Canadian Democracy & Corporate Accountability

An Overview of Issues

CANADIAN DEMOCRACY & CORPORATE ACCOUNTABILITY COMMISSION

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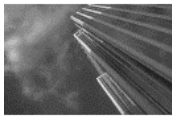

CANADIAN DEMOCRACY & CORPORATE ACCOUNTABILITY

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The Democracy and Corporate Accountability Commission

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About the Project

The Canadian Democracy and Corporate Accountability Commission will produce a report with recommendations for the federal and provincial governments, the corporate sector and the social/economic justice community on the issue of corporate accountability in modern Canadian democracy. In arriving at these recommendations, it will embark on a national consultative process involving public and private meetings with key private sector insiders, government officials, advocacy groups, trade unionists and other interested citizens. Hearings will be held in Halifax, Montreal, Ottawa, Toronto, Winnipeg, Calgary and Vancouver. The schedule for these proceedings can be consulted at:

www.corporate-accountability.ca

The discussion paper that follows lays out a series of issues related to the challenges, advantages and shortcomings of corporate accountability as it exists at present. It provides a framework for the discussions that will lead to the final report and recommendations.

Discussion Paper Abstract

Introduction:

The modern "corporation" is an important actor in contemporary democracies; one whose apparent lack of accountability to all the "stakeholders" affected by corporate activities has sparked intense controversy. All modern democracies require state institutions to be accountable, precisely because they are centres of power that affect citizens' lives. The centres of public power include state institutions such as government, the bureaucracy, courts, and police forces. The same principles of accountability to citizens should be applicable to other institutions that wield substantial power in society, including corporations.

The Canadian Democracy and Corporate Accountability Commission will grapple with a series of practical questions regarding corporate accountability. In the discussion paper, we try to do three things: we seek to define "corporations" and sketch out very briefly their historical and legal bases in Canada. We explore the dilemmas associated with corporate accountability, and particularly corporate social responsibility. Finally, we set out a number of particular questions that confront corporations and Canadian democracy at the start of a new century. It is these questions that the final report, after thorough

consultation, will seek to answer. It is our ultimate intention to propose a series of changes to law and policy that would make companies more responsive to all of their stakeholders – shareholders, employees, customers, national and international communities – while recognizing their legitimate need to remain profitable.

Corporations:

In terms of the law corporations are artificial or "juristic" persons granted a unique, separate legal identity. This corporate legal identity, together with other aspects of corporate law, limits the liability of a corporation's incorporators, investors and managers. Granted these privileges of "separate legal personality" and limited legal liability, corporations are a potent and massively successful tool for generating wealth and prosperity. Yet, do the corporate charters bestowed by governments to facilitate the generation of profits relieve corporations of broader requirements of responsibility and accountability to the societies in which they operate? Or does the very success of the corporation and the scale of corporate operations in the modern economy bring with them special obligations?

Accountability and Social Responsibility:

Accountability is the requirement to explain and accept responsibility for one's actions. Determining to whom corporations should be accountable is a difficult issue. Much of corporate law is dedicated to rendering corporations – and specifically corporate directors – accountable only to shareholders. However, for many Canadians, simple accountability to shareholders is insufficient. Corporations, over the course of their operations, have an impact on an array of "stakeholders" and increasingly, are expected to perform their functions in a fashion that is seen to be socially responsible.

There is a view in some circles that beyond accountability to shareholders for making profits corporations owe no social responsibility. Discussion of whether corporations should be socially responsible at all typically hinges on two related questions: First, are corporations, in acting in a socially responsible fashion, reducing their profitability? Second, if directors manage corporations in a socially responsible fashion, do they run afoul of their "fiduciary duties" to act in the best interest of the corporation – typically defined as maximizing profits for shareholders?

Achieving corporate social responsibility in Canada represents an important democratic challenge. The much-touted voluntary codes of conduct devised by corporations typically contain guarantees reflecting issues of importance to the profit interests of the corporation, and not necessarily to the interests of other stakeholders; that is, to employees, customers, national and international communities. Further, corporations generally do little to measure and assess the ethics of their actions.

These findings suggest that accountability remains an unrealized objective for most corporations in Canada, an observation that sparks a number of important questions. This discussion paper raises six such questions that need to be answered. If acted upon, they would lead to a series of changes to law and policy that would make Canadian companies more responsive to all of their stakeholders, while recognizing their legitimate need to remain profitable.

Key Discussion Questions:

1. Information is the currency of democracy: In order to facilitate tracking of corporate activities in all areas of concern to stakeholders, should corporations be obliged to disclose detailed information about their records of compliance with labour, environmental, human rights, consumer, health and safety, criminal, competition and tax laws or policies? Should governments set up easily accessible databases containing the information? Should staff or management who disclose information a corporation is required to disclose, but has failed to do so, or who report violations of legal requirements by a corporation, be protected from retaliation by the corporation? Should independent "social audits" be legally required?

2. Making social responsibility and stakeholder considerations part of business: To guarantee that directors do not run afoul of fiduciary duties in responding to socially responsible imperatives, should corporate laws be amended to permit or explicitly require directors to consider non-shareholder stakeholder interests in making decisions? Should provisions in corporate laws preventing or inhibiting shareholders from raising corporate social responsibility issues with companies, via shareholder proposals or otherwise, be eliminated? Should the so-called "oppression" remedy presently found in corporate laws and available to shareholders, directors and, to an extent, creditors who feel their interests have been improperly disregarded by management be expanded to permit access to these remedies by other stakeholders beyond shareholders, creditors or directors, thereby providing stakeholders with access to court review of corporate decisions?

3. Encouraging responsible behaviour at home and abroad: (a) The Ontario Business Corporations Act specifies that a corporation may be dissolved by the relevant government official for a conviction of the corporation under the Criminal Code, any other federal statute or a provincial offence, in circumstances where the dissolution would be in the public interest. Should this power be included in other corporate laws?

(b) Should corporations and other suppliers of goods and services to the Government who violate labour, environmental, human rights, consumer, health and safety, criminal, competition and tax laws and policies be prohibited for a specific period of time (e.g. 5-10 years) from receiving grants or contracts from the Government? Should access to these government benefits also be made conditional on adequate corporate responsibility in a company's overseas activities?

4. Corporate democracy: Proposals exist calling for laws obliging corporations, in their shareholder mail outs, to include pamphlets inviting individual shareholders to join an association of individual shareholders by paying a nominal annual membership fee. The association would be directed by a board elected by members of the association, and would provide centralized expertise and assistance on shareholder rights issues. Requiring corporations to distribute such a pamphlet would be a very low-cost, effective way of helping individual shareholders band together across Canada. Such collective action by shareholders remains a difficult challenge that presently plagues many attempts by individual shareholders to defend their rights. Should these changes be made? Should corporate laws be amended to require that corporate boards include a sufficient number of "independent" directors – persons with a more arms length relationship to the company? Should corporate laws oblige boards to assign responsibility for stakeholder relations to one or more board members or committees of the board?

5. Electoral Democracy and the Corporation: Should Canada's electoral laws be amended to prohibit donations from corporations or other collective entities such as trade unions to political parties, MPs, riding associations and candidates for public office? Should rules be introduced barring corporations from reimbursing directors, managers, shareholders or others who make political donations?

6. The Globalized Economy: Can these changes be made to Canadian law and policy without jeopardizing Canadian competitiveness? Can they be made unilaterally or must there be multilateral change? If there is insufficient competitive advantage to accountability at present in the unregulated global market, what changes should be made to the system of global commerce such as the World Trade Organization to render it advantageous to be responsible? On the other hand, must responsibility be uncompetitive? More concretely, would, in fact, changes that increase Canadian corporate transparency and enhance the ethical reputation of Canadian firms represent a competitive disadvantage in the globalized economy?

Without losing sight of its basic economic role, or its need to make a profit, the modern corporation has concerns, ideals and responsibilities which go far beyond the economic. . . it must accept community responsibilities as well as private obligations.

— Allan Taylor
Then-chairman of the Royal Bank, the Wilder Penfield Lecture, Montreal, 1994

Large Canadian corporations and transnational corporations (TNCs) are especially influential. Because of the sheer size of these corporations, the decisions of the relatively few people who control them exert great influence on the decision-making of local, provincial and national governments, and can have great impact on the communities in which these corporations are located. For these reasons, there is a need for a social responsibility framework for large corporations and TNCs especially, a framework that enables individual citizens and communities to hold corporations accountable to community interests.

— Duff Conacher,
Co-ordinator of Democracy Watch

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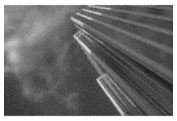
EXECUTIVE SUMMARY



Introduction

The "corporation" is an important actor in modern democracies; one whose apparent lack of accountability to "stakeholders" affected by corporate activities has sparked intense controversy. Campaigns by consumers, shareholders and protestors focusing on individual acts of corporate "irresponsibility", and on an agenda of globalization and business liberalization perceived as being driven by corporations, have had discernable impacts. Recent public opinion polls suggest that for a growing number of people in Canada and elsewhere, corporate social responsibility has become an important measure of a corporation's merit. If present trends continue, there may well come a time when corporate profitability is impossible without responsibility and accountability to a broader public.

All modern democracies require state institutions to be accountable, precisely because they are centres of power that affect citizens' lives. These centres of public power include government, public employees, courts, police forces and armies. The same principles of accountability to citizens should be applicable to other institutions that wield substantial power in society, including corporations. Key questions to answer concerning corporate accountability include: How do we render corporations more responsive to their employees, consumers, shareholders and citizens at large? To what extent should human beings be able to insulate themselves from accountability for their actions by using a corporate veil? In a rights-based democracy, which rights should be available to corporations and which should be reserved for human beings? To whom should corporations be accountable? For what should they be accountable and by what means? Apart from their important, positive function in producing goods and services, what is the proper role of corporations in a modern democracy? As a collective entity should they participate financially in elections? How do we reconcile demands for accountability to a broader public and broader array of issues with the ultimate purpose of the corporation: the generation of profits? Is there a conflict between corporate social responsibility and competitiveness? Does it even make sense to talk about corporate responsibility and accountability for Canadian companies competing against firms from countries where such issues are regarded by their governments as irrelevant?

The Canadian Democracy and Corporate Accountability Commission will grapple with these questions. This discussion paper simply introduces these and related matters — grouped for convenience sake under the label of "corporate accountability". Here, we try to do three things: we seek to define "corporations" and sketch out very briefly their historical and legal bases in Canada. We explore the dilemmas associated with corporate accountability, and particularly corporate social responsibility. Finally, we set out a number of particular questions that confront corporations and Canadian democracy at the start of a new century. It is these questions that the final report, after thorough consultation, will seek to answer. It is our ultimate intention to propose a series of changes to law and policy that would make companies more responsive to all of their stakeholders, while recognizing their legitimate need to remain profitable.

The Origin, Rights & Powers of Corporations

Corporations are a dominant and important form of business organization in modern market economies and, in some instances, dwarf nation-states in their size and financial influence. Corporations are artificial or "juristic" persons granted a unique, separate legal identity. This separate legal identity, together with other aspects of corporate law, limits the liability of a corporation's incorporators, investors and managers. Granted these privileges of "separate legal personality" and limited legal liability, corporations are a potent and massively successful tool for generating wealth and prosperity. Yet, as corporations are legal constructs chartered by law as artificial persons, their entire legitimacy stems from the state, and in democracies, from the citizenry. Initially regarded with a measure of suspicion under older corporate laws, corporate charters creating separate legal "persons" bring with them certain powers and privileges, including, in certain instances, access to what are traditionally human rights. However, do these charters bestowed by governments to facilitate the generation of profits relieve corporations of broader requirements of responsibility and accountability to the societies in which they operate? Or do the very success of the corporation and the scale of corporate operations in the modern economy bring with them obligations?

For What Should Corporations be Accountable?

Accountability is the requirement to explain and accept responsibility for one's actions. Determining to whom corporations should be accountable is a difficult issue. Much of corporate law is dedicated to rendering corporations – and specifically corporate directors – accountable only to shareholders. However, for many Canadians, simple accountability to shareholders is insufficient. Corporations, over the course of their operations, have an impact on an array of "stakeholders" and increasingly, are expected to perform their functions in a fashion that is "socially responsible". The precise definition of corporate social responsibility (CSR) varies enormously. Probably the best conception of CSR sees corporations as having "spheres of influence". According to the sphere of influence theory, there are zones in which social issues and stakeholders are more or less proximate to companies. Other matters are more distant from the company's control and the company's relationship with these issues is more remote.

Using this image of a sphere, corporations have relationships with the following stakeholders, in order of declining influence: employees, customers, local communities, national communities, and international communities. Key questions must be asked about corporate relations with each of these stakeholders. For example, should corporations be expected to go beyond regulations protecting the rights of workers, or apply decent standards, where they are not now required to do so? Should corporations be expected to police the workplace standards – including the rights and safety of workers – of the suppliers from whom they source? Should corporations meet high standards for goods and services where legal apparatuses obliging these standards do not exist? Should companies producing essential medicines price these products outside of the reach of the world's poor? Should socially responsible firms contemplate the impact of plant closure and relocation decisions on local communities? Does a company owe anything to a community it decides to leave? Should companies pursue "social impact assessments" before commencing a project, even where there is no obligation to do so? Should they conduct environmental assessments of projects in jurisdictions that do not require such studies?

Should companies, or any other collective entity such as a trade union, make political donations? Are such donations appropriate in a democracy? Are they consistent with a system of one person, one vote where it is assumed that all citizens have an equal opportunity to influence government policy? How far does a company's "sphere of influence" extend where its presence is contributing to human rights abuses in a repressive country? Will a responsible company withdraw from a country or project where its activities are exacerbating human rights abuses? Should a Canadian company, in all of its operations at home and abroad be legally compelled to act in a way that is consistent with international human rights as found in the Universal Declaration of Human Rights? Is it appropriate for a responsible company to engage in action or urge policies or promote an international system that augments profits at the risk of negative social, environmental and human rights consequences?

Should Corporations be Socially Responsible?

There is a view in some circles that corporations owe no social responsibility, beyond generating profits for shareholders. Discussion of whether corporations should be socially responsible at all typically hinges on two related questions: First, are corporations, in acting in a socially responsible fashion, reducing their profitability? Second, if directors manage corporations in a socially responsible fashion, do they run afoul of their "fiduciary duties" to act in the best interest of the corporation – typically defined as maximizing profits for shareholders?

Issue 1: Profiting from Principles

With regard to the first question, there is now a substantial body of evidence suggesting that corporate social responsibility contributes to business success. At an abstract level, CSR serves to strengthen the fabric of society, thereby improving the environment in which corporations operate. Further, It is now frequently argued that CSR has an important impact on a company's "reputational capital". In particular, a company's CSR image becomes closely linked to its product image, heightening investor, consumer and employee confidence. Some studies posit a positive correlation between social responsibility and financial success, suggesting that shareholder wealth is decreased when firms act in a socially irresponsible or illegal manner. There are also studies showing positive correlations between profits and social responsibility. If accurate, these findings suggest that there is no meaningful contradiction between responsible behaviour and profitability. Still, these findings raise questions. Do all businesses benefit equally from CSR? If there were an exact, automatic causal link between CSR and profits, would it not be more commonplace? Or is it simply that the payoffs flowing from CSR are long-term, far removed from the radar screens of businesses operating in an economy and market obsessed with short-term profitability?

Issue 2: The Law's Narrow Compass

If there is a clear and direct link between business success and CSR, a director charting a socially responsible course for a corporation could not be said to be violating fiduciary duty obligations, even if these obligations were narrowly defined as simple profit maximization for shareholders. On the other hand, where the link between responsible behaviour and profits is unclear, fiduciary duty – a concept very ambiguously defined in Canadian law – may inhibit socially responsible behaviour. It is certain that there is no legal requirement for companies to be socially responsible, in the broad sense of the term.

On the other hand, the traditional view of fiduciary duty might inhibit CSR where profits are not seen to flow from the expenditure of corporate resources on the CSR initiatives. A more progressive view permitting CSR so long as the directors do not disregard entirely the interests of the corporation's shareholders was enunciated by the BC Supreme Court in a case often cited as the prevailing position on fiduciary duty and CSR in Canada.

Other jurisdictions have sought to remove ambiguity surrounding the precise scope of fiduciary duty legislatively. In the UK and the US certain changes have been made to corporate law allowing directors to consider the interests of non-shareholder stakeholders in making decisions. In practice, these changes have generally done little to promote CSR. Accordingly, there is a need to ask how one solves the potential contradictions between fiduciary duty and CSR, protecting on the one hand the shareholder interest and allowing, on the other, responsiveness to a broader range of stakeholders.

How Can Corporations be Made Accountable?

Notwithstanding the possible correlation of business success and responsibility, achieving corporate social responsibility in Canada represents an important challenge. The much-touted voluntary codes of conduct devised by corporations typically contain guarantees reflecting issues of importance to the profit interests of the corporation, and not necessarily to stakeholders. Specifically, codes typically focus on conduct committed against the firm, rather than on responding to the interests of stakeholders. Codes that do grapple with corporate social responsibility matters are often a response to external pressures – such as protests and the threat of regulation. Where this external threat diminishes, compliance with codes may fall off. Studies suggest that codes are frequently poorly monitored or enforced. Corporations generally do little to measure and assess the ethics of their actions.

Where do we go from here? Some key issues.

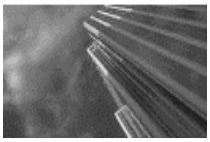
These findings suggest that accountability remains an unrealized objective for most corporations in Canada, an observation that sparks a number of important questions. This discussion paper of the Canadian Democracy and Corporate Accountability Commission raises six specific questions that need to be answered. If acted upon, they would lead to a series of changes to law and policy that would make Canadian companies more responsive to all of their stakeholders, while recognizing their legitimate need to remain profitable.

The Commissioners participating in the Project welcome input on this discussion paper. A series of public and private consultative meetings is intended to produce specific suggestions to be considered in preparation of a final report that will be made available in Fall 2001. The report will then be submitted to federal and provincial governments, as a well as representative corporate institutions for their consideration and action. It will simultaneously be made available to the public.

Hearings will be held in Halifax, Montreal, Ottawa, Toronto, Winnipeg, Calgary and Vancouver. The schedule for these proceedings can be consulted at:

www.corporate-accountability.ca

INTRODUCTION



The term "corporation" sparks an immense range of responses in the public mind. Sir Geoffrey Chandler, former Royal Dutch Shell executive and now an active member of Amnesty International, has called corporations the most efficient vessel of wealth creation humanity has ever invented. Ambrose Bierce, in his famous *Devil's Dictionary*, captures a less optimistic view, defining the corporation as "[a]n ingenious device for obtaining individual profit without individual responsibility."

Everywhere people have been demanding that those holding power be accountable to a wider public, that power be used to improve the common good and that people be able to participate in the decisions that shape their lives. As the twentieth century closed, a majority of the world's nations could at last be said to have achieved formal democracy. At the same time, in a massive demonstration in a beautiful west-coast American city, a fledgling global civil society movement drew attention to the existence of the major democratic anomaly. From Seattle, came demands that all concentrations of power be accountable. Why, they asked, should corporations be exempt? Why indeed?

The "corporation" is a key component of modern society. In fact, in many respects, corporations have become a more immediate presence to many citizens in modern democracies than either governments or other organs of civil society. As a direct consequence, at the turn of the new century, corporations are the legitimate and necessary focal point for profit-making activities in market economies. They are also increasingly a target for those discontented with business liberalization and globalization, an agenda that corporations are perceived as driving.

In the last five years, consumer, shareholder and street activism contesting the so-called "corporate rule" of public policy agendas and individual instances of corporate "irresponsibility" has exploded. Companies ranging from The Gap to Daishowa have been targeted in effective and damaging consumer protests. Protestors opposed to the agenda of trade and investment liberalization have seriously impeded international meetings of such bodies as the World Trade Organization and the World Bank. Negotiations of international agreements such as the Multilateral Agreement on Investment have ground to a halt in the face of vigorous and highly orchestrated grassroots opposition. The proliferation of cheap, accessible communication via the internet has facilitated a potent form of information exchange between and among activists. As a consequence, in the globalized economy, there are many jurisdictions to which a company can run to avoid regulation and taxes or reduce labour costs. But there are increasingly very few places where a company can hide its activities from skeptical consumers, shareholders or protesters.

From a purely business perspective, these developments have a cost. A recent boycott led by Toronto-based "Friends of the Lubicon" against a Daishowa Ltd. forestry concession in

Fully 40% of participants in the world-wide Millennium survey have or have considered "punishing" companies not seen as socially responsible in the last year. In North America, this figure rose to 67%..

northern Alberta said to be harmful to aboriginal interests provides a case in point. According to evidence presented to an Ontario court in 1995,

> [a]t least 43 companies representing 4,300 retail outlets joined the boycott. As a result of the boycott, about 26 customers discontinued supply services and Daishowa lost a significant portion of its business, estimated at about $5 million worth of sales since 1991. The boycott also affected the ability of Daishowa to acquire new customers.[1]

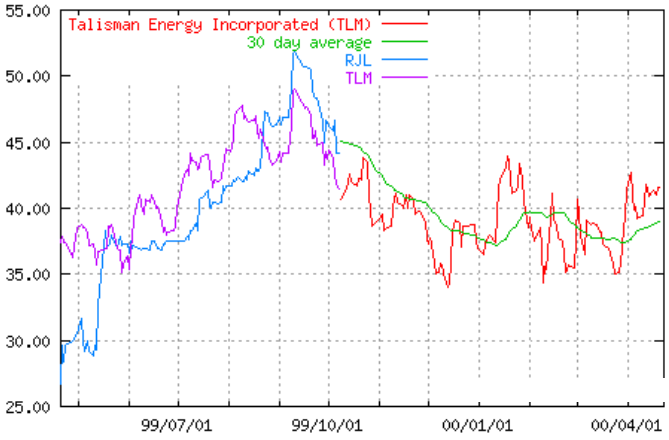
The company ultimately brought a lawsuit in an Ontario court to block the boycott. That lawsuit failed, with the judge declaring, "there is nothing unlawful about a consumer boycott".[2]

More recently, the operations of Canadian oil company Talisman Energy in Sudan – and specifically allegations that these operations are prolonging that country's civil war – have prompted concerted criticism of the company that, in turn, has caused significant fluctuation in Talisman's share price. As the accompanying sidebar suggests, key developments that have affected Talisman's share value include a massive shareholder divestment campaign, threats by the government of Canada to impose sanctions and the imposition and extension of sanctions by the United States on a member of the oil project in which Talisman is a participant. As a result of these pressures, financial analysts have identified a "Sudan discount" on Talisman's share values stemming from operations in Sudan, one that "could keep squeezing the stock of Talisman Energy Inc. for months."[3] More recently, even with the threat of Canadian sanctions lifted, the *Wall Street Journal* noted "[l]argely because of the Sudan cloud, Talisman's stock languishes at only 10.3 times this year's earnings." Analysts report that "Talisman's stock trades at a 6% discount to net asset value, compared with a 20% premium before its Sudan involvement." Now pumping record quantities of oil, "Talisman's stock is up 40% since April, but because other oil shares have fared even better, Talisman is vulnerable to a takeover".[4]

These examples may be indicative of new trends and a significant shift in public thinking. Recent public opinion polls suggest that a sizable number of people view a company's social responsibility as elemental in their assessment of companies. The May 1999 "Millennium survey" asked questions related to corporate social responsibility (CSR) to citizens in over 20 countries. For 49% of the respondents, corporate social responsibility was the item most influencing their impressions of individual companies. Fully 40% of participants had or had considered "punishing" companies not seen as socially responsible in the year prior to the poll. In North America, this figure rose to 67%. Meanwhile, some 43% of respondents in Canada indicated that the role of large corporations in society should be to set higher ethical standards and build a better society for all. Only 11% thought that the role of large corporations was merely to make profit, pay taxes, create jobs and obey the law.[5]

Effect of Sudan Operations on Talisman Share Price (Late 1999/Early 2000)

Various news reports connect Talisman's falling share values in late 1999 and early 2000, at least in part, to divestment by a number of US state and institutional pension funds[6] and the threat of divestment by Canadian institutional shareholders. In this last regard, "[o]n Nov. 17, the Ontario Teachers Federation said it would ask its powerful pension plan board to divest its $ 184-million stake in Talisman if reports of human rights abuses in the war-torn country could be corroborated…A day after the Ontario Teachers Federation made its statement, Talisman shares lost $ 1 on the Toronto Stock Exchange",[7] a decline of about 2.5%. In fact, it was reported on January 10, 2000, that "share divestitures have triggered a five-month dive in Talisman's shares to C$ 38… from C$ 49, a drop of almost 30% compared with the Greater Nile's 10% share of Talisman's production."[8]



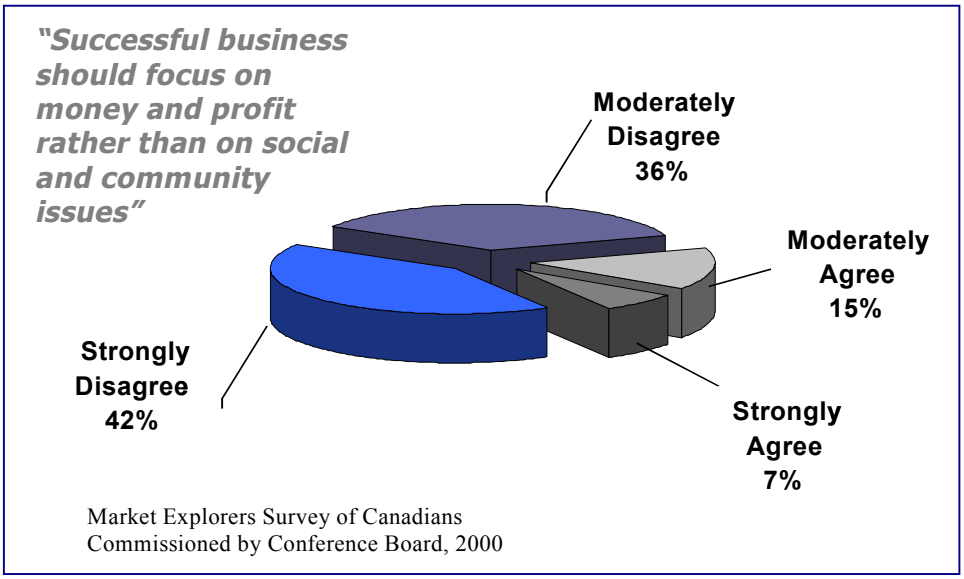
Meanwhile, on October 27, 1999, "shares of Talisman Energy Inc. dropped $2.55… to $40.95, after the federal government said it would consider applying sanctions if it finds the oil industry is exacerbating Sudan's civil war or violating human rights."[9] By November 21, pressure directed against the company sparked in part by this threat of sanctions had "driven down the stock price 17 percent in two months, to [US]$27.90 a share, and wiped out [US]$538 million of the company's market value."[10]

Subsequently, on February 16, 2000, the US government introduced measures extending existing sanctions against Sudan to apply to a member of the Sudanese oil project of which Talisman is also a member. According to reports, "[t]he Clinton administration imposed the sanctions after ruling that the oil operation is an entity of the Sudanese government, which is accused of using oil revenues to help finance a civil war against rebels."[11] In the wake of this announcement, "[s]hares of Talisman Energy Inc. continued to drop…despite glowing financial results and assertions by its boss that additional sanctions by the United States will have little effect on operations in Sudan."[12] "Talisman stock lost an astounding $4 per share in just two minutes of panic trading. By day's end, 2.7- million shares had traded hands and closed down $ 2.20 at $ 38.90."[13]

At present, Talisman's share values have recovered, but, according to analysts, are still trading substantially below where they should be by reason of a "Sudan discount" (see accompanying text).

Other polls have arrived at similar findings. As the accompanying chart suggests, a 2000 survey conducted for the Conference Board of Canada found that 78% of Canadians strongly or moderately disagreed with the statement "successful business should focus on money and profit rather than on social and community issues".[14] A 1999 poll in the United Kingdom asked participants whether they agreed with the statement that the profits of large British companies help make things better for everyone who buys their goods and services. Only 25% agreed that big business profits were beneficial, while 52% disagreed.[15]

Taken together, these results suggest that where a corporation is used – or perceived as being used – as a device for obtaining profit without individual responsibility, a significant number of people are likely to think less of that company. In certain instances, those people are able and willing to act in a fashion undermining the profitability of



Market Explorers Survey of Canadians
Commissioned by Conference Board, 2000

the firm. If present trends continue, there may well come a time when corporate profitability is impossible without accountability to a broader public. But what do we mean by corporate accountability in a modern democracy?

What is Democratic Accountability?

Those holding power and authority in a democracy do so only at the direct or indirect behest of the citizens.

History's march toward democracy has been long, tortuous and uncertain. The major push came in the second half of the nineteenth century when the industrialized workers in most North Atlantic countries forced their way into the social and political structures of society. Following the great depression, totalitarianism and World War II, the other great period of democratic reform came in the last half of the twentieth century. Building on their liberal legacy of political and civil rights, all of the North Atlantic democracies created welfare states, significantly different in their provisions, but all accepting the principle that democracy entailed not simply formal political rights but some degree of social and economic justice. During the same period, women, ethnic minorities and indigenous peoples made significant progress in their own struggles for democratic inclusion.

In a sense, the democratic notion of accountability derives from turning the feudal order upside down. Instead of fealty to the barons and loyalty to the crown, democratic citizenship means that accountability goes in the opposite direction: the few holding day-to-day power at the top of the hierarchy are responsible for what they do to the many below. Those holding power and authority in a democracy do so only at the direct or indirect behest of the citizens. As the American and French revolutions proclaimed 200 years ago, all democratic citizens are equal in rights and at birth are presumed to have a morally equal claim to the good life. This has been seen to mean that the mode of behaviour of all society's institutions must cohere with individual rights and the well-being of at least a majority of the free and equal citizens. This can be understood as a minimal definition of what we now mean as the public good or public interest.

With the important exception of fundamental human rights, which are to be found in the *Canadian Charter of Rights and Freedoms* and similar constitutional provisions in other democracies, we turn to Parliament and the legislatures to decide what is in the public interest. In practice, accountability in government is governed by a sophisticated series of laws and conventions: elections statutes, access to information laws, auditor-general rules, lobbying regulation, Question Period, criminal provisions on influence peddling, conflict of interest guidelines etc.

Yet, contemporary democracy is not only about the government or the state – its parliaments, courts, public employees, police forces and the military. It also involves that vibrant network of voluntary and non-profit organizations, now commonly described as civil society. In a healthy democracy it is expected that good governance requires a constructive interplay between the two. It also requires the successful and multi-faceted engagement with a modern society's third major sphere of organization, that of the corporations. It is this sector that produces most goods and services and is the one within which most citizens work. No society can be considered truly democratic unless the norm of accountability applies to all three spheres of organized life. However the details in application may differ in these sectors, there can be no democracy unless those who have power over people's lives are actually accountable to them. Accountability is a core democratic value.

Accountability in the Voluntary Sector

Consisting of over 175,000 organizations, Canada's voluntary and non-profit sector is a key component of our democracy. At the community level, civil society provides the organizations through which Canadians work voluntarily with and for their neighbours: groups aiding the poor and the elderly, arts festival organizations, debating societies and environmental activists. Collectively, civil society provides crucial ideas and organizational muscle to inform, support and criticize state institutions. In Canada it is also the source of over one million paying jobs, with revenues and assets equivalent in size to the economy of British Columbia.

A recent national inquiry into governance and accountability practices in Canada's civil society made many recommendations for improvement.[16] These proposals explicitly avoided advice to all these organizations on how to carry out their particular mission. In a democracy they must be left free to make such decisions themselves. What the recommendations did provide was a legal framework which established criteria for their recognition as legal entities and outlined the parameters within which they should function in a free society, parameters that took into account the public interest and the rights of others; the public, in this case, which provides through Parliament hundreds of millions of dollars in tax benefits. These private organizations have many obligations, to their employees, clients, donors, and the public at large, as well as to municipal, provincial and federal governments. By making changes in governance and transparency, democratic accountability can be improved significantly. Most of the key proposals of the national inquiry have been strongly endorsed by local and national organizations in civil society. While guarding their right to be left alone in implementing their specific missions as private organizations, they have recognized that they have other obligations, among which are included being responsible for problems created for the broader community in carrying out their mandates.

Accountability in the Corporate Sector

In contrast, the acceptance of obligations to society as a whole is not a widely-shared characteristic of Canadian corporations. Corporate accountability as seen by most business leaders simply means responsibility to shareholders whose basic goal is the maximization of

profits. As long as profits are pursued within a framework established by law, the dominant corporate view is that nothing more should be expected of them. While the two other components of Canadian democracy, governments and civil society, continue to make improvements in practices that were already strongly accountable in terms of democratic norms, the large majority of corporations have remained aloof. While some corporate leaders have joined other citizens in making changes to meet increased accountability requirements, most have not. In this, Canadian business executives can be seen as representative of corporate thinking throughout the Anglo-American world, but – as recent polls discussed above suggest – not necessarily reflective of public sensibilities.

The broad accountability requirements that corporate leaders expect of governments and civil society, they refuse to apply to themselves. Ordinary Canadians know little economic theory. They do, however, have strong feelings about fairness and accountability. Is it any wonder that a poll conducted in 1997 revealed that only a small minority of citizens believe Canadian corporations have become more responsible for their actions?

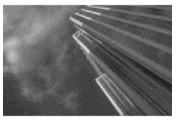
All modern democracies require state institutions to be accountable, precisely because they are centres of power which impact on citizens' lives. The same principles of accountability to citizens should be applicable to other institutions that wield substantial power in society. If it is through mandates given explicitly or tacitly by the democratic state that organized bodies in society obtain the legal parameters within which they act, then like the exercise of power by the state itself, the democratic legitimacy of those bodies can be established only by procedures that hold them accountable to the citizens directly or indirectly affected by their decisions. This is the point of democracy and it should be particularly evident for those comparatively new entities like profit-making corporations, which were legal creations mandated by the state and grew during the time the state itself was being democratized. They exercise functions and rights that entail having power over others. There is thus no excuse for avoiding questions about accountability of the kind that would be expected if those powers were performed by the state or by organizations in civil society.

The following are among the many questions requiring answers: How do we render corporations more responsive to their employees, consumers, shareholders and citizens at large? To what extent should human beings be able to insulate themselves from accountability for their actions by using a corporate veil? In a rights-based democracy, which rights should be available to corporations and which should be reserved for human beings? To whom should corporations be accountable? For what should they be accountable and by what means? Apart from their important, positive function in producing goods and services, what is the proper role of corporations in a modern democracy? As a collective entity should they participate financially in elections? How do we reconcile demands for accountability to a broader public and broader array of issues with the ultimate purpose of the corporation: the generation of profits? Is there a conflict between corporate social responsibility and competitiveness? Does it even make sense to talk about corporate responsibility and accountability for

Canadian companies competing against firms from countries where such issues are regarded by their governments as irrelevant?

The Canadian Democracy and Corporate Accountability Commission will grapple with such questions. This discussion paper simply introduces these and related matters — grouped for convenience sake under the label of "corporate accountability". Here, we try to do three things: we seek to define "corporations" and sketch out very briefly their historical and legal bases in Canada. We explore the dilemmas associated with corporate accountability, and particularly corporate social responsibility. Finally, we set out a number of particular questions that confront corporations and Canadian democracy at the start of a new century and that the final report, after thorough consultation, will seek to answer. It is our ultimate intention to propose a series of changes to law and policy that would make companies more responsive to all of their stakeholders, while recognizing their legitimate need to remain profitable.

THE ORIGINS, RIGHTS & POWERS OF THE CORPORATION



BY VIRTUE OF their very success in generating wealth, corporations are now a striking, perhaps even dominant feature, of modern society. By 1995, 51 of the 100 largest economic entities in the world were not nation-states. They were corporations. The largest 200 corporations in the world had combined sales greater than a quarter of the world's economic activity. In fact, these firms had aggregate sales that surpassed the combined economies of the smaller 182 countries.[17] In the United States, the revenues of the top 500 corporations constituted about 60 percent of the country's GDP.[18] Meanwhile, in Canada, by the mid-1980s, the largest 100 companies controlled "more than 50 percent of all industrial sector property and profits, and more than one-third of all sales."[19] As of 1990, the combined revenue of Canada's 10 largest corporations constituted approximately 17.29% of the country's Gross Domestic Product, an amount exceeding the combined contributions of most of the provinces.[20] Clearly, we live in a "corporate" economy. But what is a "corporation"? Where does it come from and why is it so successful?

Since at least the 1897 decision of the UK House of Lords in Salomon v. Salomon & Co., a corporation has been viewed in Anglo-Canadian law as having a legal personality separate and distinct from that of its shareholders.

A leading Canadian authority has defined a corporation as "an artificial or juristic person created by or under authority of the laws of a state, province or nation which is regarded in law as being a legal entity…separate and distinct from the person or persons who comprise its membership."[21] In legal terms, then, a "corporation" in the Canadian context is an institution having separate legal personality, created by virtue of one of a number of provincial or federal laws.

For the purposes of this project, the corporations of interest are "business corporations", defined as "corporations formed for the purpose of transacting business in the widest sense of the term on a for-profit basis".[22]

Breaking this definition down, there are two distinct features that differentiate corporations from other ways of conducting commerce and render corporations an extremely advantageous form of doing business: "separate legal personality" and "limited liability".

Since at least the 1897 decision of the UK House of Lords in *Salomon v. Salomon & Co.*, a corporation has been viewed in Anglo-Canadian law as having a legal personality separate and distinct from that of its shareholders. Accordingly, "[f]rom the time when a company is legally incorporated, it is considered to be a legal person and will be bound by any rule of law applying to persons generally. It will be treated as an independent person with rights and liabilities belonging to itself, even where there is only a single owner of the corporation."[23] In its most extreme form, separate personality protects shareholders, employees and managers from being pursued for the debts, obligations and liabilities of the corporation. Since this corporate "veil" generally insulates shareholders,

This second statute followed the American, not the UK, experience in viewing corporations, not as a simple matter of contract between incorporators, but a privilege to be granted or refused by the state.

employees and managers, corporations *limit* the liability exposure of these actors to the assets they invest in the corporation.

Modern Canadian corporate law entrenches the notion of separate legal personality and limited liability. For example, by virtue of the federal *Canada Business Corporations Act*, a corporation has "the capacity and, subject to this act, the rights, powers and privileges of a natural person."[24] The Act also provides that shareholders cannot usually be held liable for actions of their corporations.[25]

Origins of the Corporation

Before 1844 in the United Kingdom, a commercial entity possessing separate legal personality could be created only by royal charter or by special Act of Parliament. The Hudson's Bay Company, for example, was created by royal charter in 1670. With the advent of the Industrial Revolution, less awkward forms of combining as a business entity were required. In 1844, the UK Parliament passed the *Joint Stock Companies Act*, a law enabling promoters and investors to prepare a corporate charter that would then be approved by a registrar. Initially, those investing capital in a company were liable for any debts and obligations incurred by the corporation. However, the *Limited Liability Act* of 1855 and the *Companies Act* of 1862 provided for the creation of a corporation possessing "limited liability" through the filing of a "memorandum of association" by the organizers of the corporation. By virtue of the 1855 legislation, individual shareholders of company were liable for the company's debts only to the value of their shares.[26]

These early corporation laws in the UK reflected a contract-based vision of incorporation. The required memoranda of association were contractual agreements amongst incorporators and between incorporators and the corporation. Given the contractual nature of the incorporation, the incorporators were generally free to decide the content of the memorandum of association, subject only to statutory requirements. The government, as the registrar, had little or no discretion to deny the incorporation once statutory criteria were met. [27]

Canada drew its initial corporate law inspiration from the UK. The Parliament of the United Province of Canada passed an incorporation Act in 1850 enabling five or more persons to incorporate a limited liability company for up to 50 years. However, subsequently, a new Act was passed in 1864 requiring incorporators to apply for a "letter patent" from the Governor in Council. In theory, corporations incorporated by letters patent owed their existence to the sovereign executive act of issuing a letter patent. The issuance of such a letter was at the discretion of a responsible Minister, empowered to impose conditions where warranted.[28] Typically, "the government would carefully vet or review the application and, if satisfied, would issue letters patent. Often applications were returned for corrections. Privileges were not easily given out."[29]

This 1864 statute followed the American, not the UK, experience in viewing corporations, not as a simple matter of contract between incorporators, but a privilege to be granted or refused by the state.[30] Following Confederation, the letters patent form of incorporation was

initially adopted at the federal level and in Ontario, Manitoba, Quebec, New Brunswick and Prince Edward Island. For their part, British Columbia, Alberta, Saskatchewan, Nova Scotia and Newfoundland became what are known as "registration" jurisdictions, where incorporation was available via memoranda of association. [31]

Traditionally, governments more closely supervised corporations formed in letters patent jurisdictions, policing and regulating such things as whether the corporation was acting within the strict boundaries of its stated objectives.[32] However, the letters patent system was criticized in the influential 1967 Lawrence Report in Ontario. The system was said to be administratively unwieldy and inappropriately viewed the grant of corporate status as a privilege. The Report recommended the adoption in Ontario of a corporate law scheme similar to contemporary American corporation legislation. The latter relied on the filing of "articles of incorporation", broadly similar to the memoranda of association used in the registration system. In 1970, the Ontario government enacted the Ontario *Business Corporations Act* (OBCA), adopting an articles of incorporation approach. In 1971, another study — the Dickerson Report — recommended a similar system at the federal level, resulting in the enactment of the *Canada Business Corporations Act* (CBCA) in 1975.[33]

Bearing a much stronger resemblance to modern American corporate laws than to UK or earlier US equivalents, the CBCA has proven a very influential statute. Since 1975, laws based on the CBCA have been introduced in Manitoba, Saskatchewan, Alberta, New Brunswick, Ontario and Newfoundland. The CBCA has also influenced amendments in Quebec. Nova Scotia remains a memorandum of association jurisdiction, as does British Columbia, although the latter has substantially revamped its corporate law scheme in a new corporate law act that, at the time of writing, had yet to come into force. Prince Edward Island remains the only letters patent jurisdiction in Canada. [34]

Corporate Rights, Responsibilities and Powers

As one judge has put it, "a corporation is a group or series of persons which by a legal fiction is regarded and treated as a person itself…In law a 'person' is any being that is capable of having rights and duties..."[35] This "personification" of corporations is not absolute. Courts and legislators have demonstrated a willingness to overlook a corporation's separate personality, "pierce the corporate veil" and penalize shareholders for corporate undertakings in certain limited circumstances, including incorporation for a purpose that is deemed improper.[36] Further, statutory liability for directors is found in a select number of laws, particularly those dealing with the environment.[37] By the late 1990s, in Ontario, roughly 100 federal and provincial statutes imposed civil and criminal liability on directors of companies.[38]

However, for the most part, corporations are treated in law in the same or analogous fashion to a human being. The federal *Interpretation Act*, the statute providing guidelines on how terms are to be interpreted in federal laws, defines "person", or any word or expression descriptive of a person, as including a corporation. Accordingly, federal laws extending rights or imposing obligations to "persons" generally apply both to

The Charter was essentially enacted to protect individuals, not corporations. It may, at times it is true, be necessary to protect the rights of corporations so as to protect the rights of the individual. But I do not think this is such a case, and … the courts must ensure that the Charter not become simply an instrument 'of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons'.

— Justice LaForest, dissenting *RJR-MacDonald*

human beings and to corporations, either by virtue of the *Interpretation Act* or pursuant to the statute in question. For example, s.2 of Canada's *Criminal Code* defines "every one", "person", "owner", and similar expressions as including "bodies corporate" and "companies". Thus, corporations, as much as individuals, are subject to the penalties set out in the *Criminal Code*, though, as is discussed in the accompanying text box, the corporation's artificial nature sometimes makes convictions difficult. Similarly, sub-section 2(1) of the *Income Tax Act* provides that a company, as a juristic person, is a person separate from its owners for tax purposes, and thus is taxed according to the rules for corporate taxation set out in the Act. Similar comments can generally be made about other federal statutes and provincial laws and regulations.

A corporation's separate identity may also give it rights. For example, the *Canadian Bill of Rights*, a federal statute passed in the 1960s and guaranteeing certain rights at the federal level, promises that no federal law is to be applied so as to "deprive a *person* of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" [emphasis added].[39] The term "person" in this phrase likely extends this guarantee to corporations.[40] Further, there have been a number of court cases in which corporations have relied upon the *Canadian Charter of Rights and Freedoms* to challenge government laws or actions. The Supreme Court of Canada has asserted that corporations should be allowed to rely on the Charter to challenge an unconstitutional law, even if the Charter rights at issue do not apply to corporations. For example, the Court has "held that a corporation can invoke s. 2(a) of the Charter, which protects freedom of religion, even though a corporation cannot hold religious beliefs."[41] "[T]he Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law…Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid".[42]

For some observers, allowing corporations access to what are typically human rights is troubling. One set of critics put it this way: "These artificial entities have a far superior offence than individuals when it comes to asserting their rights and escaping responsibilities in our society. They do not need an equal defence when it comes to constitutional protection. By adding constitutional rights to the legislative benefits corporations already enjoy, courts create Frankensteins with inhuman powers who are often unaccountable to law enforcers, workers, consumers, and taxpayers."[43]

In 1995, tobacco companies successfully argued before the Supreme Court of Canada that the freedom of speech guaranteed by the Charter was violated by prohibitions on cigarette advertising found in the *Tobacco Products Control Act*. One Supreme Court Justice, dissenting from the decision striking down the law, commented that "[t]he Charter was essentially enacted to protect individuals, not corporations. It may, at times it is true, be necessary to protect the rights of corporations so as to protect the rights of the individual. But I do not think this is such a case, and … the courts must ensure that the Charter not become simply

Corporations cannot commit treason, nor be outlawed nor excommunicate, for they have no souls.

– Sir Edward Coke, *Case of Sutton's Hospital, 10 Rep. 32.*

an instrument 'of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons'." [44] Notably, given their potential exposure to lawsuits seeking compensation for smoke related injuries, cigarette manufacturers are very unlikely to conduct business as anything other than corporations. Are cigarette manufacturers getting the best of both worlds here: the shield of limited liability flowing from corporate law and the sword of constitutional law found in the Charter?

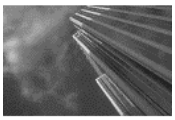
Conclusion

In sum, a "corporation" is a legal construct whose legitimacy and powers stem entirely and exclusively from laws, and thus, in a democratic society, from the people. Owing to the substantial privileges of separate personality and limited liability that corporations are accorded, they have become the most popular, powerful and pervasive form of business organization. Yet, do charters bestowed by governments to facilitate the generation of profits relieve corporations of broader requirements of responsibility and accountability to the societies in which they operate? Or do the very success of the corporation and the scale of corporate operations in the modern economy bring with them obligations?

Corporate Crime and Wrong-Doing

In the United States, reports from a decade ago suggest that every year approximately 30,000 people were killed and 20 million seriously injured from unsafe consumer products. Industrial accidents, many stemming from corporate cost-cutting exercises, claimed some 14,000 lives a year. Occupational diseases resulted in the death of 100,000 people. In Canada, in the mid-1980s, a worker died every six hours on the job.[45] Studies suggest that more than half of these fatalities resulted from unsafe or illegal working conditions.[46] And yet, while all political parties loudly denounce crime in the streets, corporate crime is, by comparison, badly neglected. Should corporations themselves be penalized in criminal law for their wrongdoings? Most Canadians would probably say yes. But for most crimes, to be convicted, the accused must have had the required mental intent to commit the crime. How do you determine the intent of an artificial person? In Canada, "corporate criminal liability is essentially vicarious liability based upon the acts and omissions of individuals."[47] In other words, "[p]roof of the personal culpability of a person who constitutes the directing mind of a corporate accused may be essential in order to establish the guilt of the corporation." What is a "directing mind"? For the Supreme Court of Canada, "[a]n employee is considered to be the company's 'directing mind' when the corporation has given him the actual authority to decide matters related to a specific area."[48] Establishing that the existence of such actual authority remains difficult, perhaps explaining the low level of corporate convictions for wrong-doings in Canada.

FOR WHAT SHOULD CORPORATIONS BE ACCOUNTABLE?



ACCOUNTABILITY IS THE requirement to explain and accept responsibility for one's actions. Accountability, so defined, is a key component of corporate law. In fact, much of corporate law is dedicated to limiting the capacity of managers to act unilaterally and capriciously, without regard to the interests of the corporation. Corporate laws, like the Canada Business Corporations Act (CBCA), closely regulate the relationship of shareholders, directors and corporations.

Though by virtue of the CBCA, directors manage the affairs of the corporation,[49] they are obliged to act honestly, in good faith and in the best interest of corporation.[50] Directors are therefore said to be in a "fiduciary" relationship with the corporation. This principle of "fiduciary duty" prohibits directors and officers from putting themselves in a position where their duty to act in the best interests of the corporation and their self-interest are in conflict. Indeed, shareholders can launch a "derivative" court challenge on behalf of the corporation against directors they believe are in breach of their fiduciary duty, and also have recourse to the remedy of "oppression" where management is unfairly ignoring their interests. Shareholders also have an assortment of procedural guarantees, including rights to information, annual meeting requirements, rights to vote for directors and to vote on, and introduce, proposals. Legally, shareholders are the owners of the corporation and have the right to receive any dividends on their shares declared by the Board of Directors, as well as the right to receive a share of the remaining property of the corporation upon its dissolution. In theory – though not always in practice — this legal regime has the effect of establishing checks and balances that curb the powers of the directors to act in a fashion strongly opposed by the majority of shareholders.

For many, however, corporate "accountability" – the duty to explain and accept responsibility for company actions – is not owed only to profit-maximizing shareholders. Accountability, for the proponents of what is known as "corporate social responsibility" (CSR), extends to other corporate "stakeholders".

Corporate Social Responsibility Defined

Corporate social responsibility is an amorphous concept, one that sometimes specifies not only to whom, but also for what, companies should be accountable. For some, CSR is simply synonymous with "ethical" behaviour by the corporation in its money-making activities. For others, CSR is more broadly and specifically defined. The World Business Council for Sustainable Development, for example, defines CSR as "the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life."[51] The Conference Board of Canada, for its part, defines corporate social responsibility as "the overall relationship of the corporation with all of its stakeholders.

An organization's stakeholders are those groups who affect and/or are affected by the organization and its activities. These may include, but are not limited to: owners, trustees, employees and trade unions, customers, members, business partners, suppliers, competitors, government and regulators, the electorate, non-governmental organizations… pressure groups and influencers, and local and international communities.

– AccountAbility 1000.

These include customers, employees, communities, owners/investors, government, suppliers and competitors. Elements of social responsibility include investment in community outreach, employee relations, creation and maintenance of employment, environmental stewardship and financial performance."[52] For Canadian Business for Social Responsibility, CSR "encompasses a company's commitment to operate in an economically and environmentally sustainable manner, while acknowledging the interests of a variety of stakeholders. Corporate social responsibility is determined by an organization's policy and continuous action in such areas as employee relations, diversity, community development, environment, international relationships, marketplace practices, fiscal responsibility and accountability."[53] The Taskforce on the Churches and Corporate Responsibility, for its part, has developed a comprehensive set of "benchmarks" defining and illustrating the content of corporate social responsibility as it relates to a broad spectrum of stakeholders and establishing a range of widely accepted, basic standards to which corporations should adhere if they wish to be considered "good global corporate citizens."[54]

Companies themselves define CSR in different ways. For BP-Amoco, for example, "social performance" means "our behaviour, that is, whether we live up to the values expressed in our company's business policy document, 'What we stand for...', our impact on people, and our overall contribution to society."[55] For VanCity, "CSR is about doing business the 'right' way. It means ensuring that we are: responsible to members and staff; respectful of the environment, and supportive of the communities in which we live and work."[56]

Clearly, the term "corporate social responsibility" is capable of encompassing a vast range of behaviour and a significant number of stakeholders. We prefer to begin with a simple definition, viewing CSR as a species of accountability that demands companies be responsive to the interests of stakeholders beyond simply shareholders. But who are a company's "stakeholders"? Typical "stakeholders" listed in preceding definitions include employees, consumers, local communities, governments and an inchoate "environment".

However, a useful starting point in answering the question "to whom should companies be accountable" starts by focusing on the firm and what it is that companies do. On this issue, the 1978 Royal Commission on Corporate Concentration made these observations:

> First there are the things that are intrinsically bound up with a firm's regular business activity: equal opportunity for employment and promotion, occupational health and safety and the quality of working life in general...The second set of issues is slightly outside regular business operations; in economic terminology they are described as "externalities," and include pollution, product safety and reliability and the social effect of plant locations, closings and layoffs. The third category is more clearly external to the firm, and comprises social problems of the larger society, which flows only indirectly, if at all, from business operations, but which is or arguably should be interested in alleviating. Examples of things in this third category are urban decay, poverty in general and regional disparities.[57]

This discussion is consistent with a "sphere of influence" approach to corporate social responsibility, illustrated in the diagram below. According to the

sphere of influence theory, there are zones in which social issues and stakeholders are more or less proximate to companies. Other matters are more distant from the company's control and the firm's relationship with these issues is more remote. BP-Amoco, in its discussion of business and human rights, puts it this way:

When you look at our policies there are some things over which we have direct control. Nobody else has responsibility for us, what we pay people, the conditions they work in. We can't blame anyone else if those things aren't done properly. But then you move out a little bit into other areas which have impact on the company. We can have an impact here, but we are certainly not the only influence. We can certainly do things, but we can't do everything we want to. We're talking about contractors or the communities around operations. We have impact on what goes on but we do not have 100% control. Even right out on the edges we are still having some effect.

…

A useful model is that of the ripples in a pond. When BP Amoco drops its stones in the global pond, there are ripples. We cause effects. Some of those effects are very local, some are very distant. And we can use this model of concentric circles to think of our own ability to manage the effects we cause. We might call these Ripples of Influence. Close to the centre, we have direct control. As we move outwards, we encompass different communities until we encounter the entire globe, where our own ripples interfere constructively and destructively with many, many others. In different countries, or in different issues, at different times, we are able to extend our influence out to different distances in the pond.[59]

Noting who falls within the sphere of influence goes a long way in identifying "stakeholders". But as BP-Amoco suggests, determining just what it is companies are accountable for is even more complicated. Clearly the nature of responsibilities a corporation might have in each sphere will vary according to its size, the nature of its operations and the stakeholder in question. Further, the expectations we have of companies must acknowledge the key role of companies as wealth-generating, and not social policy, institutions. As one corporate ethics

Corporate Canada's Perception of Good Behaviour

A survey released by KPMG in 1999 of Canada's 1,000 largest companies provides insight into how Canada's business community defines CSR. The companies were asked to respond to ten "ethical" behaviours and to rank the five that count most strongly in their own evaluation of an organization's ethics. Complying with applicable laws and regulations, implementing fair employment practices, producing high-quality products/services, having a formal programs to promote ethical responsibility and demonstrating environmental responsibility were the behaviours most frequently regarded as exemplifying "ethics". Low on the list were such things as exhibiting a commitment to local communities, undertaking and publicly disclosing social audits and corporate philanthropy. [58] Notably, when asked to list in order of importance nine qualities that might be used to evaluate a company's ethics, companies ranked promise keeping, responsibility, and accountability very highly, but considered exercising corporate power fairly and considering effects on all stakeholders significantly less relevant.

professor has emphasized, "[s]takeholder theory should not be used to weave a basket big enough to hold the world's misery."[60] But maybe the basket can be woven bigger than it has been to date. The following sections identify several different stakeholders implicated in a company's sphere of influence. They ask, in each instance, "for what should companies be accountable?"

Treatment of Employees

Employees are indisputably a part of every corporation's operations. In much of the world, a corporation's relations with its employees are overseen by a vast array of employment, human rights and labour laws, many of which are designed to oblige corporations to meet minimum standards of behaviour in their workplaces. But should corporations be expected to go beyond these regulations, or to apply decent standards where they are not now required to do so? Should corporations be expected to police the workplace standards – including the rights and safety of workers – of the suppliers from whom they source? Clearly, such matters are now of considerable concern not only in the industrialized nations but also in developing countries, as the discussion on corporate codes of conduct below suggests.

Treatment of Customers

The efficient production of goods and services is the rationale for a market-based economy and all business corporations. There are very few companies, therefore, for whom customers are not "stakeholders" clearly within corporate spheres of influence. Notably, numerous legal standards exist in many countries imposing a cost on corporations where they act inappropriately, producing shoddy or dangerous products or services. But should corporations meet high standards for goods and services where such legal requirements do not exist? For example, should corporations observe the privacy interests of their customers even where relevant regulations are absent? Should they avoid sending dangerous, damaged or expired products to jurisdictions that do not carefully regulate consumer safety? A related issue: Should companies producing essential medicines price these products outside of the reach of the world's poor?

Local Communities

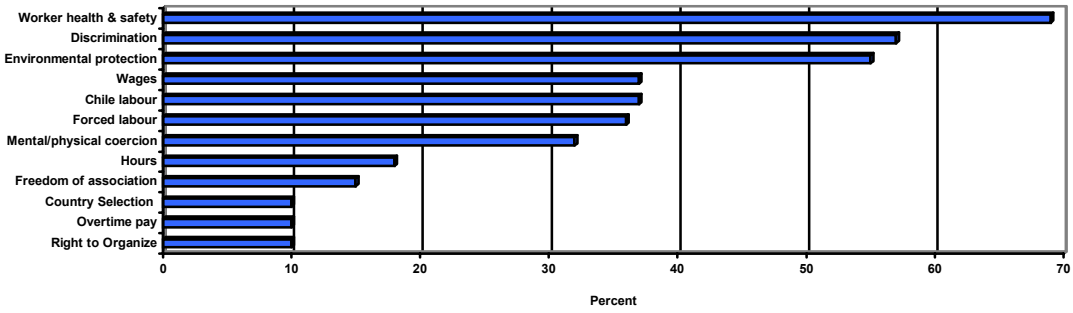
All companies operate in the real, physical world. To greater or lesser degrees, the communities that surround them are within their "sphere of influence". Indeed, depending on their size and importance, corporations may have an enormous impact on the local community in which they operate. Giving to local charities and other worthy causes is one form of community involvement that a socially responsible firm might consider. But should socially responsible firms also contemplate the impact of plant closure and relocation decisions on local communities? Does a company owe anything to a community it decides to leave? Another area of community relations that firms should be concerned with relates to the impact of their operations on local environments and vulnerable populations. Should companies pursue "social impact assessments" before commencing a project, even where there is no obligation to do so? Should they conduct environmental assessments of projects in jurisdictions that do not require such studies?

Labour Rights, Codes of Conduct and Overseas Operations by Northern Companies

A small, but growing number of companies now have codes of conduct governing overseas operations in jurisdictions with poor adherence to employee human rights standards. In a 1996 survey of 150 US multinational corporations in sectors deemed likely to have supplier codes, San Francisco-based Business for Social Responsibility found that 25 firms had human rights codes.[61] Another survey by Boston-based Franklin Research and Development found that roughly 10% of US multinationals had overseas human rights guidelines.[62] A more comprehensive survey on the child labour practices of US retailers and textile manufacturers by the US Department of Labor in 1996 revealed that of 42 major textile retailers and manufacturers surveyed and willing to make public their responses, 36 had adopted some form of policy specifically prohibiting the use of child labour in overseas production facilities. Two of the respondents also had country human rights guidelines that they used to determine in which countries they would invest.[63] Finally, a content analysis of a 1998 International Sourcing Report from the New York-based Council on Economic Priorities surveying prominent US corporations, suggests that 80 of the 145 responding businesses had codes of conduct containing labour rights standards.[64]

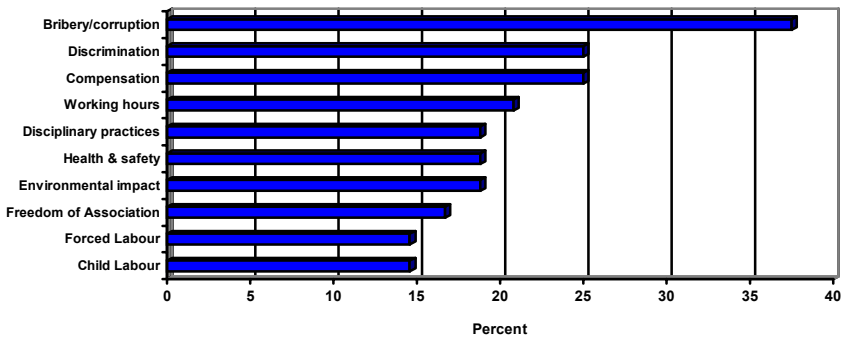
What sorts of things appear in these codes? A 1998 study by the Investor Responsibility Research Center surveyed 121 U.S. companies drawn from the Standard & Poor 500 or considered major retailers. An analysis of the content of company responses revealed that companies had codes or policies dealing with the following:

Statistical Breakdown of Content of U.S. Corporate Codes on Overseas Practices



In Canada, a 1996 survey of the 98 largest Canadian businesses operating internationally suggested that relatively few Canadian companies have codes of conduct dealing with the human rights impacts of their overseas operations. While 49% of the respondent companies reported possessing international codes of conduct, only 32% had codes containing some of the ILO "core" labour rights,[65] and only 14% had codes containing all the core labour rights. Similarly, only 14% had any sort of provision touching on business relations with repressive regimes.[66] A 1998 KPMG survey of Canada's largest 1,000 businesses concluded that only 44% of respondents had written policies on supplier adherence to company ethical, labour and environmental standards.[67] A more recent KMPG survey contained broadly similar results, as the graph below suggests.

Percent of Canadian Companies with Overseas Codes by Topic



Relationship with National Communities

1. The Role of Corporations in Democracies

In a democracy, governments are clearly stakeholders situated somewhere in a company's sphere of influence. Companies don't vote, but they do have an acute interest in – and potentially enormous impact on – the actions of government. Governments levy taxes, regulate and confer benefits. They establish minimum wages and set environmental standards. In the last 15 years, there has been an enormous growth in Canada's lobbying industry. At the same time, we are in a period in which government, through "stakeholder consultation", brings companies into the policy-making process.

If a company is committed to social responsibility, should it query whether the legislative or policy changes it urges on the government are in the broader public interest or should it simply seek advantages that maximize its profits?

At the present time, companies are the leading donors to Canada's governing political party, as the adjoining text box suggests. Some jurisdictions are wary of corporate money in politics. The Government of Quebec bars election donations from both corporations and unions. The Government of Manitoba passed similar legislation in the summer of 2000. In 1999, the UK government accepted a proposal that will require UK companies to seek shareholder approval before making political donations. Should other jurisdictions follow suit? Should companies, or any other collective entity such as a trade union, make political donations? Are such donations appropriate in a democracy? Are they consistent with a system of one person, one vote where it is assumed that all citizens have an equal opportunity to influence government policy?
The Government of Canada, for its part, has declined to address these issues in recent amendments to the *Canada Elections Act*.

Corporate Money and Politics

In his March 11, 1888 diary entry, U.S. President Rutherford B. Hayes noted the excessive influence of moneyed interest on the legislative agenda and concluded that "[t]his is a government of the people, by the people and for the people no longer. It is a government of corporations, by corporations, and for corporations."[68] Over a hundred years later, the issue of corporate money in politics remains in the public eye. In the United States, while direct corporate donations to political parties are illegal, soft-money donations through "political action committees" are enormous. Accordingly, presidential hopeful Al Gore promised a ban on "soft money" corporate and union electoral donations. In Canada, meanwhile, the newly elected NDP government in Manitoba enacted in 2000, as one of its first Act, an amended *Elections Finances Act* providing that "[n]o person or organization other than an individual normally resident in Manitoba shall contribute to any candidate, constituency association or registered political party."[69] In so legislating, Manitoba joined Quebec as the only other Canadian jurisdiction with a law barring electoral donations from companies.

The relative lack of Canadian legislative attention to this matter does not, however, accurately reflect its scope. As the Royal Commission on Corporate Concentration noted in 1978, contributions by companies have always played a role "in sustaining the political process in Canada," one that can only increase as campaigning and communication costs increase.[70] At present, politics in Canada is awash in corporate money. In 1999, for example, of the top ten donors to the governing federal Liberal Party, eight were corporations and two were limited liability partnerships.[71] Together these donors contributed over $600,000 to Liberal coffers. All told, in 1999, the Liberals received $8,506, 809 in contributions from "businesses", a figure representing roughly 58% of the total contributions made to the party.[72]

Canadian political actors typically deny any correlation between donations and influence. While Liberal MP John Bryden has gone on record urging that companies give money "to get some return and at least general influence",[73] federal Liberal Party official Jack Siegel urges "it is overly simplistic to think that all policy decisions are decided simply by who donated the most. I wouldn't be so naive as to say that donations don't play any role at all when people get somebody's ear, but any group that simply, as a sitting government, capitulates entirely to their donors will face the wrath of the electors in the next election. And this is such a fundamentally basic point that I think very few governments go that far."[74] Don Weiss, executive director of the PC Ontario Fund, organizer of high level political fundraisers, asserts that "getting a chance to slap a politician's back [at fundraising events] doesn't mean he or she will do a favour in return."[75]

The 1991 Royal Commission on Electoral Reform and Party Financing concluded "contributors are most often motivated by a commitment to support the democratic process and the political activities that keep this process vibrant."[76] Other studies suggest company objectives are less benign. In 1997, *Business Week* / Harris conducted a poll of 400 senior company executives whose companies had made donations in US electoral contests. The survey asked companies to identify various reasons prompting them to make contributions. For 90% of company respondents in the *Business Week* survey, money was given because they had strong political views and wanted to support candidates who shared that view. The poll results also suggest that, in fact, for 92% of corporations giving money was a way of supporting the democratic process. These results dovetail with the view expressed by leading Canadian party fundraisers in the early 1990s that corporations have "social obligations to support the democratic system by making contributions that reflect the scale of their operations."[77]

More serious in its implications are the findings of the *Business Week* poll suggesting that for fully 77% of firms surveyed, a reason for giving money was to gain fair access to politicians on matters affecting their business. Meanwhile, 58% of companies gave money for fear that it they did not, they would be at a competitive disadvantage as against other firms. This latter response is consistent with comments from Canadian business leaders suggesting that that they have little choice but to attend political fundraisers: "If you are dependent on the government for legislation which can profoundly affect the way you operate, and if you are invited by a minister, you don't want to be conspicuous by your absence."[78] Most concerning were responses in the *Business Week* poll indicating that for fully 51% of corporations, getting preferential treatment in regulations or legislation beneficial to their businesses was identified as a reason for making campaign contributions.[79]

Some Canadian businesses supporting the principle of political fundraising dismiss allegations of influence purchasing by arguing that they give to all "free enterprise" parties. Yet, the table below suggests that, at least insofar as the top 10 donors to the federal Liberal party in 1999 are concerned, parity in giving is a rare exception, even to "free enterprise" parties. Overall the top ten donors gave only a fraction of the money they gave the governing Liberals to the other parties. Corporate money, in this snapshot, favours those who are actually making the laws, writing regulations and establishing tax policy. Is this any way to run a democracy?

Multi-Party Giving by Liberal's Top 10 Donors (1999)

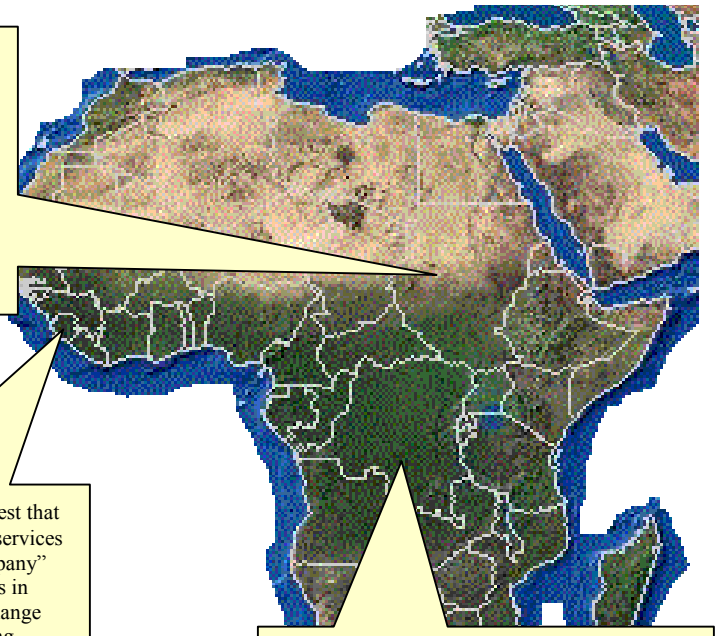
Contributor's Name	Liberals	PC	NDP	Alliance
Bank of Nova Scotia	119618.7	272	-	-
Canwest Global Communications Corporation	87172.57	-	-	-
Bombardier Inc.	63480.55	30000	2900	15852
Royal Bank of Canada	61565.3	29146	-	48271
KPMG	60910.22	5488	10000	4360
Bank of Montreal	58729.53	47799	20000	48280
SNC-Lavalin Inc.	55862	1752	-	10000
RBC Dominion Securities Inc.	54032.96	58404	784	54180
Bennett Jones	53242.76	7698	-	10608
Canadian Occidental Petroleum Ltd.	52678.2	12598	-	12208
TOTAL	667292.8	163157	33684	187907

2. The Role of Corporations in Non-Democratic or Repressive Nations

For several years, Canada has adopted an express policy of business and trade "constructive engagement" with human rights-abusing regimes. Business groups have advanced and embraced this position. In Canada, the Business Council on National Issues (BCNI), the country's foremost business lobby group, has enunciated a "constructive engagement" position, arguing that companies should engage in more business with non-democratic countries because "trade will act as a positive catalyst for change."[80] However, the behaviour of a corporation may also be a catalyst for negative development. As the discussion below suggests, there are now numerous examples of acts by companies that seem to increase human rights-abusing propensities and strengthen repressive regimes. How far does a company's "sphere of influence" extend where its presence is contributing to human rights abuses? What steps does a socially responsible company take to reduce and eliminate its negative impact? Will a responsible company withdraw from a country or project where its activities are exacerbating human rights abuses? Should a Canadian company, in all of its operations, at home and abroad be legally compelled to act in a way that is consistent with international human rights as found in the Universal Declaration of Human Rights?

Examples of Canada's Militarized Commerce

SUDAN: A Canadian government mission to Sudan in late 1999 reported that "…Sudan is a place of extraordinary suffering and continuing human rights violations, even though some forward progress can be recorded, and the oil operations in which a Canadian company is involved add more suffering." The mission found that "…the contractual obligation under which Talisman labours more or less provides that the oilfield facilities can be used for military purposes..." and that "flights clearly linked to the oil war have been a regular feature of life at the Heglig airstrip, which is…operated by the [oil] consortium".



SIERRA LEONE: 1997 reports suggest that a Canadian mining company acquired the services of the South African "private military company" (PMC) to provide security for its operations in war-ravaged Sierra Leone, possibly in exchange for certain indirect rights to diamond mining properties in that country. The unit was described in 1997 as "a collection of former spies, assassins, and crack bush guerrillas, most of whom served for fifteen to twenty years in South Africa's most notorious counter insurgency units." While the PMC is said to have "conducted itself professionally and compiled a respectable human rights record, especially relative to other African armies", other reports suggest the company's soldiers may have been indiscriminate in their use of violence.

DEMOCRATIC REPUBLIC OF CONGO: Mining firms are said to have developed close relations with state or rebel forces. Thus, a Canadian firm is reported to have paid US$80 million in cash to Kabila's rebel forces in the civil war racking then-Zaire in return for a mining concession. The loan by the company's major shareholder "of a Lear jet for Kabila's personal use during the [rebel] advance also may have helped cement the deal." Since that time, reports have emerged of atrocities committed by Kabila and the rebel forces during the 1993-1997 civil war.

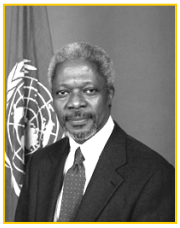
"Militarized Commerce" in Troubled Countries

Increasingly, there are examples of "complicity" by businesses that augment the human rights-abusing *activity* of a repressive regime or enhance the human rights-abusing *capacity* of that government. With respect to *repressive activity*, the mere presence of a firm may induce a regime to increase its repressive activities and engage in human rights-abusing behaviour. Thus, a regime may use repressive means to supply resources to a company by, for example, clearing people off oil-rich lands, something that is occurring in Sudan.[81] In Colombia, meanwhile, Human Rights Watch has criticized two major multinational oil consortiums for retaining the services of the Colombian military to protect their pipelines. These security forces have been implicated in massive human rights abuses, including killings, beatings and arrests.[82] In Indonesia, government army officials hired as security at a mining site on Irian Jaya have been accused of torturing and extra-judicially executing local people opposed to the mine.[83] In Nigeria, oil companies have been implicated in "the systematic suppression by Nigerian security forces of protesting local communities."[84] In Burma, Burmese forces providing security for the massive Yadana pipeline are said to have committed "violations against villagers along the pipeline route, including killings, torture, rape, displacement of entire villages, and forced labor."[85] In Chad and Cameroon, a coalition of European and African environmental groups and German parliamentarians have pointed to a "noticeable increase in human rights violations" in the region surrounding another multinational corporation pipeline project.[86] More recently, in India, Human Rights Watch has accused a US firm of being complicit in efforts by security forces to quash protest against its power project.[87]

With respect to *repressive capacity*, there are several ways in which companies augment a regime's ability to engage in human rights-abusing behaviour. First, the firm may produce products used by the regime that increase its repressive capacity. For example, two US car companies were accused of supplying apartheid-era South African security forces with vehicles.[88] Second, the firm may be a major source of revenue that increases a regime's repressive capacity. For example, the Yadana pipeline project in Burma backed by US, French and Thai companies will provide the Burmese junta with its largest source of foreign capital.[89] They are doing this in spite of the objections of Nobel Peace Prize winner Daw Aung San Suu Kyi, who was elected to lead her country but denied office by the military. In 1993, Petro-Canada International abandoned its Burmese operations, but not before facing intense criticism for having paid the Burmese regime a non-refundable $6 million cash "signing bonus" for permission to conduct oil explorations.[90] A Vancouver based company announced in November 1998 the start-up of a US$300 million copper mine in Burma, one that is jointly owned by the regime's mining company.[91] At present, Canadian oil company Talisman's operations in Sudan are expected to provide significant revenue to the repressive Sudanese government.[92] Third, as with apartheid-era South Africa, the firm may provide infrastructure in the form of roads, railways, power stations, oil refineries, or the like, that increases a regime's repressive capacity. For example, in Burma, a country where telephones and faxes are closely controlled by the government, several international telecommunications companies — including at least one Canadian firm — have supplied, directly or indirectly, telephone equipment to the military government. Human rights groups say that this technology has been monopolized by the military regime to conduct its affairs.[93] In Sudan, the government has used infrastructure built or operated by a Canadian oil company and its partners for its own purposes, including to mount attacks on civilians.[94] Finally, the presence of the firm in the country may provide international credibility to an otherwise discredited regime. For example, multinational firms in South Africa once provided moral support to the apartheid regime[95] and augmented the ranks of the pro-South Africa lobby abroad preaching tolerance for apartheid. In Nigeria, oil companies "provided both increased financial investment and a diplomatic public relations shield for the Nigerian [military] government."[96] In Afghanistan, a major US oil company concluded a pipeline agreement with the Taliban *de facto* regime and reportedly actively lobbied the US State Department to extend formal diplomatic recognition to the Taliban, despite the group's poor record on human rights.[97]

International Community

Many corporations are now key players at the international level. In the words of one observer, "[a]s liberalization has expanded business opportunities and generated global corporate networks, the bargaining balance in many societies has shifted in favor of the private sector, and in developing countries particularly to TNCs [transnational corporations]".[98] Currently, transnational corporations control 80% of the investment flowing from industrial to



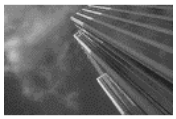
Transnational companies have been the first to benefit from globalization. They must take their share of responsibility for coping with its effects.

– Kofi Annan, UN Secretary-General

developing nations.[99] Some stress that the regulations of the World Trade Organization and the practices of the World Bank and International Monetary Fund have privileged global corporate priorities. Governments from developing nations, for example, have complained that current wording on intellectual property rights is in conflict with their human rights obligations to meet minimal health commitments to their populations. Others contend that corporate lobbying is undermining such key environmental agreements as the Kyoto agreement on climate change. Meanwhile, UN Secretary General Kofi Annan has publicly called upon the corporate sector to promote human rights, development and environmental values in their operations,[100] as set out recently in the UN's "Global Compact".[101]

How should companies conduct themselves in relation to the international community? Is it appropriate for a responsible company to engage in action or urge policies or promote an international system that augments profits at the risk of negative social, environmental and human rights consequences?

SHOULD CORPORATIONS BE SOCIALLY RESPONSIBLE?



MOST COMPANY EXECUTIVES believe that corporations should be accountable to their shareholders. Not all people agree, however, that corporations should be accountable to other stakeholders via "corporate social responsibility". In his influential essay "The Social Responsibility of Business is to Increase its Profits",[102] economist Milton Friedman argued that "there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception and fraud." More recently other voices have emerged to challenge this narrow view that profit maximization should be the exclusive corporate goal. At present, two questions are often asked: Can a corporation be both social responsible and profitable? Are corporate directors legally able to chart a path towards social responsibility?

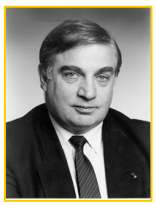
There is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game…

- Milton Friedman

Issue 1: Profiting from Principles

The Conference Board of Canada urges that Canadian companies adopting CSR "consider competitiveness and corporate social responsibility as compatible, interdependent and mutually reinforcing."[103] Matthew Barrett, when CEO of the Bank of Montreal, argued in 1996 that "corporate responsibility to shareholders and corporate responsibility to other stakeholders are not alternatives, as the debate in recent years suggests. The two are interdependent and mutually reinforcing. The more effectively a corporation fulfils one responsibility, the more effectively it is likely to fulfil the other…[T]he interests of the shareholder and other stakeholder are more than ever converging, and what is good for the customer, the employee and the community is more and more often good for the bottom line."[104] The Toronto Stock Exchange, in what is known as the "Dey Report" made a similar point: "In making decisions to enhance shareholder value the board must take into account the interests of other stakeholders. In today's environment it is difficult for a corporation to prosper if it is not 'on side' with all of its stakeholders."[105]

At an abstract level, to the extent that corporate social responsibility "serves to strengthen the fabric of society, it indirectly improves the corporate environment and the health of the companies operating within it."[106] Further, it is now frequently argued that a company's CSR record has an impact on the bottom line through its effect on the company's "reputational capital".[107] As one observer puts it "[c]ompanies that can demonstrate social responsibility through their reports or disclosures will certainly gain recognition and a favourable reputation in the long term. This reputation, once established, will lead to benefits such as positive employee relations, easier access to credit, products being perceived as reliable, and customer and supplier loyalty. Corporate behaviour



Some in business say 'Why should business stand up and lecture Governments on human rights: Our business is to look after shareholders.' Well, I don't believe that business should stand up and lecture governments on human rights. But I also believe that it is part of building good sustainable businesses to help establish safe, secure, stable and peaceful societies. Business thrives where society thrives.

— Peter Sutherland, former Director-General of the GATT, Chairman, Goldman Sachs International

will become inevitably linked to product image, so that a company's social identity will be as important as its brand identity."[108] In the words of another researcher, "[f]irms that produce superior quality products, use truthful advertising, act in a socially and environmentally responsible manner, and have a history of fulfilling their obligations to various stakeholder groups are creating reputational advantage."[109] Studies suggest that there is an empirical connection between reputation/goodwill and firm market value.[110] Investors, it is said, "are more willing to trust their investments with firms that enjoy superior reputations due to lower perceived risks and potentially enhanced marketing opportunities."[111] The Conference Board of Canada emphasizes that "[r]eputation is fast becoming recognized as a dynamic corporate asset affecting firm performance."[112] Similarly, as Matthew Barrett has pointed out, "[t]he community's perception can affect the bottom line."[113] Given these comments, it is not surprising that a survey of Canada's l,000 largest firms released by KPMG in 1999 concluded that the single most important impetus driving companies to invest resources in ethics was protection or enhancement of reputation.[114]

With regard to consumer relations some observers contend that, "public attention to such issues as the use of prison labor in products exported to the United States is making human rights a 'bottom line' concern for multinational companies."[116] Surveys in the United States suggest that a sizeable majority of Americans say they prefer to buy from a retailer they know is not sourcing products or materials from sweatshops.[117] In Canada, a 1998 CROP survey commissioned by Toronto-based Ideation Conferences revealed that a majority of Canadians say they consider conditions of production when buying consumer goods. Further, a majority of Canadians report that they are prepared to pay higher prices for ethically produced products. In fact, given a choice between two products of equivalent price, almost a 1/3 of Canadians have indicated that they would prefer to purchase a product made by a human rights-respecting US company over a product simply produced by a Canadian company. Meanwhile, a 1999 UK survey found that 41% of the British public chooses products and services based on corporate moral values.[118] Another 1999 survey of 4,000 residents of France, Germany, Italy, and the UK showed that 86% of people preferred to purchase products from socially minded companies, while 9 out of every 10 respondents expected companies to employ some of their resources to solve social ills such as unemployment, health issues, and poverty.[119]

Does the public think companies are responsible?

Polls in the mid-1990s suggested fully 45% of Canadians surveyed felt that "large corporations have become less responsible in the past few years."[115] A 1998 survey commissioned by Ideation Conferences found that half of Canadians felt that only a minority of companies observe human rights in their international operations.

Given these figures, it is no surprise that a recent study from the UK suggested that customer loyalty "can be generated and maintained not just by monetary rewards but by a more general appreciation of what the company is doing and how it operates - how good a 'corporate citizen' it is" and that "being a 'good citizen' is good for commercial success."[120] And employees, too, are motivated by corporate responsibility. A 1997 study found "evidence that … the employees' perception of corporate

As we move into the 21st century, it is increasingly clear that the key elements of social responsibility – especially how we support our workers, their lives and their communities – will be key elements in a company's productivity and competitiveness.

— Michael Bonsignore, CEO, Honeywell

image… influence both their job satisfaction and their intentions to leave the organization… If the employee views the company to be lowly regarded by external groups..., he/she has lower job satisfaction and a higher probability of leaving. …The costs of turnover, especially of good performers, is known to be high… Therefore, corporate actions taken relative to the social environmental can have direct effects on the economic well-being of the organization through their impact on the organizational members."[121]

Other studies posit a positive correlation between social responsibility and financial success, though it is often unclear whether ethical behaviour engenders economic performance or vice versa. Particularly notable in this regard are several studies that have examined the effects of corporate ethical behaviour on stock prices. Though studies conducted before 1989 were inconclusive and subject to possible methodological problems, more recent data suggest that corporate social performance and stock prices are positively correlated.[122] A 1997 study found "overwhelming evidence of a positive relationship between social and financial performance indicators in a sample of large and important U.S. corporations." In terms of causality, the authors concluded that "financial performance either precedes or is contemporaneous with social performance."[123] On the other hand, another 1997 study found that "shareholder wealth is decreased when firms act in a socially irresponsible or illegal manner" and that "acting in a socially responsible and law-abiding manner can be seen as a necessary (though not sufficient) condition for increasing shareholder wealth, all other things equal."[124]

Most socially responsible investment mutual funds and indexes in North America perform as well or better than the average level of performance for mutual funds and indexes as a whole.[125] For example, for much of the last decade the Domini Social Index (DSI) – a US index fund of 400 socially screened stocks – performed as well or better than the conventional Standard & Poor index. In 1999, the Domini Social Index gained 24.49%, while the S&P 500 gained 21.01%. The DSI companies have gained, on average, 2% more over ten years then have S&P companies.[126] In Canada, the new Jantzi Social Index – a socially screened index of 60 Canadian companies – gained 17.32% from the time of its inception in January 2000 to July 2000, a performance far surpassing the 10.14% gain of the TSE 300. As one analyst put it, "[w]hile past performance is no guarantee of future results, the consistently strong performance of screened funds and indexes over the past decade is likely to continue into the next."[127]

Many studies of corporate profitability also show a positive correlation between profits and social responsibility. In one study, researchers examining the financial performance of the best and worst corporate citizens as determined by the US Council on Economic Priorities "found a clear link between long-term profitability and social performance in five categories: environment, advancement of women, advancement of minorities, charitable giving and community action."[128] In a study of the performance of Canadian firms between 1976 and 1986, researchers found that "[a]verage or above-average economic performance, in an industry group over several years, is related to the integration of social, ethical and discretionary responsibilities and goals with the strategic

planning of the company. To be socially responsible is to be ethically responsible and profitable."[129]

There is little in Canadian corporations law to encourage the leadership of a healthy company to focus on the interests of constituencies other than shareholders.

– Laurence D. Hebb, Osler, Hoskin & Harcourt[130]

In sum, substantial evidence exists suggesting that ethics and corporate social responsibility do not hurt the bottom line. In fact, there is fairly compelling evidence suggesting that CSR is good for business. But will all businesses benefit equally from CSR? Does investment in CSR by a small, junior mining company produce the same dividend as investment by a name-brand, image-sensitive shoe manufacturer? If there were an exact, automatic causal link between CSR and profits, would it not be more commonplace? Or is it simply that the payoffs flowing from CSR are long-term, far removed from the radar screens of businesses operating in an economy and market obsessed with short-term profitability?

Issue 2: The Law's Narrow Compass

As one observer puts it, "[t]he corporation is a unique fiction that is ostensibly locked into a profit motivation. Unlike businesses run by private individuals none of the participants involved in a corporations may take responsibility for deviating from that motivation. By way of broad generalization, shareholders may not interfere with business operations except on the grounds of a detrimental impact upon their economic interests. Managers may not use their powers for purposes other than the profit interest of the company qua the shareholders."[134] In fact, as the discussion below suggests, the historic tendency in common law jurisdictions has been for courts to penalize those public corporations that favour social objectives over the maximization of returns for shareholders. After all, corporate managers have been entrusted with shareholder money for only one purpose: to make profit. Who are they to divert other people's resources into social responsibility?

The law in Canada as it stands at present is not definitive. It is certainly

Fiduciary Duty and Corporate Social Responsibility at Common Law

In a U.S. case from the turn of the century still taught in Canadian law schools, the Ford Motor Company was sued by a shareholder for its decision to expand its operations — and number of employees — in lieu of paying its available capital out to shareholders as dividends. The plaintiff argued that Ford's decision was motivated, not by business concerns, but by its desire "to employ still more men to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes." While the court declined to reverse management's decision and was unconvinced that Ford's actions could be attributed to a desire to establish itself as a quasi-charitable organization, rather than as a forward-looking business enterprise, it held that "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or the non-distribution of profits among stockholders in order to devote them to other purposes."[131]

More recent cases seem to have mitigated this rigid view. As a general rule, courts in common law jurisdictions appear to be prepared to endorse social responsibility initiatives where they can envisage benefits — whether long-term or short-term — flowing to the shareholders. This position was stated explicitly in the recent US case of *Revlon Inc. v. MacAndrews & Forbes Holdings Inc.*.[132] In deciding whose interests directors could consider in assessing a corporate take-over bid, the Delaware court held that a "board may have regard for various constituencies in discharging its responsibilities provided there are rationally related benefits accruing to the stockholders."[133]

clear, at least, that there is no legal obligation for a company to be socially responsible. As was noted by Mr. Justice Freedman in the 1964 Report of the Industrial Inquiry Commission on Canadian National Railways "Run-Through", there is "no basis in law, in the absence of express contract or government regulation, for imposing responsibility on a company towards a community. A company is not obliged to remain in town or to continue an uneconomic operation there. It has the right to leave, or to alter or reduce the nature of its activity there. The result of its action may be to prejudice the interests of a community or even to imperil its future, but the company would in no way be answerable."[135]

On the other hand, if directors were to *choose* to consider the interests of the local community in making a decision to relocate, would they be violating their fiduciary duties? While directors have a fiduciary duty to manage a company in its "best interest", as lawyer Laurence Hebb has noted, "[t]here is little guidance in the CBCA as to how a company's 'best interests' should be determined. There are no references to stakeholders, or to the need or desirability to balance the interests of non-shareholder stakeholders against those of shareholders. Are the corporate decision makers on strong legal grounds in trying to balance such interests effectively? If so, who precisely are the other stakeholders whose interests should be taken into account?"[136] In other words, if a corporate director pursues a course of action that, while socially responsible, does not immediately translate into profits, does he or she breach their fiduciary duty?

These questions remain unanswered in Canada. The case often cited to support arguments that directors can consider non-shareholder interests is the 1973 decision of the British Columbia Supreme Court in *Teck Corporation Limited v. Millar*.[137] Here, the court was asked to decide whether a director could be rendered accountable to a key shareholder for his failure to stall a deal that the shareholder wished delayed. The court agreed that where directors act in good faith and have reasonable grounds to believe that their actions are in the best interest of the corporation, their actions should not be viewed as improper. Further, urged Mr. Justice Berger, the classical notion that the directors must consider the interests of the corporation to be those only of the shareholders as a whole,

> …must yield to the facts of modern life...If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders...I appreciate that it would be a breach of their duty as directors to disregard entirely the interests of a company's shareholders in order to confer benefit on its employees...But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.

While Canada lags behind, other jurisdictions have used legislation to correct the ambiguity surrounding the precise scope of fiduciary duty. In the UK, directors of a company incorporated under the

Going Beyond Constituency Statutes: The Corporate Democracy Act of 1980, H.R. 7010, 96th Congress, 2d Session

This Bill, had it been passed by the US Congress, would have required large corporations operating in the United States to have a majority of independent directors on its board. An "independent director" was defined as excluding any person related to the corporation through an affiliate, a director, officer or managing agent, a law firm, a bank, or a supplier or customer. The Bill would have prohibited any person from serving as a director or officer for more than two corporations subject to this Act. Each corporation subject to the Act would have been obliged to publish an annual report containing specified information, including on the diversity of its employees, its compliance with environmental requirements, its largest shareholders, its operations and their location in the world, and its political activities. Further, each corporation that changed its operations in a manner disrupting the employment of more than 500 individuals would have been obliged to give advance notice of the change to the Secretary of Labor. The Secretary would them have conducted an investigation of the change upon request of a labour union representative or ten percent of the employees involved and published a report with recommendations for minimizing the economic and social dislocation resulting from the change. Corporations would also have been obliged to give specified assistance to employees and local governments affected by a change in operations, with employees being granted a right to equitable relief for failure to comply with these requirements.

Companies Act must, as part of their duties to the company, have regard to the interests of not only shareholders, but also employees, in their business decisions. Similarly, in the United States, thirty states have introduced "non-shareholder constituency statutes" or amendments to existing incorporation laws that "explicitly permit directors to consider the effects of their decisions on a variety of non-shareholder interests."[138] While they remain largely uninterpreted by the courts,[139] these laws usually extend to all operations of the corporation and define "constituency" groups as including employees, suppliers, customers, creditors, and local communities in which the corporation operates.

Most of these laws are only permissive: directors "may" take the interests of these parties into account, but need not do so. In other words, these statutes do not create a fiduciary relationship between directors and stakeholders. As a consequence, constituency groups likely do "not have standing under these statutes to seek judicial review of a director's decision."[140] Perhaps as a consequence, a recent review of court cases involving constituency statutes concluded "concerns about the increased discretion afforded directors by constituency statutes, which release directors from liability for decisions which take constituency interests into account, have been unfounded."[141]

While the non-shareholder constituency laws in the United States do represent a break with the orthodox view restricting corporations to confine themselves to managing profits, the laws do not oblige corporations to act in socially responsible fashions[142] and the record of these statutes in promoting CSR is disappointing. As one observer puts it, "[c]onstituency statutes are red herrings…[T]hey have been developed and invoked by corporate directors successfully as an anti-takeover mechanism. Although it is true that preventing takeovers may ultimately benefit constituency groups by forestalling plant closures, the fact that these statutes are invoked by directors casually, perhaps sometimes even cynically, does little to advance the case for

consideration of constituent interests in corporate law. On some level, constituency statutes may be seen to detract attention from the need for changes in corporate law that will more effectively address the needs and rights, of employees and other constituent groups."[143]

Given this discussion, how does one solve the potential contradictions between fiduciary duty and corporate social responsibility? Would non-shareholder constituency laws be appropriate for Canada? If so, how could the US experience be improved upon?

On the other hand, perhaps this discussion of fiduciary duty and CSR is itself a red herring, drawing a false dichotomy between profit generation and CSR. If the evidence marshalled above concerning the link between CSR and business success is correct, does it not justify management acting in a socially responsible fashion, even where one labours under the strictures of the narrowest conception of fiduciary duty?

Amendment to the CBCA proposed by the Canadian Centre for Ethics and Corporate Policy:

> Subject to subsection 122(1), in discharging his or her duties pursuant to this Act, every director or officer of the corporation may (but shall not be required to) give consideration to the interests of those who are affected by the corporation's actions (including the corporation's customers, employees, lenders, suppliers and communities in which it operates) in assessing any action or proposed action of the corporation. This provision does not create ant duty of any director or officer to any person and shall not give rise to any cause of action against any director or officer

Impeding Ethical Shareholding

The fiduciary duty concept assumes that where directors fail to pursue profits, they act in a fashion contrary to the interests of shareholders. But, with the rise of ethical investment, a new class of shareholder has emerged, one that is concerned with more than the immediate bottom line. Are these ethical shareholders in a position to influence the actions of the company? Under the *Canada Business Corporations Act* (CBCA), directors manage the affairs of the corporation. As a consequence, shareholders cannot directly impose their views on management. They cannot micro-manage the affairs of the corporation. However, they are in a position to affect indirectly the operations of the corporation through their voting power. Beyond voting for or against directors, the most effective tool that shareholders have in their toolkit is something called the shareholder proposal. The proposal process gives shareholders a limited right to add items to the agenda of annual meetings. For federal corporations, this process is governed by s.137 of the CBCA. Under the CBCA, any shareholder entitled to vote may submit to the corporation notice of any matter s/he wishes to discuss and have voted on at the annual general meeting (AGM). If and when management accepts a proposal, it is then voted upon at the AGM. These proposals are usually unsuccessful. However, proposals are often an excellent way of raising issues that would otherwise be overlooked.

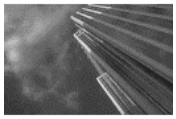
Unfortunately, the CBCA strongly inhibits shareholder abilities to bring forward proposals that might deal with corporate social responsibility. Section 137 of the CBCA allows management to reject proposals on a number of grounds. Most important from the social responsibility perspective: the proposal can be rejected where it clearly appears (to management) that the proposal is being submitted primarily for the purposes of promoting general economic, political, racial, religious, social or similar causes. These terms provide enormous discretion to management to exclude shareholder proposals dealing with social responsibility matters. In fact, the section effectively bars shareholders from expressing concern on social responsibility issues unless the proposal is strongly couched in language dealing with more traditional business matters. Even then, nothing stops management from abusing the section to avoid proposals questioning the business impacts of corporate irresponsibility.

If management decides to reject a proposal on one or more or these grounds, the corporation must notify the shareholder within 10 days of receipt of the proposal, and include reasons. If the shareholder is unhappy with this decision, he or she may go to court and apply to have the AGM delayed. In other words, if management excludes a proposal, the only recourse a shareholder has is to an expensive and time-consuming court challenge.

Companies often do not hesitate in rejecting proposals, including those relating to human rights matters. In February 1999, 11 churches and religious orders from Canada and the US submitted shareholder proposals to Talisman Energy. This proposal asked the Board to assure shareholders that the company was not materially aiding the Sudanese government in the civil war in that country nor in its repeated violations of internationally accepted standards of human rights. The company was also asked to prepare an independently verified report of its compliance with this commitment. On February 2, 1999, Talisman rejected the proposal on two grounds. One of these grounds was an allegation that the proposal clearly appeared to be submitted primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes, despite the clear business implications of operating in the midst of a civil war.

Amendments to the CBCA introduced as Bill S-19 in Spring 2000 tinker slightly with this exclusion, probably making it slightly less restrictive. However, the Bill also introduces new impediments on shareholder proposals, including requiring shareholders to have a minimum number of shares and hold those shares for a minimum period of time before being allowed to submit a proposal. Bill S-19 died on the order paper in the Fall of 2000. It remains to be seen how its replacement will deal with this issue.

HOW CAN CORPORATIONS BE MADE ACCOUNTABLE?

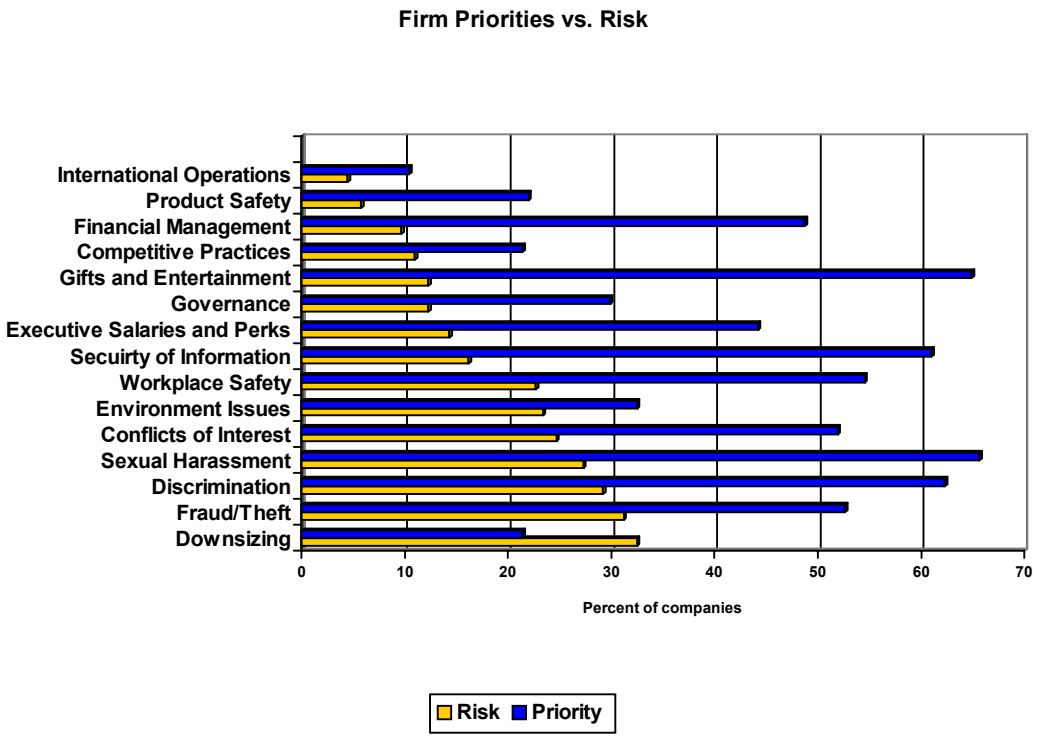


AS NOTED ABOVE, corporate law includes several remedies open to shareholders who feel management has abused its powers. Yet, as is evident from the discussion thus far, there are often few formal legal requirements obliging companies to be accountable to other stakeholders. How does a corporation, comprising scores, if not thousands of employees, create a culture of stakeholder accountability? How can the company and its stakeholders measure the company's performance? Companies urge that they can meet these standards voluntarily, often through codes of conduct.

Codes of Conduct

"Voluntary" codes of conduct pledging companies to meet a dizzying array of accountability standards have proliferated enormously in the last decade. Some estimates suggesting that upwards of 85% of large US companies have codes of some sort.[144] The proportion of corporations in Canada that have some sort of corporate code of conduct is also high. Accounting firm KPMG, in a report published in 2000, found that 86.4% of respondents in a survey of Canada's largest 1,000 companies "have a document that outlines their values and principles."[145] However, many of these codes deal with a limited range of issues. A 1996 study of US and Canadian codes concluded that the focus of these documents was on conduct committed against the firm, rather than on corporation social responsibility.[146] Similarly, a 1998 KPMG survey of Canada's largest 1,000 companies found that the "areas more frequently addressed [in written codes] tend to deal with misconduct that has a direct impact on the company's interests, or for which the company faces legal exposure. The areas less frequently addressed tend to deal with misconduct directed at the company's external stakeholders, and competitors."[147]

In its more recent survey released in 2000, KPMG found that company priorities in terms of code content were in such areas as sexual harassment, discrimination, security of information, workplace safety, conflicts of interest, financial management, gifts and entertainment and fraud and theft. Less important for Canadian companies were such issues as employee and client privacy, environmental issues, product safety, governance, international operations, downsizing, competitive practices and executive salaries and perks. Notably, as the graph below suggests, these priorities are more or less consistent with companies' rankings of "ethical risks" faced by the company, as manifested in the form of lawsuit, media coverage or a "significant problem". The areas where there is little correlation between "ethical risk" and priorities are financial management, gifts and entertainment, environmental issues and downsizing. The first two are clearly areas in which the company has an immediate financial interest in overseeing, irrespective of any external risk. On the other hand, the relatively low priority placed on downsizing and environment, despite



what is regarded by companies as significant risk, is difficult to explain.

At present, there is a sharp debate regarding the effectiveness of codes. Many critics contend that corporations only introduce and abide by these codes where there are external pressures inducing them to do so. A 1998 study examining US codes indicated that "during the period 1960 to 1994, many of the Fortune 1000 companies have voluntarily enacted corporate codes of conduct, and...this activity coincides with the growth in regulatory, prosecutorial, and judicial incentives for corporate self-regulation during this period."[148] A March 1998 report from Canada's department of industry noted that

> [w]hile codes are voluntary — firms are not legislatively required to develop or adhere to them — the term 'voluntary' is something of a misnomer. Voluntary codes are usually a response to the real or perceived threat of a new law, regulation or trade sanctions, competitive pressures or opportunities, or consumer and other market or public pressures...[O]nce the code is in place, the initial pressure that led to its creation may dissipate, which could cause compliance among adherents to taper off.[149]

The 1998 Industry Canada study urged that "voluntary codes that are well designed and properly implemented can help achieve public-interest goals...However, a code that is poorly designed, improperly implemented, or used in inappropriate circumstances, can actually harm both its proponents and the public."[150] As noted by other observers, a code of conduct "is not a corporate compliance program — it is only part of it, and maybe not even the more important part of a corporate compliance program."[151] As a consequence, "the existence of a formal written corporate code of conduct is evidence that a company has begun a process of instituting a self-regulation program, but it is not conclusive evidence that the process

has been completed or that it is effective."[152]

Voluntary regulation can do a great deal to promote better practice, but the worst offences will only ever be prevented through national and international laws and binding rules.

- European Rapporteur on European companies operating in developing countries[154]

These findings raise serious questions about voluntarism and corporate social responsibility. If codes are successful to the extent that the external pressures are strong, then will the development and effective implementation of codes continue to be dependent on the glare of publicity and disproportionately affect companies with a image and reputation to protect? Will maintaining and broadening the spotlight on the multitude of companies, and ensuring adherence to codes, tax the limited resources of consumer, human rights, environmental and other groups, effectively rendering many companies immune from scrutiny? Further, given the present preoccupation with corporate codes of conduct, will a focus on such voluntary measures take pressure off governments to work towards more systematic means of ensuring corporate social responsibility, including new regulatory measures?

As a director of a large public corporation I am acutely aware of how these guidelines for ethical behaviour work. When Board members are uneasy about some foreign investment, their concerns are fairly easily contained by a reassuring legal document which uses lofty language to ensure that people in foreign lands will not be hurt by what the corporation does. Ninety percent of all Fortune 500 companies now have these codes of conduct, but for the most part these are only worthy statements of principles with which the corporations can assure the public of its good intentions. They are also handy when things go wrong because at least they show the corporation intended to be decent. For the most part they are weak documents which never go as far to protect people and the environment in other countries as do the laws in the home country of the corporation. They are also generally documents which are not enforced, except when a major scandal erupts and the corporation needs some damage control. Ensuring they are enforced requires inordinate pressure in board rooms and in shareholder meetings, pressure which requires a great deal of effort for relatively little effect.

– Majorie Griffen Cohen, Professor, Simon Fraser University, director, BC Hydro.[153]

A recent study of eight major Canadian companies by the Taskforce on the Churches and Corporate Responsibility makes some instructive comments relating to these questions:

> The voluntary adoption of social and environmental responsibility practices varies so widely among the corporations studied that the effectiveness of voluntary codes of company conduct, as a mechanism which leads to higher levels of corporate responsibility, is put in question. As a form of voluntary or non-regulatory initiatives, self-regulated codes of conduct, while perhaps necessary, are inadequate if left as the only accountability instrument for social and environmental considerations. Their effectiveness as an alternative to state regulation needs to be better demonstrated.[155]

Inducing Corporate Codes of Conduct

Proposals for conditioning corporate access to government benefits on adequate codes of conduct and overseas practices have been made in Canada. In 1998, the Standing Senate Committee on Foreign Affairs recommended that "[i]n order to ensure that Canadian public funds are being spent in a manner that complements Canadian values, the provision of federal assistance to support commercial activity should be made conditional on adherence to the minimum international standard for human rights."[156] In this regard, the Standing Committee cited with approval a recommendation that "[l]aws should be promulgated (a) conditioning government procurement on adherence by firms to...core labor rights in their overseas operations; (b) conditioning financial and investment support contributions by government agencies, including the Export Development Corporation and CIDA [Canadian International Development Agency], on adherence by firms to...core labor rights in their overseas operations; and (c) requiring that adherence to these [standards] be assessed with reference to independently audited reports.[157] The government has thusfar rejected any efforts to impose a formal human rights screen on financial support extended to companies by the government-owned Export Development Corporation[158] and has not moved on any of the other proposals noted by the Senate, even though doing so would, in the words of the Committee, "mesh well" with the government's endorsement of voluntary codes of conduct.

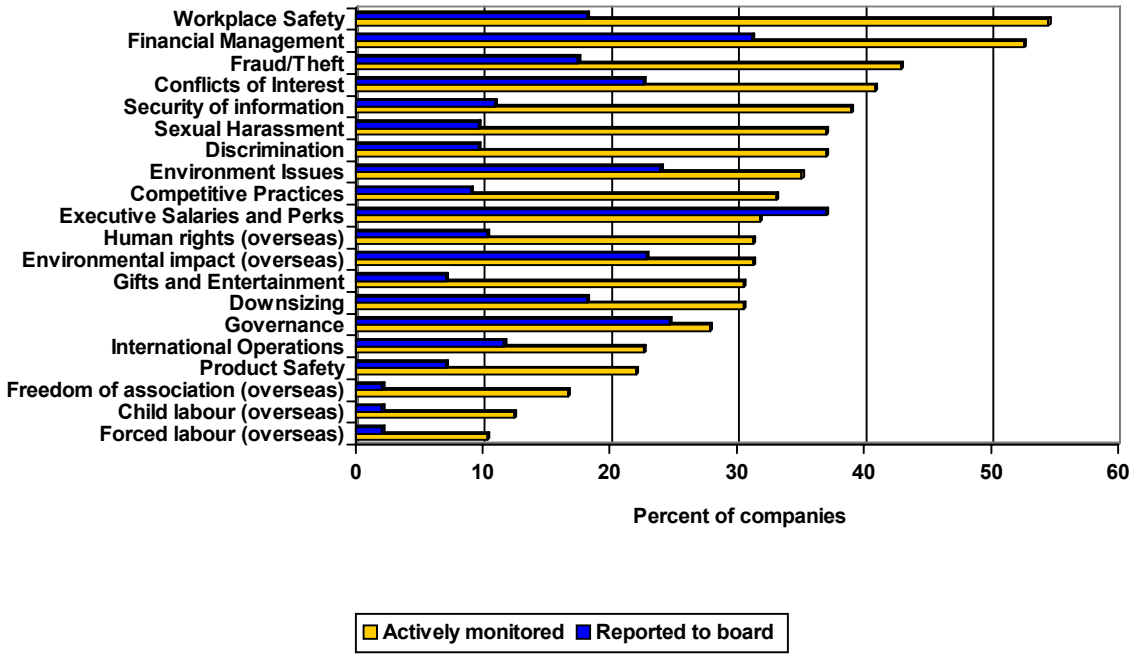
Meanwhile, in the United States, a Bill introduced in 2000 in the US House of Representatives would make international codes mandatory for all U.S.-based corporations with more than 20 employees. Bill H.R. 4596 would oblige these companies to enact a code of conduct that would apply to the companies' own operations, as well as those of subsidiaries, subcontractors, affiliates, joint ventures, partners, or licensees. The code would pledge companies to respect identified international labour standards, adhere to both international environmental standards and U.S. federal environmental laws and regulations and disclose information on their overseas practices. Notably, the U.S. government would be required to give preference to complying corporations in contracts and in export assistance. Further, victims of violations of the bill – including non-U.S. citizens — would be given standing to sue U.S. companies in U.S. courts.

Measuring and Monitoring Performance

As one business person has put it, "[a] compliance policy that is not monitored and enforced isn't worth the paper it's written on. By contrast, many companies that have no formal compliance policy routinely perform to a very high standard. So in our view, the issue isn't what your policy is, it's what standards you apply."[159] KPMG, in its 2000 survey, makes a similar observation: "the effectiveness of ethics initiatives can be enhanced by…regularly evaluating the organization's ethical performance."[160] Yet, only 26.6% of the survey respondents had undertaken a formal evaluation of their organizational culture as it related to ethics. An even smaller group – 14.4% — had reviewed their ethical performance to date. In KPMG's words, this is "a surprisingly low rate if organizations wish to effectively manage their ethical risks and know if their initiatives are successful in enhancing ethics in the workplace."[161] Further, as the graph that follows suggests, firms may be much more likely to review individual issues that expose them to liability or have a more readily apparent impact on their bottom line.

The low priority apparently placed by Canadian companies on monitoring may stem, at least in part, from difficulties in actually measuring responsibility. If corporate social responsibility is an amorphous concept for which there is no common definition, how can it be assessed?

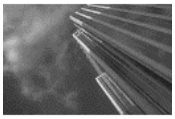
Monitoring Ethics: Company Monitoring of Select Issues



As one observer puts it "[t]he lack of generally accepted categories of social and economic impacts – much less generally accepted indicators of such impacts – leaves the quest for standardized reporting in its earliest stages."[162] A number of new initiatives designed to alleviate this problem have emerged in the last several years, including various ISO standards in the environmental area. A newer system, the Global Reporting Initiative (GRI), aims to "elevate sustainability reporting to a level equivalent to that of standard financial reporting in terms of comparability, auditability, and generally accepted practices".[163] Another standard, the AccountAbility 1000, seeks to "support organizational learning and overall performance – social and ethical, environmental and economic – and hence organizations' contributions towards a path of sustainable development. It seeks to achieve its aim through improving the quality of social and ethical accounting, auditing and reporting."[164]

Given these developments, how can such auditing systems be integrated into measures of corporate performance? In 1995, the Toronto Stock Exchange introduced new rules requiring TSE listed companies to disclose their corporate governance practices and indicate the extent to which these practices fail to conform to TSE guidelines. As one observer has noted, "[t]his approach could be readily adopted for use in the corporate social responsibility context."[165] Obliging corporations to disclose the extent to which they comply with a comprehensive set of guidelines, such as the Taskforce on the Churches and Corporate Responsibility "Benchmarks", or to meet Global Reporting Initiative standards would likely go a long way in prompting CSR in the marketplace.

WHERE DO WE GO FROM HERE? SOME KEY ISSUES.



THIS BRIEF REVIEW of "corporate accountability" suggests that with few exceptions corporations are insufficiently accountable to stakeholders. Indeed, given limitations in disclosure and restrictions in the shareholder proposal process, corporations are insufficiently accountable even to their shareholders. Adherence to appropriate standards of corporate social responsibility is comparatively rare, and all indicators suggest that the prospect of voluntary compliance with such standards remains remote. Where do we go from here? It seems likely that rendering corporations accountable will necessitate a variety of changes to the way in which business is conducted. Such shifts require leadership and vision on the part of business leaders. But it is probable that we also need changes in law and policy that acknowledge the importance of accountability and facilitate efforts to create the accountable corporation. Some groups have proposed such amendments. Here are questions reflecting some of their proposals. They are intended to serve as the starting points for discussion:

1. Information is the currency of democracy: *In order to facilitate tracking of corporate activities in all areas of concern to stakeholders, should corporations be obliged to disclose detailed information about their records of compliance with labour, environmental, human rights, consumer, health and safety, criminal, competition and tax laws or policies? Should governments set up easily accessible databases containing the information? Should staff or management who disclose information a corporation is required to disclose, but has failed to do so, or who report violations of legal requirements by a corporation, be protected from retaliation by the corporation? Should independent "social audits" be legally required?*

Can a Company Change? What moves Corporate Canada

In its survey of Canada's 1,000 largest companies released in 1999, KPMG asked what factors companies thought might influence ethical behaviour. The most important motivators were executive leadership, personal commitment to ethical principles, organizational culture, and the example set by immediate supervisors. When asked how well different types of initiatives served to promote ethical conduct and avoid misconduct, training was named as the most important. Yet, a subsequent 2000 KPMG survey revealed that 61% of respondent companies have no ethics training. And the majority of those that did do training provided less than 4 hours of instruction a year.

2. Making social responsibility and stakeholder considerations part of business: *To guarantee that directors do not run afoul of fiduciary duties in responding to socially responsible imperatives, should corporate laws be amended to permit or explicitly require directors to consider non-shareholder stakeholder interests in making decisions?*

Should provisions in corporate laws preventing or inhibiting shareholders from raising corporate

social responsibility issues with companies, via shareholder proposals or otherwise, be eliminated?

Should the so-called "oppression" remedy presently found in corporate laws and available to shareholders, directors and, to an extent, creditors who feel their interests have been improperly disregarded by management be expanded to permit access to these remedies by other stakeholders beyond shareholders, creditors or directors, thereby providing stakeholders with access to court review of corporate decisions?

3. Encouraging responsible behaviour at home and abroad: *(a) The Ontario Business Corporations Act specifies that a corporation may be dissolved by the relevant government official for a conviction of the corporation under the Criminal Code, any other federal statute or a provincial offence, in circumstances where the dissolution would be in the public interest. Should this power be included in other corporate laws?*

(b) Should corporations and other suppliers of goods and services to the Government who violate labour, environmental, human rights, consumer, health and safety, criminal, competition and tax laws and policies be prohibited for a specific period of time (e.g. 5-10 years) from receiving grants or contracts from the Government? Should access to these government benefits also be made conditional on adequate corporate responsibility in a company's overseas activities?

4. Corporate democracy: *Proposals exist calling for laws obliging corporations, in their shareholder mail outs, to include pamphlets inviting individual shareholders to join an association of individual shareholders by paying a nominal annual membership fee. The association would be directed by a board elected by members of the association, and would provide centralized expertise and assistance on shareholder rights issues. Requiring corporations to distribute such a pamphlet would be a very low-cost, effective way of helping individual shareholders band together across Canada. Such collective action by shareholders remains a difficult challenge that presently plagues many attempts by individual shareholders to defend their rights. Should these changes be made?*

Should corporate laws be amended to require that corporate boards include a sufficient number of "independent" directors – persons with a more arms length relationship to the company? Should corporate laws oblige boards to assign responsibility for stakeholder relations to one or more board members or committees of the board?

5. Electoral Democracy and the Corporation: *Should Canada's electoral laws be amended to prohibit donations from corporations or other collective entities such as trade unions to political parties, MPs, riding associations and candidates for public office? Should rules be introduced barring corporations from reimbursing directors, managers, shareholders or others who make political donations?*

6. The Globalized Economy: *Can these changes be made to Canadian law and policy without jeopardizing Canadian competitiveness? Can they be made unilaterally or must there be multilateral change? If there is insufficient competitive advantage to accountability at present in the unregulated global market, what changes should be made to the system of global commerce such as the World Trade Organization to render it advantageous to be responsible? On the other hand, must responsibility be uncompetitive? More concretely, would, in fact, changes that increase Canadian corporate transparency and enhance the ethical reputation of Canadian firms represent a competitive disadvantage in the globalized economy?*

These and other questions will be pursued in the series of public and private consultations that will take place across Canada during the next six months. The Commission plans to meet as many Canadians as possible during this period. All comments and proposals pertinent to the document's theme of corporate accountability and Canadian democracy will be welcomed. Following the consultation process, the commissioners will produce a final report.

Endnotes

[1] *Daishowa v. Friends of the Lubicon*, (1996) 27 O.R. (3d) 316 (Ont. Div.Ct.)

[2] *Daishowa v. Friends of the Lubicon*, (1998) 39 O.R. (3d) 620.

[3] Claudia Cattaneo, "Lingering 'Sudan effect' likely to tarnish Talisman," *National Post* (February 24, 2000).

[4] Tamsin Carlisle, "Calgary Oil Firm Talisman Pays Painful Price for Sudan Investment," *The Wall Street Journal* (August 17, 2000).

[5] Summary of the survey on the internet at www.environics.net/eil/millennium/ ; at 06/14/00.

[6] Jane Lampman, "Battle against oppression abroad turns to Wall Street," *The Christian Science Monitor*, March 3, 2000: "Despite Ottawa's reticence to take more concrete steps, the private divestment campaign is leaving its mark on Talisman Energy, which owns 25 percent of the venture. Several major pension funds - including New Jersey and California state funds and the Texas Teachers Retirement Fund - have already pulled money out of the company. Talisman officials said last week the company would have to buy back as much as $ 247 million worth of its shares in the next year to help shore up the plummeting stock."

[7] Andrew Nikiforuk, "Oil patch pariah," *Canadian Business,* December 10, 1999

[8] Gary Park, "Despite Defections, Talisman Stands Firm," *Platt's Oilgram News*, January 10, 2000

[9] Claudia Cattaneo, "Talisman shaken as Ottawa talks sanctions: Sudan civil war: Pension funds keep eye on 'disturbing' situation," *The National Post*, October 27, 1999.

[10] Colin Nickerson, "Canadian Oil Company Finds Opposition In The Pipeline," *The Boston Globe*, November 21, 1999

[11] "Sanctions For Calgary Firm? Investors, U.S. Government Not Charmed By Talisman," *The Edmonton Sun*, February 17, 2000

[12] Ian McKinnon, "Talisman boss takes sanctions in stride: Predicts share recovery," *National Post*, February 18, 2000.

[13] Sydney Sharp, "Politics Edge out Sudan slap," *The Calgary Sun*, February 17, 2000

[14] Market Explorers Poll, at www.conferenceboard.ca/ccbc/knowledge-areas/csr/csr_week.htm; at 06/23/00.

[15] British Broadcasting Service, *The Economy: Support for business at 30-year low* (Feb. 22, 1999), at news.bbc.co.uk/hi/english/business/the_economy/newsid_283000/283873.stm; at 06/22/00.

[16] Panel on Accountability and Governance in the Voluntary Sector, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (February 1999).

[17] Sarah Anderson and John Cavanagh, *Top 200: The Rise of Global Corporate Power* (Washington, DC: Institute for Policy Studies); at www.corpwatch.org/trac/corner/glob/ips/top200.html on 06/15/2000.

[18] Joshua Karliner, *The Corporate Planet: Ecology and Politics in the Age of Globalization* (Sierra Club Books, 1997); at www.corpwatch.org/trac/feature/planet/fact_1.html on 06/15/2000.

[19] Laureen Snider, *Bad Business: Corporate Crime in Canada* (Scarborough: Nelson Canada, 1993), p.23.

[20] Kevin McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths), p. 2.

[21] McGuinness, *The Law and Practice*, p.1.

[22] Ibid.

[23] Ibid, p.17.

[24] R.S.C. 1985, c. C-44, s.15

[25] Section 45 does provide that shareholders can be held liable for corporate activities in the following circumstances: where the corporation reduces its stated capital by paying out funds or assets to shareholders in violation of s.38; the shareholders establish a unanimous shareholder agreement and thereby take over management of the corporation themselves, or; the shareholder is in possession of assets distributed to it following the dissolution of a

corporation against which a complainant has a claim by virtue of s.226.

[26] F.H. Buckley, Mark Gillen and Robert Yalden, *Corporations: Principles and Policies*, 3d Ed. (Toronto: Emond Montgomery, 1995), p. 153.

[27] Buckley *et al*, *Corporations*, p. 154.

[28] Buckley *et al*, *Corporations*, p. 153, 154.

[29] McGuinness, *The Law and Practice*, p. lxxv.

[30] Ibid.

[31] Buckley *et al*, *Corporations* , p.153.

[32] McGuinness, *The Law and Practice*, p. lxxvi.

[33] Buckley *et al*, *Corporations*, p.155.

[34] Ibid, p.156.

[35] *Hague v. Cancer Relief & Research Institute*, [1939] 3 W.W.R. 1 at p.5, per Dysart J.

[36] Canadian courts have looked beyond the corporate veil in the following circumstances: incorporating to do something that is improper such as fraud (*Big Bend Hotel Ltd. v. Security Mutual Casualty Co*., [1979-1980] 19 B.C.L.R. 102 (S.C.)), the circumvention of contracts (*Gilford Motors v. Holmes*, [1933] Ch. 935, cited with approval in *Big Bend, supra*) or tax avoidance (*DeSalaberry Realties Ltd v. M.N.R.* (1974), 46 D.L.R. (3d) 100 (F.C.T.D.)); where a shareholder and not the corporation is carrying on the business and the corporation is merely being used as the a agent of the shareholder (*DeSalaberry, supra*), and; perhaps where upholding the separate existence of a corporation would be unfair as determined by the court (see Wilson J. in *Kosomoupolous v. Constitution Insurance Co*. (1983), 149 D.L.R. (3d) 77 (Ont. C.A.)).

[37] Laws that include some form of director's liability include the *Income Tax Act* (Canada), the *Canadian Pension Plan Act* (Canada), the *Canadian Environmental Protection Act*, the *Fisheries Act* (Canada), the *Transportation of Dangerous Goods Act*, and the *Environmental Protection Act* (Ontario). For a general discussion of director's liability see McCarthy Tétrault, *Directors And Officers - A Personal Liability Update* (September 1991).

[38] Marica Moffat, "Directors' Dilemma — An Economic Evaluation of Directors' Liability for Environmental Damages and Unpaid Wages," (1996) 54 U.T. Fac. L. Rev. 293.

[39] Canadian Bill of Rights, R.S.C. 1985, App. III, s. 2(e)

[40] See *Vanguard Coatings & Chemicals Ltd. v. Canada (Minister of Natural Revenue)*, [1987] 1 F.C. 367, varied [1988] 3 F.C. 560 (F.C.A.).

[41] *Canadian Egg Marketing Agency v. Richardson*, File No.: 25192., Supreme Court of Canada, 1998 Can. Sup. Ct. LEXIS 49, March 19, 1998.

[42] *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295.

[43] Aaron Freeman & Duff Conacher, Democracy Watch, "Corporations don't deserve protection under the Charter," *The Ottawa Citizen*, Thursday, September 28, 1995.

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[45] Snider, *Bad Business*, p.1.

[46] See discussion in Aaron Freeman and Craig Forcese, "Get tough on corporate crime," *Toronto Star* (Nov. 17, 1994).

[47] *R. v. CIP Inc.*, [1992] 1 S.C.R. 843 at 855.

[48] *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.*, [1998] 3 F.C. 103 at 124.

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[54] See www.web.net/~tccr/benchmarks; at 06/20/00.

[55] BP-Amoco webpage at www.bpamoco.com/alive/index.asp?page=/alive/performance/social_performance; at 06/15/00.

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[57] Royal Commission Report, at p.377. Cited in Leonard Brooks, *Canadian Corporate Social Performance* (1986).

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