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Questions and Answers about

Bill C-45 ("The Westray Bill") and Second-Hand Smoke in the Workplace

What is Bill C-45?

Officially known as "An Act to amend the Criminal Code (criminal liability of organizations)," Bill C-45 is informally known as the "Westray Bill," because it is a legislative response to the Westray Mine disaster. Twenty-six miners lost their lives when the Westray, Nova Scotia coal mine blew up in 1992. Occupational Health and Safety laws did not prevent the tragedy, or punish the guilty. The public inquiry that followed the disaster laid blame for the disaster squarely at the feet of the mine's owners and managers. Despite this, no one ever paid any fines or served any time in jail for the death of these 26 men. Bill C-45 received Royal Assent on November 7, 2003. This new law:

- Establishes a duty in criminal law to protect the health and safety of everyone in the workplace.
- Proposes severe penalties of imprisonment if failure to protect worker health and safety results in bodily harm (maximum penalty – 10 years in prison) or death (maximum penalty – life imprisonment).
- Broadens the scope of who is responsible for worker health and safety to all levels of management and everyone else who can "direct how another person does work or performs a task."
- Makes it possible to charge organizations, including government departments, agencies and corporations, with criminal negligence if bodily harm results from their failure to protect workplace health and safety.
- Puts the duty for ensuring workplace health and safety on an equal footing for everyone in Canada. This duty is important and serious and is now clearly described in a single statute – the Criminal Code of Canada. Notwithstanding this, jurisdiction for occupational health and safety remains divided among 14 jurisdictions (the federal government, 10 provinces, 3 territories).

How, exactly, does this new law work to amend the Criminal Code?

It amends the Criminal Code in several key areas. Here are the amendments that are most important for the protection of worker health and safety:

- It adds a new Section 217.1 to the Criminal Code which states –

  "217.1 Every one who undertakes, or has 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."*

- It changes the definition of "every one" to include government departments, agencies and corporations for all levels of government (a.k.a. *"Her Majesty"*) and all other organizations:

  "'every one', 'person' and 'owner', and similar expressions, include Her Majesty and an organization."

- It expands who can be charged with criminal negligence causing bodily harm or death to cover organizations as well as persons. It sets out what the prosecution has to do to prove criminal negligence of an organization.

  "…an organization is a party to the offence if …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."

* *"'bodily harm' means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature."*

What does this have to do with second-hand smoke?

Lots.

Even though the motivation behind the new law was to prevent a workplace disaster like Westray from ever happening again, the law is written in very broad terms so that it applies, not just to mines and not just to heavy industry, but to *all* workplaces.

Moreover, while the Westray mine disaster was the result of serious breaches of safety procedure, the new Criminal Code amendments establish a duty to protect both safety *and* health. There is a new duty to prevent bodily harm and

"'bodily harm' means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature."

Tobacco smoke in the workplace is probably the most widespread unresolved health problem in Canadian workplaces. The problem is very visible; the solution is readily at hand – making all workplaces smoke-free. It is reasonable to do so. Many jurisdictions have done so, but not all. Fifteen per cent of Canadians live in communities with 100% protection from second-hand smoke in all workplaces, including bars and restaurants. However, in about 85% of Canada's bars and more than half of the restaurants, servers are still exposed to daily doses of second-hand smoke. They are the most exposed workers and at considerable risk for death and disease from second-hand smoke. They are being denied a level of health protection that has already been demonstrated to be effective for the minority of their colleagues who are fortunate enough to work in jurisdictions where smoking has been banned in all workplaces, including bars and restaurants.

How bad is second-hand smoke in the hospitality industry?

Really, *really* bad.

The United States Occupational Safety and Health Administration (OSHA) call a working lifetime risk of one death in a thousand a "significant risk of material impairment of health." It has been reliably estimated that hospitality workers, a highly exposed group, face lifetime mortality risks from passive smoking that are *15 to 26 times higher* than the one-in-a-thousand significant risk level defined by OSHA. Among hospitality workers, one of the most exposed sub-groups is bar workers. Estimates for English bar and pub workers show that they face a lifetime risk of death from passive smoking that is *170 times higher* than the OSHA one-in-a-thousand significant risk level. Why should hospitality workers continue to be exposed to such high levels of risks to their health, risks that would be unacceptable in any other industry?

Can you really compare working in a restaurant to working in a coal mine?

Yes.

Professor Gerald Wilde, a Queen's University psychologist, analysed the Westray Mine Public Inquiry Commission documents and concluded that failure to put health before wealth was behind the Westray disaster.

"Mine management, rather than putting in place a safety-incentive programme of a type known to significantly improve cautious and accident-free performance, instituted instead a remuneration schedule with a progressive production bonus component that appears to have exacerbated risk acceptance and the frequency of imprudent practices among the miners. The pursuit of short-term economic gain may well have set the stage for the fatal explosion and the mine's premature demise."

http://pavlov.psyc.queensu.ca/faculty/wilde/westray.html

Obliging workers to trade off their health for a pay check is a dilemma that bar and restaruant workers face every day. Either they keep their mouths shut about smoke in the workplace or risk losing their jobs.

Long before the "Westray" Bill passed, Heather Crowe was drawing a comparison between restaurants and coal mines. Heather Crowe worked as a waitress for 40 years, never smoked, and now suffers from lung cancer. She has received worker's compensation as a result of the terminal illness that she got from second-hand smoke at work. During her remaining time on this earth, Heather has become an active campaigner for smoke-free workplaces. Heather is not incorrect when she says of smoky restaurants, "They are gas chambers, and they are sending the workers in there to perish." She has described herself as "the canary in the coal mine for the restaurant industry." Now that failure to provide a safe and healthy workplace has become a crime, punishable by time in jail, will Canadians start paying serious attention to "the canary in the coal mine for the restaurant industry?"

With these new Criminal Code amendments, can workers now turn their bosses in to the police if the bosses force the workers to inhale second-smoke at work?

Yes.

The continued presence of second-hand smoke in the workplace may well meet all the tests for a charge of criminal negligence causing bodily harm to be laid against the workplace owners and managers. Workers, however, will probably be reluctant to go the police and ask that such charges be laid against their bosses. Most workers don't want to risk being fired for being troublemakers. They could reduce this risk by acting collectively, either through a formal or informal group of employees or their trade union.

How can unions protect workers from second-hand tobacco smoke in workplaces where smoking is still allowed?

They can demand smoke-free workplaces for all workers.

Some Canadian unions have been very active in fighting for worker health and safety. The United Steel Workers (USW) lobbied government long and hard, urging the government to pass Bill C-45. The Canadian Auto Workers (CAW) has taken a strong position in favour of smoke-free workplaces. Now is the time for USW, CAW and all other Canadian unions to work together and use the new law to get rid of one of the biggest hazards to workplace health and safety in Canada today – second-hand tobacco smoke. Here are some things unions could do to get smoking out of workplaces:

- Demand smoke-free workplaces during contract negotiations.
- Lobby governments at all levels to make all workplaces smoke-free.
- Provide legal advice and assistance to workers to defend their legal right to a smoke-free workplace, and to ensure that the new Criminal Code amendments are enforced.

Can employers and managers now really end up in jail, just for allowing smoking in the workplace?

Yes, they can.

However, no-one really wants to send employers and managers to jail. As usual, the best way to stay out of jail is to obey the law. A demonstrated real commitment to health and safety in the workplace, including creating and maintaining a smoke-free workplace is an employer's best strategy for demonstrating due diligence for compliance with the new law. It is also good business; it will result in a happier, healthier and more productive workforce.

However, failure to create a smoke-free workplace, and to generally demonstrate a commitment to workplace health and safety, could well result in criminal charges. Criminal charges could result from *anyone* being harmed by second-hand smoke in the workplace, including employees, on-site contractors, customers or visitors. And all levels of management are responsible. Depending on the circumstances, charges could be laid against proprietors, any level of management from the lowest to the highest or against the organization itself, with the senior officers liable for time in jail.

National bar and restaurant chains that operate smoke-free establishments in municipalities with smoke-free by-laws but allow smoking in establishments elsewhere may be especially vulnerable to criminal charges. Why should they protect the health of some employees and not others?

What does the new law mean for the federal government and its actions to protect workers from second-hand smoke?

As an employer, the federal government may face the risk of criminal liability, just like other employers.

As a regulator, the federal government should move quickly to ban smoking in all workplaces under its jurisdiction. This will create a level playing field and help employers and managers live up to their new duties to provide a safe and healthy workplace.

In addition to federal departments, agencies and corporations, the federal government regulates workplace health and safety in shipping, railways, air transport, broadcasting and banking.

Recently the federal government signed the Framework Convention on Tobacco Control, signalling its intent to protect all workers under its jurisdiction from second-hand smoke.

The federal government now has many reasons to update the Non-Smoker's Health Act without delay to ensure that *all* workers under federal health and safety jurisdiction are protected from second-hand smoke at work.

Could provincial and territorial governments face criminal prosecution if they fail to pass laws and regulations to protect workers from second-hand smoke?

Criminal charges are possible if, as employers, the provincial and territorial governments fail to protect their employees.

About 90% of workers come under provincial or territorial jurisdiction for occupational health and safety. Territorial and provincial governments can help all employers and managers protect themselves from criminal liability by moving quickly to put their regulatory house in order, and make sure that all workplaces under their jurisdiction – about 90% of Canadian workplaces – are smoke-free.

What does the new law mean for municipal governments and their actions to protect workers from second-hand smoke?

Municipal governments also have a duty to make sure that workplaces under their control are healthy and safe.

Municipalities that provide no protection or only partial protection from tobacco smoke in the workplace may similarly want to help protect employers and managers from criminal liability. The surest solution to this problem is for municipalities to adopt by-laws to make all workplaces smoke-free. Otherwise, they must depend on their provincial government to make all workplaces in the province smoke-free.

Would the new Criminal Code amendments mean increased risk of criminal liability for tobacco companies?

Possibly.

Although tobacco companies have never been charged with criminal negligence, some lawyers are of the opinion that a good case could be made that making and selling cigarettes, a product known to be hazardous, is criminal negligence. It may be that, with the adoption of the new Criminal Code amendments, the case for criminal negligence against tobacco companies is even stronger. The new law requires employers to not only prevent bodily harm to workers but to *"any other person."* Could "any other person" be interpreted to include all smokers and all people who are forced to inhale second-hand smoke? Perhaps it could. Perhaps, one day, Canadian courts will provide an answer to this question.

Who can lay charges against employers and managers for failure to provide protection from second-hand smoke at work?

In theory, anyone can bring criminal charges for alleged violations of the Criminal Code. Procedures for doing so vary by province.

In practice, it is difficult for a private citizen to pursue criminal charges through the legal system. It is more usual for police to investigate a complaint and lay charges and then for a crown prosecutor to prosecute the action in court. All citizens, however, are encouraged to report suspected crimes to the police, and ask them to investigate and lay charges.

Every day, I have to work in air polluted by tobacco smoke. I can't stand it. What should I do?

Call your union, employees' association, or Physicians for a Smoke-Free Canada, and ask for help and advice.

You might have previously felt you had few options to deal with second-hand smoke in your workplace except to suffer in silence. Now, new Criminal Code amendments open up many more options to help you remedy the situation.

Thanks to this new law, in Canada, we may soon see an end to unhealthy smoke-filled workplaces.