



Criminal Code amendments impact municipalities

by Glen R. Peters of Fillmore Riley

On November 7, 2003, the Parliament of Canada passed *Bill C-45* known as ‘*An Act to amend the Criminal Code (criminal liability of organizations)*.’ While this Bill received little public recognition, its impact on organizations (including municipalities) is potentially significant. While most recent commentary on this legislation has focussed on the expanded criminal exposure of corporations, municipal officials should take note that the definition of organization, to which these amendments apply, includes municipalities. The following is a summary of relevant aspects of the legislation, as well as some context as to its origin.

It is believed that the impetus for this legislation goes all the way back to the Westray Mining explosion in 1992. Readers will recall that this explosion took the lives of more than 20 miners. Charges were laid against at least two of the mine’s managers but were later dropped and it is the writer’s understanding that the company itself was never criminally charged. The failure to proceed with charges (apparently having regard to the difficulties in pursuing a criminal prosecution) resulted in a push for legislative amendments to broaden the availability of criminal prosecution of organizations. While it took over a decade to complete, *Bill C-45* certainly represents a step in that direction.

To place the new legislation in context, it is important to first understand, in a general sense, the state of the law prior to these

amendments. In general terms, in order to secure a criminal conviction under the prior law, a prosecutor had to establish that the incident or crime resulted from a policy or policies developed or implemented by the ‘directing minds’ of an organization. These directing minds were thought to be the board of directors, corporate CEOs, or other highly placed individuals in an organization. Thus, if the activity in question was the product of the actions of a mid-level manager and was not ‘company policy,’ it was generally considered that the likelihood of a conviction was remote.

The new *Criminal Code* amendments appear to broaden the exposure of organizations to criminal prosecutions. The definitions in *Section 2 of the Code* of “everyone”, “person”, and “owner” have now been clarified to include organizations. Organizations, in turn, are broadly defined and include municipalities. Under other provisions in *Bill C-45*, it now appears that municipalities and other organizations could face exposure to criminal convictions where their representatives or senior officers have failed to take reasonable measures to prevent criminal activities. *The Code* amendments in *Bill C-45* distinguish between ‘offences which require the prosecution to prove negligence,’ and ‘those that require the prosecution to prove fault, other than negligence.’ In the case of offences requiring the proof of negligence, organizations (including municipalities) will be found to be 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.

In the case of offences that require proof of fault other than negligence, an organization will now be 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 the authority is a party to the offence;
- b. having the mental state required to be a party to the offence in 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 omissions specified in the events; or
- c. knowing that a representative of the organization is, or is about to be party to the offence, does not take all reasonable measures to stop them from being a party to the offence.”

Breaking down these new provisions in the context of municipalities first requires a consideration of who might be considered a “representative” or a “senior officer” of a municipality. “Representative,” in respect of an organization, is defined to mean “a director, partner, employee, member, agent or contractor of the organization.” Note that this is a very broad definition that doesn’t necessarily require a senior position and could include anyone from mayors, reeves and councillors to CAOs, by-law enforcement officers, or other agents or contractors of a municipality.

“Senior officer” is defined to mean: “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.” In

the context of a municipality, this definition would seem to apply to the municipal councillors, mayor or reeves and likely to chief administrative officers. Judicial interpretation will be required in order to flush out the words “*or is responsible for managing an important aspect of the organization's activities;*” however, at first blush, this may well include many mid-level managers within municipal organizations.

One element of the amendments that does afford some protection to municipalities for offences that require proof of fault other than negligence (i.e., fraud) is the requirement that the prosecution show that the offence was committed, “*with the intent, at least in part, to benefit the organization.*” Thus, if a rogue municipal employee were to commit criminal activity purely for his/her own benefit, and without a view to benefiting the municipality itself, the municipality will not be subject to prosecution under this section. However, for negligence offences, the municipality could be convicted, whether or not the municipality derived any benefit. As previously stated, in the context of negligence offences, the municipality will be subject to conviction if one of its representatives is party to the offence and if its senior officer (who is responsible for the municipal activity that is relevant to the offence) “*departs markedly*” from the standard of care that could reasonably have been expected to prevent the representative from committing the offence. Municipalities may take some comfort from the words “*departs markedly*” in the sense that this suggests a standard beyond mere negligence, and perhaps suggests a higher standard such as gross negligence.

While the situations where a municipality may face criminal prosecution are likely to remain relatively rare, the expanded potential for such prosecutions under this legislation should not be ignored. Penalties can be severe, including fines up to \$100,000, for summary conviction offences. As well, courts may prescribe as an additional condition of a probation order made as part of a sentencing, that a restitution payment be made to a person for any loss or damage that they have suffered as a result of the offence. One can imagine circumstances where such restitution payments could be considerable.

In light of all of the above, just as municipalities have typically established policies, procedures and compliance mechanisms to manage liability exposure for civil claims, municipalities would be advised to consider the establishment of such policies, procedures and compliance systems in the context of these criminal provisions. In fact, the provisions of the legislation that prescribe

additional conditions that may attach to a probation order provide a potentially useful due diligence check-list for municipalities to review in advance in an effort to avoid any potential prosecution. Some of those elements include:

- the establishment of policies, standards and procedures to reduce the likelihood of an organization committing a subsequent offence;
- the communication of those policies, standards and procedures to its representatives;
- identification of the senior officer who is responsible for compliance with those policies, standards and procedures; and

- compliance with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

It will be interesting to monitor in the coming years, the extent to which crown prosecutors look to these new provisions to charge organizations with crimes, as opposed to the traditional focus on individuals. Certainly, the current corporate environment (Enron, World.Com, etc.) suggests that such charges are likely in the corporate world. Whether municipalities are targeted remains to be seen. ●

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