PENALIZING CORPORATIONS FOR ENVIRONMENTAL OFFENCES:
A COMPARATIVE STUDY OF THE CANADIAN EXPERIENCE AND
THE FINNISH LAW PROPOSAL

by

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ABSTRACT

This thesis reviews some of the issues involved with penalizing corporations in environmental cases. The Canadian experience and the Finnish law proposal on corporate criminal liability form the basis for this study.

Imposing criminal liability on corporations and using criminal sanctions in environmental protection have been opposed by a number of legal scholars. Both the theoretical and practical feasibility of holding a corporate entity criminally liable has been questioned. The criticism addresses such issues as assigning liability to a "mindless" entity, and fashioning an appropriate sentence to a "body" that cannot be imprisoned, and whose form varies from a multinational corporation to a company comprised of a single individual. Traditional penal sanctions have also been criticized for their inability to compensate the victim or repair the damaged environment.

This thesis addresses and challenges this criticism by attempting to design a system of corporate criminal liability that would efficiently comprise the problem of corporate non-compliance with environmental legislation. While it is acknowledged that penal measures cannot provide an exclusive solution against unwanted corporate environmental behaviour, it is premised that such measures have their place among other control strategies. Therefore, instead of giving in to the mounting criticism, this thesis attempts to further develop the existing law on corporate criminal liability and seek solutions
to some of the problems surrounding the issue of penalizing corporations in environmental cases.

The existing law studied in this thesis consist of the Canadian experience and the Finnish law proposal on corporate criminal liability. The two approaches are introduced in chapters 2 and 3 of the thesis. The two systems are then evaluated in light of three social functions of law in chapter 4; the functions of restoring equilibrium to the social order, maintaining predictability, and molding and advancing the moral and legal conceptions and attitudes of a society are used as the "measuring stick" against which the Canadian experience and the Finnish law proposal are evaluated.

The evaluation discloses both strengths and weaknesses in the two systems of corporate criminal liability. The most predominant problems appear to involve the question about the very foundation for imposing penal liability on a non-human offender, and the difficulties in designing an efficient and just sentence to the corporate offender. Other difficult issues revealed in the evaluation are the question about the entities liable, and the interrelationship between the corporation and its individual agent.

Chapter 5 confronts these problems and suggests some ideas for the development of the law. The most comprehensive change to the present corporate criminal liability schemes is in the proposition that corporate criminal liability should be founded on the blameworthiness entertained in corporate policies and operations rather than on the guilt of an individual corporate
agent. Treating blameworthy corporate policies and structures as a proof of genuine corporate guilt emphasizes the collective nature of corporate offences, and promotes uniform and fair treatment of different corporations. Such a system may also inspire more uniform enforcement by forcing the prosecutor to select only those cases that imply genuinely blameworthy corporate policies behind the illegal conduct.

With regard to sentencing, it is suggested in chapter 5 that instead of resorting to deterrence as the sole sentencing objective, an assortment of objectives should be employed. In addition to deterrence, a sentence should reflect the condemnatory nature of the offence by clearly denouncing the unwanted behaviour, and where appropriate, a sentence should be designed to encourage compensation and redress. In order to meet these diverse goals, a variety of measures should be employed and the exclusive use of the fine should be rejected. The principle of proportionality is recommended as the leading principle for the apportionment of a sentence.
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1. INTRODUCTION


Continued influence on the economy by large national and transnational enterprises and organizations, and the consequent increased risk to the public posed by the large-scale intentional or unintentional harmful effects of the activities of such organizations, will require more attention to be devoted to ways in which society, through law, can control and limit such risks.¹

Since the end of the Second World War, corporations have acquired an increasingly crucial position in society to the point that essentially all economic activity is greatly influenced by corporate behaviour. The standard of living in the Western world has been accomplished largely through corporations whose many and diverse activities affect virtually all aspects of our lives from the food we eat to the air we breathe.

The primary force behind corporate activities is the ambition to realize profit. To a great extent, this profit-making process is based on utilizing our natural environment; natural resources provide raw materials and energy essential for production, and water, air, and soil make depositories for wastes. As a result of this exploitation of the environment, we receive goods and services, jobs and tax revenues - all essential elements of an economically healthy society. A less desired but an inevitable by-product of pursuing profit is environmental degradation. Although by no means the only source, corporations

do contribute a considerable part of environmental damage. Corporations handle the most dangerous types of pollutants, such as radioactive waste or heavy metals, they exploit vast amounts of natural resources and cause equally vast amounts of waste and pollution as a result of their production methods. These negative by-products have become a significant problem during the second half of the 20th century; today's news is filled with oil and toxic spills, the air we breathe is increasingly polluted, and even some of the renewable resources are threatened due to extensive exploitation. It is evident that "[o]ne of the most pressing issues confronting modern industrial man is his concern over the natural environment." 

The increased concern for the well-being of our natural environment has brought about a multitude of laws and regulations through which governments attempt to control corporate environmental behaviour by setting legitimate limits on profit-making. Consequently, a modern corporation acts in an economy that is highly regulated. As a result, the corporation is pulled in different directions by two opposing forces: the restricting legislation and the corporate ambition to make profit. Since

2. Although there do not appear to be any empirical studies establishing the integrity of this statement, several authors have accepted the belief that corporations are predominantly responsible for environmental degradation. See e.g., Dianne Saxe, *Environmental Offences, Corporate Responsibility and Executive Liability.* (Aurora: Canada Law Book Inc., 1990), at 21. For a general discussion on the impact of corporations, see Marshall Clinard, *Corporate Corruption. The Abuse of Power.* (New York: Praeger Publishers, 1990), at 1-6.
corporate activity is steered towards economic benefit, corporations naturally choose courses of action based on a calculation of potential costs and benefits. That is, potential costs and benefits in short-term. Corporate vision generally does not extend beyond a couple of decades. These kind of short-term profit-making policies do not encourage installing expensive pollution control or conservative resource use. While controlling pollution or resource exploitation is expensive, it does not add anything to the value of the goods produced. Consequently, incentives to comply with environmental legislation are scarce. In fact, complying with legislation is often bad business for a corporation whose main concern is to maintain or make more profit in a competitive economy.

While the reasons for corporations to conform with environmental legislation are few, there is a definite need to make corporations comply because they are at once more powerful and more materially endowed and equipped than are individuals and, if allowed to roam unchecked in the field of industry and commerce, they are potentially more dangerous and can inflict greater harm upon the public than can their weaker competitors.

Furthermore, achieving an adequate level of corporate compliance with environmental legislation is not important only because of corporations' significant contribution to environmental degradation, but also because positive corporate behaviour can result in a substantial benevolence to the well-being of the

environment. For one thing, due to their ample economic resources, large corporations have generally every possibility to invest in environmental protection. Secondly, big corporations carry extensive economic and political powers, and therefore their environmental policies can have a significant effect on other companies and consumer behaviour. Furthermore, controlling corporations has an important moral and normative rational; since a big part of corporate profit is accumulated as a result of using common goods of air, water, and other natural resources, they can be expected to invest some of the profits in protecting these common goods. Also, controlling corporations represents an important means to maintain public confidence in the capacity of the government to protect public interests. To ignore corporate wrongdoings can create a dangerous impression that people and groups controlling economic power are beyond the law, as well as set an example of lawlessness for the general public.

The ways to encourage compliance are numerous including such diverse measures as education, peer pressure, inspections, and use of sanctions.\(^7\) Seeking compliance with the Canadian Environmental Protection Act (CEPA), Environment Canada divides these different strategies into two basic categories of promotion and enforcement.\(^8\) Promotion is based on a conciliatory style of control, and can appear in the form of negotiations, education, or economic incentives. Enforcement is generally connected with "sanctions" and "penalties", although not necessarily solely with

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7. For a more complete list of measures, see Saxe, supra 2 at 25.
penal sanctions. Administrative, civil and criminal law all include sanctions, the nature of which is very similar, that of "a conditional evil annexed to a law to produce obedience to that law". However, in this thesis, the "conditional evil" is limited to penal sanctions, the use and application of which to corporate offenders is the subject matter of this study. While the term "corporate offender" can apply equally to corporations and to individuals working inside the corporate entity, the focus of this thesis is on penalizing the corporate body as an entity. The use of penal measures against corporate officers and employees is, for the most part, excluded from this work.

1.2. Corporations in the Penal Spotlight

While the other compliance strategies are generally accepted as appropriate measures in encouraging corporate compliance with environmental legislation, the use of penal sanctions has raised plenty of controversy within the legal profession. Both the theoretical and practical feasibility of holding the corporation, a "nonperson", criminally responsible has been questioned. Some

of the most popular arguments against penalizing corporations, in addition to the questions of evidence, include the problems in assigning liability on a "mindless" entity and fashioning an appropriate sentence to a "body" that cannot be imprisoned. The fact that corporate forms range from multinationals to a single individual who has formed a company because of tax advantages does not make the issues any easier. A further serious criticism is the inability of traditional penal sanctions to compensate the harm done to the victim or to repair and clean up the damaged site. Also, the fines are often regarded as mere "licence fees" to pollute with little real influence on corporate environmental behaviour.

Although I admit that all these concerns are relevant and give reason to review further the application of penal measures, I do not believe that penal measures should be completely erased from the list of alternatives in encouraging corporate compliance. For one thing, penal measures carry a certain moral, condemning stigma missing from alternative tools. They emphasize the unpleasantness of "being caught". When a penal provision has been attached to a prohibition or a requirement, it is a clear signal about a certain degree of opprobrium. The possibility of becoming labeled "criminal" and being exposed to the public may often be enough to deter most potential offenders; particularly so, when the target group, such as corporations, pays specific attention to their good public image. Also, past experiences in environmental law and related areas, such as economic or labour legislation, demonstrate quite clearly that more than mere
persuasion is needed in order to achieve an adequate level of corporate compliance with environmental legislation. Negotiations, education, and other promoting measures certainly have an important role to fulfill, but they are not always enough. Economic incentives for non-compliance are often simply too great to resist. Hence, "[i]t is folly...to anticipate that proper standards of environmental responsibility can be secured by doing nothing more than tickling the soft underbelly of industry onto compliance."¹¹

Instead of fruitless arguing about the "betterness" of different compliance strategies, more effort should be made to use all available measures to complement each other, and to solve some of the problems of the present alternatives. This thesis is an attempt to examine and seek solutions to some of the problems surrounding the issue of penalizing corporations in environmental cases, more specifically, the problems of imposing liability on a non-human entity and finding a suitable sanction that takes into account the vast diversity of environmental offences and offenders. In the study, the comparative method is employed to appraise how two different countries in two different legal systems - common law Canada and civil law Finland - have

¹¹ Donald Avison, "Using the Criminal Courts to Regulate Polluters" in Into the Future: Environmental Law and Policy for the 1990’s. Ed. Donna Tingley (Edmonton: Environmental Law Centre (Alberta) Society, 1990), at 70. See also, Peter Nemetz, Federal Environmental Regulation in Canada. (1986) 26 Natural Resources Journal 551 at 571, where Nemetz notes that a study undertaken for the Economic Council of Canada on the use of environmental regulation shows that "excessive reliance on negotiation for compliance appears to have compromised the goal of acceptable environmental quality."
proceeded to solve the theoretical and practical challenges of imposing criminal liability on corporations. The research objective is to study the role, function, and efficiency of criminal corporate liability as a compliance strategy, and find out how well the present Canadian and proposed Finnish law on corporate criminal liability complies with the aim of increasing corporate compliance with environmental legislation.

1.3. Legislative Framework

Both in Canada and Finland, the strong reliance on legislation in environmental protection is reflected in the continuously growing volume of environmental legislation. The legislative boom which started in the 1960s has brought about a multitude of environmental statutes which exist mostly in a scattered, dispersed form. In Canada, the diversity of legislation is emphasized by the fact that the Constitution Act divides the legislative powers in environmental matters between the federal and provincial governments. Some of the most important federal environmental statutes include the Canadian Environmental Protection Act (CEPA), the Fisheries Act, the Northern Inlands Waters Act, and the Transportation of Dangerous Goods Act. Also the Criminal Code includes sections

which can be used against polluters such as section 219 on
criminal negligence or section 180 on common nuisance.\textsuperscript{17} The Law Reform Commission has also proposed that a new crime against the environment should be included in the Code.\textsuperscript{18} Provincial legislation deals with such issues as waste management, public health, and ecological reserves.\textsuperscript{19}

In Finland, environmental control is governed by a similarly diverse and complex maze of legislation ranging from the Finnish Penal Code (39/1889) to the Private Roads Act (358/62). Some of the most important laws include the Air Protection Act (67/82), the Waste Management Act (673/78), the Waters Act (264/61), the Conservation Act (71/23), and the Noise Abatement Act (382/87). Provisions regarding the protection of the environment can also be found in such widely diverse laws as the Planning and Construction Act (370/58), the Mining Act (503/65), and the Recreation Act (606/73). As in Canada, a proposal has been made about concentrating environmental offences under a new "Environmental Offences" chapter to the revised Penal Code.\textsuperscript{20}

In both countries, environmental statutes usually contain provisions that create offences for breach of specific


\textsuperscript{19} For more information on constitutional constraints, see 1 Robert T. Franson - Alastair R. Lucas, \textit{Canadian Environmental Law}. (Toronto: Butterworths, 1976).

\textsuperscript{20} \textit{Rikoslain kokonaisuudistus II}. Rikoslakiprojektin ehdotus. Oikeusministeriön lainvalmisteluosaston julkaisu 1/1989. ("Total Reform of the Penal Code II", publication 1/1989 of the Legislative Department of the Ministry of Justice.)
prohibitions or requirements. A common type of statute is one that establishes a regulatory scheme under which failure to comply with any requirements contained in the act or regulations is made an offence. Another type of statutes is based on a central prohibition or series of prohibitions of environmentally damaging actions. Almost all of these statutes contain a penal provision in which violations of the statute are penalized.\(^\text{21}\) The most common penalty is a fine. In Canada, the fines provided can be quite substantial with the maximum penalties of six or even seven figures.\(^\text{22}\) In Finland, environmental statutes generally set a penalty of a day-fine or six months in prison.\(^\text{23}\)

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21. It is important to notice that the terms "penalizing" and "penal sanctions" are generally used to imply the provincial power to enforce their laws by imposing penal sanctions, while the use of terms "criminal penalties" and "crimes" is restricted to federal criminal laws and penalties under s. 91 of the Constitution Act, and only the federal government has the authority to enact such laws in Canada. However, for the sake of convenience, in this work, the term "penalize" covers as well the Canadian federal and provincial offences as the relevant sections of the Criminal Code, and the Finnish environmental offences found in environmental statutes or in the Finnish Penal Code.

22. For example, under the CEPA, polluters are liable to maximum fines of $1 million. A million dollar maximum fine can be found also in the federal Oil and Gas Production and Conservation Act, R.S.C. 1985, c. O-7. Another federal statute, the Fisheries Act, provides for fines of $100,000 a day. On the provincial level, the Ontario Environmental Protection Act, R.S.O. 1980, c. 141, provides for fines up to $100,000 for repeat offences, and the Manitoba Environment Act, S.M. 1987, c. 26, has a special $200,000 fine reserved for repeat offences committed by corporations while a corresponding fine for an individual is only $10,000.

23. Some penal provisions provide for more stringent penalties. For instance, the penalty for aggravated violation of the Waste Management Act is six years in prison. However, in legal practice the use of imprisonment in environmental cases has been a rare exception and if imposed, it has almost always been a suspended sentence.
The approach to the idea of imposing criminal liability on corporate bodies has traditionally been very different in these two countries. In common law systems, corporate criminal liability has been an accepted principle for more than one hundred years. Although the roots of the concept are in England, the Canadian courts soon established their own approach to the notion, and today there is a significant body of Canadian law on corporate criminal liability. In Finland and other civil law countries, the approach to the idea of imposing criminal liability on corporations has been more cautious. Since a corporation has no mind to entertain guilt and no body to act in *propría persona*, punishing such a body has been considered against all fundamental principles of criminal law. Accordingly, sentencing a corporation has not been possible under the Finnish legislation. However, even fundamental principles of criminal law cannot resist the change of times. Legal history was made in Finland in 1987 when the Criminal Law Project Task Force published its proposal on "The Criminal Liability of Corporate Bodies". This proposal and its later versions together with the Canadian experience on the application of corporate criminal liability to environmental offences form the sources for this study.

1.4. What Are Good Laws Made of?

As with any law, the law on corporate criminal liability has developed to deal with problems that are threatening social order. With corporate criminal liability, the threat is non-complying corporations - more specifically, with regard to the topic of this paper, corporate non-compliance with environmental legislation. Also, as with any law, in order to perform efficiently, the law on corporate criminal liability must fulfill certain criteria or purposes. According to Harold Berman and William Greiner, these criteria are founded on the social functions of law.\(^{25}\) To Berman and Greiner, legal order means a way to hold a society together, and every law, as a part of this legal order, is supposed to contribute to this goal of social order through three social functions: firstly, by restoring equilibrium to the social order when that equilibrium has been disturbed; secondly, by maintaining predictability and enabling members of society to calculate the consequences of their conduct; and thirdly, by molding the moral and legal conceptions and attitudes of a society. In order to work efficiently towards solving the problem that is causing social disorder, the law should function in all three ways.

In this thesis, the social functions of law are used as a "measuring stick" against which the Canadian experience and Finnish law proposal on corporate criminal liability are

evaluated. Using this "measuring stick" as my guiding principle, I attempt to reveal strengths and weaknesses of the two approaches and then, on the basis of this evaluation, seek to construe a framework for an efficiently working system of corporate criminal liability.

1.5. The Plan of the Thesis

Chapter two of this thesis is devoted to the Canadian experience on corporate criminal liability. In addition to surveying the Canadian system, the purpose of the chapter is to familiarize the reader with the concept of corporate liability, and bring out some of the problems surrounding its application. The chapter starts with the theoretical framework which is then followed by the study on the sentencing practices. The emphasis lies on the legal practice and legislative developments of the 1980s although some older material is used where appropriate. With statutory material, I have concentrated the research on federal statutes and on the environmental legislation of Ontario and British Columbia. Some recent and relatively advanced statutes of other provinces, such as the Manitoba Environment Act from 1987, are referred to when relevant.

Chapter three discusses the Finnish law proposal. The purpose of the chapter is to introduce a different way of applying criminal liability to corporations. The Finnish proposal is then, together with Canadian experience, evaluated in light of the social functions of law in chapter four. Finally, in chapter
five, using the information revealed in previous chapters, I attempt to determine some of the elements of an efficiently working system of penalizing non-complying corporations in environmental cases, and make some suggestions for the improvement of the law.

Since the material used in this thesis consists of the law (or proposed law) in two different countries with different legal systems, a word of warning is necessary; due to differences in legal structures and concepts, one should be wary about comparing the two approaches directly. Direct transplants from one system to another rarely work because of different cultural, economic, and legal backgrounds. With this in mind, I do not attempt to find the "one and only" ideal solution. Instead, my research is based on pursuing some essential elements that should be part of an efficiently working corporate criminal liability. Obviously, every jurisdiction has to mold and adjust these elements to fit its own legal traditions. Yet, I have not wanted the differences to stop me from comparing these two systems, and I hope that this work fulfills the function Sir Henry Maine gave to comparative law when he noted that "if not the only function, the chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of law."26

2. THE CANADIAN EXPERIENCE

This chapter consists of two parts; the first part is devoted to discussing the theoretical framework around corporate criminal liability while the second part deals with corporate sentencing. Theories of liability and their application to environmental offences, limitations of corporate liability, interrelationship between corporate and individual liability, and the entities liable are discussed under the theoretical framework. Under the section on corporate sentencing, the theories of sentencing are introduced together with sentencing criteria and sentencing options.

The primary sources are environmental cases, particularly those of the 1980s, and environmental statutes. The Criminal Code provisions are referred to where applicable to environmental offences. When legal precedents in the area of environmental law are not available, I have resorted to comparable cases of corporate offences, such as trade and tax offences.

2.1. Theoretical Framework

2.1.1. Theories of Liability

Under the old common law, the general principle was that corporations were not criminally liable. This was based on the notion that corporations can neither think nor act by themselves, thus having "no soul to damn and no body to kick". Furthermore, the statement is attributed to Lord Thurlow and has since been cited by several authors, e.g. Glanville Williams, Criminal Law: The General Part. 2nd ed. (London: Stevens & Sons, 1961), at
there was no adequate system of procedure which could have made a corporation appear and answer for its alleged crimes.\textsuperscript{28} However, social and economic changes in society over the last one hundred years have encouraged the legal profession to find the soul and the body in the corporate entity. The development towards full corporate criminal liability has taken place along two theoretical lines, those of vicarious liability and identification doctrine.

2.1.1.1. Vicarious liability

The development of corporate criminal liability started in England through so called vicarious liability. Since a corporation was regarded as an artificial entity with no mind to entertain guilt and no body to act \textit{in propria persona} but only through its servants and agents, corporate liability had necessarily to be vicarious liability. That is, liability for the acts and the state of mind of another usually due to some prior relationship between the two; with corporations, this generally meant the relationship between the corporate employer and employees.\textsuperscript{29}

The concept of vicarious liability first developed in the English law of torts, where a master was held liable for the acts

\textsuperscript{29} Leigh 1969, ibid. at 15-24.
of his servant when the acts in question created a public
nuisance or were criminally libelous. At first, a corporation was
held liable only when it breached a duty by an act of omission
(so called nonfeasance). By the middle of the 19th century,
corporate liability had extended to misfeasance, that is
breaching a duty by committing a wrongful act.\textsuperscript{30} Accordingly, the
number of corporate prosecutions started to grow, and by the end
of the 19th century, corporations were charged under common law
offences of public nuisance and statutory public welfare offences
created in such statutes as the Factories Act or the Public
Health Act.\textsuperscript{31} In 1900, the Supreme Court of Canada summed up the
state of law as follows:

> it is manifest that a corporation can render itself amenable to
> the criminal law for acts resulting in damage to numbers of
> people, or which are invasions of the rights or privileges of the
> public at large, or detrimental to the general wellbeing or
> interests of the State.\textsuperscript{32}

In spite of these early developments, the fundamental
principle that "a man is criminally liable for his own acts and
for them alone" prevailed, and vicarious liability could not be
applied to "real crimes".\textsuperscript{33} Consequently, by the 1920s, there was
still no theoretical basis for holding corporations liable for

\textsuperscript{30} Whitfield, Molineux and Whitfield v. South Eastern Ry. Co.
(1858), 120 E.R. 451; R. v. Stephens (1866), L.R. 1 Q.B. 702; R.
v. Holbrook (1878), 4 Q.B.D. 42; R. v. Birmingham and Gloucester
Co. (1846), 115 E.R. 1294. See, Michael W. Caroline, Corporate
Criminality and the Courts: Where Are They Going? (1984) 27
Criminal Law Quarterly 237 at 240-42.

\textsuperscript{31} Leigh 1969, supra 28 at 22.

\textsuperscript{32} The Union Colliery Co. v. The Queen (1900), 4 C.C.C. 400 at
404, quoted in Caroline, supra 31 at 241.

\textsuperscript{33} C.R.N. Winn, The Criminal Responsibility of Corporations.
serious crime. This led to an irrational result; corporations were immune from criminal liability at a time when the corporation had become the principal tool for commercial activity in society.

In order to hold corporations responsible for criminal offences, the courts had two approaches they could use; they could either extend vicarious liability to cover serious crimes by deciding that the rules applying to corporations differed from those applying to natural employers, or that the acts of some individuals inside the corporation could be attributed to the company as its own. While American federal courts have extended vicarious liability and assimilated it with corporate responsibility, the Canadian courts have generally favoured the second alternative of identification doctrine.

2.1.1.2. Identification doctrine

The identification doctrine is based on identifying certain people within the company with the corporate entity and attributing their acts and omissions to the corporation.

35. Ibid. at 266-72. The leading case is considered to be Egan v. U.S. (1943), 137 F.2d 369 (8th Cir. C.A.). The decision was reaffirmed in U.S. v. Basic Construction. (1983), 711 F.2d 570 (5th Cir. C.A.). See also, Kathleen Brickey, Corporate Criminal Accountability: A Brief History and Observation. (1982) 60 Washington University Law Quarterly 393; Kip Schleger, Just Deserts for Corporate Criminals. (Boston: Northeastern University Press, 1990), at 5-7.
Although the identification doctrine can be traced as far back as the 1923 decision of R. v. Canadian Allis-Chalmers Ltd., the basis and fundamental principles of the doctrine were laid twenty years later in R. v. Fane Robinson Limited. In the decision, Justice Ford adopted the reasoning of the House of Lords in Lennard's Carrying Company v. Asiatic Petroleum Co., in which Viscount Haldane noted that "a corporation is an abstraction. It has no mind of its own any more than it has a body of its own," and called for "somebody who...is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation".

The doctrine has been restated and justified in several later cases. Its application to environmental offences will be looked at next.

2.1.2. Applying Corporate Criminal Liability to Environmental Cases: The Division of Offences

The rise of industrialism in the nineteenth century led to the development of a society that was economically and socially a lot more diverse than its predecessors. Technology and the urban environment caused threats to the public welfare; accidents in the workplace, unhealthy dwellings, and poor sanitary systems were all by-products of the industrial revolution. Traditional criminal law with its mens rea requirement was unable to deal
with these modern hazards. That is when a new category of
offences called public welfare offences saw daylight; the
requirement of mens rea was suspended and replaced with absolute
liability, and by the end of the nineteenth century it was
judicially recognized that in public welfare offences, mere proof
of the actus reus was enough to lead to conviction.  

This division of offences to mens rea and absolute liability
offences led to a situation in which the justice system was faced
with two extremes: absolute liability with its wide scope but
questionable fairness at the one end, and "true crimes" with
enforcement problems at the other. It took until 1978 to find a
solution to this problem of extremes; R. v. City of Sault Ste.
Marie created a half-way house between the two categories by
dividing offences into three groups.  

According to the decision, these three groups are:

1) Offences in which the prosecution must prove mens rea, or
guilty mind. Most mens rea crimes can be found in the Criminal
Code. The Code provisions applicable to environmental offences
include at least criminal negligence (s. 202), common nuisance
(s. 176), and mischief (s. 387). However, in practice, Criminal
Code offences are seldom used as the basis for environmental
prosecutions. It has been argued that the present Code provisions
do not adequately address serious environmental offences and

40. For more information about the birth of regulatory offences,
see Ingebor Paulus, Strict Liability: Its Place in Public Welfare
42. Supra 17 as am.
43. For more detailed coverage, see Crimes Against the
Environment, supra 17 at 49-59.
consequently, a separate and newly formulated Code crime about environmental offences has been suggested.\textsuperscript{44}

\textit{Mens rea} offences also include statutory offences using such words as "willfully", "intentionally", or "knowingly". For example, sections 114 and 115 in the CEPA provide for environmental \textit{mens rea} offences. Section 114 penalizes providing false or misleading information concerning a toxic substance, and section 115 provides for intentionally or recklessly causing environmental disaster or danger to others. An example of a provincial \textit{mens rea} offence can be found in section 145 of the Ontario Environmental Protection Act, which penalizes knowingly providing false information to the Minister of the Environment.\textsuperscript{45}

2) \textbf{Strict liability offences} which do not require proof of \textit{mens rea}. All the prosecution has to prove is the prohibited act, the \textit{actus reus}. However, the accused avoids liability if he can establish a defence of due diligence - that he "reasonably believed in a set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event".\textsuperscript{46} According to \textit{Sault Ste. Marie}, unless a pollution statute expressly includes or excludes both \textit{mens rea} and negligence, the offence is likely to be regarded as one of strict liability.\textsuperscript{47} Accordingly, the vast majority of environmental offences fall into this category.

\textsuperscript{44} Ibid.  
\textsuperscript{47} Ibid.
3) **Offences of absolute liability** require only proof of the prohibited act, *actus reus*, and allow no defence of due diligence. Most environmental offences belonging to this category can be found in municipal by-laws.

The liability of a corporation is different depending on the category the offence belongs to. Conditions for corporate criminal liability were remarkably clarified by the Supreme Court of Canada in the *Canadian Dredge and Dock Co. v. The Queen* in 1985 on which the following presentation is primarily based.48 According to the decision, the basic difference between *mens rea* and other kinds of offences is that in the former, liability is based on the conduct of the company's directing mind, while in absolute and strict liability offences liability is based on the acts and omissions of servants and agents of the corporation. In practice, this means that in *mens rea* offences, the number of people whose conduct invoke corporate liability is very limited, while in absolute and strict liability offences, acts and omissions of anyone in the corporation can be imputed to the corporation.49 This and other criterion for corporate criminal liability will be discussed next.

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48. Supra 36. The decision also significantly clarified the distinction between vicarious liability and identification theory.
49. See generally, Saxe, supra 2 at 99-102.
2.1.3. Conditions for Corporate Criminal Liability

2.1.3.1. Whose conduct invokes corporate liability?

A) In absolute and strict liability offences

With absolute and strict liability offences the answer is easy enough; since there is no mental element (except when establishing the defence of due diligence), corporate liability arises automatically and directly from the fact that as a result of an act or an omission of any servant or agent of the corporation, a violation of an environmental statute has taken place. It must be emphasized that the liability is primary liability, not vicarious liability. In vicarious liability a person is liable for the guilty mind of others while in strict liability offences the question of fault is irrelevant except for the establishment of due diligence. Hence, under the Canadian theory, the corporation is not held liable for the acts of someone else, but for its own acts. Liability arises from the fact that a corporation cannot act on its own but only through its servants and agents; their acts and omissions are the acts of the corporation.\(^5\) Therefore, although the identification doctrine is generally connected only to "real crimes", primary liability comes very close to the same idea by identifying acts and omissions of servants and agents with those of the corporation.

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The identification between the corporation and its servants and agents has been codified into several environmental statutes. A typical provision states that

it is sufficient proof of the offence that it was committed by an employee or agent of the accused...unless the accused establishes that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission.\(^{51}\)

In practice, in cases of strict and absolute liability offences, statutory provisions do no more than codify principles set in the common law. However, with mens rea offences the situation is different; according to Canadian Dredge & Dock, the required guilty mind has to be present in the directing minds of the corporation. Consequently, to convict a corporation on the basis of an act or omission of someone who is not a directing mind would conflict with the decision and would probably be held unconstitutional.\(^{52}\) Section 124(1) of the CEPA which provides that "it is sufficient proof of the offence that it was committed by an employee or agent" appears to raise the possibility for such a conflict; the CEPA includes both strict liability and mens rea offences, and since section 124(1) provides for "any prosecution for an offence under this Act", it is obviously meant to cover both categories of offences.

The identification doctrine is also relevant when establishing the defence of due diligence in strict liability offences. The question of whose due diligence is required was

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51. B.C. Waste Management Act, S.B.C. 1982, c. 41, s. 34(11) (am. by 1987, c. 51, s. 14(c)). For a list of statutes containing similar provisions see Saxe, supra 2 at 100n.
52. Saxe, ibid.
answered by Justice Dickson in *Sault Ste. Marie* when he ruled that

[the due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself (emphasis added).] 53

Thus, the acts and omissions of any corporate servant invoke corporate liability unless the corporation establishes a defence of due diligence by showing that the directing minds either reasonably believed in a mistaken set of facts that, if true, would render the act or omission innocent, or had taken reasonable care to prevent the offence. 54

**B) In mens rea offences**

As mentioned above, with mens rea offences the mental element must also be taken into consideration. Unlike the acts and omissions, the mental state of a servant or agent is not attributed to the corporation unless the individual represents the directing mind and will of the corporation. In other words, the mens rea must be present in the directing mind.

The identification doctrine raises a further question about the identity of the directing mind and will. Who can be regarded

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53. Supra 41 at 377-78.
54. See Saxe, supra 2 at 145-90.
as the directing mind and will? How low on the corporate ladder can the identification doctrine reach? A closely related problem is whether to look at the formal standing of an individual agent or regard his actual powers and position within the corporation. The following classic statement given by Justice Schroeder in R. v. St. Lawrence Corp. forms a basis for answering these questions:

if the agent falls within a category which entitles the Court to hold that he is a vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of the company itself, then his conduct is sufficient to render the company indictable by reason thereof.  

In legal practice, a director or a senior executive officer is usually regarded as the directing mind and will of the corporation. However, the "vital organ" does not always have to belong to the senior management; for example, in Canadian Dredge & Dock, the board of directors, the managing director, the superintendent, the manager or anyone else to whom the board of directors had delegated the governing executive authority were regarded as possible directing minds.  

Also, the words "in the sphere of duty and responsibility assigned to him" in the above quotation from St. Lawrence Corp. seem to suggest that the duties of a directing mind can be delegated.

In some cases, the delegation has reached quite far down on the corporate ladder; for instance, in Karen Reese v. London Realities & Rentals, the only employee of a realty company who

55. Supra 6 at 281.
56. Supra 36 at 23.
was responsible for renting properties was held to be a directing mind.\(^{57}\) Similarly, in \(R.\ v.\ Waterloo\ Mercury\ Sales\ Ltd.\), a used-car sales manager who was not a director or officer of the company and who violated orders of senior officials was regarded as a directing mind of the corporation.\(^ {58}\) Residing directing mind in fairly low-level officials has been defended by referring to the general corporate organizational structure in Canada; the size of the country necessitates that corporate operations are often very widespread. Consequently, a corporation can have several directing minds with delegated duties in different geographical locations.\(^ {59}\)

An interesting situation connected to the issue of delegation is created when a corporation has engaged an individual contractor to conclude a part of a project, and the contractor commits an offence while operating under the contract. Such a situation took place in \(R.\ v.\ Placer\ Developments\ Ltd.\) when the conduct of an individual contractor directly led to a spill. Placer was found responsible for the offence because the contract between the two parties empowered Placer to supervise and influence the offending conduct. It was pointed out in the judgement that "[t]hey [Placer] had the opportunity and expertise to exercise their responsibilities and failed to do so."\(^ {60}\)

\(^{59}\) Hanna, supra 36 at 463-66. Contrary to the Canadian law, in England only the acts of superior officers can be identified with the corporation. See \(Tesco\ Supermarket\ v.\ Nattrass,\ [1972]\ A.C. 153, [1971] 2 All E.R. 127 (H.L.).
\(^{60}\) (1983), 13 C.E.L.R. 42 at 42.
Similarly, in the ruling *Aurora Quarrying Limited v. Catherwood*, the court noted that "a corporation cannot escape conviction merely by saying its mind and will were delegated to another, an independent contractor." 61

Another problematic issue is whether to look at the formal or actual position of a corporate officer. In *Canadian Dredge & Dock*, Justice Estey noted that an individual must "represent the de facto directing mind, will, center, brain area or ego" of the corporation. 62 Hence, it is evident that the Canadian courts emphasize function rather than form. The question does not seem to be so much what is the title of the officer but whether he exercises substantially autonomous powers in respect to relevant corporate activities. 63 This interpretation is evidently supported when an apparently low-level official is regarded as a directing mind; if an employee has been delegated substantial discretion to decide how to carry out duties, she may well become the directing mind within the scope of those duties.

The proposed new Criminal Code seeks to clarify the picture of the directing mind by articulating the criteria for corporate criminal liability. Since the proposed Criminal Code would apply to all crimes, including those outside the Code, that are punishable by a term of imprisonment, the proposed provisions would be a significant clarification of the present situation. According to the proposed section 2(5)(a),

62. Supra 36.
63. Leigh 1977, supra 28 at 255.
a corporation is liable for conduct committed on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy.\textsuperscript{64}

The common law principles, discussed above, are retained and clarified in the proposal. Specific reference to employees reflects the expanded interpretation of the identification doctrine, and including formulation and implementation of corporate policy demonstrates that the emphasis is on the function rather than on the form.

C) Question of identification

A further important question is whether, in order to convict a corporation, there must be an identifiably guilty person with whom the corporation can be identified. The issue was discussed in \textit{R. v. Dawson City Hotels Ltd.} which ruled that finding the directing mind guilty is a condition precedent for finding the corporation criminally liable in offences that require a guilty mind.\textsuperscript{65} In absolute and strict liability offences, the elimination of fault makes the situation quite different; since there is no need to find a guilty mind, there is obviously no need to find a specific person behind the conduct. Hanna illustrates the present practice with \textit{R. v. Pierce Fisheries Ltd.}, a case in which the corporation was charged under regulations made pursuant to the federal Fisheries Act for possession of undersized lobsters.\textsuperscript{66} He notes that

\textsuperscript{64} \textit{Recodifying Criminal Code}, supra 18 at 26.
The conclusion that the acts of employees counted as corporate acts was so obvious that it was never explicitly discussed, yet the point remains that some sort of identification theory was being relied upon to impute the acts of humans to the corporation. 67

Hence, not only the requirement of finding a guilty individual is eliminated from strict liability offences, but it seems that there is no need to identify anyone at all; as long as it is evident that someone within the corporation must have committed the act, the corporation can be made liable. With regard to the defence of due diligence, the onus of proof is on the offender. Hence, it is the corporation's duty to identify the directing mind(s).

Several environmental statutes contain a specific provision in which the question of identification is settled. For example, according to section 78.3 of the federal Fisheries Act, identification or prosecution of an employee or agent is not a prerequisite for corporate liability. 68 Also the proposed new Code deals with the question of identification. The proposed section 2(5)(b) provides that

[w]ith respect to crimes requiring negligence, a corporation is liable...notwithstanding that no director, officer or employee may be held individually liable for the same offence. 69

The Law Reform Commission justifies its proposal by noting that the harm is often the result of negligence in the organizational process rather than in the conduct of a single individual. The Commission talks about "collective participation" in which "no

67. Supra 36 at 460.
68. Supra 14 (as am S.C. 1991, c. 1, s. 24). See also CEPA, supra 13, s. 124(1); B.C. Waste Management Act, supra 51, s. 34(11) (as am. 1987, c. 41, s. 14(c)).
one...may individually have had the requisite culpability." It is important to notice that the provision does not cover offences of intent or recklessness, but only those of negligence.

2.1.3.2. What kind of conduct is attributable to the corporation?

It is obvious that not all kinds of conduct invoke corporate liability; a corporate senior executive cheating on corporate taxes and transferring the profit into his own pocket is hardly acting for the benefit of the company. Similarly, a corporate director with kleptomaniac tendencies who shoplifts during his lunch hour is obviously not committing the crime as a corporate director but as a private individual. Attributing his act to the corporation would be irrational. In order to be able to attribute the conduct to the corporation, the act or omission must apparently be something quite different.

The question about the proper scope of corporate liability was extensively discussed in Canadian Dredge & Dock. According to the decision, in order to attribute the conduct of an directing mind to the corporation, the Crown must show the existence of the following elements:
1) the action taken by the directing mind was within the field of operation assigned to him,
2) the conduct was not totally in fraud of the corporation, and

70. Ibid.
3) the conduct was by design or result at least partly for the benefit of the corporation. 71

The first element denotes that the identity of the directing mind and the corporation coincide as long as the actions of the directing mind are within the sector of operation assigned to him by the corporation. In other words, the act or omission in question must be done by the directing force of the company when carrying out his assigned function in the corporation. 72 In R. v. St. Lawrence Corp., a similar requirement was expressed as follows:

both on principle and authority this proposition is subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied. 73

Some courts have also talked about "the scope of employment", but Justice Estey explicitly rejects the terminology on the basis that "it smacks of vicarious liability". 74 Also, the proposed new Code prefers the phraseology "acting within the scope of their authority". 75

The second, "fraud" element denotes that unless the conduct is totally in fraud with the corporation, the corporation is responsible. Justice Estey underlined the word "totally", thus indicating that partial conflict is not enough to free the corporation from liability. He drew the outer limit for corporate liability to the point where the directing mind "ceases

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72. Ibid. at 17.
73. Supra 6 at 281.
74. Canadian Dredge & Dock, supra 36 at 17.
75. Recodifying Criminal Code, supra 18 at 26.
completely to act, in fact or in substance, in the interest of the corporation". This kind of a situation is created when

all of the activities of the directing mind are directed against the interests of the corporation with a view to damaging that corporation, whether or not the result is beneficial economically to the directing mind...\(^76\)

A person acting in fraud with the corporation is not, while doing so, the directing mind because his entire energies are directed towards destroying the corporation; he turns from the directing mind to the "arch-enemy" of the corporation, and consequently the doctrine of identification ceases to operate.\(^77\)

A different interpretation was applied in an earlier case of \(R. v. McNamara (No 1)\) which ruled that there should be corporate liability even for the deceptive activity of corporate officers because it "stimulates shareholders to exercise stricter supervision and control in the selection of its directors and compels directors to be alert to the corporate practises of its senior personnel".\(^78\)

The final requirement is that the conduct must by design or result be at least partly beneficial to the corporation. If the conduct is some kind of "share the wealth" project in which all the concerned benefit, the corporation cannot avoid liability even if its share is small compared to that of the other parties.\(^79\) However, if the disparity is significant and the benefit to the corporation is a necessary by-product of the

\(^76\). \textit{Canadian Dredge \\& Dock}, supra 36 at 37.
\(^77\). Ibid. at 33, 42.
\(^79\). \textit{Canadian Dredge \\& Dock}, supra 36 at 39.
conduct, it would appear logical that the corporation is not held responsible in such a case.

The discussion above is limited to *mens rea* offences. However, it seems appropriate to set limits to the corporate liability also in absolute and strict liability cases. Hanna suggests that the identification doctrine requires that the employee's act must be related to the scope of his employment, since "otherwise corporations would be liable for offences completely unrelated to their enterprise".\(^8^0\) A statement by Justice Dickson in *Sault Ste. Marie* seems to support Hanna's suggestion. Justice Dickson was commenting on the defence of due diligence when he stated that

> [t]he due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval...\(^8^1\)

With strict liability offences, the question of the nature of due diligence is of great importance because by establishing due diligence the corporation can free itself from liability. Defining what constitutes due diligence is impossible without knowing the circumstances of each particular case. The rules of "reasonable care" and "mistaken set of facts" are too general to give any precise information about the nature of due diligence. Some kind of a general standard for a responsible and efficiently run corporation is that it should be able to have an adequate system to ensure that corporate servants and agents are

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80. Supra 36 at 460.  
81. Supra 41 at 377.
sufficiently trained and instructed to take appropriate measures to ensure that offences will not be committed.\textsuperscript{82}

A related question is whether conduct carried out contrary to express instructions creates corporate liability. Justice Estey makes a distinction between \textit{mens rea} and absolute and strict liability offences. According to him, in absolute and strict liability offences a corporation might absolve itself from liability by adopting and communicating to its staff a general instruction in which the illegal conduct is forbidden and conformity with the law is directed. However, in \textit{mens rea} offences, general or specific instructions are irrelevant to the liability. Because the corporation and its directing minds are one, the prohibition directed by the corporation to others has no effect on the determination of criminal liability of the corporation.\textsuperscript{83}

\subsection*{2.1.4. Corporate Liability vs. Individual Liability}

In common law, criminal corporate liability is cumulative rather than substitutionary.\textsuperscript{84} Thus, corporate guilt in no way eliminates the personal guilt of the natural person to whom the


\textsuperscript{83} Canadian Dredge \& Dock, supra 36 at 27. See also, \textit{R. v. Waterloo Mercury Sales Ltd.}, supra 58, a case in which the president of the company had circulated written instructions to prohibit the conduct in question. This was not considered a defence against the acts of the sales manager, who was regarded as a directing mind of the company.

\textsuperscript{84} Leigh 1977, supra 28 at 275.
offence may be attributed; he remains liable throughout.

According to Glanville Williams

[t]he device of incorporation does not protect people who commit offences. A company can act only through human beings, and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself, just as any employee committing an offence for a human employer is liable.85

The principle of cumulative liability has been widely acknowledged both in case law86 and in environmental statutes87. Nevertheless, prosecution of corporate directors and officers has been rare.88 However, some dual convictions in the end of the 1980s seem to indicate that prosecutors are increasingly seeking to prosecute both the corporation and its officials.89 The most striking example of dual liability took place in Metropolitan Toronto (Municipality) v. Siapas in 1988. In this Ontario decision, the corporate president was sentenced to six months in jail and a fine of one hundred thousand dollars was imposed on the corporation for contempt of court for not complying with a court order forbidding further pollution.90

87. E.g. CEPA, supra 13, s. 122; Transportation of Dangerous Goods Act, supra 16, s. 11; B.C. Waste Management Act, supra 51, s. 34(10).
88. Saxe, supra 2 at 31.
89. Saxe, Fines Go Up Dramatically in Environmental Cases. [1989] 3 C.E.L.R. (N.S.) 104 at 107-08. See also, Saxe, ibid. at 103-16.
An explanation for the rare use of dual prosecutions with regard to corporate directors might be the heavy onus set on the prosecution; the Ontario Court of Appeal ruled in *R. v. Fell* in 1981 that although the offence in question was one of strict liability, convicting the directing mind required mens rea on his part, that is, knowledge of the circumstances which make up or constitute the offence.\(^{91}\) The situation with a lower level employee is totally different; if an employee’s behaviour falls below the standard of care expected from a reasonable person in that person’s position, he can be convicted of an offence. Common law of negligence applies.\(^{92}\) It is important to notice that in a strict liability offence it is possible for an employee to be convicted even when the corporation is acquitted on the basis of due diligence.\(^{93}\)

The justification for setting a directing mind on a different footing from a lower level employee is questionable. If directing minds have fostered environmentally negligent corporate policy or failed to instruct and train corporate employees, there should be no reason to let the management escape from liability. In *R. v. United Keno Hill Mines Ltd.*, Justice Stuart emphasized the importance of the personal liability of directors and supervisors, and noted that "[a] corporate veil should never afford the slightest measure of special protection to anyone for criminal conduct." He pointed out that concessions to one class

91. Supra 65.
of offenders not afforded to others can endanger public perception of bias and unjustifiable discrimination.\textsuperscript{94}

Most environmental statutes accept the directing mind's \textit{mens rea} requirement. A typical provision provides that a director is party to and guilty of an offence if he "directed, authorized, assented to, acquiesced in or participated in the commission of the offence".\textsuperscript{95} The words are usually held to connote influence or control and knowledge of the relevant facts.\textsuperscript{96} It appears that the provision imposes liability on corporate servants only for their actual participation or active support of unlawful activity. A different approach has been taken in Ontario's environmental statutes under which it is not necessary for the Crown to prove the directing mind's \textit{mens rea}, mere negligent omission to prevent the corporation from causing or permitting pollution is enough.\textsuperscript{97} The Ontario approach is in keeping with recommendations of the Law Reform Commission of Canada when it suggested that in regulatory offences, criminal liability should be imposed on a directing mind who "simply did not exercise reasonable care to prevent harmful occurrences", and thus failed

\textsuperscript{94} (1980), 10 C.E.L.R. 43 at 54, 1 Y.R. 299 (Y.T.Terr.Ct.). It has also been argued that the ruling in \textit{Fell} is unclear and possibly not applicable to provincial strict liability offences. See, R.M. McLeod, supra 92 at 3.

\textsuperscript{95} \textit{E.g.} CEPA, supra 13, s. 122; Transportation of Dangerous Goods Act, supra 16, s. 11; B.C. Waste Management Act, supra 51, s. 34(10).

\textsuperscript{96} Saxe, supra 2 at 132.

\textsuperscript{97} \textit{E.g.} Ontario Environmental Protection Act, supra 22, s. 147a (as am. S.O. 1988, c. 54, s. 49(3)). See also, Saxe, supra 2 at 131-40.
to fulfill his responsibilities as a directing mind. The failure to give adequate training and supervision to employees or failure to find out about the hazards of the operation could provide a basis for liability. It has been noted that a provision that includes negligent omissions serves also certain normative and educational goals; personal liability of corporate officers emphasizes the officers' duty to govern the corporation in a manner that gives priority to the establishment and proper operation of pollution control systems.

The question whether convicting the corporation is a prerequisite for convicting directors and officers has been dealt with in a somewhat random manner in environmental statutes. Some environmental statutes provide that the directors and officers can only be convicted if the corporation has first been convicted, while others state that the conviction of the corporation is not necessary. An even greater number of statutes do not deal with the question at all. It has been pointed out that the diversity does not have any rational reason but is rather "a historic relic of the changing fashions in legal draftsmanship and in regulatory fervour".

101. CEPA, supra 13, s. 122; Transportation of Dangerous Goods Act, supra 16, s. 11; B.C. Pesticide Control Act, R.S.B.C. 1979, c. 322, s. 22(4).
102. See Saxe, supra 2 at 136.
103. Ibid.
2.1.5. Entities Liable

The general common law principle is that the only entity to which criminal liability can be attributed is a corporation since it alone is regarded as a person capable of having rights and duties. However, several statutes include an exception to this basic rule; for instance, the Quebec Civil Code recognizes a partnership as a legal entity, and according to the Canada Shipping Act, a ship may be prosecuted for marine pollution. Similarly, trade unions and employers' organizations can be prosecuted under the Canada Labour Code.

Corporate criminal liability does not always cover all forms of corporations. This is particularly the case with public and Crown corporations whose liability is often more limited than that of private companies. The problems of such limited liability are discussed by Dianne Saxe in her article "Application of Provincial Environmental Statutes to the Federal Government, Its Servants and Agents." Saxe illustrates the issue with the unreported case of R. v. National Research Council in which several federal government departments and agents were charged together with private corporations for disposing of hazardous industrial waste. While private defendants and the Bank of

106. Shipping Act, R.S.C. 1985, c. S-9, s. 682.
Canada (a federal body) pleaded guilty and paid fines up to forty thousand dollars, the charges against the National Research Council and its four employees were quashed after they claimed immunity from provincial laws.\textsuperscript{109}

Saxe notes that this absurd situation has grown from the legal tradition which creates a presumption that no statute binds the Crown unless it is expressly named therein, or unless the purpose of the statute would be wholly frustrated unless the Crown were bound.\textsuperscript{110} Although some provincial environmental statutes still make no attempt to bind the Crown, the situation has been improving during the 1980s; section 15 of the Charter of Rights has led to extensive litigation challenging Crown immunities, and some legislative changes have taken place.\textsuperscript{111} For instance, Ontario's Environment Enforcement Statute Law Amendment Act of 1986 removed some of the immunities granted to municipalities under the Ontario Water Resources Act and repealed the Crown immunity from prosecution under the same Act.\textsuperscript{112}

Exempting public corporations from criminal liability has been defended with the argument that in effect, the fining of said corporations is to fine the public at large.\textsuperscript{113} In R. v. Northwest Territories Power Corp., the court did not accept the

\begin{footnotes}
\item[109] Ibid at 116.
\item[110] See, Interpretation Act, R.S.C. 1985, c. I-21, s. 17.
\item[111] Sweigen, supra 99 at 20.
\item[112] See, Ontario Environmental Enforcement Statute Law Amendment Act, S.O. 1986, c. 68. It has been argued that even if a provincial statute expressly includes the Crown, it does bind the Crown only in right of that province, not in right of Canada. This would mean that the Crown is immune from provincial statutes except where the Crown can be said to have sought the benefit of the provincial legislation. See Saxe, supra 108 at 117.
\item[113] Leigh 1977, supra 28 at 290.
\end{footnotes}
defendant's argument that since it was a Crown corporation, it did not have money of its own but only "public money". However, Justice Bourassa acknowledged the problem of "spilling over" and noted that the cost to the defendant should perhaps include a cost that cannot be passed on to the public. In R. v. North Vancouver, the municipal offender argued that imposition of a fine on the municipality would result in money being transferred from one government pocket to another. The court rejected the argument, and noted that the fine may have the effect of forcing a change in the municipality's budgeting priorities thus acting as a deterrent.

Under the present Canadian law, corporations can be prosecuted even after they have been dissolved or amalgamated. The effect of amalgamation was discussed in R. v. Black & Decker Manufacturing Co. by the Supreme Court of Canada. In the case, an information under the Combines Investigation Act was laid against the company formed by an amalgamation for an offence committed by one of the old companies. The Supreme Court of Canada ruled that the impact of the amalgamation depends on the wording of the applicable statute which in this case was Canada Corporation Act. The Court held that since the Act does not extinguish the old company, the new company is liable.

2.2. Sentencing Corporations in Environmental Cases

"Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence." This definition was proposed by the Canadian Sentencing Commission in 1987 in its report on sentencing. The Commission avoided the adjective "criminal" (as in "criminal sanctions") because it wanted to emphasize the fact that the sentencing process reaches outside the scope of "true crimes" and the Criminal Code. For instance, the vast majority of environmental offences fall under regulatory legislation while the number of actual mens rea environmental offences remains small.

By using the words "legal sanctions" instead of "punishment", the Sentencing Commission wanted to assert that of the two notions included in the concept of sentencing, the notion of obligation and the concept of punishment, the former has precedence. The notion of obligation is the more comprehensive of the two; sanctions are always unpleasant, while only the most severe forms of coercion can be called punishments. In this study, the concept of "penal sanction" is used to describe the sanctions available in the penal provisions of environmental legislation, thus excluding civil and administrative sanctions. It is important to notice that such traditional civil law measures as a compensation or remedial order can and have been

119. Ibid.
increasingly included in the penal provisions of environmental statutes. It is no longer unusual to find a provision providing for a remedial order or forfeiture among the penal sanctions of a statute.

The purpose of the following presentation is to study the present Canadian practice of sentencing corporations in environmental cases. The section is divided into three parts; the first looks at the sentencing rationale, and the objectives and principles pursued in sentencing. The second part is devoted to examining the different criteria employed in the determination of a sentence, and finally, the third part looks at different sentencing options available for corporations.

2.2.1. Sentencing Rationale, Objectives and Principles

The purpose of a sentencing rationale is to supply the foundation for sentencing decisions and justify the existence and use of penal sanctions. A good rationale provides both a reason and a goal for sentencing which are then pursued through sentencing objectives and principles.

Traditional sentencing rationales can be divided into two categories of retributivism and utilitarianism. The retributivist view emphasizes punishment as the primary sentencing goal. Moral reasons require that retribution be exacted from those who are found guilty, and no further justifications are needed.

Unlike retributivism, the utilitarian rationale has nothing to do with moral rationales; it is based on the social utility of sentencing, and regards the objectives of deterrence,
rehabilitation and incapacitation as means for crime prevention and crime control. A threat of sanction or actual conviction is justified because it reduces or prevents the threat of a greater evil, crime. The basic difference between the two rationales is that while the utilitarian approach looks to the future as a means of justifying the imposition of legal sanctions, retributivists look primarily to the past, focusing on the blameworthiness of the offence committed rather than the future consequences of punishment.\textsuperscript{120}

Retributivism and the utilitarian approach have, until recently, represented the two fundamental ways of resolving the issue of justification. However, a new approach has been developing during the 1980s which attempts to blend morality and utility in advocating that sanctions should provide compensation for the victims of crime. The development of this new victim oriented approach is a result of growing concern among the public that the courts have been so concerned with the rights of the offender that they have forgotten the rights of the victim.\textsuperscript{121}

How these rationales and the objectives and principles they embrace are being applied to sentencing corporations in environmental cases will be looked at next.

\textsuperscript{120} Ibid. at 127-28.
\textsuperscript{121} Ibid. at 128.
2.2.1.1. Retribution

The original idea of retribution, that of vengeance, has been rejected by the Canadian courts. Denunciation and removal of unjust enrichment have replaced revenge as the primary objectives of retribution, and the idea of a deserved punishment has turned into just deserts and the principle of proportionality.

The Canadian Sentencing Commission defines denunciation as being "essentially a communication process which uses the medium of language to express condemnation". The purpose of denunciation is to express society's abhorrence and disapproval towards certain kind of conduct, and thereby brand the conduct as reprehensible. The degree of denunciation achieved is dependent upon the publicity of the condemnation; from this perspective, the historical pillory represented an ideal tool for denunciation.

In public welfare cases, denunciation has not been recognized as an independent sentencing objective. However, some evidence on the existence of denunciation can be found; in R. v. Panarctic Oils Ltd., Justice Bourassa remarked that "[dumping] should become a banned word, an immoral concept." In R. v. Cotton Felts Ltd., denunciation was regarded as an aspect of deterrence. In the decision, the court described deterrence as being composed of two aspects; the negative aspect of punishment

123. Sentencing Reform, supra 118 at 142.
124. (1983), 12 C.E.L.R. 78 at 84 (N.W.T.Terr.Ct.).
is based on achieving compliance by threat of punishment, while
the positive aspect emphasizes community disapproval of an act by
branding it as reprehensible. The court considered the positive,
morally educative aspect of denunciation particularly applicable
to public welfare offences and declared a hope that "a person
with an attitude thus conditioned to regard conduct as
reprehensible will not likely commit such an act."125 Similarly,
in R. v. Canadian Marine Drilling Ltd., Justice Bourassa
expressed a wish that public denunciation, as a result of the
conviction, may act as a deterrent and encourage better
compliance in the future.126

Removing unjust, illegally gained enrichment is the second
sense in which retribution has been applied. According to P.C.
Weiler, those who do not comply with laws and regulations gain an
unfair advantage over law abiding citizens in the distribution of
scarce benefits. Therefore "punishment is necessary to remove
that unjust enrichment from the offender and so secure a just
equilibrium on behalf of those who were willing to be law
abiding."127 Such considerations were obviously in the mind of
Justice Stuart in United Keno Hill Mines when he remarked that
"[t]he assessment of a fine based on illegally obtained gains is

125. (1982), 2 C.C.C.(3d) 287 at 295. See also, R. v. Richard
Lehnen and Wildwood Camperland (Canada) Inc. (185), 14 C.E.L.R.
32 at 34.
(N.W.T.Terr.Ct.).
127. P.C. Weiler, "The Reform of Punishment" in Studies on
Sentencing. Law Reform Commission of Canada (Ottawa: Information
Canada, 1974), at 173, quoted in John Sweigen - Gail Bunt,
Sentencing in Environmental Cases. A Study Paper prepared for the
essential to ensure that non-complying corporations do not acquire an economic advantage over complying competitors." The importance of recompensating the offender’s law-abiding competitors was also acknowledged by the sentencing judge in *R. v. Richard Lehnen and Wildwood Camperland (Canada) Inc.* when he noted that a "mere slap on the wrist" penalty means "unfairness to those who at considerable personal expense observed the requirements".

Although the notion of depriving the offender from illegally gained profits comes up frequently in sentencing, the deprivation is generally backed by deterrent motives. Courts argue that in order to deter, the penalty must show that "the crime does not pay", and one way to achieve this goal is to deprive the offender from the profits of the crime. In such rulings, the objective is to prevent further crimes rather than compensate the offender’s law-abiding competitors.

Unlike denunciation and removal of unjust enrichment, the notion of just deserts does not specifically address the issues surrounding the general objectives of sentencing, but rather influences the allocation of sanctions by advocating the principle of proportionality. Proportionality consists of two

128. Supra 94 at 51.
129. Supra 125 at 34.
131. The principle of proportionality was recognized in *R. v. Heck* (1963), 40 C.R. 142 (B.C.C.A.); *R. v. Wilmott*, [1967] 1 C.C.C. 171 (Ont.C.A.). The most influential advocate of just deserts has been American Andrew von Hirsch. His main concern was not to justify the imposition of punishment but rather to limit
aspects; firstly, it entails the idea of balance between the conduct and penalty by mandating that the quantum of a sanction reflects fairly the seriousness of the offence. Secondly, the principle requires that similar offences are treated alike.\textsuperscript{132} The two components of proportionality were expressed in the policy objectives set in "The Criminal Law in Canadian Society", according to which "the criminal law should provide sanctions for criminal conduct that are related to gravity of the offence and the degree of responsibility of the offender", and "persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar".\textsuperscript{133}

The first aspect, that of balance between the conduct and penalty, requires determining the harm caused or risked by the act and the culpability of the actor. Considerations regarding the elements of harm and culpability are examined in more detail in section 2.2.2.1. under the headings "Harm" and "Intent".

The call for like penalties in like offences emphasizes such factors as uniformity and equity in sentencing. Uniformity of sentencing has been acknowledged as recently as in 1989 in \textit{R. v. Oxford Frozen Foods Limited}. In the decision, the court scrutinized the fines imposed on similar type of cases and came to the conclusion that the fine imposed by the lower court was not in line with general sentencing practice and therefore

\footnotesize{the quantum of punishment meted out to the offender. See, infra 132.}


\textsuperscript{133} Supra 1 at 53.
lowered the fine.\textsuperscript{134} In \textit{R. v. Echo Bay Mines Ltd.}, Justice Ayotte warned against resorting too much on sentencing practice by pointing out that "any attempt to...extract some tariff of sentencing from decided cases" is a "futile exercise" because "[e]ach sentence must be decided on its own facts". He recommended that sentencing practice should be used more for providing general guidelines than for fixing the precise amount of the fine.\textsuperscript{135}

A survey to the Canadian sentencing practice in environmental cases reveals that although superficially rejected, the retributivist perspective comes up frequently in sentencing. Essentially retributivist objectives are often muddled and confused with utilitarian goals, thus making it difficult to identify the true rationales behind sentencing decisions. The tendency to connect retributivism with some kind of "an eye for an eye" principle might be an explanation for the general reluctance to accept and acknowledge retributive considerations as cogent sentencing objectives. A blind assertion that crimes should be punished because they are crimes does not appeal to today's judiciary.

A further reason for the disregard of retribution seems to lie in the nature of environmental offences. Since the vast majority of the cases are strict liability offences in which the element of fault has been eliminated, courts frequently regard environmental offences as morally blameless in contrast to "real"

\textsuperscript{134} (1989), 5 C.E.L.R. (N.S.) 37 (N.S.Co.Ct.).
\textsuperscript{135} (1980), 12 C.E.L.R. 38 at 42 (N.W.T.Terr.Ct.)
mens rea crimes. John Sweigen and Gail Bunt summarize their study on sentencing by noting that

"there does seem to be an ambivalence in the minds of judges as to whether environmental offences are morally reprehensible, so that the sentence must express repudiation, or morally neutral, so that deterrence is the governing factor..."

The latter, deterrent approach has at least superficially gained more popularity among sentencing judges. Deterrence and other utilitarian objectives will be examined in more detail next.

2.2.1.2. Social utility

The utilitarian rationale pursues crime prevention and reduction through such objectives as rehabilitation, incapacitation, and deterrence. In addition to these traditional objectives, the goals of providing respect for law and protection of the public can be classified under the utilitarian rationale.

The purpose of rehabilitation is to alter an offender's "characters, habits, or behaviour patterns so as to diminish his criminal propensities". Although the most popular application of rehabilitation, that of treatment, has been rejected as a means to change corporate behaviour, the possibility of rehabilitating corporations through some other measures comes up occasionally in sentencing. For instance, in Panarctic Oils, Justice Bourassa noted that the "corporate defendant is...a candidate for rehabilitative measures because...it is a rational

137. Sentencing in Environmental Cases, supra 127 at 40.
139. Sentencing in Environmental Cases, supra 127 at 12.
140. See, for example, R. v. Echo Bay Mines Ltd., supra 135; R. v. United Keno Hill Mines Ltd., supra 94.
being, and reason will presumably work."\textsuperscript{141} The sentencing objective in the case is clearly rehabilitative when he notes that "deterrence in this particular case means effecting forever a complete and utter excision of the concept of dumping from corporate defendant's inventory of options."\textsuperscript{142} The measure he chose for rehabilitation was intervention with corporate operations through a probation order; the court employed (the former) section 663 of the Criminal Code and placed the corporation on probation for two years. The terms of the probation were that the corporation "be of good behaviour and not breach the peace", and that the corporation must file with the court a detailed written policy for correcting the situation that led to the offences. The court noted that it would have been unsatisfactory to leave the question of resolving the problem that led to the offences wholly in the hands of the corporation, especially since the corporation had shown signs of "lots of talk but little action."\textsuperscript{143}

In Panarctic Oils, the intervention was limited to the actual operation methods of the corporation. Another possibility would be to extend the intervention to corporate structure and decision-making by remedying the internal process that led to illegal conduct. In Panarctic Oils, Justice Bourassa explicitly rejected this kind of direct interference and noted that "I do

\textsuperscript{141} Supra 124 at 90.
\textsuperscript{142} Ibid. at 84.
\textsuperscript{143} Ibid.
not believe it is open for a Court to tell a corporation how to run its business."\textsuperscript{144}

An aspect of rehabilitation that has not gained much attention in Canadian courts is the notion of social responsibility. While the corporate ambition to make profit cannot (and should not) be "cured", the way and means by which the corporation pursues the profit can be influenced. A socially and environmentally irresponsible "whatever it takes" mentality should not be accepted as "a necessary part of doing business". Such considerations were briefly discussed in \textit{R. v. North Vancouver} when the court noted that "a substantial fine may well provide the impetus for a realistic re-assessing of corporate consciousness about environmental responsibility."\textsuperscript{145} The capabilities of penal sanctions to change corporate attitudes should not, however, be overestimated. To alter the very ideology of pursuit-of-profit-at-any-cost obviously requires some very fundamental societal changes that cannot be accomplished through legal measures alone.

The second utilitarian objective, that of incapacitation, is based on the idea of preventing further crimes by incapacitating the offender, and thus making it impossible for him to continue his illegal conduct. In the traditional sense, this has almost always meant removing the offender from society through imprisonment, a measure that is not applicable to corporate offenders. However, incapacitation can work in a more innovative

\textsuperscript{144} Ibid. at 94.
\textsuperscript{145} Supra 115 at 170.
manner, namely by incapacitating the offender from the means to
commit further offences. In practice, this could happen by
forfeiting an object or property which was used in committing the
offence or revoking permits or licences to operate. The scarce
selection of such measures is discussed in more detail in section
2.2.3.4. under the heading "Forfeiture".

The objective of deterrence is raised either expressly or
implicitly in almost every environmental offence, and it is
regularly referred to as the most central sentencing objective in
environmental cases. In spite of its popularity, the contents
of the term "deterrence" remain somewhat ambiguous and the term
is often confused with other sentencing objectives. In this work,
"to deter" means "to discourage or stop by fear, to stop or
prevent from acting or proceeding by danger, difficulty, or other
consideration which disheartens or countervails the motive for
the act." Hence, the essence of the concept is a threat that
is used as a disincentive against undesirable conduct.

Normally deterrence is divided into general and special
deterrence. Special deterrence is aimed at discouraging
recidivism, preventing the offender in question from committing

146. R. v. Kenaston Drilling (Arctic) Ltd. (1973), 12 C.C.C.(2d)
383 (N.W.T.S.C.); R. v. Sheridan (1972), 10 C.C.C.(2d) 545
(N.S.) 119 (Ont.Prov.Off.Ct.), var'd Crowe et al. v. The Queen
Crowe (1991) 6 C.E.L.R. (N.S.) 116 (Ont.C.A.); R. v. The Canada
Panarctic Oils Ltd., supra 124.
147. Black's Law Dictionary, supra 9 at 536.
148. Contrary to this traditional division, von Hirsch regards
special deterrence as a particular application of general
deterrence, not as an independent category. See, von Hirsch,
supra 132 at 38n.
further crimes, while the aim of general deterrence is to prevent other potential offenders from committing similar violations. Both elements of deterrence appear frequently in environmental cases. As noted by Justice Camblin in *R. v. North Vancouver*:

> [r]educed to the fundamentals, the aim of the courts in sentencing for environmental offences is, and should be, to curb the potential for such offences in the future, whether by the defendant or by others [emphasis added].

Of the two elements of deterrence, that of general deterrence is generally regarded as the more prominent one. In *R. v. Cyprus-Anvil Mining Corp.*, the court ruled that even when the maximum fine is insufficient to deter the offender in question because of its size and wealth, imposing the maximum fine can still be justified because of its general deterrence. Similarly, in *R. v. Esso Resources Canada Ltd.*, although the company's policies and procedures were of a very high standard, and the court was satisfied that "the defendant is prepared to do everything the law requires and more", the court went on to impose a substantial sentence on the basis of "deterring anyone else."

As mentioned above, deterrence consists of the threat of something unpleasant. For corporations, the primary threat appears to be the financial consequences of the conviction because "problems on the profit and loss sheet...is what companies know most about." A frequently repeated citation was

149. Supra 115 at 170.
when he noted that

[w]here the economic rewards are big enough persons or
corporations will only be encouraged to take what might be termed
a calculated risk. It seems to me that the Courts should deal with
this type of offence with resolution, should stress the deterrent,
viz., the high cost, in the hope that the chance will not be taken
because it is too costly.\(^{153}\)

An important limitation to deterrence was announced in *R. v.
McNamara*, when the court ruled that although the general
deterrence requires that the fines are substantial and exemplary,
they may not be "crippling or vindictive".\(^{154}\) Also the principle
of proportionality seems to act as a force resistant to
deterrence; in *R. v. Oxford Frozen Foods Ltd.*, the court lowered
the fine on the basis of uniformity in sentencing. According to
the decision, the lower court had overemphasized the question of
deterrence and disregarded the principle of uniformity.\(^{155}\)

The objective of deterrence is strongly connected to public
welfare offences which are often regarded as not being prohibited
because they are wrong in themselves but because of their
potentially grave consequences.\(^{156}\) Consequently, there is a
certain morally neutral stigma attached to environmental offences
in which no mens rea is required. Justice Stuart questioned the
idea of moral neutrality in *United Keno Hill Mines* by noting that

\[\text{[t]he range of inherent criminality in pollution offences can be}
\text{extreme. Actions may be negligent or premeditated and the}
\text{ramifications may range from trivial littering offences to}\]

\(^{153}\) Supra 146 at 386.
\(^{154}\) Supra 78 at 527.
\(^{155}\) Supra 134 at 53.
\(^{156}\) Sentencing in Environmental Cases, supra 127 at 10-11.
offences precipitating untold destruction to resources, property and in some cases death.\textsuperscript{157}

The courts have, to some degree, acknowledged the wide variety of environmental offences, and although generally emphasizing deterrence as the primary motivation in their decisions, retributive considerations can often be found "between the lines".

In addition to traditional deterrence, rehabilitation, and incapacitation, two frequently mentioned utilitarian sentencing objectives are providing respect for the law and the protection of the public.\textsuperscript{158} Providing respect for the law has become popular since the publication of the Canadian Sentencing Commission’s report "Sentencing Reform: A Canadian Approach" in 1987. In the report, the Commission recommended that the fundamental purpose of sentencing should be "to preserve the authority and promote respect for the law through the imposition of just sanctions".\textsuperscript{159} The recommendation was followed in \textit{R. v. Gulf Canada Corp.} which pointed out that "[t]he goal of sentencing must be to uphold the law over and above other considerations and any penalty should seek to encourage law-abiding as a core value."\textsuperscript{160} The role of sentencing in providing respect for the law was acknowledged by Justice deWeerdt in \textit{R. v.}

\textsuperscript{157} Supra 94 at 47. 
\textsuperscript{158} "Protection of the public" is frequently used in all sentencing. According to a study accomplished by the Canadian Sentencing Commission, 88\% of the surveyed judges saw protection of the public as the primary purpose of sentencing. See, \textit{Sentencing Reform}, supra 118, at 145. See also, \textit{R. v. The Canada Metal Company}, supra 146; \textit{R. v. Le Chene No. 1} (1987), 2 C.E.L.R. (N.S.) 273 (N.W.T.Terr.Ct.). 
\textsuperscript{159} Ibid. at 151. 
\textsuperscript{160} (1987), 2 C.E.L.R. (N.S.) 261 at 261.
Placer Development Ltd., a case in which the accused was convicted of nine offences under the Northern Inlands Waters Act, as follows:

[the whole point of the requirements for licenses and authorizations under the legislation is to ensure the public that the waters in the public domain in the two northern territories will not be interfered with in ways beyond public control. It is therefore essential that these requirements be enforced in such a way as to give meaning to them.] 161

The protection of the public comes up in several different contexts; sometimes it is referred to as one of several objectives without any priority while at other times it is used as an overall purpose of sentencing that is to be accomplished through secondary objectives of retribution, rehabilitation, or deterrence. Another way in which the concept has been applied is to describe the paramountcy of society's needs and interests to those of individual interests when the two appear to conflict. 162

In short, the protection of the public seems to be an extremely convenient, although ambiguous term to which the courts can refer to in almost any sentencing case. The diversity and ambiguity of the concept becomes clear when one notices that the protection of the public is, a lot more than a mere sentencing objective; the Canadian Sentencing Commission has aptly pointed out that while it may be appropriate to ascribe the overall goal of protection of the public to the criminal justice system as a whole, it is hardly justifiable to assign the sentencing system the same goal. 163

162. Sentencing in Environmental Cases, supra 127 at 8-10.
163. Sentencing Reform, supra 118 at 146-47.
2.2.1.3. Rights of the Victim

Redressing the crime victims and repairing the damages have not received much attention from supporters of retribution or the utilitarian approach. Traditionally, repairing the damage and paying compensation to the victim of the offence have been regarded as a part of the civil procedure. The courts have been reluctant to impose restitution or compensation orders, fearful of turning into some kind of collection agencies.¹⁶⁴

The negative attitude towards redress is reflected in the present sentencing theories which are absorbed with seeking "justifications for punishment", neglecting the bigger picture of sentencing that includes both punishment and obligations.¹⁶⁵ Consequently, in the present system, strong emphasis lies on the punitive aspects of sentencing. The Canadian Sentencing Commission has noted that a problem with this kind of an unbalanced situation is that "it tends to degenerate into a self-fulfilling prophecy"; if only the most punitive aspects of sentencing are accentuated, sentencing will result in increased severity, thus making change more difficult.¹⁶⁶

The victim orientated approach started at the end of the 1970s from the growing concern among the public that the courts were so occupied with the rights of the offender that they had forgotten the rights of the victim. It was stated in "The Criminal Law in Canadian Society" in 1982 that

¹⁶⁴. Sentencing in Environmental Cases, supra 127 at 69.
¹⁶⁵. Sentencing Reform, supra 118 at 108.
¹⁶⁶. Ibid. at 108.
[t]o the victim, it may at times appear that the criminal justice system is overly concerned about "solemn ritual" and the punishment of the offender, and insufficiently concerned with the victim's financial losses and needs.  

The new approach does not attempt to replace the two mainstream rationales but tries rather to blend morality and utility in advocating that sanctions should provide redress for crime victims.  

One strong supporter of the victim orientated approach is the Law Reform Commission of Canada; the Commission has frequently suggested that imposing sanctions encouraging reconciliation and redress to the victim, such as restitution and compensation, would appear to be appropriate in a majority of offences and particularly so in environmental cases.  

The present sentencing practice in environmental cases does not, however, pay much attention to the position of the victim. Occasionally, the harm to the victim is taken into consideration as a sentencing factor - the greater the harm the higher the fine - but actual restitution or compensation orders are rare exceptions. Similarly, although the harm to the environment is frequently regarded as a factor in sentencing, remedial orders remain a rarity among penal sanctions. However, some changes in recent environmental legislation give reason to believe that

167. Supra 1 at 30.  
168. Sentencing Reform, supra 118 at 128.  
170. See, Sentencing in Environmental Cases, ibid. at 20.  
171. Ibid. at 18-19.
the neglected position of a victim is becoming more widely acknowledged; for example, sections 130(1)(b) and 131(1) of the CEPA provide, respectively, for remedial orders and compensation for the loss of property. Similar types of provisions can be found in the 1987 Manitoba Environmental Act. Also, the 1988 amendment of the Criminal Code laid strong emphasis on the rights of the victim. The remedial sanctions provided in these and other statutes will be discussed in more detail later in this chapter.

2.2.2. Sentencing Criteria

A number of commonly considered sentencing criteria have evolved in case law that are intended to reflect the broader objectives discussed above. The criteria and an assessment of their practical application is presented in this section.

Sentence consists of two basic decisions; the quality and quantity of the sentence. Generally, the first consideration is to determine the specific type of sanction used in a particular case. This is followed by assessing the quantum of the penalty. Since in the majority of environmental cases the only available or only applied sentencing option for corporate offenders is a fine, the following presentation concentrates primarily on observing the criteria for assessing the quantum of a fine. The section is divided into three parts, the first part dealing with offence-related factors, the second part with

172. Supra 22, ss. 36(b) and 36(c).
offender-related factors, and the third part examines other factors that influence sentencing.

The leading Canadian case with respect to sentencing factors in environmental cases is *R. v. United Keno Hill Mines Ltd.* from 1980.\(^{174}\) The case together with John Sweigen and Gail Bunt's study "Sentencing in Environmental Cases" (published in 1985) form the basis for the presentation.\(^{175}\)

2.2.2.1. Offence-related factors

A) Harm

The extent of both actual and potential damage is often very difficult to determine in environmental cases. For one thing, the effects of violation may not be immediately measurable; damage can be latent or cumulative and show up in two years or twenty years following the incident. Secondly, the damage might not be measurable at all. Harming human life, health, or property can be assessed with some degree of accuracy, but how can one measure destruction of an ecosystem? Destroying a unique species or harming a link in an ecosystem has no immediate monetary value and there is no measurements for assessing such losses.

In spite of the difficulties, the presence of potential or actual harm to the environment or human beings appears to be one of the most important stimulus in sentencing. The courts are divided in their approach to the notion of harm; some of the courts stress deterrence and impose substantial penalties even in

\(^{174}\) Supra 94.

\(^{175}\) Supra 127.
the absence of actual damage while others emphasize the results of violation as the primary factor and refuse to punish the offender for something that cannot be proved.\textsuperscript{176} The latter, "backward" looking approach is generally connected to the retributivist idea of just deserts and the principle of proportionality.

The former deterrence orientated approach was first adopted in Kenaston when the court ruled that the basis for substantial penalty should be the risk of harm instead of actual harm.\textsuperscript{177} The validity of this approach was confirmed by the observation in \textit{R. v. Canadian Marine Drilling Ltd.} that damage is not even an element in many environmental offences.\textsuperscript{178} Similarly, in \textit{Panarctic Oils}, the court ruled that harm was not a factor to be taken into consideration unless there is concrete evidence of serious harm which would then be regarded as an aggravating factor. In the \textit{Panarctic} decision, Justice Bourassa paid special attention to the cumulative nature of pollution by noting that "the destruction of any ecosystem or environment is a gradual process, effected by cumulative acts - a death by a thousand cuts, as it were." Consequently, each offender is equally

\textsuperscript{176} Ibid. at 17-18.
\textsuperscript{177} Supra 146.
\textsuperscript{178} Supra 126. For example, s. 34(1) of the Fisheries Act has been interpreted to mean that when determining whether the offence under s. 36(3) has been completed the key factor is the harmful nature of the substance, not the state of the water after the deposition. The offence is complete without ascertaining whether the water itself was rendered deleterious, and therefore there is no need to show actual harm to fish but potential harm is enough. See, \textit{R. v. MacMillan Bloedel (Alberni) Ltd.} (1979), 47 C.C.C.(2d) 118 at 121-22; \textit{R. v. Jack Cewe Ltd.} (1981), 10 C.E.L.R. 120.
responsible for the total harm and "[t]he first offender can’t be allowed to escape with only nominal consequences because his input is not as readily apparent."\textsuperscript{179}

Although courts have generally adopted the Kenaston approach in their sentencing and continue to cite the case regularly,\textsuperscript{180} some courts insist on using the absence of actual damage as a justification for imposing low fines.\textsuperscript{181} The case on which the courts support their preoccupation is \textit{United Keno Hill Mines Ltd.} in which Justice Stuart ruled that in absence of proof about actual damage a substantial penalty is inappropriate.\textsuperscript{182} However, when reading the case carefully, it becomes obvious that Justice Stuart did not deny the role of potential harm as a sentencing factor but rather emphasized the Crown’s duty to show evidence of potential damage.

An interesting aspect to the question of harm was brought up in \textit{R. v. Gulf Canada Corp.} in 1987 when Justice Bourassa noted that "there is no harm to the environment, but there is harm inflicted upon the process of environmental protection." He regarded providing respect for law as the primary objective of

\textsuperscript{179} Supra 124 at 85-86. A similar approach was taken in \textit{R. v. Falconbridge Nickel Mines Ltd.} (1982), 12 C.E.L.R. 135 (Ont.Prov.Ct.) when the court refused to regard the fact that the discharged water was less impaired than the water in the lake into which it was discharged as a mitigating factor in sentencing.


\textsuperscript{182} Supra 94 at 47-48.
sentencing and noted that the objective enables substantial penalties in cases where there is no evidence of harm to the environment.\textsuperscript{183}

As noted before, compensating the victim and paying for or repairing damage has traditionally been regarded as belonging to the civil procedure. However, when assessing the size of a fine, courts have occasionally paid attention to the effects of the offence on an individual victim or society as a whole; in Quebec, the fact that for two years the residents of a town had been forced to carry water to their homes as a result of pollution in the river was taken into consideration in \textit{R. v. Grégoire}.\textsuperscript{184} In another Quebec case, a fine of ten thousand dollars was imposed because the pollution in a river had forced one neighbour to spend six thousand dollars to construct a private aqueduct, and had deprived other neighbours of water for drinking and for their cattle for a long period of time.\textsuperscript{185} Negative health effects, such as nausea, headaches, respiratory ailments as well as complaints of odors have also been considered in sentencing.\textsuperscript{186} The cost of reparations to the government was taken into account in \textit{R. v. Jackson Bros. Logging Co.} when the fine of $6,000 was

\begin{flushright}
\textsuperscript{183} Supra 160 at 267. See also \textit{R. v. Echo Bay Mines Ltd.}, supra 135.
\end{flushright}
calculated to represent an amount equivalent to that expended by the government in restoring the area.\textsuperscript{187}

The question to what extent the consequences should be taken into consideration in sentencing was answered in R. v. Parks, a case in which the offender caused the death of two persons while driving impaired. The Ontario Appeal Court ruled that "the tragic consequences constitute a relevant factor, although one that should not magnify the offence so as to make the sentence disproportionate to its intrinsic gravity."\textsuperscript{188} The decision appears to support the principle of proportionality which entails the idea of balance between the conduct and penalty by mandating that the quantum of a sanction reflects fairly both the harm caused or risked by the act and the culpability of the actor.

\textbf{B) Intent}

Although it is submitted that \textit{mens rea} is not an element in strict liability environmental offences, in practice the lack of "guilty mind" appears to function as a downward force on the size of the fines.\textsuperscript{189} The courts have by implication made lack of intent a mitigating factor by virtue of their consideration of the "criminality of conduct". For instance, in United Keno Hill Mines, Justice Stuart noted that "[a]ccidents, innocent mistakes, innocent mistakes,

\begin{itemize}
\item \textsuperscript{188}R. v. Parks (1982), 39 O.R.(2d) 334 (C.A.) at 336.
\item \textsuperscript{189}See, \textit{Sentencing in Environmental Cases}, supra 127 at 22.
\end{itemize}
and not reasonably foreseen events are less damnable than wilful surreptitious violations."

Hence, in sentencing practice, categorizing most environmental offences under the label of strict liability has led to a trivializing of environmental offences; courts apparently hesitate to inflict heavy penalties that carry a morally condemning stigma on a person or a corporation who might have unknowingly become a criminal. Before Sault Ste. Marie this approach may have been justified as a measure to relieve the harshness of the sharp division between absolute liability and mens rea offences. However, after the "half-way house" of strict liability and defence of due diligence were created in Sault Ste. Marie, justifications for treating "mere" negligence as a mitigating factor lost their relevance. Furthermore, it must be borne in mind that an important reason behind the development of absolute and strict liability was the difficulty of proving mens rea in public welfare cases, not "moral neutrality" of these offences.

It has been noted that instead of regarding the lack of intent as a mitigating factor, "[a] more logical approach...would be to consider intent only at the other end of the spectrum, that is, wilfulness or recklessness as an aggravating factor." Some decisions support this train of thinking; for instance, such

191. See generally, Paulus, supra 40; Sentencing in Environmental Cases, supra 127 at 22.
192. Sentencing in Environmental Cases, ibid.
elements as deliberateness, recklessness, and a cavalier
disregard for the regulations have been regarded as conditions
for placing an offence in the "worst case" category. A well, the
fact that an offence was a "calculated risk" whereby the flagrant
violation was profit motivated and carried a low likelihood of
detection, has been regarded as an aggravating factor.¹⁹³

C) Fruits of the crime

It has been noted that "[i]f a fine is to be effective in
achieving the objectives of retribution and deterrence, it must
at least approximate the dollar value of the fruits of the
crime."¹⁹⁴ In United Keno Hill Mines, the court ruled that the
savings or gain derived from the offence, "the fruits of the
crime", should be regarded as a sentencing factor. The court held
that profits or savings realized as a consequence of an offence
should generally establish the minimum fine while other matters
considered should increase the amount of the fine.¹⁹⁵ The factor
has been frequently interpreted as meaning that if no profit has
been made through the illegal conduct, the lack of profit should
be regarded as a mitigating factor when assessing the size of a
fine.¹⁹⁶

¹⁹³. R. v. Cyprus-Anvil Mining Corp., supra 150; R. v. Panarctic
¹⁹⁴. Sentencing in Environmental Cases, supra 127 at 22. See
also, Criminal Responsibility for Group Action, supra 98 at 39.
¹⁹⁵. Supra 94 at 51. See also, R. v. Ocean Construction Supplies
Industries Ltd., supra 180.
The importance of depriving an offender of the fruits of the crime has been recognized in recent environmental legislation. Several of the environmental statutes enacted in the 1980s provide for a so-called "additional fine" which is employed when the economic benefits from breaking the law exceed the maximum fine. In such cases, courts may impose an additional penalty equivalent to any savings or gain derived from the offence.  

Both retributive and utilitarian sentencing rationales have been used to provide a justification for forfeiting the profits of a crime from a corporate offender. The deterrent effect has been emphasized particularly in trade and tax cases; for instance, in *R. v. Browning Arms Co. of Canada*, the court levied a ten thousand dollar fine expressly calculated to deprive the company of its net profits derived from a trade offence while ruling that "the Court must do its best to see to it that the fine is of sufficient quantum to take away any profit...and...to be a strong deterrent." A clear retributivist objective of removing unjust enrichment appeared in *United Keno Hill Mines*, when Justice Stuart ruled that "[t]he assessment of a fine based on illegally obtained gains is essential to ensure that non-complying corporations do not acquire an economic advantage over complying competitors."  

197. CEPA, supra 13, s. 129; Manitoba Environment Act, supra 22, s. 36(d); Ontario Environmental Protection Act, supra 22, s. 146(c) (as am. S.O. 1986, c. 68, s. 15); Ontario Water Resources Act, R.S.O. 1980, c. 361, s. 70 (as am. S.O. 1986, c. 68, s. 41); Ontario Pesticides Act, R.S.O. 1980, c. 376, s. 34b (as am. S.O. 1986, c. 68, s. 47).  
198. Supra 130 at 300-01.  
199. Supra 94 at 51.
2.2.2.2. Offender-related factors

A) Size and wealth of the corporation

The size and wealth of a corporation is frequently considered as a factor in sentencing. The factor is considered in relation to the corporation's ability to pay as well as for the impact of the penalty upon the corporation. With regard to the company's size and wealth two conflicting interests meet; on one hand, the penalty must be of sufficient magnitude so that the cost is not "readily absorbed as a simple cost of doing business".\(^{200}\) On the other hand, the courts should avoid "destroying the economic viability of the corporation by imposing a crippling fine".\(^{201}\) Special attention has also been paid to large corporations who are regarded as generally holding greater risks for severity of impact of their wrongdoings, as stated by Justice Stuart in United Keno Hill Mines: "[t]he scope of corporate activities has a multiplier effect on the extent and severity of risk potential flowing from corporate action."\(^{202}\)

The biggest problem with the size and wealth factor is the question of evidence. The problem is particularly difficult with private or closely held corporations which are not by law required to make public reports. Some possible factors that should be considered include "such matters as profits, assets, current financial status, and characteristics of the relevant market".\(^{203}\) In Panarctic Oils, the court noted that when

\(^{200}\) Ibid. at 50.
\(^{201}\) Ibid. See also R. v. Blackbird Holdings Ltd., supra 146.
\(^{202}\) Ibid. at 48.
\(^{203}\) Ibid. at 50.
impecunity is at issue in sentencing, the convicted corporation is obligated to tender evidence to that effect. Otherwise, the court will take judicial notice as to the size and wealth of the corporation. 204

A judicially unresolved issue arises respecting sentencing of small subsidiary corporations. The problem is of particular importance in branch-plant economies such as Canada. If the court’s attention focuses solely on the financial standing of the individual subsidiary unit that committed the forbidden act, it becomes easy to channel the corporate activities in such a manner that small subsidiaries or branches will attend to the environmentally suspicious operations and if caught, pay for the consequences with their limited assets. The mother company will escape the liability and transfer the illegal activity to another small branch. The problem was acknowledged in R. v. Canadian Marine Drilling Ltd. when Justice Bourassa noted that "the Court must be on guard to see that large corporations do not avoid large fines or responsibility for their illegal actions by establishing a network of small corporations." 205 As well in United Keno Hill Mines, Justice Stuart took the view that courts "seem prepared to hear evidence of corporate connections or simply to take judicial notice of such corporate relationships". 206

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204. Supra 124 at 86.
205. Supra 126 at 10.
206. Supra 94 at 50.
B) Corporate Behaviour

The sentencing criterion of corporate behaviour arises in several stages; before the violation, after the violation, and during the court proceedings. The considerations regarding corporate behaviour before the infraction are closely interwoven with the level of intent attributed to the company's violation. Evidence of specific efforts to comply and expenses incurred appear to foster a better position on the intent continuum. For instance, in United Keno Hills Mines, Justice Stuart stated that "[a] corporation should not be harshly punished if evidence indicates diligent attempts to comply with government regulations."207 However, it is important that the effort is in "actions, not words", and that the efforts have taken place "before the fact".208 Evidence of endeavors "after the fact" have generally little relevance to the sentencing.209

Although the "after the fact" efforts to comply with legislation are generally rejected, some other aspects of corporate behaviour after the violation are sometimes taken into consideration by the sentencing judges. In United Keno Hill Mines, Justice Stuart talked about "corporate remorse", and noted that factors considered in assessing a corporation's "remorse" include voluntary reporting of the infraction and the speed and efficiency of corporate action to rectify the problem or clean up the pollution.210

207. Ibid. at 49.
209. Ibid. at 41.
210. Supra 94 at 49-50.
Voluntary reporting is encouraged as a matter of policy, as most environmental legislation "depends upon the integrity of corporations to provide full disclosure of the impact of their operation on the environment".\footnote{Ibid. at 49. See also, R. v. Ocelot Industries Ltd., supra 180; R. v. Gulf Canada Corp., supra 160.} Similarly, the money and time saved makes courts generally more favourable to an offender who has pleaded guilty; after all, environmental offences tend to be complex, time-consuming, and expensive.\footnote{R. v. American Can of Canada Ltd. (1977), 2 F.P.R. 121 (Ont.Prov.Ct.); R. v. Gulf Canada Corp., ibid.} However, reporting must be prompt; delayed disclosure has not been viewed as positively as immediate notification to authorities.\footnote{R. v. Placer Developments Ltd. (1985), 14 C.E.L.R. 1 at 2 (Y.Terr.Ct.).} Also, if apprehension and conviction were inevitable a guilty plea should not be regarded as a mitigating factor.\footnote{R. v. United Keno Hill Mines, supra 94 at 49; R. v. Gulf Canada Corp., supra 160; R. v. Canadian Marine Drilling Ltd., supra 126.} Presumably, voluntary reporting in such situation would have a similar sentencing impact.

As with voluntary reporting, a prompt clean-up and response to rectify problems are encouraged as a matter of policy.\footnote{R. v. United Keno Hill Mines, ibid. at 49; R. v. Placer Developments Ltd., supra 213 at 2.} Hence, immediate action to clean up and specific efforts to remedy problems as well as cooperation with environmental officials are generally viewed favourably by the courts. For instance, in *Cyprus-Anvil*, the maximum fine of $5,000 was reduced to $4,500 on appeal because "the company responded promptly...to
make the necessary repairs as soon as the spillage was discovered." 216

The appearance of corporate officers in the court proceedings is sometimes regarded as an indication about the sincerity of expressions of regret, and hence serving as a mitigating factor. 217 A different approach was adopted in Panarctic, when Justice Bourassa stated that although the appearance of corporate officers bodes well for the defendant "it is only proper that the defendant have a human representative present at its sentencing; and this kind of conduct should be expected." 218 Similarly, in R. v. Northwest Territories Power Corp., the court regarded the fact that the corporation was represented by its legal secretary as an aggravating factor in sentencing. 219

C) Recidivism

The traditional concept of recidivism is seen as "especially important in sentencing corporations" because "recidivistic conduct raises an assumption that the corporation is more concerned about profit than compliance." 220 The factor is considered of particular importance when the company's operations involve "little or no direct contact...with the general public..."

216. R. v. Cyprus-Anvil Mining Corp., supra 150 at 34. See also, R. v. Canadian Marine Drilling Ltd., supra 126.
217. R. v. Tricil, supra 186.
218. Supra 124 at 85.
219. Supra 114 at 63. See also R. v. Gulf Canada Corp., supra 160 at 270.
[and therefore the corporation] is probably only peripherally concerned about a public image".\textsuperscript{221}

Recidivism is generally regarded as indicating "willful flouting and ignoring of the laws and the permit requirements", and an "above the law" attitude that needs to be addressed in sentencing through heavy fines.\textsuperscript{222} Prior convictions have also been used to assail the sincerity of verbal assurances given by the corporation at the sentencing hearing; in \textit{Panarctic Oils}, Justice Bourassa noted that the fact that the corporation had two prior convictions showed that "[t]he corporation's verbal assurances with respect to the environment do not appear to have worked in the past, they don't appear to have worked in this particular situation."\textsuperscript{223}

While recidivism is generally seen as an aggravating factor in sentencing, the fact that a corporation has had no previous environmental violations has occasionally reduced the sentence.\textsuperscript{224} A different approach was taken in \textit{R. v. Northwest Territories Power Corp.} when the court considered the seriousness of the offence together with negative public attitude towards polluters weighing more than the lack of previous convictions.\textsuperscript{225}

\begin{notes}
\textsuperscript{221} Ibid. at 52.
\textsuperscript{222} \textit{R. v. Panarctic Oils Ltd.}, supra 124 at 84.
\textsuperscript{223} Ibid.
\textsuperscript{224} See for example, \textit{R. v. Oxford Frozen Foods Ltd.}, supra 134.
\textsuperscript{225} Supra 114 at 60-61.
\end{notes}
2.2.2.3. Other factors

A) Laxity of government officials

Although the primary responsibility for complying with environmental legislation lies on corporations themselves, it is obvious that government officials have an important role in encouraging or discouraging such compliance. "If the government watchdogs aren't going to get worried, then there doesn't seem to be a need for the company to get worried."226 This in mind, the courts have been reducing sentences as a result of government laxity and incompetence. In United Keno Hill Mines, Justice Stuart pointed out that

[i]f the responsible government agency is not pressing compliance, or is actually encouraging non-compliance through tacit or explicit agreements to permit non-compliant operations, the corporation cannot be severely faulted.227

A more careful approach was adopted in R. v. Cyprus-Anvil, when Justice O’Connor pointed out that the primary responsibility for proper behaviour rests on the corporation, and the government officials’ failure to register violations does not diminish the company’s responsibility.228 The approach can be justified for policy reasons; corporations should not be encouraged to wait for government action to comply with legislation. If legislation is unclear, it is only logical to require the corporation to contact government officials for advice and further information. Prolonged periods of non-compliance can cause severe environmental damage, and in such cases the excuse of "not

227. Supra 94 at 49.
228. Supra 150 at 116.
knowing" or "not being told" should not be regarded as a mitigating factor. Corporate passivity was taken into consideration in *R. v. Imperial Oil Ltd.* when the corporation requested the sentence be mitigated on the basis of an "officially induced error of law". The court turned the request down on the basis that the company never sought any advice from government officials and therefore there was no erroneous advice given.

B) The sensitivity of the environment

With the great potential for harm to the Northern environment, people and businesses operating in the Northern extremes of Canada have a substantial burden to take precautions to protect the delicate balance of nature in this remote part of the country which can be so easily damaged and, when once damaged is so difficult and sometimes impossible to repair.

It is evident that some areas of the environment are more vulnerable to the effects of pollution than others. In extreme natural conditions where such elements as warmth, water, or nutrients are limited, even a small change in the habitat can be fatal. One fragile area that has gained a lot of attention is the Canadian North. The resiliency of the northern environment and its limited capacity to repair the damage was taken into consideration in *Kenaston* when Justice Morrow noted that tundra is "a delicate land, easily damaged and perhaps when once damaged impossible to repair." Other ecosystems that have been regarded as requiring special attention include "[a] unique

230. Supra 180 at 105-08.
232. Supra 146 at 386.
ecological area supporting rare flora and fauna, a high-use recreational watershed, or an essential wildlife habitat". According to Justice Stuart, any injury to such delicate ecosystems must be more severely condemned than environmental damage to less sensitive areas.233

A more questionable approach to the sensitivity of the environment was taken in R. v. Cyanamid Canada Inc., a case in which the company was convicted for discharging effluent containing ammonia into a river. Since "[t]he particular portion of the...[r]iver where the Cyanamid plant [was] located" was, in the judge's opinion, "a poor quality fishing area in any event and not a good sport fishing area because the waters there are principally inhabited by catfish", the judge did not want to impose a severe sanction on the corporation. The application of this and other mitigating factors led to a sentence of one dollar.234

C) Political and socioeconomic considerations

It is evident that both political and socioeconomic factors have a significant although not easily identifiable or analyzed influence on sentencing. In its decision, the court might be responding to public pressures which can work both against and for the offender. "[T]he high profile environmental matters have achieved in the public eye"235 may make the courts feel the need to reinforce the credibility of the justice system by imposing a

233. R. v. United Keno Hill Mines, supra 94 at 47.
234. Supra 181 at 40-41.
rigorous penalty on a polluter, especially if the trial has gained plenty of publicity. One obvious example of the influence of public pressures is the dramatic increase in the size of the fines in the 1980s; maximum fines for environmental offences have gone up from thousands to millions, and also the fines imposed have grown significantly.\(^{236}\)

In spite of the increased concern for the welfare of the environment, it is evident that socioeconomic realities continue to work as a downward force in sentencing. The fact that pollution is a by-product of otherwise legitimate and beneficial business activity means in practice that pollution is "a political problem."\(^{237}\) In sentencing, this can mean opting between the financial security of a community or clean environment. Sweigen and Bunt remark that the fact that environmental cases are initiated in the lowest courts can have a remarkable impact on sentencing; when the offender is a prominent taxpayer in the community or a major employer, socioeconomic and political factors weigh heavier than the need to protect the environment.\(^{238}\) Such factors were eminent in *R. v. Cyanamid Canada Inc.* when the court ruled that correcting the operation and installing proper equipment "would have created a tremendous financial burden upon the accused...and... may have required that the Cyanamid factory be shut down and that many jobs be lost".\(^{239}\)

\(^{236}\) See Saxe, supra 89.
\(^{239}\) Supra 181 at 40.
It appears that economic and political factors are only seldom explicitly expressed in sentencing. More often such considerations are hidden under such criteria as the "good corporate citizen" character of the offender, or the difficulty or high cost of alternative technology, both of which are used as mitigating factors in sentencing.\(^{240}\)

Similar issues of conflicting values come up when the corporation pleads technical or economic difficulties in the prevention of pollution. A good summary of the problem was made by Justice Paradis in \(R. v.\) North Vancouver when he noted that

> the cost [of alternative technology] are high indeed. But whether or not they are "prohibitive" depends on the value society as a whole is prepared to place, in the long view, on the preservation of a resource.\(^{241}\)

It would seem reasonable to presume that if a company chooses to run an operation that is potentially dangerous, it should assume responsibility to minimize the hazards at whatever cost. Quoting Justice Dnieper in \(R. v.\) Nacan Products Ltd.:

> [o]ur society, of course, needs the manufacturer of products made by like corporations and enterprises, yet such manufacturing cannot be done at the expense of others. The responsibility must lie upon the manufacturer to ensure that others do not pay the price of such enterprise [emphasis added].\(^{242}\)

The approach consistent with this route of thinking was taken in \(R. v.\) Echo Bay Mines Ltd., when the court ruled that "the most aggravating factor against the...defendant is that measures which


\(^{241}\) Supra 115 at 171.

could have been taken...were relatively inexpensive and simple."^243

2.2.3. Sentencing Options

2.2.3.1. The fine

The only penal sanction permitted for most environmental offences is the fine. The popularity of the fine is based on the inducement that criminal corporate behaviour is essentially profit-motivated and can thus be prevented by aiming the sentence at the pocketbook. However, up until the second half of the 1980s, fines had generally been too small to have any real effect on corporate behaviour. On the contrary, they have been more of an "invitation to gamble". Fines of a couple of hundred dollars or even less (one dollar in *R. v. Cyanamid Canada Inc.* in 1981!^244) were more of a rule than an exception in the 1970s, and since other alternatives were almost nonexistent, the penalties were generally mere tokens to corporate polluters.

The situation started to change in the 1980s; since then there has been a clear upward revision in the size of the fines attached to environmental offences. While the typical maximum fine was ten thousand dollars in 1970, today the maximum penalty can be in six or even seven figures. For example, a person (an individual or a corporation) who causes or permits an oil and gas spill contrary to the federal Oil and Gas Production and Conservation Act is liable to a fine of up to one million dollars

^243. Supra 135 at 40.
^244. Supra 181.
a day.\textsuperscript{245} Fines of corresponding caliber are available pursuant to section 113 of the CEPA. Another federal statute, the Fisheries Act, provides for fines of one hundred thousand dollars a day. On the provincial level, the Ontario Environmental Protection Act provides for fines up to one hundred thousand dollars for repeat offences, and Manitoba Environment Act has a special two hundred thousand dollar fine reserved for repeat offences committed by corporations while a corresponding fine for an individual is only ten thousand dollars.

Although the fines imposed have generally not increased proportionately to the increase in maximum fines, it has become common to impose fines of five or even six figures. There are several reasons, in addition to higher maxima, for this development. One important factor is the judicial acceptance of daily fines; courts have increasingly imposed a separate fine for each day on which an offence occurs or continues. For instance, in \textit{R. v. Jack Cewe Ltd.} the company was fined twenty thousand dollars for each of seven days on which its effluent was discharged to a river, for a total of one hundred and forty thousand dollars.\textsuperscript{246} Since environmental offences often take place on several successive days, the fines can be quite significant. The question of the reasonableness of such fines was resolved in \textit{R. v. Bocskei} when the court ruled that "when consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is

\footnotesize
\textsuperscript{245} Supra 22.
not excessive."247 However, in Panarctic Oils, the court decided that this so called totality principle has only a very limited application in environmental cases because "the provision for deemed offences for each day of continuing offence is the legislative way of reflecting to [sic] gravity of the offence contemplated in terms of sanction", and therefore applying the totality principle would be "to ignore the impact that the law is designed to make on offenders."248

Another reason for more severe penalties lies in the increased application of contempt of court to environmental cases. Municipal by-laws as well as some of the recent environmental statutes give the court the power to make orders prohibiting pollution or orders to take positive steps to restore the environment.249 If the defendant defies the order, the court can charge him for contempt of court. High fines to corporations and jail terms to corporate executives have been imposed as a result of such charges. In R. v. Jetco Manufacturing Ltd. the corporation was fined two hundred thousand dollars and a jail term was imposed on the corporate president.250 Similar sentences were delivered in R. v. B.E.S.T. Plating Shoppe Ltd. in the same year.251

248. Supra 124 at 88.
249. Saxe, supra 89 at 111-12. See for example, CEPA, supra 13, s. 130(1)(a)-(b); Fisheries Act, supra 14, s. 79.2(a)-(b); Ontario Environmental Protection Act, supra 22, s. 146d(1).
251. Supra 90. See also, Metropolitan Toronto v. Siapas, supra 90; R. v. Blackbird Holdings Ltd., supra 146.
Unlike an individual offender, a corporation cannot be jailed for defaults in fine payments. An alternative measure is introduced in the Ontario Provincial Offences Act, according to which, if fines are not paid, the Provincial Offences Court is empowered to suspend and prohibit the issuance of licences, permits and approval issued by the Ministry until the fines are collected. They include certificates of approval to operate waste hauling and waste disposal businesses under the Environmental Protection Act, permits for taking groundwater under the Water Resources Act, and licences to carry on business as an exterminator under the Pesticides Act.\(^{252}\)

The main argument for higher fines is that since rational corporate decision-making is based on calculating costs and benefits, high fines produce a disincentive to engage in misconduct, and "[i]t must be cheaper to comply."\(^{253}\) The argument appears somewhat dubious in light of case law. For example, in *R. v. Canadian Marine Drilling Ltd.*, the company had spent between sixty and ninety thousand dollars a month per barge for storing waste oil. The company was convicted under the Fisheries Act when one of the barges almost sunk resulting in an escape of oil. The fine imposed was thirty thousand dollars.\(^{254}\) When compared to the cost of storage, it is easy to see that the cost of complying is much higher than paying for the fine.\(^{255}\)

\(^{252}\) Ontario Environmental Protection Act, supra 22, s. 146e(1).
\(^{253}\) *R. v. Gulf Canada Corp.*, supra 160 at 271.
\(^{254}\) Supra 126.
Although the fine is still by far the most common penalty in environmental offences, the number of alternative sanctions is increasing. These alternative sanctions can be divided roughly in three groups, namely publicity, sanctions providing redress, and forfeiture. The sanctions and their use in environmental cases will be looked in more detail next.

2.2.3.2. Publicity

Brent Fisse has divided publicity into formal and informal publicity. Informal publicity is left to the discretion of the mass media while formal publicity is advocated by an official agency upon the imposition of a sanction by a court. While informal publicity is almost always an inevitable result of sentencing, especially so in criminal cases, the use of publicity as an official sanction has been rare in Canada. However, some recent legislative developments seem to indicate increased interest in the sanction; pursuant to section 130(1) of the CEPA the court can, in addition to any other punishment, direct the offender to publish the facts relating to the conviction. If the offender fails to comply, section 130(2) empowers the Minister of Environment to publish the facts and recover the cost of publication from the offender.

257. The effect of informal publicity was recognized in R. v. Placer Development Ltd., supra 161 at 61, when Justice DeWeerdt noted that the fine was a mere "token" and that "the real penalty must rest in the fact that the respondent now has a conviction on its record."
A similar type of publicity order is provided in section 79.2(c) of the federal Fisheries Act. The provision empowers the court, in addition to any punishment imposed, to order the offender to publish the facts relating to the offence.\textsuperscript{258} It is important to notice that in spite of superficial similarity, the CEPA provision differs from its counterpart in the Fisheries Act in one significant aspect; the words "in addition to any other punishment" in CEPA reveal that the sanction can have penal implications while the Fisheries Act provision "in addition to any punishment" does not authorize imposition of a punitive sanction. \textit{R. v. Northwest Territories Power Corp.} illustrates the question; in the decision, the Northwest Territories Territorial Court employed (the former) section 41(2) of the Fisheries Act.\textsuperscript{259} The section allows courts, in addition to any punishment, to order an offender to refrain from doing certain acts or to take specified action to prevent further offences. The Territorial Court applied the section and ordered the directors and chief executive officer of the corporation to publish an apology to the public for the defendant's negligence. It was noted in the decision that

\begin{quote}
s. 41(2) should be utilized so as to teach the directors of the corporation to increase their sense of responsibility and induce changes in the corporation's policies, priorities, and values, and thereby help prevent commission of a further offence.\textsuperscript{260}
\end{quote}

\textsuperscript{258} Supra 14 (as am. S.C. 1991, c. 1).
\textsuperscript{259} At the time of the trial, Fisheries Act did not contain the present publicity section 79.2(c), but only a general section providing for remedial orders (s. 41(2)).
\textsuperscript{260} Supra 114 at 58.
Justice Bourassa pointed out that "a public apology carries with it a degree of publicity which may also act as a deterrent."²⁶¹

The order was, however, overruled on appeal by the Territorial Supreme Court. The Supreme Court ruled that an involuntarily given, judicially-coerced apology is a punishment, and orders given under the Fisheries Act may not have punitive implications because section 41(2) only authorizes orders in addition to any punishment. The Court also referred to the publicity section of the CEPA and ruled that although the CEPA allows the use of publicity as a punishment, an apology goes beyond what the statute authorizes because a judicially coerced apology is contrary to the principles of sentencing recognized by the Canadian courts, and may well be contrary to the principles of fundamental justice declared in section 7 of the Charter of Rights.²⁶² In short, the ruling appears to mean that the publicity provision of the Fisheries Act, or other similar type of provisions, cannot be used for giving publicity orders with penal implications, and when employing section 130(1) of the CEPA, publicity may not be in the form of an apology.

2.2.3.3. Redress

As mentioned earlier in this paper, the Canadian Sentencing Commission resisted casting the concept of sanctions exclusively in terms of "punishment". The purpose of this section is to look at sanctions that are better described as "obligations" than

²⁶¹. Ibid. at 66.
²⁶². Ibid.
"punishments" in the traditional sense. The sanctions discussed here cover the compensatory and remedial measures provided by the penal provisions of environmental statutes or the Criminal Code.

The victim orientated approach to sentencing has concentrated on human victims of crime. Yet, in environmental offences it is often impossible to pinpoint the individual sufferers. Harm is done to the "common good", "common heritage of mankind", or "the environment itself", depending on the speaker's perspective. Therefore, the following presentation is divided into two parts; the first part is devoted to restitution and compensation for human victims while the second part concentrates on remedial orders for "victimless" offences.263

A) Restitution and compensation

Restitution and compensation orders are rare exceptions in the present environmental statutes. One of the few provisions providing for compensation is section 131(1) of CEPA, which provides compensation for the loss of property. Conditions for compensation are the conviction of the offender and application for compensation from the person aggrieved. Also the 1987 Manitoba Environment Act empowers courts to order the offender to pay damages or make restitution. Neither one of the provisions can be used independently but only in addition to a penalty.264

263. In this thesis, "restitution" means the performance of specified services for the victim while "compensation" is used for monetary payments. It should be noted, however, that the terms are often used interchangeably, and there remains a certain ambiguity about the definitions.
264. Supra 22, s. 36(c).
In the sentencing practice the courts have been reluctant to impose restitution or compensation to crime victims. The basic objection is that the criminal courts are ill-equipped to deal with difficult monetary questions involved in compensation and restitution. It is also feared that compensatory claims would unduly lengthen the trials, and that the courts would turn into some kind of "collection agencies".265

B) Remedial orders

Section 130(1)(b) of the CEPA empowers the court to direct the offender to take specified action to remedy or prevent harm to the environment resulting from the offence. The Manitoba Environmental Act empowers the court to order convicted polluters to take action to clean up or restore the environmental damage.266 Remedial type orders can also be given under section 79.2 of the Fisheries Act. The provision has been used for giving orders to perform repair and maintenance work to the damaged salmon spawning grounds,267 and to prepare a clean-up plan for contaminated property.268 Other suggested uses of the section could include clean-up or re-stocking a body of water with fish.

In addition to direct reparative actions, remedial orders can also be used for preventing further violations and environmental misconduct. In R. v. Placer Developments Ltd. (the

265. Sentencing in Environmental Cases, supra 127 at 69.
266. Similar provisions can be found also in the Ontario Water Resources Act, Ontario Pesticides Act, and Ontario Environmental Protection Act.
section 33(7) of the Fisheries Act was used for ordering the company to prepare a manual covering the common environmental problems in northern mineral explorations. The same provision was used in R. v. Robinsons' Trucking Ltd. when the company was ordered to equip all of its tankers with equipment designed to prevent future ecological mishaps, and to designate an on-scene commander to supervise future oil spills as well as to designate and train an environmental response team. In R. v. Oxford Frozen Foods Ltd., the court ordered the offender to put in place a waste management strategy for upgrading its waste treatment and handling systems. It is interesting to notice that in the decision, the court took the cost of the remedial order into consideration when assessing the size of a fine.

Both compensation and remedial orders can also be imposed as part of a probation order. In present legislation, a probation order can be imposed only under section 737 of the Criminal Code. The section provides the court with the power to suspend the passing of sentence, and direct that an offender be released upon the conditions prescribed in a probation order. The order may include a condition relating to compensation and reparation

269. Supra 213.
270. Supra 190.
271. Supra 134.
272. The Code applies to federal environmental statutes, and the probation order has also been incorporated to some provincial summary conviction procedure legislations. For example, according to Saskatchewan Summary Offences Procedure Act, R.S.S. 1978, c. S-63, Code probation orders can be made in provincial environmental offences.
273. It is important to notice that it is the passing of sentence that is suspended rather than the execution of a sentence that has already been imposed. See, R. Paul Nadin-Davis, Sentencing in Canada. (Toronto: Carswell Company Ltd., 1982).
for any actual loss or damage inflicted as a consequence of the commission of an offence.

Every probation order is deemed by section 737(2) of the Criminal Code to contain a condition that the accused "shall keep the peace and be of good behaviour." The court may also impose other reasonable conditions it considers desirable to secure the good conduct of the defendant or prevent him from committing further offences. The objective must be the securing of law-abiding conduct, not punishment, and therefore provision authorizes only such measures that are not punitive by nature.274 The measure must be aimed at deterring the accused, not others, and it must be reasonable.275

The Canadian courts seem to disagree over the question whether a corporation can be put on probation or not. In Panarctic Oils, the Territorial Court of the Northwest Territories applied the Code probation provision to the offence, and put Panarctic Oils on probation for a period of two years. The terms of the probation were that the corporation "be of good behaviour and not breach the peace", and that the corporation must file with the court a detailed written policy for correcting the situation that led to the offences.276 The decision was a radical departure from an earlier ruling in R. v. Algoma Steel Corp. in which the Ontario Provincial Court held that a suspended sentence and probation order were inapplicable to a corporation

276. Supra 124 at 95.
both under the Criminal Code and provincial legislation.\textsuperscript{277} However, in spite of the successful application of probation in \textit{Panarctic Oils}, the courts still appear reluctant to put a corporation on probation. In a 1989 decision of \textit{R. v. Gulf Canada Corp.}, the court ruled that the negative attitude of the Northwest Territories Appeal Court toward probation forced the court to rely on fines although probation would have been a more appropriate sanction.\textsuperscript{278}

\subsection{2.2.3.4. Forfeiture}

Black's Law Dictionary defines forfeiture as "the losing of something by way of penalty".\textsuperscript{279} This little used sanction can be divided into two categories; forfeiture of profits which is aimed at depriving the offender from gains or savings derived from illegal conduct, and forfeiture of property, the purpose of which is to remove an object or property used in committing the offence or resulting from the offence of the offender.

Forfeiting profits or "the fruits of the crime" is the more commonly used of the two. The normal procedure is that instead of issuing a special order of forfeiture, the profit is taken into consideration when assessing the size of a fine. A typical statement of a court is that "the Court must do its best to see to it that the fine is of sufficient quantum to take away any profit earned".\textsuperscript{280} Some of the environmental statutes also

\textsuperscript{278} \textit{R. v. Gulf Canada Corp.}, supra 160.
\textsuperscript{279} Black's Law Dictionary, supra 9, at 778.
\textsuperscript{280} \textit{R. v. Browning Arms Company of Canada}, supra 130 at 300.
provide a possibility to order a so called "additional fine". When the economic benefit from breaking the law exceeds the maximum fine, the court may impose an additional penalty equivalent to the monetary benefit received as a result of committing an offence. Besides CEPA (section 129), at least the Fisheries Act, the Manitoba Environment Act, Ontario Environmental Protection Act, and B.C. Waste Management Act provide for the fine.

Forfeiture of profits requires evidence on the savings or gains derived from the offence. The courts are faced with some difficult evidentiary questions; for one thing, it can be very problematic to prove causality between pollution and profit. Moreover, assessing the quantum of gains with any degree of accuracy is often almost impossible. A solution to these problems was suggested in United Keno Hill Mines, when Justice Stuart took the position that the onus lies on the corporation since it is privy to the necessary information. If the corporation did not provide the information, a reasonable Crown estimate would suffice. Another way to gather evidence would be to let courts hear complying competitors on the extent of economic benefits the offender derived from non-compliance.

Forfeiture of property is rare in environmental legislation. Only the Fisheries Act contains a general provision about forfeiture. According to section 72(1) of the Act,

281. Supra 14, s. 79 (as. am. 1991, c. 1, s. 24).
282. Supra 22, s. 36(d).
283. Supra 22, s. 146(c) (as am. S.O. 1986, c. 68, s. 15).
284. Supra 51, s. 34(1).
285. Supra 94 at 51.
"the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty."^286

Section 47(b) of the Ontario Environmental Protection Act provides that when a person is convicted of an offence in respect of hauled liquid industrial waste or hazardous waste, the court can order suspension of permit and detention of number plates of the vehicle used in the commission of the offence. The order cannot be used independently but only in addition to any other penalty. Also, section 47(c) provides for an order to detain permit and plates until the fine imposed on the offender is paid.^287

Licences and permits to operate can be viewed as property of the corporation. When they are used against regulations and orders, they become property used in commission of the offence. Revocation of licences and permits could therefore be regarded as a type of property forfeiture. Such provision can be found in the Manitoba Environment Act. According to section 33(2) where, in the opinion of the judge, the corporation is unwilling or unable to remedy the situation, the judge may suspend or revoke all or part of the environmental licences, or permits for such time as the judge sees fit. The sanction can be used only in addition to any penalty. The Ontario Provincial Offences Act makes a provision for this remedy in default of payment of fines. A similar type of provision is also provided in section 79.1 of the Fisheries Act. According to the section, a lease or a licence can

^286. Supra 14 as am.
^287. Supra 22 (as en. S.O. 1988, c. 54, s. 25(1)).
be cancelled or suspended or its renewal can be prohibited for any time the judge deems appropriate.

3. THE FINNISH LAW PROPOSAL ON THE CRIMINAL LIABILITY OF CORPORATE BODIES

Traditionally, corporate criminal liability has not been accepted as a general principle in civil law systems. The Finnish legal system has followed this tradition with the present Finnish Penal Code (39/1889) not recognizing the possibility of punishing a corporation. However, with changing economic and social structures, pressures to adopt criminal corporate liability have increased. Principles that worked adequately in an agricultural society with simple organizational structures no longer meet the

288. The term "punishing" in this context means the imposition of general Finnish penalties of imprisonment, the fine and the petty fine. In Finnish criminal law, penal sanctions are divided into two sub-categories: actual penalties or punishments and so called supplementary sanctions or "side-sanctions". The most important forms of supplementary sanctions are various forms of forfeiture, compensation, and withdrawal of driver's licence. They are not coercive in the same manner the penalties are, but their function is to protect society from recurrences of the crime by incapacitating the means to commit further offences, and to pay damages for the victims of the crime. The supplementary sanctions are discussed in more detail in section 3.1.2.1. under the heading "Sanctioning a Corporation". See generally, Tarja Pellinen, "The Finnish System of Penal Sanctions and Its Reform" in Towards a Total Reform of Finnish Criminal Law. (Publications of the Department of Criminal Law and Judicial Procedure B:2. University of Helsinki, 1990), at 159. See also, Markku Halinen - Pekka Koskinen - Tapio Lappi-Seppälä - Martti Majanen - Harri Palmen - Per Ole Träskman - Terttu Utriainen, Rikosten seuraamuksset ("Penal Sanctions": a textbook). Helsinki: Lainopillisen Ylioppilastiedekunnan Kustannustoimikunta, 1981), at 1-6 and 177-204.
standards of a highly developed, industrial society. Traditional legal control strategies are regarded as not having the required effect on trade and industrial enterprises. Public authorities have responded to the inadequacies of the present situation by introducing a proposal on corporate criminal liability.

The dialogue on corporate criminal liability has been going on for nearly 20 years. The idea was first introduced in several committee reports, and finally, in 1987, legal history was made when the Penal Code Task Force published a proposal on the "Criminal Liability of Corporate Bodies". The proposal advocates that Chapter 9 of the revised Penal Code is to be devoted to corporate criminal liability.\(^{289}\)

The purpose of this chapter is to examine some of the reasons and background for the proposal, and introduce the concept of criminal corporate liability as it is seen by the Finnish legislator. The chapter is divided into three parts. The first part gives the reader some background to the topic by discussing the historical development of criminal liability, and surveying the present practices and present means of controlling corporate behaviour. Justifications for the development of corporate criminal liability are also shortly discussed. The second part of the chapter is devoted to the law proposal on corporate criminal liability. In the first section, the law proposal is discussed in the light of the Penal Code Reform while the second section is dedicated to scrutinizing the theoretical

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289. Oikeushenkilön rangaistusvastuu, supra 24. For an unofficial translation of the proposal see appendix.
framework of the Finnish approach to corporate criminal liability. Since sentencing is, for the most part, governed by general criminal law principles, corporate sentencing is discussed separately in the third part of the chapter. A survey to general sentencing principles is followed by an introduction to the corporate fine, sentencing criteria, and waiving of measures.

3.1. Background

3.1.1. The Penal Code and Individual Liability

The Finnish Penal Code was passed at the end of the last century (1889) when Finland was an agricultural society. The industrial era had not yet reached Finland where organizational structures were simple, and the few existing companies were small one-person proprietorships. Companies could be directly identified with their owners making it easy to find the person or persons responsible. Consequently, there was no need to penalize corporate entities separately from their owners. Also, the end of the last century was characterized by a strong sense of individualism resulting in an increased reluctance to punish collective entities. As a result, the fundamental principle of the 1889 Penal Code was that only a human being can be punished under the criminal law. This principle still prevails, and
accordingly, the present penalties of imprisonment, the fine and the petty fine can only be imposed on an individual offender.\textsuperscript{290}

\textbf{3.1.2. The Present Practice of Controlling Corporations}

Although Finnish law does not presently recognize the possibility of punishing a corporate entity, corporations can be reached by a variety of other means. Corporations are by no means above the law, not even criminal law. For one thing, corporations may be subject to forfeiture and payment of damages. Secondly, several forms of administrative orders can be imposed on them. Corporations may also become indirectly punished through the prosecution of their individual members such as executive officers and employees.

Corporate activities are regulated either directly or indirectly by several statutes, such as the Company Act (734/78), Cooperative Banks Act (247/54), Associations Act (503/89), Bookkeeping Act (904/85), and Small Business Act (88/389). The statutes lay particular emphasis on the responsibility of the board of governors or a corresponding body to secure that the company is operated according to laws and regulations. Some of these statutes include a criminal provision which makes a

\textsuperscript{290} In Finland, so called general penalties are imprisonment, the fine and the petty fine (chapter 2, section 1 of the Penal Code). A sentence of \textit{imprisonment} may be imposed either for a determinate period (at least 14 days and at most 12 years) or for life. The \textit{fine} is imposed as day-fines. The smallest fine is one day-fine, and the largest is 120 day-fines. The size of each day-fine depends on the financial situation of the offender. The \textit{petty fine} is a monetary penalty that is set at a fixed amount for petty traffic offences. Besides general penalties, the Finnish Penal Code includes special penalties for civil servants and soldiers.
violation of the statute punishable by criminal prosecution. However, only individuals working or acting for the corporation can be prosecuted and convicted for these violations. Usually the penalty is meted out to those individuals who have acted in an authoritative position on behalf of, and in the name of the corporation.

In the following, some of the sanctions available against corporations are introduced together with the basic principles concerning the division of responsibility inside a corporation.

3.1.2.1. Sanctioning a corporation

Although no actual penalties can be imposed on a corporate body, courts may impose various so called supplementary sanctions on corporations. The most important of these are compensation for damages and various forms of forfeiture.

An order to pay damages can be made in addition to a penalty as a part of the criminal procedure, or it can be used alone as a civil sanction. Making a civil claim in criminal proceedings means the proceedings are "adhesive". In such proceedings, the main proceeding is criminal, but at the discretion of the court, the complainant is allowed to present his compensation claim during the procedure if the claim is based on the criminal act in question. The court will thereupon decide on both the criminal and civil issue at the same time. However, if the compensation
claim would considerably prolong the process, the court can divert the civil claim to a separate civil proceedings.291

The most important provisions on compensation are in the Civil Liability Act (412/74). According to the Act, under certain circumstances, an employer or a public corporation has a vicarious liability for the acts of agents or employees acting in the course of their employment.292 Section 2:1 of the Act expresses the general civil law principle of fault. This principle, unlike the principle of guilt in criminal law, applies also to corporations. Liability is restricted to compensation for personal damages, damages to property, and, to certain extent, economic damages.293 The Act on Compensation for Crime Damages from State Funds (73/935) provides a state compensation scheme for criminal injuries. Under the Act, human crime victims have a right to collect damages for personal injury and loss of income.

292. An employer is liable for damage caused by her employee or agent only insofar as he has been negligent himself. As a rule, this is the case where she has failed to give the employee due instructions, or has not shown due care in choosing or supervising the employee. The burden of proof is on the employer. Absolute liability exists in certain cases where the dangerous nature of the activities justifies such liability. For instance, owners and operators of electricity and nuclear plants have absolute liability.
293. According to the Act, "one who wilfully or negligently causes damage to another is liable for damages". Negligence or "tuottamus" in Finnish civil law has a different meaning from that in criminal law. The borderline between the two is somewhat vague with the basic difference lying in intent (dolus). In short, civil law negligence starts from where criminal law negligence ends. Civil law negligence can be mere carelessness or thoughtlessness, "guilty mind" or malice is not required. See generally, Brynolf Honkasalo, Suomen rikosoikeus II, yleiset opit. ("Finnish Criminal Justice System II", general part), Helsinki 1967, at 75-76.
from the government, which, in turn, has a right of recourse against the offender.\textsuperscript{294}

The second supplementary sanction that can be used against corporations is forfeiture. The most important forms of forfeiture with regard to environmental offences are forfeiture of profits (\textit{scelere quae situm}) and forfeiture of an instrument or property used in committing the offence (\textit{instrumentum sceleris}).\textsuperscript{295} According to section 2:16 of the Penal Code, the financial benefit of the offence to the offender, or to whom he is acting for or on behalf of, must be forfeited. The forfeiture takes place regardless of whether charges have been raised against the party for whom the offender has been acting. Since the provision includes the benefactor of the crime, it can be used against corporations. While the actual offender can only be a human being, the benefactor can be any kind of entity. Also, according to the same provision, an instrument or property which was used in committing the offence belonging to the offender, or to the party for whom or on behalf of whom he has been acting, can be forfeited. In addition to these two general provisions,

\textsuperscript{294} In 1990, the Commission on Environmental Damages prepared a law proposal for an Act on Civil Liability for Environmental Damages. If passed, the proposed law would significantly improve the position of claimants. See, Jukka Similä, For a Civil Liability Act: A Proposal. (1991) 21 Environmental Policy and Law 72.

\textsuperscript{295} Other forms of forfeiture that appear in Finnish criminal law are forfeiture of the product of the crime (\textit{productum sceleris}), and forfeiture of the crime object (\textit{corpus delicti}), such as smuggled goods. If the instrument or property cannot be forfeited, its estimated value can generally be forfeited instead. See Halinen - Koskinen etc., supra 288, at 177-87.
some statutes have their own specific provisions about forfeiture. 296

In Finnish criminal law, forfeiture is an essential part of sentencing. This is particularly so with the forfeiture of profits which is always obligatory. 297 Determining the amount of profit is, however, left to the discretion of the court. In principle, all the profit must be forfeited, but in practice, the courts generally base their decision on the defendant’s admission. As a result, forfeiture orders are often quite lenient. 298

Defining the term profit and estimating its amount are regarded as the biggest obstacles for efficient use of forfeiture. The Finnish Environmental Offences Committee recommended drafting guidelines, and The Criminal Law Committee suggested the courts use experts in calculating profit. 299

Unlike the forfeiture of profits, forfeiture of property is not obligatory but is left to the discretion of courts. Its use is further limited by the fact that in the sentencing practice, forfeiture of property has generally been applied only to

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296. For instance, the Private Forests Act provides that trees cut without a permission or their value must be forfeited to the District Forestry Board which then must use the funds for reforestation on the area in question.
297. However, the complainant’s right to damages always precedes forfeiture.
298. Halinen - Koskinen, etc., supra 288, at 182. The Finnish Supreme Court decision KKO 1983 II 170 presents a good example of a lenient forfeiture. In the case, the prosecutor demanded a forfeiture of 300,000 FMK but the Water Court order a forfeiture of 100,000 FMK. The Supreme Court upheld the Water Court’s decision.
intentional crimes. In environmental offences, property forfeiture is also hindered by some practical problems; for one thing, identifying the particular instrument or property is often difficult and once identified, forfeiting such "instruments" as the whole factory that has been used in the violation is hardly rational. Also, if the truck that has been used in the hauling of illegal waste is essential to the livelihood of the defendant, forfeiture might cause unreasonable hardship. For these reasons, forfeiture of property has remained rare in environmental cases.

In addition to supplementary sanctions of compensation and forfeiture, some coercive measures, such as search and seizure, can also be used against corporations. As well, most administrative orders can be imposed on corporations. Logging or building prohibitions, reparation orders, or suspension of work on construction site are examples of such orders.

So called conditional imposition of the fine is another important measure in controlling corporate activities. The sanction is administrative by nature and its imposition consists of two parts; first, if a violation of a law has happened, administrative officials impose the conditional fine on the violator. If the violator changes his behavior, the fine is dropped. If he continues the violation, the fine becomes an unconditional penalty imposed by a court. The conditional fine is not a general sanction, but can be imposed only when a statute specifically provides for it, as in the Extractable Land Resources Act (555/81), Air Protection Act (67/82), or Planning and Construction Act (370/58).


3.1.2.2. Attributing liability within a corporation

Since a corporation as such cannot be made criminally liable for its actions, the liability lies on the individuals working in or for the corporation. However, finding the right persons is often difficult due to complex corporate structures and delegation of authority. Since only a few of the present environmental statutes specifically attribute the liability to a certain person, the courts have been forced to look elsewhere for guidance.300 The starting point is the criminal law principle that the person whose conduct constitutes a crime is liable for the offence.301 With intentional offences, this principle can be supplemented by the rules of participation provided in chapter 5 of the Code. In legal practice, the courts have also put significant importance on internal regulations and instructions, and job descriptions in employment contracts. Another important factor is the actual prospects of the accused to influence the decision-making process; the further down on the corporate-ladder

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300. For instance, some log-floating offences provided in chapter 13 of the Water Act (1961/264) are attributed to the members of the board of governors of the log-floating association and to the log-floating foreman.

301. According to Finnish criminal law doctrine, crime is "an imputable, wrongful act that fulfills the definitional elements prescribed by the law." Thus, the basic requirements for criminal liability can be represented in three steps:
1) the act must fulfill the definitional elements prescribed by the law,
2) the act must be wrongful, and
3) the actor must display the required culpability.

an employer stands, the more limited his authority normally is. Also, it appears to be general practice that if the actor cannot be identified, the courts use the managing director as their favorite scapegoat.302

The legal practice is strongly based on *in casu* decisions; thus, decisions depend on the details of each particular case. The rules on attributing liability are complex and ambivalent, and finding the liable person appears almost random. Often the courts do not even give reasons for singling out a certain individual. This ambivalent situation has encouraged formulation of more specific and unified rules on attributing liability. For example, the proposed chapter 48 to the revised Penal Code on Environmental Offences includes a provision on "Apportionment of Liability". According to the provision, in the assessment of liability,

consideration shall be paid to the nature, extent and clarity of the functions and authority of the person in question, his professional competence and also in other respects his complicity in the origins or continuation of the unlawful state.303

3.1.3. Justifications for Corporate Criminal Liability

After the Second World War, Finland developed into a highly developed, industrial nation with complex organizational structures. A dominant force behind this development are corporations which have grown vastly in size and influence from

302. The Environmental Offences Committee Report, supra 299 at 91.
small proprietorships to complex, national or multinational power structures.

The changed socioeconomic situation of the corporation has brought about two paramount reasons for introducing corporate criminal liability. First of all, individual liability is no longer regarded as sufficient in influencing decision-making in large corporations. The people inside a company have turned from independent decision-makers into mere components of the company machinery making the identification of corporate practice with certain individuals either impossible or irrational. Also, sanctions available to individual offenders are not in just proportion to serious offences committed in corporate operations.

Secondly, since corporate practices are often a result of interaction between several individuals and groups, the concept of structural, collective guilt has become a reality that must be taken into account in the criminal justice system. In the corporate decision making process, a violation is often caused by defective company policies which are a result of contributions made by several people on different levels of corporate structure. In such cases, penalizing the corporation instead of individuals enables comprehensive evaluation of the organizational behaviour that led to the commission of an offence. Also, cumulative guilt can be made up of such small individual contributions that holding these people individually responsible is not possible while imposing liability on the corporate entity would enable just distribution of denouncement over all involved persons.
A further stimulus towards the formulation of corporate criminal liability has been the public’s perception of corporate criminality. Today’s public regards corporations as entities with a definite identity who are capable of considering risks and consequences. Consequently, penalizing corporations has become a generally accepted and even anticipated concept among the public. 304

3.1.4. Development of Chapter 9

The idea of introducing corporate criminal liability to the Finnish legal system was first introduced in several committee reports in the beginning of the 1970s. The first report including the idea of corporate criminal liability was prepared by the Freedom of the Press Committee in 1973 (report 1973:1). The first actual proposal for corporate criminal liability was prepared by the Environmental Offences Committee later in the same year (report 1973:49). The proposal suggested that a chapter in the Penal Code should be devoted to crimes against the environment, and a special penal sanction called "liability fine" (vastuusakko) should be applied to corporate offenders. A similar type of proposal was also advocated by the Labour Offences Committee (report 1973:70).

Corporate criminal liability was also extensively studied by the Criminal Law Committee which was in charge of the whole Penal Code Reform. The Committee’s work ended with a final report in

Many questions of principle were decided in the report, and it has basically determined the direction for the work of the Penal Code Task Force, appointed to continue the legislative work in 1980. Among several other proposals, the Task Force published a proposal for the criminal liability of corporate bodies (Oikeushenkilön rangaistusvastuu) in 1987. According to the proposal, chapter 9 of the revised Penal Code will be devoted to corporate criminal liability. Since then, the Ministry of Justice has prepared a Government Bill from the proposal. The Bill is presently under Parliamentary consideration.

In the following section, the law proposal is examined in light of the Penal Code Reform as a whole. The presentation is based on the Government Bill as it was presented in the report prepared by the Commission for the Examination of Legislation in 1990.305

3.2. The Law Proposal

3.2.1. The Setting

One of the aims of the Penal Code Reform is to improve the general comprehensibility of criminal law. The basic virtues of codification - the values of certainty, consistency, comprehensibility, and accessibility - strongly support efforts to include the general doctrines and the basic legal principles of criminal law in the Penal Code. Also the principle of

305. Oikeushenkilön rangaistusvastuu, supra 24.
legality\textsuperscript{306} and the underlying demands for legal security and predictability require that criminal liability must have its foundations in written law.\textsuperscript{307}

These considerations were acknowledged in the Criminal Law Committee report which emphasized the need to make the criminal justice system clearer and simpler, so that an ordinary lay person would find it easier to examine the law and discover the consequences of various courses of action. According to the report, it is desirable to concentrate all important information - both general rules and crime definitions - in the Penal Code.\textsuperscript{308} With this in mind, the Task Force drafted a relatively detailed proposal for corporate criminal liability according to which chapter 9 in the General Part of the revised Penal Code will be devoted to corporate criminal liability.

According to section 1 of the proposal, corporate criminal liability will not be applied to all offences, but only those Penal Code crimes that specifically refer to chapter 9. The commentary of the proposal notes that by limiting the application of the law on corporate criminal liability to serious crime, the

\textsuperscript{306} In Latin \textit{nullum crimen sine lege, nulla poena sine lege poeneli}, meaning that an offender may be sentenced to punishment or other penal sanction only for an act that was specifically stipulated to be criminal at the time it was committed. Includes also the notion that general principles of criminal law should be written. At present, these principles exist mainly outside the written law as guiding maxims of customary law. According to the unofficial proposal for the General Part of the revised Penal Code, these principles would be included in the General Part. See also, \textit{Recodifying Criminal Law}, supra 18 at 17.

\textsuperscript{307} Lappi-Seppälä, supra 301 at 1.

\textsuperscript{308} Supra 299.
denouncing and norm-strengthening effect of the law will be most efficiently emphasized.

According to section 11 of the proposed chapter 48 on environmental offences, "[t]he stipulations on the criminal liability of corporate bodies shall apply to the offences referred to in this chapter."309 The offences in the chapter vary from pollution to unauthorized changing of the environment, and from nuisance to damaging an object of protection. Other offences where corporate criminal liability will be applied include offences against the public economy (ie. tax evasion, subsidy frauds), trade offences (ie. unfair competition, marketing crimes), smuggling, and labour violations.

3.2.2. Theoretical Framework

This section seeks answers to such questions as what kind of entities are included in the definition of a "corporation", what is corporate criminal liability based on, and how does the relationship between a corporation, its servants and agents effect corporate liability?

3.2.2.1. Entities liable

According to section 1 of the proposal, as a general rule, corporate criminal liability can be attributed to any kind of legal persons. In the Finnish legal system, the term "legal

309. Rikoslain kokonaisuudistus II, supra 20. This second phase of the total reform of the Penal Code is in the form of a Government Bill, and it is anticipated that the Parliament will pass at least part of the packet by the end of 1992. Translation from The Finnish Criminal Code Reform, supra 303.
person" covers a diverse variety of entities from business companies to registered associations and societies, and independent foundations.\footnote{310}

The most important forms of business companies are limited liability companies, partnership companies, limited partnership companies, and co-operatives. A limited liability company is the most popular form of a business enterprise in Finland. These companies are governed by the Companies Act (734/78). Also the co-operative movement is well developed in Finland in various fields of trade, especially in those connected with the sale and purchase of consumer goods or farm products. Both a limited liability company and a co-operation become incorporated the moment they are entered into the Trade Register kept by the Ministry of Trade and Industry.

Another important form of business enterprise is partnership, which, unlike in Canada, is incorporated, and has a legal personality. Partnerships become incorporated the moment the partners make an agreement about forming a partnership. With partnership proper, an oral agreement is enough while in a limited partnership, a written agreement is required.\footnote{311}

\footnote{310. Other terms used are artificial or juristic person.  
311. In a partnership proper, all partners are equal with a voting right in the partnership's internal affairs and a right to represent the company outwards. In a limited partnership, there are two kinds of partners: those responsible for all the liabilities of the partnership (partners with unlimited liability), and partners who are under no liability in excess of an agreed sum for partnership purposes (so called silent partners). The position of partners with unlimited liability is basically the same as that in partnership proper while silent partners do not have a voting right or a right to represent the partnership outwards.}
Associations and societies can be almost anything from hunting clubs to political parties and labour unions. They become incorporated when entered to the Register of Associations kept by the Ministry of Justice. Although it is perfectly legal to form an association without entering it into the register, these unregistered associations do not have legal personality. Instead, liability rests on the individual members of the association.

The purpose of a foundation is to take care of a certain amount of money or property donated for some specific purpose. A foundation is independent when it has a separate body, normally a board of governors, taking care of donation revenues. While an independent foundation is a legal person, dependant foundations are not because they do not have rights or duties of their own. The caretaker of the donated money or property is obliged to keep the donation separated from his personal property, and he is directly responsible for any loss or damage caused to the money or property.

In addition to private entities, a variety of public bodies have a legal personality. The State of Finland, municipalities, the Evangelical Lutheran Church of Finland, the Orthodox Church of Finland, and the Finnish Student’s Union are examples of incorporated public persons, while the Bank of Finland, the University of Helsinki, and the Social Insurance Institution of Finland are categorized as public foundations.

In this work, the concept of corporation includes all legal persons introduced above. In fact, it would be more accurate to talk about "the liability of legal persons", but for the sake of
simplicity, the term corporate liability will be used throughout the study. The main thing the reader of this thesis must keep in mind is that the Finnish concept of corporation is quite a bit wider than that in the Canadian legal system, including partnerships, registered associations, and independent foundations. According to section 1 of the proposal, in addition to all legal persons, corporate criminal liability can also be attributed to unincorporated private entrepreneurs who have large scale business activities, and whose organizational structure is similar to that of an incorporated entity. Since the operations of large private entrepreneurs are often comparable with the activities of companies or partnerships, different treatment would be unjustifiable if the only difference is in the form of the business.

With bankrupt estates, death estates, non-profit associations, foundations and religious communities, the law proposal limits the liability to the business activities of these entities. Thus, for example, a death-estate that continues running the business of the deceased is liable for offences committed in connection to its business operations.

The most important limitation to corporate liability is in section 2, according to which chapter 9 does not apply to the exercise of public authority. What is meant by "exercise of public authority" is not further defined, but generally the term includes such public powers as judicature, police action, fire services, or municipal administration. The Task Force defends the limitation by noting that the use of public authority is already
controlled efficiently through such measures as supervision of administration, statutatory investigations, and disciplinary actions. Also, public officials have a strong criminal liability for their conduct. A violation in office can result in a permanent removal or suspension from office for maximum of two years.  

It is important to notice that the limitation does not include state or other public companies that perform business activities or provide public services such as transportation.

The Commission for the Examination of Legislation noted that the law proposal is quiet about the position of foreign companies who commit offences in Finland. Chapter 1 of the Penal Code deals with the territorial application of the Finnish criminal law, but it is written in such a way that its provisions only apply to natural persons. The question of applying criminal liability to foreign corporations is an obvious gap in the law and needs to be promptly filled by the legislature.

312. According to section 12 of chapter 2 of the Penal Code, the term "official" means "government officials and those who have been appointed to take care of the affairs of general establishments or foundations set up by cities, towns, rural communities, parishes or other communities or by authorities, and those officials and staff members who are subordinate to such an official or administrative body, and also others who are appointed or elected to a public function or to take care of a public matter." Translation from an unauthorized draft translation Penal Code of Finland and the Decree on the Enforcement of the Penal Code, compiled by Matti Joutsen and provided by The Finnish Research Institute of Legal Policy, Helsinki 1983.
3.2.2.2. The criteria for corporate liability

At present, the elements of crime are built in such a manner that only a human being can commit a crime. The Task Force did not want to make radical departures from the traditional criminal law doctrine. Therefore, in the proposal, corporate criminal liability is not based on wrongful acts or guilty mind of the corporate entity itself, but on the conduct of its servants and agents. Consequently, corporate liability is always secondary to individual liability, and apart from some exceptional situations, finding and convicting a guilty individual is a prerequisite for corporate criminal liability. Also, convicting a corporation in no way eliminates personal liability of the natural person to whom the offence is attributed. He remains liable throughout.

Since a corporation is not considered "criminal" in the traditional sense, there must be some sort of rationale or criteria for imputing the conduct and culpability of individuals to a corporation. According to section 3 of chapter 9, these criteria are:

1) A breach in the corporate duty to ensure due enforcement of laws and regulations

It is a general principle of law that a corporation (as any person or entity) has a duty to obey laws and regulations. To fulfill this duty, a corporation must ensure due enforcement of laws and regulations by supervising their application and enforcement internally. According to section 3, this can be done by selecting and organizing personnel and providing for their supervision and training in an appropriate manner, and by
organizing corporate activities and operations otherwise in accordance with laws and regulations. The breach of this duty is the first condition for corporate liability.

The duty to ensure due enforcement of laws and regulations is, however, limited to what is reasonable "in the circumstances". In other words, a corporation is responsible only when its procedures and practices unreasonably fail to prevent corporate criminal violations. Hence, when determining whether the corporation is liable, two questions need to be asked; firstly, whether the corporation has behaved in a careful and responsible manner, and secondly, whether the corporation had, in the circumstances, the capacity and opportunity to act in such a manner.

The openness and flexibility of the phrase "in the circumstances" is intentional. It is noted in the commentary of the proposal that it is impossible as well as unnecessary to list all the duties that can be attached to corporations. The quality and quantity of these duties is left to the discretion of the courts. For guidance, the courts can use relevant legislation that may reveal what is expected from a careful and responsible corporation. Also, such matters as the size, structure, and other characteristics of the corporation, the nature of the activity, and the seriousness of the possible violation must be taken into consideration. Hence, a large corporation who continuously uses toxins in its production methods has a higher duty of care than a small country store which only occasionally stores such substances. Similarly, if the activity by its very nature is
dangerous, such as operating a nuclear power plant or disposing of lethal toxins, the corporation can be regarded as having a particular duty to ensure due enforcement of laws.

2) Commission of an offence

Obviously, a corporation cannot be made liable if there is no offence committed. A mere breach in the corporate duty to enforce laws and regulations does not invoke criminal liability if no concrete crime has taken place. Thus, the second criterion for corporate criminal liability is the commission of an offence.\(^{313}\)

As mentioned above, the Task Force did not desire to give up the fundamental principle that only a human being can commit a crime. The proposal is based on the notion that a corporation cannot act or think "criminally" because it does not have a body to act or a mind to have malice. Instead, corporate liability is based on attributing the offences committed by corporate servants and agents to the corporation. Therefore, in principle, finding and convicting an individual is always a prerequisite for convicting a corporation. Conviction of an individual requires there to be a wrongful act and that the individual has the necessary culpability.

In some cases, finding the guilty individual is difficult or even impossible due to complex structures and delegation of powers in the corporation. Hiding an individual behind the corporate veil can also be done intentionally. If the

\(^{313}\) In the proposal, the order of criteria differs from that used in this presentation. The change has been made in order to improve the coherence of this presentation.
prerequisite of finding and convicting an individual offender was followed to the word, corporations who have neglected to arrange the power relations in a clear and exact manner would avoid liability while their more conscientious competitors were convicted. In order to avoid such unfair situations, the proposal includes a provision about anonymous guilt. The provision is reserved for situations where it is obvious that the offence is committed by someone inside the corporation, but pin-pointing the guilty individual is not possible. Anonymous guilt can be applied, for example, when the only possible source of a toxic spill is the one and only factory located by the lake, but it is not possible to establish the persons responsible for violating pollution regulations.

According to the proposal, anonymous guilt must be reserved for exceptional cases when efforts to find a guilty individual have been unsuccessful.

Another exception in section 3 provides for situations in which it is not possible, for some reason, to bring charges against the individual offender. He might have, for example, fled the country or died. The provision provides the possibility of convicting the corporation in such cases in spite of the fact that the individual offender cannot be prosecuted. However, similar to anonymous guilt, the provision is meant to be used only as an exception.

3) Causality

The third criterion for corporate criminal liability is that the breach of the corporate duty to internally enforce laws and
regulations and the commission of an offence have a causal connection. The minimum requirement is that the breach of duty has at least considerably increased the prospects of a crime being committed. Thus, in order to convict the corporation, prosecution has to prove the fact that the corporation, for example, neglected to supervise its personnel, organize education, or draw procedure guidelines, caused or at least significantly increased the risk of the violation.

What is a "significant increase of risk" can naturally not be expressed in any exact percentage. According to the proposal, when determining whether the increase is significant, the court must rely on the general rules of experience. If the increase, in the experience of the court, is less than considerable, the corporation is not liable.

3.2.2.3. The relationship between the corporation and the individual agent

Evidently, any act committed by any individual is not imputable to the corporation. Certain qualifications must first be met. Section 4 of the proposal deals with the issue. According to the section, the first qualification is that the individual is acting on behalf of the corporation, or for the benefit of the corporation. "Acting on behalf of the corporation" includes those individuals who have a statutory or delegated power over the particular area to which the allegedly criminal conduct relates. The essential element is authority.
When someone acts for the benefit of the corporation, he does not have formal authority for his actions. In fact, the act may not even be accepted. Essential elements are an opportunity to act, and the fact that the corporation benefits from the activity. Hence, if the acts were done for the benefit of the company, the corporation may be held liable even though the acts were done in defiance of express corporate policy. The wording used in the provision as well as the commentary of the proposal seems to support the interpretation that the corporation must benefit de facto from the illegal conduct. Hence, mere benefiting purpose would not be enough to invoke corporate liability.

The second condition for corporate liability is that the offence has been committed by someone belonging to a statutory or other body with decision-making powers (a member of the board of governors, the managing director, a participant in the shareholders' meeting, an auditor), or by a corporate employee, agent, or contractor. Hence, offences committed for the benefit of the corporation by an outsider do not invoke corporate liability. The actor must be someone working or acting in or for the corporation.

3.3. Sentencing Corporations

The following presentation is based on both the general criminal law doctrine as it appears in the Penal Code and customary law, and on the law proposal on corporate criminal liability. The section starts with a short survey of the dominant
Finnish sentencing principles, and then moves on to discussing the corporate fine and the criteria that will be applied when determining the size of the corporate fine. The last part of the section deals with waiving of the measures.

### 3.3.1. Sentencing Rationale and Principles

According to the Finnish criminal law doctrine, the aim of the system of sentencing lies in prevention of crime, and through this, the increase in and equitable distribution of well-being. This utilitarian rationale for the use of penal sanctions is bound to the benefits the sentencing system offers to society, as well as to the fairness of the laws and regulations that are maintained through the threat of penal sanctions.  

The paramount sentencing principle through which the aim of crime prevention is sought is general prevention. The Finnish legal scholars prefer the term general prevention to general deterrence because the former is the more comprehensive of the two. Deterrence is only one aspect of general prevention. Rather than deterrence, the Finnish and Scandinavian textbook

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315. Up till the 1960s sentencing theories were dominated by Swedish-style rehabilitation ideology that stressed individual treatment of offenders. The ideology became abandoned as a result of strong criticism of social scientists and negative experiences obtained from treatment programmes. Since the beginning of 1970s, general prevention has taken the dominant position in the Finnish sentencing ideology. General prevention is supported by other principles such as individual prevention, incapacitation, and rehabilitation. Their role is, however, clearly secondary to general prevention. See Törnudd, supra 304.
definitions of general prevention emphasize the norm-strengthening impact of a properly working sentencing system. A penalty is regarded as a demonstration of society's reproach through which citizens' sense of morals and justice is reinforced and their inhibitions against committing crimes are strengthened. In order to perform its inhibition-reinforcing function, a penalty must carry a degree of denouncing stigma.316 The pursuit of norm-strengthening is primarily based on people's knowledge on the criminal justice system and certainty and speed of apprehension and conviction. Strict penalties are clearly a secondary goal.317

Although the justification for the existence of penal sanctions is the prevention of crime, the prevention is not pursued blindly. In fact, minimization of the harmful effects of criminality and the effects caused by the measures of its control are regarded as more worth striving for than the elimination of criminality as such. This limitation has brought about a variety of legal safeguards and principles that are meant to guarantee the justness and humaneness of the sentencing system. Some of the most important principles are predictability, proportionality, equality, and mercy.318

318. Ibid. at 45; Lahti, supra 316 at 57-59. See also Criminal Law Committee Report, supra 299 at 67-70.
According to the Criminal Law Committee, predictability requires clarity and simplicity from the penal system. With this in mind, the Committee demanded in its 1976 report that only sanctions officially termed as punishments be used for punitive purposes. Administrative sanctions should never be used for such purposes, unless the administrative sanction is so lenient that the justice issue becomes irrelevant.\textsuperscript{319} The Criminal Law Committee's hostility toward administrative punitive sanctions carried weight in the Task Force's proposal for corporate criminal liability. After a lengthy debate the Task Force voted that the new sanctions be termed punishments. According to the Task Force, calling sanctions punishments instead of something else underlines the disapproving stigma attached to penal sanctions and keeps the penal system clear and simple.\textsuperscript{320}

According to the prevailing criminal law doctrine, penalties may not be cruel or inhumane, nor may they violate the principles of equality, proportionality, or mercy.\textsuperscript{321} The principle of proportionality requires just relation between the offence and the penalty. The threats of punishment as well as actual penal sanctions must be in accordance with the principles of guilt and

\textsuperscript{319} Ibid. at 86-88.

\textsuperscript{320} In Sweden a sanction called "corporate fine" (foretagsbot) is classified as "other special consequence of a crime" (annan särskild rättsverkan av brott). The minimum of Swedish foretagsbot is 10,000 crowns, and the maximum is 3 million crowns. (One Canadian dollar is about 5 crowns.) In Finland, the Swedish approach has been criticized because in reality, the effects of the foretagsbot are very close to those of a penalty. According to the Finnish approach, only formal punishment should be used for punitive purposes because "hidden" punishments tend to confuse the system and threaten legal safeguards.

\textsuperscript{321} Criminal Law Committee Report, supra 299 at 67-72; Tapio Lappi-Seppälä, supra 314 at 660.
proportionality, and in reasonable relation to the harmfulness and blameworthiness of the facts. The rationale of the principle is to assure that there is a balance between the offender's degree of blameworthiness and the intensity of society's reaction.

The principle of equality requires that similar punishments be given in similar cases. Equality is also a part of the demand for consistency in the administration of justice and the prohibition of arbitrariness. The principles of proportionality and equality are stated in chapter 6 of the Penal Code. Section 1 of the chapter provides that

[i]n measuring a punishment all the grounds increasing and decreasing the punishment which affect the matter and the uniformness of sentencing practice shall be taken into consideration. The punishment shall be measured so that it is in just proportion to the damage and danger caused by the offence and to the guilt of the offender manifested in the offence (emphasis added). 322

The principle of mercy incorporates the idea of a certain degree of flexibility. 323 The principle has been expressed in section 4 of chapter 6 of the Code. It provides that

[i]f the offence has caused or the resultant punishment has imposed on the offender another consequence which together with the punishment... would lead to a result that is unreasonable in comparison with the nature of the offence, such situation is to be taken into consideration as is reasonable in measuring the punishment (emphasis added).

Other values emphasized in the Criminal Committee's Report were straightforwardness and the economics of the penal system.

322. Translation from Penal Code of Finland and the Decree on the Enforcement of the Penal Code, supra 312.
323. There is no coherent English translation for this last principle of "kohtuus". Expressions such as "equity", "fairness" and "reasonableness" can be used in this context together with "mercy".
In addition, the system should be built in such a manner that unregulated cumulation of sanctions can be avoided.\textsuperscript{324}

\subsection*{3.3.2. The Corporate Fine}

The only suggested penalty for a corporate offender is the so called corporate fine. According to the Task Force, the goal of general prevention is most efficiently met through the fine. According to section 5 of chapter 9, the minimum corporate fine would be five thousand marks, with the maximum being four million marks.\textsuperscript{325}

The earlier forms of the proposal suggested that the fine should be supplemented with another penalty, a warning, which could be used in less serious offences. It was also proposed that the imposition of the fine could be suspended in some cases. The Task Force's original proposal also recommended formal publication of the conviction. The sanctions were, however, considered unnecessary and they were excluded from the final version. Suspension of the fine was considered too difficult to administer. A warning was regarded as too meager to have any preventive effect, and since trials are public, informal publicity was considered sufficient.

The small selection of sanctions is in line with the Criminal Law Committee's aim to keep the sentencing system clear and simple. The Committee's objective was to keep the number of criminal sanctions low and strictly separate from civil and

\textsuperscript{324} Criminal Law Committee Report, supra 299 at 70-72.
\textsuperscript{325} In September 1991, one Canadian dollar was about 3.6 Finnish marks.
administrative sanctions. For this reason, the Task Force did not consider including special sections on compensation, restitution, or forfeiture in the proposal. These measures are already provided for elsewhere in the legislation.

The latitude of the fine was under a lot of discussion. Latitudes are an important legal safeguard, and they assign the relative penal values of offences. With the corporate fine, finding a balance between the demands for predictability and sufficient flexibility appeared to be particularly difficult. Some argued that it would be better to leave the maximum open, because it is impossible to forecast how serious "the worst case" can possibly be. However, the Task Force decided to set a fixed maximum fine justifying its decision on the principle of legality and on general preventive reasons.

Since corporate criminal liability is built on double liability, double sanctions could in some cases lead to unreasonable hardship since penalizing both the individual and the corporation can, with small companies, mean punishing the same person twice. This has been taken into consideration in section 9 of the proposal which provides the court with a possibility to reduce the corporate fine to an equitable amount when the offender is an unincorporated private entrepreneur. The intention is good, but the provision falls short by excluding other small businesses. A two partner partnership or other small entity is hardly in a different situation from a large entrepreneur. Therefore, categorizing the two groups differently is illogical. Such a discriminatory provision is also
contradictory to section 2 of the chapter in which big private entrepreneurs are placed on an equal footing with small incorporated entities.

3.3.3. Sentencing Criteria

In addition to general sentencing principles of proportionality, equality, and mercy discussed above, the proposal includes a variety of factors that the court must take into consideration when determining the size of a corporate fine. According to section 6 of the proposal, these factors are the nature and extent to which the corporation has breached its duty to ensure proper enforcement of laws and regulations, and the corporation’s ability to pay. The two criteria are meant to weigh about the same in the assessment.

Although it is impossible to give exact rules on the assessment, the proposal provides some guidelines to help the courts. According to subsection 2, when appraising the nature and extent of the breach, such factors as the seriousness of the breach, the extent of criminal activity, the position or status of the individual actor within the corporation, manifestation of general disregard for laws and orders, as well as the general aggravating and mitigating factors provided in chapter 6 of the Penal Code shall be taken into consideration. The list of factors is not exclusive, but rather provides examples of different factors that can influence the sentencing decision.

When considering the seriousness of an offence, the essential factor is the degree of corporate negligence rather
than the seriousness of the criminal act committed by an individual. Thus, the more serious the breach in corporate duties, the more strongly such corporate behaviour must be condemned. For example, intentional encouragement of employees into non-compliance must be regarded as more serious than neglecting employee training because of obvious thoughtlessness.

The extent element has several aspects. For one thing, several individuals working in or for the corporation can be involved in the wrongful activity. Secondly, the activity might have been going on for long periods of time. A further possibility is that illegal activity has become almost habitual in the corporation; none of the specific acts may not be very serious in itself, but the continuous breach of laws and regulations can be regarded as an expression of general "lawlessness" in the corporation's activities. Criminal activity can also be viewed as extensive when it effects a large geographical area or vast numbers of people. In all these cases, extensive criminal activity must be taken into account as an aggravating factor.

A further important factor is the status or position of the individual actor who actually commits an offence. The higher up in the organization the individual is, the easier it is to identify his actions with those of the corporation. Hence, an offence committed by a person with a considerable amount of authority must be regarded as more condemnable as an offence committed by someone on the lower steps of the corporate-ladder.
If the offender is manifestly heedless of the prohibitions and commands of the law and government officials, it must be taken into consideration as an aggravating factor in sentencing. The proposal does not define what such "heedless behaviour" consists of, but obviously such factors as continuous breach of laws and regulations, or breaking a specific order given by a government official could be regarded as constituting such behaviour.

The general aggravating and mitigating sentencing factors are included in chapter 6 of the Penal Code. The aggravating factors applicable to corporations include deliberate planning and risk taking, and committing the offence for remuneration. Regarding deliberate planning and risk taking as an aggravating factor requires that commission of the offence was approved by an authoritative body, such as the board of governors. An offence is committed for remuneration when the corporate offender receives direct or indirect financial or other benefits, such as money or business favours, for committing the crime from someone outside the corporation. Such a situation can take place, for example, when a corporation "hires" another corporation to illegally dump hazardous waste.

"[S]ignificant pressure, threat or similar influence on the perpetration of the offence" and "voluntary attempt...to prevent or remove the effects of the offence or to further the clearing up of his offence" are regarded as mitigating factors. 326

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326. Translation from Penal Code of Finland and the Decree on the Enforcement of the Penal Code, supra 312.
Particularly small and financially dependent (such as branch-plant) corporations can come under such pressure from a larger company that they are practically forced into committing a crime. Voluntary attempts to mitigate the damages and helping investigators are important to secure fast and efficient reparation of damages. Payment of restitution or compensation can be regarded as such attempts.

It is a general criminal law principle that the offender’s ability to pay should be taken into account when determining the size of the fine.\footnote{327} Also, the principle of equality requires that similar offences must be treated the same, but obviously, when assessing the similarity of penalties, one cannot look only at the actual size of the fine. The impact of the penalty on different offenders must be taken into account as well.

According to subsection 3 of section 6, when assessing the corporation’s ability to pay, the factors that can be taken into account include the size of the corporation, the financial stability and the financial results of the corporation. Also, if corporate income is divided unevenly over certain periods of time, this should be noted in the assessment. The correctness of the company’s financial statements must naturally also be verified.

\footnote{327. The principle has influenced the development of the Finnish day-fine system in which the amount of the fine is determined, in addition to the seriousness of crime, on the basis of the offender’s wealth.}
3.3.4. Waiving of the Measures

In principle, the conviction of a corporation is obligatory whenever the conditions for corporate criminal liability are met. Provisions in sections 7 and 8 on waiving of the measures ease the strictness of the law by providing officials with more discretion.

According to section 7, in the case of a petty offence, the prosecutor may refrain from raising charges if the corporation has made the necessary efforts to rectify the problem that caused the violation, and the danger or damage caused by the offence is small. Also, if it is obvious that the prosecutor will not prosecute in the case, the police can refrain from reporting the offence. Section 8 empowers the court to refrain from imposing a penalty on similar grounds. It must be noted that application of the provisions of the waiving of measures does not relieve the offender of responsibility for any damage caused by the offence.

Although the Task Force underlines the fact that the uniformity of sentencing practice requires cautious use of the waiving of the measures provisions, their mere existence creates a big loophole in the law on corporate criminal liability. The objectivity of judicial authorities is not always guaranteed, particularly so in small communities. Uncomfortable situations may be avoided by waiving the measures. If such a possibility is included in the law, special attention should be paid to its proper application.
According to Harold Berman and William Greiner, "law is a form of social control", and "legal order is one important way of holding a society together."\textsuperscript{328}

As the definition states, law is not the only way of keeping a society together, but it exists side by side with other forms of social order, such as family, the educational system, or political structures. However, certain characteristics, such as formality, publicity, generality, and objectivity make law different and distinct from the other forms of social order. Moreover, law is generally employed only when things go wrong or when it is anticipated that they will or can go wrong. Invention of a law, either legislative or "judge-made", is one response to the challenge set by disruption in social norms or organizations.\textsuperscript{329}

The law functions through three components which are aimed at meeting the challenge of holding a society together. Berman and Greiner call these components the social functions of law. The first of these functions is quite obvious; to restore equilibrium to the social order when that equilibrium, or a part of it, has been disturbed. The function can be restated more simply as resolving disputes in society.

\textsuperscript{328} Supra 25 at 7.
\textsuperscript{329} Ibid. at 25-28.
Mere dispute settlement is not, however, enough to secure efficiency and rationality in society. In order to act efficiently, people must to a reasonable degree be able to calculate the consequences of their conduct. Therefore, the second function of law is to maintain predictability in society and protect normal expectations of its members.

The third function consists of molding the moral and legal conceptions and attitudes in society. The function is of particular importance on areas of large-scale social problems which cannot be solved without firm government interference, and which at the same time require substantial change in traditional attitudes and values. Regulation of labour relations and environmental behaviour are examples of laws which attempt to amend and change the ways people think, feel, and act.  

The social challenge discussed in this thesis is that created by the corporations not complying with environmental laws and regulations. One of the measures chosen to answer the challenge of non-compliance is the law on corporate criminal liability. The two earlier chapters of this thesis were devoted to introducing two different approaches to penalizing corporations - those adopted in Canada and Finland. This chapter is designed to evaluate the successfulness of the two approaches in meeting the challenge of non-complying corporations in light of the three social functions of law. The chapter does not attempt or claim to cover comprehensively all the problems related to the present legislation, but it is more of an overview.

330. Ibid. at 31-35.
of some of the problems involved in achieving corporate compliance with environmental legislation through the application of corporate criminal liability.

4.1. Restoring the Equilibrium

As noted above, the first and foremost function of any law is to restore the equilibrium to the social order when that equilibrium has been disturbed. With regard to the topic of this paper, this means the application of corporate criminal liability to adjust the disequilibrium caused by illicit corporate environmental behaviour.

Restoring the equilibrium consists of two aspects; from society’s perspective, dispute resolution serves as a means to reaffirm the social norms that were broken in the violation. From the point of view of the aggrieved party, the process can be described more simply as resolving disputes between the parties. Thus, for the victim, restoration means a legal remedy that satisfies his financial and mental grievances. With environmental offences, victim compensation has an additional aspect; that of restoring and cleaning up the damaged environment. Such measures are essential because restoring the natural and legal equilibrium do not necessarily always meet; if the polluted area has no monetary value, or if human health or life are not directly endangered, it is hardly likely that someone will demand reparative actions on the damaged site. It is also possible that there is no individual, identifiable victim in an environmental
offence. In such cases, the interests of the environment need to be secured by government action.331

How the goals of norm-strengthening and redress have been accomplished in the Canadian experience and the Finnish law proposal will be looked at next.

4.1.1. Reaffirming the Norms Set in Environmental Legislation

In order to confirm the concept that corporations are truly bound by the norms set in environmental laws and regulations, the law on corporate criminal liability must be practically feasible. This requires real accountability from the entities engaged in breaking environmental statutes; if the law is built in such a way that it enables corporations to escape from liability through technical or procedural loopholes, the law is obviously not serving its purposes.

Once the liability has been established, the resulting sanction must appropriately support the objective of norm-strengthening. A trivial sanction with little or no negative consequences to the offender frustrates the whole idea of corporate criminal liability.

The law must also be built in such a manner that it is equitable in its treatment of those affected. If the system is

331. Ibid. at 31.
perceived as unfair and unequal, its plausibility and thereby its norm-strengthening impact evidently suffers. 332

4.1.1.1. Entities liable

The requirement of equal treatment leads us to the first problem with the existing legislation on corporate criminal liability, the question about the entities liable. Obviously, liability should be built in such a manner that it does not exclude or include certain entities solely because of the form in which they have chosen to run their business. The fact that a business is operated in the form of a partnership does not necessarily make its activities any less hazardous than those of an incorporated entity.

The perspective that emphasizes the function of the entity rather than its form has been adopted in the Finnish law proposal. According to the proposal, even private entrepreneurs who operate large-scale business and whose organizational structure is similar to that of corporations can be prosecuted. Liability also applies to such entities as partnerships, registered associations, and foundations.

In Canada, corporate criminal liability is principally limited to incorporated entities. The Canadian Law Reform Commission has on several occasions criticized the limited application of liability, and suggested that criminal liability should not be restricted to corporations but should be expanded

to other forms of collective action, such as partnerships, joint ventures and non-profit organizations. 333 Although the core of financial power and authority is well established in the hands of corporations, small unincorporated enterprises, such as partnerships or sole proprietorships, form an important part of the Canadian economy. 334 Businesses from all of these groups are capable of contributing to environmental degradation; for instance, such common incorporated enterprises as dry cleaners, service stations, and painters use, store, and dispose of toxic and other harmful chemicals. Excluding these kinds of enterprises from liability, particularly when they are large scale operations with a refined organizational structure, does not appear logical when, at the same time, any one-person corporation can be made liable.

There is another aspect in which the Finnish proposal is more successful with regard to the requirement of equal treatment; in the Finnish proposal, state and other public corporations carry similar liability to that of private corporations. Only "exercise of public authority", such as education, health care, fire services, or municipal administration, is excluded from liability.

333. Recodifying Criminal Code, supra 18 at 27; Criminal Responsibility for Group Action, supra 98 at 53-56. See also, Leigh 1977, supra 28 at 251-52.
In Canada, the liability of Crown corporations is significantly more limited than that of other forms of enterprise leading to a situation in which the principle of equal treatment is seriously threatened. One of the most popular arguments for limited liability arises from the claim that the effect of fining a Crown corporation is simply to fine the public at large, and that the cost of the fine can be passed onto the public. But, it must be noted that such "passing on" does not occur exclusively with public corporations; similar effects are common also with private corporations in the form of lower dividend, higher prices, or lost jobs. Hence, excluding public corporations from criminal liability on the basis of the "passing on" argument is hardly valid.

Making an exception with public polluters is absurd also in the light of statistics that show that public companies are far from innocent when it comes to violating environmental legislation. For the record, a study made in Ontario revealed that in 1985, a quarter of Ontario’s municipal sewage treatment plants violated three basic pollution guidelines and failed to meet their annual pollution targets.335 Besides, many areas of government activity carry potential for extreme environmental disasters - nuclear energy and the military representing some of the most dangerous of government operations.336 Furthermore,

335. Chappell, ibid. at 15.
336. André Picard, Inuit Villagers’ Referendum Puts Crimp in Air Defence Plan. Globe and Mail, June 17, 1991, at 5. Picard refers to the Inuit village of Kuujjuac in northern Quebec as "probably the most polluted community in Canada's North" as a result of military activities that took place after the Second World War. The waste on the area includes old radar systems whose remnants
giving special treatment to public corporations and government activities hardly encourages private corporations to comply with environmental legislation; if the government does not comply with its own legislation, how can they expect anyone else to do so?

4.1.1.2. Corporate blameworthiness

A fundamental principle of criminal law is the general undesirability of imposing criminal liability in the absence of some element of fault. According to Hart,

"[i]n all advanced legal systems liability to conviction for serious crimes is made dependant, not only on the offender having done those outward acts which the law forbids but on his having done them in a certain frame of mind or with a certain will..." 337

With individual offenders, the fault or blameworthiness is determined on the basis of the offender's mental state. Since a corporation does not have a mental state, corporate blameworthiness must be built in some other way. In the Canadian system, corporate blameworthiness is identified with the mental state of its individual agents. Identification doctrine arises from the fact that a corporation cannot act on its own but only through its servants and agents. Hence, the act or omission of a corporate servant is the conduct of the corporation, and the guilty mind of a servant is the guilty mind of the corporation. In mens rea offences, only higher echelon corporate executives are identified with the entity, and accordingly, only their

leak toxins, such as PCNs and jet fuel into the fragile Arctic environment, 20,000 rusting barrels of coal tar and fuel, dozens of rusting military vehicles and other military garbage.

guilty mind invokes corporate liability. With strict and absolute liability offences, identification reaches all levels of corporate servants, and corporate liability is based on the conduct of any corporate employee or agent. The defence of due diligence, however, must be established in the directing minds of the corporation.

The Finnish approach is different from that adopted in Canada. Instead of identification, corporate liability is based on the standard of a corporation's internal processes. The rationale for imposing liability on a corporation lies in the corporate duty to enforce laws and regulations internally. If the corporation has breached this duty, it has behaved in a blameworthy manner, and imposing the offences committed by corporate servants to the corporation is justified. Corporate liability therefore depends not solely on the commission of an offence by an individual corporate servant, but on the overall reasonableness of corporate practices and procedures designed to prevent illegal behaviour.

The rationale of corporate liability, as opposed to individual liability, is to emphasize the structural, collective fault that has led to the commission of an offence. Subsequently, corporate blameworthiness should be based on this structural fault, not on individual conduct. Of the two systems, the Finnish approach is more successful in meeting this aspect of corporate liability. The Finnish theory, better than its Canadian counterpart, emphasizes the fact that corporate offences often result, not from an isolated act of an individual, but from
faulty corporate policies and complex interactions of many corporate servants. Consequently, the Finnish system carries more potential in meeting the norm-strengthening goal since it specifically denotes the fact that liability rests on the entity, not on individuals. 338

4.1.1.3. Evasion of liability

As mentioned above, the norm-strengthening impact of the system is greatly dependent on the real accountability of the entities involved in illegal activities. If a corporation can benefit from illegal acts of its servants but get away without becoming subject to liability, the law is evidently not functioning properly. Such dysfunction can be caused by either a technical or a procedural loophole in the law. 339 Both types of get-aways can be found in both the Canadian and Finnish system. Generally, the big problem with the Finnish law proposal is the heavy prosecutorial burden of proof whilst in Canada loopholes are of more technical nature.

One such get-away for Canadian corporations was created in R. v. Dawson City Hotels Ltd. when the court ruled that identifying the directing mind and will of the corporation is a precedent condition for finding the corporation criminally liable in offences that require mens rea. 340 In other words, if no guilty individual can be identified, the corporation cannot be convicted. Consequently, it is in the corporation's best interest

338. See, Developments in the Law, ibid. at 1243, 1257-58.
339. Ibid. at 1253.
340. Supra 65.
to make the power relations within the corporation so complicated that finding the responsible directing mind becomes very difficult if not impossible. Corporations who have neglected to arrange their power structures in a clear and exact manner or who have intentionally hidden the directing minds behind the corporate veil would avoid liability while their more conscientious competitors were made liable.

The requirement also seems to put big and small corporations in an unequal position; complex, multidimensional power structures are typical to large corporations while smaller companies tend to have fewer layers of authority and less sharp differentiation between managerial and operational roles. Accordingly, hiding behind the maze of power structures and thereby evading liability is easier for large corporations than it is for small companies.341

Since a Canadian corporation is liable only for mens rea offences committed by its directing minds, corporations could theoretically avoid liability also when the directing mind has delegated her responsibilities to someone who is not normally regarded as a directing mind. However, in light of legal practice, escape from liability is at best doubtful. The prevailing view accepts the delegation of the powers and duties of a directing mind, and in some cases, delegation has reached quite far down on the corporate ladder. A low-level officer or even an employee can be regarded as the directing mind and will

341. Developments in the Law, supra 10 at 1254-55.
as long as she has a measure of discretion and control on the area of operation.\textsuperscript{342}

In the Finnish proposal, although in principle finding the guilty individual is a prerequisite for convicting the corporation, invention of anonymous liability has at least in theory eased the strictness of the requirement. However, since the application of anonymous guilt does not relieve the prosecutor from the burden of showing that a crime has taken place - that there is a wrongful act and required culpability - the provision on anonymous guilt might be left with little practical value. Showing that someone was negligent should generally not cause overwhelming difficulties, but proving a higher degree of culpability, such as intent or aggravated negligence, can be practically impossible if the guilt cannot be assigned to a specific individual. Most offences under proposed chapter 48 on Environmental Offences require intent or aggravated negligence.\textsuperscript{343} Subsequently, in order to invoke corporate liability, the prosecutor must show that someone within the corporation intentionally or with aggravated negligence committed the forbidden act. If the required culpability cannot be proven, the corporation will either escape liability entirely, or be convicted only for negligence.

The heavy evidentiary burden appears all through the Finnish proposal. Both the Environmental Offences Committee and the

\textsuperscript{342} See for example, \textit{R. v. Waterloo Mercury Sales Ltd.}, supra 58; \textit{Karen Reese v. London Realities & Rentals}, supra 57.

\textsuperscript{343} For more information on the concept of "aggravated negligence", see \textit{Lappi-Seppälä}, supra 301 at 21.
Labour Offences Committee recommended partially reversed onus, but the final proposal is based on traditional criminal law onus in which it is the prosecution's duty to establish the facts of the crime. The heavy onus can cause particular difficulties with section 3 which provides the prosecutor with the obligation to show a breach in the corporate duty to internally enforce laws and regulations. In its report, the Commission for the Examination of Legislation criticizes the heavy onus, and argues for reversed onus with regard to showing the breach of corporate duty. The Commission suggests that instead of having the prosecutor prove the breach of duty, the corporation should show the measures undertaken by the corporation to internally enforce laws and regulations. After all, it is the corporation who has the primary, and often the only, access to information regarding these measures.

It must be noted that the concept of reversed onus is not totally foreign to the Finnish criminal law tradition. Section 32 of the Freedom of the Press Act (19/1) provides the presumption of negligence of the editor of a periodical journal with regard to offences committed through the articles in the journal. Unless the editor can show due diligence, he is considered guilty. A Finnish authority on criminal law, Brynolf Honkasalo, has specifically pointed out that the provision is not an exception to the general requirement of culpability but a way to ease the prosecutor's burden of proof.\footnote{Honkasalo, supra 293 at 21-23.}
In Canada, the difficulties in establishing corporate guilt was one of the reasons for the development of strict and absolute liability offences. In R. v. Sault Ste. Marie, the Supreme Court acknowledged that due diligence would normally be within the special knowledge of the defendant, and cast the burden of proof about due diligence on the defendant.\textsuperscript{345} The standard of proof is a balance of probabilities; hence, the defendant must show that it was \textit{more than likely} that it had done everything reasonable to prevent the offence. If there is no evidence of care, the defendant will be convicted, that is, care by the directing minds of the corporation. In other words, the corporation must show that the commission of an offence took place without direction or approval from a directing mind of the corporation, and that the directing mind(s) exercised all reasonable care by establishing a proper system to prevent commission of the offence, and by taking reasonable steps to ensure the effective operation of the system.\textsuperscript{346} Since the burden of proving due diligence is left to the defendant, it is in the corporation's best interest to encourage compliance and make efforts to arrange the power structures in a clear and consistent manner.

The Finnish Commission for the Examination of Legislation has suggested similar arrangements to the Finnish law on corporate criminal liability. According to the Commission, if a reversed onus cannot be accepted, an alternative way to ease the burden of proof would be to lighten the standard of proof from

\begin{footnotesize}
\textsuperscript{345} Supra 41.
\textsuperscript{346} See Saxe, supra 2 at 147-48.
\end{footnotesize}
the proof beyond a reasonable doubt to the balance of probabilities. Once the prosecutor has established on the balance of probabilities that a breach has taken place, the defendant could prove its innocence by showing that its behaviour has been appropriate.

4.1.1.4. Interrelationship between corporate and individual liability

One of the major arguments among those opposed to the idea of corporate criminal liability is that readily available finding of corporate liability shifts liability away from, and therefore insulates, individuals who work within a corporation, providing a shield for irresponsible behaviour in corporate decision-making. The argument derives direct support from the present Canadian practice of environmental prosecutions. The vast majority of environmental cases are strict liability offences in which, unlike in mens rea offences, finding the guilty individual is not a prerequisite for convicting the corporation. Accordingly, while corporate prosecutions are common, prosecution of corporate servants and agents has been rare. The use of double prosecutions has, however, become more common during the second half of the 1980s. This might indicate the beginning of more active application of dual liability.

There are several good reasons to prosecute both the corporation and the individual agent. For one thing, the possibility to penalize both the corporation and the individual

347. Criminal Responsibility for Group Action, supra 98 at 33.
increases the number of possible prosecutions; if finding grounds for prosecuting the corporation is not successful, there might still be enough evidence against a corporate servant or agent — and visa versa. The fact that the prosecution can "take their pick" offers two qualitatively different pressure points and thus, two chances for successful crime prevention. 348 Secondly, the reality is that collective liability notwithstanding, corporations must act through individuals. Therefore, prosecuting corporate directors has an important normative function; it underlines the fact that corporate compliance begins with the directors and senior management. They have a particular duty to establish a proper ethical climate and corporate culture. This duty was expressed by Justice Bourassa in R. v. Northwest Territories Power Corp. as follows:

[...]these are the officers, the people, that corporate law puts in control. These are the people who have accepted the responsibility of overseeing and directing the corporation's management...They reflect the corporate character and must be accountable for it. 349

A further argument for dual prosecutions is based on the effectiveness aspect. Most legal scholars seem to assert that dual prosecution is more effective in obtaining compliance than simply prosecuting the corporation. 350 Both directors and employees share the fear of personal prosecution. The

348. Saxe, supra 2 at 43.
349. Supra 114 at 65.
350. See for example, Robert Iseman, The Criminal Responsibility of Corporate Officials for Pollution of the Environment (1972) 37 Albany Law Review 61; Tracey Spiegelhoff, Limits on Individual Accountability for Corporate Crimes (1984) 67 Marquette Law Review 604. See also Saxe's survey, supra 2 at 45-54 which indicates that compliance would be particularly high if corporate directors were personally liable for prosecution.
reprehensible stigma attached to criminal prosecution forms a significant deterrent to comply with legislation. Such stigma might be of particular significance with corporate management who have their social standing at stake. The possibility of personal prosecution might also give a further incentive for the employees to resist the pressures from above to break laws and regulations.

When determining the interrelationship between individual and corporate liability, it must be kept in mind that corporate liability could be of particular importance in situations where it is impossible to establish the guilt of any one person. Also, unlike individual liability, corporate liability emphasizes the need to judge corporate behaviour as a whole. The requirement of finding a guilty individual restricts the reach of the criminal law from finding fault in a group itself which might be desirable. While it is important not to shield individuals from justified criminal liability, the system should also enable corporate prosecutions in cases where an offence cannot be imputed to any particular individual.\textsuperscript{351}

The Finnish proposal attempts to solve the problematic interrelationship issue by introducing anonymous guilt to corporate criminal liability. Although in principle, finding the guilty individual is a prerequisite for invoking corporate liability, the requirement is eased with the provision on anonymous guilt which enables the court to convict a corporation even when no individual offender has been prosecuted or sentenced. However, the use of anonymous guilt is limited to\textsuperscript{351}. See Hanna, supra 36 at 465.
exceptional cases in which it is evident that someone within the corporation must have committed the offence. The system provides more flexibility than the Canadian practice in mens rea offences in which finding the directing mind is always necessary. At the same time, it - at least in theory - bestows the prosecutor with the duty to find the guilty individual thus utilizing the norm-strengthening effect of double liability to the maximum. Only time will tell whether the provision on anonymous guilt will be used according to these fine principles or whether it will give prosecutors an easy way out when identifying a guilty individual requires great effort.

Fair application of double liability requires equal treatment of individual offenders regardless to their status or position within the corporation. The Canadian practice appears somewhat questionable in this respect. One reason for the rare use of dual prosecutions in strict liability offences might be the strict standard of proof set on the prosecutor with regard to the mental state of a directing mind. It was ruled in R. v. Fell that in spite of the strict liability nature of an offence, convicting the directing mind requires mens rea from his part.\(^{352}\) At the same time, common law of negligence applies to any other corporate employee. The negative impact of such discriminatory practice was acknowledged by Justice Stuart who notes that

by ignoring the criminality of responsible corporate officers, the criminal law process is offering concessions to one class of offenders not afforded to others. This practice can only engender a public perception of bias and unjustifiable discrimination.\(^{353}\)

\(^{352}\) Supra 65.
\(^{353}\) R. v. United Keno Hill Mines Ltd., supra 94 at 54.
The requirement of equal treatment also raises a question about the cumulation of sanctions in small entities. In small, closely held or one-person companies, penalizing both the corporation and its directing mind may result in excessive penalties. The issue came up in *Shamrock Chemicals Ltd. et. al. v. R.* in 1990 when Ontario District Court was faced with the question of whether penalizing both the company and its directing mind was in effect penalizing the same person twice.\(^{354}\) The company in question was a so called "one person corporation" with Mr. S. being "the embodiment of the corporation who kept the place going". The appellant argued that the penalty imposed against the corporation would be felt by Mr. S. directly and therefore penalizing Mr. S. separately from his company meant in practice punishing him twice. In the decision, Justice McDermid noted that by choosing to run his business through a corporate form, Mr. S created a separate legal person and that he must bear the burdens as well as enjoy the benefits of that voluntary choice. Thus, there was nothing wrong with imposing a penalty on both the corporation and Mr. S.

The inflexible stand taken by the Court seems unjustified in light of such fundamental principles of sentencing as proportionality and reasonableness of sanctions; cumulation of sanctions can lead to unreasonable hardship which should be taken into consideration in sentencing.\(^{355}\) The Finnish proposal is

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354. Supra 268.
355. The collateral effect of conviction and sentence was taken into account in *R. v. Ruddock* (1978), 39 C.C.C.(2d) 65 (N.S.C.App.Div.).
somewhat better endowed in this respect; section 9 provides the court with the possibility to reduce the corporate fine to an equitable amount when the offender is an unincorporated private entrepreneur. For some reason, other small businesses are not covered by the provision. Truly equal treatment of defendants would clearly require the provision to be extended to all forms of small entities.

4.1.1.5. Sanctions

Although the establishment of liability is the necessary prerequisite for sentencing, "sanctions are really the tail that wags the dog of corporate criminal liability."\textsuperscript{356} Success in prosecution is generally measured through the sanctions imposed; if the establishment of liability is not followed by an appropriate sentence, efforts to control corporate behaviour through criminal action have been futile. The norm-strengthening effect of the law is therefore strongly dependent on adequate sanctions.

In order to have norm-strengthening impact, the sanction must carry negative or unpleasant consequences for the offender. With regard to corporations, such consequences can be achieved by affecting the corporation's ability to achieve its goals, the most prominent of which is profit. The corporation's profit-making abilities can be strained through several different measures. One of them consists of making the illegal activity unprofitable through severe economic sanctions. Hence,

\textsuperscript{356} Hanna, supra 36 at 468.
the penalties imposed should...exceed the cost of compliance. Only through compliance with the law, and the duties it imposes, will respect for the law be encouraged and negligence in operations deterred. 357

Both in Canada and in Finland, this aspect of sentencing is emphasized strongly. The chosen tool is the fine. In Canada, the fine is by far the most important penalty provided in environmental statutes. In Finland, the monopoly of the fine is even stronger - it is the only penalty included in the proposed law on corporate criminal liability. Unfortunately, this strong reliance on the fine is not without some serious shortcomings. For one thing, the Canadian experience shows that the fines imposed have generally been too low to have any real impact on corporate behaviour. Even when the maximum penalties provided in the statute are rigorous, sentencing judges often apply an assortment of mitigating factors varying from the offender’s economic contributions to the lack of concrete harm with such a vigour that the resulting fine is a mere token.

Simply raising fines, however, does not provide a full solution. Vast number of polluters who come to trial are small businesses with limited ability to pay. 358 Due to economics of scale, severe monetary penalties can end up being crippling or vindictive to a small corporation while being a mere slap on the wrist to a big company. Such different consequences do not meet the requirement of equal treatment of offenders. Obviously then, the fine is a notoriously ineffective sanction in cases of inability to pay or extreme wealth.

358. Sentencing in Environmental Cases, supra 127 at 25.
It has also been argued that the impact of higher fines will not be felt by the corporation but by its shareholders, employees or consumers. The critics of big fines talk about the problem of "spilling over" or "passing on". American legal scholar John Coffee has noted that "when the corporation catches a cold, someone else sneezes." 

It is self-evident that a fair and just sentencing system sanctions only the actual offender without harming the innocent in form of lower dividend, higher prices, or lost jobs. However, the problem may not be as serious as it looks; for instance, it can be argued that the shareholders have taken a voluntary risk by investing in a company with suspect environmental policies. Severe financial losses may convince the shareholders to transfer their investments to a company with better environmental policies. Furthermore, shareholders generally belong to the wealthier section of society or are corporations themselves and can bear the loss. The concern for consumers is similarly exaggerated; in market economy where monopolies are supposed to be scarce, consumers can usually find lower prices from law-abiding companies.

The concern over employees is, however, often real; employees are rarely in the position to pick their employer,

359. See, for example, Criminal Responsibility for Group Action, supra 98 at 42; Iseman, supra 350 at 64-75.
especially if the company is located in a small, remote community. In such cases, the loss of a major employer can cause drastic problems, and a degree of restraint must be used when using fines against corporate offenders.

An important aspect to hurting corporate profits through severe economic sanctions is the need to deprive the offender of the fruits of the crime. If the penalty imposed is smaller or equivalent to the savings or gain derived from the offence, the situation presents the corporation with an attractive gamble. In order to have any norm-strengthening impact, the penalty must exceed the illicit benefit by some significant amount.

In Canada, the fine is the primary measure used for depriving the offender of illegal profits. The majority of legal opinion seems to support the idea that "the fruits of the crime" have to be deprived from the offender through heavy fines. In practice, depriving the profits has been a pretty insignificant sentencing factor with the result that complying with the legislation has often been more expensive than paying the fine. The "additional fine" provisions provided in some recent environmental statutes may improve the situation.\(^{361}\) In Finland, in principle, forfeiture of profits is obligatory. Yet, since the courts have based their estimate about the amount of profits on the defendant's plead, forfeiture orders have generally been very lenient. Obviously, more effective measures must be employed to gather evidence about the amount of profits.

\(^{361}\) CEPA, supra 13, s. 129; Manitoba Environment Act, supra 22, s. 36(d); Ontario Environmental Protection Act, supra 22, s. 146(c) (as am. 1986, c. 68, s. 15).
In addition to economic deprivation, corporate behaviour can be influenced by stigmatizing the corporate image. Imposition of a penal sanction carries a negative stigma by its very nature. The norm-strengthening stigma of penal sanctions is strongly connected to society's reproach expressed through a penalty. The effectiveness of the reproach is dependent on publicity that follows the conviction. Public denunciation can be of particular significance with regard to corporations who generally try their best to keep up a good public image. The Canadian legislator has wanted to optimize the negative impact of publicity by providing some of the most recent environmental statutes with a provision that empowers the courts to order the convicted offender to publish the facts of the case. Formal publicity was advocated also by the Finnish Penal Code Task Force, but it was left out of the final version of the proposal.

While the Canadian courts and legal scholars have widely acknowledged "the inadequacy of existing remedies, which consist almost entirely of fines, and the need to fashion more appropriate remedies", and have made attempts to use publicity, additional fine, or remedial orders against corporate offenders, the Finnish Criminal Law Committee has emphasized the objective of a clear and simple sentencing system by keeping the number of penal sanctions low. This aim of clarity shows as a

362. CEPA, supra 13, s. 130(1); Fisheries Act, supra 14, s. 79.2(c) (as am. S.C. 1991, c. 1).
364. Criminal Law Committee Report, supra 299 at 65.
pretty empty selection of sentencing options. As the discussion above shows, the fine is not always the most appropriate measure when sentencing corporate offenders. The Canadian experiments with publicity and other alternative penalties might provide some ideas for supplementing the fine with alternative options.

As mentioned earlier, the norm-strengthening impact of the law is greatly dependent on the degree people feel the system is just and equitable in its treatment of those involved. The requirement of justice is of particular importance in sentencing because penal sanctions violate such fundamental rights as personal liberty and financial security. Therefore, once the quality of the penalty is established, its quantity must be determined so that the result is fair and equitable. In other words, the sanction should be no more or less than the offender deserves. This notion of "just deserts" has led to the principle of proportionality. The principle consists of two aspects; first of all, the penalty must be in proportion to the gravity of the offence and the culpability of the offender. Secondly, the principle requires similar treatment for similar offences.\(^{365}\)

In Finland, the principle of proportionality is included in the Penal Code, and it is recognized as the leading sentencing criteria. In Canada, in spite of the fact that the legal literature frequently brings up the principle as the most important sentencing criteria, the practice shows that the principle is often neglected or muddled with other criteria.\(^{366}\)

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365. See, von Hirsch, supra 132.
366. For instance, in The Criminal Law in Canadian Society "the need for sentences to reflect, above all, the seriousness of the
Sentences have only mildly reflected the gravity of the offence, particularly so if no evidence of concrete harm has been available. Similarly, the culpability factor has generally worked only for the offender; the lack of guilty mind in strict liability offences is often regarded as a mitigating factor in spite of the fact that it is submitted that mens rea is not even an element of a strict liability offence. Furthermore, such external factors as "corporate character" or the corporation's socioeconomic significance have often outweighed other considerations.

4.1.2. Redress to the Victim and the Environment

In the previous section, I have discussed the norm-strengthening impact of sanctions. There is, however, more to sanctions than merely reaffirming the broken norms. For the victim of the crime, sanctions mean a way to satisfy his mental or financial grievances. And from the viewpoint of the natural environment, sanctions should provide for cleaning up and mitigation of damages. If asked the victims of a toxic spill, a fisherman who has suffered a loss of income, or a summer cabin owner who can no longer swim in his lake, it is hardly revenge or even deterrence that is the foremost concern in their minds, but reparation of damage and compensation. For the victim and the harm involved in the criminal conduct, and the degree of culpability of the offender" was strongly underlined. Similarly, the report noted that "special attention [must be] devoted to ensuring similarity of treatment for persons who are alike in relevant respects". Supra 1 at 61, 64. See also Sentencing Reform, supra 118 at 152.
environment, equilibrium becomes restored only through appropriate sanctions that remedy the wrong caused through the offence.

Whether redress should be obtained through penal sanctions or by some other measures remains a controversial issue. Both in Canada and Finland, criminal courts have traditionally paid only little attention to redress when determining an appropriate sentence. Compensating the victim has been regarded as a fundamental part of the civil procedure, and restoration of the damaged site has been left to administrative officials. In Canada, however, the strict division between penal and other forms of sanctions has subsided, at least in theory, after the victim orientated approach started to gain more ground in the 1970s. One strong supporter of the approach has been the Canadian Law Reform Commission who on several occasions has recommended incorporation of restitution and compensation into sentencing alternatives.\textsuperscript{367}

In some instances, the recommendations have led to legislative action; the CEPA provides compensation for the loss of property,\textsuperscript{368} and the Manitoba Environment Act empowers courts to order the offender to pay damages or make restitution.\textsuperscript{369}

Compensation and restitution can also be granted under so called remedial order provisions provided in some environmental statutes or as a condition of a probation order under the Criminal

\textsuperscript{367} Restitution and Compensation and Fines, supra 169 at 5-8; Sentencing in Environmental Cases, supra 127 at 69.
\textsuperscript{368} Supra 13, s. 131(1).
\textsuperscript{369} Supra 22, s. 36(c).
Code. It must be noted, however, that an order to pay damages or restore the damaged site can only be made in addition to a penalty. For instance, the Criminal Code provision on probation specifically denotes that the objective of a probation order must be to secure the good conduct of the defendant or prevent him from further offences, not punishment.

In sentencing practice the redress remains a rarity. The Canadian courts have been reluctant to order compensation or restitution claiming that they do not want to turn into "collection agencies", and perform complex monetary calculations connected to compensation and restitution. Yet, the same courts are able to handle such complicated matters as tax frauds and other economic crime which often involve huge sums of money.

In Finland, the desire to keep penal sanctions separate from civil and administrative sanctions has remained strong. For instance, only administrative officials have powers to order cleaning up or restoration of the damaged site. A significant exception to the separation of procedures is the possibility of presenting a compensation claim in criminal proceedings when the claim is based on an injury caused by the crime in question. Such adhesive proceedings mean procedural economy because the two cases are combined in one, thus decreasing the amount of judicial and administrative work and time. However, joint procedure does not necessarily improve the victim’s rights to receive compensation. For one thing, it is up to him to take the

370. Supra 17, s. 737 as am.; Fisheries Act, supra 14, s. 79.2 (b) (as am. S.C. 1991, c. 1) ; Ontario Environment Protection Act, supra 22, s. 146d(1).
initiative about the claim, not the prosecutor. Also, since the compensation order imposed is regarded as a civil sanction, securing payment of damages is a matter for the victim. Furthermore, since the civil claim is ancillary to the penal claim, it is possible that the civil claim will not be considered to its full extent.\textsuperscript{371}

When addressing the question of redress in criminal sentencing, we run into the fundamental issue about the proper functions of penal sanctions. As the discussion above reveals, the limits of these functions have been somewhat differently drawn in Canada and Finland. At least in theory, the Canadian system has paid more attention to the matters concerning redress. The selection of penal sanctions includes a variety of measures through which the victim can be compensated or the damaged site can be restored. The measures are non-punitive by nature; their function is not to punish but to compensate and restore, and they can be imposed only in addition to a penalty. Hence, punitive sanctions (normally a fine) and other sanctions are kept strictly separate. A similar separation of functions takes place also in the Finnish sentencing system with regard to forfeiture. Although an integral part of sentencing, neither forfeiture of profits or property is regarded as a penalty but as so called "supplementary sanction" the purpose of which is to prevent further offences.

Hence, in both systems, the functions of penal sanctions have expanded from purely punitive to compensatory and preventive functions, from punishment to obligations. This enlarged role of

\textsuperscript{371} See Joutsen, supra 291 at 193-95.
penal sanctions raises some points worth considering. For one thing, by including compensation and remedial sanctions among penal sanctions, the justice system emphasizes the importance of these issues. Criminal process is likely to bring increased attention to the harm done to the victim and the environment as well as to the need to remedy the harm. After all, "criminal process has an inherent theatricality" which attracts media coverage in a lot higher degree than administrative or civil proceedings do.\textsuperscript{372}

Secondly, including compensatory and remedial restitution to criminal proceedings would reduce the duplicate (or triplicate) actions of civil and criminal (and administrative) proceedings and save both time and money. Also, when the victim is a private citizen with limited assets, bringing an action for damages is often not done for variety of reasons such as high expenses or belief that a "small guy" cannot win when the opponent is a big and powerful corporation. Sweigen and Bunt have noted that "[t]he alternative to recovery through the sentencing process is not recovery through the civil process, but no recovery at all."\textsuperscript{373} Thus, it can be argued that empowering the prosecution to claim damages or restitution would mean improved protection for the rights of the victim.

Although the present Finnish system of adhesive proceedings doubtless increases the efficiency of the sanctioning system thereby lessening the concern over human crime victims,

\textsuperscript{372} Coffee, Making the Punishment Fit the Corporation, supra 360 at 22.

\textsuperscript{373} Sentencing in Environmental Cases, supra 127 at 69.
redressing the damaged environment is completely excluded from criminal proceedings. Concurrently, it is evident that the fine alone is not always a suitable sanction. The wider variety of remedial sanctions available for a Canadian sentencing court may offer more innovative sanctioning alternatives for corporate offenders. At least restitution in the form of community service or cleaning up the site would appear appropriate for those corporate offenders with whom the fine is for some reason an inappropriate or insufficient penalty. The Finnish Environmental Offences Committee also pointed out that including remedial orders into the criminal process would provide increased legal security compared to the present administrative procedure.374

4.2. Maintaining Predictability

The first part of this chapter was devoted to examining the Canadian experience and the Finnish law proposal in the light of the first social function of law, that of restoring equilibrium to the social order. In this part, I shall examine the second social function of law which contributes to the social order by maintaining predictability in the lives of people.

Law serves as a means to protect normal expectations and it enables people to act more efficiently by allowing them to calculate the legal consequences of their actions. Obviously, if people had no guarantees about the safety or security of their conduct, there would be no development and progress would perish. A meaningful degree of certainty about the content of law is also an important element of compliance. A law that is ambiguous or random invokes distrust and lack of respect for the law and the whole legal system thereby encouraging non-compliance. Therefore, predictability is an important part of any successful compliance strategy.\textsuperscript{375}

Maintaining predictability requires the law to be exact enough to allow a meaningful degree of certainty. For one thing, the rules of the law must be of sufficient precision. With corporate criminal liability, this means both knowledge about the conditions for liability and certainty about sentencing. Corporations must be made aware of how, when, and on what basis they can be made liable for their activities. Similarly, they need to have an idea of existing sentencing factors and sentencing options.

Exact rules on liability and sentencing do not alone guarantee a sufficient degree of predictability, but they must be supported with consistent and uniform enforcement. The disparity between the rules of law and the law in practice inserts a degree of uncertainty into the process. Therefore, enforcement has a significant role in drawing the limits of acceptable corporate

\textsuperscript{375} Berman - Greiner, supra 25 at 32.
conduct. How well the Canadian and the Finnish approaches meet these different aspects of predictability will be looked at next.

4.2.1. Precise Rules of Liability

In Canada, the rules and principles on corporate criminal liability have developed over a period of more than one hundred years. The majority of rules are still based on case law, the most important case being R. v. Canadian Dredge & Dock Co. from 1985. Although the decision nicely codified and clarified the limits of corporate liability, the rules themselves do not always promote predictability. An example of such a rule is the identification theory which focuses solely on the directing mind's guilty mind, and automatically imputes the individual's intent to the corporation. Since the corporation's efforts to prevent criminal conduct are irrelevant and it has no way of predicting and controlling its own destiny, it has no incentive to make efforts to develop responsible corporate policies.

In the Finnish system corporate liability depends not on the conduct of its individual members but on the corporation's efforts to promote compliance. Since the corporation knows that its liability will depend on its own voluntary acts "it can better plan and predict its future fate by choosing whether to

376. See Trezise, supra 332 at 404.
377. Supra 36.
engage in activities that limit - or expand - its exposure to criminal liability."  

Although in Canada the general principles of corporate criminal liability can be found in case law, some rules of liability have been retained and further clarified in statutory law. For instance, the proposed recodification of the Criminal Code includes specific provisions about corporate criminal liability. Also some environmental statutes codify or further specify liability rules. These statutory provisions are not always consistent with each other. For instance, while most environmental statutes support the common law rule that the conviction of the directing mind requires mens rea from the individual even when the offence is one of strict liability, Ontario’s environmental statutes have adopted a different approach according to which the Crown does not need to prove mens rea but a mere negligent omission to prevent the corporation from causing or permitting pollution is enough.  

Similar inconsistencies appear with regard to the question of whether convicting the corporation is a prerequisite for convicting company directors. Environmental statutes provide both positive and negative answers to the question with the majority of the statutes not dealing with the question at all.  

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379. Ibid. at 1113.
380. The revised Code would, however, be applicable only to crimes punishable by a term of imprisonment.
381. Compare, for example, CEPA, supra 13, s. 122; Transportation of Dangerous Goods Act, supra 16, s. 11; B.C. Waste Management Act, supra 51, s. 34(10) with Ontario Environmental Protection Act, supra 22, s. 147a (as am. S.O. 1988, c. 54, s. 49(3)).
382. Compare, for example, B.C. Environment Management Act, supra 100, s. 14(4) with CEPA, ibid.
disparities in legislation create situations in which corporations (or corporate directors) are set in different positions depending on the province they operate in. Such diverse legislation does not advance the public’s awareness about the contents of the law thereby enhancing unpredictability and uncertainty.

The Finnish law proposal on corporate criminal liability is drafted in a relatively detailed manner. The Task Force justified specific and detailed provisions by the radical change corporate criminal liability will bring into the Finnish legal system. The Task Force noted that such a fundamental alteration is certain to raise insecurity among the legal profession, and ambivalent and abstract provisions could lead to even more uncertainty and incoherent legal practice.

Although the Task Force’s point is certainly relevant, it must be kept in mind that while casuistic definitions have a stronger guiding effect, they might carry the risk of saying too much of one thing (and nothing of other things). In fact, this is exactly what appears to have happened with the proposal. In its ambition to formulate clear and precise rules, the Task Force has gone too far in details regulating matters that are self-evident while leaving some essential questions wide open. An example of a self-evident provision is the requirement of causality stated in section 3. According to the section, there must be a causal connection between the commission of an offence and the corporate breach of duty. The requirement of causality is, however, one of the basic principles of the Finnish criminal law doctrine and
hence, there is no particular need to specifically articulate the requirement. The proposal also provides for long, casuistic lists in sections 6 (sentencing criteria) and 7 and 8 (waiving of measures). Such lists could be included on the commentary of the proposal thereby relieving the law itself from long and tiresome lists.\footnote{383}

While some issues are over-regulated in the proposal, others have not been regulated at all. For instance, the applicability of the law to foreign corporations operating in Finland is not defined in the proposal or anywhere else in criminal law. Similarly, the proposal does not address the questions about the effects of a dissolution or amalgamation to corporate liability.

\subsection*{4.2.2. Clear Sentencing System}

When studying the Canadian experience on penalizing corporations for environmental offences, some of the greatest problems appear to be connected to sentencing. The vast diversity of environmental offences and offenders has led to a situation in which \"[t]here is no consensus on the appropriate sentencing principles or the factors to be taken into account in the sentencing and the relevant weight to be given different principles or factors\".\footnote{384}

It is generally acknowledged that sentencing in environmental cases requires a special approach different from

\footnote{383. See, \textit{Oikeushenkilön rangaistusvastuu}, the Report by the Commission for the Examination of Legislation, supra 24 at 6, 15, 19-20.}

\footnote{384. \textit{Sentencing in Environmental Cases}, supra 127 at 6.}
that used in traditional crime, but what this "special approach" consists of remains an open issue. The sentencing practice reflects ambivalence even about the sentencing objectives and principles. Deterrence is cited as the primary objective in most environmental cases, but in reality, retributive undertones can be found in many sentencing decisions. At least on a theoretical level, deterrence and retribution are often contrasted with each other so that the court must choose either or. This uncertainty about the proper purposes of sentencing is reflected in sentencing factors. For example, if the sentencing judge wants to emphasize deterrence, he wants to impose a substantial penalty even in the absence of actual damage. Meanwhile, a "retributive" judge supports the principle of proportionality and refuses to punish the offender for something that cannot be proved.

The confusion over sentencing factors is further accentuated by the very nature of environmental offences. Most environmental offences are by-products of otherwise useful and socially acceptable operations. Consequently, the courts have brought about a variety of factors that underline the economic welfare provided by the offender or the offender's good behaviour in the past. As a result, too much emphasis has been cast on matters of marginal relevancy and the focus of attention has drifted from the harm sought to be prevented in the statute to such trivialities as "good corporate character".

Since no articulated policies about sentencing principles or factors are provided, the uniformity of sentencing suffers. The

results of the haphazard sentencing practice show in wide discrepancy in the fines imposed. Present practice provides no guidance to sentencing judges who can apply practically any principles and factors and impose a penalty of any size. Such a system is naturally not capable of promoting predictability and corporate awareness about environmental sentencing.

In Finland, criminal justice system is very legalistically regulated, and the discretion of the judicial bodies imposing penal sanctions has traditionally been restricted. For example, the maximum penalty for each type of offence is always expressly stated in law. This legalistic approach shows as precise sentencing criteria. The Penal Code includes general sentencing criteria applicable to all crimes. In the proposed law on corporate criminal liability, these general criteria are supplemented by specific criteria provided in section 6. In fact, the Task Force has succeeded in its ambition for preciseness so well that the section can be criticized for being overly casuistic.

The most important general sentencing criterion is the principle of proportionality which requires the penalty to be in just proportion to the culpability of the offender and the harm caused by the offence. In addition to promoting fair sentences, the principle promotes predictability by setting the basis for decision-making in sentencing. By dictating that the decisive factors are the harm and the intent, the principle equips the

386. Historical perspectives of the Finnish legality principle are discussed in Raimo Lahti, On Finnish and Scandinavian Criminal Policy. 1989 Cahiers de Defence Sociale at 64.
courts with clear instructions, and excluding factors of marginal relevancy becomes easier.

With regard to sentencing options, the Task Force has optimized predictability by providing only one penalty, that of a corporate fine. Such useful measures as revocation of licences or remedial orders are strictly limited to administrative officials. As we have seen above, the fine is not always the best possible sentencing tool against corporate offenders, especially in environmental offences which involve a vast diversity of offences and offenders. Obviously, "a broader range of penalties and a wider variety of sentencing tools must be fashioned to reflect the wide range of offenders and offences contemplated by environmental laws". 387 A wider selection calls for clear articulation of the sentencing goals and relationships between the various sentencing options. This requires evaluation of the relative seriousness of the various offences and rationalization of sentencing criteria relevant to environmental offences. A system that is clearly structured and consistent provides grounds for more diverse sentencing options, contributing both to predictability and flexibility of the system.

4.2.3. Consistent and Uniform Enforcement

The requirement for predictability in enforcement is specifically expressed in the CEPA's compliance and enforcement policy, which states that "[e]nforcement officials throughout Canada will apply the Act in a manner that is fair, predictable, 387. Sentencing in Environmental Cases, supra 127 at 7,
and consistent." The Canadian reality, however, is far from this ideal due to the exercise of wide prosecutorial discretion.

The formal exercise of prosecutorial discretion is exercised at the executive level of individual regulatory agencies so that in most jurisdictions, the final decision to prosecute is made by the deputy minister of the relevant department although advice on the legal merits is normally sought first from the Attorney General. Lynne Huestis has studied prosecutorial discretion in environmental cases, and has made several interesting findings about the present practice which she describes as selective enforcement. She notes, firstly, that detected violations are only rarely prosecuted. She then moves on looking at factors that influence the execution of prosecutorial discretion, and concludes that "factors not technically relevant to statutory law substantially influence the enforcement of law". For example, the concept of harm, which is generally the basic rationale for government intervention, has only secondary influence on the decisions to prosecute. At the same time, a variety of "socially relevant attributes" such as the mental state of the offender, the offender's past compliance record and general "attitude" of the offenders are important factors in prosecutionary discretion. She has also pointed out that the fact that prosecutorial discretion is formally in the hands of a regulatory

388. Canadian Environmental Protection Act, Enforcement and Compliance Policy, supra 8 at 9.
389. Chappell, supra 334 at 35.
390. Lynne Huestis, "Charter of Rights Implications in Discretionary Enforcement" in Environmental Enforcement, supra 82 at 25.
391. Ibid. at 25-26.
agency "raises the possibility of political considerations in the final decision to prosecute".\(^{392}\)

Huestis notes that selective enforcement is not reflected in the legislation but is based almost entirely on the discretion of an enforcement agency. According to her, this has led to a situation in which

\[\text{[s]tatutes take on the appearance of "paper tigers", with enforcement sporadic and without apparent consistency. Illegal noncompliance is not uniformly prosecuted. Enforcement decisions are within the framework of closed and secretive process within the agencies. As a consequence, the enforcement strategies and prosecutorial criteria relied on by the agency are not readily apparent to either regulated industry or the public.}\(^{393}\)

While prosecutorial discretion provides an important degree of flexibility in the criminal justice system, inconsistent enforcement creates uncertainty and unpredictability which may have a negative impact on corporate compliance. If corporations perceive that the chances of prosecution are small, violating legislation might become a gamble with a good chance to win.

Inconsistent enforcement raises also a question about the fairness of such a system. Huestis notes that "discretion attains legitimacy only when it is generally perceived to be appropriate in the circumstances."\(^{394}\) Since the decisions to prosecute have low visibility, it becomes difficult to identify the appropriateness of the criteria used in decision-making.

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393. Huestis, supra 390 at 26.
394. Ibid. at 27.
In Finland, the legality principle is observed also in prosecution. Research suggests that there is very little room for discretion in prosecutorial decision-making. The impact of limited discretion is emphasized by the fact that the application of the proposed law on corporate criminal liability is made obligatory. Originally, the Task Force proposed discretionary application of the law, but the final version of the proposal is based on compulsory application whenever the criteria for corporate liability exists.

The strictness of compulsory application is mitigated by the provisions on waiving of measures. Waiving of measures can be done at three stages of the process; the police or other enforcement agency may refrain from reporting the offence, the prosecutor may refrain from laying charges, and the court may refrain from imposing a penalty. The general basis for the decision to waive measures is the pettiness of the offence.

According to section 7 of the proposal, a police may refrain from reporting an offence if it is obvious that the prosecutor will refrain from laying charges. In its report, the Commission for the Examination of Legislation notes that providing the police with a power to waive measures means in practice that the police must anticipate the prosecutor’s decision. Such a power is not appropriate considering that the law is meant to apply only

395. This result was obtained in an international comparative study based on summarized case prosecutions. See, Matti Joutsen - Jorma Kalske, *Prosecutorial Decision-Making in Finland. The Results of a Simulation Study.* (Helsinki: National Research Institute of Legal Policy, 1984), publication 67.
to relatively serious offences. The seriousness of the offence should be left to the prosecutor to decide.

Although the discretionary powers with regard to prosecution have been little used in traditional crimes, there is a reason to believe that prosecutors might use more discretion with corporate offences. One contributing factor is the heavy onus set on the prosecution. Also, environmental cases often involve difficult scientific and technical issues which prosecutors are not accustomed to. A solution is to form a separate prosecutor's office for environmental offences or to ease the burden of proof on the prosecutor. Without such measures, waiving of prosecution might become a rule instead of an exception.

4.3. Creating Environmental Responsibility

In the first part of this chapter I discussed the norm-strengthening function of the law, and evaluated its role in controlling corporate environmental behaviour. In his book "Why People Obey the Law", Tom Tyler identifies the norm-strengthening aspects of the law with a so called instrumental perspective to compliance. According to Tyler, the instrumental perspective is based on shaping peoples' behaviour through a system of incentives and penalties, and is strongly connected to the ideology of deterrence. Such a system is built on the pursuit of self-interest. For example, a possibility of prosecution forces the company to make judgements about possible gains and losses.

396. (Chelsea: Yale University Press, 1990), at 3.
resulting, on one hand, from law-obedient behaviour, and on the other hand, from breaching the norms.

Whilst the instrumental perspective to compliance is widely adopted among policy makers, it is also possible to promote values and enhance compliance by making people view compliance with the law as appropriate because of their attitudes about how they should behave [so that] they will voluntarily assume the obligation to follow legal rules [because] they feel personally committed to obeying the law irrespective of whether they risk punishment for breaking the law. 397

Tyler calls such voluntary compliance a normative commitment to the law. Unlike the instrumental perspective which makes people comply because of external pressures, the normative perspective aims at a voluntary, inner commitment to comply. The following presentation is devoted to exploring this normative perspective to compliance. The presentation starts by introducing the concept in more detail and then discussing its application to corporate environmental behaviour.

4.3.1. The Normative Perspective to Compliance

In its traditional form, law reflects the values of the society in which it functions. However, sometimes law must do more than that; it must anticipate future developments, leap ahead, and set new values and new standards of conduct, and thereby mold and advance the moral and social attitudes of the public in order to cope with emerging social problems. 398

397. Ibid. at 3.
398. Berman - Greiner, supra 25 at 33.
With regard to the topic of this thesis, the "emerging social problem" lies in the lack of corporations' environmental responsibility which results in non-compliance with environmental legislation. As noted above, one way to encourage compliance is through a system of penalties and rewards. Although this instrumental perspective is widely adopted by policy makers, its application is not entirely without problems. Tyler notes that

[although the idea of exercising authority through social control is attractively simple, it has been widely suggested that in democratic societies the legal system cannot function if it can influence people only by manipulating rewards and costs...This type of leadership is impractical because government is obliged to produce benefits or exercise coercion every time it seeks to influence citizens' behaviour. These strategies consume large amounts of public resources and such societies would be "in constant peril of disequilibrium and instability".]399

For these reasons, Tyler advocates supplementing the instrumental perspective with normative commitment to the law. The key difference between the two perspectives is that a system built on the normative perspective attempts to enhance people's inner commitment to comply, while a system based on the instrumental perspective compliance is based on considerations of reward and punishment.400 A normatively committed person complies with the law because he feels the law is just and moral, not because he feels it is in his best self-interest to comply.

The normative perspective is built on the suggestion that people will voluntarily act against their self-interest. Tyler talks about "internalized obligations" which are so strong that they replace self-interests as the primary consideration in a

399. Supra 396 at 22.
400. Ibid. at 24.
person's mind.⁴⁰¹ Imposing such internalized obligations to corporations through corporate criminal liability will be looked at next.

### 4.3.2. Corporations and "Internalized Obligations"

David Trezise has noted that "[a] primary cause of our contemporary environmental problems is the tacit pre-eminence accorded the right to despoil the environment over the right to a clean environment."⁴⁰² This pre-eminence is strongly founded on the fact that pollution is largely a result of otherwise legitimate and socially desirable corporate activities. The corporation is an instrument designed to make profit, and therefore to override other values, such as environmental protection, that conflict with the goal of maximizing profit. The success of some corporations in achieving their goals unlawfully encourages others to follow the same path to success. The absence of normative support for legitimate conduct is replaced by normative support for the illegitimate, but expedient. Non-compliance becomes "acceptable business practice".⁴⁰³

The aim of the normative, educative function of the law is to turn such "acceptable business practices" unacceptable by convincing corporations into compliance not from force, but because they have adopted internal cultures that reflect the ideology of environmental protection. Creating a responsible

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⁴⁰¹ Ibid.
⁴⁰² Trezise, supra 332 at 405.
corporate culture must be the foremost goal in any successful compliance strategy; convicting a corporation is not much good if sufficient internal pressure to violate the law continues to exist within the corporation. Only a change in the corporate attitude towards compliance will actuate real change.

Since a corporation itself is a "mindless" entity, the process of internalizing environmental obligations must take place through individuals who in turn can promote the development of corporate culture and influence corporate decision-making. In addition to corporate management, investors, corporate employees and customers can have significant influence on forming a responsible corporate culture. When the number of investors refusing to invest in companies with environmentally suspect policies has grown big enough, or when the majority of customers demand "green" products, environmental policies of many corporations are likely to change. Therefore, although I talk about creating environmental responsibility in corporations, on the practical level, this third function of corporate criminal liability is based on molding and advancing the environmental consciousness of private individuals.

Obviously, no law alone can accomplish the formidable task of internalizing environmental obligations, but a variety of measures of social control must be employed. Nevertheless, criminal liability and criminal sanctions can have a significant input to the process of internalizing environmental obligations

if properly applied. After all, the global purpose of criminal law is to support and endorse fundamental values of our society by penalizing their breach, and since criminal measures are often regarded as the last resort, reliance on such measures carries a definite authoritative stigma.

The authoritative stigma attached to criminal law is, however, quite vulnerable and can wear off. In order to retain its stigma, the law must, above all, appear just and legitimate to the public. Justness and legitimacy require such legal safeguards as proportionality, equality, and predictability, and demand the law to be reasonable and fair in its treatment of those involved. Giving special treatment to government corporations or excluding partnerships and other unincorporated entities from liability on purely technical grounds is not likely to enhance the public's perception about the legitimacy of the law. Similarly, a random and inconsistent sentencing system with a confusion about objectives and principles hardly meets the requirements of predictability or equality.

A further important aspect of legitimacy is that corporations should not be liable for something over which they have no control. Only voluntary engagement in lawless activity should be penalized. As I pointed out earlier, the present Canadian approach to mens rea offences totally ignores the corporation's efforts to comply with legislation. Hence, no distinction is made between good and bad corporations. A more

405. See Tyler, supra 396 at 20. See also, Hart, supra 337 at 50. 406. Hart, ibid. at 181-82.
equitable approach is that adopted by the Finnish legislator; according to the proposed law on corporate criminal liability, a corporation is liable only if it has breached its duty to enforce and implement laws and regulations internally. The standard promotes the legitimacy of the system by penalizing only corporations who "deserve" the punishment, and rewarding corporations who make efforts to promote compliance.

To some degree, the requirement of legitimacy is also linked to tangible remedies for self-interested parties.\textsuperscript{407} Inadequate or insufficient sanctions can do more harm than good in that they foster contempt for law in general, and tend to encourage the violations which they are intended to prevent.\textsuperscript{408} In Canada, although both the selection of different sentencing options as well as high maximum fines provide a relatively good basis for imposing effective sanctions against corporate offenders, the sentencing practice shows that resultant sentences are often both insufficient to prevent further crimes, and do little to remedy the harm done to the victim or the environment.

An explanation for low or inadequate penalties may lie in the fact that the Canadian courts seem not to know whether to treat pollution as serious or not. Despite the presence of penal sanctions, the legal profession has traditionally viewed the vast majority of environmental dictates as administrative rather than criminal in quality. For instance, in \textit{R. v. Sault Ste. Marie} the

\textsuperscript{407} See Tyler, supra 396 at 164.
\textsuperscript{408} Trezise, supra 332 at 404.
Supreme Court of Canada suggested that environmental offences are not crimes but "public welfare offences".  

The fact that the motivations of those involved are often guided by economic rather than more sinister aims means that substantial problems can arise when it is sought to label these activities as criminal or morally wrongful. Consequently, the courts have pursued deterrence as their primary objective in sentencing. Moral condemnation linked to retributive sentencing objectives has been regarded as unnecessary due to the "morally neutral" nature of environmental offences.

Socioeconomic factors and political pressures are also reflected in the abundant use of mitigating factors. Some of the factors have little relevance to the crime committed, and in many cases, the undercurrent of political and socioeconomic pressures is evident. The problem is particularly eminent in small communities where the jobs and tax revenues are crucial to the economic welfare of the community. Ross Howard has studied the illegal environmental practices of several Canadian companies, and has come to the conclusion that the government and judiciary are greatly influenced by corporate economic power. When threatened with a prosecution or harsh penalties, a company can simply threaten to close down or cut back on needed jobs. Faced with such threats, government and judiciary often back down and do not prosecute or impose only marginal penalties.

409. Supra 41.
One-sided favoring of economics and corporations at the expense of the environment and the public does not contribute to advancing peoples' environmental awareness. One can hardly expect the general public to regard environmentally harmful activities as criminal if even the courts hesitate in calling environmental offences crimes, or if they through frivolous sentences accept the non-compliance in the name of "economic good".

For the victim of a crime, an important part of a fair outcome includes a remedy for the harm done. Local citizens who have lost a beautiful natural resort, or an environmental group who has seen the destruction of an ecologically valuable site can be left feeling deprived if the only sanction imposed is the fine. The authority of law requires maintaining the public's confidence in the capacity of the state to protect the public interests. These interests include, in addition to the interests of the state itself, also the interests of private individuals and groups. Therefore, full satisfaction of all parties requires remedial and compensatory measures. Including such measures into the penal system is one way of emphasizing environmental values, and thereby enhancing peoples' perception about the importance of environmental protection.

In addition to influencing the environmental thinking of individuals, remedial measures might also have a direct impact on corporate environmental policy. The Canadian Law Reform Commission has noted that a remedial order "challenges the offender to see the conflict in values between himself, the
victim, and society." If a corporation was concretely made to face the harm done, it might learn more from the experience than if it was imposed with a symbolic fine. Such an "invitation to reconciliation" does not isolate the offender from the society but encourages positive participation for the common good.

5. TOWARDS AN IDEAL: SOME SUGGESTIONS FOR THE IMPROVEMENT OF THE LAW

"National and international law has traditionally lagged behind events. Today, legal regimes are rapidly outdistanced by the accelerated pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature."

As the above quotation from the United Nations' report "Our Common Future" notes, mankind has a responsibility to respond to the challenges set by the degradation of the environment. The most common response has been the composition of laws and regulations directing environmental matters from littering to toxic emissions. An assortment of strategies ranging from education to penal sanctions has been employed to encourage compliance with this legislation.

Of all the important compliance strategies, in this work, I have concentrated on studying the application of penal measures against corporate offenders in Canada and in Finland. After having introduced the two different approaches to corporate

criminal liability, I examined the Canadian experience and the Finnish law proposal in light of the social functions of law. The evaluation revealed both strengths and weaknesses in the two systems. In this chapter, I intend to utilize these findings and pursue to construct an improved framework for penalizing corporate criminals in environmental cases. I do not attempt (and cannot due to the different legal systems of the two countries) to dictate a specific model of corporate criminal liability. Instead, this chapter is an endeavor to bring up some suggestions of how the difficult task of "reformulating" this "human law" could be done.

The chapter is divided into three parts, with the first part concentrating on the construction of corporate liability. The second part is devoted to building an efficiently working sentencing system, and finally, the chapter finishes by summarizing some of the conclusions arrived at in this thesis.

5.1. Corporate Liability

Since it is a fundamental principle of criminal law that criminal liability requires the existence of a culpable state of mind, the first two sections are devoted to establishing fault in a corporate offence. This is followed by a short discussion about the role of individual liability in a corporate context. The question about liable entities is discussed in the final section.
5.1.1. The Basis for Liability

The two systems introduced in this work have a fundamentally different approach to the question of imposing criminal liability on a corporate entity. In Canada, the identification doctrine imputes an individual agent’s criminal act and intent to the corporation because individual members of the corporation are regarded as the corporation. Meanwhile, the Finnish system attempts to look beyond an individual agent; while finding a guilty individual is generally required, the basic test of corporate liability is the reasonableness of the corporation’s practices and procedures to avert illegal conduct.

The Canadian Law Reform Commission has pointed out that one purpose of corporate liability is to permit the law to make a judgement about a process. Of the two systems studied in this thesis, the Finnish approach of structural fault appears to be better equipped to make such a judgement because it focuses on the structural, collective blameworthiness of the entity, rather than on the fault of its individual members.

Shifting the limelight from an individual to an entity provides several advantages; for one thing, a system built on structural fault is more equitable on its treatment of different corporations because it takes into consideration the special characteristics of each corporation. Under the identification doctrine, if a directing mind is found guilty of a mens rea offence, the corporation is automatically imputed regardless of its efforts to prevent such offences. The problem became

accentuated in the Canadian Dredge & Dock when Justice Estey stated that a corporation is liable for the conduct of its directing minds even when they are acting contrary to an express corporate policy.\textsuperscript{414} At the same time, if no directing mind can be identified, the corporation will escape from liability even when it is obvious that a crime has been committed because of faulty corporate policies. Only strict liability offences with their due diligence defence offer any attention at all to corporate efforts to discourage illegal behaviour. However, since due diligence relates to the efforts of directing minds rather than to the standard of care endeavored by the corporation as a whole, it is possible for a corporation to be convicted in spite of its sincere efforts to comply.

The inability of the identification doctrine to distinguish between "good and bad" corporations is against the fundamental criminal law principle of equal treatment, and one can readily agree with Gerhard Mueller that "[i]t is a poor legal system indeed which is unable to differentiate between the law breaker and the innocent victim of circumstances so that it must punish both alike."\textsuperscript{415} The fact that diverse corporations are equally exposed to liability means also that they have "no way of predicting whether an individual prosecutor will seek criminal charges against it on any given day for any given crime".\textsuperscript{416} Hence, since a corporation has no guarantees that its efforts to

\textsuperscript{414} Supra 36.
\textsuperscript{415} Mens Rea and the Corporation. (1957) 19 University of Pittsburg Law Review 21 at 45.
\textsuperscript{416} Bucy, supra 378 at 1104-1105.
prevent illegal behaviour will be rewarded, it has no incentives to make such efforts. Alteratively, a corporation can use excessive caution to ensure that they do not run afoul of the uncertain standards. This can lead to overdeterrence of desirable conduct, and decline in creativity and efficiency.417

A further reason to focus on the entity instead of an individual agent is founded on the fact that permanent increase in the level of compliance requires changes in the corporate culture. The pursuit of an individual agent ignores the fact that the roots of a problem are often in the entity itself. If the general corporate culture continues to encourage non-compliance, a change of faces will do little good with regard to corporate compliance. By steering the prosecution’s focus from an individual to the corporation, the prosecution may have more success in underlining the need for change in corporate cultures, not in corporate agents.

Founding corporate criminal liability on faulty corporate policies rather than on the conduct of individual agents is also more successful in realizing the basic criminal law principle that "a man is criminally liable for his own acts and for them alone".418 The identification doctrine does not change the fact that corporate agents are not always the corporation. While in most cases the conduct of a directing mind probably does flow from group norms and can be identified with the corporation, the accuracy of such a generalization is somewhat haphazard.419

417. See, Developments in the Law, supra 10 at 1271-72.
418. Winn, supra 33.
419. Hanna, supra 36 at 467.
Corporate policies can be the result of a series of decisions made by various individuals over a long period of time. In such cases, identifying an individual or a group of individuals with the corporation is not feasible, and the identification doctrine turns into little more than fiction.

Hanna has noted that the requirement of a human co-perpetrator "restricts the reach of the criminal law from finding culpability in a group itself, which might be desirable". The discussion above denotes this desirability and supports a system in which corporate liability is founded on the standard of corporate efforts to enhance compliance with legislation. Hence, a corporation could be made liable only on the absence of a reasonable effort to implement and enforce laws and regulations internally. The lack of reasonable effort would disclose the blameworthiness of corporate activities and form the foundation for corporate liability.

5.1.2. The Question of Guilty Mind

Founding corporate liability on the blameworthiness of corporate operations gives us a justification for imposing liability on the corporation for the acts and omissions committed by its individual members. A crime, however, consists of more than mere acts and omissions. All offences, with the exception of those of absolute liability, require a guilty mind from the offender in the form of intent, recklessness, or negligence.

420. Ibid. at 467.
Hence, establishing the guilty mind must be the next step in constructing the framework for corporate criminal liability.

The crucial question is whose guilty mind must be established. Basically, we have two alternatives; we either require guilty mind from an individual agent, or we expand the above discussed requirement of corporate fault so that corporate blameworthiness would not only provide a justification for imposing liability on a corporate entity, but it would also form an essential element of an offence. In the following, I shall look at the practical implications of the two alternatives.

5.1.2.1. Guilty individual

In principle, individual guilt is an element of corporate liability in both the Canadian and Finnish systems of corporate criminal liability. In the Canadian system, the guilt entertained by an individual is imputed to the corporation because the individual members of the corporation are regarded as the corporation. In the Finnish system, although corporate liability is founded on the blameworthiness of corporate policies and processes, the offence itself must be committed by an individual with required culpability.

Possibly the greatest problem invoked by the requirement of an individual co-perpetrator is that in practice, detecting the individual agent with the required guilty mind is often impossible. Complex corporate power structures can make it very difficult to establish guilt in one particular person. Actus reus and mens rea can also be divided between different individuals.
The Canadian *mens rea* offences with their strict requirement of human co-perpetrator provide a good example of the problems involved. If the court cannot identify a guilty individual, there is nothing to impute and the corporation will escape from liability. As we have seen above, it is then in the corporation's best interest to build the power structures so complicated that finding the responsible individual becomes difficult if not impossible. Using the corporate veil to hide the individuals is much easier for a large corporation with multilevel or even multinational operations, thereby setting small and large companies on unequal footings.

In Canadian strict liability offences the absence of the mental element eliminates the problems involved with identification; since the guilty mind is not an element of an offence, there is no need to find a guilty agent. In fact, there is no need to find an agent at all; it appears that as long as it is evident that someone within the corporation must have committed the act, the corporation can be made liable. Hence, there is no need to impose either *mens rea* or *actus reus* on a particular person. Also, with regard to due diligence of the directing minds, the prosecutor does not need to specify which corporate officers were involved because the onus is on the corporate offender to introduce evidence as to which directing mind had the responsibility over the subject matter of the offence.

The Finnish legislator has gotten around the problem of identification by creating the concept of anonymous guilt which
enables the court to convict the corporation even when no individual has been prosecuted or convicted. It must, however, be evident that someone within the corporation has committed the crime. An example of such a situation is a toxic spill caused by the only near-by factory using the particular toxic in its production processes.

Although the principle of anonymous guilt offers some sort of a solution to the question of identification, it has its own problems. For one thing, anonymous guilt can discourage prosecutors from seeking conviction against both the corporation and the individual by providing an easily available finding of corporate liability. Prosecuting both the corporation and the guilty individual might be desirable for optimal compliance. The role of individual liability will be discussed in more detail later in this chapter.

The second and more fundamental problem with anonymous guilt is its apparent inconsistency with the requirement of fault. Anonymous guilt is unestablished guilt at best, and as such, it conflicts with the contemporary criminal law doctrine that requires the establishment of both actus reus and mens rea. The requirement serves the functions of predictability and social stability by providing people with security about the standards used in the criminal process. Without such security, people's faith in the system, and thereby their will to comply with legislation will diminish. Hence, in spite of its apparent attractiveness, a degree of restraint must be employed when considering the possibility of bestowing anonymous guilt.
5.1.2.2. Guilty corporate policy

An alternative way to establish guilt in corporate offences is suggested by Pamela Bucy in her article "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability".\textsuperscript{421} Bucy suggests that instead of pursuing guilty individuals, guilt should be established on corporate structures and policies.

Bucy's approach to corporate criminal liability starts from an assumption that each corporation has a distinct and identifiable personality, or "ethos", separate from its individual members.\textsuperscript{422} In a sense, the Finnish system of corporate liability is also built on the notion of a separate corporate identity. Bucy, however, takes the notion a step further by requiring that the offence element of guilty mind must be found from this identity.

According to Bucy, "the standard proposed herein imposes criminal liability on a corporation only if the corporation encouraged the criminal conduct at issue."\textsuperscript{423} By encouragement she means primarily intentional crimes. The idea can, however, be extended to all levels of mens rea so that corporate behaviour could be negligent as well as intentional. The notion of "corporate intent" or "corporate negligence" would nicely solve the problems caused by the requirement of individual co-perpetrator. Since the guilty mind of an individual actor would be irrelevant to corporate liability, a corporation could not

\begin{flushleft}
\textsuperscript{421} Supra 378.  \\
\textsuperscript{422} Ibid. at 1099.  \\
\textsuperscript{423} Ibid.
\end{flushleft}
evade liability by hiding its directing minds, and the equivocal
theory of anonymous guilt would become unnecessary.

Basing corporate liability on genuine corporate guilt may
also increase the uniformity of enforcement. In the present
Canadian practice, liability can raise from almost any act or
omission committed by an individual agent. Such broad potential
liability offers little guidance to prosecutors. Lynne Huestis
has noted that at present, the enforcement decision is often
"creative ad hocery" in which political and socioeconomic
factors play a significant role.424 The uncertainty and
unpredictability created by such wide discretion could be
eliminated or at least limited if the prosecutors were forced to
select cases based on the blameworthiness entertained in
corporate policies and practices.425

Finding the guilt in corporate policies rather than in the
minds and wills of individual corporate agents is also better
equipped to reflect the realities of today's society by shifting
the focus from the "evil mind" of the offender to the social harm
caused by irresponsible behaviour. Ezzat Fattah has criticized
the present sin and moral orientated concepts of "criminal
intent" and "moral responsibility" for making "it impossible to
effectively control, sanction, and curb a wide variety of
socially harmful and dangerous behaviours" such as the
criminatility of negligence, corporate crime, and environmental

424. Supra 390.
425. See Bucy, supra 378 at 1108-09.
offences. He notes that the inadequacy of these post-French-revolution era metaphysical and philosophical concepts has been such that legal scholars have been forced to "do some mental acrobatics in order to come up with acceptable deviations, exceptions, and exemptions from [such] metaphysical yet fundamental principles [as] 'mens rea'. These "deviations" include such concepts as strict liability and corporate liability which are both attempts to deal with modern problems through desperately outdated concepts. Obviously then, the evolution of the concept of guilty mind is required to better reflect social realities such as the rising predominance of corporate actors.

The change from individual guilt to corporate fault requires a wholly new approach to the issue of establishing guilt. The decisive factor must be the fault entertained in corporate activities as a whole. Bucy suggests that prosecutors should look at such factors as the corporate structure or hierarchy, corporate goals, education and monitoring of employees, and compensation incentives. Leaving certain areas of corporate responsibility unattended or insulating corporate executives from liability are examples of structural deficiencies that would constitute corporate guilt. Illegal behaviour can also be enhanced through unrealistically high corporate goals. It was

427. Ibid. at 8.
428. See Bucy, supra 378 at 1106-07.
429. Ibid. at 1129-46.
pointed out in the commentary of the American Model Penal Code that "the economic pressures within the corporate body [may be] sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain."\(^{430}\)

Bucy gives some examples of the types of inquiries relevant in assessing whether corporate employees have been properly educated and supervised. For example, are employees informed in a comprehensive manner of regulatory changes that affect their duties? Does middle management have special training in ethics and government regulation? Are internal audits and inspections conducted?\(^{431}\) It must also be asked if the illegal conduct has been clearly and convincingly forbidden. Merely issuing a directive prohibiting all illegal activity is not enough if there is insufficient proof of sincere attempts to implement and enforce laws and regulations. Employee compliance can also be encouraged with incentives such as bonuses, stock options, or other benefits. Bucy notes that "[t]he values reflected in compensation will permeate an entire corporation and communicated to employees what behaviour on their part the corporation favors or dislikes."\(^{432}\)

Since the acts of corporate executives are likely to represent the practices and procedures of the corporation, the involvement of top officials in corporate criminal activity should be regarded as a strong indicator of corporate guilt.

\(^ {430}\) Model Penal Code, paragraph 2.07 commentary at 158-59 (tent. draft no. 4, 1956) 174, quoted in ibid. at 1133.
\(^ {431}\) Ibid. at 1134-37.
\(^ {432}\) Ibid. at 1139.
Hanna has suggested that if the prosecutor is able to point to a guilty directing mind, "it could raise an evidentiary presumption that the acts of the directing mind are instances of corporate policy."\(^{433}\)

Bucy suggests that the onus of proof about corporate guilt should be on the prosecutor. While the prosecutor might succeed in showing negligence "beyond reasonable doubt", it is doubtful that such a high standard could be met with intentional offences. A possible solution could be to lower the standard of proof from "beyond reasonable doubt" to the balance of probabilities. The alleviated standard would, in addition to making the prosecutor's job easier, also encourage corporations to pay more attention to their internal control mechanisms and thereby increase compliance.

The traditional high standard of proof required in criminal cases is justified by the purposes for which the penal sanctions can be used; interfering with a person's liberty, and the economic and social consequences that criminal conviction entails make it important to have strict safeguards against the possible abuse of law. However, it can be argued that since a corporation is not a human being, the need for legal safeguards is limited. For one thing, penalizing a corporation does not affect individual rights such as liberty or economic security - at least not directly. Secondly, corporations are generally much more powerful and have more resources to defend themselves than individual defendants. Also, corporate structure enables

\(^{433}\) Supra 36 at 471.
corporations to hide behind the maze of complex power structures, different levels of authority, and internal regulations. Corporations are ideal for creating opportunities for unlawful conduct; geographical expansion, size, structure and internal processes can provide an excellent shield against prosecution.

Another way to establish corporate mens rea has been suggested by Brent Fisse. Under his "reactive corporate fault" proposal, a failure by the corporation to change its behaviour after a conviction or other coercive measure would itself be sufficient to establish mens rea. The proposal is justified in light of the present sentencing practice which generally regards recidivism as an aggravating factor because it shows "heedless disregard" to the laws and orders of authorities.

Obviously, a corporation cannot be made liable for all crimes committed within its walls. The act must reflect corporate decisions, and not simply the choices of individuals within the corporation; no social purpose is served by penalizing a corporation for an offence that is totally disconnected to its policies and operations, or which victimizes the corporation itself. Therefore, corporate liability must be limited to situations where there is some sort of contractual relationship between the corporation and the individual. Such a relationship exists between the corporation and its management, employees, agents, or anyone else who has made a contract to work or act for the corporation. Hence, "hiring" someone outside the corporation

to commit a crime for the corporation establishes the required relationship. When determining whether the required relationship exists, the basic requirement is the corporation's competence to practise authority over the individual.

The second limitation must be based on the intended benefit. Penalizing the corporation for something it was not intended to benefit from would be grossly unfair. The most aggravated example is an offence in which the corporation itself is a victim. The limitation should, however, be restrained to the beneficial intention; whether corporation de facto benefited from an offence should not affect corporate liability.

5.1.3. The Role of Individual Liability

Once the element of guilt is founded on the guilty corporate policy, there is no longer a need to find a guilty individual agent within the corporation. This does not mean, however, that the crime committed by an individual has lost its significance. Where an individual within the corporation demonstrates intent to commit a crime, she too is subject to blame, and must be held responsible.

Prosecuting both the corporation and the individual is desirable for several reasons. For one thing, individual liability strengthens employee's incentives to resist corporate pressures to violate the law in the pursuit of profits, thereby increasing compliance. Individual liability also emphasizes the management's role in forming environmentally responsible corporate culture; management must comprehend that they not only
have the duty to make profit, but to make profit in a way that gives priority to the establishment and proper operation of environmental protection systems.

Sweigen and Bunt justify personal liability by noting that "[o]ccasionally...there is a bad apple in senior management or ownership." If left unpunished, such "bad apples" can move from corporation to corporation, and bring their degenerating policies and practices into several corporations. Thus, prosecuting the "bad apples" is an effective way to prevent unwanted corporate behaviour.

5.1.4. Entities Liable

The question of individual liability brings up an interesting question with regard to small closely held companies. If the owner of a small one-person company is convicted, what purpose does it serve to prosecute the company as well? Bucy has noted that

"[u]nlike the large corporate entity that could continue to encourage new generations of executives to commit criminal acts, the closely held corporation generally has no identity apart from the convicted individual. Hence, following conviction of this individual, the government gains no further deterrence by convicting the corporation."  

Another point worth mentioning is that penalizing both the corporation and its owner may in fact mean penalizing the same person twice. Such double convictions can lead to excessive penalties and unreasonable hardship to the offender. Obviously then, the prosecutor must practice some discretion when laying

435. Sentencing in Environmental Cases, supra 127 at 41.
436. Supra 378 at 1151.
charges against small companies. Similarly, the sentencing judge has to take the cumulation of sanctions into account when determining the penalty for a closely held corporation.

When deciding about the application of corporate liability, the objective must be equal treatment of those effected. This requires that certain entities are not excluded from liability solely because of the form they operate in. The concept of a corporation must be wide enough to include any entity that has been formed for the purpose of operating in a collective form as opposed to a unit that is distinctly an individual operation. This wide definition has been met in the Finnish proposal which includes partnerships, associations, foundations, as well as large private entrepreneurs. Since the definition covers both private and public entities, public corporations do not receive special treatment but are on equal footing with other entities.

A corporation may attempt to avoid liability by changing its name, declaring bankruptcy, or by dissolving or amalgamating to another company. The change of name or form should not effect liability but prosecution must be possible against the new or amalgamated company for the offences committed by the old company. Individual liability secures the possibility to bring prosecution against individual agents when the corporation is dissolved or in bankruptcy.
5.2. Sentencing

Sentencing has been called the climax of the criminal process.\textsuperscript{437} It is the most visible result of prosecution through which the general public, rightly or wrongly, tends to judge the success of criminal process. Consequently, sentencing has an important role in building respect for the legal system in general and the particular law specifically. Quoting Sweigen and Bunt: "justice...cannot be said, or be seen, to have been done until the offender has received an appropriate and effective sentence".\textsuperscript{438} The purpose of this part is to pursue such a sentence for a corporation that has been convicted for an environmental offence. The question of sentencing objectives is discussed in the first section of the presentation while the two last sections are devoted to determining the quality and the quantity of a sanction.

The wide range of sentencing principles, options, and factors employed in Canada and Finland was extensively covered in the previous chapters. Of all these various alternatives I have attempted to choose and further develop the ones that appear to be best suited to encourage corporate compliance with environmental legislation.

\textsuperscript{438} Sentencing in Environmental Cases, supra 127 at 2.
5.2.1. About the Objectives

The Canadian sentencing practice shows widespread confidence in the utility of deterrence in combating corporate non-compliance with environmental legislation. The strong reliance on deterrence is based on the notion that environmental offences are somehow "morally neutral", mala prohibita instead of mala in se, and since there is no morally wrongful conduct to condemn, the use of criminal sanctions can only be justified by the utilitarian goal of preventing harmful conduct.

The logic of this path of reasoning is questionable. Sweigen has pointed out that if the penal sanctions were meant "only to deter, and not to punish, this goal could probably be achieved in many cases just as easily through administrative procedures without the stigma attached to prosecution". 439

Obviously then, the legislator must have had some special reason for resorting to penal sanctions. This reason can be found from the condemnatory features of a penal sanction; the forbidden conduct deserves a criminal sanction because it is morally blameworthy. According to von Hirsch,

"[p]revention explains why the state should impose material deprivations on offenders. Reprobation for wrongdoing justifies why their deprivations should be visited in the condemnatory fashion that characterizes punishment." 440

Obviously then, the legislator has desired to call attention to the wrongfulness of certain types of unwanted environmental

439. Sweigen, supra 363 at 94.
behaviour. The very fact that a penal sanction has been attached to the conduct rather than a civil or administrative measure is an indication that there is a degree of opprobrium attached to the type of behaviour in general and in the particular case.

Since the legislator has viewed certain environmental values as deserving the protection of criminal law, sentencing must naturally support this choice. It is evident, then, that deterrence alone cannot provide a satisfactory basis for sentencing in environmental cases, but the synthesis of utilitarian and retributive sentencing objectives is needed. The value free fashion in which deterrence pursues its goal of crime prevention confuses the public about the seriousness of environmental crime. If the public does not perceive the sanction as clearly condemning the forbidden conduct, it becomes uncertain about the importance of the values sought to be protected, and its inhibitions against non-compliance are weakened. By clearly denouncing the irresponsible conduct of a corporation, the penalty demonstrates the value of environmental protection and shapes the legal and moral attitudes of citizens. These attitudes are then transferred to the corporate decision-making process through individual directors, managers, investors, employees, and consumers.

The synthesis of both utilitarian and retributive aspects is apparent in the Finnish sentencing theory; while the primary justification for penal sanctions is utilitarian crime prevention, a penalty is regarded as a demonstration of society's reproach through which citizens' sense of morals and justice is
reinforced and their inhibitions against committing crimes are strengthened. The theory works on two levels; in addition to encouraging compliance through the threat of penalties, the sentencing system is also aimed at building inner commitments to comply. The proportion in which these different objectives are to be applied must be determined on the basis of the facts of each individual case. In offences of great opprobrium the accent must be on the denouncing components of the sentence, while deterrence and other utilitarian objectives should dominate sentencing for less reproachable offences.

Both utilitarian and retributive sentencing rationales above all serve the interests of the state. Even when a successful prosecution results in a penalty, it can be asked what does the penalty contribute to the victim or towards achieving a higher level of environmental quality. Traditional penal sanctions have focused on the offender, not on the offended, and while satisfying the state, they have done little to remedy the harm caused by the crime.

Although the very purpose of criminal law is to protect fundamental values, such as property, health, and now, environmental quality, the protection seems to extend only to sentencing where it abruptly stops. Remedial issues are transferred from criminal to civil and administrative procedures, thereby denoting the secondary status of these matters. Such secondary status does not enhance the public's confidence in the capacity of the state to protect their interests. Also, by branding the redressing of the harm as subordinate to punishment,
the system loses a sublime opportunity to call attention to the
substance of injured values. The criminal sentencing process
serves as a powerful tool in making clear what values are at
stake in the conflict of the offence, and affirming those values
that have the support of the community. The Canadian Law Reform
Commission has pointed out that the "[r]ecognition of the
victim’s need underlines...the larger social interest inherent in
the individual victim’s loss. Thus, social values are reaffirmed
through restitution to the victim." 441 Civil and administrative
processes do not carry the stigma of criminal measures, and
consequently, their value affirming impact is less compelling.

Including redress into the criminal sentencing process may
be desirable also for the sake of procedural efficiency; instead
of wasteful duplicate or triplicate procedures, all matters
arising out of the same activity could be dealt with in one
procedure. A single procedure might also provide increased
protection for the victim who may perceive his chances of
attaining any compensation from a big corporation so small that
he becomes discouraged and refuses to make claims against the
corporate offender.

While it is obvious that the spotlight of sentencing must
stay on the offence and the offender, and that redress cannot
stand alone as a sentencing objective, the discussion above
supports placing more attention to remedial matters in
sentencing. Therefore, the following sentencing options include,
in addition to traditional "punishments", measures that are aimed

441. Restitution and Compensation and Fines, supra 169 at 6-7.
at compensation and reconciliation. It must be noted that the range of possible options is much wider than what is possible to make in this presentation.

5.2.2. The Quality of a Sanction: Sentencing Options

5.2.2.1. The Fine

The sentencing principle most commonly linked to the fine is deterrence. The deterrent effect of the fine is based on the assumption that most corporations are profit oriented and that they are rational, that is, they select the most appropriate means to attain their economic goals. Consequently, the risk of the fine is supposed to stop a rational decision-making from committing an offence and encourage her to increased apprehension and care.

In order to have deterrent effect, the fine must be substantial enough to persuade the corporation that illegal conduct is "not worth it". The discussion in previous chapters has revealed the inadequacies of the fine with regard to extreme wealth or inability to pay; what is a mere slap on the wrist to a big and wealthy corporation may be disastrous to a small company. A connected problem with high fines is what Coffee refers to as the "deterrence trap". He notes that in order to be deterrent: "the expected punishment cost" must exceed the expected gain. The risk of apprehension and conviction must also be taken into account. According to his calculations, if the expected gain is one million dollars and the probability of apprehension is 25%,

442. "No Soul to Damn: No Body to Kick", supra 27 at 389-93.
the penalty would have to be four million dollars if the expected penalty is to equal the expected gain. Hence, the fines needed may far exceed the corporation's ability to pay, and "our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources."\textsuperscript{443}

The fine is also a somewhat weak measure to encourage change in unwanted corporate policies. For one thing, the corporation may decide to treat the fine as a mere business cost and pass the fine on to its shareholders, customers, or employees. Even if we accept the argument that "spilling over" is an inevitable result of the imposition of any penal (or for that matter, civil or administrative) sanction, and that it may well be an unavoidable effect of a choice that achieves maximum good, it does not change the fact that such passing on can drastically dilute the intended impact of the fine. Secondly, although in theory the corporation is expected to revise its environmental policies and practices, the fine in no way compels the corporation to respond in this way. A 1978 empirical study about the impact of the fine under the Australian Trade Practices Act showed that in 40\% of the cases, the imposition of the fine did not incite any organizational reform. Thus, the ability of the fine to effectively motivate companies to adopt preventive controls is quite equivocal.\textsuperscript{444}

\textsuperscript{443} Ibid. at 390.
\textsuperscript{444} Brent Fisse, Sentencing Options against Corporations. (1990) 1 Criminal Law Forum 211 at 225-26.
As noted above, deterrence is not sufficient to form a comprehensive basis for corporate sentencing. A sanction should also emphasize the social undesirability of the illegal conduct. Although all criminal sanctions carry certain denouncing stigma, the fine is possibly the least successful in conveying the message that the offence is intolerable. It has been argued that the exclusive use of fines is like putting a price tag on an offence, thereby trivializing the seriousness of the crime. Corporations might get the impression that non-compliance is permissible as long as the corporation pays the going price.\textsuperscript{445}

A further limitation of the fine is that it does not contribute to environmental clean-ups or victim compensation. The fact that the fine goes to government revenues does not guarantee reparations or restitution; there are several hands in the public purse, and unfortunately the environment is often one of the last ones to receive anything. Fines can also be counterproductive in that they can take away from small corporations resources that might otherwise be spent on pollution control.\textsuperscript{446}

Nevertheless, although the discussion here is by no means a comprehensive presentation about all the shortcomings of the fine, the limitations of the fine should not be overstated. The fine provides a good basic sanction which the courts and the public are accustomed to. The fine is also easy to administer, and it is the most economical

\textsuperscript{445} Ibid. at 220. See also Hanna, supra 36 at 475.
\textsuperscript{446} See Sweigen, supra 363 at 98.
sanction available since it generates revenue for the public purse. Nevertheless, its exclusive use is apt to lead to inefficient sanctions with little or no effect on corporate behaviour, not to mention its inability to redress the harm caused by the offence. Therefore, alternative and supplementary sanctions must be fashioned to meet the demands of an efficiently working sentencing system. Also the fine itself can be developed to better suit corporate offenders. In the following, I shall present some ideas for the development of the fine and other sentencing alternatives.

5.2.2.2. The equity fine

Coffee has suggested that instead of a cash fine, an "equity fine" could be imposed on a corporation. Under this model, a convicted corporation for which a heavy penalty was in order would be required to authorize and issue shares to a crime victim compensation fund or to a similar type of fund of a market value equal to that of cash. The fund could then liquidate the securities at will, thereby avoiding many of the financial problems involved with a direct cash. Coffee suggests that the equity fine could be increased with each succeeding criminal conviction. Recidivism would then eventually lead to a situation in which the fund would hold a sufficient number of shares to appoint "public interest" directors. Consequently, since the

economic performance of the company would be directly linked to its environmental policies, shareholders would be forced to consider the ethical aspects of their investment.

One advantage of an equity fine over a cash fine is its ability to avoid the "deterrence trap" discussed above. While the cash fine is limited to the sum of the corporation’s available liquid assets, the equity fine would raise the upper limit of the amount collectible, thereby allowing the fine to reach the necessary deterrence level. Furthermore, the equity fine provides a possibility to seize a share of its future earnings. The possibility would be of great significance with young companies with high growth prospects but low present book value. Such a company is "essentially immune from high cash fines because it has only modest liquid assets, and in part for this reason it may be tempted to risk illegal activities".

The equity fine would also reduce the spill over to employees and consumers and focus instead on the shareholders. Yet, Fisse has pointed out that the equity fine is unable to differentiate between authoritative shareholders and those who are "merely relatively powerless outsiders".\(^{448}\)

5.2.2.3. The day-fine system

An alternative way to evolve the fine would be to adopt the day-fine system in corporate sentencing. The system is used with

\(^{448}\) Fisse, supra 444 at 256.
individual offenders in Finland. In this system, the size of a fine is determined by the financial situation of the offender. According to the basic rule, one day-fine is one third of the offender’s total daily income. The number of day-fines, in turn, is determined on the basis of the seriousness of the offence.

A system based on day-fines would increase both the equity and clarity of the sentencing system; the day-fine takes into consideration both the offender’s ability to pay and the seriousness of the offence. The number of fines imposed directly shows the severity of the sanction. This means enhanced clarity. It is easy enough to see that an offence worth 10 day-fines is less serious than an offence worth 100 day-fines. This also provides increased guidance for the courts in sentencing.

It is quite surprising that the Finnish Penal Code Task Force did not wish to employ the day-fine system with corporate offenders. The Task Force rejected the idea by referring to the impossibility of transferring unpaid day-fines into imprisonment, and noted somewhat ambiguously that the "nature" of the day-fine system does not suit corporate offences without further justifying itself. 449

Although both the equity fine and the day-fine system would contribute to the improvement of the fine, it is clear that standing alone they are not "adequate tools to deal with problems of... recalcitrance, or offences of great opprobrium...[n]or are fines applied where they are most needed: in environmental clean-up or restoration, to compensate victims, or to reduce the cost of effective

449. Oikeushenkilön rangaistusvastuu, publication 13/1987, supra 24 at 93-94.
enforcement. Other techniques should be made more readily available for courts.\textsuperscript{450}

Some suggestions for these other techniques will be presented next.

\textbf{5.2.2.4. Adverse publicity}

As noted above, the ability of the fine to denounce unwanted behaviour is quite limited. Of all the sanctions employed in Canada and Finland, probably the strongest denouncing stigma is attached to court-ordered publicity.

Although rare today, publicity sanctions were common to the English criminal law of earlier centuries. For instance, the names of merchants who sold adulterated products were publicly posted.\textsuperscript{451} In Finland, the most common form of publicity was pillory, which was normally located in front of the church, so that "the decent folks" could show their disapproval and take a warning example from the wrongdoers.

Publicity is a kind of a modern pillory. It carries a strong denouncing stigma and can seriously damage the public image and prestige of a company. In \textit{R. v. Giant Yellowknife Mines Ltd.} Magistrate Smith noted that

\begin{quote}
I am driven to the conclusion that the defendant is not particularly concerned with the size of the penalty...but much more with its corporate image which, if it was seriously damaged, renders it difficult to operate in a climate of hostile public opinion.\textsuperscript{452}
\end{quote}

In addition to being an important element of a successful, profitable business, a good public image can also carry great

\textsuperscript{450} Sentencing in Environmental Cases, supra 127 at 56.
\textsuperscript{451} Fisse, supra 256.
\textsuperscript{452} Supra 240.
value to the corporate directors and officials. Several studies have shown that white-collar, middle-class managers pay particular attention to their immaculate reputation.\textsuperscript{453} Hence, management has a vested interest in keeping the company out of negative limelight because if the reputation of the company they work for becomes blemished, some of the lost prestige is likely to cast over directors and senior officials.

In order to be effective, a publicity sanction must be able to attract public attention. An offence that can cause harm to human life or health, or to private property is most likely to draw the necessary attention.\textsuperscript{454} Environmental offences fit perfectly in this category. Fear of cumulative toxic, diseases, dying forests or dirty beaches is something the majority of people share. Crimes involving these fears are likely to raise great public concern. With increased public awareness about the harms caused to the environment by pollution, fear of publicity can be a major factor when a corporation makes decisions about its pollution policies.

Publicity is not, however, without problems; according to Fisse, the effectiveness of publicity can suffer from persuasion, counter publicity, dissolution, change of a location, or a change of the corporate name.\textsuperscript{455} The impact of publicity is therefore quite uncertain. Also, publicity requires some

\begin{footnotesize}
\textsuperscript{454} Coffee, ibid. at 22-23.
\textsuperscript{455} Fisse, supra 256 at 109.
\end{footnotesize}
oversimplification. In order to get through, "the message must be simple and catchy".456 This can cause a certain degree of inaccuracy. Coffee was also concerned about the "spilling-over" problem, harm done to innocent parties.457 However, the "spilling-over" caused by publicity can be eliminated better than that caused by fines. While a fine hits directly without giving a second chance, publicity can be built in such a manner that it gives the offender a chance for "rehabilitation". Some sort of a probational publicity order would give the offender an opportunity to show improvement and fulfill his obligations before becoming exposed to publicity.

Public attention can also become weakened if all channels are overloaded with negative news about environmental offenders. The sanction loses its special force if the public constantly receives an implicit message that all corporations are bad and pollute.458 To avoid public boredom the sanction of publicity must be employed sparingly. It should be reserved for the most flagrant offences when a fine alone cannot strongly enough denounce the conduct or cannot be used due to the weak financial standing of the offender. A small fine combined with big publicity could be a very effective composite if used with restraint.

456. Coffee, Making the Punishment Fit the Corporation, supra 261 at 23.
457. Ibid. at 24.
458. Ibid. at 22.
5.2.2.5. Forfeiture

In the case of a theft, the stolen property is given back to its rightful owner and the punishment imposed goes beyond depriving him of his illegal profits. Similarly, in tax cases, a fine is levied in addition to the assessment of the tax evaded.

In environmental cases, prospective savings or gains are the greatest incentive for committing a crime. If this incentive was removed, the temptations for violations would be greatly reduced. Forfeiture of profits also serves an important normative function; by removing the illegal enrichment, it secures a just equilibrium on behalf of those who were willing to be law abiding.

In the Canadian sentencing practice, forfeiture of profits has been included in the fine. However, when profits are included in the fine, the two different components of the sanction - punishment and removal of unjust enrichment - become confused. There is no way of telling just how much of a fifty thousand dollar fine is profit, and how much is punishment. Determining the penal value of the offence becomes difficult, and this kind of a mixture provides no guidance for sentencing practice causing ambivalence and inequality in sentencing. For these reasons, the Canadian Law Reform Commission recommended differentiating between the profits of a crime and the fine. The Commission noted that in traditional crimes, such as theft, the offender is required to submit the stolen property and the fine imposed goes beyond our desire to deprive him of his illegal profits.
reflecting only the view we take of the particular crime he has committed. 459

This approach has been adopted in Finland where illegal profits are removed from the offender by forfeiture. In the Finnish system, first the profit is forfeited, and then the actual sentence is calculated separate from forfeiture. The greatest difficulties with forfeiting the profits lie in showing causality between pollution and profit, and assessing the amount of savings or gain with any degree of accuracy. The Finnish Environmental Offences Committee recommended drafting guidelines for this purpose. Another solution suggested by Justice Stuart in United Keno Hill Mines is to place the onus about the amount of savings or gain on the corporation since it is privy to the necessary information. If the corporation does not provide the information or if the provided information appears unreliable, a reasonable prosecutor's estimate would suffice. An alternative way to gather evidence would be to let courts hear complying competitors on the extent of economic benefits the offender derived from non-compliance. 460

In addition to removing the profit, forfeiture can be used to deprive the corporation of its means to commit further offences, such as the property that was used in committing the offence or the corporation's licences and permits to operate. In spite of their obvious effectiveness, such measures are a rarity both in Canada and Finland.

460. Supra 94 at 51.
Revocation of licenses could also serve another function. One big problem with the fine is caused by the offender's inability to pay. Unlike an individual offender, in the case of a default, a corporation cannot be imprisoned. The Ontario Provincial Offences Act has come up to with the solution by enabling the courts to suspend or prohibit the issuance of the corporation's licences, permits and approvals to operate until the fines are paid.¹⁴⁶¹

While the forfeiture of profits would appear to be expedient in most environmental offences, forfeiting the offender's property or revoking his licences should be reserved to only most extreme cases. In practice, forfeiture of property can mean the closure of a factory and loss of livelihood or goods and services for numbers of people. One possible way to limit the negative impact of property forfeiture is to make the forfeiture temporary or a conditional measure.

5.2.2.6. Redress

A possible solution to the controversial question about the suitability of compensatory and remedial measures to criminal sentencing is to make such measures probationary orders connected to a corporate probation. The Canadian courts have taken some tentative steps towards putting corporations on probation.¹⁴⁶² Even the little experience shows that probation can form a convenient platform upon which different sanctions can be based.

¹⁴⁶¹. See, Ontario Environmental Protection Act, supra 22, s. 146e(1).
By connecting the remedial measures to probation, the penalty would retain its punitive nature while performing the function of redress.

Probationary orders could consist of at least four different types of measures; making compensation or restitution directly to an individual victim, making reparation or cleaning up the damaged site, community service, and orders to take specific action to remedy the problem that has caused the violation. The two last mentioned measures would be of particular importance when there is no identifiable victims or when the offence has not caused any immediate harm.

An order to clean up or perform services to the victim or the community forces the offender to accept some responsibility towards the victim and society in general. Unlike the fine that requires only the payment of money, a community service order requires both time and effort from the corporation. By forcing the corporation to face the consequences of its actions, such measures may even carry some rehabilitative value. Community service and other remedial measures are also more condemnatory than the fine because they in a very public manner demonstrate to the public that the offender is being punished for his illegal behaviour.463

When a corporation is ordered to take specific action to rectify the problem that has caused the violation, the corporation is essentially required to investigate the offence

and take appropriate measures to prevent future violations. The measure was employed in *R. v. Robinsons' Trucking Ltd.* when the company was ordered to gear all of its tankers with equipment designed to prevent future ecological mishaps, and to designate an on-scene commander to supervise future oil spills as well as to designate and train an environmental response team.464 Other Canadian applications include an order to put in place a waste management strategy for upgrading the waste treatment and handling systems of a company465, and an order to prepare a manual covering the common environmental problems of the particular area of operation.466

An American study by Arthur Lurigio and Robert Davis showed that the offenders who received a notification letter reminding them about the restitution amounts owed and threatening them with serious sanctions in case of a default, were significantly more likely to accomplish restitution than those who did not receive a "reminder".467 Such notification process may be a good way to encourage compliance with any probationary order.

5.2.3. The Quantity of a Sanction: Sentencing Criteria

Having determined the objectives pursued in corporate environmental sentencing and the tools these objectives can be pursued with, the question about the proper distribution of these

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tools remains to be solved. Thus, we must determine the appropriate limits for the application of the sentencing options and decide about the criteria for deciding "how much sanction".

When looking for applicable sentencing criteria, the natural starting point is in sentencing objectives; the sentencing objectives encompass the larger goals which are then supposed to be transferred to the sentencing criteria. The sentencing objectives discussed above reflect both the goal of preventing further harm caused by unwanted behaviour, and the objective of bringing attention to the blameworthiness of the conduct. Obviously then, when deciding about the proper amount of a sanction, both the harm and the fault entertained in an offence must be taken into consideration. The more blameworthy the behaviour has been, the more attention must be called on it through strict, denouncing sanctions. Similarly, the graver the harm subsequent to the offence, more reason there is to employ stiff penalties to prevent similar harms from taking place in the future.

The aspects of harm and culpability are brought into a synthesis in the principle of proportionality. The principle developed in the early 1970s from the theory of just deserts which emphasized both the condemnatory and fairness aspects of penal measures by advocating that the penalty should be no more than the offender deserves. Accordingly, when determining the quantum of a penal sanction, "[s]everity of punishment should be
commensurate with the seriousness of the wrong."\textsuperscript{468}

"Seriousness", again, depends both on the harm done (or risked) by the offence and on the degree of the offender's culpability. In addition to denoting just relation between the offence and the penalty, the principle also requires that offences must be in proportion to each other so that similar offences are treated the same.\textsuperscript{469}

Employing the principle of proportionality as the primary criteria for sentencing is justifiable on several grounds. For one thing, the principle meets the every day concept of fairness by advocating equity and proportionality. Since the people perceive that the penal sanctions are distributed on fair and just basis, their respect towards the legal system and the values inherent in it increases. The principle also "ensures...that the rights of the person punished not be unduly sacrificed for the good of others".\textsuperscript{470} If the only decisive criteria was to prevent further harm, maximized deterrence could lead to unjustifiably severe penalties. The requirement of fault, then, serves as an important safeguard against harsh and unfair penalties.\textsuperscript{471}

Principle of proportionality is also apt to increase the predictability and uniformity in sentencing by providing the sentencing court with a guideline about the relevant sentencing criteria. This may help the courts to differentiate between factors of real significance and those of only marginal

\textsuperscript{468} von Hirsch, \textit{Doing Justice}, supra 132 at 66. See also, Schleger, supra 35 at 43-47.
\textsuperscript{469} von Hirsch, ibid. at 69.
\textsuperscript{470} Ibid. at 70.
\textsuperscript{471} Ibid. at 69-70.
relevancy. This is not to say that the task of determining an appropriate and effective sentence would be made easy. The vast diversity of environmental offences and offenders makes it difficult to find factors of general acceptance that would automatically be applicable to each particular case. In the following, I shall look at the different elements of the proportionality principle in more detail, and discuss the different factors that can be taken into consideration in sentencing. In the first two sections, I shall look at the elements of harm and culpability, and the third section is devoted to discussing equity.

5.2.3.1. Harm

The concept of harm involves a variety of different aspects. When assessing the harm we must determine both the quality and quantity of the harm caused or risked.472 Since the harm is essentially a loss of value, determining the quality of harm requires grading the different values at stake. While the high value of human life and health is self-evident, ranking some other values with each other can be more difficult; what is the value of clean air and water compared to economic welfare of a community? Is a safe swimming beach more valuable than tax revenues provided by the polluter? Similarly, with regard to the quantity or extent of the harm caused or risked, the court is faced with the difficult question whether to look at the harm at

472. See generally, Schleger, supra 35 at 91-115.
present or whether to take into consideration a probable or possible harm to the future generations.

The question of harm represents a typical example of the counteracting forces behind the decision-making in sentencing. Sweigen and Bunt talk about "ecological consciousness" as "an ability to see past the obvious and immediate conflicting interests". When assessing the different interests at stake, the natural starting point would appear to be the particular law or regulation that has been violated; the values sought to be protected should carry the most value in the assessment. Hence, if the violated law is the Clean Water Act, the decisive factor should be the state of the water after the violation, not the possible economic benefits the polluting company contributes to the local community.

In environmental cases, the assessment of the harmed value must to some degree take into account the sensitivity of the particular environment. In the Canadian sentencing practice the courts have regarded the harm to sensitive ecosystems such as the Canadian north as more serious than the harm to other areas. Although the relevancy of the factor is indisputable, it carries certain dangers the sentencing judge must be aware of; for one thing, classifying some ecosystems as more sensitive and thus worthier of protection efforts than others is morally a somewhat dangerous exercise. The ultimate value should be the protection of all environment and all ecosystems without discrimination.

473. Sentencing in Environmental Cases, supra 127 at 17.
Selective protection leads to decisions in which the fact that a lake is, in judge's opinion, "a poor quality fishing area" (because it is inhabited principally by catfish) is regarded as a mitigating factor in sentencing. This kind of selective protection can lead to a situation where only clean and untouched areas are considered worth protection while pollution on damaged sites is regarded as trivial.

A distinguishing feature of environmental offences is that they often involve multiple victims. This raises the question whether the number of victims should be taken into consideration as an aggravating factor. Schleger suggests that while the number of victims does not concern the gravity of the harm per se, the multiple victimization should be taken into consideration when determining the extent of the harm. Hence, "[i]f two offences are ranked similarly with respect to the harm typically caused or risked, but only one involves multiple victims, the act involving multiple victims would...merit more severe punishment." 476

Another typical feature of environmental offences is the collective and cumulative nature of the harm done. Air pollution is a typical example of such harm; while the harm to a single individual is small, the collective harm may be extensive. Also, due to the cumulative nature of the pollution, it is impossible to estimate the extent of the harm. For instance, how can a cumulative toxic in a food chain or a loss of a recreational area be evaluated? Also, what is the share of an individual polluter

476. Supra 35 at 103-04.
in this process? Obviously, an "environmentally conscious" judge does not stare only at the concrete harm done to concrete people but takes into account both the collective harm and the cumulative nature of the harm because

[t]he destruction of any ecosystem is a gradual process, effected by cumulative acts - a death by thousand cuts, as it were. Each offender is as responsible for the total harm as the last one, who triggers the end. The first offender can't be allowed to escape with only nominal consequences because his input is not as readily apparent.477

5.2.3.2. Culpability

As noted above, in corporate offences the degree of culpability should be determined on the basis of corporate policies and operations. In addition to forming an element of a corporate offence, corporate guilt must also be taken into account in sentencing; if evidence that the corporation has behaved intentionally can be established, the corporation deserves the highest degree of blame and, if the harm is constant, would receive the most severe sanction. Similarly, if the evidence shows that the corporation's policies and practices were negligent, the corporation merits a lower penalty by virtue of the reduced blameworthiness.478

Although the assessment of culpability is always dependant on the facts of each particular case, some general guidelines can be drawn by defining certain factors that can be regarded as indicating "greater" or "lesser" blameworthiness. Such factors as persistent non-compliance, disregard of prior warnings, taking of

478. See, Schleger, supra 35 at 117-133.
a calculated risk, and signs about attempts to cover the illegal activity belong to the "more blameworthy" end of the scale. Also, repeated failures to take remedial action can be regarded as evidence of a cavalier attitude. The conduct is likely to be at the other end of the scale if there are signs about honest efforts to comply. Also the fact that the corporation acted promptly right after the accident by either voluntary reporting the accident or by acting to mitigate the damage can be taken into consideration as a mitigating factor.

The corporate structure offers several different elements that can be utilized in the assessment of intent. These elements include both written and informal corporate policies, corporate goals and objectives and the ways they are pursued, and the general corporate attitude towards enforcing and implementing laws and regulations.

5.2.3.3. Equity

An important aspect of proportionality is the requirement that similar offences must be treated the same, that is, offenders whose crimes are similar in harm and culpability must be punished with equal severity. Equity increases both the predictability and uniformness of sentencing. Equal treatment is also an important element of a fair and legitimate sentencing system; to treat those involved in similarly reprehensible conduct differently, or to punish for serious offences more leniently than for less serious offences would distort the
condemnatory implications of penalty and render the treatment unjust.\textsuperscript{479}

It is obvious, however, that the requirement of equal treatment consists of more than mere uniform sentences. Because the penalty depends on pain, one view of equality is that the amount of pain inflicted on identical offenders should be the same.\textsuperscript{480} With corporate fines and other monetary penalties this requires that the corporations' ability to pay must be taken into consideration when assessing the size of the penalty. The Finnish Task Force suggested that such factors as the size of the corporation, its financial stability and financial results should be taken into consideration when assessing the corporation's ability to pay. Also, if corporate income is divided unevenly over certain periods of time, this should be noted in the assessment. When doing such assessment, the correctness of the company's financial statements must naturally be verified. In \textit{R. v. Panarctic Oils Ltd.}, the court noted that when impecuniosity is at issue in sentencing, the convicted corporation should be obligated to tender evidence to that effect. Otherwise, the court will take judicial notice of the size and wealth of the corporation.\textsuperscript{481}

The equal treatment of offenders is made difficult by the vast diversity of environmental offences and offenders. The

\textsuperscript{479} von Hirsch, supra 440 at 36.
\textsuperscript{481} Supra 124 at 86.
Canadian Sentencing Commission has recommended sentencing guidelines for Criminal Code offences. The Commission also proposes written reasons to be provided every time the judge imposes a sentence which departs from the guidelines, and a list of mitigating and aggravating factors that would serve as the primary grounds to justify such departures. The idea of guidelines could be of particular value in environmental offences. Since environmental offences are generally quite different from so called traditional crime, special guidelines drafted specifically for environmental offences might be the best and most concise solution.

5.3. Finally

An impressive amount of literature has been written from a perspective which opposes the use of penal sanctions to enforce environmental laws and regulations, and at least an equal number of scholars have devoted time and effort to show the impossibility of controlling corporations through criminal measures. Judging from all this criticism, it would appear impossible to bring the two together, that is, to use criminal liability to increase corporate compliance with environmental legislation. Yet, this is exactly what the two countries presented in this thesis have done; corporations have been

482. Sentencing Reform, supra 118 at 269-333.
483. See, for example, Kerraghan Webb, "On the Periphery: The Limited Role for Criminal Offences in Environmental Protection" in Into the Future, supra 11 at 58; Wilson, supra 480; Developments in the Law, supra 10 at 1365-75.
prosecuted under environmental statutes for years in Canada, and one of the most important areas to which the Finnish legislator has desired to apply the proposed corporate criminal liability is environmental offences.

As the evaluation in chapter 4 disclosed, the two endeavors to employ corporate criminal liability to environmental cases has not been altogether successful. The two most predominant problems appear to lay in imposing penal liability on a non-human entity, and finding a just and efficient sanction to meet the vast diversity of environmental offences and offenders. In this chapter I have sought to suggest solutions to these problems, and further develop the law on corporate criminal liability and its applicability to environmental offences.

The first part of this chapter was devoted to building an alternative framework for imposing criminal liability on a corporation. The predominant difficulty with the Canadian system particularly but also with the Finnish approach appeared to be the strong dependance on individual guilt. In both systems, in the end, the element of guilty mind had to be found from an individual corporate agent. As we have seen above, in practice such reliance on individual guilt connotes unfairness because, on one hand, corporations are treated in a similar manner regardless to their efforts to prevent lawless behaviour; and on the other hand because big corporations are better endowed to hide their directing minds and thereby avoid liability than their smaller competitors. Even more serious, however, is the system's inability to emphatically convey that the object of the criminal
procedure and therefore the denunciation is the corporation, not the individual. A system built on individual guilt discounts the fact that corporate offences often result, not from an isolated act of an individual, but from faulty corporate policies and complex interactions of many corporate servants.

While the Finnish law proposal is more progressive by making corporate liability dependent on the standard of corporate policies and operations, it too falls short by resorting to the criminal conduct of an individual agent. Since in reality finding a guilty individual is often impossible, the legislator has done some pretty questionable legal "acrobatics" by inventing the concept of anonymous guilt.

Such "acrobatics" as well as the other problems connected to the requirement of individual guilt could be avoided by taking the Finnish approach a step further, and treat blameworthy corporate policies and operations as a proof of genuine corporate guilt. Thus, the standard of corporate policies and structures would be the decisive factor when determining corporate liability. Since the guilt of an individual would no longer matter, anonymous guilt would become unnecessary. Also, since the liability would be dependent solely on the corporation's own voluntary actions, both predictability and fairness of the system would be enhanced. Such a system may also inspire more uniform enforcement by forcing the prosecutor to select only those cases that imply genuinely blameworthy corporate policies behind the illegal conduct.
The second big problem revealed in chapter 4 was the difficulty of finding an appropriate and effective sentence for the diversity of environmental offences and offenders. In the second part of this chapter such a sentence was pursued by employing an assortment of sentencing options. The selected options were meant to reflect both utilitarian and retributive sentencing objectives as well as to encourage compensation and redress. The strong emphasis was laid on the condemnatory aspects of a penal sanction; it was pointed out that since the particular behaviour has been prohibited and a penal sanction has been attached to it, the sentencing must, in addition to aiming at preventing further offences, emphatically denounce the forbidden behaviour. If no such denunciation is expressed in a sentence, the seriousness of the offence becomes underestimated and inhibitions against non-compliance are weakened.

The sentencing options with clearly condemnatory implications may be left unutilized if the system as a whole does not emphatically enough convey the blameworthy nature of the particular conduct. The system based on individual guilt fails to reflect the corporate blameworthiness and undercuts the justification for imposing severe sanctions on corporations. Founding corporate liability on corporate fault offers a way to attribute guilty mind to the corporation in a way that is corporate in orientation. Once the genuine corporate guilt has been established, it becomes justified to call attention to this guilt, and use sanctions that reflect the fault of corporate policies. The principle of proportionality secures that the
severity of the sanction is no more than the offender deserves considering the harm caused and the guilt entertained.

Bringing increased attention to the blameworthiness of corporate policies and operations is of particular importance with environmental offences. Criminal measures can carry special power in conveying the message that pollution is not an inevitable by-product of otherwise useful corporate activities. A corporation whose policies encourage non-compliance with environmental legislation is not operating in a socially acceptable manner and must be condemned for it. Such public denunciation emphasises the value of the environment and turns the environmental legislation from mere statements to legally binding laws.
APPENDIX

Unofficial translation of the proposed chapter 9 (the author’s translation)

Chapter 9: CRIMINAL LIABILITY OF CORPORATE BODIES

S. 1. Corporations, foundations and other legal persons shall be sentenced to a corporate fine for crimes committed in the corporation’s sphere of activities. This chapter shall only apply to those Penal Code crimes that specifically refer to this chapter.

This chapter shall apply to large unincorporated private entrepreneurs whose organizational structure is similar to that of an incorporated entity.

S. 2. This chapter shall not apply to the exercise of public authority.

With regard to death estate, bankrupt’s estate, non-profit associations, foundations and religious communities, this chapter shall only apply to the crimes committed in the entity’s business operations.

S. 3. A corporation shall be sentenced to a corporate fine if,

1) it has neglected to make reasonable effort, in the circumstances, in selecting and organizing personnel and providing for their supervision and training, or it has otherwise breached its duty to arrange its operations in accordance with laws and regulations,

2) the breach of corporate duty has provided an opportunity for the commission of a crime or at least considerably increased the prospects of a crime being committed,

3) the crime can be imputed to an individual agent.

A corporation shall be sentenced to a corporate fine even if the individual agent can not be identified or prosecuted.

S. 4. A crime is imputable to a corporation if the individual agent has acted on behalf of the corporation or for the benefit of the corporation, and he belongs to a statutatory or other body with decision-making power, or he is a corporate employee, agent, or contractor.

S. 5. The minimum corporate fine is 5,000 FMK and the maximum corporate fine is 4,000,000 FMK.
S. 6. The nature and extent of the breach of duty described in s. 3 and the corporation's ability to pay shall be taken into consideration when determining the size of the corporate fine. The type and seriousness of an offence, the extent of criminal activity, the position of the individual agent within the corporation, general disregard for laws and orders manifested in corporate activities as well as general aggravating and mitigating factors provided elsewhere in the law shall be taken into account when appraising the nature and extent of an offence. The size of a corporation, its financial stability, its financial results and other relevant factors shall be taken into consideration when assessing the corporation's ability to pay.

S. 7. The prosecutor may refrain from prosecuting the offence if the breach of duty described in s. 3 has been insignificant, and the corporation has made the necessary efforts to rectify the problem, and the offence has caused only small damage or danger. If it is obvious that the prosecutor will refrain from the prosecution, the police or other government agent may refrain from reporting the offence to the prosecutor.

S. 8. If the corporation's breach of duty has been insignificant, the court may refrain from imposing a penalty when 1) the offence has caused only small damage or danger, or 2) a penalty would cause unreasonable hardship or be purposeless considering the other consequences of the offence and corporations efforts to rectify the problem, remove or remedy the damage and help in solving the offence.

S. 9. In case of an unincorporated private entrepreneur, the court may refrain from imposing the corporate fine or reduce the fine to an equitable amount if the individual entrepreneur is sentenced for the same offence.