

R. V. PÉTROLES GLOBAL: THE FIRST JUDGMENT IN A DECADE TO APPLY THE NEW CANADIAN CORPORATE CRIMINAL LIABILITY REGIME

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On March 31, 2004, Bill C-45 *An Act to Amend the Criminal Code (Criminal Liability of Organizations)* came into force in Canada. Bill C-45 virtually overrode the concept of “directing mind” developed by the case law with the more extensive notion of “senior officer.” The *Criminal Code* sets out a three-pronged definition of this term:

2. [...] “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.

In a manner similar to case law rendered before the 2004 amendments, the *Criminal Code* first provides that a person who plays an important role in the establishment of an organization’s policies may expose the organization to criminal liability. Thus, the conviction of a directing mind of an organization, as defined by case law prior to the 2004 amendments, may still lead to a conviction of the organization. However, the definition in the *Criminal Code* is nonetheless broader than the concept of “directing mind”. While courts had held that a directing mind must have had the capacity to exercise decision-making authority in implementing policies, the *Criminal Code* provides that it suffices for a representative to play an “important role” in their establishment. The second part of the definition is the one that best demonstrates the legislature’s intent to broaden the criminal liability of organizations. Insofar as a representative has the responsibility for managing an aspect of activities of certain significance within the organization, even if his duties are limited to the implementation of policies, the acts or omissions of such a representative may give rise to the liability of the organization. The third definition is more straightforward: the director, chief executive officer

and chief financial officer of a body corporate are senior officers.

By triggering the criminal liability of organizations for subjective *mens rea* offences perpetrated by such “senior officers”, Bill C-45 aimed to facilitate the conviction of organizations for certain criminal offences committed in violation of the *Competition Act*, for financial fraud and other subjective *mens rea* offences committed with a view to benefit an organization. The 2004 amendments also introduced provisions with respect to sentencing and established probation conditions specifically designed for organizations.

Although Bill C-45 has been enacted over a decade ago, its provisions regarding the criminal liability of organizations (ss. 22.1 and 22.2 CrC) have seldom been applied. The first ruling on the merits regarding the criminal liability of an organization for a subjective *mens rea* offence was handed down in August 2013 by the *Superior Court of Québec* in *R. v. Pétroles Global inc. (Global)*.¹ The Court determined that Pétroles Global inc. was criminally liable for the participation of its senior officers in a retail gasoline price fixing cartel.²

BACKGROUND

Justice Tôth had to determine whether Global could be held criminally liable for the involvement of its representatives in a cartel to fix gasoline prices in the cities of Sherbrooke, Magog and Victoriaville, located in the Province of Québec. Two territorial managers who used to be employed by Global, as well as its General Manager for Québec and the Maritimes, pleaded guilty to charges of conspiracy in breach of s. 45(1)(c) the *Competition Act*. The prosecution had to demonstrate that the territory managers or the General Manager satisfied the definition of “senior officer” of the *Criminal Code* to establish the criminal liability of Global.

¹ 2013 QCCS 4262.

² Note : This ruling is currently being challenged before the Québec Court of Appeal: 2013 QCCA 1604.

Under the supervision of the General Manager, the territorial managers were required to manage, among other things, the corporate locations (service stations operated by a tenant representative) within their respective territories, to set the prices of gasoline, to maintain and repair the facilities and equipment and to interview, hire and terminate tenant representatives. They were also assigned the task of applying the “*Economics*” designed by Global’s senior management, which were laid out in spreadsheets aimed at maximizing the profitability of the service stations. The General Manager’s responsibilities included supervising of the territorial managers, ensuring the application of Global’s policies, coordinating vacations, acting as translator between senior management and territorial managers, ensuring the implementation of the *Economics* and presenting the managers’ investment proposals to the Vice-President for approval.

THE DEFENCE’S POSITION

In its defence, Global contended that the term “senior” was chosen by the legislature as to maintain the rational connection that the case law had developed prior to the 2004 amendments. Thus in Global’s argument, to be qualified as a senior officer, a representative had to be empowered with significant decision-making autonomy in managing an important aspect of the organization’s activities and possess the same intent as that of the organization. Since the territorial managers did not agree with the *Economics*, and because they only carried out policies conceived by the organization, Global argued that they did not qualify as senior officers. In the defence’s view, the territorial managers did not exercise price management because the prices “automatically” reflected the prices set by major market players in retail gasoline sales. A similar argument was made with regard to the General Manager, who only translated the information and passed on requests from the territorial managers to senior management, which ultimately made the decisions. The General Manager was not empowered to authorize major investments with respect to service stations and could only approve repairs, gas pump changes and other minor expenditures necessary for the daily operation of corporate locations.

THE CROWN’S ARGUMENTS

The Crown argued that where the legislature has clearly defined a term, the latter may not be redefined according to its ordinary meaning or the meaning assigned to it by other areas of law, such as labour law. Thus, according to the prosecution, the legislature was free to borrow a term of its choice and to re-define it as it saw fit. Since it was expressly defined, there remained no ambiguity about the term “senior officer” that the accused might use to its advantage. Nor could the defence add to the law claiming that a manager must possess significant decision-making autonomy and be part of the organization’s senior management. The prosecution argued that the legislature’s clear intent to widen the scope of corporate criminal liability dictated that the territorial managers and the General Manager should be qualified as senior officers within the meaning of s. 2 CrC.

THE RULING

The Court ultimately held that the evidence demonstrated that Global’s General Manager was a “senior officer” as contemplated by the *Criminal Code*, since he managed an important aspect of the company’s activities. To reach this conclusion, the Court considered that he supervised over 200 service stations in Québec, which corresponded to approximately two thirds of the stations operated by Global across Canada; was the third highest-paid employee of Global at that time; ensured implementation of the *Economics* developed by the senior management; and approved expenditures exceeding \$1,000 before recommending them to senior management. Justice Tóth. also noted that the fact that certain expenditures required approval from the Vice-President did not reduce the scope of the General Manager’s responsibilities. Since the General Manager met the definition of “senior officer,” the Court made no determination as to whether the territorial managers also satisfied the definition.

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In his comments, Justice T^oth explained that the legislature intended to extend criminal liability of organizations by removing the necessity of decision-making authority with respect to the establishment of policies. The purpose of the amendments was not to solely extend the definition of “directing mind” to representatives that are not members of the board of directors. Justice T^oth ruled that while the *Criminal Code* maintains the identification doctrine as the basis for the establishment of the criminal liability of organizations, it went further by establishing a “new criminal liability regime for corporations.” The Court dismissed the defence’s argument that the term “senior” implied that the officer must have had significant decision-making autonomy and be a senior executive of the organization to be characterized as a “senior” officer as such a definition would restore the notion of “directing mind” from which the legislature intended to distance itself. Justice T^oth also declined to apply the definition of “senior officer” as used in labour law and cautioned against the use of case law developed pursuant to *Qu^ebec’s Act Respecting Labour Standards* since its objective is distinct from that of the *Criminal Code*.

Pending the Court of Appeal’s judgment, certain conclusions may be drawn from Justice T^oth’s ruling:

- The definition of the term “senior officer” is auto-sufficient. It may not be construed based on statutes whose objectives are different from those of the *Criminal Code* or by reference to its ordinary meaning, for the legislature chose to define it expressly.
- The choice of the word “senior” does not add to the definition. An officer does not need to be vested with significant decision-making autonomy and be part of senior management.
- Bill C-45’s purpose was not solely to broaden the rule of identification as described by the Supreme Court in *Rh^one*. The amendments made to the *Criminal Code* constitute a new criminal liability regime, the legislature having established provisions bordering on vicarious liability.

However, the scope of the term “important aspect of the organization’s activities” remains uncertain, especially since the Court made no determination on whether Global’s territorial managers, whose management powers were more limited as compared to those of the General Manager, were “senior officers.” At any rate, the question of whether or not a representative is someone responsible for managing an important aspect of an organization’s activities is clearly an issue of fact that must be assessed in light of the specific circumstances of each particular case, including the organizational structure and activities of the organization.

IMPACT

The Superior Court has confirmed that the amendments brought to the *Criminal Code* in 2004 demonstrated the legislature’s clear intention to expand the criminal liability of organizations beyond the board of directors and senior management, even where there is no overlap of intent and power to determine the organization’s policies. Individuals responsible for managing an important aspect of an organization’s activities may now engage the criminal liability of the organization, even where such managers play no role and have no influence in the establishment of policies. It is immaterial whether or not a manager possesses significant decision-making autonomy for the establishment of an organization’s criminal liability. A mid-level manager may thus engage the criminal liability of his employer for the perpetration of competition crimes.

Prudent organizations seeking to minimize the risk of having their criminal liability engaged by the acts of their seniors officers ought to take efficient preventive measures. Courts have recognized that a compliance program such as that recommended by the Competition Bureau constitutes a mitigating factor in the event of a conviction. In addition, the adoption of such a program may also influence the Commissioner of Competition’s recommendation to PPSC prosecutors of a reduced sentence to be imposed on the convicted organization.