The Criminal Liability of Corporations: A Comment on Section 2(5) of the LRCC's Draft *Criminal Code*

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Arguably, the law governing corporate criminal liability is amongst the most confused and inconsistent areas within the criminal law. England's Law Commission is not alone in finding the theories which underpin the existing notions of liability to be "strangely uncertain", and the law as whole to be in a "relatively undeveloped state".[201] At bottom, this confusion can be seen to stem from the difficulties inherent in any attempt to apply to a collectivity a body of law which was in fact designed to be applied to natural persons.[202] As Professor Asplund notes, "the criminal law would similarly disfunction were it applied to dogs or machines."[203]

In light of the inconsistent and inadequate state of the current law, the decision of the Law Reform Commission of Canada to include in its draft *Criminal Code*[204] a section governing corporate criminal liability is to be welcomed. On the other hand this decision does raise a number of questions. In what follows I will briefly consider what I take to be the most important, these including:

1. Is there any real need for a distinct notion of corporate criminal liability?
2. If so, is the LRCC's formulation of the notion adequate as to its form and substance?
3. Is the LRCC's formulation adequate as to its scope?
4. What are the implications of such a formulation for other areas of the criminal law?
5. What are the implications of such a formulation for the law governing criminal sanctions?

Is a Distinct Principle of Corporate Criminal Liability Necessary?

The debate over the appropriateness of a distinct principle of corporate criminal liability is a long-standing one. Those who oppose such a principle argue that it is impossible to subject the corporation to the underlying goals of the criminal law. They contend, for example, that it makes

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201 *Supra*, note 24 at 213. According to the American Law Institute, "The modern development [of the law of corporate criminality]... has proceeded largely without reference to any intelligible body of principle and the field is characterized by the absence of articulate analysis of the objectives thought to be attainable by imposing criminal fines on corporate bodies.": Model Penal Code, *supra*, note 23 at 332.

202 C. D. Stone, Where the Law Ends, The Social Control of Corporate Behaviour (New York: Harper, 1975) at 10.

203 "Corporate Criminality: A Riddle Wrapped in a Mystery Inside an Enigma" (1985) 45 Crim. Rep. (3d) 333 at 338.

204 *Supra*, note 20.

little sense to speak of rehabilitating a corporation.[205] Of course these critics admit that in principle the corporation ought to be amenable to the goal of deterrence. However they argue that the standard means of achieving deterrence--punishment by a monetary fine--is inevitably flawed. In particular they argue that fines are necessarily both ineffective and unfair, at least in part because they are almost invariably passed on to innocent stakeholders such as employees and shareholders. The critics thus conclude that the most appropriate way of dealing with corporate crime is under the traditional regime of individual liability.

For their part the supporters of a distinct principle of corporate criminal liability agree that the fine is flawed. Nonetheless they contend that the corporation can still be subjected to the underlying goals of the criminal law, including not only deterrence but also both rehabilitation and retribution. All that is wanted is some imagination in devising appropriate sanctions. In addition, and perhaps more importantly, the supporters argue that the traditional regime of individual liability is simply inadequate as a means of dealing with the realities of corporate criminality.

Doubtlessly, the interim conclusion must be that the arguments favouring a distinct principle of corporate criminal liability are the stronger. The argument that the larger goals of the criminal law are inappropriate in the corporate context is premised on an overly narrow understanding of the precise ways in which these goals might be applied to corporations. It is premised, in particular, on a decidedly unimaginative approach to the issue of corporate sanctions. But perhaps even more importantly, the need for a distinct principle of corporate criminal liability finds clear support in the problems posed by the realities of corporate action. Given the fragmented nature of decision-making within the modern corporation, it requires little imagination to realize that a regime of purely individual liability would prove inadequate as a mechanism for dealing with corporate criminality. As Neil Sargent notes,

> Given the elaborate division of management functions within large corporate structures, decisions resulting in illegal corporate behaviour may be made at various levels in the corporate hierarchy, without any one individual being ultimately responsible for the illegal activity. In such circumstances, the decentralization of management and diffusion of responsibilities typical of large corporations may promote illegal corporate behaviour....[206]

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[205] Note, "Developments in the Law--Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions" (1979) 92 Harvard Law Review 1227 at 1231, 235-36.

[206] N. Sargent, "Law, Ideology and Coporate Crime: A Critique of Instrumentalism" (1989) 4 Can. Jnl. of Law and Soc. 39 at 55-56.

It thus seems clear that if the corporation is to be brought entirely under the purview of the criminal law, the law itself must be properly equipped--and in particular it must be equipped with an adequately designed principle of corporate liability.

Is the LRCC's Formulation of the Principle of Corporate Criminal Liability Adequate as to its Form and Substance?

A. Case Law

As a means of evaluating the adequacy of the L.R.C.C.'s draft provision governing corporate criminal liability it is useful to begin by considering the existing case law. Here the leading issue has been the construction of a solution to the culpability riddle: in what sense can an entity which has neither a body nor a mind be understood to be culpable? Two solutions are discernable in the case law. On the one hand the English courts have relied on the so-called "identification theory".[207] Here the court begins by seeking out an individual wrongdoer. If that individual can be identified as a leading figure within the corporate hierarchy--a "guiding mind" of the corporation--then the court will allow that individual's personal culpability to be imputed to the corporation as a basis for finding the corporation itself criminally liable. The principal drawback of the English approach lies in the restrictive way in which the English courts have defined "guiding mind". Thus in the leading case of Tesco Supermarkets v. Nattras[208] the House of Lords held that to be designated as a "guiding mind" the employee must be one of the superior officers of the corporation.[209]

The second solution to the culpability riddle is much more expansive than the Tesco approach, and it can be discerned, in particular, in the decisions of the American federal courts. Put at its simplest, the strategy has been to import a tort-based notion of vicarious liability into the criminal law, thereby holding that corporations are strictly liable for the acts of their agents and officers.[210] The drawback is that this approach creates a doctrinal inconsistency at the very heart of the criminal law by doing away with the central notion of mens rea. It is perhaps for this reason that the American State Courts have rejected the approach adopted by their federal counterparts, preferring instead an approach which looks very much like the English "identification doctrine".[211]

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207 For the origins of the theory see Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705.

208 [1972] A.C. 153.

209 See in particular ibid. at 171.

210 See in particular Egan v. U.S. (1943) 137 F. 2d 369 (8th Ct. C.A.).

211 See in particular People v. Canadian Fur Trappers Corp. (1928) 248 N.Y. 159 (N.Y.C.A.).

The Canadian courts have sought to chart a middle course between the English approach and that of the federal courts in the U.S. Thus in the leading Supreme Court of Canada case of Canadian Dredge and Dock Co. Ltd. v. the Queen,[212] Estey J., writing for the court, explicitly rejected any approach grounded in tort-like notions of vicarious liability.[213] Instead, he invoked a much more expansive version of the "identification theory" than that adopted by the House of Lords in the Tesco case. For one thing he noted the need for flexibility in applying the English requirement that the act in question must have been committed within "the scope of employment".[214] But what is more important is the manner in which he defined the notion of "guiding mind". Here he made it clear that multiple "guiding minds" are possible, that they may occupy relatively low positions within the corporate hierarchy, and that they could well be geographically dispersed from the corporate centre.[215] In short, as Don Hanna notes, a "guiding mind" could be found to reside in a station "as high or as low as is necessary" to address adequately the judicial needs created by the realities of modern corporate organization.[216] At the same time, however, Justice Estey does impose certain limits. In particular he makes it clear that a corporation can defend itself against the imputation of culpability by showing either that the "guiding mind" was acting wholly in defraud of the corporation, or that he was acting entirely for his own "benefit".[217]

B. Codification Proposals

In addition to the case law, a second vantage point from which to assess the adequacy of the LRCC's proposal can be found in the parallel proposals made by law reform bodies at work in other jurisdictions. The American Law Institute (A.L.I.) and the English Law Commission have each included provisions governing corporate liability in their draft criminal codes, and they both differ from the Canadian provision, not only in substance, but even more obviously in form. On the substantive side they both incorporate fairly restrictive versions of the identification theory, the Law Commission's version relying on the language of the Tesco decision,[218] and the A.L.I. version relying on the approach adopted by the American courts at the state level.[219] But what is especially striking about these two provisions is their expansive form. Both proposals are more complex and more detailed than that offered by the LRCC.

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212 (1985), 19 C.C.C. (3d) 1.
213 *Ibid.* at 22.
214 *Ibid.* at 17.
215 *Ibid.* at 23.
216 D. Hanna, "Corporate Criminal Liability" (1988-89) 31 C.L.Q. 452 at 466.
217 *Supra*, note 212 at 37-8.
218 *Supra*, note 24 at s. 30(2)(b).
219 *Supra*, note 23 at s.2.07(1)(c).

As has been suggested, the case law and the codification proposals developed in other jurisdictions provide the most obvious benchmarks for assessing the adequacy of the LRCC's corporate criminal liability provision in both its formal and substantive aspects. As to its form there is no denying that the provision is distinguished by its brevity and its simplicity. As such it is suggested that it is a notable improvement over the comparable codification proposals.

Turning to the issue of substantive adequacy, the most useful starting point is the pre-existing case law, and in particular the leading Canadian case of Canadian Dredge and Dock. The LRCC's draft provision would appear to represent an attempt to codify the main elements of the Supreme Court's decision in that case. This being so, two questions arise: 1) Does the provision adequately capture Justice Estey's version of the identification theory? and 2) Does that theory itself provide an adequate approach to the problem of corporate criminal liability? The first question can be answered in the affirmative. Thus s.2(5)(a) provides that liability will be imputed to the corporation where the agent or employee acts with some sort of "authority", where the act in question was committed within the "scope of their authority", and where that act was committed "on its [the corporation's] behalf". Each of the elements of Justice Estey's formulation of the theory is thus brought into play.

The second question, focusing on the broader adequacy of the identification doctrine itself, is perhaps the more difficult. On the one hand the virtues of the theory are obvious. The fiction of the "guiding mind" allows the criminal liability of corporations to be treated as both primary and personal. The integrity of traditional notions of liability, and of the concepts of *actus reus* and *mens rea*, is thus preserved. As such the concerns of older commentators that the principle of corporate criminal liability could only be adopted at the price of doctrinal inconsistency are overcome. It is arguable, however, that the maintenance of doctrinal consistency carries costs of its own, particularly with respect to the issue of functional efficiency. Of course, as has been noted, the Canadian version of the identification theory is the most flexible and expansive version of the theory now current. And these virtues are reflected in the LRCC's draft provision, thus setting it apart from the more restrictive provisions proposed by both the Law Commission and the A.L.I. All this notwithstanding, it is suggested that the identification theory inevitably stands as a barrier to the achievement of real functional efficiency in the prosecution of corporate criminality. As was noted at the outset, the principal reason for adopting a principle of corporate liability must be to allow the law to deal with the realities of corporate action--and in particular with the fragmented nature of decision making within the modern corporation. However, and by its very nature, the identification theory ensures that in at least some cases the law will fail to achieve its goal--it will fail to overcome the barrier inevitably thrown up by the very nature of corporate activity. The reasons for this are fairly obvious. No matter how expansively one defines "guiding mind", the fact remains that no liability can be imposed until one first finds a natural person in whom the

necessary *actus reus* and *mens rea* can combine in the requisite way. And given the fragmented nature of corporate activity, this may not always be possible. As the LRCC itself notes, "[o]ne director might do the *actus reus*, another might have the *mens rea*, but neither might be liable."[220] Indeed despite the claims that the identification theory puts corporations and natural persons on an equal footing before the law, the reality is that it does not. Unlike a natural person a corporation will always enjoy immunity from criminal prosecution until a co-perpetrator can be found with the requisite level of culpability.

To some extent the LRCC has responded to these problems by adding s.2(5)(b), which allows for the imposition of liability in the case of crimes of negligence "notwithstanding that no director, officer or employee may be held individually liable for the same offence." However it is arguable that the more comprehensive--and therefore better--approach is that adopted by the "alternative" provision:

> 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, notwithstanding that no director, officer or employee may be held individually liable for the same offence.[221]

Here the main structure of the identification theory is preserved. However the requirement that corporate liability be conditional on individual culpability is jettisoned. Instead the necessary elements of culpability can be derived, in piecemeal fashion, from the actions and intentions of all those who might have participated in the impugned corporate activity. Under the "alternative" provision, the miscreant corporation will therefore not be able to shield itself behind the complexities of the corporate process. And as such, as the LRCC itself acknowledges, "[t]he alternative provision puts the fictitious person constituting the corporation on the same footing as a real person."[222]

Is the LRCC's Formulation Adequate as to its Scope?

The decision to limit the scope of the LRCC's draft provision to corporations is explicable on several grounds. The identification theory itself has traditionally been confined to corporations, and to the extent that the LRCC has attempted to map that theory in its own provision, the limitation would seem to follow naturally. In addition, the limitation may reflect

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220 *Supra*, note 20 at 27.
221 *Ibid.* at 26.
222 *Ibid.* at 27.

political considerations. Thus the Department of Justice's Working Group refers explicitly to the "political repercussions of applying criminal liability under this principle to trade unions."[223] And yet it is arguable that there is no principled reason to draw a distinction between corporations and unincorporated associations for the purposes of criminal liability. As such the extension of the scope of the proposed provision is an issue which deserves consideration, at least in the future. For the present, however, it remains true that the issue has received scant attention, either from the courts or from commentators. This being so, the LRCC's decision to confine the scope of its draft provision to incorporated bodies seems sensible, at least as an interim solution.

What Are the Implications of the LRCC's Provision for Other Areas of the Criminal Law?

The decision to incorporate corporate liability into the *Criminal Code* must raise questions about the way in which individual crimes should be defined, and, more generally, about the sorts of crimes that should be included in the "Special Part". Thus on the one hand attention must be given to the wording of the provisions governing existing crimes so as to ensure that corporations are not, on purely definitional grounds, granted immunity. In addition, and perhaps more importantly, the principle of corporate criminal liability would seem to require that some consideration be given to adding new crimes so as to ensure that the criminal law is properly equipped to respond to the corporation's full potential for doing harm. In this connection a useful starting-point might be the various statutory wrongs which exist outside the *Criminal Code* itself, and which, under the rubric of "social welfare offences" are typically distinguished from "true crimes".[224] It may be suggested that if the proposed corporate liability provision is to provide an effective means of dealing with corporate wrongdoing, then it must be complemented by a hierarchy of crimes which is attuned to the real capabilities of corporations, and this in turn may require the inclusion of offences which at present are confined to the margins of the criminal law.[225]

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223 Toward a New General Part for the Criminal Code of Canada *supra*, note 18.

224 See in particular *supra*, note 206 at 53, 58.

225 One obvious example would be the inclusion in the Criminal Code of a crime of industrial pollution. On this see J. Wilson, "Re-thinking Penalties for Corporate Environmental Offenders" (1986) 31 McGill L. J. 313.

What are the Implications of the LRCC's Provision for the Law Governing Criminal Sanctions?

The last of the issues to be dealt with is far from the least important. Indeed, as Hanna notes, the issue of sanctions is really "the tail that wags the dog of corporate criminal liability."[226] But like the earlier issues the problems involved here are considerable. On the one hand, as has been noted, there is generally little sympathy for the present regime of corporate sanctions--a regime based entirely on fines. At the same time, there is little consensus as to appropriate alternatives. And yet the fact remains that if the proposed provision is to have any practical effect it must be complemented by a scheme of sanctions which is attuned to the real nature of the corporation. This being so, it is suggested that consideration should be given to the work of those commentators who have developed corporate penal options which are not only sensitive to the real nature of the corporation, but which are grounded in the assumption that the corporation can indeed be subjected to the underlying goals of the criminal law. As to particulars, these sanctions might include punitive injunctions, corporate probation, community service orders, adverse publicity orders, compensation payments, and even partial delicensing and outright nationalization. In some cases the value of these sanctions would derive from their deterrent effect. Thus the threat of adverse publicity, delicensing, and outright nationalization would undoubtedly have a salutary effect on the thinking of corporate decision-makers.[227] Other sanctions would derive their value from their rehabilitative effect. For example, both the punitive injunction and corporate probation would require that the corporation correct its own future conduct by taking action against miscreant employees, and by adopting measures to "purify" its decision-making procedures.[228] Still other sanctions would derive their value from their retributive effect. Thus the requirement that the corporation compensate the victim's for its actions, or that it perform some form of community service, would force the corporation to bear the burden of its criminality.[229]

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[226] *Supra*, note 216 at 468.

[227] See for example, *ibid.* at 478-79.

[228] See for example, B. Fisse, "Reconstructing Corporate Criminal Law:Deterrence, Retribution, Fault, and Sanctions" (1983) 56 So. Calif. L.R. 1141 at 1164-66, 1223-24.

[229] See for example *ibid.* at 1226-29; LRCC., Criminal Responsibility for Group Action (Report 16) (Ottawa, The Commission, 1976) at 47.

Conclusion

The decision by the LRCC to codify the principle of corporate criminal liability is no doubt a brave decision; but more to the point it is arguably the right decision. Debate continues over the wisdom of such a principle. However, if the new Code is to be truly comprehensive, and in particular if corporations are to be brought under the purview of the criminal law, then the inclusion of such a principle is an inescapable necessity.

In addition, it is suggested that the LRCC's decision to look to Canadian case law, and in particular to the Supreme Court of Canada's decision in Canadian Dredge and Dock was entirely sensible. But at the same time it is also suggested that the doctrine of corporate liability outlined by Justice Estey is in need of some modification if it is to offer a practically effective means of dealing with the problem of corporate crime. In particular it is suggested that there be a jettisoning of the requirement that individual culpability be established as a basis for imputing liability to the corporation. The better, more realistic approach, is that embodied in the "alternative" provision.

Of course establishing the proper form and substance of the new provision does not exhaust the issues raised by its proposed inclusion. Consideration will also have to be given to its scope, and in particular to the advisability of extending its reach to include unincorporated associations. In addition it seems clear that any decision to adopt a principle of corporate criminal liability must be complemented by a re-thinking of both the hierarchy of offences outlined in the Code, and of the hierarchy of sanctions available under the criminal law. It makes little sense to open the door to corporate prosecutions without also ensuring that the corporation can be properly and effectively charged and punished. In the end, it seems clear that the decision to codify the principle of corporate criminal liability is not, in itself, a solution to the legal problems posed by corporate crime; it is merely the beginning of a solution.