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International Corporate Criminal Liability in the Workplace

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Countries and the international regulatory community vary in their approach to regulating and prosecuting corporations in occupational health and safety (OHS) contraventions. Some countries focus primarily on individual liability while others focus on corporate liability. Some countries recognize no form of corporate criminal liability while others impose administrative penalties for criminal acts (Allens Arthur Robinson, 2008).

In recent years, many nations have faced increased international pressure to implement laws and standards that incorporate various forms of corporate criminal liability. As corporate globalization continues to afford companies headquartered in certain countries the ability to conduct business in other jurisdictions, the international community is beginning to recognize the importance of ensuring that corporations understand the laws and standards with which they must comply if they wish to avoid criminal liability. This article provides a survey of many approaches to criminal enforcement of OHS standards.

Australia

For the most part, criminal law in Australia is governed at the state level and can vary significantly from jurisdiction to jurisdiction. However, Australia recently passed laws at the federal level providing for corporate liability in relation to interstate offenses. These newly introduced federal laws hold corporations liable for criminal offenses where "corporate culture" has encouraged or allowed the commission of offenses.

Australia has not yet developed sentencing principles to adapt to these new offenses despite an Australian Law Reform Commission report suggesting that changes be made to the country's corporate sentencing model to bring it in line with the British Corporate Manslaughter and Corporate Homicide Act outlined below (Weisbrot, Opeskin & McCrimmon, 2006).

The organizational liability provisions in the Australian Criminal Code Act are found at Part 2.5, Division 12 of this legislation in a section titled "Corporate Criminal Responsibility" (Criminal Code Act, 1995). This section provides that if an employee, agent or officer of the body corporate commits an offense within the scope of his or her employment, the physical elements of the offense are attributed to the body corporate. It also provides that intent,

knowledge or recklessness becomes a fault element of an offense if the body corporate expressly, tacitly or impliedly authorized or permitted the commission of the offense.

To establish this element of a corporate offense, one of the following scenarios must be proven to establish the requisite authorization or permission:

- 1) The board of directors carried out or allowed the prohibited conduct.
- 2) Senior management engaged in or allowed the conduct.
- 3) The “corporate culture” of the body corporate “directed, encouraged or tolerated” the commission of the offense.
- 4) The body corporate did not create and maintain a “corporate culture” that required compliance with the law.

For the purposes of the Australian Criminal Code Act, corporate culture means “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.”

Where the fault element is negligence, meaning the corporation owed a duty of care to the public and failed to perform that duty, certain provisions apply in situations where no individual can be shown to possess requisite level of negligence. These criminal negligence provisions bear striking similarity to the majority of Canada’s OHS laws, which impose strict obligations on corporations to effectively implement, supervise, and communicate safety in the workplace.

Canada

The Canadian Criminal Code was amended on March 31, 2004, to establish a new positive duty on individuals and organizations to take “reasonable steps to prevent bodily harm” to workers, the public and others involved in workplace activity (R.S.C. 1985, c. C-46). These amendments to the criminal code also significantly changed the threshold for establishing guilt for an organization, including a corporation. Maximum penalties for the offense of OHS criminal negligence include life imprisonment for an individual and a fine with no maximum limit for an organization. Canadian law is now consistent with legal changes in Australia and Great Britain to establish crimes for “corporate killing.”

This offense fundamentally added to existing provisions under the criminal code. For example, the term “corporation” in the criminal code has been replaced with the term “organization,” which is broadly defined. This dramatically changed the fault elements of all offenses against organizations under the criminal code, and although the criminal code contains many specific criminal offenses, they constitute only a small proportion of the total number of offenses in Canada.

Most penal offenses in Canada are regulatory offenses, also known as public welfare offenses. These types may be legislatively enacted by the federal parliament, provincial parliaments, or municipalities. Regulatory offenses include highway traffic offenses, environmental offenses, and offenses for overfishing. Offenses for harmful commercial practices include misleading advertising and OHS offenses.

The prosecution is not required to show proof of intention or deliberation to establish the crime of OHS criminal negligence. However, the prosecution must show reckless disregard for the lives or safety of others. Many criminal negligence cases relate to motor vehicle accidents and

related injury and death. For example, an accused may be convicted of criminal negligence on proof of driving in a way that amounts to a marked and substantial departure from the standard of a reasonable motor vehicle driver in circumstances where the accused recognized, then disregarded an obvious and serious risk to the safety of others or gave no thought to the risk whatsoever.

The law of criminal negligence in Canada is found in Sections 219, 220 and 221 of the Criminal Code, which is as follows:

S.219:

- 1) Everyone is criminally negligent who a) in doing anything, or b) in omitting to do anything that it is duty to do, shows wanton or reckless disregard for the lives or safety of other persons.
- 2) For the purpose of this section, “duty” means a duty imposed by law.

Canadian OHS law provides for enforcement, in part, by prosecutions brought as quasicriminal, strict-liability offenses. The Supreme Court of Canada in *R. v. Sault Ste. Marie (City)* identified three different categories of offenses:

- 1) mens rea offenses;
- 2) strict-liability offenses; and
- 3) absolute-liability offenses. ([1978] 2 S.C.R. 1299).

Enforcement of OHS law against workplace stakeholders that have legal duties has been a growing trend across Canada. Enforcement of Canadian OHS laws by way of prosecution has increased since the mid-1970s. Workplace stakeholders may include the employer, supervisor, officers, directors, professional engineers, architects, suppliers, workers and others. Although many workplace stakeholders have legal duties under Canadian OHS law, employers are the primary stakeholders that are prosecuted with OHS offenses.

European Civil Law Jurisdictions

Corporate criminal liability does not exist as a concept in some EU jurisdictions, such as Bulgaria, Luxembourg and Slovakia. In other jurisdictions such as Germany, Greece, Hungary and Sweden, corporations face regulatory sanctions for the criminal acts of their employees.

In Finland, corporate criminal liability came about in 1995. It is borne of acts by management or decision makers, and the corporation may be subject to fines whether the natural person carrying out the acts can be identified or not. A corporation can also attract liability if an agent, employee, manager, or person taking informal instruction from a representative of the corporation acts in a manner that benefits the corporation.

In a sense, the liability resembles a mixture of the identification theory favored in commonwealth countries and the vicarious liability approach favored in the U.S. Prosecutors have discretion as to whether to bring charges against the corporation. It must be noted that legal persons have been subject to criminal liability very rarely.

In 2005, criminal corporate liability was introduced in Austria. It covers acts by employees and decision makers, however, contractors and agents are not covered. The offending act must be for the benefit of the entity or in breach of the entity’s duties. It may require intent (i.e., mens

rea) on the part of the decision maker. Finally, liability may be incurred due to negligence stemming from the organizational culture of the corporation.

In 1999, criminal liability for corporations was introduced in Belgium. It covers acts for the benefit of the corporation or offenses on behalf of the corporation. In 1996, corporate criminal liability was introduced into law in Denmark. It covers acts by anyone connected with the legal person acting negligently or with intent, within the legal person. In Iceland, corporate criminal liability may attach to the acts of any natural person acting on the corporation's behalf, even if the natural person cannot be identified.

Japan

Generally, criminal liability for corporations does not exist under Japanese law. The Japanese Penal Code contains no provision for corporate criminal liability [Keiho (Penal Code), Act No. 45 of 1907, Art. XXXX, No. XXX-XXX]. On the other hand, Japan has in place a process of corporate liability that operates in parallel to the liability incurred by natural persons. Under this system, when a natural person commits a crime, the corporation will be liable for fine if that person is an agent of a corporation or if that person is an employee and the corporation is negligent in supervising that employee.

Unlike circumstances in the U.S. or the U.K., there is no consideration of whether the employee was acting as the mind of the corporation or for the benefit of the corporation.

New Zealand

Organizational liability for criminal acts in New Zealand is found in the Crimes Act 1961, which applies to acts by a "person," which include "any board, society, or company, and any other body of persons, whether incorporated or not" [Crimes Act 1961, 1961 (N.Z.), No. 43, s. 2 (1)]. One notable exception is the offense of homicide, which is specifically defined as an offense that must be committed by a human being.

The leading case on this subject is *Meridian Global Fund Management Asia Ltd vs. Securities Commission* [Meridian (1995) 2 AC 500 PC]. In that case, the issue revolved around whether a corporation could be said to have had knowledge of the illegal acquisition of securities when employees, who had the authority to acquire such securities on the corporation's behalf, knowingly committed the offense.

The court cited public policy reasons in its decision noting that if a corporation could not be said to possess the requisite criminal knowledge in the situation outlined above, then senior corporate managers and directing minds would be provided with substantial incentive to avoid monitoring the activities of corporate agents to protect the corporation from criminal liability. New Zealand, like Canada, has not yet followed the U.K. in the enactment of legislation creating corporate liability for manslaughter as outlined below.

United Kingdom

The U.K. recently passed the Corporate Manslaughter and Corporate Homicide Act 2007 (UK) (referred to as the Corporate Manslaughter Act in England and Wales and the Corporate Homicide Act in Scotland (CMCHA)). Prior to CMCHA's introduction, corporations could only be held liable if a "directing mind" of the organization had been found guilty of an offense, which would then be imputed to the organization (Corporate Manslaughter and Corporate Homicide Act 2007, Explanatory notes).

Under CMCHA, corporations will be guilty of an offense when the manner in which corporate activities are managed or organized amount to a gross breach of a relevant duty of care that causes death of a person. For the organization to be found guilty of such an offense, the activities of a senior manager must play a substantial role in the breach [Corporate Manslaughter and Homicide Act 2007 Chapter 19 s.1 (1), (2), (3)]. In turn, a senior manager is defined as a person who plays a significant role in making decisions about the management and organization of the corporation or who plays an actual role in those activities.

CMCHA provides that organizations owe the following duties of care: 1) duty to all employees or other persons working for the organization; 2) duty to the public as the occupier of a premises (workplace); 3) duty in connection with the supply of goods and services; 4) duty in constructing or maintaining buildings; 5) duty for infrastructure or vehicles, etc. or when using plant or vehicles, etc.; and 6) duty when carrying out other activities on a commercial basis.

A gross breach of the duty of care under the act arises if the conduct “falls far below what can reasonably be expected of the organization in the circumstances.” CMCHA works in concert with the Health and Safety Work Act 1974 and, like in Canada, parallel prosecution under both the regulatory and criminal regimes is possible.

United States

Currently, the OSH Act is the primary source of corporate criminal liability for crimes relating to health and safety in American workplaces. The act includes offenses that are similar to “regulatory” or “public welfare” offenses in Canada, known in the U.S. as misdemeanors and more serious offenses similar to those found in Criminal Code of Canada. Corporations may be prosecuted under the OSH Act as “employers.” Section 6 of the OSH Act outlines the standards that must be followed by employers, however, Section 17 restricts the more serious prosecutions outlined above to those employers convicted of having “willfully violated” an OSHA standard resulting in the death of a worker.

Corporations in the U.S. are held “vicariously liable” through the actions of the corporate directing minds and those employees who act to advance the corporate interests. So restricted has the use of the most serious penalties allowed under the OSH Act that only eight prosecutions have resulted in the imposition of imprisonment (<http://www.pbs.org/wgbh/pages/frontline/shows/workplace/osha/referrals.html>).

Individual U.S. states also play a limited role in regulating corporations in the management of safety and health in the workplace. However, state laws relating to safety and health violations are very limited and such laws vary widely from state to state, with some providing a variety of sanctions for corporations while others rely solely on regular criminal sanctions for individuals, such as criminal negligence laws, to regulate corporate entities through directing minds.

As of yet, the U.S. has not enacted a comprehensive system of laws specifically designed to hold corporations and other organizations criminally liable for management decisions that result in criminal offenses. However, as demonstrated through the OSH Act, situations exist in which a corporation may be subject to serious penal sanctions.

Conclusion

The international regulatory community is moving toward more strict regulation and criminalization of workplace safety and health. Employers who work in more than one

jurisdiction must be aware of these trends. Employers must also have an effective safety and health policy and program to manage workplace risk.

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