important for the members to know whether they do direct the work of others, whether they are responsible for the creation or implementation of policies. If they are, but either the policies or practice is not consistent with the standard of care which would reasonably be expected to prevent harm to others in the particular circumstances, their actions and inactions in this regard could give rise to criminal liability.

6. The bill enables the imposition of traditional criminal law sanctions against those who are responsible as senior officers for the bodily harm caused by a representative of the organisation. The *Code* defines *bodily harm* in such a way as to include psychological

and physical injury[4]. Therefore, for example, harassment, whether of a discriminatory or personal (bullying) nature, which may cause only invisible (or less visible) psychological injury, would be covered as an intentional (or negligent) *criminal* act. Physical injury appears a more apparent risk in relation to the work performed by academic staff, researchers, post-graduate students, and other students in the many laboratories on campus.

B. Practical actions for academic staff associations.

1. The members involved in the academic association's activities (whether as Executive Board members managing work of other members or employees of the association, or as grievance officers responsible for directing work of other grievance officers or staff) need to be knowledgeable about the consequence of their involvement in "directing the work (or tasks) of others"; including meaning of "directing work" "performing a task", "others", "standard of care" and so on. It is entirely reasonable to argue that the work carried out by volunteers of a non-profit organisation or trade union would be included in the "performing a task" component of the legal duty created by the new provision. As such, any one who directs the work or performance of a task by a volunteer, member, employee or agent of the union will be under a legal duty to take reasonable steps to prevent bodily harm to those individuals or anyone affected by the work being performed.

2. The association should undertake the following:

    a) Pursue legal defence and other insurance coverage for members through collective agreements to insure members for potential criminal acts/omissions in course of (or scope of) employment.

    b) Ensure that the association's own employees, members, agents, contractors who "direct the work (or task) of others" in the association are aware of their legal obligations, the requisite standard of care, etc.

    c) Review the association's legal liability insurance re: the association's officers, staff, agents, members in event of criminal charges (legal defence etc.).

    d) If workplace safety standards need to be adopted or adapted, and if training is required, the association (through its work on joint health and safety committees or otherwise) ought to demand that the employer provide the

[4] For the meaning of "bodily harm" in s. 217.1 (or other provisions of the *Code* using the term), see the headnote in the reported decision of: *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (SCC).

training. (Harassment training, specific safe use of equipment, emergency preparedness re fires, explosions in labs, threats from students). It will not serve the institution, the association, the members or any other participant in the academic community (students, staff, visitors) if the representatives or senior officers of the organisation (chair's of departments, instructors, etc.) are not fully knowledgeable of the workplace policies and how to apply them, implement them, enforce them (where necessary) in order to comply with industry standards for a safe work environment. As it remains the employer's (institution's) responsibility to ensure a safe work environment, the association needs to represent its members by doing everything in its power to get the institution to adopt adequate measures and to adequately train those responsible for the safety measures. In appropriate cases, the association ought to file grievances rapidly where the administration refuses to act appropriately.

e) Represent members in grievances if they are being disciplined. An institutional policy that is vague and fails to set out adequately the measures for compliance with industry standards could result in both criminal charges for the member, as well as discipline. Given that the institution, as the organisation, may also be charged, it would not be unexpected if discipline followed. It would be far better for the academic staff association to act earlier to negotiate or demand responsible action by the employer (development of policies that comply with industry standards and reasonable training for members responsible for implementation / application of these standards), than to delay taking action and subsequently having to represent members in grievance proceedings.

f) In order to ensure that a consultative process will occur, negotiate clauses in collective agreement that require the employer to consult with the association prior to implementing new policies or workplace practices or procedures. Even in the absence of such collective agreement language, the association ought to urge the employer to consult with the association prior to finalizing and implementing the policies.

g) Resolve uncertainty over who is *the senior officer responsible for policies* in the academic setting. There is need for clear procedures for development of policies, as well as for the management of the policies themselves. At the least, it should be clear in the procedures and policy which *management* position will be the senior officer responsible for the policy administration.

III. Concerns expressed over the new legislation:

1. On the face of the legislation, the government has criminalized what used to be mere regulatory offences under occupational health and safety legislation. (Duty to prevent harm to employees in the workplace). But the wording of the criminal provisions lack sufficient clarity to be certain whether the provisions would only apply to the most egregious forms of bodily harm and further, would only apply where the standard of care was that traditionally applied to criminal negligence as opposed to that applied pursuant to provincial regulatory offences under occupational health and safety legislation.

2. It remains unclear whether this legislation will be applied in a manner that imposes greater and greater legal and practical burdens on trade unions (and even non-certified associations) to implement policies to prevent harm to their members.

   Does the duty of fair representation require increased proactive action on the part of unionized academic staff associations? Courts generally have restricted union liability to acts of gross negligence. However, one court has recently suggested that where a *critical job interest is at stake*, a union may be found to have breached the duty of fair representation even though its actions fell short of gross negligence *(Payne v. British Columbia (Labour Relations Bd*). Therefore, it is unclear whether the failure of the union to take reasonable steps to ensure that any legal (criminal) duty being thrust upon the academic staff member by the employer is both understandable and reasonable in the circumstances, would or would not constitute an act of sufficient negligence to constitute a breach of the unions duty of fair representation. Certainly the criminal liability of a member would result in a serious risk to employment and therefore a *critical job interest* would be at stake.

   Where an employer introduces a new policy or practice, it may be viewed as a breach of the union's duty of fair representation if the union fails to determine whether the policy or practice is in breach of the collective agreement or any other law, rule or regulation governing the employment relationship.

   See *Harrop and Okanagan University College Academic staff Association (Re),* [1997] B.C.L.R.B. No. B430/97; *Stolp and CUPE, Local 1000 (Re)* (1998), 43 C.L.R.B.R. (2d) 315,107 di 1, [1998] C.L.R.B.D. No. 11

3. Some commentators on the amendments have been discussing whether the legislation as worded breaches fundamental rights under the *Charter of Rights and Freedoms.* For example, does the criminalizing of acts that result in any bodily harm, not just egregious bodily harm, with criminal penalties (incarceration, unlimited fines), constitute a breach of s. 7 of the *Charter:* the right to security of person.

Appendix A

Relevant existing *Criminal Code* provisions, and some of the relevant provisions amended by effect of Bill C-45

Negligence causing bodily harm:

Section 221 (predates bill C-45)

> "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.

Section 219 (predates bill C-45)

> Defines "criminal negligence" as:
>
> (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
>
> (2) For the purposes of this section "duty" means a duty imposed by law.

But as a result of the new provision, s. 217.1 of the *Code*, the *duty imposed by law* is clear, any one who is responsible for directing the work of others, has a duty to take reasonable steps to prevent bodily harm.

Section 217.1 *(by effect of Bill C-45)*:

> Every one 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".

Meaning of *bodily harm*: The duty is to take reasonable steps to prevent *bodily harm*. "Bodily harm" is defined in **section 2** of the *Criminal Code* as:

> "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature;"

Bodily harm therefore includes *psychological* harm[5], and, the duty includes the obligation to protect employees or others from harassment.

It has long since been the case that a corporation could be prosecuted, because "corporations" were considered legal "persons." However now the provision defines "persons" as including "organisations," and an "organisation" is defined under the amended provisions of **s. 2** of the Criminal Code as:

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

Section 22.1 *(amended by Bill C-45)* of the Criminal Code reads:

"In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

a) acting within the scope of their authority

I) one of its representatives is a party to the offence, or

ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs - or the senior officers, collectively, depart - markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence."

Section 2: Is the mammoth definitions provision of the *Code.* Bill C-45 makes several new amendments to this provision, including "organisation" as found above:

[5] *R. v. McCraw* (1991) 66 C.C.C. (3d) 517 (SCC)

(New) A “representative” of an organisation under 22.1 means:

> “director, partner, employee, member, agent or contractor of the organization”

(New) A “senior officer” of an organisation means:

“...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 organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer”

Intentional acts of representatives and senior officers of the organisation causing bodily harm

Section 22.2 *(amended by effect of Bill C-45)* allows for the conviction of the organisation where the senior officer acts (or is attributed to act) so as to cause bodily harm to another:

> .... an organisation is a party to the offence if, with the intent at least in part to benefit the organisation, one of its senior officers
>
> (a) acting within the scope of their authority, is a party to the offence;
> (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
> (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

Appendix B

Resources

Links

Department of Justice, Government of Canada: A Plain Language Guide to Bill C-45, available at: http://canada.justice.gc.ca/en/dept/pub/c45/

Parliament of Canada, Legislative Summaries, Bill C-45, available at: http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&Parl=37&Ses=2&ls=C45&source=Bills_House_Government#acriminaltxt

Bill C-45 as passed by the House of Commons October 27, 2003, available at: http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-45/C-45_3/C-45_cover-E.html

Criminal Code of Canada, available at: http://laws.justice.gc.ca/en/C-46/index.html