

May 17, 2002

The Honourable Andy Scott, P.C., M.P., Chair
Standing Committee on Justice
and Human Rights
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Mr. Scott:

**RE: Bill C-284, *Criminal Code* amendments
(offences by corporations, directors and officers)**

We write on behalf of the Canadian Bar Association's National Criminal Justice Section and National Business Law Section's Corporate Law Subcommittee (CBA Sections) in regard to Bill C-284, *Criminal Code* amendments (offences by corporations, directors and officers). The CBA Sections appreciate the opportunity to provide our views for your Committee's consideration. We have been assisted by the Department of Justice *Corporate Criminal Liability Discussion Paper*, March 2002 (Discussion Paper) in guiding our study of the Bill.

Bill C-284 proposes significant changes to Canadian law, requiring very careful consideration. While we have had limited time to analyze the impact at this juncture, we would be pleased to participate in any further consultations to develop an appropriate Canadian response to corporate criminal liability. As evidenced by the Discussion Paper, the model of corporate criminal liability reflected in the Bill C-284 is not the only model of corporate criminal liability, nor is it without its difficulties. Certainly, the comparative analysis provided in the Discussion Paper assists in formulating an appropriate Canadian model, and most compellingly illustrates the complexity and importance of the issue.

The role of the corporation within Canadian society has evolved rapidly over the last fifty years. Corporate entities are now a part of virtually every aspect of our daily life. As this change has come about, we have experienced a corresponding growth in law relating to various aspects of corporate existence, including corporate criminal liability. Reference to the law guides corporations in their conduct and actions and, in appropriate instances, dictates when they will be found responsible and punished for misconduct.

In addition to guiding corporate conduct, precise and reasonable laws can encourage corporations to comply with and contribute to broader societal norms. With clear legislation pertaining to criminal liability, and a subsequent finding of such liability, we can then rely on the purposes and principles of sentencing set out in section 718 of the *Criminal Code*, including

denunciation, deterrence, separation from society when necessary, rehabilitation, reparation, and the promotion of a sense of responsibility, to promote these goals. Such considerations support making corporations specifically and clearly subject to the provisions of the *Criminal Code*.

Certainly, it is a legitimate impulse to hold a specific individual, rather than a corporation, responsible for the harm caused by gross negligence or misconduct. We need accountability for intentional wrongdoing and corporations are run through people. We must protect workers and the public from irresponsible, negligent or criminal corporate behaviour. While corporate entities can be fined, sometimes it is appropriate for an individual or individuals to shoulder the blame and bear the weight of the criminal law.

By its potential size and scope, corporate activity may cause harm beyond that likely to be caused by an individual. Though this potential, coupled with the “deep pockets” of some corporations and the corresponding ability to make reparation for harm may influence our considerations of civil liability, such considerations should not shape the way that criminal liability applies to corporations. Long-standing principles of criminal law and constitutional protections available for individuals charged with criminal offences must not be compromised or eroded to make the social objectives underlying corporate criminal liability more readily attainable. Constitutional standards defining individual liabilities, such as the requirements of a criminal intent or *mens rea*, proof beyond a reasonable doubt, the presumption of innocence, and that legislation be precise and tailored to its objective must be appropriately transposed to protect corporations and the individuals seen as representing those corporations.

Bill C-284 proposes an attributed *mens rea* through an after-the-fact assessment of what was known. Sections 467.4(1)(b) and 467.6(1) both operate to impose criminal liability on the basis of an “ought to have known” standard. Given that this legislation is criminal, as opposed to regulatory, and taking into account severe penalties and stigma associated with a criminal conviction, we are concerned that it may contravene section 7 of the *Charter* to impose a standard of *mens rea* less than specific knowledge on the part of an accused.

Proposed section 467.3(2)(b) uses the words “tolerated, condoned or encouraged”. Section 21 (1) of the *Criminal Code* currently makes it an offence to “abet” a person in committing an offence and section 22 makes it an offence to counsel an offence, so liability through “encouragement” is not new to our criminal law. However, the words “tolerate” and “condone” raise different concerns. Their uncertain meaning, scope and inclusiveness allows the potential for criminal liability to be imposed in rather far-reaching and poorly circumscribed circumstances. Similar concerns arise with respect to the phrase “allowed the development of a culture or common attitude...”, in section 467.3(2). This provides insufficient guidance as to exactly what conduct is criminally prohibited. Given these concerns of over breadth and vagueness, this proposal may also contravene section 7 of the *Charter*.

In addition to constitutional concerns, we must recognize that the stigma associated with a criminal prosecution can tarnish a corporate reputation, as well as the reputation of any individuals implicated. Existing law, such as environmental law, creates regulatory offences

applicable to individuals within corporations. Directors are also already subject to civil liability for things such as employee wages or for a corporation's failure to remit source deductions prescribed under the *Income Tax Act*. The *Canadian Business Corporations Act* has recently expanded available defences for civil liability, moving in the opposite direction as that proposed by Bill C-284. While corporations can apply to a court for a "sheltering order" for civil liability when it is appropriate to grant such an exemption, it is difficult to imagine a parallel exemption from criminal liability.

Further, an overly inclusive model of corporate criminal liability may have the effect of deterring qualified people from becoming directors or officers of Canadian corporations, or cause more sophisticated directors to resign at the first sign of trouble if concerned about the imposition of criminal consequences based on an external assessment of what they should have known. From our experience, it is especially when things go awry that corporations need a strong board of directors. We are concerned that, as currently worded, Bill C-284 could have a very chilling effect on corporate relations, causing Canadian corporations to operate with less expertise and less qualified leadership than currently available. If so, this proposal would have an adverse impact on Canadian businesses both nationally and in the international marketplace.

The issue of corporate criminal liability generally, and the specific constitutional issues that are raised by Bill C-284, are both extremely important and complex. Careful study and thorough consultation should be a prerequisite to deciding on a particular model of liability as the correct one for Canada. We are grateful for this opportunity to present the Committee with our preliminary comments on Bill C-284, and look forward to elaborating further in our appearance before the Committee.

Yours truly,

John McIninch
Chair, Corporate Law Sub-Committee
National Business Law Section

Heather Perkins-McVey
Chair, National Criminal Justice Section