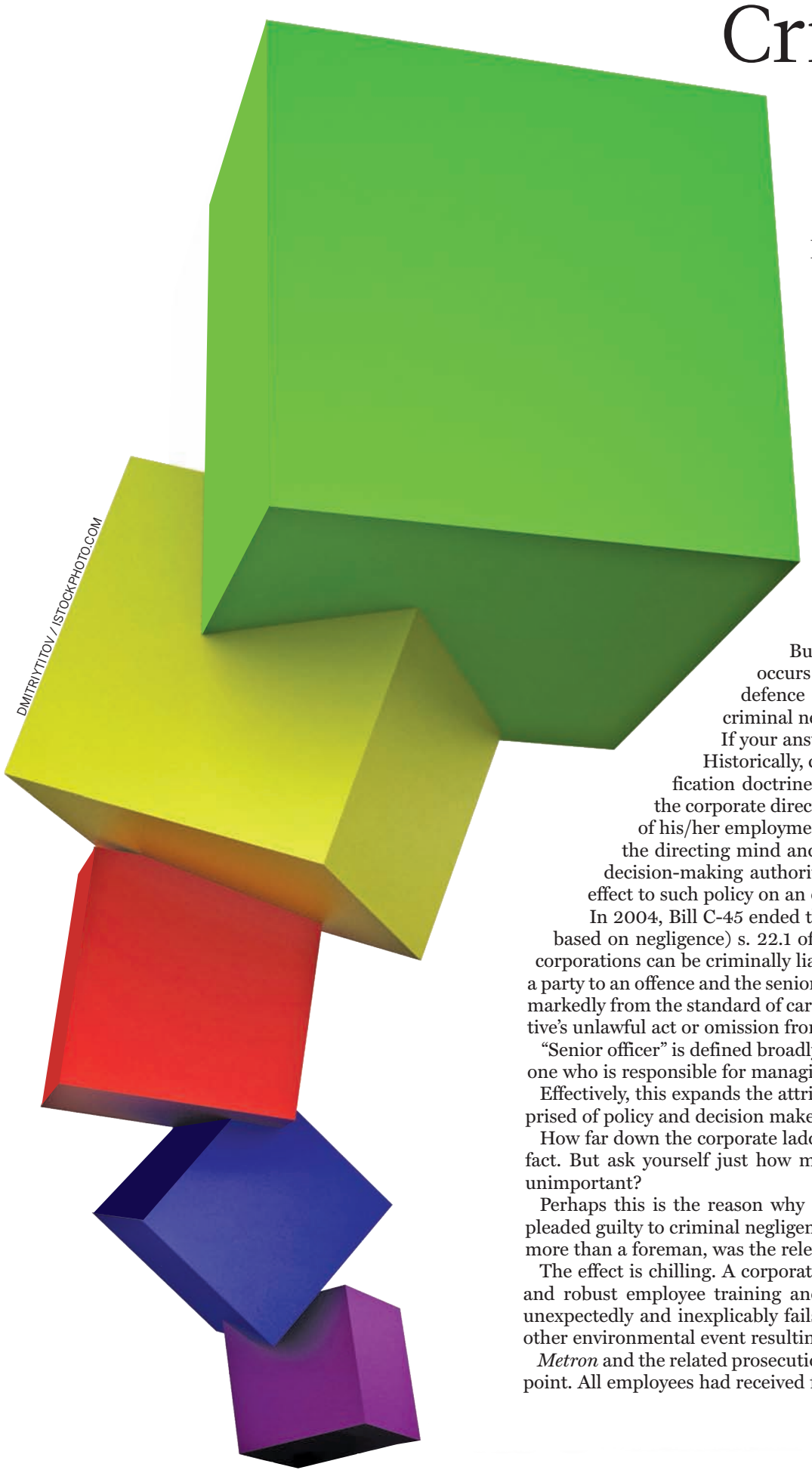
Focus

ENVIRONMENTAL LAW



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Criminal liability rises to the top

Decisions show company officers responsible for actions of subordinates

Bruce McMeekin

A robust environmental compliance system can certainly minimize the risk of a catastrophic incident occurring.

But if a disastrous spill like that in Lac-Mégantic nevertheless occurs causing serious injuries and/or fatalities, can it provide a defence insulating an organization from the risk of prosecution for criminal negligence?

If your answer is "yes," think again.

Historically, corporate criminal liability in Canada was based on the identification doctrine. It provided that corporate liability was engaged only when the corporate directing mind and will committed a criminal offence in the course of his/her employment. The Supreme Court distinguished regular employees from the directing mind and will on the basis that the latter had the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis.

In 2004, Bill C-45 ended the reign of the identification doctrine by enacting (for crimes based on negligence) s. 22.1 of the *Criminal Code*. It provides that organizations including corporations can be criminally liable if one or more of representatives (employee, agent etc.) is a party to an offence and the senior officer responsible for the area relevant to the offence departs markedly from the standard of care that could reasonably be expected to prevent the representative's unlawful act or omission from occurring.

"Senior officer" is defined broadly to not only include directors, CEOs, and CFOs, but also anyone who is responsible for managing an important aspect of the organization's activities.

Effectively, this expands the attribution of corporate criminal liability to a class of actors comprised of policy and decision makers *and* those who manage or supervise operations.

How far down the corporate ladder does s. 22.1 permit one to go? That is always a question of fact. But ask yourself just how many corporations would describe any of their operations as unimportant?

Perhaps this is the reason why in the *Metron* [2013] ONCA 541 prosecution, the company pleaded guilty to criminal negligence causing death agreeing that its site supervisor, arguably no more than a foreman, was the relevant senior officer.

The effect is chilling. A corporation can have satisfactory compliance policies and procedures and robust employee training and re-training and still be left exposed if a mere supervisor unexpectedly and inexplicably fails to act as trained, causing a gas spill and explosion or some other environmental event resulting in catastrophic harm.

Metron and the related prosecution *R. v. Kazenelson* [2015] ONSC 3639 are illustrations of this point. All employees had received fall arrest training and equipment. However, at the end of the

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Group calls for more radon testing, mitigation help

Kathleen Cooper

Whether you have heard about radon or not, chances are it will surprise you. Radon gas is a radioactive indoor pollutant that is the second leading cause of death from lung cancer in Canada, killing about 3300 people a year (according to figures taken from a recent Health Canada study).

In cancer risk parlance, the "lifetime excess cancer risk" from radon is far greater than any other indoor pollutant.

Originating from the natural breakdown of uranium in the ground, radon can enter building foundations, getting trapped indoors, even more so as we tighten buildings for energy efficiency.

It can only be detected via testing. If you caught recent TV ads with Mike Holmes urging testing, did you get yourself a test kit? You should. The three-month test needs to occur while doors and windows are closed up for winter.

Many homeowners need not worry. A cross-Canada survey of 14,000 homes found seven percent above the federal guideline of 200 Bequerels per cubic metre (Bq/m3). Targeted testing finds up to 50 per cent of homes in specific regions above the guideline (in parts of Manitoba, New Brunswick, Saskatchewan, and Yukon). However, radon is tricky. Every building should be tested since homes beside each other can record very different levels.

The federal government has shown valuable leadership. Added to their research and testing programs, the government updated the National Building Code, created a Canadian certification program for radon mitigation professionals, and continues to run extensive public outreach on the need to test.

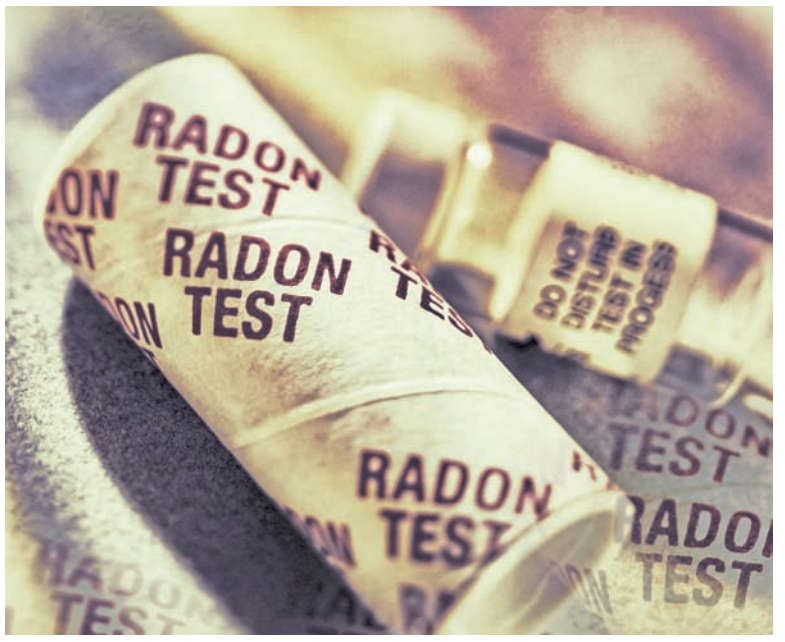
A criticism is the decision to set the Canadian radon guideline at 200 Bq/m3, a number based on out-of-date science and double the level recommended by the World Health Organization.

As well as seeking a lower federal guideline, environmental groups recommend as a logical next step a federal tax credit to help offset radon mitigation costs. Mitigation involves diverting radon away from the foundation and can run to about $3,000 per house.

In a report published during Radon Action Month in 2014, the Canadian Environmental Law Association (CELA) canvassed law and policy across Canada.

We found numerous laws potentially applicable to radon and that jurisdiction rests largely at the provincial/territorial level. In parallel, a pilot radon testing project in Manitoba child care centres heard considerable interest among participating staff but also a belief that radon testing would be unlikely to occur unless it was mandatory.

Provinces and territories have made some progress. Most of them have updated radon provisions in building codes, generally applicable to new construction and large renovations. But, the existing housing stock is largely untouched by these changes.



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In other provincial/territorial laws, there is no legal requirement of general application that requires testing, remediation of high levels, or public disclosure of test results (with the exception of occupational health and safety rules in Yukon). As well, the pan-Canadian NORM (Naturally Occurring Radioactive Materials) guidelines address radon but divergent opinion arises among officials as to whether to apply them. (They should.)

However, like public health legislation, the NORM Guidelines are complaint-driven. With radon undetectable to the senses, complaints, inspections and associated radon testing almost never occur.

In time for Radon Action Month in 2015, CELA sent a Radon Policy Challenge to provincial and territorial leaders. Based on our legal review, we sought a comprehensive, top-down and health-focused approach due to the large numbers of people affected, given that most of us spend over 80 per cent of our time in multiple indoors settings, and the diversity of relevant statutes and departmental mandates.

Hence, we asked for any remaining Building Code updates to be finalized in line with the radon provisions in the National Building Code.

We sought assurance that the NORM Guidelines be clearly applied to *all* workplaces given the fact that radon can infiltrate any building regardless of what occupation may be occurring within.

We called for legislation, supplementary guidance, and resources (where appropriate) governing public health, occupational health and safety, residential tenancies, education, and occupiers' liability to be amended. The changes would address radon and place duties on school boards, licensed child care facilities, landlords, employers, and building owners. They would ensure mandatory radon testing and radon mitigation if necessary to achieve indoor radon levels below the federal Radon Guideline reference level, and mandatory public notification of test results and mitigation strategies.

Additional legal reforms can help during real estate transactions including new or amended home warranty legislation to statutorily deem new homes to come with implied warranties of habitation that include specific reference to soil gas ingress and radon.

And for sales of existing homes, legal reforms could require property disclosure statements annexed to prescribed forms under real estate legislation so sellers will disclose whether there is a known presence of radon in their homes before signing an agreement to sell or transfer the property.

Among other recommendations we also sought comprehensive radon testing data-sharing arrangements among governments and public registries to make radon test results in public buildings, and related risk mapping, publicly available.

Radon-induced lung cancer is preventable and can result in significant health care savings. A rigorous response via broadly applicable legal requirements is an appropriate response to a significant public health issue.

Kathleen Cooper is senior researcher and a paralegal at the Canadian Environmental Law Association.

Safety: 'Senior officer' could mean anyone managing important activities

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work day on Christmas Eve, 2009, the site supervisor permitted workers to use a motorized elevation device known as a swing stage to ride down the side of the building on which they were working without ensuring the they had engaged their fall arrest equipment.

The stage collapsed and four workers, including the supervisor, fell 14 floors to their deaths. In *Kazenelson*, the defendant (sentenced to 3.5 years) was the project manager for the same project and the immediate superior of the supervisor.

He was on the stage without his fall arrest equipment engaged when it collapsed but managed to save himself by hanging on to a balcony. He had noticed that not all of the workers had their fall arrest engaged yet let the site supervisor proceed to lower the swing stage. The court applied the defendant's understanding of the fall arrest requirements to highlight his recklessness. Noteworthy, the court refused to accept the relevance of evidence tendered by the Crown that the defendant's prior conduct allegedly exhibited a general pattern of poor safety practices providing context by which to analyze his conduct. It had "nothing to do" with the offences before the court.

The foregoing is not intended to suggest that Metron should not have been convicted on the facts of that case. But s. 22.1 was enacted to deal with situations wherein serious corporate regulatory compliance failures impact public safety.

> Effectively, this expands the attribution of corporate criminal liability to a class of actors comprised of policy and decision makers and those who manage or supervise operations.
>
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By permitting fault to be attributed downstream from policy and decision makers to managers and supervisors, s. 22.1 goes much further, risking exposing corporations to liability in circumstances where one might question what more they could have done to protect the environment and the public.

Britain seems to get this point. Enacted in 2007, the *Corporate Manslaughter and Corporate Homicide Act* requires that the way in which the corporation's activities are managed or organized amount to a gross breach of a relevant duty of care.

A corporation can be found guilty only if the way in which its activities are managed or organized by its senior management is a substantial element in the breach.

Senior management is defined to mean the persons who play significant decision-making roles about how the whole or a substantial part of corporate activities are to be managed or organized, or the actual managing or organizing of the whole or a substantial part of those activities.

This may represent a more balanced approach.

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