



Due Diligence in the Workplace

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Meaning of Due Diligence

- Take every precaution reasonable in the circumstances to avoid harm/offence.
 - Under Occupational Health and Safety Act Due Diligence is applied both as a DUTY and a DEFENCE.
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Statutory Duty of Due Diligence


- Employer: “ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employers workers.”
 - Worker: “take reasonable care to protect his or her health and safety and the health and safety of other workers who may be affected by his or her omissions.”
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Factors considered to assess Reasonableness

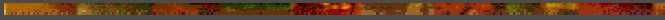
- An objective test - the degree of knowledge and skill expected of a reasonable person.
 - Foreseeability
 - Gravity of the potential harm
 - Likelihood of harm
 - Degree that underlying causes are within your control
 - Available Knowledge and Technology
 - Benchmarks – Industry standards
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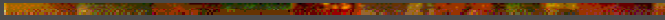
Bill C-45

- Effective March 31, 2004
 - Response to Westray Mine disaster and failure by employer to act where workers, management and even regulators were aware of the poor working conditions of the mine.
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- Neither the mining company nor any of its officers were convicted
 - Nova Scotia government spent six years investigating the disaster. In 1997, Justice K Peter Richard said:

“The Westray story is a story of incompetence, of mismanagement, of bureaucratic bungling, of deceit, of ruthlessness, of cover-up, of apathy, of expediency, and of cynical indifference.”



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- Bill C-45 changed the Criminal Code to make it possible to hold corporations criminally liable for the negligent actions of all employees and representatives of a company
 - Although first of its kind in North America, there is a movement in the United States to implement similar legislation. Great Britain and Australia already have similar legislation
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Substantial Penalties

- Occupational Health and Safety Act
 - Offence resulting in death or serious injury to a worker.
 - Fine not exceeding \$300,000 and term of imprisonment not exceeding 2 years.
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Substantial Penalties (2)

- Criminal Code

- Bodily Harm

- Unlimited fines or
 - Imprisonment not exceeding 10 years

- Death

- Unlimited Fines or
 - Imprisonment for Life
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Expanded Corporate Criminal Liability

- Inclusion of an organization within the expressions “every one” and “person”
 - “Organization” defined to include
 - an association of persons that:
 - 1) is created for a common purpose,
 - 2) has an operational structure, and
 - 3) holds itself out to the public as an association of persons.
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Expanded Corporate Criminal Liability (2)

- Prior to Bill C-45 Corporations (organizations) were only criminally responsible for offences committed by its “directing minds.”
 - Bill C-45 modifies the law so that even in cases where different individuals may be responsible for the physical and mental elements of an offence both will still be attributable back to the organization.
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Expanded Corporate Criminal Liability (3)

- Post Bill C-45 an organization is guilty of an offence as a result of the actions of any number of persons including:
 - 1) where one of its representatives is a party to the offence.
 - includes directors, partners, employees, members, agents or contractors of the organization.
 - 2) where a senior officer intentionally commits a crime for the benefit of the organization.
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Expanded Corporate Criminal Liability (4)

- 3) where a senior officer directs others to commit an offence for the benefit of the organization.
 - 4) where a senior officer becomes aware of an offence being committed by other employees but does not take action to stop them.
 - 5) where two or more of the organization's representatives engage in conduct such that if had been the conduct of only one representative, that representative would have been a party to the offence and a senior officer shows a marked departure from a reasonable standard of care in preventing the commission of the offence.
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Criminal Negligence

- Criminal Code Section 219
 - Offence for anyone who in doing anything or 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.
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Criminal Negligence

■ Elements of the Offence

- The Crown is required to prove
 - an undertaking of the prohibited act by the accused (“actus reus”), and
 - the presence of a guilty state of mind (“mens rea”)
Wanton or reckless disregard.
Courts have interpreted it to mean an act or an omission of a person who in a conscious way disregards the lives and safety of others .

Criminal Negligence

- Duty is one imposed by law.
 - Bill C-45 through section 217.1 creates the duty to prevent harm to others.
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Imposition of Duty on Everyone who Supervises Work

- Section 217.1

- “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.”
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Duty of Supervisor (2)

- Includes individuals and organizations.
 - Those with authority to supervise are compelled to act.
 - Individual who undertakes or takes it upon themselves to provide direction adopt the duty to take care to prevent harm.
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Duty of Supervisor (3)

- Title of Supervisor is only a factor, issue is whether authority to direct or actual direction is given to another as to how work is performed.
 - Extends Criminal Liability to a broader range of individuals.
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Duty of Supervisor (4)

■ Impact

- Obligation placed on those that supervise work broader than that found in The Occupational Health and Safety Act.
 - Supervisor under provincial legislation must be an individual authorized by the employer.
 - Supervisor must ensure that workers comply with the Act and any regulations made pursuant to the Act that apply to the place of employment.
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Duty of Supervisor (5)

- Provincial Legislation fails to place broad duty on supervisors to take all reasonable steps to prevent harm to workers.
 - Criminal Code covers not only harm to workers but any other person as well.
 - Provincial penalties increase only as a result of degree of risk or injury to workers.
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Bill C-45 vs. Occupational Health and Safety Act

■ Totality of Evidence

- Under Criminal Code it must be established that the accused showed a wanton or reckless disregard for the lives or safety of others.
 - OH & S Act, accused is required to demonstrate that they were duly diligent in ensuring health and safety of workers.
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Bill C-45 vs. Occupational Health and Safety Act (2)

■ Duty of Supervisor

- Under Criminal Code, supervisor must take reasonable steps to prevent bodily harm, general duty.
 - OH & S Act, supervisor must ensure that workers comply with regulations that apply to the workplace but no general duty currently imposed.
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Bill C-45 vs. Occupational Health and Safety Act (3)

- Due Diligence
 - accepted test is whether the defendant took all reasonable steps to ensure the safety of workers and the public.
 - Factors to be considered, but not limited to;
 - Industry standards
 - Economic Realities
 - Forseeability
 - Experience of Employee
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Bill C-45 vs. Occupational Health and Safety Act (4)

■ **Due Diligence**

- Defence in strict liability offences such as those under The Occupational Health and Safety Act
 - Not a true defence to charges under Criminal Code but if demonstrated shows that there was no wanton or reckless disregard for the life or safety of an individual
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Bill C-45 vs. Occupational Health and Safety Act (5)

■ Potential Penalties

- Criminal Code may result in increased fines, prison terms as compared to Occupational Health and Safety Act.

■ Limitation Period

■ Court Process

QUESTIONS

