

## Bill C-45: What P.Engs need to know

By NORM KEITH, LLB, CRSP

Professional engineers have had duties under the *Occupational Health and Safety (OHS) Act* (Ontario) since January 1, 2001. These duties require all professional engineers to ensure compliance with the act and regulations, and if they fail to do so, are liable to Ministry of Labour charges and a \$25,000 fine, or 12 months in jail, or both. These OHS regulatory obligations have now been increased by an amendment to the *Criminal Code*, known as Bill C-45.

New legislation has been passed that, for the first time, establishes a duty to ensure workplace health and safety under the *Criminal Code*. Bill C-45, which was proclaimed into force on March 31, 2004, compels all employers across Canada to demonstrate that they have met their legal obligations relating to workplace health and safety. The federal government, through Bill C-45, will also impose a new legal duty to all “organizations” whether they are federally or provincially regulated, and this will be in addition to existing occupational health and safety legislation.

### Legal duty

Part of the new legislation reads: “Everybody 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.”

This duty will apply to individuals and to organizations. Some of the key points to review are:

1. The duty applies to everyone who undertakes, or has the authority, to direct how work is performed. This duty goes beyond the title of supervisor and could even potentially involve a lead hand or a co-worker.
2. A “representative” of the organization includes a contractor. This definition

The federal government’s Bill C-45 represents what some legal authorities interpret as the “criminalization” of health and safety laws. While the bill’s impact on engineering will become more apparent in the coming months, practitioners providing advice or certification on workplace safety matters should be on the lookout for potential shortcomings in the occupational health and safety regime.

extends beyond the relationship established in most OHS legislation, and requires you to become more aware of not only your contractor’s OHS program, but also how they implement it.

3. The organization’s liability will depend on the actions of the “senior officer.” The senior officer is not just an officer or director of a corporation, but is more broadly defined to be either a person 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. This could not only involve a senior officer or director, but potentially someone in the role of plant manager or site superintendent—an individual who is responsible for managing an important aspect of the organization’s activities.

Note that the term “corporation” has been replaced by “organization” so as to deliberately capture the complex structure of businesses.

The *Criminal Code* does not establish specific criteria that must be in place or regulations that must be followed. Instead, it merely requires that “reasonable steps” be taken, and includes the penalties that

would follow if it is determined the duty was not met.

One of the key drafters of the legislation from the Department of Justice has publicly stated that, in his opinion, taking reasonable steps would imply following your OHS legislation. What must also be considered and included in your OHS management system is incorporating best practices and industry standards, so as to demonstrate that all reasonable steps are being taken. It is unclear if industry standards and best practices will now be established nationally, or if the police investigating offences under the *Criminal Code* will be influenced by OHS requirements from a particular jurisdiction. High fines are not uncommon for health and safety prosecutions; however, life imprisonment, a criminal record and the public shaming aspect of probation are far reaching to you as an individual and to your organization itself.

### Charter rights

Bill C-45 will make full awareness of your rights under the *Charter of Rights and Freedoms* more important than ever. Pre-charge rights under the charter include the right to be free from unreasonable search and seizure and the right to retain and instruct legal counsel. Documents cannot be seized by the police or other

authorities for the purpose of use in a criminal investigation without proper authorization, likely in the form of a search warrant. Further, the right to direct a lawyer and obtain legal advice is critical with the new risks and criminal liabilities of Bill C-45. Also, once charges are laid, the accused is presumed under the charter to be innocent and therefore is to receive the proper protection of their rights under the charter.

The importance of obtaining and relying upon legal advice from an expert in the area of OHS and criminal law is one of the most important rights that an accused will have under the charter, if charged with a criminal offence.

Recommended steps at this point are to become familiar with how your organization has been structured, also to identify who meets the new definitions as listed under the *Criminal Code*, with particular focus on who has the authority to direct work within your organization and through contractors. It is also worth considering consulting a lawyer to draft a response protocol for your organization to ensure all of your rights would be protected in the event of a criminal or regulatory investigation. Assess your current OHS management system to ensure that, as a minimum, your organization is currently in compliance with the requirements under the applicable OHS legislation.

Bill C-45 emphasizes the importance of integrating an effective OHS management system throughout your organization. Professional engineers now face the prospect of being charged criminally, if they direct how work is done in a manner that fails to take reasonable steps to prevent bodily harm.

The extent of the application to the profession will be determined by various cases for the courts, and also the discretion exercised by policing and Crown Attorney decision makers. However, now more than ever, the health and safety of workers and members of the public must be foremost in the minds of all professional engineers when they provide advice and certification in any manner that relates to the workplace. ❖

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