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## Paedophilia: The Criminal Responsibility of Canada's Churches

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## I. *Introduction*

In the last few years Canada's churches have been plagued by sexual abuse scandals from Newfoundland to British Columbia. Members of the clergy and of lay orders across the country have been charged with, and convicted of, criminal offences involving the physical and sexual abuse of children. Media reports and television documentaries have emphasized the tremendous scope of the problem of clergy paedophilia, the seriousness of the harm done to the victims, and the irresponsible and sometimes heartless behaviour of church officials who received reports of such abuse. These stories have shocked the Canadian public and have given rise to a sense of crisis to which the law and society must respond. The purpose of this article is to explore the question of whether churches and religious organizations should be held criminally responsible for the acts and omissions of senior clerics who, in response to reports of clergy paedophilia, engage in organizational behaviour which is designed to protect the abuser and to promote the interests of the church or organization concerned, at the expense of past and future victims.

In exploring this issue, this article first considers some of the similarities and differences between churches and business corporations from an organizational perspective. This article applies a corporatist model to the issue of the criminal responsibility of Canada's churches. In doing so it examines the theoretical basis for the criminal responsibility of business corporations in Canada today and the criticisms that have been made of corporate criminal responsibility. The policy reasons underlying the corporate responsibility of churches for the acts of their agents, and the circumstances in which it would be appropriate to impose corporate liability on churches and church organizations are explored. The development of criminal sanctions especially designed to target the non-financial motivations of churches is considered. Finally, several provisions of Canada's criminal law are examined with a view to their potential application to the acts and omissions of senior clerics and church officials who fail to take reasonable steps in order to stop existing sexual and physical abuse of children by clergy under their control. The

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purpose of considering these provisions is not to provide an exhaustive legal analysis, but is only to demonstrate that the prosecution of churches in respect of acts of clergy paedophilia is at least plausible.

### 1. *The Scope of The Problem*

On May 1, 1991 Stephen Rooney, a former member of the Roman Catholic lay order known as the Christian Brothers of Ireland, was found guilty of sexually abusing two young boys at the Mount Cashel Orphanage in St. John's, Newfoundland, more than ten years earlier.<sup>1</sup> Mr. Rooney was the first of eight current or former Christian Brothers from the Mount Cashel Orphanage to go on trial following the re-opening, in 1989, of an earlier police investigation into complaints of physical and sexual abuse of young boys at the hands of members of the lay order.<sup>2</sup> On May 18, 1991 a second member of the Christian Brothers was convicted of sex-related offences against young boys during his years as a teacher at the Mount Cashel Orphanage in the early 1970s.<sup>3</sup>

The Mount Cashel scandal dominated local news programs in Newfoundland and was a popular topic of open-line radio shows and letters to the editors of local newspapers for months. As well, it received extensive national media coverage. However, the sexual abuse scandal which has gripped the Roman Catholic Church in Newfoundland reaches far beyond the walls of Mount Cashel. The eight Christian brothers who were charged in connection with the abuse at Mount Cashel were among 18 priests, brothers and other members of the Catholic community in Newfoundland charged or convicted of sexually abusing young boys.<sup>4</sup> In 1988, one of St. John's most popular priests, fifty-five year-old James Hickey, was convicted of twenty counts of gross indecency and sexual assault committed mainly against altar boys over a seventeen-year period. In January, 1989, another Newfoundland priest, John Corrigan, fifty-seven, was sentenced to five years in prison for assaulting altar boys over a period of seven years.<sup>5</sup>

The sexual abuse scandal facing the Roman Catholic Church in Canada is not limited to Newfoundland. Similar charges of sexual abuse of children by Catholic clergy have occurred recently in other provinces.

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1. "Former Brother convicted in Mount Cashel abuse case", *The Globe and Mail*, May 2, 1991, at A4.

2. *Ibid.*

3. "Jury convicts ex-Cashel teacher", *The Globe and Mail*, May 18, 1991, at A5.

4. N. Underwood and R. Wangersky, "Scandal on the Rock", *Maclean's*, February, 1989, at 61.

5. *Ibid.*

In May 1989, Harold McIntee, a fifty-eight year old Oblate priest from Williams Lake, British Columbia, pled guilty to seventeen charges of sexually assaulting young boys at Catholic schools or parishes over a thirty-year period.<sup>6</sup>

In what has now become the largest sex-abuse investigation in Canadian history, Ontario Provincial Police have laid at least 182 charges against a total of 25 ex-employees of two reform schools run by the Roman Catholic lay order, the Brothers of the Christian Schools.<sup>7</sup> The charges, which involve indecent assault, gross indecency and buggery, as well as 82 counts of assault causing bodily harm, are alleged to have occurred at the St. John's School for Boys at Uxbridge, north of Toronto, between 1957 and 1967, and at the now-closed St. Joseph's Training School in Alfred, east of Ottawa, between 1941 and 1971.<sup>8</sup>

In June 1991, R.C.M.P. in Cape Breton, Nova Scotia, charged three Roman Catholic priests with a series of sexual offenses against males between 1965 and 1990. The 30 charges included 23 of indecent assault, 4 of sexual assault and 3 of obstruction of justice.<sup>9</sup>

The sexual abuse scandal that has struck the Catholic Church in Canada is not the first of its kind to hit the church in North America. In 1985, Louisiana priest Gilbert Gauthé was convicted on 11 counts of sexually abusing children.<sup>10</sup> While Gauthé's case was widely publicized, it was only one of twenty-one similar cases in Gauthé's diocese.<sup>11</sup> In May 1986, a forty-one year old American priest who served as a Boy Scout leader confessed to raping or sodomizing at least thirty-seven children.<sup>12</sup> The list goes on.<sup>13</sup>

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6. D. Roberts, "B.C. bishop charged with sex offenses", *The Globe and Mail*, February 5, 1991, at A4.

7. T. Appleby, "Further charges laid by OPP in Christian Brothers case", *The Globe and Mail*, April 19, 1991, at A8.

8. *Ibid.*

9. The Canadian Press, "More charges possible - R.C.M.P.", *The Chronicle Herald*, June 25, 1991, at 1. There are now convictions and at least one sentence handed down. See *The Chronicle-Herald*, June 25, 1992, A-15 and *The Mail-Star*, November 4, 1992, C-16.

10. "Priest's Child - Molestation Case Traumatizes Catholic Community", *Washington Post*, June 9, 1985, at A6.

11. G. W. Taylor, "Sins of the Flesh", *Maclean's*, July 17, 1989, at 11.

12. "Roman Catholic Church Discusses Abuse of Children by Priests", *New York Times*, May 4, 1986, §1, at 26.

13. For further instances of convictions of Catholic priests on sexual abuse charges in the United States see R. C. O'Brien, "Paedophilia: The Legal Predicament of Clergy", (1988), 4 *Journal of Contemporary Health Law and Policy* 91. See also "Unholy Alliances", *Vanity Fair*, December 1991, 224, which provides details of the case of Father Cinel, described as the largest documented case of priest paedophilia in the history of the crime.

Instances of clergy being arrested for acts of paedophilia<sup>14</sup> are certainly not limited to the Roman Catholic Church. However, it is the Roman Catholic Church in Canada which has been hardest hit by sexual abuse scandals in recent years. All of these cases can be seen as evidence of the widespread problem of sexual abuse throughout North America.<sup>15</sup> However, the cases involving the clergy seem especially shocking because of the positions of trust and respect which they occupy and their avowed personal commitment to eschew even thinking about such crimes.

## 2. *Current Legal Responses to The Problem*

The legal system offers both civil and criminal responses to behaviour which society deems unacceptable. In recent years the Canadian legal system has responded to instances of physical, emotional and sexual abuse of children with more extensive reporting requirements for various professionals involved with children. For instance, section 72(1) of the *Ontario Child and Family Services Act*<sup>16</sup> requires every "person" who has reasonable grounds to suspect that a child is or may be suffering abuse to report the suspicion and the information on which it is based to the child welfare authorities in Ontario. Subsections 72(3) and 72(4) of the Act impose the same duty on every person who performs professional or

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14. For purposes of this article I have adopted the definition of paedophilia developed by Dr. Fred S. Berlin, M.D., Ph.D. He is Associate Professor, School of Medicine, John Hopkins University Baltimore, Md. He is also Co-Director of the John Hopkins Hospital Sexual Disorders Clinic and a member of the American College of Forensic Psychiatry. In Berlin, "Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment", in *The Sexual Aggressor, Current Perspectives on Treatment* 83, 86-87 (1983), Berlin defines paedophilia as follows:

... the term paedophilia will be used when referring to persons sexually oriented towards children, regardless of whether the children are pre- or post-pubertal ... [This definition includes three elements:] First, it is necessary to establish that the patient becomes erotically excited by the act or fantasy of engaging in sexual activities with children. Secondly, if the patient is an adult, rather than an adolescent, the children must be at least ten years his junior. Finally, it must be clear that any sexual acts engaged in with children are not either due to other mental disorders such as schizophrenia, dementia or drug intoxication, or due to the lack of a suitable age-appropriate partner, which occurs in some cases of incarceration or incest.

15. In 1984, the Canadian National Population Survey reported that 53.5% of females and 22.3% of males reported being abused at some time in their lives. Four-fifths of the victims were children and youths. The reported abuses included all types of contact and non-contact abuse, from exposure to sexual assault. The figures are high but they include not only abuse of children by adults, but also by peers. See Robert F. Badgley (Chairman), *Sexual Offences Against Children, Report of the Committee on Sexual Offences Against Children and Youths*, (Vols. 1 and 2) (Ottawa: Supply and Services Canada, 1984), Vol. 1, at 180.

16. R.S.O. 1990, c. C-11.

official duties with respect to a child, including *inter alia*, health care professionals, teachers, school principals, social workers, family counsellors, priests, rabbis and clergy, operators and employees of day nurseries, and solicitors. The definition of abuse in the Act is very broad. It includes physical and emotional harm and sexual molestation and exploitation.<sup>17</sup> The duty to report applies even though the information reported is confidential or privileged.<sup>18</sup> The obligation to report is reinforced by the creation of a penal offence for failure to report. In the Ontario Act penal sanctions are reserved for those classes of professionals and officials mentioned in subsection 72(3) of the Act. Under the Act such professionals who breach the duty to report may be found guilty of an offence and liable on summary conviction to a fine of not more than \$1000 or to imprisonment for a period not exceeding 1 year or to both.<sup>19</sup> Every other province of Canada has enacted similar, though not identical, legislation.<sup>20</sup> In all of the other provinces, with the exception of New Brunswick,<sup>21</sup> the penal offence applies to *any* person who fails to report.

As to who must be reported, the Ontario Act relates the reporting requirements in s. 72 back to the concept of "a child in need of protection" in s. 37(2). Section 37(2) discusses a child in need of protection in terms of a child who suffers harm due to the acts or omissions of a parent or "person having charge of the child." The case law has interpreted the words "person having charge of the child" broadly, so as not to limit their application to a parental context.<sup>22</sup> Thus the words have been held to apply to abuse of a child by a day care supervisor<sup>23</sup> or older brother.<sup>24</sup> Section 25 of the Nova Scotia Act<sup>25</sup> makes it clear that the reporting requirement applies to abuse of the child *by any* person, whether or not they are in

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17. *Ibid.*, s. 37(2).

18. *Ibid.*, s. 72(7).

19. *Ibid.*, s. 85(1)(b).

20. *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 25; *Family and Child Services Act*, R.S.P.E.I., c. F-2, s. 7; *The Youth Protection Act*, R.S.Q. 1977, c. P-34.1, s. 39; *Child Welfare Act*, R.O.N.W.T. 1974, c. C-3, s. 30.1; *Child and Family Services Act*, S.S. 1989, c. C-7.2, s. 12; *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 3; *Family and Child Services Act*, S. B.C. 1980, c. 11, s. 7; *Child and Family Services Act*, R.S.M. 1987, c. C-80, s. 18; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 30; and *The Child Welfare Act*, 1972, S. Nfld. 1972, Act No. 37, s. 49.

21. *Family Services Act*, S.N.B. 1980, c. F-22, s. 30(3).

22. *R. v. Kates*, [1987] W.D.F.L. 1840 (Ont. Co. Ct.).

23. *Ibid.*

24. *R. v. Stachula* (1984), 40 R.F.L. (2d) 184 (Ont. Prov. Ct. (Fam. Div.)).

25. *Children and Family Services Act*, S.N.S. 1990, c. 5.

charge of the child. Most Canadian reporting provisions are capable of an interpretation at least as broad as that found in the Ontario Act and thus do not limit the reporting requirement to abuse of a child by a parent or guardian.<sup>26</sup> Only Saskatchewan<sup>27</sup> and Alberta<sup>28</sup> expressly define the need for protection from abuse in purely parental terms. Such legislative provisions are evidence of the seriousness with which physical, emotional and sexual abuse of children is regarded in Canada today.

The Canadian legal system has also responded to instances of abuse of children through the criminal prosecution of those individuals who are alleged to have committed the abusive acts. The charges and convictions mentioned at the beginning of this article, almost all of which relate to acts of paedophilia committed by members of the clergy, are examples of the enforcement of Canada's criminal laws against the individual abusers.

In the United States there have also been a number of tort actions against America's churches and against individual religious leaders or bishops, in which victims of sexual abuse have sought to have liability imposed upon churches or religious leaders for acts of sexual molestation committed by their agents and subordinates, respectively.<sup>29</sup> Where the tort action has been based on the concept of *respondeat superior*, so that liability depends entirely on the attribution of the acts of the agent to the church principal, churches have escaped liability because acts of sexual

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26. *Supra*, note 20, Nfld., s. 49(1) ("abandonment, desertion, physical ill treatment or need for protection of a child", with the latter defined in s. 1(a.1) using the word "person" or no parental reference at all); P.E.I., s. 14(1) ("a child has been abandoned, deserted or abused", with "abuse" defined in s. 1(1)(a) as abuse by "a person responsible for his care and well-being"); N.B., s. 30(1) ("a child has been abandoned, deserted, physically or emotionally neglected, physically or sexually illtreated or otherwise abused"); N.W.T., s. 30.1(2) ("the abandonment, desertion or need of protection or the infliction of abuse upon a child", with "abuse" defined in neutral language in subs. (1) and "need for protection" defined in s. 14(1) in terms of a "person in whose charge [the child] is"); Man. s. 18(1) ("a child may be in need of protection", defined in s. 17 in non-parental terms, sometimes as "in the care of a person", also used in the definition of "abuse" respecting s. 17(c) found in s.1 "abuse"); B.C. s. 7(1) ("a child is in need of protection", defined in s. 1 "in need of protection" in non-parental terms, except for ground (c)).

27. *Supra*, note 20, Sask., s. 12(1) ("a child is in need of protection", which is tied in s. 11 to "action or omission by a child's parent").

28. *Supra*, note 20, Alta., s. 3(1) ("a child is in need of protective services", defined in s. 1(2) exclusively in terms of the guardian of the child).

29. See, for instance, *Alma W. v. Oakland Unified School District*, 123 Cal. App. 3d 133, 142, 176 Cal Rptr. 287, 289 (1981); *Milla v. Tamayo*, 232 Cal Rptr. 685, 187 Cal. App. 3d 1457 (Cal App. 2d Dist. 1987); *Jeffrey Scott E. v. Central Baptist Church*, 243 Cal. Rptr. 128, 197 Cal. App. 3d 718 (Cal. App. 4 Dist. 1988); *Magnuson v. O'Dea*, 75 Wash. 574, 135 P. 640 (1913); *Carini v. Beaven*, 219 Mass. 117, 106 N.E. 589 (1914).

abuse are viewed as not being within the scope of the agent's employment.<sup>30</sup> Likewise, tort actions against religious leaders and bishops, based on the wrongdoings of priests or agents under their supervision, have failed where it could not be shown that the leader or bishop approved of or ratified the acts of their subordinates.<sup>31</sup> Nevertheless, Catholic church officials in the United States and the church's insurers, in unreported jury awards and confidential settlements, have paid out more than \$300 million since 1985 in cases of priests abusing children and adolescents.<sup>32</sup>

In Canada, Shane Earl commenced the first civil suit against several members of the Christian Brothers of Ireland and the Roman Catholic Church in connection with abuse he suffered at Mount Cashel.<sup>33</sup> Gregory Connors, another victim of abuse at Mount Cashel has commenced a similar suit against the Christian Brothers, four brothers or former brothers and a former lay worker at the orphanage.<sup>34</sup> Whether such suits, especially as they relate to the order or church, will succeed remains to be seen. However, the recommendations of a Church inquiry into sexual abuse by members of Newfoundland's Roman Catholic clergy, which were released on July 18, 1990, included a recommendation that the Church compensate victims through a fund established by the Church but run by community members at arm's length from the Church.<sup>35</sup>

What has not been attempted or done in either Canada or the United States is to criminally prosecute churches and religious organizations, or individuals in positions of authority within the hierarchical structures of

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30. For an interesting discussion of the obstacles which such suits have encountered in the United States see S. D. Young, "Sexual Molestation Within America's Parishes and Congregations: Should The Church Be 'Thy Priest's Keeper'?" (1989), 91 West Virginia Law Review 1097. See also, A. Jackson, "Exclusion of Diocesan Liability For Negligence of Parish Priest: *Bullhart v. Sheier*, 243 Kan. 591, 758 P. 2d 219 (1988)" (1989), 58 Cincinnati Law Review 323; W.W. Bassett, "Religion and Religious Institutions: The Rising Din of Litigation" (1986), 20 Univ. of San Francisco Law Review 775; and D. Frohlich, "Will Courts Make Change for a Large Denomination?: Problems of Interpretation in an Agency Analysis in Which a Religious Denomination Is Involved in an Ascending Liability Tort Case" (1987), 72 Iowa Law Review 1377.

31. S.D. Young, *Ibid.*, at 1110-1111.

32. "Unholy Alliances", *Vanity Fair*, December 1991, 224, at 227. See also *Nat'l. Cath. Rep.*, May 30, 1986, at 15 col. 2 in which it was reported that in Lafayette, Louisiana, there was a \$6.75 million damage settlement and that "Two civil grievances involving one priest in a midwestern diocese were recently settled for approximately \$600,000 and an Idaho case was settled for \$25,000."

33. *Supra*, note 11, at 11.

34. The Canadian Press, "Man suing over alleged Mount Cashel abuse", *The Chronicle-Herald*, November 29, 1989, at A4.

35. *The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy*, Vols. I.-III submitted to the Most Reverend Alphonsus L. Penney, D.D., Archbishop of St. John's, June 1990 (hereinafter referred to as the "Winter Report"), Vol. I, at 140.



churches and religious organizations, in connection with acts of sexual or physical abuse committed by members of the clergy and of lay orders. This is so even though the evidence clearly suggests that in some cases further acts of abuse could have been prevented had a senior cleric, to whom the occurrence of abuse was reported, not ignored the report, or had such cleric acted in a manner designed to protect present and future victims rather than the abuser or the reputation of the religious organization itself. For instance, in the Mount Cashel case, one Christian Brother was ordered out of the orphanage by the superintendent of the Christian Brothers in Newfoundland, Superintendent Baron, following complaints that the brother was sexually molesting boys in 1970. The brother left the orphanage to teach at a local school in St. John's where he led the school's Boy Scout troop for two years. He then returned to Mount Cashel following a change in the superintendent of the order.<sup>36</sup> There was no formal internal investigation by Superintendent Baron into the allegations of sexual abuse by the brother, no report of the allegations to Newfoundland social service authorities, and no counselling or treatment provided to the alleged abuser or to the victims.

In Newfoundland, a commission was appointed by Archbishop Penney of St. John's Catholic Archdiocese to enquire into sexual abuse by Catholic priests and brothers in the Archdiocese. The commission was headed by former Newfoundland lieutenant-governor Gordon Winter, an Anglican. It found that because Archdiocesan authorities, including Archbishop Alphonsus Penney, had not acted expeditiously on the complaints and concerns of priests, parishioner's and concerned parents, children continued to be abused by some priests.<sup>37</sup> The 700-page report of the commission also stated that the Church's response to allegations of abuse took on a familiar pattern after the first reports of problems in 1975 - Church officials aligned themselves with the accused and showed little compassion for the victim.<sup>38</sup> The commission went so far as to suggest that Archbishop Penney may have broken the provincial *Child Welfare Act*<sup>39</sup> by failing to notify provincial authorities of the suspected abuse.<sup>40</sup>

The behaviour of Archbishop Penney and of Superintendent Baron in Newfoundland is not atypical of the behaviour of church officials, generally, when confronted with reports of abuse by their subordinates.

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36. K. Cox, "Teacher ousted over sex charges back at Mount Cashel in 2 years", *The Globe and Mail*, September 28, 1989.

37. *Supra*, note 35, at 137-138.

38. *Ibid*, at 138.

39. S. Nfld. 1972, Act No. 37, s. 49.

40. *Supra*, note 35, at 138.

American journalist Jason Berry helped to break the story of abuse in the Louisiana diocese where Gilbert Gauthé was convicted and is writing a book about sexuality and clerical celibacy. He states that instead of disciplining the offenders, the Catholic Church in Louisiana in most cases merely moved them out of sight, often to another parish where they sometimes committed new offences.<sup>41</sup>

One striking example of a case in the United States where church authorities knowingly acted contrary to the interests of potential victims involved a Louisiana priest, Father Robert Fontenot. Father Fontenot was suspended from his priestly duties in January, 1984 after he admitted to sexual misconduct with minors.<sup>42</sup> Father Fontenot was ordered to obtain treatment and counselling at the House of Affirmation in Massachusetts.<sup>43</sup> At the time of his release from the House of Affirmation, the Diocese was given a report on his progress. The report stated that "because of a long pattern of secrecy and denial concerning his sexual behaviour . . . it is important that for the protection of himself and adolescents . . . he refrain from ministry that would involve work with adolescent boys."<sup>44</sup> Father Fontenot was not permitted to return to his priestly duties in Louisiana but was employed in the adolescent unit of the Deaconess Medical Centre in Washington. Church authorities from the Diocese of Lafayette, by whom Father Fontenot continued to be employed, failed to warn the Medical Centre of the priest's paedophilia.<sup>45</sup> In 1986, criminal charges were brought against Father Fontenot for the sexual abuse of nine former patients while he was employed in the adolescent care unit.<sup>46</sup>

The dangers posed for the public, and especially for children, by the behaviour of church officials such as Superintendent Baron in the Mount Cashel case, Archbishop Penney of St. John's, and the bishop and vicar-general of the diocese of Lafayette in Louisiana in connection with Father Fontenot, are best understood in the light of current medical literature regarding paedophilia. The current medical assessment suggests that paedophilia is not a curable disorder any more than alcoholism is.<sup>47</sup> Science does offer treatment which includes psychotherapy, behaviour therapy, surgery, and medication.<sup>48</sup> Treatment helps heal the damage that

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41. *Supra*, note 11, at 12.

42. *John Does 1-9 v. Compcare Inc.*, 763 P.2d 1237 (Wash. App. 1988).

43. *Ibid.*

44. *Ibid.*, at 1240.

45. *Ibid.*, at 1238.

46. *Ibid.*, at 1241.

47. F. Berlin and E. Krout, *Paedophilia: Diagnostic Concepts, Treatment, and Ethical Considerations* 7 (1983), at 165-166.

48. *Ibid.*, at 169.

has been done, tries to stop the development of the disorder and to improve the quality of life of the abuser, but the paedophile will never be cured.<sup>49</sup> Paedophilia is an ongoing problem. Therefore, avoiding situations of temptation is as important to the paedophile as it is to the alcoholic.

Working in association with children or youth can be as dangerous for the paedophile as being a bartender for the alcoholic.<sup>50</sup>

In light of this current medical assessment responsible church officials must do everything possible to make sure that a member of the clergy who is a known or suspected paedophile is never appointed to a ministerial function that involves or invites association with children.

Who should be held responsible when the acts and omissions of church officials in response to reports of abuse permit existing abuse to continue or fail to adequately protect potential victims? That is the issue dealt with in this article. However, the focus of this article is not on the individual civil or criminal responsibility of those clergy who are paedophiles and who commit acts of sexual abuse. Nor is the focus of this article the civil liability of churches or of religious leaders for the acts of their agents and subordinates. The starting point for this article is the proposition that society is justified in seeking redress through the criminal process against individual abusers, and that victims are entitled to fair compensation in the civil courts both from the individual abusers and from the churches and religious organizations concerned.<sup>51</sup> The primary focus of this article is the potential corporate criminal responsibility of churches and church organizations in connection with incidents of physical and sexual abuse of children, and to a lesser extent, the potential criminal responsibility of church officials who act irresponsibly in connection with such incidents.

## II. *The Analogy Between Churches and Business Organizations*

In Canada incorporated bodies, whether business corporations or incorporated charitable organizations, such as churches, parishes, or dioceses, are recognized as juridical persons. As such they have a legal personality separate from those of their members. They have a nationality. They can hold any form of real or personal property in their own name. They can sue and be sued in their own name. They enjoy many of the same privileges and bear many of the same burdens as natural persons.

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49. *Ibid.*, at 165-166.

50. Rev. J. E. Paulson, "The Clinical Considerations in Cases of Paedophilia" (1988), 22 *Studia canonica* 77, at 94.

51. The theoretical basis for the civil liability of Canada's churches and religious leaders for the acts of their agents and subordinates, respectively, is also a proper subject for further exploration.

Christopher D. Stone has commented that the “the success of the law as a social instrument – deterring, rehabilitating, securing effective compensation for victims, educating citizens between right and wrong - turns upon its capacity to deal with the corporation as a basic unit of communal activity.”<sup>52</sup> Furthermore, Stone suggests that,

Indeed, we do well to think of “corporation” today in something akin to its original sense, as comprising not merely business corporations, but the whole range of giant corporate bureaucracies that have become the peoples of a modern society: co-operatives, unions, pension funds, university systems, hospitals, charities, and governmental agencies. Such mischief as these nonbusiness institutions threaten is neither more confined nor more controllable, because it is not motivated by profit.<sup>53</sup>

While Stone does not expressly mention churches, churches would certainly fit into his broad conception of corporations. Stone recognizes that there are undeniable differences between business corporations and not-for-profit corporations, the most significant of which is the fact that business corporations are motivated primarily by the desire to make profits. Nevertheless, he urges that sustained attention be given to the features which business corporations and other classes of corporate organization have in common which may “merit their treatment as a class distinct from other classes of social actors - from ordinary persons, in particular.”<sup>54</sup>

Stone emphasizes the “organic similarities” between the various types of corporate and bureaucratic organizations: their size and complexity; the evaluation of employees and agents on the basis of their performance in organizational roles; their schooling in management techniques; common structures to divide authority and to disseminate information; and the fact that each is a “vehicle for livelihood, prestige, intrigue, self-fulfilment, aggression and play”.<sup>55</sup> He points out that much of the harm done by the various types of corporate organization may be due to their common bureaucratic features, as a consequence of which their delicts should be seen “not as mere incidents of tort or crime, but as primarily and distinctly organizational phenomena”.<sup>56</sup>

Furthermore, Stone contends that most of the harmful conduct of corporate organizations “does not have at its root a particular agent who is so clearly ‘to blame’ that he or she merits either imprisonment or a

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52. C.D. Stone, “The Place of Enterprise Liability in the Control of Corporate Conduct”, (1980), 90 *Yale L.J.* 1.

53. *Ibid.*, at 2.

54. *Ibid.*, at 2-3.

55. *Ibid.*, at 5.

56. *Ibid.*, at 5-6.

monetary fine extracted in a public ceremony."<sup>57</sup> Stone recognizes that there are circumstances in which we may wish to condemn an act as wrongful, but to ascribe it to the corporation rather than to any particular agent. According to Stone,

Such an attribution has appeal when, for example, the society wishes to denounce the conduct and rehabilitate the actor, but the source of the wrongdoing seems to lie in bureaucratic shortcomings - flaws in the organizations's formal and informal authority structure, or in its information pathways - rather than in the deliberate act of any particular employee. In these circumstances, it may be more intelligible, and make better policy to focus the sanction on the enterprise.<sup>58</sup>

The analogy Stone draws between business corporations and not-for-profit corporations as types of bureaucratic organizations which serve as vehicles for communal activity is of direct relevance to churches and religious organizations. Many, indeed most, church-related organizations in Canada today, including individual congregations, synods, dioceses, presbyteries, schools, pension funds, religious orders and church-sponsored organizations are incorporated as not-for-profit corporations either under special or private Acts of the provincial legislatures or the federal parliament, or under general provincial or federal statutes regulating not-for-profit corporations.<sup>59</sup> Almost thirty years ago, Max Weber pointed out that the organizational form represented by the Roman Catholic Church, in particular, is the historical prototype of all present forms of bureaucratic organization.<sup>60</sup> Today, commentators on the sociology of religion find it useful to study churches generally as types of bureaucratic organization.<sup>61</sup> For example, Kenneth Westhues, writing in 1976, states that

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57. *Ibid.*, at 31.

58. *Ibid.*

59. See, for instance, *An Act to Incorporate the Church Societies of the United Church of England and Ireland, in the Dioceses of Quebec and Ontario*, 1843 (U.C.), c. 68; *Act to Incorporate the Roman Catholic Bishops in Toronto and Kingston, in Canada, in each Diocese*, 1845 (U.C.), c. 82; *Anglican Church of Canada Act*, S.O. 1979, c. 46, and *Ontario Corporations Act*, R.S.O. 1980, c. 95. The Presbyterians incorporated the managerial boards for various pension funds in 1847 and also were the first to use the incorporation device in respect to individual congregations when, in 1849, the Minister and Trustees of St. Andrews Church, Montreal, were incorporated. See 1847 (U.C.), c. 103 and 1849 (U.C.), c. 136. This point is made by M. H. Ogilvie, "The Legal Status of Ecclesiastical Corporations" (1989), 15 *Can. Bus. L.J.* 76, at 87. Ogilvie's article contains a thorough and concise history of the legal status of Canadian churches.

60. M. Weber, *Wirtschaft und Gesellschaft, Studienausgabe* (Cologne and Berlin, 1964), 2 *Holbband*, p. 880, cited in F.X. Kaufmann, "The Church as a Religious Organization", in G. Baum and A. Griebly, eds. *The Church as Institution*, (New York: Hender & Hender, 1974) 70, at 75.

61. F.X. Kaufmann, *Ibid.*

From a sociological perspective the Catholic Church is first of all an organization with a leader, a hierarchy of authority, a chain of command, goals, an ideology, functionaries, and all the other properties of organizations. This church conforms to the classic definition of an organization, "a system of consciously coordinated activities or forces of two or more persons."<sup>62</sup>

Franz-Xaver Kaufmann, a sociologist of religion, has suggested that the distinguishing feature of churches as a type of organization is that, although they have experienced the general historical developments of functional differentiation, bureaucratization, and socialization common to most large institutions today, the churches' own interpretation of themselves, rooted as they are in religion and theology, cause them to see themselves as being endowed with "a particular and essentially unchangeable structure".<sup>63</sup> While Kaufmann's comment relates to churches generally, he says that this is especially true of hierarchical churches and more true of the Catholic Church than of the Protestant churches.<sup>64</sup> Kaufmann points out that the structures of the hierarchical churches, such as the Catholic Church, were developed hundreds of years ago and justified on the basis of theological principles.<sup>65</sup> He points out that these hierarchical structures have not kept up with actual developments within the churches themselves - the increased complexity of the churches and the growth of unofficial groupings, such as religious orders and administrative posts, which are not accounted for by the hierarchical structures of these churches.<sup>66</sup> He sees this as resulting in "organizational backwardness", in a rejection of the principle of functional organization adopted by most bureaucracies today, and in a tremendous gap between decision-making structures as they actually exist and decision-making authority as recognized or defined by internal church laws.<sup>67</sup> It is precisely these types of "institutional shortcomings" which Stone recognizes as the source of much corporate wrongdoing and which he sees as one justification for, and a proper target of, enterprise or corporate liability.

The concept of injurious conduct arising from institutional shortcomings has a direct bearing on the problem of clergy paedophilia in Canada and on the failure of the churches as institutions to respond to reports of abuse

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62. K. Westhues, "The Adaptation of the Roman Catholic Church in Canadian Society", in S. Crysedale and L. Weatcroft, eds. *Religion in Canadian Society* (Toronto: MacMillan Co. of Canada, 1976) 290, at 291.

63. Kaufmann, *supra*, note 60, at 77.

64. *Ibid.*

65. *Ibid.*, at 71-74.

66. *Ibid.*, at 73.

67. *Ibid.*

in a manner appropriate to prevent further abuse. Altogether apart from any individual wrongs committed by church officials, it appears that the widespread problem of abuse is attributable, at least in part, to flaws in the formal and informal authority structures and in the "information pathways" of the churches and church organizations concerned. For instance, the Winter Report found that while the Roman Catholic Church is an institution which wields extensive power within parishes, within the Archdiocese of St. John's and within the Province of Newfoundland, it is "crippled by serious weaknesses in personnel, support mechanisms, administrative structures and management".<sup>68</sup> It also found that while weak organizational structures and poor government within the Archdiocesan Church were not the direct causes of the sexual abuse of children, they allowed the abuse to continue.<sup>69</sup>

In the case of both Archbishop Penney and Superintendent Baron, it is questionable whether the diocese or the order had developed clear policies and procedures for responding to complaints of sexual abuse. The Winter commission established by the diocese of St. John's to look into the problem of sexual abuse in the diocese recommended, *inter alia*, that the Church revise its policies for reacting to sexual complaints.<sup>70</sup> The Winter Report found that the Archdiocese of St. John's had no policies and procedures in place until 1990. This lack of policies and procedures seems difficult to justify in light of the fact that the Canadian Conference of Catholic Bishops had prepared guidelines for handling allegations of misconduct, including sexual assault, in August 1987 and had distributed these guidelines to all Canadian bishops on December 1, 1987.<sup>71</sup> The fact that Archbishop Penney was also unaware of the child abuse reporting requirements in *The Child Welfare Act, 1972*,<sup>72</sup> of Newfoundland, is further evidence of the inadequate attention which the Archdiocesan Church had devoted to the problem of clergy paedophilia.

The Winter Report also revealed a further gap in the Church's structure which involved the lack of accountability of Church officials to the faithful, that is, to the laity of the Church who have no authority within the formal Church hierarchy. The Winter Report recommended that the Church promote increased communications between church officials and congregations to change Archbishop Penney's "closed management" style.<sup>73</sup> The powerlessness of the laity and the unrestrained authority of

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68. *Supra*, note 35, at 138.

69. *Ibid.*

70. *Supra*, note 35, at 150-151.

71. *Ibid.*, at 149-150.

72. *Supra*, note 20.

73. *Supra*, note 35, at 156-157.

the parish priests in small, close-knit rural communities of Newfoundland was also cited by psychologist and sexual abuse expert William Marshall, a professor at Queen's University in Kingston, Ontario, as another dimension of the sexual abuse scandal confronting the Church in Newfoundland. <sup>74</sup>Marshall, who has visited Newfoundland to counsel church, police and citizen's groups, urged the Church to limit the authority granted to parish priests who, "in some communities, are like God, with no restraints in place."<sup>75</sup>

Since, as Kaufmann points out,<sup>76</sup> the hierarchical structure of the Roman Catholic Church and of some of the Protestant Churches is derived from "immutable" theological principles, the churches are extremely slow to change their internal structures and to respond to concerns of their congregations. It was only when the sexual abuse scandal in Newfoundland became public that the Catholic Church in Newfoundland reacted. The concerns expressed by parishioners were not enough to force Church officials to take the problem of sexual abuse seriously. One of the rationales for enterprise liability generally - that it may force the enterprise to improve its organizational structure, lines of accountability, information pathways, and policies and procedures for preventing and responding to corporate wrongdoing - therefore seems apropos with respect to the widespread and ongoing problem of clergy paedophilia.

A further analogy between church organizations and business corporations, which might also suggest a common rationale for the imposition of enterprise liability on each, is that much of the corporate wrongdoing done by both of these types of organization is attributable to the phenomena of institutional loyalty or of loyalty of their agents to the goals of the institution. Harry Glasbeek suggests, for instance, that much of the harmful conduct of corporate agents results from their attempts to meet performance standards generated by the ultimate objectives of every business corporation, the accumulation of capital and the making of profits.<sup>77</sup> He states that,

If deviance is engaged in because of attempts by personnel to meet performance standards generated by those goals regardless of means, the situation would be like that applicable to the corporate organization.<sup>78</sup>

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74. *Supra*, note 11, at 12.

75. *Ibid.*

76. Kaufmann, *supra*, note 60, at 71-74.

77. H. J. Glasbeek, "Why Corporate Deviance Is Not Treated As A Crime - The Need To Make 'Profits' A Dirty Word" (1984), 22 Osgoode Hall L. J. 393, at 424.

78. *Ibid.*, at 424-425.



In the case of church officials who respond inappropriately to reports of sexual abuse by members of the clergy, with the result that existing abuse continues or further abuse occurs, their failure to respond adequately, especially where they themselves are not involved in the abuse, may be attributable to the fact that their primary concern is the protection of the institutional church. They may feel that by ignoring reports of abuse, by covering up the abuse, by denying that it exists or by getting rid of the abuser without making the reasons public, they are protecting the reputation of the church. They may feel that they are thereby enabling it to carry on with its spiritual and temporal mission, which they regard as more important than a few individual members of the church who have become victims of abuse.

Reverend Jerome C. Paulson, Vicar-general of the diocese of New Ulm, in Minnesota, describes the difficult position of Catholic bishops who are confronted with the denunciation of one of their priests for alleged paedophiliac acts:

In a denunciation case, a bishop has the difficult task of maintaining a balance between relating compassionately with the faithful who have been scandalized or who are alleging injury, and with his accused brother priest who may be suffering from a serious illness and who may also have committed a serious crime in the canonical or civil sphere, or both. At the same time, he is obliged to maintain discipline and the observance of ecclesiastical laws as well as to protect the diocese and the Church as a whole.<sup>79</sup>

Rev. Paulson emphasizes the importance of showing the Church's concern for the victims of sexual abuse.<sup>80</sup> However, the very manner in which he expresses his rejection of the behaviour of Church officials which is obviously aimed at protection of the institutional Church suggests that his own primary concern is the welfare of the Church:

Past experience has shown that if the denouncer perceives the bishop's main concerns to be those of the protection of the institutional Church, or the protection of his diocese, his priest or himself, then the bishop is likely to have more problems. *Greater animosity can develop as well as unfavourable publicity.*<sup>81</sup> [Emphasis added.]

To the extent that the failure of churches to act responsibly so as to prevent further sexual abuse results from organizational shortcomings or is attributable to the attempts by church officials to benefit their church by protecting it from scandal, the imposition of liability on the church itself

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79. *Supra*, note 50, at 78.

80. *Ibid.*, at 124.

81. *Ibid.*, at 104.

for such failure is likely to be more of a deterrent of such behaviour in the future than the targeting of the individual church official.

A further analogy between corporations and churches which suggests that they should be treated in a similar manner in terms of enterprise liability is that the relationship between the organization and those who suffer harm at its hands is, in both cases, often a relationship between the powerful ruling elite, on the one hand, and the weak, on the other.

A member of society who is not a member of any church or religious organization might wonder why the laity, or members of such organizations who are aware of or who are affected by sexual abuse, permit church officials to cover up the abuse or trust them to remedy the abusive situation. As far as the victims of paedophilia - children and youth - are concerned, the answer to this question often lies in their fear of further abuse, in their fear that the adults they might tell about the abuse will not believe them, and in their personal feelings (real though unfounded) of guilt and shame.<sup>82</sup> However, as regards the parents of victims who learn of the abuse or others, the answer to this question seems less obvious.

The answer to this question may lie in the fact that for a church member, one's personal identity is closely associated with their faith and their faith is inextricably tied up with the church or institution which has always served as the vehicle for the practice and expression of that faith. Their trust in the institution and in its hierarchy has been nurtured from an early age and they may feel that not to trust the hierarchy, or to challenge it, is to deny their faith and their own identity. The church, linked as it is to their identity, holds tremendous power over them. Just as the relationship of the abuser to the victim is one of power and domination, so also is the relation of the church hierarchy to the laity.

Writers, such as Harry Glasbeek, analyze the relationship between capitalists who own and manage business corporations and the workers they employ as a class struggle, in which tremendous harm is done to the workers at the hands of the owners of capital, the ruling elite and their agents. Glasbeek advocates the use of corporate criminal responsibility to protect the weaker members of this relationship, the workers.<sup>83</sup> The relationship between church hierarchies and their members, even in the more democratically structured congregational-type churches, can also be seen as a class struggle in which the weak suffer harm at the hands of powerful. Similarly, the imposition of enterprise liability on churches

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82. M. M. Fortune, *Sexual Violence: The Unmentionable Sin* (New York: Pilgrim Press, 1983), at xii-xiii.

83. H. J. Glasbeek and S. Rowland, "Are Injuring and Killing At Work Crimes?" (1979), 17 Osgoode Hall L.J. 506, at 507-523.

might serve as an effective means of preventing future harm arising from this unequal relationship.

### III. *The Case for Criminal Sanctions*

Assuming that there are sound reasons for imposing enterprise liability on churches and church organizations in situations in which senior clerics and church officials fail to act in response to reports of clergy paedophilia in a manner appropriate to prevent future harm, the question arises as to whether the use of criminal sanctions, as opposed to civil liability, is justified. The position advocated here is that the use of criminal law is justified because the conduct of the churches and their agents is, in many instances, what most members of our society would consider immoral. It is conduct which displays a wilful disregard, or a wilful blindness to the right to physical integrity of present and future victims of clergy paedophilia. Criminal sanctions are justified from the perspective of deterrence because the problem appears to be widespread. Moreover, the serious, perhaps irreparable, nature of the harm done to the victims calls for a dramatic response in order to prevent further harm.

William Marshall predicts that for the children who suffered abuse in Newfoundland, their families and many communities, "the emotional suffering will take years to fade" and that many victims will lose their faith and "may have difficulties with respect to their own identity - they will blame themselves."<sup>84</sup> Marshall's assessment is supported by the story of the mother of one victim of abuse in Newfoundland who recalled: "My son used to sit at the kitchen table and cry and he would say, 'There is only one way out - to commit suicide'. He was only 17."<sup>85</sup> The seriousness of the harm done to the victims of paedophilia is further emphasized by the statements of Dr. Nuala Kenny, Dalhousie University's head of paediatrics, who was one of five members of the commission established by the Archdiocese of St. John's. Dr. Kenny, commenting on the abuse that went on in Newfoundland as a microcosm of sexual abuse across Canada, stated

I knew that sexual abuse was damaging to children before joining the commission but my awareness of the depth of the damage and the length of the damage greatly increased by serving on it.<sup>86</sup>

Criminal law is used in liberal democratic societies such as ours when, in addition to the types of sanctions which can be imposed by the civil

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84. *Supra*, note 11, at 12.

85. *Ibid.*

86. C. MacKeen, "Offer to resign courageous - Hayes", *The Chronicle-Herald*, July 19, 1990, at A2.

courts and through administrative processes, we wish to publicly condemn conduct as anti-social and morally unacceptable, when the public condemnation of behaviour is seen as important to the protection of our social values.<sup>87</sup> Admittedly, apart from the general agreement among Canadians as to the immorality of the intentional killing and maiming of people, there is widespread disagreement about basic social values.<sup>88</sup> However, it can be asserted that the sexual abuse of children is not condoned. The frequent criminal prosecutions of paedophiles in every province in Canada are evidence of widespread agreement among Canadians that the physical and sexual abuse of children is morally and socially unacceptable. More importantly, however, as far as the criminal responsibility of churches and of church officials is concerned, the stringent child abuse reporting requirements found in the legislation in every province of Canada<sup>89</sup> are evidence that the conduct of those who know about such abuse, and who fail to take action to stop it, is similarly unacceptable and worthy of moral condemnation. It is also worth noting that the fact that a church official who, in effect, knowingly permits existing abuse to continue, or carelessly fails to prevent future abuse, is not motivated by a desire to inflict harm, but rather to protect the church or the abuser, is irrelevant to the characterization of his or her behaviour as criminal in nature. Canadian criminal law expressly accepts the notion that for a person to do anything, or to omit to do anything that it is her or her duty to do, in a manner which shows wanton or reckless disregard for the lives or safety of other persons may amount to criminal negligence.<sup>90</sup>

In the previous section of this article the argument was put forward that churches, like business corporations, are the proper targets of liability and will, if subjected to liability, improve the internal structures of their organization and exert pressure on individuals within them so as to produce better behaviour in the future. In other words, enterprise liability will serve as an important deterrent to prevent future harm. With respect to the liability of Canada's churches for the acts of senior clerics and church officials who behave irresponsibly, the imposition of civil liability upon churches for the harm resulting from such conduct is undoubtedly important and justifiable in order to provide compensation to the victims.

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87. See, for instance, D. Stuart, *Canadian Criminal Law: A Treatise* (Toronto: The Carswell Company Limited, 1987), at 53-54; and A. W. Mewett and M. Manning, *Criminal Law* (Toronto: Butterworth & Co. (Canada) Ltd., 1985), at 11-15.

88. H.J. Glasbeek makes this point in his article "Why Corporate Deviance Is Not Treated As a Crime - The Need To Make 'Profits' A Dirty Word", *supra*, note 77, at 402-403.

89. *Supra*, note 20.

90. R.S.C. 1985, c. C-46, s. 219.

However, the imposition of criminal sanctions on churches may prove to be a more effective deterrent than the imposition of civil liability.

The churches in the United States have, as mentioned previously, already demonstrated a willingness to settle civil suits and to pay out large sums to compensate victims and their families. The willingness of churches to settle such suits probably arises in part from a sincere recognition of wrongdoing. However, it is also likely that such settlements are a response to legal advice aimed at avoiding court findings of institutional responsibility, which would increase external pressure upon church organizations to alter their internal structures for reasons unrelated to theology. Money is, of course, important to churches, both as an instrument of social and political power and as a means of carrying out their mission of looking after the spiritual and moral welfare of their members and of carrying on their charitable activities. Nevertheless, churches, unlike business corporations, do not have as their primary objective the making of profits. Given the religious and charitable objectives of churches and church organizations, it seems logical that a finding of criminal responsibility on the part of a church, entailing by implication a finding of immoral behaviour on the part of the church, would have much more serious implications for it than the loss of money consequent upon the imposition of civil liability. Accordingly, the churches are likely to go to greater lengths to avoid a criminal conviction than they would to avoid the imposition of civil liability.

A further justification for the use of the criminal process against churches, in addition to the use of civil and administrative processes, is that one of the basic constitutional principles upon which Canada's liberal democratic society is built, the rule of law,<sup>91</sup> requires that the law, to use Harry Glasbeek's words, "punish behaviour which has been judged unacceptable by society no matter who the perpetrator of the offensive behaviour is."<sup>92</sup> Churches, like business corporations and individuals, enjoy rights and privileges in our society and must bear similar burdens, including responsibility and sanctions when they behave in an unacceptable manner.

In summary then, the use of criminal law to deal with irresponsible church behaviour in cases involving clergy paedophilia is justified because: the scope of the problem and serious nature of the harm done to the victims of paedophilia call for drastic preventative action; because in

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91. See, for instance, the judgment of Rand J. in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at 142 in which Rand refers to the Rule of Law as a "fundamental postulate of our constitutional structure."

92. *Supra*, note 83, at 523.

modern liberal democratic societies such as ours criminal law serves a standard-setting function and is a vehicle for the condemnation and stigmatization of anti-social and morally unacceptable behaviour (and most Canadian's agree that acts or omissions which, in effect, permit child abuse to continue or recklessly fail to prevent further abuse are immoral); the imposition of criminal sanctions is likely to be a more effective deterrent when dealing with churches and church organizations than a finding of civil liability; and the rule of law demands that the law punish those guilty of unacceptable behaviour even when the perpetrator is a church.

#### IV. *The Case For and Against Corporate Criminal Responsibility*

The law on corporate criminal liability in Canada has evolved from the time when it was considered unthinkable to hold a corporation criminally responsible to the present time when corporate criminal liability is an accepted, though not frequent, phenomena. The development of corporate criminal law both in Canada and in the United States has always been hindered by the existence of controversial and unresolved questions about the responsibility and punishment of corporate actors. Amongst the questions still debated in Canada and the United States are the following: whether the objective of deterring corporate crime requires criminal as well as civil regulation; whether the prosecution of individual agents who acted on behalf of the corporation may be equally effective or more effective than the prosecution of the corporate entity; whether it is possible to identify the wrongdoer and to attribute his or her behaviour to the corporation on a satisfactory basis; and whether it is possible to devise effective sanctions against corporations.<sup>93</sup> Since the same questions may be raised and debated in the context of the criminal responsibility of churches and church organizations, it is important to confront some of the

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93. B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions" (1983), 56 Southern California L.Rev. 1141, at 1145; J. Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982), 80 Mich. L.R. 1466; B. Coleman, "Is Corporate Criminal Liability Really Necessary" (1975), 29 Southwestern L.J. 908; C.J. Coffee Jr., "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment" (1979), 79 Mich. L.R. 386; E.R. Elkins, "Corporations and the Criminal Law: An Uneasy Alliance" (1976), 65 Kentucky L.J. 73; E. Lederman, "Criminal Law, Perpetrator & Corporation: Rethinking a Complex Triangle" (1985), 76 J. Crim. Law & Criminology 285; and C.D. Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct" *supra*, note 52. See, for instance, H. J. Glasbeek, "Why Corporate Deviance Is Not Treated As A Crime - The Need To Make Profits A Dirty Word", *supra*, note 77; Law Reform Commission of Canada, "Criminal Responsibility for Group Action" (1976), Working Paper 16; L.H. Leigh, "The Criminal Liability of Corporations and Other Groups" (1977), 9 Ottawa L.R. 247.

arguments frequently made against the concept of corporate criminal responsibility.

Under current Canadian law, if a corporate agent commits a crime while acting within the scope of his or her authority and with the intent to benefit the corporation or with the result that the corporation is benefitted, then the corporation may be held criminally responsible for these acts.<sup>94</sup> One of the arguments marshalled against imposing criminal liability on corporations is that of the traditional aims of criminal law - deterrence, prevention, retribution and rehabilitation - only deterrence plays an important role in criminal liability.<sup>95</sup> This argument goes on to point out that deterrence of corporate activity relies primarily upon the threat which criminal fines pose to corporate profits,<sup>96</sup> and that in order to provide an adequate threat the penalties must be high, and accordingly, more similar in amount to civil monetary penalties<sup>97</sup> than to traditional criminal fines. Those who put forth this argument conclude that criminal sanctions serve no useful purpose that cannot be equally well served by the imposition of civil liability awards, complemented when appropriate by individual criminal sanctions.<sup>98</sup>

Writers such as Brent Fisse respond to this argument by pointing out is that it takes "insufficient account of the deterrent value resulting from the stigma of criminal conviction" and that it "neglects important non-financial values in corporate decision making".<sup>99</sup> Interestingly Fisse notes that in some types of organizations, "most notably churches", non-monetary motivations take precedence over monetary concerns.<sup>100</sup> As discussed in the previous section of this article, criminal sanctions entail a moral condemnation of certain behaviour that is absent from civil and administrative penalties.<sup>101</sup> While the symbolic value of criminal sanctions may be doubted in the case of business corporations, it is likely to serve as an effective deterrent against churches and church organizations because it is the antipathy of the *raison d'être* of such corporate entities.

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94. *Canadian Dredge & Dock Company, Limited, Marine Industries Limited, The J.P. Porter Company Limited, and Richelieu Dredging Corporation Inc. v. R.*, [1985] 1 S.C.R. 662.

95. Developments in the Law - Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions" (1979), 92 Harvard L.R. 1222, at 1235-36.

96. *Ibid.*, at 1235.

97. *Ibid.*, at 1368, 1370.

98. *Ibid.*, at 1365-75 and Comment, "The Economic Inefficiency of Corporate Criminal Liability", (1982), 73 J. Crim. L. & Criminology 582, at 586-87, 599-602.

99. Fisse, *supra*, note 93, at 1147.

100. *Ibid.*, at 1155.

101. See Oberdick, "The Role of Sanctions and Coercion in Understanding Law and Legal Systems" (1976), 21 Am. J. Juris. 71, 77-78. Oberdick points out that the moral blame which a criminal sanction symbolizes is important in prohibiting the targeted behaviour.

If the deterrent effect of criminal sanctions is successful, then rehabilitation in the form of the implementation by the corporation of effective crime prevention policies, disciplinary controls, and changes in defective or inadequate standard operating procedures should follow.<sup>102</sup> It is hoped that rehabilitation in this sense would be the result of imposing criminal sanctions on churches with respect to the failure of church officials to act in a manner appropriate to stop existing sexual abuse or to prevent further abuse. The Winter Report, as mentioned previously, found that although the Canadian Conference of Catholic Bishops had issued guidelines for dealing with allegations of misconduct and had distributed these to all Canadian bishops, Archbishop Penney had not followed them. Where such standard operating procedures exist but are breached, the imposition of criminal sanctions on the church should serve as a catalyst for internal church discipline.

A second argument marshalled against corporate criminal responsibility is that it is more just and more effective to punish those individuals within the corporation who are guilty of wrongdoing than to punish the corporation, especially if the offence involves a jail sentence.<sup>103</sup> Holding the corporation responsible rather than the individual may only serve to obscure the fact that the people who are really guilty of wrongdoing are attempting to feather their own nests rather than trying to please the corporate entity. Where the motivation behind the conduct of the guilty agent is self-interest and the crime is attributable to the behaviour of one or more individuals who are truly blameworthy, and not to the collective failure of many corporate actors and/or to organizational shortcomings, then it may well be fairer and more effective to punish the individuals rather than the corporation. In some circumstances, however, it will no doubt be possible to attribute the harmful conduct to one or more corporate agents whose conduct deserves punishment as well as to organizational shortcomings which make such conduct possible. In such

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102. Fisse, *supra*, note 93, at 1159-1163; and Stone, *supra*, note 52.

103. For an example of how this argument is articulated see Bruce Coleman, *supra*, note 93.



circumstances, it makes sense to punish both the individuals and the corporation.<sup>104</sup>

To advocate corporate criminal liability is not to exclude the possibility of prosecuting individual wrongdoers. What is being advocated here is that in appropriate circumstances churches and church organizations should be subject to criminal sanctions, because such sanctions will serve as the most effective deterrent of the unacceptable behaviour. In order to determine whether, in any particular instance, it is possible to realize the objectives of deterrence and rehabilitation by imposing liability on the church, it is necessary to examine the way in which a particular church and its decision-making processes are organized.<sup>105</sup> Simeon M. Kriesberg, who has developed different models of corporate decision-making, argues that,

The definition of criminal responsibility that emerges from decision-making models is a functional one: responsibility lies with whichever corporate decision-makers were capable of preventing the corporate offense that occurred. The models imply that the identity of these decision-makers varies according to the character of the corporate decision-making process.<sup>106</sup>

Kriesberg identifies three models of corporate decision-making. In Model I the corporation can be seen as a unitary entity in which all decisions are made as part of a rational decision-making process activated by corporate problems, framed by corporate alternatives, and guided by corporate values. Kriesberg suggests that where corporate decision-making accords with Model I, the corporate entity itself, for whose benefit decisions are made, may be the proper target of criminal responsibility. In Kriesberg's Model II the corporation consists of a host of loosely connected decision-making units (such as a marketing group, a

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104. The deterrent value of prosecuting both the corporation and the individual within the corporation who could have prevented the harmful conduct has been recognized in Canada in the field of environmental law. See for instance, *The Environmental Enforcement Statute Law Amendment Act*, S.O 1986, c. 68, which was passed and came into force on December 18, 1986. The Act amended three key environmental statutes in Ontario in order to clarify and extend the penal liability of corporate officers and directors, municipalities and the Crown. The provisions impose a duty on directors and officers of corporations to take all reasonable care to prevent the corporation from causing or permitting pollution. Failure to do so may result in the director or officer being found guilty of an offence, whether or not the corporation is prosecuted or convicted, with the possibility of imprisonment for up to one year for flagrant violations of the statute involving actual pollution or violations of stop orders. See also cases such as *R. v. B.E.S.T. Plating Shoppe Ltd. and Siapas* (1988), 1 C.E.L.R. (N.S.) 145 (Ont. C.A.) in which both the corporation and its chief executive officer were prosecuted in relation to acts causing pollution.

105. S.M. Kriesberg, Note, "Decision-making Models and the Control of Corporate Crime", (1967), 85 Yale L. J. 1091.

106. *Ibid.*, at 1099.

manufacturing division, a research group), each of which has some autonomy and control over a narrow range functions, with respect to which decisions are made on the basis of standard operating procedures. Kriesberg contends that in a Model II situation there are valid reasons for imposing liability on both the corporate entity, whose standard operating procedures are inadequate or defective, and upon individual corporate managers with knowledge or authority with respect to unlawful or inadequate standard operating procedures.<sup>107</sup> Finally, according to Kriesberg's Model III, corporate decision-making is the outcome of a bargaining game involving a hierarchy of players and a maze of formal and informal channels, in which each decision is the result of a single game, with the identity of the players dependent on the issues involved and the organizational structure. Kriesberg suggests that in a Model III situation individual actors involved in the bargaining rather than the corporate entity should be held criminally responsible.<sup>108</sup>

Although Kriesberg's comments are addressed to business organizations, it will be equally important to examine the nature of a church's organizational structure and decision-making processes in order to determine whether the aims of deterrence and rehabilitation can be achieved by imposing liability on the church. David Frolich points out that the three major categories of church polity are congregational, hierarchical and presbyterial.<sup>109</sup> In hierarchical churches, such as the Roman Catholic Church, the Anglican Church and the Greek and Russian Orthodox Churches, the individual congregations are subordinate members of the general and larger church and power is placed in clerical superiors.<sup>110</sup> In congregational churches, such as the Unitarian Church, the Baptist Church, the Quaker Church and the Jewish Church, local churches are autonomous, governed either by a majority of the congregation or by another local body which the members have implemented for that purpose. The local congregation owes no loyalty or obligation to any higher denominational authority.<sup>111</sup> In presbyterial churches, such as the Presbyterian Church, each local congregation is largely autonomous in directing its own affairs, but elects representatives to the denomination's governing bodies which exercise the authority of the general denominational organization through a hierarchy of governing bodies.<sup>112</sup>

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107. *Ibid.*, at 1112-1115.

108. *Ibid.*, at 1121-1124.

109. D. Frolich, *supra*, note 30.

110. *Ibid.*, at 1389.

111. *Ibid.*

112. *Ibid.*

The three different types of church polity described by Frohlich do not fit neatly the three different models of corporate decision-making identified by Kriesberg. Furthermore, as Franz-Xaver Kaufmann points out there may be a gap between a church's formal organizational structure and its actual decision-making processes. Kriesberg's models may, nonetheless, provide some insights into the circumstances in which responsibility should be imposed on churches or church organizations. For example, Kriesberg explains that the essence of Model I is that it treats the behaviour of corporate employees as sufficiently concerted to justify treating their numerous individual acts as a unitary corporate decision-making process aimed at maximizing the corporation's values. Furthermore, Kriesberg points out that the fewer persons and hierarchical levels involved in the particular decision, the more likely it is that Model I will provide useful insights.<sup>113</sup> On the other hand, Kriesberg points out that among the characteristics of Model III are the fact that the decision-making process lacks the purposefulness and consistency that are basic to Model I, and that "the result of the Model III process is only by coincidence, if at all, the course of action that maximizes the values of the entity as a whole."<sup>114</sup>

The essential elements of a Model I type of situation may exist in any of the three types of church polity described by Frohlich. They may exist in a local congregational church, or in the local incorporated diocese of a larger hierarchical church, or in the structure of a lay order. If the church officials are acting to achieve a singular objective, such as the protection of the institutional church, then Model I suggests that it will be appropriate to impose criminal liability on the corporate entity. If the church officials are acting out of institutional loyalty, and the wrongdoing is also attributable in part to organizational shortcomings, such as the "serious weaknesses in personnel, support mechanisms and management" which the Winter Report found to exist in Newfoundland, then Models I and II might both suggest that there is a sound basis for imposing liability on the church. Each case will require individual analysis to determine whether the prosecution of individual wrongdoers or of the church or of both will most effectively deter further harm.

Another objection to imposing criminal responsibility on business corporations is that it punishes innocent people. The objection is that it is the shareholders, who in most cases have not participated in the crime, and the consumer of the corporation's goods and services, who ultimately

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113. *Supra*, note 105, at 1101, 1111.

114. *Ibid.*, at 1105.

bear the burden of the corporate fine through decreased dividends and increased prices, respectively.<sup>115</sup> The analogous argument applicable to churches and other charities is that the imposition of criminal responsibility is contrary to the public interest because the payment of criminal fines will eat up the funds which charitable organizations have available for charitable good works, and criminal convictions will cost them prospective donors. This was part of the rationale for the doctrine of charitable immunity from tort action once widely accepted in most states in the United States, but now at least partially abandoned by most.<sup>116</sup> In answer to this argument it is worth pointing out, firstly, that the doctrine of charitable immunity has never existed in Canada, and secondly, that criminal fines pose no greater threat to a charity's capacity to provide a valuable public benefit than civil compensatory judgments. However, even if liability would jeopardize a charity's capacity to function, immunity to criminal liability is not a just response where it would permit an intolerable infringement of an individual's rights to go unpunished and would violate the rule of law.

The objection that churches and other charities should not be held criminally responsible because criminal penalties threaten their capacity to benefit the public is one variation of the more general objection to criminal corporate responsibility that fines are an ineffective and unjust sanction against corporate wrongdoing.<sup>117</sup> Fines have been criticized on the grounds that: they punish the wrong people - innocent shareholders and consumers;<sup>118</sup> that historically they have been too low to effectively deter corporations which simply write them off as a business expense;<sup>119</sup>

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115. Bruce Coleman, *supra*, note 93, at 920.

116. For a further understanding of the American doctrine of charitable immunity see "The Inequality of Mercy: 'Charitable Torts' and Their Continuing Immunity" (1987), 100 Harvard L.R. 1382.

117. See, for instance, C. Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct," *supra*, note 52, at 36-57 (which discusses the inadequacy and inefficiency of corporate fines); Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963), 30 Univ. Chi. L. Rev. 423, at 434 (doubting the deterrent effect of criminal fines on corporations); and Comment, "The Economic Inefficiency of Corporate Criminal Liability" (1982), 73 J. Crim. L. & Criminology 582.

118. See B. Coleman, *supra*, note 93, at 920, and see, "Corporate Criminal Liability", (1928) 28 Colum. L. Rev. 181, at 187 and C. Stone, *ibid.*, at 47-48.

119. See Comment, "Criminal Sanctions for Corporate Illegality" (1978), 69 J. Crim. L. & Criminology 40, at 48, and Comment, "Increasing Community Control over Corporate Crime - A Problem in the Law of Sanctions" (1961), 71 Yale L. J. 280, at 297-305 (which argues that corporate fines should be sufficiently high to deprive corporations of illegal profits and to provide compensation for victims).

that they do not address the non-financial motivations behind corporate misconduct;<sup>120</sup> and that they give the corporation too much freedom to decide what, if any, internal reorganization or disciplinary action to initiate in order to prevent further wrongdoing.<sup>121</sup>

As Brent Fisse points such arguments against criminal liability, based on the limitations of fines as a sanction, ignore the deterrent value of the stigmatization which a conviction symbolizes.<sup>122</sup> As suggested previously, a criminal conviction, in and of itself, is likely to be a more effective deterrent against churches and church organizations than against business corporations, given the non-financial motivations of such entities. That is not to suggest that the inadequacies of fines as a sanction be ignored. Rather an attempt should be made to develop alternative kinds of sanctions designed to achieve the traditional goals of criminal law – deterrence, rehabilitation and retribution. Several of the sanctions suggested by reform agencies and commentators are of particular interest because of their potential effectiveness against churches and church corporations.

As suggested previously, one of the reasons for imposing entity liability on churches would be to put pressure on the church to initiate organizational changes or internal disciplinary procedures, or to modify or introduce preventative policies and procedures. In light of this goal Christopher Stone's proposal for the use of organizational reform orders as a criminal sanction against corporation's seems especially appropriate for use against churches and church organizations. In Stone's Proposed Model Code for Corporate Rehabilitation<sup>123</sup> he recommends that the courts be authorized to require a corporate offender to prepare and file a "Proposed Rehabilitation Agenda" when it appears that the corporate wrongdoing stemmed from defective or inadequate company policies and procedures.<sup>124</sup> The agenda that Stone envisaged would include a statement of the corporation's findings as to why the wrongful conduct

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120. See C. Stone, *supra*, note 52, at 43; and Coffee, "No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981), 79 Mich. L.Rev. 386, at 393-94.

121. See C. Stone, *ibid.*, at 57, in which he makes the point that imposing even substantial criminal fines on corporations "is no guarantee that they will respond as we should like."

122. *Supra*, note 93, at 1220.

123. See "Corporate Rights and Responsibilities: Hearings Before the Senate Comm. on Commerce", 94th Conf., 2d Sess. 297-301 (1976) (appendix to statement of Christopher D. Stone, "Stone Proposed Model Code for Corporate Rehabilitation").

124. *Ibid.*, at 297.

arose, identifying problems with the companies policies, practices and procedures, and a statement as to the measures which the company proposes to take in order to prevent future harm.<sup>125</sup>

One advantage of Stone's proposal is that it avoids undue interference with the internal affairs of the corporate entity, an advantage of particular concern with respect to churches and church organizations, with respect to which an order directing particular changes might be seen as an undue interference with religious freedom. At the same time the implementation of this type of sanction is consistent with a view expressed in 1976 by the Law Reform Commission of Canada:

In a society moving increasingly towards group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that harm does not materialize through the conduct of people within the organization. Rather than having the state monitor the activities of each person within the organization, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level.<sup>126</sup>

Another type of sanction which might prove effective against churches and church organizations, particularly where the harmful conduct is attributable in part to the attempt by church officials to protect the reputation of the institution, is the use of court-ordered adverse publicity. The use of court-ordered adverse publicity as a criminal sanction against corporations was recommended by the American National Commission on Reform of Federal Criminal Laws in 1970,<sup>127</sup> and has received support from various commentators.<sup>128</sup> Brent Fisse suggests that the Court could quantify the sanction at the time of sentencing in terms of media time or space and cost.<sup>129</sup> Although the impact of court-ordered adverse publicity would, as John Coffee points out,<sup>130</sup> be uncertain, the same can be said of fines which are not quantified according to the means of the defendant or

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125. *Ibid.*

126. The Law Reform Commission of Canada, "Criminal Responsibility for Group Action" (1976), Working Paper 16, at 31.

127. National Commission on Reform of Federal Criminal Laws, *Study Draft of a New Federal Criminal Code* 405(1)(a)(1970).

128. B. Fisse, "The Use of Publicity As a Criminal Sanction Against Business Corporations", (1971), 8 Melbourne Un. L.R. 107; and Gellhorn, "Adverse Publicity by Administrative Agencies", (1973), Harv. L. R. 1380, 1419-21.

129. *Supra*, note 93, at 1231.

130. J.C. Coffee, *supra*, note 93, at 427.

their impact upon him or her. The use of adverse publicity as a sanction is ideally suited to address the non-financial motivations of churches and church organizations.

Yet another sanction which would be appropriate for use against churches and church organizations, especially where the wrongful conduct permits the continuation of or commission of further acts of sexual abuse, is a court order requiring the corporate defendant to follow a particular course of action in order to compensate the victim or to provide redress to him or her.<sup>131</sup> Brent Fisse suggests, for instance, that "punitive discovery orders might be used to expedite or increase the flow of information from convicted corporate defendants to plaintiffs in subsequent civil litigation",<sup>132</sup> or that the defendant corporation be required "to publicize the conviction and thereby provide notice to potential claimants."<sup>133</sup> Such sanctions would be unnecessary where the church or church organization had already demonstrated a willingness to compensate victims, as has often been the case with the Roman Catholic Church both in the U.S. and Canada,<sup>134</sup> but could be very useful where no such willingness has been expressed.

The implementation of organizational reform orders, adverse publicity orders or "redress facilitation orders"<sup>135</sup> for use against churches and other corporate offenders would, of course, require a long term program of statutory reform of the criminal sanctions available under Canada's *Criminal Code* and raises some constitutional questions concerning the federal/provincial division of powers which would have to be addressed and resolved.<sup>136</sup> In the meantime, however, the limitations of fines as a sanction should not be treated as an adequate justification for a refusal by society to impose criminal responsibility on churches for socially unacceptable behaviour. The same limitations have not prevented the prosecution and conviction of business corporations. Furthermore, attaching the mark of Cain to a church by way of a criminal conviction alone is likely to have a much more dramatic deterrent effect against the church than it would against a business corporation.

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131. *Supra*, note 126, at 46-47 where the Law Reform Commission of Canada emphasizes the need for redress for victims of corporate crime.

132. *Supra*, note 93, at 1232.

133. *Ibid.*

134. See *supra*, note 32, and "Abused altar boy families paid \$150,000", *Calgary Herald*, February 13, 1990, A3.

135. This is the general term which Brent Fisse uses for punitive discovery orders, orders for notice to potential claimants and similar orders. See Fisse, *supra*, note 93, at 1231-33.

136. R.S.C. 1985, c. C-46.

### V. *The Position of the Corporation in Criminal Law*

In Canada all criminal and quasi-criminal offences are created by statute.<sup>137</sup> The basis on which a corporation may be held criminally responsible varies according to the type of offence with which the corporation is charged. The courts have developed a system of classification which separates offences on the basis of the degree of intent, if any, required to establish liability. Criminal and quasi-criminal offences may fall into one of three classes: absolute liability offences, strict liability offences, and offences requiring *mens rea*.<sup>138</sup>

Absolute liability offences are offences for which liability attaches immediately upon the breach of the statutory prohibition. No proof of intent or of any particular state of mind is required. With respect to such offences the corporation is treated the same as a natural person. The corporation has automatic primary responsibility for the breach.<sup>139</sup>

Strict liability offences are offences for which liability attaches not upon the breach of the statute, but rather upon proof of the *actus reus*, subject to the defence of due diligence.<sup>140</sup> With respect to such offences corporations are, as in the case of absolute liability offences, treated the same as natural persons. Liability is primary, and in accordance with the terms of the statute concerned, arises in the same way as with respect to absolute liability offences.<sup>141</sup> The liability of the corporation does not depend on the attribution to it of the misconduct of others, except in the sense that the corporation, being a fictitious legal person, can only act through its agents and employees. The Supreme Court of Canada has been very clear that liability for such offences is primary, not vicarious.<sup>142</sup>

Most crimes are offences requiring proof of *mens rea*, the presence of a guilty mind. Where the accused is a corporation, it is necessary to find within the corporation some natural person whose guilty mind can be attributed to the corporation. One of the most difficult barriers to the imposition of criminal responsibility upon corporations was the attribution of *mens rea* to a corporation.<sup>143</sup> English and Canadian courts have

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137. *Ibid.*, s. 9(a).

138. *Supra*, note 94, at 673-674.

139. *Ibid.*, at 674.

140. *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

141. *Supra*, note 94, at 674.

142. *Ibid.*

143. The transition from virtual corporate immunity from criminal liability to virtual equality with humans in like circumstances under the criminal law is traced in detail by Jessup J. in *R. v. J.J. Beamish Construction Co.*, [1966] 2 O.R. 867 and by Schroeder J.A. of the Court of Appeal of Ontario, in *R. v. St. Lawrence Corp.*, [1969] 2 O.R. 305, at 315-21. See also Leigh, "The Criminal Liability of Corporations and Other Groups" (1971), 9 U. Ott L. R. 247.



overcome this barrier by adopting a pragmatic approach. The courts in Canada and the United Kingdom, unlike the courts in the United States have refused to apply the principle of *respondeat superior*<sup>144</sup> as the basis of corporate criminal responsibility. In the United States, where corporate criminal responsibility is based on the doctrine of *respondeat superior*, vicarious criminal responsibility of the corporation can arise out of the criminal acts of any employee regardless of his or her status in the corporation.<sup>145</sup> As explained by Estey J. of the Supreme Court of Canada in *Canadian Dredge & Dock Co. v. The Queen* "criminal responsibility in our courts thus far has been achieved in the *mens rea* offences by the attribution of the acts of its employees and agents on the more limited basis of the doctrine of the directing mind or identification."<sup>146</sup> As Mr. Justice Estey goes on to explain the identification doctrine,

is a court-adopted principle put in place for the purpose of including the corporation in the pattern of criminal law in a rational relationship to that of the natural person. The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation. In *St. Lawrence, supra*, and other authorities, a corporation may, by this means have more than one directing mind. This must be particularly so in a country such as Canada where corporate decisions are frequently geographically widespread.<sup>147</sup>

In order for a corporate agent's action and intent to result in the criminal responsibility of the corporation, the agent must be found by the Court to be "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."<sup>148</sup> While the guilty mind of just any low-level employee will not be adequate to convict the corporation, the act need not have been authorized by the board of directors, nor need the act or intent be that of a director or chief executive officer of the corporation. As Bruce Welling points out, the case law demonstrates that the corporation can be convicted where "*mens rea* can be fixed upon an official who, according to the formal corporate structure, is responsible for the department or activities

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144. *Supra*, note 94, at 686 .

145. *Ibid.*

146. *Ibid.*, at 691.

147. *Ibid.*, at 693.

148. *R. v. St. Lawrence Corp.*, *supra*, note 143, per Schroeder J.A., at 320, adopting the statement of Jessup J. in *R. v. J.J. Beamish Construction Co.*, *supra*, note 143.

in which the *actus reus* occurred.”<sup>149</sup> The employee must be one who has been entrusted by the corporation with actual authority to make decisions in the field of operation in which the criminal act occurred. In some cases the delegation of authority will be expressed in the corporation’s constitutional documents. In other circumstances it will be implied authority, a grant of authority to the agent which can be inferred from the course of dealings between the corporation and its agent.<sup>150</sup>

The outer limits of the identification doctrine were considered by the Supreme Court of Canada in 1985 in *Canadian Dredge & Dock Co. v. The Queen*.<sup>151</sup> Estey J., speaking for the Court stated:

...in my view the identification theory only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.<sup>152</sup>

It is no defence for the corporation to argue that the criminal actions of the employee were beyond the scope of the agent’s employment, since all corporations would argue that any criminal action must *prima facie* be beyond the scope of an employee’s duty and authority.<sup>153</sup> Provided the corporate agent was acting within the sector of corporate operation assigned to him or her while he or she was carrying out his or her assigned function in the corporation, the acts of the managerial agent will give rise to corporate criminal responsibility. This is so “whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and whether or not there be express prohibition.”<sup>154</sup> Canadian law does not recognize a defence of express prohibition, because if it did a corporation could avoid criminal

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149. B. Welling, *Corporate Law In Canada: The Governing Principles* (Toronto: Butterworth & Co. (Canada) Ltd., 1984), at 162, citing in support *D.P.P. v. Kent and Sussex Contractors Co. Ltd.*, [1944] K.B. 146 (Eng., D.C.); *R. v. I.C.R. Haulage Ltd.*, [1944] K.B. 551 (Eng., C.C.A.); and *R. v. Fane Robinson Ltd.*, [1941] 2 W.W.R. 235, [1941] 3 D.L.R. 409, 76 C.C.C. 196 (Alta. C.A.).

150. One of the leading cases on implied actual authority of a corporate agent is *Hely-Hutchinson v. Brayhead Ltd.*, [1967] 3 All E.R. 98 (Eng., C.A.). For an example of a case in which the acts and intent of a non-management employee resulted in the criminal conviction of the corporate employer as a consequence of the implied delegation of authority to the agent to make unsupervised decisions in the field of operation in which the criminal act occurred see *R. v. Waterloo Mercury Sales Ltd.*, [1974] 4 W.W.R. 516, 49 D.L.R. (3d) 131, 18 C.C.C.(2d) 248, 27 C.R.N.S.55 (Alta. Q.B.). For an interesting discussion of the *Waterloo Mercury* case see Welling, *supra*, note 149, at 165-166.

151. *Supra*, note 94.

152. *Ibid.*, at 713-714.

153. *Ibid.*, at 684.

154. *Ibid.*, at 685.

responsibilities simply by adopting and conveying to its agents and employee's a general instruction prohibiting illegal conduct.<sup>155</sup>

However, as Estey J.'s judgment in *Canadian Dredge & Dock Co. v. The Queen* makes clear, the corporation will not be held criminally responsible if the agent's acts were "totally in fraud" of the corporate employer. According to Estey J.'s judgment the criminal act is totally in fraud of the corporate employer where it "is intended to and does result in benefit exclusively to the employee-manager", "when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation."<sup>156</sup>

As far as the criminal responsibility of Canada's churches or church organizations for acts of paedophilia is concerned, it is clear that the acts and intent of those clergy who commit acts of sexual abuse could not be attributed to the corporate entity on the basis of the identification doctrine, even if committed by a senior cleric or church official. Such acts cannot be said to benefit the church, but are indeed contrary to everything that most churches stand for. However, the acts or omissions of a managing employee of a church to whom acts of sexual abuse are reported, or who has knowledge of such abuse, but who fails to act in a manner appropriate to prevent further abuse, might very well be attributable to the corporate entity. The behaviour of such a managing-employee, who has actual express or implied decision-making authority, might be seen as benefitting the church either by design or by result by protecting its reputation from scandal, at least in the short term.

The determination of the extent of the actual decision-making authority of a particular cleric would, as in the case of an employee of a business corporation, have to be determined by looking at internal church documents setting forth the formal church hierarchy and allocation of decision-making powers, as well as by examining any course of conduct which might have given rise to an implied extension of actual authority. In many circumstances the formal church structure will be sufficient to establish the actual decision-making authority of the particular cleric to deal with reports of abuse. Such is the case with respect to Archbishop Penney in relation to reports of acts of abuse committed by priests within the Archdiocese of St. John's Newfoundland, and with respect to Superintendent Baron in relation to reports of acts of abuse committed by members of the Christian Brothers at Mount Cashel.<sup>157</sup>

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155. *Ibid.*, at 699.

156. *Ibid.*, at 712, 713.

157. *Supra*, note 50, at 102-103, citing J. Coriden, T. Green, D. Heintschel, eds. *The Code of Canon Law: A Text and Commentary*, (New York: Mahwah, Paulist Press, 1985), at 440, Canons 292, 381, 391 and 392.

## VI. *Potentially Applicable Criminal Law Provisions*

The following is a consideration of those few *Criminal Code* provisions which might possibly be used to condemn the behaviour of churches and church officials who, as a result of inappropriate and irresponsible responses to reports of clergy paedophilia, permit such abuse to continue or fail to prevent further abuse. The purpose of this section of the article is to show that the application of the *Criminal Code* to the acts and omissions of church officials is at least plausible.

As mentioned earlier in Part II of this article most churches and church-related organizations in Canada today, including individual congregations, synods, dioceses, presbyteries, schools, pension funds, religious orders and church-sponsored organizations are incorporated as not-for-profit corporations either under special or private Acts of the provincial legislatures or the federal parliament, or under general provincial or federal statutes regulating not-for-profit corporations.<sup>158</sup> Thus most churches and church organizations, as “corporate bodies”, would certainly be subject to the provisions of the *Criminal Code*, s. 2 of which provides:

“everyone”, “person”, “owner”, and similar expressions include Her Majesty and public bodies, *bodies corporate*, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively; [emphasis added]

Sections 620-623 of the *Code* contain the procedural provisions concerning the appearance of a corporation on a criminal charge, notices to corporations concerning criminal charges, the procedure to be followed on the default of appearance of a corporation, and the trial of a corporation. Section 719 of the *Code* makes provision for the imposition of fines as sanctions against convicted corporations. All of these sections of the *Code* would be applicable to the prosecution of a church or religious organization.

### 1. *Criminal Negligence Causing Bodily Harm: Sections 219 and 221*

The criminal offence with the greatest potential application to churches in connection with the acts and omissions of church officials in response to reports of clergy paedophilia appears to be the offence of criminal negligence causing bodily harm. The relevant provisions of the *Criminal Code* are as follows:

- 219.(1) Everyone is criminally negligent who
- (a) in doing anything, or
  - (b) in omitting to do anything that it is his duty to do,
- shows wanton or reckless disregard for the lives or safety of other persons.

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158. See note 59, and accompanying text.

- (2) For the purposes of this section, "duty" means a duty imposed by law.

221. Everyone who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

The wording of this offence and the name of the offence itself invite comparisons with the tort of negligence. In tort law liability is based on an objective test. Where X can or should reasonably foresee that his or her behaviour is likely to injure Y and then behaves in a manner which falls short of the standard of care of a reasonable person, then X will be held liable to compensate Y for any injury which Y may have incurred as a result of X's behaviour. However, the present state of the law in Canada with respect to the test of culpability in criminal negligence cases, which can be traced to a series of Supreme Court of Canada decisions in the 1960s, concerning the offences of dangerous driving and criminal negligence, seems to be that merely establishing a departure from an objective standard of care is not sufficient to ground a finding of criminal negligence.<sup>159</sup>

In order to succeed on a charge of criminal negligence the Crown must prove the guilty mind of the accused in the sense of subjective intent. In a case of criminal negligence the subjective intent is established by showing the advertence or subjective foresight of the accused as to the consequences of his or her conduct.<sup>160</sup>

There have, in recent years, been several decisions of the Ontario Court of Appeal which have ignored the subjective test of criminal negligence set out by the Supreme Court of Canada in *O'Grady v. Sparling*<sup>161</sup> in 1960 in favour of a more objective standard, at least in cases of criminal negligence involving driving.<sup>162</sup> Even in some of the early Supreme Court

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159. See *O'Grady v. Sparling* (1960), 128 C.C.C. 1, 33 C.R. 293, [1960] S.C.R. 804; *Mann v. The Queen*, [1966] 2 C.C.C. 273, 47 C.R. 400, [1966] 5 C.R. 238; *Binus v. The Queen*, [1968] 1 C.C.C. 227, 2 C.R.N.S. 118, [1967] S.C.R. 594; *Peda v. The Queen*, [1969] 4 C.C.C. 245, 7 C.R.N.S. 243, [1969] S.C.R. 905.

160. *Binus v. The Queen*, *ibid.*, at 233 C.C.C., 123 C.R.N.S. per Judson J.

161. *Supra*, note 159.

162. In *R. v. Sharp* (1984), 12 C.C.C. (3d) 428, 39 C.R. (3d) 367, 26 M.V.R. 279 (Ont. C.A.), a case involving criminal negligence causing death due to an automobile accident, the Ontario Court of Appeal held that proof of advertence as to the possible consequences was not necessary, that "indifference" as to the consequences would suffice. In *R. v. Waite* (1986), 28 C.C.C. (3d) 326, 52 C.R. (3d) 355, 41 M.V.R. 119 (Ont. C.A.), also involving criminal negligence in the operation of a motor vehicle causing death, the Ontario Court of Appeal held that the Crown need not prove subjective intent in the sense of a deliberate assumption of risk in the case of an act of commission; that a marked and substantial departure from the conduct that could be expected of a reasonable person would suffice.

of Canada cases<sup>163</sup> involving driving offences the Court appeared to approve of instructions to the jury which might suggest an objective test of culpability.<sup>164</sup> However, the recent decisions of the Supreme Court of Canada in *R. v. Waite*<sup>165</sup> and *R. v. Tutton*,<sup>166</sup> despite a division of opinion in both cases, strongly suggest that the view of the majority of the Supreme Court is that a conviction for criminal negligence does require proof by the Crown of the accused's advertence or awareness of the risk that the prohibited consequences will come to pass<sup>167</sup> or, alternatively, the accused's wilful blindness to that threat which is culpable in light of the gravity of the risk that is prohibited.<sup>168</sup> Furthermore, the decisions of Wilson J., with Dickson C.J.C. and LaForest J. concurring in the result in both cases, suggest that the same test of subjective intent in the form of advertent negligence applies to both acts of commission and acts of omission. The decisions also establish that "a deliberate and wilful assumption of risk" need not be shown in order to establish the subjective *mens rea* required for criminal negligence.<sup>169</sup>

In many cases in which society might wish to attach blame either to the church or church organization concerned, or to a church official, or to both, a church official will have received a report of an incident of clergy paedophilia and will have failed to report the information or suspicion to appropriate government authorities. At the same time the church official will have taken no action to prevent a continuation of the reported abuse, or will have moved the alleged abuser to a new post or position involving contact with young people, without warning anyone of the fact that the person is a known or suspected paedophile. In such circumstances it should not be too difficult to establish that the responsible church official was either aware of the risk that further abuse would occur, or that he or she demonstrated a wilful blindness to that threat. This is especially so in

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163. See, for instance, the judgment of Cartwright J. in *Binus v. The Queen*, *supra*, note 159, at 230 C.C.C., 121 C.R.N.S.

164. For helpful discussions of the *mens rea* in criminal negligence cases see E. Fruchtman, "Recklessness and The Limits of Mens Rea: Beyond Orthodox Subjectivism: Part I," (1986-87), 29 *Crim L.Q.* 315; M. Eisen, "Recklessness", (1988-89), 31 *Crim L.Q.* 347; Comment, Alan D. Gold, "Criminal negligence - Elements of offence" (1986-87), 29 *Crim L.Q.* 12; and Comment, Alan D. Gold, "Criminal law - Criminal negligence" (1988-89), 31 *Crim L.Q.* 405.

165. (1985), 48 C.C.C. (3d) 1 (S.C.C.).

166. (1989), 48 C.C.C. (3d) 129 (S.C.C.).

167. *Per* Wilson J. (Dickson C.J.C. and LaForest J. concurring) in *Tutton*, *supra*, note 166, at 12.

168. *Ibid.*, at 13.

169. *Waite*, *supra*, note 165, at 2.

light of the publicity which sexual abuse scandals involving the clergy have received in Canada in the past few years, and the increased awareness of the public generally about the nature of paedophilia and about the seriousness of the harm done to the victims of paedophilia.

It should be noted that according to the definition of criminal negligence in s. 219 of the *Criminal Code* the offence may be committed by either the doing of an act or by the omission to do an act which the accused has a duty to do. Subsection 219(2) provides that "for the purposes of this section, 'duty' means a duty imposed by law." The words "a duty imposed by law" in s. 219 of the *Code* have been interpreted as including a duty arising by virtue of statute or common law.<sup>170</sup>

It may be beneficial to be able to show that it was a positive act of the church official which resulted in the abuse of a victim, since the Crown would not have to show that the church official breached a duty imposed by law. In some cases, a church official, with knowledge of a cleric's abusive tendencies, may remove the cleric to a new position involving contact with children, without warning anyone of the cleric's paedophilia. In such a case, if the removal of the cleric is followed by subsequent abusive conduct, the Crown should be able to establish the charge of criminal negligence on the basis of a positive act - removal with knowledge.

However, in many instances in which the conduct of the church official will be worthy of blame, it will involve a knowledge or suspicion of previous abuse and a failure to report such abuse to proper government authorities. It will, therefore, likely involve a breach of the statutory reporting requirements discussed in the introduction to this article.<sup>171</sup> These statutory reporting requirements could form the basis of the "duty imposed by law" where the behaviour consists of omissions only.

The provincial statutes, such as the Ontario *Child and Family Services Act*<sup>172</sup> and the Nova Scotia *Children and Family Services Act*,<sup>173</sup> impose the duty to report on every "person". The word person is not defined in the statutes, but provincial interpretation statutes, such as the *Interpretation Act*<sup>174</sup> of Ontario, make it clear that the word "person" includes a corporation. Thus the reporting requirements would apply to an incorporated church or church organization. Furthermore, as mentioned

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170. *B. v. Coyne* (1985), 124 C.C.C. 176, 31 C.R. 335 (N.B.S.C. App. Div.); *R. v. Popen* (1981), 60 C.C.C. (2d) 232 (Ont. C.A.); *R. v. Thornton* (1991), 1 O.R. (3d) 480 (Ont. C.A.).

171. See notes 16-28 and the accompanying text.

172. *Supra*, note 16, s. 72(1).

173. *Supra*, note 20, s. 25.

174. R.S.O. 1990, c. I-11, s. 29.

in the discussion of these statutes in the introduction, the reporting requirements in most of these statutes can be construed as requiring the reporting of abuse of the child not only by a parent or guardian, but also by others in temporary charge or control of the child. Thus they might require reporting of abuse of a child by a priest or other cleric in temporary charge or control of the child. They would almost certainly apply where the abuse takes place within a church-run institution, such as an orphanage, boarding school, or reform school, in which the abused child resides, and where the abuse is by one of the caretakers within the institution.

As well, in situations of continued abuse of a child resident within a church-run institution, where the abuse has been reported to a responsible official within the institution and that official has failed to take the steps necessary to protect the child from further abuse, both the official and the institution might be seen as having breached a statutory duty to provide necessaries of life to the child. Section 215(1)(a) of the *Criminal Code* imposes on the guardians of a child the duty to provide necessaries for a child under the age of sixteen years. Section 214 of the Code defines guardian for the purpose of s. 215 of the Code as "a person who has in law or in fact the custody or control of a child." Section 215(1)(c) imposes the same duty to provide necessaries of life on a person who has another person under his or her charge, where the other person, by reason of age or other cause, is unable to withdraw himself or herself from that charge.

The concept "necessaries of life" has been construed as meaning such necessaries as tend to preserve life and as not being limited to necessaries in their ordinary legal sense.<sup>175</sup> Thus they have been interpreted as including medical aid,<sup>176</sup> and might also be interpreted to include the protection of a child from harm. The failure of a responsible church official to protect a child resident within an institution from further abuse might therefore be seen as the breach, by the official and by the institution, of the s. 215(1) duty to provide necessaries of life to the child under their charge or guardianship. Such a breach of the statutory duty to provide necessaries could form the basis of a prosecution for criminal negligence based on an omission.

Furthermore, in such cases it might also be possible to show that the institution and responsible church official had breached a common law duty imposed upon it and upon him or her as temporary legal guardians of the victim. The duty breached in such a situation would be the common

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175. *R. v. Brooks* (1902), 5 C.C.C. 372 (B.C.S.C.).

176. *Ibid.*; *R. v. Lewis* (1903), 7 C.C.C. 261, 6 O.R.L. 132; *R. v. Cyrenne, Cyrenne and Cramb* (1981), 62 C.C.C. (2d) 238 (Ont. Dist. Ct.); and *R. v. Tutton, supra*, note 166.



law duty of the institution and official as guardians of the child to take reasonable steps to protect the youth from illegal violence by an agent or employee of the institution. Such a duty might be imposed at common law based on an analogy between the position of the church official in charge of an orphanage or school and a parent. In *R. v. Popen*<sup>177</sup> the Ontario Court of Appeal held that a parent is under a legal duty at common law to take reasonable steps to protect his child from illegal violence used by the other parent towards the child which the parent foresees or ought to foresee. In *Popen* it was held that such parent is criminally liable for failing to discharge that duty in circumstances which show a wanton or reckless disregard for the child's safety, where the failure to discharge the legal duty has contributed to the death of the child or resulted in bodily harm to the child. The same reasoning would seem to apply by analogy to the church official in charge of an institution in which the youth was living at the time the abuse occurred. In such a case the common law duty would form the basis of the "duty imposed by law" which must be established to found a conviction based on an omission.

Section 219 of the *Criminal Code* does not itself create an offence, but where criminal negligence as defined in s. 219(1) results in death or bodily harm, it may be punishable as an offence under s. 220 or s. 221, respectively. In the case of sexual abuse by members of the clergy the relevant offence is that of causing bodily harm by criminal negligence embodied in s. 221 of the *Code*. The Crown must show a causal connection or *nexus* between the negligence of the accused and the bodily harm suffered by the victim. In cases where a responsible church official knew of the abuse and failed to act in order to prevent further abuse, or has moved a known or suspected abuser into a position involving contact with youth and further abuse has occurred, it should be possible to establish that the negligence caused or contributed to the harm suffered by the victim.

"Bodily harm" is not defined for the purposes of s. 221, but the definition of "bodily harm" in s. 267(2) of the *Code*, which is applicable to ss. 267, 269 and 272, replicates the meaning of that term at common law. S. 267(2) provides:

- (2) For the purposes of this section and sections 269 and 272, "bodily harm" means any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

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177. *R. v. Popen*, *supra*, note 170.

The fact that the harm done to victims of paedophilia is neither transient nor trifling in nature is well documented.<sup>178</sup> However, the long term effects of sexual abuse for the victim usually relate to their emotional and mental health rather than to physical injury. Unless the concept of bodily harm is broadly interpreted to include injury to the emotional or mental health of the victim, the requirement that the Crown prove "bodily harm" to the victim would appear to reduce the potential usefulness of criminal negligence causing bodily harm to condemn immoral and anti-social behaviour of church officials who ignore reports of abuse in order to protect their church or their colleagues.

The case law relating to "bodily harm" does suggest that the Crown must establish physical injury as opposed to emotional or mental harm. In *R. v. Dupperon*<sup>179</sup> the Saskatchewan Court of Appeal held that where the evidence failed to show whether the bruising caused by the accused's acts was more than merely transient or trifling in nature, the element of "bodily harm" as defined in subsection 267(2) was not made out. However, in *R. v. Dixon*<sup>180</sup> Esson J.A. speaking for the Court of Appeal of the Yukon made it clear that the words "transient or trifling in nature" import a very short period of time and an injury of a very minor degree of distress. Accordingly, while the Crown must establish physical harm, that harm need by no means be long term.

Nevertheless, it appears from these cases concerning the meaning of bodily harm that a charge of criminal negligence causing bodily harm will be of potential use against churches and church officials only where the further acts of abuse caused by the criminal negligence are accompanied by violence causing physical injury. In this respect it is worth noting that 82 of the 182 charges laid by the Ontario Provincial Police in connection with the sexual abuse scandal at the Catholic reform schools in Ontario were charges of assault causing bodily harm.<sup>181</sup> The fact that instances of sexual abuse by the clergy have often been accompanied by acts of physical violence suggests that there is still considerable scope for the use of criminal negligence causing bodily harm against churches and church organizations.

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178. See for instance, J. J. Huagaard and N. D. Reppucci, *The Sexual Abuse of Children* (San Francisco, California: Jossey Bass Inc., 1988), at 60-100; B.F. State and H. Alexander, "Long-Term Effects of Sexual Abuse in Childhood", in P.B. Mrazek and C.H. Kempe, eds. *Sexually Abused Children and their Families*, (Oxford, England: Pergamon Press, 1987), at 223-234; and D. Tinkelhor and A. Browne, "Assessing the Long-Term Impact of Child Sexual Abuse: A Review and Conceptualization", in L.E.A. Walker, ed., *Handbook on Sexual Abuse of Children*, (New York: Springer Publishing Company, Inc., 1988), at 55-71.

179. (1984), 16 C.C.C. (3d) 453, 43 C.R. (3d) 70, [1985] 2 W.W.R. 369 (Sask. C.A.).

180. (1988), 42 C.C.C. (3d) 318, 64 C.R. (3d) 372, [1988] 5 W.W.R. 577 (Yukon Terr. C.A.).

181. See note 7 and accompanying text.

## 2. *Abandoning or Exposing a Child Under Ten Years of Age:* *Section 218*

Another *Criminal Code* offence which might be used against churches and church organizations is the offence of abandoning or exposing a child. This offence is embodied in s. 218 of the *Code* which provides as follows:

s. 218. Everyone who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years.

The words “abandon” and “expose” are defined in s. 214 of the *Code* which provides:

s. 214. In this Part “abandon” or “expose” includes  
 (a) a wilful omission to take charge of a child by a person who is under a legal duty to do so, and  
 (b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection.

In the case law, the word “abandoned” has been interpreted as meaning “leaving the child to its fate”.<sup>182</sup> The word “wilful”, as used in this section, has been interpreted as meaning “by deliberate or purposeful conduct; with full knowledge of, or reckless of or indifferent to the consequences of his act or omission; a callous disregard; a complete and utter disregard for the safety of children”.<sup>183</sup>

The word “unlawfully”, as used in s. 218, is not defined anywhere in the *Code*. However, the meaning of the word “unlawful” as used in statutes creating crimes, misdemeanours and minor offences was considered by the Ontario Court of Appeal in *R. v. Robinson*.<sup>184</sup> In that case it was held that the word unlawful has various significations, that it does not necessarily mean “contrary to law”, that it may mean “contrary to moral standards or spiritual principles”, “not authorized by law” or “contrary to some prohibition of positive law.”<sup>185</sup> In the context of s. 218 the word “unlawfully”, which qualifies the words “abandons or exposes”, appears to signify an abandonment or exposure of a child by someone who is under a legal duty to care for the child. Since the concept of “a wilful omission to take charge of a child by a person who is under a legal

182. *R. v. Boulden* (1957), 41 Cr. App. R. 105, at 110.

183. *R. v. Reedy* (No. 2)(1981), 60 C.C.C. (2d) 104 (Ont. Dist. Judges Crim. Ct. of Algoma), at 106.

184. [1948] O.R. 857 (Ont. C.A.).

185. *Ibid.*, at 859-860.

duty to do so” is already part of the definition of “abandon” or “expose” by virtue of s. 214, the word “unlawfully” appears to add little to the definition of the offence embodied in s. 218.

In order for s. 218 to apply, the child who is abandoned or exposed must be under the age of ten years. Furthermore, its “life” or “health” must be endangered. The word “health” is not defined in the *Criminal Code* and the case law is not helpful. In the absence of a clear definition in the statute, it is for the courts, in interpreting the provision, to say what the word means. The courts will, unless some other meaning is indicated by the context, give the word its ordinary or plain meaning.<sup>186</sup> It is perhaps worth noting that *Black’s Law Dictionary* defines “health” as the “State of being hale, sound, or whole in body, mind or soul; well being.”<sup>187</sup> According to this definition, the concept of injury to health embodied in s. 218 appears to be broader than the concept of “bodily harm” contained in s. 221 of the *Code*, in so far as it would include injury to mental and emotional health and not just physical harm.

A conviction under s. 218 does not require proof of actual permanent injury to the health of the child, but only proof of an abandonment or exposure which was likely to cause permanent injuries to the child’s health or to endanger its life. Thus the offence was held to have been made out where an accused abandoned her child in a motor vehicle for an indefinite period of time in an environment which posed a threat to its life due to the cold temperatures and risk of abduction.<sup>188</sup>

An orphanage, reform school or boarding school run by a church or church organization, and the head of such an institution, would appear to be “persons” who are under a legal duty to take charge of a child who is a resident in the institution.<sup>189</sup> Where the head of such an institution has knowledge or receives reports of sexual or physical abuse of such a child under ten years of age, and fails to take any action to stop the abuse, the institution of which he or she is in charge, and the official himself or herself, clearly abandon or expose the child. Furthermore, in light of the literature confirming the harmful and long term effects of sexual and

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186. *Victoria (City) v. Bishop of Vancouver Island*, [1921] A.C. 384, at 387.

187. *Black’s Law Dictionary* (6th ed.) (St. Paul, Minn.: West Publishing Co., 1990), at 721.

188. *R. v. Holder* (1988), 63 C.R. (3d) 301 (Alta. Q.B.).

189. The institution and the official in charge would appear to be under the same duty as a parent to care for the child. See, for instance, *R. v. Reedy* (No. 2) (1981), 60 C.C.C. (2d) 104 (Ont. C.A.) in which it was held that a babysitter who had undertaken to look after and care for children in the parents’ absence was under a legal duty toward their children to take the same care of the children as their parents are at law required to.

physical abuse on the mental and emotional health of the abused child,<sup>190</sup> it could almost certainly be established that such an abandonment or exposure is one which permanently injures or is likely to permanently injure the health of the child.

### 3. *The Duty To Provide Necessaries of Life: Section 215*

Yet another provision of the *Code* with potential application to churches and church organizations in the circumstances which are the focus of this article is s. 215, which creates the offence of failing to provide necessaries of life. S. 215 provides as follows:

215. (1) Every one is under a legal duty
- (a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;
  - (b) as a married person, to provide necessaries of life to his spouse; and
  - (c) to provide necessaries of life to a person under his charge if that person
    - (i) is unable, by reason of detention, age, illness, insanity or other cause, to withdraw himself from that charge, and
    - (ii) is unable to provide himself with necessaries of life.
- (2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies upon him, to perform that duty, if
- (a) with respect to a duty imposed by paragraph (1)(a) or (b),
    - (i) the person to whom the duty is owed is in destitute or necessitous circumstances, or
    - (ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or
  - (b) with respect to duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

As in the case of s. 218, s. 215 of the *Code* is most likely to have application to a church-run institution such as an orphanage, reform school or boarding school, or to the church official who acts as the head of such an institution. Such an institution and official would almost certainly be regarded as persons who, according to s. 215, are under a legal duty to provide the necessaries of life to children under 16 years of age who are resident in the institution. The duty to provide necessaries for children within the institution might be based either on the status of the institution and official as the temporary legal guardians of such children (s. 215 (1)(a) of the *Code*), or on the fact that the children are under the

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190. *Supra*, note 178.

charge of the institution and of the church official and are, by reason of their age, unable to withdraw themselves from that charge (s. 215 (1)(c)).

The offence of failure to provide necessaries is one which involves an intentional omission to do what the law requires to be done and is therefore a *mens rea* offence.<sup>191</sup> The essential elements of the offence are first, proof of a legal duty to provide the necessaries of life as discussed above. The words “necessaries of life” have been interpreted broadly to mean such necessities as tend to preserve life, and might be interpreted as including protection of the child from physical and/or sexual abuse.<sup>192</sup> Secondly, the failure must be to a person in destitute or necessitous circumstances or, in the alternative, the failure must endanger the life of the person to whom the duty is owed, or cause the health of that person to be permanently endangered.<sup>193</sup>

There have been no reported cases in which the words the “necessaries of life”, as used in s. 215(1) of the *Code*, have been interpreted to include “protection of a child from harm”. However, there is no reason why the words could not be so interpreted in circumstances where it could be proven that the guardian, or person under whose charge a child had been placed, knew or suspected that the child had been subjected to sexual or physical abuse by another individual also under his or her supervision and control. Where, for instance, a church official acting as the head of an institution in which children reside receives reports of sexual and physical abuse of a child at the hands of someone under the official’s supervision and control, but fails to take reasonable steps to protect the child from further harm, the institution and the official might be seen as breaching the s. 215(1) duty to provide necessaries of life to the child. Furthermore, as suggested in the foregoing discussion of s. 218 of the *Code*, such a failure might legitimately be regarded as permanently endangering the health of the child, given the long term effects of sexual abuse on the emotional and mental health of the victim.

There may, of course, be other provisions of the *Criminal Code* with potential application to churches and church organizations in the circumstances contemplated by this article. The foregoing is not intended to be an exhaustive discussion of all potentially relevant *Criminal Code* offences. I have discussed only those three offences, the substance of which seems most closely related to the primary objective which I hope

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191. *R. v. Degg* (1981), 58 C.C.C. (2d) 387.

192. *Supra*, notes 178 and 176.

193. *Supra*, note 191.

will be served by the imposition of criminal liability on churches in connection with instances of clergy paedophilia - that is, the deterrence of further irresponsible behaviour in order to protect children from the harmful and long term effects of sexual abuse.

## VII. *Conclusion*

In advocating the potential application of ss. 219, 221, 215 and 218 of the *Code* to the acts of church officials who act irresponsibly when faced with reports of clergy paedophilia, this article is undoubtedly attempting to push the existing law beyond its present bounds. One of the main obstacles to using criminal law in the manner and for the purposes suggested in this article is the natural reluctance many of us may have to condemning as criminal the behaviour of churches and church organizations, which, though obviously the source of some injurious conduct, are also the source of many charitable good works which benefit the weakest and most needy members of our society. The arguments presented in this article in favour of the imposition of corporate criminal responsibility upon Canada's churches and church organizations are not written from an anti-church perspective or out of any hatred of or distaste for, institutionalized religion. Nor are the arguments presented here intended as a mere indulgence in academic theorizing.

The arguments contained in this article have been developed in response to a genuine concern that the irresponsible acts and omissions of church officials, who could have taken reasonable steps to prevent further acts of clergy paedophilia when confronted with reports of abuse, have instead, in many instances, contributed to the continuation of such abuse. The arguments presented herein are based on the belief that this irresponsible behaviour results, at least in part, from a misplaced institutional loyalty which sacrifices the well-being of the victims to serve the greater interests of the institutional church or church organization concerned. As well, it appears that in some instances the irresponsible behaviour of church officials has resulted, in part, from flaws in the formal and informal authority structures of the churches concerned, from defects in their administrative and management structures, and from a lack of clearly developed policies and procedures for responding to complaints of sexual abuse.

This article has attempted to highlight the similarities between churches and business corporations as types of corporate organizations, and to show that much of the harmful conduct of such organizations is due to their common institutional characteristics - their structural defects and the phenomena of institutional loyalty. As a result this article urges that their delicts should be seen and treated as organizational phenomena. The

imposition of enterprise or corporate liability on churches and church organizations is advocated with a view to forcing them to improve their internal organizational structures, decision-making processes, and operating policies and procedures. The imposition of liability on churches as corporate entities should serve as a catalyst which will cause the churches concerned to better police their own agents and employees and exert pressure on them to produce better behaviour in the future.

The imposition of criminal responsibility, rather than mere civil liability, on Canada's churches, is advocated as the most effective means of deterring future acts of clergy paedophilia. This argument is based on a recognition of the primacy of the non-financial motivation and goals of churches and church organizations. The moral condemnation inherent in a criminal conviction is the antipathy of the *raison d'être* of such organizations.

The article recognizes that in some circumstances it may be more effective to punish those individuals within the church who are guilty of wrongdoing than to punish the church itself. This is particularly so where the motive behind the irresponsible behaviour was self-interest rather than institutional loyalty, and where the continued abuse was attributable to the behaviour of one or more individuals who are truly blameworthy, rather than to the collective failure of many church officials and agents or to institutional shortcomings. Thus in advocating corporate criminal responsibility of Canada's churches in connection with acts of clergy paedophilia, the article does not exclude the possibility of prosecuting individuals wrongdoers. The determination of the appropriateness of imposing criminal responsibility on the church itself will depend upon an examination of the facts of each case and of the decision-making processes of the church concerned.

It is hoped that the ultimate impact of imposing criminal liability will be to deter future instances of clergy paedophilia, by improving the behaviour of churches as corporate actors and the behaviour of individuals within the corporate organization. Improving the behaviour of churches as corporate actors in relation to the problem of clergy paedophilia will require the churches themselves to examine their own organizational and administrative structures, their decision-making processes, and policies and procedures, with a view to discovering those institutional shortcomings which give rise to irresponsible behaviour and result in further abuse of children.

More specifically, churches may have to examine their ministry formation programs in order to identify and treat those individuals with paedophilic tendencies. Such action will benefit potential victims, potential abusers and the churches themselves. A similar attempt should



be made to identify members of the clergy who have completed the ministry formation stage and who are suspected of having paedophilic tendencies.

Furthermore, churches must clarify their own moral teachings concerning acceptable and unacceptable sexual conduct and strictly enforce these teachings through well-developed internal disciplinary procedures. Churches may also have to alter or improve their internal organizational structures in order to improve the accountability of the institutions to their members and the lines of communication between the institutions and their members.

All churches and church organizations must initiate procedures in order to respond compassionately, quickly and effectively to reports or allegations of child abuse. Such procedures would include the distribution of copies of provincial statutory child abuse reporting requirements to all members of the clergy and to all employees of churches and church organizations who might be caught by such reporting requirements. The same individuals should be provided with educational programs concerning the nature of paedophilia and the nature and effects of abuse. Procedures should also be established for the speedy notification of the proper authorities whenever an instance of child abuse is discovered.

Procedures and programs should be established by all churches and church organizations to provide counselling and treatment both for the alleged abuser and the purported victim. Churches might also consider establishing funds for the purpose of compensating the victims of clergy paedophilia.

Perhaps Canada's churches and church organizations will respond to recent reports of sexual abuse of children by members of the clergy by taking such measures without the need for the dramatic action advocated in this article. They have not done so in the past. The appointment of the Winter Commission to explore the issue of clergy paedophilia in the Archdiocese of St. John's was clearly a step in the right direction. However, should Canada's churches fail to respond adequately to the sense of crises which many Canadians feel, as a result of the recent reports of sexual abuse scandals plaguing Canada's churches, then criminal prosecution of churches and church organizations should be seriously considered. The purpose to be served by such prosecution is deterrence and rehabilitation, not retribution. Accordingly, should prosecution of Canada's churches become necessary to force them to initiate the internal changes required to reduce instances of clergy paedophilia, it would be preferable if Canada's *Criminal Code* could be amended to provide for new sanctions which would be potentially more effective than fines to achieve the deterrent and rehabilitation goals advocated in this article.