

May 22, 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: Subject matter of 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 the subject matter of 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 would propose significant changes to Canadian law, requiring very careful consideration. While we have had limited time to analyze the impact at this juncture, we have the following submissions to offer on the principal substance of the Bill, which we think would have serious ramifications beyond those envisaged by the drafters. 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.

In addition to guiding corporate conduct, precise and reasonable laws can encourage corporations to comply with and contribute to broader societal norms. Such considerations support making corporations specifically and clearly subject to the provisions of the *Criminal Code*, but they also require clarity regarding the criteria on which corporate criminal liability or the individual liability of directors and officers will arise, with all the consequences that entails.

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 will be appropriate for individuals to shoulder the blame and bear the weight of the criminal law.

By its 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 is made to attach to corporations. Long-standing principles of criminal law and constitutional protections available for individuals charged with criminal offences must not be compromised or eroded in an overzealous effort to attain social objectives. Constitutional and quasi-constitutional protections, such as the requirements of a criminal intent or *mens rea*, proof beyond a reasonable doubt, the presumption of innocence, and clarity of criminal legislation must be appropriately transposed. It is no answer to say that these protections are unnecessary when the accused is a corporation.

Bill C-284 proposes an attributed *mens rea* through an after-the-fact assessment not only of what was known but of what “ought to have been 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, and not merely regulatory, and taking into account the severe penalties and stigma associated with a criminal conviction, we disagree with imposing a standard of *mens rea* less than specific knowledge on the part of an accused, and are concerned that such an imposition may contravene section 7 of the *Charter*.

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 raise the specter of

criminal liability in 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 and criminally sanctioned. Are we to have criminal liability and criminal sanctions because a board of directors failed to meet and therefore “tolerated” a situation or practice of which it was actually unaware? Is an outside director who follows the dictates of an overbearing and secretive management nevertheless to be found guilty of having “allowed the development of a culture” or of having “condoned” things which, in hindsight only, ought to have been brought to the light of day? Given these concerns of over-breadth and vagueness, this proposal may also contravene section 7 of the *Charter*.

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.

An overly inclusive and over-broad model of corporate criminal liability will have the effect of deterring qualified people from becoming directors or officers of Canadian corporations, particularly if we are to fear the imposition of criminal consequences based on an external assessment of what should have been known. We are concerned that 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, and would be likely to have exactly the opposite of the intended effect. The drafters of this Bill evidently want to encourage corporations to have strong boards of directors, but we fear that the result would be that the most qualified will shun the task, particularly in the case of corporations most in need of directors’ help.

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 criminal liability.

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,

Original signed
“*per Gaylene Schellenberg*”

A handwritten signature in black ink, appearing to read 'HPM', with a stylized flourish at the end.

John McIninch
Corporate Law Sub-Committee
National Business Law Section

Heather Perkins-McVey
Chair, National Criminal Justice Section