

A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions:

CANADA

The following is part of a larger project looking into the potential liabilities facing companies under public international law, specifically the laws governing genocide, crimes against humanity, and international humanitarian law. This survey is intended to assist in decisionmaking by companies, governments, and affected communities. It is not intended as a definitive description of liability or culpability under the law in Canada or internationally. It is not specific to any particular case or situation and is intended to be the basis for further research.

I. Status of business entities under criminal law:

1. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?

Yes. Business entities are included within the definition of “person” within the Criminal Code (R.S. 1985, c-46), under section 2: ““every one”, “person”, “owner”, and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.” See *Interpretation Act*, R.S. 1985, c. I-21, governing the interpretation of federal law, s.35: “In every enactment ... person, or any word or expression descriptive of a person, includes a corporation.” For its part, the Criminal Code of Canada specifically provides that the terms “‘every one’, ‘person’, ‘owner’, and similar expressions” used to describe who is liable for most offenses in the Code “include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.” Criminal Code, R.S. 1985, c. C-46, s.2. For a discussion of the Canadian approach to criminal corporate liability, and particularly how *mens rea* is determined, see *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 (S.C.C.).

The Criminal Code definition of “person” also applies to the use of the word “person” within the Crimes Against Humanity and War Crimes Act (hereinafter CAHWCA) [(2000, c.24)], under section 2(2), which states: “Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*.” Section 4 of the CAHWCA (listing the crimes of genocide, crimes against humanity and war crimes committed within Canada) begins “Every person is guilty of an indictable offence who commits...” and section 6 (listing these same crimes committed outside of Canada) begins “Every person who, either before or after the coming into force of this section, commits outside Canada...”

2. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:

a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business?

Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662 (S.C.C.) establishes an “identity doctrine” that merges the board of directors, the managing director, the superintendent, the manager or anyone else to whom was delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby

attributed to the corporation. The directing mind, as a prerequisite to the theory's operation, must act within the scope of his authority, that is, his/her actions must be performed within the sector of the corporate operation assigned to him/her. The sector may be functional, or geographic, or may embrace the entire undertaking of the corporation. It is no defense to the application of the identification doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing. Liability can arise whether or not there be formal delegation, awareness of the board or directors, or express prohibition.

The outer limit of the delegation doctrine is, however, reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee-manager, the employee-directing mind, from the outset of the design and execution of the criminal plan, ceases to be a directing mind of the corporation and consequently his/her acts cannot be attributed to the corporation under the identification doctrine. Thus, the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him/her; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.

- b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present?**

See discussion of the identity theory above.

- 3. Under your criminal code (penal law), what is the legal standard for convicting someone of aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?**

Sections 4(1.1) and 6(1.1) of the CAHWCA state: "Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence." Under these sections, the punishment is listed in subsection (2) as imprisonment for life, if an intentional killing forms the basis of the offence, or liability to imprisonment for life in all other cases. Additionally, the Criminal Code provides that "every one is a party to an offence who ... (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing." See s-s. 21(1). Essentially, abetting means "to encourage or set on," and an abettor as "an instigator or setter on, one who promotes or procures a crime to be committed." See, e.g., *R. v. Salajko*, [1970] 1 O.R. 824 at 826 (Ont. C.A.). "Aiding" means "to assist or help the actor." *R. v. Greyeyes*, [1997] 2 S.C.R. 825 at 837 (S.C.C.), per Cory J. The offence has both an *actus reus* and *mens rea* element. The Crown must show "not only that the accused encouraged the principal with his or her words or acts, but also that the accused intended to do so." *Ibid* at 842. However, the Supreme Court has held that a person may be convicted of manslaughter "who aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken." *R. v. Davy*, [1995] 4 S.C.R. 573 at 583.

Conspiracy is also criminalized in the Criminal Code. *See, e.g.*, paragraph 465(1)(a), making it an offense to conspire “with anyone to commit murder or to cause another person to be murdered, whether in Canada or not ...”. The core of conspiracy is an “agreement to perform an illegal act or to achieve a result by illegal means.” *R. v. Douglas*, [1991] 1 S.C.R. 301 at 316 (S.C.C.). There must be “an intention to agree, the completion of an agreement, and a common design.” *United States v. Dynar*, [1997] 2 S.C.R. 462 at 500 (S.C.C.).

Section 14(1) addresses the issue of superior orders, eliminating the defence of superior orders as follows: “(1) In proceedings for an offence under any of sections 4 to 7, it is not a defence that the accused was ordered by a government or a superior – whether military or civilian – to perform the act or omission that forms the subject-matter of the offence, unless, (a) the accused was under a legal obligation to obey orders of the government or superior; (b) the accused did not know that the order was unlawful; and (c) the order was not manifestly unlawful. (2) For the purpose of paragraph (1)(c), orders to commit genocide or crimes against humanity are manifestly unlawful.” This defence could apply in cases involving individuals from business entities, as “superior” includes civilian superiors, including Boards of Directors, management, etc. In addition, section 14 contains another limitation on defence: “(3) An accused cannot base their defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group.” For example, hate literature or hate propaganda cannot be relied upon.

Section 25(2) of the CAHWCA addresses offences against the administration of justice of the International Criminal Court found in sections 16-23 (such as obstructing or bribing officials or committing perjury) committed outside of Canada. It states: “Every person who, being a Canadian citizen, commits outside Canada an act or omission that if committed in Canada would constitute conspiring or attempting to commit, being an accessory after the fact in relation to, or counseling in relation to, an act or omission that is an offence or a contempt or court under subsection (1) is deemed to have committed that act or omission in Canada.” A similar approach to conspiracy and attempt is found in section 26, which addresses retaliation against International Criminal Court witnesses. If the crimes found within sections 16-26 occurred in Canada, the sections of the Criminal Code addressing conspiracy and attempt would apply.

Section 27 of the CAHWCA, relating to possession of property or proceeds of property derived from genocide, crimes against humanity, war crimes, breach of responsibility of a military commander or a superior, or offences against the administration of justice of the International Criminal Court, also states that no person shall possess the proceeds of crime gained as a result of “a conspiracy or an attempt to commit, being a party to, being an accessory after the fact in relation to, or any counseling in relation to, an offence referred to in any of paragraphs (a) to (d)” [genocide etc.]. The same prohibition is found in section 27, relating to laundering of proceeds of crime.

4. Are there any other special elements not required in the conviction of a natural person that must be present when the defendant in a criminal proceeding is a business entity?

No, there are no provisions of the CAHWCA that specifically address business entities only, subject to satisfaction of the identity theory for offenses for which there is a *mens rea* element.

II. Status of International Law/International Humanitarian Law in your Country's Legal Framework:

5. May an individual be prosecuted for violations of international law in the courts of your country?

Not directly. International law is generally not considered part of Canadian law unless received as part of Canadian law through an Act of Parliament (or the provincial legislatures, as the case may be). Thus an international legal crime cannot be prosecuted as such in Canadian court until articulated or incorporated in a Canadian statute. Certain international war crimes and crimes against humanity have been articulated as Canadian crimes in the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

The CAHWCA provides for the prosecution in Canada of genocide, crimes against humanity, war crimes, breach of responsibility by a military commander or a superior (usually a civilian superior), offences against the administration of justice of the International Criminal Court and possession or laundering of proceeds derived from these crimes. The CAHWCA implements domestically the Rome Statute of the International Criminal Court. Genocide, crimes against humanity and war crimes are defined in the CAHWCA in accordance with customary and conventional international law [so, for example, the Genocide Convention would be taken into account in the prosecution of genocide], as well as the general principles of law recognized by the community of nations. The CAHWCA also makes it clear that the crimes listed in articles 6, 7 and 8(2) of the Rome Statute (genocide, crimes against humanity and war crimes in internal and international armed conflict) are crimes according to customary international law as of July 17, 1998 (date of adoption of the Rome Statute).

Jurisdiction under the CAHWCA is wide and includes jurisdiction based on both active and passive personality, as well as universal jurisdiction as presently defined under customary international law (i.e. containing a presence requirement). Section 8 states that, for offences committed outside of Canada, “A person who is alleged to have committed an offence under section 6 [genocide, crimes against humanity or war crimes committed outside of Canada] or 7 [breach of responsibility of a military commander or a superior outside of Canada] may be prosecuted for that offence if (a) at the time the offence is alleged to have been committed, (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity, (ii) the person was a citizen of a state that was engaged in armed conflict against Canada, or was employed in a civilian or military capacity by such state, (iii) the victim of the alleged offence was a Canadian citizen, or (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or (b) after the time the offence is alleged to have been committed, the person is present in Canada.

6. May a business entity be prosecuted for violations of international law in the courts of your country?

Yes, as long as those crimes have been implemented into domestic law, as Canada is a dualist system. The international crimes of genocide, crimes against humanity, war crimes and breach of responsibility of a military commander or superior (usually called superior or command responsibility in international law) have been incorporated into Canadian law through the CAHWCA. However, companies are not explicitly included or excluded from prosecution where international crimes may be prosecuted in Canadian law.

III. Alternative Mechanisms: Civil Law/Tort:

7. Are there any bases in your country's tort law (civil law) for suing individuals and/or business entities for violations of international law?

There is no ATCA equivalent in Canada. In fact, there is uncertainty as to whether there could ever be a federal ATCA or whether each province would have to enact such a law.

To the extent that international crimes or wrongs also constitute injuries of the sort cognizable as a tort, civil law remedies would be available in Canadian courts. Generally, there would be no bar on subject matter jurisdiction for such a wrong and, should the defendant corporation be incorporated in the Canadian court's province, there would likely be no issue of personal jurisdiction. The plaintiff would not need to be a Canadian resident or citizen and Canadian courts generally favour a plaintiff's right to choose their forum. However, Canadian courts follow the common law doctrine of *forum non conveniens*, a discretionary principle allowing a court to decline to hear a matter where there is a stronger connection to a foreign jurisdiction. In deciding whether to apply this doctrine, Canadian courts will look to such things as the place where the harm occurred, the location of the witnesses, which law applies, etc. While it did not involve an alleged wrong of international law, a classic case applying *forum non conveniens* to defeat a tort action brought by foreign plaintiffs against a Canadian company is *Recherches Internationales Quebec v. Cambior*, [1998] Q.J. No. 2554 (Que. S.C.), (QL), (14 August 1998).

8. What types of causes of action might be asserted against a business entity with respect to actions committed outside of your country but which involve a business entity that is domiciled in your jurisdiction?

Assuming that the applicable law to be applied is the law of Canada, pursuant to a conflicts of law analysis, any of the traditional civil causes of action could presumably be employed in such a case (though property actions at common law sometimes may require that a case be brought at the *situs* of the property in question).

IV. Jurisdiction:

9. On what bases do the courts of your country assert jurisdiction over criminal and civil defendants?

For civil jurisdiction, the court requires a "real and substantial connection" with the subject of the litigation. *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1049 (S.C.C.) Also known as jurisdiction *simpliciter*, this issue usually only arises where someone is served *ex juris*, in which case a question arises as to whether the court has personal jurisdiction over the defendant. Special rules on when such service will be permitted exist, I believe, in the civil procedure rules of each province. *In juris* service to a defendant ordinarily resident in a province likely meets the test.

For criminal jurisdiction, Canadian courts generally may only prosecute those crimes committed within Canadian territory. *See R. v. Finta*, [1994] 1 S.C.R. 701 at 805-806; Criminal Code, s-s. 6(2). There are exceptions. First, some crimes may have a "real and substantial link" to Canada. *See, e.g., R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.). What this means is far from clear, but one reasonable interpretation is that there is a continuity of the

acts that constitute the crime from one state to Canada (i.e., some portion of the activities constituting the crime took place in Canada) or that there is harm in Canada.

Second, there are special extraterritorial crimes that may be prosecuted in Canada. *See, e.g., Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24. Jurisdiction under the CAHWCA is wide and includes jurisdiction based on both active and passive personality, as well as universal jurisdiction as presently defined under customary international law (i.e. containing an presence requirement). Section 8 states that, for offences committed outside of Canada, “A person who is alleged to have committed an offence under section 6 [genocide, crimes against humanity or war crimes committed outside of Canada] or 7 [breach of responsibility of a military commander or a superior outside of Canada] may be prosecuted for that offence if (a) at the time the offence is alleged to have been committed, (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity, (ii) the person was a citizen of a state that was engaged in armed conflict against Canada, or was employed in a civilian or military capacity by such state, (iii) the victim of the alleged offence was a Canadian citizen, or (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or (b) after the time the offence is alleged to have been committed, the person is present in Canada.

10. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

See discussion of jurisdiction in questions 7-9 above.

11. Do the courts in your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?

See discussion in question 7 above.

12. Would the doctrine of sovereign immunity be applicable to protect a state-owned enterprise?

Under section 48 of the CAHWCA (as it amended the Extradition Act by adding section 6.1), claims of individual immunity (e.g. diplomatic impunity) cannot be used to prevent Canada from surrendering an individual to the International Criminal Court.