# CORPORATE CRIMINAL LIABILITY[1]

## Corporations can be convicted of Criminal Offences in Canada

A corporation is a legal entity which is legally separate from the people who own, manage and work for it. In Canada, the *Criminal Code* allows corporations to be prosecuted for crimes.

## Identification Theory of Corporate Criminal Liability

Before 2003, the courts developed the "identification" theory to decide when a corporation commits a crime. According to this theory, if a senior representative of a corporation committed a crime in the course of his or her duties (having committed the criminal conduct with the required level of fault), and mostly for the benefit of the corporation, the corporation was also said to have committed the crime. The senior person would have to have been the responsible decision maker (or "directing mind") in the area concerned. The acts of a junior employee with no managerial authority, for instance, might have been a crime committed by the employee, but would not normally have been a crime committed by the corporation. The court decisions increasingly seemed to indicate that only a person with executive decision making power could be a directing mind.

This theory had also been criticized, in part, because for the corporation to have committed the crime, a single individual must have committed the crime. However, there may have been situations where a number of people may have done things on behalf of the corporation such that no individual may have done enough to have committed a crime individually, but the acts of a number of individuals, when viewed collectively, may have indicated that a crime had been committed.

## *Criminal Code* Reforms (2003)

In 2003, however, Parliament added special rules to the *Criminal Code* to determine when a corporation, or other organization, can be convicted for the commission of a criminal offence (sections 22.1 and 22.2). By virtue of the *Interpretation Act*, these rules apply to all federal offences.

## Criminal Fault

Every criminal offence requires "fault". Even if a person does some physical act or omission that the *Criminal Code* would describe as being the basis of an offence, the person is not guilty unless the evidence proves fault. "Fault" is often referred to as a "state of mind", the "mental element", "culpability" or "*mens rea*" (a guilty mind).

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[1] This document does not address non-criminal corporate liability, such as liability that arises from regulatory offences or civil actions.

There are many different types or levels of fault in the criminal law. These include intent, recklessness and criminal negligence. A person will be found guilty of a criminal offence only if he or she meant to do the act (intent) or knew the risks and took them (recklessness), or if his or her actions were very different (a marked and substantial departure) from what a reasonably prudent person would have done in the same situation (criminal negligence).

In the special rules for corporate criminal liability that are contained in the *Criminal Code*, there are distinct rules that apply depending on the level of fault required for the commission of the offence.

**Rules for Finding Criminal Fault for Corporations for Other than Criminal Negligence**

Most criminal offences require subjective knowledge, meaning intention or recklessness as the mental element that must be proven. For these types of offences, for the prosecution to prove that the corporation is criminally responsible, it must prove one of the following three scenarios. First, that one of the senior officers of the corporation, with the intent at least in part to benefit the corporation, and acting within the scope of his or her authority, is personally a party to the offence. Second, that one of its senior officers, with the intent at least in part to benefit the corporation and acting within the scope of his or her authority, while having the mental state himself or herself required to commit the offence, directs the work of others within the corporation to do or omit to do the act specified in the offence. Third, that a senior officer, with the intent at least in part to benefit the corporation and acting within the scope of his or her authority, knowing that an employee of the corporation is or is about to be a party to the offence, failed to take all reasonable measures to prevent that person from becoming a party to the offence.

For the purposes of the *Criminal Code*, a "senior officer" includes both representatives who play an important role in the development of the policies of the corporation, as well as those who are responsible for managing an important part of the corporation's activities.

There are a wide variety of criminal offences that fit within this category, and they need not necessarily be found in the *Criminal Code*. Examples of this type of offences include bribing a foreign public official (section 3 of the *Corruption of Foreign Public Officials Act*); bribery and influence peddling (sections 119, 120, 121, and 123 of the *Criminal Code*); fraud (section 380 of the *Criminal Code*); manipulation of stock exchange transactions (section 382 of the *Criminal Code*); price manipulation (section 383 of the *Criminal Code*); secret commissions (section 426 of the *Criminal Code)*; possession and laundering of proceeds of crime (sections 354 and 462.31 of the *Criminal Code*, respectively); crimes against humanity or war crimes under the *Crimes Against Humanity and War Crimes Act*; and terrorism offences in the *Criminal Code* by virtue of the *Anti-terrorism Act* (for example, terrorism financing).

**Rules for Finding Criminal Fault for Corporations for Criminal Negligence**

Other crimes are based on criminal negligence. In such a situation, a corporation can be found guilty of the offence if either one of its employees, acting within the scope of his or her authority, is a party to the offence or if two or more of its representatives engage in conduct, whether by act

or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence. In both cases, in order for the corporation to be found guilty, the prosecution must also show that "the senior officer who is responsible for the aspect of the corporation'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 corporation from being a party to the offence". It is clear that the corporation can be held criminally liable even when the criminal negligence cannot be found in one single representative within the corporation.

Examples of offences based on negligence include the offence of criminal negligence causing death (section 220 of the *Criminal Code*) and causing harm (section 221 of the *Criminal Code*).

**Corporate and Individual Criminal Liability**

Both the corporation itself, as well as the particular individual within the corporation, may be prosecuted and convicted for the same offence, either as principal actors in the commission of the offence, or as parties to the offence for having counselled, aided or abetted the commission of the offence. When both a corporation and an individual are prosecuted for an offence, the finding of guilt against the corporation is not dependent on the finding of guilt against the individual, and vice versa.

**Punishment of Corporations for Criminal Offences**

Corporations cannot be sentenced to imprisonment. However, when a corporation is found guilty, the *Criminal Code* provides that, except where otherwise prescribed by law, the penalty of imprisonment will be replaced by a fine of an amount in the discretion of the court for an indictable offence or a maximum amount of $100,000 for a summary conviction offence. Corporations can also receive probation orders.

**Jurisdiction for the Prosecution of Criminal Offences**

Canada has jurisdiction to prosecute offences that are committed in Canada or, in cases involving some activities in Canada and others outside of Canada, where there is a "real and substantial" link between the offence and Canada. In making this assessment, the court must consider all relevant facts that happened in Canada that may legitimately give Canada an interest in prosecuting the offence. Subsequently, the court must then determine whether there is anything in the facts that may offend international practice.

Canadian criminal law also applies to some activities conducted completely outside Canada where jurisdiction has been extended for certain offences, often linked to the implementation of international treaties (for example, for terrorism offences, genocide, war crimes and crimes against humanity). Depending on the international treaty and its bases for jurisdiction, additional bases of jurisdiction for particular offences include where Canadian citizens have either committed the offence or been the victims of the criminal offence, where the act or omission has taken place on board a Canadian registered ship or aircraft or where the offender is present in Canada after committing the offence. In addition, special rules exist for all federal offences that

are committed in the exclusive economic zone; in, above or beyond the continental shelf; outside Canada on board or by means of a Canadian registered ship or in the course of hot pursuit; or outside the territory of any state, by a Canadian citizen.

Further, a person who conspires in Canada to commit certain offences outside Canada that are also unlawful in that place may be prosecuted in Canada. Similarly, a person who conspires, outside Canada, to commit certain offences in Canada can also be prosecuted in Canada for conspiracy.

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