



**criminal  
responsibility  
for  
group action**

Law Reform Commission of Canada

Working Paper 16

**criminal  
responsibility  
for  
group action**

1976

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Catalogue No. J32-1/16-1975

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# Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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## Foreword

This is our third Working Paper on General Principles of Criminal Law. The first, *The Meaning of Guilt*, asked what state of mind should be required for criminal guilt. The second, *The Limits of Criminal Law*, asked what the scope of the criminal law should be. This Paper further explores these questions and moves into a new area, group conduct. It accepts as a premise what is recognized in much of contemporary literature in the fields of sociology, economics and political science, that there is a risk of conflict between the specialized interests of groups, the more general interests of the society they function in and the individual interests of people in that society. This Paper examines the place of criminal law, in the conflict of these interests, focussing on the responsibility of groups or what has traditionally been called the criminal liability of corporations.

Selecting the criminal law as a perspective from which to take a look at group conduct was to some extent an arbitrary decision. We might as easily, or more easily, have looked at the problem as one of administrative regulation or civil responsibility. As we point out in the Paper, the challenge of legal control over group process is one of melding a variety of approaches into a body of law that will encourage responsible decision-making. Our emphasis on restraint in the use of criminal law leads inevitably to the need for increased emphasis on non-criminal ways of accomplishing this goal.

We chose our perspective principally because it allowed us to probe further into the nature and scope of criminal law. *The*

*Meaning of Guilt* restricted itself to human offenders, expressly avoiding the reality that many of our strict liability laws are aimed more at corporations than at people. Our Working Papers on sentencing and dispositions concentrated on the use of criminal sanctions against people, despite the fact that the present criminal law authorizes sanctions to be imposed on corporations. So we felt obliged to examine the role criminal law should play in group control and what problems arise in using an instrument like criminal law in pursuit of this objective. We chose the corporation as the point of focus for the Paper, although the discussion is not restricted to the narrow issue of corporate responsibility.

The Paper adopts a largely theoretical approach. Once again we deplore the limited useful empirical data on corporate criminal activities. What insight we have that is empirically based is gained from consultations with government administrators, Crown prosecutors, police investigators, members of the Bar, and interest groups concerned with these questions. Two background papers were prepared for use in this project, "The Criminal Liability of Corporations and Other Groups", by Leonard H. Leigh, and "Vicarious Liability for Crime", by Brian Hogan. Valuable advice was also provided by Philip Anisman, Director of Corporate Research, Department of Consumer and Corporate Affairs.

We recognize that this Working Paper is only a starting point for what must become a continuing discussion about ways of dealing with corporations and other groups in society so that group decision-making is responsive to public interest considerations. We invite our readers to reflect upon the issues raised and to share their opinions, ideas and suggestions with the Commission.

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# Introduction

Over the past thirty years since the end of the Second World War, corporations have occupied an increasingly dominant position in our society. The level of achievement reached in production and marketing has been accomplished largely through corporations, which have come to be regarded as the core of the economic system. When we think about it, most of our day-to-day experience is affected in one way or another by the activities of corporations. We purchase our consumable articles from them; we live in houses built by them; we breath air and drink water that has been contaminated by them; much of our entertainment is produced by them; and large numbers of our population either work for or hold shares in a corporation. Corporations, whether industrial concerns, merchandising organizations, banks or insurance companies, make decisions that influence growth in society, the products that will be available, the manner in which people will be employed, the accommodation they will reside in, the way wealth will be distributed and the quality of the environment.

In a sense, however, it is misleading to talk about corporations holding this kind of control. It is important to recognize that corporations involve people, and that, from a legal standpoint, the corporation is primarily relevant because it represents a mode of organization in which *people* can make decisions that have this impact on society. The legal personality that attaches to a corporation, for example, allows those who form it to deal with outsiders under a collective identity, and to exercise collectively many of the powers and capacities of a natural person—for

example, to own property, to enter into contracts and to sue and be sued. The limited civil liability we associate with corporations has allowed people to invest in them without risking unlimited financial responsibility for their failures. This has been important in providing corporations with broad bases of investment and thus in encouraging their growth.

As a mode of organization, the corporation has proven to be flexible. Its use extends to a wide range of objectives—to businesses, large and small, to charitable organizations, to recreational clubs, to financial institutions and many others. Corporations run the gamut from small corner store businesses, which may have been incorporated for tax reasons, to large multi-national firms, designed to take advantage of favourable labour, consumer, financial and tax situations in different countries. Quite naturally the organizational structure varies from corporation to corporation, depending on its purposes and on the extent and nature of its activities. Some corporations are “widely held”, signifying that ownership is spread and that shares in the corporation can be purchased by members of the public. Others are “closely held”, indicating that ownership is concentrated within a small number of investors and closed to members of the general public. Systems of management vary as well, some exhibiting much more centralization of authority than others.

While it is important to recognize the importance of the corporation as an organizational mode, it is in a different sense that we view corporations when we talk about the degree of influence they have in society. Our concern springs not so much from the fact that people use a particular legal form for advancing their goals as from the fact that corporations normally involve group processes, some simple and some highly complex. Not only are there shareholders, who in a legal view would be regarded as the corporation; there are those who provide direction to the corporation through the occupation of key positions, whether as directors or as management personnel. The corporation also encompasses its employees, whose technical abilities are used to implement its policies. Most corporations, therefore, function through the cumulative efforts of many individuals performing diverse roles.

Our interest in corporations, then, reflects a more general concern about the impact groups have on society, and how group processes provide a vehicle through which power can be exercised anonymously, often without feeling or responsibility. We are concerned about what happens to people in groups, and how group and sub-group pressures to conform to behavioural patterns may lower the sense of responsibility people feel for their contribution to socially harmful results caused by the group. We are concerned about the problems involved in determining how group decisions are reached and who contributes to them. Above all we are concerned that values and interests can be asserted through powerful groups to the detriment of values and interests held by less powerful groups and individuals.

While the goals of many of our corporations—profit and growth—spur important advances in the technologies of production and marketing benefiting the Canadian consumer, decisions made in the course of this development have detrimental influences as well. In some cases these are felt by society generally, for example resource depletion and environmental pollution; in others they are felt by individuals—for example, injuries caused by faulty production or marketing standards. The fact that many corporations come into contact with large numbers of people increases the risk of detriment flowing from corporate action. An automobile manufacturer who does not adopt specified safety standards can cause irreparable harm. So can an industrial factory on a major waterway.

As a society we face the difficult problem of coping with the detrimental effects of corporate activities. We face the problem of compensating people for injuries they suffer because of particular corporate activities; of stopping certain activities because to tolerate them may create a risk of injury to many people or may cause more general losses to society; and of creating a climate of respect within our corporations for the interests of those outside the corporate process.

There is, therefore, and this is a position that has become increasingly recognized over the years, a need for exerting controls over corporate processes and for developing policies that will keep the interests of corporations in line with public interest considera-

tions. This involves providing a legal framework within which policies can be implemented. We do not propose in this Working Paper to examine substantive policy questions that affect corporate control, for example the circumstances under which corporations should be restricted from merging and creating monopolies, or the extent to which they should be permitted to pollute in the course of production. We shall, however, attempt to analyse the role of a traditional legal control, the criminal law, in implementing substantive policy choices to cope with these questions. In doing so, we hope to achieve a broader purpose than merely to make recommendations for imposing criminal responsibility on corporations and the people who operate within them; we hope to give some insight into the difficulties of applying concepts of criminal responsibility to group situations generally, and into the limits of criminal law as a means of creating a high level of responsibility within corporations and other group processes.

We shall first look briefly at the present law affecting criminal responsibility for corporate action, after which we shall discuss some of the broad policy questions involved in using criminal law to deal with corporate behaviour.

# Criminal Responsibility for Corporate Action—The Existing Law

Corporate activities have increasingly been drawn within the ambit of the criminal law. Because of a high level of regulation of the activities they carry on, corporations are affected by a maze of criminal offences that limit their freedom to operate. These include provisions restricting their ability to obtain capital, governing forms of production, controlling plant operations, ensuring the safety of their products, restricting their ability to advertise their products, and limiting their freedom to pool their resources and to combine operations.

While most of these provisions are found outside the Criminal Code, the traditional criminal law is also relevant to corporations. We have come to see how fraud and theft can be committed within the corporate framework and can affect consumers, governments and other corporations and bodies. Even offences usually associated with personal conduct, those dealing with violence, property interference, corruption and intimidation, can be relevant in the corporate context. Corruption, intimidation and violence reported to exist in certain sectors of the construction industry, for example, illustrate how traditional crime can occur in struggles between corporations and labour unions, leading to wasted resources, high costs, low construction standards and general social disruption. While the crimes that can be associated with corporations seem to be more limited in range than those that can be associated with natural persons, the Criminal Code does provide standards by which corporate conduct can be measured.

It is important, then, to see how the criminal law presently allocates responsibility for criminal activities occurring in the course of corporate operations. A brief overview will show that it provides a basis for dealing with individuals within the corporation, and with the corporation itself.

### *Individual Responsibility*

Individuals are made responsible for corporate action through two related approaches. First, through doctrines that impose liability on those who commit criminal acts and on those who aid or abet, counsel or conspire to commit them. It is on the basis of these doctrines that traditional criminal charges involving fraud, theft, violence and intimidation can be brought against individuals participating in criminal conduct through corporations.

Individual responsibility is also imposed through statutory provisions that specify that corporate officers, directors and agents will be liable for offences committed by corporations. These provisions are often associated with statutory offences framed in terms that, in the context of the activities of a corporation, make them more applicable to the corporation than to an individual; for example, where statutory language uses terms such as “no *manufacturer* shall”, “no *dealer* shall”, or “no *importer* shall”, suggesting the primary responsibility of the corporation rather than its agents and employees. These special provisions vary somewhat from statute to statute. Some clearly contemplate the need for proof of fault; some start from a position of presumed guilt, reversing the onus of proof by requiring the accused to prove he was not at fault or that he exercised due diligence; others can be construed to eliminate fault altogether in some situations. For the most part they depend upon proof of corporate criminality, although the actual conviction of the corporation is not usually necessary. Although most of these provisions are rarely used, they do express the potential responsibility of individuals participating in corporate criminal activities.

## *Corporate Responsibility*

Historically, corporations were not regarded as suitable subjects for the criminal law. There were several reasons for this. Since corporations could not think or act for themselves, they were thought incapable of being held criminally responsible. Nor were the courts prepared simply to attribute responsibility to corporations, since criminal law theory did not look favourably upon imposing liability on someone for the acts of another. Another reason can be found in the view that a corporation would exceed its capacity to act in committing a crime. Difficulties were also perceived in the adaptation of criminal procedures to corporate defendants.

Over the last century and the early part of the present century, however, attitudes gradually changed. Courts first recognized that corporations should be held liable for crimes of omission where Parliament had imposed a duty on the corporation that was not performed. Other exceptions were created to impose criminal responsibility for nuisance, criminal negligence, criminal libel and contempt of court. Courts also began to accept that corporate employers, like human employers, should be held accountable for certain acts of their employees.

By 1941, it had become clear that a corporation could also be held criminally responsible as a "person" for crimes involving active wrongdoing. This development is not surprising, however, since Parliament had identified a corporation as a "person" for the purposes of the Criminal Code as early as 1906, without giving any indication that liability was to be restricted to a particular class of criminal offence.

There are, then, in the present law, two bases for holding corporations liable. One has its roots in the doctrine of vicarious responsibility—responsibility imposed on a corporation for the acts of its agents and employees. Parliament has enacted many provisions that express this kind of liability. Usually it is associated with "regulatory offences", "penal provisions", "public welfare offences" or "quasi-criminal offences", terms used interchangeably by lawyers, judges and administrators to set certain offences



apart from those that are viewed as more traditional crimes. And strict liability, the elimination of fault, is normally a companion of vicarious liability.

The other basis for holding corporations liable requires that the corporation itself be regarded as the offender even though the conduct of someone within the corporation must be imputed to it. This is the usual basis for imposing responsibility for Criminal Code offences as well as criminal offences outside the Code requiring proof of fault. Fault is attributed to the corporation through a person holding a position that gives him some control over corporate decision-making, allowing a court to identify the person with the corporation. A court will look for the traditional elements of fault in a corporate manager, for example, and attribute the mental processes of that individual to the corporation. Courts have become somewhat flexible in recognizing the capacity of different categories of management personnel to represent the corporation; one does not necessarily have to find culpability in the board of directors to convict a corporation. If control is left to the managing director, his culpability will normally be sufficient. If control is decentralized and is delegated to several management officials, it may be possible to impute the fault of one of them to the corporation.

### *The Scope of the Inquiry*

This brief overview of the law provides us, then, with a starting point for examining how criminal law can be used as a way of dealing with activities that fit into complex socio-economic patterns. In the course of this examination we shall raise a number of questions. On what basis is it legitimate to impose responsibility on people who contribute to criminal harm through participation in corporate activities? How valid is a concept of corporate criminal responsibility for conduct that can be traced to individuals participating in corporate activities? What is the significance of "fault" in evaluating the collective criminal responsibility of a group? Each is a question that must be addressed in developing a theoretical basis for criminal responsibility in a corporate context.