

Evolution of Corporate Accountability: From Moral Panic to Corporate Social Responsibility

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This article explores the effect of the sociological theory of ‘moral panic’ on the evolution of corporate accountability. Corporations are an important if not indispensable legal mechanism by which both profit and non-for-profit organisations structure their activities and operations in modern societies. Corporations are also established by public legislation to enable and facilitate their rules of conduct and their impact on society. Accountability of corporations for their management decisions is manifest by their enabling and public welfare statutes and by public and political reaction to their activities. However, the history of accountability of corporations has often been directed by crisis and ‘moral panic’ more than by reasoned, logical application of legal responsibility. Public outcry and political expediency have historically resulted in a ‘blame’ rather than ‘solution’ mentality and the criminalisation of corporate behaviour. More reasonable and effective means of motivating responsible corporate decision-making has been overlooked. It is argued in this article that alternative dispute resolution mechanisms are more appropriate to ensure corporate accountability than the traditional criminal sanctions model. Further, the broad yet practical principles of corporate social responsibility (CSR) are particularly well suited to set, communicate and enforce public policy for corporations. Through a number of examples, this article encourages corporate executives, their legal advisers and all corporate stakeholders to consider corporate social responsibility as a means of contributing to society in a manner that provides

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internal accountability for the external effects of corporate activity on society. This approach is more likely to meet social and political objectives than the criminal sanctions model that may appeal politically yet is often difficult to enforce in criminal prosecutions.

Introduction

The prosecution and punishment of corporate offenders are important but often overlooked subjects in the administration of criminal justice. The evolution of the corporation, as a separate legal person and as a criminal defendant, has an impact on the public interest and social justice. The accountability of corporations, regarding their activities in the marketplace and their impact on society, is critical to address in this era of globalisation. Corporate and economic globalisation affects individuals, society and social justice.¹ Prosecuting corporate offenders to achieve accountability first requires a reliable theory of corporate criminal liability. Punishing corporate offenders is only briefly addressed in the sentencing literature.² Deterrents have been the theory for sentencing individuals but there has not been an extensive review of this sentencing theory for corporate offenders.³ In short, there is a compelling need to review the evolution of corporate accountability to address its purpose, social utility and consider new ideas to enhance the morally, legally and socially acceptable behaviour of corporations in the new millennium.

This article will briefly consider the history of corporations and corporate accountability. It will review the effect of moral panic on the development of the legal accountability of corporations. It will be argued that laws establishing offences against corporations have been significantly influenced by moral panic. Moral panic has been associated with a social, media and political response to real issues that have been escalated with surreal overreactions. New offences have been established against corporations, under the influence of moral panic, with harsh monetary penalties. More corporate offences and higher fines, however, do not appear to improve corporate accountability. The validity of Khanna's 'substitution thesis' that corporations actually prefer fines, which they pass on to customers and

1 Jock Young, *The Vertigo of Late Modernity* (Los Angeles: Sage Publishing Ltd, 2007), 38–40.

2 For example, Clayton C Ruby's text, *Sentencing* (LexisNexis, 7th edn, 2008) is one of the few criminal law texts that has a chapter on the subject of sentencing the corporate offender; however, the chapter only devotes a brief 11 pages out of 1,138 to sentencing corporate offenders; see 478–479.

3 A N Doob and C M Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis', in *Crime and Justice: A Review of Research* (University of Chicago, 1993).

end users, does not necessarily promote social accountability.⁴ It will be submitted that the prosecution and sentencing of corporate offenders are an opportunity to consider the broader impact that corporations have on society as a whole. Support for a principled approach to prosecuting and sentencing corporate offenders may be found in the application of alternative dispute resolution (ADR) principles, a move away from monetary deterrents, and a move towards a rehabilitative model of criminal justice. The law of corporate accountability must let go of moral panic and engage the concept of CSR.⁵

Evolution of corporate accountability

A brief history of corporate accountability

The corporation, as an independent person in law, has existed longer than Canada has been a nation. Although the prevalence of incorporation statutes was largely a 19th century phenomenon, corporations were known to exist in ancient Roman law.⁶ English law, up until the last 200 years, saw the establishment of the corporation as a privilege granted by the Crown. The ability that exists today, to incorporate a business without specific Crown approval, is a relatively recent historical development.⁷ One of the first kinds of organisation to be recognised as a separate legal entity was the ecclesiastical offices of bishops. They were given charters by the Crown and were recognised as separate legal persons. As separate legal entities, ecclesiastical offices could own land, execute deeds and enter into contracts. Ecclesiastical bodies were not, however, established in order to conduct business like the modern corporation. The positive experience of the ecclesiastical offices was one of the catalysts of the modern form of corporation that exists as a separate person under the law today.⁸

4 Vikramaditya Khanna, 'Corporate Crime Legislation: a Political Economy Analysis' (2004) 82 *Washington University Law Quarterly* 95.

5 Corporate social responsibility does not have a universal definition, but is generally understood as a corporate entity's system of integrating economic, social, environmental and human rights activities and responsibilities. Corporate social responsibility frequently involves creating innovative and proactive solutions to societal problems, while at the same time engaging in sustainable and profitable economic activity.

6 D L Perrott, 'Changes in Attitude to Limited Liability: the Europe Experience', in T Orhnlial (ed), *Limited Liability and the Corporation* (London: Croon Helm, 1982), 81 and 86.

7 Welling et al, *Canadian Corporate Law: Cases, Notes and Materials* (Canada: Butterworths Canada Ltd, 1996) ('Welling'), xxiii.

8 Mark Gillen, 'Notes on Business Associations, Chapter 11: History of the Corporation in England and Canada', online: www.law.uvic.ca/mgillen/315/documents/Ch11-History.pdf ('Gillen'), 137.

The Crown also recognised merchant guilds as separate legal entities in medieval times. Merchants established industry standards for trading that were approved and regulated by the guild. Trading missions were run on a joint stock basis.⁹ The merchant guilds eventually gave way to charters being issued by the Crown and some of the first business corporations. A classic Canadian example of royal prerogative establishing a corporation is the Hudson's Bay Company. The Hudson's Bay Company remains Canada's oldest existing corporation, having been granted royal charter by King Charles II in 1670. Corporations were often given charters for political reasons that benefited the Crown. A corporation that supported British colonialism for several centuries, the East Trading Company, was given its royal charter by Elizabeth I in 1600.¹⁰

With the growing influence of the corporation over the last 200 years, issues of corporate governance, investor confidence and legal accountability became a subject of concern. However, the regulation and criminalisation of corporate activity have, for the most part, been a reactive process arising from specific crisis. For example, in 1720, the English Parliament outlawed some types of corporations in response to the infamous 'South Sea Bubble'.¹¹ The South Sea Bubble involved the exploits of a corporation called the South Sea Company. This company was a British joint stock company that was awarded exclusive trade in the Spanish colonies of South America by the Crown. The directors of the South Sea Company promised fabulous profits, gold and silver in exchange for common British exports such as cheese and pickles.¹² These promises by the directors, fuelled by investor greed, increased demand and stock prices rose to six times their original value in one year. However, when the promises were not fulfilled and shareholders came to realise that the company was essentially worthless, the stock value plummeted and shareholders faced huge losses. The South Sea Company ultimately collapsed in 1720.¹³ The directors were brought before Parliament to explain their actions. Every director was fined and some were jailed.¹⁴ The result of the collapse led the British Parliament to enact the Bubble

9 Joint stock basis meant that people would invest in the trade voyage by paying money to the company which would be used to buy goods for the voyage. Those goods would then be traded, and any profit made would be divided up among the original investors.

10 Peter Marshall, 'The British Presence in India in the 18th Century', BBC (1 May 2001), online: www.bbc.co.uk/history/british/empire_seapower/east_india_01.shtml.

11 Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2004) ('Bakan'), 6.

12 John Carswell, 'The South Sea Bubble' (London: Cresset Press, 1960), 55.

13 See note 11 above, 7.

14 *Ibid.*

Act, which abolished the issuance of stocks without the authority of an Act of Parliament or Royal Charter.¹⁵

Corporate accountability in England began in earnest after the Bubble Act was repealed and with the subsequent introduction of the Joint Stock Companies Act¹⁶ (JSA) in 1844 and finally the introduction of the Companies Act of 1862 (CA). Much of Canadian corporate law evolved from and was influenced by English legislation.¹⁷

The JSA, the earlier of the two statutes, provided for incorporation by registration and made those documents completely public.¹⁸ All that was required to form a company was registration; there was no need for a special act of parliament or a royal prerogative. However, personal liability of shareholders still existed and thus we still did not have the full extent of the modern corporation.¹⁹

The CA has been referred to as the single most important event in the history of capitalism.²⁰ The CA gave birth to what is now the modern form of incorporation with limited liability of shareholders. No longer was a royal prerogative or special statute required, but rather the government granted permission to any individual to incorporate a joint stock company at any time and for any purpose as long as it met statutory requirements. This established the harmonisation of three core principles of the modern corporation:

1. it could be a distinct legal entity able to conduct business like any natural person;
2. it was able to issue shares to investors to raise capital; and
3. those investors had limited liability in the company and thus would only lose what they put into the corporation.²¹

The only requirements in the CA for incorporation were that seven or more people had to sign a memorandum of association, register that document with the government and have the word limited in the company's title to warn creditors that they would have no recourse to the company's shareholders.²²

15 Ron Harris, 'The Bubble Act: Its Passage and its Effects on Business Organization' (1994) 54(3) *J Econ His* 610.

16 7 & 8 Vict, ch 110 & 111 (1844) (England).

17 However, it should be noted that in more recent trends, US policies on corporate governance have blazed the trail for Canada.

18 Gillen, note 8 above, 143.

19 This changed in 1855 and 1856 with the introduction of the Limited Liability Act and a revised JSA respectively.

20 Wesley B Truitt, *The Corporation* (United States: Greenwood Press, 2006) ('Truitt'), 7.

21 John Micklethwait and Adrian Wooldridge, 'The Company: A Short History of a Revolutionary Idea' (New York: Modern Library, 2003), xvii.

22 Note 20 above, 7.

This development coincided with and to some extent fuelled the Industrial Revolution.²³

In 1849, statutes were passed in both Upper and Lower Canada that provided for the incorporation of companies for the purpose of building roads and bridges.²⁴ This was followed in 1850 with the enactment, by the United Provinces of Canada, of a general statute for incorporation. This statute allowed for the incorporation of mining, shipbuilding, manufacturing and chemical businesses through a more expedited process that was no longer tethered to royal prerogative.²⁵ The general incorporation statute provided for a separate legal identity and limited liability to the shareholders of the corporations incorporated under it. They established the modern law of corporations in Canada.

Theories of corporate accountability

A corporation, given the very nature of its legal existence, is a legal fiction with a real impact on the society in which it operates. The corporation is the primary modern means of conducting business, employing the vast majority of workers, producing most of the economy's goods and services, purchasing many goods and services itself and paying taxes and it supports a multitude of social and governmental services. If corporations commit crimes and other offences in the course of their activities, they may be prosecuted and convicted like an individual. However, the law has struggled to articulate a consistent theory of corporate criminal liability. This is understandable given the religious, social and moral ethos of criminal law.²⁶ Social control and behaviour accountability for a corporation is problematic since it has 'no soul to damn or body to kick'.²⁷

Four classic theories have evolved to establish corporate legal liability for *mens rea* offences: the identification theory, the vicarious liability theory, the aggregation of individual fault theory and the general corporate fault mode.

23 *Ibid.*

24 Anthony VanDuzer, *The Law of Partnerships and Corporations* (Canada: Irwin Law, 2003) ('VanDuzer'), 80. See, for example, An Act to Authorize the Formation of Joint Stock Companies in Lower Canada for the Constructions of Macadamized Roads, and of Bridges and Other Works of Like Nature, SC 1849, c 56.

25 *Ibid.*

26 For an interesting review of the origins of criminal law in England, which includes reliance on the Holy Bible and excerpts from history, see William Blackstone's *Commentaries on the Laws of England*, Book IV, 'Of Public Wrongs', A Facsimile of the First Edition of 1765–1769 (Chicago: University of Chicago Press, 1979), 1–20.

27 Lord Chancellor (Edward) Thurlow of England's famous 17th century quote referenced in J C Coffee Jr, 'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Mich L Rev* 386 at 386.

The dominant theory in Canadian jurisprudence was the identification theory.²⁸ The identification theory was affirmed and restated by the Supreme Court of Canada ('the Court') in *Canadian Dredge and Dock Co.*²⁹ That prosecution involved bid-rigging allegations involving contracts to dredge Hamilton Harbour. The charges alleged that companies were involved in bid-rigging activities to inflate the prices of government contracts. The corporate defendants denied any knowledge that their representatives were acting fraudulently. The Court held that under the identification theory of corporate criminal liability, only the board of directors, officers and senior managers would have the *mens rea* to hold the corporation criminally liable. The identification theory had the effect of reducing the likelihood of corporations being held criminally responsible for the offences committed by lower-level managers and mere representatives of the corporation. This theory of corporate criminal liability was in contrast to strict liability offences where the mere establishment of the *actus reus* of the offence would *prima facie* import guilt, subject to the defence of due diligence.³⁰

Corporations are subject to accountability under both criminal and *quasi*-criminal regulatory laws. The differences between *mens rea* and strict liability offences for corporations were substantially diminished with the introduction of statutory corporate *mens rea* on 31 March 2004. The Bill C-45 amendments to the Code, referred to at the time as the 'Westray Amendments to the Code', introduced a statutory framework by which organisations, including corporations, may now be held criminally liable.³¹ The role of moral panic in the promulgation and passage of Bill C-45 is reviewed later in the article. Bill C-45 was intended, among other objectives, to modernise the law of establishing criminal liability for a corporation. Sections 22.1 and 22.2 of the Code – for the first time – provided a statutory framework for the *mens rea* and of organisations, including corporations. Those provisions are strikingly similar to the language of many strict

28 The identification theory holds a corporation liable for the acts and omissions of the senior officials and directing minds of the corporation. Depending on the size, structure and hierarchy of authority within the corporation, case law generally struggled to determine, on a case-by-case basis, what level of managerial authority and position amounted to a person whose acts and omissions were also those of the corporation.

29 [1985] SCJ No 28.

30 For a more complete discussion of the four models of corporate liability, see Paul Dusome, 'Criminal Liability under Bill C-45: Paradigms, Prosecutor, Predicaments' (2008) 53 *The Criminal Law Quarterly* 98.

31 This referred to the Westray Mine disaster in Pictou County, Nova Scotia, when 26 miners were killed in a series of explosions and fire on 9 May 1992. Recommendation 73 of the Report of the Public Inquiry, entitled 'The Westray Story: A Predictable Path to Disaster' K P Richard – Commissioner recommended amendments to establish criminal law accountability of officers and directors for workplace safety.

liability-regulatory offences. Section 22.1 applies with respect to offences under the Code where the prosecution is required to prove negligence. Section 22.2 applies to offences under the Code where the prosecution is required to prove fault, or *mens rea*, other than negligence. Both provisions significantly redefined how an organisation, including a corporation, may be proven to have committed an offence.³² These changes lowered the *mens rea* threshold from the identification theory of senior executives to the conduct of all representatives of the corporation. Bill C-45 also had an impact on sentencing under the Code for organisations, including corporations, which were convicted of a *mens rea* offence.³³ It is submitted that this evolution means that criminal offences against corporations now have more in common with strict liability offences than they do with individuals charged with criminal offences.

Regulation of the modern corporation

The safety and security of individuals, the public and the environment are the primary purposes of corporate accountability. Public welfare statutes have evolved to become more important than the Code in regulating the conduct of corporations in our modern, complex society. The increase in public expectations in the areas of environmental, occupational safety, public security and financial markets stability is the subject of media coverage, interest group advocacy, political debate and moral panic. Public pressure to regulate corporations and their activities is demonstrated by government passing more statutes and more regulatory standards to respond to new technologies and evolving public expectations. This increased public expectation is heightened by fear³⁴ of terrorism, workplace safety, pandemics, environmental disasters and capital market fraud and has increased public expectations that government needs to protect its citizens in the post-9/11 world.³⁵ In short, modern corporations are subject to increased regulation in a media-driven age ripe for moral panic. The legislative response and government prosecution of

32 Bill C-45 replaced the term 'corporation' with 'organization' in the Code. The term 'organization' is now defined in the Code as follows: 'organization' means (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons.

33 *Ibid*, ss 781.21 and 732.1 of the Criminal Code.

34 For a well-researched and provocative commentary on the role of fear and moral panic to promote an environmental political agenda, see Michael Crichton, *State of Fear* (New York: HarperCollins Publishers, 2004).

35 For an excellent commentary of the impact of 9/11 on the Canadian legal system, society and the legislative over-reaction caused by fear of terrorism, see Kent Roach, *September 11 – Consequences for Canada* (Montreal: McGill – Queen's University Press, 2003).

corporations are not only good politics; they offer an oversimplified approach to the complex subject of corporate accountability.

The modern trend of regulating corporations by the prosecution of both strict liability and criminal offences against corporations is problematic. On the one hand, charges against corporate offenders enhance the importance of financial, environmental, occupational safety and public security laws in society; penal enforcement seems well justified to protect the public interest. On the other hand, prosecutorial enforcement of these laws against corporations often results in considerable public resources being used and in response traditional criminal law defence strategies are employed by corporations vigorously to defend charges in court. Corporations naturally want to avoid the stigma and adverse effect of a conviction on business finances and reputation. The truth is only a by-product of the adversarial trial.³⁶ The adversary trial lacks a process for creative solutions in the sentencing process and relies primarily on the blunt theory of deterrence and monetary penalties.³⁷

The evolution of corporate accountability has resulted in a plethora of regulatory strict liability offences, which now regulate corporate conduct more significantly than the Code. From Highway Traffic Act³⁸ offences to product liability regulations, from environmental protection to occupational health and safety standards, corporations are subject to significant public regulation. Many public welfare statutes and fines for their contravention are a political reaction to public crisis, media campaigns and moral panic resulting in substantial government legislative intervention. However, the literature indicates that this rights-based approach enforcement model does not work well for the meaningful resolving of complex societal disputes.³⁹

Punishing corporate offenders

Corporate accountability by prosecution also needs to have a credible theory of punishment. There has been little evolution in the theory of punishing the corporate offender. A principled approach to sentencing a corporate offender requires consideration of the effect of punishment on the offender and society. Garland and Doob argue: 'we must understand

36 John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003), 331–333.

37 The leading case, for example, in sentencing for strict liability offences in Ontario is *R. v Cotton Felts* (1982) 2 CCC (3d) 287 (Ont CA) where the criteria for sentencing focuses primarily on specific and general deterrents.

38 Highway Traffic Act, RSO 1990, c H.8.

39 Julie McFarlane, *Dispute Resolution Readings and Case Studies* (Toronto: Emond Montgomery Publications Limited, 2003).

punishment in a larger social context, and not try to understand it solely in terms of its criminal justice functions.’⁴⁰ It is respectfully submitted that a court ought to consider ‘the integration of economic considerations, the traditional focus of business, with environmental and social imperatives’ to achieve corporate accountability.⁴¹

The fundamental principle of sentencing under section 718.1 of the Code is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This applies to both corporate and individual offenders. Proportionality principles include the gravity of the offence, the blameworthiness of the accused, the harm caused to a victim arising from the commission of the offence, the potential harm that the offence indicates, and the degree of participation by the defendant in committing the offence.⁴² Since imprisonment is not available for punishing the corporate offender, apart from individual charges against corporate officers and directors, legislatures and courts have demonstrated lack of a thoughtful and principled approach to punishing corporate offenders. The courts have largely relied on the theory of specific and general deterrence to impose varying degrees of monetary fines and penalties on corporations. Both types of deterrence, ‘attempt to prevent crime by threatening punishment’.⁴³ The notion of deterrence, it is submitted, has little impact on corporate offenders and their decision-makers. Fines against corporations are, quite literally, a cost of doing business. Further, the theory of deterrence lacks any meaningful connection with opportunities to improve the conduct of corporations in the future. Several strict liability prosecution and sentencing (of corporations) cases illustrate this point. First, is the long-standing decision of *Cotton Felts Ltd.*⁴⁴ In that decision, the Court of Appeal for Ontario dealt with the appropriateness of a sentence given by a trial judge for a conviction under the regulation pursuant to the Occupational Health and Safety Act.⁴⁵ The case involved a worker who had his arm caught and injured and ultimately amputated in an industrial establishment in Toronto. Although the Crown had proposed a range of fine in the amount of CA\$4,000.00 to CA\$6,000.00, with the maximum fine

40 AN Doob and M Marinos, ‘Reconceptualizing Punishment: Understanding the Limitation on the Use of Intermediate Punishment’ (1995) 2 University of Chicago Law School, Roundtable; p 424.

41 M Per Kerr, R Janda and C Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis, 2009), 9.

42 Allan Manson, *The Law of Sentencing* (Erwin Law, 2001), 84–92.

43 J V Roberts and D P Cole, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999), 6.

44 Note 37 above, *R v Cotton Felts Ltd* [1982] OJ No 178 (Ont CA).

45 SO 1998, c 83, s 105.

available for a corporate defendant at the time being CA\$25,000, the trial judge imposed a fine of CA\$20,000. Mr Justice Blair, writing for the court, set out the now well-known statement with respect to sentencing factors of a corporation convicted under health and safety legislation in Ontario, and across Canada: 'The amount of the fine will be determined by a complex of considerations including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. *Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence.*'⁴⁶ (Emphasis added.)

In *Hoffman-LaRoche Ltd.*,⁴⁷ in a criminal prosecution under the Combines Investigation Act for predatory pricing, the Court emphasised the need for deterrence for the corporate offender and indicated that the fine must be substantial and significant such that it not be viewed as a mere licence for illegality by other corporations. In the prosecution of *K-Mart Canada Limited*,⁴⁸ the corporation was convicted of the criminal offence of contravening provisions of the Labour Relations Act of Ontario. The corporate offender had hired a security service that provided undercover anti-union infiltrators into the union with the intention of interfering with and defeating a union-organising drive. In reviewing the sentence on appeal, Chief Justice Howland said that the CA\$25,000 fine did not 'adequately reflect the gravity of the offence and was an error in principle. The fine must not be tantamount to a licence fee to commit illegal activity, but must be sufficiently substantial to warn others that such illegal activity will not be tolerated. We consider that a fine of CA\$100,000 would be appropriate in the circumstances'.⁴⁹

The sentencing of a corporate offender charged and convicted with an environmental offence was considered at length by the court in *United Keno Hills Mine Ltd.*⁵⁰ In that prosecution of a strict liability environmental offence, the corporate defendant plead guilty to depositing waste in Yukon territorial waters in excess of the waste discharge limits prescribed by a water licence, thereby contravening the Northern Inland Waters Act.⁵¹ In assessing the appropriate fine, as a deterrent, the Territorial Court Judge Stuart said:

46 Note 44 above, paragraph 19.

47 *R v Hoffman LaRoche Ltd (No 2)* (1980) 30 OR (2d) 461 (SCO).

48 *R v K-Mart Canada Limited* (1982) OJ No 54 (Ont CA).

49 *Ibid*, para 15.

50 *R v United Keno Hills Mine Ltd* [1980] YJ No 10.

51 RSC 1970 c 28, s 6(1).

‘To fairly determine a deterrent fine, the capacity of each corporate offender to deflect or absorb a fine should be assessed. Thereby such matters as profits, assets, current financial status, and characteristics of the relevant market must be before the court.... evidence establishing corporate finances and relevant marked characteristics is essential in a system of sanctions reliant almost exclusively on fines.’⁵²

The sentencing process for corporations has often focused on the bottom line rather than the broader impact on public safety, security and environmental welfare. There is a need for a better model of corporate accountability. A broader set of principles would consider the nature of the corporate offender, the nature of the offence; the effect on the victim is required for a principled approach in sentencing corporations convicted of *mens rea* and strict liability offences. However, corporate accountability has been largely driven by moral panic rather than encouragement of social responsibility.

Moral panic and corporate accountability

Moral panic and criminal law

Moral panic has been discussed in the literature from both a sociological and a criminal justice perspective.⁵³ Moral panic is typified by an incident or series of incidents, a strong media reaction or distortion and a dramaturgical casting of the activity by various actors being out of social control. The unacceptable behaviour of an individual or groups is then identified or named as deviant or socially unacceptable. Legislators and law enforcement officials play their role in this drama and are then granted broad, new enforcement powers to deal with the purported crisis.

The application of moral panic to criminal law can take many forms. Cohen argues that the social phenomenon of moral panic occurs, from time to time, in most societies. The nature and cause of the panic may vary but the traits of moral panic are consistent regardless of the object of the panic. He states:

‘Some times the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten, except in folk-lore and collective memory; at other times it has more serious and long

⁵² See note 50 above, paragraph 30.

⁵³ David Garland, *The Culture of Control* (University of Chicago Press, 2001), Ch 1, 4 and 8.

lasting repercussions and might produce such changes as those in society and social policy or even in the way the society conceives itself.⁵⁴

Manning's contribution to the moral panic effect on criminal law focuses on organisational performances and the structural meaning from the roles that organisations play. Although the application of a moral panic to criminal accountability of corporations is not included in his examples, Manning's theory that teamwork and coordination of the various actors in the moral panic potentially has application to corporate offenders.⁵⁵

The key elements in a moral panic may involve a very significant social value such as safe drinking water, healthy workplaces and secure financial investments. It is suggested that moral panic has had significant influence on the development of corporate accountability. Cohen argues that there is a need to label the individual, the criminal organisation or the phenomena in particularly heinous terms to secure social, media and political support for response. This is often rooted in social, religious and cultural norms that define what behaviour is appropriate and acceptable and that which is not. Labelling corporate conduct as criminal is available at every level that a corporation may affect society. By using this labelling approach to corporate activity, the actors involved in a staging of the moral panic, knowingly or otherwise, garner support to establish strong legislative and reactive law enforcement activity.

The more visible and well-publicised the inappropriate corporate conduct is made, the easier it is to secure media attention, social support and political will for new law enforcement action. At first blush, this aspect of a moral panic may not appear to be as effective with corporate crime as with individuals. However, since the corporation has no 'soul', with no sympathetic human attributes, that may increase the vulnerability of corporations to moral panic.

Moral panic and corporate vulnerability

It is suggested that corporations, especially large, publicly traded corporations, are easy targets of moral panic, leading to a more stringent punishment. When organisations are blamed for unsafe drinking water, workplace deaths and loss of one's life savings, strong legislative and enforcement are demanded by the media and the public. Since a corporation, apart from directors and officers, cannot be incarcerated for crimes, the public and media may mischaracterise the corporation as above or beyond the law. This leads to a general distain for the entity itself, even though the corporation as a

54 Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (London: Basil Blackwell, 1972, 1st edn, 1990 edn).

55 Peter K Manning, *Police Work* (Illinois: Waveland Press Inc, 1997).

separate legal entity has tremendous economic, social and public importance and benefit to modern society.

The process of labelling a corporation as powerful, unaccountable and socially irresponsible fuels media, public and political outrage and action to prosecute corporations. When the rhetoric of social panic threatens perceived order in modern society, strong political action often follows. Silver discusses the demand for order in the civil society and the use of naming and fear to achieve that end. His comments have applicability in the evolution of corporate accountability under the influence of moral panic. 'It was much more than a question of annoyance, indignation or personal insecurity; the social order itself was threatened by an entity whose characteristic name reflects the fears of the time – the "dangerous classes"... One of an unmanageable, volatile, and convulsively criminal class at the base of society.'⁵⁶

There are at least three arguments for suggesting that corporations are vulnerable to moral panic. First, the corporation has no soul or human face that would insulate it from irrational and implausible moral panic. The absence of a human face and human identity of a corporation ironically makes the corporation more vulnerable to criticism, blame and moral panic. Even though many modern, large corporations have media relations personnel, the media are often free to criticise corporations for their mistakes and adverse effects on society. The very nature of the legal entity itself makes a corporation vulnerable to moral panic when individuals, groups or the public is adversely affected by the actions of a corporation.

Secondly, the management of corporations, especially large corporate organisations, is not well understood by society generally, and the law in particular. The decision-making process in a large organisation may be complex and may vary from corporation to corporation. The extent of both external regulatory standards, be they financial, environmental, occupational or public safety, must be addressed at various levels within a large corporate organisation. However, there is a broad range of management decision-making models available to corporations. Therefore, what may seem as a reasonable and plausible management decision within the organisation may not be understood by society, the media and legislators and may even be vilified. The review of theories of corporate legal liability earlier in this article illustrates the legal difficulties regarding how corporate decisions are made. When there is a breakdown in the decision-making process of a small element within the corporation resulting in illegal activity, the corporation

56 Allan Silver, 'The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police and Riot, in David J Bordua (ed), *The Police: Six Sociological Essays* (New York: John Wiley and Sons, Inc, 1967).

as a whole is vulnerable to criticism and prosecution. Therefore, the lack of knowledge of the management structure and decision-making process of the corporation makes it easier to criticise the corporation as being socially irresponsible and in need of stronger punitive laws and legal enforcement.

Thirdly, corporations are an easy target for blame from politicians and policy-makers when social and economic political policy goes awry. Corporations operate *prima facie* in accordance with the social and economic structure mandated by corporate, regulatory and tax laws in modern society. However, during a period of economic instability or recession, it is much easier for a politician to blame 'corporate greed' and 'mismanagement' by the corporation than a lack of regulatory oversight or misconceived or poorly executed economic policy. Corporations operate within a highly regulated society that encourages globalisation. Young argues that globalisation has led to underemployment and insecurity in the middle class and working poor in North America.⁵⁷ This aspect of late modernity is fertile soil for the politics of moral panic. Corporations are therefore vulnerable to moral panic because they are non-human legal entities, with complex management structures that often are easy to blame for public policy and political decisions that contributed to economic and social problems.

Moral panic and new corporate offences

This section deals with three examples of significant new legislation and increased fines, all in the name of improved corporate accountability in Canada. All examples arise from serious social issues that triggered media events, and resulted in legislative change. These examples support the argument that corporate activity that results in public harm may result in a moral panic, which, in turn, results in increased law enforcement. The important social values of workplace safety, environmental security and financial stability all loom large in these examples.

Workplace safety

On 9 May 1992, 26 miners died in an explosion and fire that ripped through the Westray Mine in Plymouth, Pictou County, Nova Scotia. Only 15 of the 26 miners' bodies were ever recovered. After a failed criminal prosecution of two mine managers and the corporation under the Code a public inquiry was appointed. The Royal Canadian Mounted Police and the provincial prosecutors in Nova Scotia decided that there was not sufficient evidence to hold a second

⁵⁷ See note 1 above, 100.

trial after the first trial had been stayed for prosecutorial misconduct and failure to provide full disclosure to the defence. Justice K P Richard, the Commissioner appointed to hold the public inquiry, stated in his final report that a 'complex mosaic of actions, omissions, mistakes, incompetence, apathy, cynicism, stupidity and neglect' contributed to the disaster.⁵⁸

Tragically, the Westray Mine disaster was not the worst coal mine disaster in the history of Nova Scotia. In 1873, an explosion fire killed 60 workers at the Drummond Mine in Westville, Nova Scotia; in 1880, an explosion resulted in the death of 44 miners at the Foord Pit; in 1918, there was an explosion and fire at the Alan Shaft Mine that resulted in the death of 88 miners.⁵⁹

The Westray Mine disaster and the subsequent scathing report by Justice Richard, the public inquiry Commissioner, resulted in many calls for stricter occupational health and safety and criminal law sanctions for corporations and executives that failed to provide a safe workplace. The province of Nova Scotia reacted quickly in amending its Occupational Health and Safety Act.⁶⁰ These amendments increased responsibility of all workplace parties, especially employers, and increased fines for employer corporations who contravene the legislation. However, no director and officer liability provisions were added to the Nova Scotia health and safety legislation.

Commissioner Richard, in his report in the Westray disaster, made 74 recommendations; number 73 of which read as follows: 'The Government of Canada through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety.'⁶¹ The result was the eventual introduction of Bill C-45, an act to amend the Criminal Code of Canada. In introducing the Bill, the Justice Minister, the Honourable Martin Cauchon, said: 'employers must fully recognize their responsibility in providing a safe work environment. Failure to do so in a manner that endangers employee and public safety must be appropriately dealt with through our criminal laws. I am pleased to introduce measures today that will effectively modernize the law on corporate liability.'⁶²

Bill C-45 was passed into law on 31 March 2004, and it provided that corporations could receive unlimited fines. The only corporation prosecuted

58 K P Richard, Commissioner, *The Westray Story: A Predictable Path to Disaster, an Executive Summary* (Pictou: Westray Mine Public Inquiry, 1997), vii.

59 Shaun Comish, *Westray Tragedy: A Miners' Story* (Halifax: Fernwood Publishing, 1993), 2.

60 Occupational Health and Safety Act, SNS 1996, c 7, as amended.

61 See note 58 above, Executive Summary, 57.

62 Department of Justice Canada, news release 'Justice Minister Introduces Measures to Protect Workplace Safety in Modernized Corporate Liability' (12 June 2003).

under Bill C-45 to date is *Transpavé*,⁶³ a Quebec corporation that pleaded guilty to criminal negligence by causing death of an employee arising from a workplace fatality. The court considered the new sentencing provisions of the Code for corporations in determining the appropriate fine. Justice Chevalier said:

‘Transpavé is not a multinational but a family corporation. It employs up to one hundred employees during production period. It has never paid dividends to its owners-shareholders, reinvesting year after year its profits in order to modernize and remain competitive. Its owners have also been very marked by this accident. They had called the next day a psychologist to help the employees. They had personally called every employee to inform them of the place and date of the funerals of their colleague. They went to the funeral home to offer their sympathy to Mr. L’Écuyer’s family and had reiterated their condolences at the hearing through their attorney. It is therefore not an incentive corporation ... with regards to the factor analysis to take into account, it must be noted that Transpavé has derived no advantage from the perpetration of this offence...’⁶⁴

Bill C-45 was passed, inter alia, to hold corporations accountable for workplace safety. Five-and-a-half years after the new law was passed and 17 years after the Westray disaster, only one corporation has been prosecuted. The promise of severe fines to deter corporate criminal negligence relating to workplace safety has not occurred and the bluster of political promises reacting to the moral panic and outrage over the death of 26 miners has resulted in very little change in corporate accountability.

Environmental security

In June 2000, a small Town of Walkerton, Ontario, had a severe problem in the quality of its drinking water. E coli from cow manure seeped into the ground water and wells that supplied drinking water to the residents of Walkerton. Seven people died and more than 500 persons became ill as a direct result of bad drinking water.⁶⁵ As a result of the Walkerton incident, a public inquiry was called to address the problem and its moral panic. Justice O’Connor, appointed to preside over the public inquiry, noted the public’s concern in his report from the Walkerton inquiry that ‘there were

63 *R v Transpavé* [2008] JQ No 1857.

64 *Ibid*, paras 11 and 12.

65 See the Honourable D R O’Connor, *Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues* (Toronto: Queen’s Printer for Ontario, 2002).

widespread feelings of frustration, anger and insecurity'.⁶⁶ There were two primary legal responses to the Walkerton incident and public inquiry. The first was to establish more strict liability offences, with higher penalties. The Provincial Legislature passed stringent new standards for water testing in Ontario under the Safe Drinking Water Act, 2002.⁶⁷ Ontario's Environmental Protection Act⁶⁸ was also amended to increase the penalties on individual directors and officers of corporations when they were found guilty of a contravention of the statute, which regulates air, water or ground pollution. The Environmental Protection Act provides for individuals to be imprisoned for up to one year, or a fine up to CA\$50,000 per day of an offence on a first conviction and up to CA\$100,000 per day for a subsequent offence, or both a fine and imprisonment. Individuals may be fined up to CA\$6,000,000 in certain circumstances.⁶⁹ Corporations are now subject to a maximum fine of CA\$10,000,000 on a conviction.⁷⁰ These escalating fines may intimidate some potential offenders to change behaviour but generally fail to address the root causes of regulatory non-compliance.⁷¹

A lesser-known legal response to Walkerton was the prosecution of two individuals under the Code. There was a prosecution and guilty plea of the Koebel brothers, Frank and Stan, for criminal offences causing the death and injury of the citizens of Walkerton.⁷² These employees of the Town of Walkerton, who were held criminally responsible for the failure to manage and monitor the town's water quality, were given much less media attention than the blame directed towards the unpopular Premier and the failure of the provincial regulatory system. The provincial government response was to introduce a harsher financial deterrent, not a more effective sentencing provision for provincial offences.

Walkerton was an example of a serious environmental incident causing widespread fear and excessive media coverage, which resulted in moral panic. The Walkerton incident resulted in a call for action in the form of legislation regulating municipal corporations and private corporations with severe fines.

66 *Ibid*, 2. The public and the media's criticism of Premier Mike Harris and his Conservative Government was much stronger than of Stan Koebel's failure to notify the government of the E coli contamination, which resulted in criminal liability in failing to perform their duties in testing the water quality in Walkerton that caused the death of seven residents.

67 SO 2002, c 32; s 1(i) of the Act states: 'the people of Ontario are entitled to expect their drinking water to be safe'. Under ss 141 and 142 of the Act, individuals may be imprisoned for a year and fined up to CA\$100,000 per day or both!

68 RSO 1990, c E.19, as amended.

69 *Ibid*, s 187(5)(c).

70 *Ibid*, s 187(4)(c).

71 See note 11 above, 17-28, for a helpful discussion of the root causes of conflict based on an understanding by human and organisational needs, by B Mayer.

72 [2004] OJ No 5199.

The enforcement of these community expectations by the new strict liability offences ignored more effective dispute resolution models available.⁷³

Financial stability

The recent Canadian legislative reaction to financial markets manipulation, dishonesty and fraud had its origins in the financial crisis of the United States. The Enron case provides a helpful example of financial instability and moral panic in the financial markets. Enron opened its doors in 1985 as a small energy company based in Houston, Texas. Enron was the result of a merger between Houston Natural Gas and InterNorth.⁷⁴ By the 1990s, Enron had become one of the largest corporations in the energy market in the country, controlling 25 per cent of all gas business.⁷⁵ Expanding quickly, by late 2000 Enron's share price reached an all-time high of over US\$90 per share, reporting global revenues in excess of US\$100 billion.⁷⁶ Around this time, however, concerns began to surface regarding the sustainability of the stock price as well as the accuracy of the numbers being reported. Confirming these concerns, then CEO of Enron, Jeff Skilling resigned on 14 August 2001. This sent shockwaves through the investor community and as a result, millions of shares in Enron dropped below US\$40/share.⁷⁷ Realising that they were likely to be facing serious trouble, the shredding of accounting documents began.⁷⁸ On 8 November 2001, the company restated its earnings for the past four years, effectively admitting it had inflated its profits over that time. Enron filed for bankruptcy on 2 December 2001, with its share price below US\$1 per share.⁷⁹ The fall of Enron led to a public inquiry headed by William Powers Jr,⁸⁰ who laid the blame for the financial collapse at management. In his address to Congress, Mr Powers stated that his report 'found a systematic and pervasive attempt by Enron's Management to misrepresent the Company's financial conditions'.⁸¹

73 Gary T Furlong, *The Conflict Resolution Toolbox* (Toronto: John Wiley & Sons Canada Ltd, 2005).

74 BBC News, 'Enron: Timeline' online: http://news.bbc.co.uk/1/hi/english/static/in_depth/business/2002/enron/timeline/1.stm at tab 1.

75 *Ibid*, tab 4.

76 *Ibid*, tab 7.

77 *Ibid*, tab 9.

78 *Ibid*, tab 10.

79 *Ibid*, tab 12.

80 William Powers Jr was a member of the Enron board of directors, as well as the chairman of the Special Investigation Committee.

81 William Powers Jr, 'The findings of Enron's special investigative committee with respect to certain transactions between Enron and certain of its current and former officers and employees' (address given to Subcommittee on Oversight and Investigations, 5 February 2002) *Committee on Energy and Commerce* online: <http://archives.energycommerce.house.gov/reparchives/107/hearings/02052002Hearing481/Powers781.htm>.

Enron's collapse together with that of WorldCom led the US Congress to pass the Sarbanes-Oxley Act of 2002 ('SOX').⁸² The WorldCom collapse also resulted in a special inquiry and report listing 78 specific recommendations regarding corporate governance procedures.⁸³

The Canadian response to instability and moral panic in financial markets was the enactment of Bill C-13 (the 'Bill').⁸⁴ The overall purpose of the Bill was aimed at 'strengthening measures to investigate, prosecute and deter capital markets fraud'.⁸⁵ In order to achieve this goal, the Bill implemented five new principal provisions under the Code:⁸⁶

1. it created a new criminal offence of improper 'insider trading';
2. it provided whistleblower protection to employees who report unlawful conduct;
3. it increased the maximum sentences for existing fraud offences and established a list of aggravating factors to aid the courts in sentencing;
4. it allowed the courts to issue production orders to obtain data and documents from persons not under investigation; and
5. it established concurrent federal jurisdiction to prosecute certain capital market fraud cases.⁸⁷

The two most important additions to the Code were the creation of the criminal offence for insider trading, and the protection of whistleblowers. Both these provisions enable the government to keep companies from misbehaving, both generally and in a corporate governance sense. The other significant changes made by the Bill include the ability for investigators to obtain production orders to compel those who are not under investigation to produce documentation deemed to be relevant to the commission of an alleged offence under section 487.012. In order to issue an order, the court must be satisfied that reasonable grounds exist to suspect that:

82 15 USC 7201 et al. After numerous failed attempts, SOX was almost unanimously passed at this point.

83 Rhicard Breeden, 'Restoring Trust, Report to the Hon. Jed S. Rakoff, The United States District Court for the Southern District of New York' (August 2003) *Southern District of New York* online: www.nysd.uscourts.gov/ruling/02cv4963082603.pdf.

84 Bill C-13, An Act to amend the Criminal Code (Capital Markets Fraud and Evidence Gathering), 1st Sess, 38th Parl, 2004.

85 Robin MacKay and Margaret Smith, 'Bill C-13: An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence Gathering)' (Legislative Summary) *Library of Parliament* (16 February 2004) online: www2.parl.gc.ca/Content/5CLOP/5CLegislativeSummaries/5C37/3/c13-e.pdf (the 'Summary').

86 Criminal Code RSC 1985, c C-46.

87 *Ibid.*

1. an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;
2. the documents or data will afford evidence respecting the commission of the offence; and
3. the person who is subject to the order has possession or control of the documents or data.⁸⁸

Bill C-13 added new crimes and severe penalties in the Code for capital market crimes. However, there have been virtually no prosecutions under this amendment. More importantly, there is no evidence that corporations and their directors and officers have significantly changed their behaviour in financial markets as a result of Bill C-13. Higher penalties in and of themselves have not resulted in a constructive, positive change in corporate accountability.

New directions in corporate accountability

A principled approach in corporate accountability

The evolution of the corporation from royal charter to statutory mandate always required a measure of political and social utility. The idea that the modern corporation should be held criminally accountable for its actions was largely a development of the 20th century. William Frederick has identified the emergence of criminal accountability and CSR by the 1950s.⁸⁹ By this time, business schools across the United States began a concerted effort to understand the meaning of CSR.⁹⁰ According to Frederick, CSR was not born out of a specific criminal scandal that rocked the consciousness of the people, but rather from business itself. The idea of corporate philanthropy and giving back to the community was one that was alive and well since before the Great Depression. In 1951, *Harvard Business Review* published a piece on Frank Abrams, the chairman of the board of directors of Standard Oil of Jersey, where he implored fellow officers and directors to ‘think of themselves as professionals in the manner of physicians and lawyers, imbued with responsibilities going beyond the narrow bound of their daily work’.⁹¹ Abrams went on to say that management should see itself as a good citizen. ‘Business managers can more effectively contribute to the solution of the many complex social problems of our time. There is no higher responsibility,

88 Code, ss 387.012(3) (a)–(c).

89 William Frederick, ‘Corporation, be Good: The Story of Corporate Social Responsibility’ (Indianapolis: Dog Ear Publishing, 2006) (‘Frederick’).

90 *Ibid*, 6.

91 *Ibid*, 7.

there is no higher duty of professional management.⁹² The altruistic ideals of Abrams were quickly challenged by Howard Bowen in 1953⁹³ and later by Milton Freedman, of the Chicago School of Economics.

The 1960s and 1970s saw the introduction of CSR into a more thought-out corporate initiative. Frederick discusses five requirements of every CSR plan:⁹⁴

1. the plan should be based on the current economic climate of the time;
2. the plan should be based on the new and emerging concepts of management and administration, including using scientific methodology;
3. an adequate CSR plan will understand that it must learn from the past to prevent future mistakes;
4. a CSR strategy will recognise that the behaviour of individual businessmen is a function of the social role they play in business and in society; and
5. real and deliberate effort is needed to create a CSR plan.

A principled approach towards accountability of corporations requires at least four questions that must be addressed. First, what is the nature of the standard or legal requirement? What is the nature of the corporate offender? What is the role of the victim in sentencing the corporate offender? What is the broader purpose of sentencing a corporation in an era of CSR?

What is the nature of the legal requirement? An offence against a corporation, be it *mens rea* or strict liability, is intended to direct corporate behaviour in a positive manner for the benefit of society with a specific legal requirement. If a corporation fails to meet a legal standard, is charged and convicted, a principled approach in sentencing must consider the nature of the offence. What was the purpose of the offence? What was the effect of the breach on individuals, environment or society as a whole? In setting legal standards for corporations, are we making isolated morality statements or establishing broad principles of socially acceptable behaviour or, to use the Garland analysis, does the law set standards for corporations to promote market freedom or the democratisation of social life and culture.⁹⁵ The degree of damage, injury and breach of trust involved must all be considered as part of a principled approach. In this respect, considering the nature of the legal standards that establish the offence that will be enforced.

What is the nature of the offender? As discussed earlier, a new formula for *mens rea* for both negligence and non-negligence offences under the Code, introduced under Bill C-45, result in the corporate offender being treated very similarly to a strict liability corporate offender. Since corporate criminal

92 *Ibid.*, 8.

93 Frank Abrams, 'The Social Responsibilities of the Businessman' (New York: Harper and Brothers, 1953).

94 *See* note 89 above, 20–22.

95 *See* note 53 above, 87–99.

liability is now more easily proven, should aggressive prosecution and higher fines be more frequently pursued? The nature of the organisation, its size and the complexity of management's role as an employer should also be considered in a principled approach to sentencing corporate offenders.

What is the role of the victim in sentencing the corporate offender? There can be several levels of victims when a corporation commits a *mens rea* or strict liability offence. In the area of capital markets fraud, there may be a number of shareholders or members of the public who have suffered financially when a corporation commits an offence. That group of victims should be clearly definable, and their interest in sentencing, especially under the probationary term of restitution, be fairly clear and discrete. On the other hand, as in the Walkerton example, citizens who died or were rendered very ill from the E coli breakout may be less easily satisfied by the municipal and provincial government's failure to meet existing clean water regulatory requirements. When a corporation permits a workplace death, as seen in the Westray Mine disaster, prosecution has no direct effect on the victim's family. Workers and their families are barred from suing their employers, supervisors or co-workers, as a result of workers' compensation legislation creating a 'no fault' system, which provides compensation to workers who are injured on the job.⁹⁶ Therefore, the need for consideration of a number of factors on the effect of victims and potential victims of corporate offences is important in the sentencing process. It is helpful to ask: what is the broader purpose of prosecuting/sentencing a corporate offender, the imposition of fines as deterrence or penalties that promote CSR? Since corporations exist by public statute it is suggested they should also be held accountable to legal standards that are set to achieve CSR.

Introducing ADR to corporate accountability

There is a need to rethink corporate accountability in the criminal justice system. The evolution of corporate accountability must recognise the important role of the corporation in society and the politics of redistribution.⁹⁷ Corporate accountability can learn from the considerable literature and experience of ADR. ADR has become well accepted in the Canadian justice system with the civil action settlement rate approaching 90 per cent through the use of negotiation, mediation and arbitration to resolve civil actions.⁹⁸ The ADR emphasis on appropriate resolution has significantly reduced the

⁹⁶ Workplace Safety and Insurance Act, 1997 SO 1997, C 16, s 28.

⁹⁷ See note 1 above, 199–200.

⁹⁸ Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008).

number of commercial laws suits that proceed to trial.⁹⁹ In the family law area, collaborative law, where each party has a lawyer in a negotiating setting, has assisted many parties resolve disputes that are emotionally charged.¹⁰⁰ Although ADR has been a transforming trend in the administration of civil justice in Canada, it has yet to be a force in corporate accountability.

The ADR literature does not deal extensively with criminal law.¹⁰¹ Other than limited application in restorative justice principles, the criminal justice system remains primarily focused on retributive justice through a system of prosecution, conviction and punishment.¹⁰² It is submitted that both *mens rea* and strict liability offences against corporations lend themselves more readily to the application of ADR principles than against individual offenders. This approach also finds support in the recent recommendations of Professor Michael Code and the Honourable Patrick J Lesage to improve the administration of justice in large, complex criminal prosecutions and its application to strict liability offences.¹⁰³

The ADR movement was more a reaction to the dissatisfaction of growing delays, costs, inefficiencies and failures of the civil justice system than a proactive solution. As noted by Macfarlane, 'some of the most significant innovations in developing an early and informal dispute resolution process have grown out of the dissatisfaction felt by some members of the profession with the limits of traditional litigation to bring peace and closure to their clients'.¹⁰⁴ On the one hand, the ADR movement has largely focused on procedural change regarding how disputes may be resolved and avoided in the future. On the other hand, courts have generally been associated with substantive, constitutional change, such as race relations in *Brown v Board of Education*¹⁰⁵ in the United States and abortion rights in *R v Morgentaler* in Canada.¹⁰⁶ Therefore, ADR is generally more appropriate as a model of dispute resolution than a standard setting legal process.

ADR involves case management, mandatory mediation and judicial pre-trial conferences, and cost consequence rules tied to formal offers to settle

99 Julie Macfarlane, *Dispute Resolution Readings and Case Studies* (Toronto: Emond Montgomery Publications Limited, 2003), 622–626.

100 *Ibid*, 396–407, and 410.

101 For example, in one of the course texts, *Dispute Resolution, Readings and Case Studies*, note 99 above, there were only seven pages specifically dealing with criminal matters, according to the index – pages 425–431 inclusive.

102 *Ibid*, 425–427.

103 The Honourable Patrick J Lesage, CM, QC, Professor Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008, submitted to the Honourable C Bentley, Attorney General, available online at: www.attorneygeneral.jus.gov.on.ca.

104 See note 98 above, 7.

105 347 US 483 (1959).

106 [1988] SCJ No 1.

have changed the civil procedure process into a pro-settlement system of procedural justice.¹⁰⁷ The use of ADR to address corporate accountability may augment rather than replace higher fines. More constructive and flexible processes that engage the opportunity of social change are critical in a society that Jock Young describes as increasingly porous.¹⁰⁸ ADR also provides lawyers, defendants and judicial officials with creative, constructive and conciliatory processes in the resolution of disputes.¹⁰⁹ ADR can be, as Dana Curtis says, ‘an agent of change’.¹¹⁰

Governments are straining under the costs of funding public prosecution offices, a public court system and lengthy trials, including the prosecution of corporations. Limits on public resources for the administration of justice are being strained. One author noted, ‘the realization among policy makers of an acute need for change in public justice systems has been a watershed in many North American jurisdictions and has led to the initiation of dozens of programs that encourage and facilitate early negotiations and assessment of resolution possibilities’.¹¹¹ The sheer cost of investigating and prosecuting corporations is staggering. Ruby argues that the public cost of prosecuting corporations is a major reason why so few are brought to justice.¹¹²

This role of lawyers, as agents of change, was not without its challenges. This has been observed: ‘there are certainly obvious financial advantages to the profession of settling after, rather than before, the most costly steps in litigation (usually discoveries)’.¹¹³ Although some lawyers have initiated ADR, the legal profession generally has been dragged into the ADR process.

ADR in civil litigation has been broadly recognised as a success.¹¹⁴ The public and politicians remain cautious on the value of ADR in the criminal justice system, owing to the perceived failure of both the retributive and the restored justice models.¹¹⁵ However, the realities of the new social media,

107 For example, the Ontario Rules of Civil Procedure, which came into force in 1985, introduced Rule 49 offers that encouraged, by their procedural mechanism, serious offers of settlement to be made as soon as possible; putting an unreasonable litigant at significant risk of paying a punitive order for costs, even if they had a measure of success; see Rules of Civil Procedure, RRO 1990, reg 194, Rule 49.

108 See note 1 above, 209.

109 See note 98 above, 3.

110 Dana Curtis, ‘Reconciliation and the Role of Empathy’ in James J Alfini and Eric R Galton (eds), *ADR Personalities and Practice Tips* (Washington, DC: American Bar Association Section of Dispute Resolution, 1998), 62.

111 See note 98 above, 8.

112 See note 2 above, 478.

113 See note 98 above, 85.

114 See note 99 above, 16, pp 104–106 for a conceptual overview of ADR offered by Professor P Emond.

115 *Ibid*, 9–10.

increased transparency and globalisation present ADR as a viable approach to corporate accountability.

One recent example in the evolution of corporate accountability has developed in federal environmental prosecutions. Environmental Protection Alternative Measures (EPAMs) are an alternative to regulatory prosecution for a contravention of the Canadian Environmental Protection Act 1999 (CEPA).¹¹⁶ An EPAM is agreement that is negotiated and mediated between the defendant and the Attorney General of Canada, prosecuting under the CEPA. EPAMs are established by CEPA and those provisions set out who is eligible for an EPAM, what are the potential terms and limits on EPAMs and how they must be documented and enforced.¹¹⁷ Some of the alternative measures are the development of pollution prevention measures, reduction of toxic substances emissions, installation of better pollution control technology systems and measures taken to clean up environmental damage.

The advantages of an EPAM for a defendant include the ability to use ADR to negotiate a constructive solution when a legal contravention of CEPA occurs. There is also a reduction of the legal costs of a lengthy trial, avoiding a conviction and a record of offence.¹¹⁸ The advantages for the federal CEPA regulator include negotiating terms that improve the environment, motivating the defendant to invest in environmental protection measures and achieving the public purpose of CEPA rather than simply imposing a fine against the offending organisation.

The EPAMs become a public document and available for media scrutiny. The CEPA environmental registry is made available to the public, the media and all interested parties, on the internet.¹¹⁹ This environmental ADR addresses one of the primary criticisms of ADR, namely the failure to uphold legal standards and make publication of the same. Fiss argues that this type of ADR promotes peace through settlements, rather than justice, based on the rules of law.¹²⁰ In short, the evolution of EPAMs gives the stakeholders the opportunity to engage in negotiation and mediation in a process that achieves the broader purpose of public welfare statutes.

In summary, the ADR process can achieve many more objectives than a large fine to a corporate offender, which gets passed on to customers and end users. The use of ADR to address contraventions of capital markets, environmental, occupational and public safety laws will require a strong

116SC 1999, c 33.

117 *Ibid*, ss 295–309.

118 In many commercial and public contracts, a corporate may be precluded from tendering a bid if they have a criminal, health and safety or environmental record of conviction.

119 www.ece.gc.ca/ceparegistry/Enforcement.

120 See note 99 above, 69–70, O Fiss, 'Against Settlement'.

legislative mandate. Leadership in this area is especially ripe for opportunity for policy-makers who understand the critical role that corporations play not only in the economy but also in social transformation in a turbulent age.¹²¹ Macfarlane poses the following challenge: ‘the role of law and legal advice in a model of conflict resolution advocacy is perhaps the most complex, contentious and challenging dimension of the practice of the new lawyer.’¹²² For lawyers both prosecuting and defending corporate offenders, in both *mens rea* and strict liability offences, this task may be a meaningful contribution to social justice and CSR.

A move towards CSR

CSR is also synonymous with sustainable business practices and responsible corporate governance. CSR has been described as a ‘form of corporate self-regulation integrated into a business model... business would embrace responsibility for the impact of their activities on the environment, consumers, employees, communities, stakeholders and all other members of the public sphere’.¹²³ CSR has also been expressed as a legal concept that guides and encourages the regulation of corporate activity in a manner that requires business, corporate decisions to be based on ethical principles. Deviations from these principles of CSR may be reflected in a breach of standards under the Code or strict liability offences or both. This view is supported by Robert Riech, who argues that ‘governments should set the agenda for social responsibility by the way of laws and regulation that will allow a business to conduct themselves responsibly’.¹²⁴

A move towards CSR requires support from regulators and prosecutors, and a move away from higher fines will take political will. Higher fines for corporate offenders are a type of ‘tunnel vision’ that has been well documented as a major cause of wrongful convictions in Canada and the United States.¹²⁵ CSR provides a broader mandate for corporate accountability and broader choice of accountability tools. Bill C-45 is a step towards that direction and it may even provide for ongoing regulatory scrutiny as part of a probationary order. However, it does not provide sufficient authority for an independent private sector inspector general (IPSIG).¹²⁶

121 See note 99 above, 198–199.

122 See note 98 above, 167.

123 CSR defined on Wikipedia: http://en.wikipedia.org/wiki/Corporate_social_responsibility, 29 July 2009, p 1.

124 *Ibid.*, 6.

125 Margaret Beare, ‘Shouting Innocence from the Highest Rooftops’, in M Beare (ed), *Honouring Social Justice* (University of Toronto Press, 2008), 24.

126 Kenneth E Jull, ‘Corporate Criminal Liability: Outside the Penalty Box’, *ibid.*, 245.

One of the first steps towards establishing legal recognition of the principles of CSR came on 16 December 2008, when the Danish Parliament adopted a Bill making it mandatory for the largest companies in that country to include information on CSR in their financial reports.¹²⁷ Seven elements of CSR have been introduced by governments and regulatory bodies around the world.¹²⁸ Several authors have identified seven legal principles that identified with and reasonably defined the application of corporate responsibility. Those principles are a useful list for legislators and regulators to consider in establishing principles and criteria for a sentencing in terms of probation for corporate offenders. The seven principles of CSR are as follows:

1. *Integrated, sustainable decision-making.* This requires corporate leaders and decision-makers to consider the full scope of the social and environmental impact of their decisions.
2. *Stakeholder engagement.* This requires corporate decision-makers broadly to define their stakeholders, and to engage them in the decision-making regarding corporate goals and activities.
3. *Transparency.* This requires corporations to provide regular, periodic public reports on their social and environmental performance measured against relevant criteria.
4. *Consistent best practices.* Corporations commit to achieving the highest reasonable best practices, as may be required by statutes, regulations and codes, the execution of their business activity.
5. *Precautionary principle.* This involves corporate decision-making that errs on the side of caution, when it relates to social and environmental issues, rather than requiring proof beyond a reasonable doubt of risk or harm from business activity, before it is restrained.
6. *Accountability.* Corporations, and their officers and directors, must be openly accountable for the social and environmental impact and potential harm of a failure to meet proper best practices.
7. *Community interest.* Corporations must undertake initiatives and programmes that contribute to the social, cultural, economic and environmental enrichment of the communities in which they operate.¹²⁹

CSR can and should be addressed proactively, by statute and regulation, and also reactively by sentencing, ADR and strict probationary terms for corporate offenders. However, when corporations transgress the law, the absence of appropriate sentencing and probationary tools is a gross omission from the

127 See note 41 above, 6.

128 *Ibid.*, 1.

129 *Ibid.*, 91.

tools necessary to achieve the movement towards CSR. Otherwise, as Fisse and Braithwaite observed:

‘Where corporations are sanctioned for offences [ie fines], in theory they are supposed to react by using their internal disciplinary systems to bring home individual accountability, but the law now makes little or no attempt to ensure that such a reaction occurs. The impact of enforcement can easily stop with a corporate pay-out of a fine or a monetary penalty, not because of any socially justified departure from the traditional value of individual accountability, but rather because it is the cheapest or most self-protective course for the corporate defendant to adopt.’¹³⁰

Summary and conclusions

The evolution of corporations and corporate accountability is inextricably linked to the role of the corporation in society. The regulation of public, occupational and environmental safety and capital markets security has relied on the theory of deterrence. Deterrents have been criticised in the sentencing of individual offenders. This theory needs to be revisited in the punishment of corporate offenders. This article has argued that moral panic has often driven legislative reaction to stricter laws and higher fines but not towards better means of corporate accountability.

Given the important and complex role that corporations play in modern society, there is a strong argument that corporate accountability requires a new approach. The prosecution and sentencing of corporations ought to encourage the principles of CSR through appropriate legislation and a mandatory ADR process. Although CSR has not been specifically legislated in Canada, its principles are being recognised domestically and internationally as a positive influence on the role of corporations in modern society. The principles of CSR may be used by regulators, prosecutors and the judiciary in sentencing and probationary orders for corporate offenders. The use of CSR concepts will promote a principled approach to sentencing corporate offenders and enhance the social benefits of corporations and social justice.

130B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), 1.

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