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COMMENTS ON THE WHITE PAPER PROPOSALS CONCERNING THE LIABILITY OF CORPORATIONS

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1. INTRODUCTION

Much ink has been spilled and many debates persist over the appropriateness of making corporations criminally liable. Opponents of this idea argue primarily that since a corporation has no mind of its own, it cannot demonstrate the moral turpitude required for a finding of criminal guilt. It is completely artificial to treat the body corporate as if it had the blameworthy state of mind that, by definition, it cannot have. In this context, the critics point out, the notion of blame is meaningless. Moreover, the impossibility of jailing a company makes a mockery of any attempt to achieve the goals of deterrence, retribution and rehabilitation sought by criminal sanctions.¹ Supporters of corporate criminal liability adopt a wholly different perspective. Corporations, they say, are not mere fictions. These institutions exist, occupy a preeminent position in the organization of our society, and are just as capable as human beings of causing harm. It is only fair, and consistent with the principle of equality before the law, to treat them in the same way as natural persons and hold them liable for the offences they commit. These organizations, with the physical influence they exert on social life, should be required to adhere to the fundamental values of our society as sanctioned by the criminal law. Furthermore, it is argued, the position that criminal deterrence is an ineffective weapon 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.²

¹ For a summary of the major objections to recognizing the criminal liability of corporations, 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.

² See, in particular, C. Wells, *Corporations and Criminal Responsibility*, Clarendon Press, Oxford, 1993, 19.

At first sight, such debates may appear abstract and obsolete in that the common law jurisdictions have endorsed 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 essentially based on a view of fault focused on the psychological processes of the human person to what is nothing but a fictitious person. It is now necessary, it seems, to adapt the notion of fault to the structure and particular mode of functioning of “moral persons”, or corporate entities. These debates illustrate as well the difficulty in treating equally two types of “persons” — moral and natural — that have nothing in common. In this context, the very notion of equality before the law warrants an approach of some originality. Even within a perspective that would allow corporations to be held criminally liable, the question is acutely posed as to how to fulfil as effectively and fairly as possible the objectives pursued by the criminal law.

No such result can validly be anticipated without some serious thought being given to a number of fundamental questions. It is necessary to investigate the capacity of penal sanctions to fulfil effectively, within the corporate context, the traditional objectives of retribution, deterrence and rehabilitation that traditionally pertain to them. To fully canvass these issues would necessitate a substantial body of research and a detailed knowledge of corporate culture. A few writers, mainly American and Australian, have been addressing these issues for several years and have formulated a number of suggestions, particularly in the area of expanding the arsenal of penalties. In fact, it is often argued in opposition to corporate criminal liability that the imposition of fines offers no guarantee of deterrence of delinquent conduct. Fines imposed on corporations, it is said, are often minimal in comparison to the devastation produced by the latter's wrongful acts — a sort of tax to be entered on the balance sheet. Yet there are concerns that excessively heavy fines may have perverse effects on innocent shareholders, creditors, employees or consumers. These issues are not addressed in the White Paper and we do not propose to address them here at any length. We will simply note that the insertion in the Criminal Code of a corporate criminal liability provision cannot, by itself, resolve all of the inherent problems in using criminal sanctions in the corporate context. Some serious thought should be initiated on the appropriateness of retaining fines as the only possible sanction.³

³ There is already an abundant literature on this matter. See, in particular, J.C. Coffee, *supra* note 1; 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”, (1982) 56 Southern Cal. L. Rev. 1141; D. Bergman, “Corporate Sanctions and Corporate Probation”, (1992) 142 New Law Journal

This study will be focused instead on the principles of criminal liability. It will essentially examine whether it is possible to devise some notion of genuine corporate fault that is neither artificial nor impractical. In this regard, the proposals in the White Paper, in recognizing that the conduct of a collectivity of individuals can result in the commission of an offence, constitutes a significant first step toward the development of such a notion. They tend to shun the rigid conceptual framework of the theories of vicarious liability and identification found in the cases, and attempt to reflect more accurately the complex and diffuse organizational context of corporations. It seems to us, however, that the proposed solution does not extend the initial reasoning far enough and is little more than a difficult compromise between an adaptation of the traditional rules of individual responsibility and the adoption of an original notion of corporate fault. We propose, therefore, to analyze these proposals in light of the major criticisms that have been made of the traditional approaches, in order to formulate recommendations that can serve as an original and realistic foundation for corporate liability. In our view, the effort undertaken in the White Paper can be pursued with profit.

1312; C. Kennedy, "Criminal Sentences for Corporations: Alternative Fining Mechanisms", (1985) 73 Calif. L. Rev. 443; 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 Law Journal 313. See also D. Hanna, "Corporate Criminal Liability", (1988-89) 31 Crim. L. Q. 452, 474-79.

TRADITIONAL THEORIES OF CORPORATE LIABILITY

All of the common law jurisdictions have adopted the view, which we have no intention of challenging, that corporations ought to be criminally liable. The theoretical underpinnings of such liability and the devices through which it is recognized vary, however, from one country to another. Attention has focused on two major theories.

- vicarious liability

Under the doctrine of vicarious liability, a person may be held to account for the acts of his employees, agents or any person for whom he is responsible. This doctrine, developed originally in the context of tort liability, was imported with some hesitation into the criminal law, primarily in the regulatory sphere.⁴

Vicarious liability is often criticized on the ground that it is contrary to the fundamental precepts of a system of justice based on deterrence of individual moral fault to hold a company liable for the acts or omissions of its agents or employees.⁵ The theory seriously stretches the doctrine of *mens rea*. The doctrine of vicarious liability can also be criticized for being both too broad and too restrictive. Too broad, because all employees of the corporation can engage its liability, irrespective of their status in the organization and the corporate hierarchy. Furthermore, a company may be held liable in the absence of any fault or negligence on its part.⁶ The doctrine of vicarious liability is too restrictive, however, insofar as the requirement of a relationship of subordination between the corporate employer and the person who committed the offence appreciably reduces the scope of operation of the criminal law. One thinks especially of the case of professionals, representatives or agents of the corporation whose area of autonomy raises doubts about the existence of a sufficient relationship of subordination. Furthermore, the employee must have acted within the scope of his employment to engage the company's liability.

⁴ In *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, Estey J. provides a brief history of the importation of this doctrine into the common law. See also L.H. Leigh, "The Criminal Liability of Corporations and Other Groups", (1977) 9 Ottawa L. Rev. 246.

⁵ See, for example, L. Leigh, "The Criminal Liability of Corporations and Other Groups: A Comparative View", (1981-82) 80 Michigan L. Rev. 1508, 1513-14.

⁶ See, for example, NOTE, "Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions", (1978-79) 92 Harvard L. Rev. 1227, 1242.

But it is not always obvious that violations of the law have been committed within the scope of employment as it is strictly understood.

This theory, which is still applied by the U.S. federal courts,⁷ appears to have been rejected by the Canadian courts, at least with regard to offences requiring *mens rea*. In the leading case, *Canadian Dredge*,⁸ the Supreme Court of Canada demonstrated a clear aversion for the theory, favouring instead the so-called theory of identification. Before presenting this latter doctrine, two remarks are in order, however.

In the first place, vicarious liability is often contrasted to personal liability. In a context in which an individual's liability is at issue, this clear distinction between the two types of liability is fully understandable. In the case of a corporation, however, the personal liability of this collective entity necessarily involves some application of the doctrine of vicarious liability, since the corporation can only act through the natural persons of which it is composed. To that extent, the liability of corporations necessarily follows from a more or less broad application of the doctrine of vicarious liability.⁹

In this connection, possible Charter-based objections to applying this doctrine to natural persons must be contemplated within a different perspective when it comes to corporations. In *Dept. of*

⁷ See, especially, *Egan v. U.S.*, 137 F.2d 369 (1943) (8th Cir.C.A.), followed by *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 a theory of identification directly inspired by the British jurisprudence. See, in particular, *People v. Canadian Fur Trappers Corp.*, 248 N.Y. 159 (1928) (N.Y.C.A.). For a succinct summary of the prevailing situation in the United States, see C. Wells, *supra* note 2, at 116-120.

For a brief statement of the differing approaches of the U.S. federal and state courts, see the summary on this by Estey J. in *Canadian Dredge*, *supra* note 4, at 686-88.

⁸ *Supra* note 4.

⁹ D. Hanna, *supra* note 3, is of the same opinion, at pp. 457 and 458. In *Canadian Dredge*, moreover, Estey J. acknowledges the relationship that exists between the theory of identification and the theory of vicarious liability. At p. 692, he states:

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, 336.

Employment and Immigration v. Bhatnager,¹⁰ the Supreme Court of Canada clearly suggested that the application of the doctrine of vicarious liability in criminal law is contrary to the principles of fundamental justice. However, this judgment explains that the doctrine, unknown in our law in the case of individual liability, is by necessity the basis of the legal reasoning underlying corporate liability. Furthermore, it is now settled in the jurisprudence of the Supreme Court that a corporation charged with an offence may invoke Charter arguments to challenge the constitutional validity of the provisions under which it has been charged.¹¹ It may argue, as in the *Wholesale Travel Group* case,¹² that non-compliance with a principle of fundamental justice affects the right to life, liberty and security of natural persons, to the extent that the latter are capable of being prosecuted in the same way as the corporation under the provision. However, the comments of Chief Justice Lamer suggest that the section 7 principles might be construed differently in a context where only corporations were affected.

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....¹³

In this context, it is unlikely in our view that a provision basing the liability of corporations on some application of the doctrine of vicarious liability can be effectively attacked on constitutional grounds.

- the theory of identification

For more than a century the English jurisprudence has based corporate liability on the so-called theory of identification. According to this theory, there is an identity between the company and the persons who are its directing mind, that is, the persons, managers or directors, whose duties within the firm are such that, in the course of those duties, they are not given orders or

¹⁰ [1990] 2 S.C.R. 217.

¹¹ 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.

¹² *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154.

¹³ *Id.*, at p. 181. A similar comment applies in the context of the section 1 analysis, at pp. 182-83 (*per* Lamer, C.J.).

directives by someone senior in rank. The liability of the company, like the liability of natural persons, is direct, and does not flow from any application of the theory of vicarious liability.

Apart from the difficulty of defining precisely the scope of the notion of directing mind, the major criticism of the theory of identification as reiterated in the English judgment *Tesco Supermarkets Ltd. v. Natrass*,¹⁴ has to do with its limited application. The limited number of people identified with the company substantially reduces the applicability of the criminal law, particularly in the context of major corporate entities in which the decision-making centres are fragmented and the persons closely identified with the corporation are rarely those who performed the incriminating actions.¹⁵ More fundamentally, associating the guilt of the company so closely with the guilt of a mere individual may obscure the fact that the commission of some offences can result from systemic or organizational pressures as a direct consequence of the corporate context. Placing too great an emphasis on personal responsibility as the basis of corporate liability ignores the fact that the organization of the company and the requirements it fosters in regard to its personnel may drive the latter to break the law. The theory of identification is in this respect overly restrictive and incapable of grasping the essence of corporate fault.¹⁶

Viewed from another angle, however, the theory of identification is overly broad. The theory can be criticized, especially inasmuch as the notion of directing mind is somewhat expanded, for automatically attributing to the corporation the moral turpitude of an individual although the organization itself, as an entity, has committed no fault in the strict sense of the word. To the degree that 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 act of an individual who took the personal initiative of breaking the law.

¹⁴ [1972] A.C. 154.

¹⁵ 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 2, at p. 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 pp. 504-504.

¹⁶ See, for example, J.C. Coffee, *supra* note 1; D. Hanna, *supra* note 3, at p. 471. See also C. Wells, *supra* note 2, at pp. 107-10, 132.

- the approach adopted by Canadian courts

- offences requiring *mens rea*

In *Canadian Dredge*, the Supreme Court of Canada adopted the theory of identification as the basis for corporate criminal liability, but in a somewhat altered version that some have referred to as the theory of delegation. Acknowledging the merits of the British theory, but aware of its restrictive nature, Estey J., writing for a unanimous court, expanded the circle of persons 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.¹⁷

The Court also recognized that the delegation and sub-delegation of authority from the corporate centre within different geographical entities did not stand in the way of applying the doctrine of identification.

The theory of identification adopted by the Supreme Court as the basis of corporate liability is thus a median rule between the extremely broad doctrine of vicarious liability and the doctrine of identification approved by the English courts. Only those employees of the company to whom managerial authority has been delegated may attract its liability. However, the notion of delegation is broader than the notion adopted by the English judgment, *Tesco*. And this is substantially the answer to those who find the identity doctrine too restrictive. However, this answer is not fully satisfactory, inasmuch as expanding the range of those likely to engage the company's liability increases to some degree the possibility that the corporation will be convicted without "actual" fault on its part. The number of people for whose moral turpitude the corporation will answer increases and the fictitious character of the corporate fault simply becomes more obvious.

Clearly the theory of identification, as presented by the Supreme Court in *Canadian Dredge*, requires that the unlawful conduct and the *mens rea* of the offence be the act of the same person.

¹⁷ *Canadian Dredge & Dock Co. v. The Queen*, *supra* note 4, at p. 693.

Estey J. states, in fact, that generally the directing mind is also guilty of the offence in question.¹⁸ However, he refuses to rule definitively on whether the guilt of the directing mind is a condition precedent to corporate guilt.¹⁹

Finally, the Court's judgment in *Canadian Dredge* deals with the company's liability when the acts of the directing mind were committed in fraud of the company. It is not a defence for the company that the acts of the directing mind were committed in defiance of explicit instructions not to disobey the law. It would be too easy, says Estey J., to escape all criminal liability by adopting and disseminating guidelines prohibiting all unlawful conduct. Moreover, the identity theory by definition blocks such a defence, since directives sent to other persons can have no effect on the company itself as represented by its directing mind. At most it acknowledges that such directives may be a factor to be considered in sentencing. The only defence open to the company lies instead in the fact that the person who constitutes the directing mind acted wholly in fraud of the corporation, and the corporation derived no advantage therefrom. In this case, it seems difficult to pretend that the natural person is still the embodiment of the company. Estey J. further acknowledges that no social interest is served in punishing the company in such circumstances.²⁰ However, it is no defence to plead that the acts of the company's directing mind were committed in fraud of the company if these acts benefited the company in whole or in part.

- strict and absolute liability regulatory offences

Let us add, finally, that although the Supreme Court's decision in *Canadian Dredge* is concerned essentially with the especially thorny problem of the liability of corporations for offences requiring *mens rea*, the Court also addresses the liability of companies in the context of absolute liability and strict liability regulatory offences. Insofar as absolute liability offences are concerned, Estey J. is of the opinion that it is unnecessary to establish any special rule applicable to corporate liability, or to rely on any theory to justify the liability of the company in such cases. Once it violates the law, the company is automatically and directly liable, he says.

¹⁸ *Id.*, at p. 685.

¹⁹ *Id.*, at p. 686.

²⁰ *Id.*, at p. 707.

Where the legislature by the clearest intentment 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.²¹

Nor, in the case of strict liability offences, is liability dependent on the doctrine of vicarious liability. Once the incriminating act is performed, the applicable due diligence defence should be that of the company. Indeed, Estey J. refers to the following passage in the *Sault Ste. Marie* judgment:

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.²²

In fact, it would appear that in relation to the commission of the *actus reus*, the corporation's liability is based on the doctrine of vicarious liability. Yet a defence of due diligence, under the theory of identification, would lie with those who constitute the directing mind of the company. Although the discussion is not very developed in the Court's reasons for judgment, it would appear that, at least insofar as strict liability regulatory offences are concerned, a corporation can be held criminally liable for the acts of a collectivity of individuals.

²¹ *Id.*, at pp. 673-74.

²² *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at p. 1331.

- proposals for reform in England and the United States

- the English Draft Criminal Code

The Draft Criminal Code proposed by the English law reform commission to a large degree codifies the *Tesco* decision.²³ The liability of the corporation is directly linked to the commission of the offence by a person who constitutes its directing mind. Section 30(2) states: "A corporation may be guilty...only if one of its controlling officers, acting with the scope of its office and with the fault required, is concerned in the offence." Furthermore, under the restrictive definition of "controlling officer",²⁴ only persons high up in the corporate hierarchy can render the corporation criminally liable. The major criticisms of the overly restrictive nature of the identity theory are not reflected in the English draft code. In this sense, this English proposal, if adopted in Canadian law, would constitute a highly questionable retreat from the current situation.

- the U.S. Model Penal Code

The Model Penal Code proposed in 1962 by the American Law Institute²⁵ would express the concept of corporate liability in three ways. For regulatory offences of absolute liability, the principle of vicarious liability is retained.²⁶ In regard to offences for which the legislator has clearly indicated an intention to include corporate liability, the Model Penal Code provides a liability regime that is likewise largely founded on the doctrine of vicarious liability, but accompanied by a potential defence of due diligence on a balance of probabilities, insofar as a

²³ Law Commission, *A Criminal Code for England and Wales*, Report 177, 1989, London, HMSO.

²⁴ The "controlling officer" is defined as follows, in section 30(3)(a) of the Draft Code:

"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).

²⁵ American Law Institute, *Model Penal Code*, Philadelphia, 1962.

²⁶ It should be noted that in the United States, as in England, the intermediate category of strict liability regulatory offences, as elaborated in the *Sault Ste. Marie* judgment 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.

“high managerial agent”, i.e. someone closely involved in the company’s management, exercised due diligence to avoid the commission of the offence. Finally, in respect of *mens rea* offences, the model would essentially adopt the theory of identification as developed in the English law. Section 207(1)(c) states: “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 in behalf of the corporation within the scope of his office or employment.”

The English and American models are variations on the classical themes of vicarious liability and the identity theory. The most novel aspect of the Model Penal Code is its implicit recognition that the *actus reus* and the *mens rea* of crimes can be the product of two different persons. To a large degree, however, the problems we identified earlier concerning the inappropriateness of these doctrines as an adequate foundation for corporate criminal liability remain unanswered. The traditional doctrines continue to be poorly adapted to the context of corporate criminality. Too broad and yet too narrow, they cannot be used to sanction some blameworthy conduct, while at the same time they allow convictions without proof of any genuine fault on the part of the corporation.

The English and American drafts represent at most an effort to codify the solutions proposed by the cases. This jurisprudence, in its development of the vicarious liability and identity doctrines, has demonstrated a finely honed pragmatism and initiated a discussion of the foundations of corporate liability. In *Canadian Dredge*, Estey J. recognizes, however, that the vicarious liability and identification doctrines, as developed by the courts, do not reflect either a true assessment of the corporate personality or fundamental principles of criminal liability.

This rule [the theory of identification] 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 lawmakers 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.²⁷

²⁷ *Canadian Dredge*, *supra* note 4, at pp. 675-76.

In our view, lawmakers cannot confine themselves to codifying the courts' initial approach to the complex social reality of corporate criminality. This is the perspective within which we now undertake an analysis of the White Paper proposals.

THE WHITE PAPER PROPOSALS

The proposed amendments to the Criminal Code contained in the White Paper are, at first sight, a reformulation of the identification (or delegation) rule proposed by the Supreme Court of Canada. However, a careful reading of the document indicates some fundamental changes. By recognizing that an offence can be the work of individuals acting collectively, the proposals tend toward the recognition of principles of liability that are specific to the corporate entity. In our opinion, however, the proposed solution does not extend the logic far enough, and is simply a compromise between adapting the traditional liability rules for individuals and adopting an original notion of corporate fault. Section 22, notwithstanding the statement that physical acts and the element of fault may be the work of more than one individual, provides a definition of corporate fault that is still too dependent upon individual cognitive and psychological processes. Yet the possibility that the *actus reus* of the offence could be the work of one person while the *mens rea* might originate with another individual makes the application of this conception of fault problematic in many respects. However, before proceeding to a more detailed analysis of these issues, we wish to make a few preliminary comments about the scope of the White Paper proposals.

- the scope of the White Paper proposals

In this regard, three observations are in order. First, while the traditional jurisprudence has primarily been concerned with the definition of rules applicable to business corporations as a particular form of corporate entity, we note that the White Paper specifically indicates that its provisions apply to all legal entities. This decision should be greeted with approval, in our view. From the standpoint of legislative policy there is no reason to exclude those entities that are not profit-making business corporations from being subject to criminal liability. Insofar as certain organizations exist, are active in society and are recognized through the attribution of a status and of certain corresponding privileges, they should, in principle, be subject to criminal

sanctions. In regard to trade unions, at least, the White Paper proposals simply codify more clearly a situation that already exists.²⁸

However, there may be some question as to why, instead of constituting distinct provisions, the sections on corporate liability are incorporated in section 21. To say that a corporation *for the purposes of paragraph 21(1)(a)* commits an offence renders problematic the application to the corporation of the other modes of criminal participation. Subsection 22(3) attempts to remedy these difficulties, but is clumsily worded in that the modes of criminal participation such as aiding and encouraging are not distinct *offences* but different ways of committing the same offence. Furthermore, there ought not to be any objection in theory to a corporation incurring liability through complicity, as understood in subsection 21(2). We see no reason to limit the criminal liability of corporations to the actual commission of the offences or modes of criminal participation that aiding, encouraging and counselling constitute. We would suggest, therefore, that the reference in paragraph 21(1)(a) and the text in subsection 22(3) be dropped, and that section 22 simply be drafted to define the conditions in which corporate criminal liability is incurred. Section 22 might also be drafted to define when the corporation commits an offence, and to provide that the modes of criminal participation listed in section 21 apply with the necessary adaptations.

Finally, the wording of section 22, although it deals with the issue of corporate liability for the commission of an offence, and not a crime, raises some problems if we attempt to apply the principles therein to regulatory offences of strict or absolute liability. In this regard the failure to deal with absolute liability offences is manifest. Subsection 22(2) is patently inapplicable. As for subsection 22(1), to the degree that it addresses the need to establish *on the one hand* the commission of an *actus reus* and, *on the other hand*, the *mens rea*, it is certainly not adapted to the context of offences in which intentional fault is irrelevant. It would be simpler, in our view, to deal with the *actus reus* in a special provision applicable to all offences, and devote another section to the different standards of fault. The separation between the physical elements and the *mens rea* would be obvious from a mere reading of the provisions, without the need to state it explicitly. This arrangement would have the advantage of establishing within the Code the rules applicable to offences of absolute liability.

²⁸ See *United Nurses (Alb.) v. Alberta (A.G.)*, [1992] 1 S.C.R. 901.

Insofar as subsection 22(2) deals with offences of negligence, it applies *prima facie* to regulatory offences of strict liability since, to repeat the terminology of section 12.7, the Acts constituting such offences, or some other proposition of law, prescribe that negligence applies thereto. As drafted, subsection 22(2), by requiring *both* the commission of the *actus reus* and the failure to exercise the standard of due diligence, may however be interpreted, in the case of strict liability regulatory offences, as overriding the jurisprudential rule that evidence of the commission of the *actus reus* entails a presumption of negligence. Thus construed, this subsection may also be hard to reconcile with statutes that expressly reverse the burden of proof. In our opinion, our earlier suggestion of adopting a drafting style that would address the physical elements and the fault standard in two distinct provisions would have the advantage of removing any ambiguity concerning the burden of proof. Once the physical elements and the fault standard have been defined, it would fall to particular rules, whether judge-made or statutory, to determine who bears the onus of proof.

- the impact of individual guilt on corporate guilt

The question of whether a corporation's criminal liability should be dependent on a finding of individual guilt was left unanswered in *Canadian Dredge*. Section 22 of the White Paper replies to this question by specifying that a corporation may be liable even if the persons who engaged in the unlawful conduct or who demonstrated the appropriate guilty mind are not identified, prosecuted or convicted. This dissociation between individual liability and corporate liability is even more evident when we consider that those who committed the *actus reus* of the offence and those having the requisite guilty mind may not be the same persons.

In *Canadian Dredge*, the theory of identification advanced by the Supreme Court required that the offence, in both its physical and psychological components, had to be the act of the same individual, at least in respect of offences requiring *mens rea*. But in the context of large organizations with dispersed operations, the bodies that make the decisions are often isolated from those that execute them.²⁹ The White Paper proposals thus establish the first indicators of an original notion of corporate fault by recognizing that the offence may be the act of a collectivity of individuals. However, this makes the application of the traditional principles of individual liability to the corporate domain increasingly problematic.

²⁹ See primarily J.C. Coffee, *supra* note 1, at pp. 399-400.

- the concomitance between the *actus reus* and the *mens rea*

In determining the liability of natural persons, the *mens rea* refers to the state of mind of an individual in relation to his or her actions, the particular circumstances surrounding his or her conduct, and the consequences that might flow from those actions. Fault is directly linked to the physical context in which this person is operating. However, the general principles of liability require a close temporal relationship between the physical and psychological elements of the offence. The *actus reus* and the *mens rea* must, in fact, be concomitant. Recognizing that the *actus reus* and *mens rea* of an offence can originate with different persons in the corporate context necessarily makes the requirement of a close relationship, both psychological and temporal, between the two elements of the offence problematic.

Section 22(1) of the White Paper defines the *mens rea* of the corporate offence as the knowledge, by a person acting under the express or implied authority to direct, manage or control the activities of the corporation in the area concerned, *that the offence is taking place, will take place or has taken place and the existence in this person of the state of mind required for the commission of the offence.* Now, the required state of mind, as traditionally envisaged, refers to a cognitive process directly linked to the context in which the individual is acting. Sections 12.4 and 12.5 of the White Paper, which define the required states of mind, refer directly to the act or omission specified in the description of the offence, the circumstances surrounding the commission of the act or omission, and the consequences that might result. Does this mean that the agent with the *mens rea* must have knowledge of the exact act or omission by someone else and the exact circumstances surrounding that person's conduct? A rigid application of the logic inherent in the principles of individual liability would require an affirmative response, thus making a sham of the attribution of liability to the corporate entity. Furthermore, the fact that the offence can be the act or omission of more than one individual quite naturally invites a reconsideration of the close temporal relationship that must traditionally exist between the physical and psychological elements of the offence. In this sense, the proposed amendments are right in anticipating a looser temporal relationship between the elements of the offence. This abandonment of the rule of concomitance between the *actus reus* and the *mens rea*, however, also invites a redefinition of the guilty mind as having something other than a close relationship to the particular physical elements. Insofar as the *mens rea* may be formed prior to the commission of the *actus reus* by some other person, it is obvious that this *mens rea* must at most be linked to the commission of some offence understood in its generic sense rather than

consisting of a cognitive relationship directly linked to a set of particular facts and circumstances. In this regard, it seems to us that the proposals are not clearly worded inasmuch as they refer to the presence of the requisite *mens rea* for the commission of the offence.

Furthermore, in regard to the temporal relationship between the *actus reus* and the *mens rea*, we wish to draw attention to the fact that the proposal to render corporations liable by associating a state of mind to a prior event is especially problematic. There might, for example, be some question as to what indeed the intention, as defined in section 12.4, might correspond to in relation to an event that had already taken place. It is hard to image how one can wish the occurrence of an event that has already occurred other than through its acceptance *a posteriori*. It would seem to us, then, that to base guilt upon a fault subsequent to the commission of the *actus reus* risks associating the intention with the passive acceptance of a result or the mere failure to take remedial measures. The boundary between negligence, recklessness and intention, if not impossible to define in such cases, is certainly hard to establish on the facts.

Stretching the temporal relationship to incorporate a *mens rea* subsequent to the commission of the *actus reus* is not unrelated to the concept of “reactive corporate fault” that Professor Brent Fisse has been working on for several years.³⁰ He argues that measuring the moral turpitude of a corporation by considering only the attitudes subsequent to or concurrent with the commission of the *actus reus* obscures the fact that the sometimes inappropriate reactions of companies following the occurrence of a prejudicial event also constitute blameworthy conduct that is disapproved of by public opinion.³¹ He suggests, therefore, that companies at fault be held liable to undertake corrective measures once the *actus reus* of an offence is 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

³⁰ See, in particular, B. Fisse, “Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions”, *supra* note 3.

³¹ *Id.*, at p. 1197.

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.³²

However, in our opinion, the commission of an offence of reactive non-compliance following the occurrence of some event, while conceivable, does not resolve the issue of whether the commission of an initial *actus reus* in itself constitutes an offence. This issue can only arise in the presence of some fault prior to or concurrent with the commission of that *actus reus*. Any other approach amounts to allowing the corporation some gratuitous share or an “inconsequent *actus reus*”. At most, the “reactive corporate fault” may be used as proof of intention or recklessness during the occurrence of a second *actus reus*. Moreover, the model envisaged by Fisse requires the establishment of structures designed to identify the expected reaction on the part of the organization.³³ In this context, “reactive corporate fault” seems to us to have more to do with contempt of court or breach of probation, and the solutions proposed by Fisse seem more promising when envisaged in a context of expanding the range of sentences in corporate crime or creating a particular offence. In our view, the possibility of convicting a corporation in a context in which the *mens rea* was subsequent to the commission of the *actus reus* should be abandoned when the issue is one of establishing the general principles governing liability.

- defences

In *Canadian Dredge* the Supreme Court of Canada held that insofar as the corporation is the sole victim of the wrongful acts of its agents there is no reason to hold it criminally liable. We wonder whether it would not be appropriate to codify this strictly corporate defence.

More generally, some serious thought should be given to the defences that may be raised by corporations. It seems obvious that defences directly linked to the particular standard of fault at issue can be raised. For example, a corporation charged with negligence may raise the defence of due diligence. However, should some defences more directly linked to the human condition

³² *Id.*, at pp. 1203-04 (notes omitted).

³³ At pp. 1204-05, Fisse provides some idea of the measures that would have to be established to flesh out his proposal:

Reactive duties would have to be specified, partly through rules of general application, and partly through compliance orders issued case-by-case.

necessarily be available to the corporation? Insofar as section 22 ascribes to the corporation the guilty mind of one of its agents, it should be able to rely on the same defences as that individual, it would seem. Thus, where the individual in question could rely on a defence of drunkenness, the corporation should be acquitted. But alcoholism in the workplace is a real problem, and it is not obvious that a corporation tolerating this scourge is not at fault.

Furthermore, insofar as any natural person working within the corporation may commit the physical act, there is also a possibility that a corporation may rely on certain defences related to the *actus reus*. In particular, we believe this raises the issue of whether such defences as automatism or necessity can be raised by the corporation, insofar as they constitute to some degree concessions to human nature. Section 22 is clear that a corporation may be liable even though no natural person has been convicted. However, the issue of whether a corporation can rely on defences available to natural persons can be controversial. Indeed, there can be no valid discussion on the scope of the defences available to corporations without a clearer definition of the notion of corporate fault.

All of the preceding comments indicate that, insofar as Parliament intends to make corporations criminally liable and elude the rigid application of the traditional vicarious liability and identification theories, it is essential to develop a notion of corporate fault in closer harmony with the organizational and decision-making process in corporations and less subject to the psychological condition of particular individuals. For several years now studies have been concluding that organizations cannot simply be envisaged as a sum of the individuals of which they are composed, but to some degree have their own personalities which transcend the individual components.³⁴ Some effort should now be made to reflect this reality in the definition

³⁴ B. Fisse and J. Braithwaite, in their article "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability", *supra* note 15, express this idea particularly well. They write, at p. 479:

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 incumbents to the next....

of corporate fault. As we know, this sensitive issue is easier to raise than to resolve, and a consultation of the reform proposals advanced in England and the United States does not indicate any solution. However, some original proposals put forward recently in Australia warrant a closer examination. A discussion of these proposals for reform can suggest a number of modifications to the content of the White Paper.

TOWARD A DEFINITION OF CORPORATE FAULT

In July 1992 the Standing Committee of Attorneys-General of Australia tabled a discussion paper on the development of a Model Criminal Code. Part 5 of chapter 2, on corporate criminal responsibility, is an original effort to adapt the general principles of criminal liability to the particularly complex context of corporate entities. The authors attempted to develop a notion of corporate fault that reflects the diffuse nature of the decision-making process in large undertakings, relying substantially on the recent work of writers such as Fisse who are trying to develop a fault model based *inter alia* on the observed operations of corporate entities.³⁵ These writers argue that corporate fault must be sought in the corporate culture.³⁶ The notion of "corporate intention" cannot be reduced to the individual intention of the employees, managers or directors. Rather, it corresponds to the explicit or implicit policies governing the corporation's activities. The draft Criminal Code presented by the Australian Committee attempts to integrate these concepts. The result is worth quoting in full and is reproduced in an appendix.

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]

³⁵ See especially 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 3; B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions", *supra* note 3. See also B. Fisse and J. Braithwaite, *supra* note 14, at p. 479, and R.N. Purvis, *Corporate Crime*, Butterworth, Sydney, 1979.

³⁶ The precursor of this notion appears to be P. French, whose work is viewed as the product of the most generally acknowledged organizational theories. See P. French, "The Corporation as a Moral Person", (1979) 16 *American Philosophical Quarterly* 207, and P. French, *Collective and Corporate Responsibility*, 1984, New York, Columbia University Press. See also B. Fisse and J. Braithwaite, *supra* note 14, at pp. 483 *et seq.*

This Australian draft invites a number of comments. In the first place, the structure of the provisions is interesting, in that it treats the *actus reus* and the *mens rea* separately. The various elements of the offence can be the act of more than one individual. In this regard, the solution adopted parallels that of the White Paper. Of particular interest in our view, however, is the treatment of the *actus reus* in a special provision applicable to all offences, with another section devoted to the different standards of fault. The separation between the physical elements and the *mens rea* is evident simply from a reading of the provisions, without the need to state this explicitly. As we noted earlier, this arrangement would also offer the advantage, in Canadian law, of including in the Criminal Code a provision applicable to absolute liability offences.

The Australian draft takes a significant step in the direction of defining a notion of corporate fault. In this regard, the notion of corporate culture encouraging the commission of the offence is particularly interesting. This notion, particularly in the case of very large entities, takes into account possible influences to commit the offence stemming from the community, organizational pressures and the pervading mentality. The concept of corporate culture can be used to assign liability to the corporation even if no *mens rea* can be identified as such in a particular individual, and expresses particularly well the collective aspect of corporate fault. The concept of corporate culture constitutes an original response to the criticism often advanced to the effect that the theory of identification is too restrictive to truly encompass corporate fault. Furthermore, the possibility for the corporation to plead in its defence that it took reasonable steps to prevent the commission of the offence means that the corporation will not automatically be made liable for the fault of an individual and be convicted in the absence of actual fault of its own. This tempering of the identification theory is thus a response to those who criticize that theory for casting too wide a net. The Canadian cases have clearly attempted to strike a balance between an overly broad and an overly narrow concept of corporate liability by engaging in a fastidious exercise of determining which persons are, under the theory of identification, likely to attract liability in the corporation. The Australian draft seeks a balance by other means. Basing itself consistently on the theory of identification — since the commission of an offence by a manager *prima facie* incurs the liability of the body corporate — it expands the notion of fault through the notion of corporate culture, while tempering it through the defence of due diligence. Corporate fault is thus generally envisaged as a collective notion.

In view of the preceding, the major criticism that can be made of the Australian draft reform has to do with its authors' attempt to preserve the traditional spectrum of faults that distinguish

between knowledge, intention, recklessness and negligence. Yet the active states of mind that constitute knowledge and intention, as defined in our law, refer directly to individual cognitive and psychological processes and are not easily transposable into the corporate context without extensive resort to fiction. The definitions of knowledge, intention and corporate recklessness advanced in the Australian draft illustrate these problems. First, it should be noted that the terminology used appreciably differs from that used in the context of the liability of natural persons. For example, the notions of authorization and permission differ appreciably from those of knowledge or will that are applicable to natural persons. Indeed, it could hardly be otherwise insofar as some traditional notions such as intention refer to individual volitional processes. Furthermore, although it is correct to say that proof of diligent efforts by the body corporate to prevent the commission of the offence negates the intention to commit that offence, the idea that the corporation's intention can be determined through evidence of its failure to encourage compliance with the laws is nevertheless more problematic. Absent some legal duty to act accordingly, the failure to create an environment promoting compliance with the laws pertains as much to negligence as it does to intention. It seems to us that at this point, notwithstanding an evident desire to keep intention and negligence conceptually distinct, a dangerous line has been crossed. Finally, paragraph 501.4 defines recklessness as the unjustified taking of a risk. While evidence of the deliberate taking of such risk by an employee of the corporation is enough to establish the liability of the body corporate, as an application, it would seem, of the doctrine of vicarious liability, the corporation can avoid a conviction by establishing that it took measures that resulted in it not being unjustifiable to take the risk. Personally, we have some difficulty in discerning what conceptually distinguishes tolerance of the commission of an offence (intention), the fact that no step was taken to justify the taking of a risk (recklessness), and the failure to be diligent in avoiding the commission of an offence (negligence).

The Australian draft could of course be reformulated to avoid, among other things, the confusion between objective and subjective fault. In this regard, it seems to us that the passive tolerance of the commission of offences can hardly be a basis for liability for an offence requiring an active *mens rea*. Nevertheless, an examination of the Australian draft raises the more fundamental issue of whether the definition of one or more notions of corporate fault need be an exact copy of the definitions applicable to individuals and derived from the empirical observation of the psychological processes peculiar to these individuals. In our opinion, neither the concept of equality before the law nor the desire to treat corporations fairly points inexorably to an affirmative answer.

In our view, it would be sufficient to contemplate two types of collective fault. A definition of corporate negligence already exists in the White Paper, when it states that negligence is the failure by certain responsible persons, individually or collectively, to exercise reasonable care to prevent the occurrence of the offence.

A higher standard of fault could be contemplated for offences requiring an active *mens rea*. The corporation could be held liable under the identification theory when a responsible person had the state of mind required for the commission of the offence as understood in its generic sense. The corporation could also be liable when a responsible person explicitly ordered or authorized the commission of the offence. Finally, the corporation should be liable if its corporate culture or its organizational structure were such as to encourage, sanction or lead to the commission of an offence. In all these cases a defence of due diligence by the corporation to avoid the commission of the offence should be available.

These various ways of envisaging the collective *mens rea* of the corporation should be understood as alternative forms of the same collective fault. It seems to us that, by definition, a collective fault standard cannot be defined monolithically. It is therefore natural to identify more than one way of committing this fault. In our opinion, however, it would be futile to attempt to grade the different forms to correspond to the different individual cognitive processes on which the distinction between the various subjective fault standards has traditionally been based. In a Judeo-Christian culture broadly influenced by the philosophy of the Enlightenment, it is conceivable that the intensity of obloquy will vary depending on the presence or absence of certain diagnosed psychological states among individuals endowed with autonomy and volition. However, we do not think these considerations have any relevance in the different context of corporate liability. In our view, a corporation should be liable for any offence requiring proof of subjective *mens rea* once one of the elements of collective fault we have suggested has been proved.

Practically speaking, the subtle distinctions between the different standards of subjective fault are really relevant only in the context of homicide offences. Canadian jurisprudence is very careful to confine the label of murderer and the opprobrium attendant thereto to those who have demonstrated a particular degree of moral turpitude. In the context of corporations, we see no reason why the principles of fundamental justice should necessarily lead to the same conclusion, especially insofar as the notion of life imprisonment has no relevance. We could, of course,

confine murder convictions, like those for bigamy, to natural persons. But whatever the approach, considerations related to the particular problem of murder should not unduly influence the development of original principles in the area of corporate fault.

Before concluding, one last point should be discussed. We stated earlier that in every case the corporation should be able to avoid conviction by establishing due diligence to avoid the commission of the offence. In this regard, we think serious thought should be given to placing the onus of proof of this due diligence on the corporation. We are well aware that doing so would *prima facie* violate the presumption of innocence under the Charter, and that, given the Supreme Court jurisprudence on the matter, it is a safe bet that such a provision would result in litigation. Nevertheless, the defence of due diligence, to the degree that an onus of proof is attached thereto, does less violence to the presumption of innocence than some alluring modification of the vicarious liability or identification doctrines. Due diligence would be raised following proof of the authorization by an official of the firm to commit the offence or of its participation in the offence, or proof of a corporate culture leading to the commission of the offence. Instead of an automatic finding of liability in the company pursuant to proof of fault of an individual, regardless of the latter's importance in the corporate hierarchy, the company could avoid a conviction by rebutting the presumption of fault on its part established by the fault of its responsible 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 representative of the corporation. The possibility of raising lack of corporate fault as a defence appreciably reduces the risk that the corporate entity would be convicted for the act 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 opposition to such a reversal of the burden amounts to saying that there is no constitutional difficulty in a rigid application of the identification theory leaving no way out for the corporation, while any modification of that theory is suspect. However, we have already noted the Supreme Court's openness to the possibility of approaching the principles of fundamental justice differently in the case of provisions exclusively applicable to corporations. And it is impossible to overlook the obvious evidential problems that would be encountered by the prosecution in ascertaining the preventive measures and the prevailing atmosphere within a firm.³⁷

³⁷ D. Hanna, in his article, *supra* note 3, appears to adopt a similar approach to reversing the burden of proof. At p. 471 he writes:

It is obvious, in our view, that the more we draft corporate liability provisions with a view to transposing as faithfully as possible the traditional rules of individual liability, the greater will be the amount of constitutional litigation linked directly to the principles of fundamental justice applicable to individuals. Indeed, the more we try to reproduce the traditional schema of individual liability, the less of its original meaning will the presumption of innocence have in the corporate context. Similarly, the more we attempt to develop principles of corporate liability aimed at matching a particular psychological state with a specific set of circumstances and consequences, the greater the likelihood that the problems of the temporal relationship between these two elements of the offence will be raised in the name of the principles of fundamental justice.

SUMMARY OF RECOMMENDATIONS

Most of the suggestions in this article imply a detailed revision of the proposed amendments to the Criminal Code contained in the White Paper. However, they are simply the logical follow-up to the process already initiated by the Supreme Court of Canada and continued in the White Paper. The alternatives are, in fact, fairly simple. If the *status quo* is seen as an acceptable rationalization of corporate liability, the compromise advanced by the Supreme Court of Canada in *Canadian Dredge* can be codified. However, in a context that recognizes the inherent limitations of the traditional doctrines of vicarious liability and identification, it will be necessary to define a notion of corporate fault that reflects the particular modes of functioning and decision-making of corporate entities. But the notion of collective fault, as already outlined in the White Paper, is hard to reconcile with the fault standards elaborated in the context of individual liability. That is why we recommend:

- the development of two standards of corporate fault defined to reflect the collective nature of the fault in the context of corporate entities

As a result, I would advocate corporate liability for *mens rea* offences in cases where the prosecution can point to a guilty corporate policy as an element of the offence. The obvious difficulty with such an approach is, of course, proof. Corporations simply do not tend to include criminal policies in their by-laws, memoranda or the minutes of meetings. One way to meet this difficulty is to suggest a slightly modified role for the identification doctrine, such as if one can point to a guilty directing mind, it could raise an evidential presumption that the acts of the directing minds are instances of corporate policy.

- the first fault standard would be applicable to offences of negligence;
 - the second would be applicable to offences requiring an active *mens rea*. This fault standard would be defined in terms of the theory of identification, but this doctrine should be modified somewhat to encompass the collective aspect of corporate fault. Thus, a corporation should have a complete defence if it demonstrates due diligence. Furthermore, it should be liable if its corporate culture favoured the commission of the offence, irrespective of whether or not a natural person demonstrated some particular state of mind;
 - in every case it is preferable to associate the corporate fault to a concomitant or subsequent physical element. If the physical element precedes the fault, there should be no criminal liability;
-
- that the corporate liability rules be drafted so as to be independent of the modes of criminal participation;
 - that the corporate liability provisions be drafted so that the definitions of the *actus reus* and of fault are contained in distinct sections;
 - that these provisions be drafted to apply to all offences, whether criminal or regulatory;
 - that the possibility be envisaged of imposing on the corporation in all cases the burden of proving its due diligence;
 - that in relation to the definition of strictly corporate fault standards, a serious discussion be initiated on the general defences that might be raised by a corporate entity;
 - finally, that we start thinking about the possible range of penalties to which a corporation might be subject.

**M O D E L
C R I M I N A L
C O D E**

**DISCUSSION
DRAFT**

**CHAPTER 2
GENERAL PRINCIPLES
OF CRIMINAL
RESPONSIBILITY**

**CRIMINAL LAW OFFICERS
COMMITTEE OF THE
STANDING COMMITTEE OF
ATTORNEYS-GENERAL**

JULY 1992

This is a discussion draft. It does not represent the concluded views of the Standing Committee of Attorneys-General.

CODE**PART 5 — CORPORATE CRIMINAL
RESPONSIBILITY****501. Bodies corporate**

A body corporate may be found guilty of any offence, including one punishable by imprisonment.

501.1 This Code applies, with any necessary modifications, to bodies corporate in the same way that it does to natural persons.

501.2 A physical element of an offence committed by a servant, agent, employee or officer of a body corporate acting within the scope of his or her employment or within his or her actual or apparent authority must be attributed to the body corporate.

501.3 If intention or knowledge is a required fault element of an offence, that fault element exists on the part of a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

501.3.1 The means by which this test may be satisfied include proving

- that the board of directors or a high managerial agent of the body corporate engaged in that conduct or authorised or permitted it but the test will not be satisfied if the body corporate proves that it exercised due diligence to prevent that conduct; or
- that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision. Factors relevant to this issue include

whether authority or permission to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate;and

whether the servant, agent, employee or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

501.3.2 "Corporate culture " is an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place. "High managerial agent" is a servant, agent, employee or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the body corporate.

501.4 If recklessness is a required fault element of an offence, that fault element may exist on the part of a body corporate if a servant, agent, employee or officer of the body corporate acting within the scope of his or her employment or his or her actual or apparent authority has that fault element. But that element cannot be attributed to the body corporate if it was aware that there was a substantial risk of the commission of the offence and it took measures that resulted in it not being unjustifiable to take that risk.

CODE

- 501.4.1 The burden of proving that a body corporate took measures that resulted in the risk of the commission of an offence not being unjustifiable is on the body corporate.
- 501.5 If negligence is a required fault element of an offence, that fault element may exist on the part of a body corporate even though no individual servant, agent, employee or officer of the body corporate has that fault element if the conduct of its servants, agents, employees and officers is negligent when viewed collectively.
- 501.6 If under section 306 a servant, agent, employee or officer of a body corporate may escape liability for a strict liability offence if he or she acted under a mistaken but reasonable belief about facts, the body corporate has a defence in respect of that person's conduct if it proves that it exercised due diligence to prevent the conduct which would, but for this sub-section, constitute an offence on the part of the body corporate.
- 501.7 Negligence or failure to exercise due diligence may be evidenced by the fact that the carrying out of the prohibited conduct was substantially attributable to
- inadequate corporate management, control or supervision of the conduct of one or more of its servants, agents, employees or officers; or
 - failure to provide adequate systems for the conveying of relevant information to relevant persons in the body corporate.