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**Rethinking Theories of Corporate Liability in Criminal Law: Pushing the
Legislative Envelope – a Comparison of Canadian, American, and English
Developments**

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Corporate Criminal Liability

Introduction – Principle means of finding corporate criminal liability

How to find the corporation liable for criminal offences involving mens rea as an essential element, has posed one of the most difficult problems for the judiciary, law makers and our society. Even before the advent of the corporation as an actor in its own right in matters touching all parts of modern lives, the need for accountability existed. In England, the United States and Canada, corporate criminal liability had been almost exclusively achieved by development and extension of common law principles. Unheard of until the middle of the 19th century corporate criminal liability began to be imposed in strict liability offences only and only much later to full mens rea offences. And it was in this evolutionary basis for the finding of liability the three jurisdictions parted company.

While three principle means of finding liability had emerged; in Canada, England and Wales, identification theory for mens rea offences, vicarious liability applied in the United States, and a corporate culture or holistic approach notably in Australia, none had satisfactorily achieved to the legislators, particularly in Canada a level of a satisfaction or accountability necessary in the twenty-first century. Increased delegation, the existence of numerous corporate offices and changing corporate structures made proof that an individual acting for the company was at a level to be “the directing mind and will” of the company for the purposes of founding criminal liability for mens rea offences, difficult and in numerous cases, impossible to achieve.¹ Law reform initiatives in jurisdictions which had formerly adopted the identification theory model of criminal liability of corporations led to a rethinking of corporate criminal liability in Canada. The earliest

¹ note this paper is brief overview of true crimes or mens rea offences, with an emphasis on the Canadian developments. Portions will be expanded upon at the Plenary. Any views expressed herein are those of the author in a personal capacity and do not represent the views of the Ministry of the Attorney General for British Columbia.

For the Australian definition of corporate culture see for e.g. Final Report Criminal Law Officers Committee of the Standing Committee of Attorneys-General, General Principles of Criminal Responsibility 501.2.2 “Corporate culture” is an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place.

charge was led in Australia and culminated in the changes to the Australian *Criminal Code Act 1995* found in Part 2.5 Division 12 and this development did not go unnoticed in reform circles in Canada (note for an interesting discussion of “corporate culture see *Imagining How a company Thinks: What is Corporate Culture?* Alice Belcher, Deakin Law Review Vol 11 No. 2, 1 a comparison of the UK developments to the Australian reforms effected at the Commonwealth level not yet implemented in the States).

In Canada ongoing analysis had been made of other common law jurisdictions, notably Australia, the United Kingdom and the United States, from in which legislative reform had been used to effect change.² The final impetus to legislate change from the common law had its genesis in several notorious events in Canada including the Westray mining disaster and awareness of developments south of the border notably Enron and Worldcom. Ultimately revolutionary changes were effected in 2003 with the legislative amendments marking the greatest change to the landscape of corporate criminal liability to have ever occurred in Canada. The Amendments to the Canadian Criminal Code (Corporate Criminal Liability) also known as Bill C 45 were proclaimed in force March 31, 2004. While little impact has yet to be seen, it is clear existing jurisprudence in Canada and England can no longer serve as a guide, given the identification doctrine no longer exists given the Criminal Code amendments. This paper explores the changes in Canada, the evolution of the Canadian doctrine from the English and examines the increased parallels to our American neighbours in the area of corporate criminal liability.

Have the recent federal amendments particularly those in Canada achieved corporate criminal liability where necessary? What is the corporate response?

Background in a nutshell: how to find corporate criminal liability

² Department of Justice Canada, Corporate Criminal Liability Discussion Paper 2002 http://www.justice.gc.ca/en/dept/pub/ccl_rpm/discussion/background.html) following upon numerous works including 1987 Report by the Law Reform Commission of Canada, a study by a Sub-committee of the House of Commons Standing Committee on Justice and the Solicitor General in 1993 and a white paper issued by the Department of Justice in 1993.

How to find an entity made of paper guilty of a criminal offence had been believed impossible. As noted by Professor Kathleen Brickey in her authoritative work of the American system in *Corporate Criminal Liability*³ as early as Blackstone's commentaries it was pronounced that a company cannot be found liable of a criminal offence "A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may in their distinct individual capacities" (1 W. Blackstone, Commentaries 476). In the case *Anonymous*, 88 Eng. Rep. 1518 (K.B. 1701) notable as well for its brevity the entirety of the judgment is "per Holt, Chief Justice. A corporation is not indictable, but the particular members of it are"⁴ still applies notably many civil code jurisdictions see brief discussion of application in Parliamentary research Branch Legislative Summary Bill C-45 An Act to Amend the Criminal code (Criminal Liability of Organizations 2003 David Goetz). This belief persisted for some time. The rejection of a doctrine of corporate criminal liability largely had its genesis in the imposition of punishment. Most serious criminal offences required the imposition of punishments ranging from the death penalty to imprisonment. Theories of vicarious liability however began to be applied in cases up to the mid-nineteenth century. Inroads changing this belief began in earnest at the turn of the twentieth century. Strong policy reasons required this change to ensure accountable to society.

Early in the twentieth century, adopting existing constructs and doctrines was the believed solution. The United States developed accountability on the basis of vicarious liability *respondeat superior*. The landmark case of *New York Central and Hudson River Railroad Company v. United States* formed a key foundation for all subsequent evolution of the theory of corporate accountability in respect of mens rea offences or true crimes. In that case the Railroad company and its assistant traffic manager were convicted for giving rebates to a particular Sugar refining company upon shipment of sugar. The Supreme Court adopted and extended vicarious liability expressly rejecting the doctrine that a corporation cannot be held criminally liable.⁵

³ Callaghan and Company, Wilmette Illinois, 1984

⁴ Case 935 ANONYMOUS, 88 Eng. Rep. 1518 (K.B. 1701) The maxim *societa delinquere non potest* (companies cannot commit an offence).

⁵ 212 U.S. 481, 53 L.Ed. 613

This approach was expressly rejected in Canada and instead adoption of a modified version of the English identification doctrine was effected in Canada.⁶ The identification doctrine was so called because the personal accused who committed the offence while working for the company was to be identified with the company for the purposes of attributing his or her mens rea and actus rea to the company thereby finding it capable of being convicted. However, the identification doctrine failed to capture many corporate acts thought by many to be ones to which the corporation should be accountable criminally. It was argued as well the prosecution was held to too high a standard to find a directing mind who satisfied the modified in the House of Lords test⁷.

Evolution of Corporate Criminal Liability in Canada pre- Criminal Code amendments – from wide to restrictive

Background Position in England

The identification doctrine, the imputing of both the act and the requisite mens rea to the company through the identification with an individual acting for the corporation, is the means by which the corporation is held criminally liable in England. But not merely any employee can suffice. Frequently considered in cases involving attribution of acts to the company, the words of Lord Denning in *H.L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159 are cited in instances where the corporation is found liable even where the board of directors may not have been aware of the specific acts making up the crime and hence the “directing mind” of the actor whose acts and intent is attributed to the company.

Presaging the delegation reasoning and ultimately a chief reason advanced as the necessity of the legislative change in Canada, his Lordship stated at page 172

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also had hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors

⁶ Estey J. in *R. v. Canadian Dredge & Dock Co.* (1985)

⁷ *Tesco Supermarkets Ltd v. Natrass* [1972] A.C. 153

and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

In the case before Lord Denning the board of Directors, as they only met once a year had delegated much to the managers. This fact was the distinguishing feature seized upon by Lord Reid in *Tesco Supermarkets Ltd. v. Natrass*, [1972] A.C. 153⁸.

In *Tesco Supermarkets Ltd. v. Natrass*, [1972] A.C. 153 the House of Lords examined this reasoning. In that case the company Tesco was charged under the Trade Descriptions Act. That Act provided that “[w]here an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, ...any director, manager, secretary or other similar officer of the body corporate...he as well as the body corporate shall be guilty of that offence”.⁹

In the facts of the case as set out by the House of Lords, Miss Rogers, whose duty it was to stock the supermarket shelves with goods, including the laundry detergent advertised as being on sale, had been unable to find those special packs and instead put out the normal packs rather than nothing at all. She failed to tell her manager Mr. Clement, who in turn reported in his daily return “all special offers okay”. Mr. Coane an old pensioner attempted to buy the sale packs without success and complained to an inspector of weights and measures. A finding of fact was made that had Mr. Clement known he would have either pulled the poster down advertising the sale detergent or reduced the price for the normal packages. Less than adequate supervision existed.¹⁰

The case turned on appeal on the issue of whether the company could advance the defence available in the legislation that the company had taken “all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control”. A defence was available to the company under the legislation in question, as it provided for a due diligence defence and whether

⁸ *Tesco Supermarkets Ltd v. Natrass* [1972] A.C. 153

⁹ Trade Descriptions Act 1968, s, 20(1)

¹⁰ facts of the case set out at page 167-168

the commission of the offence was due to act or default of another person thus central to the reasoning was whether delegation had occurred thereby making the manager “another person”¹¹. Mr. Clement was merely a manager and not a director of the board it was argued, nor a managing director. The House of Lords agreed. The manager was a subordinate not carrying out the functions of the company nor speaking and acting as the company carrying out “orders from above”¹².

Lord Reid set out that the term “alter ego” did not capture the concept he was outlining rather

In some cases the phrase alter ego has been used. I think it is misleading. When dealing with a company the word alter is I think misleading. The person who speaks and acts as the company is not alter. He is identified with the company. And when dealing with an individual no other individual can be his alter ego. The other individual can be a servant, agent, delegate or representative but I know of neither principle nor authority which warrants the confusion (in the literal or original sense) of two separate individuals¹³.

The House of Lords traced the evolution of the company as criminal defendant. In absolute liability offences in certain instances the Court had held that Parliament must have intended that mens rea was not to be a constituent element of the offence – proof of the offence alone was all that required a conviction. But where the court could not conclude Parliament intended the offence to be absolute, it could be all but impossible for the prosecution to prove intent.

The converse proposition was of course, equally bad. Conviction of a morally blameless person brings the law into disrepute. The English Parliament, however, had not enacted a universal solution permitting a due diligence defence to be available and had instead, however, enacted the legislation piecemeal.

The solution was to find the company liable only where it could be shown the Board had delegated and further, given the delegate “full discretion to act independently of

¹¹ section 24 (1) (a) *Trade Descriptions Act 1968* (c.29, ss. 20(1), 24(1) (a) (b)

¹² see Lord Reid page 171, *Tesco Supermarkets Ltd v. Natrass* [1972] A.C. 153

¹³ page 171-172, *Tesco Supermarkets Ltd v. Natrass* [1972] A.C. 153

instructions from them”¹⁴. In *Tesco* Lord Reid held the Board had not delegated and instead had set up a chain of reporting, remaining in control – the managers were never given discretionary ability thus any nonconforming acts of the shop managers were not acts of the company.

But what of the non-delegated situation? Should the company be immune from criminal responsibility in such situations?

With this backdrop, reform has been examined notably for a finding of corporate manslaughter. Much research has been initiated and reform begun. Corporate manslaughter which is to apply in England and Wales is largely based on The Law Commission (U.K.) released in 1996 Report No. 237, *Legislating the Criminal Code: Involuntary Manslaughter*, Report No. 237, 1996, Part VIII. In Scotland the offence is to be Corporate homicide. The U.K. Home Office in response to the Report wished to adopt legislation to create an offence of corporate killing but this process has not yet culminated in legislation in the area of manslaughter. The Corporate Homicide and Corporate Manslaughter Bill 2006-2007 was introduced originally in the session of 2005 2006 and carried over to 2006-2007. The legislation has yet to be passed. It has been noted however the legislation is largely as a consequence of failed prosecutions where it had found there was insufficient evidence that one single human being was the directing mind for the application of the identification doctrine. (see Alice Belcher op. cit.).

But the identification theory has not been supplanted as has been noted by Gerard Forlin in a paper presented to the International Society for the Reform of the Criminal Law in 2005, the identification theory still is held in place notably in the *R. v. Great Western Trains and Larry Harrison* the Crown argued there was no need to find an individual with whom the company had to be identified to have the mens rea found¹⁵. Cited as *Attorney General's Reference No 2/1999 under Section 36 of the Criminal Justice Act*

¹⁴ Page 171, *Tesco Supermarkets Ltd v. Natrass* [1972] A.C. 153

¹⁵ *The New Corporate killing proposals: Where are we now and where are we going* Conference ISRCL 2005

1972 [2000] EWCA Crim. 10 (15th February 2000) The two central issues before the Court of Appeal were stated by the Vice President Rose L.J.:

1. can a defendant be properly convicted of manslaughter by gross negligence in the absence of evidence as to that defendant's state of mind?
2. can a non-human defendant be convicted of the crime of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual for the same crime?

The Court held yes to question 1 and no to the second. In the course of the reasoning the Court held as follows:

There is, as it seems to us, no sound basis for suggesting that, by their recent decisions, the courts have started a process of moving from identification to personal liability as a basis for corporate liability for manslaughter. In *Adomako* ([1995] 1 AC 171) the House of Lords were, as it seems to us, seeking to escape from the unnecessarily complex accretions in relation to recklessness arising from *Lawrence* 1982 AC 510 and *Caldwell* 1982 AC 341. To do so, they simplified the ingredients of gross negligence manslaughter by re-stating them in line with *Bateman*. But corporate liability was not mentioned anywhere in the submissions of counsel or their Lordship's speeches. In any event, the identification principle is in our judgment just as relevant to the actus reus as to mens rea. In *Tesco v Natrass* at 173D Lord Reid said "The judge must direct the jury that if they find certain facts proved then, as a matter of law, they must find that the criminal act of the officer, servant or agent, including his state of mind, intention, knowledge or belief is the act of the Company." In *R v HM Coroner ex.p Spooner* Bingham LJ at 16 said "For a company to be criminally liable for manslaughter...it is required that the mens rea and the actus reus of manslaughter should be established...against those who were to be identified as the embodiment of the company itself." In *R v P & O European Ferries* 93 CAR 72 Turner J, in his classic analysis of the relevant principles, said at 83 "Where a corporation through the controlling mind of one of its agents, does an act which fulfils the pre-requisite of the crime of manslaughter, it is properly indictable for the crime of manslaughter." ¹⁶

¹⁶ Note his Lordship in the course of the analysis reviewed the Law commission Report Law Commission (U.K.), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No. 237 1996, Part VIII and held "This approach is entirely consonant with the Law Commission's analysis of the present state of the law and the terms of their proposals for reform in their Report No 237 published in March 1996. In this report, both the House of Lords decision in *Adomako* and the Privy Council's decision in *Meridian* were discussed. In the light of their analysis, the Law Commission concluded (paragraph 6.27 and following and paragraph 7.5) that, in the present state of the law, a corporation's liability for manslaughter is based solely on the principle of identification and they drafted a Bill to confer liability based on management failure not involving the principle of identification (see clause 4 of the Draft Bill annexed to their Report). If Mr Lissack's submissions are correct there is no need for such a Bill and, as Scott Baker J put it, the Law Commission have missed the point. We agree with the judge that the Law Commission have not missed the point and Mr Lissack's submissions are not correct: the identification principle remains the only basis in common law for corporate liability for gross negligence manslaughter.

There is no question that the amendments to the Canadian Criminal code parallel in many ways the proposed Corporate Homicide and Corporate Manslaughter Bill 2006-2007 notably breach of a duty of care creating an offence, the inclusion of Crown entities in “organization”. (This aspect will be explored in greater detail in the plenary).

Early Canadian response – Common Law development

The “identification” doctrine had been the means for finding the mens rea and actus rea of corporations when mens rea offences were involved.

In *R. v. Canadian Dredge and Dock Co.*, [1985] 1 S.C.R. 662 the Supreme Court of Canada set the course for the finding of criminal liability of a company through the adoption of the “identification” doctrine. The case involved conspiracy charges brought against numerous companies for bid-rigging. The identification doctrine is the legal basis forming the foundation for the finding of guilt against the company. The identification theory establishes the “identity” between the directing mind of the company and the company. Estey J. for the Court held paragraph 48

The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation.

By this reasoning a company may have more than one directing mind and further not only is delegation probable but even sub-delegation is likely given the realities of operating a country in Canada where offices are geographically widespread. Estey J. expressly contained the application of the reasoning in Tesco finding “The application of the identification rule in Tesco, supra, may not accord with the realities of life in our country, however appropriate we may find to be the enunciation of the abstract principles

We should add that, if we entertained doubt on the matter, being mindful of the observations of Lord Lowry in *C v DPP* at page 28C, we would not think it appropriate for this court to propel the law in the direction which Mr Lissack seeks. That, in our judgment, taking into account the policy considerations to which Mr Lissack referred, is a matter for Parliament, not the courts. For almost 4 years, the Law Commission's draft Bill has been to hand as a useful starting point for that purpose.

of law there made.¹⁷ Importantly his Lordship noted the doctrine will only operate where the action undertaken by the “directing mind” and the action

- (a) was within the field of operation assigned to the directing mind
- (b) was not totally in fraud of the corporation,
- (c) was by design or result partly for the benefit of the company [paragraph 66]

This doctrine was further clarified in *Rhône (The) v. Peter A.B. Widener (The)* [1993] 1 S.C.R. No. 19 in which Iacobucci J. for the Supreme Court of Canada stressed the label of directing mind must be confined to only those cases where

the impugned individual had been delegated the “governing executive authority” of the company within the scope of his or her authority. I interpret this to mean that one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision- making power in a relevant sphere of corporate activity.¹⁸

Phrases such ability to “design and supervise the implementation of corporate policy” (paragraph 41) and “full discretion to act without guidance” and the ability to “exercise decision-making authority on matters of corporate policy” exercising “decision-making authority on matters of corporate policy” clarified the policy versus implementation role as being the bright line which had to be crossed to find a “directing mind”¹⁹. Similar language is employed by Doherty J.A. at the Court of Appeal for Ontario in *R. v. Safety-Kleen* [1997] O.J. 800. Even though the employee may have extensive responsibilities and discretion, unless this is accompanied with “the power to design and supervise the implementation of corporate policy” or “governing executive authority” Estey J.’s words in *Canadian Dredge*, individual’s intent and actions cannot be attributed to the company for the purpose of finding criminal liability²⁰.

This restriction of requiring delegation of the policy function was held by many to be insufficient and limiting. Later cases decided after the enactment of the amendments but

¹⁷ *R. v. Canadian Dredge and Dock Co.*, [1985] 1 S.C.R. 662, at page 693

¹⁸ paragraph 32 of *Rhône (The) v. Peter A.B. Widener (The)* [1993] 1 S.C.R. No. 19

¹⁹ paragraphs 41 and 42

²⁰ paragraph 41

restricted to deciding the case under the law as it stood at the time considered the identification doctrine in light of the amendment. In *R. v. Ontario Power Generation* [2006] O.J. No. 4659 two recreational users of a waterway were killed after water spilled through a sluiceway. The company was charged with criminal negligence. Bélanger J. of the Ontario Court of Justice expressly noted the concept of “directing mind” in common law was “restrictive” and the court failed to find that a manager was a directing mind despite that individual’s extensive authority. Bélanger J. allowed a directed verdict of acquittal in the case against the company charged ²¹. On Mr. Justice Bélanger’s analysis, to find a manager acted in such a manner as to be identified with the company it was necessary to answer the following questions in the affirmative:

- does the individual have the power both to devise (or design) AND supervise implementation of corporate policy.
- does the individual have governing executive authority
- is the individual invested with full discretion to act without guidance from supervisors in relation to matters of corporate policy ²².

In the case before Bélanger J. the individual lacked both the power to devise and supervise accordingly there was no ability to found a conviction for the company.

Archibald, Jull and Roach note in their authoritative work on the Canadian area, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* ²³ additional problems, likely arising in part from a lack of caselaw further interpreting *Canadian Dredge*. They note that it had been held as an existing problem to the finding of corporate criminal liability that there had to be but one directing mind. However, Estey, J. for the Supreme Court in *Canadian Dredge* had arguably rejected this approach having outlined at length the reason why the wholesale adoption of the Tesco test could not be adopted in Canada. Arguably further evidence of the fact that more than one directing mind could exist was evident in the Court upholding the convictions of in some

²¹ see also the companion case *R. v. Tammadge* [2006] O.J. No. 5103 (Q.L.) charging the plant manager and operating agent

²² *Ontario Power Generation* paragraph 16

²³ Canada Law Book: Aurora Ontario, 2007 update

instances more than one officer of a single corporation²⁴. “Another major problem with current law is the need to find a single directing mind who committed the prohibited act with the necessary guilty state of mind (mens rea)”

www.canada.justice.gc.a/en/dept/pub/ccl_rpm/legislative.html.

United States

In the Federal courts Corporate Criminal liability is founded chiefly on a vicarious liability approach. Liability will only be found for a corporation however if firstly the employee is acting within the scope and nature of their employment, and secondly the acts are designed to benefit the company, and the court must impute the intent of the individuals to the company²⁵. What is the scope and nature of employment will vary. In the federal sphere it can mean liability for the acts of an employee regardless of their position in the company. For instance *In re Hellenic*, 252 F.3d 391, 395 (6th Cir. 2001) and *U.S. v. Jocelyn* 206 F.3d 144, 159 (1st Cir. 2000) in which it was held there is no requirement a person be a “central figure” in the company if the court has sufficient basis for finding the individual has some relationship to the company which allowing for obtaining the requisite knowledge. Most interesting is the role of an agent to the company such as the company lawyer which can vary from high managerial to even arguable outsider yet still found liability. In *Gutter v. E.I. Dupont De Nemours*, 124 F. Supp. 2d 1291, 1309 (S.D. Fla. 2000), a federal securities law class action lawsuit, knowledge of the company’s lawyer was imputed to the company where the facts known to the attorney fell in his sphere of knowledge.

²⁴ see Department of Justice, Government Response to the Fifteenth Report of the Standing Committee on Justice and human rights – Corporate Liability, November 2002. Darcy MacPherson in *Extending Corporate Liability?: Some Thoughts on Bill C-45 (2004)* 30 *Man. L.J.* 253 also writes “for crimes of negligence, the legislation allows for an aggregation of fault of senior officers”

²⁵ see 42 *Am. Crim. L. Rev.* 277 Twentieth Survey of White Collar Crime: Article Corporate Criminal Liability, Kendel Drew and Kyle Clark

The landmark decision respecting the American theoretical basis for corporate criminal liability is *New York Central and Hudson River Railroad Company v. United States* a 1909 decision of the United States Supreme Court²⁶. Mr. Justice Day for the Court held:

We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to [*496] give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

NY Central & Hudson River was the watershed for imputing criminal liability to the corporation. What remained to be achieved, however, was the precise application of the theory. How high in the corporate hierarchy did the individual have to be? Criminal liability for the corporate officer was found to exist for both the corporation and the individual president for filing false claims where the individual was acting in his role as an employee and company representative AND within the scope of his authority in *United States v. Empire Packing Company* (1949) 174 F.2d 16 (7th Cir.), cert. denied, 337 U.S. 959 No issue arose in that case respecting delegation of duties. Which agent of the corporation, however, could commit a criminal act involving intent that could be imputed to the company? What of the manager and the supervisor?

²⁶ 212 U.S 481 (1909) . In violation of the Elkins Act which prohibited carriers from offering rebates to shippers so enacted to ensure that equal rights existed to all for interstate transportation, a manager and a railroad had given rebates to a sugar refining company(note Elkins Act 32 Stat.847

The Model Penal Code ²⁷ sets out in Part I General Provisions the provisions at § 2.07 for the Liability of Corporations, Unincorporated Associations and Persons Acting, or Under a Duty to Act, in Their Behalf

- (1) A corporation may be convicted of the commission of an offense if
 - (a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or
 - (b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
 - (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

Restricting the analysis accordingly to true crimes by subsection (1) the conduct of an agent acting on behalf of the corporation and within the scope of employment can found corporate criminal liability even for omissions in set situations.

Key definitional sections set out

- (4) As used in this Section:
 - (a) "corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program;

²⁷ Refs & Annos, Uniform Laws Annotated current to 2007 Part I General Provisions Article 2 General Principles of Liability. American criminal law is codified in 52 codes. The federal code overlays the codes of each of the 50 states and the district of Columbia power to impose criminal liability is reserved primarily to the states save unusual crimes of federal interest and crimes involving more than one state. While Many differences but also many similarities in the codes and the Model Penal Code was promulgated in 1962 and since then over half of the states 34 have gone on to modify their codes.

(b) "agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

Accordingly, officers, directors and higher placed individuals will be found likely to stand in place of the corporation for founding criminal liability. There is no application of an identification doctrine.

Writing in 1984 Professor Kathleen Brickey stated in her work *Corporate Criminal Liability: A treatise on the Criminal Liability of Corporations, Their officers and Agents*²⁸ there had been a "proliferation of statutes regulating corporate conduct" (Page 99)²⁹. And while between that writing and 2002 numerous additional legislative enactments captured corporate criminal liability none were such however as to capture what is now set out in the Sarbanes-Oxley Act.

Canadian Legislative Change

As noted the 1992 Westray mining disaster in Nova Scotia Canada in which 26 lives were lost in a mine explosion was one of the great impetuses to legislative change. Many believed the explosion could have been averted had necessary regulations been in place. Two mining managers were charged with manslaughter but the charges were ultimately stayed. The subsequent contamination of the water supply at Walkerton, Ontario in

²⁸ Callaghan & Company /Wilmette Illinois, 1984

²⁹ ¹See, eg., Tobacco Statistics Act § 3, 7 U.S.C. § 503 (1976); Dumping or Destruction of Interstate Produce Act § 1, 7 U.S.C. § 491 (1976); National Housing Act of 1933 § 21, 12 U.S.C. § 378 (1976); Securities Act Amendments of 1975 § 27(d), 15 U.S.C. § 77yyy (1976); Foreign Corrupt Practices Act of 1977 §§ 103(a), 103(b), 104, 15 U.S.C. §§ 78dd-1, 78dd-2, 78ff (1976 & Supp. I 1977); Securities Exchange Act of 1934 § 32, 15 U.S.C. § 78ff (1976); Federal Trade Commission Act §§ 10, 14, 15 U.S.C. §§ 50, 54 (1976); Emergency Petroleum Allocation Act of 1973 § 5, 15 U.S.C. § 754 (1976); Toxic Substances Control Act §§ 15-16, 15 U.S.C. §§ 2614-2615 (1976); Wholesome Meat Act § 406, 21 U.S.C. § 676 (1976); Bank Secrecy Act §§ 209-210, 31 U.S.C. §§ 1058-1059 (1976); Oil Pollution Act § 6, 33 U.S.C. § 1005 (1976); Federal Water Pollution Control Act § 309, 33 U.S.C. § 1319 (1976).

which 7 people died and thousands were rendered ill and the ensuing public inquiry underscored the need for change.³⁰ Further corporate scandals in the United States such as Enron followed quickly with WorldCom added to the sense of urgency and made it clear that wholesale changes were required to the system as incidents involving alleged corporate wrong were anything but unique aberrations.

Detailed study was again undertaken in Canada. In March 2002 the Department of Justice published its discussion paper on the issue of corporate criminal liability (http://www.justice.gc.ca/en/dept/pub/ccl_rpm/discussion/background.html), In Canada the Amendments to the Criminal Code (Corporate Criminal Liability) also known as Bill C 45 were proclaimed in force on March 31, 2004 creating new language for Corporate Criminal Liability which altered the definition of “organization”, “representative” and “senior officer” in section 2, 22.1 and 22.2 of the Criminal Code to potentially capture more corporate criminal behavior than ever before. Bill C-45 has completely altered the landscape for corporate criminal liability and brings Canada far closer legislatively to the American basis for finding corporate criminal liability than the roots of the Canadian doctrine, the identification doctrine, found in England.³¹

The changes

INTERPRETATION

2. Definitions – In this Act,

“organization” means

³⁰ see Report of the Walkerton Inquiry: The events of May 2000 and related issues; Report of the Honourable Dennis R. O’Connor note
http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/part1/WI_Summary.pdf.

³¹ Pub. L. No. 107-204 , 116 Stat. 745 (2002) altered the American corporate landscape, which has been compared to the biggest impact on American corporate life since the New Deal, Bill C-45 effects the greatest change to potential findings of corporate criminal liability since the leading case of the Supreme Court of Canada in *R. v. Canadian Dredge and Dock* [1985] 1 S.C.R. 662.

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons;

“senior officer” means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer;

“representative” , in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization;

The definition of organization accordingly builds on the existing definition of “every one”. The other key changes reflect the movement to casting a far greater net

22.1 Offences of negligence – organizations – In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- (a) acting within the scope of their authority
 - (i) one of its representatives is a party to the offence, or
 - (ii) 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; and
- (b) the senior officer who is responsible for the aspect of the organization’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 organization from being a party to the offence.

2003, c. 21, s. 2

22.2 Other Offences – organizations – In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the

offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

2003, c. 21, s. 2

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any person, arising from that work or task.

Also whistleblowers are protected 425.1

2003, c. 21, s. 2

Additionally sentencing amendments are effected

718.21 Additional Factors – A court that imposes a sentence on an organization shall also take into consideration the following factors:

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to public authorities of the investigation and prosecution of the offence;

- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- (g) whether the organization was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

2003, c.21, s. 14

Section 732.31

(3.1) **Optional conditions – organization** – The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:

- (a) make restitution to a person for any loss or damage that they suffered as result of the offence;
- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;
- (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- (f) provide, in the manner specified by the court, the following information to the public, namely,
 - (i) the offence of which the organization was convicted,
 - (ii) the sentence imposed by the court, and

- (iii) any measures that the organization is taking – including any policies, standards and procedures established under paragraph (b) – to reduce the likelihood of its committing a subsequent offence; and
- (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

(3.2) **Consideration – organizations** – Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.

Effect of the Changes – New theory of corporate criminal liability

There can be no question that the identification doctrine as enlarged after *Canadian Dredge* is gone. As presently evolved in Canada the jurisprudence would be of little guidance in clarifying the legislation except in the sense that it is clear that movement is away from the strict requirements previously sought to find the directing mind. While the governing mind arguably is now replaced with senior officer, that ignores the clear move away from any policy implementation together with responsibility sought in the past.

Key changes in the legislation are also definitional which guide the courts to finding corporate criminal liability in expanded situations including those nearing vicarious liability. Canadian courts however do not accept vicarious liability for crimes of intent see *Canadian Dredge* and *The Minister of Employment and Immigration and the Secretary of State for External Affairs v. Debra Bhatnager* [1990] 2 S.C.R. 217 (S.C.C.) and a rigid vicarious liability interpretation of the legislation would not be consistent with the development of Canadian law in areas outside of the identification doctrine. There is no doubt that the identification doctrine was developed in response to this problem in seeking a theory for the application of corporate criminal liability.

The impact of section 22.1 will be seen in possible charges arising under the Canadian Criminal Code for crimes of negligence such as dangerous driving, manslaughter, certain firearms offences, and of course criminal negligence causing death. Of interest will be the application of existing Canadian jurisprudence of section 219 criminal negligence to the new provisions. Marked departure from the norm was an existing central aspect for the court to review under section 219: **R. v. Anderson** (1990) 53 C.C.C. (3d) 481 (S.C.C.) as was an examination of “reasonableness” : **R. v. Tutton** (1989) 69 C.R. (3d) 289 (S.C.C.). This process of examining aspects of the corporation, and in particular that aspect from the alleged criminal act is under scrutiny however will now require a thorough review of the entire “due diligence” aspect of the department, likely an examination far more rigorous than in situation under section 219 to ensure proof respecting marked departure from the norm. From a prosecution standpoint it would be prudent to ensure that this area under responsibility of the senior officer or senior officers collectively is thoroughly covered for any industry for which the approval of criminal charges are being sought.

The Department of Justice in *Bill C-45 Amendments to the Criminal Code Affecting the Criminal Liability of Organizations – A Plain Language Guide* (note <http://www.justice.gc.ca/en/dept/pub/c45>) sets out the viewpoint of the Department respecting how an organization can commit an offence. The three examples given are

1. Senior officer actually commits the crime for the direct benefit of the organization.
2. Senior officer directs others to undertake the criminal act – the senior officer has the necessary intent but the subordinate carries out the actual physical act.
3. Senior officer knows employees are going to commit an offence but does not stop them because he wants the organization to benefit from the crime.

In these three examples the first captures what the state of the law pre Bill C-45 was, the second is the vicarious liability approach and the third is a completely new offence to be committed by a corporation.

There is no doubt that without the changes *Canadian Dredge and Dock* had been receiving a more and more restricted treatment in the application of the identification doctrine. As noted above in *R. v. Ontario Power Generation* [2006] O.J. No. 4659 Mr. Justice Bélanger of the Ontario Court of Justice expressly noted the concept of “directing mind” in common law was “restrictive”³² and acquitted the corporate defendant stating:

¶ 16 I am of the opinion however that a determination of who a person in authority is in a corporate organization requires an affirmative answer to the following questions:

- does the individual have the power both to devise (or design) AND supervise implementation of corporate policy.
- does the individual have governing executive authority
- is the individual invested with full discretion to act without guidance from supervisors in relation to matters of corporate policy.

Clearly without the amendments to the Criminal Code imputing criminal responsibility to a company, in cases not involving an act by a senior level manager, involved in policy implementation, or delegation by the board it was becoming more and more difficult, arguably impossible in numerous instances, to make a finding of corporate criminal liability. There was no issue that the requisite definitional sections were in place already. The Corporation was subject to the Criminal Code. The definition of “every one”, and “person” by section 2 of the *Criminal Code* includes “public bodies, bodies corporate, societies, companies” existed.

Central to the legislation however, unlike before, is there is no longer is there a dividing line between an individual who works for a company who must be imbued with policy implementation ability in order to find liability. Simply working for the company may suffice, providing 22.1 (b) is also met. There is no distinction now to be made between the functions rather the question turns on responsibility. The most important difference in this regard is the use of “or” in the definitional section. How far Courts will extend the agency relationship will be of import.

³² paragraph 16

Much has been written of the changes³³. It has been noted that now the Canadian approach while now not entirely an adoption of the American vicarious liability approach it is far closer to that regime than before. Only three courts have looked at section 22.1 and 22.2 to date, *R. v. Ontario Power Generation* [2006] O.J. No. 4659 (O.C.J.), *R. v. Tri-Tex* [2006] N.J. No. 230 (Newf. Lab Prov. Ct) and *R. v. Great White Holdings* [2006] A.J. No. 134 (A.C.A).

In *Great White Holdings* Berger J. for the Court of Appeal of Alberta stated:

¶ 13 I leave for another day the question of whether s. 22.2 of the Criminal Code informs the prosecution of a body corporate for a regulatory or public welfare offence that requires proof of fault. In the instant case, the Crown did not proceed on the basis that one of the senior officers of the Appellant acting within the scope of his authority was a party to the offence. Nor did the Crown allege that a senior officer directed the work of other representatives of Great White Holdings Ltd. or knew that a representative of the company was or was about to be a party to the offence. Where the theory of the Crown does not rest upon such factual underpinnings but rather (as in the case at bar) upon the acts of an employee or agent other than a senior officer, the conditions precedent in s. 91(1) must be established.

In *Ontario Power* Mr. Justice Bélanger considered the provisions in greater detail.

Setting out the legislative changes the court stated:

¶ 6 The combined effect of these changes is that the corporation is now linked to the aggregated results of the actions of its key officials and their delegates..

In the case Crown was able to show the manager held significant responsibility, however, it was clear he did not hold the ability to make policy. The Court agreed that given this fact coupled with the definitional disjunctive change as follows:

¶ 17 The Crown's contention, in my view, obscures rather than clarifies the process of identification. If the Crown is right, in as large and complex an organization as Ontario Power Generation, it might be said that virtually any supervisor at any level in the structure who has managerial responsibilities is a

³³ see infra and primarily Archibald Jull and Roach, *Regulatory and Corporate Liability*

person in authority. I am tempted to agree with defence counsel's submission that such an interpretation would make redundant the enactment of Bill C-45 as well as the statement by Archibald, Jull and Roach that C45 abolishes "the dichotomy between the setting of policy and only managing the corporation"³⁴ developed by the common law concept of a directing mind

His Lordship reviewed the role of the manager in detail and the substantial and significant responsibilities were detailed. However it was held that criminal liability could not be found as

35 He was not a directing mind of OPG. The Crown specified that he was the sole directing mind through which criminal responsibility could attach to OPG. Absent evidence of a directing mind, I am forced to conclude that there is simply no case for OPG to answer and that its motion for a directed verdict must succeed. Some could, with understandable justification, find perversity in the result, particularly when there exists a substantial body of evidence pointing in the direction of a cumulative and aggregated corporate failure to ensure public safety at the site of this generating station.

¶ 36 This case illustrates vividly why the law was changed in 2003. Clearly the same result would not obtain today but I am bound to apply the law as it existed on June 23, 2002.

The fact that he oversaw 276 employees and was responsible for overseeing a budget of \$60 million comprising 8% of the Province of Ontario power budget could not determine application of the corporate identification principle because as found by his Lordship

“it appears to me that a determination of whether or not he was a pawn in authority does not turn on the quantitative aspects of his work. He had no power to devise or design corporate policy. He did not have governing executive authority. He was not invested with full discretion to act without guidance from supervisors in relation to matters of corporate policy.”

The Court clearly suggests a different finding would be made were section 22.1 not to be applied retrospectively.

In *R. v. Tri-Tex* the court similarly held section 22.2 could not be applied retrospectively however prior to that finding made the observation that

37 Corporate liability in Canada is presently tied to the fault of "senior officers" and "representatives."

The Court further observed the individual was responsible for the finances of the corporation which:

was an "important aspect" of Tri-Tex's activities. Thus, if section 22.2 of the **Criminal Code** applies, Tri-Tex will be a party to any offence committed in this case by Mrs. Smith.

Accordingly the Court suggests that responsibility for an aspect of the companies' important managerial functions only, will found corporate criminal liability in matters preceding the amendments.

Sentencing Amendments

In addition to the amendments noted above increases to the fines that could be imposed on the corporation were included in the amendments. The maximum fine is increased to \$ 100,000 from \$25, 000. In Canada additionally factors many of which had existed at common law were enumerated in amendments to the Criminal Code in s. 718 to aid the Sentencing court. Under the new legislation factors in sentencing a corporation would include moral blameworthiness, public interest, prospects for rehabilitation, and restitution.

Corporate probation became on March 31st, 2004 an additional new concept including making restitution, establishing policies, standards and procedures to reduce the likelihood of the organization reoffending, and reporting back to the court on the implementation of these measures and policies: section 732.1 (3.1). In the United States under federal law companies are sentenced pursuant the rules set out in the United States Sentencing Guidelines which has effected similar changes: U.S.Sentencing Guidelines Manual 8D1.1(2004). The U. S. Sentencing guidelines apply to all federal felonies. Probation is an element of corporate sentencing the three stated purposes set out in the guidelines are to prevent further offences by requiring changes or limitations to business practices secondly to provide for public disclosure of past offences. The sentencing

guidelines apply to organization which are “a person other than an individual” so are not restricted to companies.³⁵

In Canada the new sentencing provisions were examined in *R. v. Hub Oil Co.* [2005] A.J. No. 1455. An explosion and fire at the Hub Oil Refinery in 1999 killed two men and injured numerous others. During the course of submissions counsel agreed that the provisions of s. 732(3.1) being procedural in nature had retrospective applicability to the sentencing of the company which had pleaded guilty to the offence of common nuisance an offence for which a 2 year sentence could be imposed if an individual was being sentenced. Applying the provisions of 732.1(3.1)(g) which states:

(g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

Brooker J. of the Alberta Court of Queen’s Bench held this provision allowed for the establishment of a payment into trust for two bursaries at an Albertan College and a further \$100,000 was to be put into trust for the four children of the deceased. The corporation was additionally fined and it was noted could be further prosecuted for breach of probation respecting the non-compliance with the order. In that case the company, had no assets of value, the family that were the shareholders however had voluntarily agreed to make the payments required.

The Canadian sentencing court can additionally consider whether another regulatory body would be more appropriate to supervise the organization: section 732.1 (3.2).

It is impossible to ignore in Canada, however, the fact that in many situations separate proceedings will have been taken in the civil courts. In such cases care must be taken to ensure the court and the parties stay current to all proceedings. A corporation may argue the fines arising in criminal proceedings and the stigma attracting to a conviction is

³⁵ like Canada one chief purpose of the sentencing guidelines was for companies to take remedial steps also a purpose was to ensure parity in sentencing (Corporate Criminal Liability and the Federal Sentencing Guidelines, 1997 A.B.A. Ctr. For Continuing Legal Educ. F-1, F-6 Joe D. Whitley).

enough to grant relief from punitive damages in civil cases. In *Insurance Corp. of B.C. v. Eurosport Auto Co.* [2007] B.C.J. No. 972 (Q.L.) punitive damages were disallowed by the British Columbia Court of Appeal in the subsequent appeal of the civil action in a case of fraud where an Insurance Corporation of British Columbia vendor had misrepresented work done on vehicles claiming payment where no work was in fact done. Prowse J.A. for the court held

[55] In my view, the award of punitive damages in this case, when taken in the context of the other “punishments” meted out to the appellants, does not pass the rationality test. Here, the appellants (with the exception of Mrs. Hwang) received substantial fines in the quasi-criminal proceedings which had as their purpose the objectives of denunciation and general and specific deterrence. Those fines were levied at a time when all of the fraudulent conduct which was the subject of both proceedings had occurred. The appellants had been stripped of their business connections with ICBC (and rightly so), and the publicity surrounding the charges and convictions made it unlikely that they would be able to find other work in the auto body industry. While special costs had not yet been imposed against them, the likelihood of a special costs order was exceedingly high, although the full magnitude of the special damages was not yet known. (In that regard, I note that Binnie J. stated in *Whiten* [*Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595] that, in considering punitive damages, the trial judge must take into account penalties that “have been or are likely to be inflicted on the defendant.”) In my view, imposing a further monetary punishment on the appellants in these circumstances served little purpose.

What happens, however, to the company that fails to file its necessary documents and is struck from the register thereby ceasing to exist? Provisions apply to restore the company to the register however the process is arguably cumbersome.

Additional criticism has been levelled respecting the sentencing provisions in that they may be of “little use in the case of bankrupt corporations, or against parent or successor corporations”³⁶. The spectre of bankruptcy which has been noted as well by Archibald, Jull and Roach who write

Greater reliance on criminal liability might be worth it if the result was genuine deterrence and reparation for the harms caused. But there is some reason

³⁶ Note David J. Roberts “Westray Response Flawed Legislation,” *The Chronicle-Herald* [Halifax], 24 June 2003, p.B2 noted in Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organizations) David Goetz Law and Government Division 3 July 2003.

to doubt that this will be the case. Some corporations facing serious criminal charges may simply declare bankruptcy, ending the promise of C-45 that the criminal law can be used to reform their practice and achieve some reparation for the victims.³⁷

For the amendments to have a greater impact, particularly from a sentencing viewpoint further accompanying amendments to companies and business corporations legislation arguably could be considered. To give greater impact to the provisions changes could be considered in the areas of preventing a company from being struck from the register when under criminal charge. Providing for the transfer of corporate assets to be restricted or to require certain reporting requirements to occur when so charged could additionally ensure a deterrent effect when coupled with the increased penalties. Although these amendments would largely be called for within the provincial sphere of competence, excepting federally incorporated companies, the federal Business Corporations Act could commence a consideration of the issue for all Provinces. All too often a company does not even require the declaration of bankruptcy to evade responsibility for criminal action. Simple failure to file the requisite documents will ultimately result in it being struck from the company register thereby letting the company in law and in fact cease to exist. While provision can be made to apply to the court to restore the company to the corporate register easing these provisions would prevent evasion of responsibility in this manner if achieving a goal of greater accountability is sought. Another consideration may be provisions that assets improperly distributed could be reclaimed through streamlined procedures from those who had not received those assets for value to the corporation. Another consideration would be to ensure a lien or some other mechanism was in place against the company against the assets once a charge was in place but bearing in mind the presumption of innocence there would be no intent to disable the company from carrying on business, accordingly a lien type mechanism may be an option to consider.

³⁷ Archibald Jull and Roach in *Regulatory and Corporate Liability*: chap The Changing face of corporate Liability 5-2

Corporate reaction
Defences remaining to the Company
Defences to 22.1 22.2

No new defences were incorporated in the legislation.

Not surprisingly however, numerous companies are now taking steps with the guidance of their lawyers and auditors to ensure the proactive compliance with regulatory matters. While greeted as revolutionary tool in to aid in corporate accountability, some authors argue little if any impact will be felt.³⁸ This is unlikely however given the standards created in the legislation. Senior corporate officers, the new directing minds, must be prepared to make a defence that meets the standards necessary in 22.1 that is “the aspect of the corporation’s activities that is relevant to the offence” should not depart “markedly from the standard of care that...could reasonably be expected to prevent a representative from being a party to the offence”. What systems, accordingly, are in place? What committees oversee the financial or other areas of the organization. There should be internal measures taken to ensure the existing for instance when considering crimes of fraud – that proper corporate governance exists. Improved audit committee structures can be looked at to demonstrated improvement to the corporate structure. In short risk assessment and risk management is required in the wake of the amendments to ensure due diligence factors are addressed with respect to the offence involving criminal negligence. Respecting other offences given the broader basis for liability out of self interest alone the corporation should be conducting internal examinations. Steps taken in this regard would create a strong first line of defence from any finding of corporate criminal liability.

Section 7 of the Charter and other issues

No examination of a defence under the new legislation would be complete without revisiting section 7 of the Canadian Charter of Rights and Freedoms (Charter). Section 7

³⁸ Steven Bittle and Laureen Snider in From Manslaughter to preventable Accident: Shaping Corporate Criminal Liability Law & Policy Vol. 28 No. 4 October 2006

provides Life, liberty and security of person – Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Since the decision of the Supreme Court of Canada in *Irwin Toy Ltd. v. A.G. of Quebec* [1989] 1S.C.R. 927 and *Big M Drug Mart* [1985] 1 S.C.R. 295 it has been consistently held that a corporation cannot avail itself of this section and recourse to the Charter will be restricted. In a section 7 vagueness argument situation, however, where the legislation is being looked at as being constitutionally vague then the company may seek a declaration pursuant to section 7: *R. v. Canadian Pacific Ltd.* (1995), 99 C.C.C. (3d) 97 (S.C.C.). Accordingly, such an argument respecting vagueness could be advanced but not in a hypothetical situation. There would have to be a focussed analysis on the facts in the particular case.

A further distinction would appear to emerge in that it is possible to envision situations in which no one individual alone would be liable for the offence but an aggregate of the actions of the two representatives would result in that aggregate being liable for the purposes of the application of section 22.1. Section 22.1 appears to import the concept of the collective knowledge doctrine found in the American jurisprudence. In *Canadian Dredge* impliedly more than one actor made up the directing mind:

The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation. At page 18 paragraph 32 of *R. v. Canadian Dredge and Dock* [1985] 1 S.C.R. 662

However, Estey J. noted the directing mind is, consequently, usually a co-perpetrator of the offence. In *R. v. Canadian Dredge & Dock Co.*, *supra* paragraph 22, Estey J. observed:

Generally, the directing mind is also guilty of the criminal offence in question. Glanville Williams, in *Textbook of Criminal Law* 1st ed. (1978), states, at p. 947: "...the director or other controlling officer will almost always be a co-perpetrator of or accessory in the offence...". In *R. v. Fell* (1981), 64 C.C.C. (2d) 456, 131 D.L.R. (3d) 105, 34 O.R. (2d) 665, Martin J.A., for the Ontario Court of Appeal, quoted the foregoing excerpt with approval but was there concerned with determining whether the directing

mind was also guilty of the offence and not with the question as to whether or not this was a condition precedent to corporate liability.

In *R. v. Dawson City Hotel* [1986] Y.J. 1 the Yukon Court of Appeal allowed the Crown appeal from a jury verdict in which the directing mind was acquitted and the company convicted on the basis of the Crown's position that the guilt of the owner of the company would be of necessity to a finding of guilty of the company. While expressly stating "based on the evidence in this case, of course, and not as a general proposition of law with respect to cases where an individual accused has been tried with the corporation of which he was a servant" per Lambert J.A. There would always be the necessity however of the additional finding of the act or omission of the senior officer thereby strictly speaking the offence is never one of the aggregate alone.

The issue remains accordingly live however as to the level of involvement required of each of the individuals making up the aggregate also referred to as collective knowledge doctrine. Notably applied in *United States v Bank of New England* (1987) 821 F2d 844 collective knowledge is the sum of all knowledge in this case the employees' knowledge within the scope of their employment became the corporate entities knowledge. In *Bank of New England* the court applied the collective knowledge theory and convicted the Bank of willfully failing to file reports relating to currency transactions based upon the individual and separate employee knowledge. Allowing a defence of compartmentalizing knowledge with divided duties would avoid liability. Arguably the same reasoning should apply in Canada. However, some question the fairness of a conviction based on the aggregate where the aggregate looked at separately does not amount to enough to be a party. Further there is the second step in the analysis following looking at the two individuals. No conviction is possible without 22.1(b) the responsibility for a senior officer over aspects of a organization which activities are a depart markedly from the norm. Comments respecting the application of the corporate culture no longer apply – there can be no question that for each of 22.1 and 22.2 one individual must be a party and this must be coupled with the actions or inaction of the senior officer.

Counsel could look to the commentators in the United States for guidance notably Hagelmann and Grinstein, *The Mythology of Aggregate Corporate Knowledge: A*

Deconstruction, 65 Geo. Wash. L. Rev. 210 (1997) (Note “no company was ever convicted without having acted in some conscious, culpable manner...Rather, when courts have aggregated knowledge, they invariably have done so as a technique in response to wilful blindness to inculpatory knowledge” quoted in Drew and Clark *Corporate Criminal Liability, Twentieth Survey of White Collar Crime*, 42 Am. Crim. L.Rev. 277.

Cases under the new legislation

While the landscape of corporate criminal liability in Canada has been vastly altered there has been no rush to charge with the aid of the new provisions. In fact, only one charge of criminal negligence causing death has been laid – that against the Transpave company in the Province of Quebec. Resulting from a worker death in October 2005, in which the individual was crushed by concrete blocks at a concrete block manufacturing plant, the investigation apparently disclosed, and allegations will be made, that there was a lack of safety systems in place, no inspection system in place, no specific work system in place and other such failures including failures to properly train workers. In another earlier case arising in Ontario, charges were originally laid of criminal negligence involving the death of a worker when a trench fell, but those charges were not laid against the company and instead were laid against the owner Mr. Fantini. Ultimately a plea was taken to offences under the *Ontario Health and Safety Act* and a Mr. Fantini received a sentence of a fine of \$50,000 (*R. v. Fantini* [2005] O.J. 2361).

Clearly there has been no overuse of the sections. Instead it might instead appear there was reluctance to consider using the sections. And yet can this be ascribed in part to a lack of familiarity with the sections by investigators? There is clearly, according to some, a corresponding lack of familiarity with the sections by organizations.

The former federal justice minister Martin Cauchon warned that corporate Canada is not properly informed about the consequences of the amendments.

Speaking to Julius Melnitzer of the Financial Post, in *Bill C-45 raises fear of parallel charges, Easier to prosecute companies on health, safety issues* published December 13, 2006, Mr. Cauchon now a lawyer in private practice, stated:

“Corporations and managers have to be much more careful in terms of their liability for the safety of employees and the public”. He outlined an example where one employee on one floor coincidentally throws a switch at the same moment an employee on the second floor turns on another switch with the result that someone on yet another floor was killed.

“If the prosecutor can demonstrate that management should have known that it was dangerous to allow the possibility of both switches being activated at the same time, the corporation could well be liable”

There is no question that these section will be used – hopefully they will used not in hindsight but the noted objective - to prevent problems from occurring and to ensure the establish of systems before the problems arise.

Conclusion

From the original arguments mounted in the Supreme Court of Canada in *Canadian Dredge* forward there has always been the argument that the company had safeguards in place and had no knowledge of the actions of the rogue criminal directing mind (now senior officer) and that since the board did not know, despite having all imaginable measures in place why should corporate criminal liability be visited upon the company? It has been argued the prosecution should bear the burden of establishing the company lacked reasonable policies and procedures (see for example *Rethinking Criminal Corporate Liability* Weissman and Newman 82 Ind. L.J. 411). Arguments have been advanced notably in the United States of the enormity of the costs associated with compliance. The reality, however, is that tragedies of a scale of Walkerton, or Westray can occur and there is an accompanying need to reflect society’s desire for accountability

for such actions. The tools found in the legislation in the Amendments to the Criminal Code bring Canada up to date with measures being already applied in other jurisdictions some in the United States or in the case of the United Kingdom in the process of being adopted. The amendments can start Canadian companies on a path to enhanced corporate governance, self scrutiny and accountability in response to the measures.

While there has been little judicial consideration of the provisions to date, it has only been three years since they were enacted. It cannot be stated yet that the provisions have resulted in little impact being felt. As has been seen in *Ontario Power* they will be available in necessary situations to found liability in situations which before would have been impossible, and as further illustrated in *Hub Oil* the sentencing amendments will aid in wider sentencing options for the court thereby ultimately creating a greater corporate accountability and responsibility where necessary.