Session No. 531

Everything You Need to Know about Health and Safety Law in Canada

Norm Keith, B.A., LLB., CRSP
Gowling LaFleur Henderson
Toronto, Ontario, Canada

Introduction

Occupational health and safety law in Canada has developed dramatically over the last fifty years. Canadian workers' compensation legislation predates Canadian occupational health and safety law. Since the Meredith Report of 1914, a no-fault system of providing compensation to workers injured on the job regardless of the cause of the accident has been in place in Canada. It appears that governments, employers, unions, and other workplace stakeholders were more concerned at the beginning of the 20th century with providing workers' compensation protection for injured employees and protecting employers from lawsuits, than from preventing accidents in the workplace.[1] Canada has also joined Australia and the United Kingdom in the enactment of Criminal Negligence for workplaces, under the *Criminal Code*.

Occupational health and safety ("*OHS*") has no specific jurisdictional designation under the Canadian *Constitution Act*, 1867. The *Constitution Act*, 1867 sets out a division of powers between the federal and provincial governments. *OHS* is not the subject of an explicit reference to the division of powers between the federal and provincial governments. Therefore, courts have been called upon to determine whether or not it is the provincial or the federal government that has authority to regulate the workplace by *OHS* legislation. Approximately 10 percent of Canadian workplaces are federally regulated and 90 percent are provincially regulated for the purposes of workers' compensation and *OHS*. Therefore, provincial *OHS* statutes and regulations regulate the vast majority of Canadian workers.

OHS statutes are based on the internal responsibility system, the framework for the health and safety requirements, standards and procedures in the jurisdiction in which they apply. The internal responsibility system is an overlapping system of rights and responsibility of workplace stakeholders. In addition to the internal responsibility system, Canadian *OHS* law also has an external responsibility system. The external responsibility system is the lawful authority establishing government regulatory accountability. The external responsibility system has two means of enforcement of *OHS* requirements, standards and procedures. First, is the issuance of orders or directions by inspectors or officers, employed by various government regulators? The issuance of an order may be to stop working immediately, or to change a work practice within a reasonable period of time. Second, is the laying of charges under *OHS* laws in Canada as a means of enforcing the duties for various workplace parties? It is an *OHS* offence to contravene these duties.

The enforcement of *OHS* laws against workplace stakeholders that have breached legal duties has been a growing trend across Canada. The incidents of enforcement of Canadian *OHS*

laws by way of prosecution have increased since 1980. Workplace stakeholders include the employer, supervisors, officers, directors, professional engineers, architects, suppliers, workers and others. Although many workplace stakeholders have legal duties under Canadian *OHS* law, employers are the primary stakeholders that are prosecuted with *OHS* offences for breach of their duties.

The common law has placed duties on an employer to provide a safe workplace for workers that was free of unnecessary and unreasonable hazards. Under the Anglo-Canadian common law, if an employer failed to meet a reasonable standard of health and safety for workers in the workplace and an injury resulted, the employer could be successfully sued for negligence. However, with the development of workers' compensation legislation, the legal right of a worker to sue an employer for breach of this common law duty was effectively, and almost universally, terminated. There are still some limited circumstances in which third party lawsuits may be available for the injured party. The Bill C-45 amendments to the *Criminal Code*, recognizes that public safety is also an important part of workers' safety. A member of the public, who is not a worker, has a full right to sue for negligence if injured by a workplace accident.

The Internal Responsibility System

The internal responsibility system is the underlying concept and philosophy behind most modern developments in Canadian *OHS* law. The internal responsibility system suggests that it is the workplace stakeholders who are best able to identify, assess, and either eliminate or control hazards in the workplace. Modern Canadian *OHS* law establishes requirements, standards and procedures that the workplace stakeholders must comply with. The internal responsibility system recognizes the limits that governments at all levels have to provide full inspection, scrutiny, and enforcement of *OHS* statutes and regulations in every workplace in Canada. The internal responsibility system is best described as a series of overlapping legal duties, rights, and responsibilities in *OHS* statutes and regulations.

The core elements of the internal responsibility system include the establishment of legal duties on various workplace stakeholders. Some jurisdictions, like Ontario, enumerate a long list of stakeholders that have legal duties including constructors, employers, supervisors, workers, licensees, professional engineers, architects, directors, officers and suppliers. The federal *Canada Labour Code*, Part II, only places legal duties on employers and employees. Regardless of the list of workplace stakeholders with duties, the overriding purpose of the legal duties is to ensure the health and safety of workers in the workplace.

Health and safety representatives and health and safety committees also demonstrates the internal responsibility. As a general rule, Canadian workplaces with five or more workers, and less than twenty workers, require health and safety representatives. The exceptions are Alberta and Quebec where representatives are not always mandatory, and under the federal *Canada Labour Code*, Part II, where every workplace, even one with only one worker, must have a health and safety representative. These are worker, non-management members of the workplace who are designated to represent the interests of workers with respect to health and safety. They may inspect the workplace, request information from their employer about workplace hazards, and investigate workplace accidents. Health and safety committees are required in most jurisdictions, except Alberta and Quebec, where there are twenty or more workers in a particular workplace location. Committees may be required in Alberta or Quebec based on the Minister's order or the type of industry. Health and safety committees are made up

of management and worker members, usually in equal number. Health and safety committees have the legislative right to meet, inspect the workplace, make inquiries of employers, and participate when the regulator investigates the workplace. In many jurisdictions, health and safety committees must be consulted before new *OHS* programs are introduced.

There are jurisdictions across Canada that regulate toxic substances and controlled products through various regulatory regimes. The purpose is to set standards those employers must follow to ensure that workers are not exposed to biological, chemical, physical, and ergonomic hazards. The Workplace Hazardous Material Information System, also known as WHMIS, is a national, legislative regime that has established hazard identification, assessment, and safe handing measures for controlled products. This system provides information to workers, by way of mandatory training, labelling of containers of control products, and providing material safety data sheets with additional information on how to avoid exposure to the control products and what to do in the event of exposure. WHMIS is a rare Canadian example where federal and provincial governments cooperated, on the subject of *OHS* workers, resulting in a nationally consistent program to regulate and provide training with respect to controlled products. WHMIS training in one part of the country will be valid in another part of the country. The system is an example of the internal responsibility system at its national consistent best.[2]

In summary, the internal responsibility system is the foundational concept of Canadian *OHS* law. It provides legal requirements, standards and procedures for workplace health and safety. The internal responsibility system promotes shared responsibility and self-regulation of workplace hazards. It reduces the need for government regulators to intervene in the workplace. Ultimately and practically, employers have the highest level of responsibility under the internal responsibility system.

OHS Law General Duty Clauses

An important part of the internal responsibility system has been the establishment of various duties on workplace stakeholders. Employers and senior management have many legal duties to ensure that a workplace is healthy and safe for employees and workers generally. In addition to specific duties, and regulations setting out control measures for employees, Canadian *OHS* statutes also have provisions known as general duty clauses. These general duty clauses provide a very broadly worded statement requiring employers, and on occasion other parties, to take all reasonable precautions for the health and safety and protection of workers in the workplace. General duty clauses have similarities to new section 217.1 of the *Criminal Code* introduced by Bill C-45. Since there is this similarity, they will be briefly reviewed here.

It is likely that judicial interpretation of the new offence established by Bill C-45, *OHS* criminal negligence, will refer to the statutory provisions, case law and judicial interpretation of the already-existing general duty clauses in health and safety legislation. Employers are the most frequently charged parties for violations of *OHS* statutes, and a large number of these charges relate to an alleged breach of the general duty to provide a safe workplace.[3]

The general duty clauses in various Canadian jurisdictions are quite similar. General duty clauses place broad health and safety responsibility on employers in their applicable jurisdictions. There is a relatively consistent pattern in the language of general duty clauses across various Canadian jurisdictions. To provide some review and analysis, from west to east, the current general duty clauses are reviewed below.

The federal jurisdiction, regulated by the *Canada Labour Code*, Part II,[4] provides employers with a very broad duty to ensure the health and safety of employees. It is interesting to note that the federal *Canada Labour Code*, Part II does not broadly protect workers, as is the case with most applicable *OHS* statutes across Canada, but rather restricts employer's general duty clause to that of employees. Bill C-45, as discussed above, protects all individuals in the workplace, including workers and members of the public, who may be at risk from hazards or activity. The federal legislation general duty clause states, "Every employer shall ensure that the health and safety at work of every person employed by the employer is protected."[5]

In British Columbia, unlike other Canadian jurisdictions, the legislature establishes its employer and other stakeholder duties under Part III of the *Workers' Compensation Act*[6] as applied by way of the *Occupational Health and Safety Regulation*.[7] The general duty clause under the *Workers' Compensation Act* states: "Every employer must ensure the health and safety of all of workers working for that employer."[8]

In Alberta, under the *Occupational Health and Safety Act*,[9] it provides the following general duty clause: "2(1) Every employer shall ensure, as far as it is reasonably practicable for him to do so, (a) the health and safety of (i) workers engaged in the work of that employer...". Arguably, the Alberta general duty clause is the least broad and expansive of the general duty clauses in Canadian health and safety law. Further, the Alberta provision moderates the extent and potential breadth of application of the general duty clause by the phrase "as far as it is reasonably practicable for him to do so".

Saskatchewan has adopted a general duty clause similar to that of Alberta. The Saskatchewan *Occupational Health and Safety Act*, 1993[10] states:

> 3. Every employer shall:
>
> (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers.

In that sense, in Manitoba, the legislature adopted similar language in its general duty clause. The Manitoba *Workplace Safety and Health Act*[11] states:

> 4(1) Every employer shall in accordance with the objects and purposes of this Act
>
> (a) ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his workers…

The *Ontario Occupational Health and Safety Act*[12] establishes the general rights and responsibilities of government, employers and workers, and sets minimum health and safety standards for the workplace. With the duty to take every reasonable precaution under the Ontario health and safety statute, employers have a general duty to "take every precaution reasonable in the circumstances for the protection of a worker."[13] This duty may require an employer to take precautions that include the development of an *OHS* management system and the suspension or discharge of workers for unsafe work practices.[14] Supervisors must also take every precaution reasonable in the circumstances for the protection of a worker in a similar general duty.[15]

In Quebec, the health and safety legislation states: "Every employer must take the necessary measures to protect the health and ensure the safety and physical well-being of his worker."[16]

In New Brunswick, the *Occupational Health and Safety Act*[17] requires that:

9(1) Every employer shall

(a) take every reasonable precaution to ensure the health and safety of employees...

As such, "foresee ability" is a critical factor in the due diligence standard. In New Brunswick, like other provinces, an *OHS* program must include activities designed to prevent the recurrence of accidents - analyzing jobs and work procedures to identify hazards and taking steps to eliminate or reduce those hazards. This concurs with the Province of Prince Edward Island's *Occupational Health and Safety Act,*[18] where the general duty clause reads as follows:

13(1) It is the duty of the employer to

(a) take every reasonable precaution to ensure the health and safety of his employees.

To the same effect, in Nova Scotia, the *Occupational Health and Safety Act,*[19] amended substantially after the Westray Mine disaster, states that:

13(1) Every employer shall take every precaution that is reasonable in the circumstances to

(a) ensure the health and safety of persons at or near the workplace;

In the Province of Newfoundland, the *Occupational Health and Safety Act,*[20] with more gender inclusive language, states as follows: "An employer shall ensure, where it is reasonably practicable, the health, safety and welfare of his or her workers."

In the Northwest Territories and Nunavut, the *Safety Act*[21] has an interesting and rather lengthy general duty clause, which states as follows:

4. Every employer shall

(a) take all reasonable precautions and adopt and carry out all reasonable techniques and procedures to ensure the health and safety of every person in his or her establishment;

Finally, the Yukon Territory would appear to be the only Canadian jurisdiction without a general duty clause. Although the Yukon *Occupational Health and Safety Act*[22] places duties on employers with respect to ensuring that workplace machinery, equipment and processes are safe, and that work techniques and procedures are used to reduce the risk of occupational illness and injury, as well as other duties relating to instruction, hazard awareness and general compliance with the Act, there is no apparent general duty clause in the Yukon Territory statute.

The *OHS* general duty clauses are somewhat similar in their language to section 217.1 of the *Criminal Code*. The phrase "reasonable steps" in section 217.1 is arguably not as broad or strict as language that uses words such as "all", "every", and "ensure" found in many of the general duty clauses. The requirement to take "reasonable steps" in section 217.1 is similar to the phrases "reasonable precautions" and "so far as it is reasonably practicable". Therefore, whether or not section 217.1 of the *Criminal Code* was specifically intended to be similar to a general duty clause, its purpose is clearly the same, to ensure the health and safety of workers and the public are protected from bodily harm.

Enforcement of *OHS* Law and Due Diligence

Canadian *OHS* law is made up of statutes, regulations and codes that are intended to keep workers healthy and safe. The goal, generally speaking, of *OHS* law is to prevent workplace accidents, injury, and death. It also holds workplace stakeholders responsible for failure to comply with *OHS* law. Canadian *OHS* statutes focus on protecting workers and not specifically members of the public. Bill C-45, the recent amendment to the Canadian *Criminal Code*, on the other hand, focuses equally on both worker and public safety. *OHS* law emphasizes the role of workplace stakeholders in taking responsibility to identify, assess, and control workplace hazards. Bill C-45, on the other hand, requires compliance with the new legal duty under section 217.1, failing which an individual or an organization may face prosecution for the offence of *OHS* criminal negligence.

The enforcement of *OHS* law is primarily by two means. Government regulators have the authority to issue orders or directions to comply with the *OHS* statutes and regulations. If a workplace stakeholder with a duty fails to comply with that duty, the *OHS* regulator may issue an order or direction requiring immediate compliance, or compliance within a reasonable period of time. This is the first means of enforcement of *OHS* law in Canada. Workplace stakeholders are given the right to appeal such orders or directions. Failure to comply with an order or direction, without commencing an appeal, is an offence.

The second means of enforcement is by way of quasi-criminal prosecution of *OHS* regulatory offences. These are not criminal offences but are similar in that they result in a government prosecution. Although the enforcement of *OHS* law in Canada by way of prosecution is similar in its process to a criminal prosecution, the legal characterization of a criminal charge is different from that of a strict liability *OHS* regulatory offence.

The Supreme Court of Canada, in *R. v. Sault Ste. Marie*, indicated that strict liability offences, although not true criminal offences, are quasi-criminal in nature. Provincial and federal health and safety offences have also been defined as regulatory public welfare offences designed for the protection of public worker and interest. Provincial legislatures and the federal parliament have the power to create true crimes or *mens rea* offences, strict liability or absolute liability offences. Although the criminal law power is constitutionally assigned to the federal government, a provincial offence may be classified as a true crime or *mens rea* offence. These three types of offences have been introduced early in this chapter. However a more complete explanation is needed to under the types of offences and the legal defence of due diligence.

(a) True Crimes or *mens rea* offences: in *mens rea* offences, the prosecution must prove beyond a reasonable doubt the prohibited act and, either as an inference from the nature of the act committed or by additional evidence, the positive state of mind on the part of the accused, such as intent, knowledge or recklessness. In a criminal offence, the prosecution has the onus of proof throughout the trial. The onus of proof never shifts to the accused.

(b) Strict liability offences: in strict liability offences, as in absolute liability offences, the prosecution need only prove beyond a reasonable doubt that the defendant committed the prohibited act; the prosecution need not prove a fault element; and thereafter, the accused has the defence that it reasonably believed in a mistaken set of facts that, if

true, would render the act or omission innocent, or that it has taken reasonable precautions to achieve compliance; these are the two branches of the due diligence defence. Most *OHS* offences are strict liability offences.

(c) Absolute liability offences: in absolute liability offences, the prosecution need only prove beyond a reasonable doubt that the accused committed the prohibited act, constituting the *actus reus* of the offence. There is no relevant mental element and it is no due diligence defence that the accused was entirely without fault. More proof of the prohibited act will lead to a conviction.

In the *R. v. Sault Ste. Marie* decision, the Supreme Court of Canada held that in a strict liability offence, the onus of proof shifts to the defendant to establish the defence of due diligence. The shifting of the onus of proof was not seen as unfair since the defendant alone had knowledge of what was done to avoid the commission of the prohibited act. It is therefore expected that the defendant would advance the defence of due diligence if it was available. There are two separate branches of the due diligence defence:

(i) in the first branch, the defendant must prove that it reasonably believed in a mistaken set of facts which, if true, would render the prohibited act or omission innocent.

(ii) in the second branch, the defendant must prove that it took all reasonable steps to avoid the particular prohibited event.

As such, the primary defence in the prosecution of *OHS* regulatory offence is the defence of due diligence. Other defences known in law may also be available to an *OHS* offence. The basis of the defence is that it would be legally and morally improper to convict a person of an offence when they have taken all reasonable precautions to ensure compliance with the applicable *OHS* legislation.

The two branches of the due diligence defence, according to *R. v. Sault Ste. Marie*, clearly placed an onus of proof on the accused to prove the defence. This was a departure from the long standing Anglo-Canadian legal presumption of innocence was significant. The Supreme Court of Canada indicated in *Sault Ste. Marie* that the accused had the onus of proof to demonstrate that it made out one of the defences in the two branches of the due diligence defence. The standard required by the accused was a civil standard of proof that is proof on a balance of probabilities.

Under the Canadian *Charter of Rights and Freedoms*, when either an individual accused or a corporate accused are charged with an *OHS* offence, they are presumed innocent until such time as the Crown has proven a *prima facie* case, beyond a reasonable doubt. Once the Crown has discharged its burden to prove the prohibited act or omission, beyond a reasonable doubt, then the burden of proof shifts to the accused to prove the defence of due diligence. Although the standard of proof on the accused is a civil standard, a balance of probabilities, rather than a criminal standard, the placing of any burden of proof on the accused in the courts of its trial may be argued to be a compromise of the accused's *Charter* right of the presumption of innocence. However, the Supreme Court of Canada has held that is an acceptable requirement for a strict liability offence and does not infringe the *Charter*.

Enforcement of *OHS* laws in Canada by way of prosecution may, as in a criminal prosecution, result in a conviction and sentencing hearing. Once an accused is convicted of an *OHS* offence, then the accused is sentenced after submissions from both the Crown prosecutor and the defence lawyer. The following chart sets out the current penalties, including fines and jail terms, for an accused convicted of a Canadian *OHS* offence.

Jurisdiction	**Maximum Fine for Organizational Accused**[23]	**Maximum Fine for Individual Accused**
Federal[24]	$1,000,000 or two years in jail, or both.	$1,000,000 or two years in jail, or both.
British Columbia[25]	**First Conviction** $547,229.80 and an additional $27,361.50 for each day the offence continues or 6 months in prison, or both.	**First Conviction** $547,229.80 and an additional $27,361.50 for each day the offence continues or 6 months in prison, or both.
	Subsequent Conviction $1,094,459.59 and an additional $54,722.98 for each day the offence continues or 12 months in prison, or both.	**Subsequent Conviction** $1,094,459.59 and an additional $54,722.98 for each day the offence continues or 12 months in prison, or both.
Alberta[26]	**First Conviction** $500,000 and an additional $30,000 for each day the offence continues or 6 months in prison, or both.	**First Conviction** $500,000 and an additional $30,000 for each day the offence continues or 6 months in prison, or both.
	Subsequent Conviction $1,000,000, and an additional $60,000 for each day the offence continues or 12 months in prison, or both.	**Subsequent Conviction** $1,000,000, and an additional $60,000 for each day the offence continues or 12 months in prison, or both.
Saskatchewan[27]	$300,000 or two years in prison, or both.	$300,000 or two years in prison, or both.
Manitoba[28]	**First Conviction** $150,000 and an additional $25,000 for each day the offence continues or 6 months in prison, or both.	**First Conviction** $150,000 and an additional $25,000 for each day the offence continues or 6 months in prison, or both.
	Subsequent Conviction $300,000 and an additional $50,000 for each day the offence continues or 6 months in prison, or both.	**Subsequent Conviction** $300,000 and an additional $50,000 for each day the offence continues or 6 months in prison, or both.

Ontario[29]	$500,000	$25,000 or 12 months in prison, or both
Quebec[30]	**First Conviction** $20,000	**First Conviction** $1,000
	Subsequent Conviction $50,000	**Subsequent Conviction** $2,000
New Brunswick[31]	$50,000 or 6 months in jail, or both	$50,000 or 6 months in jail, or both
Nova Scotia[32]	$250,000 or 2 years in prison, or both.	$250,000 or 2 years in prison, or both.
Prince Edward Island[33]	$50,000 or 1 month in prison, or both	$50,000 or 1 month in prison, or both
Newfoundland[34]	$250,000 or 12 months in prison, or both.	$250,000 or 12 months in prison, or both.
Yukon Territories[35]	**First Conviction** $150,000 or 12 months in prison, or both.	**First Conviction** $150,000 or 12 months in prison, or both.
	Subsequent Conviction $250,000 or 24 months in prison, or both.	**Subsequent Conviction** $250,000 or 24 months in prison, or both.
Northwest Territories[36]	$500,000 or 1 year in prison, or both.	$500,000 or 1 year in prison, or both.
Nunavut Territory[37]	$500,000 or 1 year in prison, or both.	$500,000 or 1 year in prison, or both.

Bill C-45 *OHS* Criminal Negligence

Bill C-45 introduced, for the first time in Canadian legal history, a duty relating to occupational health and safety in the *Criminal Code*. The amendment to the *Criminal Code* came into force on March 31, 2004. The *OHS* legal duty reads as follows: "*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."*

Section 217.1 applies to "every one", which includes the government, individuals and organizations. In other words, individuals, organizations, and the federal and provincial governments have this legal duty. Further, the duty applies to every one who undertakes to direct how another person does work or performs a task. The use of the word "how", may be a restrictive modifier in determining the scope of this duty. In other words, it is not enough that a person undertakes, or has the authority, to direct another person to do work. This legal duty only applies if the person directs how the other person does the work or performs the task. The use of the word "how", an adjective, clearly modifies and restricts a set of individuals to whom new legal duty applies. "How" is synonymous with the phrase "by what means", or "in what manner or way". The rules of statutory interpretation instruct courts that every word in a statute is intended to have meaning and should be given its plain and ordinary meaning. The word "how", therefore, modifies the phrase "another person does work or performs a task". Section 217.1 therefore establishes an *OHS* legal duty for every one who directs how, or the manner in which, the work is done.

This legal duty also applies to every one who has the authority to direct how another person does work or performs a task. The application of this duty to every one who has the authority to direct how another person does work or performs a task extends it beyond the individual who directed the work or a task. The phrase, "or has the authority", is problematic because it does not provide a particular title or level of responsibility within the organization. It appears that any person who has the authority to direct how another person does work or performs a task is a much broader description of organizational decision makers than the identification theory. Further, since the new Bill C-45 term "senior officer" is not used in section 217.1, it must be reasonably inferred that the legislature intended a different and broader set of individuals than those specifically defined in the term senior officer to have this new legal duty. What is clear from the phrase "or has the authority", in section 217.1, is that a court would have to specifically and carefully review who has the authority to direct how another person does work or performs tasks, in order to establish the application of the new legal duty. Therefore, although this phrase gives some uncertainty as to how high in the organizational hierarchy a person may be who has the authority to direct how another person does work or performs tasks, it nevertheless gives trial courts a degree of flexibility to look at the specific organizational structure, and reporting authority, of each organization that is brought before the courts.

Express reference to the existence of the new "legal duty", in section 217.1, clearly establishes a basis for breach of this duty to amount to criminal negligence. Criminal negligence, either results from an act or an omission relating to a legal duty, when a person shows wanton or reckless disregard for the lives or safety of other persons. Since section 217.1 establishes a new legal duty, the breach of which may give rise to a charge of *OHS* criminal negligence.

The legal duty is to take “reasonable steps” to prevent bodily harm to that person, the person to whom direction is given as to how to do the work or perform the task. The term “reasonable steps” is not defined. It is the writer’s view that reasonable steps, at minimum, would refer to compliance with applicable *OHS* statutes and regulations. Reasonable steps may also refer to industry standards, codes of practice and in some cases best practices. The phrase “that person” is not specifically defined. This phrase, presumptively, would be an employee or a worker. The phrase “that person” in section 217.1, is broader than either the word employee or worker, but would apply to both. There is no requirement for an employment relationship for this duty to apply. However, that phrase may extend to a volunteer or visitor who is the subject of a direction on law to perform work or a task.

The legal duty also extends to “any other person”, in section 217.1. That phrase includes the public. Therefore, the Bill C-45 new *OHS* legal duty extends to the public as well as workers. The phrase “any other person” is modified by the last subordinate clause in section 217.1 and states “arising from that work or task”. Therefore, the legal duty to take reasonable steps to prevent bodily harm arises from and in relation to that work or task. It does not arise, in other words, unless the work or task or activity related to it causes the risk of bodily harm. In the writer’s opinion, there must be evidence of a nexus or causal connection between the assignment of how “another person” does the work or performs a task and the risk of bodily harm to “that person” or “any other person” arising from that work or task.

In contrast to *OHS* statutes, regulations and due diligence jurisprudence, section 217.1 does not provide any specific steps, actions, controls requirements or *OHS* systems that did not exist prior to Bill C-45 becoming law. In other words, although a legal duty is added to the *Criminal Code* under section 217.1, it does not necessarily add any new specific *OHS* steps, actions, controls requirements or systems for workplaces in Canada. In fact, the new legal duty to take reasonable steps to prevent bodily harm is best understood as reinforcing existing *OHS* statutes and regulations rather than amending, altering, or replacing them. Although applicable Canadian *OHS* statutes and regulations have their own regulatory enforcement mechanism, the rationale for adding this legal duty to the *Criminal Code* is to enhance the importance of accident and injury prevention, reinforce the legal seriousness by introducing a legal duty, and increasing the penalties and deterrents for failure to take reasonable steps to prevent workplace bodily harm under the *Criminal Code*. This was made clear in the Committee recommendations and the legislative debates regarding Bill C-45.

This legal duty gives rise to the potential of *OHS* criminal negligence charges and a number of related criminal offences. Under sections 21 to 24 of the *Criminal Code*, persons may be found criminally liable as parties to an offence by committing the offence and aiding, abetting, counselling, attempting, or being an accessory to the offence. Under these provisions, a corporate executive or board member may be liable if he or she aided or abetted a person to commit an offence in section 21, counselled a person to be a party to an offence in section 22, or was an accessory after the fact to an offence in section 23. It is important to understand that for each of these types of liability, the person is liable on account of his or her own actions.

Individuals who direct how another person does work within the organization must now realize that there is a criminal penalty for failure to properly discharge the legal duty. The legal duty extends from the most senior organizational decision makers all the way to foremen, lead hands, and potentially even co-workers who direct how work or tasks are performed. This means that workers who would not normally expect to owe a duty to prevent harm in the

workplace may now find themselves guilty of criminal negligence if they do not fulfill this duty and bodily harm or death results. All persons who undertake to direct how another person does work or performs a task, or has authority to do so, must be prepared to recognize and reasonably deal with health and safety hazards in the workplace in the face of this new legislation. The importance of *OHS* prevention has taken on a whole new importance and meaning.

OHS Due Diligence And Bill C-45 "Reasonable Steps"

There is a similarity between Canadian *OHS* law, *OHS* general duty clauses, and the defence of due diligence on the one hand and the new legal duty under Bill C-45 on the other. In the Bill C-45 amendment to the *Criminal Code* in section 217.1, there is a duty to take reasonable steps to protect the safety of workers and the public. This duty is similar to the general duty clauses found in Canadian *OHS* law and the language used by the courts in the legal defence of due diligence defence. There is no reverse onus in a prosecution of the new crime of *OHS* criminal negligence. The question remains, however, regarding what constitutes sufficient proof of reasonable steps in the new health and safety crime.

There is every reason to suggest that if an employer complies with the new duty under section 217.1 of the *Criminal Code*, an accused must be compliant with the applicable *OHS* laws. However, reasonable steps will be difficult to determine consistently across the country since *OHS* statutes vary jurisdiction by jurisdiction. In most provinces, for example, the *OHS* legislation contains legal requirements for health and safety committees. In other provinces, specifically Quebec and Alberta, committees are not required unless ordered by regulation or the regulator. These *OHS* legal requirements may serve as a yardstick in an *OHS* criminal negligence prosecution, to measure whether or not reasonable steps had been taken. However, since there is no national, consistent *OHS* statute, this makes the interpretation of reasonable steps more problematic. In other words, it is not clear exactly what will amount to reasonable steps under section 217.1 under the *Criminal Code*. What is clear is that there will have to be some development of the case law to establish what will constitute reasonable steps to prevent bodily harm to workers and the public.

Determining what reasonable steps an employer or manager was required to take in the circumstances will be a fact-specific determination. The mere failure to take reasonable steps required under an *OHS* regulatory statute, or failure to exercise due diligence in an *OHS* prosecution, will not necessarily result in a conviction for *OHS* criminal negligence. This is due to the different onus of proof and fault element of a criminal offence from that of an *OHS* offence. However, it is reasonable to anticipate that the courts will seek guidance from the extensive due diligence jurisprudence arising from *OHS* prosecutions that have generally imposed a high standard of care on regulated parties such as employers, constructors, prime contractors, supervisors, officers and directors.

---

[1] For a more complete introduction to the origins of this subject see N.A. Keith, *Canadian Health and Safety Law* (Aurora: Canada Law Book, 2003) at 1:10.

[2] For further information on the workplace hazardous material information system see N.A. Keith, *supra* note 187 at c. 4.

[3] *Supra* note 189, s. 25(1)(a), (b) and (d). In addition to general duty clauses, employers also have a specific duty with respect to safety requirements under other statutes such as the *Building Code Act*,

1992., S.O. 1992, c.23. Specifically, an employer should obtain the opinion of a professional engineer or building code expert with respect to this obligation under the Ontario health and safety statute.

[4] R.S.C. 1985, c. L2.

[5] *Ibid*., s. 124.

[6] R.S.B.C. 1996, C.492

[7] B.C. Reg. 296/97.

[8] *Ibid*., s. 3.22.

[9] R.S.A. 1980, c. O-2

[10] R.S.S. 1993, c. 0-1.1.

[11] C.C.S.M. c. W210.

[12] *Supra* note 189.

[13] *Ibid*., s. 25(2)(h).

[14] Ministry of Labour Legal Branch, *Interpretation Opinions*, (Ottawa: Ministry of Labour, November 1983) at 9; cited in N.A. Keith, *Canadian Health and Safety Law*, Looseleafed., (Aurora: Canada Law Book, 1997) at 3:40.2(6)0).

[15] *Supra* note 189, s. 27(2)(c).

[16] *An Act respecting Occupational Health and Safety*, R.S.Q., c. S-2.1, s. 51.

[17] S.N.B. 1983, c. 0-0.2.

[18] R.S.P.E.I. 1988, c. O-1.

[19] S.N.S. 1996, c. 7.

[20] R.S. Nfld. 1990, c. 0-3, s. 4.

[21] R.S.N.W.T. 1988, c. S-1.

[22] R.S.Y. 1986, c. 123.

[23] *Interpretation Act* R.S.C. 1985, c. 1-21, S. 35(1)(11).

[24] *Supra* note 193, s. 148.

[25] *Supra* note 195.

[26] *Occupational Health and Safety Act*, R.S.A. 2000, c. 0-2, s. 41.

[27] *Supra* note 199, s. 58.

[28] *Supra* note 200, s. 55.

[29] *Supra* note 189, s. 66.

[30] *Supra* note 205.

[31] Supra note 206, s. 47(1).

[32] *Supra* note 208, s. 74(1).

[33] *Supra* note 207, s. 31(1).

[34] *Supra* note 209, s. 67(2)(3).

[35] *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159, s. 44.

[36] *Supra note* 210, s. 22(2) and (4), fine is $50,000 if committed by employee instead of employer.

[37] *Ibid*.