Corporate Criminal Liability Discussion Paper 1999

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INTRODUCTION

[1] Much has been written on the appropriateness of attributing criminal liability to corporations, [1] and the debate is still far from over. The opponents of this idea argue primarily that a corporation has no mind of its own, so it cannot demonstrate the moral turpitude required to establish criminal guilt. It is completely artificial, they say, to treat a corporation as if it had a blameworthy state of mind which, by definition, it cannot have. The notion of blame is meaningless in this context. Furthermore, the impossibility of jailing an organization foils any attempt to attain the goals of deterrence, punishment and rehabilitation pursued by penal sanctions. [2] The partisans of corporate criminal liability approach the issue from a quite different perspective. Corporations, they note, are not mere fictions. They exist, occupy a predominant position within the organization of our society, and are as capable as human beings of causing harm. It is only just and consistent with the principle of equality before the law to treat them like natural persons and hold them liable for the offences they commit. Such organizations, which have a major impact on our social life, must be required to respect the fundamental values of our society upheld by the criminal law. Furthermore, the position that punitive measures are necessarily ineffective against corporations reflects a narrow view of the notion of personal fault and a chronic lack of imagination in regard to the use of criminal sanctions.[3]

[2] Such debates may appear, at first blush, theoretical and outmoded, in that the common law jurisdictions have adopted the second approach and recognize that corporations may be held criminally liable. However, they do highlight the conceptual difficulty in applying a theory of criminal liability based on a view of fault centred on the psychological processes of humans to what is simply a fictional person. There is an apparent need, now, to adapt the notion of fault to the structure and particular modus operandi of corporations. The existing mechanisms used to attribute criminal liability to corporations are but a partial solution, and should be improved.

[3] These debates to which we have briefly alluded further illustrate the difficulty in treating equally two types of "persons" that have nothing in common. In this context, the very notion of equality before the law calls for an original approach. And even from the perspective of recognizing corporate criminal liability, there remains the critical issue of how the objectives of the criminal law can be fulfilled most effectively and equitably.

[4] These objectives cannot be achieved in any meaningful way unless some serious thought is given to a number of fundamental questions, including the ability of criminal sanctions to effectively fulfill, in the corporate context, the objectives of punishment,

deterrence and rehabilitation traditionally associated with them. A full reply, genuinely responsive to these concerns, would necessitate considerable research and a detailed knowledge of corporate culture. Some writers, primarily Americans and Australians, have been addressing these issues for several years and have come up with many suggestions, particularly in regard to expanding the arsenal of potential sentences.[4] It is often argued in opposition to corporate criminal liability that the imposition of fines provides no guarantee that delinquent conduct will be deterred. The fines imposed on corporations are often minimal in comparison with the devastating effects of their wrongful acts, and virtually amount to a cost of doing business. But there is also a concern that excessive fines can have perverse effects that may have to be borne by innocent shareholders, creditors, employees or consumers.

[5] These issues will not be addressed in this paper. We will note only that the insertion in the Criminal Code of a provision that would make corporations criminally liable for their actions would not, by itself, resolve all of the difficulties inherent in using criminal sanctions in the corporate context. Some serious thinking should be initiated on the appropriateness of adopting fines as the sole possible penalty.

[6] This study will be devoted instead to the principles of criminal liability. Essentially, it will examine whether it is possible to conceptualize a notion of true corporate fault that is neither artificial nor impracticable.

[7] What follows, then, is a presentation of the applicable principles of corporate criminal liability, a review of the major criticisms of those principles, a discussion of the various solutions that have been proposed, and, in conclusion, a series of proposals for the purpose of promoting discussion.

TRADITIONAL THEORIES OF CORPORATE LIABILITY AT COMMON LAW

[8] The criminal liability of corporations is widely recognized in the common law jurisdictions. How it is recognized, and its theoretical underpinnings, vary from one country to another, however. Two major theories have attracted attention in this regard.

Vicarious liability ("respondeat superior")

[9] Under the doctrine of vicarious liability, a person may be bound to answer for the acts of another. Applied to corporations, the theory means that an organization may be liable for the acts of its employees, agents or mandataries, or any person for whom it is responsible. This doctrine, which was developed originally in the context of tortious liability, was imported with some hesitation into the criminal law, and especially its regulatory branch, when offences of this type were essentially absolute liability offences.[5]

[10] The doctrine of vicarious liability is frequently criticized on the ground that it is contrary to the fundamental precepts of a justice system based on the punishment of individual fault to hold someone liable for the acts or omissions of his agents or employees. [6]The theory seriously distorts the doctrine of mens rea, since a person's fault is automatically attributed to another person who has not himself committed any fault.

[11] The doctrine may also prove to be excessively restrictive if a finding of liability in an employer requires the existence of a relationship of subordination between the corporate employer and the person who committed the offence. In the case of professional staff, representatives or agents of the corporation, the margin of autonomy may be cause to doubt the existence of a sufficient relationship of subordination. Furthermore, an employee or agent of the corporation who is not an employee within the strict meaning of the word must have acted in the course of his or her employment or assignment if the company is to be held liable. Yet it is not always obvious that breaches of the law are committed in the course of employment as it is strictly understood. [7]

[12] This theory, which is still applied by the U.S. federal courts, [8] has been discarded by the Canadian courts as a basis for corporate liability, at least in so far as mens rea offences are concerned. In the leading decision, Canadian Dredge, [9] the Supreme Court of Canada, after describing the difficulties, manifests a clear aversion for this theory and a preference for the so-called identity doctrine. Before introducing this latter doctrine, however, a comment is in order.

[13] Vicarious liability is often contrasted with individual liability. In a context in which an individual's liability is at issue, this clear distinction between the two types of liability is completely understandable. In Min. of Employment and Immigration v. Bhatnager, [10] the Supreme Court clearly indicated that the application of the vicarious liability doctrine in criminal law is contrary to the principles of fundamental justice. However, the judgment explains that this doctrine, while proscribed by our law in the case of the criminal liability of individuals, is necessarily the basis for the legal reasoning underlying corporate liability. The personal liability of these collective entities necessarily implies some application of the doctrine of vicarious liability, since organizations can act only through the natural persons of whom they are composed. To that extent, corporate liability, whether based on the theory of "respondeat superior" or the identification theory, necessarily results from a rather broad application of the doctrine of vicarious liability. [11] In R. v. C.I.P. Inc., [12]the Supreme Court frankly acknowledged this:

We must also remember that corporate criminal liability is essentially vicarious liability based upon the acts and omissions of individuals: "a corporation may only act through agents" (Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662, at p. 675).[13]

[14] In this regard, possible Charter-based objections to applying this doctrine to natural persons must necessarily be considered from a different perspective when corporations are involved. And although the Supreme Court decisions clearly hold that corporations charged

with an offence may rely on Charter arguments in challenging the constitutional validity of the charging provisions, [14] it is equally clear that the section 7 principles could be construed differently in a context in which only corporations are contemplated.

[15] However, this is not to say that if the same provisions were enacted so as to apply exclusively to corporations, a corporation would be entitled to raise the Charter arguments which have been raised in the case at bar. The problem with ss. 36(1) and 37.3(2) of the Competition Act is that they are worded so as to encompass both individual and corporate accused. . . .[15]

[16] In this context, it is unlikely, in our view, that a provision basing corporate liability on some application of the vicarious liability doctrine could effectively be challenged constitutionally.

Identification theory

[17] For over a century, the English courts have based corporate liability on the so-called identification theory. Under this theory, there is an identity between the corporation and the persons who constitute its directing mind, that is, the individuals (officers or managerial level employees) whose duties within the firm are such that, in the course of their duties, they do not take orders or directives from a higher authority within the organization. The commission of an offence by a person or group of persons identified with the organization therefore constitutes an offence by the corporation as well. In this context, the criminal liability of the corporation, like that of natural persons, is primary and is not actually based on an application of the theory of vicarious liability.

[18] In addition to the difficulty of defining exactly what the notion of directing mind encompasses, the major criticism of the identification theory, as restated in the English judgment Tesco Supermarkets Ltd. v. Natrass, [16] has to do with its limited application. [17] The limited number of individuals identified with the company substantially reduces the potential applicability of the criminal law, particularly in the context of large corporate entities in which the decision-making centres are fragmented and the persons closely identified with the corporation are seldom those performing the incriminating acts.[18]

[19] In the leading decision, Canadian Dredge, [19] the Supreme Court of Canada adopted the identification theory as the basis for corporate criminal liability, but in a somewhat modified version that some have referred to as the delegation theory. Acknowledging the merits of the British theory, but aware of its limitations, Estey J., writing on behalf of a unanimous Court, expanded the circle of individuals who might attract liability in the company.

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. [20]

[20] The Court further recognized that delegation and sub-delegation of authority from the corporate centre within different geographical entities does not bar the application of the identification doctrine.

[21] In St. Lawrence, supra, and other authorities, a corporation may, by this means, have more than one directing mind. This must be particularly so in a country such as Canada where corporate operations are frequently geographically widespread. The transportation companies, for example, must of necessity operate by the delegation and subdelegation of authority from the corporate centre; by the division and subdivision of the corporate brain; and by decentralizing by delegation the guiding forces in the corporate undertaking. 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 of law there made. [21]

[22] The identity theory, as adopted by the Supreme Court as the basis for corporate liability, therefore steers a middle course between the extremely broad doctrine of vicarious liability and the identity doctrine recommended by the English courts. Only those employees of the company to whom powers pertaining to its management have been delegated may engage its liability. The notion of delegation is, however, broader than the concept adopted by the English decision, Tesco. To some degree, the criticisms that the identification theory is excessively restrictive are hereby answered, albeit not completely satisfactorily.

[23] Some recent decisions illustrate that, even in its expanded conception, the identification theory has its limits. In RhÃ´ne (The) v. Peter A.B. Widener (The), [22] the issue was whether the captain of a vessel, who was liable for damage, could be considered a directing mind of the corporate owner of the vessel and engage the latter's liability. Writing on behalf of the majority, Iacobucci J. summarized as follows the parameters of the notion of directing mind:

As Estey J.'s reasons demonstrate, the focus of inquiry must be whether the impugned individual has 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.[23] . . .

With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea.[24]

[24] In view of this definition of the concept of directing mind, the navigational error of the lead tug captain, acting as master of flotilla, a captain to whom had been delegated significant responsibilities in relation to navigational operations, did not engage the liability of the company that employed him.

[25] In a recent judgment, [25] the Ontario Court of Appeal, applying similar reasoning, acquitted a transportation company charged with filing a false shipping manifest covering hazardous wastes. The record indicated that the driver of the truck at the origin of the false manifest was the company's sole representative over an extensive geographical territory, and was the only one responsible for the collection of waste materials, the company's bookkeeping in the area and its relations with its customers. When this employee left, the company ceased its activities in the area.

[26] There is no doubt that Mr. Howard had many responsibilities and was given wide discretion in the exercise of those responsibilities. It is equally clear that those, like Mr. Corcoran, who dealt with the appellant in the area, equated Mr. Howard with the appellant corporation. Neither of these facts establish the kind of governing executive authority which must exist before the identification theory will impose liability on the corporation. Mr. Howard had authority over matters arising out of the performance of the task he was employed to do. It was his job to collect and transport waste to its eventual destination in Breslau. His authority extended over all matters, like the preparation of necessary documentation, arising out of the performance of those functions. I find no evidence, however, that he had authority to devise or develop corporate policy or make corporate decisions which went beyond those arising out of the transfer and transportation of waste. In my opinion, Mr. Howard's position is much like that of the tugboat captain in The RhÃ´ne, supra. Both had extensive responsibilities and discretion, but neither had the power to design and supervise the implementation of corporate policy.[26]

[27] These two cases show that the discussion on corporate liability is essentially centred on a case-by-case analysis to determine whether a particular employee, whose actions amount to an offence, may be characterized as a directing mind of the company. To the extent that the person who committed the wrongful act is not responsible for developing the company's policy, the latter is not liable. It is irrelevant that corporate expectations, defective corporate policies or insufficient supervision of the employee are the cause of the harm. The corporation is not criminally liable since the person who committed the wrongful acts does not have the authority to develop the corporate policies he is implementing.

[28] It should be noted that the identification theory, as presented by the Court in Canadian Dredge, requires that the mens rea of the offence be that of the person who committed the unlawful conduct. As Estey J. comments, generally the directing mind is also guilty of the offence in question. [27] Although he declines to rule definitively on the issue of whether the guilt of the directing mind is a condition precedent to corporate guilt, [28] it is fairly clear that a corporation's liability is contingent on the liability of at least one

individual.

[29] Finally, it should be noted that the Court's judgment in Canadian Dredge discusses some defences that may be relied on by corporations. The fact that the actions of the directing mind were committed in disobedience of express instructions not to disobey the law is not a defence for the company. It would be too easy, says Estey J., to elude any criminal liability by adopting and disseminating general guidelines prohibiting any illegal conduct. Furthermore, the identification theory by definition bars any such defence since guidelines directed to other persons can have no effect on the company itself, as embodied by its directing mind. At most, he says, such guidelines can be a factor to be taken into consideration on sentencing. The only defence available to the company lies, rather, in the fact that the person who constitutes its directing mind acted wholly in fraud of the company, without the company deriving any benefit therefrom. In that case, it is hard to claim that the natural person still constitutes the ego of the company. Estey J. further recognizes that there is no community interest in punishing the company in such circumstances. [29] However, the fact that the acts of the company's directing mind were committed in fraud of the company cannot be relied on as a defence unless the company benefited to some degree from those acts.

CRITICISMS OF THE TRADITIONAL THEORIES

General criticisms concerning the capacity of these theories to apprehend the true nature of corporate fault

[30] The view that an original notion of corporate fault needs to be developed is based to a large degree on the observation by legal writers that the traditional theories of vicarious liability or identification are unable fairly and realistically to apprehend reprehensible corporate conduct. For many, this is illustrated by an analysis of the inquiry reports and judgments issued in the wake of such disasters as the sinking of the ferry "Herald of Free Enterprise" [30] or the fire in the London tube. [31] In every instance, the observation is further buttressed by philosophical and social science research on how organizations function and make decisions.[32]

[31] There is no denying that our theory of criminal liability developed in a context in which the issue was one of seeking individual liability in natural persons. [33] Our theory of fault, based on free will, is essentially focused on human psychological processes and punishes certain psychologically blameworthy choices. Once the decision is made to criminally punish corporations, the issue arises of whether we can be content to attribute to the corporation the blameworthy state of mind of those persons who may be characterized as directing minds.

[32] Legal writers criticize the doctrine of vicarious liability not only for dealing hammer

blows at the fundamental precepts of a justice system based on suppressing individual moral wrongdoing and seriously distorting the doctrine of mens rea, but for being both overly broad and overly restrictive. [34] Overly broad, first, because all of the corporation's employees may engage its liability irrespective of their status in the organization and the corporate chain of command. Second, because the company can be held liable in the absence of any wrongdoing or negligence on its part. [35] The doctrine of vicarious liability is said to be overly restrictive, however, in so far as the requirement of a relationship of subordination between the corporate employer and the person who committed the offence appreciably reduces the potential reach of the criminal law.

[33] There are problems as well with the identification theory. Apart from the difficulty of accurately defining the parameters of the notion of directing mind, the major criticism of this theory, as replicated in Tesco Supermarkets Ltd. v. Natrass [36] and more or less followed in Canada, [37] is addressed to its limited application. As we stated earlier, the limited number of persons identified with the company substantially reduces the applicability of the criminal law. Furthermore, linking the corporation's liability to the wrongful acts of its senior officials clearly constitutes an encouragement to isolate the latter to ensure they are unaware of any doubtful practices by the corporation. [38] In this regard, it is argued, the identification theory is counterproductive. Moreover, focusing on the state of mind of the senior management works to the benefit of the larger entities and to the detriment of the smaller ones, [39] and this is unfair. [40] Finally, making an excessively narrow association between the guilt of the company and the guilt of a mere individual may obscure the fact that some offences may be committed as a result of systemic or organizational pressure originating directly from the corporate context. [41] Relying too strenuously on personal liability as the foundation of corporate liability overlooks the fact that a company's organization and the requirements it imposes on its staff may push the latter into breaking the law. In this regard, the identification theory may be excessively restrictive and incapable of grasping the essence of what constitutes corporate wrongdoing. [42]

[34] Viewed from another angle, however, the identification theory may be too broad. Indeed, the theory can be criticized, especially in so far as the notion of directing mind is expanded somewhat, for automatically attributing to the corporation the moral turpitude of an individual even though the organization itself, as an entity, has committed no wrong in the strict sense of the word. [43] In so far as the corporate entity took steps to prevent the wrongful conduct, it would be unfair to subject it to the opprobrium and consequences of a criminal conviction for the deed of an individual who took the personal initiative to break the law.

[35] More fundamentally, these criticisms all take for granted that it is inappropriate to try to transpose the individual model to the corporate context, to the degree that corporations have knowledge, a mode of operation, decision-making processes and powers that differ from those of natural persons. [44] These criticisms borrow from the works of social science researchers, which tend to demonstrate that such organizations cannot simply be envisaged

as the sum of the natural persons of which they are composed, but to some degree have a personality of their own that transcends individuals. [45] Corporations, like natural persons, it is said, have the capacity to make decisions, an essential ingredient of criminal liability, but this faculty is not comparable to individual free will. Field and JÃrg summarize quite well this idea, which is advanced primarily by French and adopted by all those who criticize the traditional approaches:

Of course, there are those who have argued that the very idea of corporations being morally responsible is nonsensical. Only the individual human being can be said to have moral personality and to be morally responsible for his/her acts. But we would argue (following French) that the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge that are not reductible to the aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge that are not reductible to the aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any particular individual devised them, but because they have emerged from a decision-making process recognised as authoritative within the corporation. These regulations and standing orders are also evidence of corporate capacity to differentiate right from wrong and act accordingly, to think ethically in terms of the consequences of corporate actions and to give reasoned explanations to the outside world. There is a strong argument for seeing such capacities for reasoning, understanding and control of conduct as the essence of moral personality and the basis of moral responsibility. [46]

[36] It is also stressed that corporations generally dispose of a sum of information that is quite incommensurate with the information available to a single individual.[47]

[37] In the context of criminal liability, the concepts of intent and corporate wrongdoing are not reducible to the individual intent of the employees, managers or officers. They correspond, rather, to the express or implicit policies governing the activities of the corporation. Corporate fault should, therefore, be sought in the corporate culture. [48]

Criticisms concerning the issues left unresolved

[38] Before discussing the potential solutions to these problems and exploring in greater detail the notion of corporate culture advanced by these writers, it is worth noting that the theories advanced by the courts as the basis for corporate criminal liability, and more particularly the identification theory, are subject to criticism in so far as they provide but a partial response to the problems related to recognizing corporate liability.[49]

[39] The main point of the Supreme Court decision in Canadian Dredge concerns the attribution of criminal liability to corporations for offences requiring subjective mens rea. The identification theory is elaborated in order to find some way to attribute moral fault to

the corporation. Some passages of the decision, however, address the liability of companies in the context of regulatory offences of absolute or strict liability.

[40] In so far as absolute liability offences are concerned, Estey J. is of the opinion that it is unnecessary to establish a special rule applicable to corporate liability or to rely on any theory to justify a company's liability in such cases. Once the law is breached, he says, there is automatic primary responsibility in the company. Where the legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility. Accordingly, there is no need to establish a rule for corporate liability nor a rationale therefor. The corporation is treated as a natural person.[50]

[41] It seems clear that the commission of the actus reus of the offence by any employee of the corporation will suffice to engage its liability. To a great extent, the corporation is vicariously liable.

[42] As for strict liability offences, the issue is less simple, although Estey J. states that in such cases as well liability does not depend on the application of any doctrine.

Where the terminology employed by the legislature is such as to reveal an intent that guilt shall not be predicated upon the automatic breach of the statute but rather upon the establishment of the actus reus, subject to the defence of due diligence, an offence of strict liability arises. See R. v City of Sault Ste. Marie, [1978] 2 S.C.R. 1299. As in the case of an absolute liability offence, it matters not whether the accused is corporate or

unincorporate, because the liability is primary and arises in the accused according to the terms of the statute in the same way as in the case of absolute offences. It is not dependent upon the attribution to the accused of the misconduct of others. This is so when the statute, properly construed, shows a clear contemplation by the Legislature that a breach of the statute itself leads to guilt, subject to the limited defence above noted. In this category, the corporation and the natural defendant are in the same position. In both cases liability is not vicarious but primary. [51]

[43] These passages from Canadian Dredge on corporate liability in the context of regulatory offences have been criticized on the ground that they constitute an abandonment of the identification theory for regulatory offences.[52]

[44] But in so far as the defence of due diligence is concerned, it seems clear that it is the diligence of the corporation that must be relied on. In fact, Estey J. refers to the following passage from the Sault Ste. Marie decision.

Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat

superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. [53]

[45] In fact, it would appear that in relation to the commission of the actus reus, the doctrine of vicarious liability is the basis for corporate liability for regulatory offences. The defence of due diligence would nevertheless be available, under the identification theory, for persons who constitute the directing mind of the company.[54]

[46] Although the aforecited passages show some confusion concerning the attribution of corporate liability for regulatory offences, they also indicate that over and above any discussion on corporate wrongdoing, no real thinking has gone into what constitutes an act capable of being attributed to a corporation. To what degree can the commission of the actus reus be attributed to a corporation? When can an act be characterized as corporate?

The most difficult question of all, however, is the determination of positive corporate action. This can be attributed in part to the fact that corporations can only act through their agents. As a result, there is a tendency to reduce the acts of the corporation into the acts of its agents who physically and mentally participated in the act. Even if it is accepted that some actions by the agents of a corporation constitute corporate action, the issue arises of which of these can be attributed to the corporation. [55]

[47] This is not a purely theoretical question. The appropriate response has some impact, for example, on the ability of corporations to rely on certain defences. As we know, some defences linked to the voluntary aspect of the actus reus may be cited by humans. We are thinking in particular of the defences of extreme drunkenness, automatism or necessity. If, for example, damage is caused by an extremely inebriated captain of a vessel, can the company cite the defence of extreme drunkenness and plead the lack of an actus reus? If intoxication aboard vessels constitutes a chronic problem and results from a lack of supervision of the employees, is the actus reus still absent? To our knowledge, the courts have not provided any answer to these questions.

PROPOSED SOLUTIONS

Traditional solutions

The English Draft Criminal Code

[48] The Draft Criminal Code proposed by the English Law Commission to a large degree codifies the Tesco decision. [56]Corporate liability is directly linked to the commission of the offence by a person who is the company's directing mind. Section 30(2) of the Draft Code provides that "A corporation may be guilty . . . only if one of its controlling officers, acting within the scope of its office and with the fault required, is concerned in the offence." Moreover, the notion of "controlling officer" is limitatively defined, [57] and only persons highly situated in the corporate hierarchy can engage the criminal liability of the corporation. The major criticisms of the overly restrictive nature of the identification theory are not reflected in the English Draft Code. In that sense, the English proposal, were it to be adopted in Canadian law, would constitute a step back from the present situation that would be hard to defend.

The U.S. Model Penal Code

[49] The Model Penal Code proposed in 1962 by the American Law Institute [58] contemplates three ways in which corporations can be criminally liable. For absolute liability regulatory offences, the principle of vicarious liability is retained. [59] In regard to offences for which the legislature has clearly indicated its intention to adopt corporate liability, the Model Penal Code prescribes a liability regime that is likewise broadly based on the vicarious liability doctrine but includes a possible due diligence defence based on the balance of probabilities, in so far as a "high managerial agent", i.e. someone closely associated with the management of the company, exercised due diligence in an effort to avoid the perpetration of the offence. Finally, in regard to mens rea offences, the model essentially adopts the identification theory as developed in English law. Section 207(1)(c) provides that "A corporation may be convicted of the commission of an offence if . the commission of the offence was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by high managerial agent acting on behalf of the corporation within the scope of his office or employment."

[50] The English and American models are variations on the classic themes of vicarious liability and the identification theory. The most innovative aspect of the Model Penal Code lies in the implicit recognition that the actus reus and mens rea of crimes can be attributed to two different persons. To a large degree, however, the problems we identified earlier as to the inappropriateness of these doctrines to serve as an adequate foundation for corporate criminal liability remain unanswered. The traditional doctrines continue to be ill adapted to the context of corporate delinquency, in that they are both too broad and too narrow to be used in sanctioning certain blameworthy conduct, while they allow convictions without proof of genuine fault on the part of the corporation.

The Law Reform Commission of Canada model

[51] In a working paper presented in 1976, [60] the Law Reform Commission of Canada discussed criminal liability for collective conduct, and came out in favour of corporate liability. Ten years later, the Commission proposed, in its report Recodifying Criminal Law, [61] to more or less codify the applicable law in this regard. The report proposed the following formulation:

2(5) (a) With respect to crimes requiring purpose or recklessness, a corporation is liable for conduct committed on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy.

(b) With respect to crimes requiring negligence a corporation is liable as above, notwithstanding that no director, officer or employee may be held individually liable for the same offence.

[52] The few comments we made earlier in respect of the English and American drafts can be repeated here. No doubt the most innovative aspect of this draft is its recognition of the collective nature of the wrongdoing, at least of those offences for which the standard of fault is one of negligence. However, as the Commission itself acknowledged, its draft was incomplete:

The problem of diffusion of the elements of a crime among members of the group, discussed above in the context of corporations, also applies to other forms of collective group action. For example, one member of a partnership might do the actus reus, another might have the mens rea, but neither might be liable.. These situations may warrant imposition of criminal liability on the collective. However, this notion of collective responsibility for group action is very complex and we have not been able to formulate any definitive recommendations on this particular issue in our proposed Code. We are of the view that further study on the whole issue of collective responsibility for group action is needed before any radical changes are made in the substance of our criminal law as it relates to this subject.

The second situation not addressed by clause 2(5) nor indeed anywhere in the proposed Code is how far an employer should be liable for the criminal acts of his employee. It is clear that an employer cannot be held responsible for the acts of an employee who goes off on a frolic of his own, unbeknownst to the employer. Much less clear though is the situation where the employer who has control over the employee knows of the employee's criminal activities but stands to benefit from them and acquiesces in them for the purpose of obtaining the benefit. Should there be a positive duty on an employer to prevent such a crime? Or should the employer be liable as a furtherer? This is an issue deserving of further careful consideration. [62]

[53] The English and American drafts, as well as the draft proposed by the Law Reform Commission of Canada, date back several years now, and represent at most an effort to codify some approaches proposed by the case law. In developing the identification and vicarious liability doctrines, the courts have displayed an appropriately pragmatic approach and initiated the discussion on the foundations of corporate liability. However, in Canadian Dredge, Estey J. acknowledged that the vicarious liability and identification doctrines advanced by the courts are not based on any real assessment of corporate personality or of fundamental principles of criminal liability.

This rule [the identification theory] stands in the middle of the range or spectrum. It is but a legal fiction invented for pragmatic reasons.

The position of the corporation in criminal law has been under examination by courts and law makers for centuries. The questions which arise are manifold and complex. They are not likely to be answered in a permanent or universal sense in this appeal, or indeed by the courts acting alone. Proceeding through the history of these issues in the criminal law adds perspective but no clear answer to the problem.[63]

[54] Corporate crime is a complex social phenomenon, and in my opinion Parliament cannot be content with codifying the initial responses to it taken by the courts.

The French model

[55] A consultation of the new French Penal Code [64] yields no solution to the problems that I have been discussing. After extensive discussions on the appropriateness of adopting and codifying criminal liability, the French parliament enacted article 121-2 of the Penal Code, a rather restrictive provision that reads as follows:

[Translation] Bodies corporate, with the exception of the State, are criminally liable in accordance with the distinctions in articles 121-4 to 121-7, and in those cases contemplated by statute or regulation, for the offences committed on their behalf by their instruments or representatives.

[56] This article, in addition to imposing numerous limitations on corporate criminal liability (since a limited number of corporations could be liable, and only for a prescribed number of offences), effectively codifies the identification theory as developed in the common law jurisdictions. In the first place, corporations are only liable if a particular individual has committed the offence. This individual must be a member of the board of directors or the management of the firm. A mere employee cannot, through his conduct, attract liability in the corporation. [65] The French Code is therefore a long way from developing a notion of collective wrongdoing capable of responding to the criticisms we have been discussing.

[57] It is therefore necessary, it seems, to turn toward the notion of corporate culture,

which has been advanced by some authorities as a foundation for corporate liability.

The notion of corporate culture as a foundation for corporate criminal liability

[58] It should be noted, first, that the notion of "corporate culture", as advanced by the commentators, has no monolithic meaning. Generally speaking, it can be said that corporate culture refers to a "pattern of shared beliefs and values that give the members of an institution meaning and provide them with the rules for behavior in their organization". [66] This rather broad notion can be used for many purposes, and is helpful in analyzing a corporation's personality in many respects.[67] For the purposes of attributing criminal liability, corporate culture refers primarily to the chain of command, the decision-making structure and the general atmosphere concerning obedience to the law. The following indicators are often singled out as pointing to facets of corporate culture that are relevant in the context of criminal liability.

[59] First, the development within the corporation of clearly defined responsibilities concerning the creation, evaluation and application of standards and procedures designed to ensure compliance with the law by employees would be a significant indicator of a corporate culture that is heedful of compliance with the law. [68] If, for example, the corporate structure is so organized as to deprive senior managers of the information they need to exercise such powers, this would indicate a corporate culture that is designed to elude law enforcement. [69] Generally, deficient structures for the dissemination of information within the firm would also be suspect. [70]

[60] The notion of a corporate culture that encouraged the commission of the offence is also advanced. This notion, especially in the case of very large entities, considers such things as the goals pursued by the firm, the corporate setting, the organizational pressures and the prevailing mentality as factors that may have promoted the commission of an offence.[71]

[61] The presence or absence of procedures designed to encourage employees to comply with the law should also be considered.[72]

[62] Pamela Bucy, in an important article, discusses in considerable detail all of the indicators that should be considered in determining the corporate culture of a company charged with a criminal offence. Her summary deserves to be quoted at length.

Most of the factfinder's work in applying the corporate ethos standard of liability will occur in the analysis of whether there existed a corporate ethos that encouraged the criminal conduct. The factfinders should examine the corporation's internal structure to make this finding. Beginning with the corporate hierarchy, the fact finders should determine whether the directors' supervision of officers, or management's supervision of employees was dilatory. Next, factfinders should examine the corporate goals, as communicated to the employees, to determine whether these goals could be achieved only by disregarding the

law. The third and fourth factors focus on the corporation's affirmative steps to educate and monitor employees and are more relevant in some fields than others. In highly technical fields where corporate employees daily decide issues involving legal compliance or violation, the factfinders should view the corporation's failure to educate its employees as encouraging criminal acts. In other fields where few corporate employees deal in issues affected by law and regulations, the corporation has a minimal duty to educate its employees and its failure to do so is less relevant. In examining the fifth factor, the commission of the present offense, the factfinders should examine the facts considered under the traditional respondeat superior and MPC [Model Penal Code] standards. Unlike these current standards that look to these facts as the sine qua non in imposing liability, however, the corporate ethos standard considers these facts to be relevant, but not conclusive indicia, of corporate liability. The factfinders should assess the sixth factor, how the corporation reacted to past violations, to further evaluate whether the corporation encourages or discourages illegal behavior. Consideration of the last factor, compensation by the corporation, is extremely important because often a corporation's compensation policies most directly influence its employees' behavior. Assessing the message inherent in compensation is complicated because most corporations use at least one form of compensation, indemnification, thus making most corporations criminally liable under the corporate ethos standard. This Article suggests a different approach toward indemnification and insurance coverage of convicted executives: If corporations follow this approach, the factfinder can more fairly weigh this component of a corporation's compensation package. [73]

[63] Finally, it should be noted that the corporate culture or "ethos" can be observed in light of the explicit guidelines issued by officers of the corporation, but that to a large degree it is also and perhaps above all observable from an examination of the institutional practices and implicit policies and rules prevailing within the corporation.

They encompass the routinely tolerated as well as the explicitly sanctioned. This is important given the evidence of tensions between formal rules and informal practices. These tensions are crucial to the understanding of unsafe corporate practice. As French has argued:

"The identity of the central policies of any particular corporation could only be revealed through a careful study of actual corporate behaviour over a period of time. Written statements may be indicative or they may be only window dressing. Acceptance among the corporate personnel or the higher managerial officers determines the content of the policy recognition."

Often there will be no formal corporate licence to break statutory provisions, for example, health and safety regulations. But companies may, by setting off their institutional priorities, create a climate which discourages obedience to known rules. There might be no effective scrutiny of compliance. Here French's stress that it should be the patterns of actual corporate behaviour that are analysed is important. It is not enough to consider a company's positively enacted rules, regulations and instructions. Non-decision making and

informal practices must be considered alongside positive acts and institutionalised rules.[74]

[64] It must be observed, however, that once the idea is put forward that corporate culture is at the centre of corporate wrongdoing, very few writers propose a corporate fault model that is functional. [75] And even fewer try to put their ideas into some form.

Aggregation of fault elements and fault based on "authority" and "acceptance" (or composite mens rea)

[65] Some writers cite the Dutch law, which seems to have moved away from the traditional theories of assigning criminal liability to corporations through vicarious liability or the identification theory. See footnote 76 76 The fairly recent cases seem to base corporate liability on two factors: the power of the corporation to determine which acts can be performed by its employees, and the acceptance of these acts in the normal course of business.

The Supreme Court decided that the employee's act could only be regarded as the employer's if:

(1) it was within the defendant's power to determine whether the employee acted in this way, and

(2) the employee's act belonged to a category of acts "accepted" by the firm as being in the course of normal business operations. [77]

[66] A study of the Dutch cases would also suggest that corporate liability could result from the juxtaposition of a set of individual fault elements. [78] This idea of the aggregation of fault elements has sometimes been accepted by the U.S. courts. For example, in United States v. Bank of New England, the Federal Court of Appeal (1st Circuit) held, in regard to knowledge:

(a) collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation.[79]

[67] This notion of aggregation of knowledge or individual fault elements as a basis for knowledge or corporate fault is certainly a means of accounting for the complex and sometimes compartmentalized character of the decision-making structures within large firms and the fact that the relevant information is often scattered. However, we must ask ourselves whether this isn't an artificial way of conceptualizing mens rea. It is not hard to conceive of cases in which the guilty intent attributed to a corporation as a result of an aggregation of faults would in fact simply be fictitious. Even in those cases in which there was evidence that the corporation had been negligent in establishing its internal procedures for conveyance of information, it is hard to find recklessness or intention on the basis of such negligence. As Brent Fisse comments:

Composite mens rea is a mechanical concept of mental state that fails to reflect true corporate fault; discrete items of information within organizations do not add up to corporate mens rea unless there is an organizational mens rea in failing to heed them. [80]

[68] Furthermore, the concepts of "power" and "acceptance" advanced by the Dutch cases are vague and imprecise. At most, they are an outline of a model. Field and JÃrg attempted to analyze what exactly was at issue. I will take the liberty of reproducing an excerpt from their study.

It seems likely that acceptance involves judgment on corporate monitoring of risky or illegal behaviour and power is a judgment on corporate response to those risks. It is also clear that there is a normative element to these criteria, that cumulatively they demand an overall judgment on the quality of corporate diligence in establishing, monitoring and enforcing appropriate standards. This is evident in the Hospital case. The management claimed that they could not prevent the unsafe practices because they did not know what was going on. The court's response was that liability was founded on the fact that the management was totally unaware of the routine practices of the hospital and they ought to have been aware of them. Thus "acceptance" does not necessarily involve foresight of the relevant risk. It is not certain whether it extends to any ordinary practice of the business or whether it merely extends to those practices that ought to have been discovered by corporate monitoring mechanisms. The stress above seems to be seen on some notion of reasonableness rather than strict liability.[81]

[69] To the degree that these notions refer back to the processes that should have been established in order to avoid the commission of the offence, they appear to be informed by a normative character, and ultimately are used to punish the corporation for its negligence. Clearly, the power and acceptance tests have the advantage of getting away from an analysis of individual conduct and take into account the collective aspect of the fault. However, they appear to allow the attribution to the corporation of offences requiring mens rea, while essentially it is the corporation's negligence that is at issue. In this regard, the notions of power and acceptance, as envisaged, cannot comprehend the corporate recklessness or intent that we were originally attempting to determine. In my view, this is a significant conceptual problem.

"Reactive corporate fault"

[70] To obviate the latter problem, Brent Fisse has advanced the concept, in recent years, of "reactive corporate fault". [82] Fisse, following the idea put forward by French, recognizes that corporate mens rea is manifested through the corporation's express or implicit policies. However, he recognizes that proof of such policies, especially when they are implicit, is hard to establish, so he suggests that the corporation be given a reasonable opportunity to formulate a policy of compliance with the law after the actus reus of the offence has been committed.

Although strategic mens rea is a genuinely corporate concept of mental state, requiring the prosecution to establish a criminal corporate policy at or before the time that the actus reus of an offence is committed would make corporate mens rea extremely difficult to prove.... The difficulty of proving strategic mens rea, however, may be significantly reduced if the requisite criminal mens rea based on corporate policy need not be shown to have existed at or before the time of the actus reus of the offense. If the corporate defendant is given a reasonable opportunity to formulate a legal compliance policy after the actus reus of an offense is brought to the attention of the policymaking officials, the corporation's fault can be assessed on the basis of its present reactions rather than its previously designed formal policy directives.[83]

[71] Fisse argues that gauging the corporation's moral turpitude solely on the basis of attitudes prior to or contemporaneous with the commission of the actus reus obscures the fact that the sometimes inappropriate reactions of companies after they have done something harmful are also blameworthy conduct that is condemned by public opinion. [84] He suggests, therefore, holding companies liable in the event that they fail to undertake remedial measures once the actus reus of an offence has been committed.

Offenses against the person or property, and other specific categories of criminal offenses, could also be converted into offenses of reactive non compliance. This could be done by imposing a general duty on corporations to undertake specified preventive or corrective actions in reaction to having committed the actus reus of an offense, and by making reactive corporate fault a sufficient mens rea. Under this approach, mens rea and actus reus need not be contemporaneous. Inasmuch as the relevant time frame for criminal fault can extend backward to include proactive fault (that is, fault displayed prior to the actus reus), it is difficult to see why the time frame should not also extend forward to include reactive fault.[85]

[72] However, in my opinion, the commission of an offence of failing to react correctly after the occurrence of some event, while conceivable, does not settle the question of whether the commission of an initial actus reus in itself constitutes an offence. [86] This can only depend on whether this is some fault prior to or concurrent with the commission of this actus reus. To view the matter otherwise would amount to allowing the corporation a free ride or a "free actus reus". At most, "reactive corporate fault" can serve as proof of intention, recklessness or negligence at the time of occurrence of a second actus reus. But while it is true that the penological objective that is sought primarily through the conviction of corporations is to get them to alter their conduct, it seems to me indefensible, from the standpoint of principle, not to censure the occurrence of an initial actus reus by a corporation when natural persons do not enjoy that advantage. Furthermore, it should be kept in mind that the commission of an initial actus may have devastating consequences that it might prove necessary to punish, without awaiting the occurrence of a second event.

[73] Incidentally, Fisse's contemplated model necessitates the establishment of structures

for the purpose of identifying the anticipated reaction on the part of the organization. [87] In this context, "reactive corporate fault" appears to me to have more to do with contempt of court or a breach of probation, and Fisse's proposed approaches seem more promising when envisaged in a context of expanding the range of possible sentences [88] for corporations or creating a particular offence.

The White Paper

[74] In June 1993, the federal Minister of Justice tabled a white paper entitled Proposals to amend the Criminal Code (General Principles), which contained some special provisions concerning corporate liability.

[75] At first sight, these proposals appear to replicate the identification (or delegation) rule as it was formulated by the Supreme Court of Canada. However, a careful reading of the paper indicates some fundamental modifications. By recognizing that a collectivity of individuals may commit an offence, the proposals appear to lean toward recognizing principles of liability peculiar to corporations. But in my view the proposed approach does not extend the logic far enough and is simply a compromise between the adaptation of the traditional liability rules for individuals and the adoption of an original notion of corporate fault.

[76] Canadian Dredge left unresolved the issue of whether corporate criminal liability should be contingent on a finding of individual guilt. Section 22 of the White Paper answers this question by stating that a corporation may be liable even if the persons who engaged in the criminal conduct or who displayed the appropriate guilty mind are not identified, prosecuted or convicted. This dissociation between individual and corporate liability is even more obvious when one considers that the persons committing the actus reus of the offence and the persons with the requisite guilty mind may be different.

[77] The identification theory put forward by the Supreme Court in Canadian Dredge required that both the physical and psychological ingredients of the offence be associated with the same individual, at least in regard to mens rea offences. But in the context of large organizations with dispersed operations, those who make the decisions are often isolated from those who execute them. [89] Thus, in recognizing that a collection of individuals may commit the offence, the White Paper takes the first steps toward an original notion of corporate fault. But its proposals are problematic, in my view, in their attempt to preserve the traditional fault spectrum and attribute the guilty mind of an individual to the corporation as the foundation of its liability. The White Paper is still far from grasping the essence of the idea of corporate culture as the foundation of corporate fault.

[78] In establishing the liability of natural persons, mens rea refers to the cognitive relationship between an individual in regard to the actions he takes, the particular circumstances surrounding his conduct and the consequences that may result. The misconduct is directly linked to the material context in which this person operates.

Moreover, the general principles of liability require a close temporal relationship between the physical and psychological ingredients of the crime. The actus reus and the mens rea must, in fact, be concomitant. But once it is recognized that the actus reus and mens rea of an offence may originate with different persons in the corporate context, the requirement of a close psychological and temporal relationship between these two ingredients of the offence necessarily becomes problematic.

[79] Section 22(1) of the White Paper defines the mens rea of the corporate offence as, in the case of a person having the corporation's express or implied authority to direct, manage or control the corporation's activities in the area concerned, knowing that the act or omission specified in the description of the offence is taking place, has taken place or will take place and having the state of mind required for the commission of the offence. However, the requisite state of mind, as traditionally envisaged, refers to a cognitive process directly linked to the context in which the individual acts. Sections 12.4 and 12.5 of the White Paper, which define the requisite states of mind, refer directly to the act specified in the description of the offence, the circumstances surrounding the perpetrator's conduct and the consequences that may result. Does it follow, then, that the agent having the mens rea must have some knowledge of the exact deed committed by another person and the exact circumstances surrounding that person's conduct? A rigid application of the logic inherent in the principles of individual liability requires an affirmative answer, but at the same time subverts the notion of corporate criminal liability. Furthermore, if the offence can be the deed of more than one individual, it naturally follows that the close temporal relationship that traditionally must exist between the physical and psychological ingredients of the offence should be reconceived. In this sense, the proposed amendments are right in providing for a looser temporal relationship between the ingredients of the offence. However, this abandonment of the rule of concomitance between the actus reus and the mens rea also suggests that the blameworthy state of mind should be redefined other than in close relationship with the particular physical ingredients. To the degree that the mens rea may be prior to the commission of the actus reus by another person, it is obvious that, rather than consisting of a cognitive relationship directly linked to a set of particular facts and circumstances, this mens rea should at most be linked to the commission of an offence understood in its generic sense. In this regard, it seems to us that the wording of the proposals is unclear in so far as it refers to the presence of the requisite mens rea for the commission of the offence.

[80] Concerning the temporal relationship between the actus reus and the mens rea, I also wish to draw attention to the fact that the proposal to adopt corporate liability by associating a state of mind to a previous event is particularly problematic. It is questionable, for example, what the intention, as defined in section 12.4, might correspond to in relation to an event that has already occurred. It is hard to imagine how one can wish the occurrence of an event that has already happened other than by its acceptance a posteriori. To base guilt on some misdeed subsequent to the commission of the actus reus risks, in my view, associating intention with the passive acceptance of a result or a mere failure to take remedial steps. The boundary between negligence, recklessness and

intention, if not impossible to define in such cases, is certainly a hard one to establish on the facts.

[81] This option of stretching the temporal relationship to incorporate in the offence a mens rea subsequent to the commission of the actus reus is not unrelated to the notion of "reactive corporate fault" on which Professor Brent Fisse has been working for a number of years, as we noted earlier. [90] The White Paper proposals constitute an initial step toward the recognition of a notion of corporate fault, but there are some problems in the attachment to individual cognitive processes as the foundation for corporate liability. The proposed model could be completed by drawing on the Australian Criminal Code. The provisions of that Code constitute, in my opinion, the most accomplished formalization of a notion of true corporate fault.

The Australian model

[82] The Parliament of Australia adopted a new Criminal Code in 1995. Division 12, which is addressed to corporate criminal liability, constitutes an original effort to adapt the general principles of criminal liability to the particularly complex circumstances of corporations. The drafters attempted to develop a notion of corporate fault that reflects the diffuse nature of the decision-making process in large companies, drawing extensively on the recent work of authorities such as Fisse who are trying to develop a fault model based, inter alia, on the observed functioning of corporate entities [91] and the notion of corporate culture as the foundation for their liability. The notion of "corporate intention" is not reducible to the individual intention of employees, managers or officers. Rather, it corresponds to the express or implicit policies governing the company's activities. The Australian Criminal Code attempts to integrate these notions. The result deserves to be quoted in full and is reproduced in an appendix to this study.

[83] The Division 12 provisions inspire a number of comments. First, the structure of the provisions is interesting, in that it deals separately with the actus reus and the mens rea. The various ingredients of the offence may be associated with more than one individual. In this regard, the approach resembles that of the White Paper. Particularly attractive, in my view, is the treatment of the actus reus in a special provision applicable to all offences, with another section devoted to the various fault elements. The separation between the physical elements and the mens rea is apparent just from reading the provisions, without the need to expressly refer to it. Such an arrangement would offer the advantage, in Canadian law, of including in the Criminal Code a provision applicable to all offences, whether criminal or regulatory. In my opinion, a codification of the corporate criminal provisions should be sufficiently general to be applicable to all types of offences.

[84] It should be noted, however, that the Australian Criminal Code, by attributing to the corporation all of the acts committed by its employees or agents acting within their actual or apparent scope of authority, does not incorporate any real notion of corporate acts. In so far as the commission of the actus reus of offences is concerned, the corporation's liability is

based essentially on the theory of vicarious liability. At most, the limitation of the mistake of fact defence in section 12.5 constitutes an attempt to distinguish the acts of individuals from acts that are strictly corporate. However, the questions we raised earlier concerning the availability to corporations of the defences related to the voluntary aspect of the actus reus that are available to individuals remain largely unanswered.

[85] Concerning the mens rea of offences, it will be noted, first, that the range of faults is retained. A corporation may be charged with an offence involving intention, knowledge, recklessness or negligence. In this regard, the Australian Code attempts a clear distinction between subjective fault elements and negligence.

[86] The procedure it establishes is, prima facie, rather complex. Section 12.3 provides that if intention, knowledge or recklessness is an essential ingredient of the offence, these fault elements must be attributed to the body corporate if it expressly, tacitly or impliedly authorized or permitted the commission of the offence. The section then prescribes four means by which such an authorization or permission may be established. [92] First, the corporation's fault will be established if the body corporate's board of directors intentionally, knowingly or recklessly carried out the wrongful conduct, or expressly or by necessary implication authorized or permitted the commission of the offence. Second, the corporation's fault may be established by evidence that a high managerial agent of the company intentionally, knowingly or recklessly engaged in the relevant conduct or expressly, tacitly or impliedly authorized or permitted the commission of the offence. In this second case, however, the corporation will not be liable if it proves that it exercised due diligence to prevent the conduct. Third, the corporation's fault may be established by proof that a corporate culture existed within the body corporate that encouraged, tolerated or led to non- compliance with the relevant provision. Fourth, the corporation's fault may be established by proving that it failed to create and maintain a corporate culture that required compliance with the relevant provision. We note, finally, that section 12.3 specifies that if recklessness is not a fault element in relation to a physical element of an offence, the corporation's liability cannot be established by proof of recklessness by the board of directors or a high managerial agent of the company.

[87] "Corporate culture" is defined in subsection 12.3(6) as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes [sic] place".

[88] To avoid the automatic attribution to the corporation of law-breaking through personal initiatives by its officials, subsection 12.3(3) provides that the corporation may escape conviction if it proves that it exercised due diligence to prevent its officers from intentionally committing or permitting the offence.

[89] Corporate negligence is established by proof of negligence of its employees, agents or officers or, if no one individually is negligent, that the body corporate's conduct, viewed as a whole, is negligent. This collective negligence may be established by proof that the

prohibited conduct was substantially attributable to inadequate management, control or supervision, or failure to provide adequate systems for conveying information within the body corporate.

[90] Thus the Australian Code takes a big step toward the definition of a notion of corporate fault. In this regard, the notion of corporate culture that encouraged the offence is of particular interest. This notion, especially in the case of extremely large entities, accounts for things in the corporate setting, organizational pressures and prevailing mindset that may have encouraged the commission of the offence. The notion of corporate culture can be used to convict a corporation even though no clear mens rea can be identified in a particular individual, and the notion serves as a particularly clear expression of the collective aspect of corporate fault. The concept of corporate culture is an original response to the frequent criticism that the identification theory is too restrictive to actually account for corporate fault. Moreover, giving the corporation the possible defence that it exercised due diligence to prevent the commission of the offence is a means of precluding the conviction of the company in the absence of any real fault on its part by automatically attributing to it the fault of an individual. This mitigation of the identification theory thus provides an answer to those who criticize that theory for casting too wide a net. The courts in Canada have clearly attempted to steer a middle course between overly broad and overly narrow interpretations of corporate liability through a tedious exercise of determining which individuals, under the identification theory, can engage the corporation's liability. The Australian Code seeks to achieve a balance in another way. While it still leans on the identification theory since a corporation is prima facie liable for the commission of an offence by a high managerial agent it expands the notion of fault through the notion of corporate culture, while mitigating it through the defence of due diligence. Corporate fault is therefore broadly envisaged as a collective notion.

[91] The Australian Code clearly constitutes the most serious and refined effort to formalize a notion of genuine corporate fault. However, it highlights a fundamental conceptual difficulty inherent in the notion of corporate culture. Whatever the efforts made to maintain a clear distinction between subjectively assessed faults and negligence, it seems hard to avoid consistently coming back to negligence as the true foundation for corporate liability. Indeed, providing that a deficient corporate culture can be the basis for a charge of intentionally committing a crime transforms into an intention what in my opinion is simply negligence. In my opinion, while the corporate culture can be the basis for a corporation's criminal liability, a corporation surely cannot be convicted of a crime of intention simply by proving that a deficient corporate culture led to the commission of the offence, or that the company was deficient in failing to maintain a corporate culture that encouraged respect for the law. It must be proved that the corporate culture instigated, encouraged or led to the commission of the offence or that the failure to maintain a law-abiding atmosphere was deliberate.

POTENTIAL SOLUTIONS AND QUESTIONS FOR DISCUSSION

[92] At the conclusion of this study, it seems obvious that the identification theory developed by the courts as the basis for corporate criminal liability is not fully satisfactory, especially when the liability in question is that of a large corporate entity.

[93] It would be appropriate, in my view, to codify a notion of corporate fault that is more closely related to the way in which bodies corporate actually operate. To a large degree, the notion of corporate culture, as formalized in the Australian Code, could serve as a model.

[94] In my opinion, there should be a distinct part of the Criminal Code expressly covering corporations. The 1993 White Paper of the federal Minister of Justice associated corporate liability with being a party to an offence. Saying that for the purposes of paragraph 21(1)(a) a corporation commits an offence made the application to a corporation of the other ways of being a party problematic. Subsection 22(3) attempted to remedy these difficulties, but it is clumsily drafted, so that such modes of participation as aiding and abetting do not constitute distinct offences but rather different ways of committing the same offence. Furthermore, there should be no objection in principle to corporate liability through complicity, as it is understood in subsection 21(2). I see no reason to limit corporate criminal liability to actually committing an offence or being a party to an offence by aiding, abetting or counselling it. So I would suggest that the reference to paragraph 21(1)(a) and the text of subsection 22(3) be dropped and that a section simply be drafted defining the conditions in which a corporation can be criminally liable.

[95] Although the courts have traditionally focused on defining rules that would apply to business corporations as a special form of bodies corporate, it will be noted that the 1993 White Paper specifically states that any body corporate may be held criminally liable. This position should be adopted, in my opinion. There is no statutory policy that would bar bodies corporate that are not profit-seeking business corporations from being subject to criminal liability. In so far as certain organizations exist, are active within our society and are recognized in the form of some status and certain corresponding privileges, they should, in principle, be subject to criminal sanctions. This position would only codify more clearly a situation that already exists, at least in regard to union associations and churches. [93]

[96] I suggest that the definition of corporate act in the Australian model be followed. The acts of any employee, agent or officer of a corporate body could constitute, prima facie, an act of the corporation itself. Notwithstanding certain criticisms that such a definition does not actually grasp the essence of the corporate act, [94] no one has so far managed to come up with a satisfactory model definition of corporate act. In fact, instead of developing an elaborate definition of corporate act as a theoretical concept, I think it would be appropriate to codify it to some degree negatively by providing a defence of due diligence that the corporation could rely on to escape liability.

[97] I also think it would be appropriate to clarify the issue of whether a corporation can

raise the defences of necessity, compulsion by threats, or any other defence based on the lack of voluntariness of the actus reus. In my opinion, a corporation should not be able to rely on these defences, which are directly related to individual free will.

[98] I*n Canadian Dredge*, the Supreme Court stated that in so far as the corporation is the sole victim of its agents' wrongdoing, there is no reason to hold it liable for that wrongdoing. I think this defence, which is strictly corporate, should be codified.

[99] With respect to the definition of the notion of corporate fault for offences requiring a subjectively assessed mens rea, a number of comments are in order.

[100] First, as we noted previously, the Australian model, while the most complete effort at formalizing the notion of corporate fault, to some degree confuses the types of fault when it comes to defining corporate culture, notwithstanding a valiant attempt to preserve the traditional spectrum of faults and to distinguish between subjectively assessed fault and negligence. In my opinion, this is inevitable and is not reprehensible in itself.

[101] Our entire penal structure attempts to establish a clearly defined boundary between various subjective faults and negligence. Furthermore, offences involving the presence of a subjective state of mind are punished more severely and are more stigmatizing than negligence offences. This is explained by the very basis of criminal liability in our law, which, while designed in part to suppress the harmful consequences of certain forms of conduct, also tends to suppress moral turpitude. Indeed, it must be acknowledged that our conception of the different fault elements is directly and solely derived from the empirical observation of the psychological processes peculiar to natural persons.

[102] Whatever the case, corporations are in some regards fictitious entities and there is a fictitious aspect to any attempt to attribute to them the cognitive and psychological states peculiar to individuals. Our concern for justice in respect of corporations has so far been manifested through the idea that it was necessary at all costs to keep intact the spectrum of faults and to treat corporations like natural persons. See footnote 95 95 Yet it is doubtful that this ideal of justice is achieved when, for example, we attribute to the corporation the fault of a natural person who took the initiative to break the law. Corporations are structures, organizations, and our reprobation should be directed to this distinctive nature. Criminal sanctions, in my view, are appropriate only if it is in fact the organization, its modes of operation and its deficient structures that are singled out where they produce unacceptable consequences that could have been avoided given the resources and information at the corporation's disposal. The entire body of literature on corporate fault points in this direction. The final remaining step is to recognize that there is little use in trying to associate this corporate fault artificially and at whatever cost with our traditional notions of intention or recklessness.

[103] In so far as negligence as a fault element is concerned, it might be necessary to provide that criminal negligence refers to a significant departure from the standard of

conduct of a prudent and diligent corporation, and define it accordingly, to ensure compliance with the Supreme Court of Canada decisions in regard to the requisite standard of negligence on which to base a finding of criminal liability. [96] I say "might" because, in my opinion, it is unnecessary to treat corporations exactly like natural persons. As I stated earlier, in the context of provisions applicable solely to corporations, the principles of fundamental justice can be interpreted differentially. [97] In my opinion, neither the concept of equality before the law nor the desire to treat corporations fairly forces us irremediably to model corporate fault on individual fault.[98]

[104] I am fully aware that proving those items that would establish the existence of a corporate culture leading to the commission of an offence will require a long and complex process of investigation. The quotation from Bucy, at note 73 of this paper, illustrates this. But in my opinion Parliament should not be deterred by this consideration.

[105] The decision to make corporations criminally liable and to found such liability on an appropriate basis is one of principle.

[106] Although at first sight it may seem difficult to prove the existence of an inadequate corporate culture, it may be no more difficult than precisely identifying the directing mind which, under the identification theory, may have committed the fault that can be attributed to the corporation. To be persuaded of this, one need only think of the Westray Mine tragedy. A consultation of the Inquiry Report [99] indicates that the identification theory was not a very effective basis for the liability of the company that owned the mine. Nor, it seems, did the identification theory, while at first sight a simpler one, greatly facilitate the work of the Inquiry. The complexity of investigations into the criminal liability of corporations stems less from the complexity of the underlying theory than from the complexity of the organization and functioning of corporations. Irrespective of whatever theory of liability is adopted, any investigation designed to sort out the sequence of events and allocate liability among individuals entails appreciably the same work. [100] In practice, there are some obvious problems in assigning criminal liability to corporations, particularly in the case of large corporate entities. Whether this or that theory is adopted as the basis for finding such liability should not, in the last analysis, have any major impact on the investigative work or the onus facing the Crown attorney.

[107] One way to lessen the investigative work is to impose a certain burden of proof on a corporation that prima facie has committed an offence. The Australian Code already puts an onus on the corporation to prove that it exercised due diligence to prevent the commission of the offence. I think some serious thought should be given in this regard to imposing a similar onus in our law. At first sight, this violates the Charter-protected presumption of innocence. And in view of the Supreme Court's decisions in this area, it is extremely likely that such a provision would be a source of litigation. However, the defence of due diligence, to the extent that a burden of proof is attached to it, strains the presumption of innocence less than some novel twist in the doctrine of vicarious liability or the doctrine of identification. Due diligence would be raised once evidence had been entered that a

managerial agent of the firm had authorized or participated in the commission of the offence or that the corporate culture had led to the commission of the offence. Instead of the company being automatically convicted once the misdeed of some senior officer was proved, the company could avert a conviction by rebutting the presumption of fault established by the fault of its officer. In this sense, the burden of proof would be reversed less by the law than by the evidence of the fault committed by the corporation's representative. The possibility of relying in its defence on the absence of corporate fault appreciably reduces the risk that the corporation would be convicted for the deed of an isolated individual without any real fault on the part of the corporation as a collective entity. To reason in terms of the presumption of innocence in the face of this reverse burden amounts to saying that a rigid application of the identification theory that leaves the corporation no way out raises no constitutional difficulty, while any extenuation of this theory is suspect. However, we noted earlier the Supreme Court's openness to the possibility of adopting a different conception of the principles of fundamental justice when reviewing provisions exclusively applicable to corporations. And the obvious problems of proof encountered by the prosecution when establishing preventive measures and the prevailing atmosphere within a firm cannot be overlooked.[101]

[108] In my view it is obvious that, to the degree that corporate liability provisions are drafted from the standpoint of transposing as closely as possible the traditional individual liability rules, the greater will be the number of constitutional challenges directly based on the principles of fundamental justice applicable to individuals. Indeed, the more we attempt to reproduce the traditional schema of individual liability, the less the notion of presumption of innocence will reflect its original meaning in the corporate context.

[109] By this logic, it would even be possible to go further and provide that once the commission of the actus reus of the offence is proved, the corporation will have the burden of proving that its corporate culture did not lead to the commission of the offence. [102] It could be enacted that the commission of the actus reus by an agent of the corporation triggers a presumption of deficient corporate culture that is rebuttable by the corporation.

[110] In my opinion, the decision to impose a burden of proof on the corporation in criminal matters is warranted by criminal policy and administrative convenience but is not predetermined by the present state of Charter case law.

[111] A number of people, wary of interfering with the presumption of innocence of corporations, have fewer scruples about proposing that harsher treatment of company directors would enhance the effectiveness of the criminal law.

[112] A number of statutes specifically address the criminal liability of company directors. For example, the Canadian Environmental Protection Act [103] provides, in section 122, that

"Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the

commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted."[104]

[113] Such provisions, while they seem harsh at first sight, in my opinion simply codify the common law rules governing parties to the offence. In so far as a natural person has participated, counselled or assisted in the commission of an offence, he is guilty of that offence under the common law. These rules are replicated in sections 21 and 22 of the Criminal Code. Given the possible issue as to the application of sections 21 and 22 of the Code to regulatory offences, provisions of this kind constitute an appropriate precaution.

[114] However, I think it is difficult to go further and attribute criminal liability to the officers, agents or directors of a firm, absent any personal fault by them, without being exposed to constitutional challenge. The liability of the natural persons making up a body corporate brings us back to the fundamental principles governing individual liability. But, as I mentioned earlier, vicarious liability is incompatible with the principles of fundamental justice as they apply to individuals. [105] The principles of fundamental justice in section 7 of the Charter bar the conviction of someone who is psychologically innocent. Statutory provisions that would automatically attribute to a natural person the fault of some other person or corporate entity, absent any personal fault on their part, would be constitutionally suspect, particularly if such provisions were accompanied by a sentence of imprisonment.

[115] In my opinion, the furthest one can go appears to have been reached in such provisions as subsection 124(2) of the Canadian Environmental Protection Act, [106] which provides:

In any prosecution of the master of a ship, the pilot in command of an aircraft or the owner or person in charge of a platform or other anthropogenic structure for an offence arising out of a contravention of Part VI, it is sufficient proof of the offence to establish that it was committed by a crew member or other person on board the ship, aircraft, platform or structure, whether or not the crew member or other person is identified or prosecuted for the offence.

[116] By itself, this provision clearly imposes vicarious liability. However, the defence under section 125 allows the person to whom fault is attributed to defend himself by citing his due diligence. [107] In this sense, the provision creates not an absolute liability offence but a negligence offence, and in this regard does not appear to pose any difficulty under section 7 of the Charter.[108]

[117] It does, however, pose another type of problem, related to the presumption of innocence. In so far as a provision of this nature applies in the regulatory context, it might be justified by section 1 of the Charter. [109] But it is far from obvious that Parliament would be able to justify, in a free and democratic society, reversing the onus of proof to facilitate identification of the guilty party in a criminal proceeding in order to avoid having to

prosecute the corporation that is responsible for the offence. In criminal matters, the Supreme Court has displayed little tolerance for arguments based on administrative efficiency.[110]

Footnotes

Footnote: 1 For convenience, this paper will variously use the terms "moral person", "corporation", "company" or "organization" in referring to the criminal activities of corporations. However, the issue of which organizations should be held criminally liable will be the subject of a later discussion.

Footnote: 2 For a summary of the major objections advanced in opposition to recognizing corporate criminal liability, see J. Groia and L. Adams, "Searching for a Soul to Damn and a Body to Kick: The Liability of Corporate Officers and Directors" (1990) Meredith Mem. Lect. 127. See also J.C. Coffee, "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry Into The Problem of Corporate Punishment" (1981) Michigan L. Rev. 386.

Footnote: 3 See, in particular, C. Wells, Corporations and Criminal Responsibility (Oxford: Clarendon Press, 1993), at 19.

Footnote: 4 Indeed, the criminal liability of corporations should be contemplated only if some valid penological objectives can realistically be attained. Brent Fisse has explored the issue in the greatest depth. In his view, the necessary objective of corporation criminal liability is essentially to encourage corporations to become better citizens, to make them more attentive to compliance with the law, primarily in the interest of averting the occurrence of harm. The very notion of corporate fault should be informed by these objectives, he says. See B. Fisse, "Criminal Law: The Attribution of Liability to Corporations: A Statutory Model" (1991) 13 Sydney L.R. 277; B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 South. Cal. L. R. 1141, at 1145ff.

See also C. Wells, Corporations and Criminal Responsibility, supra note 3, at 17ff.; J. C. Coffee, supra note 1; D. Bergman, "Corporate Sanctions and Corporate Probation", (1992) 142 New Law Journal, 1312; C. Kennedy, "Criminal Sentences for Corporations: Alternative Fining Mechanisms", (1985) 73 Calif. L. Rev. 443; Law Reform Commission of Canada, Criminal Responsibility for Group Action, Working Paper 16 (Ottawa, 1976), at 41ff; J. D. Wilson, "Re-thinking Penalties for Corporate Environmental Offenders: A View of the Law Reform Commission of Canada's Sentencing in Environmental Cases", (1986) 31 McGill L.J., 313. Finally, see D. Hanna, "Corporate Criminal Liability", (1988-89) 31 Crim. L. Q. 452, 474 to 479.

Footnote: 5 In Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662, Estey J.

provides a brief historical account of the importation of this common law doctrine. See also L. H. Leigh, "The Criminal Liability of Corporations and Other Groups", (1977) 9 Ottawa L. Rev. 246.

Footnote: 6 See, for example, L. LEIGH, "The Criminal Liability of Corporations and Other Groups: A Comparative View", (1981-82) 80 Michigan L. Rev. 1508, 1513-1514.

Footnote: 7 See C.D. Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct", (1980) 90 Yale L.J., at 7, note 27.

Footnote: 8 See especially Egan v. U.S., 137 F.2d 369 (1943) (8th Cir. C.A.), followed in U.S. v. Basic Construction, 711 F.2d 570 (1983) (5th Cir. C.A.). It should be noted, however, that the state courts, unlike their federal counterparts, clearly prefer to base corporate liability on an identification theory directly inspired by the British cases. See, in particular, People v. Canadian Fur Trappers Corp., 248 N.Y. 159 (1928) (N.Y.C.A.). For a succinct summary of the current situation in the United States, see C. Wells, supra note 3, at 116-20.

For a brief explanation of the disagreements between the U.S. federal and state courts, see the summary by Estey J. in Canadian Dredge, supra note 5, at 686-88.

Footnote: 9 Supra note 5.

Footnote: 10 [1990] 2 S.C.R. 217.

Footnote: 11 D. Hanna, supra note 4, is of the same opinion, at 457-58. In Canadian Dredge, supra note 5, Estey J. acknowledges the relationship between the identification theory and the vicarious liability theory. He states, at 692:

Thus where the defendant is corporate the common law has become pragmatic, as we have seen, and a modified and limited "vicarious liability" through the identification doctrine has emerged.

See also C.T. Asplund, "Corporate Criminality: A Riddle Wrapped in a Mystery Inside an Enigma" (1985) 45 C.R. (3d) 333, at 336.

Footnote: 12 [1992] 1 S.C.R. 843.

Footnote: 13 Idem, at 855.

Footnote: 14 See R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 and Dywidag Systems v. Zutphen Brothers Construction, [1990] 1 S.C.R. 705.

Footnote: 15 R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, at 181 (per Lamer

C.J.). Similar considerations would apply in the context of the section 1 analysis: see discussion at 182-83 (per Lamer C.J.).

Footnote: 16 [1972] A.C. 154.

Footnote: 17 See G. Williams, Textbook of Criminal Law, (2d ed., 1983), 973; E.G. Ewaschuck, "Corporate Criminal Liability and Related Matters", (1975) 29 C.R.N.S. 44, at 52-52.

Footnote: 18 See, for example, "Note: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions", (1978-79) 92 Harvard L.Rev. 1227, 1255. See also C. Wells, supra note 3, at 109 and B. Fisse and J. Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability", (1988) 11 Sydney L. Rev. 468, at 504-504.

Footnote: 19 Supra note 5.

Footnote: 20 Canadian Dredge & Dock Co. v. The Queen, supra note 5, at 693.

Footnote: 21 Idem, at 693.

Footnote: 22 [1993] 1 S.C.R. 497.

Footnote: 23 Idem, at 520-21.

Footnote: 24 Idem, at 523.

Footnote: 25 R. v. Safety-Kleen Canada Inc., (1998) 16 C.R. (5th) 90.

Footnote: 26 Idem, at 95.

Footnote: 27 Canadian Dredge, supra note 5, at 685.

Footnote: 28 Idem, at 686.

Footnote: 29 Idem, at 707.

Footnote: 30 See, for example, C. Wells, supra note 3, at 43ff; C. Wells, "Corporations: Culture, Risk and Criminal Liability", [1993] Crim. L.R. 551.

Footnote: 31 See, for example, S. Field and N. JÃrg, "Corporate Liability and Manslaughter: Should we be Going Dutch?", [1991] Crim. L.R. 156.

Footnote: 32 The most influential writer, without doubt, is French. See French, "The

Corporation as a Moral Person", (1979) 16 American Philosophical Quarterly 207 and French, Collective and Corporate Responsibility (New York: Columbia University Press, 1984). See also M. Dan-Cohen, Rights, Persons and Organizations (Berkeley: University of California Press, 1986). Also, see C.D. Stone, supra note 7 and B. Fisse and J. Braithwaite, supra note 18, at 483ff.

Footnote: 33 See, in particular, C.D. Stone, supra note 7. See also N. Sargent, "Law Ideology and Corporate Crime: A Critique of Instrumentalism", (1989) 4 CJLS/RCDS 39, at 54ff; C. Wells, Corporations and Criminal Responsibility, supra note 3; B. Fisse and J. Braithwaite, supra note 18, at 476ff. See also C. Tollefson, "Ideologies Clashing: Corporations, Criminal Law, and the Regulatory Offence", (1991) 29 Osgoode Hall L.J. 705.

Footnote: 34 P.H. Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability", (1991) 75 Minnesota L.R. 1095, at 1104ff. See also B. Fisse, "The Attribution of Criminal Liability to Corporations: A Statutory Model", (1991) 13 Sydney L.R. 277, who also notes, at 278, that the unfairness of vicarious liability may impede the development of effective sanctions.

Footnote: 35 See, for example, Note: "Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions", (1978-79) 92 Harvard L.Rev. 1227, at 1242:

Vicarious liability must be based on the act of a lone agent or on an assumption of shareholder control; the former is unfair and the latter is often untrue.

See also P.H. Bucy, supra note 34 at 1104:

Because the respondeat superior standard focuses solely on an individual corporate agent's intent and automatically imputes that intent to the corporation, a corporation's efforts to prevent such conduct are irrelevant. Under this approach all corporations, honest or dishonest, good or bad, are convicted if the government can prove that even one maverick employee committed criminal conduct.

Footnote: 36 [1972] A.C. 154.

Footnote: 37 Canadian Dredge & Dock Co. v. The Queen, supra note 5.

Footnote: 38 See, for example, P.H. Bucy, supra note 34, at 1105; C. Wells, "Corporate Liability and Consumer Protection: Tesco v. Natrass Revisited", 57 Modern L. Rev. 817, note 36. See also S. Field and N. JÃrg, supra note 31, at 158.

Footnote: 39 B. Fisse, "The attribution of Liability to Corporations", supra note 4, at 278. (Fisse, incidentally, notes that in the case of small businesses, the need for criminal proceedings against the corporation is doubtful.)

Footnote: 40 See, for example, P.H. Bucy, supra note 34, at 1100-01.

Footnote: 41 "Liability based on an individualistic model does not confront the reality of corporate decision-making. The identification doctrine applied to diffuse corporate structures can result in no-one being liable, or improperly reflect the limits of moral responsibility. Management priorities set from above determine the social context within which a corporation's shopfloor workers...make decisions about working practices. Liability should more closely reflect those organisational realities." C. Wells, supra note 38, at 820-21.

Footnote: 42 See, for example, J. C. Coffee, supra note 2; D. Hanna, supra note 4, at 471. See also C. Wells, Corporations and Criminal Responsibility, supra note 3, at 107-110 and 132. See also H. Bucy, supra

note 34, at 1105.

Footnote: 43 B. Fisse, "The Allocation of Criminal Responsibility", supra note 4, at 277, note 4, summarizes this situation as follows:

The Tesco principle also fails to reflect the concept of corporate blameworthiness. To prove fault on one managerial representative of a company is not to show that the company was at fault (the fact that a director or other top-level representative was at fault may suggest the presence of fault on a more widespread organisational basis, but fault on a more widespread organisational basis is not necessary to satisfy the Tesco principle). The Tesco principle thus imposes vicarious liability for the conduct or fault of a restricted range of representatives, namely high-level managers acting in the pursuit of corporate functions.

Footnote: 44 See especially C. D. Stone, supra note 7 and B. Fisse, "Corporate Criminal Responsibility", (1991) 15 Crim. L.J. 166; B. Fisse, "Criminal Law: The Attribution of Criminal Responsibility to Corporations: A Statutory Model", supra note 4; B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions", supra note 4. See also B. Fisse and J. Braithwaite, supra note 7, at 479 and R. N. Purvis, Corporate Crime, Butterworth, Sydney, 1979. See, further, C. Wells, Corporate Criminal Responsibility, supra note 3, at pp.65ff.

Footnote: 45 B. Fisse and J. Braithwaite, supra note 18, at 479, state:

In the case of organisations, individuals may be the most important parts, but there are

other parts [...] Organisations are systems ("socio-technical" systems, as they have sometimes been described) not just aggregations of individuals. More crucially however, organisations consist of sets of expectations about how different kinds of problems should be resolved. These expectations are a residue of the individual expectations of many past and present members of the organisation. But they are also the product of the interplay among individuals' expectations which distinguish shared meanings from individuals' views.

The interaction between individual and shared expectations, on the one hand, and the organisation's environment, on the other, constantly reproduces shared expectations. In other words, an organisation has a culture which is transmitted from one generation of organisational role encumbents to the next.[...]

The products of organisations are more than the sum of the products of individual actions. . . . The collective action is thus qualitatively different from the human actions which, in part, constitute it. [notes omitted]

Footnote: 46 S. Field and N. JÃrg, supra note 31, at 159 (notes omitted).

Footnote: 47 See, among others, M. McDonald, "The Personless Paradigm", (1987) 37 U. of Toronto L.J. 212, at 217-218.

Footnote: 48 The precursor of this notion appears to be French, whose works are considered to reflect the most widely accepted organizational theories. See French, supra note 32.

Footnote: 49 In Canadian Dredge, supra note 5, Estey J. clearly acknowledges this:

The position of the corporation in criminal law has been under examination by courts and law makers for centuries. The questions which arise are manifold and complex. They are not likely to be answered in a permanent or universal sense in this appeal, or indeed by the courts acting alone. Proceeding through the history of these issues in the criminal law adds perspective but no clear answer to the problem. [p. 676]

Footnote: 50 Idem, at 673-74.

Footnote: 51 Idem, at 674.

Footnote: 52 D. Stuart, Canadian Criminal Law, A Treatise (3rd ed.) (Toronto: Carswell, 1995) at 577.

Footnote: 53 R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, at 1331.

Footnote: 54 For a short discussion of the difficulties that emerge in relation to corporate liability for offences that are neither absolute liability nor complete mens rea offences, see C. Wells, "A quiet revolution in corporate liability for crime" (1995) N.L.J. 1326. Wells reports that some English courts are attempting to remedy this situation by developing new theories on which to base corporate liability in such cases.

Footnote: 55 J. Quaid, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis", (1998) 43 McGill L.J.67, at 90.

Footnote: 56 Law Commission, A Criminal Code for England and Wales, Report 177 (London: HMSO, 1989).

Footnote: 57 In section 30(3)(a) of the Draft Code, the "controlling officer" is defined as follows:

"Controlling officer" of a corporation means a person participating in the control of the corporation in the capacity of a director, manager, secretary or other similar officer (whether or not he was, or was validly, appointed to any such office).

Footnote: 58 American Law Institute, Model Penal Code (Philadelphia, 1962).

Footnote: 59 It should be noted that in the United States, as in England, the intermediate class of strict liability regulatory offences, as elaborated in the Sault Ste. Marie decision by the Supreme Court of Canada, does not exist as such. "Strict liability offences" correspond, therefore, to what we characterize in Canadian law as absolute liability offences.

Footnote: 60 Supra note 4.

Footnote: 61 Law Reform Commission of Canada, Recodifying Criminal Law, Report 31 (Ottawa, 1986).

Footnote: 62 Ibid., at 27.

Footnote: 63 Canadian Dredge, supra note 5, at 675-76.

Footnote: 64 Law 92-683 of 22 July 1992.

Footnote: 65 See J. Pradel, Le nouveau Code pÃnal (partie gÃnÃrale) (Paris: Dalloz, 1994), at 115.

Footnote: 66 S. Davis, Managing Corporate Culture, (1984) quoted in H. Bucy, supra note 34, at 1123, note 115.

Footnote: 67 For example, it might be said that a particular company has a culture that is more aggressive than others in marketing its products, or that the corporate culture of a business facilitates employees in reconciling their professional life with their family life.

Footnote: 68 See, for example, S. Field and N. JÃrg, supra note 31, at 161.

Footnote: 69 See, for example, P.H. Bucy, supra note 34, at 1129-1130.

Footnote: 70 S. Field and N. JÃrg, supra note 31, at 165.

Footnote: 71 P.H. Bucy, supra note 34, at 1133, expresses this idea as follows:

When considering the corporate goals, the factfinder should examine whether the goals set by the corporation for the relevant division, subsidiary, or employee promote lawful behavior or are so unrealistic that they encourage illegal behavior.

See also S. Field and N. JÃrg, supra note 31, at 166.

Footnote: 72 S. Field and N. JÃrg, supra note 6, at 166-67. -

Footnote: 73 H. Bucy, supra note 34, at 1146, 1147.

Footnote: 74 S. Field and N. JÃrg, supra note 31, at 166 (notes omitted).

Footnote: 75 See, for example, C.T. Asplund, supra note 11.

Footnote: 76

August 1999