

management ethics

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Spring 2001

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Dealing with Corporate Crimes in Canada

*By Chantal
Plamondon*

In May 1992, 26 miners met their death amid rocks and coal in the depths of the Westray Mine in Nova Scotia. The public inquiry launched following the disaster pointed to several managerial defects in the operation of the mine and in the application of basic safety measures aimed at protecting the workers. Although the ingredients of criminal negligence seemed to be present, neither the corporation nor any of its managerial officers were ever found guilty of any crime. After a fierce legal battle lasting several years, charges against the corporate leaders were dropped in June 1998.

Canada's regime of corporate criminal liability bears an important share of the blame with regard to the difficulty the Crown faced in prosecuting both the corporation and its officers. Unsatisfied with the outcome, relatives of the victims and other interested parties gathered in Ottawa last June to demand that legislation be changed in order to make corporations and their officers more accountable for the consequences of their decisions. The House of Commons Standing Committee on Justice and Human Rights, that listened to their stories, recommended that the

Department of Justice bring forward legislation to ensure sufficient accountability for workplace safety.

In the following paragraphs, I will describe the current corporate criminal liability regime in Canada and compare it with the regimes in place in the United States and Australia.

The Canadian Regime

In Canada until 1941, corporations were considered immune from criminal liability for serious crimes, based on the assumption that they could not have a guilty mind, or *mens rea*, of their own. In those early days, corporate officers were protected from personal prosecution by the corporate veil and, as a result, could make any business decision they wished without fear of criminal proceedings. Employees' carelessness rather than a corporation's bad decisions were often blamed for work-related deaths or injuries.

(continued page 5)

Which stakeholder did you have in mind?

by David Selley

The dilemma posed by the apparent conflict between stakeholder interests has been illustrated recently in public statements by two senior Canadian airline executives.

The CEO of the nation's largest airline announced that the "number one priority for 2001" was cost cutting. The COO of one of his smaller competitors was reported as saying his airline had a competitive advantage over one of its rivals because it only paid its pilots about half what the competitor paid!

Presumably, these remarks were aimed at investors and the business media. But what about other stakeholders such as employees and customers who were also listening? Let's consider these statements from the point of view of the passenger - a stakeholder of some significance to an airline.

Many passengers may suspect there is some lingering validity left in the old adage, "You get what you pay for". That being the case, given the choice between two airlines, one of which pays its pilots and the other which only half pays its pilots, which one would you choose? So the COO's comment is clearly not a plus for this stakeholder, and, of course, even more directly not so for the pilots.

As for cost cutting, that is interpreted by passengers to mean less telephone operators (longer waits to speak to an agent), fewer check-in staff (longer and slower line-ups) and fewer baggage handlers (even longer waits for baggage, if that is conceivable). In Air Canada's case,

after their efforts and achievements in 2000 to improve customer service after the merger, it seems extraordinary that they really mean to switch to cost cutting as "number one priority". Ahead of safety? Of course not. Ahead of service? We all hope not.

If we assume that these statements were intended to provide comfort to investors and bond rating agencies, is it appropriate even to them? Do the interests of investors and passengers necessarily conflict? After all, in a competitive environment, an airline that upsets its customers isn't going to be of much value to its shareholders. The problem is more likely to do with the notoriously short term view taken by the stock market, where quarterly earnings are given a weight far beyond reality and far beyond what in truth can be measured with precision. If the market takes this view, it has the potential to seriously damage performance of all businesses, not just airlines.

All this is not to say that costs are unimportant. It's just that they are not a very good motivator of the people who matter most, including investors who take the longer view. Business leaders should be very careful when making comments aimed at a particular group of stakeholders that they consider the impact on the others. Bizarre outcomes are possible if such considerations are ignored by leaders and their "spin" departments, including the credibility of business generally with the public.

Letter to the Editor

Dear Editor,

I just finished reading your synopsis of the Auditor General's Report. While what you say is factual, I would have expected the comments on the AG report to have noted what the Auditor General himself said about the three departments in the Federal Government who have what he calls advanced and sophisticated programs.

While I can appreciate and expect nothing less from the general media, I was disappointed by the decidedly negative and unbalanced stance of the editorial.

Norman Steinberg

Director General, Audit and Review and Senior Departmental Ethics Officer
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Editorial: Trust We Must by David Selley

Even the most rule oriented organization is unlikely to be successful if it is not based to some degree on trust - trust by management that employees are capable of making appropriate decisions. Indeed, unless such trust is seen by employees to exist, an organization may become dysfunctional. David Malloy, in his article on existentialism in this issue, takes this concept to an extreme that most organizations would find unworkable. The article is more academic than most in this newsletter, but is included because of its emphasis on trusting and empowering employees to make the right ethical decisions - an approach which is difficult and sometimes dangerous to apply, but likely enormously effective when it works. A criticism might be that in a multi-ethnic society like our own such an approach would be unworkable because employees would apply a wide range of different ethical principles to business situations. Surely this problem is exaggerated. After all, we get on satisfactorily in many aspects of our lives within a multi-ethnic society and situations where this would present serious problems would probably be rare.

Nevertheless, rules are necessary for several reasons. Firstly, there are legal reasons. For example, a food processing company would be obliged to follow various sanitary and health related rules and regulations and it would be entirely inappropriate to leave it to employees to make up their own. Then there are reasons to have rules to limit employee discretion in order to increase the comfort level of the employees themselves. For example, if a company has no policy on whether air miles accumulated on company business belong to the employee or to the company, and the employee is left to make his or her own ethical decision, the result is likely to be unsatisfactory for both. The employee will keep the miles but the employer will get no credit.

In any event, it is difficult to know where to draw the line between specific rules and guiding principles, or both. This writer would argue that guiding principles are always desirable and excessive rules are undesirable. Malloy's article is a useful reminder that trust is an important motivator. If followed, it could move companies a little down the road away from detailed rules and towards a focus on guiding principles. Companies won't know whether this is a good or bad thing until they've tried it.

Ethical models for corporate employees - Can existentialism play a role?

By David Cruise Malloy, Ph.D.

The field of applied ethics has relied traditionally upon ethical theories that focus upon the ends or the means of actions and behaviour. There is however another avenue that has rarely been travelled in realm of the organisational ethics. This perspective is that of existentialism. Though existential writers

differ dramatically in many ways, the common conceptual threads of freedom and responsibility tie together their ideas regarding the nature of authentic ethical conduct.

Freedom implies that the organisational member has the ability to choose his or her own destiny. In other words, the member (continued on page 4)

Existentialism *(cont'd page 3)*

is not programmed or predestined to behave in a particular manner by God, society or organisational culture.

Responsibility suggests that the member is accountable for the decisions that he or she makes. Blame (or praise) for individual action cannot be redirected to a co-worker, a policy, or a boss. When an individual is able to acknowledge personal freedom and responsibility, it can be argued that behaviour is *authentic*.

Authenticity can be difficult because the tendency in organisations is for members to conform (i.e., organisational cultures formally and informally attempt to socialise members). For example, Kierkegaard speaks at length regarding the propensity for individuals to hide behind the group (or the policy) when making a "decision" in order to avoid accountability. He states that "a crowd in its very concept is the untruth, by reason of the fact that it renders the individual completely impenitent and irresponsible, or at least weakens his sense of responsibility by reducing it to a fraction".

The implication of the inclusion of existentialism into the ethical decision-making process is profound not only for the individual professional but also for the firm. Employing this perspective, the individual would be faced with the realisation that he or she is "condemned to be free", that is, condemned to consider making a decision authentically. While this realisation may appear to be obvious, Sartre argues that humans spend much of their life fleeing from this realisation, content to ignore the responsibility that such freedom necessarily implies. Those who choose to be authentic, argues Guignon, a contemporary applied ethicist, may make better decision-makers. He states that

The existential notion of authenticity embodies certain ideal character traits – such as courage, integrity, clear-sightedness, steadfastness, responsibility, and communal solidarity – which can contribute to the formation of a character capable of making meaningful choices in concrete situations. The authentic agent might be better equipped to evaluate different ethical standpoints and their applicability to specific contexts of action than the slavish rule-follower [i.e.,

deontologist] or the cool cost/benefit calculator [i.e., utilitarian].

The authentic individual takes seriously personal and organisational actions and understands to a greater extent the responsibility for all outcomes of behaviour. This authentic relationship between the individual and his or her role as a business decision-maker will foster a greater sense of commitment to and fundamental awareness of the missions, policies, and goals of the firm. This occurs because the individual will not accept a policy without due introspection. Stated in Socratic form, The unexamined policy is not worthy of being followed.

From the perspective of the firm, the implication of such decision-making behaviour is daunting as the members are being encouraged to reflect and act upon their own values in relation to those of the organisation. This perspective may seem antithetical to most approaches to organisational behaviour which encourage conformity and clan-like unitary cultures. However, despite the organisation's fear of "fostering" freedom to its members the outcome may be highly and intrinsically committed members who experience cognitive and moral consonance rather than role occupancy dissonance.

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Corporate Crimes (continued from page 1) Following the lead of British courts, a new theory was developed in Canada to make corporations liable for the criminal acts of their officers. Entitled the “identification theory,” it involved attribution to the corporation of the guilty state of mind of its highest ranking officials. This theory was officially accepted by the Supreme Court of Canada in 1985 in the case of *Canadian Dredge & Dock Co. Ltd. v. The Queen*¹. The application of this theory is somewhat difficult in practice because it requires the high ranking corporate official to have committed, and intended to commit, the wrongful act. For example, in the case of the sinking of a ship due to a mechanical failure caused by a lack of maintenance, in order for the corporation that owns the ship to be charged with criminal negligence, one of its senior officers would have to have been personally negligent in performing the maintenance tasks. In the case of the Westray Mine disaster, the fact that it could not be found that the company’s operating manager had personally been criminally negligent made it impossible to find the corporation guilty of the crime. This theory can be criticized from many angles. First, it has a very narrow application because only a person who qualifies as a “directing mind” can trigger a corporation’s criminal liability. In reality, however, corporations tend to be more and more decentralized and often important decisions are made at a much lower level. Second, by focusing on the acts of one or a few persons, there is a tendency to overlook the content of corporate policies and values that may encourage the commission of crimes but that do not necessarily emanate explicitly from one person. For example, there could be “institutionalized sloppiness” in the implementation of a corporation’s maintenance or security policies. Finally, this approach tends to punish corporations for the acts of one or a few individuals instead of punishing a corporation for acts which emanate from its deficient corporate culture. The application in Canada of this corporate criminal liability regime provides very little incentive for the implementation of a corporate culture that is respectful of workers’ safety or for the implementation of legal compliance programs and ethical

incentives. On the contrary, corporations are encouraged to insulate their highest ranking corporate officials and be less transparent in order to ensure that none of the personal decisions of these people would trigger the corporation’s criminal liability.

The American Regime

In the US, the situation is completely different. At the federal level, there is a regime of “vicarious liability” that triggers corporate criminal liability for any criminal

Characteristics of the Canadian Regime

- * Requires high ranking corporate official to have committed and intended to commit a crime.
- * Only the person that qualifies as a “directing mind” can trigger a corporation’s criminal liability.
- * There is a tendency to overlook the content of corporate policies and values that may encourage the commission of crimes but that do not necessarily emanate explicitly from one person

act committed by an employee, agent or officer, as long as the conduct was within the scope of the individual’s employment or authority. In this case, the criminal acts and intents of the corporate agent, whether employee or officer is attributed to the corporation, which becomes criminally liable for his or her behaviour. The corporation’s liability is triggered even when express instructions not to commit the acts were violated. No defence is available to corporations. The corporate liability scheme is complemented by a sentencing regime (the *Federal Sentencing Guidelines for Organizations*) which takes into account a corporation’s efforts to prevent the wrongful behaviour through the implementation of an effective corporate compliance program. The existence of such a compliance program can bring down to almost nothing the otherwise substantial fines that corporations can face when found vicariously guilty of a crime. The main problem with this scheme is that it tends to taint relationships between employers and employees with mistrust. Because a corporation can be held liable (cont’d page 6)

¹ [1985] 1 S.C.R. 662.

Corporate Crimes (continued from page 5)

For example, a corporation that rewards its employees based on the quantities of

Characteristics of American Regime

- Corporate criminal liability exists for any criminal act committed by an employee, agent or officer in the scope of the individual's employment or authority
- Corporate liability is complemented by the *Federal Sentencing Guidelines for Organizations*, which take into account a corporation's efforts to prevent wrongful acts through corporate compliance programs.
- The American scheme taints the relationship between employers and employees with mistrust and fails to address systematic wrongful acts emanating from corporate culture.

finished goods they produce without regard for the quality of the goods. Such a situation could lead to defective goods being produced, which could in turn be harmful to consumers. Finally, although this regime creates incentives for ethical behaviour through the Sentencing Guidelines, these incentives come into play after a corporation has been convicted. This is somewhat counter-productive. A corporation with a very good legal compliance history could still have the stain of a conviction on its record. If, instead, the proof of compliance efforts could be taken into account at the level of the inquiry this would encourage corporations to develop truly effective programs that prevent criminal violations.

The Australian Regime

In Australia, instead of pinpointing an individual to establish criminal intention, the "corporation's intention" is derived from a corporation's culture, which is manifested in the express or implicit policies that govern the corporation's activities. The scheme works as follows: an employee who commits a crime within

trigger the corporation's liability if it can be proven that the corporation's culture "directed, encouraged, tolerated or led to non-compliance with the relevant provision" of the law² or "failed to create and maintain" a culture of compliance³. If the act was expressly authorized by the board of directors⁴ or a high managerial agent⁵, the corporation is also liable. The Australian regime appears to be a good compromise between the Canadian and American approaches. It creates excellent incentives for a corporation to improve its culture in order to encourage compliance with ethical values and within the dictates of the law. At the same time, it does not penalize a corporation merely because one of its employees is at fault. There must always be an additional element coming directly from the corporation itself for the corporation to be liable. In that sense, the corporation is held accountable only for faults that it could have avoided had it been more diligent. If it has an effective compliance program in place, it will be well positioned to rebut allegations of having a culture that led to the commission of a crime.

What Next for Canada?

The Australian regime could be an inspiring compromise for the Canadian government. In fact, when the group from Nova Scotia gathered before the Common's Committee last June, one of its suggestions was to encourage the government to take a closer look at a private member's bill (C-259) that Alexa McDonough had put forward in the fall of 1999 entitled: "An Act to Amend the Criminal Code (criminal liability of corporations, directors, officers)." This bill proposed to enact new provisions to the *Criminal Code* which resemble very closely those of the Australian Act.

A source from the Department of Justice mentioned in September that the matter was under serious consideration. The question of corporate liability is considered to be a very important and sensitive issue. The request from the Common's Committee required the Department to act quickly, within 180 days. Unfortunately, the calling of the federal election eliminated any obligation on the part of the government to react to the

Characteristics of the Australian Regime

- Corporate liability is derived from a corporation's culture which is expressed in its policies and activities
- The scheme does not penalize a corporation merely because one of its employees is at fault. An additional element of liability from the corporation its self must be present.

the scope of his or her employment can

² s. 12.3(2)(c) *Criminal Code Act 1995*.

³ *Ibid.*, s. 12.3(2)(d).

⁴ *Ibid.*, s. 12.3(2)(a).

⁵ *Ibid.*, s. 12.3(2)(b).

recommendations of the Common's Committee. It is presently too easy for Canadian corporations and their senior officers to get away with bad decision-making that puts profitability ahead of

workers', customers' or the public's safety. We must modernize our corporate criminal liability regime if we want to avoid another Westray. Corporations and their senior officers each need to be subject to criminal liability for reckless disregard for the safety of others - corporations when their culture promotes such conduct, and senior officers

personally if they are shown to be directly responsible.

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2000 Canadian Business Ethics Summit

A summary report of the 2000 Canadian Business Ethics Summit was published in the *Report on Business Magazine* on February 23, 2001. An event hosted by the Canadian Centre for Ethics & Corporate Policy, the Conference Board of Canada and the *Globe & Mail*, the Summit was held on November 16 and 17, 2000 in Toronto. For a program summary, list of attendees or for information about continuing initiatives and the 2001 Canadian Business Ethics Summit, please contact the Canadian Centre for Ethics & Corporate Policy (416-348-8691) or visit the Centre's website www.ethicscentre.com.

UPCOMING EVENTS

* ***Coalition for Environmentally Responsible Economies (CERES)***

Conference : What is Global Citizenship? Ecology and Society in an Era of Rapid Change

April 5-6, 2001 at the Swissôtel Atlanta

For more information visit <http://www.ceres.org/index.html>

* ***Conference Board of Canada - Corporate Social Responsibility Week 2001: May 21-25, 2001***

Conference CSR 2001: Integrating and Advancing Community Investment, Environment and Global Ethics

- May 23 and 24, 2001, Toronto

For more information visit <http://www2.conferenceboard.ca/ccbc/>

* ***The Canadian Social Investment Conference***

June 9-11, 2001 in Montreal, Quebec

For more information visit: www.socialinvestment.ca

* ***Ethics in Action***

Ontario Awards Ceremony - June 21, 2001 at the Royal Ontario Museum, Toronto, Ontario

Nominations end - March 16, 2001

For more information on Ontario and British Columbia Awards visit <http://www.ethicsinaction.com>

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