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Workplace Safety and the Law
Recent amendments to the *Criminal Code* establish a specific legal duty for employers to take steps towards a safe workplace, including on the water. Failure to do so may result in charges of criminal negligence.

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Every year industrial accidents exact a heavy toll in Canadian industry. In the marine industries, collisions, capsizing and confined spaces are only a few of the workplace safety issues that provincial and federal legislation seek to address. Recent changes to the *Criminal Code of Canada* highlight the severity with which the Federal Government views breaches of occupational health and safety ("OHS") legislation.
In March of 2004 the *Criminal Code* was amended to expand the scope of liability for criminal negligence in the workplace. The amendments made it easier for *organizations*, including companies and partnerships, to be convicted of negligence causing injury or death in the workplace. In order to avoid potential criminal liability and fines of up to $100,000 arising from a failure to adhere to the new provisions of the *Criminal Code*, mariners are well advised to become familiar with the new law.

Background
In 1992, twenty-six miners died in an explosion in the Westray mine in Nova Scotia. Despite strong pressure from the victims' families and their union, the province was unable to prosecute those in charge of the organization that owned and operated the mine for the negligent acts causing the explosion. In response, Bill C-45, *An Act to Amend the Criminal Code of Canada (*otherwise known as the "Westray Bill") was proposed and passed by Parliament in 2003.
The Westray Bill made significant changes to the definitions in the *Criminal Code*, and added section 217.1, which reads as follows:

> *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.*

The New Law in a Nutshell — Extending Liability
Historically, organizations such as corporations were relatively safe from a conviction for negligence causing injury or death in the workplace. This was because, in order to be convicted, the prosecution had to prove that the *directing mind* (typically a senior officer) of the organization committed *both* the physical act *and* had the mental intent of wanton or reckless disregard for safety. This has now changed. The new law provides that an organization can be found guilty of criminal negligence where the *physical act* and the *mental intent* are perpetrated by two separate people in the organization.
For example, the chief executive officer of a towing company, motivated by rising diesel costs, reduces the budget for maintenance knowing (the mental intent) that this precludes compliance with the manufacturer's recommended maintenance schedule for onboard fire

suppression equipment. At sea, the skipper or engineer skips the regularly scheduled maintenance of the system (the physical act). A fire occurs, the fire suppression system fails due to lack of maintenance, and three crewmen die. Previously, the company could not be convicted of criminal negligence — this is no longer the case.

The purpose of section 217.1, above, is to establish criminal liability for a wide range of *organizations* and individuals who fail to take reasonable steps to prevent workplace accidents. For this reason, the amended *Criminal Code* refers to an "organization" and then defines it to mean "a public body, a body corporate, a society, a company" and "a firm, a partnership, a trade union or an association of persons created for a common purpose" — an extremely broad definition of those potentially liable.

Individual Liability of Directors and Officers

The new law deals only with the criminal liability of *organizations*. It does not provide for amendments to the current law dealing with the personal liability of directors and senior officers. Under current Canadian law, directors and/or senior officers can be held criminally responsible only if they direct a corporation to commit crimes to benefit the corporation, or otherwise participate in criminal activities.

Despite this, it should be noted that although the personal liability of directors and senior officers is not addressed by section 217.1, a specific legal duty is established, as will be discussed below, requiring those charged with responsibility for directing the work of others to take reasonable steps to prevent bodily harm arising from such work.

Preventing Harm in the Workplace

Simply stated, section 217.1 requires that employers take steps to provide a safe workplace for their workers. Employers who fail to do so may face charges of criminal negligence under the amended *Criminal Code*. Criminal negligence occurs when an act or omission of an accused party shows *wanton or reckless disregard* for the safety of others where the accused is under a legal duty to act. This requirement under the new law is similar to the obligations already imposed on employers under OHS legislation across Canada.

Previously, the *Criminal Code* imposed liability on corporations only for the acts and omissions of senior employees such as directors and officers. However, the criminal liability of corporations and other organizations no longer depends on a senior member of the organization having committed the offence. Under the amended *Code*, the class of persons whose acts or omissions will be attributable to a corporation or other organization has been expanded to include all "representatives." Representative is defined to include almost every person engaged by an organization, including directors, partners, employees, members, agents and contractors — again, a very broad definition.

To establish a breach of the "duty to take reasonable steps" imposed by the new law, the Crown has to prove the breach *beyond a reasonable doubt*. This is similar to the standard of proof required by strict liability offences under provincial OHS legislation. After a violation has been demonstrated beyond a reasonable doubt, the accused must establish *due diligence* in order to avoid a conviction (in other words, the employer must prove that it took all the precautions reasonable in the circumstances to prevent the accident or injury in question).

The Due Diligence Defence

What constitutes due diligence will depend on the circumstances of each case. Generally, an employer can establish due diligence by demonstrating that it developed *a proper system to prevent the commission of the offence*. In assessing a due diligence defence in the workplace safety context, courts have considered facts such as whether the employer:

- Appointed appropriate and sufficient supervisory personnel;
- Reviewed the workplace for foreseeable health and safety risks;
- Developed policies and procedures to protect workers against risks;
- Implemented and maintained disciplinary guidelines;
- Received regular reports on the operation of the health and safety program.

The same preventative steps taken by an employer in the workplace safety context will likely prove useful in developing a defence to a charge under the new *Criminal Code* provision. As such, employers must ensure that appropriate preventative steps are established, and that implementation of such steps occurs at all levels of their organization.

Consequences of Violating the Amended *Criminal Code*

In addition to increasing the maximum monetary penalty for organizations from $25,000 to $100,000 for summary conviction offences, the Westray Bill also amended the *Criminal Code* by establishing factors that courts should take into consideration when sentencing organizations convicted of criminal offences. These factors include:

- Any advantage realized by the organization as a result of the offence;
- Any attempt by the organization to conceal its assets in an attempt to avoid a fine;
- The impact that the sentence would have on the economic viability of the organization;
- Any regulatory penalties imposed on the organization for conduct forming the basis of the offence.

The latter factor takes into consideration the possibility that concurrent prosecutions may occur under both the amended Code and provincial OHS legislation.

Concurrent Prosecution under the *Criminal Code* and Provincial Legislation

In some instances, as noted above, concurrent prosecutions could be brought under both the amended *Criminal Code* and applicable provincial OHS legislation for the same accident or event. However, the specific legislation under which a prosecution will proceed will be dictated by the facts of each case. For example, in certain cases where the Crown believes that it would be able to establish *wanton or reckless disregard* for the lives of employees or others, it may proceed under the *Criminal Code*. Absent such evidence, an alleged violation would likely be prosecuted under provincial OHS legislation.

Should prosecutions be brought concurrently under both the *Criminal Code* and OHS legislation, two potential defences that may be raised include the principle of *double jeopardy*, and the rule against multiple convictions for the same offence. The *double jeopardy* defence, enshrined in section 11(h) of the *Charter of Rights and Freedoms*,

essentially provides that once a party is charged with an offence, whether found guilty or acquitted, that party may not be tried or punished for the same offence again.
The rule against multiple convictions for the same offence is similar in that it provides that an accused cannot be convicted of the same offence more than once. This defence is distinguishable from the principle of *double jeopardy* in that it assumes concurrent charges at the same time for the same offence, while the *double jeopardy* principle assumes that a final decision has been reached on the trial of an offence. Though the applicability of the rule in circumstances of concurrent prosecutions under different legislation has not been tested, the defence may be raised in response to charges under both the *Criminal Code* and OHS legislation.

Recommendations
In order to avoid prosecution under the new *Criminal Code* provisions, employers are advised to perform compliance reviews to determine the status of current workplace policies, practices and procedures. If current procedures are not compliant with OHS legislation, employers should keep in mind the following practical points that will assist them in establishing a *due diligence* defence:

- Have written policies, practices and procedures in place;
- Establish a program to monitor the workplace on a regular basis to ensure that employees are following the policies, practices and procedures;
- Provide appropriate training and education to employees so that they understand and carry out their work according to established polices, practices, and procedures.

Given the new law attributes criminal liability to organizations based on the acts or omissions of nearly every individual associated with the organization, it is imperative that employers ensure all “representatives” of the organization understand and apply stated workplace health and safety policies and procedures.
The severity of a *Criminal Code* violation cannot be overstated. As such, it is strongly suggested that the recommendations outlined above be implemented in a structured way. Records should be kept at all times to document an organization’s development and execution of a proper workplace health and safety program.

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PULL-QUOTE:
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