

“I am a Corporation and I Committed a Crime, I Can’t Go Bankrupt”: Recent Cases on the Intersection of Organizational Criminal Liability and Bankruptcy

D A R C Y L . M A C P H E R S O N *

I. INTRODUCTION

In two recent cases, two different Courts of Appeal have addressed the impact of insolvency on organizational criminal liability sentencing, with almost diametrically opposed results. In this paper, I will confront the role of bankruptcy and insolvency created or exacerbated by criminal malfeasance for which a corporation is responsible. The Ontario Court of Appeal says that bankruptcy should be largely irrelevant to the imposition of an otherwise appropriate penalty for criminal wrongdoing. The Quebec Court of Appeal, on the other hand, indicates that criminal fines that cause bankruptcy are to be avoided.

I agree with the Ontario Court of Appeal that the potential bankruptcy of a corporate criminal offender is not a barrier to the imposition of what is otherwise a just sentence for a corporation’s criminal wrongdoing. I disagree with the Quebec Court of Appeal that a bankruptcy may lead to a

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grossly disproportionate sentence. In my view, it is entirely appropriate that a criminal sentence may cause a struggling corporation to declare bankruptcy.

In the first part of this paper, I will lay out the facts and relevant holdings of *R. v. Metron Construction Corporation*¹ (from the Ontario Court of Appeal) and *9147-0732 Québec inc. c. Directeur des poursuites criminelles et pénales*,² (from the Quebec Court of Appeal). While the Supreme Court of Canada³ did weigh in on the constitutional aspects of the latter case, it did not address the issue of bankruptcy beyond its constitutional analysis.

In Part II, I will examine what I consider to be the basic bedrock of corporate insolvency and bankruptcy law, and juxtapose this with the purposes of personal bankruptcy. In short, while the latter appears to be motivated by the principle that an individual bankrupt requires a “fresh start,” the same underlying principle does not appear to motivate the corporate bankruptcy system.

In Part III, I argue three basic points:

- (a) that bankruptcy does not meet the definition of “punishment” as it is currently understood under Canadian criminal law, and that it should not meet the requirements to be “punishment”;
- (b) that there is a policy argument against allowing potential bankruptcy to be relevant at all in determining a fit sentence under the criminal law; and
- (c) if, contrary to the previous point, some concession to the effect of bankruptcy is necessary, there are usually a range of fit sentence, as opposed to a single “correct” sentence. Where the higher end of the fit range of sentences would have a high likelihood of causing bankruptcy of an organizational offender while a fit sentence at the lower end of the range would have an appreciably lower likelihood of causing bankruptcy, the lower sentence might be preferred.

I. THE FACTS AND HOLDINGS OF THE RELEVANT CASES

A. Metron Construction

¹ *R v Metron Construction Corporation*, 2013 ONCA 541 [Metron], per Justice Pepall, for the Court.

² *9147-0732 Québec inc c Directeur des poursuites criminelles et pénales*, 2019 QCCA 373 [9147 (CA)].

³ *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 [9147 (SCC)].

In *Metron*, the Ontario Court of Appeal was confronted with an appeal on sentence. The accused corporation had pled guilty⁴ to criminal negligence causing death⁵ after a swing stage at a construction site collapsed when overloaded with people and equipment.⁶ The swing stage, which was operated by the site manager, had only two safety harnesses despite the six people onboard, (contrary to normal practice), leading to the deaths of four people, including the site manager.⁷ The sentence imposed by the trial judge was \$200,000. The Crown sought to appeal based on the alleged manifest unfitness of this sentence.⁸ The appeal was allowed, and the sentence was increased to \$750,000.⁹

With respect to the argument that bankruptcy should not result, the Ontario Court of Appeal held as follows:

If appropriate, the prospect of bankruptcy should not be precluded.

The UK Sentencing Guidelines require the court to consider “whether a fine will have the effect of putting the defendant out of business” but go on to state that “in some bad cases this may be an acceptable consequence”. Consistent with this principle, in *R. v. Cotswold Geotechnical (Holdings) Ltd.*, [2011] EWCA Crim 1337, aff’g 2011 W.L. 2649504, the U.K. Court of Appeal upheld a fine of £385,000 for corporate manslaughter notwithstanding that the fine would force the company into liquidation. The sentencing judge in *Cotswold*, in holding that the impact of the fine on the company’s financial state could not be the determinative factor, had stated that:

[a] fine must be fixed at a level that marks the gravity of the offence and sends out a clear message... that it is essential that health and safety guidance and good practice is strictly adhered to pursuant to the duty all employers have to take reasonable care to ensure the safety of their employees. [Emphasis added.]

⁴ *Metron*, *supra* note 1, at para 1.

⁵ *Criminal Code*, RSC 1985, c C46 [*Criminal Code*], ss 219-220.

⁶ *Metron*, *supra* note 1, at para 11.

⁷ *Ibid* at paras 1 and 10. All of the victims were from central east Europe. *Ibid* at para. 17. I raise this issue for two reasons. First, it was evident that the defendant was hiring from an immigrant population. This led me to believe that this might possibly indicate a cavalier attitude toward the employees, perhaps signaling a level of disrespect that should be concerning. Second, it is always helpful to be reminded these were people that actually died. By listing some of their attributes, we are forced to confront their humanity, rather than dismiss them as simply as victims (which they surely are) without considering them as people.

⁸ *Ibid* at para 1.

⁹ *Ibid* at para 121.

Pursuant to s. 178(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, an order of discharge does not release the bankrupt from any fine imposed by a court in respect of an offence.

In sentencing the respondent in this case, the sentencing judge stated:

I am of the view that imposing the penalty recommended by the Crown would likely result in the bankruptcy of the corporation and would *be in violation of the statutory requirements that I take into account the offender's ability to pay*. [Emphasis added.]

It is apparent from this passage that the sentencing judge considered himself precluded from imposing a fine that might result in the bankruptcy of the corporation. In my view, this was an error. The economic viability of a corporation is properly a factor to be considered but it is not determinative. Certainly[,] it is not a condition precedent to the imposition of a fine nor does it necessarily dictate the quantum of the fine.

The sentencing judge erred in concluding that imposition of a penalty that would likely result in bankruptcy would be in violation of the statutory requirements. While bankruptcy may be considered, it is not necessarily preclusive.¹⁰

¹⁰ *Ibid* at paras. 104-109 [emphasis added]. Some reviewers have questioned whether or not the fact that Metron was not a large-scale employer actually determined the outcome on this point. Justice Pepall wrote as follows: “The sentencing judge was correct in observing that the financial future of the respondent was impossible to predict with any degree of certainty given the outstanding litigation both by and against the respondent. To this, I would add that the heavily qualified and incomplete financial statements filed at the sentencing hearing constituted unreliable indicators of the respondent’s financial prognosis. In this case, the respondent had only two permanent employees. The minimal financial information that was produced showed no ongoing payment of any compensation to employees. Corporate construction activity was evident in Formstructures [DLM: a related company to the accused corporation (see *Metron* para 36)], not in the respondent. Any public interest in the continued viability of the respondent was not manifest. The sentencing judge placed undue weight on the respondent’s ability to pay.”

In my view, Justice Pepall was simply laying out why, on these facts, any consideration of the potential for bankruptcy was particularly irrelevant to her consideration of whether the sentence imposed by the sentencing judge was a fit one. For me, it does not necessarily follow that, had the facts been different, Justice Pepall necessarily would have found that the avoidance of bankruptcy would have justified an otherwise unfit sentence. Justice Pepall should be taken as saying that, on different facts, her result may have been different. But that is a far cry from holding, as the Quebec Court of Appeal did in the case discussed below, that the threat of bankruptcy necessarily precluded an otherwise fit sentence.

The fact that there would be relatively small impacts on unemployment by the bankruptcy of Metron simply made it easier and less controversial to reach the decision that Justice Pepall thought was appropriate (that is, that bankruptcy is not a barrier to

To be clear, the “statutory provisions” on which the sentencing judge relied included the following:

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

...

- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;¹¹

We will return to consider para. 718.21(d) of the *Criminal Code* further below. The original sentencing court¹² also relied on the *Provincial Offences Act*.¹³ The sentencing judge wrote as follows:

There would be little reason for the court to be given authority to inquire into the economic circumstances of the defendant unless those circumstances were relevant considerations in the imposition of sentence. I agree with the approach taken by the court in *Geometrical*¹⁴ where the court does take into account the economic circumstances of the corporation in imposing sentence as well as the comments of the Justice Fairgrieve in *Czumak v. Etobicoke (City)*¹⁵ when he states with respect to sentencing under the *Provincial Offences Act*:

It is an error in principle to impose a fine without an investigation into the defendant's ability to pay it, or to impose a fine which he or she lacks the means to pay within a reasonable time.

If there was any doubt with respect to whether the court is required to take into account the offender’s ability to pay, under the *Provincial Offences Act*, there is no doubt that the *Code*¹⁶ does require the court to do so. Section 734(2) of the *Code* states:

Except when the punishment for an offence includes a minimum fine or a fine is imposed in lieu of a forfeiture order, a court may find an offender

the imposition of a fit sentence). Justice Pepall does not ignore the threat of bankruptcy. She considers it carefully. She finds that it is a fit outcome here, even if it were to occur. *Criminal Code*, *supra* note 5, para. 718.21(d).

¹¹ *R v Metron Construction Corporation*, 2012 ONCJ 506, per Justice Bigelow [Metron (CJ)].

¹² *Provincial Offences Act*, RSO 1990, c P.33. There can be little doubt that any reliance on the *Provincial Offences Act* was in error. By its very terms, the *Provincial Offences Act* applies only to an offence creates in an Act of the legislature of Ontario. On this point, see the *Provincial Offences Act*, s. 1, *sv* “offence”. Since this was a conviction for an offence under the *Criminal Code*, the *Provincial Offences Act* could not apply.

¹³ *R v Geometrica De Mexico SA De CV*, described as an unreported decision of the Her Worship M. Robins, dated September 24, 1999.

¹⁴ *Czumak v Etobicoke (City)*, [1994] OJ No 2247 (ONCJ).

¹⁵ *Criminal Code*, *supra* note 5.

under this section only if the court is satisfied that the offender is able to pay the fine or discharge it under section 736.

I have already referred to section 718.21(d) which directs the court to take into account the “the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees”.

The financial future of Metron is impossible to predict with any degree of certainty given the outstanding litigation both by and against Metron which makes attempting to determine the impact of a fine on it extremely difficult. However, based on the evidence before me with respect to the economic viability of Metron I am of the view that imposing the penalty recommended by the Crown would likely result in the bankruptcy of the Corporation and would be in violation of the statutory requirements that I take into account the offender's ability to pay. However, I am also of the view that a fine well above that suggested by the defence is appropriate. Metron does have significant accounts receivable, although how much of those receivables will ever be collected is certainly in issue, and despite the negative impact that this incident has had on its reputation and goodwill, the corporation still has a long history of successful projects and may well be able to survive and grow. I also take into account that pursuant to section 734.3 of the *Code* the offender upon whom a fine has been imposed may make application to the court to vary the time within which a fine is to be paid providing a process where the payment of a fine can be delayed if the offender establishes an inability to pay within the time frames set out by the court.¹⁷

To be clear, Justice Pepall disputed this line of reasoning in the Court of Appeal when she wrote as follows:

Section 734(2) provides that the court “may fine an offender under this section” (emphasis added) only if satisfied of the offender’s ability to pay. It is therefore clear from this language that s. 734(2) does not encompass an organization.

At para. 30 of his reasons, the sentencing judge relied on s. 734(2) for the proposition that the *Code* required the court to consider the offender’s ability to pay. In my view, this was an error.¹⁸

In the end, therefore, the Court of Appeal found that the \$200,000 fine imposed by the original sentencing judge was manifestly unfit and increased it, as mentioned earlier, to \$750,000.

¹⁷ *Metron (CJ)*, *supra* note 12 at paras 29-32.

¹⁸ *Metron*, *supra* note 1 at paras 94-95.

B. 9147

In this case,¹⁹ the corporate accused was found to have violated the Québec *Building Act*,²⁰ in particular, s. 197.1 thereof, which read, at the relevant time, as follows:

Any person who contravenes section 46 or 48 by not holding a licence of the appropriate class or subclass is liable to a fine of \$5,141 to \$25,703 in the case of an individual and \$15,422 to \$77,108 in the case of a legal person, and any person who contravenes either of those sections by not holding a licence is liable to a fine of \$10,281 to \$77,108 in the case of an individual and \$30,843 to \$154,215 in the case of a legal person.

The corporate defendant alleged that the application of the statutory minimum fine would be cruel and unusual punishment within the meaning of s. 12 of *Canadian Charter of Rights and Freedoms*.²¹ The majority, writing through Justice Bélanger (Justice Rancourt concurring), held that this particular fine met the standard for constitutional infirmity under s. 12.²² The portion most relevant to our discussion of the effect of insolvency in criminal law is found at paragraphs 130-133, which read as follows:

I do not believe that Canadian society would find it acceptable or in the natural order of things, in all circumstances, for a totally disproportionate fine to lead a legal person or organization to bankruptcy [²³], thus endangering the rights of its creditors or forcing dismissals. In this case, it would not only be certain people

¹⁹ 9147 (CA), *supra* note 2. Because this was decided by the Quebec Court of Appeal, the original judgments in the case were delivered solely in French. Given that I understand the language, I have, with the assistance of a computer, provided rough translation to English to ensure that all readers are able to understand the broad parameters of the intent of the judge delivering the opinion. However, rough translations do not always provide the most reliable detail or corresponding nuance. As a result, when I provide a translation, I will also provide a footnote which gives the original French version of the judgment. Hopefully, other people familiar with the French language will be able to use this original version to ensure that any relevant nuances are not overlooked.

²⁰ *Building Act*, CQLR, c B-1.1.

²¹ *Canadian Charter of Rights and Freedoms* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

²² 9147 (CA), *supra* note 2, at para 137.

²³ The relevant footnote reads as follows: “In this regard, I cannot agree with the conclusions of the Ontario Court of Appeal in *R. v. Metron Construction Corporation*, 2013 ONCA 541, para. 104: ‘If appropriate, the prospect of bankruptcy should not be precluded’”. The original French reads as follows: “À cet égard, je ne peux souscrire aux conclusions de la Cour d’appel de l’Ontario dans l’arrêt *R. v. Metron Construction Corporation*, 2013 ONCA 541, paragr. 104: « If appropriate, the prospect of bankruptcy should not be precluded »”

who would be penalized, but sometimes a whole community and, from there, society in general.

The argument that bankruptcy is common and trivial for a business is troubling.

Of course, it is common for legal persons to file for bankruptcy and a multitude of factors can lead them to bankruptcy. It may be fair in some cases, such as a criminal organization, for the fine to have the effect of terminating its activities.

On the other hand, it is also possible that a totally disproportionate minimum fine creates significant problems for a company, leading to the loss of employment for employees with all the ensuing consequences. I agree that this case will be exceptional. Imagine, however, a legal person that would be the economic engine of its region, forced to close its doors, lay off its employees and provoke their move, affecting the pension fund for retirees, because it was imposed an exaggeratedly disproportionate minimum fine ... Imagine again a family business built after long years of work, finding itself with no other alternative than bankruptcy. Let us also imagine a large company, which to counter the harmful effects of an exaggeratedly disproportionate fine, has no choice but to pass the fine to its customers with respect to an essential good.²⁴

²⁴ The original French reads as follows: Je ne crois pas que la société canadienne trouverait acceptable ou dans l'ordre naturel des choses, en toutes circonstances, qu'une amende totalement disproportionnée conduise une personne morale ou une organisation à la faillite, mettant ainsi en péril les droits de ses créanciers ou forçant les licenciements. Dans ce cas, ce serait non seulement certaines personnes qui seraient pénalisées, mais parfois toute une communauté et, de là, la société en général.

L'argument voulant qu'une faillite soit chose courante et banale pour une entreprise est troublant.

Bien sûr, il est fréquent que des personnes morales déposent leur bilan et une multitude de facteurs peut les conduire à la faillite. Il est possible qu'il soit juste dans certains cas, par exemple celui d'une organisation criminelle, que l'amende ait pour effet de mettre fin à ses activités.

Par contre, il est aussi possible qu'une amende minimale totalement disproportionnée engendre des problèmes importants pour une entreprise, conduisant à la perte d'emploi pour des employés avec toutes les conséquences qui en découlent. Je conviens que ce cas sera exceptionnel. Imaginons toutefois une personne morale qui serait le moteur économique de sa région, obligée de fermer ses portes, licencier ses employés et provoquer leur déménagement, affectant le fonds de pension des retraités, parce qu'elle s'est vu imposer une amende minimale exagérément disproportionnée. Imaginons encore une entreprise familiale construite après de longues années de travail, se retrouvant à n'avoir d'autres alternatives que la faillite. Imaginons aussi une grande société, qui pour contrer les effets néfastes d'une amende exagérément disproportionnée, n'a d'autre alternative que de refiler l'amende aux consommateurs d'un bien essentiel.

The Supreme Court of Canada heard an appeal from the judgment of the Quebec Court of Appeal in 9147.²⁵ While there was significant disagreement amongst members of the nation's highest court with respect to other issues in the case (notably, the proper weight to be given to constitutional norms in other countries²⁶), the Court was unanimous that this was not an appropriate case to apply s. 12 of the *Charter*.²⁷ The court unanimously held that s. 12 protection was not available to corporations.²⁸ This was similar to the conclusion of the majority in *Irwin Toy Ltd. v. Quebec (Attorney General)*,²⁹ that the protections against the loss of life, liberty and security of the person in s. 7 of the *Charter* were not available to corporations.

To be clear, I do not disagree with the unanimous ruling of the Supreme Court of Canada in this regard. I agree wholeheartedly that s. 12 of the *Charter* should not apply to corporations. What is most interesting about the Supreme Court of Canada's ruling in this case, at least for current purposes, is what it says about bankruptcy. All the judges agree that bankruptcy is irrelevant to the scope of s. 12. Justices Brown and Rowe (writing for the majority) hold as follows:

This Court’s jurisprudence on s. 12, in both its French and English versions, is marked by the concept of human dignity, as our colleagues have noted. And the existence of human beings behind the corporate veil is insufficient to ground a s. 12 claim of right on behalf of a corporate entity, in light of the corporation’s separate legal personality. Like our colleagues, and contrary to the majority at the Court of Appeal, we therefore reject the proposition that the effect of a corporation’s bankruptcy on its stakeholders should be considered in determining the scope of s. 12.³⁰

The majority continues:

Returning to the case at bar, the text of s. 12, particularly the inclusion of “cruel”, strongly suggests that the provision is limited to human beings. Justice Chamberland [the dissenting judge in the Québec Court] quite rightly emphasized that the ordinary meaning of the word “cruel” does not permit its application to inanimate objects or legal entities such as corporations. As he explained, [TRANSLATION] “[o]ne would not say, it seems to me, that a group of workers

²⁵ 9147 (SCC), *supra* note 3.

²⁶ *Ibid.*

²⁷ *Supra* note 21.

²⁸ 9147 (SCC), *supra* note 3, at para. 1 (majority); at para 51 (multi-judge minority); at para 138 (Justice Kasirer)

²⁹ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

³⁰ 9147 (SCC), *supra* note 3 at para 2.

who demolish a building using explosives (rather than going about it more gradually, brick by brick, plank by plank) are being cruel to the building. Nor would one say that a group of consumers who boycott a business's products, creating a real risk that it will be driven into bankruptcy, are being cruel to the company that owns the business": para. 56, fn. 32. We therefore agree with Justice Chamberland (at paras. 51-56), as with our colleague (Abella J.'s reasons, at para. 86), that the words "cruel and unusual treatment or punishment" refer to human pain and suffering, both physical and mental.³¹

Justice Abella (writing for the minority) made only one reference³² to bankruptcy in her judgment. It reads as follows:

The Court in *Irwin Toy* also concluded that bankruptcy and winding up proceedings did not engage s. 7, because that "would stretch the meaning of the right to life beyond recognition" (p. 1003). And it rejected the argument that corporations should be protected against deprivations of economic liberty:

The intentional exclusion of property from s. 7, and the substitution thereof of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee ... In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.³³

In the end, therefore, all the discussions of bankruptcy are specifically framed in the context of s. 12 of the *Charter*.³⁴ Some authors have claimed the Supreme Court decision "nips in the bud" any criticism of *Metron*.³⁵ As much as I hope that this is accurate, there are still other avenues to attack the holding in *Metron*. In my view, this is a much richer field than the judgment of the Supreme Court of Canada tackled. The Supreme Court of Canada confined its analysis to the narrow question regarding availability

³¹ *Ibid* at para 14. Paragraph 15 reproduces a portion of *Irwin Toy*, *supra* note 29, summarized by Justice Abella in the portion of her judgment reproduced at the text accompanying note 3332, *infra*.

³² Although the majority refers to paragraph 86 in their judgment, they are likely referring to this paragraph, because this is paragraph 134 of the report of the judgment, Justice Abella's reasons began at paragraph 49, meaning that paragraph 134 was the 86th paragraph of her reasons.

³³ 9147 (SCC), *supra* note 325, at para. 134.

³⁴ *Charter*, *supra* note 21.

³⁵ Jennifer Quaid, "Supreme Court dismisses company's cruel and unusual punishment claim" *TheConversation.com* (24 November 2020), online: <theconversation.com/supreme-court-dismisses-companys-cruel-and-unusual-punishment-claim-149346> [perma.cc/36DG-CKGL].

of s. 12 of the Charter to corporations. In the pages that follow, I will attempt to make the case that the rules of corporate bankruptcy actually lead one to the same conclusion, and the result is more consistent with the view of punishment espoused by the *Criminal Code*.³⁶

II. BANKRUPTCY LAW AND POLICY

There are several things in bankruptcy law that should be considered beyond dispute. The first of these is that, in most cases, there is an expectation that individual bankrupts will generally be given a fresh start by virtue of a discharge from bankruptcy if they follow the conditions set out by the trustee in bankruptcy during the period of their bankruptcy. Roderick Wood puts it this way:

For many individuals, the prospect of a bankruptcy discharge is the light at the end of the tunnel. Through discharge, a debtor is given a fresh start and is freed from the burdens of pre-existing indebtedness.³⁷

However, a discharge from bankruptcy is generally not available to corporations. As Wood explains:

The bankruptcy discharge is one of the primary mechanisms through which bankruptcy law attempts to provide for the economic rehabilitation of the debtor. However, it is not the only means by which bankruptcy law seeks to meet this objective. The exclusion of exempt property from distribution to creditors, the surplus income provisions, and mandatory credit counselling also are directed towards this goal. The goal of debtor rehabilitation applies only to natural persons and not to artificial entities, and for this reason a corporation cannot obtain a discharge unless it has satisfied the claims of its creditors in full.³⁸

The non-availability of a discharge for a corporate entity is also statutorily enshrined in subsection 169(4) of the *Bankruptcy and Insolvency Act*,³⁹ which reads as follows:

- (4) A bankrupt corporation may not apply for a discharge unless it has satisfied the claims of its creditors in full.

The need for a bankrupt to pay any fine resulting from criminal activity is found in s. 178 of the *BIA*:

³⁶ *Criminal Code*, *supra* note 5.

³⁷ Roderick Wood, *The Essentials of Canadian Law - Bankruptcy and Insolvency Law*, 2nd ed, (Toronto: Irwin Law, 2015) [Wood, *Bankruptcy and Insolvency Law*] at 295.

³⁸ *Ibid* at 295-296.

³⁹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA].

178 (1) An order of discharge does not release the bankrupt from

- (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;
- (a.1) any award of damages by a court in civil proceedings in respect of
 - (i) bodily harm intentionally inflicted, or sexual assault, or
 - (ii) wrongful death resulting therefrom;⁴⁰

Despite the “fresh start” principle for individuals, bankruptcy and insolvency law demands that wrongdoers pay any criminal fines owing, including civil liabilities resulting from the intentional infliction of bodily harm. As Wood explains: “An exception is made in these cases in order to recognize that the fresh start policy of bankruptcy law must yield to certain overriding social policy objectives that require that certain claims be protected against the discharge.”⁴¹ Where there is criminal behaviour, in my view, the obvious overriding social policy objective is to enforce our collective, shared morality as expressed in the *Criminal Code*.⁴² Put another way, the non-dischargeable nature of the fine is meant to show both the particular bankrupt, and society as a whole, that there was morally reprehensible conduct, and that none of the conduct, the consequences of that conduct (the harm done) or the condemnation of that conduct (represented by the fine) are to be forgotten or pushed aside through the law of bankruptcy and insolvency.

III. ANALYSIS

A. The Punishment Argument

Below, I make the argument that bankruptcy, even if it results from punishment (such as a fine) is not, in and of itself, punishment. In order to make this argument, I begin by acknowledging that a fine is punishment, according to the *Code*. Then, having made this concession, let us move on to consider the definition of punishment under punishment theory. In my

⁴⁰ *Ibid* s paras 178(1)(a), (a.1).

⁴¹ Wood, *Bankruptcy and Insolvency Law*, *supra* note 37 at 312-313.

⁴² *Criminal Code*, *supra* note 5.

view, the theory that comes closest to the reality of the *Criminal Code* is a retributivist account favoured by Andrew von Hirsch.⁴³ The account put forward by von Hirsch also deals with the argument that those associated with the company (often directors, officers or shareholders) are being punished for the wrongdoing of another.

1. What is Punishment?

There can be little doubt that a fine qualifies as punishment under the *Criminal Code*. After all, this is one of the major ways that the *Criminal Code* itself contemplates punishment. One need only look to s. 734 of the *Criminal Code* to see that this is the case. The section provides as follows:

- 734 (1) Subject to subsection (2), a court that convicts a person, other than an organization, of an offence may fine the offender by making an order under section 734.1
 - (a) if the punishment for the offence does not include a minimum term of imprisonment, in addition to or in lieu of any other sanction that the court is authorized to impose; or
 - (b) if the punishment for the offence includes a minimum term of imprisonment, in addition to any other sanction that the court is required or authorized to impose.
- (2) Except when the punishment for an offence includes a minimum fine or a fine is imposed in lieu of a forfeiture order, a court may fine an offender under this section only if the court is satisfied that the offender is able to pay the fine or discharge it under section 736.

Subsection 734(2) makes clear that fines are punishment for the purposes of the *Criminal Code*; even more interestingly, subsection 734(1) establishes that the section generally does not apply to organizations.⁴⁴

⁴³ See e.g. Andrew von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993).

⁴⁴ Paradoxically, as described earlier in this paper, this is one of the disagreements between Justice Bigelow (the judge at the trial level of the *Metron* case), on the one hand, and the Court of Appeal, on the other. Justice Bigelow believed that an offender's ability to pay was nonetheless relevant under subsection 734(2), presumably because that subsection did not include the words "other than an organization," as did the other subsection within s. 734. See *Metron* (CJ), *supra* note 12 para. 30. Though there was much disagreement between the judgments in the cases, on this point, the two Courts of Appeal agree. See 9147 (CA), *supra* note 2, at note 99, per Justice Bélanger (dissenting, but not on this point; the majority does not address the impact of s. 734 at all). The note reads as follows: "Section 734 of the *Criminal Code* only applies to individuals". The original French reads as follows: "L'art. 734 C.cr. ne s'applique qu'aux individus."

However, this does not provide insight into what constitutes punishment. Since the theoretical approach should match the pre-existing reality, I lay out the sentencing provisions most directly applicable to this discussion in terms of sentencing:

- 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
 - (b) to deter the offender and other persons from committing offences;
 - (c) to separate offenders from society, where necessary;
 - (d) to assist in rehabilitating offenders;
 - (e) to provide reparations for harm done to victims or to the community; and
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

...

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.⁴⁵

In a 1991 article, von Hirsch and Jareborg argue that sentencing is an exercise in proportionality.

The present topic, of gauging criminal harm, is part of a larger subject that we have been mulling over for some time: the seriousness of crime. The question of how to assess crime-seriousness has been gaining importance in recent years, with the increasing influence of desert-oriented or 'proportionalist' conceptions of sentencing-conceptions which make the severity of punishment depend principally on the gravity of the offence of conviction.⁴⁶

⁴⁵ *Criminal Code*, *supra* note 5, ss 718, 718.1.

⁴⁶ Andrew Von Hirsch & Nils Jareborg, "Gauging Criminal Harm: A Living-Standard Analysis" (1991) 11:1 *Oxford J Legal Stud* 1 at 1 [Von Hirsch and Jareborg].

The article refers to Canadian sentencing reform, including government reports,⁴⁷ and only four years later, s. 718.1 was added⁴⁸ to the *Criminal Code*. The article also makes reference to the two key elements of punishment: the harm done by the offence and the culpability of the offender.⁴⁹ Von Hirsch, in other writing,⁵⁰ draws a direct link between why society punishes, on the one hand, and how much society punishes, on the other. In three books,⁵¹ von Hirsch argues that the two basic elements of punishments are hard treatment (a deprivation of something important, such as a fine or imprisonment) and censure (a statement that the action was morally blameworthy). He explains as follows:

Punishing someone consists of visiting a deprivation (hard treatment) on him, because he supposedly has committed a wrong, in a manner that expresses disapprobation of the person for his conduct. Treating the offender as a wrongdoer, Richard Wasserstrom has pointed out, is central to the idea of punishment. The difference between a tax and a fine does not rest in the kind of material deprivation (money in both cases). It consists, rather, in the fact that the fine conveys disapproval or censure, whereas the tax does not.⁵²

Von Hirsch continues on the following page:

Censure addresses the victim. He or she has not only been injured, but *wronged* through someone's culpable act. It thus would not suffice just to acknowledge that the injury has occurred or convey sympathy (as would be appropriate when someone has been hurt by a natural catastrophe). Censure, by directing disapprobation at the person responsible, acknowledges that the victim's hurt occurred through another's fault.

Censure also addresses the act's perpetrator. He is conveyed a certain message concerning his wrongful conduct, namely that he culpably has injured someone, and is disapproved of for having done so. Some kind of moral response is expected on his part—an expression of concern, an acknowledgement of wrongdoing, or an

⁴⁷ *Ibid* at 2.

⁴⁸ *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995, c 22, s 6.

⁴⁹ See von Hirsch and Jareborg, *supra* note 46 at 3-5.

⁵⁰ Andrew von Hirsch, "Proportionality in the Philosophy of Punishment: From Why Punish to How Much" (1991) 25:3&4 *Isr L Rev* 549.

⁵¹ See Andrew von Hirsch, *Doing Justice: The Choice of Punishments – The Report of the Committee for the Study of Incarceration* (Boston: Northeastern University Press, 1976); Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick, New Jersey: Rutgers University Press, 1985); *Censure and Sanctions*, *supra* note 43.

⁵² *Censure and Sanctions*, *ibid* at 9 [footnotes omitted].

effort at better self-restraint. A reaction of indifference would, if the censure is justified, itself be grounds for criticizing him.⁵³

Canadian academic Allan Manson, in his book on sentencing, wrote as follows:

The Canadian Sentencing Commission seemed to be impressed with "just deserts."^[54] In advocating what was essentially a "just deserts" or proportionality-based model, it defended von Hirsch and said:

The view that "just deserts" is simply a rediscovery of retributivism is incorrect. Andrew von Hirsch has always argued that if punishment was a useless instrument for controlling crime, one could not justify its existence on purely retributivist grounds. Without the support of utilitarian considerations, retributivism becomes a circular argument or is reduced to the blind assertion that crimes ought to be punished.^[55]

This comment accepts that there must be some concomitant or derivative crime prevention benefit to justify a just desert scheme. In his more recent work, von Hirsch has emphasized the role of censure. In terms of the multi-layered effect of the focused expression of disapprobation which is central to the sentencing function, he considers censure to be more important than prevention in his sentencing theory.^{[56]57}

In short, the Canadian statutory law has accepted von Hirsch's view on how much to punish a criminal wrongdoer. It then follows that this most likely means that it also accepts von Hirsch's basic definition of what constitutes punishment for the purposes of the criminal law. As a result, in the argument that follows, I will use the von Hirsch definition as my starting-point.

If this is our working definition of punishment, the question that remains is not whether the fine is punishment (it clearly is, both by this definition and the *Criminal Code*⁵⁸), but whether the bankruptcy itself is punishment.

⁵³ *Ibid* at 10 [footnotes omitted].

⁵⁴ Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 129-131 [*Report of the Canadian Sentencing Commission*].

⁵⁵ *Ibid* at 143.

⁵⁶ See *Censure and Sanctions*, *supra* note 43.

⁵⁷ Allan Manson, *The Essentials of Canadian Law: The Law of Sentencing* (Toronto: Irwin Law, 2001) at 39 [*The Law of Sentencing*]. The citations within the excerpt are reproduced directly from Manson's text.

⁵⁸ *Criminal Code*, *supra* note 5, in particular, s 734.

2. Does Bankruptcy Qualify as Punishment?

i. Against the Corporation

In my view, bankruptcy and insolvency law meets neither of the criteria to be considered punishment, as defined above. First, bankruptcy is not designed as a method of harsh treatment. Rather, bankruptcy law is simply a recognition that the debtor (whether individual or corporate) is unable to pay his, her, or its debts.⁵⁹ The law, therefore, steps in to ensure that no creditor is denied the right to assert their claim,⁶⁰ and in bankruptcy, there is a systematic and fair way that the assets of the debtor are distributed to existing creditors.⁶¹ There is no harsh treatment of the debtor at all, given that the primary goal of bankruptcy is to ensure that proper debts of the bankrupt are paid fairly, based on the assets of the bankrupt.⁶²

Secondly, there is no censure involved in bankruptcy law in general. The "fresh start" principle⁶³ on which individuals can generally rely shows that, as a general proposition, most debtors will not be considered to have done anything blameworthy (at least in so far as the bankruptcy system is considered).⁶⁴ One having made some bad or unfortunate financial choices over time does not mean that one is necessarily morally blameworthy. The label of "criminal" evokes (for most people at least) images of incarceration and blameworthiness. The term "bankrupt", on the other hand, may conjure up images of the nascent business, begun at an unknowingly ill-advised time. For example, one can even have significant sympathy for

⁵⁹ Wood, *Bankruptcy and Insolvency Law*, *supra* note 37 at 2.

⁶⁰ *Ibid* at 5-6.

⁶¹ *Ibid* at 3.

⁶² A careful reader may point out that s. 12 of the *Charter*, *supra* note 21, refers to "cruel or unusual treatment or punishment." In my view, the fact that that there is no harsh treatment for the purpose of the definition of punishment would also preclude a finding of "cruel or unusual treatment" under s. 12.

⁶³ Wood, *Bankruptcy and Insolvency Law*, *supra* note 37 at 295.

⁶⁴ This is not meant to suggest that no actions taken by a debtor either in contemplation of or during a period of bankruptcy may not be considered morally blameworthy. Attempts to funnel assets to either non-arm's-length parties or specific creditors other than as contemplated by the legislation, would be considered a "fraudulent preference" under provincial legislation. See e.g. *Fraudulent Conveyances Act*, RSO 1990, c F.29, s 2; *The Fraudulent Conveyances Act*, CCSM c F160, s 2. The suggestion here is simply that the modern system of bankruptcy law is not driven at sending a message of moral culpability to all debtors who use the system. Those who deserve moral culpability and condemnation can be held responsible, but the system does not attempt to put forth the message that bankruptcy per se is proof of moral culpability.

young entrepreneurs who took their life savings to begin businesses in early 2020, only to be hit by a worldwide pandemic that forced a shutdown of all non-essential business enterprises for more than a year. Such entrepreneurs are not blameworthy in any meaningful sense (unless, of course, “bad timing” is a moral failing, which, in my view, it is not).

As may be evident here, for the purposes of this discussion, I am concerned with the well-meaning debtor, with a bad business idea, poor execution of that idea, unfortunate timing, or some combination of these factors (or countless other reasons without blame attached). This is because whether the bankruptcy system is being used as a form of punishment depends whether the bankruptcy system is designed to send a moral message.

For now, I am significantly less concerned with the spendthrift debtor who through culpable overspending or deliberate avoidance of legitimate obligations ends up within the bankruptcy regime. As Wood explains, bankruptcy law did not, historically speaking, draw this distinction. However, this distinction was added later. Wood writes with respect to this historical evolution as follows:

The bankruptcy statutes provided creditors with enhanced powers of enforcement against merchant debtors. However, it came to be recognized that bankruptcy law could produce extraordinary hardship for debtors whose ships were lost at sea or whose losses were otherwise caused by no fault of their own. Daniel Defoe, a merchant, journal-ist, and pamphleteer who is most well known for his novel *Robinson Crusoe*, went bankrupt in 1691. His *Essay upon Projects*, written in 1697, captures this sentiment. Defoe argues that bankruptcy law failed to differentiate between the "Honest Debtor, who fails by visible Necessity, Losses, Sickness, Decay of Trade, or the like" and the "Knavish, De-signing, or Idle, Extravagant Debtor, who fails because he has run out his Estate in Excesses, or on purpose to cheat and abuse his Creditors."

In 1705 bankruptcy legislation was passed to respond to this concern by introducing the concept of the discharge of a bankrupt. Prior to this, a bankrupt remained liable for all amounts remaining unpaid to the creditors following the bankruptcy. The Act marks a key moment [sic] in the history of bankruptcy law. Although the original purpose behind the discharge may have been to offer an incentive for cooperation on the part of the bankrupt, the concept would ultimately expand [sic] and transform bankruptcy law. Bankruptcy would no longer be viewed solely as a powerful collection tool for creditors, but would be recognized as having an additional objective. Bankruptcy provides an honest bankrupt with a means of escaping the crushing burden of debt.

The bankruptcy discharge was afforded only to bankrupts who cooperated and assisted in the proceedings. The Act dealt harshly with uncooperative and fraudulent bankrupts through the imposition of capital punishment by hanging.

The death penalty for this offence was abolished in 1820, once it became widely apparent that the penalty was seldom exacted and therefore did not provide an effective deterrent. The task of distinguishing between the honest but unfortunate debtor and the undeserving debtor who is responsible for the financial crisis is not always easy to do. Modern bankruptcy law continues to struggle to find proper techniques to achieve this purpose.⁶⁵

The change described by Wood suggests that the modern law of bankruptcy and insolvency is not designed to be in and of itself a source of censure. This is not to suggest that the bankrupt will never do things in the context of the bankruptcy that will be morally blameworthy. Nor is this argument meant to suggest that when there is moral culpability in the bankruptcy context, punishment is not justified. Rather, the argument is simply that, whatever its beginnings, in its current iteration going bankrupt does not necessarily imply any form of moral blameworthiness. The moral blameworthiness arises not from the accessing of the bankruptcy system, but the actions of the bankrupt (either as the precipitating act or acts of the bankruptcy, or actions once the bankruptcy has been declared).

In the end, therefore, there is simply no argument available that bankruptcy, as the result of an otherwise fit sentence in the form of a fine, is a form of punishment against the corporation.

i. Against the Employees

Some may suggest that the concern is not for the corporation itself, but rather, the employees of the corporation. This argument relies on the fact that the employees are morally blameless and therefore, are not deserving of the hard treatment. There are at least three responses to this.

First, collateral negative impacts of punishment are generally not the concern of the criminal law. When a fraudster is caught and sent to prison, is there a genuine desire to not deliver a reasonable and fit sentence to the perpetrator because his or her family will be negatively impacted? If the fraud is serious enough that a term of incarceration is appropriate, do we really give weight to the fact that the spouse and children of the fraudster will not be able to maintain the same lifestyle given the imprisonment of the family breadwinner? I must hope that this would not be the case. The family is not being punished. A fair sentence (that is, fair punishment) is being visited on the offender alone. While the "knock on effects" of

⁶⁵ Wood, *Bankruptcy and Insolvency Law*, *supra* note 37 at 30-31.

punishment may be considered at the sentencing, the primary concern should be the offender alone.

One of the most classic examples of this arises in the case of Bernard L. Madoff. Called the perpetrator of one of the largest fraud schemes in history,⁶⁶ the fraudster was sentenced to 150 years in jail,⁶⁷ and died in prison in 2021.⁶⁸ Particularly interestingly for the sake of this argument, his wife and others in his family were negatively affected by the criminality of Madoff,⁶⁹ even though they apparently had no knowledge of the criminality.⁷⁰ One of Madoff's sons even committed suicide on the second anniversary of his father's arrest.⁷¹

The point of this is to suggest that the unfortunate consequences of the discovery of wrongdoing and the trial and sentencing of the wrongdoer cannot be entirely avoided. Imagine if, as a society, we said: "Bernie Madoff excluded, the Madoff family (his wife and sons) is blameless. Therefore, any impact on them is unjust." In fact, according to some reports, it is the sons who reported their father's wrongdoing.⁷² I find it hard to believe that even the most bleeding-heart liberal would refuse to punish the truly guilty

⁶⁶ Martha Graybow "Madoff mysteries remain as he nears guilty plea", *Business Week* (11 March 2009), online: <www.reuters.com/article/us-madoff/madoff-mysteries-remain-as-he-nears-guilty-plea-idUSTRE52A5JK20090311> [perma.cc/J4FX-UM33] [Graybow]; Michael Rothfeld and Justin Baer, "Bernie Madoff Dead at 82; Disgraced Investor Ran Biggest Ponzi Scheme in History", *Wall Street Journal* (14 April 2021) online: <www.wsj.com/articles/bernie-madoff-dead-at-82-disgraced-investor-ran-one-of-the-biggest-ponzi-schemes-in-history-11618408844> [perma.cc/Z76Z-UCML] [Rothfeld and Baer].

⁶⁷ CBC News, "Madoff gets 150 years for fraud" *CBC News* (29 June 2009), online: <www.cbc.ca/news/business/madoff-gets-150-years-for-fraud-1.784066> [perma.cc/BF8F-CSRX].

⁶⁸ Rothfeld and Baer, *supra* note 66.

⁶⁹ Post Staff, "A look at the Madoffs two years after Bernie's scandal unfolded" *New York Post* (12 December 2012) online: <nypost.com/2010/12/12/a-look-at-the-madoffs-two-years-after-bernies-scandal-unfolded/> [perma.cc/7N4B-LYEM].

⁷⁰ Graybow, *supra* note 66.

⁷¹ Irene Cornell, "Officials: Bernie Madoff's Son Mark Madoff Found Dead of Apparent Suicide in Soho Apartment" *CBS News* (December 11, 2010), online: <newyork.cbslocal.com/2010/12/11/officials-one-of-madoffs-sons-found-dead/> [perma.cc/NLW7-QGK3].

⁷² Charisse Jones and Jordan Mendoza, "Who was Bernie Madoff? Who did his Ponzi scheme impact and how did he get caught? Your questions, answered" *USA Today* (14 April 2021) online: <www.usatoday.com/story/money/2021/04/14/bernie-madoff-ponzi-scheme-scam-today/7219947002/> [perma.cc/4C7D-B8NB].

(Bernard Madoff) on the basis that there would be negative effects on others (his wife and sons), if the others were blameless.

Second, in many cases of organizational criminality, it is not clear that all employees will be morally blameless. Where the crime is one where the prosecution must prove the mental state of a corporate offender, in general, a “senior officer” of the corporation will be associated with the wrongdoing. In cases where a mental state other than negligence must be proven by the prosecutor, s. 22.2 of the *Criminal Code* must be satisfied. The section reads as follows:

- 22.2 In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization⁷³ is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers
- (a) acting within the scope of their authority, is a party to the offence;
 - (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
 - (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.⁷⁴

The effect of this provision is that a “senior officer” (as defined under s. 2 of the *Criminal Code*) must have either (i) direct involvement in the criminal activity (under paragraphs (a) or (b)), or (ii) knowledge of the criminal activity and not have taken all reasonable steps to prevent its continuation (under paragraph (c)). In determining the scope of the term “senior officer”, the following definitions are relevant:

“senior officer” means a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer;

⁷³ “Organization” is defined under the *Criminal Code*, *supra* note 5, s 2, *sv* “organization,” as follows: “‘organization’ means (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons.”

⁷⁴ *Criminal Code*, *supra* note 5, s 22.2.

“representative”, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization.⁷⁵

Section 22.2 deals with offences where the prosecution must prove a mental state other than negligence. For offences where the prosecution must prove criminal negligence, s. 22.1 provides the applicable rules. It reads as follows:

- 22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if
- (a) acting within the scope of their authority
 - (i) one of its representatives is a party to the offence, or
 - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
 - (b) the senior officer who is responsible for the aspect of the organization’s activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.⁷⁶

The most likely “representative” of most organizations will be employees. Many senior officers will be employees. A senior officer is a necessary element of corporate criminality under the *Criminal Code*. It therefore seems, to me at least, difficult to make the assumption that all employees are blameless when the most common conduit to organizational liability for a crime under the *Code* is an employee.

Another small point is also relevant here. Many large corporations have employee profit-sharing programs, wherein employees of the corporation share, either directly or indirectly, in the profitability of the organization, whether by year-end bonuses, stock options or other forms of incentive-based remuneration when the corporation does well financially. Where this is the case, though certainly I would not suggest that all employees are morally culpable, it is very difficult for me to suggest that when things go well, employees are to benefit, but when things go poorly, those same

⁷⁵ *Criminal Code*, *ibid.*, s 2, *sv* “senior officer” and *sv* “representative.”

⁷⁶ *Ibid* s 22.1.

employees can be used as shields against the natural consequences of poor business decisions, particularly when those decisions involve criminality. To be clear, I am not suggesting that every person who without their knowledge receives a benefit that can be tied back to the criminality of another is morally blameworthy. I am simply reminded of the theme song from the 1970s situation comedy *The Facts of Life*: "You take the good/You take the bad/You take them both/And there you have/the facts of life." If you enjoy the sunshine, it seems to me you cannot complain when the rain comes down. The very fact that you knew that your personal success (monetarily at least) is tied at least in part to your employer's success, means but when that success goes away because it was based on criminality, it is difficult for you to cry foul. This is not a reason to send the unaware to jail, or to fine them as if they were a wrongdoer, but rather, if there are negative consequences that befall such a person, the law must think long and hard before it tries to change that result and avoid those negative consequences. Such a person is not being punished; they are simply in the orbit of the wrongdoer. This sometimes has consequences that though the law does not specifically intend those consequences, it may nonetheless be appropriate to leave the chips where they fell.

Third, it is very problematic to support this on a concept of blamelessness. Paragraph 22.2(c) is based on the idea that the management team is exactly that: a team. When one member of the team is aware of the criminal wrong of a representative, the senior officer has an obligation to report the wrongdoing to people who have an opportunity to prevent it.

Also, paragraph 22.1(b) allows all senior officers of any given organization to be treated in the aggregate for the determination of the criminal responsibility of the organization. If aggregation is allowed in the establishment of liability, it seems unusual to separate the misbehaving manager from the rest. As a result, I find it very difficult to accept the idea that the blamelessness of one person should mean that no negative consequences should befall the business from the criminality of another.

If one or more members of the managerial team behave criminally, how much more do we as a society need before we say that perhaps this business not be allowed to operate? The effect of a corporate bankruptcy is to do exactly that.

B. A Policy Argument in Favour of Not Allowing Bankruptcy to be Relevant at All

Perhaps one of the oddest things that I discovered in preparing this paper was that there seems to be a significant incongruity in the treatment of criminal fines and other penalties imposed for wrongdoing involving the justice system itself, depending on the type of offender concerned. On the one hand, if the offender is an individual, the starting point of bankruptcy and insolvency law is that the bankrupt is entitled to a fresh start, through the discharge mechanism. On the other hand, the discharge mechanism is not available to a corporation that has gone bankrupt, unless it is fully able to pay all creditors.⁷⁷ Of course, a corporation is one of the most common “organizations” found in the criminal law, though other types of associations are also included in the definition.

How is it, then, that we are expressly more concerned (in paragraph 718.21(d) of the *Criminal Code*) about the negative effects of a criminal fine on the employment of the workforce of a corporation where it causes a bankruptcy, than we are concerned about the ability of an individual to pay a criminal fine? In the former case (which does not generally allow access to a “fresh start” mechanism), the Court is directed to see if it can avoid a bankruptcy, whereas in the latter case (where there is clearly a fresh start mechanism), the criminal fine is excluded from that fresh start. It seems as though the avoidance of bankruptcy due to criminal misbehaviour is a uniquely corporate phenomenon. I simply question whether this is appropriate, given how the criminal law fines individuals.

The protection of a workforce is a laudable goal but, why are we less interested in the protection of a workforce when a business fails due to a massive contract damage award, a large personal-injury award (due to civil negligence) or a product-liability award? Arguably, the difference is that these activities are intended to be profit makers but have gone wrong. Perhaps the argument is that these types of mistakes show the business is not viable. One could then continue the argument and point out the criminal wrongdoing does not show the business itself is not viable.

The problem with this approach is that is inconsistent with the criminal liability of organizations under the *Criminal Code*.⁷⁸ I again reproduce the opening words of s. 22.2 for convenience:

⁷⁷ BIA, *supra* note 39, s 69(4).

⁷⁸ *Criminal Code*, *supra* note 5 [emphasis added].

- 22.2 In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

According to the underlined words, under the statutory rules of the *Criminal Code*, the only way to convict the corporation of a *mens rea* crime in the first place is if the criminal actions undertaken were designed to achieve a benefit for the organization. Business corporations are generally designed to be interested in profit-making.⁷⁹ As such, the criminal behaviour is just as linked to the overall mission of the corporation as is the actions that resulted in the awards against the corporation.

This leads to an even more important question. There can be no doubt that corporate law encourages risk-taking, particularly by shareholders,⁸⁰ through many mechanisms, including the separate legal personality of the corporation and the limited liability of shareholders that now accompanies it.⁸¹ Where the risk-taking is within the bounds of the law, why should it be treated more harshly (allowing the business to end up in bankruptcy) than where there is criminal behavior? I find that to be a difficult proposition to accept.

C. An Alternative Proposal

In this alternate proposal, I begin with the basic premise that sentencing is not an exact science. Very often sentences in the criminal law are designed to fall in the range of acceptable alternatives, rather than have one clear outcome.⁸² Where applicable, I would propose, the proper way to use paragraph 718.21(d) is through a two-step process. The first question that

⁷⁹ Of course, there are corporations that are relatively uninterested in a profit motive. These would include non-governmental civic organizations that are organized as corporations, corporations with a religious motive, and other types of philanthropic organizations that are incorporated. However, the vast majority of corporations are business corporations designed to earn economic profit. See *Canada Business Corporations Act*, RSC 1985, c C-44, in particular, s-s. 102(1) [CBCA].

⁸⁰ J Anthony VanDuzer, *The Essentials of Canadian Law: The Law of Partnerships and Corporations*, 4th ed (Toronto: Irwin Law, 2018) at 124-129 [*The Law of Partnerships and Corporations*].

⁸¹ *Ibid* at 138-142.

⁸² There are, of course, exceptions to this rule. The most notable of these is that the sentence for first-degree murder is currently life in prison with no possibility of parole for at least 25 years. See *The Law of Sentencing*, *supra* note **Error! Bookmark not defined.**57 at 294.

a sentencing court should ask itself in a situation where the prospect of bankruptcy of a corporate offender is raised, is “1. What is the range of fit sentence available to the judge to impose, without considering the potential for a bankruptcy?” The second question is as follows: “2. Given the range decided at question 1, does the top end of that range create a significantly higher risk of bankruptcy than would the bottom end of that range?” If the answer to question 2 is “No”, the potential for bankruptcy is irrelevant. Under this proposed system, if the lowest fit sentence of the criminal activity of the corporate offender were still likely to result in the bankruptcy of the offender, this is not a reason to adopt a lighter sentence. To do otherwise would be only to promote, rather than deter, wrongdoing. Deterrence is still a valid aim of sentencing.⁸³ The only time that the potential bankruptcy of the corporate offender is relevant is where (i) the higher end of the range would likely result in bankruptcy; and (ii) a sentence that is less harsh and would fall within the range of fit sentences is available. Thus, the prospect of bankruptcy does not turn what would otherwise be an unfit sentence into a fit one, but can provide a reason for the judge to sentence the corporate offender to a sentence at the lower end of the range of a fit sentence in an effort to avoid the negative consequences for others.

In my view, this approach simply makes clear what Justice Pepall referred to when she wrote, in *Metron*,⁸⁴ as follow: “If appropriate, the prospect of bankruptcy should not be precluded.”

There is a second, more aggressive, version as well. We generally want to take active steps as a society to deter bad behavior. The criminal law is simply one way to do so. Deterrence may be based on positive reinforcement, or negative reinforcement (the carrot or the stick). What is suggested below does a bit of both of these.

I begin by reproducing s-ss. 119(1) and (2) of the *CBCA*:

- 119(1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.
- (2) A director is not liable under subsection (1) unless
- (a) the corporation has been sued for the debt within six months after it has become due and execution has been returned unsatisfied in whole or in part;

⁸³ See para 718(b) of the *Criminal Code*, *supra* note 5.

⁸⁴ *Metron*, *supra* note 1, at para 104 [emphasis added].

- (b) the corporation has commenced liquidation and dissolution proceedings or has been dissolved and a claim for the debt has been proved within six months after the earlier of the date of commencement of the liquidation and dissolution proceedings and the date of dissolution; or
- (c) the corporation has made an assignment or a bankruptcy order has been made against it under the Bankruptcy and Insolvency Act and a claim for the debt has been proved within six months after the date of the assignment or bankruptcy order.⁸⁵

Relevant portions of section 227.1 of the *Income Tax Act*⁸⁶ read as follows:

227.1(1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

...

- (3) A director is not liable for a failure under subsection 227.1(1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

The sections reproduced above make directors responsible for costs that would otherwise be the rightful responsibility of a corporation (wages of employees, in the case of s. 119 of the CBCA, and remittances to the government of source deductions or other payments, in the case of the *Income Tax Act*). Section 119 of the CBCA can be triggered by the application of the BIA⁸⁷ (see para. 119(2)(c)).

The basic idea here is simple: just as these sections exist to provide a second possible payor (members of the board of directors) from whom particular groups (employees, and the government, respectively) can seek recovery in the event that the primary payor (the corporation) is unable or unwilling to make the required payments, and a similar approach could be applied to protect a workforce in the case of a bankruptcy due to criminal misbehaviour.

⁸⁵ CBCA, *supra* note 79 [Emphasis added].

⁸⁶ *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], s-ss 227(1), (3).

⁸⁷ BIA, *supra* note 39.

Several advantages could flow from this approach. First, this would provide an additional incentive for directors and other supervisors to carry out their oversight duties in such a way as to prevent criminal wrongdoing. This is particularly so when the criminal wrongdoing is financial in nature. Boards of directors should be on the lookout for the badges of fraud, that is, indicators that would lead a reasonable person to believe that the likelihood of fraud is elevated. Boards of directors should be encouraged to have the type of financial literacy that would allow them to spot potentially wrongful transactions. Some may suggest this is what auditors are for. After all, there is a statutory requirement for an audit.⁸⁸ There is even a Supreme Court of Canada case that statutory auditors can be held liable for the unreasonable failure to discover criminal wrongdoing by management.⁸⁹

The answer to this is that the auditing function is simply designed to take an overall view of the financial statements, not to review every transaction. Directors, on the other hand, are responsible for the management or oversight of management as a whole.⁹⁰ As well, just because the auditors may be liable if they fail to recognize the badges of fraud, this does not excuse any laxity in performance of the oversight duties of directors (and potentially officers as well). If the oversight of the directors is so lax as to allow a massive criminal penalty to be levied against the corporation, perhaps a hit to the wallet is a necessary prudential reminder to directors of the importance of that oversight.

Second, such a cost is not punishment against the directors. Just as with s. 119 of the *CBCA* (protection for the workforce) and s. 227.1 of the *ITA* (protection of the tax base), this liability is designed to deal with a social problem (negative financial consequences for the workforce) and to incentivize proper oversight by the board of directors.

There may be legitimate concern that the liability suggested might be too large. There are ways to deal with this concern. For example, subsection 227.1(3) of the *ITA*⁹¹ offers one example of a “safe harbour” designed to protect against an overly expansive liability. There are other examples as well. In para. 22.2(c) of the *Criminal Code*,⁹² if the managers have taken all reasonable steps to prevent the wrongdoing, the liability does not extend to

⁸⁸ See *CBCA*, *supra* note 79, s 162.

⁸⁹ See *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 SCR 855.

⁹⁰ See *CBCA*, *supra* note 79, s-s 102(1).

⁹¹ *ITA*, *supra* note 86.

⁹² *Criminal Code*, *supra* note 5, para 22.2(c).

the corporation. A similar safe harbour could be used with respect to this proposed civil liability. Also, limits could be placed on the amount of the liability. One such limit might be temporal, similar to the six-month limitation in s-s. 119(1) of the CBCA. Another example might be a monetary limitation (\$20,000 per director; or \$5,000 per employee to a maximum of \$100,000 are potential choices). The goal here is not to come with the single "best solution". Rather, the goal is to suggest that there are possible solutions, that would fix the social problem without increasing the incongruity between bankruptcy and insolvency law, on the one hand, and criminal law of organizations, on the other.

IV. CONCLUSION

In the recent past, two provincial Courts of Appeal have disagreed on the effect of possible insolvency when dealing with a fine imposed for criminal wrongdoing. The Court of Appeal for Ontario held that the bankruptcy of a corporate offender is not precluded. The Quebec Court of Appeal, on the other hand, held that they could not agree with this approach. The Supreme Court of Canada disagreed with the Quebec Court of Appeal, but only on the basis of their analysis of s. 12 of the *Charter*.

I agree with both Court of Appeal for Ontario and the Supreme Court of Canada on these points, but I come at it from a very different perspective. I begin with the idea that bankruptcy is not punishment at all, even if it results from a fine which is clearly punishment under the criminal law. I began my analysis with a review of the theoretical framework of the *Criminal Code* with respect to sentencing. This led me to the work of Andrew von Hirsch, whose approach to these issues was accepted by the Canadian Sentencing Commission. As his work was accepted, and translated into the statutory framework on this point, I began with his definition of punishment, as requiring both hard treatment and censure. When assessing bankruptcy and insolvency law against this definition, I took the view that neither element was satisfied. Therefore, in my view, it was inappropriate to apply section 12 of the *Charter* at all. I then went on to consider whether, even though there was no punishment as against the corporation, there could nonetheless be "punishment" as against anyone associated with the corporation, particularly the members of the workforce of that corporation who would lose their employment as a result of the bankruptcy. In my view, there was no punishment, as this would unduly extend the notion of

punishment to everyone in the offender's orbit who suffered negative consequences as result of the offender's sentence. With individual offenders, there are often negative consequences for family members and associates when those individual offenders are punished by the courts. Yet, to suggest that these consequences are to be avoided by not punishing the actual offender would be a bridge too far for almost everyone. Also, under the rules of the *Criminal Code* with respect to organizational criminal liability, there will almost always be an employee who is morally blameworthy and whose moral blameworthiness must be attributable to the organizational offender before it can be held criminally liable. Further, the *Criminal Code* allows for the aggregation of certain employees with respect to certain types of offences. To treat one employee as being entirely separate from others as a reason to punish the corporation to a lesser extent seems to fly in the face of this principle.

Within Canadian law, there is a significant incongruity with respect to the treatment of criminal fines at the intersection of organizational criminal liability, on the one hand, and the law of bankruptcy and insolvency, on the other. This incongruity could be lessened if the law applied the need for a fit sentence as a matter of a range, and did not allow bankruptcy to be considered unless the sentence remained within the range of a fit sentence.

Finally, I propose an alternative to the current system, suggesting that an additional liability could be placed on directors in a situation where a corporation is unable to pay a criminal fine levied against it due to bankruptcy. This would be similar to statutory provisions currently in place in both corporate law and tax law. Further or different safeguards could also be included to ensure that the liability is against directors could be kept within reasonable limits.