WHITE COLLAR SENTENCING

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"Laws can never be enforced unless fear supports them"

\- Sophocles

INTRODUCTION

"The bite of law", an American Supreme Court Justice once wrote, "is in its enforcement."[1] Sentencing of "ordinary offenders" in criminal and quasi-criminal cases is fraught with difficulties about inter-jurisdictional parity, restitution, victim-impact statements, mitigating factors, and the trade-offs in the interests of deterrence, rehabilitation, public security and punishment. Many Canadians think that there is too much leniency in both sentences and in early release, that inmates may be pampered too much and that the victims, if not society in general, are not considered enough through the entire sentencing process.

Sentencing of corporations and their managers is bedeviled with the same issues, although less directly. Moreover, sentencing of "white collar offenders" gives rise to a whole separate set of legal issues. First of all, there are two categories of offences in which businesses can be involved. Both categories involve wrongs in the business sphere. There is the question of what is the most effective way to influence corporate behaviour, since the business world operates differently than the non-business world. There are assorted sentencing options available for business crimes. Distinguishing between the illegal actions of a manager as an individual wrongdoer and those of a manager on behalf of a corporate wrongdoer is problematic. To date several of these issues unique to the business world have not been satisfactorily resolved.

The modern shift to targeting managers for sanctions is notable. Managers possess a strong instinct for acceptance, if not favour, by their peers, regulators and the public. Few exhibit or express the criminal proclivities that ordinary criminals do. Corporate crime normally involves fraud rather than force. Investigations and adverse publicity have a chastening effect on them. They are, therefore, a vulnerable class, easy for law makers and law enforcers to identify. At the moment, a much-criticized American law, which seeks to discourage companies from doing business in Cuba, has as one of its provisions the barring of executives (and their families) of disobedient companies from entering the United States.[2] As we see, imposing personal liability and sentences on managers is a recently-embraced and effective instrument to influence corporate behaviour. It also injects confusion and uncertainty into the long-standing model of business and its management.

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1 *Fisher v. United States*, 328 U.S. 463 at 484 (1946), per Mr. Justice Felix Frankfurter.

2 The "extraterritorial" *Helms-Burton Act*, 1996.

THE RANGE OF SENTENCING OPTIONS

Corporations have no physical existence. They are legal fictions. They operate entirely through their assets, such as buildings, equipment and products and through their agents. Corporate agents include employees, officers and directors. These agents are authorized to represent and bind the corporation in its profit-making activities. These activities are usually related to making, performing and benefiting from contracts with others.

The two types of offences corporations can commit are true crimes or quasi-crimes. True crimes are contained in the federal *Criminal Code*.[3] Companies cannot engage in true criminal conduct such as sexual assault, hijacking, robbery or arson. This is because they do not possess the physical body to commit such crimes, or because these actions are not in the economic realm. True crimes which companies can, and do from time to time, commit include fraud, extortion, criminal negligence and laundering proceeds of crime.

Quasi-crimes are created by all levels of government (note that true crimes can be only federal in origin). All governments need to implement and "administer" law and policy which is within their constitutional jurisdiction. All levels of government in Canada regulate business, from requiring permits and licenses, to advertising, taxation, packaging, transportation, zoning, discharges into the environment, communication, product testing, and minimum employment standards and safety at the workplace. Government regulation of business is extensive. In order to provide effective sanctions for this regulation, quasi-crimes are enacted. This is called administrative or regulatory liability. Conviction for misleading advertising would be an example of a regulatory offence or quasi-crime.

Quasi-crimes and administrative regulation are generally considered to be less serious than true crimes. Quasi-crimes generate no "criminal record", and are almost never, if ever, tried by a jury. The publicity and stigma associated with them are less than for a true crime. A quasi-crime is often easier to prove since the degree of criminal intent (*mens rea*) required for conviction is often less than for a true crime. Nevertheless, sanctions for quasi-crimes can include substantial fines, prohibition orders (eg. injunctions), publication of the wrongdoing, forfeiture of assets, proceedings costs, remedial and prevention orders, revocation of licenses (eg. a liquor license in a restaurant or a license to operate an airline), restitution orders and even imprisonment (of an individual, such as a corporate director). For true crimes, the convicted corporation is usually only fined, although harshly. Corporations, lacking physical existence, cannot be imprisoned.

Most quasi-criminal legislation deliberately leaves all the sentencing options open for

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[3] R.S.C. 1985, c. C-46.

regulatory and prosecutorial discretion. Legislation does not explicitly set out a framework of priorities for any enforcement options. Often administrative sanctions against the business (as compared with the managers personally), such as remedial orders, suspension of permits, prohibition orders and cost recovery are attempted first. These can hurt business operations, if not by public opinion, by financial cost. If they are not effective, tougher sanctions can be pursued. Because managers are often "inadvertent" offenders seriously concerned about their professional images, an investigation alone of them or their company may bring about complete corrective behaviour.

Industry Codes of Ethical Conduct and self-regulation also play an important role in shaping corporate performance. As government budgets shrink for monitoring and enforcement, regulators increasingly rely on self-monitoring and reporting. While not technically formal "law", Codes of Conduct are proxy laws that elicit compliance with industrial norms. They lead to uniformity and fair competition in the marketplace. Violation of the Codes, depending on their severity, can lead to costs, a loss of professional status, and humiliation or ostracism in business.

MANAGER LIABILITY

Legal liability for crimes and quasi-crimes can be imposed on a principal or derivative basis. The matters below point out some of the special legal issues in sentencing corporate managers.

(a.) Liability as a Principal Offender

While a corporation is an independent legal person, we know that it needs a human agent to "help it commit the crime". If that human being was the "directing mind and will" identified with the company, the company may be liable as the principal criminal offender.[4] The managers who engaged in the crime are just as criminally liable as principal offenders. In the *Canadian Dredge & Dock* case, the corporate directors and the company were jointly tried and convicted of the same crime. Law enforcement officials must determine whether the wrongful acts are of the corporation or of the manager, or of both?

(b.) Liability as Director

A rather recent phenomenon, particularly in quasi-crimes, is for the legislation to make officers, directors, "or other agent" equally responsible for the offence as the corporation committing it. This recognizes that corporations have "no body to kick and no soul to damn." As non-sentient legal fictions, it is hard to make corporations accountable. Without the option for imprisonment, a corporation may simply pass on to others the cost of larger fines. Currently, the

[4] *R. v. Canadian Dredge & Dock Co.*, (1985) 45 C.R. (3d) 289 (S.C.C.).

policy that is thought to best influence corporate conduct is to make the corporation's managers personally liable.

Therefore, officers and directors (and presumably other senior managers) may be fined or imprisoned for the company's wrongdoing. Very little culpability of the manager need be proven. The outcome is virtually "liability by association". The following provision in Alberta's *Environmental Protection and Enhancement Act*[5] is typical:

> *218. Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the office is guilty of the offence and is liable to the punishment provided for the offence ...*

It is expected that the stigma of potential quasi-criminal investigation, prosecution, conviction and sentencing processes will motivate most managers to take a personal interest in ensuring their companies obey the law. White collar crime often makes the front pages, and the public is fascinated with the downfall of corporate leaders. Nevertheless even today, there is no consensus among law enforcement officials as to the best way to obtain corporate compliance with criminal and regulatory laws. Locking up executives in jail for minor roles in wrongdoing might only lead to bitterness, resignations, less qualified managers - and injustice. One would also expect managers to divert extraordinary personal and corporate resources away from legitimate economic activities to self-preservation.

(c.) The Corporate Veil Gets in the Way

Limited liability of corporations was invented centuries ago. The aggregation of large pools of capital and the assurance of investors that they would not be liable for more than they invested was thought necessary for modern industrial development. A hallmark of this limited liability is the separation of ownership and management and the establishment of the corporation as a distinct legal entity apart from its owners and managers. This is the "corporate veil".

Legislators know that if they can influence managerial conduct, they effectively determine corporate conduct. Managers are less able to hide behind the corporate veil. In fact, one might ask if there is a corporate veil anymore? Ultimately, management may find the risk of personal liability for corporate actions intolerable. Good and competent people may be discouraged by the spectre of legal exposure. They may pass on joining the management rolls, or will do so only with adequate security of insurance and indemnity.

While the law continues to tinker with the corporate veil, we can draw one conclusion from

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[5] S.A. 1992, c. E-13.3, section 218.

the judicial decisions so far of managerial liability. Only instances of wilful disregard by managers have been prosecuted today. Only the most egregious managerial misconduct has led to imprisonment.

(d.) Can the Manager be Insured or Indemnified Against Liability?

There is little the company, or anyone else, can do for a manager who has been sentenced to serve a jail term. As we have seen, however, this sanction is a last resort, set aside only for the worst cases of management misconduct and damage. Director and officer liability insurance is written on a negligence standard, but often excludes coverage for criminal and quasi-criminal offences (even where the latter is essentially based on a negligence standard). The reasoning is that no one should be insured for criminal wrongdoing. That is against public policy.

In light of the need to attach personal liability and accountability upon management for corporate misconduct, it is not surprising that many judges who have fines managers have gone further. They ordered the corporation not to indemnify the director for the personal fine. This is perhaps impossible to monitor in any event, since a corporation has great latitude to reward its agents if it has the means to do so. The recent Ontario Court of Appeal decision of *Bata* found that such non-indemnification orders were improper and could not be enforced.[6] This finding, however, will depend on the particular language of each provincial statute. The legislature can also amend the statute to permit these kinds of orders in the future. It would, however, suggest that the corporation be charged and convicted along with the manager, so that the corporation can be "punished" with this kind of non-indemnification order. There is no jurisdiction to make such an order against a company which has not been found to have done anything wrong.

[6] (1995) 83 O.A.C. 343, 127 D.L.R. (4th) 443, 25 O.R. (3d) 323