

A CRIMINAL CODE OFFENCE

DEATH & INJURY AT WORK

*A guide to investigating corporate criminal negligence
in the event of a serious injury or fatality in a workplace*



**POLICE LINE
DO NOT CROSS**

This booklet was written by two University of Ottawa law students based on research and advice from police officers, prosecutors, lawyers and worker health and safety representatives.

The Canadian Labour Congress produced this booklet on the occasion of the 20th anniversary of the Westray explosion and the 8th anniversary of the corporate criminal negligence amendments.

The CLC has a longstanding commitment to improve health and safety for all workers. Through our ongoing work on health and safety training, education standard development, legislation, regulations and collaboration; we have and will continue to work tirelessly for a safe and healthy workplace for all.

For additional copies or information, contact the CLC at 613.521.3400 or e-mail hse@clc-ctc.ca



Canadian Labour Congress

Congrès du travail du Canada

© Canadian Labour Congress, 2012. All Rights Reserved.

2841 Riverside Drive, Ottawa, ON K1V 8X7

613-521-3400 | hse@clc-ctc.ca

www.canadianlabour.ca



THE ROLE OF CORPORATIONS: THEIR RESPONSIBILITY TO PROTECT HEALTH & SAFETY

Corporations play important roles in our everyday lives. They produce what we eat, assemble what we drive, and create what we live in. They employ millions of people. Corporations play a big role in society and have significant effect on our wellbeing. Corporations must meet legal obligations under the *Criminal Code* like all other organizations¹. Corporations are operated by senior officers who are responsible for establishing policies and managing the work to be done². Those officers who undertake or have the authority to direct how work is done are under a legal duty to take reasonable steps towards protecting people from bodily harm³. If senior officers do not carry out their duty according to their role in the company and act with a wanton and reckless disregard for the safety of employees and others, the corporation and the officers may be guilty of criminal negligence⁴.



FIGURE 1: The Safety Triangle. Workplaces have internal warning systems when Products and Processes are Unsafe

1 In the *Criminal Code* of Canada, corporations are just one form of “organization” whose liability and that of their senior officers have been affected by Corporate Criminal Negligence amendments. See “Organization”. *Criminal Code* section 2 definition.

2 A “senior officer” is defined in the *Criminal Code* under section 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 organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer”.

3 *Criminal Code*, RSC 1985, c C-46, section 217.1.

4 *Criminal Code* sections 22.1, 217.1 and 219.

THE WESTRAY STORY

The Westray explosion 20 years ago on May 9, 1992 in Stellarton, Nova Scotia marked a watershed in **corporate criminal negligence**. Twenty-six men were killed when a coal mine exploded. After a public inquiry, a Nova Scotia Supreme Court judge was so outraged by the failure of corporate senior officers to prevent the tragedy that he called upon the Federal government to revamp the *Criminal Code*. In 2004, Canada's 37th Parliament passed amendments to the *Criminal Code* in Bill C-45 or the "Westray Bill" with unanimous support of all parties. The bill became law after years of hard work by the Westray families and unions who brought the judge's recommendations to the attention of parliament. The amendments introduced by the bill revoked the antiquated legal principle of the "directing mind" of the corporation, created a new legal framework that understood the different roles and responsibilities of senior officers and representatives⁵, and imposed a duty on those who direct how people work to protect them from bodily harm⁶. This imposed a positive duty on senior officers to ensure that work is designed, planned, and supervised to be carried out safely.

Since the **corporate criminal negligence amendments** were passed, many Canadians have died at work. Very few of these deaths have been investigated by police as possible charges. So far there have only been six charges laid. In addition, there is not yet case law that directly addresses the amendments. However, the language of the amendments is clear on its face and the intention of Parliament was unanimous. This fact sheet proposes to address questions and concerns about the role of police and the Criminal Code in investigating **corporate criminal negligence**.

5 *Criminal Code* section 22.1.

6 *Criminal Code* section 217.1.

GENERAL

Q.1 *What is corporate criminal negligence?*

Prior to 2004, corporations could be charged with criminal negligence. Few charges were ever laid because the Crown had to prove beyond a reasonable doubt that a person within the corporation, who was the “directing mind”, knew the crime was being committed. Similarly the actions of representatives were not seen as acts of the corporation without the approval of the “directing mind”. Few corporations actually operate this way. The “directing mind” legal technicality imposed a significant barrier to police investigations.

The *corporate criminal negligence amendments* recognize that managers at different levels have different responsibilities. Prevention is a management responsibility in two ways. Firstly, if a manager has an important role in policy or manages an important aspect of a corporation’s activities, they are considered senior officers⁷. As senior officers, they must make sure that policies and practices address health and safety concerns within the area of their responsibility⁸. Secondly, when they direct the work that others do, senior officers have a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person arising from that work or task⁹.

For most of the last hundred years, prosecution of health and safety crimes was left to the provinces as workplace regulation. What Westray showed is that there are cases when the failure of management to identify and prevent hazards that kill and injure people is so out of keeping with acceptable standards, that the full approbation of the criminal law is demanded. The 37th Parliament of Canada, made up of Liberal, Conservative, Reform, Bloc and NDP, confirmed this when it passed C-45 unanimously.

Corporate criminal negligence is not only about workers’ safety. It applies to cases when companies do not plan sufficiently and do not put in place means to protect their customers or neighbours. Environmental and consumer

⁷ See *Criminal Code* at section 2 definitions “senior officer”.

⁸ *Criminal Code* section 22.1.

⁹ *Criminal Code* section 217.1

complaints may justify *corporate criminal negligence investigation* when bodily harm results from an incident where a corporation is involved. Corporate criminal negligence can result from wantonly and recklessly ignoring risks of harm to others. Examples could include toxic chemicals in a children's toy, or a potent pharmaceutical that causes bodily harm.

Q. 2. Why are the corporate criminal negligence amendments important?

Corporate decision-making is delegated by leadership to different managers. Recent cases have highlighted that failures of senior officers to act can have drastic consequences for workers and the public. Westray continues to serve as one of many examples of a catastrophic result of the failure of management to address previous complaints of employees, process failures, or production failures that indicated safety was not being addressed.

Corporations can be held liable in some cases when it is not possible to prosecute a specific person. A simple illustration given by the Federal Department of Justice in their plain language guide demonstrates this:

“in a factory, an employee who turned off three separate safety systems would probably be prosecuted for causing death by criminal negligence if employees were killed as a result of an accident that the safety systems would have prevented. The employee acted negligently. On the other hand, if three employees each turned off one of the safety systems each thinking that it was not a problem because the other two systems would still be in place, they would probably not be subject to criminal prosecution because each one alone might not have shown reckless disregard for the lives of other employees. However, the fact that the individual employees might escape prosecution should not mean that their employer necessarily would not be prosecuted. After all, the organization, through its three employees, turned off the three systems”¹⁰

It is the magnitude of the risk and the degree of failure to act to prevent bodily harm by management that is critical.

10 See Canada, Government of Canada (Department of Justice Canada), *Criminal Liability of Organizations: A Plain Language Guide to Bill C-45* (Ottawa, 2003) online: Department of Justice Canada <http://www.justice.gc.ca/eng/dept-min/pub/c45/>.

Q.3. *What did it do/Whom did it affect?*

Overall, the *corporate criminal negligence amendments* affected corporate liability in two major ways. First, corporations are liable for the failure of senior officers to take appropriate steps to prevent criminal consequences from happening as the result of the behaviour of representatives of the corporation including contractors¹¹. Secondly, everyone in management whose work directs what others in the corporation do -- whether supervision, design, or planning -- is under a duty to take reasonable steps to make sure the work can be done safely¹². Key words “organization,” “representative” and “senior officer” are found at the beginning of the Code with other definitions.

Q.4. *Why is there so much media coverage and public interest when people are killed at work?*

With all the technology and resources available, the continued failure to protect people at work or downstream is socially unacceptable. The idea that corporations can poison the environment or that accidents are inevitable are long past. The owners of Westray promised it would be the most modern and technologically advanced facility. There were concerns raised before and during the operation of the Westray mine. No one investigated the concerns seriously – inspectors didn’t think it was their job, senior managers and government left it up to the workers, and workers were threatened if they complained.

The explosion of the mine on May 2, 1992 was catastrophic. It was followed by days of efforts to try and find survivors. An investigation and a full public inquiry brought to light the extent of disregard that management had for safety. Despite these findings, no senior official, government representative, politician, owner or corporation was held criminally responsible. Recommendation 73 of the Westray Commission of Inquiry specifically asked the Federal government to review the criminal law.

This recommendation of a Nova Scotia Supreme Court judge came before the federal Parliament. After careful review and unanimous support of all parties, the 37th Parliament of Canada passed corporate criminal law amendments. Martin Cauchon, Minister of Justice at the time, noted that, “Employers must fully recognize their responsibility in providing a safe work environment.

¹¹ *Criminal Code* section 22.1.

¹² *Criminal Code* section 217.1.

Failure to do so in a manner that endangers employee and public safety must be appropriately dealt with through our criminal laws.”

The intention of the *corporate criminal negligence amendments* could not be clearer. It mandates police to investigate potential charges when bodily harm results.

POLICE SERVICES AND BILL C-45

In order to ensure an effective investigation, police officers must rely on three C’s:

- **Collaboration** with other police services and interested parties;
- **Communication** with affected parties and anyone who might have valuable information for the investigation. Given the legal complications associated with corporate crime, police must also communicate effectively with Crown counsel; and a
- **Consistent** approach to investigations is needed.

Q.5. What is the role of the police in enforcing the corporate criminal negligence amendments?

Police services regularly face challenges in adapting to new criminal provisions adopted by Parliament. Many new crimes have been added in recent decades and successfully applied by police officers across the country. The successful application of these laws has made people and communities safer. The main objective of the *corporate criminal negligence amendments* was to ensure that workplaces become safer.

Police officers are obligated to approach corporate crime as any other crime. Police officers should investigate workplace deaths to identify relevant evidence and to determine if there is sufficient evidence for a charge to be laid. As they do with dangerous driving, the police have to evaluate the behaviour to determine if there was a marked departure from acceptable behaviour. Consultation with experts may be required.

Q.6. *How does an investigation under the corporate criminal negligence amendments take place?*

Like most investigations, a **corporate criminal negligence** investigation begins with the immediate events which led to the death or serious injury. The main objective is to figure out why it happened. Who was supervising? Why was this work being done on this day? In this context, almost all activities related to corporations are governed by documents. Such evidence is manifested by emails, purchase orders, contracts, standard operating procedures, etc.

Corporate criminal negligence requires the police to look at why the work was being done, who was in charge and who made the decisions. In doing so, police will be better situated to determine whether there is the presence of criminally negligent conduct and the extent of that conduct.

Given the nature of investigations under the **corporate criminal negligence amendments**, additional bodies, such as a provincial and territorial Ministries of Labour (“MoL”), will also be investigating. The police are the only ones with the authority to conduct a criminal investigation. MoL inspectors have expertise in occupational health and safety regulations and requirements. In some cases, both police and the MoL inspectors will need technical expertise to interpret what has happened. Like any other investigation, police must arrive quickly to the crime scene, secure the scene while identifying relevant actors, call for additional resources if needed and collaborate with all involved parties in order to maximize the likelihood of identifying relevant evidence. It is imperative that police make it clear to all parties involved, including those conducting regulatory investigations, that a criminal investigation is taking place.

Q.7. *What should police be looking for during such an investigation?*

Investigating corporate crime requires police to look for a pattern of behaviour within an organization. This explains why an investigation can be challenging at times. However, in practice, it is not any different than a conventional investigation, taking into account and considering a few important factors.

1. **Take control of the scene:** Traditionally, workplace accidents are not perceived as crime scenes. If you do not take control of the crime scene, possible key evidence could be lost or tampered with. As in any other case, a criminal investigation takes precedence over any other investigation.

-
2. **Call for back up:** Workplace investigations can be complex and the crime scene can be on a large scale. The first Officer on the scene should notify the Ministry (or Department) of Labour or Workers Compensation Board to send an inspector as well.
 3. **Understand the corporate structure:** This is key as it might lead to evidence not usually sought in a traditional investigation but essential for meeting the requirements of *corporate criminal negligence*. All organizations have hierarchies. Identify people by name, title and function.
 4. **Identifying victims and relevant players:** Police who have investigated the few cases thus far of *corporate criminal negligence* highlight that it is often difficult to speak to those most involved. Company management often wants people to speak to the company lawyer first. It is helpful to identify members of the joint health and safety committee and company health and safety staff who may have relevant advice and information.
 5. **Identifying relevant evidence:** The scene of the bodily harm is central to the investigations. To understand why the situation occurred you need to know what was being done and why it was done. Who made which decisions? Corporations run on records, paper and e-mail. Tracking down relevant internal correspondence, memos, records of meetings, policies and procedures is useful to understand what was known, the decisions that were made and by whom.
 6. **Nature of relevant evidence:** evidence required for a successful criminal investigation may require preserving extremely large objects (e.g. cranes). Occupational health and safety (“OHS”) requirements and voluntary principles adopted by employers often produce evidence in the form of documentation that must be sought by police (e.g. site plan, work plan). In addition to general records planning, designing and supervising the work, companies have clear OHS responsibilities. A MoL inspector or the members of the joint health and safety committee can help explain the relevant components of the health and safety program, any internal investigations and technical advice. Many organizations have health and safety programs, a manager responsible for OHS and systems in place to make sure work is being done safely. The failure to have committees or a program or a manager may be indicators of serious concern that might lead

to establishing negligence by either the corporation or management. Many employers by law must have a joint health and safety committee made up of equal representation of workers and management. This committee must meet at least monthly and carry out inspections. Minutes of these meetings are kept and posted. These are important resources for a *corporate criminal negligence* investigation.

7. **Experts will assist after identifying relevant evidence:** Even though it is not required that scientific links are made, look for possible scenarios that could have contributed to an accident. For example, when a scaffold breaks in the middle – once police have secured the immediate scene – police will identify why it wasn't properly maintained. This could be translated into off-site documentary evidence highlighting a problem ignored by senior officers. Subsequently, experts will identify how it broke which may or may not establish a link to the problem identified by police.
8. **Fundamental questions:** Police must seek to answer the following questions when investigating an individual or group of individuals acting on behalf of corporation: When did they know? What did they know? What they should have known? How did they know it? What was done about it? If something was done, when was it done?
9. **No due diligence:** Police must assess the degree of corporate failure to address the hazard that resulted in bodily harm. There is no case law so far. The *Criminal Code* requires exceptional circumstances which are both a marked departure and a wanton and reckless disregard. Due diligence is not relevant.
10. **Arrest/Criminal charges:** Unlike most traditional crime, charges or arrests in this area should only be done once a thorough investigation has been completed and access to off-site relevant evidence is in the hands of police. Police do not want to make a premature arrest and have it thrown out of court because of a constitutional technicality.

Q.8. *Can police rely on an OHS regulatory investigation to gain access evidence?*

Police are often involved in cases where concurrent regulatory and criminal investigations are taking place. In a 1994 Supreme Court of Canada decision named *R. v. Colarusso*¹³, the court tended to discourage police from obtaining evidence obtained by regulators because the evidence was likely not admissible in a criminal proceeding. In other words, the court held that police could not rely on evidence obtained under a different statutory authority and that the police had to obtain its own search warrant for the purpose of a criminal investigation.

In *R. v. Sandhu*¹⁴, a recent Ontario Court of Appeal decision, the court held that investigations conducted under a regulatory process, such as an investigation by an OHS inspector, may find criminal evidence and assign it to police authorities without contravening section 8 of the Charter. Each case is specific and has its own set of facts. Where a regulatory investigation finds criminal evidence, police may, under certain circumstances, use such evidence in their own investigation. This does not suggest that police may rely on regulatory inspectors to conduct the work of police. Rather, it stresses the importance to police of collaborating and communicating with others involved - such as OHS inspectors - while conducting their own C-45 criminal investigation by seeking warrants to gain access to relevant evidence. Yet, the courts are clear that police investigators should always aim to obtain their own evidence and should never rely on concurrent investigations. Police may not rely on statements made in interviews conducted under a regulatory investigation as police must provide every interviewee with a possibility of legal representation.

¹³ *R. v. Colarusso* [1994] 1 SCR 20.

¹⁴ *R. v. Sandhu*, 2009 ONCJ 77.

Q.9. *How does the corporate criminal negligence amendments differ from OHSA regulations?*

Police are not routinely involved in investigations conducted by OHS inspectors. Many investigations by OHS inspectors go beyond offences and involve inspections and other activities. Prior to C-45, prosecutions were seen as the responsibility of provincial health and safety system and prosecuted only as provincial offences¹⁵. These provincial offences are strict liability offences and due diligence is a defence. Health and safety regulations vary from province to province.

The Westray explosion and C-45 changed all that. Criminal law is the same everywhere in the country. Corporate criminal responsibility was amended to recognize that cases where behaviour shows a wanton and reckless disregard and bodily harm result must be treated more seriously.

Q.10. *What is the relationship between police services and regulatory investigators under an occupational health and safety act?*

Police investigate crimes and inspectors investigate regulatory offences. This explains why OHS inspectors are more familiar with OHS legislation just as police are more familiar with the *Criminal Code*. Inter-ministerial protocols are needed to promote communication and consistency. When investigating possible charges, responsibilities of inspectors are very similar to police – they have to get a warrant.

Police and OHS inspectors are trained to investigate different types of cases. OHS inspectors are not trained as investigators to the same level as police. Some inspectors have work experience in industry, but not all. Like police, they often have to rely on technical and forensic experts to reconstruct the scene. Both police and inspectors have the authority to take control of the scene. Police should develop good working relationships with OHS inspectors. Yet, as it has been highlighted in *R. v. Colarusso*, criminal investigations require police to gather their own evidence and meet a higher threshold under the *Criminal Code*.

¹⁵ British Columbia is different. Most occupational health and safety matters are under Work-SafeBC, the workers' compensation board, which employs the provinces OHS inspectors. Penalty assessments are used instead of prosecutions.

Q.11. How many prosecutions under the corporate criminal negligence amendments have taken place since 2004?

Over the eight years since C-45 amended the *Criminal Code* only six charges have been laid. In two cases, criminal charges were subsequently withdrawn and replaced by OHS charges; one case ended in a plea, one convicted at trial; one charge was stayed and one charge is pending. There is no case law so far.

Generally, Crown prosecutors and police involved in these cases stressed the need to collaborate while conducting independent criminal investigations. OHS inspectors and other actors might be of great value in assisting to understand circumstances of a specific case. This was true in *R. v. Scrocca* where the inspector had informed the Quebec officer that he had worked for the same back-hoe manufacturer where the machine had struck and killed an employee. This information led the inspector to notify the officer that the incident was not a traditional accident but that it was caused by a brake failure coupled with years of negligence in maintaining the back-hoe. Although the inspector's experience had a huge role in ensuring the conviction of the accused under C-45, it is solely the police investigator's responsibility to conduct criminal investigations.

The C-45 amendments are clear and unambiguous. They describe organizations and the different roles of senior officers and representatives¹⁶. They explain how an organization is a party to an offence¹⁷. They describe the duty with which those who direct or have authority to direct work must comply¹⁸. Combined with section 219 of the Code, this is a clear definition of *corporate criminal negligence*.

¹⁶ *Criminal Code* at section 2 definitions "senior officer" and "representative".

¹⁷ *Criminal Code* section 22.1.

¹⁸ *Criminal Code* section 217.1.

APPENDIX – RELEVANT *CRIMINAL CODE* PROVISIONS

Section 2 – Definitions

“organization” means

(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(b) an association of persons that

(i) is created for a common purpose,

(ii) has an operational structure, and

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

“representative” means, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;

“senior officer” means

“senior officer” 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;

Section 22.1

Offences of negligence — organizations

22.1 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.

2003, c. 21, s. 2.

Section 22.2

Other offences — organizations

22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, 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.

Section 217.1

Duty of persons directing work

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.

2003, c. 21, s. 3.

Section 219

Criminal negligence

219 (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.

Definition of “duty”

(2) For the purposes of this section, “duty” means a duty imposed by law.

R.S., c. C-34, s. 202.

Section 718.21

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to public authorities of the investigation and prosecution of the offence;
- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- (g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

2003, c. 21, s. 14.



visit www.canadianlabour.ca to find out how you can help unions make a difference!



follow us at www.facebook.com/clc.ctc then invite your friends to join along.

 Like  everybody likes this



follow us at www.twitter.com/CanadianLabour and [@CanadianLabour](https://twitter.com/CanadianLabour) for the latest news.



Canadian Labour Congress
Congrès du travail du Canada



National Headquarters Canadian Labour Congress

2841 Riverside Drive
Ottawa, ON K1V 8X7
Telephone: 613-521-3400
Fax: 613-521-4655



Atlantic Region Canadian Labour Congress

2282 Mountain Road
Moncton, NB E1G 1B4
Telephone: 506-858-9350
atlantic@clc-ctc.ca



Ontario Region Canadian Labour Congress

15 Gervais Drive, Suite 401
Toronto, ON M3C 1Y8
Telephone: 416-441-3710
ontario@clc-ctc.ca



Prairie Region Canadian Labour Congress

1888 Angus Street
Regina, SK S4T 1Z4
Telephone: 306-525-6137
prairie@clc-ctc.ca



Pacific Region Canadian Labour Congress

#201 - 5118 Joyce Street
Vancouver, BC V5R 4H1
Telephone: 604-430-6766
pacific@clc-ctc.ca



Quebec Fédération des travailleurs et travailleuses du Québec

565, boulevard Crémazie Est, bureau 12100
Montréal, QC H2M 2W3
Téléphone: 514-383-8000
ftq@ftq.qc.ca

