CORRUPTION AND CORPORATE CRIMINAL LIABILITY*

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I. Introduction

Although Canadian statutes specify that corporations and other collective entities are "persons" for the purposes of the criminal law,[1] those statutes do not specify how the law will or should attribute criminal liability to such collective entities. This critical issue -- the basis for imposing criminal liability -- originally arose and is still dependent today on common law principles developed by judges on a case by case basis.[2]

The central issue that arises in attaching criminal liability to a corporation is the theoretical difficulty of attributing a culpable mental state (or *mens rea*) – a required element of most criminal offences – to non-human, artificial entities. However, it is well-established in Canadian law that a corporation *can* be convicted of crimes requiring a culpable mental state. Such criminal liability attaches to both "true crimes" and regulatory offences.

This paper explores the basis and extent of corporate criminal liability for "true crimes," with a particular emphasis on corporate liability for corruption offences. The *Criminal Code* establishes a number of offences relating to corruption, including bribery of officials,[3] bribery of officers,[4] frauds on government[5] and municipal corruption.[6] However, these offences relate

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1. Section 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, defines "every one" and "person" as including corporate bodies. Likewise s. 35 of the *Interpretation Act*, R.S.C. 1985, c. I-21 which applies to all federal statutes defines "person" as including a corporation.

2. Although Canadian criminal law is for the most part codified in the *Criminal Code*, R.S.C. 1985, c. C-46, as amended, there are still some general principles such as the rules of causation, the definition of *mens rea* and the basis for corporate criminal liability, which remain a matter of common law development. Section 8 of the Canadian *Criminal Code* provides that these common law rules and principles apply unless or until they are altered by statute.

3. S. 119 of the *Criminal Code* provides that it is an offence to bribe a holder of a judicial office, or a member of Parliament or of the legislature of a province.

4. S. 120 creates a bribery offence similar to s. 119, but relating to the bribing of a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or a person employed in the administration of criminal law.

exclusively to corruption of *Canadian* public officials.[7] The recently enacted *Corruption of Foreign Public Officials Act*[8] addresses this territorial limitation by creating offences relating to the bribing of foreign public officials, the laundering of proceeds obtained from such bribery, and the possession of property derived from either offence.

The corruption offences contained in the *Criminal Code*, and the offences established in the *Corruption of Foreign Public Officials Act*, fall into the category of "*mens rea* offences".[9] "*Mens rea* offences" refer to offences requiring proof of both an *actus reus* and a *mens rea* in the sense of some culpable state of mind. Such states of mind are usually subjective, such as intentionally, recklessly or knowingly (or "wilfully blind" which in law is treated as equivalent to "knowingly"). The question arises: when will a corporation – an artificial entity – be held liable for *mens rea* offences committed by its employees?

This paper attempts to answer this question, and also examines the basis upon which such liability attaches to a corporation.[10] Other important and related issues -- enforcement, procedural

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5. S. 121 sets out several different offences relating to frauds on the government, the most relevant including: bribery in relation to the transaction of business involving the government; influence-peddling and pretending to have influence with the government; interference with competitors' tenders for government contracts; and providing valuable consideration for the purpose of promoting the election of a candidate or party in order to obtain or retain a contract with the government.

6. S. 123 relates to the bribing or unlawful influencing of "municipal officials," defined as "a member of a municipal council or a person who holds an office under a municipal government."

7. Each corruption offence specifies the categories of public officers captured under the provision. Ss. 119 (bribery of officials), 120 (bribery of officers), and 123 (municipal corruption) are restricted in application, by implication or statutory definition, to *Canadian* officials and public employees. Similarly, the offences under s. 121 (frauds on government) relate to the "government," which is defined in s. 118 as the Government of Canada, the government of a province, or Her Majesty in Right of Canada or a province. Consequently, s.121 has no application to offences committed in relation to foreign governments.

8. S.C. 1998, c. 34. (Also known as Bill S-21. Given Royal Assent on December 10, 1998.)

9. *Mens rea* offences, along with strict liability and absolute liability offences, comprise the three categories of offences delineated by the Supreme Court of Canada in *R.* v. *Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.). In **strict liability offences**, the Crown must prove the accused committed the *actus reus*. The accused will then be found guilty unless the accused can establish on a balance of probabilities that the accused took reasonable care or exercised due diligence to avoid the prohibited consequence or circumstance. **Absolute liability offences** are sometimes referred to as "no fault" offences. Once the Crown proves the *actus reus*, the accused will be found guilty even if the accused shows that he or she is free of any fault. The fact that the accused did not intend the harm and took all reasonable steps to avoid the harm is no defence. While interesting issues concerning corporate criminal liability arise in relation to strict and absolute liability offences, this paper is concerned exclusively with *mens rea* offences.

10. Although various types of collective entities are subject to criminal law (such as trade unions, societies, incorporated associations, etc.), the vast majority of criminal prosecutions of collective entities relate to business corporations. The discussion and analysis of criminal liability of collective

and evidentiary issues, sanctions and alternatives, and issues relating to strict liability and absolute liability offences -- are for the most part beyond the scope of this paper.

II. The Basis of Corporate Criminal Liability

(1) *Introduction*

It is undeniable that a corporation has its own legal identity. A corporation's legal identity is separate from that of its shareholders, directors and officers. A corporation can hold property, enter contracts and can sue and be sued. Owners or shareholders enjoy the benefit of limited liability; they are not personally liable for the debts or obligations of the corporation. And a corporation is perpetual in the

sense that its existence is not altered by the addition of new members or the retirement or death of existing members.[11]

Legal theorists have provided various theories for treating corporations as responsible actors and thus fit subjects for penal sanctions: Fauconnet's theory relies on a corporation's distinct legal personality;[12] French argues legal personality alone is inadequate and he articulates a theory of a corporation as a moral or intentional actor;[13] and Fisse and Wells argue that it is unnecessary to frame corporate responsibility in terms of moral notions that apply to humans, that a corporation can and often does exceed the sum of its individual parts (i.e. the organic theory) and that a corporation's true responsibility can be located in its organizational structure, policy, procedures and culture.[14]

Canadian courts have avoided any analysis of these competing theoretical bases for corporate criminal liability. Instead they have simply contented themselves with imposing corporate criminal liability on the basis of the fault of senior corporate managers who are identified for such purposes as the corporation. Canadian courts' discussion of the basis for

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entities in both the case law and the academic literature has focused almost exclusively on business corporations. My analysis in this paper will likewise focus on business corporations.

11. See *J.S. Ziegel et al.*, Cases and Materials on Partnerships and Canadian Business Corporations, vol. 1, at p. 3 (Toronto: Carswell, 1994). It should also be noted that when two companies amalgamate, no new company is created and no old company is extinguished by the amalgamation. Consequently, the newly amalgamated company continues to be criminally responsible for the offences of the old companies committed prior to the amalgamation: *R.* v. *Black & Decker Manufacturing Co.*, [1975] 1 S.C.R. 411.

12. *P. Fauconnet, La responsibilité: étude de sociologie* (Paris: Librairie Félix Alcan, 1920) as described by *J.A. Quaid*, The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis, (1998), 43 McGill L.J. 67.

13. *P.A. French*, Collective and Corporate Responsibility (New York: Columbia Univ. Press, 1984) as discussed in *Quaid*, note 12.

14. *B. Fisse*, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions (1983), 56 S. Calif. L. Rev. 1141; *C. Wells*, Corporations and Criminal Responsibility (Oxford: Clarendon Press, 1993).

corporate criminal liability has mostly focused on the problem of articulating a test or mechanism for locating a corporation's "directing minds" so that the *mens rea* of the directing minds can be attributed to the corporation. There has been surprisingly little judicial analysis of the basis for attributing an *actus reus* to the corporation.

It is worth observing at this stage that the extremely wide variation in the form and structure of corporations may make it most appropriate to have more than one basis for corporate criminal liability, any one of which will suffice for liability. There is little in common between the small, single-owner corporation and the large-scale, and perhaps multinational, corporation where responsibility for conduct or policy is more diffuse and harder to locate in one or more individuals. While the identification doctrine may be quite adequate for the former, something closer to Fisse's corporate culture doctrine may be most appropriate for the latter. It is also worth noting that although a relatively few, large-scale corporations dominate economic activity in Canada,[15] it has been estimated that approximately 97% of all businesses (whether incorporated or not) can be characterized as small businesses.[16]

(2) *Historical Context*

For a long time, the common law of England and Canada did not generally permit a corporation to be convicted of a crime (as opposed to a regulatory offence). There were exceptions and these exceptions were based on the doctrine of *respondent superior* (or vicarious liability). Under this doctrine the master is liable for the conduct of his servant in the course of the servant's employment. This doctrine was created in the law of tort in the seventeenth century in order to provide compensation to third parties who were injured by a master's servant while the servant was carrying out the master's business. This doctrine was justified on the ground that since the master acquired the benefits of the servant's work, he should also carry the burdens. And as a practical matter, servants were impecunious and therefore if compensation was to be forthcoming, it would have to be obtained from the master.

While the common law recognized the appropriateness of vicarious liability for tort compensation, it rejected vicarious liability for crimes since crimes required *mens rea* or personal fault.[17] The mere existence of the master-servant relationship was not a sufficient basis for imputing personal fault to the master. There were however three common law crimes -- public nuisance, criminal libel and contempt of court[18] -- where the courts did not require *mens rea*. Nor was *mens rea* required for a number of regulatory offences created by statute which the courts held to be absolute liability offences. In these four categories of offences, where no *mens rea* was

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15. For example, it has been estimated that one half of all corporate assets in Canada are owned by the 100 largest, non-financial corporations. *W.T. Stanbury*, Business-Government Relations in Canada: Grappling with Leviathan (Toronto: Methuen, 1986) at p. 3.

16. *Ontario Ministry of Industry and Tourism*, A Small Business Development Policy for Ontario (Toronto, 1980).

17. *R.* v. *Huggins* (1730), 92 E.R. 518.

18. See, e.g. *R.* v. *Great North of England Ry. Co.* (1846), 115 E.R. 1294 and *R.* v. *Stephens* (1866), L.R. 1 Q.B. 702 (public nuisance); *R.* v. *Holbrook* (1878), 4 Q.B.D. 42 (criminal libel); and *R.* v. *Evening Standard Co. Ltd.*, [1954] 1 Q.B. 578 (contempt).

required, the courts applied vicarious liability, allowing the master to be convicted for offences of his servant. The master could be either an individual or a corporation. Apart from these four vicarious liability exceptions, corporations were immune from liability under the criminal law.

Early in the twentieth century, courts began to dismantle this corporate immunity from criminal law. Courts held that words such as "everyone" in criminal statutes could include corporations,[19] that corporations could be punished by common law fines for offences where the only penalty specified for such offences in the *Code* was imprisonment.[20] And courts specified procedural rules for how a corporation could be summoned and appear for trial. These procedural and evidentiary rules were later codified. Courts also rejected the argument that corporations can not be held criminally liable for offences committed by their officers because committing crimes would be *ultra vires* (i.e. beyond the scope of the officers' employment) unless those employees were expressly ordered to commit the act in question.

The last and most challenging obstacle to imposing criminal liability on corporations was the difficulty of attributing *mens rea* (i.e. a blameworthy state of mind) to an abstract, non-human entity called a corporation. Ironically the breakthrough on this point came from a civil liability case decided by the House of Lords in 1915 entitled *Lennard's Carrying Co. Ltd.* That case concerned a corporation's civil liability for damages under a statute which afforded the corporation a defence if the damage occurred without its fault. The issue was whether the fault of a director, who was actively involved in the operation of the company, was in law the fault of the corporation. In holding that it was, Viscount Haldane laid down a general principle -- the directing mind principle -- for attributing fault to a corporation. Viscount Haldane stated:

> [A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.... For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself....[21]

The "directing mind" theory was subsequently applied in Canada to the prosecution of corporations for true crimes. For example, in *R. v. Fane Robinson Ltd.*, the corporation and two directors of the company who were its active managers were, on appeal, convicted of the crimes of conspiracy to defraud and obtaining money by false pretences. The Court held that there is no reason why a corporation which can enter into binding agreements with individuals and other corporations cannot be said to entertain *mens rea* when it enters into an agreement which is the gist of a conspiracy and a false pretence. The Court concluded that:

> [The two corporate officers] were the acting and directing will of Fane Robinson Ltd., generally and in particular in respect of the subject-matter of the offences

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19. *Union Colliery Co.* v. *The Queen* (1900), 31 S.C.R. 81.

20. *R. v. Great West Laundry Co.* (1900), 3 C.C.C. 514 (Man. Q.B.).

21. *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co.*, [1915] A.C. 705, at 713 (H.L.).

> with which it is charged, that their culpable intention (*mens rea*) and their illegal act (*actus reus*) were the intention and the act of the company and that conspiracy to defraud and obtaining money by false pretences are offences which a corporation is capable of committing.[22]

III. Current Law of Corporate Criminal Liability

(1) *Traditional Devices*

Two devices have been used, in different contexts, to hold corporations criminally liable for true crimes and regulatory offences. The first device is vicarious liability and the second device is the identification theory. A third device -- locating fault in the corporation's organizational structure, policies, culture and ethos which permitted or encouraged the commission of the crime -- has been advocated by legal theorists such as Fisse and Wells, but has not as yet been adopted by Canadian courts.

As previously noted, the traditional doctrine of vicarious liability holds the master (or employer) liable for the acts of the servant (or employee) in the course of the master's business without proof of any personal fault on the part of the master. The master can be either an individual or a corporation. Because vicarious liability does not require proof of personal fault on the part of the master, it is only used in exceptional circumstances in Canadian penal law.

By way of contrast, in the United States, corporate criminal liability for federal offences (which are largely but not exclusively regulatory offences) is based on vicarious liability.[23] On the other hand, corporate liability for many state offences, which include most traditional crimes, is premised on the identification theory similar to that used in England.[24]

Under the second device, the identification theory, the acts and state of mind of certain senior officers in a corporation -- the directing minds of the corporation -- are deemed to be the acts and state of mind of the corporation. The directing minds are identified as the corporation. The corporation is considered (fictionally) to be *directly* liable, rather than *vicariously* liable. The difference between the Canadian and English identification theory is that Canadian courts are

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22. (1941), 76 C.C.C. 196 at 203 (Alta. C.A.).

23. See, e.g., *United States* v. *Basic Construction Co.*, 711 F. 2d 570 at 573 (4th Cir. C.A., 1983) where the Court stated:

> [A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions.

24. See, e.g., *Canadian Dredge & Dock Co. Ltd.* v. *The Queen* (1985), 19 C.C.C. (3d) 1 (S.C.C.); *Wells*, note 14 at 116-120.

apparently prepared to locate the directing mind at a lower level in the corporation than are the English courts.[25]

The Canadian Supreme Court has recognized the relationship between the vicarious liability and the identification doctrine.[26] The identification doctrine is actually a modified and limited version of vicarious liability. The identification doctrine holds corporations liable only for the fault of senior corporate employees or officers (i.e. directing minds), rather than for the fault of all employees as occurs under vicarious liability. The identification theory is used to attribute *mens rea* to the corporation itself, whereas in the case of vicarious liability, no distinct or separate "corporate" *mens rea* by those who control or run the corporation is required.

(2) *Corporate Liability for Mens Rea Offences*

(a) *Introduction*

In most cases, *mens rea* offences require a subjective state of mind such as intention, knowledge or wilful recklessness; in a few crimes, an objective state of mind such as penal negligence will suffice.[27] For the most part in this discussion, I will assume we are dealing with subjective *mens rea* offences.

The identification doctrine arose out of the perceived need to find a way to hold corporations liable for *mens rea* offences. As the Supreme Court said in the leading case of *Canadian Dredge & Dock*, "the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of the natural person".[28]

The identification doctrine was created as a pragmatic median rule between the extremes of total vicarious liability for all criminal acts and no corporate liability unless the Board of Directors expressly authorized the criminal acts. The identification doctrine, as a median rule, states that the actions and mental state of the corporation will be found in the actions and state of mind of employees or officers of the corporation who may be considered the directing mind and will of the corporation in a given sphere of the corporation's activities. The crucial question under this doctrine is which employees or officers of a corporation are its directing mind for the purpose of the identification doctrine.

(b) *Attributing Actus Reus to the Corporation*

Canadian Dredge & Dock is the leading Canadian case on the use of the identification theory to convict corporations of *mens rea* offences. In that case, several corporations, and

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25. Compare *Canadian Dredge & Dock*, note 23, with *Tesco Supermarkets Ltd.* v. *Natrass*, [1972] A.C. 153 (H.L.), discussed below in Part IV, (2)(d).

26. See *Canadian Dredge & Dock*, note 24, at 22.

27. *Criminal Code*, ss. 219-221 make it an offence to cause death or bodily harm by criminal negligence.

28. *Canadian Dredge & Dock*, note 24, at 22.

senior officers in those corporations, were convicted of the *mens rea* offence of conspiracy to defraud. The convictions arose out of "bid rigging" for dredging contracts for the government. As a result of the accused's collusion, the government paid more for the dredging than it should otherwise have paid.

The collusion or bid rigging was done by the persons in charge of making bids for each corporation; in each case, those persons were at the very top of the corporate ladder holding titles such as vice-president or general manager. Thus on the facts of this case, both the *actus reus* and the *mens rea* of the offence was committed by the directing minds of the corporation. In describing the identification theory, the Supreme Court did not carefully distinguish between the process for attributing *actus reus* and the process for attributing *mens rea* to the corporation. At some stages in its judgment, the Supreme Court states that the identification doctrine was devised as a method to attribute *mens rea* to the corporation. But on most occasions the Supreme Court speaks of the identification doctrine as the method for attributing both the *actus reus* and the *mens rea* to the corporation. Both the actions and the intent of the corporation's directing minds are identified as the corporation's actions and intent.[29]

The *mens rea* and the *actus reus* of an offence will normally be located in the same person, as they were in the fraudulent acts and intent of the senior corporate officers in the *Canadian Dredge & Dock* case. But the Supreme Court seems to have inadvertently erred when it suggested that to trigger the identification doctrine, and through it corporate criminal liability for the actions of the employee, "the actor-employee who *physically committed* the offence must be ... its 'directing mind'" (emphasis added).[30] The directing mind must commit the *actus reus* with the appropriate *mens rea* , but he or she need not be the person who physically commits it. In Canada, sections 21 and 22 of the *Criminal Code* make a person a party to an offence and guilty of that offence if that person actually commits it, or aids, abets (i.e. encourages) or counsels another person to commit it. In the context of corporate liability, the directing mind need not *physically* commit the offence as long as the corporation's directing mind is "a party" to the offence. Thus, if a directing mind "knowingly" assists, encourages or counsels another person (who is not a directing mind) to actually commit the *actus reus* of an offence under the *Corruption of Foreign Public Officials Act*, then the directing mind, and therefore the corporation, has committed the offence.

(c) *The Identification Doctrine in Canada*

As already noted, the leading statements on the identification doctrine in Canada are to be found in the Supreme Court of Canada's judgment in *Canadian Dredge & Dock*. In that case, the

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29. See, e.g., *Canadian Dredge & Dock*, note 24, at 15 where the Supreme Court states: "It [the identification theory] produces the element of *mens rea* in the corporate entity, otherwise absent from the legal entity but present in the natural person, the directing mind." Later in the same paragraph, the Court adds: "This establishes the 'identity' between the directing mind and the corporation which results in the corporation being found guilty for *the act* of the natural person [who is the directing mind]." (Emphasis added.)

30. *Canadian Dredge & Dock*, note 24, at 15.

Supreme Court described the characteristics of the identification theory, which characteristics may be summarized as follows:

1. It is a court-adopted, pragmatic, but fictional device used to attribute a human element (mental states of mind) to an equally abstract entity called a corporation, for the purpose of including corporations within the control of the criminal law in much the same way that natural persons are.[31]

2. If a corporate employee (or agent) is, in the Court's assessment, virtually the directing mind and will of the corporation in the sphere of duty and responsibility assigned to the employee by the corporation, then the employee's action and intent are the action and intent of the company itself, provided the employee is acting within the scope of his/her authority either express or implied.[32]

3. The essence of the test is that the identity of the directing mind and the company *coincide* when the directing mind is acting within his/her assigned field of corporate operations. That field of operations may be geographic, or functional, or it may embrace the corporation's entire operations.[33]

4. The identity doctrine merges the board of directors and all persons who are delegated the governing executive authority for a sphere of the corporation's business. The conduct of any of the merged entities is thereby attributed to the corporation.[34]

5. A corporation may have more than one directing mind. Where corporate activities are geographically widespread or diffuse, it will be virtually inevitable that there will be delegation and subdelegation of authority from the corporate centre and therefore there will be several directing minds.[35] On this point, the Supreme Court suggested that the application of the identification doctrine in the English case of *Tesco Supermarkets Ltd*.[36] was too narrow for Canadian realities.[37] In that case, the House of Lords held that the manager of one of the supermarkets owned by Tesco was not a directing mind of the corporation in the context of selling goods at a higher price than the advertised price.

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31. *Canadian Dredge & Dock*, note 24, at 22-23.

32. *Ibid*. at 14, citing *R.* v. *St. Lawrence & Corp. Ltd.*, [1969] 3 C.C.C. 263 (Ont. C.A.).

33. *Ibid*. at 17.

34. *Ibid*. at 23.

35. *Ibid*. at 23.

36. [1971] 2 W.L.R. 1166 (H.L.).

37. *Canadian Dredge & Dock*, note 24, at 23.

6. Because the actions and intent of the directing mind within his or her assigned field are merged with and become the actions and intent of the corporation, it is no defence for a corporation

   a) to claim that the Board of Directors or other corporate officers issued general or specific instructions prohibiting the criminal conduct; the corporation and its directing mind are one, and thus the prohibition from one controlling arm of the corporation to another controlling arm can have no effect in law;[38] nor,

   b) to claim the Board of Directors had no awareness of the criminal conduct and did not authorize or approve it.[39]

7. The merging of the corporation and its "directing mind" will only cease where the actions of the "directing mind" in his or her assigned sector of operations are *totally* in fraud of the corporation, or where the actions of the "directing mind" are intended to, and do result in, benefit exclusively to the "directing mind"; in such circumstances, the Supreme Court has held that "it is unrealistic in the extreme" to consider that such persons are still "directing minds" of the corporation and therefore their acts in such circumstances can not be attributed to the corporation.[40] Thus the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.[41]

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38. *Ibid.* at 27, where the Supreme Court stated:

> If the law recognized such a defence, a corporation might absolve itself from criminal consequence by the simple device of adopting and communicating to its staff a general instruction prohibiting illegal conduct and directing conformity at all times with the law.

39. *Ibid.* at 17, where the Supreme Court stated:

> It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing. Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition.

40. *Ibid.* at 38-39.

41. *Ibid.* at 38. In *R. v. Forges du Lac Inc.* (1997), 117 C.C.C. (3d) 71 (Que. C.A.), the Court upheld the accused corporation's conviction for tax evasion, contrary to s. 239(1)(d) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1. The company had three directors. The accused, who was one of the directors, had total control over office administration and accounting. The accused diverted company money, without the other director's knowledge, into her own accounts. She then filed income tax returns for the company without reporting the diverted money. The corporate accused

8. Although the directing mind and the corporation merge as one for the purposes of allowing the corporation to be convicted of an offence, both the directing mind and the corporation can each be prosecuted, convicted and punished for the offence.

(d) *Application of the Identification Doctrine*

The determination of which corporate employees are in sufficient *de facto* control of a sphere of corporate operations so as to make them directing minds of the corporation involves a fairly wide ambit of judicial discretion. It will depend at least in part upon the court's analysis of the organization of the corporation, its command structure, the extent of delegation and the nature of the misconduct. Hanna lists the following examples of the application of the identification test in Canada:[42]

- a used-car sales manager who was not a director or officer of the corporation and who defied orders of senior officials by turning back odometers was held to be a directing mind and will for the purpose of holding the corporation liable for fraud;[43]

- transactions of a salesman which required only *pro forma* approval by a corporate official were held to be acts of the corporation making it liable for fraud;[44]

- in a company of four thousand employees, permit issuers with authority to implement safety procedures were held not to be the directing mind and will of the corporation as they were simply carrying out a policy already in place;[45]

- bid-rigging on a road surface treatment contract by a company superintendent, held to be a directing mind and will, was sufficient to ground liability of the corporation;[46]

- theft by an accountant was held to be an act of the corporation;[47]

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claimed the defence, recognized in *Canadian Dredge & Dock*, of "fraud upon the company". The Court rejected that defence, holding that it was the government, not the company, that was defrauded by the false income tax returns.

42. *D. Hanna*, Corporate Criminal Liability, (1988-89), 31 Crim. L.Q. 452 at 464.

43. *R.* v. *Waterloo Mercury Sales Ltd.* (1974), 18 C.C.C. (2d) 248, 27 C.R.N.S. 55, [1974] 4 W.W.R. 516 (Alta. Dist. Ct.).

44. *R.* v. *P.G. Marketplace*(1979), 51 C.C.C. (2d) 185 (B.C.C.A.).

45. *R.* v. *Syncrude Canada Ltd.*, [1984] 1 W.W.R. 355, 48 A.R. 368, 28 Alta. L.R. (2d) 233 (Q.B.).

46. *R.* v. *J.J. Beamish Construction Co.*, [1967] 1 C.C.C. 301, [1966] 2 O.R. 867, 50 C.P.R. 97 (H.C.J.), affd [1968] 2 C.C.C. 5, 65 D.L.R. (2d) 260, [1968] 1 O.R. 5 (C.A.).

47. *R. v. Spot Supermarket Inc.* (1979), 50 C.C.C. (2d) 239 (Que. C.A.); *R. v. Forges du Lac*, *supra* note 41.

- the only employee of a realty company who was responsible for renting properties was held to be a directing mind and will for the purpose of holding the company liable under the *Ontario Human Rights Code*;[48]

- and gas price-fixing by a regional supervisor of marketing representatives was held to be the conduct of the company.[49]

The above examples show that the Canadian application of the identification doctrine allows for the directing mind of the corporation to reside in a broader and lower-level group of corporate officials than appears to exist in England under the leading case of *Tesco Supermarkets Ltd.*[50] However, there has been a recent Supreme Court of Canada case, *The Rhone* v. *The Peter A.B. Widener*,[51] which, although it is a civil damages case, at least implicitly suggests that in future cases directing minds will only be found at higher levels of authority.

In *The Rhone*,[52] a barge towed by four tugs collided with a ship moored in the port of Montreal. The liability issue turned on whether a tug captain, who had been negligent, was the directing mind of the company. This captain was master of the flotilla and a "troubleshooter" for the other tugs; moreover, his superiors exercised very little control over him. Nonetheless, the Supreme Court found that he was not a directing mind of the owning company. The Supreme Court interpreted *Canadian Dredge* to find that the "key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea."[53]

The Rhone was recently applied by the Ontario Court of Appeal in the criminal case of *R.* v. *Safety-Kleen Canada Inc.*[54] In that case, the employee and the corporation were charged with a *mens rea* offence of "knowingly" giving false information on a waste disposal form. The company owned and operated a fleet of waste oil collection trucks, several waste oil transfer stations, and a facility for refining waste oil for resale. The employee, Mr. Howard, was a truck driver for the company. He was also its sole representative in a very large geographical area. He was responsible for collecting waste, completing necessary documentation, maintaining the

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48. *Karen Reese* v. *London Realties & Rentals* (1986), 7 C.H.R.R. D3587 (Ont. Bd. of Enquiry).

49. *R.* v. *Shell Canada Products Ltd.* (1990), 75 C.R. (3d) 365 (Man. C.A.).

50. *Tesco Supermarkets Ltd.*, note 36.

51. [1993] 1 S.C.R. 497.

52. As summarized in *D. Stuart*, Punishing Corporate Criminals with Restraint (1995), 6(2) Criminal Law Forum 219, at 235-36.

53. *The Rhone*, note 51, at 526.

54. (1997), 114 C.C.C. (3d) 214 (Ont. C.A.). It is worth noting that *The Rhone* application of the identification doctrine was *not* applied in the recent case of *R.* v. *Church of Scientology of Toronto* (1997), 116 C.C.C. (3d) 1 (Ont. C.A.) which was decided by a different panel of Ontario Court of Appeal judges. However, this difference in approach appears directly attributable to the highly atypical command structure of the Church of Scientology, in which the board of directors was irrelevant.

appellant's property in the region, billing, and responding to calls from customers and regulators. When he was on holidays, the company did not do business in the region. However, Mr. Howard did not have any managerial or supervisory function. He took no role in shaping any aspect of the company's corporate policies. The Court stated that Mr. Howard had many responsibilities and was given wide discretion in the exercise of those responsibilities. Those who dealt with the company in that geographical area equated Mr. Howard with the company. But the Court held that neither of these facts established the kind of governing executive authority that must exist according to *The Rhone* before the identification theory will apply. Mr. Howard had extensive authority over matters arising out of the performance of tasks he was employed to do. But he had no authority to devise or develop corporate policy or to make corporate decisions that went beyond those arising out of the transfer and transportation of waste.

The Court held that Mr. Howard's position was much like that of the tugboat captain in *The Rhone*. Both had extensive responsibilities and discretion, but neither had the power to design and supervise the implementation of corporate policy. Thus, the company was acquitted on the charge of knowingly giving false information, because Mr. Howard's *mens rea* in committing the offence could not be attributed to the company under the identification theory. (The corporation was convicted of a separate, strict liability offence on the basis that it had not exercised due diligence to avoid the commission of that offence.)

(e) *Criticisms of the Identification Doctrine*

(i) *Lack of Precision*

As the above discussion illustrates, the identification doctrine, or at least the "directing mind" component of it, is still in a state of flux in Canada. *Canadian Dredge & Dock* and *The Rhone* leave a choice between

(i) a decentralized notion of who in the corporation should be held in law to have sufficient *de facto* control of an aspect of the corporation's business to justify identifying that person's actions as the corporation's actions; and

(ii) a highly centralized notion that directing minds of a corporation are those relatively few senior corporate officers who have "governing executive authority" in the sense of designing corporate policy, but not relatively senior officials who simply carry out such policy.

In my opinion, the latter approach is wholly inappropriate to bring corporations under the control of the criminal law in a fair and rational way. This is especially so when the highly centralized model is applied to increasingly large, complex corporations where corporate policy may be centralized but corporate operations are geographically and functionally diffuse.

Apart from the current uncertainty of where the identification test is headed in Canada, there will always be a degree of uncertainty in the specific application of the test regardless of whether the ultimate test is the centralized or decentralized version. The application of the test must occur on a case-by-case, fact-specific basis. The organizational and command structure and complexity of corporations is so varied between small corporations and multinational corporations

that a certain degree of flexibility is essential in both the wording and the application of the identification theory.

(ii) *The Fallacy of Identification*

The identification doctrine is used to attribute criminal responsibility to collective entities. These entities function by group effort not by individual effort, yet the identification theory seems to assume that responsibility for the behaviour of the collectivity can be assigned by looking at the behaviour of key individuals within the group. In simple, hierarchical groups that assumption is less suspect than in large, diffuse groups. More importantly it masks the reality that some acts may flow from group norms and policy and may be difficult to attribute to any particular individual within the group.

Professor Wells aptly describes one aspect of the identification fallacy in the following words:

> The idea that only certain people act *as* the company presents a problem over and above the difficulties attending any such line-drawing exercise. While the company is regarded as a fiction, it is none the less real. Whatever the managing director does as an individual will be entirely different in its scope and effect from anything a managing director does within the company. The same goes for other workers. It is true that they could engage in a fight in the canteen which would be no different in its impact than a fight in the local pub. But once the individual in the company does anything which is part of the greater enterprise of which she is a part, then she contributes to the corporate effect. Whatever the branch manager of Tesco did with special offers (the subject of this prosecution) he was only able to do because the company had invested in and maintained the shop, the supplies to it, the posters advertising the offer, and so on. The idea that some people within a corporation act as that corporation while others do not is fundamentally flawed.[55]

The conceptual flaw in the identification theory is magnified on a practical level by the *possible* judicial tendency not to recognize aggregate behaviour for the purposes of corporate criminal liability. The clearest illustration of this failure to date can be found in Well's description of the reckless manslaughter prosecution of *P & O European Ferries (Dover) Ltd.* for the deaths arising out of the capsizing of its ferry, the *Herald of Free Enterprise*.[56]

There is no reason in principle why aggregation should not be accepted by the courts. It has been accepted in at least one case from United States.[57] In any event, application of general principles of causation and party liability (complicity) in Canada are very broad and should keep the need to rely upon aggregation to a minimum. For example, the test for causation in Canada is met if the accused's conduct contributed to the criminal harm *in any way which is more than*

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55. *Wells*, note 14, at 109-110.

56. *Ibid.* at 44-48, 68-72 & 111-113.

57. *United States* v. *Bank of New England*, 821 F. 2d 844 (1st Cir. C.A.), cert. denied, 484 U.S. 943 (1987).

trivial.[58] The accused's conduct does not have to be the sole cause or the primary cause; it need only be a contributing cause which is beyond the *de minimus* range. Likewise, by the very act of employing persons and providing the facilities for carrying out the corporation's business, the *actus reus* of aiding, encouraging or facilitating an offence is easily met. The *mens rea* can be met by intention, recklessness or wilful blindness of directing minds to wrongful or risky conduct. In the context of corporations, ignoring dangers which have been brought to the corporation's attention either through previous incidents, or otherwise, constitutes wilful blindness.

Another conceptual weakness in the use of the identification theory for establishing corporate criminal liability the potential difficulty of taking notions of fault which are designed for human behaviour and applying them to a non-human entity with its own unique structure and modes of functioning. This and other inherent weaknesses in the identification theory have encouraged theorists such as Fisse and Wells to create a separate theory or doctrine of genuine corporate fault.

58. *R.* v. *Smithers* (1977), 34 C.C.C. (2d) 427 (S.C.C.).