

Work Safety Offences may soon be in *Criminal Code*

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A fascinating and frightening potential change to the *Criminal Code* of Canada is being seriously contemplated by both the Federal Minister of Justice and the Attorney General of Canada.

In November 2002, it was announced that the federal government will take action to expand corporate criminal liability in a number of areas. A particular focus of the government's commitment to take action involves a plan to make corporations properly account-able when they recklessly endanger the safety of the public and workers in the workplace.

The concept of finding corporations and their senior management responsible for negligent actions that cause workplace deaths and injuries is not new. In the United States, company presidents and other senior management have been convicted criminally of murder and similar criminal offences and have gone from "pinstripes to prison stripes" on many occasions over the years. In Canada, a number of prominent writers have for years advocated an approach of treating corporate actions resulting in workplace fatalities and injuries as "crimes".

The Report of the Westray Mine Public Inquiry ("The Westray Story: A Predictable Path to Disaster" released November 1997) called for the federal government to produce amendments to the *Criminal Code* as necessary to ensure that corporations, and their executives and management, are held properly

accountable for workplace safety and for their wrongful or negligent acts which cause workplace injuries and fatalities.

The Westray Report scathingly attributed responsibility for the mine explosion that occurred in 1992 to the actions of management in "trivializing and ignoring safety concerns," placing production demands above safety, having an "absence of safety ethic ... which manifested itself through every facet of the operation," and in actively discouraging meaningful dialogue on safety issues.

The government, it seems, is now proceeding rapidly in the direction of adopting some of the Westray Commission's recommendations. The government is committed to introducing specific legislative proposals in the House of Commons by spring 2003.

What proposed corporate criminal liability provisions may look like:

In 2002, a federal government committee, called the Standing Committee on Justice and Human Rights, issued a report which recommended that the government table legislation in the House of Commons to deal with the criminal liability of corporations, directors and officers.

On Nov. 7, 2002, the federal government filed its response to the Report of the Standing Committee, bluntly stating that the conclusion of the Standing Committee that legislative change is required is accepted, and promising to present specific legislative proposals in the House of Commons in 2003.

These legislative proposals would not supersede current regulatory provisions in the *Occupational Health and Safety Act* and in other regulatory statutes, but would create new, additional, "criminal" offences for corporations and individuals who fail to protect workers and the public. No specific legislative proposals are available as yet. However, the government's response indicates that legislative changes may very well involve the following:

1. Changes to eliminate “directing mind” requirement so it is easier to criminally convict corporation

Legislative changes to the *Criminal Code* will take a more expansive approach to corporate criminal liability. The government will attempt to eliminate an existing barrier to prosecution for criminal negligence. Currently the corporation can only be convicted if the “directing mind” of the corporation has the necessary intent for criminal conviction and has been involved in criminal activities or actions which demonstrate the necessary criminal intent to convict the corporation.

In at least one attempt to utilize the criminal law to convict a corporation of criminal negligence in Canada, the corporation was not convicted because the court was not satisfied that any one “directing mind” had intentionally been reckless or had violated a criminal standard. Proposals would allow corporate criminal liability to arise where individuals who exercise delegated, operational authority, have been involved in activities or actions which demonstrate the necessary criminal intent to convict the corporation.

2. Changes to make it easier to criminally convict corporation for reckless or negligent OH&S-related behaviour

Criminal Code provisions would be amended so that the offence of criminal negligence could be proven based on the actions and moral fault of the corporation as a whole. For , if managerial officers and employees who reasonably ought to have known what was happening (*e.g.*, an inappropriate safety practice, ignoring of safety rules or physical measures to protect workers) and were reckless, the corporation could be convicted.

Further, where managerial officers were not reasonably diligent in establishing or monitoring mechanisms for compliance with corporate policies as a whole, and were reckless as a result, this could lead to a conviction of the corporation. It is

also suggested that the corporation could be criminally negligent if it allowed senior officials to insulate themselves so that instances of safety violations would not come to their attention.

3. Changes to make it easier to criminally convict corporation for intentional OH&S "crimes"

Criminal Code offences that require clear intent (*mens rea*), and not simply recklessness or criminal negligence, would be amended to create corporate criminal liability where a "directing mind" or person exercising operational authority formed the necessary intent to commit the crime, and had the intention of benefiting the corporation. It is suggested that this type of corporate criminal responsibility could arise where a person with operational authority fails to take remedial action when they are aware of the fact that one or more employees are committing a criminal offence on behalf of or for the benefit of the corporation.

4. Changes to create positive OH&S duties for employers, supervisors, managers within Criminal Code

While the primary focus of the Standing Committee Report is directed to corporate criminal liability, it is also suggested that the *Criminal Code* be amended to create an explicit positive duty for any person directing work or employing others or who has the power to direct how work should be done. This positive duty would include taking reasonable steps to ensure the safety of workers and the public. This is a very specific new duty, which the government has specifically suggested will be enshrined in a new section 217.1 of the *Criminal Code*. This would place this obligation firmly within the other criminal negligence-related provisions of the *Criminal Code*. What is reasonable to ensure the safety of workers will vary with the nature of the work and the experience of the workers. What is reasonable may very well parallel existing court-developed standards for "due diligence" under regulatory statutes.

Implications for Ontario and Canadian corporations and corporate officials

While these proposed potential changes to the *Criminal Code* are at an early stage, it is not too early to comment on potential implications for corporations and any corporate official who might have a new positive duty under the *Criminal Code*, or whose actions could result in criminal conviction for themselves or the corporation under these new provisions.

The stigma of criminal charges and criminal conviction for both corporations and corporate officials may motivate more significant and concrete action to review occupational health and safety programs and practices. If ever there were a motivation to review and exercise “due diligence” at both a corporate and individual level, this is it.

Any corporation or individual who has the misfortune to have a serious or fatal accident occur at the workplace could well face the prospect of parallel OH&S regulatory investigations and charges, as well as a criminal investigation and criminal charges, proceeding simultaneously. Procedural protections for individuals and corporations have been increasing in the regulatory sphere, and criminalizing” the failure to take reason-able steps to protect workers and the public will result in still greater protections at the investigative stage than have existed previously where regulatory bodies investigate OH&S charges. Corporations should know those procedural protections. They should also be conducting a careful review to ensure that corporate steps for taking “due diligence” are in order to both prevent accidents and negative consequences upon criminal or regulatory prosecution.

OH&S practitioners, corporate counsel across Canada, and corporate representatives across Canada, will be well advised to note the current serious commitment to “criminalize” behaviour that is now only subject to regulatory

sanctions. All of these parties will wish to carefully watch for further developments in this area.

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