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HEALTH AND SAFETY A MATTER OF CRIMINAL LAW

On November 7, 2003, Bill C-45, *An Act to Amend the Criminal Code*, was given Royal Assent, making it law in Canada.

The new *Criminal Code* provisions significantly expand the scope of corporate criminal liability in matters of health and safety. Now, "organizations", their "representatives" and "senior officers" (with authority to direct how another person works) have an additional, positive legal obligation to ensure the safety of workers and the public.

Under the new law an organization and/or individual may be charged with criminal negligence where a representative or senior officer, with intent to benefit the organization and/or acting within the scope of their authority:

- Commits an offence
- Directs a representative to commit an offence
- Fails to prevent a representative from committing an offence that the individual knew was about to occur
- Demonstrates a lack of care

A violation of new criminal law could result in a fine of up to $100,000 against an organization, and a fine and/or imprisonment for up to 25 years against a representative or senior officer. This is in addition to any fine or imprisonment which may be levied under the applicable health and safety legislation.

WHO IS AT RISK?

The terms "organization", "representative" and "senior officer" are defined broadly in the Criminal Code. "Organization" includes a company, firm, partnership and trade union. "Representative" includes a director, partner, employee, member, agent or contractor of the organization. And "senior officer" is not exclusive to what one normally associates with the term - president, vice-president, chief executive officer, chief financial officer, etc. - but includes an individual who plays an "important role" in the establishment of the organization's policies and who is responsible for managing an important aspect of the organization's activities. Needless to say, the term "important role" is open to interpretation and will likely be hotly contested in the courts when charges are laid under the new law.

> "...the new law sends a clear message to employers that those who fail to provide a safe workplace will be dealt with severely through the criminal law."

Prior to the *Criminal Code* amendments, occupational health and safety offences were governed in Ontario primarily by the *Occupational Health and Safety Act* and at the federal level by the *Canada Labour Code*. In addition, in rare circumstances, a corporation could attract criminal liability if at the time of a health and safety infraction its "directing mind" had the intent to commit a criminal offence.

In the wake of the *Report of the Westray Mine Public Inquiry*, the Federal Government received increasing pressure to make sweeping changes to the *Criminal Code* to ensure that corporations, their executives and employees were held accountable for workplace safety. Through Bill C-45 the Government confirmed its belief that *"the criminal law can provide an important additional level of deterrence if effectively targeted at and enforced against companies and individuals that show a reckless disregard for the safety of workers and the public."*

WHAT THIS MEANS FOR YOUR ORGANIZATION

While every responsible organization takes seriously its obligation to ensure a safe workplace for its workers and the public, the new *Criminal Code* provisions up the *ante* considerably. In addition to increased fines and jail sentences and the stigma of prosecution, the new law sends a clear message to employers that those who fail to provide a safe workplace will be dealt with severely through the criminal law.

There are many steps an organization can take to respond to these new and onerous criminal responsibilities. Some are industry-specific, while others more general in nature. In each case the responsibility to provide a safe workplace is on-going and should be re-evaluated at regular intervals. Every organization should:

1. Educate and re-educate every

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HEALTH AND SAFETY...

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member of the organization about the evolving nature of workplace safety - the legal obligations (federal and provincial) and cost of non-compliance both financially and in human terms.

2. Conduct a detailed and honest internal audit of safety practices and protocols.

3. Create formal and informal lines of communication that encourage and applaud the free-flow of safety ideas, information and concerns both actual and potential.

4. Foster a workplace environment in which every person is encouraged and expected to plan safely, work safely and take responsibility for the safety of everyone around them.

The members of ***Sherrard Kuzz LLP*** *regularly advise employers concerning health and safety matters, including health and safety practices, discipline and other enforcement mechanisms, work refusals, appeals of inspectors' orders and defending employers in prosecutions under applicable legislation.*

Our legal team also regularly assists senior management to train supervisors and other management staff concerning their health and safety obligations.

For assistance with these issues, please contact us.

SUPREME COURT OF CANADA ALLOWS GRIEVANCE EVEN THOUGH NO BREACH OF COLLECTIVE AGREEMENT

The Supreme Court of Canada recently held that an employee may grieve an employer's non-compliance with an "employment-related statute" even though no provision of the Collective Agreement had been breached.

THE FACTS

In the case of *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, Ms. O'Brien was a probationary employee represented by the Ontario Public Service Employees Union ("OPSEU") in her employment with the District of Parry Sound Social Services Administration Board ("District").

The Collective Agreement, the terms and conditions of which OPSEU and the District voluntarily negotiated, provided that the discharge of a probationary employee could not be subject to the grievance and arbitration provisions and did not constitute a difference between the parties.

Ms. O'Brien commenced maternity leave prior to the expiry of her probationary period. The District discharged Ms. O'Brien shortly after her return to work from maternity leave. Ms. O'Brien grieved her discharge.

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Breakfast Seminar

Next in our series of employment and labour law update seminars:

GUEST SPEAKER: Ken Anderson, Assistant Commissioner (Privacy)
Office of the Information and Privacy Commissioner/Ontario

TOPIC: Privacy Legislation: Developing Your Privacy Plan - 5 Steps to Compliance

DATE: Thursday January 15, 2004, 7:30 a.m. – 9:00 a.m.
(program to start at 8:00 a.m.; breakfast provided)

VENUE: Wyndham Bristol Place Hotel, Toronto Airport
950 Dixon Road, Toronto

HRreview Seminar Series

Watch for your faxed invitation the week of December 15th, 2003 or call 416.603.0700 to request an invitation.

ARBITRATION HEARING

At the arbitration hearing, the District argued that the Board of Arbitration did not have jurisdiction to hear the matter since the Collective Agreement expressly prevented arbitration of the discharge of probationary employees.

OPSEU argued that under section 48(12)(J) of the *Ontario Labour Relations Act* an Arbitrator has the power to interpret and apply human rights and other employment-related statutes despite any conflict between these statutes and the terms of the Collective Agreement.

Arbitration Paula Knopf agreed with the union, holding that the substantive rights of the *Human Rights Code* were imported into the Collective Agreement. As such, the Board of Arbitration had the power to determine whether discrimination was a factor in Ms. O'Brien's discharge.

DIVISIONAL COURT

The Board of Arbitration's ruling was overturned by the Divisional Court on the grounds that the Board did not have jurisdiction to hear the matter because the grievance was not a difference arising out of the Collective Agreement, but rather a difference arising out of the *Human Rights Code*.

COURT OF APPEAL

Upon appeal to the Ontario Court of Appeal, the Court sided with the Board of Arbitration.

In reaching its decision, the Ontario Court of Appeal relied on the *Ontario Employment Standards Act* which prohibits discharge of an employee because she has taken maternity leave. The Court of Appeal held that the *Employment Standards Act* was incorporated into the Collective Agreement and could therefore be enforced through the grievance and arbitration provisions.

> "(this)...decision means that every Collective Agreement ... must be interpreted within the context not only of the provisions of the Collective Agreement, but also of all employment-related legislation..."

SUPREME COURT OF CANADA

The case was further appealed to the Supreme Court of Canada which upheld the decision of the Board of Arbitration and Court of Appeal.

The Supreme Court first recognized the long standing principle that an Arbitrator's jurisdiction arises from the Collective Agreement. That is, conduct which does not violate the Collective Agreement is conduct which cannot be the subject of arbitration.

However, the Supreme Court also held that Section 48(12)(j) of the *Ontario Labour Relations Act* not only gave Arbitrators the power, but also the responsibility, to enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the Collective Agreement.

The Supreme Court of Canada held that:

- The substantive rights and obligations of employment-related statutes are implicit in every Collective Agreement
- Parties to a Collective Agreement are prohibited from negotiating terms which fall below the substantive rights and

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DID YOU KNOW...?

As of January 1, 2004 all "organizations" in Ontario are required to comply with the Federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA").

For information concerning your organization's obligations and how to comply with this privacy legislation, contact any member of the Sherrard Kuzz team.

PARRY SOUND...

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obligations of employment-related statutes

- An employer's right to change the enterprise and direct the work force (language in a typical management rights clause) is subject to, and limited by, the provisions of the Collective Agreement and the statutory provisions of employment-related statutes
- It is irrelevant that the parties to a Collective Agreement may have agreed to negotiate provisions that are inconsistent with the rights and obligations set-out in employment-related statutes
- Statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot detract

PRACTICAL APPLICATIONS

The Supreme Court's decision means that every Collective Agreement and, more specifically, a management rights clause, must be interpreted within the context not only of the provisions of the Collective Agreement, but also of all employment-related legislation - not merely human rights legislation.

It also means that employees governed by a Collective Agreement may file a grievance arising out of a breach of an "employment-related statute" even though no provision of the Collective Agreement has been breached.

There are a number of steps an employer may take to reduce the potential that actions taken under a Collective Agreement will unwittingly violate employment-related statutes:

1. **Be proactive**. Review the Collective Agreement now to determine if provisions could result in a violation of employment-related statutes.
2. **Be alert** to statutory rights and obligations when imposing discipline or enforcing provisions of the Collective Agreement.
3. **Be strategic.** Attempt to renegotiate or reach an understanding with the union on how to interpret and apply provisions of the Collective Agreement that may, directly or indirectly, violate employment-related statutes.

*The team at **Sherrard Kuzz LLP** are skilled at assisting clients to identify and address potential violations of employment-related statutes in their Collective Agreements.*

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Providing management with practical strategies that address workplace issues in proactive and innovative ways.